More football in pubs: European Union – Court of Justice (Grand Chamber) *Football Association Premier League Ltd and Others v QC Leisure and Others* (C-403/08) and *Karen Murphy v Media Protection Services Ltd* (C-429/08)

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The judgment of the European Court of Justice in the so-called Premier League cases (Joined Cases C-403/08 and C-429/08), which continues to generate intense debate, has serious implications for copyright, conditional access protection, the fundamental freedom to provide services and the application of competition law. While the judgment has often been looked at from the angle of fundamental freedoms and competition law, this contribution focuses on the copyright aspects of the case. It reviews the Court's assessment of the IPR subject-matter at stake as well as the scope of the reproduction right, the concept of communication to the public under Article 3 Directive 2001/29/EC and the potential meaning of 'appropriate remuneration'. As the Court of Justice continues to produce copyright decisions at an unrelenting pace, it is important to understand the approach that is emerging. The goal of this article is to make a modest contribution to that understanding.

Keywords: *copyright, reproduction, temporary copies, communication to the public, remuneration*

In October 2011, over three years after the initial referral from the High Court in London, the European Court of Justice finally adjudicated two joined cases concerning the unauthorized use of foreign decoder cards in the United Kingdom to access satellite transmissions of live football matches in pubs from Greece. In the interim, the President of the Court refused to accelerate the proceedings and rebuffed the additional parties who had been added by the domestic judge.¹

Why had BSkyB, Canal Plus, UEFA, Setanta and the MPA decided to expend scarce resources and time to apply for and be granted admittance to these proceedings

1. *Football Association Premier League Ltd and Others v QC Leisure and Others* (C-403/08) and *Karen Murphy v Media Protection Services Ltd* (Case C-429/08), Order of the President of the Court of 16 December 2009.

by Mr Justice Kitchin? What is it about football in pubs which has sparked so much interest across the EU and around the world?

These cases which were directed against the suppliers of equipment and decoders to pubs and bars which acquired the cards under false pretences (C-403/08) as well as against the licensees and operators of four pubs (C-429/08) continue to generate intense debate amongst stakeholders and regulatory authorities far beyond the cosy surroundings of quaint English pubs.

The Court of Justice, hereinafter referred to as ‘the Court’, delivered its judgment on 4 October 2011² and issued a press statement to the effect that ‘A system of licences for the broadcasting of football matches which grants broadcasters territorial exclusivity on a Member State basis and which prohibits television viewers from watching the broadcasts with a decoder card in other Member States is contrary to EU law’. At the same time, the Court also made it clear that ‘The screening in a pub of football-match broadcasts containing protected works requires the authorisation of the author of those works’.³

The judgment provides more questions than answers. What is left of the territoriality of copyright in the EU? The Court of Justice has addressed the nature of the right to communication to the public by satellite of broadcast signals incorporating Premier League matches in places quite generally – and in others not. How far does this judgment go – beyond live football? Beyond satellite pay-TV? From a copyright perspective, certain elements of the judgment could be interpreted as being limited to satellite broadcasts of football matches. However, there are also general aspects of the decision, particularly in respect of free movement and competition rules. While this article focuses on the copyright issues, we cannot ignore the importance of the Court’s treatment of the fundamental principles of free movement and the competition rules (not to mention the views of regulatory authorities and policy-makers). In this regard, a further issue to consider is the impact of the Court’s findings on the ability of stakeholders, content providers and consumers, to benefit from the digital single market.

This little taster gives already a flavour of the serious implications of the judgment for copyright, conditional access protection, fundamental freedoms (particularly the freedom to provide services) and the application of competition law. There has already been a thought-provoking review of this important judgment in an earlier issue of this Journal.⁴ The present article seeks to complement this previous analysis through a closer examination of the copyright aspects of the case.

As the Court of Justice continues to produce copyright decisions, those affected by those judgments, which is not only rightholders but increasingly everyone, struggle to interpret the somewhat disjointed (given the lack of a specific IP chamber) approach that is emerging. We hope that this article can make a modest contribution to understanding the copyright issues of the case. We are not in a position however to explain judicial activism, policy-making and indeed to a certain extent even a tendency towards legislating...

APPROACH

The High Court in London had referred a series of questions to the Court of Justice which addressed in logical order conditional access issues, copyright including broadcasting by

2. *Football Association Premier League Ltd and Others v QC Leisure and Others* (Case C-403/08) and *Karen Murphy v Media Protection Services Ltd* (Case C-429/08), Judgment of the Court of 4 October 2011.

3. Court of Justice of the European Union, Press Release No. 102/11 of 4 October 2011.

4. AW Roughton, ‘Football in Pubs’ (2012) 2(3) QMJIP 288–96.

satellite as well as fundamental freedoms and competition.⁵ For obscure reasons, the Court of Justice departed from this sound and logical order of the questions and divided the case into two main parts:

- Rules relating to the reception of encrypted broadcasts from other Member States, focusing on conditional access, fundamental freedoms and competition with some references to copyright; and
- Rules relating to the use of the broadcasts once they are received, covering the areas of copyright including reproduction, communication to the public and satellite broadcasting.

However, this change of order did not make the matter any easier for the Court. While the bulk of the copyright issues flow from the second part, the first part raises important questions with regard to copyright and licensing of works protected by copyright in the European Union. For example, as the Court did not follow the logical order of the questions referred by the High Court, it experienced some difficulties when considering whether a restriction of the fundamental freedom to provide services, which the Court deemed relevant for the case, could be justified because an intellectual property right might be at stake.

DOES IPR SUBJECT MATTER

Logically, before addressing the question of whether a restriction of the fundamental freedom to provide services may be justified by an intellectual property right, the Court must examine first whether the Football Association Premier League (hereinafter referred to as 'Premier League' or 'FAPL') is actually in a position to assert copyright or another intellectual property right. This follows from the case law of the Court which allows derogations from the principle of free movement 'only to the extent to which they are justified for the purpose of safeguarding the rights which constitute the specific subject-matter of the intellectual property concerned'.⁶

Here the Court focuses on the Premier League matches and asks whether those live football matches may be protected by an intellectual property right.⁷ The Court comes to the conclusion that the matches are not protected by copyright as they are not an author's own intellectual creation. For the Court, sporting events generally and football matches in particular cannot be regarded as intellectual creations as they 'are subject to rules of the game, leaving no room for creative freedom for the purposes of copyright'.⁸ The Court concludes that these events cannot be protected by copyright and states categorically that 'it is undisputed that European Union law does not protect them on any other basis in the field of intellectual property'.⁹

Nevertheless, the Court concedes that sports events can have a unique and original character 'which can transform them into subject-matter that is worthy of protection *comparable* to the protection of works' (emphasis added) which can be granted by the various domestic legal orders.¹⁰

5. [2008] O.J.E.U. C 301/19 of 22 November 2008.

6. Judgment, para 106 with reference to *Rioglass v Transremar* (Case C-115/02), Judgment of the Court of 23 October 2003, [2003] ECR I-12705.

7. Judgment, paras 95–100.

8. Judgment, para 98.

9. Judgment, para 99.

10. Judgment, para 100.

These considerations of the Court give rise to a number of comments.

First of all, EU copyright law only contains provisions dealing with originality in the Software, Database and Term Directives respectively.¹¹ While the criterion of the 'author's own intellectual creation' is certainly a measure for assessing originality of computer programs, databases and photographs in the aforementioned directives, Member States retain discretion to apply different criteria for other categories of works.

Admittedly, in *Infopaq*, on which the Court bases its assumption in the *Premier League* judgment, the Court had already stated that copyright within 'the meaning of Article 2(a) of the Copyright Directive is liable to apply only in relation to a subject-matter which is original in the sense that it is the author's own intellectual creation'.¹² However, in *Infopaq*, the Court nonetheless recognized that apart from the partial harmonization for software, databases and photographs requiring an 'author's own intellectual creation', there is no further harmonization of the concept of originality in the European directives on copyright and therefore based itself also on Articles 2(5) and (8) of the Berne Convention as pointing towards an 'intellectual creation'. In *Infopaq*, the Court also left discretion to national courts to determine whether in a particular instance these criteria are fulfilled, thus enabling them to accommodate their particular local concepts, be it skill, judgment and labour in the UK tradition, the imprint of personality in the French system or a personal intellectual creation in German law.

Conversely, in the *Premier League* judgment, the Court has created a new rule, namely that sports events including football matches can under no circumstances be classified as works at the EU level, and this in an area which is not fully harmonized. While in numerous jurisdictions, particularly in continental-European traditions, the level of creativity required for copyright protection may lead to the same result as reached by the Court, namely that a straightforward football match is not an intellectual creation, this is a question of appreciation on a case-by-case basis. There are other sports, such as gymnastics and ice-skating which may merit a different treatment from the point of view of originality and creativity. Such case-by-case assessment seems to be ruled out by the Court's categorical statement. Indeed it appears that the Court has actually 'legislated' a new EU standard.

Secondly, the Court only concentrates on the events, the matches as such, but not the individual programme output which is made available by FAPL to the individual broadcasters. The programming could at the very least lead to a related right (ie, for the broadcast), which the Court nonetheless takes into account later in paragraphs 148 and 150 when discussing the copyright aspects in the second part of the judgment. However, it dismissed these considerations immediately as related rights protection is not part of the proceedings – though arguably they should have been. Copyright protection is however accepted later with regard to the individual elements included in the broadcast for the purposes of answering the copyright questions.¹³

Yet, the Court needs some intellectual property. As a result, the Court attempts to create a protection for sports events comparable to the protection of works which national

11. For computer programs cf Article 1(3) Directive 2009/24/EC of 23 April 2009 on the legal protection of computer programs; for photographs cf Article 6 of Directive 2006/116/EC of 12 December 2006 on the term of protection of copyright and certain related rights; for databases cf Article 3(1) Directive 96/9/EC of 11 March 1996 on the legal protection of databases.

12. *Infopaq International A/S v Danske Dagblades Forening* (Case C-5/08), Judgment of the Court of 16 July 2009, [2009] ECR I-06569, at para 37.

13. Judgment, paras 149, 152.

legislators may grant in order to permit it to move forward with its fundamental freedom and competition law analyses.¹⁴ However, the Court leaves us in the dark as to what this protection exactly is and in the following paragraphs generally refers to an ‘intellectual property right’ and agreements concluded between a ‘holder’ of IPRs and a broadcaster without further definition or explanation. By referring specifically to Recital 21 of Directive 97/36/EC, it seems that the Court has in mind some kind of specific IP protection for events whose organizer is legally entitled to sell the rights pertaining to that event.¹⁵ Hence it looks like the Court has created a specific intellectual property right for an event organizer, a kind of ‘sui generis right of the event organizer’ – as opposed to copyright protection which the Court has clearly and categorically ruled out.

REMUNERATION OR REWARD

The Court comes to the conclusion that the restriction of the principle of freedom to provide services is not justified as the prohibition of foreign decoder cards secures the payment of a ‘premium’ which goes beyond what is necessary to ensure appropriate remuneration for the intellectual property right at stake.

The Court thus takes the view that the specific subject-matter of the intellectual property right concerned does not guarantee rightholders the opportunity to demand the highest possible remuneration but only appropriate remuneration. The Court thus puts a cap on the remuneration which may be obtained. One may argue that the remuneration envisaged here is the competitive price rather than equitable remuneration in the copyright sense. Indeed, it is clear that copyright is more than a mere right to be paid and the Court has recognized this before.¹⁶ This being said, to support its view, the Court referred expressly to two unrelated provisions of the copyright *acquis*: Recital 10 of Directive 2001/29/EC on copyright in the information society and Recital 5 of Directive 2006/115/EC on rental and lending.

These considerations are flawed in two respects. First of all, as the Court stated before, copyright is not relevant for the present appreciation as the Court has ruled expressly that sports events are not subject to copyright protection. The quoted Recitals do therefore not appear appropriate for assessing the remuneration for the broadcasting of sports events. Rather, the specific intellectual property right at stake, whatever this may be, should determine the scope of remuneration for the grant of licences.

Secondly, even if copyright was relevant, Recital 10 of Directive 2001/29/EC refers to an ‘appropriate reward’ for creative and artistic work rather than ‘appropriate remuneration for each use’ and also requires that there be ‘satisfactory returns’ on investment. The text of the Recital does not imply that ‘appropriate’ is a benchmark for the upper level of remuneration. Rather the reference is to demonstrate that there must always be an appropriate reward when a work is used and that authors, performers and producers cannot be content with an insufficient amount of remuneration. From this point of view, even obtaining the highest possible amount could still be appropriate under the

14. Judgment, para 100.

15. Judgment, para 103.

16. *Coditel v Cinévog Films* (No.1) (Case 62/79), Judgment of the Court of 18 March 1980, [1980] ECR 882, at 902, paras 12–17; *Musik Vertrieb Membran GmbH and K-tel International v GEMA* (Joined cases 55 and 57/80), Judgment of the Court of 20 January 1981, [1981] ECR 148, at 165, para 25; *Metronome Musik GmbH v Music Point Hokamp* (Case C-200/96), Judgment of the Court of 28 April 1998, [1998] ECR I-1971, paras 15–20.

specific circumstances of the case as long as the amount requested is not excessive and obviously in full compliance with other applicable EU norms.

AFTER A NICE RECEPTION IN THE PUB: REPRODUCTION – SCOPE

The Court also had to consider the scope of the reproduction right regarding acts of reproduction which occur in the memory of the satellite decoder and on the TV screen in the pub. The Court's decision in this respect is not surprising. In line with the *Infopaq* decision, the Court stated that the notion of reproduction must be given a uniform interpretation in the European Union on the basis of Article 2 of Directive 2001/29/EC.¹⁷ The Court further held that the reproduction right extends to transient fragments within the memory of a satellite decoder and on a TV screen on condition that fragments contain elements which are the author's own intellectual creation. In order to determine whether fragments contain elements which are the author's own intellectual creation, the unit composed of the fragments reproduced simultaneously must be examined.¹⁸ Thus, the judgment contains an important confirmation of the status quo with regard to the reproduction right.

STILL IN THE PUB: REPRODUCTION – TEMPORARY COPY EXCEPTION

The Court then examined whether the aforementioned acts of reproduction which occur in the memory of a decoder and on a television screen might fall under the temporary copy exception in Article 5(1) of the Directive. In this context, the Court engaged in some further extravagant decision-making which ultimately has the effect of taking away much of what had just been given. The reproduction right's reach into the satellite decoder and the TV screen is rendered nugatory. Indeed, the Court's introduction of some new concepts attached to an Article 5(1) analysis would appear to go beyond that envisioned by the EU legislator. Moreover, the Court's short shrift application of the three-step test (Article 5(5) Directive 2001/29/EC) is also cause for concern.

General conditions

The matter starts well, with the Court reiterating an important principle from the *Infopaq* decision, namely that the conditions for applying Article 5(1) of the Directive must be interpreted strictly as the provision is a derogation from the exclusive reproduction right.¹⁹

However, the Court then takes a U-turn as this important statement is immediately rendered obsolete by an extravagant act of decision-making which leads the Court to create a new criterion on the basis of which the exception must be assessed: the interpretation of the mentioned conditions must 'enable the effectiveness of the exception', namely 'the exception must allow and ensure the development and operation of new technologies and safeguard a fair balance between the rights and interests of right

17. Judgment, para 154.

18. Judgment, para 159.

19. Judgment, para 162.

holders, on the one hand, and of users of protected works who wish to avail themselves of those new technologies, on the other'.²⁰

In other words, the Court establishes a new criterion, namely that the exception must allow and ensure the development and operation of new technologies. One can seriously question whether this approach was necessary to the outcome here. While this is a kind of technology safeguard in the context of limitations and exceptions which as such may not be found in the Directive, the Court already had a degree of flexibility but it appears to have equipped itself with more. Recital 31, to which the Court points, calls for safeguarding a fair balance between the rights and interests of the different rightholders as well as between rightholders and users, which has already been put in practice by devising a set of limitations and exceptions in Article 5 of the Directive. However, the technology safeguard is a novel concept in the life of the Directive which smacks of a 'fair use' analysis and potentially significant legal uncertainty.

The Court has thus exercised a rather extensive freedom when judging the relationship between copyright and technology with which it ultimately justified its decision to apply the exception in respect of the acts of reproduction at issue. This approach, which arguably frustrates the will of the EU legislator, is particularly troublesome if one takes into consideration that Article 5 of the Directive contains an *exhaustive* list of exceptions and limitations with rather specific conditions which may not be broadened.²¹ The privilege to widen or amend the exceptions and limitations in Article 5 lies with the EU legislator, who recently adopted a new exception for orphan works.²²

However, the Court has usurped this competence. This additional requirement goes completely against the balanced concept in Article 5(1) of the Directive which was the subject of an intense debate during the negotiations over the Directive and was finally settled with carefully weighed conditions which are now reflected in the provision.²³ The Court's decision in this respect also goes against Recital 44 which concedes that the scope of an exception or limitation may have to be even more limited when it comes to certain new uses.

Specific conditions of Article 5(1) of the Directive

The Court establishes with little effort that the copies in the decoder and on the screen are temporary and transient and form an integral part of a technological process carried out in order to enable the reception of the transmitted broadcasts.²⁴

However, the matter becomes more difficult when the condition of the 'lawful use' is reached. In order to benefit from the exception for temporary copies, the sole purpose of the reproduction must be either to enable a transmission in a network between third parties via an intermediary, which is not relevant to this case, or a lawful use.

20. Judgment, paras 163, 164.

21. MM Walter and S von Lewinski (eds), *European Copyright Law: A Commentary* (Oxford University Press, Oxford 2010), Chapter 11 at 11.5.9.

22. Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works, O.J.E.U. L 299/5 of 27 October 2012.

23. T Shapiro, 'Directive 2001/29/EC on Copyright in the Information Society', in B Lindner and T Shapiro (eds), *Copyright in the Information Society: A Guide to National Implementation of the European Directive* (Edward Elgar Publishing, Cheltenham 2011), at pp 38, 39.

24. Judgment, para 165.

The Court however took the view that the acts of reproduction in question enable a lawful use.²⁵ First of all, the Court considered that these acts of reproduction enable the broadcasts to be received as they are necessary for the satellite decoder and the TV screen to function properly. Secondly, the Court sets out that the reception of a broadcast – at least in private circles – is not an act restricted by copyright. Pointing to their considerations in the context of fundamental freedoms, the Court states that this is also the case where the broadcast is received by means of a foreign decoding device.

Even if one accepts that the use of a foreign decoder card is lawful, it is still debatable to accept a lawful use, as further down the road the Court confirms that there is also an infringement of the communication to the public right to which the defence under Directive 93/83/EEC does not apply. This fact alone would rule out a lawful use with the consequence that the exception could not apply.

However, as the Court accepted nonetheless a lawful use, the question whether the acts of reproduction have any independent economic significance had to be addressed. While the Court accepts that the acts of reproduction in question have an economic value and thus an economic significance, it takes the view that the economic significance cannot be independent. For the Court, this is necessary as this exception would otherwise be ‘redundant’, pointing yet again indirectly at its newly developed technology safeguard. In particular, the Court argues that the temporary acts of reproduction that occur in the memory of the satellite decoder and on the television screen form an ‘inseparable and non-autonomous part of the process of reception of the broadcasts transmitted containing the works in question’.²⁶ The Court states that the persons accessing the works are not aware of these acts and have no influence on them without stating why this is a relevant consideration. The Court thus takes the view that the temporary acts of reproduction in question are not capable of generating an additional economic advantage which goes beyond the advantage derived from the mere reception of the broadcasts.²⁷ To justify the result found, the Court yet again invoked the technology safeguard in order to stress that, without this result, technological developments would be impeded and even paralysed.²⁸

As the focus of the Court seems to be the advancement of technology at the expense of those who invest in content, it does not realize the potential damage to the economic interests of the rightholder as a whole which must also be taken into consideration together with the potential benefits derived by others from the use of the work, in particular the beneficiary of an exception. On this basis, the independent economic significance of the acts of reproduction would have become clear. One might now raise the question under what circumstances the Court of Justice would ever consider temporary acts of reproduction to have independent economic significance (assuming the preceding conditions have been met).

Three-step test

At the end of its analysis, the Court also quickly gives the three-step test (Article 5(5) of Directive 2001/29/EC) a rather unsympathetic treatment. Since it considers that all the conditions of Article 5(1) of the Directive are fulfilled, the Court did not deem it necessary to examine whether the conditions of the individual steps of the three-step

25. Judgment, paras 170–72.

26. Judgment, para 176.

27. Judgment, paras 176 and 177.

28. Judgment, para 179.

test are fulfilled.²⁹ However, as follows from Recital 44 of the Directive, Article 5(5) is a safeguard for the application of all limitations and exceptions and its conditions must be examined in each individual case. Whilst emphasizing repeatedly the technology safeguard, the Court has given short shrift to this important limit on the scope of limitations and exceptions.

COME TO THE PUB

The Court further had to examine whether a communication to the public within the meaning of Article 3(1) of Directive 2001/29/EC occurs if a live transmission of a football match is shown via a TV screen and speakers to the customers in a pub.

Having clarified a number of interpretative rules, the Court first of all established that in light of Article 11 bis (1)(iii) Berne Convention on which the provision in the Directive is based *inter alia* and the legislative history of the Directive, it is clear that the notion of communication to the public must be construed broadly in the sense of covering 'any transmission of the protected works, irrespective of the technical means or process used'.³⁰

The Court then drew a parallel with the hotel cases, and in particular the *SGAE* case,³¹ and demonstrated that the acts in question are comparable with those in *SGAE*: the landlord of the pub intentionally gives his customers access to a broadcast containing protected works via a TV set and speakers without which they would not be in a position to watch the broadcast.³²

However, according to the Court, it is not sufficient if the landlord effects such a communication; it is also necessary that the broadcast is transmitted to a new public.³³ This means a public which was not originally taken into consideration when the use was authorized. As the Court sets out, when a broadcast is authorized, usually only a transmission to the owners of TV sets and their close circle is intended. However, as the Court states at paragraph 198:

Where a broadcast work is transmitted, in a place accessible to the public, for an additional public which is permitted by the owner of the television set to hear or see the work, an intentional intervention of that kind must be regarded as an act by which the work in question is communicated to a new public.

The Court concludes that such an additional public also exists where a broadcast is transmitted by a pub landlord to his customers. The customers constitute an additional public which was not considered when the original authorization was given.³⁴ Interestingly, this notion of a new audience features in the ruling of the referring judge, Kitchin J, in a separate case involving the structurally-infringing website, Newzbin.³⁵

The Court then turns to the condition that the broadcast must be transmitted to a 'public not present at the place where the communication originates'. This requirement

29. Judgment, para 181.

30. Judgment, para 192.

31. *SGAE v Rafel Hoteles* (C-306-05), Judgment of the Court of 7 December 2006, [2006] ECR I-00107, at paras 41, 42.

32. Judgment, para 195.

33. Judgment, para 197.

34. Judgment, para 199.

35. *Twentieth Century Fox Film Corporation and Others v Newzbin Limited*, Judgment of the High Court of 29 March 2010, [2010] EWHC 608 (Ch), at para 125, [2010] FSR 21.

follows from Recital 23 of Directive 2001/29/EC and has given rise to divergences in view as to what it entails. Recital 23 of the Directive reads as follows:

This Directive should harmonise further the author's right of communication to the public. This right should be understood in a broad sense covering all communication to the public not present at the place where the communication originates. This right should cover any such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting. This right should not cover any other acts.

While it looks as if the wording of the text excludes from the scope of the communication to the public right only live and stage performances, some have claimed that the playing of a work in public with the help of technical means was also outside the scope of the provision.³⁶ By pointing to the legislative history, the Court now confirms that it was the intention of the European Parliament to exclude only direct representations or performances where the performer is in direct physical contact with the audience from the scope of Article 3(1) Directive 2001/29/EC.³⁷ The Court therefore comes to the conclusion that this condition is fulfilled in a case where a broadcast programme is transmitted to the customers in a pub as there is no direct physical contact with those who perform the works.

Finally, the Court takes the view that it is not irrelevant that the communication is of a profit-making nature. By showing the transmission of sport events, the landlord benefits from an increased number of customers which also has an impact on his financial results.³⁸

The Court thus fully extends its jurisprudence in the hotel cases to the transmission of broadcast programmes to the customers in a pub. As in the hotel cases, the Court along the lines of the interpretation in the WIPO Guide to the Berne Convention, pointed to the fact that when the author authorizes the broadcast of his work, he considers only direct users, that is, the owners of reception equipment who, either personally or within their own private or family circles, receive the programme.³⁹ If the reception is for a larger audience, possibly for profit, a new section of the receiving public hears or sees the work and the communication of the programme via a loudspeaker or analogous instrument no longer constitutes a simple reception of the programme itself but is an independent act through which the broadcast work is communicated to a new public. Such public reception falls within the scope of the author's exclusive authorisation right. Hence showing the transmission in a pub instead of showing it for domestic or private purposes requires further consent from the right owner.

Thus, with this extension of the communication of the public right into the pub, the Court of Justice has now confirmed that this fundamental principle is inherent in Article 3(1) of Directive 2001/29/EC as further defined in Recital 23.

The ramifications, particularly in the UK, will now have to be considered. Mr Justice Kitchin stills needs to render a ruling on what copyrights were actually infringed.⁴⁰ Where does this leave Section 72 CPDA?

36. Walter and von Lewinski, *European Copyright Law*, supra n 21, at 11.3.23; T Aplin, 'United Kingdom', in Lindner and Shapiro (eds), *Copyright in the Information Society*, supra n 23, at pp. 568–70.

37. Judgment, para 201.

38. Judgment, para 205.

39. Judgment, paras 198, 199.

40. *Football Association Premier League and Others v QC Leisure and Others*, Judgment of the High Court of 3 February 2012, [2012] EWHC 108 (Ch), paras 88–90.

CONCLUSION

While views on the reach of this judgment will vary significantly, any consideration of the decision will include careful examination of the nature of the rights and the forms of exploitation at issue. In this case, the Court of Justice focused on satellite broadcasting which is quite distinct from, for example, making available. The Court clearly states at para. 57 of its judgment that 'the present cases concern only the satellite broadcasting of Premier League Matches to the public by broadcasting organisations, such as Multichoice Hellas'. The making available of copyright works over the Internet would attract a different analysis and potentially different results, but that is for another time. For now there are plenty of immediate questions including in particular whether BSkyB needs to establish service centres all over the EU?