

Oxford International Intellectual Property Moot 2021

Instructions

The 2021 moot concerns *Hotenhoffer Pharmaceuticals Erewhon and Hotenhoffer Lilliput v Republic of Erewhon* [2019] HCE 46. A copy of this case is included in the pages that follow, along with relevant statutory provisions.

At first instance in the High Court of Erewhon, Madam Justice Davies found as follows.

1. The compulsory licence was validly issued by the Comptroller for Patents.
2. The Trade Marks became deceptive when they were assigned to Hotenhoffer Lilliput, and are cancelled under section 34(1)(d) of the Trade Marks Act 1993.
3. There was no breach of confidence by the release of the Internal Documents because release was in the public interest.
4. There was an infringement of copyright by the release of the Internal Documents as: (a) there is no public interest defence to copyright infringement; and (b) release did not fall within the quotation exception in section 45(1) of the Copyright Act 1997.

The claimants were granted leave to appeal from Items 1 and 2 in the list above; and the Republic of Erewhon was granted leave to appeal from Item 4. The claimants also sought leave to appeal from Item 3, but this was denied.

A unanimous bench of the Court of Appeal upheld (without releasing a substantive opinion) the decision of Madam Justice Davies on all appealed aspects, and dismissed both the appeal and the cross-appeal. The claimants have been granted leave to bring a further appeal to the Supreme Court of Erewhon, and the Republic of Erewhon a further cross-appeal. It is your task to prepare written and (for teams that are invited to the Oral Proceedings) oral submissions for this appeal.

Some points to consider:

- a. Each written submission must cover all issues on appeal, i.e., make submissions on Items 1, 2 and 4 in the list above.
- b. Whilst you are encouraged, within the grounds of appeal, to present arguments and authorities not mentioned by Madam Justice Davies, you should not seek to introduce entirely new causes of action or to press arguments that have been conceded or that were never ventilated in the original proceedings. For instance, the Republic of Erewhon makes no challenge in relation to the validity of the 380 Patent; and does not seek cancellation of the Prozurol Marks on the grounds of non-use.

- c. Erewhon is a common law jurisdiction, and the opinion of Madam Justice Davies includes reference to a number of cases. For the purposes of the written submissions, it is expected that you will deal with all of these cases, and you risk missing out on credit if you omit analysis of them. However, these references are **not** intended to constitute your sole authorities for the moot, and indeed you are expected to rely on other primary and secondary materials. The emphasis you give to any particular authority (including those cited by Madam Justice Davies) is up to you, although the Panel will not look favourably upon strong reliance on an unduly narrow spectrum of authorities.
- d. Appeals to the Supreme Court are on points of law only, although it is permissible to challenge the legal conclusions that arise from findings of fact. Please assume that all rules in relation to standing and procedure have been complied with, for instance that the Department for Industry and Trade may initiate an application to cancel trade marks for deceptiveness, and that the judge was able to consolidate the proceedings in a single action.
- e. Although the moot is held in Europe, this is an international competition and you are not limited in the jurisdictions from which you use authority. You can therefore use authorities from around the world. Obviously, however, it needs to be clear why any given authority is relevant to the legal issues in dispute.
- f. Erewhon is not a member of the European Union. It is a member of the World Trade Organization (WTO) and is a signatory to the TRIPS Agreement. Treaties are not self-executing in Erewhon.
- g. Requirements for your written submissions are contained in §14 of the Rules. The following is some additional guidance:
 - i. You do not need to include such things as a table of contents, statement of jurisdiction, statement of facts, index of authorities, etc. Submissions should focus on the substantive matters raised in the appeal.
 - ii. When marking your submissions, the Panel will be instructed not to give extra credit for court headings and other flourishes that merely give the submissions the superficial “look” of an official court document. Credit may be awarded for a presentation style that facilitates the arguments being made (for instance, in the content and number of headings, the use of a logical paragraph numbering system, and so forth). You should not, therefore, be worried about purely stylistic matters when constructing your submissions.
 - iii. The word count includes all the text in the footnotes. It is recommended that footnotes are used primarily for citation purposes, and that you minimise the amount of substantive text that appears in the footnotes.

- iv. There is no prescribed style guide for the submissions. Teams should, however: (i) maintain consistency of style throughout each submission; (ii) include full citations for sources on which they rely (at least the first time any given source is cited); and (iii) ensure that whenever they *quote* from a source, a pinpoint reference is included to the relevant page number and/or paragraph.

Any requests for clarifications of or corrections to the moot problem should be directed to the Moot Secretary at [moot@oiprc.ox.ac.uk] by **3.00pm on Wednesday 4 November 2020** (Oxford time). Requests should note the paragraph number to which they relate, and explain why the requested clarification or correction is expected to have legal significance for the problem. Requests will be treated as confidential. If any clarifications or corrections are deemed necessary by the Organising Committee (OC), these will be released on the moot website by **Friday 13 November 2020**. The OC will not respond individually to any requests for clarifications or corrections, nor will it respond to requests that are seeking assistance with substantive aspects of the moot.

Your submissions must be received by the Moot Secretary (at the email address above) by **3.00pm on Monday 7 December 2020**, Oxford time; see further §15-§16 of the Rules. As noted there, within their written submissions, teams must identify themselves **only** by use of the anonymous identifier given to them in advance by the Moot Secretary. To apply for this identifier, you should email the Moot Secretary **well before** the submission deadline.

The registration process will not open until *after* invitations have been issued to compete at the oral rounds. These invitations will be issued in mid-late January 2021. Only those teams who are invited to the oral rounds will need to register and pay the registration fee.

To keep apprised of announcements and news in relation to the moot (**#OxIPMoot**), please follow us on Twitter: **@OxIPMoot**.

Before:
THE HONOURABLE MADAM JUSTICE DAVIES

Between:

Hotenhoffer Pharmaceuticals Erewhon and Hotenhoffer Lilliput

- and -

Republic of Erewhon

Madam Justice Davies:

[1] The proceedings before me are brought by Hotenhoffer Pharmaceuticals Erewhon (“HPE”), a company based in Erewhon; and Hotenhoffer Lilliput (“HL”), a company based in Lilliput, a small country to the west of Erewhon. HPE develops and sells a range of pharmaceuticals, including medications used in the treatment of lung disease and cystic fibrosis. Its corporate headquarters are located in Erewhon’s capital city, and it runs three large facilities in regional cities, focused on research and manufacturing. Its Erewhonian workforce is approximately 20,000 people. HL, on the other hand, has three staff working out of an office in Lilliput, being two lawyers and an accountant.

[2] The claims brought by HPE and HL respond to actions of the Erewhonian Government in relation to the drug ribocafitose, sold under the name Prozurol. This drug was developed by HPE for the treatment of cystic fibrosis, and works by improving lung function. The Erewhonian Patents Office granted HPE a patent in relation to ribocafitose in March 2010, being Erewhonian Patent No 4,737,380, (“380 Patent”). Regulatory approval to market ribocafitose was secured in October 2012, and in November 2012, the Erewhonian Trade Marks Office accepted HPE’s application to register the word mark PROZUROL and a device mark comprising the word PROZUROL in stylised form (together “Prozurol Marks”). In early 2013, HPE began marketing Prozurol in Erewhon. By instrument dated 24 April 2013, HPE assigned its entire trade mark portfolio to HL in return for one Erewhonian dollar. This portfolio comprised 172 word and device marks, including the Prozurol Marks. The Government does not seek to challenge the validity of the 380 Patent, or suggest that there were any problems with the initial registration of any of the trade marks.

[3] Instead, this case concerns actions of the Government in 2018. Some details of these events will be elaborated on in the course of this judgment, but the key facts are set out here. In Erewhon, there exists a publicly-funded, universal health care system: the Erewhonian National Health Trust (known as the “Trust”). The Trust provides free medical treatment to Erewhonian citizens. The vast majority of its funding – approximately 97% – comes from the Government.

[4] As set out in the expert evidence of Professor Bunsen and Dr Beaker, cystic fibrosis is a serious and life-limiting condition. Those with the condition produce a thick mucus that has particular effect on the lungs and digestive system, leading to a range of symptoms such as difficulties breathing, chronic lung infections and malnutrition (due to impaired digestive function). In Erewhon, the prevalence of cystic fibrosis is approximately one in every 2,500 babies born; and amongst the entire population of 50 million people, there are around 8,000 sufferers. Prozurol reduces the level and viscosity of lung secretions. Clinical studies suggest that 25% of patients experience a significant improvement in their lung function (such that other medications can be withdrawn); a further 50% experience mild to moderate improvement; whilst the remaining 25% do not see any improvement. It is not currently possible to predict whether a patient will be responsive to Prozurol. HPE is focusing significant research funding on cystic fibrosis, including new drugs whose effects may be more predictable and/or extensive than Prozurol.

[5] The Trust provides comprehensive health care to patients with the disease, but this does not include treatment with Prozurol, even though approximately 75 per cent of patients would show some improvement in their lung function if given this drug. The reason given by the Trust is that the cost of Prozurol – ERD\$99,000 per patient per year – has been judged as unaffordable, given the many demands on the Trust’s financial resources. The Trust has on numerous occasions attempted to negotiate with HPE regarding the price for Prozurol, but these efforts have thus far been unsuccessful. In the meantime, some individual Erewhonians have been able to purchase the drug through private arrangements with HPE. For completeness, I observe that Prozurol is sold by HPE in other countries at the price of ERD\$99,000 per patient per year.

[6] On 17 July 2018, the Minister for Health made a keynote speech at a conference on access to medicine at the University of Erewhon. The Minister announced that following an application by the Department for Health under section 65(1)(b) of the Patents Act 1980, the Comptroller for Patents had granted a compulsory licence in relation to the 380 Patent. The Minister said that this would permit the manufacture of generic versions of Prozurol, to the benefit of patients with cystic fibrosis. However, the Minister also indicated that the Government had been looking into other practices of pharmaceutical companies. This included an investigation by the Commissioner for Taxation into the assignment of HPE’s trade mark portfolio to HL, using documents supplied by a whistleblower. The Minister said that these documents revealed that the assignment had been motivated by the desire to reduce the taxation liability of

HPE in Erewhon. He said that legal advice received by the Government was that the trade marks were now deceptive, and that an application would be made to the Erewhonian High Court by the Department for Industry and Trade for cancellation of all marks. To substantiate these claims, the Minister circulated to conference attendees a 31 page dossier of HPE/HL documents (being documents supplied by the whistleblower), including emails, spreadsheets, strategy documents and so forth (“Internal Documents”). The names of HPE and HL personnel were redacted.

[7] HPE and HL, who had already resisted the granting of the compulsory licence, now indicated to the Government that they also objected to the proposed cancellation of HL’s trade mark portfolio, and that they were considering their legal options in relation to the release of the Internal Documents. They issued proceedings in this court, as did the Department for Industry and Trade in relation to the trade marks. Following case management discussions with all the parties, I made orders that these proceedings be consolidated in a single action covering the following matters:

- (a) Whether the facts fell within section 65A(1)(a) of the Patents Act 1980, such that the grant of a compulsory licence was within the powers of the Comptroller for Patents.
- (b) Whether, due to the assignment of HPE’s trade mark portfolio to HL, the trade marks are likely to deceive or cause confusion, permitting revocation pursuant to section 34(1)(d) of the Trade Marks Act 1993.
- (c) Whether release of the Internal Documents constituted breach of confidence.
- (d) Whether release of the Internal Documents infringed copyright, contrary to section 10 of the Copyright Act 1997.

I shall deal with each of these matters in turn.

The compulsory licence

[8] The compulsory licence in relation to the 380 Patent is the first compulsory licence issued in Erewhon under section 65 of the Patents Act 1980. Prior to the Department for Health’s application, only a handful of applications had been made in relation to other patents, and in all cases those applications were withdrawn before a decision was made. The focus of these proceedings is whether the Comptroller was right to grant a compulsory licence. If the answer to that question is yes, there will be a further hearing in relation to the terms of that licence.

[9] Certain elements of section 65 are uncontroversial, for instance that more than three years have transpired since the grant of the 380 Patent; and that HPE is a “WTO Proprietor”, meaning that the “relevant grounds” are those in section 65A. Both parties also agreed that the Minister for Health had initiated discussions with HPE in relation to HPE licensing other local companies to manufacture ribocraftose, but that this request was refused. In contrast, a major focus of the submissions was whether

the facts fell within subsection 65A(1)(a), namely, that there exists “a demand in Erewhon for [the patented product that] is not being met on reasonable terms”.

[10] The Government’s case is that there is “a demand” for Prozurol, given the 8,000 Erewhonians with cystic fibrosis, three quarters of whom would see improvement in lung function if they were given the drug. It argues that, but for some private transactions with individual patients, there has been no satisfaction of that demand, as all attempts at negotiation between the Trust and HPE have failed. It notes that if the Trust prescribed Prozurol for the 6,000 patients who would benefit from its use, this would cost ERD\$594m per year. The Government argues that this is not “reasonable terms”.

[11] The claimants, on the other hand, take issue with numerous aspects of the Government’s reasoning. They submit that concepts such as “a demand” and “reasonable terms” suggest a market with a seller and a large number of potential buyers. But because treatment of cystic fibrosis takes place almost entirely within the public health system run by the Trust, there is really only one seller (HPE) and one buyer (the Trust). They point to the moral hazard in this court agreeing that the facts fall within subsection 65A(1)(a), as this will embolden the Trust to hold out in other negotiations, in order to secure more favourable rights under a compulsory licence. More broadly, they point to Erewhon’s obligations as a member of the TRIPS Agreement, and observe that the case for compulsory licensing for, say, the manufacture of essential drugs for export to developing countries is very different from a wealthy developed country, such as Erewhon, issuing compulsory licences due to its own decisions about domestic spending priorities.

[12] Although I appreciate the concerns of the claimants, I am of the view that the power of section 65 lies not so much in the *issuing* of compulsory licences (after all, this is the first such licence in Erewhon), but through the *threat* that such licences are available, as this strengthens the hands of prospective licensees (or purchasers) in their negotiations with the patent holder. In this case, HPE has created a drug that can make a marked difference to the lives of people with cystic fibrosis, but it has for years been entirely inflexible in relation to the price charged for that drug. If, despite HPE’s intransigence, I were to find that Prozurol was being made available on “reasonable terms”, I would strip section 65 of all its power. I therefore agree with the grant of a compulsory licence, and will schedule a further hearing in relation to the terms of that licence.

Cancellation of the trade marks

[13] I now turn to the application to cancel the entire portfolio of 172 word and device marks assigned from HPE to HL by instrument dated 24 April 2013. The assignment was for ERD\$1, and HL is now listed on the Erewhonian Trade Mark Register as proprietor for these marks. Under a separate licence agreement between HPE and HL also dated 24 April 2013, HL (as new owner of the marks) agreed to license HPE to

use the marks in return for an annual licensing fee of ERD\$20m (approximately GBP£16m). The Government argues that this transaction was set up so that profits from HPE's activities in Erewhon would be paid to HL, thus reducing the company's taxable income in Erewhon and shifting it Lilliput, where corporate tax rates are extremely low. It points to statements in the Internal Documents to support its contention that the "overriding, unambiguous and cynical purpose" of the Holterhoffer companies was to take advantage of HL's domicile in Lilliput.

[14] I am not being asked whether the arrangements between HPE and HL fell afoul of tax laws in Erewhon. Rather, the question is whether revocation of HL's trade mark portfolio is available under section 34(1)(d) of the Trade Marks Act 1993, on the basis that "circumstances applying at the time when the application for revocation is filed" mean that "the use of the trade mark is likely to deceive or cause confusion".

[15] The essence of the Government's argument is that HL does not guarantee the quality of the goods marketed and sold under its trade marks. HL does not conduct any research, operate any plants that manufacture pharmaceuticals, or participate in the marketing and sale of drugs. These activities are all undertaken by HPE, without any meaningful involvement by HL, meaning that the arrangements between the two entities are in practice "naked licensing". The Government says that trade mark proprietors must be required to maintain some control over the activities of licensees. "Trademarks [are] indications of consistent and predictable quality assured through the trademark owner's control over the use of the designation": *Eva's Bridal Ltd v Halanick Enterprises, Inc*, 639 F. 3d 788, 790 (7th Circuit, 2011), quoting from the *Restatement (Third) of Unfair Competition*, § 33 (1995). If a trade mark proprietor fails to exercise a "legally enforceable power of control" over the licensee, the mark can be cancelled for becoming deceptive: *Health World Ltd v Shin-Sun Australia Pty Ltd* [2008] FCA 100.

[16] The claimants presented two arguments by way of response. The first was that there is no requirement for control, as this does not reflect the realities of trade mark licensing and consumer understandings. In making this argument, the claimants pointed to the speech of Lord Nicholls in *Scandecor Developments AB v Scandecor Marketing AV* [2001] UKHL 21. The claimants say that consumers are aware that trade marks are licensed, and do not assume that the licensor relies on some legally-enforceable right to control the activities of licensees. Rather, "[t]hey assume that if a licence has been granted the owner can be expected to have chosen a suitable licensee and imposed suitable terms": *Scandecor*, para. 39. The claimants' second argument was that even if control is required, the licensing agreement gives HL control through: (i) reporting requirements; (ii) obligations in relation to how HPE runs its business (for instance, that HPE must ensure that the manufacture, marketing and sale of drugs complies with local regulatory requirements); (iii) powers given to HL to visit HPE plants, inspect equipment, review and provide input into business plans, and so forth; and (iv) provisions in relation to breach and termination.

[17] Having considered the arguments, I prefer the “legally enforceable power of control” test put by the Government; and I agree with its contention that there was, in practice, no control by HL. Despite writing into the licensing agreement clauses in relation to reporting, business operations, breach, and so forth, there is no evidence that these clauses were taken seriously by either party. Annual reports produced by HPE and sent to HL were rudimentary documents of fewer than two pages, often repeating the same text from one year to the next. The claimants could only produce minimal amounts of email correspondence between HPE and HL in relation to the former’s operations; and they did not produce any evidence of HPE plants being inspected, or HL personnel reviewing the plans of HPE. This is hardly surprising, given that the number and type of staff employed in Lilliput make it obvious that HL does not have the personnel or expertise to oversee the complex operations of a large pharmaceutical company. The only plausible explanation for the April 2013 transaction is that it was designed to reduce HPE’s tax liability.

[18] Given the lack of any control by HL over the activities of HPE, and as a result the lack of any control over the quality of goods marketed under the trade marks, I conclude that HL’s trade mark portfolio is likely to deceive, and will make orders that those marks are cancelled.

Breach of confidence

[19] The third question pertains to the alleged breach of confidence by the Government through the release, at the conference on 17 July 2018, of the Internal Documents. As noted earlier, these documents were said to show that the trade mark assignment from HPE to HL was for tax purposes only. The Government came into possession of the Internal Documents when they and other documents were provided by a whistleblower to the Commissioner for Taxation. The Internal Documents were included in hard copy form in a dossier given to attendees of the conference, these attendees including academics, industry representatives, public servants, students and journalists.

[20] Aspects of the claimants’ case were accepted by the Government, for instance that the documents were confidential to HPE and/or HL, and that the Government bound by a duty of confidence given the circumstances in which the documents came into their possession. Instead, submissions focused on whether release was in the public interest and hence permissible. As stated by Lord Goff in *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 282, this involves a balancing exercise:

the basis of the law’s protection of confidence is that there is a public interest that confidences should be preserved and protected by the law, nevertheless that public interest may be outweighed by some other countervailing public interest which favours disclosure. This limitation may apply ... to all types of confidential information. It is this limiting principle which may require a court

to carry out a balancing operation, weighing the public interest in maintaining confidence against a countervailing public interest favouring disclosure.

[21] I have formed the view that disclosure was in the public interest. There is a clear public interest in being informed about the ways in which large corporate entities such as HPE attempt to reduce their tax liability in Erewhon. In this case, the Minister, speaking on behalf of the Government, made some very serious claims about the conduct of HPE and HL. The Internal Documents were released in hard copy form to attendees of the conference at the University of Erewhon with the goal of providing background and context to its (I believe, unprecedented) decision to apply for the cancellation of 172 trade marks. Finally, although I do not wish to suggest that I am applying the so-called iniquity rule, I note that the Internal Documents contemplated a transaction whose effect was to render the trade marks deceptive. In assessing the balance described by Lord Goff in the quote above, I have therefore placed less weight on arguments in favour of preserving the confidence of the claimants' documents.

Infringement of copyright

[22] In addition to arguing that release of the Internal Documents constituted a breach of confidence, HPE and HL also argued that there was an infringement of copyright under section 10 of the Copyright Act 1997. Following a number of concessions by the Government – that copyright subsists in the Internal Documents; that copyright is owned by HPE and/or HL; and that the making of hard copy reproductions was prima facie infringing – the copyright case turned on whether the Government could make out a defence, of which it raised two. The first was that copyright, like breach of confidence, is subject to a public interest defence, and that the claim for infringement of copyright must fail. Second, the Government argued that the reproduction of the Internal Documents for the purpose of briefing conference attendees fell within the quotation exception in section 45(1) of the Copyright Act 1997.

[23] I can deal with the first defence swiftly. Ms Jam, counsel for the Government, noted that there exists in the United Kingdom a public interest defence to copyright infringement (e.g., *Ashdown v Telegraph Group Ltd* [2002] Ch 149), and argued that Erewhon should likewise recognise such a defence. But that case makes it plain that recognition of this common law defence is dependent on section 171(3) of the Copyright, Designs and Patents Act 1988 (“Nothing in this Part affects any rule of law preventing or restricting the enforcement of copyright, on grounds of public interest or otherwise”). In the absence of an equivalent provision in the Copyright Act 1977, I am not disposed to conclude that there is some common law supplement to the forty or so “exceptions and limitations” in the Erewhonian statute. Ms Jam also pointed me to Article 3 of the Erewhonian Human Rights Code, which provides that “Everyone has a right to freedom of speech ...”. But I do not believe that the existence of Article 3 displaces the conclusion that the statute is extensive and covers the field.

[24] I have also concluded that the Government is unable to rely on the quotation exception in section 45(1) of the Copyright Act 1997. There are at least three reasons for this. First, the quotation exception applies only to works which have “already been lawfully made available to the public”. This phrase is not defined for the purposes of section 45. Both sides accepted the Internal Documents had not been made available to the public by any act of HP or HLE, nor by their provision from the whistleblower to the Commissioner for Taxation. The question arises as to whether the Government can point to the Minister’s release of the documents at the conference to fulfill this limb of section 45(1). I have concluded that the answer is no, first because I take “lawfully” to mean “with the consent of the author or copyright owner”; and second, because even if lawful release by a third party can count, the Internal Documents had not “already” been made available. The act claimed to be a permissible quotation cannot also be the act that places the works in the public sphere.

[25] The second reason for rejecting the section 45 defence is that the reproductions were not quotations. The dossier comprised 31 pages of emails, spreadsheets, strategy documents and the like. Each document was reproduced in full. Ms Jam argued that the facts contained some parallels to those in *Spiegel Online v Beck* (C-516/17) (Grand Chamber, 29 July 2019). She referred me to the definition of quotation at para. 78 of the judgment to support her submission that quotations can relate to entire works:

As regards the usual meaning of the word “quotation” in everyday language, it should be noted that the essential characteristics of a quotation are the use, by a user other than the copyright holder, of a work or, more generally, of an extract from a work for the purposes of illustrating an assertion, of defending an opinion or of allowing an intellectual comparison between that work and the assertions of that user. ...

[26] Ms Jam also argued that it was not necessary that the quotations be integrated into the work citing them, meaning that it was sufficient that the Internal Documents were cited in the PowerPoint presentation of the Minister, even though they were supplied separately. She pointed to para. 80 of *Spiegel Online v Beck* that:

neither the wording of Article 5(3)(d) of Directive 2001/29 nor the concept of “quotation”, as described in paragraphs 78 and 79 above, require that the quoted work be inextricably integrated, by way of insertions or reproductions in footnotes for example, into the subject matter citing it, so that a quotation may thus be made by including a hyperlink to the quoted work.

[27] I am not persuaded by the Government’s reasoning. Whilst I do not agree with the claimants that only “short” quotations fall within section 45, I find it difficult to accept that the reproduction of a series of entire literary works, two of which were over seven pages long, can be said to have involved “quotation” in the ordinary sense of the term. The Government did not quote from the documents supplied by the

whistleblower; it took a selection of those documents, in complete form, and reproduced them in full. On no reasonable interpretation can this be quotation.

[28] A third reason for rejecting the section 45 defence is the redaction of the names of HPE and HL staff. Although this was done in order to protect the identities of those individuals, the result was to take the facts outside the requirements in section 45(2).

[29] I appreciate that it may seem difficult to reconcile my conclusions in relation to copyright with those for breach of confidence, and that my conclusions might suggest that there are anomalies in the law. However, I would point out that: (i) copyright and breach of confidence serve different policy goals; (ii) some of the submissions pressed by the Government would require me to ignore the statutory language; and (iii) given the findings on breach of confidence, the Government was not precluded from describing the information in the Internal Documents, only from reproducing the expression of those documents (unless that conduct fell within another statutory exception). If such a state of affairs produces undesirable results, then the solution lies in reform to the Copyright Act 1997.

Madam Justice Davies set a hearing date for submissions in relation to the terms of the compulsory licence, other remedies and costs. Before that hearing, leave was granted for the claimants to appeal to the Court of Appeal in relation to the conclusions on the compulsory licence and cancellation of the trade marks; and for the Republic of Erewhon to cross-appeal in relation to the conclusions on copyright infringement. Leave was not granted in relation to the conclusions on breach of confidence.

Oxford International Intellectual Property Moot 2021

Patents Act 1980 – extracts

Section 65 Compulsory licence

- (1) At any time after the expiration of three years from the date of the grant of a patent, any person may apply to the Comptroller for Patents on one or more of the relevant grounds—
- ...
- (b) where the applicant is a government department, for the grant to any person specified in the application of a licence under the patent;
- ...
- (2) If the Comptroller is satisfied that any of the relevant grounds are established, the Comptroller may—
- ...
- (b) where the application is under subsection (1)(b) above, order the grant of a licence to the person specified in the application on such terms as the Comptroller thinks fit;
- ...
- (5) In this section, “the relevant grounds” means, in the case of a patent whose proprietor is a WTO proprietor, the grounds set out in section 65A.
- ...
- (7) A proprietor is a WTO proprietor for the purposes of this section if—
- (a) that proprietor is a national of, or is domiciled in, a country which is a member of the World Trade Organisation; or
- (b) that proprietor has a real and effective industrial or commercial establishment in such a country.

Section 65A Compulsory licences: WTO Proprietors

- (1) In the case of an application made under section 65 above in respect of a patent whose proprietor is a WTO proprietor, the relevant grounds are—
- (a) where the patented invention is a product, that a demand in the Erewhon for that product is not being met on reasonable terms;
- ...
- (2) No order or entry shall be made under section 65 above in respect of a patent whose proprietor is a WTO proprietor unless—
- (a) the applicant has made efforts to obtain a licence from the proprietor on reasonable commercial terms and conditions; and

- (b) his efforts have not been successful within a reasonable period.
- (6) A licence granted in pursuance of an order or entry made under section 65 above in respect of a patent whose proprietor is a WTO proprietor—
 - (a) shall not be exclusive;
 - ...
 - (c) shall be predominantly for the supply of the market in Erewhon;
 - (d) shall include conditions entitling the proprietor of the patent concerned to remuneration adequate in the circumstances of the case, taking into account the economic value of the licence; and
 - (e) shall be limited in scope and in duration to the purpose for which the licence was granted.

Trade Marks Act 1993 – extracts

Section 34 Revocation of registration

- (1) The registration of a trade mark may be revoked on any of the following grounds—
 - ...
 - (d) because of the circumstances applying at the time when the application for revocation is filed, the use of the trade mark is likely to deceive or cause confusion;
 - ...

Copyright Act 1997 – extracts

Section 9 Exclusive rights

- (1) Copyright, in relation to a literary, dramatic or musical work, is the exclusive right:
 - (a) to reproduce the work in a material form;
 - (b) to publish the work;
 - (c) to perform the work in public;
 - (d) to communicate the work to the public;
 - (e) to make an adaptation of the work;
 - (f) to do, in relation to a work that is an adaptation of the first-mentioned work, any of the acts specified in relation to the first-mentioned work in subparagraphs (a) to (e), inclusive;

Section 10 Infringement of copyright

- (1) Subject to this Act, the copyright in a copyright work is infringed by a person who, not being the owner of the copyright, and without the licence of the owner of the copyright, does in Erewhon, or authorises the doing in Erewhon of, any act comprised in the copyright.
- (2) References in this Part to the doing of an act comprised in the copyright in a work are to the doing of it:
 - (a) in relation to the work as a whole or any substantial part of it; and ^[11]_[SEP]
 - (b) either directly or indirectly.

Section 45 Quotation

- (1) It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.
- (2) Where use is made of works in accordance with section (1) above, mention shall be made of the source, and of the name of the author if it appears thereon.

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Cases cited by Madam Justice Davies

Ashdown v Telegraph Group Ltd [2002] Ch 149

Attorney-General v Guardian Newspapers Ltd (No 2) [1990] 1 AC 109

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