

# Football broadcasting: Advocate General opines that internal market freedoms trump copyright

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The aim of IP law, competition law, and the internal market freedoms is ultimately the same: to promote economic growth; this is achieved through the promotion of consumer welfare and the efficient allocation of resources.<sup>1</sup> Despite this common goal, tension is perceived to arise where these areas of law intersect: one highly topical example is the satellite broadcasting of Premier League (PL) football matches within the EU, which has been the subject of two preliminary references from the UK's High Court and a recent Opinion of Advocate General Kokott.<sup>2</sup>

For many years, the broadcasting of PL football matches has been largely on a country-by-country basis. The PL auctions licences to broadcasters, who bid to win exclusive contracts to broadcast the matches within their territory. Satellite signals are broadcast indiscriminately across the entire European continent—territorial divisions are enforced by the use of signal encryption and contractual restrictions on the sale of decoder cards. The UK exclusive licensee has historically been BSkyB, which sells subscriptions to its sports channels to pubs typically for around £700 per month. Some pubs have sought to avoid paying the high UK fees by importing foreign decoder cards and paying the lower subscription fees charged by foreign broadcasters, most notably the Greek broadcaster NetMed's 'NOVA' platform.

On 3 February 2011, Kokott AG delivered her Opinion on the references. The Opinion dealt at length with the interpretation of various directives on the harmonization of copyright, but Kokott AG made clear that the issues fell to be determined essentially on the basis of the freedom to provide services, guaranteed under Article 56 of the Treaty on the Functioning of the European Union (TFEU).<sup>3</sup> In Kokott AG's view, territorial division of broadcasting of PL games was

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## This article

- English Premier League (PL) football is a global, multi-billion pound business. The PL derives much of its income from the auction of territorial licences to broadcasters throughout the EU and the world. Each broadcaster beams matches live into private homes and pubs within its licensed territory in return for subscription fees.
- Although satellite signals are broadcast indiscriminately across the continent, territorial divisions are enforced by signal encryption and restrictions on the sale of decoder cards. Following attempts to stymie parallel trade in decoder cards by use of criminal and civil proceedings, the High Court has referred questions to the ECJ on the interpretation of the relevant rules. Advocate General Kokott has advised the ECJ that territorial divisions of the sort imposed by the PL are contrary to the internal market freedoms and EU competition law.
- The Opinion, if followed by the ECJ, will have considerable ramifications for broadcasting and other areas in the digital economy. This article considers the Opinion and outlines the business implications that might follow where the ECJ to follow the Opinion.

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1 See Art 3(3) Consolidated version of the Treaty on European Union [2010] OJ C83/1 and para 7 of the Commission Notice—Guidelines on the application of Art 81 of the EC Treaty to technology transfer agreements OJ [2004] C 101/2.

2 Cases C-403/08 and C-429/08 *Football Association Premier League v QC Leisure; Karen Murphy v Media Protection Services Ltd*, Opinion of Advocate General Kokott of 3 February 2011—not yet reported ('Opinion').

3 Consolidated version of the Treaty on the Functioning of the European Union [2010] OJ C83/47.

incompatible with the freedom to provide services and was unlikely to be capable of being justified. Similarly, the contractual obligations relating to the decoder cards were restrictive of competition by object.

This article considers the Opinion of Kokott AG. It is likely that the Opinion will be criticized by many on the grounds that it is overly formalistic; that it ignores the economics of IP ownership and the reality of the relationship between licensor and licensee; and that it overextends protection for parallel traders to the potential long-term detriment of consumers—who may face increased prices in the long run if the Opinion is endorsed by the ECJ. A final decision along these lines will have significant consequences for commercial models in other areas of broadcasting and other digital media, including music, software, and e-books. It is debatable whether allowing internal market freedoms to trump IP will serve the common goal of increased consumer welfare. Assuming intervention is needed to increase consumer welfare—a big assumption—it may be argued that it should take place before the initial sale of media rights to broadcasters, rather than by diluting copyright protection following the sale.

## The facts

PL is a professional league for association football ('soccer') clubs in England. Each season, 20-member clubs play a total of 380 games as they attempt to win the PL trophy and avoid relegation. PL is a corporation owned by the 20-member clubs; it raises revenues for the member clubs through the joint selling of licences to broadcast the matches. It is the long-established business practice of PL to grant exclusive licences across the EU (and globally) on a territorial basis. To protect the system of territorial exclusivity, each broadcaster agrees to encrypt its satellite signal as a condition of the licence agreement. Contractual provisions also prohibit the licensee selling decoder cards to customers based outside of the licensed territory.

At the relevant time, each of the matches is filmed by either the BBC or Sky. Their chosen images and the ambient sound from the match constitute a 'clean live feed'. Logos, video sequences, on-screen graphics, music, and English commentary are then added to create the 'world feed'. This is then compressed,

encrypted, and broadcast to the foreign broadcasters. The foreign broadcasters decrypt and decompress the signal and then add their own logo and commentary; encrypt and compress the signal again and retransmit the signal to the subscribers within their exclusive territory. Subscribers require a satellite dish to receive the transmission and a decoder card to decode the transmission to view the content.

In *Football Association Premier League v QC Leisure* (*QC Leisure*), PL brought civil actions for copyright infringement against parallel importers of Greek and Arab decoder cards and against publicans who had purchased the decoder cards.<sup>4</sup> This article focuses exclusively on the Greek decoder cards, as only these raise issues under the EU Treaties. In *Karen Murphy v Media Protection Services Ltd* (*Murphy*), a private enforcement company successfully brought about a private criminal prosecution of a pub landlady—Ms Karen Murphy—who had shown matches in her pub using a Greek decoder card; thereby avoiding BSkyB's fees.<sup>5</sup> Ms Murphy appealed the conviction to the administrative division of the High Court, which made a preliminary reference seeking assistance in the interpretation of EU rules governing the situation.

## The preliminary reference questions

The two referring courts asked a total of 18 questions and a significant number of sub-questions. The questions fell into three categories: (i) questions relating to the interpretation of the Conditional Access Directive, Copyright and Information Society Directive and Satellite and Copyright Directive;<sup>6</sup> (ii) questions relating to freedom to provide services; and (iii) questions relating to the application of competition law (what is now Article 101 TFEU).

Kokott AG answered the questions in accordance with the order of the questions as put to the ECJ. However, Kokott AG made clear that she considered the Treaty provisions on freedom to provide services to be decisive in resolving the questions posed by the High Court since Treaty provisions take precedence over directives.

Notably, although the decoder cards were physical objects and thus provisions relating to the free movement of goods were potentially engaged, Kokott AG was of the view that in the present case the free move-

4 [2008] EWHC 1411 (Ch).

5 [2008] EWHC 1666 (Admin).

6 Directive 98/84/EC of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access [1998] OJ L320/54; Directive 2001/29/EC of 22 May 2001 on the harmonization of certain

aspects of copyright and related rights in the information society [2001] OJ L167/10; and 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 [1993] OJ L248/15.

ment of goods provisions was entirely secondary to those relating to the freedom to provide services. The decoder card represented merely the means by which access was provided to the service in the form of the television programme broadcast from the UK. The dispute did not relate to the trade in decoder cards—the material value of which was insignificant—instead it focused on their use, which was to grant access to a valuable service.<sup>7</sup> The Opinion did not therefore analyse the free movement of goods.

## Freedom to provide services

The freedom to provide services enables an undertaking in one member state to offer services on a temporary basis in another member state, without having to establish itself in that other member state. Although not stated expressly in the Treaty provisions, case law extends the freedom to provide services to cover both providers and recipients of services.<sup>8</sup>

Kokott AG considered that PL had impaired the freedom of foreign broadcasters to provide services (and the freedom of customers to receive those services) by seeking to use its copyright to restrict access to those programmes. Kokott AG considered that the impairment was particularly serious because it would have the effect of partitioning the internal market into quite separate national markets.<sup>9</sup>

An impairment of the freedom to provide services is permissible only where it pursues a legitimate objective compatible with the Treaty, is justified by overriding reasons of public interest, and is proportionate. The Treaty recognizes certain limited public policy justifications<sup>10</sup> and case law has developed other grounds—including protection of the specific subject matter of industrial and commercial property.<sup>11</sup> In the present context, the key question is what constitutes the specific subject matter of the copyright in the broadcast—this determines whether the doctrine of copyright exhaustion is applicable.

In the context of tangible items incorporating IP (such as DVDs), case law has established that the specific subject matter of copyright is to copy the work and to place the copies on the market.<sup>12</sup> Once legiti-

mate copies are placed on the market in one member state, the copyright holder has exploited the subject matter of the right—the copyright is then exhausted; this means that the Treaty prohibits the copyright holder relying on his copyright to restrict the subsequent export of the DVD into other member states. QC Leisure argued that decoder cards were essentially the same as DVDs because both performed the same function, namely controlling access to a recording. QC Leisure therefore drew a parallel to DVDs and argued that PL's copyright in the decoder cards was similarly exhausted by the authorized sale in Greece.

PL argued that the analogy with DVDs was inappropriate. PL drew its own analogy with the showing of cinema films for a charge. In its *Coditel I* judgment,<sup>13</sup> the ECJ held that the EC Treaty did not preclude a Belgian assignee of the performing right in a cinematographic film from relying on its right to prohibit the showing of that film by means of cable TV retransmission from another member state, even though the original television transmission in that other state had been made with consent of the copyright holder. The ECJ held that the right of a copyright holder to require fees for any showing of a cinema film is part of the essential function of copyright which was sufficient to justify the partitioning of the internal market.

Kokott AG preferred the DVD analogy to that of the cinema film. In her view, the specific subject matter of a broadcast-transmission is its commercial exploitation.<sup>14</sup> Commercial exploitation occurs through charging for the decoder card. As charges were paid for the Greek decoder cards, the copyright holder had exploited the subject matter of the right; the copyright was therefore exhausted—the internal market therefore prevents the rights holder using its copyright to restrict the circulation of the decoder cards without encroaching upon the specific subject matter of the right (its commercial exploitation).

Kokott AG distinguished *Coditel I* on the basis that this case involved a retransmission of an authorized cinema showing in another format, namely television. The television showing could impair the exploitation of the rights in cinema showings. In contrast, PL was not

7 Opinion (n 2) [170].

8 The freedom to receive services was first developed in Cases 286/82 and 26/83 *Luisi and Carbonne v Ministero del Tesoro* [1984] ECR 377.

9 Opinion (n 2) [175]–[176].

10 Art 52(1) TFEU in conjunction with Art 62 TFEU allows restrictions on grounds of public policy, public security, or public health.

11 This line of authority was established by Case 16/74 *Centrafarm and de Peijper* [1974] ECR 1183, which in the context of the free movement of

goods established that derogations could be justified for the purpose of safeguarding rights which constitute the specific subject matter of industrial and commercial property.

12 Case 119/75 *Terrapin (Overseas)* [1976] ECR 1039, [6]; Joined Cases 55/80 and 57/80 *Musik-Vertrieb membran and K-tel International* [1981] ECR 147, [10].

13 Case 62/79 *Coditel and Others I* [1980] ECR 881.

14 Opinion (n 2) [190].

seeking to protect the broadcast-transmission from another format of transmission—it was seeking to partition the market to optimize the exploitation of the same transmission within different market segments.<sup>15</sup> Because the partitioning of the market was unnecessary to protect the subject matter of the broadcast-transmission (its commercial exploitation), the Treaty prohibited PL's attempts to restrict parties such as QC Leisure and Karen Murphy from accessing NOVA's services.

PL raised an additional argument to justify the restriction of parallel imports of decoder cards. In the UK, PL imposes a 'closed period' of two-and-a-half hours during which football matches are not permitted to be transmitted. The closed period aims to ensure that spectators and players are not deterred from attending local football matches because of the transmission of PL games coinciding with such matches. Because the closed period varies by country, the importation of decoder cards would make it very difficult to enforce the closed period in the UK. Kokott AG accepted that the protection of this sporting interest might justify a division of the internal market, but she doubted seriously whether the closed periods were capable of encouraging attendance at local matches. Only if PL could demonstrate substantial detrimental effects on local matches would the closed periods prevail over the internal market.<sup>16</sup>

## Reproduction right, communication to the public

Another significant issue in dispute was whether infringements of copyright had even occurred. Under Article 2(e) of the Information Society Directive, broadcasters are accorded the exclusive right to authorize reproduction of their broadcasts. A reproduction of the broadcast occurs on the television screen in the pub showing the match.<sup>17</sup> The High Court found that the artistic works incorporated were fully reproduced, but that no 'substantial part' of the film, musical work, or sound recording had been reproduced since only a

few frames of the entire broadcast were in existence at any one time.<sup>18</sup>

A separate issue was whether the works had been communicated to the public. The Greek broadcaster's initial broadcast was assumed to have been made with the consent of the rights holder (PL).<sup>19</sup> The query then arose as to whether the communication from the screen to the spectator in the pub constituted a retransmission to the public which requires further consent from the broadcaster.

Article 3(1) of the Information Society Directive provides authors the exclusive right to authorize or prohibit any communication to the public of their works, by wire or wireless means.<sup>20</sup> It would appear that screening a match in a pub would constitute a communication to the public because the match is relayed to spectators by wireless means—light and sound. The Berne Convention, the basis on which Article 3(1) was originally drafted, covers communications by loudspeakers or analogous instruments (such as television screens).<sup>21</sup> However, an examination of the history of the directive revealed that EU legislature had deliberately excluded such communications from the scope of Article 3(1).<sup>22</sup> In particular, recital 23 of the directive was introduced which stated that the:

right of communication to the public [...] 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 [emphasis added].

By definition, the retransmission from the television screen to a pub's clientele is a communication to the public *present* at the place where the communication originates. Thus no communication to the public occurs in the sense of Article 3(1) Information Society Directive.<sup>23</sup>

Article 8(3) of the Rental Rights Directive<sup>24</sup> grants broadcasters the exclusive right to authorize the communication to the public of their broadcasts provided

15 Opinion (n 2) [197].

16 Opinion (n 2) [203]–[210].

17 Acts of reproduction also occur in the memory buffers, but since these occur for purely technical reasons they are excluded from the reproduction right pursuant to Art 5 Information Society Directive—Opinion (n 2) [63]–[101].

18 *QC Leisure* (n 4) [234]–[235].

19 Opinion (n 2) [117].

20 Art 3(2) Information Society Directive (n 6) applies only to on-demand transmissions.

21 Art 11 *bis*(1)(iii) of the Berne Convention for the Protection of Literary and Artistic Works (9 September 1886, revised Paris, 24 July 1971).

22 Opinion (n 2) [127]–[139].

23 Commentators have noted that this lacuna in the law is a viable candidate for possible further development; see Silke von Lewinski and Michael M Walter, *European Copyright Law* (OUP 2010) 1519.

24 Directive 2006/115/EC of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property [2006] OJ L376/28.

the communication takes place against the payment of an entrance fee. However, no entrance fees were charged by the relevant publicans in the proceedings. Thus a lacuna in the EU law governing communication to the public in the absence of an entrance fee was found to exist. The issue therefore fell to be determined under national law.

## Infringement of national copyright and the freedom to provide services

The relevant national statute governing copyright is the Copyright, Design and Patents Act 1988 (CDPA). Section 19(1) CDPA restricts performance (including broadcast) in public of literary, dramatic, or musical works. Section 19(3) CDPA restricts the showing of a sound recording, film, or broadcast in public. A television broadcast of a work will amount to both the public performance of the work embodied in the broadcast, and the showing of the broadcast itself.<sup>25</sup>

Section 72 CDPA states that a public showing of a broadcast does not infringe the copyright in the broadcast, provided the audience has not paid for admission (reflecting Article 8 of the Rental Rights Directive). The High Court found that the section 72 defence covered the showing of artistic work embodied in images of the film, but not the performance of underlying literary, dramatic, or musical works.<sup>26</sup>

At issue was the inclusion of PL's anthem music, which was played in pre-recorded clips and live at the matches. Although the copyright in the sound recordings had not been infringed,<sup>27</sup> the public performance of the musical work had not been authorized by PL. PL therefore had a potentially viable infringement claim against QC Leisure.

Recognizing that PL's anthem was a potentially unimportant element of the broadcast of the live football match, the High Court referred to the ECJ the question whether the internal market freedoms precluded the application of national copyright law protecting the performance of the musical work, and whether or not it made a difference that the protected musical work was an unimportant element of the service as a whole.<sup>28</sup>

Kokott AG noted that it is for the UK to determine what level of protection to grant to rights holders.<sup>29</sup> However, where a national rule gave rise to a restriction to provide services this could be justified only if it were proportionate in relation to the protection of the primary rights in question.<sup>30</sup> Kokott AG stated that where:

... secondary elements are involved, the economic value of which represents only a very small portion of the value of the broadcast as a whole and which are only of very low importance or are even without importance for viewers, it would be disproportionate to prohibit the reception of the broadcast as a whole for their protection.<sup>31</sup>

Although the matter was left for the referring court to decide, this was a very strong indication that the copyright in the musical work embodied in PL's anthem could not be used to preclude access to the sports channel as a whole.

## Illicit devices

Kokott AG also addressed issues arising from the interpretation of the Conditional Access Directive, a directive intended to approximate Member State measures against 'illicit' devices which give unauthorized access to protected services.<sup>32</sup> These issues, which featured in both cases, were particularly pertinent to the *Murphy* case—where the focus was not on copyright infringement, but on whether use of a Greek decoder allowed the unlawful avoidance of BSkyB subscription fees.

Ms Murphy was convicted by Portsmouth Crown Court on two counts of having dishonestly received a programme included in a broadcasting service provided from a place in the UK with intent to avoid payment of any charge applicable to the reception of the programme, contrary to section 297(1) CDPA.

Ms Murphy's appeal rested on the contention that section 297(1) CDPA was inapplicable in this case because its use would infringe Article 3 Conditional Access Directive which guaranteed the free movement of conditional access devices. MPS countered that the Greek decoder she had purchased was an 'illicit device',

25 Kevin Garnett QC, Gillian Davies and Gwilym Harbottle (eds), *Copinger and Skone James on Copyright* (vol 1, 16th edn, Sweet & Maxwell 2010) para 7–104.

26 *QC Leisure* (n 4) [269]–[279].

27 In relation to the pre-recorded clips section 5B CDPA provides that a sound track accompanying a film is to be treated as part of the film—the sound recordings were therefore covered by the defence in s 72 CDPA. The recording of the anthem live at the grounds was incidental and

therefore covered by the incidental inclusion defence under s 31 CDPA—*QC Leisure* (n 4) [198]–[202], [268].

28 *QC Leisure* (n 4) [334]; this query is set out at Question 9 in Opinion (n 2) [41].

29 Opinion (n 2) [226].

30 Opinion (n 2) [228].

31 Opinion (n 2) [230].

32 Conditional Access Directive (n 6).

the use of which was prohibited by Article 4 Conditional Access Directive. Article 2(e) Conditional Access Directive contains the relevant definition:

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.

Kokott AG was of the clear view that a Greek decoder card, legitimately manufactured with the consent of the rights holder, was not an illicit device and could not become one simply because of an unauthorized import into another member state. Kokott AG stated that Article 2(e) Conditional Access Directive was not directed to preventing the use of an access device against the will of the service provider. Rather, it requires equipment designed or adapted to give access without the authorization of the service provider.<sup>33</sup> In other words, only pirate equipment manufactured without consent constitutes an 'illicit' device.

## Competition law considerations

The matter having been decided primarily on internal market principles, Kokott AG's analysis of the competition law issues in the Opinion was relatively brief. Kokott AG examined whether the contractual obligation on a broadcaster to prevent its decoder cards being used outside the licensed territory amounted to a restriction of competition by object under Article 101(1) TFEU. In Kokott AG's view, this obligation prevented any competition between broadcasters and that this kind of absolute territorial protection was incompatible with the internal market and was thus restrictive of competition by object under Article 101(1) TFEU.<sup>34</sup> Kokott AG noted that an individual exemption might be available under Article 101(3) TFEU, but stated that 'similar considerations should apply as in the examination of whether a restriction of freedom to provide services is justified'<sup>35</sup>—a strong indication that an individual exemption would not be forthcoming.

33 Opinion (n 2) [53].

34 Opinion (n 2) [248].

35 Opinion (n 2) [250].

36 Owen Gibson and Mark Sweny, 'Pub landlady goes 1-0 up over cheaper TV football' *The Guardian* (London, 3 February 2011); Paul Kelso, 'Pub landlady's European case threatens to scupper Premier League's £1.78 billion TV deal' *The Daily Telegraph* (London, 3 February 2011); Ashling O'Connor, 'Murphy's law could lead to cheaper viewing' *The Times*

## Implications and concluding remarks

Considering that these cases deal with the complex interaction of internal market, IP, and competition law, *QC Leisure* and *Murphy* have received an unusual degree of attention in the popular press.<sup>36</sup> Karen Murphy's case has received particularly prominent coverage: the story of a publican fighting the might of the giant BSkyB media corporation all the way to Luxembourg—and possibly winning—is a stirring narrative attractive to many newspaper editors. The cases have also provoked reaction because the issues go to the heart of PL's business model. It is surprising that such fundamental issues have only now been ventilated.<sup>37</sup>

In truth, however, an eventual victory of the individual against the media giant might prove to be pyrrhic. The Opinion is premised on the assumption that the various national broadcasters should be free to compete with each other; the logic of this assumption is that parallel trade in the decoder cards necessarily benefits consumers. Unfortunately, this assumption ignores the reality of the relationship between rights holder (PL) and licensee (broadcaster). The reality is that each broadcaster can offer its services only with the consent of PL; PL entirely controls access to the broadcasting rights and the conditions on which access is granted. Allowing parallel trade will not necessarily create competition—it may simply result in PL licensing fewer broadcasters or in altering licence terms to make parallel trade unprofitable.

The value of broadcasting PL games varies enormously by region: in England its value is very high; in other countries such as Greece its value is much lower. This reflects the existence of other more popular domestic leagues in places such as Greece. In such a situation, the profit maximizing strategy is to price discriminate along territorial lines, this is exactly what PL's existing licensing scheme does. For broadcasters, each territorial license derives its value from its exclusivity. To permit parallel trade from a low value territory into a high value territory destroys the value of the licence for the high value territory. If a rights holder such as PL cannot price discriminate based on territory, it must find acceptable alternative means to price discriminate or apply a uniform or near-uniform price across the entire EU.

(London, 04 February 2011); Ian Burrell, 'Landlady 1, Sky Sports 0 – the legal victory that has Murdoch worried' *The Independent* (London, 4 February 2011).

37 It has been suggested that rights holders have used criminal proceedings rather than civil proceedings precisely to avoid an adverse decision of an authoritative court. See Daniel Geey, "'Pubcasting': Enforcement and Competition Concerns' (2006) 4 World Sports Law Report 10, 11.

Assuming an acceptable alternative form of price discrimination cannot be found, the rights holder must choose either to charge low fees and attempt to maximize profits through high volumes of subscription sales or sacrifice volumes in return for high fees. As the UK market is much more valuable than the rest of the EU, PL may well prefer to level prices up rather than down. If it does so then UK customers will face essentially unchanged high fees while Greek customers will no longer be able to obtain reduced fees. Overall, consumer welfare would diminish as Greek customers find themselves unable to access the service at a price they are willing to pay. Such a reduction in customer choice might well have a knock-on impact on the prices of other sports services, for example the Greek domestic football league might potentially raise prices knowing that Greek bars and pubs cannot afford to show English football instead.

Assuming the ECJ follows the Opinion, PL might attempt to mitigate the effects of the judgment by seeking to delineate territories by indirect means. Kokott AG recognized that PL might seek to raise prices or limit transmissions outside of the lucrative UK market but suggested that:

restricting the commentary to certain language versions might create sufficiently effective practical delimitation of the markets in order to continue to serve the different national markets at different prices.<sup>38</sup>

It seems likely that commentary language versions could be used to introduce a limited degree of price discrimination. However, the potential for price discrimination is small (particularly in the UK) as alternative commentaries via radio or internet could easily be used in combination with a foreign decoder card.

A more effective means to price discriminate might be to differentiate along lines of transmission quality.<sup>39</sup> Higher fees are already charged for high definition services compared with standard transmission quality. Soon, three-dimensional transmissions will allow even greater price differentiation. Price discrimination in terms of camera quality might also be possible—a cheaper service might offer only certain camera shots; an expensive service might offer greater variety of close-ups and replays. Alternatively, time delays might be used—some customers might be willing to pay a higher price to see the action live, whereas others

might accept a 15 or 30 minute feed-delay in return for lower prices.

Although non-UK customers are more likely to be willing to accept cheaper, lower quality services than UK customers, none of the alternatives allows for true territorial price discrimination. Since PL will not wish to undermine the premium UK market, the willingness of UK customers to switch to lower quality services aimed at non-UK customers will always be the determinative factor in deciding whether or not the cheaper alternative is offered. Although introducing cheaper alternatives might partially mitigate the effect of a ECJ judgment following Kokott AG's Opinion, it still seems highly likely that PL will opt to apply uniform or near uniform prices close to the existing UK price level. This will bring little benefit to UK customers, but will substantially increase prices and reduce choice outside of the UK—reducing overall consumer welfare.

The error underlying Kokott AG's Opinion is the false premise that parallel trade is necessary in order to bring benefits to consumers. This is wrong: parallel trade is not an end in itself insofar as consumer welfare is concerned; it is, however, a recognized means of reducing market differences between member states so as to increase market integration—this is a political, rather than consumer welfare goal, although often greater market integration will benefit consumers, this is not always the case. Removing apparent discrimination can sometimes harm economic aspects of consumer welfare.<sup>40</sup> In the particular context of the broadcasting industry, it is not true that parallel trade necessarily benefits consumers as a group across Europe: it adds very little value to consumers and may even harm their interests. 'Competition' in the form of parallel trade between broadcasters creates no genuine efficiency gains, it merely allows the exploitation of price differentials between territories: it generates no economies of scale; nor does it counteract supply shortages. Worse still, parallel trade arguably reduces efficiency by adding new layers of administration and new transportation costs.

Kokott AG's conclusion that the freedom to provide services should allow unrestricted parallel trade in decoder cards is also questionable. Internal market case law requires the identification of the 'specific subject matter' of the right in question. Exhaustion cannot occur if it would intrude upon that specific subject matter of the right. Kokott AG identified the specific

38 Opinion (n 2) [201]–[202].

39 Assuming service content cannot differ because of 'closed periods' employed in the various member states—see text to n 16.

40 Consider Case C-236/09 *Association belge des Consommateurs Test-Achats ASBL v Conseil des ministres* of 1 March 2011 (not yet reported), forbidding gender discrimination in connection with the provision of car insurance, which may lead to women paying higher insurance premiums.

subject matter of the transmission of the football matches as its ‘commercial exploitation’.<sup>41</sup> In her view, commercial exploitation occurred through charging for decoder cards; this exploitation was not undermined by parallel trade in Greek decoder cards, since charges were paid for all cards.<sup>42</sup>

It is tempting to argue that Kokott AG has simply misunderstood how commercial exploitation occurs in the context of broadcasts of football matches; that live images are very different to recorded images and that their exploitation—being time limited—must be different to that of recordings. However, the concept of commercial exploitation is so nebulous it is difficult to see how to produce a definitive interpretation of it. A better approach might be to address the underlying policy aims of copyright and the internal market.

Copyright exists primarily to prevent unauthorized copying of a work. A copyright holder cannot prohibit the resale of a DVD because the resale does not involve the creation of a new copy. It is irrelevant whether the resale occurs in the same member state or in another member state: in neither case is a new copy created.<sup>43</sup> The internal market policy therefore accepts reselling across borders and restricts copyright actions which would stop this.

In contrast to a DVD, a decoder card has no content; it streams live images from the pitch as it happens—the ‘content’ does not exist when the decoder card is sold. It is therefore inappropriate to apply the concept of exhaustion where no copyright has yet arisen. The rationale for exhaustion—preventing the rights holder asserting control over ‘reselling’ of existing copies—does not apply: the rights holder does not seek to control the second hand market in the services—there is none.

The very first paragraph of the Opinion states that ‘[c]reative works must be properly remunerated’.<sup>44</sup> It is submitted that this objective can only be achieved by a policy allowing the rights holder to control the ‘first sale’ of its work, including by delineating territories into which licensees can operate. The freedom to provide services should not constrain the rights holder’s ability to enforce its copyright in the same way as it does over tangible items. It follows naturally that

the rights holder can lawfully prohibit a broadcaster from contracting with persons outside its allocated territory, without breaching competition rules.

Kokott AG suggested that PL’s business model amounted to profiting from the elimination of the internal market, stating that ‘there is no specific right to charge different prices for a work in each Member State’.<sup>45</sup> Some might argue that Kokott AG is wrong to oppose so vigorously attempts by PL to charge different prices in different member states, it might be said that her statement is the wrong way round—that there is no obligation on a rights holder to charge the same price for a work in every member state; that the internal market does not require uniform pricing.

It is an unfortunately common misconception that price discrimination is evidence of weak competition. This misconception might arise because monopolists also typically attempt to price discriminate. However, price discrimination is not necessarily evidence of a monopolist at work and can sometimes be pro-competitive.<sup>46</sup> Assuming—a big assumption—PL achieves monopoly profits, it is unlikely to be because it employs territorial licensing: such pricing might benefit consumers overall as explained above. If a problem exists, the root cause might lie in the market power accruing to PL through the joint selling of the broadcasting rights held by its 20-member clubs. Competition law can address any issue which arises from this arrangement by weighing up the positive effects such as the reduction in transaction costs against the accrual of market power; intervention might be justified to tame the market power acquired. Indeed, competition law has already considered the issues that arise from the joint selling of sports rights on a number of occasions.<sup>47</sup>

For example, the European Commission has extracted commitments from PL to modify its UK auction procedure so that the games are no longer sold as bundle to a single bidder.<sup>48</sup> Instead, PL must sell six packages of rights—and no single entity can purchase more than five of the six packages. In the last round, BSKyB won bids for five packages. The commitments imposed are far from ideal, especially from a consumer perspective, as it is now necessary

41 Opinion (n 2) [190].

42 Opinion (n 2) [191].

43 Other issues arise in relation to international exhaustion of copyright which are not considered here.

44 Opinion (n 2) [1].

45 Opinion (n 2) [192].

46 Consider price discrimination between adults and children at cinemas, for discussion on this point see Simon Bishop and Mike Walker,

*The Economics of EC Competition Law* (3rd edn, Sweet & Maxwell 2010) 252–6.

47 See for example *Joint selling of the commercial rights of the UEFA Champions League* (Case 37398) Commission Decision 2003/778 [2003] OJ L291/25; *Joint selling of the media rights to the German Bundesliga* (Case 37214) Commission Decision 2005/396 [2005] OJ L134/46.

48 *Joint selling of the media rights to the FA Premier League* (Case COMP/C-2/38.173) Commission Decision of 22 March 2006.

to purchase multiple subscriptions to view all live games. Nevertheless, assuming intervention is needed to increase consumer welfare, it makes sense that such intervention addresses market power which arises through the initial sale of media rights, rather than by using internal market rules to dilute copyright protection following the sale.

The final outcome of the case will be keenly awaited by lawyers and football fans alike. It is likely to have an

impact in other fields of broadcasting and in other areas of the digital economy. Kokott AG drew particular attention to computer software, musical works, e-books, and films.<sup>49</sup> Rights holders in these areas will need to consider how they exploit their copyright very carefully in the light of the full judgment. It is to be hoped that the ECJ considers carefully the economic consequences of the decision it takes to ensure that a victory for Karen Murphy is not an own-goal for pub-going football fans.

49 Opinion (n 2) [185]–[186].