JUDGMENT OF THE COURT
6 April 1995 *

In Joined Cases C-241/91 P and C-242/91 P,

Radio Telefis Eireann (RTE), a public authority having its office in Dublin, represented by W. Alexander and G. van der Wal, Advocates, instructed by G. F. McLaughlin, Director of Legal Affairs of Radio Telefis Eireann, and by E. Murphy, Solicitor, with an address for service in Luxembourg at the Chambers of Arendt & Medernach, 8-10 Rue Mathias Hardt (C-241/91 P),

and

Independent Television Publications Ltd (ITP), a company incorporated under English law, having its registered office in London, represented by M. J. Reynolds and R. Strivens, Solicitors, and Alan Tyrrell, QC, with an address for service in Luxembourg at the Chambers of Zeyen, Beghin & Feider, 67 Rue Ermesinde (C-242/91 P),

appellants,

supported by

Intellectual Property Owners Inc. (IPO), having its registered office in Washington, D. C., United States of America, represented by D. R. Barrett and G. I. F. Leigh, Solicitors, with an address for service in Luxembourg at the Chambers of Bonn & Schmitt, 62 Avenue Guillaume,

intervener,

* Language of the case: English.

APPEALS against two judgments of the Court of First Instance of the European Communities (Second Chamber) of 10 July 1991 in Case T-69/89 *RTE* v *Commission* [1991] ECR II-485 and in Case T-76/89 *ITP* v *Commission* [1991] ECR II-575, seeking to have those judgments set aside,

the other party to the proceedings being:

Commission of the European Communities, represented by Julian Currall, of its Legal Service, acting as Agent, and I. S. Forrester, QC, with an address for service in Luxembourg at the office of G. Kremlis, also of the Legal Service, Wagner Centre, Kirchberg,

supported by

Magill TV Guide Ltd, having its registered office in Dublin, represented by Gore & Grimes, Solicitors, and J. L. Cooke, SC, with an address for service in Luxembourg at the Chambers of Louis Schiltz, 83 Boulevard Grande-Duchesse Charlotte,

intervener at first instance,

THE COURT,

composed of: G. C. Rodríguez Iglesias (Rapporteur), President, F. A. Schockweiler and P. J. G. Kapteyn (Presidents of Chambers), G. F. Mancini, C. N. Kakouris, J. C. Moitinho de Almeida and J. L. Murray, Judges,

Advocate General: C. Gulmann,
Registrar: L. Hewlett, Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 1 December 1993, at which Radio Telefis Eireann was represented by W. Alexander and G. van der Wal, Advocates; Independent Television Publications Ltd by A. Tyrrell, QC, R. Strivens, Solicitor, and T. Skinner, Barrister; the Commission by J. Currall, of its Legal Service, and I. S. Forrester, QC; Magill TV Guide Ltd by J. L. Cooke, SC; and Intellectual Property Owners by G. I. F. Leigh, Solicitor, and D. Vaughan, QC,

after hearing the Opinion of the Advocate General at the sitting on 1 June 1994,

gives the following

Judgment

1 By application lodged at the Court Registry on 19 September 1991, Radio Telefis Eireann ('RTE'), notified of the judgment of the Court of First Instance in Case T-69/89 *RTE* v *Commission* [1991] ECR II-485 ('the *RTE* judgment') on 10 July 1991, the date of judgment, appealed against that judgment on the ground of non-compliance with Community law.

2 By application lodged at the Court Registry on 19 September 1991, Independent Television Publications Ltd ('ITP'), notified of the judgment of the Court of First Instance of 10 July 1991 in Case T-76/89 *ITP* v *Commission* [1991] ECR II-575 ('the *ITP* judgment') on 12 July 1991, appealed against that judgment on the ground of non-compliance with Community law.

3 By two applications lodged at the Registry on 6 January 1992, Intellectual Property Owners Inc. ('IPO') sought leave to intervene in the two cases in support of the forms of order sought by the appellants. By two orders of 25 March 1992 the Court granted IPO leave to intervene.

4 By an order of the President of the Court of Justice of 21 April 1993, Cases C-241/91 P and C-242/91 P were joined for the purposes of the oral procedure.

5 Since the two cases concern the same subject-matter, it is appropriate for them to be joined for the purposes of the judgment, in accordance with Article 43 of the Rules of Procedure.

6 According to the judgments of the Court of First Instance, most households in Ireland and 30% to 40% of households in Northern Ireland can receive television programmes broadcast by RTE, ITV and BBC.

7 At the material time, no comprehensive weekly television guide was available on the market in Ireland or in Northern Ireland. Each television station published a television guide covering exclusively its own programmes and claimed, under Irish and United Kingdom legislation, copyright protection for its own weekly programme listings in order to prevent their reproduction by third parties.

8 RTE itself published its own weekly television guide, while ITV did so through ITP, a company established for that purpose.

9 ITP, RTE and BBC practised the following policy with regard to the dissemination of programme listings. They provided their programme schedules free of charge, on request, to daily and periodical newspapers, accompanied by a licence for which no charge was made, setting out the conditions under which that information could be reproduced. Daily listings and, if the following day was a public holiday, the listings for two days, could thus be published in the press, subject to certain conditions relating to the format of publication. Publication of 'highlights' of the week was also authorized. ITP, RTE and the BBC ensured strict compliance with the licence conditions by instituting legal proceedings, where necessary, against publications which failed to comply with them.

10 Magill TV Guide Ltd ('Magill') attempted to publish a comprehensive weekly television guide but was prevented from doing so by the appellants and the BBC, which obtained injunctions prohibiting publication of weekly television listings.

11 Magill lodged a complaint with the Commission on 4 April 1986 under Article 3 of Regulation No 17 of the Council of 6 February 1962, the First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87) ('Regulation No 17') seeking a declaration that the appellants and the BBC were abusing their dominant position by refusing to grant licences for the publication of their respective weekly listings. The Commission decided to initiate a proceeding, at the end of which it adopted Decision 89/205/EEC of 21 December 1988 relating to a proceeding under Article 86 of the EEC Treaty (IV/31.851 — Magill TV Guide/ITP, BBC and RTE) (OJ 1989 L 78, p. 43) ('the decision'), which was the subject-matter of the proceedings before the Court of First Instance.

12 In that decision the Commission found that there had been a breach of Article 86 of the EEC Treaty and ordered the three organizations to put an end to that breach, in particular 'by supplying ... third parties on request and on a non-discriminatory basis with their individual advance weekly programme listings and by permitting reproduction of those listings by such parties'. It was also provided

that, if the three organizations chose to grant reproduction licences, any royalties requested should be reasonable.

13 By order of 11 May 1989 in Joined Cases 76, 77 and 91/89 R *RTE and Others* v *Commission* [1989] ECR 1141, the President of the Court of Justice, at the request of the applicants, ordered suspension 'of the operation of Article 2 of the ... decision in so far as it obliges the applicants to bring the infringement found by the Commission to an end forthwith by supplying each other and third parties on request and on a non-discriminatory basis with their individual advance weekly programme listings and by permitting reproduction of those listings by such parties'.

14 At first instance the two appellants sought annulment of the Commission decision and an order requiring it to pay the costs of the proceedings.

15 The Court of First Instance dismissed the appellants' applications and ordered them to pay the costs.

16 RTE claims that the Court of Justice should:

'1. quash the judgment of the Court of First Instance;

2. annul the decision of the Commission of 21 December 1988;

3. order the Commission and the intervener to pay the costs.'

17 ITP requests the Court of Justice to:

'1. quash the judgment of the Court of First Instance dated 10 July 1991 in Case T-76/89 *ITP* v *Commission* and itself give final judgment in the matter;

2. declare Commission Decision IV/31.851 of 21 December 1988 (Magill TV Guide/ITP, BBC and RTE) void; and

3. order the Commission and/or the intervener to pay the costs of ITP in the Court of First Instance and the Commission to pay the costs of ITP in this Court.'

18 The Commission contends that the Court should dismiss the appeals, order each appellant to bear the costs of the proceedings brought by it and order IPO to bear the costs incurred by the Commission by virtue of IPO's intervention.

19 In the alternative, in the event that the Court of Justice should hold, contrary to the Commission's submissions, that the judgments of the Court of First Instance must be quashed on a particular point, the Commission submits that the Court of Justice should none the less confirm the operative parts of the judgments of the Court of First Instance while substituting its own reasoning in accordance with the judgment in Case C-30/91 P *Lestelle* v *Commission* [1992] ECR I-3755. The Commission contends that the operative parts of the judgments, which upheld the Commission's decision, are sound since the conduct complained of in this case was evidently abusive, harmed the interests of consumers, drove Magill's multi-channel guide out of the market, restricted trade between Member States and was intended (at least by two of the three applicants) to restrict such trade.

20 IPO claims that the Court should set aside the two judgments of the Court of First Instance, annul the decision of the Commission and order the Commission to bear IPO's costs before the Court of Justice.

21 RTE relies on three pleas in law in support of its appeal. The first is that the Court of First Instance misconstrued the concept of abuse of a dominant position contained in Article 86 of the Treaty. The second is that the Court of First Instance misconstrued the concept of effects on trade between Member States. The third is that the Court of First Instance wrongly refused to take into consideration the Berne Convention of 1886.

22 ITP, in support of its appeal, relies on the first plea raised by RTE, along with two further pleas in law. The first is that the Court of First Instance misconstrued Article 3 of Regulation No 17 by holding that the Commission had the power to require a proprietor of intellectual property rights to grant compulsory licences. The second is that Article 190 of the Treaty was infringed in so far as the Court of First Instance held that the reasoning of the decision satisfied the conditions relating to observance of the rights of the defence.

23 In its two statements in intervention, IPO particularly supports the plea common to both ITP and RTE, namely that the Court of First Instance misconstrued the concept of abuse of a dominant position within the meaning of Article 86 of the Treaty.

The existence of an abuse of a dominant position

24 So far as the existence of a dominant position is concerned, the Court of First Instance held that 'ITP enjoyed, as a consequence of its copyright in ITV and Channel 4 programme listings, which had been transferred to it by the television companies broadcasting on those channels, the exclusive right to reproduce and market those listings. It was thus able, at the material time, to secure a monopoly

over the publication of its weekly listings in the *TV Times*, a magazine specializing in the programmes of ITV and Channel 4'. Consequently, in the opinion of the Court of First Instance, 'the applicant clearly held at that time a dominant position both on the market represented by its weekly listings and on the market for the magazines in which they were published in Ireland and Northern Ireland. Third parties such as Magill who wished to publish a general television magazine were in a situation of economic dependence on the applicant, which was thus in a position to hinder the emergence of any effective competition on the market for information on its weekly programmes' (*ITP* judgment, paragraph 49). With regard to RTE, the Court of First Instance reached the same conclusion in nearly identical terms (*RTE* judgment, paragraph 63).

25 So far as the existence of an abuse of that dominant position was concerned, the Court of First Instance considered that it was necessary to interpret Article 86 in the light of copyright in programme listings. It pointed out that, in the absence of harmonization of national rules or Community standardization, determination of the conditions and procedures under which copyright was protected was a matter for national rules (*ITP* judgment, paragraphs 50 and 51). The relationship between national intellectual property rights and the general rules of Community law was governed expressly by Article 36 of the EEC Treaty, which provided for the possibility of derogating from the rules relating to the free movement of goods on grounds of the protection of industrial or commercial property, subject to the conditions set out in the second sentence of Article 36. Article 36 thus emphasized that the reconciliation between the requirements of the free movement of goods and the respect to which intellectual property rights were entitled had to be achieved in such a way as to protect the legitimate exercise of such rights, which alone was justified within the meaning of that article, and to preclude any improper exercise thereof likely to create artificial partitions within the market or pervert the rules governing competition within the Community. The Court of First Instance took the view that the exercise of intellectual property rights conferred by national legislation had consequently to be restricted as far as was necessary for that reconciliation (*ITP* judgment, paragraph 52).

26 The Court of First Instance found, in the light of the case-law of the Court of Justice, that it followed from Article 36 of the Treaty that only those restrictions on freedom of competition, free movement of goods or freedom to provide services which were inherent in the protection of the actual substance of the intellectual property right were permitted in Community law. It based its view in particular on

the judgment of the Court of Justice in Case 78/70 *Deutsche Grammophon* v *Metro* [1971] ECR 487, paragraph 11, in which the Court of Justice held that, although it permitted prohibitions or restrictions on the free movement of products which were justified for the purpose of protecting industrial and commercial property, Article 36 only admitted derogations from that freedom to the extent to which they were justified for the purpose of safeguarding rights which constituted the specific subject-matter of such property (*ITP* judgment, paragraph 54).

27 The Court of First Instance then observed that in principle the protection of the specific subject-matter of a copyright entitled the copyright-holder to reserve the exclusive right to reproduce the protected work (*ITP* judgment, paragraph 55).

28 However, the Court of First Instance took the view that, while it was plain that the exercise of the exclusive right to reproduce a protected work was not in itself an abuse, that did not apply when, in the light of the details of each individual case, it was apparent that that right was being exercised in such ways and circumstances as in fact to pursue an aim manifestly contrary to the objectives of Article 86. In that event, the Court of First Instance continued, the copyright was no longer being exercised in a manner which corresponded to its essential function, within the meaning of Article 36 of the Treaty, which was to protect the moral rights in the work and ensure a reward for the creative effort, while respecting the aims of, in particular, Article 86. From this the Court of First Instance concluded that the primacy of Community law, particularly as regards principles as fundamental as those of the free movement of goods and freedom of competition, prevailed over any use of a rule of national intellectual property law in a manner contrary to those principles (*ITP* judgment, paragraph 56).

29 In the present case, the Court of First Instance noted that the applicants, by reserving the exclusive right to publish their weekly television programme listings, were preventing the emergence on the market of a new product, namely a general television magazine likely to compete with their own magazines. The applicants were thus using their copyright in the programme listings produced as part of the activity of broadcasting in order to secure a monopoly in the derivative market of weekly television guides in Ireland and Northern Ireland. The Court of First Instance also regarded it as significant in that regard that the appli-

cants had authorized, free of charge, the publication of their daily listings and highlights of their weekly programmes in the press in both Ireland and the United Kingdom.

30 The Court of First Instance accordingly took the view that conduct of that type — characterized by preventing the production and marketing of a new product, for which there was potential consumer demand, on the ancillary market of weekly television guides and thereby excluding all competition from that market solely in order to secure the applicants' respective monopolies — clearly went beyond what was necessary to fulfil the essential function of the copyright as permitted in Community law. The applicants' refusal to authorize third parties to publish their weekly listings was, in this case, the Court of First Instance ruled, arbitrary in so far as it was not justified by the requirements peculiar to the activity of publishing television magazines. It was thus possible for the applicants to adapt to the conditions of a television magazine market which was open to competition in order to ensure the commercial viability of their weekly publications. The applicants' conduct could not, in those circumstances, be covered in Community law by the protection conferred by their copyright in the programme listings (*ITP* judgment, paragraph 58).

31 In the light of the foregoing considerations, the Court of First Instance found that, although the programme listings were at the material time protected by copyright as laid down by national law, which still determined the rules governing that protection, the conduct at issue could not qualify for such protection within the framework of the necessary reconciliation between intellectual property rights and the fundamental principles of the Treaty concerning the free movement of goods and freedom of competition. The aim of that conduct was clearly incompatible with the objectives of Article 86 (*ITP* judgment, paragraph 60).

32 The Court of First Instance accordingly dismissed the plea in law based on breach of Article 86.

33 RTE, supported by IPO, relies on the judgment in Case 238/87 *Volvo* v *Veng* [1988] ECR 6211 in arguing that the exercise by an owner of intellectual property rights of his exclusive rights, in particular his refusal to grant a licence, cannot in itself be regarded as an abuse of a dominant position.

34 According to RTE, ITP and IPO, one of the essential rights of the owner of a copyright, without which that right would be deprived of its substance, is the exclusive right of reproduction. That right, which has not been placed in question by the Treaty rules, entitles its holder to be rewarded by the exclusive sale of the products incorporating the protected work and to prevent competition by a third party in respect of those products.

35 ITP denies that the exercise of the exclusive right of reproduction is itself an abuse where it is in pursuit of an aim manifestly contrary to the objectives of Article 86 (*ITP* judgment, paragraph 56) since copyright owners ordinarily and naturally exercise their copyright in order to restrict competition with their own product by other products made using their copyright material, even on a derived market. That, it continues, is the essence of copyright.

36 IPO considers that copyright is by nature beneficial for competition, pointing out that it attributes exclusive proprietorial rights only to a particular expression of an idea or concept, not to the concept or idea itself.

37 RTE and IPO point out that, in the absence of Community harmonization, the scope of national copyright laws can be defined only by the legislature of each Member State. The definition of that scope cannot be altered by a measure adopted in implementation of Article 86, but only by specific Community legislation.

38 Moreover, according to RTE, the right of first marketing has been considered in the case-law of the Court of Justice as the specific subject-matter of all industrial property rights.

39 RTE contends that the owner of an intellectual property right is under no obligation to offer justification for his refusal to grant a licence, contrary to the view taken by the Court of First Instance. ITP adds that this view of the Court of First Instance is not supported by the case-law of the Court of Justice and that, due to the imprecision of the criteria used, it undermines legal certainty for copyright owners.

40 According to RTE and IPO, a refusal, by the owner of a right, to grant a licence forms part of the specific subject-matter of his exclusive right. RTE considers that this would constitute an abuse only in very particular circumstances and IPO adds that the use of an intellectual property right is justified if it is within the scope of the specific subject-matter of the right in question.

41 IPO and RTE criticize the approach, adopted by the Court of First Instance and the Commission in this case, of seeing copyright as a mere combination of the right of attribution of authorship and the right to compensation for exploitation. IPO claims that this is in marked contrast not only to the laws of the various Member States but also to the Berne Convention and would represent a significant diminution of the protection afforded by copyright. ITP adds that this view overlooks the right of exclusive reproduction and distinguishes between the protection of moral rights and the protection of commercial rights with the result that assignees of the creator — such as ITP — cannot avail themselves of moral rights, which are inalienable, and will therefore be unable to exercise the right of exclusive reproduction.

42 RTE submits that consumer demand cannot justify application of Article 86 to the present cases and that it is for the national legislature alone to remedy such a sit-

uation, as has been done in the United Kingdom. ITP adds that it is ordinarily the case that a copyright owner who sells his own product made from his copyright material deprives consumers of the opportunity of obtaining it elsewhere.

43 Next, according to IPO, there is no presumption that the holder of an intellectual property right is in a dominant position within the meaning of Article 86 (judgments in Case 40/70 *Sirena* v *EDA and Others* [1971] ECR 69 and Case 78/70 *Deutsche Grammophon*, cited above). Relying in particular on the judgment in Case 322/81 *Michelin* v *Commission* [1983] ECR 3461, IPO takes the view that a dominant position presupposes a position of economic strength and for that reason it calls in question the analysis of the Court of First Instance that the appellants were dominant merely because they held copyrights without reference to any analysis whatever of economic power in the marketplace.

44 IPO also criticizes the Commission for having failed to apply the criterion of dominant position based on economic power and having taken the view that the appellants and the BBC held a factual monopoly. In doing so, the Commission takes the view that a factual monopoly is likely to arise wherever there exists a primary market and a secondary market and a third party wishes to avail itself of the products or services on the primary market in order to carry on business on the secondary market. According to IPO, the Commission considers that such a situation will result in a position of economic dependence which is characteristic of the existence of a dominant position.

45 IPO criticizes this conception in so far as it artificially links economic dependence with the intention of a third party, who would always have the possibility of undertaking some other economic venture. For IPO, the concept of 'factual monopoly' appears to be an artificial construct whereby the Commission seeks to justify the use of competition law in order to change the specific subject-matter of copyright.

(a) *Existence of a dominant position*

46 So far as dominant position is concerned, it is to be remembered at the outset that mere ownership of an intellectual property right cannot confer such a position.

47 However, the basic information as to the channel, day, time and title of programmes is the necessary result of programming by television stations, which are thus the only source of such information for an undertaking, like Magill, which wishes to publish it together with commentaries or pictures. By force of circumstance, RTE and ITP, as the agent of ITV, enjoy, along with the BBC, a *de facto* monopoly over the information used to compile listings for the television programmes received in most households in Ireland and 30% to 40% of households in Northern Ireland. The appellants are thus in a position to prevent effective competition on the market in weekly television magazines. The Court of First Instance was therefore right in confirming the Commission's assessment that the appellants occupied a dominant position (see the judgment in Case 322/81 *Michelin*, cited above, paragraph 30).

(b) *Existence of abuse*

48 With regard to the issue of abuse, the arguments of the appellants and IPO wrongly presuppose that where the conduct of an undertaking in a dominant position consists of the exercise of a right classified by national law as 'copyright', such conduct can never be reviewed in relation to Article 86 of the Treaty.

Admittedly, in the absence of Community standardization or harmonization of laws, determination of the conditions and procedures for granting protection of an intellectual property right is a matter for national rules. Further, the exclusive right of reproduction forms part of the author's rights, so that refusal to grant a licence, even if it is the act of an undertaking holding a dominant position, cannot in itself constitute abuse of a dominant position (judgment in Case 238/87 *Volvo*, cited above, paragraphs 7 and 8).

However, it is also clear from that judgment (paragraph 9) that the exercise of an exclusive right by the proprietor may, in exceptional circumstances, involve abusive conduct.

In the present case, the conduct objected to is the appellants' reliance on copyright conferred by national legislation so as to prevent Magill — or any other undertaking having the same intention — from publishing on a weekly basis information (channel, day, time and title of programmes) together with commentaries and pictures obtained independently of the appellants.

Among the circumstances taken into account by the Court of First Instance in concluding that such conduct was abusive was, first, the fact that there was, according to the findings of the Court of First Instance, no actual or potential substitute for a weekly television guide offering information on the programmes for the week ahead. On this point, the Court of First Instance confirmed the Commission's finding that the complete lists of programmes for a 24-hour period — and for a 48-hour period at weekends and before public holidays — published in certain daily and Sunday newspapers, and the television sections of certain magazines covering, in addition, 'highlights' of the week's programmes, were only to a limited extent substitutable for advance information to viewers on all the week's programmes. Only weekly television guides containing comprehensive listings for the week ahead would enable users to decide in advance which programmes they wished to follow and arrange their leisure activities for the week accordingly. The Court of First Instance also established that there was a specific, constant and

regular potential demand on the part of consumers (see the *RTE* judgment, paragraph 62, and the *ITP* judgment, paragraph 48).

53 Thus the appellants — who were, by force of circumstance, the only sources of the basic information on programme scheduling which is the indispensable raw material for compiling a weekly television guide — gave viewers wishing to obtain information on the choice of programmes for the week ahead no choice but to buy the weekly guides for each station and draw from each of them the information they needed to make comparisons.

54 The appellants' refusal to provide basic information by relying on national copyright provisions thus prevented the appearance of a new product, a comprehensive weekly guide to television programmes, which the appellants did not offer and for which there was a potential consumer demand. Such refusal constitutes an abuse under heading (b) of the second paragraph of Article 86 of the Treaty.

55 Second, there was no justification for such refusal either in the activity of television broadcasting or in that of publishing television magazines (*RTE* judgment, paragraph 73, and *ITP* judgment, paragraph 58).

56 Third, and finally, as the Court of First Instance also held, the appellants, by their conduct, reserved to themselves the secondary market of weekly television guides by excluding all competition on that market (see the judgment in Joined Cases 6/73 and 7/73 *Commercial Solvents* v *Commission* [1974] ECR 223, paragraph 25) since they denied access to the basic information which is the raw material indispensable for the compilation of such a guide.

57 In the light of all those circumstances, the Court of First Instance did not err in law in holding that the appellants' conduct was an abuse of a dominant position within the meaning of Article 86 of the Treaty.

58 It follows that the plea in law alleging misapplication by the Court of First Instance of the concept of abuse of a dominant position must be dismissed as unfounded. It is therefore unnecessary to examine the reasoning of the contested judgments in so far as it is based on Article 36 of the Treaty.

Effects on trade between Member States (second plea in the appeal in Case C-241/91 P)

59 With regard to the effects on trade between Member States, the Court of First Instance first reviewed the case-law of the Court of Justice (paragraph 76 of the *RTE* judgment) before finding (at paragraph 77) that 'the applicant's conduct modified the structure of competition on the market for television guides in Ireland and Northern Ireland and thus affected potential trade flows between Ireland and the United Kingdom.'

60 The reasons given by the Court of First Instance for this conclusion were based on the effects of RTE's refusal to authorize third parties to publish its weekly listings on the structure of competition in the territory of Ireland and Northern Ireland. These, the Court of First Instance found, excluded all potential competition on the market in question, 'thus in effect maintaining the partitioning of the markets ... [of] Ireland and Northern Ireland respectively.' It found that the appreciable effect which the policy in question had on potential commercial exchanges between Ireland and the United Kingdom was evidenced by the specific demand for a general television magazine. The Court of First Instance added that 'the relevant geographical area, within which a single market in television broadcasting services has already been achieved, likewise represents a single market for information on television programmes, particularly since trade is greatly facilitated by a common language' (paragraph 77).

61 RTE states that Community competition rules are not intended to remedy situations which are purely internal to a Member State and it disputes the finding of the Court of First Instance that RTE had 'in effect maintain [ed] the partitioning of the markets represented by Ireland and Northern Ireland respectively.' RTE asserts that it has observed one and the same policy in respect of the supply of weekly programme listings and licensing, irrespective of the place of establishment of the undertakings concerned. It denies ever having stopped or hindered the export or import of television guides.

62 RTE also recalls the following facts, which are supported by the findings of the Commission and the Court of First Instance:

(i) outside Ireland, RTE's programmes are received only in part of Northern Ireland, which represents less than 1.6% of the United Kingdom television market and less than 0.3% of the EEC television market;

(ii) according to the findings of the High Court of Ireland, the RTE signal is received by 30% to 40% of the population of Northern Ireland;

(iii) sales of RTE's television guide in the United Kingdom are less than 5% of sales in Ireland.

63 RTE adds that it does not have programmes or commercials aimed at or broadcast to Northern Ireland. Its programmes can be received in Northern Ireland only because of 'overspill'. In Northern Ireland, approximately 100 000 households receive RTE programmes and 5 000 copies of RTE's television guide are sold.

64 According to RTE, these facts demonstrate the marginal importance of the cross-border sales of weekly guides containing RTE's programmes.

65 Moreover, following the new licensing policy applied by RTE, it appears that:

(i) sales in Ireland of *Radio Times* and *TV Times*, originating in the United Kingdom, have decreased;

(ii) sales in Northern Ireland of the *RTE Guide*, originating in Ireland, have not increased; in general the inclusion of RTE's programme listings in a multi-channel guide does not appreciably affect sales figures of such a guide in Northern Ireland;

(iii) no other publishers have availed themselves of the new possibility of publishing comprehensive weekly television guides, including RTE's programmes, and of selling them across the border.

66 RTE concludes from this information that its licensing policy, condemned by the Commission decision, has had no effect, or no more than an insignificant effect, on commercial exchanges between Ireland and the United Kingdom. In any event, RTE states, the Commission must prove that there is an appreciable effect on trade between Member States (judgment in Case 27/76 *United Brands* v *Commission* [1978] ECR 207), and that is something which the Court of First Instance failed to take into account. It points out that the Commission's arguments on this aspect relate only to sales in Great Britain, to ITP and to the BBC.

67 It is to be noted at the outset that the Court of Justice has consistently held that, pursuant to Article 168a of the Treaty and Article 51 of the Statute of the Court of Justice of the EEC, an appeal may rely only on grounds relating to infringement of rules of law, to the exclusion of any appraisal of the facts (judgment in Case C-53/92 P *Hilti* v *Commission* [1994] ECR I-667, paragraph 10). The arguments relied on by RTE must therefore be rejected in so far as they question the appraisal of the facts by the Court of First Instance.

68 Nevertheless, the condition that trade between Member States must be affected is a question of law and, as such, subject to review by the Court of Justice.

69 In order to satisfy the condition that trade between Member States must be affected, it is not necessary that the conduct in question should in fact have substantially affected that trade. It is sufficient to establish that the conduct is capable of having such an effect (judgments in Case 322/81 *Michelin* v *Commission*, cited above, paragraph 104, and in Case C-41/90 *Höfner and Elser* v *Macrotron* [1991] ECR I-1979, paragraph 32).

70 In this case, the Court of First Instance found that the applicant had excluded all potential competitors on the geographical market consisting of one Member State (Ireland) and part of another Member State (Northern Ireland) and had thus modified the structure of competition on that market, thereby affecting potential commercial exchanges between Ireland and the United Kingdom. From this the Court of First Instance drew the proper conclusion that the condition that trade between Member States must be affected had been satisfied.

71 It follows that the plea in law alleging misapplication by the Court of First Instance of the concept of trade between Member States being affected must be dismissed.

The Berne Convention (third plea in the appeal in Case C-241/91 P)

72 So far as the Berne Convention ('the Convention') is concerned, RTE had submitted before the Court of First Instance that Article 9(1) thereof conferred an exclusive right of reproduction and that Article 9(2) allowed a signatory State to permit reproduction only in certain special cases, provided that such reproduction did not conflict with normal exploitation of the work and did not unreasonably prejudice the legitimate interests of the author. From this RTE deduced that Article 2 of the contested decision was incompatible with the Convention inasmuch as it conflicted with the normal exploitation of RTE's copyright in the programme listings and seriously prejudiced its legitimate interests (*RTE* judgment, paragraph 100).

73 In response to those arguments, the Court of First Instance considered whether the Convention was applicable. Its first finding was that the Community was not a party to it. After reviewing Article 234 of the EEC Treaty and the case-law of the Court of Justice (*RTE* judgment, paragraph 102), the Court of First Instance pointed out that 'In the present case concerning Ireland and the United Kingdom, ... under Article 5 of the Act of Accession, Article 234 of the EEC Treaty applies to agreements or conventions concluded before ... 1 January 1973.' From this it deduced that 'In intra-Community relations, therefore, the provisions of the Berne Convention, ratified by Ireland and the United Kingdom before 1 January 1973, cannot affect the provisions of the Treaty. ... The argument that Article 2 of the decision is in conflict with Article 9(1) of the Berne Convention must therefore be dismissed, without there even being any need to inquire into its substance.' With regard to Article 9(2) of the Convention, the Court of First Instance observed that this provision 'was introduced by the Paris revision of 1971, to which the United Kingdom has been a party since 2 January 1990 and which Ireland has not yet ratified.' The Court of First Instance then pointed out that an agreement or a convention concluded subsequent to accession without recourse to the procedure set out in Article 236 of the EEC Treaty cannot affect a provision of the Treaty (*RTE* judgment, paragraph 103).

74 The Court of First Instance accordingly dismissed as unfounded the plea alleging infringement of the Convention (*RTE* judgment, paragraph 104).

75 RTE claims that Article 9(2) of the Berne Convention, as revised in Paris in 1971, only allows for exceptions from authors' exclusive rights of reproduction to be made by legislation, in special cases, and provided that such reproduction does not prejudice the normal exploitation of the work or cause unreasonable prejudice to the legitimate interests of the author.

76 According to RTE, the Convention does not contain a definition of what comes under its protection but excludes only 'miscellaneous news facts having the character of mere facts of press information' (Article 2(8)), an exception which must be interpreted restrictively. It is thus for the national legislature and courts to determine the scope of the Convention at national level.

77 RTE submits that the obligation imposed by the Commission's decision has not been provided for by legislation which is sufficiently clear in its terms to define the circumstances in which, and the conditions on which, reproduction is to be permitted. The decision itself cannot be regarded as 'legislation'. Application of competition law does not fulfil the conditions of Article 9(2). A copyright holder must be able to know on the basis of explicit legislation whether or not he may be subject to an obligation of compulsory licensing. A provision such as Article 86 of the Treaty, which merely sets out a general obligation and must be made precise and adapted from case to case, does not fulfil the conditions laid down by Article 9(2) of the Convention. Community legislation alone is capable of providing a proper legislative basis.

78 RTE submits that the Convention is part of the rules of law relating to the application of the Treaty referred to in Article 173 of the EEC Treaty. In support of that proposition, RTE refers to numerous declarations made by the Commission which show that the Convention enjoys broad international support (see the preamble to the Proposal for a Council Decision concerning the accession of the Member States to the Berne Convention for the Protection of Literary and Artistic Works, as revised by the Paris Act of 24 July 1971, and the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention) of 26 October 1961, OJ 1991 C 24, p. 5).

According to RTE, the Commission has always regarded the Convention as establishing a minimum level of protection. It refers to the Proposal for a Council Directive on the legal protection of computer programs (OJ 1989 C 91, p. 4, particularly pp. 8 and 10) and Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs (OJ 1991 L 122, p. 42). The amended Commission proposal for a Council Decision concerning the accession of the Member States to the Berne Convention for the Protection of Literary and Artistic Works, as revised by the Paris Act of 24 July 1971, and the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention) of 26 October 1961 (OJ 1992 C 57, p. 13) states (Article 1a):

'In the exercise of its powers concerning copyright and neighbouring rights, the Community shall be guided by the principles and act in accordance with the provisions of the Berne Convention ...'.

The Proposal for a Council Directive on the legal protection of databases, adopted on 29 January 1992, provides a legislative basis for compulsory licensing. RTE observes that, in all fields other than competition law, the Community respects the Convention.

79 RTE accordingly takes the view that, although the Community itself is not a party to the Convention, account must be taken of the rules of that Convention within the framework of Community law (judgments in Case 4/73 *Nold* v *Commission* [1974] ECR 491, and in Joined Cases 46/87 and 227/88 *Hoechst* v *Commission* [1989] ECR 2859).

80 According to RTE, the Community cannot, on the one hand, oblige the Member States to accede to and comply with the Convention and, on the other, adopt measures which do not comply with it.

81 In conclusion, it contends that examination of the scope of Articles 234 and 236 would be relevant only if a conflict between the obligations arising from the Convention and certain provisions of the EEC Treaty had been established.

82 IPO endorses this opinion and contends that harmonization of national intellectual property law can be achieved only by legislative means, namely by a Council measure adopted in accordance with the procedure provided for in Article 100a or Article 235 of the EEC Treaty. An individual decision issued by the Commission on the basis of competition law is not the appropriate way to resolve this issue.

83 It is appropriate to observe at the outset, as the Court of First Instance did, that the Community is not a party to the Convention for the Protection of Literary and Artistic Works.

84 Next, so far as the United Kingdom and Ireland are concerned, it is true that they were already parties to the Convention when they acceded to the Community and that Article 234 of the Treaty therefore applies to that Convention, in accordance with Article 5 of the Act of Accession. It is, however, settled case-law that the provisions of an agreement concluded prior to entry into force of the Treaty or prior to a Member State's accession cannot be relied on in intra-Community relations if, as in the present case, the rights of non-member countries are not involved (see, in particular, the judgment in Case 286/86 *Ministère Public* v *Deserbais* [1988] ECR 4907, paragraph 18).

85 Finally, the Paris Act, which amended Article 9(1) and (2) of the Convention (the provisions relied on by RTE), was ratified by the United Kingdom only after its accession to the Community and has still not been ratified by Ireland.

86 The Court of First Instance was therefore correct to hold that Article 9 of the Convention cannot be relied on to limit the powers of the Community, as provided for in the EEC Treaty, since the Treaty can be amended only in accordance with the procedure laid down in Article 236.

87 It follows that the plea that the Court of First Instance failed to have proper regard to the Convention must be dismissed as unfounded.

The powers conferred on the Commission by Article 3 of Regulation No 17 (second plea in the appeal in Case C-242/91 P)

88 The first limb of ITP's second plea is that the Court of First Instance misconstrued Article 3 of Regulation No 17 in holding that that provision enabled the Commission to impose compulsory licensing, on conditions approved by it, relating to intellectual property rights conferred by the laws of the Member States. Relying on the judgment in Case 144/81 *Keurkoop* v *Nancy Kean Gifts* [1982] ECR 2853, ITP submits that only the Parliaments of Ireland and the United Kingdom may take away or replace the copyrights which they have conferred.

89 The second limb alleges infringement of the principle of proportionality in so far as the Court of First Instance held that the Commission's decision was not contrary to that principle (*ITP* judgment, paragraphs 78 to 81). ITP contends that the Court of First Instance should have taken account of a number of considerations: the decision removed not only ITP's exclusive right of reproduction, but also its right of first marketing, particularly important where, as in this case, the product has a useful life of 10 days; there is no reciprocity between ITP and the competitors (other than the BBC and RTE) to whom it is required to grant licences; many of those competitors, particularly the national newspapers, have turnovers and profits greatly in excess of those of ITP and they also possess valuable copyrights which they protect from reproduction.

90 It is appropriate to observe that Article 3 of Regulation No 17 is to be applied according to the nature of the infringement found and may include an order to do certain acts or things which, unlawfully, have not been done as well as an order to

bring an end to certain acts, practices or situations which are contrary to the Treaty (judgment in Joined Cases 6/73 and 7/73 *Commercial Solvents*, cited above, paragraph 45).

91 In the present case, after finding that the refusal to provide undertakings such as Magill with the basic information contained in television programme listings was an abuse of a dominant position, the Commission was entitled under Article 3, in order to ensure that its decision was effective, to require the appellants to provide that information. As the Court of First Instance rightly found, the imposition of that obligation — with the possibility of making authorization of publication dependent on certain conditions, including payment of royalties — was the only way of bringing the infringement to an end.

92 The Court of First Instance was also entitled to dismiss, on the basis of the same findings of fact, the allegation that the principle of proportionality had been infringed.

93 As the Court of First Instance correctly pointed out, in the context of the application of Article 3 of Regulation No 17, the principle of proportionality means that the burdens imposed on undertakings in order to bring an infringement of competition law to an end must not exceed what is appropriate and necessary to attain the objective sought, namely reestablishment of compliance with the rules infringed (*ITP* judgment, paragraph 80).

94 In holding, at paragraph 81 of the *ITP* judgment, that, in the light of the above findings, the order addressed to the applicant was an appropriate and necessary measure to bring the infringement to an end, the Court of First Instance did not commit an error of law.

The reasoning (third plea in the appeal in Case C-242/91 P)

95 In its third plea ITP claims that the Court of First Instance failed to comply with Article 190 of the EEC Treaty in finding that the decision was adequately reasoned (*ITP* judgment, paragraphs 64 and 65) when the Commission did no more than state that the exercise of copyright was outside the scope of the specific subject-matter of this right and went on to conclude that an exercise of copyright consisting simply in refusing to grant a reproduction licence was an abuse of a dominant position.

96 According to ITP, the crucial question whether a mere refusal to grant a licence could constitute an abuse was dealt with by the Commission in a summary fashion. There was no analysis of the special position occupied by owners of copyright in the context of the application of Article 86. ITP maintains that such an approach fails to meet the requirements laid down in the judgment in Case C-269/90 *Hauptzollamt München-Mitte* v *Technische Universität München* [1991] ECR I-5469. ITP maintains that it still does not know what the Commission meant by describing ITP's use of its copyright as falling outside the scope of the specific subject-matter of the intellectual property right.

97 ITP claims that the inadequacy of the decision's reasoning was highlighted by the numerous arguments advanced by the Commission in the course of the proceedings before the Court of First Instance. If the Commission could so act and remain within the law, Article 190 would be rendered nugatory. ITP submits that the Court of First Instance adopted its own legal reasoning which bore no relation to the decision.

98 The Court must observe here that, according to settled case-law, Commission decisions intended to find infringements of competition rules, issue directions and

impose pecuniary sanctions must state the reasons on which they are based, in accordance with Article 190 of the EEC Treaty, which requires the Commission to set out the reasons which prompted it to adopt a decision, so that the Court can exercise its power of review and Member States and nationals concerned know the basis on which the Treaty has been applied (see the judgment in Case C-137/92 P *Commission* v *BASF and Others* [1994] ECR I-2555, paragraph 66).

99 However, the Commission cannot be required to discuss all the matters of fact and law which may have been dealt with during the administrative proceedings (judgment in Case 246/86 *Belasco and Others* v *Commission* [1989] ECR 2117, paragraph 55).

100 The Court of First Instance found in particular, at paragraph 64 of the *ITP* judgment, that 'as regards the concept of abuse, the Commission clearly stated in the decision its reasons for finding that the applicant, by using its exclusive right to reproduce the listings as the instrument of a policy contrary to the objectives of Article 86, went beyond what was necessary to ensure the protection of the actual substance of its copyright and committed an abuse within the meaning of Article 86.' It accordingly arrived at the view that 'Contrary to the applicant's allegations, the statement of reasons in the contested decision is ... sufficient to allow interested parties to ascertain the main legal and factual criteria on which the Commission based its findings and to enable the Court to carry out its review. It therefore fulfils the conditions relating to the respect of the right to a fair hearing as they have consistently been defined in the case-law.'

101 ITP's criticisms fail to show that those assessments of the Court of First Instance are marred by an error of law.

102 It must be added that, in so far as those criticisms concern the inadequacy of the legal analysis of the situation made by the Commission in its decision, they substantially reproduce the arguments put forward to challenge the description of the appellants' conduct as an abuse of a dominant position, arguments which have already been rejected above in the examination of the first plea in law.

103 The plea of non-compliance with Article 190 of the Treaty must therefore be dismissed.

104 It follows that the appeals must be dismissed in their entirety.

Costs

105 According to Article 69(2) of the Rules of Procedure, the unsuc-cessful party is to be ordered to pay the costs if they have been applied for by the successful party. Since the appellants have failed in their submissions, they must each be ordered to pay the costs of their appeal. Pursuant to Article 69(4) of the Rules of Procedure, IPO, which has intervened in support of the appellants, must be ordered to bear its own costs as well as those incurred by the Commission due to IPO's intervention.

On those grounds,

THE COURT

hereby:

1. **Dismisses the appeals;**

2. **Orders Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) to pay the costs of the appeals lodged by them;**

3. **Orders Intellectual Property Owners Inc. (IPO) to bear its own costs and to pay those incurred by the Commission due to its intervention.**

Rodríguez Iglesias Schockweiler Kapteyn Mancini

Kakouris Moitinho de Almeida Murray

Delivered in open court in Luxembourg on 6 April 1995.

R. Grass
Registrar

G. C. Rodríguez Iglesias
President