Pub football cases highlight European Commission's lack of guidance on new media distribution

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In recent months, two very interesting English cases concerning the parallel import of satellite decoder devices (set-top boxes) have been referred to the European Court of Justice (ECJ). Depending on their outcome, these cases have the potential to turn the established practices for licensing sports rights (and also other types of content, eg, films) on their heads.

The two cases raise a wide range of issues relating to copyright, broadcasting rights, the transposition of European Union (EU) directives into national law, free movement rules and competition law. They have broad implications for longstanding EU competition law concepts and doctrines developed by the EU courts to promote the single market in the EU. For instance, they question whether the fundamental competition law distinction between active and passive sales (restrictions on actively selling into another exclusive distributor's territory within the EU are allowed, but restrictions on passive parallel sales generally are not) still makes sense in satellite broadcasting, online and other new media/technology situations. The two cases also focus attention on the principle that regulation should be technologically neutral, and raise doubts about the scope of previous EU case law which implied that exclusive and territory-restricted licences of copyrighted content are not generally prohibited by EU competition law.

Both cases relate to equipment that enables the reception of live English Premier League football matches from non-UK channels. Using non-UK decoder cards in the United Kingdom enables the holder of such cards to access Greek or Arabic satellite channels, for example, and view English Premier League games without a subscription to the Premier League's UK licensee, BSkyB Ltd (Sky). Furthermore, holders are able to watch live Premier League games during the 'closed period' on Saturday afternoon, as designated by the English Football Association pursuant to a UEFA rule designed to protect attendances at live matches.[1] The licensing of rights to broadcast Premier League games in the UK is lucrative[2] and the use of decoder cards from other countries undermines the exclusivity, and thus the value of the licensed rights. This has prompted the Football Association Premier League (FAPL), the owner and licensor of the intellectual property rights to English Premier League games, to take legal action to protect its rights.

The two cases raise policy issues that are essential to the modern cross-border economy and highlight the lack of consistent guidance on the extent to which companies can reserve or grant truly exclusive territorial licences. Despite the high value, importance and, in some cases, the relatively well-established nature of the markets concerned, there are still significant areas of legal uncertainty. Although the European Commission (Commission) is not party to either of the cases, the cases can be said to be the inevitable result of the lack of guidance from the Commission on the key competition law issues that the cases raise. As often arises when the regulators leave a void, business uncertainty and disputes arise and the courts are invited to plug the gaps. A failure to respond in a timely manner to the challenges of technology (or, worse, occasionally issuing conflicting responses) has left the legal landscape uncertain with the result that the ECJ (rather than policy makers) is now being invited to answer basic questions like: in circumstances where it is legal for a football rights owner to license rights on an exclusive territorial basis, can it still be illegal to *require* that the territorial restrictions be respected?

This article will explore the key competition law issues raised by these cases and argues that the regrettable absence of a clear policy in this area can only lead to further litigation.

The Football Association Premier League case (the FAPL case)[3]

The claimant in this case, FAPL, arranges for Premier League games to be filmed and licenses the right to broadcast these games on an exclusive, territorial basis. Each licence is for three years. Licensees are entitled to sublicence their rights. Sky was awarded this exclusive licence in the UK (although from August 2007, Setanta has an exclusive licence for some of the Premier League games). The Greek sublicensee of the live broadcasts of Premier League Games was NetMed. NetMed and the owner of NOVA, the platform that broadcasts these games, were also claimants in this action.

Two of the defendants in the case, QC Leisure and AV Station PLC, were suppliers of Greek satellite decoder cards to the UK. AV Station PLC also supplied Arab Radio and Television Network satellite decoder cards to the UK. The other defendants were four publicans that admit to using the foreign decoder cards.

The claimants alleged that the defendants had infringed section 298 of the UK Copyright Designs and Patents Act (CDPA) by trading in, or being in the possession for commercial purposes of, decoder cards designed to give access to the claimants' services without authorisation. They alleged infringements of copyright under the CDPA based on the copying the licensed material internally by the decoding equipment (apparently necessary to allow broadcast),[4] showing it in public,[5] and communicating it to the public.[6] They also alleged the authorisation of these CDPA infringements by QC Leisure and AV Station PLC. In addition, FAPL sought an injunction against the import of foreign satellite decoder cards to the UK.

The defendants contended that the claim was misconceived and that the case is actually about cross-border trade in lawfully issued decoder cards. In light of that contention, a number of provisions of Community law were identified for consideration including Directive 98/84/EC (the Conditional Access Directive) on the legal protection of conditional access (as in conditional access technology (CAT)).

Murphy v Media Protection Services Ltd (the Murphy case)[7]

The second case concerns an appeal by a publican, Mrs Murphy, against her conviction under section 297 of the CDPA for showing FAPL's content in her pub. This case was a private prosecution brought by Media Protection Services Ltd, a company that brings private prosecutions on behalf of the FAPL in respect of copyright law.

The arguments presented by the parties in the *Murphy* case were very similar to those presented in the FAPL case, although constructed differently because the basis for the action was criminal rather than civil. These arguments included: whether enforcement would amount to a quantitative restriction on the free movement of goods and services; and whether section 297(1) of the CDPA was discriminatory in that it protected broadcasting services emanating from the UK and gave them favourable treatment; the definition of 'illicit device' in the Conditional Access Directive, and whether the restriction in the licence agreement entered into by Sky is contrary to Article 81(1)EC. The court expressed unease at the idea that a criminal prosecution could be brought 'where the establishment of an essential element of an offence…depends upon the compatibility with EC law of an export ban imposed in a license agreement between two companies who are legally strangers to the purchaser in question'.[8] On that basis, it decided to refer to the ECJ for a preliminary ruling.

Referrals to the ECJ

The references for preliminary rulings in the FAPL and Murphy cases were submitted on 17 September 2008[9] and 29 September 2008[10], respectively. UEFA, Sky, Setanta, Canal Plus and the Motion Picture Association applied to the English High Court to be joined as claimants in the FAPL case. On 13 November the High Court allowed each application. In an order of 3 December 2008, the ECJ rejected the requests for an accelerated procedure and joined the two cases.

The questions referred to the ECJ in both cases were very similar and included:

- whether the scope of the term 'illicit devices' in the Conditional Access Directive extends to all decoder cards used without authorisation as the claimant argued, or whether it was limited to pirated decoder cards (and so did not apply to parallel imported decoder cards);
- whether the relief sought by the claimants would amount to a quantitative restriction on trade between Member States or a measure having equivalent effect within the meaning of Article 28 EC; or a restriction on the freedom of foreign broadcasters to supply services contrary to Article 49 EC; and
- whether, in restricting each licensee from supplying or permitting use of its decoder cards outside its licensed territory, FAPL's licensing agreements are contrary to Article 81 EC.[11]

Key issues in the cases

This article will briefly describe the issues in relation to the first two questions above, although it will focus mainly on the third question – the application of Article 81 EC to the FAPL licence provision that requires that licensees do not circulate, or allow circulation, of decoder cards outside their exclusive territories.

Application of the Conditional Access Directive

Section 298 of the CDPA, the basis of the claim in the FAPL case that the decoders in question were 'illicit devices' because they were used without authorisation, was added to the CDPA to implement the Conditional Access Directive.[12] However, the words used in that section are not the same as those used in the Conditional Access Directive. Notably, the parties to the FAPL case do not agree on the scope of the term 'illicit devices' as defined in Article 2(e) of the Conditional Access Directive. Both parties agreed that the term encompasses pirated decoder devices, but the defendants contested the claimants' submission that it was also intended to include decoder cards used without authorisation. That would mean that it would apply to parallel imports that were not authorised by the claimants.

The English High Court judge in the FAPL case, Kitchin J, referred to the ECJ the question of whether a conditional access device becomes an illicit device when used without the authorisation of the service provider. He described this interpretation as underpinning the whole claim. If the defendants are correct then it seems that the claim relating to section 298 of the CDPA must fail.

Free movement of goods and services

The defendants in the FAPL case argued that the injunction sought by the claimants against the export of decoder cards would amount to a quantitative restriction on free movement of goods and could not be lawfully enforced. The defendants also argued that the resulting restriction on the freedom of foreign broadcasters to provide a service outside their exclusive territories would be contrary to the free movement of services enshrined in Article 49 EC.

Kitchin J was of the opinion that the argument was bound up with the questions on the interpretation of copyright law, for which the assistance of the ECJ was required. He decided that the outcome turned on the correct interpretation of the Conditional Access Directive. If the claimants' interpretation is right (and an unauthorised use is an 'illicit' use), then the restriction in the licence is likely compatible with the EC Treaty.

Article 81 EC

Two main competition law points were raised. The first (and for our purposes, key) argument raised by the defendants was that FAPL's requirement that licensees were not to circulate, or allow circulation, of decoder cards outside their exclusive territories, resulted in the grant of a closed exclusive licence and that such licences are, per se, prohibited by Article 81(1)(b)EC.

The FAPL licence provision does appear to result in the grant of a *closed* exclusive licence (ie, one prohibiting both active and passive sales outside the territory). The form of wording used in licence agreements applicable to ART and NOVA decoder cards requires the foreign satellite broadcasters to:

> 'procure that no device (including but not limited to any 'smart card' and any decoding equipment which is necessary to decode or decrypt any such transmission) shall be knowingly authorised or enabled by or with the authority of the Licensee and/or any permitted sublicensee and/or any distributor, agent or employee of the licensee and/or any permitted sublicensee so as to permit any person to view any such transmission outside the territory [which territory does not include the UK] in an intelligible form.'[13]

The defendants argued that this prohibition had as its object the prevention, restriction or distortion of competition within the EU's common market, and in particular, that it purported to limit or control the markets to which broadcasters supply their services and/or decoder cards and was therefore contrary to Article 81(1)(b)EC. Consequently, such clauses could not be relied upon to obtain an injunction preventing the sale of decoder cards outside the territories for which they are intended.

FAPL argued that *Coditel II*[14] provided a complete answer to the defendants' argument and justified the restriction in its licensing agreements prohibiting licensees or permitted sublicensees from allowing the circulation of decoder cards outside their exclusive territories.

Coditel II was the second reference under Article 234 EC that was made in a case between Cine Vog, an exclusive distributor of the film 'Le Boucher' in Belgium, and Coditel, a Belgian cable company that retransmitted Le Boucher in Belgium to its subscribers from a broadcast on German television. Cine Vog claimed for breach of copyright.

The purpose of the *Coditel II* reference to the ECJ was to ascertain the relationship between the Article 81 EC prohibition and the contract granting an exclusive right to show a film in a territory for a specified period of time. In that case the ECJ stated that:

> 'the mere fact that the owner of a copyright in a film has granted to a sole licensee the exclusive right to exhibit that film in the territory of a Member State and, consequently, to prohibit, during a specified period, its showing by others, is not sufficient to justify the finding that such a contract must be regarded as the purpose, the means or the result of an agreement, decision or concerted practice prohibited by the Treaty'.[15]

In *Coditel II*, the ECJ said that while copyright and the rights deriving from it are not in themselves subject to Article 81 EC, the exercise of those rights may come within the prohibition if the effect of that behaviour is to 'restrict film distribution to an appreciable degree or to distort competition, on the cinematographic market, regard being had to the specific characteristics of that market'.[16] The national court was left to make the decision as to whether there was a restriction on competition based on the economic circumstances.

Before the English High Court, the FAPL had requested summary judgment on the defendants' Article 81 EC defence stating that, in light of *Coditel II*, such a defence could not succeed. To succeed in a summary judgment application, the court must be satisfied that the defendant will have no real prospect of success at trial and there is no other compelling reason why the matter should proceed to trial.

The defendants resisted this application for summary judgment and sought to distinguish this case from *Coditel II* on a number of grounds. In particular, they referred to *Nungesser*.[17] In that case, the ECJ distinguished between open licences and an exclusive licence where absolute territorial protection is intended to be achieved on the territory by the exclusion of parallel imports. The Court referred in particular to a clause in the contract whereby the licensor promised that it and its other licensees would do everything in their power to prevent the export of the product in question into the territory. Only the 'open' exclusive licence arrangements were held to be outside Article 81 EC.[18]

Barling J rejected the summary judgment application in January 2008. He concluded that FAPL 'places more weight on *Coditel II* than it can bear'[19] and that he was inclined to take the view that '*Coditel II* does not provide the answer to this case'.[20] He considered that the *Coditel II* judgment was narrow, finding as it did that the licence should not to fall foul of the competition rules merely because it was a grant of a right within a territory. In the FAPL licence, there was an obligation imposed on non UK licensees to prevent the use of decoder cards outside their territory, which was a more complex provision which required consideration. This distinction led Barling J to conclude that the FAPL situation is not clearly resolved by *Coditel II*.

In the main High Court judgment on 24 June 2008, Kitchin J was not persuaded by the claimants' argument based on the *Coditel II* case either because *Coditel II* concerned an open exclusive licence, rather than a closed exclusive licence. The defendants in the FAPL case were not arguing that the object of an open exclusive licence was to harm competition.

Kitchin J stated that he was 'satisfied on the evidence that the export restriction is intended to and does in fact restrict trade between Member States and so inevitably restricts competition between the services provided by FAPL's current licensees.'[21]

Kitchin J also recognised that unlimited broadcasting of Premier League matches across borders might be damaging for the FAPL in that, although Sky might benefit from making sales into other territories, its exclusivity in the UK would be weakened and as a result Sky might not be prepared to pay as much for those exclusive rights. Also, there was a possibility that allowing the broadcast of matches from non-UK sources would potentially place the FAPL in breach of its obligations to the Commission and UEFA.[22] Kitchin J also recognised that if the Conditional Access Directive is interpreted broadly (to the effect that unauthorised use is deemed illicit use), then the restriction contained in the licensing agreements cannot be contrary to Article 81 EC because it goes no further than enforcing the obligations of the non-UK satellite broadcasting service providers.

In the second competition law question referred to the ECJ, the defendants argued, based on the ECJ's decisions in *Miller International v Commission*[23] and *Nungesser*,[24] that since the object of the export restriction is to restrict competition it was not necessary to analyse its effect.[25] However, the FAPL argued that, based on *Coditel II* and the CFI's decision in *GlaxoSmithKline v Commission*,[26] there was no basis for concluding that the restriction was per se contrary to Article 81 EC, and that for the defendants to succeed with their Article 81 EC defence, they must address issues such as the relevant product and geographical markets, whether the restriction is justified and the counterfactual situation were the restriction not imposed. Kitchin J noted that the defendants have not put forward any evidence to permit a factual or economic analysis, so that if the ECJ finds that the FAPL licence provision is not a restriction by object, then the defendants will probably lose the case when it is referred back to the UK courts.

Comment

These two cases highlight a lack of consistent guidance on the extent to which companies in the satellite broadcast sector can reserve or grant truly exclusive territorial licences. As technological convergence is now a fact rather than an aspiration, this same lack of guidance affects all 'new media' content distribution.

Agreements that attempt to impose absolute territorial restrictions are generally viewed in a dim light. For example, in *Consten and Grundig* the ECJ stated that '…an agreement between producer and distributor which might tend to restore the national divisions in trade between member states might be such as to frustrate the most fundamental objections of the Community. The Treaty, whose preamble and content aim at abolishing the barriers between states, and which in several provisions gives evidence of a stern attitude with regard to their reappearance, could not allow undertakings to reconstruct such barriers'.[27]

However, the benefit of territorial restrictions in some cases to help realise efficiencies and develop new markets has long been recognised, including in the Commission's Guidelines on Vertical Restraints.[28] In exclusive distribution systems, restrictions on active selling into other distributors' territory are allowed, but passive parallel sales into another distributor's exclusive territory or customer group must be permitted.[29]

The two satellite decoder cases once again focus attention on whether the distinction between active and passive sales makes sense in broadcast, online and other new media/technology situations (in that the grey market sale of decoder cards is what allows copyrighted sports content to be parallel traded). If the logic of the active/passive distinction were applied to this case, the conclusion would have to be that pub owners should be free to seek out decoders and cards from other EU jurisdictions and nothing should prevent providers from satisfying that demand. In other words, if passive sales must be allowed, the FAPL would be entitled to have a licence granting exclusive territorial rights, but it would not be entitled to enforce that licence in a way that guaranteed true exclusivity.

It is clear that the Competition Commissioner, Neelie Kroes, believes the distinction between active and passive sales is still essential to EU competition law, but she has also acknowledged the challenges raised with respect to this distinction by the internet. During a September 2008 roundtable discussion on online market issues and opportunities to use the internet to promote the single market, she stated:

> 'It is a long standing principle of Community law that a company can prevent its distributors from actively selling across borders – this helps to protect investments and efforts made by other distributors. However a company cannot prevent arbitrage and stop its distributors selling – passively – to consumers who are themselves active, and who seek out the distributor. This distinction between active and passive sales is fundamental – but questions have arisen as to what this means on the internet. Since the rules were last reviewed, there are a number of practices which are being used by companies to restrict cross border sales which I think require a closer look.'[30]

The use of the internet is, in general, considered a form of passive selling, except where territories or customers are targeted through the use of banners, links in pages or unsolicited e-mails.[31] In practical terms, these distinctions grow finer and finer and it will always be difficult for legal definitions or guidance notes to keep up with the speed at which technology adapts and creates new market realities.

The same issues were again addressed, though not resolved, in a January 2008 Commission policy paper on Creative Content Online in Europe's Single Market.[32] In that context, the Commission noted that the lack of multi-territory copyright licences made it difficult for online services to be deployed across some or all EU Member States. The policy paper makes clear that the Commission is in favour of adopting technologically neutral solutions to remedy the distinction that is being made between physical and non-physical delivery of goods over the internet so that both have equal treatment (thus, presumably, continuing to try to fit the online sales model into the physical delivery model).

Another opportunity to state a clear position was lost when the Commission investigated Apple's iTunes online music store.[33] In March 2007, the Commission sent a statement of objections to Apple following a complaint regarding higher prices in the UK than the rest of Europe for music downloads from the iTunes store. The iTunes site sought to restrict consumers to buying from a site in their country of residence by using their credit card details to verify the consumers' address. Following Apple's announcement of its intention to equalise prices across Europe, the Commission released a statement confirming that it is in favour of a truly single market for online downloads. The statement noted that the Commission was 'very much in favour of solutions which would allow consumers to buy off the iTunes' online store without restrictions, but it is aware that some record companies, publishers and collecting societies still apply licensing practices which can make it difficult for iTunes to operate stores accessible for a European consumer anywhere in the EU.[34] Thus even in accepting what may have been a pragmatic solution

(Apple's commitment to equalise prices across Member States, thereby all but eliminating the incentive to shop across borders) the Commission had to acknowledge that it has so far failed to tackle the underlying problem as iTunes continues to operate on a national basis for copyright reasons.

When commenting on the Commission's recent decision in *CISAC*,[35] which was aimed at ending territorial restrictions preventing collecting societies from offering licences to commercial users outside their domestic territory, Commissioner Kroes said that the CISAC decision would 'also facilitate the development of satellite, cable and internet broadcasting, giving listeners more choice and giving authors more potential revenue'.[36] Such statements suggest that the Commission continues to favour multi-territorial licences in other new media/technologies, as well as online, though has yet to find a way to bring this about.

Apart from the necessity to acquire on a once-off basis an item of equipment (the decoder device with a 'foreign' subscription card) there is no practical distinction between content being downloaded across borders and content being fed via satellite across borders. Given the Commission's statements on multi-territory licensing in the online world, and its support for technologically neutral regulation, one might guess that the Commission would favour the outcome sought by the defendants in the two satellite decoder cases (ie, one which favours the grey market).

However, despite the policy statements and comments above, the Commission has repeatedly endorsed or at least accepted national and territory-by-territory licensing models for content that can, technologically speaking, move easily across borders. Thus, the Commission is simultaneously allowing and discouraging national licensing.

In its own 2006 decision relating to different aspects of FAPL's media rights strategy, the Commission noted (in a section indicating the Commission's jurisdiction to act, rather than any operative part) its 'preliminary assessment' that the practices in question (which included exclusive national licensing) had 'the effect of reinforcing the partitioning of markets on a national basis, thereby holding up the economic interpenetration which the Treaty is designed to bring about'.[37] The Commission nonetheless resolved this case and accepted the commitments put forward by FAPL without further comment on the territorial aspects. It has accepted or has not opposed similar arrangements in relation to music, film, sports content, games and other digital and IP based content that is easily transmitted across borders.

In the Commission's second report on the Conditional Access Directive published on 30 September 2008 (after the FAPL case was referred to the ECJ), it recognises a 'grey' market in relation to access to TV channels in different Member States. It says that this grey market 'is not entirely above board since certain broadcasting rights obtained by TV channels are valid only within the territory of the country in question and not that of other Member States'.[38] It commented that stakeholders find 'the possibility of legalising the grey market'[39] disturbing because it challenges the current national divisions that are in place. More significantly for the two satellite decoder cases, the Commission remarks that '*the only* cross-border market which the Commission would like to see being developed is that for services catering to the mobility and legitimate expectations of European citizens and, as such, legally available in their mother tongue and the language of their native country'[40] (emphasis added).

Comments such as these strongly indicate that the Commission fully recognises the territorial exclusivity that exists in various sectors, is contemplating or has contemplated 'legalising' cross border sales between these territories, but yet has still failed to put forward any convincing policy or initiative to achieve just that.

The current policy of *leaning towards* disapproval of national divisions, though without taking any clear policy or enforcement steps to end those national divisions demonstrates a hesitancy and lack of direction that, in the end, helps neither business nor consumers.

The authors would argue that the passive/active distinction is an outdated artifice, designed for simpler times. This is so because it assumes that if sellers are prevented from 'pushing' sales to territories outside their own (eg, through advertising targeted at particular territories), the advantages of territorial restrictions referred to in the Commission's Vertical Agreements Guidelines will remain intact. However, the power of search engines makes it just as easy for buyers to search out sellers in other countries (eg, try an internet search for cheap flights between any two European Union destinations and options from sellers around the world will be presented). Also, the free roaming nature of online surfing habits and the fact that so much online advertising is targeted at users based on what they are doing, not where they are, strongly suggests that seeking to prevent active (but allowing passive) extraterritorial sales erodes the integrity of territorial grants. Why continue with a distinction that is unworkable?

The Commission is certainly right that vertical agreements containing territorial exclusively can have economic and consumer benefits, as well as benefits to competition. Article 81(3)EC already provides a framework for assessing those benefits, without recourse to artificial distinctions that require an examination of how the sale came about and who made the first approach before one can determine its legitimacy. In other words, the authors would argue, simply, that 'true' territorial exclusivity (ie, exclusivity that can be enforced, including by way of closed licences) should be acceptable without recourse to passive/active distinctions, *provided* the terms of Article 81(3)EC can be met.

The FAPL response to the September 2008 Issues Paper defended the national scope and absolute territorial protection of its satellite broadcasting licences as a way of ensuring investment and innovation. The submission noted that the licensing model is a function of fluctuations in demand by region rather than something inherent in copyright law:

> '[I]n relation to physical and non-physical delivery of copyright works, the fundamental nature of the rights granted by copyright are different, which necessitates different legal and regulatory treatment, including in relation to territorial restrictions.'[41]

No doubt the FAPL would also have other Article 81(3) EC arguments in favour of its current system. The merits of these arguments should be the only topic of relevance. If substantiated, FAPL's territorial model (including its ability to enforce strictly the territorial divisions that this would entail, including by refusing passive sales and taking action against grey marketers) should be preserved and confirmed.

As mentioned above, no Article 81(3)EC arguments have been raised in the FAPL case regarding the justifiability or otherwise of the territorial model. Instead, the case turns mainly on whether a closed licence is a per se violation because it has as its object the preservation of the territorial exclusivity it grants. It is lamentable that this basic question, which in essence is a policy question and which has relevance for all online and broadcast sectors, has not been clarified by the Commission before now and will be left for the ECJ to determine.

Conclusion

The *FAPL* and *Murphy* cases raise policy issues that are not new, are fundamental to the modern cross-border economy and yet have not been addressed head on. As often arises when the regulators leave a void, business uncertainty and disputes arise and the courts are invited to plug the gaps.

The Commission should already have taken, and should certainly now take, an active position on the question of whether rights holders are entitled to insist on absolute territorial protection. It is illogical to allow territorial exclusivity but deny licensors the means to enforce it. Perhaps in times gone by the active/passive distinction was a useful bridge between recognising the value of territorial allocation and the EU's single market objectives in that a limited number of passive sales were actually made in most markets. However, for content that can be delivered with speed and ease across borders, it is necessary to make a policy choice as in these cases the value of territorial allocation cannot be maintained if passive sales must be allowed (and if, in these football cases, a grey market must be tolerated by the rights owner).

Ultimately, if Mrs Murphy and the defendants in the FAPL case are successful and absolute territorial protection in satellite broadcasting is, in effect, prohibited, companies may have to completely reorganise the way they do business. Satellite broadcasters with significant resources and reach would no doubt adapt to any new model. However, in exactly the same way as the commercial value of music rights has declined with the advent of piracy, file sharing and online sales, the real risk may be to the value of sports rights, which could in turn have knock on implications for the development of sport in the mid to long term.

Perhaps consistent with its somewhat patchy approach, it appears that the Commission has decided not to intervene in the satellite decoder cases. This is to be regretted as the cases present another opportunity for the Commission to clarify its position and to try lead policy in this area from the front.

Notes

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1 The prohibition on showing games during the closed period relates only to games within that same territory, hence a Greek licensee is entitled to broadcast Premier League matches during the UK's closed period.

2 It was reported that Sky and Setanta will pay GB£1.78bn for the right to broadcast Premier League games from 2010–2013, 'Sky tightens grip on TV football with extra package of live rights', *Financial Times*, 7 February 2009.

3 *Football Association Premier League Ltd and others v QC Leisure (a trading name) and others*, [2008] EWHC 1411 (Ch).

4 Allegedly contrary to section 17 CDPA.

5 Allegedly contrary to section 19 CDPA.

6 Allegedly contrary to section 20 CDPA.

7 *Murphy v Media Protection Services Ltd*, [2007] EWHC 1666 (Admin).

8 Para 60, *Murphy v Media Protection Services Ltd*, [2007] EWHC 1666 (Admin).

9 Case C-403/08, *Football Association Premier League and others* (Pending).

10 Case C-429/08, *Murphy* (Pending).

11 These three referral questions are from the FAPL case.

12 The CDPA refers to 'unauthorised decoder', while the Conditional Access Directive uses the term 'illicit device'.

13 Para 337, *Football Association Premier League Ltd and others v QC Leisure (a trading name) and others*, [2008] EWHC 1411 (Ch).

14 Case 262/81 *Coditel SA and others v Ciné-Vog Films SA and others* [1982] ECR 3381, ('*Coditel II*'). That case was heard by the ECJ following an appeal by Coditel against the decision not to ask

questions relating to Article 81 in Case 62/79 *Coditel SA and others v Ciné-Vog Films SA and others* [1980] ECR 881, ('*Coditel I*').

15 Para 15, *Coditel II.*
16 Para 17, *Ibid.*
17 Case 258/78, *Nungesser v Commission*, [1982] ECR 2015.
18 See para 53, in particular, *Ibid.*
19 Para 38, *The Football Association Premier League Limited v QC Leisure and others,* [2008] EWHC 44 (Ch).
20 Para 46, *Ibid.*
21 Para 347, *Ibid.*
22 This refers to the obligation on national football governing bodies to restrict the broadcast of football matches for a two and a half hour period each week (the 'closed period') in order to safeguard match attendances and participation in the sport at all levels.
23 Case 19/77 *Miller International v Commission* [1978] ECR 131.
24 Case 258/78 *Nungesser v Commission* [1982] ECR 2015, [1983] 1 CMLR 278, CMR 8805.
25 We also note that in *Consten and Grundig*, the ECJ stated that: 'Besides, for the purpose of applying Article 81(1)EC, there is no need to take account of the concrete effects of an agreement once it appears that it has as its object the prevention, restriction or distortion of competition. Therefore the absence in the contested decision of any analysis of the effects of the agreement on competition between similar products of different makes does not, of itself, constitute a defect in the decision'. Joined Cases 56 and 58/64, *Consten and Grundig v Commission*, [1996] ECR 299.
26 Case T-168/01 *Glaxosmithkline v Commission* [2006] ECR II-2969. That decision stated that, while it has been recognised that an agreement restricting parallel trade must in principle by considered to have the object of restricting competition, that assumption only applies in so far as that agreement can be presumed to deprive consumers of the advantages of effective competition.
27 Joined Cases 56 and 58/64, *Consten and Grundig v Commission*, [1996] ECR 299.
28 Para 116, Commission notice - Guidelines on Vertical Restraints, OJ [2000] C 291/1, exemplifies the benefits of vertical restraints in distribution agreements.
29 Para 50, *Ibid.*
30 Neelie Kroes, European Commissioner for Competition Policy, *Making online commerce a reality, Closing Remarks at Online Commerce Roundtable*, Brussels 17 September 2008.
31 Paras 50–51, Commission notice – Guidelines on Vertical Restraints, OJ [2000] C 291/1.
32 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Creative Content Online in the Single Market, COM(2007) 836 final.
33 COMP/39.154 – *iTunes.*
34 IP/08/22, *Antitrust: European Commission welcomes Apple's announcement to equalise prices for music downloads from iTunes in Europe*, 9 January 2008.
35 See COMP/38.698 – *CISAC Agreement.*
36 IP/08/1165, Antitrust: Commission prohibits practices which prevent European collecting societies offering choice to music authors and users, 16 July 2008.
37 Commission Decision of 22 March 2006 in Case COMP/C-2/38.173 – joint selling of the Media Rights to the FA Premier League, para 31.
38 Para 2.2, Report From The Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of Regions, Second report on the implementation of Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access, COM (2008) 593 final.
39 *Ibid.*
40 *Ibid.*
41 Para 2.11, The Football Association Premier League Response to the Online Commerce Roundtable's Issues Paper on *Opportunities in online goods and services.*