

# Murphy case continues to haunt TV licensing models

In October 2011, the Court of Justice handed down its ruling in the combined cases of *Football Association Premier League v QC Leisure* and *Murphy v Media Protection Services*<sup>1</sup> (reported in our November GMCQ).

The first case<sup>2</sup> centred on whether Football Association Premier League (“FAPL”) was entitled to prohibit the importation and use of foreign satellite decoder cards in the UK. The cards had been issued by broadcasters authorised by FAPL to broadcast English football matches in their respective territories only (such as Greece).

In the second case,<sup>3</sup> Ms Murphy was challenging her conviction under the Copyright, Designs and Patents Act 1988 (“CDPA”) for dishonestly receiving a broadcast with the intention of avoiding payment of applicable charges.<sup>4</sup> A BSkyB commercial subscription was available at a much higher cost than the Greek subscription charges Ms Murphy had paid.

The CJEU’s ruling confirmed that foreign decoder cards issued by authorised broadcasters are not the same as pirate decoder cards which legislation is intended to address. To the extent that licensing arrangements and national legislation prohibit the use of legitimate decoder cards, this is inconsistent with the EU concept of the freedom to provide services. The CJEU also confirmed that when a pub plays out a television broadcast, this involves a “communication to the public”, which is an act restricted by copyright.

Applying this ruling to the first case, Lord Justice Kitchin found<sup>5</sup> that by displaying foreign broadcast signals to customers, the defendant pubs had infringed, and the suppliers of the cards had authorised the infringement of, certain copyright works incorporated in the broadcast and owned by FAPL.<sup>6</sup> However, the defendants were entitled to rely in part on the defence in section 72 CDPA which states that it is not an infringement of broadcasts, certain sound recordings or films to show a broadcast in public provided the audience has not paid for admission. This left only the underlying literary and musical works incorporated in the broadcast for which appropriate

licences had not been obtained (ie the FAPL logo and other graphics and the FAPL anthem which formed part of the programmes). Further, it was only an infringement of those works because they had been communicated to the public; domestic use of the decoder cards would not so infringe. The matter has now been referred to the Patents County Court for an inquiry as to the appropriate sum of damages.

Ms Murphy’s criminal conviction was quashed on 24 February 2012.<sup>7</sup> Lord Justice Stanley Burton and Justice Barling noted that their judgment has no bearing on issues relating to infringement of copyright or other intellectual property rights. Accordingly, Ms Murphy could still face a civil action should she continue to use the foreign decoder cards in her pub.



**Danielle Amor**

T +44 20 7296 5376

danielle.amor@hoganlovells.com

- 1 *Football Association Premier League Ltd and others v QC Leisure and others; and Karen Murphy v Media Protection Services Ltd* Joined Cases C-403/08 and C-429/08, 4 October 2011.
- 2 *Football Association Premier League Ltd v QC Leisure* (No. 2) [2008] EWHC 1411 (Ch).
- 3 *Karen Murphy v Media Protection Services Ltd* [2007] EWHC 3091 and [2008] EWHC 1666.
- 4 Section 297(1) CDPA.
- 5 *Football Association Premier League Ltd v QC Leisure* [2012] EWHC 108 (Ch).
- 6 Sections 20 and 16(2) CDPA respectively.
- 7 *Murphy v Media Protection Services Limited* (unreported) Queen’s Bench Division (Administrative Court), 24 February 2012.