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Foreign Satellite Viewing Cards and English Premier League Football: Implications of Recent Judgments for the Consumer

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ABSTRACT

This article examines the impact of the outcome of a number of recently concluded judicial proceedings in the English courts and at the Court of Justice of the European Union on the use by consumers of foreign satellite television viewing cards. The article observes that while much focus has been placed on the effect of the outcome of the relevant cases on publicans and other commercial entities, not much attention has been placed on potentially serious implications that the cases have for private consumers. The article highlights difficulties with the interpretation adopted in respect of section 297(1) of the Copyright, Designs and Patents Act 1988. In particular the article highlights the dichotomy that while use of a viewing card issued by a satellite television provider based or pursuing economic activities in the European Union is legal, using a similar card issued by an entity based outside the EU could potentially be a criminal act. The article also discusses the impact on consumers of the decision of the courts on the civil law elements relating to copyright infringement and provides a careful analysis of salient elements of the proceedings in both the Court of Justice and the English courts.

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1. INTRODUCTION

The decision of the Court of Justice of the European Communities ('ECJ') in *Football Association Premier League Ltd & Ors v QC Leisure & Ors* and *Karen Murphy v Media Protection Services Ltd*, (1) and the subsequent proceedings in the English courts, (2) have now provided considerable clarification on the question of the lawfulness of screening English Premier League football matches by public houses ('pubs') using foreign (non-UK) satellite TV viewing cards and services. In general, it is now considered lawful for a pub to screen live Premier League football matches by means of a 'foreign' viewing card (also called decoder card) (3) issued by a provider of satellite television services (programme content) based in a Member State of the European Union, as long as care is taken to avoid potential breach of copyright in protected works of the broadcast material other than the football match itself. (4) At present, it would appear to be yet unlawful for a pub to screen Premier League football matches using satellite TV viewing cards issued by providers ordinarily based outside the European Union.

While the focus has been on the situation concerning pubs and publicans, scant attention has been paid to the implications for private consumers using foreign satellite TV viewing cards to watch live English Premier League football matches in a purely domestic (i.e. non-commercial) setting. (5) It is widely considered that the use of foreign viewing cards by private consumers to watch Premier League football is now generally lawful. As

with the case of pubs, this is also seen as pertaining to the use of viewing cards issued by providers based within the European Union. Again as with pubs and publicans, the use of viewing cards issued by providers based outside the European Union to watch Premier League football on the other hand, even by private domestic users, is still potentially an unlawful and even criminal act. When it is borne in mind, however, that motives and considerations for purchase and use of foreign viewing cards can differ significantly as between pubs on the one hand and private consumers on the other this position is undesirable and arguably untenable as will be demonstrated in the following pages of this article.

2. THE COMMERCIAL AND TECHNOLOGICAL BACKGROUND

The football competition based in England and known as the Premier League is organised and run by the Football Association Premier League Ltd ('FAPL') whose members are the various football clubs that participate in the competition. (6) The football matches of the Premier League are filmed and the live broadcast of Premier League football matches is a highly desirable and prime content for satellite television services providers in different parts of the world in light of the recognised global popularity and appeal of the English Premier League.

The FAPL arranges for the filming of each football match and sells the rights to live broadcasting of these matches in special packages to satellite television services providers in the United Kingdom, Europe and other parts of the world. The actual filming of football matches from the football grounds is done on behalf of the FAPL by BSkyB and the 'clean feed' or 'clean live feed' of the filming is sent separately to BSkyB for its own UK broadcasts as UK rights holders (as explained further below) and via the FAPL (7) to the foreign providers for the broadcasts intended for their respective contractual countries or territories. Additional materials are normally added to the feed received by each provider which may include logos and, importantly, commentary. In the case of BSkyB commentary is provided by its own contracted commentators while foreign providers may add commentary in local languages and, crucially for English speaking customers, may also take English language commentary provided by the FAPL (different from the English language commentary used with BSkyB broadcasts).

The rights to broadcast the contracted packages are sold subject to some important conditions including firstly that the broadcasts must be in encrypted format thus restricting the ability to view the broadcasts lawfully to paying customers who are issued with an entitling viewing card for decoding the encrypted signals. A further important condition is that which confines the broadcast rights of each provider to a particular country or territorial region. For example, the principal broadcast rights in the United Kingdom have been sold traditionally to the provider BSkyB. (8) In Europe, the live broadcast rights are generally sold to a provider based in an individual country in relation to broadcast in that particular country (e.g. Sky Italia in Italy, SatBG in Bulgaria etc) while in the Middle East and Africa, rights have been sold occasionally to a particular provider in relation to broadcasts within a number of countries e.g. Orbit Showtime in relation to a number of countries in the Middle East and North Africa and Multichoice (also known as DSTV) in relation to a number of countries in Western and Southern Africa.

Each provider to which live broadcast rights are sold is usually obliged to control access to its broadcasts and to allow access to customers within only the licensed country or countries. The primary method of complying with this obligation is by the issuing of entitling viewing cards supplied to customers on condition that the cards will be used only within the licensed territories. The viewing cards allow customers to decrypt and view the broadcasts, hence their alternative appellation of decoder cards. It is, however, in relation to the use of viewing cards that the technological limits of this form of control and, specifically, of confining the services of a particular provider to the licensed country or countries become exposed. As explained further below, a viewing card issued and stated to be for use in only a particular country (or region/territory) is in fact very much capable of being used in a different country altogether to decrypt and watch encrypted broadcast signals outside and beyond the licensed territory.

The most critical technological issue in relation to the ability of a customer to receive the services of a satellite television provider at all is whether the signals from the specific satellite used by a particular provider to transmit its services can be received in the country or locality of the customer. It is a secondary issue whether or not the broadcast signals are encrypted; it is only if the broadcast signals can be received at all that a viewing card becomes

useful to decrypt an encrypted signal. The extent of reach of the broadcast signals from an individual satellite is called that satellite's 'footprint'. In general the satellite television services provider will seek to use a satellite whose footprint covers its territory of operation adequately. On the other hand, even despite increased use of satellites with very tight footprints, it is still quite rare that the footprint of any satellite (in the traditional C and Ku bands) will be confined exclusively to an individual country. More often than not, the broadcast signals from a satellite can be received in countries neighbouring to a satellite TV provider's territory of operation and, in the case of less tightly shaped or less tightly focused footprints, even much further afield in countries on other continents.

The controversy surrounding the use of foreign viewing cards in the UK to watch the Premier League is in part owed to the fact that reception of broadcast signals primarily aimed at customers in various overseas countries and even in continents other than Europe is possible in the UK. The main requirement is the possession of a suitably sized satellite dish aligned for adequate reception of signals from the appropriate satellite in geostationary orbit. Secondary to this is the possession of an appropriate viewing card which allows the decryption of encrypted broadcast signals. It is necessary to point out that apart from encrypted signals, other signals are often transmitted from such satellites unencrypted or 'free to air' (FTA) and these can be received altogether lawfully without the use of any viewing card at all. Indeed, quite often many private consumers who use adequately sized satellite dishes [\(9\)](#) to receive broadcasts from such overseas targeted satellites do so for the *primary* purpose of receiving programmes transmitted FTA for a range of reasons including genuinely cultural and educational reasons. Additionally, foreign satellite television services providers also supply viewing cards to customers for the purposes of receiving and viewing a range of programming content, other than Premier League football, in respect of which quite often there are no territorial restrictions in the same mould as for Premier League football. [\(10\)](#)

3. THE LEGAL ISSUES

From the point of view of the consumer, the issue of primary concern is whether the use of foreign viewing cards in the UK is in violation of any law and, in particular, whether it amounts at least potentially to a criminal activity. More specifically, the question remains whether the use of a foreign

viewing card issued by a non-EU provider to watch English Premier League (and other) football matches transmitted live from the UK is an offence under section 297(1) of the *Copyright Designs and Patents Act 1988* ('CDPA'). This is the provision that had been deployed to prosecute publicans who screened live Premier League matches with foreign viewing cards in a number of cases pursued predominantly in Magistrates Courts [\(11\)](#) until the seminal case of *Karen Murphy v Media Protection Services Ltd.* [\(12\)](#) That case has the effect, now widely accepted, of decriminalising such use of foreign viewing cards issued by satellite TV service providers based in the European Union. While the prosecutions under section 297(1) CDPA were mainly focused on publicans, the terms of the provisions are not so confined and the language of the provisions mean clearly that section 297(1) CDPA can be used to prosecute private consumers considered to be in violation of the provisions. A second and perhaps less controversial issue is whether private consumers who use foreign viewing cards, whether or not issued by a provider within the European Union, may potentially face civil law liability for breach of copyright. As will be seen in discussions to follow, the effect of the jurisprudence emerging from the recent litigation would seem to indicate that in this particular respect there is much less to worry about for the consumer compared to commercial users like publicans.

4.POTENTIAL CRIMINAL LIABILITY: THE KAREN MURPHY CASE

The primarily crucial provisions in this respect are contained in section 297(1) of the Copyright, Designs and Patents Act 1988 (CDPA) which states: A person who dishonestly receives a programme included in a broadcasting service provided from a place in the United Kingdom with intent to avoid payment of any charge applicable to the reception of the programme commits an offence and is liable on summary conviction to a fine not exceeding level 5 on the standard scale.

As can be seen readily, the provisions of section 297(1) CDPA raise a number of important issues of interpretation. Another significant factor, and which was ultimately determinative in the *Karen Murphy* prosecution, is the effect of provisions of EU law in respect of free movement of goods and services and of competition on the applicability of section 297(1) CDPA. Prior to referring the *Karen Murphy* case to the ECJ on those specific issues, however, the English courts had focused on a determination of the case purely from

the perspective of English law. Nevertheless, even in this respect, the courts could not wholly escape the effect or potential effect of some elements of EU law in respect of the interpretation of the provisions of the section.

In the *Karen Murphy* case the appellant, a publican, had been convicted in the Magistrates Court, under section 297(1) CDPA, of screening two Premier League football matches in the UK using a foreign viewing card originally issued by a Greek satellite television services provider called NOVA, (13) having previously discontinued her subscription to the UK provider BSkyB. Her conviction was initially upheld by the High Court ('Administrative Court'), (14) on further appeal by way of case stated following unsuccessful appeal to the Crown Court, primarily on the English law aspect subject to the subsequent reference to the ECJ on the EU law aspects. (15) A number of the interpretation issues addressed by the court in respect of section 297(1) CDPA are discussed below.

4.1.WHETHER A PROGRAMME INCLUDED IN A BROADCASTING SERVICE IS PROVIDED FROM A PLACE IN THE UNITED KINGDOM

In respect of the interpretation of section 297(1) CDPA, the Administrative Court held that the question whether a programme included in a broadcasting service is provided from a place in the United Kingdom is to be answered by identifying what is 'the programme included in a broadcasting service' and then determining where the broadcasting service is provided from. The court held that the question is not to be determined by reference to the 'Copyright in Satellite Broadcasting Directive'. (16) This followed naturally from the court's conclusion that the provisions of sections 297 and 299(5) of the CDPA were not to be interpreted as if they were passed to implement that Directive or others mentioned in the judgment. (17) The court held further that the meanings of 'programme' and 'broadcast' are to be obtained from section 6 of the CDPA to the considered limited extent imported by section 299(5) of the same legislation. (18) Accordingly, the court held that a programme is 'any item included in a broadcast', that a broadcast itself is 'an electronic transmission of visual images, sounds or other information' while a 'broadcasting service' was held to be not more than a succession of such transmissions. Further in relation to the definition of 'broadcast' in section 6(1), the court held that the core of the transmission received by the appellant 'was transmitted for simultaneous reception by

members of the public and was capable of being lawfully received by them from BSkyB.' (19)

Significantly, in relation to one of the specific questions posed in the case stated, the court held: (a) that the question in each case is to identify the 'programme' received by the defendant and that in the present case, that comprised visuals and ambient sound transmitted from the ground in the UK; (b) that the broadcasting service is the supply of this programme for simultaneous reception by members of the public in the UK; and (c) that the identity of the 'programme' received by the appellant was not changed by the fact that an English commentary, a Greek commentary and a Greek visual logo were added to the programme. The court held further that the UK is the place from which the broadcasting service is provided, being 'the point at which the initial transmission of the programme for ultimate reception by the public took place.' (20)

The decision of the court that the programme received by the appellant was included in a broadcasting service provided from a place in the UK was considerably influenced by its holding that the provisions of the Copyright in Satellite Broadcasting Directive are not relevant. This is reflected in the court's answer to another specific question of the case stated that the issue does not arise whether the feed provided from BSkyB to the FAPL, from the FAPL to Nova and from Nova to the appellant was 'part of a continuous chain of communication' in terms of the provisions of the Directive. More significant in this respect, however, is the width granted to the word 'programme', stemming from its definition in section 6(3) CDPA as '*any item included in a broadcast*', which led to the holding that the programme in the present case was 'the visual and ambient sound transmitted from the ground in the United Kingdom'. Ordinarily, such transmissions which are known as 'feeds', 'live feeds' or 'clean feeds' are not seen as broadcast programmes at all and are truly more appropriately a precursor to a programme to be transmitted. The feeds or clean feeds are not very often intended by satellite television services providers to be broadcast *as such* to the members of the public. Rather, the broadcast programme that goes out, and that is intended for reception by members of the public, is usually a modified, abridged or enhanced version of the clean feed. In other words, other than the width of interpretation of the word 'programme' in the light of section 6(3) CDPA, the programme received by a customer is that in the format transmitted by the

satellite television services provider in the form and manner intended for public consumption. [\(21\)](#)

In the *Karen Murphy* case the feeds supplied to the various broadcasters in the UK and abroad and the transmissions going out from each broadcaster were close to instantaneous because the circumstance involved live broadcasts of football matches. In other instances feeds might be sent to satellite television services providers from the entity filming an event while the transmission to the public of the programme based on the filmed event may take place hours or even days later. In many instances, the clean feeds will not be suitable for public broadcasts until editorial work and polishing have first been done. This factor strengthens the consideration that feeds are not ordinarily programmes intended for public reception as such. [\(22\)](#)

Another significant factor is that the transmissions of each of BSkyB and NOVA based on the original live or clean feed are done from different satellites in geostationary orbit. While BSkyB transmissions are received by its customers from satellites located in the orbital position 28 degrees East, the transmissions of NOVA are received from satellites at 13 degrees East. Moreover, the transmission of the original live or clean feed from the football ground to each of these broadcasters follow different routes altogether going to BSkyB via BT Tower and to foreign broadcasters via a separate satellite link. [\(23\)](#) Another interesting matter is that viewing cards issued by NOVA cannot be used to decode transmissions by BSkyB nor vice versa; this is because these operators use different encryption/decryption systems [\(24\)](#) (Videoguard aka NDS for BSkyB and Irdeto for NOVA).

The explanation that original live or clean feeds are not ordinarily programmes intended for public reception as such is indirectly supported in the judgment of the ECJ in its consideration of the provisions of the Copyright in Satellite Broadcasting Directive and the operations by which a consumer receives the satellite TV signals. The ECJ made a distinction between what it called 'the upstream part of the communication' between the FAPL and the broadcasters concerned on the one hand and, on the other, the transmission of the broadcasts to the public [\(25\)](#) taking the view that the latter operation is 'carried out from the Member State where the programme-carrying signals are introduced into a chain of satellite communication'. The court said further that the upstream part is irrelevant in the particular

consideration and, quite significantly, concluded that the operation of transmission to the public took place in Greece. (26)

Now, it is important to reiterate that the Administrative Court took the view that the Copyright in Satellite Broadcasting Directive was not relevant for the purpose of interpreting section 297(1) CDPA. Nevertheless, the approach to the intrinsic nature and the true source of the transmission received by a customer outlined by the ECJ is worth further consideration by the English courts. (27) Additionally, the Administrative Court itself pointed out that the *Marleasing* (28) principle required a consideration of Directives which impose a relevant requirement on the UK. (29) In this respect, it is possible that a refined version of one of the lines of argument put forward on behalf of the appellant, that the transmissions that she received being from NOVA were not made from a place in the UK, could potentially lead to a reconsideration of the interpretation accorded to the word 'programme'. It may be that greater weight has been placed on the provisions of section 6(3) CDPA than is truly deserved.

4.2. THE ISSUE OF 'DISHONESTY' UNDER SECTION 297(1) CDPA

Another significant element of the definition of the offence provided for in section 297(1) CDPA relates to the issue of 'dishonesty'. In order to prove the offence, it is necessary to prove that the defendant received the programme concerned *dishonestly* and with the intent to avoid payment of a charge applicable to the reception of the programme. This element eventually had the greatest determinative significance in the *Karen Murphy* case because of the effect of European Union law as interpreted by the ECJ following the reference. It is also the final decision on this particular point, following and applying the ruling of the ECJ, which now offers some considerable amount of security for consumers using viewing cards issued by satellite television services providers outside the UK but based within the EU. It is important, however, to understand the interpretation of this element by the English courts in order to be able to set in fuller context the effect of the decision of the ECJ.

According to the terms of section 297(1) CDPA, the element of 'dishonesty' does not stand in isolation but is tied to an intent to avoid the payment of a charge applicable to a programme, that is, to a programme included in a broadcasting service provided from a place in the UK. In the case stated the Crown Court posed the question, in summary, whether the requisite intent

to avoid a charge applicable to the reception of a programme is proved when the defendant paid to receive the programme from a foreign broadcaster but does not pay any fee to any other broadcaster and, specifically, the domestic broadcaster. (30) Indirectly, this element once again touches upon the question of what programme exactly was received, where the broadcasting service is provided from and even who is the broadcaster of the programme. Evidently, if a transmission received from a foreign broadcaster is considered as a programme in its own right different from the transmission received from the domestic broadcaster and also distinguishable from the original live or clean feed on which both transmissions are based, then the programme received by the defendant would not be one broadcast from a place in the UK and the question of dishonesty would not even arise at all. However, as the Administrative Court had held that the programme in this particular case comprised visuals and ambient sounds transmitted from the ground and, additionally, that the transmission from the football ground consisting of sounds and pictures provided to the foreign broadcaster was a broadcast or programme included in a broadcasting service within the meaning of the CDPA, (31) it is indeed a legitimate question whether payment to any authorised and legitimate broadcaster of the 'programme' concerned, foreign or domestic, does not eliminate or exclude an intent, especially a *dishonest* intent, to avoid payment. In other words, since the programme received from the foreign broadcaster has been held to be one broadcast from a place in the UK, and since a payment has been made to receive *that* programme, there is a legitimate question whether there was indeed an 'intent to avoid payment of any charge applicable to the reception of the programme' on the bare face of the provisions of section 297(1) CDPA. This possible line of interpretation was not considered however by the Administrative Court.

On its face, section 297(1) CDPA focuses on payment applicable to the reception of a programme included in a broadcasting service provided from a place in the UK and does not identify the party entitled to the payment or in respect of whom payment is being avoided. The Administrative Court took a straight forward view that if the defendant is aware of a broadcaster with exclusive right in the UK which makes a charge for its broadcasts but the defendant arranges to receive 'its broadcasts' without paying the charge, the requisite intent to avoid a charge is proved. The court said further that payment to a foreign broadcaster who the defendant knows does not have

UK rights is not inconsistent with an intent to avoid the UK broadcasters charge. (32) It is thought that this interpretation is perhaps generous to the UK rights holder and perhaps also rather elastic against the background of the wording of the provisions of section 297(1) CDPA.

It is interesting that in answering another specific question of the case stated, the Administrative Court held in effect that the question of whether either BSKyB (UK rights holder) or the FAPL (owners of the intellectual property rights) were providing or provided a broadcasting service was not really relevant. The court held that the 'question is the identification of the broadcasting service, *not the person responsible for it*'. (33) Nevertheless, the court concluded that both the FAPL and BSKyB were the broadcasters since they had editorial responsibility 'for the composition of schedules of television programmes' in relation to the match transmitted.

It is important to point out that in this context BSKyB is seen as a broadcaster not on the basis that it was the UK rights holder but rather on the basis that it was contracted by the FAPL to do the filming from the football grounds. It is entirely possible that a separate third party entity, e.g. the BBC who has been so contracted in the past, could in future be contracted by the FAPL to do the filming and provide the pictures and ambient sounds from the football ground, transmit those to the FAPL who in turn transmits them to all the rights holders individually, whether UK rights holder or foreign broadcaster. In that event, if the courts holding that the 'programme' received comprised visuals and ambient sounds *transmitted from the ground* remains, then BSKyB as UK rights holder is no more the broadcaster of *that programme* than a foreign broadcaster whose transmissions can be received in the UK. On that basis, it is arguable that payment to a foreign broadcaster is sufficient to evince a lack of an intent to avoid paying the charge for the programme broadcast by the FAPL and the contracted filming entity from a place in the United Kingdom in terms of a strict construction of the provisions of section 297(1) CDPA. Paradoxically, it may also be arguable alternatively that again if the interpretation of 'programme' as the visuals and ambient sounds transmitted from the grounds is maintained then there is actually no charge applicable to that programme as such. Neither the FAPL nor the filming entity, in its capacity as such, charges members of the public for that 'programme'; rather, the charges applicable are those imposed by both

domestic and foreign rights holders pursuant to their broadcast rights and which are due to them in that capacity. (34)

If the line of interpretation suggested in the immediately preceding paragraphs were to be followed, it would mean that a person who pays a foreign broadcaster and, quite significantly, including even a foreign broadcaster not based within the European Union, could not be said to intend to avoid a charge in respect of a programme broadcast from a place in the UK and could not be convicted properly under section 297(1) CDPA. Of further significance is that this conclusion would be reached even without a consideration of the competition law and freedom of movement of goods and services dimensions under European Union law. Such a conclusion would be rather significant against the background of uncertainty that still concerns the use by consumers of foreign satellite cards issued by satellite television services providers based outside the European Union. This uncertainty is a reflection of the outcome of the reference by the Administrative Court to the ECJ in relation to the second part (35) of the appeal in the *Karen Murphy* case on the important issues of European law. As things stand, the result of the application of the decision of the ECJ on the European Union law dimensions is that there will almost certainly exist a dichotomy of approach under section 297(1) CDPA depending on whether the consumer used the services of an EU based foreign broadcaster or of a non-EU foreign broadcaster. This of course would be rather confusing and unsatisfactory from the consumer's point of view. More significantly, it would mean that the finding or a conclusion that a defendant prosecuted under section 297(1) CDPA has a dishonest intent turns on whether the defendant was using a foreign viewing card issued by an EU or non-EU based satellite television services provider. Even more fundamentally the decision of the ECJ, and its subsequent application by the Administrative Court in respect of the second part of the appeal in the *Karen Murphy* case, have a rather more profound effect on the understanding of the dishonesty element under section 297(1) CDPA than might at first appear to be the case.

4.3. IMPACT OF ECJ DECISIONS ON 'DISHONESTY' UNDER SECTION 297(1) CDPA

In the second part of the appeal in the *Karen Murphy* case focusing on the EU law dimensions, (36) the appellant argued inter alia: that the provisions of section 297(1) CDPA cannot be applied to a case like hers because such application would violate the provisions of Article 3(2)(a) and/or (b) of the

Conditional Access Directive (37) and free movement principles of EC law; that the prosecution of the appellant had an equivalent effect to a quantitative restriction on imports of decoder cards and was also a restriction on her ability to receive services from another EU Member State contrary to provisions of EU law on free movement of goods and services; and, that the charge said to be payable to BSkyB under section 297(1) CDPA is only 'applicable' because of territorial licensing arrangements between the FAPL and broadcasters which, by incorporating export restrictions, violate competition rules of EU law. (38)

Starting with the argument based on the Conditional Access Directive, the stated objective of the Directive is 'to approximate provisions in the Member States concerning measures against illicit devices which give unauthorised access to protected services'. (39) The Directive enjoins each Member State to take measures to prohibit on its territory, inter alia, the manufacture, import, distribution, sale, rental, or possession for commercial purposes of 'illicit devices'. (40) On the other hand, the Directive also provides that Member States may not restrict the provision of protected (or associated) services which originate in another Member State or restrict the free movement of conditional access devices, for reasons falling within the field coordinated by the Directive. (41) An 'illicit device' is defined as 'any equipment or software designed or adapted to give access to a protected service in an intelligible form without the authorisation of the service provider.' (42)

It was argued on behalf of the appellant in the *Karen Murphy* case that the foreign viewing card that she used to receive the broadcasts from NOVA was not an illicit device within the meaning of the Conditional Access Directive. The card was not a 'pirate' (43) card but a card of genuine origin having been indeed issued by NOVA, and not even the use of the card in contravention of contractual stipulations (44) makes the card an illicit device. Thus if the card is not an illicit device, to prosecute a person under section 297(1) CDPA for use of such a card 'would be to restrict the free movement of conditional access devices and/or the provision of protected services, contrary to both Article 3(2) and the underlying free movement provisions of the EC Treaty itself.' (45)

In answering the questions posed to it about the Conditional Access Directive, the ECJ held that the wording of the definition of illicit device in Article 2(e) of the Conditional Access Directive is limited solely to equipment

that had been 'the subject of manual or automated operations' before its use and which enables reception of protected services without the consent of the service provider. The court also referred to the explanation of the concept of 'illicit device' in Recitals 6 and 13 of the preamble to the Directive which is to the effect that illicit devices are those which allow access to protected services free of charge or which enable or facilitate the circumvention of any technological measures designed to protect connected remuneration. The court therefore concluded that 'illicit device' under the Conditional Access Directive does not cover foreign decoding devices (issued and marketed by EU service providers) even if they are procured or enabled by the provision of a false name and address or have been used in breach of a contractual stipulation limiting their use to only private purposes. [\(46\)](#)

Additionally, the ECJ ruled in respect of the free movement provisions that national legislation which protects contractual arrangements imposing territorial restrictions, itself restricts the freedom to provide services. [\(47\)](#) The court thus held that Article 56 TFEU 'precludes legislation of a Member State which makes it unlawful to import into and sell and use in that State foreign decoding devices which give access to an encrypted satellite broadcasting service from another Member State that includes subject-matter protected by the legislation of that first State.' [\(48\)](#) Again, in this respect also, the court held further that its conclusion is not affected by the fact that the foreign decoding device has been procured or enabled by the giving of a false identity and false address or that it had been used for commercial purpose contrary to a restriction to private use. [\(49\)](#)

In respect of competition law, the ECJ ruled that an agreement that has the object or effect of preventing, restricting or distorting competition falls within the prohibition in Article 101 TFEU. The court also noted that 'object or effect' are alternative criteria and that it is appropriate to determine whether just the object of an agreement falls within the prohibition. [\(50\)](#) The court then held that an agreement that is designed to prohibit or limit cross-border provision of broadcasting services is deemed to have the object of restricting competition unless it can be shown from other circumstances in the economic and legal context of the agreement that it is not liable to impair competition. [\(51\)](#) In the particular case, the court concluded that the agreements between the FAPL and the broadcasters prohibit cross-border provision of services and no justifying circumstance had been provided that

the agreements are not liable to impair competition and thus do not have an anticompetitive effect. [\(52\)](#)

Following the conclusions and answers provided by the ECJ it was inevitable that the conviction of the appellant by the English courts would no longer stand. Thus, at the resumed hearing before the Administrative Court, the court held: that the appellant's NOVA viewing card was not an illicit device within the meaning of the Conditional Access Directive; that in view of Article 56 TFEU, the provisions of section 297(1) CDPA could not be applied to the appellant's use of the card; and, that the territorial restrictions imposed on the use of NOVA cards were unlawful under EU law. [\(53\)](#)

A very significant aspect of the decision quashing the appellant's conviction at the resumed hearing concerns the Administrative Court's holding on the element of dishonesty. The court held that the 'appellant had paid for her card, she had not avoided any charge applicable to its use and had not acted dishonestly' and that accordingly she had been wrongly convicted and the convictions will be quashed. [\(54\)](#) It is also significant that even prior to the conclusions and answers provided by the ECJ, the Administrative Court itself had expressed some reservation about the propriety of a prosecution under section 297(1) CDPA in these circumstances. In the proceedings by which the court made the reference to the ECJ, the court expressed concern that establishing the important element of 'intent to avoid payment of any charge applicable to the reception of the programme' depended upon the compatibility with EU law of an agreement between parties who were legally strangers to the appellant purchaser and user of the viewing card. The court observed that it seems 'unlikely that the legislature would have envisaged that the applicability of the avoided charge to the programme received by a defendant would be dependent upon something so remote from that defendant's own knowledge.' [\(55\)](#)

Given these aforementioned observations by the Administrative Court, it is a little surprising that these or similar factors were not taken into account in the court's consideration of the first part of the appellant's appeal under English law even without consideration of the EU law dimensions.

Irrespective of the incompatibility of the agreement between the FAPL and the broadcasters with EU law, the parties to the agreement are still legally strangers to the appellant (even her NOVA card was procured through intermediaries) and the content, legal validity and or enforceability generally

of that agreement are still things quite remote from a defendant's knowledge and this would be even more likely to be so if the defendant is an ordinary consumer.

4.4. 'DISHONESTY' UNDER SECTION 297(1) CDPA AND THE USE OF NON-EU PROVIDER CARDS

Now that it is clear that EU law protects a defendant from prosecution under section 297(1) CDPA when using a card issued by a provider based in the EU, the element of a dishonest intent to avoid a charge under the provision is more significant in the context of the use of a foreign viewing card issued by a provider based outside the European Union and deserves proper scrutiny. In the first place, it is not always clear cut that a provider established in a country outside the EU and also with a primary market outside the EU does not have sufficient connection to the EU to bring its viewing cards within the free movement of services provisions of EU law. For example, in *Gregory Turner v Stafford Crown Court* [\(56\)](#) the defendant was convicted under section 297(1) CDPA in connection with the use of a card issued by ART who was then the FAPL's licensee for the Middle East and North Africa. It was argued in his appeal before the Crown Court that the conviction was not lawful under EU law. The Crown Court chose to decide the case on the English law element alone relying on the Administrative Court's decision on that element in the *Karen Murphy* case and, on that basis, upheld the appellant's conviction. On further appeal, however, the conviction was quashed by the High Court (Divisional Court) which held that the Crown Court had been wrong to overlook the potential European law element in the case. The court held that it is fundamental that courts dealing with these and similar issues should include a consideration of the EU law dimension and that the question whether a case involves EU law is in itself a matter which requires consideration of EU law. From the High Court case, it is revealed that the basis on which it was sought to argue the EU law element was that ART (albeit a non-EU entity) 'pursued economic activity' in Italy.

The *Gregory Turner* case underscores the concerns about reaching a conclusion that a defendant had a dishonest intent to avoid an applicable charge based on the consequences of things ordinarily remote to the defendant's knowledge such as contractual arrangements and even the legal or trading status of entities that are legally foreigners to the defendant. Nevertheless, and irrespective of the decision in the *Gregory Turner* case, a person who uses a foreign viewing card issued by a provider based outside

the EU to watch English Premier League football in the UK still runs a risk of possible conviction. (57) As the Administrative Court clarified when making the reference to the ECJ, that a conflict exists between section 297(1) CDPA and EU law does not ipso facto render invalid that primary legislation. Rather, it remains in force and enforceable except to the extent that it must be disapplied in order to remove the conflict with, and to give effect to, the overriding requirements of EC law. (58) Crucially, the court said that 'in other circumstances where EC law is not engaged there is no impediment to prosecutions and convictions under [section] 297(1).' (59) This statement would ordinarily encompass the use of viewing cards issued by a non-EU based provider although the court used the examples of pirate, counterfeit or stolen cards. On the other hand, when quashing the appellant's conviction in the resumed hearing, the court did seem perhaps a little more equivocal. In that instance, the court said that the decision to quash the appellant's conviction does not affect cases relating to counterfeit or stolen viewing cards or illicit devices within the meaning of the Conditional Access Directive. In relation to cards and devices from outside the EU, the court said that these give rise to different considerations and that it was not saying anything further about them as it had not heard any argument about the use of such cards. (60)

In view of the foregoing, while there is clarity regarding the use of viewing cards issued by EU providers, uncertainty still envelops the use of viewing cards issued by providers based outside the EU. On the other hand, the use of viewing cards issued by entities from outside the European Union is quite popular among members of some expatriate communities in the UK as well as satellite hobbyists more generally. These cards are bought for a range of reasons and purposes beyond simply watching English Premier League football or other programmes broadcast from a place in the United Kingdom. The cards enable some to keep in touch with political, economic and cultural events and developments in the originating country or, among satellite hobbyists, to have access to a range of programmes that may not be offered in the UK or simply as alternatives to any available UK offering.

To demonstrate the predicament that a user of a foreign viewing card issued by a non-EU provider may potentially face, one type of example that has been raised may be demonstrated by this scenario: the English football club Manchester United has to play a two leg tie against the Turkish club

Galatasaray; a Turkish resident of the UK with a Turkish card is able to watch the first leg played in Turkey using the Turkish card and with access to commentary in Turkish. This would be entirely legal and there would be no violation of section 297(1) CDPA. On the other hand, if the same Turkish card is used to watch the second leg of the tie played two weeks later, when the pictures and ambient sounds are transmitted from a football ground in the UK, the likelihood is that an offence would be committed under section 297(1) CDPA as things stand.

The example of a card issued by a provider based in Turkey is particularly poignant considering that there is a realistic prospect that Turkey would become a Member State of the European Union at some point in the future. This would then mean effectively that a finding of a dishonest intent to avoid an applicable charge under section 297(1) CDPA could turn on whether Turkey is one day not a Member State of the EU but another day some time later it is. Even if the provider is further afield from the EU, e.g. a Middle East provider, the concern expressed by the Administrative Court about arrangements between strangers to the consumer using the card, the other highlighted concerns about the consumer's possible lack of awareness of the status and trading arrangements of such entities, and the matter of the remoteness of the consumer's knowledge of these things to the issue of a dishonest intent are, arguably, still valid concerns in these circumstances. It is doubtful that the provisions of section 297(1) CDPA were ever intended to deal with the kind of circumstance where a consumer makes payment, quite lawfully, for a legitimate card issued by a legitimate provider. Even considering that some foreign viewing cards have contractual territorial restrictions, it is to be borne in mind in the first place that a consumer may not necessarily even be aware of such restrictions as witnessed for example by the case of ART who issues cards intended for use outside its Middle East base and indeed intended for use by UK and EU consumers. [\(61\)](#) Secondly, it is not an automatic given that such contractual territorial restrictions are legally enforceable even as the cases under discussion have now demonstrated quite clearly. Thirdly, as has been explained, users of foreign viewing cards have a range of reasons including genuinely educational or cultural reasons [\(62\)](#) for the use of these cards and there will certainly be cases where the possibility of watching Premier League football or other programmes transmitted from the UK is simply incidental. [\(63\)](#) In light of

these factors it is considered that the current approach to the interpretation of section 297(1) CDPA under English law, that is even without the EU law elements, calls for a review. This is thought to be the case even despite the Administrative Court's observation at the end of the resumed hearing of the *Karen Murphy* case that it had not been then necessary to consider any effect of the ECJ's judgment on the Administrative Court's finding in relation to the place of broadcast for the purposes of section 297(1) CDPA. [\(64\)](#)

5.POTENTIAL CIVIL LAW LIABILITY: FAPL & ORS V QC LEISURE & ORS

From the consumer perspective, the concern about a potential civil law liability for use of foreign viewing cards relates to whether the possession and use of such cards amount to infringement of copyright. Specifically in this context, the question is whether using such cards to watch Premier League football infringes the protected rights arising out of copyright of interested entities like the FAPL or their licensed broadcasters.

As with the criminal prosecutions pursued by or on behalf of the interested entities, the actions in the civil proceedings were brought against parties alleged to be acting in commercial capacities rather than against consumers or private users of foreign viewing cards. Nevertheless at least one of the headings of the claims pursued by the copyright holders had the potential to make the use of foreign cards even by consumers a potential breach of copyright - if it had been successful.

In the *QC Leisure* case, the infringements of copyright in protected works alleged by the claimants were seen as falling into three categories being of film, artistic, and sound recording and musical works. [\(65\)](#) The headings under which the claimants pursued the claims of infringement of copyright against the various defendants include: [\(66\)](#)

(1) trading in, or being in possession for commercial purposes of, decoder cards designed or adapted to give access to claimants' services without authorisation in breach of section 298 CDPA;

(2) performing, playing or showing protected works in public in breach of section 19 CDPA;

(3) communicating the works to the public in breach of section 20 CDPA;

(4) authorising acts of infringement by supplying decoder cards; (5)

infringement of copyright by creating copies of protected works on decoder boxes and displaying them on TV screens in breach of section 17 CDPA.

Of the five headings of claim listed above, only the fifth had the potential to pose problems for a consumer using a foreign viewing card in entirely private circumstances. Depending on whether the relevant work is musical, broadcast or film (among others), infringement of copyright under the provisions of section 17 could occur as a result of: copying or reproducing the work in any material form including storing it in any medium by electronic means; copying by making a photograph of the whole or any substantial part of any image forming part of a film or broadcast; or, making copies which are transient or are incidental to some other use of the work. On the other hand section 28A CDPA provides that there is no infringement by the making of a temporary copy which is transient or incidental if the other requirements of the section are satisfied.

The interpretation of both sections 17 and 28A CDPA at the trial necessitated consideration of European Union law and especially what the High Court referred to as the 'Copyright and Information Society Directive.'⁽⁶⁷⁾ The court said that section 17 must be construed in conformity with Article 2 of the Directive which requires Member States to introduce a 'reproduction right' in favour of copyright owners by which they have exclusive right to authorise or prohibit temporary or permanent reproduction of their work or broadcasts among other things. The court also observed that section 28A CDPA implements Article 5(1) of the Directive, providing an exception to the reproduction rights in respect of some transient or incidental reproductions.⁽⁶⁸⁾ Eventually, matters of interpretation of the Directive were referred to the ECJ although the High Court expressed its own conclusions or provisional opinions.

The question posed to the ECJ in respect of the interpretation of Article 2 of the Copyright and Information Society Directive reflected the manner of operation of decoder boxes and TV sets while processing broadcast signals for display and viewing. The ECJ was asked whether the reproduction right under the Directive 'extends to the creation of transient sequential fragments of the works within the memory of a satellite decoder and on a television screen which are immediately effaced and replaced by the next fragments.'⁽⁶⁹⁾ To this question the ECJ replied that the reproduction right does indeed extend to transient fragments within the memory of a decoder box or TV screen as long as 'those fragments contain elements which are the expression of the authors' own intellectual creation.'⁽⁷⁰⁾

In respect of the exception to the reproduction right, emanating from Article 5(1) of the Copyright and Information Society Directive, the ECJ concluded that acts of reproduction that are performed within the memory of a decoder and on a TV screen meet the conditions for the exception, which must be interpreted strictly, that such an act must be: temporary; transient or incidental; an integral and essential part of a technological process; for the sole purpose of a lawful use of a work;⁽⁷¹⁾ and, of no independent economic significance. Accordingly, the court concluded that such acts of reproduction may be carried out without the authorisation of the concerned copyright holders. ⁽⁷²⁾ Even more germane from a consumer's perspective, the court ruled that mere reception and visual display of broadcasts containing protected works in private circles is not restricted by either EU or UK legislation and is indeed lawful. ⁽⁷³⁾

In light of the conclusions and answers of the ECJ on the interpretation of Articles 2 and 5 of the Copyright and Information Society Directive and the consequential effect on the interpretation of sections 17 and 28A of the CDPA, it is very much clear that a consumer using a foreign viewing card in entirely private or domestic circumstances is not at much risk of a civil action for infringement of copyright. It is also fair to conclude that it should not matter whether the viewing card is issued by a satellite television services broadcaster based within or outside the European Union. A consumer is only likely to be exposed to risk of civil liability if straying beyond wholly private or domestic use into such areas as performing, playing or showing protected works in public or communicating such works to the public in violation of either section 19 or 20 CDPA. In relation to playing or showing (but not performing) protected works in public, a defendant may be able to raise the defence of free public showing or playing of broadcast under section 72 CDPA. ⁽⁷⁴⁾ The provisions of section 20 CDPA on infringement by communication to the public implement the provisions of Article 3 of the Copyright and Information Society Directive and the ECJ provided answers on matters of interpretation of the latter.

The ECJ stated that each of the expressions 'communication' and 'communication to the public' is to be interpreted broadly. The court ruled that in this context communication refers to any transmission of relevant protected works irrespective of the technical means or process used. Communication to the public on the other hand must involve transmission of

broadcast work to a new public not taken into account by the copyright holder when authorising communication to the original public and must involve transmission of the work to a public not present at the place where the communication originates. Additionally, the court said that it is not irrelevant that a communication is of a profit-making nature. (75)

An indication of what may be considered the limits of private use could be inferred from an observation of the ECJ that when copyright holders authorise the broadcast of their work by communication to the public they envisage 'only the owners of television sets who, either personally or within their own private or family circles, receive the signals and follow the broadcasts.' (76) On this basis it would be reasonable to surmise that a private consumer using a foreign viewing card would ordinarily be able to enjoy the use of the card in the company of family and friends in normal domestic or private settings. (77)

6.CONCLUSION

There is no question that after the judicial decisions in both the English courts and the ECJ, there is greater clarity than previously existed in relation to the use of foreign viewing cards in the UK. While the cases arose primarily in connection with the broadcasts of Premier League football by satellite, their consequences actually extend to all pay-service programmes included in a broadcast service provided from a place in the UK. The cases and their outcomes are therefore of enormous significance for television services providers indeed throughout the European Union and even beyond. They are naturally also quite significant for pubs (78) and entities who deal in the supply of foreign viewing cards.

As far as commercial operators like pubs and viewing card distributors are concerned, while the outcomes of both the ECJ reference and the concluded hearing in the High Court offers enormous relief, there are still areas where care is to be taken. On the one hand, dealing in, or possessing for commercial purposes, a card issued by an EU provider is now lawful since the cards are not illicit devices and thus there is no violation of section 298 CDPA.

Similarly, screening of Premier League football matches per se is not an infringement since there is no copyright in the match itself. On the other hand, certain items included in broadcast material such as an anthem, logos and some other graphics are still either subject or potentially subject to copyright especially when an element of public performance, showing or

communication is involved. (79) This has led to quite amusing developments like the FAPL introducing a more prominent logo and infringement-avoidance suggestions for foreign viewing card users such as turning down the volume of a TV set when the anthem is being played or covering up on-screen logos. More seriously, there is a potential argument whether the screening or playing of at least some such material is not protected against allegations of copyright infringement on the basis that they are merely incidental and whether a deliberate attempt to use such incidental material to interfere with otherwise lawful screening and/or playing is sustainable. (80) A recent development which is also potentially contentious is the emergence of a service to replace broadcasters' on screen logos with other material. (81)

In respect of Premier League football, there has been quite some speculation about what approach the FAPL would adopt for the future selling and licensing of broadcasting rights of Premier League football. For example, there have been suggestions that future licensing may be done on a wider basis like selling pan European rights to a single provider. This of course runs the risk of creating a monopoly operation and the potential of questions about compliance with European Union competition law. Other measures that have been noticed already include reducing some advantages that foreign broadcasters currently enjoy over UK rights holders such as the ability to screen matches kicking off at 3PM on a Saturday which are currently subject to a blackout in the UK. (82)

From a consumer's perspective, while the greater clarity that has emerged especially in relation to criminal liability for using a card issued by a provider based in the EU and copyright infringement is very helpful, the uncertainty and lack of clarity concerning the use of non-EU viewing cards is very undesirable and quite troubling. While the legality or otherwise of using non-EU viewing cards to watch Premier League football and other programmes included in a broadcasting service provided from a place in the UK is not settled finally yet, the effect of the decisions in the *Karen Murphy* case on the English law aspects alone (leaving aside the EU law elements) seems to be that such use of non-EU viewing cards is presently a criminal offence under section 297(1) CDPA.

For the reasons that have been discussed in this article, it is doubtful that section 297(1) CDPA was originally intended to apply to circumstances like

use of a legitimate non-EU card for which a legitimate payment is made rather than to the use of wholly illegal pirate cards and other methods that are intended to receive programmes free of charge without any payment at all. An example like the *Gregory Turner* case where the non-EU provider possibly also "pursues economic activity" within the EU demonstrates the concern about the remoteness of what a user of the card may or may not know about the provider and the element of a dishonest intent under section 297(1) CDPA. (83) Similarly, the example of a two leg tie between Manchester United and Galatasaray where it would be lawful to use a Turkish card to watch the leg played in Turkey but possibly criminal to use the same card to watch the leg played in the UK demonstrates the potential absurdity that could result from using section 297(1) CDPA in this manner. It is not certain whether or when a case will come before the courts that is concerned with the use of a card issued by a provider based outside and who does not pursue economic activity within the EU. Such a case would however be a very interesting one to look forward to and the further clarity that should emerge after such a case is certainly very desirable.

(1) Joined Cases C-403/08 and C-429/08, [2011] EUECJ C-403/08 & [2011] EUECJ C-429/08;
<http://curia.europa.eu/juris/document/document.jsf?text=&docid=110361&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=20941>
5.

(2) *FAPL Ltd & ors v QC Leisure & ors* [2012] EWHC 108 (Ch),
<http://www.bailii.org/ew/cases/EWHC/Ch/2012/108.html>
Karen Murphy v Media Protection Services Ltd [2012] EWHC 466 (Admin),
<http://www.bailii.org/ew/cases/EWHC/Admin/2012/466.html>.

(3) Increasingly, the modern practice is for the satellite television services provider to also supply a satellite decoder or receiver box to which the card is then paired; traditionally, however it was fairly common to use the card supplied by a provider with generic decoder boxes not tied to any particular provider.

(4) See e.g. *FAPL Ltd & ors v QC Leisure & ors*, note 2 above, paras 96-99 per Kitchin LJ.

(5) This is notwithstanding the observation of Burnton LJ (in one of the decisions referring the EC law issues to the ECJ) that the EC law impact 'would clearly also have consequences for consumers throughout the EU, and in particular for the variety and availability of the relevant services to the public and the prices charged for them.' See *Karen Murphy v Media Protection Services Limited* [2008] EWHC 1666 (Admin), para 62(i), <http://www.bailii.org/ew/cases/EWHC/Admin/2008/1666.html>.

(6) See further *FAPL v QC Leisure & Ors* [2008] EWHC 44 (Ch) para 8 per Barling J, <http://www.bailii.org/ew/cases/EWHC/Ch/2008/44.html>; see also note 1, paras 30-39.

(7) The civil law trial touching on these issues provides additional insight into the practise concerning the transmission of the feeds to the different broadcasters. In the case of the foreign broadcasters, the feed supplied is called the 'World Feed' which comprises the 'Clean Live Feed' and additional material including additional graphics, music, additional video sequences and commentary. See *FAPL & ors v QC Leisure & Ors* [2008] EWHC 1411 (Ch) paras 25-29, <http://www.bailii.org/ew/cases/EWHC/Ch/2008/1411.html>.

(8) In recent times, a smaller package of live matches has been sold to a second services provider which has included at different times Setanta, ESPN and, BT.

(9) Such dishes are sometimes referred to colloquially as big ugly dishes or BUDs.

(10) There is indeed an example of a foreign broadcaster (Arab Radio and Television Network or ART) who has, at least in the past, issued different categories of viewing cards with at least one set being authorised for use overseas, including Europe, outside the broadcasters regular territorial areas of operation. See *FAPL Ltd & ors v QC Leisure & ors*, note 2, paras 51, 155-160 per Kitchin J (as he then was).

(11) See e.g. *Gannon v F.A.C.T.* [2006] A20050128 in which the Crown Court even doubted whether its own forum was appropriate for dealing with an appeal from a Magistrates Court on the complex issues involved, <http://law-uk.info/2012/09/gannon-v-fact-2006-a20050128/>; see also D. Geey, 'The Legality of Football Broadcasts in the UK and the Lack of Choice for Publicans in the Premier League Broadcasting Market' (2007) 5(1) *Entertainment and Sports Law Journal* especially paras 24-33.

<http://www2.warwick.ac.uk/fac/soc/law/elj/eslj/issues/volume5/number1>

(12) [Note 2](#) above.

(13) The Greek provider is more widely known by its operating name NOVA, which is also the appellation used by the Administrative Court; the NOVA platform is operated by Multichoice Hellas while the holder of the sub-licence in Greece is NetMed Hellas; these two are related entities. See [note 1](#), para 39.

(14) [2007] EWHC 3091 (Admin),

<http://www.bailii.org/ew/cases/EWHC/Admin/2007/3091.html>.

(15) [Note 14](#) above, paras 46 & 47; the matter was subsequently referred to the ECJ after further hearing in *Karen Murphy v Media Protection Services* [2008] EWHC 1666 (Admin), [note 5](#) above.

(16) Directive 93/83/EEC of 27th September 1993 (on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission). See [note 14](#), paras 35 & 36.

(17) See [note 14](#), para 25. On the other hand, however, the court said that the provisions of the separate s.297A were somewhat amended to accommodate the provisions of another Directive, that is, Directive 98/84/EC otherwise known as the 'Conditional Access Directive'; [note 14](#), para 32.

(18) The court agreed with counsel for the prosecution that s. 299(5) imports into s.297 only the definition of ss 6(1) and 6(1A) CDPA but did also employ the definition of 'programme' in section 6(3); , para 36.

(19) See , para 36.

(20) [Note 14](#) paras 37-38. Having held that section 299(5) only imports the definition in section 6(1) into section 297(1), the court naturally could not then employ the provisions of section 6(4) dealing with the place from which a broadcast is made. Similarly, the court discountenanced the provisions of the Copyright in Satellite Broadcasting Directive (93/83/EC) dealing with 'communication to the public by satellite' on the basis that the Directive is concerned with something different i.e. 'fixing the right by reference to the place from which the programme-carrying signals intended for reception by the public originate.' See [note 14](#), para 28.

(21) This consideration is reflected to some extent in the observations of Kitchin J in the separate civil proceedings, *FAPL v QC Leisure*, though he also concluded that the FAPL is also providing a broadcasting service, drawing from the *Karen Murphy* case in reaching the conclusion. See [note 7](#), para 111 and compare paras 119-127.

(22) As a matter of fact 'feed hunting' is a well known hobby among satellite television technology enthusiasts. In those circles it is considered a thrill to find, especially when transmitted FTA, raw and unedited versions of items intended or being prepared for later broadcast or indeed occasionally even being transmitted live. This could include feeds of unfolding news events, social events or items being prepared by satellite television providers for broadcast at some later stage. One example of a prized feed for satellite television hobbyists and enthusiasts concerned the play *One Man, Two Guvnors* which was 'broadcast to cinemas around the world as a part of the [National Theatre Live](#) programme'

http://en.wikipedia.org/wiki/One_Man,_Two_Guvnors#Live_Broadcast; the unencrypted feeds of this broadcast sent to the cinemas by satellite were picked up serendipitously by rather gleeful hobbyists and enthusiasts, <http://www.satellites.co.uk/forums/topic/149990-interesting-test-loop-on-08w/?hl=%2Bjames+%2Bcorden#entry765531>.

(23) See [note 14](#), para 9; note 7 paras 25-29; it is also worth bearing in mind the further distinction reflected in the civil proceedings that while the feed sent to BSkyB is a version of the clean feed (called the 'Sky Dirty Feed'), the feed sent to foreign broadcasters is the 'World Feed'.

(24) This element did not receive attention in the criminal proceedings before the English courts or in the final ruling of the ECJ. It was however part of the questions referred to the ECJ from the English civil proceedings and was mentioned by Advocate General Kokott when rendering her Opinion in the joined cases before the ECJ. See [2011] EUECJ C-403/08_O, [2011] EUECJ C-429/08_O, para 41A.2(d)

http://www.bailii.org/eu/cases/EUECJ/2011/C42908_O.html.

(25) Incidentally, Kitchin J partly and indirectly makes a similar distinction in the civil proceedings when he commented that the decoder cards issued by the foreign broadcasters give access to those broadcasters' services 'and not (at least directly) to FAPL's World Feed signal.' See , para 101. Even the claimants in the case tacitly acknowledged the possibility of such distinction by claiming that each of NOVA (Greece) and the FAPL is providing a protected service, in respect of the broadcasting of Premier League football, according to terms of the Conditional Access Directive; [note 7](#), paras 107-109.

(26) See [note 1](#), paras 57 & 58.

(27) Interestingly and somewhat tellingly, the Administrative Court itself made the passing comment that the possession of the NOVA viewing card by the appellant 'enabled her to receive and view *programmes originating with the NOVA satellite*'; similarly, question 5 of the case stated alluded to the appellant receiving 'a *programme from NOVA*'. (Both emphases added); see [note 14](#), paras 11 and 42. See also [2012] EWHC 466 (Admin), para 3 ([note 2](#) above). Further, in the proceedings leading to the reference to the ECJ, the Administrative Court observed that if the geographical restriction on the use of NOVA cards is held to be unlawful, it would be questionable whether BSKyB's charge should be treated as "'applicable" to the *Nova programme screened by the Appellant*.' See [note 5](#), para 67 (again, emphasis added).

(28) *Marleasing SA v La Comercial Internacional de Alimentacin SA* (Case C-106/89) [1990] ECR I-

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(29) See [note 14](#), para 26.

[\(30\)](#) Question 5 of the case stated as set out and considered by the Administrative Court; see [note 14](#), paras 42-45.

[\(31\)](#) See [note 14](#), paras 37 & 40-41.

[\(32\)](#) See [note 14](#), paras 42-45.

[\(33\)](#) See [note 14](#), para 39 (emphasis added; not the courts emphasis).

[\(34\)](#) Compare, however, the comments of Kitchin J on a similar point arising under Directive 89/552/EC of 3 October 1989 ('the Television Without Frontiers Directive'); see [note 7](#), paras 120-127.

[\(35\)](#) The Administrative Court expressly made its decision on the first part of the appeal subject to the resolution of the European law issues raised in the second part.

[\(36\)](#) See [note 5](#).

[\(37\)](#) See [note 17](#).

[\(38\)](#) While the arguments on principles and provisions of EU law on free movement and competition were presented before the Administrative Court under the EC Treaty (Articles 28-30, 49 and 81), they were considered by the ECJ under the *Treaty on the Functioning of the European Union* ('TFEU'; Articles 34,36,56 and 101).

[\(39\)](#) Article 1; in this respect, protected services include television broadcasting (as defined in the Television Without Frontiers Directive) provided against remuneration on the basis of conditional access; Article 2 of the Conditional Access Directive.

[\(40\)](#) Articles 3(1) & 4.

[\(41\)](#) Article 3(2)(a)&(b).

[\(42\)](#) Article 2(e)

(43) The Administrative Court noted that it was ultimately common ground that the appeal should proceed on the basis that the decoder card in issue in the case was not a 'pirate' card. The court also took the provisional view that a pirate card is one that 'has not been manufactured and marketed by or on behalf of the relevant service provider, and of which the inherent nature has been adapted or designed to bypass the charging arrangements put in place by the service provider.' See [note 5](#), paras 9 & 34.

(44) The allegation that the decoder card was used in violation of contractual stipulations was in two respects: (a) that it had been used outside Greece as contractually agreed; and, (b) that the type of card possessed by the appellant was the type normally supplied to private domestic users whereas it had been used in a commercial setting to screen football matches in a pub. Additionally, it was also raised that such cards as supplied to the defendant were procured in Greece, by intermediaries rather than the defendant herself, who would use local Greek addresses falsely when the cards were intended for use outside Greece.

(45) [Note 5](#), para 26.

(46) [Note 1](#), paras 64-67, 72 & 211.1.

(47) [Note 1](#), para 88. The court had ruled that where the effect of the relevant national legislation on the free movement of goods aspect of a case is secondary to the freedom to provide services aspect, the legislation is to be assessed from the freedom to provide services aspect. Accordingly, the court considered the national legislation against the background of Article 56 TFEU. See [note 1](#), paras 78-84.

(48) [Note 1](#), para 125. Distinguishing the *Coditel I* case [1980] ECR 147, the court ruled that the restriction prohibiting foreign decoding devices cannot be justified in light of the objective of protecting intellectual property rights; in effect, the restriction did not meet the requirements for justification on the basis that it serves overriding public interest reasons and does not go beyond what is necessary in order to attain the public interest. See [note 1](#), paras 93 and 117.

(49) [Note 1](#), paras 132 & 211.3.

(50) [Note 1](#), para 135.

(51) [Note 1](#), paras 140 & 211.4.

(52) [Note 1](#), paras 142-146.

(53) *Karen Murphy v Media Protection Services Ltd*; [note 2](#), para 9.

(54) *Karen Murphy*; [note 2](#), para 10.

(55) See [note 5](#), para 60.

(56) [2011] EWHC 490 (Admin); see also, L. Madhloom, 'Domestic Courts Taking Account of EU Jurisprudence' (2011) 75(4) *Journal of Criminal Law* 259-263.

(57) It is fair to say that hitherto the focus of the prosecutors has been on publicans and the use of foreign viewing cards in commercial settings. Nevertheless, as has been noted earlier, the provisions of section 297(1) CDPA are not confined to the actions of pubs and publicans or use in a commercial setting; they are wide enough to cover use of foreign viewing cards by consumers and even use in a private and non-commercial setting.

(58) [Note 5](#), paras 63 & 64.

(59) [Note 5](#), para 65.

(60) *Karen Murphy*; [note 2](#), paras 11 & 12.

(61) See [note 10](#).

(62) At the first trial in *FAPL v QC Leisure*, Kitchin J also points out that there is 'a variety of reasonable purposes' for wanting to receive satellite broadcasts from other EU Member States; he outlines a number of examples and, interestingly, one somewhat ironic example is that even Premier League football clubs have installed foreign satellite systems to watch 'match

broadcasts for player analysis and scouting purposes.' See [note 7](#), paras 346 and 371.

[\(63\)](#) It would certainly appear rather absurd that a person who has paid for a legitimate card and can watch a range of programmes and transmission with the card quite lawfully should have to discipline himself by refraining to watch any available Premier League football - or indeed other programmes broadcast from a place in the UK within section 297(1) - in order to avoid committing a crime. See also [note 7](#), para 352.

[\(64\)](#) *Karen Murphy*; [note 2](#), para 14.

[\(65\)](#) See [note 7](#), paras 179-185; note 1, paras 149-152.

[\(66\)](#) See [note 7](#), para 13; note 1, paras 46-48.

[\(67\)](#) Directive 2001/29/EC of 22 May 2001 (on the harmonisation of certain aspects of copyright and related rights in the information society); it was referred to in the ECJ as the 'Copyright Directive'.

[\(68\)](#) [Note 7](#), paras 219 & 236.

[\(69\)](#) [Note 1](#), para 153.

[\(70\)](#) [Note 1](#), para 159. In the High Court, Kitchin J had concluded that copies of a substantial part of the films, musical work and sound recording are not made on the decoder or TV screen while some artistic works are indeed reproduced in full. See [note 7](#), paras 220-235.

[\(71\)](#) Under both Article 5(1) of the Directive and section 28A CDPA, an alternative to the lawful use element is that the sole purpose of the act of copying is to enable a transmission in a network between third parties by an intermediary.

[\(72\)](#) [Note 1](#), paras 161-182.

[\(73\)](#) [Note 1](#), paras 170&171.

(74) See [note 7](#), paras 266-282. Significantly, it has now been held that the defence under s.72(1)(c), in respect of the showing of a film included in a broadcast, remains available to a defendant presently "because the UK has failed to implement" the Copyright and Information Society Directive in that the exception granted in the provision is wider than that granted under Article 5 in respect of the right in Article 3 of the Directive. See *FAPL Ltd & ors v QC Leisure & ors* [2012] EWCA Civ 1708.

(75) See [note 1](#), paras 186-204.

(76) [Note 1](#), para 198.

(77) On the other hand, it is possible to identify situations that are not commercial but yet which are not entirely private. One example would be where a private club or association or, say a working men's club, procures a foreign viewing card for reception of broadcasts on premises used by its members, and possibly their guests, for meetings and social events.

(78) In another respect, a significant recent judicial development has the effect that some publicans who had been convicted similarly to the defendant in the *Murphy* case may possibly have an extra basis for launching an appeal. The convictions of Ms. Murphy and some other publicans in separate cases followed private prosecutions by a private company, MPS, engaged by the FAPL for that purpose. Importantly, especially for some other publicans who yet stand convicted following such prosecutions, another similar prosecution by the MPS has now been dismissed on the basis that when a director of MPS commenced the proceedings, by the laying of information before magistrates, he had acted unlawfully in carrying out a reserved legal activity within the meaning of the Legal Services Act 2007 when neither he nor MPS was authorised or exempt for the purpose. See *Media Protection Services Ltd v Crawford* [2012] EWHC 2373 (Admin), <http://www.bailii.org/ew/cases/EWHC/Admin/2012/2373.html>

(79) See further especially *FAPL Ltd & ors v QC Leisure & ors*, [note 2](#) above.

(80) This line of argument is based on the provisions of Article 5(3)(i) of the Copyright and Information Society Directive and section 31(2) CDPA. See

<http://www.headoflegal.com/2011/10/04/eu-law-2-fa-premier-league-0/>.

Some rudiment of support for the argument is possibly derivable from the generally forceful Opinion of Advocate General Kokott in the ECJ joined cases; see [note 24](#), para 99.

(81) See <http://www.tvadtech.com/>

(82) The FAPL is permitted, though not obliged or mandated, to designate a period of two and half hours in each week when certain football matches are not to be screened on television, pursuant to [Article 48 of the Statutes of the Union des Associations Européennes de Football \(UEFA\)](#); see e.g. [note 7](#), para 23.

(83) See also the Opinion of Advocate General Kokott; [note 24](#), paras 214 & 215.