

# TELEVISION PROGRAMME LICENSING: ENDGAME FOR EXCLUSIVITY?

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*Summary: This paper analyses territorial licences in broadcasting and their effect on the internal market. Particular attention is paid to market freedoms (goods and services), taking into account the outcome of a pending ruling before the ECJ with regard to the selling of Premier League broadcasting rights.*

## Introduction

In this digital era of television, consumers all over Europe, by means of digital decoders, have gained a wide choice of television service providers, programme packages and television channels. On the other hand, copyright holders of television content which freely flows through these same devices have gained a secure way of observing copyright.

The introduction of digital receivers and satellites, as well as digital decoder cards, has enabled broadcasting bodies to introduce broadcasting territorial licences which curb the free flow of services, as well as goods, and strengthen the rights of copyright holders on the market. This form of copyright protection is common in the sale of broadcasting rights for football matches. Although the Audio Visual Media Directive<sup>1</sup> stipulates that events of major importance to the European public, such as the World Cup and the UEFA Champions League, cannot be curbed to an extent that prevents the viewer from receiving information as well as extracts from the programme, that same protection does not yet apply when it comes to the sale of broadcasting rights for national football leagues all over Europe.

The joined cases of the *Football Association Premier League Ltd and Others v QC Leisure and Others* and *Karen Murphy v Media Protection Services Ltd*,<sup>2</sup> involving the sale of broadcasting rights of the Premier

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<sup>1</sup> Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) [2010] OJ L95/1.

<sup>2</sup> Cases C-403/08 and C-429/08 *Football Association Premier League Ltd and Others v QC Leisure and Others* and *Karen Murphy v Media Protection Services Ltd*, delivered on 4 October 2011. The joined cases concern the legality of the use of satellite decoders purchased outside the United Kingdom to show Premier League football matches in public houses in the United Kingdom.

League, have already been dubbed by the British media as Murphy's Law and the *Bosman*<sup>3</sup> of broadcasting rights.<sup>4</sup> Whether they will change the broadcasting of football matches as we know it remains to be seen.

The issue that has arisen involves the sale of broadcasting rights of football matches to different countries in the form of licence agreements through a bidding process. These licence agreements were formed differently for specific countries and involve a different purchasing price for broadcasting rights on the basis of a territoriality principle. According to this principle, a sporting event has a different value in relation to where it is broadcast, and deriving from this, matches broadcast on a specific territory command a higher price than if these matches were broadcast on a territory which does not find such matches (or sport) interesting. In this specific case, we have a Greek broadcaster who purchased the rights for a lower price than its UK counterpart. The Greek broadcaster sells the decoder cards in the UK, and thus breaches the licence agreement made with the Football Association Premier League Ltd (FAPL), the top English football league organisation for marketing the league's matches. The question now remains whether or not the Greek decoder cards are an 'illicit device' and whether the contractual stipulations in the form of an exclusive licence can be allowed under EU law. The outcome of the case can lead either to the validation of territorial licences and with it the partition of the internal market, or to the scrapping of territorial licences, and thus hindering the protection of copyright. The question that remains is whether Europe is ready to jeopardise market freedoms for more stringent copyright protection.

### **The broadcasting framework**

Broadcasting and its embedded copyright in the European Union is safeguarded by a legal framework consisting of three directives. The

<sup>3</sup> C-415/93 *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others* and *Union des associations européennes de football (UEFA) v Jean-Marc Bosman* [1995] ECR I-04921. Bosman was a football player in the Belgian First Division whose contract had expired in 1990. He wanted to transfer to Dunkerque, a French team. However, Dunkerque did not offer his Belgian club RFC Liege a sufficient transfer fee, so Liege refused to let him go. The case challenged the legality of the system of transfers for football players and the existence of so-called 'quota systems', whereby only a limited number of foreign players were allowed to play in a club match. After the judgment, UEFA altered the rules on the transfer of football players, as well as the so-called 'quota systems'.

<sup>4</sup> Owen Gibson, 'EC Official's Court Advice in TV Rights Case Worries Premier League' *The Guardian* (London 3 February 2011) <[www.guardian.co.uk/football/2011/feb/03/ec-tv-rights-premier-league](http://www.guardian.co.uk/football/2011/feb/03/ec-tv-rights-premier-league)>. See also Adrian Goldberg, 'Premier League Face Potential 'Bosman' of TV Rights' (BBC Mobile News 3 October 2010) <[www.bbc.co.uk/news/business-11452434](http://www.bbc.co.uk/news/business-11452434)> both sites accessed 21 October 2011.

first is Directive 2010/13/EU (the AVMS Directive)<sup>5</sup> which in its provisions defines broadcasting<sup>6</sup> and the broadcaster.<sup>7</sup> The second Directive is Directive 98/84 (Conditional Access Directive)<sup>8</sup> whose provisions safeguard the observance of copyright embedded in broadcasting which is distributed through devices such as satellites or digital decoders. Last is the Copyright Directive<sup>9</sup> which tackles the subject matter of programmes embedded in the broadcasting signal.

Broadcasting, and especially the broadcasting signal, was recognised early on in *Sacchi*<sup>10</sup> and *Bond*<sup>11</sup> as a service which cannot be limited to a specific territory, because the nature of the broadcasting signal is such that it travels over national borders with no obstacle. The subject matter of that signal is audiovisual media services as defined by the AVMS Directive,<sup>12</sup> namely programmes, and they fall under the provision of services as stated by the Court in *De Agostini*.<sup>13</sup>

In the course of the development of this specific field, lawmakers found that the only way to protect the specific subject matter of broadcasting and its embedded copyright was to concentrate on the service carriers. Service carriers, unlike the broadcasting signal, have a material form and can be limited to a specific territory. Today, broadcasters choose which sort of service carriers and technology they will use in order to distribute their signal. This enables the copyright holders to consider to which broadcaster they will grant rights, depending on the manner of the signal distribution. In this respect, at the EU level, the AVMS Directive<sup>14</sup> provides a clear definition of what constitutes broadcasting and who

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<sup>5</sup> Directive 2010/13/EU (n 1).

<sup>6</sup> Directive 2010/13/EU (n 1) article 1 (e) 'television broadcasting' or 'television broadcast' (ie a linear audiovisual media service) means an audiovisual media service provided by a media service provider for the simultaneous viewing of programmes on the basis of a programme schedule.

<sup>7</sup> Directive 2010/13/EU (n 1) article 1 (f) 'broadcaster' means a media service provider of television broadcasts.

<sup>8</sup> Directive 98/84 EC of the European Parliament and of Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access [1998] OJ L320.

<sup>9</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167.

<sup>10</sup> Case 155/73 *Giuseppe Sacchi* [1974] ECR 00409 paras 6-8.

<sup>11</sup> Case C-352/85 *Bond van Adverteerders and others v The Netherlands State* [1988] ECR 02085 para17.

<sup>12</sup> Directive 2010/13/EU (n 1) article 1 a.

<sup>13</sup> Cases C-34/95, C-35/95 and C-36/95 *Konsumentombudsmannen (KO) v De Agostini (Svenska) Förlag AB* (C-34/95) and *TV-Shop i Sverige AB* [1997] ECR I-03843 paras 27 and 28.

<sup>14</sup> Directive 2010/13/EU (n 1).

can be a broadcaster, while the Conditional Access Directive<sup>15</sup> tackles problematic copyright protection by introducing measures against fraudulent service carriers which, in this case, are satellite dishes, decoding equipment and decoder cards.

Due to the fact that service carriers are in a material form and, in the light of the Treaty, are considered as goods, the issue of limiting the free flow of goods has arisen. When we have two competing freedoms, the freedom to provide goods and the freedom to provide services, they should be observed through the Court's line in *Schindler*,<sup>16</sup> whereby the dominant freedom prevails when the second one is ancillary to it. In our case, it is evident that satellite dishes, decoding equipment and decoder cards are the means of receiving the service, and without the broadcasting signal there would be no use for them for potential viewers. Even if we do not take such a line, and if we examine both of them separately, we should bear in mind that property derogation (and, accordingly, intellectual property) applies to them both.

### **The Premier League case: what is it good for?**

The case should provide answers to several questions which are currently not settled in the case law of the ECJ with regard to broadcasting, and especially the licensing system within it, and the way it correlates to market freedoms. Where is the line between an acceptable territorial licence and one that causes anticompetitive behaviour and breaches market freedoms? What exactly is an 'illicit device', and do we count only pirate devices or in fact any device that is bound by a contract? And lastly, what is communication to the public, the criterion that is used to distinguish between users that can be punished, and those that cannot, for the unauthorised usage of the aforementioned illicit device?

#### *The subject-matter of broadcasting: copyright*

Intellectual property rights in the European Union are a conundrum. Primarily, their role is to protect the private ownership of their proprietor and whilst doing so not to impede or disturb the common market. This delicate balance is often hard to achieve, and the Court of Justice of the European Union has through the years tried to strike this delicate balance.

Although a plethora of different intellectual property rights (IPR) currently exist,<sup>17</sup> they all have the same features in common: they are

<sup>15</sup> Directive 98/84 EC (n 8).

<sup>16</sup> Case C-275/92 *Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler* [1994] ECR I-01039 para 20-25.

<sup>17</sup> For example, patents, trademarks, copyright, design rights, etc.

confined to a specific territory; they confer protection of an intellectual property right holder in a particular Member State; they are exclusive in their nature; and they concern property rights.<sup>18</sup>

Protection of IPRs is still mainly confined to the Member States themselves. There have been some harmonisation measures, most notably, in connection with the case at hand, Copyright Directive 2001/29/EC.<sup>19</sup> Before the enactment of this Directive,<sup>20</sup> the Court had an extensive case law concerning IPRs.

### *The licence: protection of copyright*

In its case law, the Court has had the tough task of reconciling the need to safeguard legitimate industrial and commercial property rights protected under national law and the free movement of both goods and services, as well as competition law. The entire concept of a property right, and accordingly an intellectual property right, is that such a right confers on its holder the exclusive right to behave in a certain way on the market. An intellectual right proprietor can choose to distribute the right itself or confer such a process on a third party. The proprietor can also limit its own distribution to a particular geographical area and grant licences for other territories.

Territorial exclusivity in the form of an exclusive licence is considered a means to penetrate a market and at the same time presents a way to preserve the proprietor's right. This can be done in the form of a sole licence, where the proprietor distributes its rights on the territory, or an exclusive licence where the proprietor authorises a third party to distribute the right on a specific territory with the introduction of a clause which forbids parallel import.

In broadcasting, the concept of territorial licences developed both through competition and market freedoms. In competition, it developed through a licensing system of patent and trade mark rights, while in market freedoms it came through the exhaustion of the rights doctrine.

### *Competition*

In *Premier League*,<sup>21</sup> the issue was whether the clauses of an exclusive licence agreement concluded between a holder of intellectual property rights and a broadcaster constitute a restriction on competition because they oblige the broadcaster not to supply decoding devices giving

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<sup>18</sup> Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms* (2<sup>nd</sup> edn, OUP 2010) 173-175.

<sup>19</sup> Directive 2001/29/EC (n 9).

<sup>20</sup> Directive 2001/29/EC (n 9).

<sup>21</sup> Cases C-403/08 and C-429/08 (n 2).

access to that right holder's protected subject matter outside the territory covered by the licence agreement.

The concept of licences first developed in competition rules. In the landmark decision in *Nungesser vs Commission*<sup>22</sup> (*Maize seeds*) the Court recognised that open licences (a licensor grants a licensee the licence to distribute a certain intellectual property right) are allowed under competition rules, but absolute territorial protection is not. The Court defined this outlook in *Consten vs Grunding*<sup>23</sup> by stating that absolute territorial protection could lead to the infringement of competition rules, and licences which grant territorial protection *per se* and have an effect in partitioning the market should be treated harshly. But it is still possible for an individual to seek exemption from the Commission, as was done in *Film purchase by German Television Stations*,<sup>24</sup> and to advocate or apply for a block exemption

It seems that the Court had a change of heart when it comes to licences which tackle performing copyright, which is also embedded in a broadcasting signal. In *Coditel II*,<sup>25</sup> it stated that in special circumstances, which we see in the protection of the intellectual property of performing rights, a licence may need absolute protection from re-transmission from other Member States. Moreover, the Court stated in *Radio Telefís Éireann v Commission*<sup>26</sup> that such protection is necessary in order to protect the owner's moral rights in the work and ensure a reward for creative endeavour.

In the specific case of *Premier League*,<sup>27</sup> the Court reaffirmed its previous ruling in the *Coditel II*<sup>28</sup> judgment with a slight twist. The Court pointed out that agreements aimed at partitioning national markets according to national borders or that make the interpenetration of national markets more difficult must be regarded, in principle, as agreements whose object is to restrict competition. But when we observe the object of the restriction of competition (in this case, contractual clauses) we need to take other circumstances into consideration (which fall within the object's economic and legal context) which are capable of justifying

<sup>22</sup> Case 258/78 *LC Nungesser KG and Kurt Eisele v Commission of the European Communities* [1982] ECR 02015 paras 44-79.

<sup>23</sup> Joined Cases 56 and 58-64 *Établissements Consten S.à.R.L. and Grunding-Verkaufs-GmbH v Commission of the European Economic Community*, ECR French edition 00429, 343.

<sup>24</sup> *Film purchases by German television stations* (Case IV/31.734) Commission Decision 89/536/EEC [1989] OJ L284/36.

<sup>25</sup> Case 262/81 *Coditel SA, Compagnie générale pour la diffusion de la télévision, and others v Ciné-Vog Films SA and others* [1982] ECR 03381 para 20.

<sup>26</sup> Case T-69/89 *Radio Telefís Éireann v Commission of the European Communities* [1991] ECR II-00485 para 71.

<sup>27</sup> Cases C-403/08 and C-429/08 para 137-146 (n 2).

<sup>28</sup> Case 262/81 (n 25).

such an agreement and thus making it not liable to impair competition. The Court concluded that the granting of a sole licence is not a restriction of competition, but that clauses which prohibit broadcasting outside the territory specified in the licence are. However, we need to be careful with this specific issue, firstly because FAPL never provided any arguments or evidence in support of other considerations which fall within the object's economic and legal context (a sort of 'get-out of an anti-competitiveness accusation' card), and secondly because clauses of agreements in general do not fall under competition rules. The conclusion that I draw from this is that FAPL's practice would have been allowed if they had provided the Court with an explanation of why such licence clauses that partition the market are needed in the current economic and legal context. In my view, this omission of FAPL just demonstrates how a default rule works, and the lack of explanation why an exception should have been granted in their case leads to more confusion in the current licence granting system. The fact still remains that territorial licences are allowed under competition rules and that nothing has effectively changed in this regard. What we can say has changed, however, is that the way these licences can be granted has become more complex and confusing.

#### *Doctrine of the exhaustion of rights in market freedoms*

Three issues come into play when we observe licences in broadcasting: the service of broadcasting, the protection of copyright, which may curb the freedom of the service itself, and the protection of cultural and language diversity. They specifically protect the subject matter of the broadcasting signal, which comes in the form of programmes, images, advertisements, clips, etc, and hence fall into the category of copyright. The main principle of copyright is to protect literary and artistic works against unauthorised copying and to financially reward producers and proprietors. Through such protection, the producer is incentivised to create more works to enrich the cultural scene of his or her community, and in the sense of a single market, to enrich the culture and language preservation of the European family. With regard to this special function, the Court recognised in *Warner Brothers*<sup>29</sup> that the specific subject matter of copyright contained two essential rights of the author: the exclusive rights of reproduction and of performance.

In the first wave of cases, notably *Consten and Grunding*,<sup>30</sup> the Court separated two notions: the first is the sole existence of the IPR (with regard to the conditions for obtaining it, procedures by which one grants

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<sup>29</sup> Case 158/86 *Warner Brothers Inc and Metronome Video ApS v Erik Viuff Christiansen* [1988] ECR 02605 para 18.

<sup>30</sup> Joined cases 56 and 58-64 (n 20).

the right) and the other is the exercise of the right. These two elements should be observed separately.

In the case of *Deutsche Grammophon*,<sup>31</sup> the Court went further, recognising the specific subject matter of the IPR which can be protected by national law. But there is a catch. The IPR holder has a choice. The choice is that the subject matter can be absolutely protected under national law and no one can use it without authorisation. In this way, the IPR holder is confined to one territory or Member State and effectively has a monopoly and receives profit from that right. If the IPR holder wishes to profit from a specific right and to export, and if the holder places it on the market in any state of the European Union, it can be considered that the aforementioned protection does not apply and that the holder has exhausted its rights. The meaning is that if the IPR holder lawfully markets its right in another Member State, then that right under the mutual recognition principle can return to the state from which the IPR holder marketed it, or the state of origin, as the Court confirmed in *HAG II*.<sup>32</sup> In order for the exhaustion of rights doctrine to apply, the consent of the IPR holder is needed to export out of its comfort zone.

The doctrine of exhaustion of rights also applies to the exclusive right of reproduction. The holder exhausts that right when it has enjoyed it, that is, when it has chosen where to circulate its work, as the Court confirmed in *Deutsche Grammophon*<sup>33</sup> and *GEMA*.<sup>34</sup> This also applies when the protection period in one Member State elapses, as the Court confirmed in *EMI Electrola*.<sup>35</sup> Once again, if there is no choice or specific consent given by the copyright holder (either by the holder or its representative), or if there is still a valid protection period, there is no exhaustion of rights.

The rights of performance are different by nature, as was rightly noted by the Court in *Coditel I*.<sup>36</sup> In essence, they can be infinitely repeated, and as such it is legitimate for the copyright holder to calculate its fees for every probable performance and to territorially limit the area over which its right will be shown, even where these limits coincide with nati-

<sup>31</sup> Case 78/70 *Deutsche Grammophon Gesellschaft mbH v Metro-SB-Großmärkte GmbH & Co. KG* [1971] ECR 00487 paras 12 and 13.

<sup>32</sup> Case 10/89 *CNL-Sucal v HAG* [1990] ECR I-3711 paras 12-15.

<sup>33</sup> Case 78/70 (n 26).

<sup>34</sup> Joined cases 55/80 and 57/80 *Musik-Vertrieb membran GmbH et K-tel International v GEMA* [1981] ECR 00147 paras 17 and 18.

<sup>35</sup> Case 341/87 *EMI Electrola GmbH v Patricia Im- und Export and others* [1989] ECR 00079 paras 11-14.

<sup>36</sup> Case 62/79 *SA Compagnie générale pour la diffusion de la télévision, Coditel, and others v Ciné Vog Films and others* [1980] ECR 00881 paras 12-14.



onal territories. With the *Coditel F*<sup>37</sup> judgment, the basis for an exclusive territorial licence was made and this view was reaffirmed in the *Warner Brothers*<sup>38</sup> judgment.

In the *Premier League*,<sup>39</sup> the Court, having in mind the aforementioned case law, took a very careful conservative position. The Court stated that FAPL could not be considered as a copyright holder under EU law, because football matches do not fall under copyright protection.<sup>40</sup> The reason is that football matches are not original in the sense that they are an author's own intellectual creation. The Court put it bluntly: matches are subject to the rules of the game and leave no room for creative freedom. By this definition, FAPL cannot creatively intervene in the football match, nor creatively control it. However, the fact that EU law does not recognise this as copyright does not preclude national legislation from doing so,<sup>41</sup> as long as the national legislation does not go beyond what is necessary to reach the objective of protection of this right. Bidding for a territorial licence was deemed by the Court as going beyond what is necessary.<sup>42</sup> The Court concluded this after analysing the proportionality of the bidding process and the preservation of copyright. First, the Court stated that the broadcasting signal falls under the provisions of services<sup>43</sup> and that a territorial licence is an obstacle to the free movement of services.<sup>44</sup> The Court continued the analysis by acknowledging that derogation from the freedom to provide services can be justified on the basis of protection of the right of the holder of the IPR and its right to be remunerated accordingly. Unfortunately for FAPL, the right to be remunerated accordingly does not include the bidding process introduced by them. Adequate remuneration is allowed, but artificially creating a higher remuneration than adequate through the bidding process goes beyond what is necessary to attain the objective (in this case, the right to adequate remuneration). Essentially, what the Court did was to reaffirm the principle of territoriality when adequate remuneration is calculated and that bidding only creates false and often exaggerated remuneration which hurts consumers and benefits the holders of IPRs.

The conclusion to be drawn is that at the EU level this specific subject matter in a form of copyright is neither regulated nor protected under existing legislation. It is up to the Member States to decide whether

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<sup>37</sup> Case 62/79 (n 31) para18.

<sup>38</sup> Case 158/86 (n 24).

<sup>39</sup> Cases C-403/08 and C-429/08 (n 2).

<sup>40</sup> *ibid* paras 97, 98.

<sup>41</sup> *ibid* paras 100-105.

<sup>42</sup> *ibid* paras 108-118.

<sup>43</sup> *ibid* paras 78-83.

<sup>44</sup> *ibid* paras 88, 89.

they want to protect this subject matter as copyright. In any case, the minimum provided by EU legislation should be observed (such as the rights of a copyright holder) and not be perverted or exaggerated. I am still of the opinion that licences are a good idea and bring more advantages to the whole broadcasting system, especially to consumers.

*Protection of consumers through the licensing system*

An exclusive territorial licence is intended to prevent unauthorised devices from entering a country. In essence, this restricts equally the circulation of all illicit devices, originating from outside or inside a specific country. The price of a territorial licence is fixed according to the number of viewers and revenues collected per potential viewer. This enables broadcasters to pay a price proportionate to the revenue they receive. Furthermore, it falls under the Treaty exception of industrial and commercial property, as confirmed by the Court in *Coditel II*.<sup>45</sup>

The practice of the territorial licensing of sports broadcasting is seriously threatened by the activities of those who deal in foreign decoder cards, or who use them to watch programmes. This leads to the loss of business for legal undertakings, resulting in the demise of competition and innovation on the side of those same undertakings, and job losses on the side of employees. If this licensing practice was not possible, bodies which sell these rights would have to stop selling the broadcasting rights to territories where games are not popular. This would increase the price of rights in the core territories in order to recuperate the loss of revenue, which would affect consumers. Consumers in core territories would end up paying more, while consumers in minor territories would not be able to watch games.

Furthermore, with the existence of a territorial licence, consumers are able to receive broadcasting in their own languages, a measure that protects the cultural diversity of nations as set in the provisions of the Treaty and protects the fundamental right to receive information in the mother tongue. Moreover, such diversity leads to media pluralism, because it fuels the creation of new specialised television channels, allowing the consumer to choose a media service provider, the language of the broadcast and the variety of programmes supplied by the media service provider. This again increases competition between broadcasting entities, leading to lower prices to obtain the desired television channel and a wide choice of suitable media service providers for the consumer.

We also have to take into account the fact that some of the money made by broadcasting rights is poured back into the community. In the

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<sup>45</sup> Case 262/81 (n 22) para 13.

UK alone, an estimated 30% of earnings fund grassroots sports<sup>46</sup> which aid in the development of poorer areas as well as in the promotion of sport among children, helping to fight obesity and related health problems. These earnings also fuel funding for the development of professional sport, sports scholarships and the betterment of the final sport product that viewers watch on their television screens. The spill-over effect of this current trend of funding is visible in other sports, which are now incentivised to give back to the community under a scheme similar to the one used by FAPL.

### **Illicit devices or authorised service carriers?**

The first issue which arises with broadcasting rights rendered through territorial licences is the devices which enable their proliferation.

There is an argument that the decoder cards in this specific case can be viewed as illicit devices. The wording of article 2 (e) of the CA Directive<sup>47</sup> on 'illicit devices' encompasses both pirate devices which are 'designed or adapted' to give access to a protected service, as well as devices which are legally manufactured but used without the authorisation of the service provider.

The difference between a legitimate and an illegitimate device is based on the authorisation given by the service provider. Accordingly, when the device that provides access to a protected service is used outside the territory for which the authorisation is granted, that device is used without authorisation and is therefore illicit.

In the present case, Greek broadcasters were given the exclusive right to provide a broadcasting service specifically within the territory of Greece. Since the explicit contractual obligation impedes selling outside Greece, Greek broadcasters cease to act as the authorised service provider when providing its service outside Greece.

I have to agree with the conclusion of AG Kokott<sup>48</sup> that the contractual obligation linked to broadcasting licences requiring the broadcaster to prevent its satellite decoder cards from being used outside the licensed territory has the same effect as agreements to prevent or restrict parallel exports. Furthermore, the decoding equipment, in order to be considered an illicit device, must be designed or adapted to give access without authorisation, rather than being devices without authorisation.<sup>49</sup> The aim of

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<sup>46</sup> European Union Committee, *Grassroots Sport and the European Union* (HL 2010-11, 130) 25-30.

<sup>47</sup> Directive 98/84 EC (n 8).

<sup>48</sup> Joined cases C-403/08 and C-429/08 (n 2), Opinion of AG Kokott, para 239.

<sup>49</sup> Directive 98/84 EC (n 8) article 2(e).

the provision in the CA Directive is protection against pirate devices which are *unlawfully made* without *previous authorisation*, as stated in recital 6 of the CA Directive and its conceptual predecessor, the Green Paper.

It can also be argued that the Greek broadcasters received authorisation from FAPL to distribute their programme and decoding equipment through the licence, which serves as authorisation from FAPL. In its practical enforcement, 'illicit devices' cover both decoders and satellites; in this case, these are products lawfully produced in Greece, thus the mutual recognition principle set in *Cassis de Dijon*<sup>50</sup> applies and smart cards which are the receivers of the encrypted service are authorised cards due to the fact that FAPL gave authorisation to Greek broadcasters. This view is also supported in the *Premier League*<sup>51</sup> judgment where it was considered irrelevant whether these devices were procured by giving a false name or address.

### **Commercial purpose or private purpose in the context of communication to the public**

The second issue is the usage of service carriers. In short, if they are used for the commercial purposes of communication to the public they breach copyright because remuneration is not received by the copyright holder, but by the service carrier.

The CA Directive<sup>52</sup> and the Commission's Green Paper<sup>53</sup> aim to prohibit and sanction commercial activities which enable illegal access to a protected service. This wording excludes private individuals due to the fact that it does not include the private-purpose usage of the end user.

It can be argued that bar owners in the UK are such private users, because their commercial activity is focused on rendering the service of catering and not on the service of broadcasting. In order to be considered a broadcaster and thus render the service of broadcasting under the CA Directive,<sup>54</sup> you need to make an *initial transmission of the signal* and there needs to be a *communication of programmes between undertakings*. Under the Rental Rights Directive<sup>55</sup> and Copyright Directive<sup>56</sup> which de-

<sup>50</sup> Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR 00649 para 8.

<sup>51</sup> Joined cases C-403/08 and C-429/08 (n 2) paras 64-67 and 71-74.

<sup>52</sup> Directive 98/84 EC (n 8).

<sup>53</sup> Commission, Green Paper on the Legal Protection of Encrypted Services in the Internal Market COM (96) 76.

<sup>54</sup> Directive 98/84 EC (n 8).

<sup>55</sup> Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property [2006] OJ L376/28.

<sup>56</sup> Directive 2001/29/EC (n 9).

fine ‘communication to the public for commercial purposes’, it is stated that broadcasters only have the right to prohibit the showing of their broadcasts where there is an entrance fee in place.

I am not inclined to accept this line of argumentation. I am more of the opinion that the term ‘possession for commercial purposes’ in article 4(a) of the CA Directive includes all commercial activities directed at gaining profit.

The CA Directive imposes sanctions only on commercial activities but does not define what constitutes such an activity. However, as rightly pointed out by the Court in *Firma E Merck v Hauptzollamt Hamburg*,<sup>57</sup> in interpreting a provision of Community law, it is necessary to consider not only its wording but also the aimed objectives. In this respect, recital 13 of the CA Directive clarifies the concept of the term ‘for commercial purposes’ by making explicit reference to ‘direct and indirect financial gain’.

It is not hard to imagine that bar owners possess decoding devices for commercial purposes. According to recital 13 (along with recitals 3, 4, 5, and 6), the essential purpose of the CA Directive is to protect the service and not the sale of the device. In connection with this, as stated in *Sacchi*,<sup>58</sup> the transmission of television signals principally comes within the provision of services.

Since bar owners do not limit themselves to unauthorised possession of devices, but use them to advantage in attracting a large number of customers to maximise their profit, it means that they are using the devices for commercial purposes. It is my view that the private purpose usage includes only usage for purely non-commercial purposes, which excludes profit making by means of decoding equipment. Moreover, the public showing of a protected intellectual right does not fit with the doctrine of exhaustion of rights, as stated in *Metronome Musik*.<sup>59</sup>

In the *Premier League*<sup>60</sup> case, the Court reaffirmed the difference between private users and public users, specifically stating that the audience in public houses represented public and not private users because such customers constitute an additional public which was not considered by the authors when they authorised the broadcasting of their works. Furthermore, airing football matches was deemed to be an economic activity which produced economic gain. Moreover, the Court stated that a breach of copyright (in the light of the Copyright Directive) was committed by the bar owners, not on the airing of football matches, but on

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<sup>57</sup> Case 292/82 *Firma E Merck v Hauptzollamt Hamburg-Jonas* [1983] ECR 03781 para 12.

<sup>58</sup> Case 155-73 (n 9).

<sup>59</sup> Case C-200/96 *Metronome Musik GmbH v Music Point Hokamp GmbH* [1998] ECR I-01953 paras 16 and 17.

<sup>60</sup> Joined cases C-403/08 and C-429/08 (n 2) paras 197- 207.

the embedded World Feed inside the signal. Unlike football matches, the World Feed, which consists of a series of immersed logos, commercials, anthems, and football match highlights in the same signal that transfers the football matches, is under the creative control of FAPL. Because FAPL can creatively control it, it was deemed by the Court that FAPL enjoys copyright protection of it, and consequently the bar owners were breaching its copyright.

### **The consequences of the judgement for internal market freedoms**

As hinted at the beginning of this article, the outcome of the case can lead either to the validation of territorial licences, and with it the partition of the internal market, or to the scrapping of territorial licences, thus hindering the protection of copyright.

We have seen in the recent *Viking Gas*<sup>61</sup> case that the Court was ready to accept AG Kokott's opinion with regard to the exhaustion of exclusive rights granted by trademark exclusive licences. If the Court had abided with the Opinion of AG Kokott<sup>62</sup> in the *Premier League* case, territorial licences in broadcasting would have become a thing of the past.

As has been shown in this paper, the Court took a very cautious and arguably a non revolutionary path when deciding this case. It tackled four points: illicit devices, the justification of intellectual property rights when derogating from the provisions of services; territorial licences in competition law; and the meaning of communication to the public. None of the Court's reasoning amounted to anything new or unexpected.

In regards to illicit devices, the Court stated that something lawfully made and placed on the market in another Member State cannot be regarded as illicit. In the issue of intellectual property rights, the Court's approach was rather like 'washing one's hands of the matter', stating as it did that the Copyright Directive is a minimal harmonisation tool, and does not cover football matches per se, but does cover certain aspects such as the World Feed (inserted logos, anthems, commercials, etc, in the signal). It went on to say that in essence it is up to the Member States to protect such copyright if they deem it to be copyright in the first place. This cautious approach, although wise in the current situation, still did not answer the key question of what today can be considered copyright on television and how far its holder can go to protect it. It is my opinion that the ruling in this respect just opened Pandora's Box, and we will be seeing judgments in future where the Court will be forced to take a stronger stance. We can

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<sup>61</sup> Case C-46/10 *Viking Gas A/S v Kosan Gas A/S*, formerly BP Gas A/S [2011] ECR I-00000.

<sup>62</sup> Joined cases C-403/08 and C-429/08 (n 37).

see this already happening in a judgment rendered nine days after *Premier League*. In *Airfield and Canal Digitaal*,<sup>63</sup> which concerned satellite package providers, the Court complicated matters even more by saying that for every transmission that is protected by copyright there needs to be direct authorisation from its holder (both for the service provider, in this case the satellite package provider, and the broadcaster). Taking this double authorisation into account, and the fact that the manner in which it is currently rendered consists of licence agreements, it seems that copyright protection has just become a little more complicated.

In respect of territorial licences, it appears that the interpretation of contractual clauses as being anti-competitive is seen more as the omission of representatives of the applicant to defend them rather than the introduction of new legal aspects to them. The novelty in the system of territorial licences is that remuneration based on the bidding process goes beyond what is necessary to reach the objective of protection of copyright and as such breaches the free movement of services. Finally, communication to the public after this judgment also encompasses viewing in public houses.

For a judgment which was keenly awaited and deemed so important, the caution of the Court and the strong compromise made, resulted, in the words of Shakespeare, in much ado about nothing. The status quo is preserved, although it has become a little more complicated, which, on balance, is a positive thing.

The most worrying concern for any copyright holder is how to protect its right. In my opinion, a licensing system, although not perfect, is the only effective way to protect broadcasting rights since the broadcasting signal covers the whole of Europe. This specific subject matter requires efficient control of the reception of that signal, and, as the Court recognised in *Coditel*,<sup>64</sup> an exclusive territorial licence achieves the aim of protection. However, it should be borne in mind that pirate devices are increasing on the market,<sup>65</sup> and that piracy in all information outlets not only exists, but is very common. Reversing the *Coditel* judgments would leave (for the time being) copyright holders vulnerable to this cyber equivalent of burglary and theft.

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<sup>63</sup> Joined cases C-431/09 and C-432/09 *Airfield NV and Canal Digitaal BV v Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (Sabam) and Airfield NV v Agicoa Belgium BVBA* [2011] ECR I-000 para 83.

<sup>64</sup> Case 62/79 (n 31) para18.

<sup>65</sup> Extract from the Commission Green Paper on the Legal Protection of Encrypted Services in the Internal Market (n 53): 'This has allowed the development, in some of those Member States, of a flourishing industry that manufactures, markets, installs and maintains pirate devices. A specialist press has also developed, providing targeted publications and commercial promotion networks for pirate decoders'.

The fact still remains that the licensing system actually decreases the cost of television for the end user (consumer).<sup>66</sup> Notions such as the exhaustion of rights and parallel imports were made in order to help the consumer receive the benefits of market freedoms and, in this way, to fuel the economy. It is my fear that blind obedience to these notions of broadcasting rights would deprive the viewer of affordable television, paving the way for more piracy and illicit devices on the market, leading to a rapid decrease in high-quality and informative television.

A licensing system benefits not only copyright holders, but consumers and the community. Until the day we have something else in place which can strike a balance between these interests, we should stick with what we have. In this specific case, the EU was right to jeopardise a bit of market freedom in order to preserve the copyright of a television broadcast.

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<sup>66</sup> See the section above on the protection of consumers through the licensing system.