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Liberalising the service market for satellite transmission: interplay between intellectual property rights, specificity of sport and TFEU economic provisions in *Murphy* (joined cases C-403/08 and C-429/08)

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Abstract The article explores the relationship between specificities of broadcasting and sporting industries and protection of intellectual property rights (copyrights) on the one hand and the economic provisions in the Treaty on the Functioning of the European Union (TFEU) on the other. It is generally built around the *Murphy* case but the discussion provides a much broader perspective at the issues raised by the Court in that judgment. We start off by looking at the EU post-Lisbon competences in the areas of sport and intellectual property and acknowledging the interrelationship and delicate balance between these areas and the EU goals of economic integration. The facts of the case are set out and thereafter the analysis turns onto the meaning and significance of ‘illicit device’ under Conditional Access Directive; the notion of ‘abuse of rights’ under the EU law; breach of the EU rules on free movement of services (Article 56 TFEU); objective justifications relied on by the Premier League (protection of intellectual property of sporting events and encouraging the public to attend stadiums); the proportionality of the measures employed; ‘closed periods’; the role that Article 165(1) TFEU played in the conclusions of the Court of Justice in *Murphy*; competition law aspects and convergence with internal market objective justification framework; Audio-visual Media Services aspects; and protecting copyrights and associated works under the Copyright Directive.

Keywords *Murphy* · Premiere League · Competition law · Broadcasting · Copyrights · Closed periods

1 Introduction

The realisation of the European Union’s internal market project necessarily has implications for questions of the interrelationship and balance between economic and social dimensions of the Union’s law and policy. The exercise of intellectual property rights that might conflict with the Union’s goals of economic integration presents another dimension requiring accommodation in the internal market project. On 1 December 2009, the Lisbon Treaty amendments came into force and introduced constitutional changes in several areas of EU internal competence, including sport and intellectual property rights. The two areas differ significantly but there are some general parallels in the substantive impact of those constitutional changes that are worth considering as a background before turning to the more specific analysis by the Court of Justice (hereinafter referred to as the Court or ECJ) in joined cases C-403/08 and C-429/08 *Murphy*.

The position of intellectual property rights in EU law has been strengthened through Article 118 TFEU, which provides explicit competence for EU legislation in this area. This contrasts with the earlier situation, when such rights were dealt with in relation to free movement or competition, as an element that may justify restrictions to other rights.¹ For example, the Satellite Broadcasting Directive was adopted on the legal basis used for other legislation dealing with the free movement of services. Article 308 EC [now Article 352 TFEU] provided a general basis for EU legislative action in any outstanding area where action at EU level was deemed necessary to achieve the internal market objectives. Article 308 EC has been the legal basis for the regulations on Community trademarks,

¹ Heinemann 2011, p. 304.

Community plant-variety rights and Community designs. Furthermore, Article 95 EC (now Article 114 TFEU) granted power to harmonise the laws of the Member States to the extent required for the functioning of the internal market. Article 95 EC has been used as a legal basis for the Union's action in the field of copyright and related rights. There exists a respectable body of the Court's case law defining the delicate relationship between the intellectual property legislation and the TFEU rules on free movement of services and competition. Thus, although Article 118 TFEU is in a way a restatement of the existing powers and does not confer a new competence upon the EU, the novelty lies in the conferral of a *specific* EU mandate marking the policy changes that might prove noteworthy in the future adoption and enforcement of European IP legislation.

Article 2(5) TFEU in combination with Article 6 TFEU gives the Union a soft competence to carry out actions in the area of sport but not to harmonise the Member States' laws or regulations. According to Article 165(1) TFEU '[t]he Union shall contribute to the promotion of European sporting issues, while taking account of the *specific nature of sport*, [...] and its social and educational function.' A study on the Lisbon Treaty and EU Sports Policy reveals that, in general, Article 165 TFEU will have a limited impact on the EU's legal powers over sport.² Unlike the provisions on environmental protection and public health, Article 165 TFEU does not contain a horizontal clause. Nevertheless, the specificity of sport has been taken into account when examining the legality of restrictions on free movement ever since the first sports related case in 1974. Two cases decided after the entry into force of Lisbon Treaty in which the Court made first references to the Article 165(1) TFEU are the judgments in *Bernard* and *Murphy*.³ The reference to the 'specific nature of sport' in *Bernard* merely reinforces already existing judicial possibilities and Article 165(1) TFEU will add little further protection for contested sports rules beyond that already provided by the Court and the Commission—the two institutions have already been highly receptive to 'the specific nature of sport'.⁴ Whereas *Bernard* has therefore not opened any new avenues of appeal, the Court's treatment of Article 165 TFEU in that case supports the view that '*the new sports competence may have given further weight to sports-related arguments*'.⁵ The Court's new

conclusions on training compensation fees in *Bernard*⁶ as opposed to the *Bosman*⁷ judgment support the conclusion that Article 165(1) TFEU has, indeed, given an additional weight to sports related arguments.⁸ This was later confirmed by the Court's approach in *Murphy*.

The *Murphy* case illustrates a number of different considerations in EU law, where different principles meet and conflict. On the face of it, the restrictions at issue in the case clearly restrict free movement of goods within the EU and almost as clearly show evidence of abuse of a dominant position inconsistent with the competition rules. But when examining the case more in detail, justifications for restrictive rules are seen and the question instead turns to the more complex one of proportionality of any exemptions and the question of weighing the different interests to evaluate such proportionality. The justification is found in the special nature of broadcasting as well as in specificity of sport and intellectual property protection. The three subjects are regarded as permitting exemptions from general EU law.

Broadcasting, especially television, developed in an environment with different national controls and restrictions. Broadcasting was initially mainly a state function serving national cultural, political as well as social purposes. When commercial broadcasting started, restrictions served the purpose of protecting the advertising market not only for the benefit of national broadcasters but also with consumer protection aims. When direct broadcasting satellites (in the 1980 s) and later other technologies (like the internet) made it technically easy to provide international broadcasting directly to audiences in any country, there was a lot of pressure from broadcasters as well as the audience to dispense with the various legal restrictions.⁹ Gradually this has happened, but the background of television broadcasting as a tool for national policy still influences the legal environment. Legitimate objectives for national restrictions may be exploited for non-legitimate protectionist purposes. As Keller writes, genuine social and cultural policy measures also serve economic protectionist goals.¹⁰

Even in societies with freedom of expression and a free media, there are certain principles and rules for broadcasting that regulate this medium more than most other forms of media. One main such principle as well as

² The Lisbon Treaty and EU Sports Policy (2010), p.10.

³ Joined Cases C-403/08 and C-429/08 FAPL and others v. QC Leisure and others; and Karen Murphy v Media Protection Services Ltd., judgment of 4 October 2011.

⁴ European Parliament, Directorate-General for Internal Policies, Study on the Lisbon Treaty and EU Sports Policy (2010).

⁵ Ibid.

⁶ Case C-325/08 Olympique Lyonnais SASP v. Olivier Bernard and Newcastle United FC judgment of the Grand Chamber of the Court delivered on 16 March 2010.

⁷ Case C-415/93 Union Royale Belge Sociétés de Football Association and others v. Bosman and others [1995] ECR I-4921.

⁸ Pijetlovic 2010.

⁹ Keller 2011, p. 90 and p. 117.

¹⁰ Keller 2011, p. 91.

justification for regulation is the management of the frequency spectrum, which is a limited natural resource. Even with digitalisation that allows a lot more content on the airwaves, it is still necessary to regulate the use of this spectrum so as to avoid interference between users of spectrum. This also means that limiting the number of broadcasters may be legitimate. The fact that broadcasters are given the use of a natural resource that belongs to all mankind also provides a justification for making certain demands on broadcasters. The objective fact of the need to regulate the frequency spectrum is usually coupled with more subjective or political and social claims concerning the impact of broadcasting on people and the interest of states—even states that respect freedom of the media—to be able to control this to some extent (for very different reasons such as to prevent incitement to hatred and violence or copyright violations). This provides a justification for rules preventing certain types of broadcasts or stipulating what time of day they can be shown, but it also provides the justification for rules on diversity and plurality of broadcasting, public service broadcasting with special programming rules and other similar content related rules. The fact that broadcasters need licences to be able to use frequencies and receiving equipment is set to receive signals on certain frequencies also means that there is an interest in a certain stability of the market—that providers of audiovisual media are financially and professionally sustainable. To verify this is one element of the process of licensing broadcasters.¹¹

In the EU context, various considerations have led to a broadcasting market that considers national borders to a greater extent than what is the case for most areas within the EU internal market. EU law mitigates negative effects of this as much as possible but does not fundamentally change the character of the market. The most encompassing EU legislation in the field is the Audiovisual Media Services Directive (2010/13/EU). The predecessor to this Directive, the so-called Television without Frontiers Directive, was first adopted in 1989 (Directive 1989/552/EEC). These Directives are minimum harmonisation Directives that allow more stringent rules while obligating Member States to exercise control over broadcasts emanating from their territory. The idea behind the regulation is to allow for a free market in audiovisual broadcasts and the rules primarily aim at enforcement of standards, leaving the content of standards mainly to national law.¹²

Although thus justified and widely accepted, this does not mean that specific broadcasting rules could not be open for abuse, for example for protectionist reasons, as pointed out above. The co-existence of broadcasting rules with competition law, free movement within the EU as well as intellectual property protection most often ends up as a balancing of various interests and an evaluation of how heavily the special broadcasting considerations weigh.

2 Facts of the joined cases

The English Football Association Premier League (FAPL) grants its licensees the right to live broadcasting and exploitation of Premier League matches within the specific country-wide territory on an exclusive 3-year basis. In order to safeguard the exclusivity the value of the rights for FAPL, the broadcasters are at the same time required by their licence agreements to prevent their broadcasts from being viewed outside the specified broadcasting area. In practice, this is done by requiring broadcasters to encrypt the programme-carrying satellite signal and restrict the circulation of authorised decoder cards only to persons residing within their exclusive territory.

In one of the joined cases, FAPL and other applicants brought proceedings against suppliers whose business included importing and marketing in the United Kingdom foreign decoder cards and equipment used to access foreign satellite transmissions of live Premier Leagues football matches in pubs and bars.¹³ They also brought an action against four pub operators who used foreign decoder cards to screen live Premier League matches.¹⁴ In another joined case, one of those pub operators, Ms Karen Murphy, unhappy with the price that exclusive broadcaster in UK charged pubs for its Sky Sports services,¹⁵ obtained a cheaper decoder from Greece and began showing Premier League matches in her Portsmouth pub. In criminal proceedings launched against her in the UK she was fined on the ground that the Greek decoder card was an illicit access device. Ms Murphy appealed to the High Court, which then made a preliminary reference to the Court of Justice ('the Court') under Article 267 TFEU.

FAPL and others complained that the practice of importing and marketing foreign decoders, as well as their use, constituted an infringement of their rights under the provisions of national law¹⁶ designed to implement

¹¹ This process is changing with digitalisation, in that transmission and programme provision are increasingly separated in the licensing process. The underlying values taken into consideration in the process have changed less.

¹² Dommering 2008, p. 20.

¹³ Case C-403/08 Football Association Premier League v QC Leisure YouTube.

¹⁴ Ibid.

¹⁵ The price is ca. £1000 per month.

¹⁶ See Sections 297(1) and 298 of the UK Copyright, Designs and Patents Act of 1988, as amended.

Conditional Access Directive (CAD) 98/84¹⁷ and of the copyright in various artistic and musical works, films and sound recordings embodied in the Premier League match coverage. The main issue in these cases was whether Articles 56 TFEU and 101 TFEU preclude national legislation and licence agreements that prohibit the use of foreign decoding devices.

3 Analytical overview of the judgment

3.1 The meaning and significance of ‘illicit device’ under Conditional Access Directive and the notion of ‘abuse of rights’ under the EU law

The main objective of CAD is the approximation of Member State laws concerning measures against illicit devices giving unauthorised access to broadcasting services.¹⁸ Under Article 4 CAD, Member States are obliged to take measures to prohibit on their territory

- (a) the manufacture, import, distribution, sale, rental or possession for commercial purposes of illicit devices; (b) the installation, maintenance or replacement for commercial purposes of an illicit device [...]

On the other hand, Article 3 CAD specifies that Member States are not allowed *for these reasons* to restrict the provision of protected services (broadcasting) which originate in another Member State or the free movement of conditional access devices. Should they do so, they have to provide an objective justification (i.e. *a different reason* from those listed under Article 4 CAD) for their restrictive measures and satisfy the requirements of proportionality to escape falling foul of TFEU free movement provisions. When such restrictions on economic freedoms originate from agreements or practices of private undertakings they have to comply with the competition provisions of the TFEU. The distinction between a decoding device having the status of a ‘conditional access device’ and one falling under the definition of ‘illicit device’, therefore, plays a crucial role in the initial assessment of the legality of Member States’ measures that restrict commercial activities in decoding equipment. The sole difference between the two is that the latter is used ‘*without the authorisation of the service provider*’.¹⁹

The Grand Chamber of the Court first answered questions concerning the meaning of these crucial concepts

under the factual circumstances *in casu*. It found that a foreign decoding device does not constitute an ‘illicit device’ within the meaning of Article 2(e) CAD.²⁰ This is because ‘illicit device’ within the meaning of the CAD covers access to broadcasting ‘free of charge’ (see paragraph 6 the preamble) and placing it on market ‘without the authorisation of the service provider’. In *Murphy*, decoding devices were purchased in Greece and remuneration had been duly paid to the Greek service provider who authorised their marketing within its exclusive broadcasting territory. Importantly, this conclusion was not affected by the fact that the foreign decoders were procured by provision of a false name and address and that they were used in breach of a contractual limitation permitting use only for private purposes.²¹ In essence, the Court here, in the framework of CAD, added another specific use of EU-conferred rights to the list of those it accepted as not constituting ‘abuse of rights’.

The prohibition of abuse of rights has been recognised as a general principle of EU law, although the Court’s approach in most areas has been to treat it solely as an interpretative principle (which is not directly effective without national anti-abuse measures), rather than as a self-standing general principle.²² In *Emsland-Stärke*, the Commission contended that the prohibition of abuse of rights is a general principle that exists in the legal systems of all Member States and that it has already been applied in the case law of the Court without being expressly recognised as a general principle.²³ However, the Court did not recognise it expressly as such in *Emsland-Stärke*. Only later, in *Kofoed*, did the Court hold that the anti-abuse provision in Directive 90/434 ‘*reflects the general [EU] law principle that abuse of rights is prohibited*’.²⁴ After a series of incoherent cases, the current position is that an act of an individual who is exercising fundamental freedoms under the Treaty can only constitute abuse if the two cumulative conditions laid down by the Court in *Emsland-Stärke* are met:

A finding of an abuse requires, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the [EU] rules, the purpose of those rules has not been

¹⁷ Council Directive 98/84/EC on the legal protection of services based on, or consisting of, conditional access OJ L 320/54, 28.11.1998.

¹⁸ Art. 1 of CAD.

¹⁹ Arts. 2(c) and (e) of CAD.

²⁰ Joined Cases C-403/08 and C-429/08 *Murphy*, paras 62–67.

²¹ *Ibid.*, paras 68–74.

²² Generally, there are three types of abuses of rights under EU law: circumvention (or U-turn transactions), fraud and misuse. For explanation of the concepts see, for example, Kjellgren 2000, pp. 179–194.

²³ Case C-110/99 (2000) *Emsland-Stärke GmbH v Hauptzollamt Hamburg-Jonas*. ECR I-1569.

²⁴ Case C-321/05 (2007) *Hans Markus Kofoed v Skatteministeriet*, ECR I-05795, para 38.

achieved. It requires, second, a subjective element consisting in the intention to obtain an advantage from the [EU] rules by creating artificially the conditions laid down for obtaining it.²⁵

The entire CAD could possibly be seen as an anti-abuse measure, for it listed the specific situations when Member States can and must restrict abuses of freedom of movement: namely, in the case of ‘illicit devices’. In such cases traders cannot rely on economic freedoms to claim their rights under the TFEU because, according to a ‘ghost provision’ of the CAD, that would amount to abuse of rights. Therefore, the Court did not have to fall back on the general case law and *Emsland-Stärke* criteria discussed above, but instead focused on the meaning of ‘illicit device’. That, in itself, was an exercise in finding out whether there was an abuse of rights in the area as specifically covered by the CAD. Deciding that the decoders were not illicit devices meant that traders were not abusing their rights, and vice versa.

Against this background, the Court in *Murphy* could have gone either way in determining whether the provision of a false name and address to procure decoders and their supply to another EU Member State constituted abuse of rights. It could have easily interpreted the concept of ‘illicit device’ under Article 2(e) CAD as meaning that the authorisation given by the Greek broadcaster was not genuine and valid because the broadcaster was unaware that the devices would be used outside its authorised territory and in breach of a contractual limitation permitting the use of decoders only for private purposes. Authorization implies conscious agreement and not an agreement given on the basis of a fraudulent misrepresentation by another party. This is a fundamental rule of any law of obligations and the Greek broadcaster could have brought an action for breach of contract before a national court. It is true that placing devices on the market was authorised, but ‘authorization’ is an expandable concept and can be interpreted as entailing conditions under which the devices are placed on the market. The broadcaster was relying on the terms of the contract for the conditions of use and had given an authorization only for a particular purpose.

Thus, the outcome of the case could have been different, and in reaching such a different outcome the Court would not even have had to apply counter-textual interpretation. Instead, the decoders procured by the provision of a false name and address were considered ‘conditional access devices’ within the meaning of Article 2(c) CAD. As seen above, Article 3 CAD neither imposes a mandatory requirement on such devices nor prohibits EU Member States from restricting their use. Having found that the

CAD does not harmonise national legislation prohibiting their use²⁶ the ECJ did not further elaborate on the legality of the devices and instead turned its attention to the compatibility of UK measures under the TFEU provisions on the internal market.

3.2 Existence of the restriction under Article 56 TFEU

Examining the case under Article 56 TFEU, the Court did not take much time to find that the national legislation conferring legal protection on contested contractual clauses in broadcasting agreements restricts the freedom to provide services by preventing the access to service for recipients outside the Member State of broadcast.²⁷ It then considered the applicability of two objective justifications put forth: protecting intellectual property rights and encouraging the public to attend football stadiums.

3.3 Objective justification and proportionality: protection of intellectual property of sporting events

The Opinion of the Advocate General starts with the words that protection of the economic interests of authors is becoming increasingly important. This can be achieved through the system of exclusive rights in the licensed territory, which often coincides with the territory of a country.²⁸ The judgement lists a number of international treaties on copyright to establish that the right to broadcast is such a right that the holder of a copyright possesses. This is not in doubt in the case, while the meaning of such a right and the extent to which it can be used to partition the EU market is of interest.

The recital in the Directive 93/83/EC on satellite broadcasting illustrates the interest of the copyright question for modern broadcasting in the EU market, by pointing out—as quoted by the Advocate General²⁹—that modern means of broadcasting may lead to a threat of works being exploited without the author receiving any remuneration or on the other hand, to copyright holders blocking free movement.³⁰

Although the principle of exhaustion of rights is difficult to apply to services, it fits with the philosophy behind this principle to discuss only the economic rights linked to copyright, as the moral rights including the decision if and how to show a work would no longer be relevant once the

²⁵ Case C-110/99, *Emsland-Stärke*, paras 52–53.

²⁶ This finding indirectly subsequently freed Ms Murphy from criminal liability in the national proceedings.

²⁷ *Ibid.*, paras 85–89.

²⁸ Opinion of the Advocate General para 1–2.

²⁹ Opinion of the Advocate General para 29.

³⁰ Recital 5.

work has been put out on the market in any EU Member State. The author (holder of the copyright) has the right to decide whether to show a work, in what form and so on, but once the work is available anywhere on the EU market it is presumed that it can be made available also in all other Member States—provided the economic rights are safeguarded. The principle of exhaustion of rights was elaborated in relation to patented goods, but the principal idea behind it remains valid for all forms of intellectual property. As pointed out in the Copyright Directive (Directive 2001/29/EC) the principle of exhaustion does not as such apply to services.³¹ At the same time, the idea that there should be no objections for copyrighted works to move freely in the EU based on the moral rights included in copyright fits with general principles of EU law.

In broadcasting terms (and in Directive 93/83) the meaning of communication to the public is the actual element of making a programme visible to television audience (Article 1.2(a) Directive 93/83), in the form of private individuals or anyone else. One important aspect is that the audience is not present at the place where the act of making available originates. The composition of an audience (individuals or groups, open to the general public or for a closed group) can be taken into consideration when negotiating terms upon which programmes are made available. Here the copyright law distinction of whether something is for private or public use comes into the picture. That this is relevant is shown in the Copyright Directive 2001/29 as well as in intellectual property conventions like the Berne convention where a difference is stipulated between public and private use. The same term is thus used with different meanings. It is well established that the cost of using a copyrighted product for private use is different and normally much lower than for public use. In EU law, the Directive on lending rights illustrates this (Directive 2006/115/EC on rental right and lending right and on certain rights related to copyright in the field of intellectual property). Any broadcast that can be received by the public is a communication to the public in the broadcasting law sense, whereas in the copyright sense, the composition of the audience is relevant. The reasoning of the Advocate General as well as of the Court is not always clear on which meaning of communication to the public they are discussing, but the relevant question in any event is that of public or private use, with public use being potentially for cost—a distinction made in the English law on the matter as mentioned in the case.

The TRIPS Agreement and the Berne Convention both reflect the principle that the holder of intellectual property rights (copyright or neighbouring right) has the right to

decide over a broadcast and how it is made available to a larger audience.

It is clear from Directive 93/83 (Article 3) that handling copyright protected works in the sense of deciding how to exploit them, what to charge for this and so on, should be subject to agreements between the parties concerned. Public use can give the right to charge a higher price for the right to use copyrighted work.

The protection of intellectual property rights was accepted as a part of the public policy derogation already in previous case-law.³² Sporting events were held in *Murphy* as forming the subject of that protection. Importantly, however, the starting point in reaching this conclusion was the Court's refusal to classify Premier League matches as 'works' within the meaning of the Copyright Directive as they were not original product of the author's own intellectual creation. It was also made clear that the EU has no other basis in intellectual property legislation to protect sporting events.³³ But the Court then held sporting events to be of such unique and original character as to make them capable of being transformed into a subject-matter of protection by intellectual property law.³⁴ Thereafter the Court made a reference to Article 165(1) for the second time ever.³⁵ Accordingly, it was held permissible for the Member States to employ various means to protect sporting events, including by virtue of protection of intellectual property rights, even if they restrict free movement, as long as the restrictions are proportionate.

Thus the judgment made it clear that EU law has no basis to protect any form of intellectual property of sporting events, but since sporting events are so specific in their nature, Member States' legislation may provide such protection. Article 165(1) TFEU played a role in opening this avenue of protection by domestic legal systems. It must be acknowledged that it has not been a decisive role as the Court already held the sporting events to be of a unique and original character capable of forming a subject of protection *before* making a reference to Article 165(1) TFEU. However, constructing the subsequent reasoning around the Treaty-based obligation to take into account specificity of sport and its social and educational functions certainly strengthened the soundness of the argument and furnished it with a firm constitutional support. Even before the coming into force of the Lisbon Treaty amendments the Court would probably have reached the same conclusion based on the 'specific nature of sports' alone, a concept entirely based on the state of affairs in the sporting industry

³¹ Para 29 of the preamble.

³² Para 94 of Joined Cases C-403/08 and C-429/08 *Murphy*.

³³ *Ibid.*, paras 96–99.

³⁴ *Ibid.*, para 100.

³⁵ *Ibid.*, para 101. The first time the Court mentioned Art. 165(1) was in C-325/08 *Bernard*.

and their recognition in the Court's jurisprudence. Objectives specific to the sporting industry accepted as legitimate before the inclusion of Article 165(1) TFEU were, for example, ensuring regularity of competitions,³⁶ maintaining the balance between clubs by preserving a certain degree of equality and uncertainty as to results, encouraging the recruitment and training of young players,³⁷ and combating doping in order for competitive sport to be conducted fairly including the need to safeguard equal chances for athletes, athletes' health, the integrity and objectivity of competitive sport and ethical values in sport.³⁸ After *Murphy*, the protection of intellectual property rights of sporting events can be added to the list of aims accepted as legitimate in the interpretation and enforcement of the EU law in the area of sport. The difference between pre- and post-Article 165(1) TFEU methodology in generating this list is the introduction of the constitutional nature of the obligation to take into consideration the specificity of the sport, as opposed to a loose obligation not delineated in clear and express terms in either the Treaty or the Court's jurisprudence that does not have a strict precedential value. Hence, the inclusion of Article 165(1) in the Treaty is a not insignificant development—in addition to giving additional weight to sport-related arguments, as explained in the introduction, it also contributed towards legal certainty for sporting bodies in as far as sports' specific nature and socio-educational function will have to be paid due regard in the interpretation and enforcement of the EU law *as a matter of constitutional requirement*.

This part of the judgement has not yet affected the interpretation of intellectual property legislation at EU level. However, by including sporting events in the derogation based on intellectual property protection, it has slightly broadened the scope of that derogation under the EU free movement law.

The *Murphy* case also illustrates that the restrictions do not necessarily have to originate from sporting bodies to benefit from the legitimate aim recognised on the basis of specificity of sport. An objective worthy of protection is to be taken as such regardless of who adopts the restrictive measures as long as the infringing party can be considered an addressee under the internal market provisions. This particular justification, placed within the broader derogation of intellectual property rights protection, is rooted in the specific nature of sporting events in general (as opposed to being confined to particular sporting events) and interpretation of the EU law in accordance with the Article 165(1) TFEU, so as to allow for the proportionate national

law to take precedence over the EU free movement provisions.

The proportionality of a measure taken at the national level to protect intellectual property of the sporting events was emphasised by the Court in paragraph 105 of the *Murphy* case. On the facts of the case, the restrictions in broadcasting agreements were held to be disproportionate. The specific subject-matter of the intellectual property did not guarantee the rights holders concerned the opportunity to demand the highest possible remuneration. Protection of intellectual property rights which included payment of a premium by broadcasters to obtain absolute territorial protection partitioned national markets and maintained artificial price differences and went beyond what is necessary for 'appropriate remuneration' to the right holders.³⁹ Hence, a premium paid in exchange for territorial exclusivity in itself would form a part of 'appropriate remuneration' and would be proportionate, but only if that exclusivity is not accompanied by export prohibitions on decoding devices granting absolute territorial protection. In other words, the system of sole licensed broadcaster per territory which encrypts programme-carrying signal is allowed, but restricting trade in decoder devices on the top of such territorial exclusivity is not. The possibility of provision of cross-border services to TV viewers in other Member States should not be affected by exclusivity clauses in broadcasting agreements. The Court followed the opinion of the Advocate General in the case who considered that offsetting the price differences between Member States by trade is a part of the idea behind the internal market and marketing the broadcasting rights by the Premier League on this basis amounts to 'profiting from the elimination of the internal market'.⁴⁰

There is no clearly recognisable pattern regarding the intensity of the proportionality test carried out by the Court in different cases. Generally, the intensity will vary depending on the restriction in question. From the *Meca-Medina* case⁴¹ it does not follow that the Court has given any special consideration to sport in this regard. Kaburakis et al. correctly note that the proportionality test applied in *Murphy* was stricter than the one carried out in *Bernard*,⁴² in which the Court for the first time ever referred to Article 165(1) TFEU and it did so in the context of the required standard of application of proportionality test.⁴³ This

³⁹ Paras 105–117.

⁴⁰ Para 192 of her Opinion in Joined Cases C-403/08 and C-429/08 *Murphy*.

⁴¹ Case C-519/04 (2006) David Meca-Medina and Igor Majcen v. Commission. ECR I-6991.

⁴² Kaburakis et al. 2012, p. 313.

⁴³ See para 40 of Case C-325/08 *Bernard*. For discussion see Pijetlovic 2010, pp. 862–867.

³⁶ Case C-176/96 (2000) Lehtonen and Castors Braine. ECR I-2681.

³⁷ Case C-415/93 *Bosman* and Case C-325/08 *Bernard*.

³⁸ Case 519/04 *Meca-Medina*.

reference was omitted at proportionality stage of analysis in *Murphy* because there were no specificities and social and educational functions of sport involved and the issues considered were strictly commercial.

3.4 Objective justification and proportionality: encouraging the public to attend stadiums

UEFA's Regulations governing the implementation of Article 48 of the UEFA Statutes allow, but do not require, national associations to set two and a half hours period on Saturdays or Sundays during which no live football matches can be transmitted. The purpose of this so-called 'closed period' or 'blocked hours' rule is to ensure that people are not deterred from going to the stadiums to watch local matches or participate in amateur or youth matches on the account of live transmission. The Football Association in England designated this closed period for Saturday afternoons. As required by the UEFA rules, this is the time corresponding to the domestic fixture schedule when the majority of the games in the top national leagues are played. The local broadcasters are required to respect this rule by the terms of their licence agreements. Also, national associations are required to observe blocked hours in their agreements with broadcasters when selling in the territory of other national associations that have designated their own closed periods.

Citing this arrangement, FAPL claimed that the importation of decoder cards would make it impossible to enforce closed periods.⁴⁴ But the Court rightfully dismissed this argument in paragraph 123 saying that

[...] even if the objective of encouraging such attendance of stadiums by the public were capable of justifying a restriction on the fundamental freedoms suffice it to state that compliance with the aforementioned rule can be ensured, in any event, by incorporating a contractual limitation in the license agreements between the right holders and the broadcasters, under which the latter would be required not to broadcast those Premier League matches during closed periods. It is indisputable that such a measure proves to have a lesser adverse effect on the fundamental freedoms than application of the restriction at issue in the main proceedings.

It is indeed far less restrictive, and yet as effective, to contractually oblige foreign broadcasters to respect seller's local rules on closed periods.

Regarding the precedential value of the justification put forth, the Court left us without clear indication on whether the goal of encouraging the public to attend football

stadiums and participate in matches was capable of justifying restrictions. Its wording 'even if the objective of encouraging such attendance of stadiums by the public were capable of justifying a restriction' would suggest that it is not. But the Court then goes on to dismiss the proportionality of the measure, a step which is not necessary for objectives not considered worthy of protection. The reason for this ambiguity in analysis might be that the Court did not necessarily have to be more specific, as the restrictions themselves were easily proven disproportionate; the outcome of the analysis would have been the same in either case. Unlike the Court, the Advocate General seems to have accepted attendance at stadiums and participation in matches as capable of constituting a legitimate goal under EU internal market law.⁴⁵ It is important to note here that in assessing the value of this objective the Advocate General relied on Article 165 TFEU but the Court did not. Siding with the Court on this issue, it is submitted that encouraging attendance at stadiums and participation in sporting activities should not be held in such high regard as worthy of protection at the expense of free movement and partitioning of internal market. Merely creating opportunities for the general public to engage in sports participation and attendance at stadiums is sufficient. Once the opportunities exist, even the argument that sport promotes public health would not justify a different conclusion. People usually like to de-stress during weekends and the choice of methods should be entirely up to them, as long as choices exist. Some prefer staying at home and being far from football crowds and socialising; who is to say that this might not be a more suitable personal health choice for both mental and physical workers. Attendance at stadiums, participation in matches and watching a live transmission are three qualitatively different activities that are poor substitutes for one another.⁴⁶

Furthermore, under the contemporary model of financing employed by the clubs in the Premier League, revenues from gate receipts are by far exceeded by revenues derived from the sales of media rights and are no longer so crucial to the financial survival of the clubs.⁴⁷ But in lower football leagues, or in other sports, gate receipts still represent a major part of the clubs' budgets and the Court might be receptive towards the justification if the arguments were repackaged and the objective were renamed as, for example, a solidarity mechanism, enhancing competitive balance between leagues, or improving training conditions for young talent (given that clubs in lower leagues are a breeding ground for that talent). So, protecting gate

⁴⁴ Joined Cases C-403/08 and C-429/08 *Murphy*, para 122.

⁴⁵ This follows from Opinion of AG in Joined Cases C-403/08 and C-429/08 *Murphy*, para 206–210.

⁴⁶ *Ibid.* (suggested in para 209).

⁴⁷ See Deloitte's Annual Report of Football Finance 2011.

receipts of the lower division clubs by closed periods for reasons such as solidarity and competitive balance by means of blocked hours is an objective likely to be accepted by the Court, but restricting free movement and partitioning the internal market with the objective of encouraging public attendance at stadiums and participation in sport—which the public can do at will anyway—should not be given the status of objective justification in EU law.

Restrictions to free movement may be justified on grounds of a legitimate public interest and the ECJ has expressed various such interests in its case law, on purpose not making an exhaustive list of what such interest may be as this should be determined in each case based on all the circumstances in such a case. However, the aims should not be economic and the aim must be compatible with Union aims.⁴⁸ In the media field, cultural policy is an important aim in relation to which movement may be restricted. The differences between cultural policies of Member States mean that some States will have rules for broadcasting for which there is no equivalence in another Member State. This does not mean that the rules are not legitimate or the aim not compatible with a Union aim.⁴⁹ However, the proportionality test applies in all events. Whether the aim to make people attend live sports events is a cultural policy measure or protecting another legitimate public interest and whether such a policy applies throughout the EU or only in some countries and in relation to some sports is not as relevant as the proportionality of the measure.

Accepting the objective as legitimate thus does not mean that the contested rule is in accordance with the Treaty provisions. The rule still has to be suitable and proportionate. To demonstrate suitability in this particular case would be a challenging task, to say the least, especially in the light of the intensity of the application of the proportionality test as suggested by the Advocate General. She assumed that the blocked hours rule might have been designed at least in part to safeguard economic interests of Premier League clubs by partitioning the internal market and considered that ‘a particularly strict test is therefore to be applied to the demonstration of the need for closed periods’.⁵⁰ Then she seems to have suggested that using closed periods to attain *any* objective can hardly ever be suitable because economic evidence and practice from other countries is heavily weighted towards the conclusion that the attendance at stadiums and sport participation is

not affected by live transmission.⁵¹ Thus, even the public health, solidarity, competitive balance and any other initially accepted legitimate objective, would all be predestined to fail. As a matter of a sound judicial advice, the Advocate General ultimately left a burden for FAPL to prove that different conditions prevailed in English football, which necessarily required protection by means of closed periods and which would in turn justify a different conclusion on the point of suitability of the restricting rule. The strictness of the application of proportionality makes any such burden particularly onerous as the FAPL evidence would have to show that live transmissions have ‘*substantial detrimental effects*’ on attendance at matches and/or participation in football matches in order for enforcement of the closed periods to be able to prevail over the adverse effects on the internal market.⁵²

3.5 Competition law aspects and convergence with internal market objective justification framework

Even though the restraint to trade under both national legislation and the broadcasting licence agreements was identical and posed identical legal questions, the national legislation was examined under free movement law, and the clauses in agreements under EU competition law, the latter set of provisions being generally addressed to private undertakings and the former to the Member States.

Competition law and free movement law have slightly different but complementary objectives. The initial dichotomy in the application of the two set of norms is among their respective circle of addressees. As a general rule, free movement provisions in EU law apply to state bodies and state measures, rather than to private parties. Competition law on the other hand primarily aims at private undertakings. Baquero Cruz considered that the heart of the relationship between the provisions on competition and free movement lies in the eventual application of the free movement rules in the private sphere and of the competition rules to state action.⁵³ With regard to sporting bodies, however, the public/private distinction is not very pronounced, if at all. As we have seen in cases like *Walrave*, *Bosman*, *Deliège*, *Lehtonen*,

⁴⁸ Case C-288/89 *Gouda* (Mediawet I), Case 352/85 *Bond van Adverteerders*. See also Böttcher and Castendyk 2008, pp. 118–119.

⁴⁹ Case C-384/93 *Alpine investments*. Böttcher and Castendyk 2008, p. 119.

⁵⁰ Para 208 of her Opinion.

⁵¹ *Ibid*, para 209 reads: ‘[...] in an investigation of the closed periods under competition law the Commission found that only 10 of 22 associations had actually adopted a closed period. No closed periods were adopted in France, Germany, Italy and Spain, or in Northern Ireland, that is to say, within the sphere of influence of English football. Furthermore, in Germany today all Bundesliga matches are evidently transmitted live without attendance at matches in the top two leagues suffering as a result.’

⁵² Para 210 of her Opinion in Joined Cases C-403/08 and C-429/08 *Murphy*.

⁵³ Baquero Cruz 2002.

Piau, and *Meca-Medina*, sports federations may be subject to both set of norms without anyone seriously questioning their applicability on the basis on impropriety of addressee. This aspect of convergence between competition and internal market provisions is facilitated by the horizontal direct effect of both set of norms.

Furthermore, in the application of both sets of rules to the same restrictive measure, it is very unlikely that the measure found legal under one set of rules will offend against another set of rules. This approach to convergence is confirmed in general terms by the Advocate General in *Murphy*, who used her conclusion in the freedom of movement area to support her conclusion in competition law. She said that

*conflicting assessments of the fundamental freedoms and competition law are to be avoided in principle. [...] an anti-competitive agreement within the meaning of Article 101(1) TFEU can be justified pursuant to Article 101(3) TFEU. However, a person who relies on that provision must demonstrate, by means of convincing arguments and evidence, that the conditions for obtaining an exemption are satisfied. In this connection, it would appear that similar considerations should apply as in the examination of whether a restriction of freedom to provide services is justified.*⁵⁴

The Advocate General was apparently of the opinion that convergence ought to exist on the level of justification, but also in general, including on the level of prohibition.⁵⁵

Unsurprisingly, therefore, the Court confirmed the result obtained under the free movement provisions: clauses in the exclusive license agreements which include obligations on broadcasters not to supply decoding devices outside their exclusive territories restrict competition *by object* and are prohibited by terms of Article 101(1) TFEU.⁵⁶ Normally, ‘object cases’ (in which the restrictions were subjectively intended and not just objectively achieved as in ‘effect cases’) are very unlikely to receive an exemption under Article 101(3) TFEU, but the possibility nevertheless exists.

The utility of establishing convergence between the free movement ordinary objective justification framework

and Article 101(3) TFEU would be relatively limited because legitimate aims providing exemption are non-economic under free movement whereas Article 101(3) recognises only economic efficiency arguments. However, the results of the proportionality test are perfectly transplantable even when it is not the same measure that is examined as long as the restrictions posed by both are the same. This was confirmed by the Court in *Murphy* when it only referred to its findings on (dis)proportionality of the measure under internal market law to hold that the exemption in Article 101(3) TFEU does not apply in the case. Had it been a regulatory rule on professional ethics passed by a sporting body (and thus the avenue of *Wouters/Meca-Medina* test⁵⁷ available to the rule under competition provisions) all of the objective justification findings from internal market law would have been fully transplantable and the Court would have referred not just to the part of the findings under free movement dealing with the proportionality of the measure, but also to the rest of the considerations under the objective justification framework.⁵⁸

Keller points out that EU competition law in comparison with free movement law has a more ambiguous impact on the European media market. If free movement law clearly supports the possibilities for media to move freely, albeit with certain restrictions for cultural or other policy reasons, competition law may prohibit behaviour that market players would like to engage into widen or strengthen their markets. Given the great importance of sports for advertising and other forms of revenue for broadcasting, competition law restrictions may be felt especially in relation to sports. As far as the market as a whole is concerned, competition law should serve to increase plurality and support more availability of content, even if it may mean restrictions on the behaviour of specific broadcasters.⁵⁹ It is worth stressing that in broadcasting (media) regulation and

⁵⁴ Opinion of AG in Cases C-403/08 and C-429/08 *Murphy*, paras 249–250.

⁵⁵ In C-222/07 (2009) *Presidente del Consiglio dei Ministri v Regione Sardegna*, ECR I-01407 she similarly considered that when the same questions arise under the law of State aid as with regard to the fundamental freedoms, the reply to the latter should not differ from the reply to the former and the same criteria must be applied in both cases to avoid conflicting assessments. See paras 134 and 135 of her Opinion in that case.

⁵⁶ Joined Cases C-403/08 and C-429/08 *Murphy*, paras 134–146.

⁵⁷ This test provides that ‘not every agreement between undertakings or every decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in Article [101(1) TFEU]. For the purposes of application of that provision to a particular case, account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects and, more specifically, of its objectives. It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives (*Wouters and Others*, paragraph 97) and are proportionate to them.’ See para 42 of C-519/04 *Meca-Medina*.

⁵⁸ Starting from paragraph 93. The Courts’ selected reference to paragraphs 105–124 also confirms the point made above in Chapter 4, section 10.2.4., that encouraging the public to attend and participate in matches is probably not accepted as an objective worthy of protection under EU law, and that Court was only dealing with the point of proportionality.

⁵⁹ Keller 2011, pp. 144–145.

legislation, the aim of provisions enhancing plurality and limiting ownership of several media outlets or of media outlets of different kinds serves other goals than restrictions on concentration in competition law. The broadcasting law looks at content from a substantive side, supporting political and cultural pluralism, whereas competition law is interested in market strength and the potential to abuse a dominant position.⁶⁰ However, in the *Murphy* case there was no element of protection of media pluralism at hand, as the reasons for the geographical restrictions for decoders as well as the different licensing for private or public use both served other interests.

It is clear that for a broadcaster the control over a major sporting event may be a key to success as there is very low substitutability for such events—people want to watch a particular event and in real time. A broadcaster that shows such events can use this to become dominant in its field, but even more evidently the organisation that has primary control over the rights to the sporting event holds a dominant position.⁶¹

3.6 Audiovisual Media Services aspects

In the original cases in the English courts, the defendants aligned themselves with a general trend toward an EU market in audiovisual media services, which they felt was shown by, for example, copyright-related EU provisions.⁶² However, the strength of any such trend is not evident as in fact there are still a number of special rules in the audiovisual services sector in the EU, making this sector stand apart from other services.

As the preamble to the Audiovisual Media Service Directive (2010/13/EU) points out (paragraph 5), audiovisual media services are as much cultural services as they are economic and this is what justifies application of special rules. Thus this aspect of the *Murphy* case cannot be overlooked. The Directive also stresses that Member States must prevent acts that are detrimental to the free movement and trade in television programmes or that create dominant positions that are detrimental to pluralism and freedom (preamble, paragraph 8). There should be a balance between the special rules and the free market. The right of broadcasters to acquire television broadcasting rights on an exclusive basis to events of high interest to the public is recognised explicitly in the Directive while naming sporting events as something to which wide access should be enabled and regarding which special rules can be made in the Member States on exclusive broadcasting rights (preamble, paragraph 48–49).

Speculative rights purchases to events of a major importance by broadcasters from another Member State are regulated specifically (preamble, paragraph 51) in line with the idea of the Directive that events must in reality be accessible to people and that it is for Member States to decide what events are of special importance and how they are made accessible.

The perceived importance of major sporting events for the population of European countries lies behind broadcasting rules on special treatment of such events, namely that they should be accessible to the majority of the population for no special charge (i.e. in addition to regular broadcasting subscription or cable fees). This principle is established by the European Broadcasting Union (EBU) and it is also formulated in EU law, first in the Television Without Frontiers Directive (Article 3a) and moved almost unchanged to Article 14 of the Audiovisual Media Services Directive. The Member States should draw up lists of what events are such events of major importance for society and it is natural that the exact list of events will vary between countries—for example as different sports are more popular in different countries. The competence for making a list belongs to Member States and EU law is restricted to ensuring mutual recognition of any lists.

Directive 2002/19/EC, the so called Access Directive, part of the 2002 package of directives related to telecommunications or as it also is called, the Electronic Communications Regulatory Framework, deals with access to digital broadcasting (Article 5(1)b and Article 6). The objectives are economic as well as non-economic; namely to ensure cultural diversity and media pluralism through obligating undertakings involved in electronic communication services to allow interoperability and access to infrastructure (like electronic programme guides and application programme interfaces). These provisions do not relate to the situation of end-users but to that of service providers and the scope is rather narrow, in that only digital broadcasting falls under the rules.⁶³ Thus systems such as encryption to permit markets to be divided between different content providers (broadcasters) are in general not affected, but the Access Directive aims solely at enabling a market to be created for digital broadcasting content providers by making sure they can be accessed on equal terms and that services are interoperable. The overall aim of plurality and diversity in addition to the purely economic competition aim is the same as in general broadcasting law, but the provisions are formulated in a narrower way, as this Directive does not deal with copyright or cultural issues or the other reasons why the encryption and territorial division of broadcasting markets has been created in the first place. It just aims at preventing digitalisation of

⁶⁰ Keller 2011, p. 419.

⁶¹ Keller 2011, pp. 417–418.

⁶² Anderson 2011, p. 58.

⁶³ Helberger 2008 at pp. 1132–1133 and p. 1135.

broadcasting transmission being used in order to narrow down markets and create obstacles for interoperability. The Commission has indeed expressed clearly in the elaboration of the Access Directive as well as in other contexts, the importance of separating regulation of transmission from regulation of broadcasting content. In practice this is not always easy.⁶⁴ The limited remit of the Access Directive can *e contrario* provide some support for the view that division of the markets for the broadcasting audience via encryption remains a permissible feature of the EU audiovisual media market.

Directives dealing specifically with audiovisual media services thus support the idea that there can be special measures to ensure certain exclusivity, including territorial division, in the broadcasting field as this is justified by special considerations linked to media. A system of a kind that has been developed with exclusive broadcasting rights linked to territory and national organs handling this is supported by the Directives. The Court does not discuss the media law aspects specifically in *Murphy*, but presumably finds that the justification for special rules does not allow total partitioning of the market—even if there is nothing in the media directives that prohibits such partitioning.

3.7 Protecting copyrights and associated works under the Copyright Directive

Having found that the EU internal market and competition law principles require that a European citizen should be able to purchase a cheaper decoder card from another Member State to gain access to foreign satellite transmissions, the Court answered a set of questions regarding the use of the broadcast once it is received. Although the live transmission was not a subject of copyright, the associated works such as the opening video sequence, the Premier League anthem, pre-recorded films showing highlights of recent Premier League matches and various graphics were.⁶⁵ The reproduction of such features within the memory of a satellite decoder and on a television screen to enable the broadcasts to be transmitted and received constituted ‘reproduction’ within the meaning of Article 2 (e) of the Copyright Directive, but since the reproduction fulfilled the exemption conditions under Article 5(1) of that directive, (*inter alia*, it was temporary and transient and had no independent economic significance) it did not require the authorisation of the copyright holder.⁶⁶ However, with regard to works that are ‘communicated to the public’ within the meaning of Article 3(1) of the Copyright Directive, the transmission of broadcast works to a new

public (i.e., a public which was *not taken into account by the authors of the protected works when they authorised their use by the communication to the original public*) constituted a new communication to the public.⁶⁷ As such, it did not fulfil the exemption conditions in Article 5(1) because it can be said that it has ‘independent economic significance’. The Court here assumes that when authors ‘authorise a broadcast of their works, they consider, in principle, only the owners of television sets who, either personally or within their own private or family circles, receive the signal and follow the broadcasts.’⁶⁸ This might indeed hold true in all other broadcasts but sports broadcasts in which the right owners are well-aware of the fact that their copyrighted material is going to be used widely in the public establishments, pubs in particular. The transmission of the copyrighted works in pub settings was considered to have satisfied the formula of a new ‘communication to the public’ and thus required authorisation.⁶⁹ So the Court distinguished between use in private homes and use containing the element of ‘communication to public’, which includes transmission of broadcast works in places where people gather, such as cafés, restaurants, pubs, clubs, offices, airplanes, etc. However, the key to the proper reading of the judgment should not be the objective test related to the place where the works are shown, but the subjective test related to the public ‘considered by the authors when they authorised the broadcasts of their works’.⁷⁰ The Court could not have been unaware of the fact that authors of the works (in this case FAPL) already take into account and know that exclusive broadcasters will be serving both private homes and pubs. It is therefore submitted that pub-clients of the broadcasters do not need any additional authorisation from the authors of works, whether they are domestic or foreign clients. Such authorisation is clearly given to exclusive broadcasters for both types of clients when the rights are sold and the public in the public house constitutes an ‘original public’ when it comes to broadcasting of the Premier League.

In order for intellectual property rights—that are territorial in nature and that until now are determined more often by national law and on the level of the Member States than on EU level—not to create too many restrictions on free movement or to breach EU competition law, the principle of exhaustion is essential. This means that once an object has been placed on the market in any EU Member State, parallel imports may not be prevented by reference to the intellectual property right. As Heinemann points out, the principle is still developing even if it is already well

⁶⁴ Ibid, p. 1143.

⁶⁵ Joined Cases C-403/08 and C-429/08 *Murphy*, para 149.

⁶⁶ Ibid, para 182.

⁶⁷ Ibid, para 197.

⁶⁸ Ibid, para 198.

⁶⁹ Ibid, para 199 and 207.

⁷⁰ Ibid, para 199.

established and although primarily a principle of free movement, it affects also competition law as any agreements must be examined with this principle in mind. Private parties are not allowed to erect barriers to intra-EU trade that this principle safeguards. The principle presumes consent: the intellectual property right is only exhausted following voluntary and consensual placement onto the market.⁷¹

Obtaining material under copyright protection includes an important distinction between public and private use of the material. Private use is allowed of any copyright protected material that is obtained legally. Public use, however, may be restricted and generally the costs for such use are much higher, as this is a way in which owners of copyright protected material make money. With the terminology used by the ECJ, this kind of distinction can be seen to illustrate the difference between the existence and exercise of an intellectual property right: its existence is within national competence whereas the way it is exercised may be within EU competence, as such exercise could contravene EU law on free movement or competition. Thus, in this context, the possibility of giving different rights of use of copyrighted material is linked to the existence of the right and belongs in national competence. It is not against EU law to restrict the use of copyrighted material, even if the effect is a restriction on the right to provide services, as the reason for such restrictions is linked to the specific subject matter of copyright law—something which should not be interfered with by the application of EU law.

Copyright law and broadcasting (media) law have to coexist while they protect somewhat different interests, just as is the case with broadcasting law and competition law. In the case of copyright law it protects the creative effort of the author and his/her right to make money from their work as well as to decide how to use it. For broadcasting law, there may be reasons why certain content should be shown without copyright creating obstacles for this. One example is the idea of the right to broadcast short excerpts from a work, even if the whole work is protected content. This idea is in line with the right to fair use of copyrighted material or can be seen as an analogy to the right to quote.

From a principled viewpoint the main issue on which intellectual property law and competition law must find an accommodation is balancing the benefits and costs of a monopoly. The very idea behind intellectual property protection is to provide a monopoly, as the holder of the intellectual property right can exclude the use by others of the protected property, whether copyrighted or industrial property. Competition law, however, seeks to prevent

monopolies.⁷² Authors find that in recent years the EU has become better at balancing these potentially conflicting interests by looking more at *de facto* market power and the real situation in any relevant market than presuming that intellectual property rights always secure a position of dominance. A more empirical assessment is better placed to address real concerns.⁷³ It is not automatically or always so that a holder of an intellectual property right has significant market power. However, in the situation at hand in this case, the owner of the rights to the games in question does have such significant market power in a very defined and specific market.

From the copyright viewpoint, the case does not appear to depart from earlier case law, where the existence of copyright protection is just one factor that together with other factors determines whether there is a *de facto* monopoly. In the *Magill* case⁷⁴ for example, which concerned television programme listings, the copyright was one element but other factors (such as the actual total control of the material as such and its nature as an essential facility for any competition in the specific market of magazines with television programme listings) were also considered.⁷⁵

The *Magill* case concerned compulsory licensing and because such licensing is a serious encroachment on the rights of the copyright holder it is not something that should be done lightly. The key to whether compulsory licensing of anything protected with intellectual property rights should be required is if such things are needed for there to be any competition at all (in competition law terminology whether the matter is an essential facility). Forrester and Czapracka point out that the essential facility doctrine appears more suited to physical infrastructure (they use a bridge as an example⁷⁶) but in practice various networks such as for telecommunications often illustrate this situation. They do not see that the essential facility doctrine and the compulsory licensing that it may entail is suited for intellectual property, not least as such property may decrease in value if used. The very value of intellectual property is to be able to decide if and how such property is to be used.⁷⁷ Intellectual property legislation is

⁷¹ Heinemann 2011, p. 306, 311.

⁷² The EU is giving increasing attention to the question of intellectual property rights and competition law, albeit primarily in relation to industrial property and to a large extent in the pharmaceutical sector. There has been important case law in this field for several decades, but recently EU is striving to make the legislative situation clearer as well. See for example Regibeau and Rockett 2011 (COMP 2010/16).

⁷³ Anderman 2011, p. 5.

⁷⁴ Case C-241/91P and C-242/91 (1995) RTE and ITP v. Commission. ECR I-743.

⁷⁵ Anderman 2011, pp. 14–15.

⁷⁶ Forrester and Czapracka 2011, p. 147.

⁷⁷ Ibid.

in itself a careful balance of different interests and for competition law to challenge this balance too much risks depriving one area of law of its meaning, to accommodate another area.

4 Final remarks

Ever since the Advocate General delivered her opinion in *Murphy*, it was thought that liberalising the service market for satellite transmission of sports, and as a necessary corollary, creating an internal market for trade in decoder cards, could result in a reorganisation of the entire broadcasting sector in Europe. Without the protection of national segmentation, the right holders would probably have to find a new way to sell their rights to make up for the loss of profits resulting from parallel trade in decoder cards. However, looking at the latest value of FAPL broadcasting rights and the manner in which they were distributed it does not appear that any significant changes took place so far.⁷⁸

One impression of the cases is that the questions referred and the treatment of them especially by the Advocate General goes into a lot of technical detail, primarily about the different elements of a broadcast in relation to copyright law. It is not evident that all this detail is necessary for the question at hand, but the nature of modern broadcasting transmission is indeed complicated as well as rapidly developing so it is not unusual for authorities that deal with regulation of audiovisual media services to get involved in such interpretation of concepts vis-à-vis the terminology used in regulations, as the original terms used are no longer clearly applicable. As the Advocate General points out,⁷⁹ for example, the question of whether only parts of a broadcast are protected by copyright has no bearing on the application of rules in the Copyright Directive 2001/29. Indeed, the exact determination of technical aspects of broadcasting may not in the end change the legal and regulatory situation.

The outcome of the case may look like a victory for individuals in the EU, benefitting from free movement. In reality it is more complicated than that. Intellectual property law is based on a principle of territoriality, which conflicts with the creation of an internal market such as that of the EU. The easiest way to avoid the problem would be to move the protection of intellectual property rights to the level of the EU, but this has not happened beyond a limited extent (with for example an EU trademark). Thus there is a need to balance the

different interests protected by different sets of laws. Audiovisual media services law has as one of its aims to ensure that intellectual property—primarily copyright—can be protected also in the audiovisual sphere. This includes as an important component that holders of copyright or neighbouring rights can make money on their works also when these are used in broadcasting. The main way to deal with this is through contracts between the parties involved, with oversight but limited intervention by authorities. The distinction between private viewing and public viewing is important, as in the case of private viewing, the viewer is at the end of the chain and there is no added value from the use of the copyrighted work beyond the value for the broadcast organisation.⁸⁰ In the broadcasting context, the broadcasting organisation will pay for copyrighted works and earn income for such payments through various means such as subscription fees or advertising. The estimation of audiences and potential income for broadcasters is complex, imprecise and changing, but in the absence of any more exact methods a way of approximate estimation has been developed in practice so that it provides guidance on the value of different works. An imperfect but still functioning system to ensure that works reach the audience on reasonable terms will be upset by this judgement and it is not clear that a better system from the viewpoint of end users will be developed, as the rights holders may charge higher prices given that their possibilities to estimate potential audiences are reduced and the buyers—broadcast organisations—will have to recuperate those costs somehow or reduce the number of expensive programmes that they buy. The legislator and regulators could (under current broadcasting law with the principle of accessibility of major works) intervene to some extent, but as any intervention to stipulate maximum prices or similar would harm the income of right holders, it may have other negative effects down the chain.

The Court finds that the estimation of potential audience is still possible even without barriers between Member States, which may be correct, although they appear to underestimate the increased complexity of such estimations if the current system for determining the audience changes. This change comes at a time of reduced income from advertising due to new technologies enabling new ways of watching programmes which have made television advertising less attractive.

⁷⁸ See <http://www.premierleague.com/en-gb/news/news/latest-premier-league-broadcast-rights-deals.html>.

⁷⁹ Para 99 of her Opinion.

⁸⁰ Similar considerations are behind the different rules regarding copyright in relation to copying for private or public purposes, as alluded to in paragraphs 38–40 and 52 of Directive 2001/29.

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