avoiding a lot of potential pitfalls that come with online international selling. Of course, the proof of success will be in the absence of problems, a quality sometimes mistaken by clients as an indication that there were no problems in the first place. Consolation lies in the fact that it is (in this context at least) better to be misunderstood than to misunderstand!

Simon Minahan is a barrister and trade mark attorney on the Greens List of Owen Dixon Chambers.

1 [1988] ATS 32.

2 *Electronic Transactions Act 1999* (Cth), *Electronic Transactions Act 2000* (NSW), *Electronic Transactions (Queensland) Act 2001* (Qld), *Electronic Transactions Act 2003* (WA), *Electronic Transactions Act 2000* (SA), *Electronic Transactions Act 2001* (ACT), *Electronic Transactions (Northern Territory) Act 2000* (NT), *Electronic Transactions Act 2000* (Tas).

3 See the ETA s 13.

4 However, this leaves the purchasers with the last word, which is not always for the best and may present issues under the CISG. Ideally, the contract documentation needs to include a choice of law clause. This matter is in the hands of the parties, since they may provide any rule they like on this point.

5 ETA s 9(1).

6 Note though that Part III of the CISG constitutes a variation of the reception regime, by allowing sending parties to rely on an interrupted communication. This is nearer the 'dispatch theory', and should be specifically considered and modified if desired.

7 ETA s 9(1)(b).

8 *Specht & Ors v Netscape Communications Corp & Anor* 306 F 3d 17.

9 *Register.com, Inc v Verio, Inc* 126 F Supp 2d 238.

10 [1975] ATS 25. See www.uncitral.org/english/status/index.htm for a list of member states.

11 See eg *International Shoe Co v Washington* (1945) 360 US 310 and *State v Granite Gate Resorts, Inc* (1997) 568 NW 716.

12 *Dow Jones & Company v Gutnick* (2002) 194 ALR 433.

You Can't Stop the Music

Peter Mulligan examines music piracy and parallel importation issues in the context of the recent case *Universal Music Australia v ACCC.*

The rise of the internet and globalisation of markets means that the recording industry in Australia is facing new and challenging threats to its existence. The ability to parallel import CDs and other sound recordings as well as the growth in music piracy through use of file-sharing networks are just some of the challenges the industry is learning to deal with.

At the time of the changes to Australian copyright law permitting parallel imports of sound recordings, the recording industry responded aggressively. While the industry claimed that its actions were intended to discourage music piracy and free-riding on local investment, the Federal Court recently found the conduct of two record companies to be in breach of the *Trade Practices Act* 1974 (***Act***) and imposed heavy penalties both on the companies and their executives.

The case is *Universal Music Australia v Australian Competition and Consumer Commission*[1] and concerned the conduct of Universal Music, Warner Music (the ***Record Companies***) and their senior executives. The Record Companies were each fined $1 million and the executives $45,000.

PARALLEL IMPORTATION OF SOUND RECORDINGS

In July 1998 the *Copyright Act* 1968 (***Copyright Act***) was amended by the *Copyright Amendment Act (No 2)* 1998 (***Amendment Act***) to remove the prohibition on the importation of sound recordings without the consent of Australian copyright owners or licensees. This enabled Australian wholesalers and retailers of CDs and other sound recordings to import stock from overseas provided the manufacture of the overseas recordings had not infringed copyright law in the overseas country and had been carried out with the consent of the copyright owner.

The effect of the change in laws was to open up to international competition the wholesale market for the supply of CDs in Australia.

The Amendment Act was introduced to give effect to the recommendations of the Prices Surveillance Authority report, "Inquiry into the Prices of Sound Recordings".[2] The report had concluded that the prices paid by Australian consumers for sound recordings was too high. One of the recommendations was the repeal of the parallel importation provisions of the Copyright Act in relation to recordings made in countries providing levels of protection for musical works and sound recordings comparable to those in Australia.[3]

The policy behind the legislation was explained at the time in the Second Reading Speech of the Attorney General:

> "The Bill will exempt the importation of non-pirate copies of a sound recording from infringement of copyright in either the sound recording or the works recorded on the recording. It will thereby remove the ability of copyright owners to control the market for each imported copy of a sound recording."[4]

Under the amendments, it is now permitted to import, sell and commercially deal with "non-infringing copies" of sound recordings. A "non-infringing copy" is defined (in a new section 10AA of the Copyright Act) as, essentially, a copy that has been made:

(i) without infringing any law of the country in which it was made that protected copyright in any musical or other work used in the sound recording; and

(ii) with the consent of the producer of the original sound recording, or other person who was the copyright owner.

THE ACTION AGAINST THE RECORD COMPANIES

Around the time of the parallel importation amendments, the Record Companies began to step up the lobbying of their CD retailers. There were visits by senior executives of the Record Companies to many of the large retailers as well as some of the smaller ones.

In July 1998 the Chairman of Warner Music sent a letter to all retailers referring to the changes in the law and the benefits to retailers of Warner's support such as promotion teams, cooperative advertising, return privileges, favourable credit terms, provision of point of sale material, television, print and radio advertising and promotional visits. The letter continued:

> "With our market now further exposed to the threat of piracy, it is important you be aware of not only our future intentions, but also the large downside should you wish to alter your source of supply. Such a move will result in us being unable to provide any of the aforementioned trading benefits and will also result in a substantially reduced marketing and advertising spends [sic]."

The conduct of Universal was a little more cloudy. While there was no "smoking gun" letter from Universal to its retailers, there was evidence that senior executives had told a number of retailers that they may lose their current trading terms if they imported CDs directly from overseas.

Upon discovering that a number of smaller retailers were importing CDs from overseas, the Record Companies responded by suspending the accounts of the guilty retailers, starving them of local product and support.

The ACCC commenced proceedings against the Record Companies alleging, among other things, that the Record Companies' conduct was in breach of sections 46 and 47 of the Act. At first instance, Justice Hill found that the Record Companies had taken advantage of their market power for an anti-competitive purpose contrary to section 46 and had engaged in exclusive dealing in contravention of section 47.[5] The Record Companies appealed to the Full Court of the Federal Court.

MISUSE OF MARKET POWER

Section 46 of the Act is concerned with misuse of market power. Relevantly, it provides that a corporation with a substantial degree of power in a market must not take advantage of that power with the purpose of:

(a) eliminating or substantially damaging a competitor;

(b) preventing the entry of a person into that or any other market; or

(c) deterring or preventing a person from engaging in competitive conduct.

Section 46(3) provides that, in determining whether a corporation has a substantial degree of power in a market, the Court must have regard to the extent to which the conduct of the corporation is constrained by the conduct of its competitors, potential competitors, customers and suppliers.

In applying these provisions, the Court considered the recent decision of the High Court in *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission*[6] (***Boral***). The High Court in Boral emphasised the centrality of section 46(3) to a determination of whether a corporation has a substantial degree of power in a market. Applied to that decision it was found that the ability of customers to drive Boral's prices "down and down" was evidence of constraint that fell squarely within the terms of section 46(3) and the absence of substantial market power.

In a similar vein, the Record Companies were also found to lack a substantial degree of market power. On the question of market definition, it was not disputed that the relevant market was the wholesale market for recorded music in Australia.

The Court based its decision regarding the lack of substantial market power on a finding that:

(i) each of the Record Companies possessed a market share of only about one-sixth of the market;

(ii) with the passage of the Amendment Act, retailers could obtain the Record Companies' products from elsewhere; and

(iii) there was no evidence that the actions of the Record Companies prevented the entry into the market of legitimate competitors.

This was enough to dispose of the section 46 case.

Importantly, however, the Court emphasised that it is wrong to adopt an upside-down approach to section 46. In particular, an instance of abuse of market power by a corporation is not determinative of whether the corporation possessed substantial market power. Rather, whether a corporation possesses a substantial degree of market power requires a consideration of the whole of the evidence relating to the market and the conduct of its participants.

EXCLUSIVE DEALING

Section 47 of the Act is concerned with the practice of "exclusive dealing". Relevantly, it provides that a corporation shall not:

(a) supply or offer to supply goods or services on the condition that a person does not acquire goods or services from a competitor of the supplier; or

(b) refuse to supply goods or services for the reason that a person has acquired goods or services from a competitor of the supplier.

Section 47(10) provides that a corporation will not be in breach of the exclusive dealing provisions unless its conduct has the purpose, or likely effect, of substantially lessening competition in a market.

The Court had little difficulty in finding that each of the Record Companies had engaged in the practice of exclusive dealing. Instances of exclusive dealing were:

(i) the refusal of the Record Companies to supply a handful of smaller retailers because they had acquired parallel imported copies of CDs;

(ii) the Record Companies offering to reinstate the supply to some of the smaller retailers on the condition that they would not in the future acquire parallel imported copies of CDs; and

(iii) the Record Companies offering to supply goods, being CDs, and services, being favourable trading terms, to the other retailers on condition that they would not acquire parallel imported copies of CDs.

However, the more difficult question was whether the exclusive dealing was engaged in with the purpose, or likely effect, of substantially lessening competition in the market for recorded music in Australia.

The issue of "purpose" in section 47(10) has not been the subject of many decided cases, with the focus generally being on the effect of the relevant conduct. However, in the present case, the Court was called upon to determine whether the exclusive dealing conduct had been engaged in with the requisite purpose, separately from a consideration of the effect of the conduct. The Court preferred to analyse the case on the basis of purpose because it did not want to rely on future conduct to base a finding of anticompetitive effect. Presumably, because there was no certainty as to whether the conduct of the Record Companies would continue, the Court felt it could not infer an effect or likely effect of substantially lessening competition.

The Court considered whether the purpose referred to in section 47(10) was either an objective or subjective purpose. On a consideration of authority and the language of the Act it was found that what needs to be proved is the actual purpose of the corporation engaging in the exclusive dealing conduct.

However, the Court emphasised that a determination of purpose will often be more difficult than simply looking at the statements of the officers of the company and their evidence before the Court. Often there will not be any direct admission of purpose. Accordingly, the purpose may need to be inferred from all of the circumstances on the balance of probabilities. Where this is the case, objective circumstances may be considered and there will be an inevitable blurring between the subjective and the objective.

In the circumstances, there was no direct admission of unlawful purpose by the Record Companies. However, the Court found there was ample evidence from which purpose may be inferred. The closure of the smaller retailers' accounts was found to be for the purpose of making an example of them and to fortify a general warning to all retailers not to import CDs from overseas. Further, it was found that the purpose was to deter all retail account holders from purchasing parallel imports. In the language of section 47(10), this purpose was to substantially lessen competition. The fact that the Record Companies did not have substantial market power was no defence.

As a result, the Record Companies were each fined $1,000,000 for exclusive dealing. It is significant that a number of senior executives were found to be accessories and were also fined. For their part, the senior executives were ordered to pay $45,000 each.

COMMENTS

The decision is interesting for a number of reasons. In a purely legal sense, it is a welcome addition to the body of case law on sections 46 and 47 of the Act. Following on from the Boral decision, the case reinforces the centrality of section 46(3) in determining whether there is a substantial degree of market power in a section 46 action. In relation to section 47, the case provides some valuable insights into the relationship between purpose and exclusive dealing.

The case is also indicative of the aggressive steps being adopted by the recording industry in defending their traditional markets from new avenues of competition. The industry has moved on since the late 1990s (when the conduct in question took place) and the parallel importation of CDs seems now to be taken for granted. The new battleground is downloadable music and file-sharing networks.

In the recent decision of *Sony Music Entertainment (Australia) Limited v University of Tasmania*[7] record companies were granted preliminary discovery against a number of Australian universities for the purpose of determining whether there was evidence of copyright infringement by students downloading music. The discovery extended to records stored on CD ROMs and backup tapes. Whether the record companies will discover evidence of infringement in that case and take action against those found to have used the university networks to infringe copyright in downloadable music remains to be seen.

However, in what might be a sign of things to come, the Record Industry Association of America recently filed lawsuits against 261 consumers for using Kazaa and other music file-sharing networks. Similar action in Australia this year includes the criminal case brought by the Commonwealth Director of Public Prosecutions against the three students, Peter Tran, Tommy Le and Charles Ng for operating an illegal Napster-style site for downloading music. The students have pleaded guilty and will be sentenced in November.

Whether action such as this will have any effect on the erosion of the profits of the record companies remains to be seen. It is unlikely that the recording industry will bring a stop to music piracy and if there is any justification for such costly litigation it must be for its value as a deterrent. However, public education about the damage caused by music piracy to artists and the industry is likely to be much more effective than expensive litigation. In the battle to win the hearts and minds of consumers, it is also more likely to draw a sympathetic response.

Peter Mulligan is a corporate, technology and communications lawyer at Henry Davis York.

1 *Universal Music Australia v Australian Competition and Consumer Commission* [2003] FCAFC 193.

2 Prices Surveillance Authority, Report No 35- *"Inquiry into the Prices of Sound Recordings"* (1990).

3 Prices Surveillance Authority, Report No 35- *"Inquiry into the Prices of Sound Recordings"* (1990) at 160.

4 Parl Deb H of R, 20 November 1997 at 10972.

5 see *Australian Competition and Consumer Commission v Universal Music Australia Pty Ltd* [2001] FCA 1800 and *Australian Competition and Consumer Commission v Universal Music Australia Pty Ltd (No 2)* [2002] FCA 192.

6 *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission* (2003) HCA 5.

7 see *Sony Music Entertainment (Australia) Limited v University of Tasmania* [2003] FCA 532, *Sony Music Entertainment (Australia) Limited v University of Tasmania* [2003] FCA 724, *Sony Music Entertainment (Australia) Limited v University of Tasmania* [2003] FCA 805 and *Sony Music Entertainment (Australia) Limited v University of Tasmania* [2003] FCA 929.