Kluwer Competition Law Blog

What's in a word?

Max Findlay (Max Findlay Associates, United Kingdom) · Monday, March 21st, 2011

Lawyers do funny things to words. Sometimes, of course, they need to create a technical term to cover something that doesn't exist in ordinary parlance. "Tort" is an obvious example. Yes, you can talk about a civil wrong that has no element of contract to it but that's a longwinded way of expressing yourself. Most people recognise that professional people sometimes need specialised words to describe events particular to their world.

The difficulties come, however, when professionals take ordinary words and give them a different meaning. Take, for instance, President Clinton's famous denial in January 1998 that he "did not have sexual relations" with Monica Lewinsky. He could get away with this because, in law, oral sex didn't constitute sex. But if lawyers thought a blowjob wasn't sex, the rest of the world certainly did.

The same is true of the word "torture" and the use of waterboarding and sleep deprivation for interrogation purposes. Ordinary people had no difficulty recognising such techniques as torture. But George W Bush's lawyers – including his assistant and deputy assistant attorney general in the infamous 2002 Bybee memo on interrogation techniques – concluded that they weren't. And of course to lawyers, if the law says something isn't a particular thing, then, intrinsically, it isn't.

Now, with the News Corp /BSkyB deal currently occupying British newspaper headlines, we have a similar difficulty with the word "competition". On 21 December, the European Commission cleared News Corp's proposed acquisition of the pay-TV operator BSkyB under EU competition rules. The Commission stressed, however, that it wasn't making any decision about media plurality – a distinctly nebulous concept that roughly means the desirability of having lots of different media owners running different businesses which, in the case of broadcasters anyway, are free of corporate interests. This issue – which non-lawyers might well see as an alternative definition of competition – was for UK regulators to decide.

The subsequent story has been well documented in the British press. In January, the UK's culture secretary Jeremy Hunt said he was thinking of referring News Corp's bid to the Competition Commission. Earlier this month, though, he changed his mind, following undertakings by News Corp to spin off its news channel, Sky News, as a separate company. There has followed a compulsory statutory consultation period on

the undertakings – and effectively the plurality of the media question – which expires on 21 March.

Pausing there, the term "consultation" is being used in a distinctly strained sense in this context. A consultation is, by definition, an act in itself and not a process to which other people respond. Nor is this particular "consultation" an exercise in seeking advice from an expert – the competition law experts have already ok'd this deal and "media plurality" has more to do with political judgment than technical skill – and Mr Hunt is most certainly not asking permission or approval from any of the opponents to the transaction. All the culture secretary means by "consultation period" here is this: "If you're against the deal, this is your last chance to come up with any further suggestions about possible regulatory constraints on the takeover so that you don't look so pathetic in front of your supporters".

In many ways, though, the most striking thing about the Commission's December analysis is its failure to understand the competition that is actually taking place in this case. In a laboriously worded announcement, the Commission carefully divided the problem up into three separate sectors – audiovisual, newspaper publishing and advertising – and concluded that News Corp's takeover wouldn't impede effective competition in any of them.

There are many – including members of the Media Alliance (the high-profile affiliation of media interests opposed to the takeover) – who will disagree cogently with some or all of these findings. But the central point is that the Commission looked at market sectors that are fast disappearing. Media is now converging to a point where divisions between audiovisual, written and promotional material are illusory, so that the competition actively takes place on the battleground where all three categories merge together.

News Corp boss Rupert Murdoch understands this far better than the Commission. Recently, News Corp's chief digital officer Jonathan Miller was talking at a media conference about the anticipated UK launch of the company's new iPad newspaper, The Daily. The newspaper, he said, is very graphic, very pictorial: "a lot of video on it, all media in the same place". Mr Murdoch and other e-publishers aren't interested in the Commission's creakingly old-fashioned analysis of a dying tripartite media world. They're interested in dominating how readers think, feel and react in a technologically-converged world. That's the competition battleground. And regulators and lawyers don't do anyone any favours by asking the wrong questions using the wrong vocabulary.

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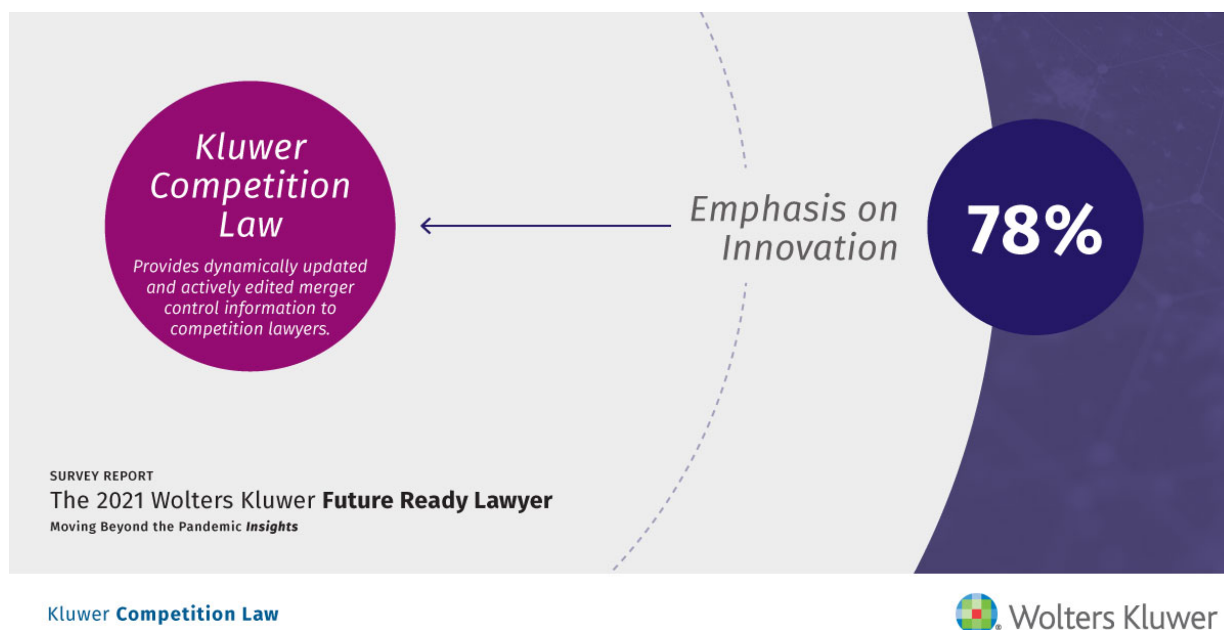

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