



Neutral Citation Number: [2008] EWHC 1411 (Ch)

Cases No: HC07 C04418

and

HC07 C00082

and

HC07 C01749

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
INTELLECTUAL PROPERTY

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24 June 2008

Before :

THE HONOURABLE MR JUSTICE KITCHIN

Between :

(1) **Football Association Premier League
Limited**

(2) **NetMed Hellas SA**

(3) **Multichoice Hellas SA**

- and -

Claimants

(1) **QC Leisure (a trading name)**

(2) **David Richardson**

- and -

(1) **AV Station Plc**

(2) **Malcolm Chamberlain**

- and -

(1) **Michael Madden**

(2) **Sanjay Raval**

(3) **David Greenslade**

(4) **S.R. Leisure Limited**

(5) **Phillip George Charles Houghton**

(6) **Derek Owen**

Defendants

Mr James Mellor QC, Mr Nicholas Green QC, Miss Charlotte May, Mr Aidan Robertson and Mr James Whyte instructed by **DLA Piper UK LLP** on behalf of the **Claimants**
Mr Martin Howe QC, Mr Andrew Norris, Mr Thomas St Quintin and Mr Stephen Vousden instructed by **Molesworth Bright Clegg** on behalf of **AV Station Plc** and **Mr Chamberlain** and **OBG Cameron Banfill LLP** on behalf of the other **Defendants**

Hearing dates: 15, 17,18, 21 – 25, 28 – 30 April and 1 – 2 May, 5 June 2008

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MR JUSTICE KITCHIN

MR. JUSTICE KITCHIN :

Introduction

1. These three actions concern the use of foreign decoder cards in the UK to access foreign transmissions of live Premier League football matches. The claimants complain that the dealing in and use of such cards in the UK involves an infringement of their rights under s.298 of the Copyright Designs and Patents Act 1988, as amended, (“the CDPA”) and of the copyrights in various artistic and musical works, films and sound recordings embodied in the Premier League match coverage.
2. The Premier League is the leading professional football league competition for football clubs in England. The first claimant (“FAPL”) is the vehicle through which the 20 Premier League clubs operate the competition. Each of those clubs owns one share in FAPL.
3. FAPL’s activities include organising the filming of Premier League matches and licensing the rights to broadcast them. The exclusive rights to broadcast the live matches are divided territorially and by three-year terms. The evidence in the actions before me relates to live broadcasts for the term that covered the 2004/5, 2005/6 and 2006/7 seasons. However, the claimants seek relief in respect of future seasons too.
4. Licensees of live broadcasts are permitted to sub-license their rights, and the claims in these actions relate to live satellite transmissions made by sub-licensees in Greece, the Middle East and North Africa.
5. In Greece, the sub-licensee was (and remains) the second claimant (“NetMed”). Matches are broadcast on “SuperSport” channels on the “NOVA” platform, which is owned and operated by the third claimant. The second and third claimants are under the same ultimate ownership, and are collectively referred to as “NOVA”. Reception of SuperSport channels is enabled by a NOVA satellite decoder card.
6. In the Middle East and North Africa, the sub-licensee was (but is no longer) a holding company called Arab Media Corporation (“AMC”). Matches were broadcast on channels produced by Arab Radio and Television Network (“ART”), a subsidiary of AMC, and transmission of the signals was handled by another AMC subsidiary called Jordan Media City (“JMC”). Reception of ART sports channels is enabled by an ART or “Arabesque” (collectively “ART”) satellite decoder card.
7. In the UK, the exclusive licensee for UK live broadcasts was (and remains) BSkyB Ltd (“Sky”).
8. The claimants say that the practice of licensing sports broadcast rights on a territorial basis is both justifiable and well established. However, it is seriously threatened by the activities of those who deal in foreign decoder cards. In summary, if a pub or a bar in the UK wishes to screen English Premier League football, the publican can at present take one of two routes. He can take out a commercial subscription from Sky, which costs several thousands of pounds a year, depending on the size of the pub or bar; or he can buy a cheaper foreign decoder card and decoder box, possibly intended for domestic use, from an unauthorised dealer. For example, NOVA cards and ancillary equipment can be acquired for about £700 a year. The effect of these

activities is, say the claimants, extremely serious. They undermine the exclusivity, and hence the value, of the rights licensed in any particular territory. Whichever broadcaster sells the cheapest decoder cards has the potential to become, in practice, the EU wide broadcaster with the result that broadcast rights in the EU will have to be licensed on an EU wide basis. This will result in a serious loss of revenue both to the FAPL and other broadcasters and so undermine the viability of the services they provide.

9. Consequently the claimants have brought what they see as three test cases. Two of the actions are brought against suppliers of equipment and satellite decoder cards to pubs and bars, which enable the reception of non-Sky satellite channels (including NOVA or ART channels) that carry live Premier League matches. The third action is against licensees or operators of four pubs that have shown live Premier League matches broadcast on ART channels.
10. More specifically, the defendants in the first action (HC06C04418) are QC Leisure and Mr David Richardson. It has become clear that QC Leisure is in fact the trading name of Mr Richardson. He is a supplier of satellite equipment and decoder cards, including both NOVA cards from 2006 and ART cards from 2004 to about February 2007.
11. The defendants in the second action (HC07C00082) are AV Station PLC (“AV”) and Mr Malcolm Chamberlain, its sole director. AV supplied NOVA decoder cards from June 2005 to February 2007 but has never traded in ART decoder cards.
12. The third action (the “Madden” action) (HC07C01749) relates to four pubs:
 - i) “The Pig & Whistle”, of which the first defendant, Michael Madden, is the licensee.
 - ii) “Earls”, which involves the second to fourth defendants. The owner of Earls is the fourth defendant, S.R.Leisure Ltd (“SR”). The second defendant, Sanjay Raval, is the sole director of SR. The third defendant, David Greenslade, is employed as Earls’ manager and licensee, but the claimants indicated during the course of the trial that the claim is no longer pursued against him.
 - iii) “The Crabtree Inn”, of which the fifth defendant, Philip Houghton, is the licensee.
 - iv) “London House”, of which the sixth defendant, Derek Owen, is the licensee.

At each of these pubs, screening of live Premier League matches using an ART decoder card is admitted.

13. In these circumstances the claimants say the defendants have infringed their rights under s.298 of the CDPA by trading in or, in the case of the Madden defendants, being in possession for commercial purposes of decoder cards designed or adapted to give access to their services without authorisation. Further, the claimants contend the Madden defendants have infringed their copyrights by creating copies of the works in the internal operation of the satellite decoder and by displaying the works on screen, in each case contrary to s.17 of the CDPA, by performing, playing or showing the

works in public contrary to s.19 and by communicating the works to the public contrary to s.20; moreover, the AV and QC defendants have infringed the claimants' copyrights by authorising these acts by the Madden defendants and by others to whom they have supplied decoder cards.

14. The defendants respond that the claim is wholly misconceived. They submit this is not a case about pirate decoder cards because all the cards in issue have been issued and placed upon the market by the relevant satellite broadcaster. Rather, they say, the case is about cross-border trade in lawful decoder cards issued by the relevant satellite broadcaster and the cross-border reception of broadcasting services within the European single market. They argue that broadcasters or programme content providers have no right to interfere with cross-border reception in an effort to divide the single market into differentially priced zones and to restrict competition between FAPL's licensees.
15. As will be seen, the contentions of the parties require a consideration of a number of provisions of Community law:
 - i) Council Directive 89/552/EEC of 3 October 1989, as amended by Directive 97/36/EC, on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (the TV Without Frontiers Directive). This abolishes regulatory barriers to cross-border broadcasting by establishing a system in which broadcasts are regulated in the home country of the broadcaster and in that country only.
 - ii) Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (the Satellites and Copyright Directive). This is relevant to the claimants' attempt to invoke national copyright law to prevent cross-border reception of satellite broadcasts.
 - iii) Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access (the Conditional Access Directive). This is plainly the key Directive governing the alleged cause of action under s.298 of the Act, since s.298 in its present form is intended to transpose this Directive into national law. Directive 98/84/EC cross refers to Directive 89/552/EEC for the definition of television broadcasting.
 - iv) Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (the Copyright and Information Society Directive). This contains a number of relevant provisions relating, in particular, to reproduction rights, rights to communicate works to the public and various exceptions to reproduction rights in the case of transient or incidental copying.

The issues

16. A host of issues fall to be determined, both of law and fact. During the course of the trial the parties identified no fewer than 40, and yet more emerged in correspondence after its conclusion which required a further hearing day. Rather than list them individually, I would summarise them as follows:

Issues relating to Directive 98/84/EC

- i) The scope of Directive 98/84/EC and, in particular, the meaning of the expression “illicit device”. The claimants say it applies to all decoder cards which give unauthorised access to a protected service. The defendants say it does not apply to parallel imported decoder cards and hence the claim must fail against all the defendants.
- ii) Whether, on the assumption the cards in issue are illicit devices, FAPL has a cause of action under Directive 98/84/EC. FAPL puts its case a number of ways but essentially contends that it does because it is the provider of a protected service and its interests are affected by the defendants’ activities. The defendants say it does not because the decoder cards do not give access to the service which FAPL provides. Instead, they give access to the broadcasting services provided by NOVA and ART. The Directive confers a right of action on service providers in respect of decoder cards which give access to the service provider’s own service. It is not intended to confer a right to control cards issued by downstream broadcasters upon all and any upstream providers of programme material to those broadcasters.
- iii) Whether there can be a claim under Directive 98/84/EC against the Madden defendants. These defendants say any claim under the Directive must fail because they have never been in possession of the cards in issue for commercial purposes and consequently have never engaged in an infringing activity within the meaning of the Directive.

Authorisation by NOVA and ART

- iv) Whether NOVA or FAPL has authorised the circulation and use of NOVA decoder cards outside Greece; further, and as a sub-issue, whether the NOVA cards were issued to domestic or commercial subscribers.
- v) Whether FAPL or ART has authorised the circulation and use of ART countdown decoder cards in the EU.

The copyright works

- vi) Subsistence of and title to copyright in the various works relied upon.
- vii) Which works were actually broadcast by NOVA and ART.
- viii) Issues arising in relation to particular copyright works, namely sound recordings, musical works and action replays.

The Madden defendants

- ix) The activities of the Madden defendants.

The acts of infringement

- x) Infringement by copying in the decoder and on television screens. This raises issues as to whether copies of a substantial part of any relevant copyright work are made in the decoder boxes or on the television screens and whether a defence is available under s.28A or s.72 of the CDPA.
- xi) Infringement by communication to the public.
- xii) Infringement by performing, playing or showing the works in public and whether a defence is available under s.72 of the CDPA.

Particular issues of or relating to Community law

- xiii) Whether there is a general defence to the infringement of copyright claims under Directive 93/83/EEC .
- xiv) Whether the claimants are seeking relief in respect of the NOVA cards (and the ART cards in so far as I find FAPL or ART consented to their importation into the EU) which would amount to a quantitative restriction on trade between Member States or a measure having equivalent effect within the meaning of Article 28 EC or a restriction on the freedom of foreign broadcasters to provide services and customers to receive services contrary to Article 49 EC.
- xv) FAPL's licensing agreements restrict each licensee from supplying (even passively in response to an unsolicited order) or permitting the use of its decoder cards outside its licensed territory. The defendants say these contractual restrictions seek to provide absolute territorial protection to each licensee contrary to Article 81 EC.
- xvi) Whether it is appropriate to make a preliminary reference to the Court of Justice under Article 234 EC.

Ancillary points

- xvii) Whether the QC and AV defendants have authorised the infringement of copyright by their customers, including the Madden defendants.
- xviii) The personal liability of Mr Chamberlain and Mr Raval.
- xix) Whether the claimants are potentially entitled to additional damages under s.97(2) of the CDPA.

17. I would re-iterate, these are the *main* issues. There are others with which I must deal in addressing the infringement claim in respect of each category of copyright work relied upon. But before considering the various claims in detail I must provide a little more of the factual background.

The factual background

Broadcasting of the Premier League matches

18. The position was explained by Mr Weingarten, an in house solicitor at the FAPL and was mostly unchallenged. Accordingly, what follows in this section of the judgment is largely taken from his witness statements.
19. Every year FAPL organises a competition in which all 20 member clubs play against each other twice – the Premier League matches. FAPL is authorised by its member football clubs to license broadcasters throughout the world to provide audio-visual coverage of these matches. FAPL's strategy is to bring the competition to viewers throughout the world while maximising the value of its media rights to the member clubs. A high proportion of the revenue generated by FAPL derives from the sale of these rights. This revenue has been, and remains, vital to the quality of the competition and FAPL's success.
20. Maximising the value of FAPL's rights not only enhances the revenue streams of the Premier League clubs, but also provides financial support for grassroots football and the numerous football-related projects supported by FAPL. For example, it has recently been announced that FAPL will give the Football League a solidarity package estimated to be worth potentially in excess of £90 million over the 2007-2010 seasons which will go towards youth development, community grassroots projects, redistribution to lower league clubs and payments to clubs relegated from the Premier League. FAPL's ability to invest in football at all levels is a direct result of its ability to maximise the value of its broadcast rights.
21. The rights to broadcast Premier League matches live are offered to broadcasters by open competitive tender and for a fixed term. Rights for the UK and Ireland are sold separately from those for the rest of the world. Bidders for territories throughout the rest of the world are invited to submit offers on a variety of bases: global, regional or territory by territory. The market (through the nature of the bids) then determines the territorial basis on which FAPL sells its international rights. However, historically, there has been only limited demand from bidders for global or pan-European rights and usually only from rights agencies (being agencies which acquire rights with the intention of sub-licensing them) rather than broadcasters. This is chiefly because broadcasters typically operate on a territorial basis, serving the domestic market either in their own country, or in a small cluster of neighbouring countries with a common language (for example, German-speaking countries). During the 2004-2007 seasons, 204 countries received broadcasts of the matches.
22. The successful bidder for a package of live rights in respect of any particular territory is granted the exclusive right to screen the matches in that package live within its territory, although that right may be sub-licensed to one or more sub-licensees (subject to the approval of FAPL). The grant of exclusivity is, says Mr Weingarten, necessary in order to realise the optimum commercial value of the rights. Broadcasters are prepared to pay a premium to acquire exclusivity. This allows them to differentiate their services from those of their rivals and so enhances their ability to generate revenue. The presence of competing live transmissions of the same matches in the same territory destroys this exclusivity and thereby diminishes the value of the rights.
23. The broadcast of matches for viewing in England is precluded for a period each week pursuant to Article 48 of the Statutes of the Union des Associations Européennes de Football ("UEFA"). UEFA is the governing body for football in Europe. The

Premier League Rules, which govern the relationship between FAPL and its member clubs, require that FAPL itself and each of its member clubs comply with the statutes and regulations of UEFA. Pursuant to the regulations governing the implementation of Article 48 of the UEFA Statutes, each national football association may designate in each week a period of two and a half hours during which the broadcasting of football matches within the territory of that national association is prohibited. This period is known as the "Closed Period". The Football Association in England has designated 2.45pm to 5.15pm on Saturday afternoons as the Closed Period. Other countries have Closed Periods at different times. The purpose of Article 48 and the Closed Period is to ensure that spectators are not deterred from attending football matches whether professional, amateur or at a local level or from participating in grassroots football.

24. Mr Weingarten also explained, and I accept, that the grant of broadcasting rights for sporting events on an exclusive territorial basis is an established and accepted commercial practice amongst rights-holders and broadcasters throughout Europe. To protect this territorial exclusivity, each broadcaster undertakes in its licence agreement with the FAPL to encrypt its satellite-delivered signal.

The creation of the Premier League match feeds – in outline

25. During the 2004-2007 seasons, each match was filmed by the BBC or Sky. The process by which the matches are filmed, prepared for transmission and transmitted to viewers was accurately summarised by FAPL as follows:
- i) At the match, several cameras capture the live action. An outside production facility at the match selects which camera's output is to be used at any moment for the live broadcast. Its output, along with the ambient sound captured at the match (together referred to as "the Clean Live Feed"), is transmitted along fibre optic cable (via BT Tower) to a production facility operated in London by IMG Media Limited ("IMG").
 - ii) IMG adds logos, video sequences, on-screen graphics, music and English commentary to the Clean Live Feed. The resulting signal is referred to as "the World Feed".
 - iii) The World Feed is then transmitted by IMG along fibre optic cable back to BT Tower, where it is compressed and encrypted, and transmitted by satellite to the foreign broadcaster.
 - iv) The foreign broadcaster decrypts and decompresses the World Feed, so that it can add its logo and possibly some commentary. The signal is then compressed and encrypted again, and transmitted via satellite to subscribers.
 - v) Subscribers receive the signal using a small satellite dish. The signal is decrypted and decompressed in a decoder, which requires for its operation a decoder card.
 - vi) During play of the football match, the foreign broadcaster superimposes only its channel logo in the corner of the image and may add a commentary. Outside play (i.e. before kick-off, during half-time and after full-time), the

foreign broadcaster may or may not use the World Feed, which during these times either carries live footage from the football ground or pre-recorded programming.

- vii) The whole process of transmission of the live signal from the football pitch to the subscriber takes approximately 5 seconds.

The Clean Live Feed

- 26. The manner in which the Clean Live Feed is produced was explained in the statement of Mr Darren Long, the Head of Sky Sports operations. Once again, this was not in dispute and can be summarised as follows.
- 27. Sky arranges for a number of cameramen to film the match. Generally they use between 20 and 25 cameras. These capture the activity on the pitch in digital form and also have inbuilt microphones which capture the ambient sound from different parts of the stadium. Sky also arranges for a production team to be present. The production team is led by a Match Director who takes decisions about which camera's output appears on the Clean Live Feed at any particular time. He is assisted by an assistant producer (known as a VT co-ordinator) who makes action replays (referred to as "Action Replay Films") available for the Match Director to include in the Clean Live Feed. These occur where the production team has decided that a particular incident warrants being shown again either in normal time or in slow motion. The output from each camera is recorded (to produce what is known as a "Match Film"), and the output of any one camera can be re-wound to show a particular incident again. For example, while the teams playing in the match are walking back to the half way line after a goal has been scored, the production team may re-show the goal. The replays are usually from the cameras situated at the 18 yard line. It is the VT co-ordinator who chooses which camera's output will be used for replays (sometimes replays include more than one angle) and makes the action replays available on one or more of four 'lines' for the Match Director to insert into the Clean Live Feed. The Action Replay Films are not pre-recorded as such but are inserted into the Clean Live Feed using a vision mixer and by playing the relevant parts of the underlying recorded Match Films. The Vision mixer has two outputs; one is the Clean Live Feed which is sent to IMG and the second is known as the Sky Dirty Feed which is the Sky branded version of the Clean Live Feed and is ultimately broadcast on Sky channels.

The World Feed

- 28. IMG carries out the Premier League's international production function on its behalf. The Clean Live Feed is carried (via BT Tower) by private fibre optic cables to mediahouse, IMG's technical facility in Chiswick. Here, IMG's production team (which comprises both IMG employees and freelancers contracted to IMG) adds graphics, music, additional video sequences and commentary (either sent from the ground or produced at mediahouse), to create the World Feed. The video sequences of particular significance in the context of this case are the following:

- i) *The Opening Sequence Film*

The World Feed commences with an introduction or opening sequence ("the Opening Sequence Film"), which is a pre-recorded video sequence of football

action, graphics (the “Opening Sequence Graphics Film”) and stills of certain players. The graphics include the Premier League logos (the “Logos”). The football action shots are derived from recently recorded footage of previous matches including the Match Films, recordings of the Clean Live Feed (the “Clean Live Feed Film”) and World Feed (the “World Feed Film”) and films made by IMG employees or freelancers who attend matches and record footage such as pre-match crowd build up and interviews with players (“IMG Match Films”). The Opening Sequence Film is accompanied by the Premier League anthem (“the Anthem”).

ii) *The Match Highlights Film*

During half time and at full time, the World Feed includes highlights of the match. These are created by IMG by selecting images from the Clean Live Feed Film and recording them onto a hard disc in a particular order to make the “Match Highlights Films”. These films may be accompanied by the Anthem.

iii) *Previous Highlights, Next Match Preview and Special Feature Films*

Before the start of the match, the World Feed includes pre-recorded films showing highlights of the last Premier League matches played by the teams in the current match (the “Previous Highlights Films”) and which may again be accompanied by the Anthem. At half time, there is a recorded preview of the teams’ next Premier League matches (the “Next Match Preview Film”) and a special feature comprising a “test your knowledge” quiz or telling a story of a particular player, manager or incident (the “Special Feature Film”).

iv) *On Screen Graphics Films*

At various points before and during the match, moving graphics are included in the World Feed. These include the Team Bar, the Previous Performance Bar and the Yellow Card Bar. They are recorded digitally in a form from which a moving image may be reproduced.

29. The World Feed produced by IMG is compressed and encrypted and uplinked from the UK to the Eutelsat (for Europe), Intelsat (for Asia) and Panamsat (for the Americas) satellites. Foreign broadcasters who have been directly or indirectly licensed by the Premier League are then able to receive the World Feed on payment of a charge, and transmit it to their own subscribers in their assigned territories.

Greece

30. For the 2004/2005, 2005/2006 and 2006/2007 seasons, a company called TV Prosports Limited was authorised by FAPL to broadcast the Premier League matches live in Greece.
31. As I have mentioned, NetMed was the sub-licensee of those rights under a written agreement dated 6 August 2004 (the “NetMed Agreement”) which required it to undertake that all of its transmissions capable of reception outside Greece were

securely encrypted and that it would not knowingly authorise any person to view any such transmissions outside Greece.

32. The material terms of the NetMed Agreement, which are mirrored in the agreements of other licensees, were summarised by Mr Weingarten as follows. Clause 2.1(a) granted NetMed the rights, amongst others, in Greece alone *"to make and to authorise the simultaneous re-transmission of: (i) a single Live Transmission OR Delayed Transmission of each Premier League Match"*, where a "Delayed Transmission" meant a Transmission of a recording of a Premier League Match in full and without editing, as though it were a Live Transmission, commencing within twenty-four hours after the end of the relevant Premier League Match, a "Live Transmission" meant any live and simultaneous Transmission of a Premier League Match in its entirety, and "Transmission" meant any broadcast or transmission in analogue or digital format of audio-visual images made by licensed delivery systems.
33. Pursuant to Clause 10.1, NetMed agreed it *"shall not interrupt a Live Transmission or a Delayed Transmission of a Premier League Match (except during the half-time interval) and shall not broadcast any material during the half-time interval of a Premier League Match except for advertisements, promotional material and/or analysis of or discussion about that Premier League Match and/or material related to Premier League Matches."*
34. Pursuant to Clause 10.2, NetMed had to ensure that its (and any permitted sub-licensee's) transmissions *"shall not be capable of reception and/or decryption by any viewer outside of"* Greece.
35. Pursuant to Clause 12.1(b)(i), NetMed undertook that all of its transmissions capable of reception outside Greece *"shall be securely encrypted and shall not be receivable by any person outside [Greece] in unencrypted form and 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"*.
36. In practical terms NetMed was therefore prohibited from supplying NOVA decoder cards for use outside Greece.
37. In April 2007, NetMed renewed directly with FAPL its contract for the 2007/2008, 2008/2009 and 2009/2010 seasons, once again for the territory of Greece.
38. Pursuant to these arrangements, NOVA has accessed the Eutelsat satellite feed and has requested up to six Premier League matches per week. As Mr Papastathopoulos, NOVA's legal advisor, explained to me, the matches are an integral and important part of Greek SuperSport branded channels' schedule and they are selected on the basis of a number of factors, including the current Premier League standings of the clubs involved in any particular match and the preferences of a Greek audience for teams with Greek players in their squads.

39. Upon receipt of the World Feed signal, it is decompressed and decoded by NetMed and then passed to the NOVA broadcasting centre. Here the SuperSport logo and Greek commentary are added. Moreover, editorial decisions are made as to when the World Feed is used and interrupted, and over other programming elements. NOVA uses the Opening Sequence Film and Previous Match Highlights Films depending upon the end time of the previous programme and the duration of the commercials. At half time it does not generally use Next Match Preview and Special Feature Films but does use Match Highlights Films, again depending on the duration of commercials. Post match films are used depending on the end time of the match and the duration of the commercials before the start of the next programme. As I elaborate in addressing the copyright claim, it is apparent from recordings made by NOVA of aspects of three particular broadcasts that the amount of the World Feed it uses varies to some degree from match to match.
40. It follows from the above that the only elements broadcast by NOVA alongside the World Feed are the SuperSport logo and the Greek commentary. NOVA subscribers can elect, using their set-top boxes, to listen either to that Greek commentary or to the original English commentary.
41. The NOVA signal is then compressed and encrypted using Irdeto encryption and multiplexed with other services before being uplinked to the Hotbird satellite.
42. Members of the public are able to watch SuperSport channels by subscribing to the relevant NOVA bouquet of channels. These subscriptions are available, together with NOVA decoder cards, set top decoder boxes and other associated hardware, from about 1600 retail outlets in Greece. They may be taken out for up to 12 months and the subscriber must provide a name, local Greek address and a local Greek telephone number. Subscriptions can be taken out for private or commercial purposes. In the case of a private subscription, the subscription agreement provides the subscriber is only permitted to view the NOVA bouquet of channels for his and his family's personal use and only at his home or workplace.

North Africa and the Middle East

43. For the 2004/2005, 2005/2006 and 2006/2007 seasons IMG was authorised by FAPL to broadcast Premier League matches live in the Middle East and North Africa. ART was the sub-licensee of those rights (via AMC). Its sub-licence came to an end in the spring of 2007.
44. In a similar manner to NOVA, AMC has, pursuant to these arrangements, accessed the Eutelsat feed. At least during the 2006/2007 season, it seems it requested every available Premier League match.
45. Upon receipt of the World Feed signal it was decompressed and decoded. Then, depending upon the match, it was treated in one of two ways. For the matches of more importance to the Arab speaking world ART produced what it described as a "studio" match. In the case of these matches, ART provided a studio with live commentators, who would provide a commentary before the match, during the match and at half and full time. As a result it generally did not use the Opening Sequence, Match Highlights, Previous Match Highlights, Next Match Preview or Special Features Films from the World Feed. Instead, the ART broadcast would cut to the studio for

the live commentators to give their views, and for some general studio discussion. At the beginning of the match ART would join the World Feed in time to see the players coming onto the pitch and the on screen graphics showing the players for each team.

46. In the case of non-studio matches, ART would use almost the entire World Feed. The only exception was that, at half time, after showing the Match Highlights Film, ART would go to a commercial break. After the break, ART would introduce some graphics film footage showing other matches coming up on the ART channels and then the operators would try (not always successfully) to cut back to the World Feed in time for the Special Features Film.
47. As in the case of NOVA, the only elements broadcast alongside the World Feed were the ART logo and the Arabic commentary. The logo was layered on top of the World Feed and the original English language commentary was left unaltered.
48. At all material times ART has broadcast a wide range of programming, including six sports channels. However it puts together different packages for different territories and arranges them so that they only include those channels and programming in respect of which it has the relevant rights.
49. In the case of the Premier League matches, the signal was compressed, encrypted using Irdeto encryption, multiplexed with other services and then uplinked by JMC for satellite broadcast and intended reception in the Middle East and North Africa. For historical reasons that broadcast had a double leg. The signals were first uplinked to the Nilesat satellite. The signal was received in Italy and decoded. It was then re-encrypted using Viaccess encryption and uplinked to the Hotbird satellite. The parties were agreed that for the purposes of these proceedings I should ignore the double leg and treat the ART uplink and broadcast as having been made from Italy. Specifically, the defendants in the QC and Madden actions have admitted for the purposes of these proceedings only that that the ART sports channels are protected services of television broadcasting within Directive 98/84/EC.
50. The footprint of the Hotbird satellite extends over North Africa and the Middle East and members of the public in those territories were able to watch the Premier League matches broadcast by ART by buying a pre-paid ART “countdown” decoder card and inserting it into a standard set top decoder box. These countdown cards were activated when first placed in the decoder box and lasted for a fixed period of time. They could be bought from a number of authorised distributors, most of which were subsidiaries of an associated company, Arab Digital Distribution (“ADD”). The distributors were warned that the cards were not to be sold outside their territories but, until December 2005, the cards themselves carried no indication of this restriction. As from that time, the cards carried a copyright warning in English, French and Arabic that they were not to be used outside the territory in which they were sold and that such use would constitute a criminal offence.
51. In addition to the countdown cards, ART issues subscription decoder cards for use in Europe. These are also marketed by ADD or its subsidiaries. However, none of the ART sports channels (and, in particular, no Premier League programming) has ever been available to European subscribers. European decoder cards only provide access to programming in respect of which ART owns worldwide rights.

52. I must return to the details of the components of the various broadcasts and the particular activities of the defendants when addressing the issues arising in relation to the allegations of authorisation and copyright infringement but I need say no more for the moment. I can now turn to the claim for infringement of s.298 of the CDPA and the scope of Directive 98/84/EC.

Section 298 of the CDPA – general

53. The claim in respect of the decoder cards turns on the scope of ss.298 and 299 of the CDPA, which read, so far as relevant:

“298.— Rights and remedies in respect of apparatus, &c. for unauthorised reception of transmissions.

(1) A person who—

(a) makes charges for the reception of programmes included in a broadcasting service provided from a place in the United Kingdom or any other member State,

(b) sends encrypted transmissions of any other description from a place in the United Kingdom or any other member State, or

(c) provides conditional access services from a place in the United Kingdom or any other member State,

is entitled to the following rights and remedies.

(2) He has the same rights and remedies against a person—

(a) who—

(i) makes, imports, distributes, sells or lets for hire, offers or exposes for sale or hire, or advertises for sale or hire,

(ii) has in his possession for commercial purposes, or

(iii) instals, maintains or replaces for commercial purposes,

any apparatus designed or adapted to enable or assist persons to access the programmes or other transmissions or circumvent conditional access technology related to the programmes or other transmissions when they are not entitled to do so, or

(b) who publishes or otherwise promotes by means of commercial communications any information which is

calculated to enable or assist persons to access the programmes or other transmissions or circumvent conditional access technology related to the programmes or other transmissions when they are not entitled to do so,

as a copyright owner has in respect of an infringement of copyright.

.....

(7) In this section “apparatus”, “conditional access technology” and “encrypted” have the same meanings as in section 297A, “transmission” includes transmissions as defined in that section and “conditional access services” means services comprising the provision of conditional access technology.

299.— Supplementary provisions as to fraudulent reception.

.....

(4) Where sections 297 and 298 apply in relation to a broadcasting service, they also apply to any service run for the person providing that service, or a person providing programmes for that service, which consists wholly or mainly in the sending by means of telecommunications system of sounds or visual images, or both.

(5) In sections 297, 297A and 298, and this section, “programme” and “broadcasting” and related expressions, have the same meaning as in Part I (copyright).”

54. Section 299(5) takes one back to s.6 for the definitions of “programme” and “broadcasting”. This reads, so far as relevant:

“6-(1) In this Part a "broadcast" means an electronic transmission of visual images, sounds or other information which –

- (a) is transmitted for simultaneous reception by members of the public and is capable of being lawfully received by them, or
- (b) is transmitted at a time determined solely by the person making the transmission for presentation to members of the public,

and which is not excepted by subsection (1A); and references to broadcasting shall be construed accordingly.

(1A)

(2) An encrypted transmission shall be regarded as capable of being lawfully received by members of the public only if decoding equipment has been made available to members of the public by or with the authority of the person making the transmission or the person providing the contents of the transmission.

(3) References in this Part to the person making a broadcast, or a transmission which is a broadcast are -

- (a) to the person transmitting the programme, if he has responsibility to any extent for its contents, and
- (b) to any person providing the programme who makes with the person transmitting it the arrangements necessary for its transmission;

and references in this Part to a programme, in the context of broadcasting, are to any item included in a broadcast.

(4) For the purposes of this Part, the place from which a wireless broadcast is made is the place where, under the control and responsibility of the person making the broadcast, the programme-carrying signals are introduced into an uninterrupted chain of communication (including, in the case of a satellite transmission, the chain leading to the satellite and down towards the earth).

(4A)

(5) References in this Part to the reception of a broadcast include reception of a broadcast relayed by means of a telecommunications system.

(5A) The relaying of a broadcast by reception and immediate re-transmission shall be regarded for the purposes of this Part as a separate act of broadcasting from the making of the broadcast which is so re-transmitted.”

55. The claimants say the defendants have infringed these rights because:

- i) The Clean Live Feed and the World Feed are programmes included in a broadcasting service provided by FAPL from the UK within the meaning of s.298(1)(a).
- ii) The transmissions provided by NOVA are programmes included in a broadcasting service provided from Greece within the meaning of s.298(1)(a).

- iii) NOVA charges subscribers directly for the reception of SuperSport transmissions; FAPL charges subscribers indirectly for the reception of the Clean Live Feed and the World Feed.
- iv) In the alternative, the Clean Live Feed and World Feed are encrypted transmissions “of any other description” within the meaning of s.298(1)(b).
- v) In the further alternative, the provision of the Clean Live Feed and the World Feed is a service provided by FAPL for NOVA within the meaning of s.299(4).
- vi) The defendants are dealing in or possess for commercial purposes ART and NOVA decoder cards which are designed or adapted to enable persons to access the programmes or other transmissions when they are not entitled to do so.

Directive 98/84 EC (The Conditional Access Directive)

56. Section 298 was substituted by SI 2000/1175 and is intended to implement Directive 98/84/EC. It is well established that a domestic statute enacted or amended to implement an EC Directive must be construed in conformity with and to achieve the result intended by the Directive. Unfortunately, in this case, as in others in the IP field, the draftsman has not used the words of the Directive with the result that the parties agreed I should address the issues of interpretation which arise by reference to the Directive itself.

57. I was referred to the following Recitals (with references omitted):

“(1) Whereas the objectives of the Community as laid down in the Treaty include creating an ever closer union among the peoples of Europe and ensuring economic and social progress, by eliminating the barriers which divide them;

(2) Whereas the cross-border provision of broadcasting and information society services may contribute, from the individual point of view, to the full effectiveness of freedom of expression as a fundamental right and, from the collective point of view, to the achievement of the objectives laid down in the Treaty;

(3) Whereas the Treaty provides for the free movement of all services which are normally provided for remuneration; whereas this right, as applied to broadcasting and information society services, is also a specific manifestation in Community law of a more general principle, namely freedom of expression as enshrined in Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; whereas that Article explicitly recognizes the right of citizens to receive and impart information regardless of frontiers and whereas any restriction of that right must be based on due

consideration of other legitimate interests deserving of legal protection;

(4) Whereas the Commission undertook a wide-ranging consultation based on the Green Paper 'Legal Protection of Encrypted Services in the Internal Market'; whereas the results of that consultation confirmed the need for a Community legal instrument ensuring the legal protection of all those services whose remuneration relies on conditional access;

(5) Whereas the European Parliament, in its Resolution of 13 May 1997 on the Green Paper, called on the Commission to present a proposal for a Directive covering all encoded services in respect of which encoding is used to ensure payment of a fee, and agreed that this should include information society services provided at a distance by electronic means and at the individual request of a service receiver, as well as broadcasting services;

(6) Whereas the opportunities offered by digital technologies provide the potential for increasing consumer choice and contributing to cultural pluralism, by developing an even wider range of services within the meaning of Articles 59 and 60 of the Treaty; whereas the viability of those services will often depend on the use of conditional access in order to obtain the remuneration of the service provider; whereas, accordingly, the legal protection of service providers against illicit devices which allow access to these services free of charge seems necessary in order to ensure the economic viability of the services;

.....

(11) Whereas the disparity between national rules concerning the legal protection of services based on, or consisting of, conditional access is liable to create obstacles to the free movement of services and goods;

(12) Whereas the application of the Treaty is not sufficient to remove these internal market obstacles; whereas those obstacles should therefore be removed by providing for an equivalent level of protection between Member States; whereas this implies an approximation of the national rules relating to the commercial activities which concern illicit devices;

(13) Whereas it seems necessary to ensure that Member States provide appropriate legal protection against the placing on the market, for direct or indirect financial gain, of an illicit device which enables or facilitates without authority the circumvention of any technological measures designed to protect the remuneration of a legally provided service;

.....

(15) Whereas those commercial activities are detrimental to consumers who are misled about the origin of illicit devices; whereas a high level of consumer protection is needed in order to fight against this kind of consumer fraud; whereas Article 129a(1) of the Treaty provides that the Community should contribute to the achievement of a high level of consumer protection by the measures it adopts pursuant to Article 100a thereof;

(16) Whereas, therefore, the legal framework for the creation of a single audiovisual area laid down in Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities should be supplemented with reference to conditional access techniques as laid down in this Directive, in order, not least, to ensure equal treatment of the suppliers of cross border broadcasts, regardless of their place of establishment;

....

(21) Whereas this Directive is without prejudice to the application of any national provisions which may prohibit the private possession of illicit devices, to the application of Community competition rules and to the application of Community rules concerning intellectual property rights;

(22) Whereas national law concerning sanctions and remedies for infringing commercial activities may provide that the activities have to be carried out in the knowledge or with reasonable grounds for knowing that the devices in question were illicit;

(23) Whereas the sanctions and remedies provided for under this Directive are without prejudice to any other sanction or remedy for which provision may be made under national law, such as preventive measures in general or seizure of illicit devices; whereas Member States are not obliged to provide criminal sanctions for infringing activities covered by this Directive; whereas Member States' provisions for actions for damages are to be in conformity with their national legislative and judicial systems;

(24) Whereas this Directive is without prejudice to the application of national rules which do not fall within the field herein coordinated, such as those adopted for the protection of minors, including those in compliance with Directive

89/552/EEC, or national provisions concerned with public policy or public security,”

58. The relevant Articles of the Directive provide (again, with references omitted)

Article 1

Scope

The objective of this Directive is to approximate provisions in the Member States concerning measures against illicit devices which give unauthorised access to protected services.

Article 2

Definitions

For the purposes of this Directive:

(a) *protected service* shall mean any of the following services, where provided against remuneration and on the basis of conditional access:

- television broadcasting, as defined in Article 1(a) of Directive 89/552/EEC,

- radio broadcasting, meaning any transmission by wire or over the air, including by satellite, of radio programmes intended for reception by the public,

- information society services within the meaning of Article 1(2) of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on information society services,

or the provision of conditional access to the above services considered as a service in its own right;

(b) *conditional access* shall mean any technical measure and/or arrangement whereby access to the protected service in an intelligible form is made conditional upon prior individual authorisation;

(c) *conditional access device* shall mean any equipment or software designed or adapted to give access to a protected service in an intelligible form;

(d) *associated service* shall mean the installation, maintenance or replacement of conditional access devices, as well as the

provision of commercial communication services in relation to them or to protected services;

(e) *illicit device* shall mean any equipment or software designed or adapted to give access to a protected service in an intelligible form without the authorisation of the service provider;

(f) *field coordinated by this Directive* shall mean any provision relating to the infringing activities specified in Article 4.

Article 3

Internal market principles

1. Each Member State shall take the measures necessary to prohibit on its territory the activities listed in Article 4, and to provide for the sanctions and remedies laid down in Article 5.

2. Without prejudice to paragraph 1, Member States may not:

(a) restrict the provision of protected services, or associated services, which originate in another Member State; or

(b) restrict the free movement of conditional access devices;

for reasons falling within the field coordinated by this Directive.

Article 4

Infringing activities

Member States shall prohibit on their territory all of the following activities:

(a) the manufacture, import, distribution, sale, rental or possession for commercial purposes of illicit devices;

(b) the installation, maintenance or replacement for commercial purposes of an illicit device;

(c) the use of commercial communications to promote illicit devices

Article 5

Sanctions and remedies

1. The sanctions shall be effective, dissuasive and proportionate to the potential impact of the infringing activity.

2. Member States shall take the necessary measures to ensure that providers of protected services whose interests are affected

by an infringing activity as specified in Article 4, carried out on their territory, have access to appropriate remedies, including bringing an action for damages and obtaining an injunction or other preventive measure, and where appropriate, applying for disposal outside commercial channels of illicit devices.

The definitions

59. Article 2 of the Directive refers to Directive 89/552/EEC (the TV Without Frontiers Directive) for the definition of “television broadcasting” and to Directive 98/34/EC of the European Parliament and Council of 22 June 1998 (the Information Society Services Directive) for the definition of “information society services”.

(a) Directive 89/552/EEC (The TV Without Frontiers Directive)

60. This Directive is primarily concerned with the regulation of the content of broadcasting services and establishes a system in which broadcasts must comply with the law of the country from which they emanate.

61. This is reflected in Recitals 3 and 12:

“(3) Whereas broadcasts transmitted across frontiers by means of various technologies are one of the ways of pursuing the objectives of the Community; whereas measures should be adopted to permit and ensure the transition from national markets to a common programme production and distribution market and to establish conditions of fair competition without prejudice to the public interest role to be discharged by the television broadcasting services;

(12) Whereas it is consequently necessary and sufficient that all broadcasts comply with the law of Member State from which they emanate;”

62. Article 1 contains the definitions and, most importantly:

“For the purpose of this Directive:

(a) ‘television broadcasting’ means the initial transmission by wire or over the air, including that by satellite, in unencoded or encoded form, of television programmes intended for reception by the public. It includes the communication of programmes between undertakings with a view to their being relayed to the public. It does not include communication services providing items of information or other messages on individual demand such as telecopying, electronic data banks and other similar services;

(b) ‘broadcaster’ means the natural or legal person who has editorial responsibility for the composition of schedules of

television programmes within the meaning of (a) and who transmits them or has them transmitted by third parties;”

(b) *Directive 98/34/EC (The Information Society Services Directive)*

63. So far as relevant, this reads:

Article 1

For the purposes of this Directive, the following meanings shall apply:

...

2. ‘service’, any Information Society service, that is to say, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.

For the purposes of this definition:

- ‘at a distance’ means that the service is provided without the parties being simultaneously present,

- ‘by electronic means’ means that the service is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means,

- ‘at the individual request of a recipient of services’ means that the service is provided through the transmission of data on individual request.

An indicative list of services not covered by this definition is set out in Annex V.

This Directive shall not apply to:

- radio broadcasting services,

- television broadcasting services covered by point (a) of Article 1 of Directive 89/552/EEC”

64. It is to be noted that the definitions are therefore mutually exclusive. A service cannot be both a television broadcasting service and an information society service.

65. I can now consider each of the three points of interpretation in turn.

Illicit device

66. This underpins the whole claim. The parties agree this expression plainly includes pirate decoder cards (by which I mean cards made and issued by third parties without the authorisation of the protected service provider). The claimants say, but the defendants dispute, that it also includes any decoder cards which are used to give access to the protected service without authorisation, even if they have been issued by the service provider. If the defendants are right then the claim must fail because the decoder cards in issue were, in the case of the NOVA cards, issued to subscribers in Greece and, in the case of the ART cards, sold in North Africa. I should note at this point that the claimants expressly disclaimed reliance upon the fact that the NOVA cards were procured and activated by providing false names and addresses. Their contention is more fundamental. They say the decoder cards sold by the defendants give access to their protected services in the UK without authorisation, and that is enough to satisfy the definition.
67. In support of their submissions the parties each rely on the wording of the Directive and upon the context in which and the purpose for which it was adopted. In this regard they have taken me to the travaux préparatoires and to the Green Paper referred to in Recital (4).
68. The claimants submit as follows. First, the essential purpose of the Directive is to outlaw unauthorised access and protect the remuneration of the service provider. This is apparent from Recitals (3) to (6) and (13). These refer to the need to protect services whose remuneration and viability relies upon conditional access. Recital (13) is of particular importance. This expressly recognises the need for protection against devices which enable or facilitate without authority the circumvention of technological measures designed to protect the remuneration of a legally protected service. In particular:
- i) The use of the word “necessary” signals that the prohibition of illicit devices is a proportionate measure, that is to say, it is necessary in order to protect a service provider’s remuneration and no less a restrictive measure will suffice to protect this legitimate policy object. This recital is, say the claimants, an answer to any argument from the defendants on proportionality.
 - ii) The protection which Member States must provide must be broad and cover both “direct and indirect” gain, including publicans who gain from increased trade in their pubs.
 - iii) An illicit device is one which “enables” or “facilitates” the circumvention of any technological measures (here, encryption) which are designed to protect the service provider’s remuneration. In this case an ART or NOVA card supplied by QC and AV for use in the UK plainly “enables without authority” the decryption of the signal in the UK.
 - iv) For the same reason each of those cards “facilitates without authority” the circumvention of technology designed to protect the remuneration of the service provider.
 - v) In Recital 13 (and in Article 2), the word “designed” is used in the sense of “the purpose of”.

- vi) Finally, Recital 13 makes it clear (along with Recitals 3,4,5 and 6) that the essential purpose of the Directive is to protect the service, not the sale of devices.
69. Second, Article 1 makes clear the objective of the Directive is to approximate laws in Member States concerning measures against devices which give unauthorised access. In short, the focus of the Directive is on the *effect* of such devices.
70. Third, the Directive draws no distinction between pirate and non-pirate devices. This is clear, inter alia, from Article 2(c) and 2(e):
- i) Article 2(c) defines “conditional access device” as any equipment or software designed or adapted to give access to a protected service in an intelligible form.
 - ii) Article 2(e) defines “illicit device” as any equipment or software designed or adapted to give access to a protected service in an intelligible form without the authorisation of the service provider.
71. The claimants point out that the two provisions are identically worded save for the inclusion at the end of Article 2(e) of the words “...without the authorisation of the service provider”. It follows, they say, that the only distinction between a legitimate and an illegitimate device lies in the authorisation of the service provider. If the device gives access without authorisation it is an illicit device. If the device gives access with authorisation, it is not.
72. Fourth, the claimants contend that even on a plain reading of the terms of Article 2(e) the devices sold and used by the defendants are illicit devices:
- i) First, they are clearly devices (decoder cards) which (when used with an appropriate decoder box) are “designed to give access” to a protected service within the UK. This is their purpose and effect.
 - ii) Second, it is clear there is no authorisation from the service provider (whether FAPL, NOVA or ART) for such access in the UK.
73. Fifth, the claimants say that the remuneration of the service provider is undermined as much by parallel imports as it is by pirate devices. In short, the Directive aims to give protection against all unauthorised access. At the heart of the Directive are, they say, the notions of “authorisation” and “prior individual authorisation” and it is the authorisation which is given which governs the situation. It is also inherent in the concept of individual authorisation that it can be limited geographically or for particular purposes.
74. The defendants respond that the purpose of the Directive is not, as the claimants contend, to give to service providers of lawful decoder cards a right to control their circulation or place of use and so divide the single European market into zones with differential pricing. On the contrary, the purpose of the Directive is to facilitate the undistorted operation of the single market by giving to service providers a Community-wide right to suppress the manufacture of and commercial dealings in *pirate* cards which give access to protected services for *free*, and further to remove

obstacles to the free circulation of cards which might previously have arisen from pre-existing provisions of national law. At the outset they point to the “Treaty bases” of the Directive, namely first, Articles 57(2) and 66 (now Articles 47(2) and 55), which are in Part II, Title III of the Treaty on “Free Movement of Persons, Services and Capital” and second, Article 100a (now Article 95). Article 66, by reference to Article 57(2), authorises the making of harmonising directives *for the purpose of making it easier to provide services across national borders*. Article 100a authorises harmonisation measures in aid of the establishment and functioning of the single market. The “single market” is defined in Article 8a (now Article 14) as “an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty.” In the light of these provisions, they say it is essential that the Directive’s substantial purpose and effect should have been to eliminate obstacles to trade between Member States in goods and services.

75. The defendants then turn to the Recitals to the Directive. They say that the objective of removing barriers to cross border broadcasting is made explicit in Recitals (1), (2), (3) (in referring to Article 10 of the European Convention for the protection of Human Rights and Fundamental Freedoms and the right of citizens to “receive and impart information regardless of frontiers”); (11) (in observing “the disparity between national rules concerning the legal protection of services based on conditional access is liable to create obstacles to the free movement of services and goods”), and (12) (in observing “Those obstacles should therefore be removed by providing for an equivalent level of protection between Member States”).
76. As to the substantive terms of the Directive, the defendants say that the definition of “illicit device”, read in the light of Recital (6), can only be referring to pirate decoder cards which permit access to a protected service free of charge. Moreover, in order to fall within the definition the equipment or software concerned must *inherently* be a device which gives access to the protected service without authorisation.
77. The defendants also draw support from Article 3 and suggest that on the claimants’ apparent construction of the Directive, it is hard to see what content Article 3(2) would have.
78. The arguments of both sides are powerful and the proper interpretation of the expression “illicit device” is not clear. I have carefully considered whether this is an issue which should be referred to the Court of Justice at this stage and, for reasons which I elaborate later in this judgment, I have concluded that it is. However, in case it may be of assistance to the Court, I offer my own provisional view.
79. I think the arguments of the defendants are to be preferred. My reasons are these. First, the Recitals do recognise the need for legal protection of broadcasting and information society services whose remuneration relies upon conditional access. For example, Recital (6) expressly acknowledges the development of a wide range of such services has the potential for increasing consumer choice and contributing to cultural pluralism but that the viability of such services often depends upon the use of conditional access in order to obtain the remuneration of the service provider. Moreover, the Recitals make clear that disparity between national rules concerning the legal protection of services based upon, or consisting of, conditional access was considered liable to create obstacles to the free movement of goods and services and

that a Directive was needed to provide for an equivalent level of protection between Member States. Further, the use of the word *necessary* in Recital 13 indicates that appropriate legal protection against illicit devices was considered a proportionate measure and that no less a restrictive measure would suffice to protect this legitimate policy object. However, I do not believe these considerations, of themselves, assist in determining the scope of definition because the protection of the service provider against pirate cards would seem to meet all these policy objectives.

80. I believe some indication of the intention behind this measure can, however, be derived from Recitals (13) and (15), read as a whole. The former refers to protection against the *placing on the market* of a device which enables or facilitates without authority the circumvention of any technological measures designed to protect the remuneration of a legally provided service. The latter explains that commercial activities in relation to such devices are detrimental to consumers who are misled about the *origin* of illicit devices. Both Recitals suggest to me that the Directive is concerned with the production and placing on the market of devices which do not have their *origin* in a legitimate service provider rather than the unauthorised *use* of devices which do originate from a legitimate service provider.
81. Second, Article 1 makes clear that the objective of the Directive is to approximate provisions in Member States concerning measures against illicit devices which give unauthorised access. However, I do not think it can be inferred the Directive is concerned only with *effect*, as the claimants contend. To the contrary, it seems to me that if this were the position then there would have been no need to limit its scope to *illicit* devices. Rather, it would have been directed to *all* devices which are used give unauthorised access.
82. Third, this impression is reinforced by the definitions of Article 2. A “conditional access device” means equipment or software *designed or adapted* to give access to a protected service. This suggests to me that it is concerned with the *physical* nature of the device or, as the defendants say, with its *inherent* nature. Similarly, an “illicit device” is a conditional access device which is *designed or adapted* to give such access *without the authorisation of the service provider*. Once again, it is the *physical* or *inherent* nature of the device which must confer this characteristic. This is the natural interpretation of the words used.
83. Fourth, and as the defendants submit, any reading of this definition which means that a device is “illicit” or “not illicit” depending upon where it is intended to be used is wholly unworkable given the infringing acts defined in Article 4 and the Community wide scope of the prohibitions. These are acts performed by manufacturers and dealers, not end users, and no *mens rea* or mental element is involved. Equipment becomes an “illicit device” upon its manufacture in any Member State of the Community; a device which is not illicit to begin with cannot change its status by reason of the subjective intention of a dealer as to the place where it is to be used. Indeed, a dealer may not even know where an end user intends to use a device which is supplied by a dealer to another dealer or to an end user.
84. Fifth, I agree with the defendants that it is very hard to see what substance there can be to Article 3(2)(b) if the interpretation for which they contend is not correct.

85. I believe the position of the defendants also derives support from a consideration of the context in which the Directive occurs and the objectives pursued by the rules of which it is part. I discuss this in greater detail later in this judgment (see paragraphs [283]-[294] and [320]-[328]) but for present purposes confine myself to the Green Paper and to the circumstances in which Recital 13 was introduced into the draft Directive by a relatively late amendment.
86. The Green Paper, dated 6 March 1996, is expressly referred to in Recital 4 and must therefore have formed part of the material to which the European Parliament and Council had regard. It is entitled “*Legal protection for Encrypted Services in the Internal market*” and explains the nature of the European market in encrypted services, the Recommendations of the Council of Europe made in September 1991, the various solutions adopted by Member States to address the problem of illicit reception of encrypted services, the view of the Commission that differences in those solutions could create obstacles to the free movement of goods and services and the need for and potential types of Community action.
87. Chapter 1 explains that technological developments have produced rapid changes in the European audiovisual landscape and allowed for a steady expansion in the supply of services which depend upon encryption for their viability. In elaborating the nature of the market, it recognises a number of reasons for encryption which include ensuring payment by subscribers, the possibility of increasing advertising revenue, accurately targeting services to the requirements of the users and simplifying the acquisition of broadcasting rights. In this regard it notes at p.11:
- “Traditionally, however, broadcasting rights are granted on a territorial basis, which means access often has to be limited to viewers within a specific geographical or common language area. Encryption allows the operator to restrict the reception of the signal exclusively to those territories for which rights have been acquired.”
88. It then points out (at pp.17-19) that the market is exposed to piracy and, in particular, that the manufacture and marketing of unauthorised decoding devices and the manipulation of authorised devices so as to allow access to a service on breach of the conditions laid down by the service provider has become highly lucrative and has a number of adverse consequences.
89. Chapters 3 and 4 respectively outline the recommendations of the Council of Europe and of WIPO, and analyse the solutions provided by national legislation to the problem of illicit reception of encrypted services.
90. Chapter 4 then addresses the issue of barriers to the efficient operation of the internal market. Section 1 (pp.34-36) suggests that protection of the encryptor against manufacturers and distributors of unauthorised decoding devices would be justified as pursuing public interest objectives in that it would protect the encryptor against those who might fraudulently profit from his activities and protect the public against devices which, as they are not official, would no longer guarantee reception of the service if the operator were to change the system. It explains the Commission view that such prohibitions would respect the proportionality criterion since:

“...they confine themselves to prohibiting the marketing of devices manufactured without the prior authorisation of the encryptor, irrespective of their domestic or foreign origins; therefore they do not go beyond what is necessary for the attainment of the objective.³⁴ Finally, they also respect the substitution and equivalence criterion, since there are no alternative and less restrictive measures that would ensure the desired protection.”

91. Footnote 34 is of importance. It contains this qualification:

“By contrast, if the prohibitions in question were applied to the import and marketing of devices manufactured and marketed in the Member State of origin with the consent of the encryptor, they would be liable to result in economic barriers which would be disproportionate to the objective, and therefore incompatible with the principles on the free movement of goods as interpreted by the Court.”

92. Two points emerge from these passages. First, the Commission envisaged protection against the manufacture and distribution of unauthorised (that is to say, pirate) decoder cards. Second, it was the opinion of the Commission that it would be disproportionate to provide protection against the circulation of decoder cards originally placed on the market with the consent of the encryptor. This is confirmed by the conclusion on p.37:

“In conclusion, an obstacle to the free movement of decoding devices manufactured and marketed in the State of origin, without the prior consent of the encryptor, may be justified by consumer protection and the fairness of commercial transactions, as well as by the protection of industrial or intellectual property.”

93. In section 2, the Commission then expresses in similar terms its views as to compatibility of restrictions on decoder cards with the Treaty rules on freedom of services.

94. Finally, Chapter 5 considers the potential different types of Community action and proposes, in section 5, and in view of the proportionality principle, various prohibited activities. In so far as they refer to decoder cards they are all qualified by the phrase:

“devices intended to permit access to encrypted services without the authorisation of the encryptor ”

95. I agree with the defendants that the Commission cannot have envisaged this phrase would cover devices put on the market with the consent of the encryptor in the light of the views it has expressed earlier.

96. The defendants rely on these observations for two purposes, both of which I consider to have merit:

- i) As an expression of the Commission's legal opinion on the scope and application of rules of the Treaty on free movement of goods and services. They say that whilst the Court of Justice is not bound to follow the Commission's opinion on a legal issue, it is plainly not *acte claire* that the Commission's opinion was wrong;
 - ii) As informing the interpretation of the Directive subsequently adopted. They submit it is inconceivable that the Commission would have proposed a measure which it believed to be contrary to the Treaty.
97. The defendants further say, again, in my judgment, with some force, this legal opinion of the Commission is fundamental to the legislation. If the Parliament or the Council had amended the measure so that it had the effect of applying to the import and marketing of devices put on the market in the Member State of origin with the consent of the encryptor, the Commission would have been bound to advise the Parliament and Council of its opinion that such an alteration would take the measure outside the scope of the Treaty bases in Articles 57(2), 66 and 100a.
98. My view is further reinforced by the circumstances in which Recital 13 was introduced into the draft Directive. This was a late amendment and led to the production by the Commission of a formal opinion under Article 189B(2)(d) of the EC Treaty in which it explained the purpose of the Directive as follows (on p.2) :
- “The proposed Directive will require Member States to prohibit and provide appropriate sanctions against a wide range of commercial piracy activities that relate to illicit (pirate) decoders, smart cards and software which allow the circumvention of conditional access systems and the reception of a service free of charge.
- The proposal concerns commercial piracy activities against protected services”
99. Parallel importation of goods issued by or with the consent of the rights holder would not normally be described as piracy.

Who has a relevant cause of action under Directive 98/84/EC?

100. It is to be remembered that the only claimants are FAPL and NOVA. No claim is brought by an ART entity although, of course, FAPL claims in respect of the dealings in and use by the defendants of both ART and NOVA cards.
101. Accordingly, and on the assumption the claimants are right as to the correct interpretation of “illicit devices”, the question then arises as to who has a cause of action under Directive 98/84/EC in respect of the NOVA and ART cards in issue in these proceedings. In this regard it is important to consider who is providing a protected service under the Directive and what kind of service it is, since FAPL is claiming a right to control the circulation and use of decoder cards issued by its customers which give access to the customers' respective broadcasting services and not (at least directly) to FAPL's World Feed signal.

102. The position of NOVA can be dealt with shortly. The parties all accept that NOVA provides a protected service within the meaning of Article 2 of the Directive, namely its television broadcasting service which is provided against remuneration and on the basis of conditional access, and that it can properly claim in respect of infringing activities in relation to illicit devices which give access to that service. However, the parties fundamentally disagree as to whether FAPL has any claim at all.
103. The claimants say that FAPL is a provider of services within the meaning of Directive 98/84/EC because:
- i) FAPL makes the initial transmission by satellite in encoded form of television programmes (i.e. the Clean Live Feed, *a fortiori*, the World Feed) intended for reception by the public. This comprises a television broadcasting service within the definition in Art 2(a) by reference to Article 1(a) of Directive 89/552/EEC (the TV Without Frontiers Directive). It is also a service provided against remuneration (directly to the foreign broadcast licensee such as NOVA and ART, and thereby indirectly to the consumer) and on the basis of conditional access (the transmissions are encrypted).
 - ii) Further or alternatively, FAPL provides the communication of programmes between undertakings with a view to their being relayed to the public. This comprises a television broadcasting service within the definition in Art 2(a) by reference to Article 1(a) of Directive 89/552/EEC. It is also a service provided against remuneration (directly to the foreign broadcast licensee such as NOVA and ART, and thereby indirectly to the consumer) and on the basis of conditional access (the transmission is encrypted).
 - iii) Alternatively, FAPL provides an information society service within the meaning of Directive 98/34/EC (the Information Society Services Directive). In particular, provision of the World Feed is a service
 - provided for remuneration (the foreign licence fee)
 - at a distance (since the parties are not simultaneously present)
 - by electronic means (using electronic equipment and transmitting and receiving by fibre optic cable and satellite)
 - provided through the transmission of data on individual request (ART and NOVA select the World Feeds they want to receive).
104. Moreover, they say the defendants are each engaging in infringing activities within the meaning of Article 4 of the Directive which affect the interests of FAPL. It follows that pursuant to Article 5, the UK must ensure that FAPL has access to appropriate remedies which include bringing this action, obtaining an injunction and any other appropriate remedies.
105. This, the claimants say, is achieved by the provisions of s.298 (set out at paragraph [53] above) and the defendants have infringed the rights conferred by carrying out the activities summarised in paragraph [55] above.

106. More specifically, the claimants explain their case in the following way, using NOVA as an illustration - the position in relation to ART being essentially the same. They say FAPL provides programmes to NOVA and NOVA provides those same programmes in its broadcast. They both contain the same live signal of the match – the visual coverage of the action and ambient sound, together with the availability of the English commentary – which is what the viewers want to watch. Adding the small NOVA logo and taking editorial decisions as to when the broadcast should cut to and from the World Feed, for example at half time to allow for the showing of advertisements, does not mean that a different programme is broadcast.
107. During the course of the hearing I understood the claimants to refine their arguments, once again, using NOVA as an illustration. Their primary contention is that the subscriber has access to two protected services. One is a broadcasting service provided by NOVA and the second is a broadcasting service provided by FAPL. In the case of the latter, FAPL provides authorisation via NOVA. Accordingly, they both have a cause of action in respect of dealings in illicit devices which give access to those services.
108. The claimants then have alternative “fall back” arguments. The first runs as follows. FAPL is providing a protected service, namely a broadcasting service or an information society service, which is accessed by NOVA. NOVA is also providing a broadcasting service which is accessed by the subscriber. However, the subscriber is also *indirectly* accessing the FAPL “first leg” service, with FAPL’s authorisation given via NOVA. Once again, they both have a cause of action in respect of dealings in illicit devices which give direct access to NOVA’s service and indirect access to FAPL’s service.
109. The second alternative argument is much the same as the first. However, here the claimants say that FAPL has a cause of action in respect of dealings in illicit devices which give access to NOVA’s service because it is also the supplier of a protected service and its *interests are affected* by such activities.
110. The defendants say that FAPL’s arguments are completely misconceived. They accept that NOVA is providing a protected service which falls within Article 2(a), first indent, of the Directive as it consists of television broadcasting, as defined in Article 1(a) of Directive 89/552/EEC. However, they say FAPL is not a broadcaster within Directive 89/552/EEC, and nor is FAPL’s transmission an act of television broadcasting within the terms of that Directive. This is because of the definition of “broadcaster” in Article 1(b), which I have set out in paragraph [62] above.
111. In this regard, the defendants say, and I accept, that NOVA composes its schedules of television programmes which include individual events provided by suppliers of sports programme material such as FAPL and others. None of those individual suppliers has editorial responsibility for NOVA’s schedules. Indeed, it is clear that NOVA exercises editorial control not merely at the level of deciding which match programmes to put on within its overall schedules, but at the more detailed level within individual programmes of deciding when to introduce visual images from FAPL’s World Feed, when to cut them off, and over what other elements to insert to make up the overall programme.

112. The defendants also say that that the reference in Article 1(a) of Directive 89/552/EEC that broadcasting includes “the communication of programmes between undertakings with a view to their being relayed to the public”, when taken in conjunction with the definition of “broadcaster” in Article 1(b), is limited to a situation where a whole service consisting of *schedules of programmes* is relayed over the networks of others, such as a cable network. Further, it follows from the first sentence of Article 1(a) that the programmes should be transmitted in the form in which they are intended to be received by the public. This does not happen in the present case, where FAPL merely transmits material which its customers utilise as they wish in composing their own match programmes.
113. The defendants say that this is the only interpretation consistent with the purpose and structure of Directive 89/552/EEC, which is to ensure that broadcasting is subject to regulation at one point only and not subject to multiple regulatory control by multiple Member States. Thus, NOVA’s broadcasts are subject to regulation in Greece because that is where NOVA puts together its schedules of sporting programmes. NOVA’s broadcasts of FAPL matches are not subject to regulation in the UK because they are drawing a feed signal from the UK; it would, the defendants argue, be absurd and unworkable if regulatory control over NOVA’s output were to pass from country to country depending upon whatever live sporting event NOVA happened to be carrying at any particular time. It would also make a nonsense of the requirements of Article 4 which reserve a majority proportion of a broadcaster’s transmission time for European works. Such provisions by their nature can only apply to broadcasters who transmit whole schedules of programmes, not to purveyors of live feeds from individual sporting events such as FAPL.
114. The correct analysis, submit the defendants, is that FAPL’s customers are broadcasters who provide services falling within the first indent of Article 2(a) of Directive 98/84/EC, whilst FAPL’s World Feed is an information society service falling within the third indent of that Article (see paragraph [58] above). Matches are provided to FAPL’s broadcasting customers at their individual request via FAPL’s conditional access system.
115. However, in either case, the defendants say that FAPL’s World Feed is a separate protected service from the protected services of each of its customers, having its own encryption and decryption system and the Directive only gives protection against illicit devices which give access to a protected service in an intelligible form. It does not extend to devices which give access to *other* services to which a protected service may feed material. Nor does it extend rights to other persons who may feed material to the provider of the relevant protected service.
116. The defendants support these submissions with two powerful arguments. First, they say the fact that the link from FAPL is encrypted, or that a satellite is used rather than a land line, is a matter of convenience for FAPL and its customers which has no relevance to the recipients of satellite broadcasts from FAPL’s customers. The signal sent on the World Feed could in principle be sent by an unencrypted secure land line, and indeed is sent by this method to broadcasters who are closer than NOVA and ART, including TPS France. It would be very odd if the fact of sending a signal via an encrypted link were in some way to spread its effect downstream and so entitle the provider to control conditional access devices which control access to downstream services. Secondly, they say that the consequences of the claimants’ arguments are

potentially very significant. Decoder cards for a satellite broadcasting service would need to be authorised not only by the satellite broadcaster itself, but by *every* programme content provider who provides content during the period of validity of a decoder card via an electronic link.

117. I have reached the conclusion that this is another point of interpretation which is not clear and which must be referred to the Court of Justice. However, again I offer my own opinion. Notwithstanding the force of the defendants' arguments, I favour the submissions of the claimants and would be minded to conclude that FAPL does have a cause of action in respect of pirate NOVA and ART cards and, it would follow, in respect of the unauthorised use of the decoder cards in issue in these proceedings if, contrary to my provisional view, they are right as to the correct interpretation of the expression "illicit device".
118. Despite the complexity of the arguments tendered by the claimants, I think the scheme of the Directive is relatively straightforward. Its objective is to approximate provisions in Member States concerning measures against illicit devices which give unauthorised access to protected services (Article 1). As has been seen, "illicit device" means equipment or software designed to give access to a protected service in an intelligible form without the authorisation of the service provider (Article 2(e)). Infringing activities are defined by reference to illicit devices (Article 4) and finally, Member States are obliged to take the necessary measures to ensure that providers of protected services whose interests are affected by an infringing activity have access to appropriate remedies (Article 5). So a convenient starting point is to identify the relevant protected service and the person who has provided it. It is by reference to the authorisation of this person that the term "illicit device" is defined and, as it seems to me, it is to this person that a remedy must be provided if his interests are affected by an infringing activity.
119. I therefore begin with a consideration of whether FAPL is providing a protected service and whether, to take a non contentious example, pirate NOVA or ART cards give unauthorised access to it. I incline to the view that FAPL is providing a television broadcasting service, as defined in Article 1(a) of Directive 89/552/EEC, for the following reasons.
120. First, it transmits television programmes intended for reception by the public. It matters not that the transmission is not direct because Article 1(a) expressly says that "television broadcasting" includes the communication of programmes between undertakings with a view to their being relayed to the public. Those programmes comprise the visual coverage, ambient sound and English language commentary of the individual Premier League matches and they are embodied in the World Feed and (in the case of the visual coverage and the ambient sound only) in the Clean Live Feed. It is true that FAPL's customers add their own logos and, on occasion, commentary. They also cut to and from the World Feed, depending on their own schedules but they do not interrupt the coverage of the matches. I do not think these steps change the essential identity of the programmes themselves.
121. In expressing this provisional view I feel supported by the decision of the Administrative Court in *Murphy v Media Protection Services Ltd* [2007] EWHC 3091 (Admin). This case concerned an appeal by way of case stated against the dismissal of an appeal against a conviction of Ms Murphy for dishonestly receiving a programme

included in a broadcasting service provided from a place in the UK with intent to avoid the charge applicable to the reception of the programme, contrary to s.297 of the CDPA. In short, Ms Murphy had been screening Premier League matches in her pub using a NOVA card supplied by AV.

122. Section 297(1) of the CDPA reads:

“A person who dishonestly receives a programme included in a broadcasting service provided from a place in the United Kingdom with intent to avoid payment of any charge applicable to the reception of the programme commits an offence and is liable on summary conviction to a fine not exceeding level 5 on the standard scale.”

123. The similarity between the words of s.297 and s.298 (set out in paragraph [53] above) is immediately apparent. Moreover, s.299(5) (also set out in paragraph [53] above) provides that the expressions “programme” and “broadcasting” and related expressions in both s.297 and s.298 are to have the same meaning as in Part I, that is to say as defined in s.6.

124. However, it must be acknowledged that in the *Murphy* case the court did not consider it a legitimate approach to construe s.297 by reference to Directive 89/552/EEC or, I would add, by reference to Directive 93/83/EEC. Rather, it concluded (at [36]):

“.....The question is to be answered by identifying what is said to be the “programme included in a broadcasting service”, then determining where that broadcasting service is provided from. Employing the definitions of s.6 CDPA, a “programme” is “any item included in a broadcast”, itself defined as “an electronic transmission of visual images, sounds or other information”. We do not consider that for this purpose a “broadcasting service” is anything more than a succession of such transmissions. In every case, however, it must be determined whether the broadcast, and so the programme, is capable of being lawfully received by members of the public. In the present case, there is no doubt that the core of the transmissions received by Ms Murphy, the visual images and the ambient sound of the matches themselves, was transmitted for simultaneous reception by members of the public and was capable of being lawfully received by them from BSkyB.”

125. It then proceeded to consider whether, for the purposes of s.297, it was a requirement that the broadcasting service or broadcaster providing the programme in question had to be based in the UK and concluded at [37] to [38]:

“37. The question in every case is to identify the “programme” received by the Defendant. In the present case, the programme in question comprised visuals and ambient sound transmitted from the ground in the United Kingdom, the broadcasting service being the supply of such programmes for simultaneous reception by members of the public in the UK.

The fact that this programme had added to it, first, an English commentary and, second, a Greek commentary and a Greek visual logo, did not change the identity of the programme as received by the Appellant.

38. The question is accordingly ambiguous, since it is necessary in every case to identify the first point at which the programme which is the subject of the charge came into existence to be included in the broadcasting service. The place from which the broadcasting service is provided is the point at which the initial transmission of the programme for ultimate reception by the public took place. That place is the United Kingdom.”

126. Importantly for present purposes, the court was of the view that the addition to the Live Feed of an English commentary (to make the World Feed) and then a Greek commentary and Greek visual logo did not change the identity of the programme.

127. I should note the court also considered whether FAPL and BSkyB were broadcasters or whether they provided a broadcasting service and determined, at [39]:

“It is not clear to us why this question arises. The question is the identification of the broadcasting service, not the person responsible for it. It seems to us, however, that both FAPL and BSkyB are the broadcaster for this purpose, since it is they who have editorial responsibility “for the composition of schedules of television programmes” so far as the transmitted match is concerned.”

128. Second, I must address the defendants’ contention that the definition of “television broadcasting” in Article 1(a) of Directive 89/552/EEC must be qualified by reference to the definition of “broadcaster” in Article 1(b). This is an important point. For if the defendants are right then I see considerable force in their submission that FAPL is neither a broadcaster nor engaging in television broadcasting. I say this essentially for the reasons which the defendants give. In summary, FAPL does not provide whole *schedules of programmes* which are then simply relayed over the network of others. Nor does FAPL have editorial responsibility for the schedule of programmes which NOVA broadcasts. From a practical perspective, I think that NOVA is the entity which must be subject to the regulatory regime contemplated by Directive 89/552/EEC. Otherwise, as the defendants put it, responsibility for the contents of the transmission would “flicker” between FAPL and NOVA and regulatory control would pass backwards and forwards from one country to the other depending on what was being broadcast at any particular moment in time.

129. However, I do not think it is appropriate to qualify the definition of “television broadcasting” in this way because Article 2(a) of Directive 98/84/EC is clear in referring only to Article 1(a) of Directive 89/552/EEC. This is a sensible scheme. Directive 98/84/EC is concerned with the protection of services whose remuneration relies upon conditional access and identifies the service provider as the person from whom authorisation must be obtained. Directive 89/552/EEC, on the other hand, is concerned with regulation and hence, quite naturally, identifies the broadcaster as the

person with editorial responsibility for the composition of whole schedules of programmes. Moreover, this interpretation is consistent with the position adopted in relation to radio broadcasting which is defined in Article 2(a) of Directive 98/84/EC in similar terms as meaning “any transmission by wire or over the air, including by satellite, of radio programmes intended for reception by the public”. There is no requirement here that the service provider must have responsibility for the composition of whole schedules of radio programmes.

130. Third, I recognise that NOVA and ART each compose their own schedules of programmes and incorporate the World Feed into those schedules in the manner I have described. They are undoubtedly engaging in television broadcasting within the definition of that expression in Article 1 of Directive 89/552/EEC. However, I do not think this creates any inconsistency. It seems to me to be perfectly possible to have a number of protected services in a single encrypted transmission for which one operator acts as gatekeeper and so provides a conditional access service. Likewise, I see no reason why that operator cannot act both as gatekeeper and provide another protected service himself.
131. Fourth, I think the World Feed is transmitted against remuneration (in the form of the subscriptions or fees paid by the final consumers and, in turn, the fees paid by NOVA and ART to FAPL). It is also provided on the basis of conditional access. Here I see the relevant conditional access not as the access gained by NOVA and ART to the encrypted World Feed but rather the conditional access of the final consumers to the encrypted NOVA and ART sports channels which include the programmes broadcast by FAPL. In this respect I agree with the defendants that the signal sent on the World Feed could, in principle, be sent by an unencrypted secure land line. However, this does not mean that rights are extended to any person who may feed material to the supplier of a protected service, nor that authorisation is needed from every provider of programme content. Authorisation is only needed from the suppliers of protected services. Moreover, this will not present a problem in practice because the final consumer will enter into a single contract as a result of which he will obtain all the necessary authorisations together in one package.
132. The final question is whether, to pursue the non contentious example, pirate NOVA or ART cards are designed or adapted to give access to FAPL’s service without FAPL’s authorisation and whether FAPL’s interests are affected. The answer, as it seems to me, is yes. Accordingly, I would be minded to conclude that FAPL is the provider of a protected service and would have a cause of action in respect of the NOVA and ART cards in issue, assuming it is right as to the proper interpretation of the expression “illicit device”.

Commercial purposes

133. The point here is a very short one. The Madden defendants argue that their possession of illicit devices is not for “commercial purposes” within the meaning of Article 4 of Directive 98/84/EC.
134. The claimants say that the language of the Directive makes a clear distinction between possession for private and commercial purposes. They refer, in particular, to the wording of Recital 21:

“Whereas this Directive is without prejudice to the application of any national provisions which may prohibit the private possession of illicit devices ...”

and contrast this with the words “possession for commercial purposes” used in Article 4.

135. Hence, the claimants argue, possession is either domestic or commercial and that there cannot be anything in between. The effect of the defendants’ arguments is, they say, to create a gap in protection somewhere between private possession and possession for onward trade and that this would undermine the objective of the Directive to protect the remuneration of the service provider in a manner which is totally arbitrary and inexplicable.
136. The defendants, on the other hand, focus on Recitals 13 to 15 of the Directive which, they say, indicate the Directive is concerned with commercial activities relating to the placing on the market of decoder cards. Hence the provision is aimed at persons who are stocking illicit devices for resale, hire or installation, rather than persons who are holding such devices for their own end use, even if that use is in a business context. The purpose of the prescribed infringing acts is to cut off supplies of illicit devices to end users rather than to penalise end users for possession or use. They also note that the Directive deliberately fails to render actual use an infringing act, whether in the course of a business or not, and suggest that it would be a very odd result if, having failed to prohibit use in the course of a business as such, the Directive were indirectly to strike at end users for mere possession.
137. This is another question of interpretation which I believe must be submitted to the Court of Justice. However, my own provisional view is that the claimants’ submissions are to be preferred. The expression “possession for commercial purposes” seems to me to be sufficiently general to encompass both possession for the purposes of trade and possession for commercial use and I agree with the claimants that the Directive appears to draw a distinction between private possession and commercial possession. The latter is an infringement but the former is not. This distinction is, I believe, quite logical. It is traders in and business users of illicit devices who are likely to cause the most damage to service providers.

Authorisation by NOVA

138. The defendants argue that NOVA has consented to or acquiesced in the circulation and sale of NOVA decoder cards throughout Europe and, in particular, in the UK. This is deployed as a defence to any claim under Directive 98/84/EC (on the assumption they are wrong as to the proper interpretation of the expression “illicit device”) and also to the claim by FAPL for infringement of UK copyright. Consent or acquiescence is to be inferred, they say, from a number of matters.
139. First, the defendants point to a number of aspects of the way in which the NOVA business is presented from which, they submit, it can be seen that the whole NOVA offering is targeted at an international audience. In particular they highlight, and I accept:

- i) The NOVA website intended for viewers has complete versions in both Greek and English.
 - ii) Channel listings on that website are in Greek and English.
 - iii) User Guides are provided on the website in Greek and English.
 - iv) The electronic programme guide is provided in Greek and English.
 - v) The SuperSports channels show football leagues from around the world.
 - vi) The SuperSports channels show live cricket, when there are only a handful of cricket clubs in Greece.
 - vii) The SuperSports channels show rugby, when there are only eight teams in Greece.
 - viii) The Filmnet channels carry Hollywood films, and they do not contain Greek films.
 - ix) Channel names in Roman script and English language are targeted at an international audience.
140. The defendants also say, and again I accept, that the above activities and the maintenance of a complete dual language set up on website, programme guides and sports sound tracks must involve a lot of money and effort and that NOVA must consider there is enough of a demand, or intended customer base, to warrant that investment.
141. NOVA's position was explained by Mr Spiros Papastathopolous, its legal advisor. All the above matters were put to him in the course of cross examination and he responded that NOVA is part of a multinational group of companies and has many subscribers in Greece who do not speak Greek. Moreover, sport in general is popular in Greece, minority sports such as rugby are gaining in popularity, and that some sports such as cricket and rugby are of particular interest to subscribers in Cyprus. I found Mr Papastathopolous to be an honest witness and I accept his evidence.
142. The defendants also say that NOVA has shown only a limited desire to enforce its territorial restrictions and that it has turned "a blind eye" to the export of its decoder cards. Moreover, NOVA provides an easy route for card exports by allowing dealers to circumvent its registration procedures and activate cards on behalf of users.
143. It is true that the dealers have been allowed to activate cards on behalf of customers but, as Mr Papastathopolous explained, it is not always possible to determine whether the supplier is calling or the customer. In addition, NOVA has tried to take action against piracy but has real practical problems taking action against traders selling NOVA cards for use outside Greece.
144. Overall, and having heard Mr Papastathopolous, I do not accept that NOVA has consented, explicitly or implicitly, to the sale or use of NOVA cards outside Greece. Nor do I accept it has turned a "blind eye" to such activities or encouraged them or created any expectation they are acceptable. If NOVA and FAPL otherwise have a

cause of action under Directive 98/84/EC, this defence fails on the facts. It also provides no answer to any claim FAPL may have for infringement of UK copyright.

Domestic or commercial subscriptions

145. I am also invited to consider a further sub-issue in relation to NOVA decoder cards, namely whether the NOVA cards supplied by QC and AV were issued to domestic or commercial subscribers. Mr Papastathopolous explained that a private subscription costs at least €676.8 (on a monthly basis) or €684 with one bonus month free if pre-paid. The price for a commercial subscription is based on the number of seats in the bar or pub, and costs at least €1080.
146. Mr. Richardson paid between €640-730 for his NOVA cards and Mr Chamberlain between €657-682. I accept the claimants' submission that it is obvious that these defendants would not have been able to purchase commercial cards at these prices.
147. The claimants say this is another manifestation of the more general point that anyone who obtains and uses a NOVA decoder card in the UK does so without authorisation. I accept that general proposition. It would apply as much to anyone who uses any decoder card outside the scope of his subscriber agreement. However, for the reasons I have explained, whether it provides the claimants with a cause of action under Directive 98/84/EC must depend upon the proper interpretation of that Directive and, in particular, upon the scope of the expression "illicit device". However, it is another reason why these matters in themselves provide no defence to the claim by FAPL for infringement of UK copyright.

Authorisation by ART

148. The defendants contend that ADD or ART expressly permitted and authorised the sale of the ART cards in issue to end users in the UK or, alternatively, the defendants were entitled to infer that ADD and ART consented to such sales. Once again, this is deployed as a defence to any claim under Directive 98/84/EC (on the assumption the defendants are wrong as to the proper interpretation of the expression "illicit device") and also to the claim by FAPL for infringement of UK copyright.
149. This contention has two limbs. The first is based upon the evidence of Mr Richardson and is to the effect that the importation into the UK of ART cards and their supply to QC for resale here was organised and arranged by a Mr Bertolelli, the Distribution Manager of ADD, from which Mr Richardson and the Madden defendants were entitled to infer that ART consented to such importation and resale.
150. The second limb is more fundamental and is that, absent an explicit statutory basis for discriminating between goods placed on the market inside or outside the EU, the sale of goods on a foreign market without any express restriction which is brought to the attention of purchasers carries an implied authorisation to use them. This argument was only developed in correspondence after the substantive hearing and is based on the decision of the Court of Appeal in *Betts v Wilmott* (1871) LR 6 Ch 239.

The defence based on Mr Bertolelli

151. The evidence of Mr Richardson in relation to Mr Bertolelli was not entirely consistent, but I do not regard this as surprising because he was trying to remember events that took place some four years ago. Nevertheless, I feel able to make the following findings.
152. Mr Richardson originally obtained ART decoder cards from various internet based businesses but found that they were selling so well he decided to contact ART directly to see if he could obtain them at wholesale prices. He noted that the name ADD and a German contact number appeared on the back of certain decoder cards. Upon ringing that number in about early 2004 and explaining that he wanted to buy ART decoder cards, he was told he needed to speak with a Mr Luc Bertolelli who was presently unavailable. He was also told that Mr Bertolelli was involved in the sale of satellite cards throughout Europe and to other countries as well. Mr Richardson left his details and Mr Bertolelli subsequently returned his call.
153. Mr Richardson explained to Mr Bertolelli that he wanted to purchase ART decoder cards direct from ADD with fixed period access to the Arabesque satellite network. He also told him that the cards were for use in the UK, that many of his customers were likely to be interested in football and that he intended to make the cards available to anyone interested in buying them, including publicans to whom he sold a range of other products. He provided to Mr Bertolelli details of the QC website.
154. Mr Bertolelli told Mr Richardson that he could not buy ART decoder cards from ADD in Germany but that he could buy them from various other businesses with which Mr Bertolelli was apparently associated. Over the course of the next two years Mr Richardson duly did buy a considerable number of ART cards and these were supplied through companies or businesses variously known as “AA Services”, “Sources” and “Fenland Investments”. Throughout this time, and as a result of the way he came to make contact with Mr Bertolelli, Mr Richards told me, and I accept, that he thought Mr Bertolelli worked for (or at least with the consent of) ART.
155. There is one other matter arising from Mr Richardson’s evidence which I should mention. In his first statement he explained that Mr Bertolelli visited him in about November 2004 and invited him to become an official dealer of ART decoder cards in the UK. Mr Richardson said he was delighted to accept this invitation because he thought that it would mean that he had a reliable supply of ART decoder cards with the blessing of ART, through its subsidiary ADD and distributor AA Services. Moreover, this agreement is expressly relied upon in the defence to these proceedings as providing consent to the sale of ART cards in the UK. However, I am quite satisfied from the terms of the agreement, the cross examination of Mr Richardson and the evidence of Mr Hollstein, the Managing Director of ADD, that the agreement has nothing to do with the ART decoder cards of which complaint is made in these proceedings. Instead it relates to European subscription cards. Indeed, Mr Richardson never sold any cards under that agreement at all and the impression given by his witness statements that it was relevant to these proceedings did him no credit.
156. The position of ART was explained by Mr Hollstein. I found him to be an honest and careful witness and I accept his evidence, the material aspects of which I now summarise.

157. The ART decoder cards sold and supplied by QC are not European cards. Rather, they are cards intended for the North African market and they carry Moroccan, Algerian and Tunisian telephone numbers. This is confirmed by Mr Richardson's own exhibit 4 to the witness statement he made on 31 October 2006 in connection with proceedings before Durham Magistrates Court against Ms Keress of The Wheatsheaf Inn, Chester-le-Street in Durham.
158. Mr Bertolelli was employed by ADD at its office in France from 1 October 2004 (that is to say, some time after he had begun to arrange of the supply of ART decoder cards to Mr Richardson) until 10 March 2006. Mr Hollstein was his line manager. He was employed as a Marketing and Distribution Manager to develop sales and distribution strategies for ART decoder cards. As part of his role, he was authorised to sign dealer agreements for the distribution of ART decoder cards in North Africa, the Middle East and Europe.
159. As I have mentioned, ART sells different packages of programmes for different territories. The European cards are available on subscription and give access to programmes (mainly movies, children's programmes, serious and religious programmes) where ART has worldwide rights. But they do not contain any European sports programming. The ART sports channels are only available on decoder cards intended for North Africa and the Middle East. Mr Bertolelli and other employees at ART and ADD have always understood the difference between the decoder cards and that decoder cards intended for North Africa and the Middle East were not to be sold in Europe.
160. Accordingly, it was made clear to Mr Bertolelli that he was not permitted and had no authority to sell or supply prepaid North African ART decoder cards to distributors in Europe. This was described as a fundamental premise of the business.
161. AA Services is a company based in Morocco and ADD has sold to it North African decoder cards for resale and use only in the territory of Morocco. It is not a subsidiary of ADD, nor part of the ART group of companies. Mr Hollstein was not aware that Mr Bertolelli had supplied Mr Richardson with North African ART cards until he was informed of it in connection with these proceedings. Had ADD been in possession of evidence that Mr Bertolelli was supplying North African ART cards to a distributor in the United Kingdom, ADD would have immediately terminated his employment contract.
162. This review shows there is an apparent inconsistency in relevant dates in that Mr Richardson made contact with Mr Bertolelli through ADD before the commencement of his employment. I conclude that the most likely explanation is that Mr Bertolelli had a commercial relationship with ADD from about early 2004. Mr Hollstein accepted that Mr Bertolelli was purchasing cards to bundle with decoders from that time and the evidence shows it is likely he was also using an ADD mobile – because the number of his mobile was confirmed by Mr Hollstein to be that of an ADD mobile and it is the one which Mr Richardson used to call Mr Bertolelli from the outset.
163. Nevertheless, the defendants submit that Mr Hollstein's refusal to accept that ART had permitted Mr Bertolelli's sales of North African ART decoder cards into Europe should be treated with caution for five reasons.

164. First, the defendants say that Mr. Hollstein had to lie to protect his company's commercial interests. I reject this submission. Mr. Hollstein frankly accepted that if it were to become apparent that ART has knowingly been involved in exporting North African decoder cards to the European market it would affect its chances of negotiating for future rights. But I do not see that as a reason for rejecting his evidence.
165. Secondly, the defendants submit that surreptitious or "deniable" selling of North African decoder cards in Europe was very tempting and made strong business sense. I do not think there is anything in this point either. Indeed, it is contradicted by Mr Hollstein's acceptance any such trade would damage ART's prospects of securing rights from FAPL in the future.
166. Thirdly, the defendants say that the sale of the decoder cards would help to defray the huge cost of renting bandwidth for the ART channel on the Hotbird satellite. No doubt it would, assuming it did not prejudice the prospect of ART securing rights in the future, but again I do not see this as a reason to disbelieve Mr Hollstein.
167. Fourthly, it was suggested that the fact that ART is using the Hotbird satellite is itself sinister. The difficulty with this submission is that Mr Hollstein gave evidence as to how ART came to use the Hotbird satellite and why it has continued to do so. In short, it began with a joint venture with a broadcaster called TPS in France which was using Hotbird and Viaccess encryption. For ART to be part of this bouquet it had to use the same satellite and the same technology. Subscribers in North Africa were then able to see the ART channels and the TPS channels cleared for North Africa. Some three years ago, ART attempted to switch its North African subscribers to Nilesat but this proved to be a commercial failure. The three main markets, Morocco, Algeria and Tunisia are all French speaking and enjoy the French content available on Hotbird. In addition, their satellite dishes were facing in that direction. Overall, I found this to be a reasonable explanation and it is one which I accept.
168. Fifthly, the defendants say that the evidence supports an inference that ART was aware of Mr. Bertolelli's activities and of the sale of North African decoder cards into Europe. I am unable to accept this submission. It is flat contrary to the evidence of Mr Hollstein which I have summarised. Mr Bertolelli began to supply decoder cards to Mr Richardson long before he was actually employed by ADD, albeit at a time when I think they had developed a commercial relationship. I am also prepared to accept that ADD put Mr Richardson in touch with Mr Bertolelli. But that does not mean to say that ADD or ART knew about or consented to the sale to Mr Richardson of North African decoder cards for use in the UK. On the evidence, I am satisfied they did not. As Mr Richardson explained in his first statement, in his first call to ADD he said he wanted to buy ART cards. It was only in the course of his subsequent discussions with Mr Bertolelli that he explained which decoder cards he wanted to buy and where he wished to sell them. Thereafter, Mr Bertolelli was his sole point of contact. I do not accept that ART or ADD employees were directing requests to buy North African decoder cards for use in Europe, to Mr Bertolelli. Nor do I accept that anything ART or ADD did amounted to a representation that Mr Bertolelli had their authority or consent to carry out any such activities. Following his employment on 1 October 2004, his activities were not incidental to the express authority he was given in his position as Distribution Manager. On the contrary, they directly flouted his instructions. Moreover, in my judgment it is clear that Mr Bertolelli did not supply

North African decoder cards to Mr Richardson on behalf of ADD or ART. The invoices were always in the name of a third party.

169. Sixthly, the defendants argue that there is no evidence that ART and ADD have made any attempt to stop something they say is not permitted. This submission goes too far. As I have explained, ART has sold different packages of programmes for different territories. It was made clear to its distributors in North Africa and the Middle East that they were only permitted to distribute prepaid ART cards in those territories. Since 2004, North African ART decoder cards have had African contact details printed on them, and since about December 2005 they have carried a warning that they are not to be used outside the authorised territories. Mr Hollstein also gave evidence that today ART only uses wholly owned subsidiaries to distribute its cards in North Africa so as to control what he described as the second level of distribution.
170. In conclusion, neither ART nor ADD consented to the activities complained of. This defence fails on the facts.

Implied licence from sale without restriction

171. I turn then to consider the second limb. The defendants draw a distinction between the subscriber system of distribution adopted by NOVA and the countdown system adopted by ART. The countdown system involved selling decoder cards to consumers through distributors without any express restriction as to where, by whom or for what purpose they might be used. In this regard the defendants rely upon the fact that, prior to December 2005, the decoder cards did not carry any warning that they were not to be used outside North Africa or the Middle East. They submit that, until the cards carried such a warning, purchasers were entitled to assume, as in *Betts v Wilmott*, they could use the cards in any country and for any purpose. Accordingly, they could use them in England for the purpose of showing Premier League matches in pubs.
172. In my judgment this submission is misconceived for this reason. FAPL cannot be bound by the purported grant by a licensee (here ART) of a right that the licensee did not possess. This is not a case like *Betts v Wilmott* where the rights holder marketed the goods in issue. I believe it is clear from the terms of the licence set out in paragraphs [31]-[35] above, considered as a whole, that FAPL's licensees were not authorised to permit the use of decoder cards outside the territory the subject of the licence. In the case of ART that territory was North Africa and the Middle East. An analogous situation arose in *Minnesota Mining & Manufacturing Company v Geerpress Europe Limited* [1973] FSR 133. There Graham J granted an interim injunction to restrain the importation into the UK of goods alleged to infringe a UK patent despite the fact those goods had been made and sold in the United States by the claimants' licensee under the United States patent. He held that no rights could be passed to the defendants which the United States licensee did not itself have.
173. Nor, it seems to me, did ART have ostensible authority to give any such permission, particularly in relation to the UK. As I have explained in considering the case based upon the activities of Mr Bertolelli, ART operated two quite different systems of distribution. The cards distributed in Europe were available on subscription but did not permit access to FAPL programming. The countdown cards intended for the North African market carried Moroccan, Algerian and Tunisian telephone numbers. Moreover, it was and is well known that other broadcasters distribute decoder cards

which give access to FAPL programming in other territories, including the UK. In my judgment FAPL has done nothing to represent by words or conduct that ART has authority to permit access to FAPL programming in the UK.

174. The claimants also contend that the reasoning of the Court of Justice in joined cases C-414/99, C-415/99 and C-416/99 *Zino Davidoff v A&G Imports* [2002] RPC 20 is apposite and refer in particular to the statement of the Court at [45] which, they submit, is of general application:

“In view of the serious effect in extinguishing the exclusive rights of the proprietors of the trade marks in issue in the main proceedings (rights which enable them to control the initial marketing in the EEA), consent must be so expressed that an intention to renounce those rights is unequivocally demonstrated”

175. I have considerable sympathy with the submission based upon *Davidoff* but prefer to express no final view upon it because it is not necessary to do so and it was not fully argued.

Copyright - introduction

176. The copyright claims do not stand or fall as a whole with the case under the Conditional Access Directive (98/84/EC). They are, as the claimants say, free standing. However, as I shall explain, one of the defences depends upon whether the activities of the defendants are unlawful.
177. I would observe at the outset that the case is complex and its inherent difficulties were compounded by a series of amendments to the pleadings in the run up to trial, the late service of important evidence, the emergence of issues during the course of the trial and the amendment of the pleadings (with my permission) in the middle of the trial to introduce yet further infringement claims under s.19 of the CDPA.

Copyright - subsistence and title

178. Pursuant to case management directions give by Norris J on 6 December 2007, the issues of subsistence of and title to copyright are to be determined by reference to the World Feed of one specimen Premier League match, *Wigan v Arsenal* on 19 November 2005. During the course of the proceedings, although regrettably not before, the parties helpfully produced a colour chart identifying the various copyright works relied upon, the areas of agreement and disagreement as to subsistence of and title to copyright and as to which copyright works were contained in NOVA’s DVDs of representative matches, the ART studio broadcast of a representative match and in the material ART intended to broadcast for non-studio matches. I append that chart, in edited form, together with a colour key, to this judgment as Annex 1.
179. It can be seen FAPL claims copyright in some 25 works falling into three categories: (a) film, (b) artistic and (c) sound recording and musical. I will address them in turn.

Film

180. FAPL relies on the following sorts of film described earlier in this judgment:- Opening Sequence Film, Opening Sequence Graphics Film, Previous Highlights Film, Match Highlights Film, Special Features Film, Next Match Preview Film, On Screen Graphics Film, Match Film (via Action replays), Clean Live Feed Film, World Feed Film, and IMG Match Film.
181. Subject to one exception and one qualification, subsistence of copyright in all these works and title to that copyright for the purposes of bringing a claim is admitted (I say this because issues of joint ownership have been left over to be determined at a later date, if necessary).
182. The exception is the IMG Match Film. It has never been identified in the specimen match and neither I nor the defendants have any idea what the film looks like. In these circumstances, I am not prepared to find that copyright subsists in this film or that it was included in the specimen broadcast (or, as a result, that any such copyright has been infringed) and all claims in respect of it fail.
183. The qualification is that the Opening Sequence Film, Previous Highlights Film, Match Highlights Film and Next Match Preview Film are comprised to varying degrees of film that is lifted from other films. During the course of the trial the defendants abandoned any point under s.5B(4) of the CDPA that copyright does not subsist in these works at all but maintain that it does not subsist to the extent that they are copies of the films from which they were taken. In these circumstances I think this is a point which is better considered in addressing infringement and reproduction of a substantial part, rather than subsistence.

Artistic works

184. Twelve different artistic works are relied upon. These comprise various graphics, devices and logos. Subsistence of and title to copyright are admitted in respect of each of them. Of these works, the most important are what are described as Opening Sequence Graphics, On Screen Graphics, two versions of the Barclays English Premier League Device, two versions of the Barclays Premiership Device and Eagle and Ball Device and finally, the Barclays Eagle and Ball Device.

Sound recording and musical work

185. Only two works are relied upon, but they are of some significance, as I shall explain. They are the sound recording of the Premier League Anthem and the Anthem as a musical work. Subsistence of and title to copyright in both is admitted, save that it is not accepted that FAPL had title to the copyright in the sound recording at the date of the claim. This, however, is a matter which FAPL can easily address and it has indicated it will do so.

Copyright – what was actually broadcast?

186. Pursuant to the same order of Norris J, the issue of what was broadcast by NOVA is also to be determined by reference to three specimen matches: Portsmouth v Chelsea on 26 November 2005, Portsmouth v Bolton on 25 September 2006 and Arsenal v Manchester City on 17 April 2007. In the case of ART, the content of studio games is to be determined by reference to the Manchester City v Manchester United match on

5 May 2007, this being the only ART studio game of which a recording was available in evidence. Unfortunately, and through no fault of the defendants, there is no record of a non-studio match at all. For this purpose, the best evidence that I have is that of Mr Balchin, which, despite its late service, I admitted into the proceedings.

NOVA - what was broadcast

187. The claimants made a concession during the course of the trial which is not shown in Annex 1 and goes to the NOVA and ART broadcasts; so it is convenient to mention it now in relation to both. The concession is that all the pink boxes in relation to the Clean Live Feed Film, the two versions of the Barclays Premiership Device and Eagle and Ball device and the two versions of the Barclays Sleeve Badge were not contained in any of the specimen broadcasts and accordingly should be coloured red. There can therefore be no infringement arising from their inclusion in a NOVA broadcast or an ART studio broadcast. According to Mr Balchin, the Barclays Premiership Device and Eagle and Ball Devices were, however, included in the ART non-studio broadcasts (and hence these are coloured green in the table).
188. I must now consider the areas of dispute. The first concerns the NOVA DVDs. Mr Papastathopolous said in his evidence that it is NOVA's practice to make copies of matches as broadcast (indeed it is, he says, bound by Greek law to do so) and it has provided DVDs of each of the three representative matches to be used for assessing infringement. However, I am satisfied that these cannot be recordings of what was actually broadcast by NOVA. At half time the recordings go blank and there are no advertisements. I accept the defendants' submission that the recordings must have been made at some intermediate stage within NOVA's studios. Nevertheless, they bear the SuperSport logo and, for much of the time, a Greek commentary. I conclude from the evidence of Mr Papastathopolous under cross examination that the material on the DVDs was broadcast, subject to the important caveat that the Greek advertisements might have continued past the point at which the DVDs begin, but not so far as to interrupt any part of the coverage of the actual games.
189. This brings me to consider the yellow boxes shown in Annex 1 in relation to the Portsmouth v Chelsea game. In the case of this DVD there is no Greek commentary for the first two minutes and 19 seconds of the recording. In the light of the evidence of Mr Papastathopolous, I conclude it is likely this footage was not broadcast and that during this time NOVA was actually broadcasting other material and had not cut to the Live Feed. The yellow boxes should therefore be red.
190. It follows the claimants have not established that NOVA broadcast the Opening Sequence Films, the Opening Sequence Graphics Films, the Special Feature Films or the Next Match Preview Films in any of the representative matches. Any claim in respect of these works arising from their inclusion in a NOVA broadcast therefore fails. They have, however, shown that Match Highlights Films were broadcast and, on one occasion, part of the Previous Highlights Film. The Clean Live Feed Film has also been used, and admittedly so, in Match Highlights Films.
191. The claimants have also established that, during the actual matches, On Screen Graphics Films and parts of the Match Films were broadcast, the latter in so far as they were used in Action Replay Films.

192. As for artistic works, it is accepted the broadcasts included On Screen Graphics, two versions of the Barclays English Premier League Device and the Barclays Eagle and Ball Device. However, the claimants have failed to establish any broadcast of the Opening Sequence Graphics, the Barclaycard Logos, the Barclays English Premier League Device and Eagle and Ball Device, the Barclays Premiership Device and Eagle and Ball Devices or of the Barclays Sleeve Badges. Any claim in respect of these works arising from their inclusion in a NOVA broadcast must therefore fail too.
193. The final category concerns the Anthem as a sound recording and musical work. The claimants rely upon this as having been played in the Opening Sequence Films, as the players line up a few minutes before the start of the match and also during the Previous Highlights Films and Match Highlights Films (which may be shown at half and full time). For the reasons I have given, I do not accept the Opening Sequence Films were broadcast in any of the representative matches. However, the broadcasts did include the Anthem in the player line up, the Match Highlights Films and, in the case of Portsmouth v Chelsea and Arsenal v Manchester City, in the Previous Highlights Films.

ART – what was broadcast

194. The position in relation to ART is relatively straightforward, as Annex 1 shows. For the studio match between Manchester City and Manchester United on 5 May 2007, it is easiest to refer simply to what did form part of the broadcast. It is apparent that only On Screen Graphics Films, the Match Film (via Action Replays), On Screen Graphics, the two versions of the Barclays English Premier League Device and the Barclays Eagle and Ball Device were included. I deal with the Anthem below.
195. For the non-studio matches the position is not entirely satisfactory because I do not have a representative match. The defendants submit that I should not draw an inference that what was intended to be broadcast was in fact broadcast and hence the claim must fail. I am unable to accept this submission which I consider unreal. I am satisfied from the evidence of Mr Balchin that all the copyright works relied upon (except for the World Feed Film, the Barclays English Premier League Device and Eagle and Ball device and the two Barclays Sleeve Badges) did, on occasion, form part of the broadcast and consequently do form the basis for a claim. However, that does not mean to say that all were used on every occasion and I do not accept that they were. Mr Balchin said himself in respect of the schedules “there is moveability everywhere” and this is supported by an internet stream produced by the claimants during the course of the trial, a representation of which forms X25. This suggests, for example, that the Opening Sequence Film and Previous Highlights Film did not form part of the non-studio ART broadcast of the Arsenal v Manchester City match on 17 April 2007.
196. Finally, I must address the Anthem as a sound recording and musical work. As I have mentioned, the claimants rely upon this as having been played in the Opening Sequence Film, as the players line up a few minutes before the start of the match and in the Previous Highlights and Match Highlights Films. For the reasons I have given, it follows that all were included, on occasion, in the ART non-studio broadcasts. On the other hand, for the studio match, I do not accept the Opening Sequence Film, the Previous Highlights Film or the Match Highlights Film were broadcast. However, the broadcast did include the player line up.

Issues arising in relation to particular works

197. Certain issues arise in relation to particular works and it is convenient to deal with them at this stage.

Sound recording

198. As I have explained, a sound recording of the Anthem forms part of the Opening Sequence, Previous Highlights and the Match Highlights Films and is played during the player line up. However, it was accepted during the course of the trial that in so far as it is embodied in a film then it is to be treated as part of the film by virtue of s.5B of the CDPA and no separate claim can be made in respect of it. That leaves the player line up. Here the defendants say its inclusion in the World Feed is incidental and hence they have a defence in respect to all alleged infringements under s.31 of the CDPA which reads:

“(1) Copyright in a work is not infringed by its incidental inclusion in an artistic work, sound recording, film or broadcast.

(2) Nor is the copyright infringed by the issue to the public of copies, or the playing, showing or communication to the public, of anything whose making was, by virtue of subsection (1), not an infringement of the copyright.

(3) A musical work, words spoken or sung with music, or so much of a sound recording or broadcast as includes a musical work or such words, shall not be regarded as incidentally included in another work if it is deliberately included.”

199. The Anthem is played at the stadium during the player line up and picked up by microphones rather than being injected electronically into the World Feed. So, the defendants say, and I accept, the extent to which it can be heard depends upon the quality of the sound system at the ground and the positioning of the ambient sound microphones. Accordingly, they invite me to infer that it is intended to be heard by the spectators at the ground, just like an announcement, say for a boy who has been separated from his father and, though it might be picked up by the World Feed, it is not intended for viewer many miles away, except incidentally.

200. The claimants say this is quite wrong. The reason the player line up is filmed and the ambient sound at the ground recorded is to promote FAPL brand recognition and add dramatic tension.

201. During the course of the trial a number of specific sequences in the NOVA DVDs were played in court. I have since watched sequences of the three NOVA representative matches and the recording of the ART studio match. It became clear that the anthem is not played at a consistent volume at all matches and, not surprisingly, the background noise from the crowd is variable too. In some of them I could barely discern the sound of the Anthem at all.

202. I have no doubt that the decision by broadcasters to cut to the ground and broadcast the player line up together with the background noise in the stadium is quite deliberate. I infer its purpose is to convey to the viewer the atmosphere at the ground and show the players lining up in the few moments before the match begins. However, I was not taken to any evidence which might suggest an intention specifically to include the sound of the Anthem. My own impression having watched all four of the matches to which I have referred is that those responsible for the broadcast were quite unconcerned as to whether the Anthem was playing at all, let alone whether it could be heard by viewers. Had they wished to make sure it could be heard, they could no doubt have placed a microphone closer to a speaker in the stadium. I have formed the conclusion that neither the broadcasters nor the viewers of the broadcasts attached any importance to whether the Anthem could be heard. The objective of the broadcasters was to show the players line up and convey the sense of excitement and anticipation in the stadium but the inclusion of the Anthem was not essential for this purpose. To the contrary, I agree with the defendants that the inclusion of the Anthem (so far as it can be heard at all) was entirely incidental. The defence in respect of the player line up therefore succeeds.

Musical work

203. The claimants also say that the musical work embodied in the Anthem is played as part of the Opening Sequence Film, during the player line up and as part of the Match and Previous Highlights Films. Here there is no comparable provision to s.5B of the CDPA and so all must be considered.

204. In relation to the player line up (but not in relation to the films) the defendants advance the same argument that its inclusion was incidental, and it again succeeds for the reasons I have given.

205. One further point is taken. The defendants point out, rightly, that it only became apparent during the course of the trial that the claimants say that the version of the Anthem played during the Match Highlights Film is a different arrangement of the musical work. In these circumstances the defendants submit that there is no evidence of what it is, how the arrangement came to be composed or of how it came to be recorded. So, they say, there has been no analysis of the two pieces of music and there is no evidence that a substantial part of the original has been reproduced. In the absence of either factual or expert evidence to the effect that the version played is derived from the musical work, this claim should be rejected.

206. I am unable to accept this submission. I have undisputed evidence that the original Anthem was composed by Mr David Kelly, a British citizen, pursuant to a commission dated 1 August 2004 whereby all the rights in it were assigned to FAPL. Indeed, it is admitted that FAPL owns copyright in the Anthem. During the course of the trial I heard the music played during the Match Highlights Film and which is said by the claimants to constitute an arrangement of the Anthem and I formed the view that it is indeed an arrangement of the original, and undoubtedly so. The similarities are clear and unmistakable. I do not think I need evidence to establish what is immediately apparent on listening.

207. I therefore find that the musical work was included in the broadcast of:

- i) the NOVA representative matches, in the player line up and in the Match Highlights Film and, in the case of Arsenal v Manchester City and Portsmouth v Chelsea in the Previous Highlights Film;
- ii) the ART studio representative match, in the player line up;
- iii) on occasion in the ART non-studio matches, in the Opening Sequence Film, the player line up, the Match Highlights Film and the Previous Highlights Film; however,
- iv) the defence of incidental inclusion in the case of the player line up succeeds.

Action Replays

208. The claimants do not rely upon the Action Replays as copyright works in themselves. Instead they say the Action Replays embody a substantial part of the various Match Films. It seems that the amount of any one Match Film used in an Action Replay is only a few seconds, at most, whereas a Match Film lasts for at least 90 minutes. In the circumstances the defendants say the Action Replays do not embody a substantial part of the Match Films.
209. I reject this submission. It is true that the Action Replays embody a relatively short extract of the Match Films. But it is well established that what amounts to a substantial part is a question of fact and degree and depends upon both quality and quantity. Action Replays reproduce incidents of particular interest to the viewers, such as goals, near misses, demonstrations of particular skill and the like. I was shown some samples during the course of the trial. Sufficient footage is shown to enable the viewers to appreciate the incident. In my judgment, these extracts do amount to a substantial part.

The Madden defendants

210. I must now provide a little more detail in relation to the Madden defendants.
211. Liability of these defendants is sought to be established on the basis of a series of visits by investigators which revealed that on particular dates ART matches were being shown in their pubs. There is no pleaded allegation that they have shown any NOVA matches. The parties were therefore agreed that I must determine the liability of these defendants by reference to the particular matches they are alleged to have shown.
212. I am satisfied that the following matches were shown:
- i) The “Pig & Whistle” (Mr Madden): Bolton v Tottenham on 19 August 2006 and West Ham v Arsenal on 5 November 2006. Both were studio matches.
 - ii) “Earls” (Mr Raval and SR Leisure): Wigan v Manchester United on 14 October 2006 and Reading v Tottenham on 12 November 2006. The former was a studio match and the latter was a non-studio match.

- iii) The “Crabtree Inn” (Mr Houghton): Manchester United v Fulham on 20 August 2006 and Newcastle v Sheffield United on 4 November 2006. The former was a studio match and the latter was a non-studio match.
 - iv) “London House” (Mr Owen): Manchester United v Fulham on 20 August 2006 and West Ham v Arsenal on 5 November 2006. Both were studio matches.
213. The general findings I have made in relation to the content of the ART broadcasts therefore apply to these particular matches. However, there is one further matter I have to consider arising in relation to the Anthem. The defendants say that in relation to the studio matches, the only time it could have formed part of the programme actually shown to members of the public was during the player line up. Moreover, they say that both in the case of the studio and non-studio matches in issue, there is simply no evidence in the case as to when the sound in each of these premises was turned on or, indeed, whether it was turned on at all. In this respect, the reports of the investigators are silent and the defendants themselves chose not to give evidence. The claimants respond that it is overwhelmingly likely the sound was turned on and that the defendants are shutting their eyes to reality.
214. I have to say that I find it unsatisfactory having to decide an issue such as this with such a paucity of evidence. I also have no doubt that, on occasion, pubs and bars do screen programmes with the sound turned off. But I think it unlikely that a Premier League match would be screened without sound for the whole match in circumstances where the publican has paid for a decoder card and at least some members of the public are likely to have attended the premises with the intention of watching that match. However, that is not the end of the matter. I must also consider when and for how long the sound was turned on. This is altogether more difficult. As Mr Mellor QC, who appeared on behalf of the claimants, observed in relation to studio matches: “If you have got a studio match from Jordan, you have got a bunch of Arabic and you would have to turn the sound down.” So, in the case of the studio and non-studio matches shown by the Madden defendants and upon which the claimants rely, how is it possible to decide when the sound was turned on and when it was turned down? I do not think this can be determined now without any evidence one way or the other. It seems to me to be perfectly possible that it was not turned on until the game actually started and was then turned down again at half time (when there were Arabic commercials) and at the end of the match. Nor, in the case of these particular non-studio games do I have evidence of precisely how much of the World Feed was used. The claimants simply have not made out their case that the Anthem was played out loud by any of the Madden defendants in any of the six ART matches pleaded against them.

Infringement – copying in the decoder and on the television screen

215. This is the first of the three allegations of infringement and it raises a number of issues:
- i) Are copies of the whole or a substantial part of the copyright works made in the decoder boxes of the Madden defendants and others to whom AV and QC have supplied NOVA or ART decoder cards?

- ii) Are such copies made on the television screens of persons to whom AV and QC have supplied such cards?
- iii) Do the defendants have a defence to any such infringement claims under s.28A of the CDPA?
- iv) Do the defendants have a defence to any such infringement claims under s.72 of the CDPA? This issue is intimately tied to the new allegation of infringement under s.19, to which s.72 is also raised as a defence. I deal with s.19 and s.72 later in this judgment and consider s.72 as a defence to copying in that context.

216. Further questions arise (in relation to this and the other allegations of infringement) as to whether the acts complained of are lawful by reason of the Directive 93/83/EEC (the Satellites and Copyright Directive) and wider EC single market and competition arguments which I also address later in this judgment.

Are copies of a substantial part of the copyright works made in the decoder boxes?

217. The essential facts are not disputed. The claimants' and the defendants' experts, respectively Mr Clark and Dr Allan, agreed that a decoder must comply with the Digital Video Broadcasting (DVB) standard that is used to encode the video stream. This constrains the decoder to having certain features, so that:

- i) for video data, the decoder assembles copies of frames in parts of memory known as frame stores. These stores need to hold four frames of video, representing approximately 160 milliseconds of video images. A minimum of a single frame is also routinely held in a part of memory known as a framebuffer, from which the video data is output to the television.
- ii) for audio data, the decoder deals with the audio stream separately and must synchronise it with the video output. It makes a copy of fragments of the audio stream, which it stores in its working memory until it needs to be output with the corresponding video data, and is likely to involve storage for in the order of up to 160 milliseconds.

218. The acts restricted by the copyright in a work include the making of copies of the whole or a substantial part of it. So far as relevant, s.17 of the CDPA provides that copying is to be construed as follows:

“(2) Copying in relation to a literary, dramatic, musical or artistic work means reproducing the work in any material form.

This includes storing the work in any medium by electronic means.

....

(4) Copying in relation to a film or broadcast includes making a photograph of the whole or any substantial part of any image forming part of the film or broadcast

....

(6) Copying in relation to any description of work includes the making of copies which are transient or are incidental to some other use of the work.”

219. Section 17 must be construed in conformity with Directive 2001/29/EC (the Copyright and Information Society Directive). This requires Member States to introduce a reproduction right, defined in Article 2, which is subject to the exceptions and limitations contained in Article 5, to which I refer below. Article 2 reads:

Article 2

Reproduction right

Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part:

- (a) for authors, of their works;
- (b) for performers, of fixations of their performances;
- (c) for phonogram producers, of their phonograms;
- (d) for the producers of the first fixations of films, in respect of the original and copies of their films;
- (e) for broadcasting organisations, of fixations of their broadcasts, whether those broadcasts are transmitted by wire or over the air, including by cable or satellite.

220. It is clear that fragments of the various film works, the musical work and the sound recording are stored sequentially in the decoder. The question is whether such fragments individually amount to a substantial part of the copyright work and, if not, whether they should be considered collectively.
221. The claimants point out that the defendants admit there is a reproduction of the whole or a substantial part of each frame of the video stream and suggest that it follows that any argument that a substantial part of the whole work is not copied is hopeless. Moreover, they say the whole of each of the works is copied fragment by fragment, just as a book might be copied page by page.
222. The defendants do not accept this is the correct approach. They say that a frame in a video stream does not amount to a substantial part and, unlike the book analogy, at no time does a copy of a substantial part of the copyright work exist.
223. This dispute gives rise to two questions which are, at least to some extent, interlinked: first, does a fragment consisting of four frames of a video stream amount to a substantial part? Second, in considering whether a substantial part has been copied, does one consider whether the material in existence at any one point in time is a

substantial part, or does one consider the whole volume of material which is progressively created and then destroyed?

224. As to the first question, I have reached the conclusion that four frames do not constitute a substantial part of the film works. They occupy a fraction of a second and there is no suggestion that they have any inherent value other than as part of the whole. I believe this conclusion is supported by the terms of s.17(4). The defendants say, and I agree, this appears to be intended to deal with the facts of, for example, *Spelling Goldberg Productions v BPC Publishing Ltd* [1981] RPC 283. In that case HH Judge Mervyn Davies QC, sitting as deputy judge of the High Court, found that under the 1956 Act an individual frame did not infringe the copyright in a film because it did not itself have the characteristics of a film; but he was reversed on appeal on the ground that the Act merely required the frame to be part of the film, which it undoubtedly was. The CDPA amended the law in respect of film copyright to include the “substantial part” requirement. However, in order to address the *Spelling Goldberg* type of case, it was felt necessary to make special provision to preserve infringement in the case where a photograph is made from the frame of a film.
225. “Photograph” is widely defined in s.4(2) of the CDPA as “a recording of light or other radiation on any medium on which an image is formed or produced or from which an image may by any means be produced, and *which is not part of a film*” (emphasis added). But the frames held in the decoder box are not photographs, not least because they still form part of a film. So they are not deemed by s.17(4) to be copies of the film in which they are included.
226. In my judgment, the structure of s.17 and the inclusion of a specific provision for the making of photographs strongly implies there was no statutory intention to make a few frames of a film a substantial part when one is considering the copying of one film in the form of another film.
227. This brings me to the next question which is whether it is appropriate to consider the fragments on a cumulative or rolling basis. The claimants say that some support for this approach can be derived from the cases referred to in the judgment of Peter Gibson LJ in *Newspaper Licensing Agency v Marks & Spencer plc* [2001] RPC 76 (at [30]-[34]). I note that Laddie J expressed some doubts about the reasoning in this line of authority in *Electronic Techniques (Anglia) Ltd v Critchley Components Ltd* [1997] FSR 401. However, be that as it may, I do not believe it can be applied where the copies relied upon are successively destroyed as an inherent part of the process about which complaint is made. In my judgment it is simply not possible to fit such a situation into the language of the statute. It is a restricted act to make a transient copy of a substantial part of the work. In other words, the substantial part must be embodied in the transient copy, not a series of different transient copies which are stored one after the other in the decoder box.
228. I feel confirmed in this conclusion by the reasoning of Emmett J in *Australian Video Retailers Assn Ltd v Warner Home Video* (2001) 53 IPR 242, a decision under ss.10 and 86 of the Australian Copyright Act of 1968, at [65]:

“It is clear that neither the whole nor any substantial part of a cinematograph film or motion picture is ever embodied in the RAM of a DVD player or personal computer at any given time.

The mere fact that, over a period of time, being the time taken to play the motion picture or cinematograph film, tiny parts of it are sequentially stored in the RAM of the DVD player or personal computer does not mean that the motion picture or cinematograph film is embodied in such a device.”

229. I recognise that the Australian Act is different to the CDPA in that the infringement is the making of a copy, rather than copying, and that “material form” is defined as any form of storage from which the work can be reproduced. However, neither of these points seem to me to impact on the reasoning of the judge in the paragraph I have cited, and I believe it accurately reflects the position under the CDPA.
230. Finally, I also accept the defendants’ submission that this approach is supported by purposive considerations and that a rolling act of copying of this kind should be prohibited, if at all, by the restricted act relevant to the kind of act in which the rolling takes place.

Are copies of a substantial part of the copyright works made on the television monitors?

231. In the QC and AV actions (but not, apparently, in the case of the Madden defendants) the claimants also rely upon the copies created by displaying the World Feed on television screens in pubs. Obviously this cannot apply to the musical work or sound recording, but it does apply to the films and artistic works.
232. I have to say that I entertain some doubt as to whether those who framed the CDPA ever contemplated that displaying an image on a television screen amounts to copying. However, s.17 must be construed in the light of the Directive and, despite my reservations, I have reached the conclusion that it is indeed this broad. The words of Article 2 and the section are clear. The reproduction right includes the making of temporary copies by electronic means, subject to the defence to which I refer below and the copies may be transient. I am confirmed in this view by the decision of Aldous J in *Bookmakers Afternoon Greyhound Services v Wilf Gilbert (Staffordshire) Ltd* [1994] FSR 723, a decision under the Copyright Act 1956 which, like the CDPA, restricted “reproducing the work in any material form”. Aldous J held that the defendants infringed the copyright subsisting in race cards by showing them on television monitors in their shops. This, he found, involved reproducing them in a material form. In my judgment the position under the CDPA is no different.
233. As to whether the whole or a substantial part of the film works are reproduced, the claimants’ position is no stronger than for the decoder.

Summary of conclusions in relation to substantial part

234. I conclude that copies of a substantial part of the films, the musical work and the sound recording are not made in the decoder or on the television screen. This conclusion is reinforced in relation to the Opening Sequence, Previous Highlights, Match Highlights and Next Match Preview Films which are, as I have mentioned, comprised to varying degrees of other film. In so far as they rely upon any element of collocation for originality it is even harder to see how a part lasting no more than a fraction of a second could be said to be substantial.

235. But the position in relation to the artistic works (the various graphics, devices and logos) is different. I accept that these are reproduced in full within one frame of the broadcast signal in the decoder and as seen on the television.

Defence under section 28A?

236. Section 28A of the CDPA implements Article 5(1) of Directive 2001/29/EC virtually word for word and provides an exception to the reproduction right in the case of certain transient or incidental reproductions. Article 5(1) reads:

Article 5

Exceptions and limitations

1. Temporary acts of reproduction referred to in Article 2, which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable:

(a) a transmission in a network between third parties by an intermediary, or

(b) a lawful use

of a work or other subject-matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2.

237. An elaboration of the purpose of this exception is given in Recital 33 of the Directive:

“The exclusive right of reproduction should be subject to an exception to allow certain acts of temporary reproduction, which are transient or incidental reproductions, forming an integral and essential part of a technological process and carried out for the sole purpose of enabling either efficient transmission in a network between third parties by an intermediary, or a lawful use of a work or other subject-matter to be made. The acts of reproduction concerned should have no separate economic value on their own. To the extent that they meet these conditions, this exception should include acts which enable browsing as well as acts of caching to take place, including those which enable transmission systems to function efficiently, provided that the intermediary does not modify the information and does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information. A use should be considered lawful where it is authorised by the rightholder or not restricted by law.”

238. The defendants rely upon this defence both for the copies produced in the decoder box and on the television screens of viewers. It can be seen the defence has four elements:

- i) the temporary copy must be transient or incidental,
 - ii) it must be an integral and essential part of a technological process,
 - iii) the sole purpose of which is to enable (a) a transmission of the work in a network between third parties by an intermediary; or (b) a lawful use of the work, and
 - iv) it must have no independent economic significance.
239. There is no dispute that the first two elements are satisfied. As to the third, the defendants say the use of the work is lawful. The claimants say it is not and that unlawfulness follows automatically from liability under Directive 98/84/EC or for any of the other claims of copyright infringement. I agree, but this depends upon the proper interpretation of that Directive and, if they are right on any of the other claims of infringement of copyright, this would seem to add little or nothing. I should also mention that in opening the case the claimants sought to argue that the *Murphy* decision leaves breach of s.297 of the CDPA in no doubt in respect of the Madden defendants, provided they had dishonest intent to avoid payment of a charge applicable to the reception of a programme, and this was the case. The defendants objected to this allegation as having been raised without warning and too late. Upon my indicating I was sympathetic to this objection, the claimants withdrew the allegation.
240. That leaves the final element, the reproduction must have no independent economic significance. Here further guidance is provided by Article 5(5):
- “The exceptions and limitations provided for in paragraphs 1,2,3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.”
241. Further, the opinion of the Economic & Social Committee (of 9 September 1998) on an early draft of the Directive explained the purpose of the exception as follows:
- “3.7.1. Article 5.1**
- 3.7.1.1. The first exception is ‘temporary acts of reproduction’. This is designed to ensure that the incidental storage of copies of the work on, for example, intermediate computer servers between a web-server and the computer running a web-browser used by an end-user is exempted. The test is whether the temporary reproduction has no ‘independent economic significance’: it should perhaps be made clear that the independent economic significance in question is independent economic significance to the use of the work in question, not to its transmission.
- 3.7.1.2. This clause needs expanding and clarifying. Any reproduction that in effect is consumption of the work, such as

the temporary copying of programmes or data into memory in order to use or access such works, for example the act of accessing on-line databases, should only be permitted with the rightholder's authorisation.”

242. It emerges from these materials that the exception is concerned with transient copies which have no value in themselves and which do not prejudice the rights holder by interfering with the normal exploitation of the work. Typical of such uses will be those mentioned in Recital 33, such as acts which enable browsing and caching, and those which enable transmission systems to work effectively.
243. Applying these principles to the present case, the claimants say the creation of transient copies does have economic significance. If the pubs had a Sky subscription, there would be no independent economic significance, since Sky would have been justly recompensed. If, however, FAPL and Sky have no other basis upon which they can require payment of a licence fee then the transient copying has real economic significance since it becomes the sole basis on which the UK rights holder can extract the value from his rights.
244. I consider this is a point of interpretation of the Directive upon which the guidance of the Court of Justice is necessary. It is closely related to other aspects of the copyright claim to which I shall shortly turn. However, my own provisional opinion is that the claimants' argument fails to take adequate account of the inherent value of the transient copies as such, rather than as a means of controlling the process of which they form part. As the defendants pithily say, the whole point of this defence is to remove ransom strips, not to create them. In the case of the transient copies made in the decoder, these would seem to have no independent value save in so far as they participate in the flow of the video and audio data to the television. However, consideration must also be given to the transient copies created on the television screen. Here it may be important to take other matters into account including the extent to which the transient copies (here the artistic works) constitute only a small part of the programming and whether it is reasonable for FAPL and Sky to seek to extract further fees in addition to those already paid.

Infringement – communication to the public

245. This is the second of the three allegations of infringement. The claimants say the screening of the matches in public is a communication of the works to the public contrary to s.20 of the CDPA. This reads:

“20 Infringement by communication to the public

(1) The communication to the public of the work is an act restricted by the copyright in–

- (a) a literary, dramatic, musical or artistic work,
- (b) a sound recording or film, or
- (c) a broadcast.

(2) References in this Part to communication to the public are to communication to the public by electronic transmission, and in relation to a work include—

(a) the broadcasting of the work;

(b) the making available to the public of the work by electronic transmission in such a way that members of the public may access it from a place and at a time individually chosen by them.”

246. This section implements Article 3 of Directive 2001/29/EC (the Copyright and Information Society Directive). Recitals 20 and 23 are of particular relevance and explain the context and purpose of the provision:

“(20) This Directive is based on principles and rules already laid down in the Directives currently in force in this area, in particular Directives 91/250/EEC, 92/100/EEC, 93/83/EEC, 93/98/EEC and 96/9/EC, and it develops those principles and rules and places them in the context of the information society. The provisions of this Directive should be without prejudice to the provisions of those Directives, unless otherwise provided in this Directive.

....

(23) 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.”

247. Article 3 itself is in broadly, but not quite, the same terms as s.20:

“Article 3 - Right of communication to the public of works and right of making available to the public other subject-matter

3(1) Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.”

248. The claimants contend the breadth of the right is reflected in the wording of s.20(2), which uses the word *include* to set out a non-exhaustive list of what is meant by communication to the public. In this case, they submit the publicans are

communicating the copyright works to the public in two ways: rebroadcasting from the pub's satellite dish to the public bar area and by displaying the visual works on the pub's television screens and the playing of the audio works through the television's speakers.

249. The defendants contend the claimants' case is completely misconceived. They accept that there is a communication to the public involved in a satellite broadcast, but say that act is deemed by the terms of Directive 93/83/EEC (the Satellite and Copyright Directive) to take place solely in the Member State of transmission. That Member State is Greece in the case of the NOVA broadcasts, and Italy in the case of the ART broadcasts. Hence no infringement of UK copyright law can occur by reason of the act of reception taking place here.
250. In support of their respective positions, both sides referred me to the decision of the Court of Justice in *Sociedad General de Autores y Editores de España (SGAE) v. Rafael Hoteles SA* (Case C-306/05) Bus. L.R. 521. In this case, the claimant, the Sociedad General de Autores y Editores de España, an intellectual property rights management society, commenced proceedings against the defendant, Rafael Hoteles SL, the owner of Hotel Rafael, for infringement of the copyright. Specifically, the claimant alleged that acts of communication to the public were carried out involving works in the repertoire managed by the claimant. The acts in question were carried out through television sets installed in the hotel rooms which enabled the guests to see programmes on channels whose signals were received by the hotel main aerial and then distributed to each of the television sets in the various rooms. The Court of First Instance in Barcelona partially rejected the claim. It took the view that the use of television sets in the hotel's rooms did not involve a communication to the public. On the other hand, it considered that the claim was well founded as regards the existence in hotels of communal areas with television sets and where ambient music is played. Of particular significance therefore was what was meant by *the public*. On appeal, the Audiencia Provincial de Barcelona stayed the proceedings and referred three questions to the Court of Justice.
251. The first and third questions were, essentially, whether the distribution of a signal through television sets to customers in hotel rooms constitutes communication to the public within the meaning of Article 3(1). By the second question the court asked, essentially, whether the private nature of hotel rooms precludes such a communication from constituting a communication to the public. The Court answered these questions as follows:

“1. While the mere provision of physical facilities does not as such amount to communication within the meaning of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of copyright and related rights in the information society, the distribution of a signal by means of television sets by a hotel to customers staying in its rooms, whatever technique is used to transmit the signal, constitutes communication to the public within the meaning of article 3(1) of that Directive.

2. The private nature of hotel rooms does not preclude the communication of a work by means of television sets from

constituting communication to the public within the meaning of article 3(1) of Directive 2001/29.”

252. In reaching these conclusions, the Court noted the obligation of the Community, as party to the TRIPs Agreement, to comply with the Berne Convention, Article 11bis(I) of which provides:

“Authors of literary and artistic works shall enjoy the exclusive right of authorising: (i) the broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images; (ii) any communication to the public by wire or by re-broadcasting of the broadcast of the work, when this communication is made by an organisation other than the original one; (iii) the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work.”

253. The Court also had regard to Article 8 of the WIPO Copyright Treaty:

“Without prejudice to the provisions of articles 11(1)(ii), 11bis(1)(i) and (ii), 11ter(1)(ii), 14(1)(ii) and 14bis(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorising any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.”

254. Then, in considering the first and third questions, it reasoned at paragraphs [36]-[42]:

“36. It follows from recital 23 in the Preamble to Directive 2001/29 that “communication to the public” must be interpreted broadly. Such an interpretation is moreover essential to achieve the principal objective of that Directive, which, as can be seen from recitals 9 and 10, is to establish a high level of protection of, inter alios, authors, allowing them to obtain an appropriate reward for the use of their works, in particular on the occasion of communication to the public.

37. The court has held that, in the context of this concept, the term “public” refers to an indeterminate number of potential television viewers: *Mediakabel BV v Commissariaat voor de Media* (Case C-89/04) [2005] ECR I-4891, para 30 and *Lagardère Active Broadcast v Société pour la perception de la rémunération équitable (SPRE)* (Case C-192/04) [2005] ECR I-7199, para 31.

38. In a context such as that in the main proceedings, a general approach is required, making it necessary to take into account not only customers in hotel rooms, such customers alone being

explicitly mentioned in the questions referred for a preliminary ruling, but also customers who are present in any other area of the hotel and able to make use of a television set installed there. It is also necessary to take into account the fact that, usually, hotel customers quickly succeed each other. As a general rule, a fairly large number of persons are involved, so that they may be considered to be a public, having regard to the principal objective of Directive 2001/29, as referred to in para 36 of this judgment.

39. In view, moreover, of the cumulative effects of making the works available to such potential television viewers, the latter act could become very significant in such a context. It matters little, accordingly, that the only recipients are the occupants of rooms and that, taken separately, they are of limited economic interest for the hotel.

40. It should also be pointed out that a communication made in circumstances such as those in the main proceedings constitutes, according to article 11bis(1)(ii) of the Berne Convention, a communication made by a broadcasting organization other than the original one. Thus, such a transmission is made to a public different from the public at which the original act of communication of the work is directed, that is, to a new public.

41. As is explained in the Guide to the Berne Convention (1978), an interpretative document drawn up by the WIPO which, without being legally binding, nevertheless assists in interpreting that Convention, when the author authorises 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. According to the Guide, if 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 simple reception of the programme itself but is an independent act through which the broadcast work is communicated to a new public. As the Guide makes clear, such public reception falls within the scope of the author's exclusive authorisation right.

42. The clientele of a hotel forms such a new public. The transmission of the broadcast work to that clientele using television sets is not just a technical means to ensure or improve reception of the original broadcast in the catchment area. On the contrary, the hotel is the organisation which intervenes, in full knowledge of the consequences of its action, to give access to the protected work to its customers. In the absence of that intervention, its customers, although physically

within that area, would not, in principle, be able to enjoy the broadcast work.”

255. The claimants submit the same approach is applicable in the present case. The publicans’ communication falls within either or both of Article 11bis(1)(ii) or (iii). The former is the act of rebroadcasting from the pub’s satellite dish to the public bar area – just as the Hotel Rafael rebroadcast from its main aerial to the hotel rooms – while the latter is the displaying of the visual works on the pub’s television screen and the playing of the audio works through the television’s speakers.
256. Although neither side invited me to refer this issue, it is again one which is eminently fit for consideration by the Court of Justice. The following are my own provisional conclusions. I think the starting point is to determine the scope and purpose of Article 3, an exercise which must be conducted in the light of the Recitals.
257. I begin with Recital 20. This makes clear that the provisions of the Directive are without prejudice to those of the other Directives identified, unless otherwise provided. For present purposes, the ‘other’ Directive of importance is Directive 93/83/EEC. This harmonises the act of communication to the public by satellite broadcasting and so addresses at least part of the subject matter of Article 11bis(1)(i) of the Berne Convention.
258. Recital 23 then explains that this Directive, that is to say, 2001/29/EC, is concerned with harmonising *further* the author’s right of communication to the public. As the Court in the *Rafael Hoteles* case emphasised at [30], “communication to the public” must be interpreted in a broad sense. Nevertheless, Recital 23 makes it absolutely clear that the Directive is only concerned with communication to the public *not present at the place where the communication originates*. This right covers any such transmission or retransmission by wire or wireless means, including broadcasting, *but not any other acts*.
259. The subject matter of Article 3 can now be discerned. It is a harmonising measure directed to all forms of communication of a work to members of the public not present at the origin of that communication. As such, I understand it to be addressed to the subject matter of Article 11bis(1)(ii) of the Berne Convention but not to the subject matter of Article 11bis(1)(iii). This latter subparagraph is directed *to public performance* rights which, in so far as they involve an act of communication, do so at the place where that communication originates. They have not been made the subject of any harmonising measure and so remain a matter of national law.
260. I believe this to be entirely consistent with the *Rafael Hoteles* decision. There was no issue as to whether the signal was transmitted around the hotel by wire. This is apparent from the questions referred to the Court and is inherent in the answers it gave. The only issue was whether this involved a communication *to the public*, and the Court concluded that it did. It was in that context that the discussion in paragraphs [40]-[42] arose. I think the case was therefore one which fell squarely within Article 11bis(1)(ii) of the Berne Convention. It is no support for an argument that Article 3 of the Directive was intended to implement Article 11bis(1)(iii).
261. I also derive some comfort from the fact that this also seems to have been the understanding of those who framed s.20 of the CDPA. Here, it is to be noted, the

requirement of communication to the public not present at the place where the communication originates has been transposed in s.20(2) to a definitional requirement of communication to the public as being one which involves *electronic transmission*.

262. I come then to consider how these principles should be applied in the context of the present case. Have the publicans communicated the copyright works to members of the public not present at the origin of those communications? They have plainly displayed them and played them to members of the public (subject to the discussion in the next section). The audience is far wider than the publicans and their families. But it is my provisional view they have not communicated them to the public within the meaning of Article 3. There has been no retransmission by the publicans whether by wire or otherwise. They have simply received the signal, decoded it and displayed it on a television. The only acts of communication to the public have been those of the FAPL, NOVA and ART. In short, there has been no act of communication to the public within the Directive separate from the satellite broadcast itself.

Infringement – performing, playing or showing the works in public

263. By a series of late amendments made during the trial the claimants introduced allegations of infringement under s.19 of the CDPA in all three actions. They complain of the performance in public of the musical work in the Anthem and the playing or showing in public of the sound recording of the Anthem and the various film works. These acts are said to have been carried out by the Madden defendants and others to whom QC and AV have supplied ART and NOVA decoder cards. The QC and AV defendants are alleged to have authorised these activities.
264. Section 19 reads:

19 Infringement by performance, showing or playing of work in public

- (1) The performance of the work in public is an act restricted by the copyright in a literary, dramatic or musical work.
- (2) In this Part "performance", in relation to a work –
 - (a) includes delivery in the case of lectures, addresses, speeches and sermons, and
 - (b) in general, includes any mode of visual or acoustic presentation, including presentation by means of a sound recording, film or broadcast of the work.
- (3) The playing or showing of the work in public is an act restricted by the copyright in a sound recording, film or broadcast.
- (4) Where copyright in a work is infringed by its being performed, played or shown in public by means of apparatus for receiving visual images or sounds conveyed by electronic means, the person by whom the visual images or sounds are sent,

and in the case of a performance the performers, shall not be regarded as responsible for the infringement.

265. It is to be noted that under s.19 the relevant restricted act in respect of the Anthem as a musical work is “performance in public” whereas the relevant restricted acts in respect of the Anthem as a sound recording and the film works are “playing or showing the work in public”. There is no relevant restricted act in respect of artistic works and hence these are not included in the amendments and no claim is made in respect of them under this head.
266. As I understand it, the defendants do not dispute that acts of performance and playing or showing in public of the musical work, the sound recording and the film works have been performed, but say they have a defence under s.72 of the CDPA, which reads in material part:

“72 Free public showing or playing of broadcast

- (1) The showing or playing in public of a broadcast to an audience who have not paid for admission to the place where the broadcast is to be seen or heard does not infringe any copyright in –
- (a) the broadcast;
 - (b) any sound recording (except so far as it is an excepted sound recording) included in it; or
 - (c) any film included in it.
- (1A) For the purposes of this Part an "excepted sound recording" is a sound recording –
- (a) whose author is not the author of the broadcast in which it is included; and
 - (b) which is a recording of music with or without words spoken or sung.
- (1B) Where by virtue of subsection (1) the copyright in a broadcast shown or played in public is not infringed, copyright in any excepted sound recording included in it is not infringed if the playing or showing of that broadcast in public –
- (a) forms part of the activities of an organisation that is not established or conducted for profit; or
 - (b) is necessary for the purposes of –
 - (i) repairing equipment for the reception of broadcasts;

(ii) demonstrating that a repair to such equipment has been carried out; or

(iii) demonstrating such equipment which is being sold or let for hire or offered or exposed for sale or hire.

(2) The audience shall be treated as having paid for admission to a place –

(a) if they have paid for admission to a place of which that place forms part; or

(b) if goods or services are supplied at that place (or a place of which it forms part) –

(i) at prices which are substantially attributable to the facilities afforded for seeing or hearing the broadcast, or

(ii) at prices exceeding those usually charged there and which are partly attributable to those facilities.”

267. It can be seen that s.72 is concerned with the free public showing or playing of broadcasts. It provides that the showing or playing in public of a broadcast to an audience who have not paid for admission to the place where the broadcast is to be seen or heard does not infringe any copyright in the broadcast, any sound recording embodied in it (save one which is excepted) or any film included in it. There was originally an issue as to whether members of the public visiting pubs are to be treated as having paid for admission (by application of s.72(2)) but, during the course of the trial, the claimants accepted that they are not. Hence I find the defence applies to all the film works relied upon. That leaves the Anthem as a sound recording and musical work.

The sound recording

268. No claim can be made about the sound recording in so far as it is embodied in a film, for the reasons I have explained. Hence I am only concerned with the player line up. I have addressed (and accepted) the incidental inclusion defence. However, since I heard argument upon it, I express here my view as to the applicability of s.72 and, in particular, whether it is an “excepted sound recording” and, if so, whether s.72(1)(B) applies. I believe it plainly is an excepted recording because it is a recording of music and its author was not the author of the broadcast. Nor is it a case where the defendants can invoke the protection of s.72(1B). The playing or showing of the broadcast in public was carried out by pubs which are established and conducted for profit and had nothing to do with any relevant repair or demonstration. The defence in respect of the sound recording would therefore have failed.

Musical work

269. Here I have to consider the performance of the musical work by playing the Anthem during the player line up and also as part of the Opening Sequence, Match Highlights and Previous Highlights Films.
270. The defendants accept that if the sound recording is excepted, then the implication that there is consequent protection in respect of the embedded musical work does not run. But they say it does run in relation to acts within the scope of section 72(1)(B) where the shield still applies and, more importantly for present purposes, to musical works (and literary and dramatic works) embedded in broadcasts, sound recordings or films falling within s.72(1).
271. The defendants recognise that a purely verbal approach to s.72 suggests that it does not provide protection against actions for infringement based upon the performance of such embedded literary, dramatic or musical works. However, they say that from a policy or purposive point of view, such a construction produces startling results. Almost all films are based upon film scripts which count as dramatic works. So also, much broadcast output is based upon scripts which are literary works and songs are generally based upon musical and literary works. If all these species of copyright can be enforced when a television or radio is played in public then the protection given by s.72 is very narrow.
272. The defendants also point to the fact that Parliament has been careful to protect the free public showing or playing of a broadcast from being restricted by the exercise of other rights. In particular, s.189 gives effect to Schedule 2 para. 18 which closely tracks the wording of s.72 and gives protection against any performers right conferred by Part II of the CDPA on a performance or recording included in the broadcast or in any sound recording or film included in the broadcast. They say that since Parliament has been very careful to prevent the right of free public showing or playing of a broadcast being circumvented by the exercise of performers' rights, it becomes even more anomalous if literary, dramatic and musical copyrights can be invoked to achieve the same effect.
273. The way out of this difficulty, say the defendants, is to recognise that turning on a television or radio in a public place clearly involves showing or playing the broadcast and films or sound recordings included in it. So it was natural for s.72(1) to mention these works and so shadow s.19(3). However, literary, dramatic and musical works are 'at one remove' and cannot be said to be included in a broadcast in the same direct way as a sound recording or a film. Accordingly, they are not explicitly mentioned even though they are subsidiary to and underlie the works which the draftsman did mention. So, to make sense of s.72 and to give it its intended purpose and effect, it must be read by necessary implication as giving protection against infringement actions based upon such literary, dramatic or musical works.
274. I found these to be powerful arguments but I am unable to accept them. My primary reason is that the wording of s.72 is clear and the contrast with s.19 is absolutely plain. It is evident from s.19 that the legislature had the performance of a literary, dramatic or musical work by presenting a broadcast well in mind by specifying that it constituted a restricted act. In that same section it also addressed the restricted acts of playing or showing a sound recording or film. However, s.72 only provides a shield in respect of the free showing or playing in public of broadcasts, and certain sound

recordings and films included in it. In my judgment the wording of s.72 is not ambiguous.

275. Secondly, and as a consequence of the foregoing, I consider the exercise upon which the defendants invite me to embark would require me to rewrite s.72. That is something about which I must exercise great caution. In this regard the claimants referred me to the decision of the House of Lords in *Inco Europe v First Choice Distribution* [2000] 1 WLR 586. There Lord Nicholls explained (at 592-593) that before adding or omitting or substituting words the court must be abundantly sure of three matters: (1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed.
276. Can I be sure that Parliament intended to provide a shield against claims by the rights holders in literary, dramatic and musical works in all circumstances where a broadcast is shown to an audience who have not paid for admission? Or as to the substance of the provision Parliament would have made? I do not believe I can. The claimants give this illustration. They invite me to consider the case where a broadcast is made of a live performance of a musical or dramatic work and does not involve a film or sound recording at all. Here it cannot be said that these copyright works underlie or are at one remove to the broadcast. Did Parliament intend a shield to be provided in these circumstances? I think it is impossible to be sure that it did. But this illustration also highlights what I see to be a further fallacy in the defendants' argument. It assumes (indeed, the defendants submit) that the literary, dramatic and musical works are *subsidiary* to the works which are expressly mentioned. But I see no basis for that assumption. Indeed, as this illustration shows, there may be nothing else for them to be subsidiary to. Even if a recording is made of, for example, a performance of a musical work before it is broadcast, I see no reason to conclude that the musical work is subsidiary to the recording.
277. Thirdly, I must have regard to the fact that the defendants are inviting me to construe the Act in a way which will override the claimants' rights. In my judgment express words are required if I am to take that course and I simply do not find them in s.72.
278. For all these reasons, the defence fails in respect of the musical work embodied in the Anthem.
279. Perhaps anticipating this conclusion, and after the commencement of the trial, the defendants in the QC and Madden actions sent an open letter to the claimants on 30 April 2008, offering (in the case of QC) to notify customers to keep the sound muted and (in the case of the Madden defendants) to keep the sound muted at any time the Anthem is being played. If necessary I will hear argument as to the consequences of this offer after I have given final judgment.

The s.72 defence to the allegation of copying

280. It is convenient now to address the submission that s.72 provides a defence to the making of copies. In the light of the foregoing section of this judgment I can do this quite shortly.

281. The defendants' concern arises from the way the claimants put their case on this issue. As I have explained, the claimants argue that transient copies are made both in the decoder and on the screen, and this is so whether fragments or frames are considered individually or on a rolling basis. The defendants say that if I were minded to accept this argument then it would follow that films in broadcasts would always be infringed by reproduction, even in the days of analogue television. The protection afforded by s.72 on the free public playing or showing of broadcasts would then always have been illusory. Therefore and by necessary implication, s.72 must also permit the performance of acts which are necessarily incidental to the acts of playing or showing in public.
282. I reject this submission for the reasons I have already given. First, the defence is limited to the free showing or playing in public of a broadcast, and certain sound recordings and films included in it. It does not extend to any of the underlying works, or to copying. Second, as I have found, no copy is made of a substantial part of the sound recording or films in any event.

The Satellite and Copyright Directive (93/83/EEC)

283. The rival positions of the parties on the issues raised by Directive 93/83/EEC (the Satellite and Copyright Directive) can be summarised as follows. The defendants deploy the Directive as a general defence to the copyright claim. They argue that copyright law applies only to the act of transmission of a satellite broadcast from its Member State of origin, and no infringement of national copyright law is involved in the reception as such of satellite broadcasts in other Member States.
284. The claimants accept there is no infringement by mere reception of a broadcast, but say this is nothing to do with Directive 93/83/EEC – it is simply because reception is not a restricted act. By contrast, copying, showing or playing in public and communication to the public *are* restricted acts, and a vital distinction must be drawn between mere reception on the one hand, and reception followed by infringement on the other.

The context

285. In developing their submissions the parties invite me to set the Directive in context in a way which I consider helpful both in assessing its scope and as background for a consideration of the free movement and competition law defences which I address later in this judgment.
286. I begin with Directive 89/552/EEC (the Television Without Frontiers Directive) which, as I have explained, provides a home country regulatory system for the content of broadcasts. Importantly this recognised, in Recital 3, the value of cross border broadcasting in pursuing the objectives of the Community:

“Whereas broadcasts transmitted across frontiers by means of various technologies are one of the ways of pursuing the objectives of the Community; whereas measures should be adopted to permit and ensure the transition from national markets to a common programme production and distribution market and to establish conditions of fair competition without

prejudice to the public interest role to be discharged by the television broadcasting services;”

287. It was found, however, that the achievement of these objectives was obstructed by a series of differences between national rules of copyright which meant that a variety of different rights needed to be acquired in different Member States. An appreciation that these difficulties might be overcome by defining at Community level the notion of communication to the public by satellite led, in due course, to Directive 93/83/EEC.

Directive 93/83/EEC

288. The problems this Directive addresses, and its aims, are described, so far as relevant, in Recitals 3-5, 7, 14 and 15:

“(3) Whereas broadcasts transmitted across frontiers within the Community, in particular by satellite and cable, are one of the most important ways of pursuing these Community objectives, which are at the same time political, economic, social, cultural and legal;

(4) Whereas the Council has already adopted Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, which makes provision for the promotion of the distribution and production of European television programmes and for advertising and sponsorship, the protection of minors and the right of reply;

(5) Whereas, however, the achievement of these objectives in respect of cross-border satellite broadcasting and the cable retransmission of programmes from other Member States is currently still obstructed by a series of differences between national rules of copyright and some degree of legal uncertainty; whereas this means that holders of rights are exposed to the threat of seeing their works exploited without payment of remuneration or that the individual holders of exclusive rights in various Member States block the exploitation of their rights; whereas the legal uncertainty in particular constitutes a direct obstacle in the free circulation of programmes within the Community;

....

(7) Whereas the free broadcasting of programmes is further impeded by the current legal uncertainty over whether broadcasting by a satellite whose signals can be received directly affects the rights in the country of transmission only or in all countries of reception together; whereas, since communications satellites and direct satellites are treated alike

for copyright purposes, this legal uncertainty now affects almost all programmes broadcast in the Community by satellite;

....

(14) Whereas the legal uncertainty regarding the rights to be acquired which impedes cross-border satellite broadcasting should be overcome by defining the notion of communication to the public by satellite at a Community level; whereas this definition should at the same time specify where the act of communication takes place; whereas such a definition is necessary to avoid the cumulative application of several national laws to one single act of broadcasting; whereas communication to the public by satellite occurs only when, and in the Member State where, the programme-carrying signals are introduced under the control and responsibility of the broadcasting organization into an uninterrupted chain of communication leading to the satellite and down towards the earth; whereas normal technical procedures relating to the programme-carrying signals should not be considered as interruptions to the chain of broadcasting;

(15) Whereas the acquisition on a contractual basis of exclusive broadcasting rights should comply with any legislation on copyright and rights related to copyright in the Member State in which communication to the public by satellite occurs;”

289. The solution so far as broadcasting was concerned, and as foreshadowed in Recital 14, was to define the act of communicating to the public by satellite by reference to the place from which the signal is emitted (Article 1(2) (b)) and to require Member States to provide to authors an exclusive right to authorise the communication to the public by satellite of copyright works (Article 2).
290. It follows, as I think both parties were disposed to accept, that any infringement of copyright by communication of a satellite broadcast to the public takes place in the country from which the broadcast is made. So also, the reception of broadcasts in other Member States cannot be prevented by copyright owners or licensees in those other countries, where the copyright might be owned by or licensed to someone different. Thus, as the defendants say, the Directive does not prevent parties from dividing up rights as such (see Recital 16, subject to the competition rules in Article 81 (ex Article 85)) but, if they do, they must accept that licensees in the country of reception cannot complain about a communication by satellite to the public in that country of works for which they hold the relevant rights.
291. The importance of this Directive and its place in the development of Community policy in relation to cross border broadcasting must not be underestimated. This was explained in a final report of the Commission dated 26 July 2002 (COM (2002) 430 final) on the application of the Directive.

292. This report summarised the objective of the Directive at 3.1.1:

“The object of the Directive, with the definition of the notion of communication to the public by satellite at Community level, was to put an end to the legal uncertainty regarding the rights to be acquired, by specifying the place where the act of communication occurs and the copyright legislation applicable to contractual relations regarding the transfer of rights. The applicable law is that of the Member State in which the programme-carrying signals are transmitted; its application extends beyond national borders into the Member States in which the signals are received (although, in technological terms, the footprint covers many areas other than those of the Member States, the term "footprint" in this Report refers only to the territory of the Member States). This principle avoids the cumulative application of several national legislations of the various Member States covered by the footprint (recitals 14 and 15).”

293. The report goes on to note the proliferation of television channels in recent years, a large number of which are encrypted and accessible by subscription only and that even if viewers located outside the Member State in which transmission is organised are prepared to make the necessary payment, they often receive a negative response from the broadcaster concerned because the latter does not hold the copyright relating to the broadcast in the Member State in question. It then continues:

“A trend is thus emerging whereby producers sell their programmes to broadcasting organisations on condition that satellite transmissions are encrypted so as to ensure that they cannot be received beyond national borders. This encryption enables producers to negotiate the sale of the same programmes with broadcasting organisations in other Member States.

However, the principle laid down by the Directive, in keeping with the logic of the internal market, envisages the transfer of rights, under the law of the country in which the communication is introduced, for the entire footprint: in practice, a transfer on a national basis has the effect of fragmenting the market and runs counter to the principle of the Directive.

The fact that the Directive provides for the transmission of programme-carrying signals (Articles 1 and 2(c)) in encrypted form does not lessen the scope of the principle of the transfer of the rights in the country of introduction of the communication for the entire footprint: whether transmission is unscrambled or encrypted, the footprint can serve as the basis for exploiting the rights.

It is particularly interesting to note that the encryption of programmes is a factor in favour of fairer remuneration for

rightholders, to the extent that a decoder has to be made available to the viewer (whether a subscription has been paid or not), which makes it possible to check very accurately the size of the actual audience.

The Commission wishes to emphasise the full scope of the law applicable in the context of satellite broadcasting: the transfer of rights for a programme applies for the entire footprint, and only the contractual relations between the rightholders or the collecting societies representing them and the broadcasting organisations, relating to the entire footprint, are compatible with the principles of the internal market.”

294. These sentiments, and particularly those in the last two paragraphs, form an important plank in the defendants’ arguments as to the proper interpretation of this Directive, Directive 2001/29/EC and in relation to the free movement and Article 81 defences.

Does Directive 93/83/EEC provide a defence?

295. This, it seems to me, must once again be a matter for the Court of Justice, but my own provisional view is that the Directive does not provide any defence because it confers no positive right to receive, still less to copy, show or play in public or communicate to the public any copyright work contained in a broadcast. Instead, it simplifies the life of the broadcaster by subjecting it to the laws of only one Member State in relation to its acts of communication to the public by satellite. I think this is apparent from the following matters to which the claimants drew my particular attention:
- i) Article 4 which preserves the rights of performers, phonogram producers and broadcasting organisations; and Article 5 which leaves intact the protection of copyright.
 - ii) Recital 26 which provides that a Member State may allow for a rebuttable presumption that there is authorisation to exploit the performers’ rights contained within a performance communicated by satellite (and hence, by implication, confirms that exhaustion is not an automatic consequence of the communication).
296. I recognise, however, this may create difficulties where transient electronic copies are created in a decoder or on the screen in the course of the ordinary communication of the satellite signal to the public. In particular, it has the potential to deprive the Directive of its intended effect by creating, rather than removing, the legal uncertainty regarding the rights to be acquired. It would no longer be enough to assume the applicable law is that of the Member State in which the programme-carrying signals are transmitted. Broadcasters and those receiving signals would again be required to consider the cumulative application of several national laws to one single act of broadcasting.
297. The defendants suggest that one solution is to conclude that if UK national law does give the claimants the rights which they claim then UK national law must be trespassing on a field occupied by Directive in a way which undermines its objectives and purposes. Further, it means that such provisions of national law cannot be

justified or proportionate within the context of the rules of the EC on free movement of goods or services since they contradict or undermine this harmonising Directive. Alternatively, they say that the creation of such copies is outside the specific subject matter of the reproduction right having regard to the essential function of that right, which relates to the initial creation of a work which can then be placed on the market.

298. For myself, I think the answer to this conundrum lies in the free movement rules or Directive 2001/29/EC (the Copyright and Information Society Directive). In particular it is to be noted this Directive requires Member States to provide protection against temporary reproduction of copyright works (Article 2) *and* provides for exceptions and limitations to that right (Article 5). I would not therefore be minded to accept that the reproduction right for which the claimants contend here is purely a matter of national law. It seems to me that the issue is one of Community law concerning the meaning and scope of the expressions “lawful use” and “no independent economic significance” in Article 5.

Articles 28-30 EC (free movement of goods) and 49 EC (services)

299. This is the first of the general defences under the Treaty. On my findings it is relevant only to the claim in respect of NOVA decoder cards. The defendants contend the claimants are seeking relief which would amount to a quantitative restriction on trade between Member States or a measure having equivalent effect within the meaning of Article 28 EC. Further, they say that such a restriction is incapable, by reason of Article 3 of Directive 98/84/EC (the Conditional Access Directive) and generally, of justification under Article 30 EC. Likewise, the claimants are seeking relief which 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 EC.
300. The defendants’ argument is, at heart, relatively straightforward. They say the Court of Justice has consistently and repeatedly ruled that under Articles 28-30, the owner of an intellectual property right is not permitted to interfere with the free circulation from state to state of goods which have been placed with his consent on the market anywhere within the single market. By way of illustration they refer to the decision of the Court in Joined Cases 55/80 and 75/80 *Musik-Vertrieb Membran GmbH v GEMA* [1981] 2 CMLR 44.
301. This dispute arose between GEMA, a German copyright management society, and two undertakings which imported into the Federal Republic of Germany sound recordings of protected musical works from various countries, including other Member States. It was common ground that the sound recordings from other Member States had been manufactured and marketed in those states with the consent of the owners of the copyright in the musical works concerned, and that the requisite licences had been granted by those owners. However, the appropriate royalties had been calculated only on the basis of distribution in the state of manufacture. GEMA contended that the importation of the sound recordings constituted an infringement of copyright and claimed payment of royalties payable on sound recordings put into circulation in Germany less the lower royalties already paid.
302. The Court emphasised (at [8]) that sound recordings, even if incorporating protected musical works, were products to which the principle of free movement of goods

provided for in the Treaty applied. Upon well established principles, the proprietor of an industrial or commercial right protected by the law of a Member State could not rely on that law to prevent the importation of a product which had been lawfully marketed in another Member State by the proprietor himself or with his consent, and this applied to copyright as much as to any other property right (at [10]-[13]). The Court therefore concluded that the German copyright could not be enforced in order to claim the balance of the royalties.

303. The defendants therefore submit as follows. NOVA is one of FAPL's licensees. Accordingly, with FAPL's consent, NOVA has placed on the single market decoder cards which have the capacity to decode broadcasts of FAPL's matches. Assuming for present purposes that there is a decoder card right which can be treated as a species of industrial and commercial property within Article 28, this is analogous to the circulation of e.g. DVDs which contain recordings of the matches. It is no answer to this analogy to say that the decoder card does not physically embody a recording of the matches: what matters is not the card's physical relationship to the programme material, but the function which it performs in controlling access to it. Physical possession of a DVD permits a programme to be watched in one place only (albeit repeatedly); similarly, possession of a decoder card permits the programme content of a channel to be watched in one place only. Like a DVD, the movement of a decoder card from one Member State to another does not increase the audience for a broadcast, since the broadcaster is remunerated for every extra card issued. The free movement rules should therefore apply to a decoder card in the same way as to a DVD: the economic arguments are similar or identical.
304. The defendants then contrast this case with that known as *Coditel I* (Case 62/79 *Coditel SA and Ors v Ciné-Vog Films SA and Ors* [1980] ECR 81) upon which, together with the related case *Coditel II* (Case 262/81 *Coditel SA and Ors v Ciné-Vog Films SA and Ors* [1982] ECR 3381), the claimants rely. The cases are intimately related and it is convenient to address them together.
305. Ciné Vog acquired the right to distribute a film called *Le Boucher* in Belgium. Coditel, a Belgian cable television company, picked up on its aerial at a reception site in Belgium a broadcast of the film which had been made over the border in Germany and proceeded to distribute the film by cable to its subscribers in Belgium. It was thereupon sued for infringement of copyright by Ciné Vog. At first instance the claim was successful but, on appeal by Coditel, the Belgian Cour d'Appel referred two questions to the Court of Justice on the interpretation of what was then Article 59 (now Article 49). However, it declined to refer any question on the applicability of Article 81. In short, the court sought guidance as to whether the Treaty prohibited an assignment, limited to the territory of a Member State, of the copyright in a film, in view of the fact that a series of such assignments might partition the market.
306. The Court held:
- “The provisions of the Treaty relating to the freedom to provide services do not preclude an assignee of the performing right in a cinematographic film in a Member State from relying upon his right to prohibit the exhibition of that film in that State, without his authority, by means of cable diffusion, if the film so exhibited is picked up and transmitted after being broadcast in

another Member State by a third party with the consent of the original owner of the right”

307. In reaching this conclusion, the Court reasoned that cinematograph films belong to the category of literary and artistic works which are made available to the public by performances which may be infinitely repeated. In this sense they are different to books and records, as the Court explained at [12]:

“12. A cinematographic film belongs to the category of literary and artistic works made available to the public by performances which may be infinitely repeated. In this respect the problems involved in the observance of copyright in relation to the requirements of the Treaty are not the same as those which arise in connection with literary and artistic works the placing of which at the disposal of the public is inseparable from the circulation of the material form of the works, as in the case of books or records.”

308. The Court continued at [14] that this difference is a reflection of the fact that the right of a copyright owner to require fees for any showing of a film is part of the essential function of the right:

“... The right of a copyright owner and his assigns to require fees for any showing of a film is part of the essential function of copyright in this type of literary and artistic work.”

309. It then elaborated at [15]-[17]:

“15. Whilst Article [49] of the Treaty prohibits restrictions upon freedom to provide services, it does not thereby encompass limits upon the exercise of certain economic activities which have their origin in the application of national legislation for the protection of intellectual property, save where such an application constitutes a means of arbitrary discrimination or a disguised restriction on trade between Member States. Such would be the case if that application enabled parties to an assignment of copyright to create artificial barriers to trade between Member States.

16. The effect of this is that, whilst copyright entails the right to demand fees for any showing or performance, the rules of the Treaty cannot in principle constitute an obstacle to the geographical limits which the parties to a contract of assignment have agreed upon in order to protect the author and his assigns in this regard. The mere fact that those geographical limits may coincide with national frontiers does not point to a different solution in a situation where television is organised in the Member State largely on the basis of legal broadcasting monopolies, which indicates that a limitation other than the geographical field of application of an assignment is often impracticable.

17. The exclusive assignee of the performing right in film for a whole of a Member State may therefore rely upon his right against cable television diffusion companies which have transmitted that film on their diffusion network having received it from a television broadcasting station established in another Member State, without thereby infringing Community law.”

310. This difference between performing rights and goods was explained in the Opinion of Advocate General Warner:

“Here the relevant right is an element of copyright, namely performing right. Everyone who has submitted observations to the Court recognises that one cannot apply in the domain of performing right the doctrine of “exhaustion” as it applies in the domain of the marketing of goods. It is of the essence of a performing right that it enables the owner of it to authorise or forbid each and every performance of the work to which it relates.

... I do not think that this Court can hold that Community law denies to the owner of the performing right relating to a work such as a film the power – as part of the specific subject-matter of that right – to authorise or forbid the cable diffusion of a broadcast of the work.”

311. In the meantime, and before the Court gave this decision, Coditel appealed to the Cour de Cassation against the refusal by the Cour d’Appel to refer any question on the application of Article 81. That appeal was successful and the Cour de Cassation duly made a second reference which became the subject of the decision in *Coditel II*. The reference essentially sought to ascertain the position, in relation to the prohibitions contained in Article 81, of a contract whereby the owner of the copyright in a film grants the exclusive right to exhibit that film within the territory of a Member State and for a specified period.

312. After referring to the decision in *Coditel I*, the Court explained at [15]-[18]:

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

16. The characteristics of the cinematographic industry and of its market in the Community, especially those relating to dubbing and subtitling for the benefit of different language groups, to the possibilities of television broadcast, and to the system of financing cinematographic production in Europe

serve to show that an exclusive exhibition license is not, in itself, such as to prevent, restrict or distort competition.

17. Although copyright in a film and the right deriving from it, namely that of exhibiting the film, are not, therefore, as such subject to the prohibition contained in Article [81], the exercise of those rights may, none the less, come within the said prohibitions where there are economic or legal circumstances the effect of which is to restrict film distribution to an appreciable degree or to distort competition, on the cinematographic market, regard being had to the specific characteristics of that market.

18. Since neither the question referred to the Court nor the file on the case provides any information in this respect, it is for the national court to make such enquiries as may be necessary. ”

313. The Court therefore concluded that a contract whereby the owner of the copyright for a film grants an exclusive right to exhibit that film for a specific period in the territory of a Member State is not, as such, subject to the prohibitions contained in Article 81.
314. I must return to *Coditel II* in addressing the arguments under Article 81, but for the moment I will focus on *Coditel I* which has a more direct bearing on the issues raised under Articles 28 and 49.
315. Paragraphs [15]-[17] of the decision in *Coditel I* are, say the defendants, important because they reveal two important differences between the circumstances of that case and those of the present. The first is that this is not a case where there has been a distinct act of re-transmission within the Member State of reception. The second is that reception takes place via a decoder card which means that the broadcaster has been rewarded by a subscription for each card that is used, irrespective of whether it is used inside or outside the broadcaster’s licensed territory. There is no additional “free” use, as would be the case through an extension of the effective area covered by a free to air broadcast as a result of cable rediffusion by a third party, as there was in *Coditel*.
316. In summary, the defendants submit that a restriction which prevents a decoder card from being moved from one Member State to another and used in the Member State of importation cannot possibly be warranted. The use of a satellite decoder card to receive a satellite broadcast is not an infringement of copyright and so there can be no justification for interference with Treaty freedoms on the basis of infringement of a performance or use type right. Moreover, the view expressed by the Commission in its Encrypted Services Green Paper referred to at [86] above is correct and is reflected in Article 3(2) of Directive 98/84/EC. A service provider who places decoder cards on the market in any Member State cannot thereafter seek to prevent the free circulation of the cards or their use in other Member States where they may be imported, nor can a licensor of such a service provider. The same result is achieved when considering the right to provide and receive services under Article 49.
317. The claimants counter that *Coditel I* is indeed a complete answer to the defendants’ case and their attempts to distinguish it are misconceived. In summary they say that

the Court of Justice has decided that performance rights, such as copyright in broadcasts, may be validly licensed and enforced in the EU on national territorial lines without falling foul of the Treaty's rules on free movement because of the specific subject matter and essential function of such copyright protection. The fact that a fee has been paid in respect of one Member State is neither here nor there because FAPL has a right to license for a fee in each Member State in which it has copyright for its broadcasts. This is the performance right to which the concept of exhaustion is inapplicable.

318. The claimants support their arguments by reference to Case C-200/96 *Metronome Musik* [1998] ECR I-1953. The issue before the Court of Justice was whether the introduction of an exclusive rental right for video-cassettes might infringe the principle of exhaustion of distribution rights. The Court concluded it did not. Having referred to the exhaustion principle it explained at [15] and [18]:

“15. However, as the Court pointed out in Case 158/86 *Warner Brothers and Metronome Video v Christiansen* [1988] ECR 2605, literary and artistic works may be the subject of commercial exploitation by means other than the sale of the recordings made of them. That applies, for example, to the rental of video-cassettes, which reaches a different public from the market for their sale and constitutes an important source of revenue for makers of films.

....

16. As the Advocate General has rightly indicated in point 14 of his Opinion, the release into circulation of a sound recording cannot therefore, by definition, render lawful other forms of exploitation of the protected work, such as rental, which are of a different nature from sale or any other lawful form of distribution. Just like the right to present a work by means of public performance (see, in that connection, Case 395/87 *Ministère Public v Tournier* [1989] ECR 2521, paragraphs 12 and 13), the rental right remains one of the prerogatives of the author and producer notwithstanding sale of the physical recording.”

319. I have come to the conclusion that these rival arguments are intimately tied to the questions of interpretation which I have discussed earlier in this judgment and again raise issues of law upon which the assistance of the Court of Justice is required. However, my own provisional views are these.
320. I think it helpful to have regard to the framework in which these claims arise. I believe a picture emerges from a consideration of the legislative measures adopted by the Council and the European Parliament, and that this picture reflects Community policy as described both in the Green Paper which preceded Directive 98/84EC and in the final report (COM(2002) 430 final) of the Commission on Directive 93/83EEC.
321. These measures are all, as the defendants put it, ‘building blocks’, in a developing project to create (in the words of Recital 16 of Directive 98/84/EC) a single European

audiovisual area. I have discussed the elements of that project at various points in this judgment but it is convenient now to draw them together.

322. I begin with Directive 89/552/EEC which expressly recognised (in Recital 3) the benefits of cross border broadcasting in pursuing the objectives of the Community and so provided a home country regulatory system for the content of broadcasts.
323. This was followed by Directive 93/83/EEC which again acknowledged the importance of satellite and cable broadcasting in pursuing Community objectives and the part played in furthering these objectives by Directive 89/552/EEC (see Recitals 1-4); but recognised the achievement of those objectives was obstructed by differences between national rules of copyright. Hence the Directive defined the notion of communication to the public by satellite at a Community level with a view to promoting cross border satellite broadcasting (Recital 14); and it did so by defining the act of communication to the public by reference to the place where the signal is emitted.
324. It was against this background that, in 1996, the Commission drew up the Green Paper which considered in detail the importance of encryption and the problems created by a fragmented system throughout the EU for dealing with illicit reception. This recognised the importance of ensuring the right to remuneration of the intellectual property rights holders but, at the same time, the need to respect the proportionality criterion. The Commission also explained its opinion as to where the balance should be drawn - a matter I have considered in paragraphs [86]-[94] of this judgment.
325. Directive 98/84/EC was duly adopted in 1998 and again acknowledged the value of cross border broadcasting to the furtherance of the objectives of the Community (Recitals 1-3) and recognised the need to supplement the legal framework for the creation of a single audiovisual area laid down by Directive 89/552/EEC (Recital 16). At the same time it recognised the value of services provided by conditional access and the need to protect the service providers against illicit devices giving access to those services free of charge.
326. Then came Directive 2001/29/EC, which is concerned with the harmonisation of aspects of copyright and related rights in the information society and is based upon the rules and principles laid down in a number of Directives, including Directive 98/84/EC.
327. Finally I come to the report (COM (2002) 430 final) on Directive 93/83/EEC which I have discussed in paragraphs [291]-[294] of this judgment and the concerns expressed there by the Commission about the emerging trend of programme producers to sell their programmes to broadcasting organisations on condition that satellite transmissions are encrypted so as to ensure they cannot be received beyond national borders. It concludes that the transfer of rights for the entire footprint, and only the contractual relations between the rightholders or the collecting societies representing them and the broadcasting organisations relating to the entire footprint, are compatible with the principles of the internal market. So, whether the transmission is unscrambled or encrypted, *the footprint can serve as the basis for exploiting the rights.*

328. I think it is apparent from the foregoing that these various legislative measures cannot be considered in isolation and each one “kept in its box”, as the claimants urged upon me. It is only by considering each measure in the context in which it was adopted that its true meaning can be discerned.
329. I turn now to consider the particular claims against which the free movement defence is raised. They fall into two categories: first, the claim under Directive 98/84/EC in respect of dealings in illicit devices; and second, the claims for infringement of copyright by copying, communicating to the public and performing, playing or showing in public works protected by copyright owned by FAPL. I would say at the outset that it is my impression that neither *GEMA* nor the *Coditel* cases provide a complete answer to the questions which arise.
330. As for Directive 98/84/EC, the starting point must be its proper interpretation. I have discussed this at some length and do not propose to repeat that discussion here. However, I would add the following postscript. The defendants say, in my judgment with some force, that the effect of the claimants’ contention is that Directive 98/84/EC provides them with a control right to allow broadcasters to control the place in the Community where their decoder cards are used. The submission continues that such an interpretation of the Directive is irreconcilable with the development of a single audiovisual area; a submission which I consider is supported by the final report (COM (2002) 430 final) on Directive 93/83/EEC.
331. It must be noted the need to consider the free movement defence to the claim under Directive 98/84/EC only arises if the defendants lose on the issues of interpretation I have discussed. If the expression illicit device is construed as applying only to what I have described as pirate devices then the claim must fail. In this event the defendants accept that the specific subject matter of the right conferred under the Directive may be as wide as the right itself.
332. If, on the other hand, the expression illicit devices is construed, as the claimants contend, to include any decoder cards which give access to a protected service without authorisation, even if such cards have been issued by the service provider, it then becomes necessary to identify, as a matter of law, the specific subject matter of the right by reference to its essential function.
333. In this regard, the defendants say the essential function of the right is to protect against access to a service by devices which allow access “free of charge” (see Recital 6), and that is not the case for the decoder cards in issue. However, this, it seems to me, is no more than a re-run of one of the arguments on interpretation which, on this hypothesis, they have lost. Moreover, I think it would amount to an attack on the validity of the Directive itself and consequently would be unlikely to succeed.
334. I turn then to consider the claims in respect of copyright which assume a particular importance if the defendants are right as to the correct interpretation of Directive 98/84/EC. As has been seen, complaint is made of the production of transient copies in decoder boxes and on television screens. These copies are necessarily made as an inherent part of the process of reception. Yet the claimants apparently accept there is no act of infringement in reception as such. That must, I think, be right, because communication to the public is deemed to take place in the country from which the broadcast is made under Directive 93/83/EEC. In these circumstances I consider there

is a real issue as to whether the creation of such copies is outside the specific subject matter of any reproduction right, although once again this may turn on the proper interpretation of Directive 2001/29/EC. That, however, is not an end to the matter. The claimants also complain about the communication of the works to the public and the performing or playing of the works in the public. The former, if established, is accepted by the defendants to be outwith any possible defence under the free movement rules. The latter is not so clear. I have found that it is, *prima facie*, an infringement of the copyright relating to the Anthem for it to be played out loud in public in the circumstances I have described. But these are not important aspects of the broadcasts so far as the defendants are concerned, and hence their offer by letter dated 30 April 2008, mentioned in paragraph [279] above. A more specific aspect of the question on which the assistance of the Court of Justice is requested is therefore whether, in these circumstances, the protection afforded in respect of the Anthem can be any broader than that which is conferred on the substantive aspects of the broadcast.

Competition law (Article 81 EC)

335. FAPL has established a system of contracts with two aspects: (i) a covenant of exclusivity that FAPL will only appoint one broadcaster within any particular territory and (ii) restrictions against the circulation of authorised decoder cards outside the territory of each licensee. The defendants' case under Article 81 is directed only at (ii) and it applies only to NOVA.

336. I must now explain how the defence came to be introduced into the proceedings and its continued relevance. The claimants pleaded in their Re-Re-Amended Particulars of Claim in the QC action at paragraphs 6A and 58:

6A: The Second Claimant receives the World Feed at facilities in Greece which are shared with the Third Claimant. The Second Claimant adds a separate Greek commentary and graphics to the World Feed. The Third Claimant encrypts and compresses the signal, and transmits it to an uplink station situated in Greece. The Third Claimant enters into contracts with subscribers in the territory of Greece to authorise them to receive the signal on payment of a charge.

....

58. The Foreign Broadcasters are prohibited from supplying SMART cards for use in the United Kingdom”

337. This provoked a request for further information of the prohibition referred to and produced the following response dated 21 March 2007:

“7. Under the terms of the license under which the Foreign Broadcasters received transmissions of the Matches from Premier League Productions each Foreign Broadcaster (“Licensee”) is required to undertake that it shall “*procure that no device (including but not limited to any “smart card” and any decoding equipment which is necessary to decode or*

decrypt any such Transmission) shall be knowingly authorised or enabled by or with the authority of the Licensee and/or any Permitted Sub-Licensee and/or any distributor, agent or employee of the Licensee and/or any Permitted Sub-Licensee so as to permit any person to view any such Transmission outside the Territory [which Territory does not include the UK] in an intelligible form.” This form of wording is present in the licence agreements... applicable to the “ART” cards and “Nova” smart cards referred to in the statements of case to date. Clauses to this effect are included in all relevant overseas broadcasting agreements”

This, it will be recalled, is reflected in clause 12(1)(b)(i) of the NetMed Agreement.

338. The claimants also asserted lack of consent to the dealings in the cards complained of in support of their claim for copyright infringement and loss of revenue.
339. Paragraphs 17, 18 and 18A of the Re-Amended Defence in the QC action state:

“17. In so far as the prohibition alleged in the first sentence of paragraph 41 is based upon or the consequence of agreements between undertakings or concerted practices, such prohibition has as its object or effect the prevention, restriction or distortion of competition within the common market. In particular such prohibition purports to limit or control the markets to which broadcasters are permitted to supply their broadcasting services and/or to supply decoder cards, contrary to Article 81 (1) (b) EC.

18. The alleged prohibition is accordingly void and cannot be relied upon as a basis for contending that the Defendants’ customers are not entitled to receive the satellite broadcasts concerned.

18A. Contract terms or other purported restrictions imposed by the Second and/or Third Claimant on holders of Nova cards which purport to restrict the use of Nova cards to the territory of Greece (including in particular the contract terms alleged in the last sentence of paragraph 6A) are the consequence or effects of the agreements or concerted practices referred to in paragraph 17 above, and/or are themselves agreements between undertakings or concerted practices which have as their object or effect the prevention, restriction or distortion of competition within the common market, in that they purport to limit or control the markets where traders are permitted to supply Nova decoder cards and to restrict the ability of persons in Member States other than Greece to receive Nova broadcasts.”

340. The defendants provided further information about this allegation on 26 November 2007:

“1. The Defendants’ case under Article 81 EC relates solely to the prohibition on the Foreign Broadcasters which is pleaded by the Claimant in the first sentence of paragraph 10 of its Particulars of Claim....and as further particularised in Responses 6 and 7 in its Further Information Responses served ... on 21 March 2007.

2. The Defendants contend that the agreements as pleaded in Response 7 between the Claimant and its Licensee in each territory... breach Article 81 in so far as they contain or... reflect the term pleaded in Response 7. Alternatively the insertion of such terms into the said agreements to constitute a network of agreements providing territorial protection for each Foreign Broadcaster constitutes a concerted practice to which the Claimant and its Licensees and sub-Licensees are parties.

3. The Defendants contend that steps taken to implement the prohibition such as steps taken by Foreign Broadcasters to prevent the circulation or use of decoder cards outside their respective territories or steps taken by the Claimant to induce the Foreign Broadcasters to take such steps, are the unlawful consequences of the above pleaded breach of Article 81 EC. ”

341. This defence was also raised to the copyright infringement claim and the claim in respect of lost revenue.

342. In their Re-Amended Reply the claimants denied (at paragraph 10) that the prohibition constituted a violation of Article 81 or was void.

343. At a hearing on 19 December 2007, the claimants sought summary judgment on the part of the defence based upon Article 81 on the basis it had no real prospect of success at trial as a matter of law, essentially relying on the decisions in *Coditel I* and *Coditel II*. Barling J dismissed the application in a judgment handed down on 18 January 2008, [2008] EWHC 44 (Ch).

344. At the trial there was some discussion as to whether the claimants were maintaining their reliance on the contractual restriction (the “export restriction”) but it became clear that this was the case and it remains both in their final amendments to the Particulars of Claim and the Reply. It seems to me the claimants have no alternative but to take this course because they accept that the NOVA cards were put on the market in Greece but say this was only for the limited purpose for which they were authorised. They maintain the decoder cards were not at that point in free circulation because of the presence of national rights in other Member States *and* because of the export restriction. I have discussed the interpretation of the NetMed agreement earlier in this judgment and I consider the contractual restriction underpins the claimants’ contention that consent given by NOVA when it supplies a decoder card is limited to use in the territory of Greece. If the contractual restriction is void then the claimants cannot rely on it. Accordingly this issue has a bearing on the claim under Directive

98/84/EC and for infringement of copyright, at least in so far as the claimants are seeking an injunction which would prohibit the defendants from arranging the supply into the UK of domestic NOVA decoder cards for domestic use and commercial NOVA decoder cards for commercial use.

345. I turn then to consider the substantive issue. The claimants submit, and I accept, it could have significant consequences for the European broadcasting market.
346. I begin by considering the evidence. The defendants have established that there is a significant demand for the reception of satellite broadcasts in Member States outside the state of origin, for a variety of reasonable purposes. The demand exists among citizens of other Member States resident in or visiting the UK and among UK citizens resident in or visiting other Member States who wish to have access to satellite TV from their home countries for personal viewing. Such persons include second home owners, tourists and other travellers. It was also shown there is a demand for satellite reception in pubs and bars and similar establishments, as illustrated by the activities in the UK of the defendants which the claimants are trying to prevent by these proceedings; and a demand for Sky broadcasts in pubs and bars throughout the EU, particularly but not exclusively in areas frequented by British tourists. Interestingly, there is also a demand by Premier League clubs who have installed foreign satellite systems in order to look at match broadcasts for player analysis and scouting purposes.
347. I am also satisfied on the evidence that the export restriction is intended to and does in fact restrict trade between Member States and so inevitably restricts competition between the services provided by FAPL's current licensees. This was apparent from the evidence of Mr Weingarten to which I have already referred in paragraph [18]-[24] of this judgment. He candidly confirmed under cross examination that if NOVA were free to respond to orders for decoder cards from other Member States, including the UK, the rights of the licensees in those other territories would be diluted. From the FAPL's perspective that would be damaging in number of respects: it would reduce the value of the UK rights to Sky and hence the amount it is prepared to pay for the exclusive right to broadcast in the UK and it would render FAPL in breach of its obligations to the Commission (which I come to in a moment) and to UEFA (as explained in paragraph [23] above). However it would increase competition, at least for now, as he explained (Day 4, pages 73-75):

Q. ... Those are reasons for imposing restrictions. But the point I am putting to you is: if the restriction were removed, there would be increased competition, or in effect there would be competition where there isn't any at the moment, between Premier League matches carried by Nova and Premier League matches carried by Sky?

A. Yes. That's natural.

Q. And therefore the purpose of imposing the restriction is in order to prevent this competition between your co-licensees in different territories?

A. Yes, that is one reason.

Q. And –

A. Because they have bought exclusive rights.

Q. Yes. If you were to remove the restriction, it would have significant and substantial effects, wouldn't it?

A. Yes.

Q. And that's your whole case?

A. Yes.

Q. And of course, the restriction or, if you like, the network [of] restrictions operates both ways; in that it prevents Sky from responding to orders for decoder cards from outside the United Kingdom; correct?

A. Yes.

Q. And in fact, if we look at the pattern across Europe, you have walled off the territory of each licensee from each other?

A. Yes

Q. If the restriction were removed, the effect of that would be, for example, that Sky would lose out because of the competition from decoder cards coming in from other member states, Greece and others?

A. Yes

Q. Sky would gain, to an extent, because they could perhaps make presales [more sales] of decoder cards into other member states?

A. Potentially, yes.

Q. And your concern -- and indeed, the export of Sky cards into other member states would of course result in competition in those states between Sky's showings of Premier League matches and the matches carried by your licensees in those territories?

A. Yes, of course.

348. Mr Papastathopolous gave evidence from NOVA's perspective. It establishes that exclusivity is a feature of the majority of its programming and that NOVA wants exclusivity to encourage customers to take out a NOVA subscription. Correspondingly, the export restriction is something required by the majority of programme suppliers as a condition of the grant of exclusive rights. Absent such a restriction, he would expect the number of cards supplied to increase.

349. Before considering the issues which arise in the light of this evidence, I would make the following preliminary observations. First, it is important to have in mind that the defendants do not seek to challenge the grant to NOVA of an exclusive licence. The challenge is only directed at the export restriction imposed upon NOVA. It is this feature which turns the contract from an “open” to a “closed” exclusive licence.
350. Second, the defendants accept that if they are wrong as to the proper interpretation of Directive 98/84/EC and on their free movement arguments such that it is not lawful to export decoder cards from Greece to the UK, then the export restriction does no more than mirror a restriction imposed by the underlying rights and the Article 81 argument must fail.
351. If, on the other hand, Directive 98/84/EC, on its true construction, is concerned with pirate devices and does not confer a right of control over the movement from state to state or on the place of use of devices issued by the service provider, or if the defendants can rely upon the free movement rights under the Treaty, then the claimants cannot say that the export restriction has no effect additional to that of the underlying exclusive licence of broadcasting rights.
352. The position is similar in relation to copyright. Moreover, it is not possible for the claimants to argue that the use of NOVA’s decoder cards in the country of importation necessarily infringes FAPL’s copyrights. They may be used for domestic purposes. Or they may be used to watch Greek sports within the UK. The export restriction would prevent all such activities, reasonable though they seem. Further, it must again be borne in mind that FAPL is seeking to rely on fragments of its broadcasts and I consider it is again questionable whether this can be sufficient to justify a total restriction of the kind asserted.
353. The defendants say it is apparent that from these matters alone that the export restriction is restrictive by object. But they say the position is confirmed by a consideration of the industry and the context within which the agreement was made. In particular, restrictions of this kind undermine the Community objective of the creation of a single audiovisual area and inhibit, rather than promote, cross border satellite broadcasting.
354. In support of their position, the defendants rely on two authorities in particular. The first is the decision of the Court of Justice in Case 19/77 *Miller International v Commission* [1978] ECR 131 where the Court said at [7]:
- “7. In this connexion it must be held that, by its very nature, a clause prohibiting exports constitutes a restriction on competition, whether it is adopted at the instigation of the supplier or the customer since the agreed purpose of the contracting parties is the endeavour to isolate a part of the market.”
355. The Court proceeded to consider whether the clauses in issue were such as to affect trade between member States and concluded that it was enough that there was a *danger* that trade between Member States would be *appreciably affected* [at 15].

356. The second is the decision of the Court of Justice in Case 258/78 *Nungesser and Eisele v Commission* [1982] ECR 2015. Here the Court was concerned with plant breeders rights and distinguished between open and closed exclusive licences. As it explained at [53]:

“53. It should be observed that those two sets of considerations relate to two legal situations which are not necessarily identical. The first case concerns a so called open exclusive licence or assignment and the exclusivity of the licence relates solely to the contractual relationship between the owner of the right and the licensee, whereby the owner merely undertakes not to grant other licences in respect of the same territory and not to compete himself with the licensee on that territory. On the other hand, the second case involves an exclusive licence or assignment with absolute territorial protection, under which the parties to the contract propose, as regards the products and the territory in question, to eliminate all competition from third parties, such as parallel importers or licensees for other territories.”

357. In relation to closed licences, it said:

“61. The Court had consistently held (cf. Joined Cases 56 & 58/64 *Consten & Grundig v. Commission* [1966] ECR 299) that absolute territorial protection granted to a licensee in order to enable parallel imports to be controlled and prevented results in the artificial maintenance of separate national markets, contrary to the Treaty.”

358. It follows, say the defendants, the evidence needed to establish that an export ban between Member States is contrary to Article 81 is slight and it is enough to demonstrate that it has real effects. If that is indeed the correct test, then it would seem to me to be established by the evidence to which I have referred.

359. However the claimants say that the defendants’ approach is misconceived. First, they submit that the right to receive remuneration is part of the specific subject matter of the intellectual property rights in the service and rely, in particular, upon *Coditel I* and *Coditel II*. Moreover, the terms of Directive 98/84/EC reflect the process of reconciliation of the various competing interests existing under the Treaty by the Council and European Parliament. As such, if the clause in question does no more than reasonably reflect the rights contained in the Directive it cannot, *a fortiori*, be inconsistent with Community law including the competition rules.

360. I consider there are two problems with this submission. The first is that the licence in *Coditel* was open, not closed, and the defendants have never sought to contend that it is clear that the object of an open licence is to harm competition. The second is that the defendants do not suggest the export restriction is invalid if they are wrong both as to the proper interpretation of the Directive and on their free movement arguments.

361. The claimants also submit that the defendants’ case is based on *per se* illegality under Article 81. As to this, they accept there are agreements which are treated as having a

restrictive object and are very much harder to justify. Nevertheless, they say the concept of *per se* illegality is not known to EC law. In this connection my attention was drawn to the decision of the Court of First Instance in Case T-168/01 *Glaxosmithkline v Commission* [2006] ECR II-2969 and, in particular, the discussion at [109]-[122]. This case suggests that an agreement intended to limit parallel trade is not to be considered by its nature, and independently of any competitive analysis, to have as its object the restriction of competition. At [121] the court said:

“121 While it has been accepted since then [*Consten and Grundig v Commission*] that parallel trade must be given a certain protection, it is therefore not as such but, as the Court of Justice held, in so far as it favours the development of trade, on the one hand, and the strengthening of competition on the other hand, that is to say, in this second aspect, in so far as it gives final consumers the advantages of effective competition in terms of supply or price Consequently, while it is accepted that an agreement intended to limit parallel trade must in principle be considered to have as its object the restriction of competition, that applies in so far as the agreement may be presumed to deprive final consumers of those advantages.”

362. The court then proceeded to take into account the legal and general context in which the relevant terms were applied and concluded that it could not be presumed that those terms deprived the final consumers of these advantages of effective competition.
363. It follows, submit the claimants, that if the defendants are to attack the export restriction they need to plead and then prove to the requisite standard each and every one of the components of Article 81(1). Here, they say the defendants have not pleaded any primary facts at all. Moreover, and more fundamentally, they have failed to deploy any, or at least any adequate, evidence. Typically, they say, proof of Article 81 allegations is achieved through a combination of witnesses of fact, trade witnesses and experts, usually economists and forensic accountants. In any event, there must be a detailed assessment of the full legal and economic context including, as a basic requirement, an identification of the relevant product and geographic markets within which the alleged restriction of competition will have an effect. One of the essential matters which must be analysed is, they say, the ‘counterfactual’, that is to say the market as it would have been in the absence of the alleged illegal restriction.
364. In this regard, the claimants contend the difficulties with the defendants’ case are compounded by the fact that the Commission has expressly considered and issued a decision in relation to the manner in which the FAPL sells its broadcasting rights: Case COMP/38.173 Joint selling of media rights to the FA Premier League, 22nd March 2006. The subject matter of this proceeding was the horizontal joint selling arrangements of the Premier League clubs for the exploitation of the media rights to their matches, under which they appoint the FAPL to act on their collective behalf. It is apparent that the Commission was well aware the rights would be sold on an exclusive basis and that this was, inter alia, designed to maximise revenue. It is also clear the Commission was conscious that geographic markets for the exploitation of media rights are usually national in scope. The decision noted various commitments by the FAPL as to its market conduct and licensing policy (including the grant of rights on an exclusive basis, together with the export restriction) and duly made those

commitments binding on the FAPL. It concluded that, in the light of those commitments, there were no longer grounds for action.

365. It seems to me that this decision of the Commission is of some, but limited value. It expressly states it has as its sole subject matter the *horizontal* joint selling arrangements and does not concern *vertical* agreements to license the rights in issue. Nor is there any reference in the body of the decision to the export restriction. Therefore, and while I recognise the grant of exclusivity was contemplated by the Commission, I cannot conclude it considered, let alone approved, the export restriction as such.
366. Nevertheless, I recognise that there is no pleading directed to the following components of a typical Article 81 case:
- i) the product and geographic market, addressing such questions as whether there are separate markets for decoder cards for use on commercial and residential premises;
 - ii) market conditions generally, such as the structure and size of the market, current market conditions and the importance of the grey market;
 - iii) the counterfactual, namely the impact on competition if exclusive territorial licensing could not be used to obtain remuneration for the exploitation of sports rights;
 - iv) ancillary restraints, that is to say the extent to which exclusive territorial licensing is necessary to give effect to collective exploitation of sports rights as approved by the Commission;
 - v) effect on trade between Member States;
 - vi) anti-competitive effect.
367. Further, and subject to paragraphs [345]-[348] above, the defendants have not adduced any evidence on any of these matters. Consequently, if the claimants are right, and a full factual and economic analysis is required, then the attack on the export restriction may well fail.
368. It is apparent from the foregoing that the parties are approaching the issue from fundamentally different perspectives as to the correct legal approach. The defendants say that Community policy as to cross border broadcasting is evident from the series of legislative measures to which I have referred and, in the event the interpretation of Directive 98/84/EC for which they contend is correct, it may be presumed that the export restriction has, as its object, the restriction and distortion of competition and it is enough to show there is a danger that trade between Member States will be appreciably affected. The claimants, on the other hand, say that it is inherent in the specific subject matter and essential function of copyright for broadcasts that rights may be licensed to exclusive licensees in particular Member States. In short, exclusive licenses of performing rights do not *per se* infringe Article 81, even though they confer absolute territorial protection and might prevent transmission into a neighbouring state. This, it seems to me, is a question which is so intimately tied to

the other issues of interpretation I have discussed that I believe it too should be referred to the Court of Justice. I would ask the Court what legal test the national court should apply and the circumstances it should take into consideration in deciding whether the export restriction engages Article 81.

Reference

369. The defendants seek a reference to the Court of Justice under Article 234 EC on the issues of Community law which I have identified. The claimants say that a reference is not necessary and, in any event, in the exercise of my discretion no reference should be made at this stage.
370. For the reasons I have given, and having determined the facts, I believe that a ruling on the important and difficult issues of Community law to which I have referred is necessary for this court to deliver a final decision on the various claims advanced by the claimants under Directive 98/84/EC and for infringement of copyright. It is therefore open to me to make a reference to the Court of Justice. Having formed this view, I must consider whether, taking into account all relevant matters, I should make a reference at this stage.
371. In my judgment this case raises very serious questions which, as both parties have urged upon me, are of the greatest importance to the European single market. The claimants submit the defendants' case is effectively a challenge to the way in which sports (and indeed virtually all) broadcast rights are licensed in the EU. The defendants say there are millions of expatriate workers in Member States who want to watch satellite television from their own country and that the claimants are seeking to bolster a system of barriers against the free circulation of decoder cards between Member States to the commercial advantage of programme providers and broadcasters who want to maintain price differentials between the markets in different Member States, to the serious detriment of consumers as regards both price and choice. Moreover, they continue, the whole trend of EC Directives in this field has been to try and create a single audiovisual area - a process which the claimants are trying to frustrate. These rival arguments raise serious policy issues and I believe it to be highly desirable they should be authoritatively decided by the Court of Justice as soon as possible.
372. Secondly, it seems to me a reference now is likely to produce a definitive answer not only more quickly but also more cheaply than if I leave the matter over for consideration by an appellate court. The claimants have indicated that if I were to find in the defendants' favour but decline to make a reference then they would appeal. The defendants are understandably very anxious about the costs of such an appeal at which the arguments advanced before me would have to be considered all over again with a very substantial prospect of a reference thereafter. On the other hand, if I make a reference now and the Court of Justice rules in the claimants' favour it is not easy to see what the defendants could hope to gain from an appeal. Alternatively, if the Court rules in the defendants' favour, any scope for an appeal by the claimants would be limited if not removed entirely.
373. Thirdly, I must take into account the claimants' submission that a reference would create a high degree of uncertainty not only in relation to the rights of FAPL, but in relation to all sports rights and contents rights across the EC. That may be so. But it

would also be the consequence of an appeal to the Court of Appeal with a reference thereafter. Indeed, in that event the uncertainty would extend for a longer period. I consider this is therefore another factor which points towards, rather than against, making a reference at this stage.

374. Fourthly, the claimants submit the proper forum for a reference is the Court of Appeal because that court will have the benefit of more refined argument and the advantage of a first instance judgment. The appellate court will then be in a better position to assess whether (a) there should be a reference and (b) what the questions should be. I accept that these are material factors for me to take into account. However I am not persuaded they outweigh the other matters to which I have referred because I am of the view that the matters of Community law raised by these claims are eminently fit for consideration by the Court of Justice and that an appellate court would be very likely to refer. As for the second matter, I would hope that, with the assistance of the parties, the questions I refer will enable the Court of Justice to decide all the points of Community law which are necessary for the just disposal of these proceedings.
375. For all these reasons I have decided that it is appropriate to make a reference now and therefore invite the parties to make submissions on the precise wording of the questions I have identified.

Authorisation

376. This is an important aspect of the copyright claim. It is contended that QC and AV have infringed FAPL's copyrights by authorising the infringing acts of their customers, including those of the Madden defendants. Authorisation is a primary infringement under s.16(2) of the CDPA.
377. The law of authorisation of copyright infringement was explained by the House of Lords in *CBS Songs v Amstrad Consumer Electronics* [1988] RPC 567. It means the grant or purported grant, which may be express or implied, of the right to do the act complained of. An act is not authorised by someone who merely enables or possibly assists or even encourages another to do an act, but does not purport to have any authority which he can grant to justify the doing of the act.
378. The claimants originally maintained that QC and AV had presented materials on websites, made presentations and even direct statements to customers that it was legal to use the decoder cards they were offering to supply. However, both defendants pleaded they had not made any express or implied representations to customers about whether or not any copies of the alleged works were made within the decoder equipment or in the course of displaying satellite broadcasts, or expressed any view on whether the making of any such copies would or would not be lawful. In the event, none of this was challenged in cross examination. At the end of the day, the claimants' case was put on the basis that authorisation was inherent in the sale and supply of the decoder cards.
379. In my judgment decoder cards are quite different to the twin-tape recorders the subject of the *Amstrad* decision. Those recorders might or might not be used to perform the allegedly infringing activities and there was nothing inherent in the sale which suggested that Amstrad had the authority to allow those activities to be carried out. By contrast, a decoder card is the key which allows the viewer to watch

encrypted programming. It has one purpose only, which is to permit him access to what he would otherwise be denied. In this sense it is an authorisation in physical form. Absent a statement or some other indication to the contrary, the supply of decoder cards to customers therefore constitutes authorisation to use the decoder cards for the purpose for which they were supplied. In the case of publicans, they were supplied to allow customers to watch the television programming in the pubs. I therefore conclude that QC and AV have authorised any infringing acts of the Madden defendants and other members of the public to whom they have supplied the NOVA and ART cards.

Personal liability

380. The claimants seek to establish personal liability of three defendants. The first is Mr Richardson. QC Leisure is his trading name. It is not a separate legal entity. It follows he is personally liable in respect of any acts of infringement carried out under that name.
381. The second is Mr Chamberlain. He is the sole director and employee of AV and he holds at least 90% of its issued shares. The company has had no other employees since at least 2005. In cross examination he accepted he has personally conducted every aspect of AV's business, including doing the paperwork and answering telephone calls. It was his decision to sell NOVA cards and he got them activated.
382. The relevant principles concerning the liability of a director for the acts of a company were explained by the Court of Appeal in *MCA Records Inc v Charly Records Ltd* [2002] FSR 26. I am satisfied on the evidence that Mr Chamberlain's participation and involvement in the acts of which complaint is made have gone well beyond the exercise of constitutional control and are such that, in so far as they are actionable, he would have been liable even if he were not a director or controlling shareholder. He intended, procured and shared a common design with the company to carry them out. I find he is personally liable for all acts of infringement by AV.
383. Mr Raval is, as I have said, the sole director of SR. It is alleged that he is the controlling mind and will of SR and has personally carried out or directed or procured the carrying out by SR of the allegedly infringing acts at the Earls pub. But Mr Raval did not give evidence and my attention has not been drawn to any primary facts which would support the contention that Mr Raval has done any more than carry out his constitutional role in the governance of the company. It has not been established he is personally liable for any infringing acts of SR.

Flagrancy

384. I can deal with this very shortly. On the assumption there has been infringement, I am invited to consider the question of flagrancy and benefit accruing to the defendants in support of FAPL's claim for additional damages under s.97(2) of the CDPA. I am not asked to rule at this stage on whether additional damages should be awarded, this being a matter for the enquiry, if there is one. All I am asked to do is to make findings of fact on the issue of flagrancy and benefit accruing. FAPL contended at the outset of the case that the defendants have openly and deliberately flouted its rights to their own benefit and that the nature of their activities would be explored during the course of the trial. But, having heard the evidence, no particular facts or matters were relied

upon in closing. I think FAPL was right not to press this aspect of its claim. The issues are complex and the evidence did not establish that any of the defendants have infringed FAPL's rights knowing their activities to be wrongful. I would reject the claim for additional damages.

Conclusion

385. The issues in this case have at their heart the proper interpretation of a number of instruments of Community legislation concerning the cross-border broadcasting of television programmes by satellite. There can be no doubt that recent years have seen a proliferation of encrypted television channels which are accessible only on payment of a fee. Yet the broadcasting organisations responsible for the transmissions are often prohibited from permitting viewers in other Member States to access the encrypted programming; and this is so even when such viewers are prepared to make the requisite payment. This prohibition stems from the desire of rightholders to extract what they perceive to be the fair remuneration to which they are entitled. However, it creates a tension with the concept of a Community audiovisual area and the principles of an internal market without frontiers, and it is this tension which is reflected in the multitude of claims and defences deployed in this case. I have made such findings as I can. But I believe the issues which I have identified and upon which the assistance of the Court of Justice is sought are so fundamental that they should be considered as a whole by the Court at the earliest opportunity. I therefore invite the parties to make submissions on the precise wording of the questions to be referred and to suggest, if so advised, any additional questions for this court's consideration.

Annex 1

Key	Indicates the following:
Green	Agreed that this work is in the NOVA DVDs, ART studio game broadcasts and in the material ART intended to broadcast for non-studio games.
Red	Agreed that this work is not in the NOVA DVDs, ART studio game broadcasts and in the material ART intended to broadcast for non-studio games.
Blue	Applies to the sound recording of the Anthem. The claimants accept this is not present in the DVD or broadcast as a sound recording – it only features as the sound track to a film work – but say the Anthem is also found in all matches during live footage (i.e. not as a sound track to a film). The defendants contend this music is played live at the stadium and is picked up incidentally as ambient sound.
Yellow	The defendants agree that these works are in the Portsmouth v Chelsea NOVA DVD, but do not agree they formed part of the actual NOVA broadcast. The claimants contend that they did.
Pink	Not agreed.

Copyright Work	Purpose and Match	SUBSISTENCE		OWNERSHIP	PRESENCE ON DVD (no admission of infringement)			
		WORLD FEED			NOVA		ART	
		Wigan v Arsenal 19/11/2005	Admitted subject to collocation		Portsmouth v Bolton 25/09/2006	Arsenal v Man. City 17/04/2007	Man City v Man Utd 05/05/2007 (studio game)	Bachin evidence of non-studio games
Film	Opening Sequences Film (<1min)	Admitted	Admitted subject to collocation	Admitted	Not accepted by the defendants to form part of broadcast. No Greek commentary before 2m19	Not on DVD, but recording starts too late to determine whether preceded what is on DVD	Not on DVD, but recording starts too late to determine whether preceded what is on DVD	Yes
	Opening Sequence Graphics Film	Admitted	Admitted	Admitted	See above	See above	Partial and see above	
	Previous Highlights Films	Admitted	Admitted subject to collocation	Admitted	See above	See above		
	Match Highlights Films	Admitted	Admitted subject to collocation	Admitted				
	Special Features Films	Admitted	Admitted	Admitted				
	Next Match Preview Films	Admitted	Admitted subject to collocation	Admitted				
	On Screen Graphics Films	Admitted	Admitted	Admitted				
	Match Film (via Action Replays)	Admitted	Admitted	Admitted (subject to issues of joint ownership)	Yes - subject to whether comprises a substantial part of the Match Film	Yes - subject to whether comprises a substantial part of the Match Film	Yes - subject to whether comprises a substantial part of the Match Film	Yes - subject to whether comprises a substantial part of the Match Film
	Clean Live Feed Film	Admitted	Admitted	Admitted	No	No		
	World Feed Film	Admitted	Admitted	Admitted	No	No		
	IMG Match Film	Not admitted	Not admitted	Not admitted.	Not agreed because the defendants say impossible to identify.	Not agreed because the defendants say impossible to identify.	Not agreed because the defendants say impossible to identify.	
	Opening Sequence Graphics	Admitted	Admitted	Admitted	Not accepted by the defendants to form part of broadcast. No Greek commentary before 2m19			
	Artistic	On Screen Graphics	Admitted	Admitted	Admitted			
Barclays English Premier League Device [A/2/92B]		Admitted	Admitted	Admitted				
Barclays English Premier League Device [A/2/92C]		Admitted	Admitted	Admitted				
Barclaycard Logo (1)		Admitted	Admitted	Admitted				
Barclaycard Logo (2)		Admitted	Admitted	Admitted	Unidentified	Unidentified	Unidentified	Unidentified
Barclays English Premier League Device and Eagle and Ball device		Admitted	Admitted	Admitted				
Barclays Premiership Device and Eagle and Ball device [A/2/92F]		Admitted	Admitted	Admitted				
Barclays Premiership Device and Eagle and Ball device [A/2/92G]		Admitted	Admitted	Admitted				
Barclays Sleeve Badge		Admitted	Admitted	Admitted				
Barclays Champions Sleeve Badge		Admitted	Admitted	Admitted				
Barclays Eagle and Ball Device		Admitted	Admitted	Admitted				
Anthem (sound recording)		Admitted	Admitted	Admitted, but not as at date of claim form	Not accepted by the defendants to form part of broadcast, save in relation to Match Highlight Film where the defendants contend it is not the same as or substantial part of Anthem pleaded at schedule 1 to Particulars of Claim	Accompanies the Match Highlights Film but the defendants contend it is not the same as or substantial part of Anthem pleaded at schedule 1 to Particulars of Claim	Accompanies the Match Highlights Film but the defendants contend it is not the same as or substantial part of Anthem pleaded at schedule 1 to Particulars of Claim	Yes
Anthem (musical work)		Admitted	Admitted	Admitted				