

wrangling. The question is whether English patent law protects inventions or descriptions of inventions. In *Conor v Angiotech*,¹⁰ Lord Hoffman says the following:

“It is the claimed invention which has to involve an inventive step. The invention means *prima facie* that specified in the claim: see section 125(1) of the 1977 Act.”

This implies that it is the description of the invention that is important, and that it can be conceptualised separately from the invention, whatever amateur philosophy informs us.

Conclusion

Mr Justice Floyd ruled that the Comptroller should not refuse a patent application if there is a reasonable prospect that, should the expert evidence be examined, the underlying theory would be proved true. On the one hand, this article has highlighted problems with the legal reasoning and unexamined philosophical assumptions. On the other hand, it is a sensible and pragmatic ruling—an invention such as the perpetual motion machine would fail because the examiners know it is impossible; however, if there is a reasonable chance that the invention would work in practice, the patent would be granted and it would be for the scientific community and for investors to make up their own minds as to whether the invention would work.

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Copyright and the EC Treaty: music, films and football

 Competition law; Copyright; EC law; Films; Football; Musical works

Introduction

Copyright is not normally considered a “monopoly” right in quite the same way as rights under patents, giving as it does only a right against copying rather than a right against independent creation. Nevertheless, those involved in the authorised distribution of copyright works can often find themselves on the wrong end of a competition claim (or, more typically, counterclaim). Within the European Union, copyright owners and their licensees also find that the exercise of their rights is restricted by the rules on the free movement of goods and, to a lesser extent, the freedom to provide services.

This article considers the interface between copyright and the competition and free movement provisions of the EC Treaty in relation to three particular areas of current interest:

- How should films and recorded music be delivered to consumers across the European Union (considering particularly the *iTunes* case)?
- How should football coverage be delivered to pubs and bars across the European Union (considering particularly the *QC Leisure* and *Murphy* cases)?
- How should copyright collecting societies compete across the European Union (considering particularly the *CISAC* case)?

Films and recorded music

The distribution of films and recorded music across the European Union has been heavily influenced by the rules in the EC Treaty on the free movement of goods and competition law since the 1970s.

Articles 28 and 29 of the EC Treaty generally prohibit quantitative restrictions on imports and exports, and all measures having equivalent effect, between Member States. Such restrictions can be justified for specific purposes laid down by art.30 (such as the protection of industrial and commercial property) or other grounds recognised by the European Court of Justice (ECJ) as “mandatory requirements” (such as the prevention of unfair competition). In order to be justified, however, the restriction in question must not constitute “a means of arbitrary discrimination or a disguised restriction on trade between Member States”.

It has been established since 1971 that arts 28 to 30 preclude copyright owners from objecting to the marketing in one Member State of products which have been distributed by the owner or with the owner’s consent on the territory of another Member State. In *Deutsche Grammophon*, the ECJ held that such a use of copyright “would be repugnant to the essential purpose of the Treaty, which is to unite national markets into a single market”.²

This means that the free movement of goods provisions of the EC Treaty require Member States to apply “Community exhaustion” of copyright. In turn, this enables the parallel trade of goods which allow users to view films and listen to music (such as videos, DVDs, records and CDs).³

The principle of Community exhaustion is supported by art.81 of the EC Treaty, which prohibits anti-competitive agreements, and art.82, which prohibits the abuse of a dominant position. Within the Community, territorial restraints will often be regarded as anti-competitive and this applies to DVDs and CDs as other goods.⁴

2 *Deutsche Grammophon v Metro SB* (78/70) [1971] E.C.R. 487; [1971] C.M.L.R. 631 at [12].

3 For further discussion, see C. Stothers, *Parallel Trade in Europe: Intellectual Property, Competition and Regulatory Law* (Oxford: Hart, 2007), pp.40–74.

4 For instance, see *Deutsche Grammophon* (78/70) at [5]–[6] & [15]–[19]; Commission Decision 72/480 *WEA-Filipacchi Music* [1972] OJ L303/52; Commission Decision 76/915 *Miller International* [1976] OJ L357/40; and *Miller International Schallplatten GmbH v Commission* (19/77) [1978] E.C.R. 131; [1978] 2 C.M.L.R. 334; *BIEM-IFPI*, “Thirteenth Report on Competition Policy” (1983), points 147–150; and Decision 98-D-76 *French Record Companies* (French Conseil de la Concurrence) BOCCRF 6/1999, upheld by the Court of Appeal BOCCRF 19/1999; OFT391 *Wholesale Supply of Compact Discs* (UK OFT, September 2002), paras 5.2–5.4 and C.9–C.14.

10 *Conor Mediasystems Inc v (1) Angiotech Pharmaceuticals Inc* (2) *British Columbia University* [2008] UKHL 49 at [17].

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However, not all aspects of copyright are exhausted by the sale in the EC of a product which can be used to produce the copyright work. The ECJ has held that it is compatible with the EC Treaty to grant copyright owners the exclusive right to play music in public, even where the records used to do so were obtained in another Member State.⁵ Similarly, copyright owners can be granted the exclusive right to authorise rental of films⁶ and the territorial licensing of the rights to distribute films is generally considered acceptable.⁷

However, methods of distributing films and recorded music to consumers are changing rapidly, as increasingly consumers are downloading them from sites on the internet (such as Apple's iTunes site). This means that there are no longer physical goods being distributed in which copyright can be exhausted. A concern has been raised by consumer groups that this may lead to an increase in differentiation of prices between countries. In particular, complaints have been made that the territorial restrictions of iTunes are anti-competitive.

In September 2004, Which? (formerly known as the Consumers' Association) complained to the UK competition authority, the Office of Fair Trading (OFT), that Apple's iTunes service discriminated on price according to the user's country of residence and that UK users were unable to benefit from cheaper prices charged on other European iTunes sites, as access to sites serving other countries was barred to non-residents.⁸

Which? pointed out that iTunes was charging UK consumers 79 pence (then approximately 120 euro cents) to download one track, whereas in both France and Germany the cost was just 99 euro cents, leaving UK consumers to pay a price differential of around 20 per cent more for an identical service.

Which? also noted that the iTunes service was set up in a way that prevented most UK consumers from taking advantage of the cheaper download service offered to the French and German consumers, because UK consumers needed to have a registered address and payment mechanism in France or Germany to access the service in those countries.

Which? had asked Apple to justify the price differential and was told that:

"The underlying economic model in each country has an impact on how we price our track downloads. That's not unusual, look at the price of CDs in the US versus the

UK. We believe the real comparison to be made is with the price of other track downloads in the UK."

The OFT decided in December 2004 that the European Commission was better placed to consider this matter, in particular as Apple iTunes operates in more than three EC Member States. In addition, the OFT considered that the Commission was in a better position fully to address the issues raised by Which? in the context of wider single market issues relating to how the online exploitation of music is licensed across Europe.

The Commission's investigation focused on whether there was a breach of art.81 due to agreements between Apple and the record companies leading to the territorial restrictions. However, in January 2008, the Commission issued a press release indicating that it did not intend to take any further action in the case.

In relation to the first aspect of Which?'s complaint, the Commission noted that Apple had announced that it would "equalise prices for downloads of songs from its iTunes online store in Europe within the next six months". In fact, the normal price to download a song on iTunes has remained 79 pence in the United Kingdom and 99 euro cents in France and Germany. However, the price differential has changed as a result of currency fluctuations. It had already fallen from 20 per cent at the time of Which?'s complaint in September 2004 to 10 per cent by the time of the Commission's press release in January 2008. By January 2009, the sterling-euro exchange rate had dropped even further so that 79 pence equated to less than 90 euro cents. Therefore, song downloads from iTunes have become around 10 per cent cheaper in the United Kingdom than in France or Germany.

The Commission investigation had also:

"... clarified that it is not agreements between Apple and the major record companies which determine how the iTunes store is organised in Europe... Rather, the structure of the iTunes store is chosen by Apple to take into account the country-specific aspects of copyright laws."

The Commission said that it was "very much in favour of solutions which would allow consumers to buy off the iTunes' online store without restrictions", but that it was:

"... aware that some record companies, publishers and collecting societies still apply licensing practices which can make it difficult for iTunes to operate stores accessible for a European consumer anywhere in the EU."

It is now French and German consumers who will wish to purchase songs from the UK iTunes site. However, in the light of the Commission's press release, it seems unlikely that the Commission will wish to take action against Apple under the competition law provisions for restricting such purchases. Equally, it seems unlikely that consumers could rely on the free movement provisions as those provisions are directed against Member States and not private parties.

One possible alternative approach lies in art.20(2) of the Services Directive.⁹ Article 20 reads in full:

9 Directive 2006/123 [2006] OJ L376/36.

5 *Basset v SACEM* (402/85) [1987] E.C.R. 1747; [1987] 3 C.M.L.R. 173; and *Ministère Public v Jean-Louis Tournier* (395/87) [1989] E.C.R. 2521; [1991] 4 C.M.L.R. 248.

6 *Warner Bros v Christiansen* (158/86) [1988] E.C.R. 2605; [1990] 3 C.M.L.R. 684; *Metronome Musik GmbH v Music Point Hokamp GmbH* (C-200/96) [1998] E.C.R. I-1953; [1998] 3 C.M.L.R. 919; and *Foreningen af Danske Videogramdistributører v Laserdisken* (C-61/97) [1998] E.C.R. I-5171; [1999] 1 C.M.L.R. 1297.

7 *Coditel v Ciné Vog Films SA (Coditel I)* (62/79) [1980] E.C.R. 881; and *Coditel v Ciné Vog Films SA (Coditel II)* (262/81) [1982] E.C.R. 3381; [1983] 1 C.M.L.R. 49. However, see the restrictions on this for satellite broadcasts and cable retransmission resulting from Directive 93/83 [1993] OJ L248/15 (the Satellites and Copyright Directive).

8 Which? Press release of September 15, 2004; OFT press release of December 3, 2004; and Commission press release IP/08/22 of January 9, 2008.

“Article 20

Non-discrimination

1. Member States shall ensure that the recipient is not made subject to discriminatory requirements based on his nationality or place of residence.
2. Member States shall ensure that the general conditions of access to a service, which are made available to the public at large by the provider, do not contain discriminatory provisions relating to the nationality or place of residence of the recipient, but without precluding the possibility of providing for differences in the conditions of access where those differences are directly justified by objective criteria.”

This Directive does not need to be implemented by Member States until December 28, 2009, but may be implemented earlier by some Member States.

eBay has argued that this article will mean that “consumers may not be charged a higher price for access to a service on ground[s] of their nationality or place of residence” and that service providers will be prohibited from:

“Refusing to serve nationals residing in certain Member States on the grounds of their nationality or residence. For example, where a British user cannot purchase digital content from a German or French website unless he possesses a German or French credit card.”¹⁰

If that is correct, then if iTunes wishes to stop consumers from using its websites in Member States other than their own it will need to justify this restriction objectively. One possible justification may be based on the licensing practices of record companies, publishers and collecting societies, as mentioned by the Commission in its press release. Alternatively, it may be argued that iTunes provides an audio-visual service which is excluded from the scope of the Directive under art.2(2)(g) for audio-visual services.

More broadly, the tension between the traditional territoriality of copyright protection and the legal and political imperatives of the internal market is likely to continue in this field over the coming years, as the growth of internet distribution renders much of the ECJ’s existing case law on the internal market largely irrelevant in the field of copyright.

Football coverage

A quite separate question arises in relation to the delivery of live football coverage, both to individual consumers and to pubs and bars. This has recently led to two references to the ECJ by the English High Court.

The Football Association Premier League (FAPL) organises the filming of football matches in the English Premier League, which is the top English football league (comprising 20 teams). It grants exclusive licences on a territorial basis to broadcast these matches. In the United Kingdom, the exclusive licensee is BSkyB. The rights were sublicensed at the relevant time in Greece to NetMed Hellas, which broadcast on the NOVA platform, and in the Middle East and North Africa

to Arab Media Corporation, which broadcast on the ART platform. All of the broadcasts could be received in the United Kingdom, but, as the broadcasts were encrypted, they could only be viewed by using the relevant decoders.

The first case, *The Football Association Premier League Ltd v QC Leisure*,¹¹ involves civil claims for copyright infringement and possession of unauthorised decoders. It comprises three separate actions. The first two were brought against individuals supplying pubs in the United Kingdom with NOVA decoders from Greece and ART decoders from the Middle East and North Africa (i.e. from outside the European Community). The third action was brought against the owners or landlords of four pubs which had used ART decoder cards to screen Premier League matches. The case was heard by Kitchin J.

The second case, *Karen Murphy v Media Protection Services Ltd*,¹² involves a criminal prosecution for dishonestly receiving a broadcast programme with intent to avoid payment. It was brought against Ms Murphy, a landlord of a pub who had used NOVA decoders (acquired from one of the defendants in the civil action) to screen two Premier League matches. She was convicted and fined by the Portsmouth magistrates and her appeal was rejected by the Crown Court, but she appealed again to the High Court by way of case stated, where it was heard by Stanley Burnton L.J. and Barling J.

There were a broad range of factual findings made by the courts before the references were made to the ECJ. In addition, the judges explained in detail the way in which they thought the references should be answered, which in general would be in a way favourable to the defendants.

The references

In the first case a total of 10 questions were referred (in fact, 29 sub-questions) and in the second case a further eight questions were referred (in fact, 16 sub-questions). The ECJ has ordered that the cases be joined, but has refused to make them the subject of an accelerated procedure.¹³

Faced with this barrage of questions, the ECJ is unlikely to answer every single question. Instead, it is likely to rephrase the questions into more manageable groups.

A similar approach will be taken in the remainder of this article, which will consider some of the key EC issues before the ECJ. These are whether the defendants can rely on the EC Treaty provisions on:

11 *Football Association Premier League Ltd v QC Leisure* [2008] EWHC 1411 (Ch), referred as Case C-403/08 [2008] OJ C301/19. See also the earlier judgment at [2008] EWHC 44 (Ch), refusing summary judgment or a stay in respect of the defence under art.81 of the EC Treaty, and the later judgment at [2008] EWHC 2897 (Ch), allowing various parties to be joined as claimants to allow them to make submissions to the ECJ.

12 *Karen Murphy v Media Protection Services Ltd* [2008] EWHC 1666 (Admin), referred as Case C-429/08 [2008] OJ C301/26. See also the earlier judgment at [2007] EWHC 3091 (Admin), dismissing the appeal save as to points of EC law. Media Protection Services brought the prosecution as FAPL’s agent.

13 Order of the President of the Court, December 3, 2008.

10 eBay, “Empowering Consumers by Promoting Access to the 21st Century Market: A Call for Action” (June 24, 2008), pp.39–41.

- the free movement of goods;
- the freedom to provide services; or
- competition.

EC Treaty provisions are unlikely to assist the defendants in relation to the ART decoders as these were not put on the market in a Member State. Some similar provisions can be found in the Euro-Mediterranean Association Agreements,¹⁴ but these are more restricted in scope than the EC Treaty and there are insufficient facts in the judgments to consider whether they might provide a defence.

The issue of copyright infringement by transient copying in the decoder and on the television screen is not discussed in this article.¹⁵

Free movement of goods

The relevant provisions have already been discussed in this article. In addition, the ECJ has specifically held that:

“... requirements relating to the free movement of goods and the freedom to provide services and those deriving from the observance of copyright must be reconciled in such a way that the copyright owners, or the societies empowered to act as their agents, may invoke their exclusive rights in order to require the payment of royalties for music played in public by means of a sound-recording, even though the marketing of that recording cannot give rise to the charging of any royalty in the country where the music is played in public.”¹⁶

The free movement of goods argument is at the core of this case, but does not appear to have been fully ventilated yet by either side. Nevertheless, the outcome of this argument could have profound implications not only for football and satellite broadcasting, but also for other sectors, particularly electronic distribution of software, music and film.

An analogy was drawn by the defendants with DVDs.¹⁷ If the copyright owners had sold DVDs containing a recording of the football matches in question in Greece, or had granted an exclusive licence for a third party to do so, then on the basis of Community exhaustion they could not have objected to the resale of those DVDs in the United Kingdom.

Although this analogy is incomplete, the question which arises is whether decoders can be distinguished from DVDs such that restrictions on the free movement of the decoders can be justified. This issue was principally considered by the English Court under the Conditional Access Directive¹⁸ and the free movement rules were only mentioned in passing.¹⁹ With respect, this is the wrong order. The Conditional Access Directive must be interpreted to comply with the EC

Treaty and, if it cannot, the Directive will be wholly or partially invalid.²⁰

In broad terms, there are three potential justifications for restricting the free movement of the decoders which have been raised by FAPL:

- contract—there are territorial limitations in the licences granted by FAPL and in the contracts between NOVA and the Greek subscribers;
- copyright—use of Greek decoders to show matches in English pubs would infringe FAPL’s copyright; and
- the Conditional Access Directive—Greek decoders are unauthorised, and thus “illicit”, in the United Kingdom.

These will now be considered in turn.

Contract

FAPL and its licensees had not authorised the use of the Greek decoders in the United Kingdom, whether explicitly or implicitly.²¹

Indeed, FAPL’s sublicensee in Greece, Netmed, had undertaken that:

“... no device (including but not limited to any ‘smart card’ and/or any decoding equipment which is necessary to decode or encrypt any such Transmission) ... shall be knowingly authorised or enabled by or with the authority of the Licensee and/or any Permitted Sub-Licensee and/or any distributor, agent or employee of the Licensee or any Permitted Sub-Licensee so as to permit any person to view any such Transmission outside [Greece] in an intelligible form.”

As Kitchin J. found: “In practical terms NetMed was therefore prohibited from supplying NOVA decoder cards for use outside Greece.”²²

However, the distributors and landlords in the United Kingdom had not entered into any contracts with FAPL or its licensees. Therefore, even if the territorial restrictions in the licence are enforceable under competition law (which will be considered further below), they cannot be enforced directly against those users.

The question is therefore whether breach of the licence terms can be relied upon by FAPL as the basis of some other action against the users.

As a general rule, the breach of contractual restrictions does not prevent the application of Community exhaustion of intellectual property rights, provided that the good in question was put on the market by or with the consent of the right holder.²³ For instance, if FAPL had sold DVDs in Greece with contractual restrictions

14 For instance, those with Tunisia [1998] OJ L97/2, Morocco [2000] OJ L70/2, Jordan [2002] OJ L129/3 or Egypt [2004] OJ L304/39.

15 *QC Leisure* at [215]–[244].

16 *Ministère Public v Tournier* (395/87) at [13].

17 *QC Leisure* at [303]; and *Murphy* at [40].

18 Directive 98/84 [1998] OJ L320/54.

19 *QC Leisure* at [56]–[99] (Conditional Access Directive) and [330]–[333] (free movement of goods).

20 See, for instance, *Gaston Schul v Inspecteur der Invoerrechten* (15/81) [1982] E.C.R. 1409; [1982] 3 C.M.L.R. 229 at [41]–[44]. More broadly, see Oliver, “Free Movement of Goods in the European Community”, 4th edn (London: Sweet & Maxwell, 2003), paras 4.10–4.25.

21 *QC Leisure* at [138]–[144].

22 *QC Leisure* at [35]–[36].

23 See *Peak Holding v Axolin-Elinor* (C-16/03) [2004] E.C.R. I-11313; [2005] 1 C.M.L.R. 45 at [50]–[56] and the Commission’s Green Paper on “Copyright and the Challenge of Technology” COM(88) 172, para.4.4.2. On the question of consent, see AG’s Opinion in *Copad SA v Christian Dior Couture SA* (C-59/08) December 3, 2008, not yet reported.

prohibiting resale outside Greece, then the intellectual property rights in those DVDs would still have been exhausted.

The ECJ has also held that the enforcement of other laws based on the breach of contractual territorial restrictions is likely to be limited by art.28. For instance, in *Dansk Supermarked v Imerco*,²⁴ a group of Danish hardware merchants (Imerco) commissioned a china service from a UK manufacturer. The manufacturer was permitted to market substandard pieces in the United Kingdom, but could not export them to Denmark. Inevitably, some of the substandard china was acquired by a Danish supermarket which offered it for sale in Denmark. Imerco sought to rely on the Danish law on marketing, claiming that this was an improper or unfair commercial practice. However, the ECJ applied art.28 and held that the importation itself could not as such be regarded as such a practice and that the agreement to prohibit export to Denmark could not be relied upon or taken into consideration in order to classify the importation as improper or unfair.

As a consequence, the ECJ is unlikely to be persuaded that the breaches of the territorial limitations in the licences constitute sufficient justification to restrict the free movement of the Greek decoders.

Copyright

Copyright infringement seems a more promising basis on which FAPL could seek to restrict the free movement of the decoders. As already indicated, the analogy between decoders and DVDs was left incomplete. The defendants did not simply want to import and resell the decoders. They also wanted to use them to show football matches to audiences in pubs.

FAPL is not trying to prohibit the importation and resale of genuine decoders on the basis that the decoders themselves infringe any intellectual property rights. It would of course be precluded from doing so on the basis of Community exhaustion, just as it could not prohibit the importation of genuine DVDs put on the market in Greece.

However, FAPL is arguing that the use of Greek decoders to show matches in English pubs infringes its copyright. For the purposes of the free movement provisions, it probably also needs to demonstrate that other uses of the decoders in the United Kingdom, such as by private individuals, would infringe that copyright too.

The right to show copyright works in public is the sort of right which the ECJ has typically held is not exhausted, even by sale of that right in another Member State. In addition, in making the references, the High Court found that the NOVA decoder cards were issued to domestic customers in Greece and not the more expensive cards issued to commercial customers in Greece (such as pubs or bars),²⁵ and so the right to show

in public had not even been sold in Greece. Together, these factors would normally suggest that FAPL should succeed before the ECJ under arts 28 to 30.

However, the right to control showing copyright and related right works to the public, such as in a pub, has only partially been harmonised by EC legislation and FAPL's rights under EC law are relatively limited.

Under the Information Society Directive,²⁶ authors of copyright works and related rights were given a right of "communication to the public". However, according to recitals 23 and 24, these rights are limited to "communication to the public not present at the place where the communication originates". Showing a football match in a pub therefore does not constitute "communication to the public" by the landlord for the purposes of the Information Society Directive.²⁷

Under the Rental Rights Directive,²⁸ limited rights to control or be remunerated for "communication to the public" were given to performers, phonogram producers and broadcasting organisations. Although "communication to the public" under this Directive would cover showing in a pub, the right is limited in the case of broadcasting organisations to communications which are "made in places accessible to the public against payment of an entrance fee". This limitation is found in art.13 of the Rome Convention 1961.²⁹

Under EC law, therefore, broadcasters only have the right to prohibit showing of their broadcasts where there is an entrance fee in place. In *QC Leisure*, it was accepted during the course of the trial that there was no entrance fee to watch the matches at the pubs in question.³⁰

In the absence of further harmonisation at an EC level, the question of whether FAPL has the exclusive right to show broadcasts of its football matches in pubs is thus one of UK domestic law.

Under s.19(1) of the Copyright, Designs and Patents Act 1988 (CDPA), the copyright owner has the right to restrict performance of a literary, dramatic or musical work in public. Under s.19(3) of the CDPA, the copyright owner has the right to restrict playing or showing a sound recording, film or broadcast in public. On this basis, FAPL could prohibit the showing of its football matches in a pub from a DVD and apparently from a satellite broadcast.

However, s.72 of the CDPA provides a defence that there is no infringement of the rights in a broadcast where it is shown in public to an audience who have not paid for admission (as in Directive 2006/115). Moreover, this defence extends to the rights in any underlying film or sound recording (except recordings of music whose author is different to the author of the broadcast).³¹ It does not explicitly extend to any

²⁴ *Dansk Supermarked v Imerco* (58/80) [1981] E.C.R. 181. For the outcome of the case when it returned to Denmark, see D. Keeling, *Intellectual Property Rights in EU Law: Volume I: Free Movement and Competition Law* (Oxford: Oxford University Press, 2003), pp.222–225.

²⁵ *QC Leisure* at [145]–[146], noted in *Murphy v Media Protection Services Ltd* at [16].

²⁶ Directive 2001/29 [2001] OJ L167/10, art.3.

²⁷ *QC Leisure* at [262].

²⁸ Directive 2006/115 [2006] OJ L376, art.8. This codified Directive 92/100 [1992] OJ L346/61, art.8, as of January 16, 2007.

²⁹ International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, 496 UNTS 43. See also TRIPs, art.14(3) and (6).

³⁰ *QC Leisure* at [267].

³¹ The exclusion of certain music recordings was introduced by the Copyright and Related Rights Regulations 2003, SI 2003/2494, r.21, which implemented the Information Society Directive.

underlying literary, musical or dramatic works and Kitchin J. held that it does not do so implicitly.³²

FAPL alleged that there was infringement of copyright in 25 separate works: 12 artistic works, 11 films, one musical work and one sound recording.³³ However, there could be no infringement of the artistic works under s.19 and no infringement of films which were broadcast under s.72.³⁴ Therefore, the only issue was in relation to the musical work and sound recording. These both related to the Premier League Anthem, which was played during various pre-recorded films (such as the opening sequence, match highlights and previous highlights) and was played live at the grounds during the player line-up before the start of the matches.

Kitchin J. held that, under s.5B of the CDPA, no separate infringement action could be brought in relation to the use of the sound recording of the anthem during the films.³⁵ He also held that the anthem was only incidentally included during the player line-up, as the intention was to broadcast the sound from the grounds rather than specifically the anthem. Therefore, the incidental inclusion defence under s.31 of the CDPA applied.³⁶

Therefore, the only copyright which could be infringed was in the musical work underlying the anthem when used during pre-recorded films. Kitchin J. held that there was insufficient evidence in the specific cases before him to show that the volume had been on when the Anthem was played in the pubs.³⁷ However, he also held that if the volume was on, then this copyright would be infringed.³⁸

Kitchin J. accepted that the anthem was “not [an] important [aspect] of the broadcasts so far as the defendants are concerned”, noting that several of the defendants had offered to turn the volume off when the anthem was played.³⁹ He therefore referred the following question:

“Do Articles 28 and 30 or 49 of the EC Treaty preclude enforcement of a provision of national copyright law which makes it unlawful to perform or play in public a musical work where that work is included in a protected services which is accessed and played in public by use of a satellite decoder card where that card has been issued by the service provider in another Member State on the condition that the decoder card is only authorised for use in that other Member State? Does it make a difference if the musical work is an unimportant element of the protected service as a whole and the showing or playing in public of the other elements of the service are not prevented by national copyright law?”

In the light of its previous case law, it is unlikely that the ECJ will hold that arts 28 and 30 preclude enforcement of the UK law. In fact, broader rights for copyright owners to prevent showing films to the public would almost certainly be acceptable under the free movement

provisions of the EC Treaty. Copyright in this field has not yet been harmonised at an EC level, save that the rights of broadcast organisations are limited to public showings for which an entrance fee is charged. The “problem” raised by Kitchin J. is due to the fact that UK law has drawn a peculiar division in s.72 between broadcasts and films and underlying copyright works. Pending harmonising EC legislation, however, the solution lies with the UK legislature (or judiciary) rather than the ECJ.

Nevertheless, that is unlikely to be the end of the matter. Although some uses of the decoders in pubs will result in copyright infringement, this does not mean that use of the decoders by private individuals (who are not showing broadcasts to the public) will infringe. It is hard to see how such use could infringe FAPL’s copyright.

Therefore, although certain uses of Greek decoders in the United Kingdom could infringe FAPL’s copyright, there would also be many non-infringing uses. On that basis, the ECJ is unlikely to accept possible copyright infringement as a justification to prevent the free movement of the decoders, use of such decoders in the United Kingdom would as not necessarily infringe the FAPL’s copyright.

The Conditional Access Directive

The third possible justification for permitting a restriction on the free movement of decoders would be that decoders are to be treated as “illicit” for the purposes of the Conditional Access Directive if outside the Member State for which they are authorised.

This issue was considered in detail by Kitchin J.⁴⁰ All parties agreed that the term “illicit” would cover entirely unauthorised decoders, but they disagreed as to whether it would also cover decoders used outside the territory for which they were authorised. After considering the arguments on both sides, Kitchin J. decided that the question would have to be referred to the ECJ. However, he also indicated that in his view the arguments of the defendants were to be preferred and that the decoders in question were not “illicit”.

On balance, this view is likely to be followed by the ECJ. The ECJ is likely to require that any restriction on the free movement of goods introduced by a Directive be explicit, and this is not the case in the Conditional Access Directive. Even if the Directive were clear, the ECJ would then have to consider whether that restriction was compatible with the EC Treaty itself. The ECJ is therefore likely to prefer an interpretation which only restricts the movement of entirely unauthorised decoders.

Conclusions on free movement of goods

In conclusion, none of the three potential justifications for restricting the free movement of the decoders which have been raised by FAPL is likely to be accepted by the ECJ. Therefore, the ECJ is likely to take the view that permitting an action for possession of unauthorised decoders in the circumstances of these cases would breach the EC Treaty provisions on the free movement of goods. It is therefore likely to interpret the

³² *QC Leisure* at [269]–[279].

³³ There was apparently no allegation of infringement of the copyright in the commentary as a literary work.

³⁴ *QC Leisure* at [265]–[267].

³⁵ *QC Leisure* at [198] & [268].

³⁶ *QC Leisure* at [198]–[202] & [204].

³⁷ *QC Leisure* at [214].

³⁸ *QC Leisure* at [269]–[279].

³⁹ *QC Leisure* at [279] & [334].

⁴⁰ *QC Leisure* at [66]–[99].

Conditional Access Directive restrictively to avoid that result.

However, this does not mean that the FAPL's present licensing scheme is entirely unsustainable. A prosecution for dishonestly receiving a broadcast programme with intent to avoid payment is probably prevented by the free movement provisions if it is brought simply on the basis that decoders are being used in the United Kingdom rather than in Greece. However, there is a separate question of whether commercial use of decoders authorised for domestic use only can be regarded as dishonest. Such a provision is likely to be accepted as a justifiable restriction, so long as it applies to decoders regardless of where they were put on the market. Equally, were the United Kingdom to introduce broader protection for copyright works used in live broadcasts of football matches, then such protection would be likely to be acceptable under the free movement rules.

Unfortunately, the truly interesting question for the EC lawyer, namely whether it is permissible to use in the United Kingdom decoders authorised for commercial use in Greece, will almost certainly be left open by the ECJ as the question does not arise on the facts before the court.

Freedom to provide services

Article 49 of the EC Treaty is perhaps less frequently considered by intellectual property lawyers and the relevant paragraph should therefore be set out in full:

“Article 49

Within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.”

The defendants argued that the relief sought by the claimants:

“... would amount to a restriction on the freedom of foreign broadcasters to provide services and the freedom of customers to receive those services contrary to Article 49”.⁴¹

However, this appears to be very much a secondary argument to that on the free movement of goods.

As with the free movement of goods, there appear to be three sets of restrictions which could be said to limit the ability of pub landlords in the United Kingdom to show football matches using Greek decoders: contract, copyright and the Conditional Access Directive. Again, these will be considered in turn.

First, the Greek sublicensee refuses to provide UK landlords with Greek decoders, as a result of the territorial restrictions in its licence. However, art.49 does not impose a general obligation on service providers to provide services to anyone who asks for them. In addition, although art.20(2) of the Services Directive⁴² will require Member States to ensure

that recipients of services are not made subject to discriminatory requirements based on their nationality or place of residence, under art.2(2)(g) this does not apply to audiovisual services. Therefore, the contractual restrictions are unlikely to be problematic under art.49.

Secondly, even if the UK landlords obtain the decoders, FAPL wishes to enforce its exclusive right to show broadcasts of its matches in pubs in the United Kingdom. As discussed above in relation to arts 28 to 30, FAPL's rights under copyright appear limited. However, it seems unlikely that art.49 would preclude enforcement by FAPL of such rights as it has. FAPL rightly relies on the ECJ's judgment in *Coditel I*,⁴³ which held that, where the copyright owner was entitled to demand fees for the showing or performance of films, it could do so on a geographically limited basis. Although the defendants sought to distinguish the case on the basis that they had purchased genuine Greek decoders, the fact that these were sold in Greece for residential use and not commercial use means that the ECJ is unlikely to accept that distinction. Again, the ECJ is unlikely to decide whether the situation would be different if the defendants had used decoders sold in Greece for commercial use.

Thirdly, again as discussed above, it is unlikely that the Conditional Access Directive changes matters.

Therefore, it seems unlikely that the EC Treaty provisions on the freedom to provide services will provide a defence.

Competition

In the light of the above discussion on the free movement of goods, the competition questions would largely seem to fall away. However, whether the territorial restrictions in the licences were lawful could still be relevant to determining whether FAPL and its licensees have contractual remedies against the individuals who bought the decoders in Greece and/or whether related tortious remedies might lie against those who had knowingly been involved in those breaches of contract. It could also be relevant in determining whether any damages would be available by those harmed by any breach of competition law.

The defendants in *QC Leisure* argued that the exclusive licence in Greece was acceptable, but that the imposition of an export restriction breached art.81 of the EC Treaty and that provision was consequently void. They accepted that this presupposed they were successful in their prior arguments that decoders should be able to move freely within the EC.

An application for summary judgment on this point brought by FAPL was unsuccessful. At trial, Kitchin J. indicated that he believed the case law supported the defendants' argument, but that the claimants might be right to say that the defendants had failed to plead all elements of art.81. He therefore agreed to refer the following question:

“Q10 Defence under Art 81 EC

Where a programme content provider enters into a series of exclusive licences each for the territory of one

⁴¹ *QC Leisure* at [299].

⁴² Directive 2006/123 [2006] OJ L376/36.

⁴³ *Coditel I* (62/79).

or more Member States under which the broadcaster is licensed to broadcast the programme content only within that territory (including by satellite) and a contractual obligation is included in each licence requiring the broadcaster to prevent its satellite decoder cards which enable reception of the licensed programme content from being used outside the licensed territory, what legal test should the national court apply and what circumstances should it take into consideration in deciding whether the contractual restriction contravenes the prohibition imposed by Article 81(1)?

In particular:

- (a) must Article 81(1) be interpreted as applying to that obligation by reason only of it being deemed to have the object of preventing, restricting or distorting competition?
- (b) if so, must it also be shown that the contractual obligation appreciably prevents, restricts or distorts competition in order to come within the prohibition imposed by Article 81(1)?

This question echoes the judgment of the Court of First Instance in *Glaxosmithkline v Commission*,⁴⁴ where appeals to the ECJ are still pending. However, assuming that the ECJ reaches a judgment in those appeals before it decides the satellite references, it seems unlikely that the ECJ will do more than repeat its decision. Moreover, pleading requirements are a question of national procedure and, except in extreme cases, the ECJ is normally loathe to interfere with such questions.

Therefore, as indicated in the judgment of Kitchen J., it seems likely that the answer to the competition question will follow the answer to the free movement of goods question. The question of sufficiency of pleadings will be left to the national court to decide.

Collecting societies

The third area where the interface between copyright and the EC Treaty is currently under scrutiny relates to the role of copyright collecting societies.

It can often be unfeasible or at least economically wasteful for individual copyright owners to monitor use of their rights, in terms of both agreeing licences with potential users and bringing action to prevent unauthorised use. The costs could easily outweigh the benefits. As a result, copyright collecting societies developed as organisations which would carry out these activities on behalf of a number of copyright owners.

While collecting societies are generally accepted to be a positive way of overcoming the problem of relatively high transaction costs compared to transaction values, there have often been concerns about the power of such societies. In addition, collecting societies have tended to operate only in their own territories and to enter into reciprocal representation agreements with collecting societies in other territories,⁴⁵ resulting in territorial

restrictions (which have already been mentioned in connection with the *iTunes* case). The question now considered is how copyright collecting societies should compete across the European Union.

The ECJ indicated in some early cases that the conditions of membership of collecting societies which applied to right holders could potentially fall foul of competition law.⁴⁶ Controversial conditions include residency requirements for membership and broad requirements of assignment of rights to the collecting society.

However, in more recent cases, the authorities and courts have considered the terms and conditions offered by collecting societies to rights users.

A number of these cases in the 1980s and early 1990s concerned allegations that the royalty rates charged to operators of night clubs by the French copyright-collecting society, SACEM, at some 8.25 per cent of the gross turnover of the clubs, were excessive and thus an abuse of a dominant position.⁴⁷ These arguments were generally sent back to the French courts with a strong indication that the rates might be excessive.

However, questions relating to territoriality arose in *Ministère Public v Tournier*,⁴⁸ *Lucazeau v SACEM*⁴⁹ and *Tremblay v Commission*.⁵⁰ Various night club operators had approached copyright collecting societies in other Member States, seeking licences to use their repertoires, but had been refused. At the same time, SACEM refused to grant cheaper licences limited to such foreign repertoires and required users to pay for a licence which covered French music as well. The night club operators alleged that this arose from the reciprocal representation agreements between SACEM and those foreign collecting societies. In fact, although there had originally been exclusive representation clauses in the original agreements, these had been removed at the request of the Commission. Therefore, the real question was whether there was a concerted practice between the collecting societies in breach of Article 81 or whether the refusals constituted unilateral decisions by the foreign collecting societies, perhaps on the basis that they did not want to start operating in France directly.

In *Ministère Public v Tournier* and *Lucazeau v SACEM*, the ECJ confirmed that such a concerted practice would breach art.81, but left it to the national court

44 Decision 2001/791 *Glaxo Wellcome* [2001] OJ L302/1 and *GlaxoSmithKline Services Unlimited v Commission of the European Communities* (T-168/01) [2006] 5 C.M.L.R. 29. Appeals have been filed as Cases C-501/06, C-513/06, C-515/06 and C-519/06.

45 This has not always been the case: see C. McGreevy, "Music Copyright: Commission Recommendation on Management of Online Rights in Musical Works", Press Release SPEECH/05/588, making the point that the French collecting society SACEM operated internationally back in the 19th century.

46 Decision 71/224 *GEMA I* [1971] OJ L134/15 and *GEMA v Commission* (45/71) [1971] E.C.R. 791; [1972] C.M.L.R. 694; Decision 72/268 *GEMA II* [1972] OJ L166/22; *Belgische Radio en Televisie v SABAM* (127/73) [1974] E.C.R. 313; [1974] 2 C.M.L.R. 238; *Greenwich Film Production v SACEM* (22/79) [1979] E.C.R. 3275; [1980] 1 C.M.L.R. 629; Decision 82/204 *GEMA III* [1982] OJ L94/12; Decision 81/1080 *GVL* [1981] OJ L370/49 and *GVL v Commission* (7/82) [1983] E.C.R. 483; and Decision *GEMA IV*, 15th Report on Competition Policy (1985), point 81. More recently, see Decision in *Banghater & Homem Christo v SACEM* (37.219) (Daft Punk), October 8, 2002, available in French only at <http://ec.europa.eu/competition/antitrust/cases/decisions/37219/fr.pdf> [Accessed February 17, 2009].

47 *Basset v SACEM* (402/85); *Ministère Public v Tournier* (395/87) [1989] E.C.R. 2521; *Lucazeau v SACEM* (110, 241 & 242/88) [1989] E.C.R. 2811; and *Tremblay v Commission* (T-5/93) [1995] E.C.R. II-185.

48 *Ministère Public v Tournier* (C-395/87) [1989] E.C.R. 2521; [1991] 4 C.M.L.R. 248.

49 *Lucazeau v SACEM* (110, 241 & 242/88).

50 *Tremblay v Commission* (T-5/93).

to determine whether there was such a concerted practice. Complaints about concerted practices were also made directly to the Commission, which rejected them. However, the complainants appealed to the Court of First Instance (CFI), which in *Tremblay v Commission* held that the Commission had failed to give reasons for rejecting the allegation and so annulled that part of the Commission's decision.

More recently, the issue has not been whether collecting societies will grant licences directly to users in other Member States, but rather the conditions under which they will grant Community-wide licences.

In *IFPI "Simulcasting"*,⁵¹ a number of collecting societies had agreed to a model reciprocal agreement relating to grants of international licences of authors' rights for simulcasting, which the societies defined as:

"... the simultaneous transmission by radio and TV stations via the Internet of sound recordings included in their single channel and free-to-air broadcasts of radio and/or TV signals".

The participating societies represented all Member States (except France and Spain) and a number of other countries. The agreement was to operate on an experimental basis until the end of 2004. The societies submitted the agreement to the Commission seeking negative clearance or, alternatively, individual exemption under art.81(3).

Under the agreement, each licensing society would charge the aggregate sum of all of the licence fees applied in each country when granting a licence. As originally submitted, national collecting societies were empowered to grant international simulcasting licences only to parties broadcasting from their own territory. However, this was then amended so that anyone located in the European Economic Area (EEA) who wanted to simulcast could seek a multi-territorial licence from any one of the EEA-based collecting societies. The agreement was then further amended by the collecting societies agreeing after a transitional period to specify which part of the tariff charged corresponded to the administration fee charged to the user and which part corresponded to the royalty payment.

The Commission began its analysis by holding that each of the societies was an undertaking and thus that the agreement could fall within the scope of art.81(1) if it were anti-competitive. The Commission went on to analyse the particular terms and noted that national tariffs were composed of two elements, namely the royalties due for the use of copyright and the cost of administration charged by the societies. The Commission held that the original proposal, under which the royalties and administration costs would remain aggregated when calculating the tariff for a multi-territorial licence, went further than necessary and that, although the other criteria of art.81(3) were met, such an amalgamation was not indispensable to the agreement. However, the Commission went on to hold that the proposals to disaggregate the elements in due course were sufficient to bring the agreement within art.81(3). The Commission therefore granted an

individual exemption until the end of 2004 when the agreement expired.

The Commission also accepted commitments in relation to the Cannes Extension Agreement,⁵² which was entered into between five major music publishers and 13 collecting societies. These commitments included the amendment of a clause under which a collecting society required the written consent of all of its members before it could reduce the fees it charged to certain companies, which the Commission suggested might limit the possibility of price competition in relation to Community-wide licences.

However, there remains a fierce dispute in relation to the model contract of the International Confederation of Societies of Authors and Composers (CISAC) for licensing of music copyright, which contains territorial restrictions forcing users to obtain a licence from the collecting society in the Member State of use and limits such a licence to that Member State.

The Santiago Agreement⁵³ was an agreement between copyright collecting societies, based on the CISAC model contract, which covered online licensing of record producers' rights by providing "one-stop" licences for downloading and streaming. In 2004, the Commission issued a statement of objections suggesting that the agreement breached art.81 by virtue of its territorial restrictions, under which users could seek a licence only from the collecting society in their own Member State. The Commission contrasted this with the free choice of collecting society permitted in the Simulcasting agreements. The agreement terminated at the end of 2004 and was not renewed. In 2005, two of the intended participants in the Santiago Agreement, BUMA (the Netherlands) and SABAM (Belgium), undertook to the Commission that they would not be party to any agreement containing such territorial restrictions for the next three years.

However, in 2006 the Commission then issued a Statement of Objections in relation to the CISAC model contract itself and its bilateral implementation between collecting societies, focusing on the application of the territorial restrictions to licences for use of music on the internet, satellite transmission or cable retransmission.⁵⁴ The collecting societies offered to make various changes, including loosening (but not removing entirely) the territorial restrictions. However, third parties generally considered that the proposed commitments would continue to make it difficult for a commercial user to obtain a pan-European licence. The Commission therefore proceeded to a final decision in July 2008, finding that the implementation of the model contract by 24 collecting societies breached art.81.

51 Decision 2003/300 *IFPI "Simulcasting"* [2003] OJ L107/58; and Press Release IP/02/1436.

52 Commission Notice [2003] OJ C282/14; and Press Release IP/06/1311.

53 Commission Notice [2001] OJ C145/2; Press Release IP/04/586; Commission Notice [2005] OJ C200/11; and Press Release IP/05/1056.

54 Press Releases MEMO/06/63, IP/07/829, IP/08/1165 and MEMO/08/511; and Commission Decision K(2008) 3435 final [2008] OJ C323/12 (this is only a summary; the full decision is available at <http://ec.europa.eu/competition/antitrust/cases/decisions/38698/en.pdf> [Accessed February 17, 2009]) and T-456/08 was rejected for being filed out of time on January 13, 2009.

CISAC and 22 of the collecting societies have challenged that decision and those cases are pending.⁵⁵

The Competition Commission, Neelie Kroes, said that the decision:

“... will benefit cultural diversity by encouraging collecting societies to offer composers and lyricists a better deal in terms of collecting the money to which they are entitled. It will also facilitate the development of satellite, cable and internet broadcasting, giving listeners more choice and giving authors more potential revenue. However, the Commission has been careful to ensure that the benefits of the collective rights management system are not put into question in terms of levels of royalties for authors and available music repertoire.”

By contrast, CISAC's President said that the Commission's decision would push the societies “into competing by a ‘race to the bottom’ on royalty value”, while its Director General stated that:

“... the confusing and flawed July Decision is not part of the solution but part of the problem. We hope that the court of first instance will provide the clarity that rights holders, music users and the public need for a thriving online content market in the EEA.”⁵⁶

These cases are clearly of crucial importance to the future operation of copyright collecting societies in the European Union.

Meanwhile, other groups within the Commission have also been taking steps to lay down a general framework for the management of copyright and related rights in the internal market.

In its 2004 Communication,⁵⁷ the Commission began a consultation considering possible ways in which copyright and related rights could be managed within the Community. This was followed by a study published in July 2005,⁵⁸ which found that the current networks of bilateral reciprocal representation agreements, with their territorial restrictions on which collecting society right holders and users can turn to and on the scope of any licence granted, could not provide the multi-territorial licences which commercial online services required and restricted the choice of representation for right holders. The Commission noted that the first problem could be resolved by removal of the territorial restrictions. However, in order to resolve the second problem, the Commission proposed that right holders should instead be able to select a single collecting society to license and monitor all of the different online uses made of their works throughout the Community. This is a rather different approach from that adopted in the competition investigations, in that it required copyright owners rather than users to have the freedom to choose the nationality of the collecting society which

they wanted to use. The Commission initially indicated that the action could be based on arts 12 and 49 of the Treaty, although when it was implemented by a Recommendation, backed up with an impact assessment which was heavily based on the study, the Treaty basis was changed to art.211, which lays down the Commission's powers more broadly.⁵⁹

In May 2006, the MCPS-PRS Alliance announced the first licence in line with the Recommendation, giving Skype access to its members' music repertoire for all countries except North America.⁶⁰ It subsequently joined with its German counterpart, GEMA, to form a company called CELAS to licence and administer EMI Music Publishing's Anglo-American songs for online and mobile usage across Europe, which had begun to grant pan-European licences to companies including iTunes and Nokia.⁶¹

However, this move towards pan-European licensing has faced criticism from stakeholders other than collecting societies themselves. In a study by KEA European Affairs,⁶² commissioned by the European Parliament and published in July 2006, it was suggested that territoriality was still important and the Commission's actions primarily benefited international, Anglo-American artists to the detriment of local artists and regional diversity in general. On the other hand, some commentators believe that it has not gone far enough and that the difficulties of licensing will still hamper growth of this sector within the Community.⁶³

In addition, the Performing Right Society (PRS) itself has challenged a pan-European licence granted by its Dutch equivalent, BUMA.⁶⁴ BUMA had announced in July 2008 that it had issued a pan-European licence to online music provider Beatport for repertoire including that controlled by PRS. PRS sought an interim injunction and this was granted by the Haarlem court in August 2008.

This is therefore an area where the interaction between copyright and EC law has a long way to go and there are likely to be significant developments in the next 12 to 24 months.

Conclusions

In each of the three areas considered in this article, the interface between copyright and the EC Treaty remains a hot topic.

Content creators and consumer groups often have divergent views on how the single market should operate when it comes to copyright works. The policies laid

55 Cases T-392/08, T-398/08, T-401/08, T-410/08, T-411/08, T-413/08, T-414/08, T-415/08, T-416/08, T-417/08, T-418/08, T-419/08, T-420/08, T-421/08, T-422/08, T-425/08, T-428/08, T-432/08, T-433/08, T-434/08, T-442/08, T-451/08 and T-456/08. Requests for interim measures were rejected in a number of these cases on November 14, 2008 and T-456/08 was rejected for being filed out of time on January 13, 2009.

56 CISAC press release, October 8, 2008.

57 COM(2004) 261.

58 Commission Staff Working Document of July 7, 2005; and Press Releases IP/05/872 and MEMO/05/241.

59 Recommendation 2005/737 [2005] OJ L276/54; Impact Assessment SEC(2005) 1254; and Press Releases IP/05/1261 and MEMO/05/369.

60 MCPS-PRS Alliance press release of May 3, 2006.

61 MCPS-PRS Alliance press releases of January 22, 2007, January 26, 2008 and November 2, 2008.

62 KEA European Affairs, *The Collective Management of Rights in Europe: The Quest for Efficiency* (KEA European Affairs, Brussels, 2006).

63 C. Chitham, “In the Slow Lane? The Tricky Case of Online Music, Collecting Societies and Cross-border Licensing in Europe” (2006) 158 *Copyright World* 13.

64 *The Performing Rights Society Ltd v Vereniging BUMA*, 148418/KG ZA 08-410, LJN: BE8765, Rechtbank Haarlem. See the discussion by Neefs [2008] J.I.P.L.P. 758.

down by the European Commission and ECJ in the 1970s and 1980s could be applied to CDs and DVDs, but are becoming increasingly redundant as electronic distribution continues to increase.

The *iTunes* case may have been “settled”, but some of the concerns raised remain and will doubtless arise in future cases. The *QC Leisure* and *Murphy* cases appear to have identified weaknesses in the current model for distribution of football coverage to pubs and bars, with the High Court so far supporting the internal market to the detriment of copyright owners. The Commission has continued to attack the territorial limitations of copyright collecting societies, particularly in the *CISAC* decision, but it remains unclear precisely how the Commission wants collecting societies to be organised within the Community (and even less clear whether such changes are a good idea). The outcome of these cases will influence the shape of the internal market for many years to come.

However, it is not a foregone conclusion that the territorial value of copyright will continue to be weakened within the Community. The drive to create an ever-closer union is running into increasing political and popular opposition, with much resting on the second Irish referendum on the Lisbon Treaty in October this year. It is true that the European Commission is more frequently intervening in the marketplace with at least one eye on “consumers” as a proxy for public opinion. However, the addition of 12 new Member States in the last five years may weaken the pressure for harmonisation at all costs, particularly in the ECJ where new judges will be keenly aware that removal of barriers may increase costs and reduce choice for consumers in their own countries.