BRITISH PUBS, DECODER CARDS, AND THE FUTURE OF INTELLECTUAL PROPERTY LICENSING AFTER *MURPHY*

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"It took six years. I don't understand how a monopoly . . . can dictate what I do . . . As with any other commodity . . . I should be free to go out and choose to buy from wherever I like. Why should they dictate where I buy from and at what price? It's not right . . . that's why I fought it . . . It was a point of principle really."

Karen Murphy, October 4, 2011[1]

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[1] Cameron Macphail, *Landlady Karen Murphy: Sky only have themselves to blame for charging too much for Premier League games*, THE TELEGRAPH, Oct. 4, 2011, *available at* http://www.telegraph.co.uk/sport/football/competitions/premier-league/8806353/Landlady-Karen-Murphy-Sky-only-have-themselves-to-blame-for-charging-too-much-for-Premier-League-games.html (*see* embedded video featuring Karen Murphy).

I. INTRODUCTION

October 4, 2011 marked a new era in global sports media rights. On this day, the Grand Chamber[2] of the European Court of Justice (ECJ) delivered its judgment in *FA Premier League et al. v. QC Leisure et al. & Murphy v. Media Protection Services Ltd* ("*Murphy*").[3] *Murphy* decided upon the legality of a scheme whereby the holder of intellectual property rights to a sporting event licenses the right to broadcast the event on a national exclusivity basis.[4]

II. FACTUAL AND LEGAL BACKGROUND

The central players in the *Murphy* saga were: (i) the Football Association Premier League Ltd ("FAPL" or "Premier League"), the rights holder who, on behalf of football clubs playing in the Premier League, licensed the rights to broadcast Premier League matches to national broadcasters; (ii) two joint ventures, BSkyB Ltd. and ESPN ("Sky") and NetMed Hellas SA and Multichoice Hellas SA ("NOVA"), who were the national broadcasters in the United Kingdom and Greece, respectively;[5] (iii) Karen Murphy, a British national who purchased NOVA decoding equipment for personal viewing and subsequently used it to display Premier League matches in her pub in Southsea, England, at a significantly lower cost than a commercial subscription with Sky;[6] and (iv) QC Leisure and AV Station, two British enterprises that arranged for the NOVA subscriptions and imported the decoding equipment, which was subsequently sold to Murphy and others.[7]

The system of nationally exclusive broadcasting rights challenged in *Murphy* was supported by a combination of private and national measures. First, the typical agreement between the Premier League and a broadcaster contained provisions giving the broadcaster exclusive rights to broadcast the events in one of the EU Member States and requiring the broadcaster to take precautions to prevent individuals situated outside that Member State from accessing their broadcast.[8] Second, in order to uphold the latter provision, the subsequent agreement between the broadcaster and its customers contained terms whereby the customer undertook that the decoding equipment would not be used to access the broadcast outside that

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[2] The ECJ rarely hears cases in a Grand Chamber of thirteen judges, which underscores the complexity and importance of this case. ANTHONY ARNULL, THE EUROPEAN UNION AND ITS COURT OF JUSTICE 8–9 (2d ed. 2006).

[3] Joined Cases C-403/08 & C-429/08, Football Ass'n Premier League Ltd. v. QC Leisure & Murphy v. Media Protection Serv. Ltd., 1 C.M.L.R. 29 (2011).

[4] *Id.*

[5] BSkyB and ESPN had paid the consequential sum of £1.78 billion for the rights to broadcast Premier League matches in Britain from 2010 to 2013. Nick Harris, *£1.78bn: Record Premier League TV deal defies economic slump*, THE INDEPENDENT, Feb. 7, 2009, *available at* http://www.independent.co.uk/sport/football/premier-league/163178bn-record-premier-league-tv-deal-defies-economic-slump-1569576.html.

[6] *League's pub battle after losing TV case*, BELFAST TELEGRAPH, Oct. 5, 2011, at 58.

[7] *Murphy*, 1 C.M.L.R. 29, ¶¶ 30–53 (2011).

[8] *Id.* ¶¶ 33–34. The second provision sought to ensure exclusive rights for broadcasters in other Member States.

Member State.[9] Finally, general copyright law and a specific British statutory provision criminalizing the import, sale, and use of foreign decoding equipment procured through dishonest means further strengthened the enforceability and seeming validity of these contractual arrangements.[10]

This licensing system was challenged in two British cases in which the plaintiffs alleged infringement. Ultimately, two divisions of the High Court of Justice of England and Wales referred a total of eighteen questions (excluding sub-questions) to the ECJ regarding the interpretation and application of various provisions under EU law.[11] The eighteen questions boil down to three principal inquiries:

(I) Are Member States' measures discouraging parallel import of broadcasting services compatible with the right of free movement of services protected by Article 56 of the Treaty on the Functioning of the European Union ("TFEU")?[12]

(II) Are the agreements between the Premier League and broadcasters anti-competitive, contrary to Article 101 of the TFEU?

(III) How are the several European Directives on intellectual property rights and, in particular, copyright law applied to such broadcasting rights,[13] and to what extent is the proprietary content protected?

This Article will address each of these three principal inquiries in order. Additionally, this Article will examine which elements of the licensing system heretofore are consistent with EU law, and analyze the likely ramifications for rights holders and future business strategies available to them.

III. FINDINGS OF THE ECJ

A. Introduction

The key policy motivating the EU, its *raison d'être*, is the creation of an internal market—that is, a geographical area where Member States are free from the burdens imposed by custom duties, quantitative restrictions, and other obstacles to the free movement of goods, workers, capital, and—in this context most importantly—services.[14] Measures that divide the internal market into national markets or hinder movement across national borders, such as those examined in *Murphy*, are an affront to the idea of a truly internal market and therefore to the EU itself. The ECJ will therefore generally invalidate any measure that, by partitioning the internal market

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[9] *Id.* ¶ 35.

[10] Copyright, Designs and Patents Act, 1988, c. 48, §§ 297–98 (quoted in *Murphy*, 1 C.M.L.R. 29, ¶ 28).

[11] *Murphy*, 1 C.M.L.R. 29, ¶¶ 54–55 (2011).

[12] *Id.* ¶ 76.

[13] Outlined in Parliament and Council Directive 2001/29, On the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, 2001 O.J. (L 167) 10 (EC).

[14] Consolidated Version of the Treaty on the Functioning of the European Union, art. 26(2), Mar. 30, 2010, 2010 O.J. (C 83) 59 [hereinafter TFEU].

into national markets, undermines market integration, on the grounds of the fundamental freedoms or competition law.[15]

When analyzing *Murphy*, one must keep in mind the key policy of furthering the EU's internal market. It is unsurprising that the ECJ would be instinctively and strongly reluctant to a licensing system that divides a market along national lines. However, what makes *Murphy* rather particular is that the licensing regime is upheld by a combination of private and national measures that are subject to different legal requirements. For example, the licensee of the Premier League in Greece, NOVA, was preempted from broadcasting its signal beyond the confines of the Greek state where subscribers were supposed to be located, whilst at the same time no other broadcaster would be allowed to broadcast the protected content within the same territory. The same situation occurred across Europe, and of course in the UK with Sky's Premier League license. In turn such exclusivity contracts and partnerships were protected vis-à-vis national law, in this case both in Greece and in the UK. As evident in *Murphy*, such national laws may often be contradictory to the principles of EU Law.

Agreements between the Premier League and the broadcasters are subject to competition law and, more specifically, Article 101 of the TFEU, which forbids agreements between undertakings with anti-competitive purposes or effects.[16] The validity of legislation and other governmental measures can be analyzed against various TFEU provisions that ensure fundamental freedoms and, in particular, Article 56, which protects the free movement of services.[17] However, Article 56 is unavailable for private causes of action,[18] unless the defending private party collectively regulates the ability to provide or receive services.[19] Thus, different EU law provisions govern the private and public measures establishing the licensing system on a basis of national exclusivity, and the analysis under these provisions is not identical.

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[15] *See Murphy*, ¶ 141. *See also* Opinion of Advocate General Kokott, Joined Cases C-403/08 & C-429/08, Football Ass'n Premier League Ltd. v. QC Leisure & Murphy v. Media Protection Serv. Ltd., 1 C.M.L.R. 29, ¶ 192 (2011). ("[I]t forms part of the logic of the internal market that price differences between different Member States should be offset by trade ... The possibility, demanded by the FAPL, of marketing the broadcasting rights on a territorially exclusive basis amounts to profiting from the elimination of the internal market."); *Id.* ¶ 247 ("An agreement between a producer and a distributor which might tend to restore the national divisions in trade between Member States might be such as to frustrate the Treaty's objective of achieving the integration of national markets through the establishment of a single market [and] the Court has held agreements aimed at partitioning national markets according to national borders or making the interpenetration of national markets more difficult ... to be agreements the object of which is to restrict competition within the meaning of Article 101(1) TFEU").

[16] *Compare with* Sherman Act, 15 U.S.C. § 1 (1998), the primary competition law statute in the U.S. The practice and actions of an actor that is dominant in a particular market, for example UEFA, could also be contrary to Article 102 TFEU which forbids abuse of dominant positions. *Compare with* Sherman Act, 15 U.S.C. § 2 (1998).

[17] TFEU art. 56.

[18] *Cf.* Case C-281/98, Angonese v. Cassa di Risparmio di Bolzano SpA, 2000 E.C.R. I-4139, ¶¶ 34–36 (establishing the so-called horizontal direct effect for the right to free movement of workers).

[19] Case C-341/05, Laval un Partneri Ltd. v. Svenska Byggnadsarbetareförbundet, 2007 E.C.R. I-11767, ¶¶ 97–98. Thus, if a central organization such as UEFA or FIFA adopted regulations requiring that broadcasting rights are sold in the way reviewed in *Murphy*, those regulations could be challenged on grounds requiring the right to free movement of services.

B. Free Movement of Services

Karen Murphy had been charged with violating Section 297(1) of the UK Copyright, Designs and Patents Act (CDPA), which establishes that "[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."[20] The Court summarized the questions asked more broadly to include the legality of all national legislation, "which makes it unlawful to import into and sell and use in that State foreign decoding devices which give access to an encrypted satellite broadcasting service from another Member State that includes subject-matter protected by the legislation of that first State."[21]

Of course, it is well-established that Article 56 of the TFEU ensures the right of individuals living in one Member State to receive services from other Member States.[22] It also requires the "abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services."[23]

Murphy is different from most cases concerning free movement of services in that the provider in question did not seek for the service to travel to other Member States.[24] Rather, in *Murphy* the question presented was whether a policy that prohibited services from *entering* one Member State from another impermissibly abridged the right to free movement of services. Nonetheless, the *Murphy* Court concluded that national legislation prohibiting the import, sale, or use of foreign decoding devices is contrary to the right of free movement of services.[25]

Article 297(1) of the CDPA appears to directly discriminate against outside-UK competition because it clearly and explicitly provides legal protection to UK businesses by differentiating between broadcasting services originating in the United Kingdom and those in other Member States.[26] As such, it can only be justified under the express exemptions for public policy, public security, or public health.[27] However, since the Court in *Murphy* construed the question more broadly to include non-discriminatory measures that nevertheless hinder the free movement of services, it had to consider whether such measures could be justified by "imperative reasons

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[20] *Murphy*, 1 C.M.L.R. 29, ¶¶ 51–52.

[21] Copyright, Designs and Patents Act 1988, §297(1) (Eng.) (quoted in *Murphy,* 1 C.M.L.R. 29, ¶ 28).

[22] *See*, *e.g.*, Case C-384/93, Alpine Investments BV v. Minister van Financiën, 1995 E.C.R. I-1141, ¶ 22; Case C-243/01, In re Gambelli, 2003 E.C.R. I-13031, ¶ 54.

[23] Case C-76/90, Säger v. Dennemeyer & Co. Ltd., 1991 E.C.R. I-4221, ¶ 12.

[24] *Murphy*, 1 C.M.L.R. 29, ¶¶ 59–60.

[25] *Id*. ¶ 125.

[26] *See* Copyright, Designs and Patents Act, *supra* note 21 and accompanying text.

[27] Case C-288/89, Stichting Collectieve Antennevoorziening Gouda v. Commissariaat voor de Media, 1991 E.C.R. I-4007, ¶ 11.

relating to the public interest... [, are] objectively necessary... [and do] not exceed what is necessary to attain those objectives."[28]

In a short sentence with far-reaching implications, the ECJ stated: "[the] FAPL cannot claim copyright in the Premier League matches themselves, as they cannot be classified as works."[29] As a result, according to the ECJ, the protection of copyright could not be used as an "imperative reason"[30] to grant a justification for such broad-based restrictions to the freedom of services. This surprising conclusion is of limited importance in *Murphy* for at least two reasons. First, the Court found alternative, acceptable objectives that may pass ECJ muster in related restrictive practices' cases. Second, FAPL films and produces most of the broadcasted material which, unlike the matches themselves, is copyrighted work.[31] These features are, however, largely unique to the facts of the particular case.

In considering the existence of other legitimate reasons for the protective legislation, the Court in *Murphy* acknowledged that sports, by their very nature, have a unique and special character, which should be protected within the EU.[32] Thus, for the second time in its history—subsequent to Case C-325/08, Olympique Lyonnais SASP v. Bernard & Newcastle United FC, 2010 E.C.R. I-2177 (*Bernard*)—the Court referred to TFEU Article 165(1),[33] which states that protecting sporting events is a legitimate reason for which Member States may restrict a fundamental freedom.[34] However, this protection is only legitimate for the purpose of giving rights holders appropriate remuneration, as opposed to the highest remuneration possible.[35] Here, the Court's approach closely resembles its previous case law on the application of the right to free movement of workers and competition law to sports, and is neither novel nor surprising.[36] In a nutshell, the ECJ assumes a consistent position upholding fundamental principles of EU Law, which may *prima facie* appear incompatible with

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[28] *Säger*, 1991 E.C.R. I-4221, ¶ 15.

[29] *Murphy*, ¶ 96; *see also id.* ¶ 98 (declaring that football matches are "subject to rules of the game, leaving no room for creative freedom for the purposes of copyright").

[30] *Id.* ¶¶ 95–99.

[31] *Id.* ¶¶ 36–38.

[32] Powers conferred on the European Union by the Lisbon Treaty (Articles 6(e) TFEU and 165 TFEU). In particular, they require account to be taken of the specific nature of sport and its structures based on voluntary activity.

[33] "The Union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function." Case C-325/08, Olympique Lyonnais SASP v. Bernard & Newcastle United FC, 2010 E.C.R. I-2177, ¶ 40. For an excellent commentary, *see* Katarina Pijetlovic, *Another Classic of EU Sports Jurisprudence: Legal Implications of Olympique Lyonnais SASP v. Olivier Bernard and Newcastle UFC*, 35 EUR. L. REV. 858 (2010) (characterizing the first utilization of the Lisbon Treaty-acknowledged EU competency in sport as symbolic and unnecessary, yet significant of an important potential trend, which may consider the specificity of sport as dispositive toward resolution of entangled cases in the sport industry where fundamental principles of EU Law will continue to conflict with sport business considerations).

[34] *Murphy*, ¶¶ 100–02; *Cf.* Op. Advoc. Gen., *Murphy*, 1 C.M.L.R. 29, ¶ 207 (2011) (relying upon the provision to conclude that a "sporting interest is in principle to be recognized in European Union law"). It is important to underscore that Advocate General Kokott's opinion, and in succession the ECJ decision, did not issue a *carte blanche* for restrictive practices on reasons based on the specificity of sport and justified as exempt accomplishing sporting-related goals. *Id.* ¶¶ 46, 207–10.

[35] *Murphy*, ¶¶ 106–08.

[36] *See Bernard*, 2010 E.C.R. I-2177, ¶¶ 39–40 (free movement of workers). *See also* Case C-519/04 P, Meca-Medina & Majcen v. Comm'n, 2006 E.C.R. I-6991, ¶¶ 42–43 (competition law).

traditionally established practices in the sports industry, as in the case of nationally-exclusive licenses in *Murphy*. Indeed, qualifiers and exemptions exist (such as in *Bernard* on the compatibility of transfer rules with the freedom of movement, or per the *Meca-Medina* test on compatibility of sport rules with EU competition law[37]), nonetheless ECJ case law signifies a clear deference to EU Law over any special industry interests.

As in many of its previous judgments,[38] the Court's examination in *Murphy* turned on the application of the principle of proportionality—that is, whether the restriction in question is suitable and necessary for the purpose of achieving its aim.[39] In some cases the Court has been quite relaxed in its application of this principle. For example, in *Community v. Italy* ("Motorcycle Trailers"), the Court held that the proportionality requirement did not "require the Member State to prove, positively, that no other conceivable measure could enable that objective to be attained under the same conditions"[40] and that a Member State "cannot be denied the possibility of attaining an objective such as road safety by the introduction of general and simple rules which will be easily understood and applied by drivers and easily managed and supervised by the competent authorities."[41]

The Court could have chosen a similar approach in *Murphy*, and even could have been expected to do so considering its ruling in *Bernard*.[42] However, the Court chose to rule on *Murphy* by relying upon a much stricter legal basis and, in the process, exercised great creativity in imagining alternative and less restrictive measures.[43] The Court concluded that an "appropriate remuneration," one that is "reasonable in relation to parameters of the broadcasts concerned, such as their actual audience, their potential audience and the language version," can be ensured, for example, through a licensing system where broadcasters pay rights holders per potential and actual viewer in different Member States.[44] Since such a system would be less restrictive to the internal market, the national law supporting the licensing system in question was deemed "unproportional" and consequently a violation of EU law.[45] The Court's analysis on this point varied somewhat from Advocate General Juliane Kokott's, who thought it unnecessary to consider specific, alternative licensing models in cases where the internal market is partitioned into national

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[37] *Meca-Medina*, 2006 E.C.R. I-6991.

[38] *See*, *e.g.*, *Bernard*, 2010 E.C.R. I-2177, ¶¶ 38–50; Case C-176/96, Lehtonen & Castors Canada Dry Namur-Braine ASBL v. Fédération royale belge des sociétés de basket-ball ASBL (FRBSB), 2000 E.C.R. I-2681, ¶¶ 56–58; Case C-415/93, Union royale belge des sociétés de football association ASBL v. Bosman, 1995 E.C.R. I-4921, ¶¶ 105–14, 121–37.

[39] *See* CATHERINE BARNARD, THE SUBSTANTIVE LAW OF THE EUROPEAN UNION, 171–72 (2010); PAUL CRAIG & GRÁINNE DE BÚRCA, EU LAW: TEXT, CASES AND MATERIALS, 544–45, 549–51 (2008); TAKIS TRIDIMAS, THE GENERAL PRINCIPLES OF EU LAW 139–41 (2006).

[40] Case C-110/05, Comm'n v. Italy (Motorcycle Trailers), 2009 E.C.R. I-519, ¶ 66.

[41] *Id.* ¶ 67.

[42] In *Bernard*, the Court indicated that the "specific characteristics of sport" should be taken into account when applying the principle of proportionality, assumingly in a less restrictive way. *Bernard*, 2010 E.C.R. I-2177, ¶ 40.

[43] *Id*.

[44] *Murphy*, 1 C.M.L.R. 29 (2011), ¶¶ 109–14.

[45] *Id.* ¶¶ 115–17.

markets in order "to optimize exploitation of the same work within the different market segments."[46]

A distinctive characteristic of Premier League's broadcasting policy is that it preempted broadcasting of events during select timeframes referred to as "closed periods."[47] Closed periods occurred on Saturday afternoons—when most top-level football matches take place in England—and were implemented with the purpose of seeking to encourage live attendance at the matches.[48] Advocate General Kokott and the ECJ differed somewhat as to whether this aim was legitimate under EU law.[49] Ultimately, although they relied on different reasons, the Advocate General and ECJ agreed that the measure did not meet the necessary and proportional threshold.[50] The Court also agreed with the Advocate General that determining whether the user had attained the equipment by submitting false information or used it contrary to the terms of the contract was irrelevant for the application of the free movement of services.[51]

C. Competition Law

Next, and distinct from its free movement analysis, the Court interpreted competition law as it applied to the facts in *Murphy*. Even before *Murphy*, it was clear that the FAPL's licensing system was suspect under a competition law analysis.[52] The scope of inquiry in *Murphy,* however, was limited to whether the clause in the broadcasting agreement prohibiting the broadcaster from giving access

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[46] Op. Advoc. Gen., *Murphy*, 1 C.M.L.R. 29, ¶¶ 192–200 (2011) (distinguishing Case 262/81, Coditel SA v. Ciné-Vog Films SA (*Coditel II*), 1982 E.C.R. 3381).

[47] *Id.* ¶¶ 208–09.

[48] *Murphy*, 1 C.M.L.R. 29, ¶¶ 122–24 (2011).

[49] *Compare Murphy*, 1 C.M.L.R. 29, ¶ 123 (2011) (declining explicitly to take a position on the issue), *with* Op. Advoc. Gen., *Murphy*, 1 C.M.L.R. 29, ¶¶ 204, 206 (2011) (accepting as legitimate the aims of increased attendance and preventing distortion in competition between pubs using domestic and foreign decoder cards, since the former were prevented from broadcasting matches during closed periods, whereas the latter were not, namely Greek NOVA subscribers could watch live matches during closed periods—for Sky subscribers—in the UK).

[50] *Murphy*, 1 C.M.L.R. 29, ¶ 123 (2011) (concluding that the aim can be achieved through less restrictive measures); Op. Advoc. Gen., *Murphy*, 1 C.M.L.R. 29, ¶¶ 208–10 (2011) (calling for additional evidence supporting that such practices actually are causally related to achieving the objective pursued, i.e. proving that closed periods lead to increased fan attendance, as only ten out of twenty-two national associations had introduced closed periods, and that many of the most successful leagues had not).

[51] *Murphy*, 1 C.M.L.R. 29, ¶¶ 126–32 (2011). *Cf.* Op. Advoc. Gen., *Murphy*, 1 C.M.L.R. 29, ¶¶ 214–15 (2011) (agreeing with Karen Murphy that it is irrelevant whether the ones who provided her and other pub managers with the decoders may have breached a terms of use agreement with NOVA in Greece. It is acknowledged that Murphy and others may have been entirely ignorant of such terms in an admittedly anticompetitive—as per below analysis—agreement).

[52] The Commission had been investigating whether the Premier League's practice was consistent with EU competition law since 2001, which included the Commission concluding "that the arrangements . . . have, by their nature, the effect of reinforcing the partitioning of markets on a national basis, thereby holding up the economic interpenetration which the Treaty is designed to bring about." Commission Decision, COMP/C-2/38.173 of 22 March 2006, Relating to a Proceeding Pursuant to Article 81 of the EC Treaty at 8, http://ec.europa.eu/competition/antitrust/cases/dec_docs/38173/38173_104_7.pdf. [hereinafter "Commission Decision"]. These investigations resulted in the Premier League committing to changing its licensing system in certain regards, changes that the Commission found sufficient. No commitment made by the Premier League, however, contravenes the system in dispute in *Murphy*, 1 C.M.L.R. 29 (2011). *See* Commission Decision, Annex "Commitments of the FAPL," *available at* http://ec.europa.eu/competition/antitrust/cases/dec_docs/38173/38173_132_7.pdf.

to persons outside the territory covered by the license—here, Greece—violated Article 101 of the TFEU, which prohibits anti-competitive agreements.[53]

In her competition law analysis, Advocate General Kokott declared the restrictive practices emanating from the exclusive licenses that the Premier League granted to regional providers as *per se* anticompetitive.[54] That is, in such occasions where license agreements are directly liable to prevent, restrict, or distort competition,[55] there is no need to prove that the anticompetitive effects have actually taken place.[56]

Following the Advocate General's opinion, the Court noted that the fact "the right holder has granted to a sole licensee the exclusive right to broadcast protected subject-matter from a Member State . . . is not sufficient to justify the finding that such an agreement has an anti-competitive object."[57] However, the Court stated that if an agreement—such as the one in question—effectively partitions the internal market into national markets, then its objective is to distort competition and is therefore contrary to Article 101.[58] Furthermore, the ECJ posited that the Premier League and its Media Protection Services (MPS) failed to offer any argument or evidence establishing that such restrictive clauses do not have an anti-competitive effect.[59] The ECJ can therefore be seen as discouraging agreements that restore the divisions into national markets and thereby frustrate the TFEU's policy objective of achieving European integration.

The *Murphy* Court's application of the principle of proportionality in its free movement analysis was comparatively rigorous. In applying competition law, the Court completely forwent analysis of the exception for proportional restrictions established in case law,[60] limiting itself to the conclusion that the restriction cannot be justified under the statutory exception for anti-competitive agreements.[61]

Another item that is noticeably—and perhaps regretfully—absent from the Court's reasoning was an analysis of the consequences following its finding of a violation of competition law on the *Murphy* facts. In fact, there are several possible consequences. First, it follows explicitly from the TFEU's text that an anti-competitive agreement is facially void,[62] which would mean that broadcasters would

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[53] *Murphy*, 1 C.M.L.R. 29, ¶ 134 (2011). *See also id.* ¶ 141 (pointing out that the scope of examination does not even cover "the actual grant of exclusive licenses . . . only the additional obligations designed to ensure compliance . . .").

[54] Op. Advoc. Gen., *Murphy*, 1 C.M.L.R. 29, ¶¶ 248–51 (2011).

[55] As expressly obliging the licensee of each Member State in these agreements to ensure that operations are restricted to the artificially set borders of that Member State.

[56] Op. Advoc. Gen., *Murphy*, 1 C.M.L.R. 29, ¶¶ 243–51 (2011).

[57] *Murphy*, ¶ 137, (citing *Coditel II*, 1982 E.C.R. 3381, ¶ 15).

[58] *Id.* ¶ 139, (citing Joined Cases C-468/06 & C-478/06, Sot. Lélos kai Sia v. GlaxoSmithKline AEVE Farmakeftikon Proionton, 2008 E.C.R. I-7139, ¶ 65; Joined Cases C-501/06 P, C-513/06 P, C-515/06 P & C-519/06 P, GlaxoSmithKline Serv. v. Comm'n, 2009 E.C.R. I-9291, ¶¶ 59, 61). *But see* Op. Advoc. Gen., *Murphy*, ¶¶ 245–48.

[59] *Id.* ¶ 143.

[60] *See* Case C-309/99, Wouters v. Algemene Raad van de Nederlandse Order van Advocaten, 2002 E.C.R. I-577.

[61] *Compare Murphy*, ¶ 145, *with* Case C-519/04 P, Meca-Medina & Majcen v. Comm'n, 2006 E.C.R. I-6991, ¶¶ 41–42 (citing *Wouters*, 2002 E.C.R. I-577, ¶ 97).

[62] TFEU art. 101(2).

not be bound by the clause prohibiting them from marketing decoding devices in other Member States.[63] Second, it follows from the Court's case law that a party to an anti-competitive agreement may rely upon EU law against the other party for the purpose of obtaining damages stemming from the agreement in question.[64] It is thus conceivable that NOVA and other broadcasters[65] could have valid claims against the Premier League under EU law, encompassing loss of profits—representing the potential EU-wide subscriptions—unjust enrichment, and other damages. It follows from Manfredi v. Lloyd Adriatico Assicurazioni SpA ("*Manfredi*") that "any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited under Article [101]." [66] According to Oxford's Jacques Delors Professor of European Law, Professor Stephen Weatherill, this private right of action extends in principle to individual consumers like Karen Murphy. However, because bringing private, anti-competition claims is complicated, costly, and time consuming, such claims are more likely to be raised by consumer advocacy organizations.[67] A third and the most interesting consequence would be if the nullity between the nationality clause in the agreement between the Premier League and the broadcasters causes certain aspects of the agreement between the broadcaster and the person receiving the broadcast to become null and void. More concretely, are the contractual provisions preventing Karen Murphy from receiving, decoding, viewing, and displaying the broadcast outside of Greece null and void due to their close connection with the now-void terms in the agreement between the Premier League and NOVA? This is of direct and critical importance for the outcome of the case when resolved by the referring national court, but although such a consequence appears reasonable, we find no current support that such subsequent nullity follows from EU law.[68] Consequently, subject to intervention in British law, the agreement between Murphy and NOVA remains valid and binding.[69]

To summarize, the *Murphy* Court's analysis of competition law provides some guidance but in doing so raises many new questions. This is particularly unfortunate since there is limited guidance on how to apply competition law to sports. National courts have raised questions regarding the application of competition law to sports in several cases without the ECJ giving any meaningful guidance,[70] with the significant

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[63] There appears to be no problem severing the void clause from the rest of the contract which thus may remain valid. *See* ALISON JONES & BRENDA SUFFRIN, EU COMPETITION LAW 1198 (2011).

[64] Case C-453/99, Courage Ltd. v. Crehan**,** 2001 E.C.R. I-6297, ¶¶ 25–33; *see also* Case C-295–298/04, Manfredi v. Lloyd Adriatico Assicurazioni SpA, 2006 E.C.R. I-6619.

[65] Indeed, NOVA and other territorially-exclusive broadcasters (even Sky) would be considered the non-dominant parties in the agreement, and FAPL the "party controlling the network" (of anticompetitive agreements). *See Courage,* 2001 E.C.R. I-6297, ¶ 34.

[66] *Manfredi*, 2006 E.C.R. I-6619, ¶ 61; *see also* JONES & SUFFRIN, *supra* note 64, at 1205.

[67] STEPHEN WEATHERILL, EU CONSUMER LAW AND POLICY 232–33 (2005).

[68] The issue was raised in a case before the Swedish Supreme Court, which found no support in favor thereof. Nytt Juridiskt Arkiv [NJA] [Supreme Court] 2004–12–23, p. 804, T2280–02, at p. 825.

[69] This may change. *See infra* Part V. In practice, however, the consequences of the continued validity of the subscriber's contractual obligations could in some cases be partially off-set by the customer's right to damages. *See supra* text accompanying notes 64–67.

[70] *See*, *e.g.*, Case C-415/93, Union royale belge des sociétés de football association ASBL v. Bosman, 1995 E.C.R. I-4921, ¶ 138; Joined Cases C-51/96 & C-191/97, Christelle Deliège v. Ligue francophone de judo et disciplines associées ASBL, 2000 E.C.R. I-2549, ¶¶ 22, 36; Case C-176/96,

exception being *Meca-Medina* where the Court analyzed the compatibility of doping rules in sports with competition law.[71]

D. Intellectual Property Law

In addition to applying free movement of services and competition law, in *Murphy*, the ECJ elaborated upon the correct interpretation of EU intellectual property law. First, as previously mentioned, the Court declared that sporting events are not copyrightable "works."[72] On the other hand, the Court held[73] that the opening video sequence, the Premier League anthem, pre-recorded films showing highlights of recent Premier League matches, and various graphics would be protectable under Directive 2001/29, commonly referred to as the Copyright Directive.[74] This directive allows Member States to protect works, for which the authors and intellectual property owners are able to restrict public access. This is important since lawful communication to the public of such content necessitates prior permission, and presumably the paying of fees to the copyright owner.[75] Thus, Murphy and other pub owners would have to either submit a newly negotiated fee to their service provider for public use of the copyrighted work or refrain from publicly disclosing proprietary content in situations where the author and copyright owner did not consent to that particular public use.

The Court in *Murphy* also interpreted a number of directives on narrower issues of EU intellectual property law.[76] The ECJ concluded that Directive 98/84, which encapsulates the protection of conditional access services and specifically covers illicit devices, did not preempt the British law in question.[77] Foreign decoders were not rendered "illicit devices," as they were in no way modified or tampered with in bad faith.[78] In addition, the Court established that Directive 93/83, which encompasses intellectual property issues in satellite broadcasting,[79] had "no bearing

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Lehtonen & Castors Canada Dry Namur-Braine ASBL v. Fédération royale belge des sociétés de basket-ball ASBL (FRBSB), 2000 E.C.R. I-2681, ¶¶ 18, 28–30.

[71] Case C-519/04 P, Meca-Medina & Majcen v. Comm'n, 2006 E.C.R. I-6991, ¶¶ 40–56.

[72] *Murphy*, 1 C.M.L.R. 29, ¶ 96 (2011). *See supra* note 29 and accompanying text.

[73] *Murphy*, 1 C.M.L.R. 29, ¶¶ 152–59 (2011).

[74] Parliament and Council Directive 2001/29, *supra* note 13, art. 3(1) (EC) ("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").

[75] JAMES BOYLE, THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND (2008).

[76] It should be noted that the Directives only apply to Member States. Therefore, the satellite broadcasting provisions apply to Greece and NOVA services. Decoder cards used to access broadcasts from third countries, such as the Arab decoder cards that certain pub managers were utilizing, are not covered under these provisions.

[77] Directive 98/84, 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, 1998 O.J. (L 320) 54 (EC).

[78] *Murphy*, 1 C.M.L.R. 29, ¶¶ 68–74 (2011). *See also* Op. Advoc. Gen., *Murphy*, 1 C.M.L.R. 29, ¶¶ 48–62.

[79] Council Directive 93/83, 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 O.J. (L 248) 15.

on the lawfulness of reproduction performed within the memory of a satellite decoder and on a television screen."[80]

One area where the ECJ disagreed with Advocate General Kokott's position was the matter of "communication to the public" under the meaning of the Copyright Directive. Whereas the Advocate General concluded that this Directive should not apply—essentially on the grounds that pub customers are not paying a fee for watching matches on a TV in the pub—[81] the ECJ focused on the profit-making character of pubs, thus assuming a broader interpretation of the "communication to the public" concept.[82]

IV. COMMENTS

A. Consequences from the Individual's Perspective

It is clear from *Murphy* that Great Britain's legal ban on using foreign decoding equipment and other similar national laws were contrary to the right of free movement of services and that national courts are required to immediately "disapply" them.[83] If the national courts disaffirm such provisions, individuals like Karen Murphy cannot violate them. This issue, for the sake of analysis, must be separated from the conditions under which physical and legal persons may watch and display foreign broadcasts.

Despite the Court's conclusion that sporting events are not in themselves considered "works" for copyright purposes,[84] the final, edited transmission is protected under copyright law.[85] It is also clear that EU law requires that Member States grant a right to the Premier League and other rights holders to authorize who may access and display their work to the public.[86] It does not follow from *Murphy* that a person can invoke the free movement of services to view and display transmissions of copyrighted works without the authorization of the rights holder, nor does it follow from the judgment that right holders are required to provide individuals with such authorization.

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[80] *Murphy*, 1 C.M.L.R. 29, ¶ 210 (2011); *Cf.* Op. Advoc. Gen., *Murphy*, 1 C.M.L.R. 29, ¶¶ 148–64 (assuming a more careful approach, utilizing various recitals in the Directive's preamble, to reach a conclusion that "the right to communicate copyright works by satellite under Article 2 of Directive 93/83 includes the right also to receive and watch that broadcast abroad").

[81] Op. Advoc. Gen., *Murphy*, 1 C.M.L.R. 29, ¶ 147 ("The answer to Question 6 in Case C-403/08 must therefore be that a copyright work is not communicated to the public by wire or wireless means, within the meaning of Article 3(1) of Directive 2001/29, where it is received or viewed as part of a satellite broadcast at commercial premises (for example, a bar) or shown at those premises, free of charge, via a single television screen and speakers to members of the public present on those premises.").

[82] *Murphy*, 1 C.M.L.R. 29, ¶ 207 (2011) ("'Communication to the public' within the meaning of Article 3(1) of Directive 2001/29 must be interpreted as covering transmission of the broadcast works, via a television screen and speakers, to the customers present in a public house.").

[83] *See*, *e.g.*, Case 106/77, Amministrazione delle Finanze dello Stato v. Simmenthal SpA (*Simmenthal II*), 1978 E.C.R. 629, ¶ 21. Although the ECJ is quite clear as to how the determination should be made, it must be noted that it is ultimately up to the referring national court—here the UK High Court of Justice—to make the final determination as to whether English law is contrary to EU law.

[84] *Murphy*, 1 C.M.L.R. 29, ¶ 96 (2011).

[85] *Id.* ¶ 149.

[86] *Id.* ¶¶ 195–203. *See*, *e.g.*, Parliament and Council Directive 2001/29, *supra* note 13, art. 3.

In fact, the Court in *Murphy* expressly states that the invalidity of the legal ban on using foreign decoding equipment does not prevent the other contracting party from suing an individual for damages for breach of contract if he or she has used the decoding equipment contrary to the terms of the agreement, such as the commercial use of equipment licensed only for private use.[87] This is supported by Advocate General Kokott's conclusion that the free movement of services and copyright law do not preclude national law, such as provisions of national copyright law, protecting the right of intellectual property owners to preempt the commercial exploitation of their work via unauthorized communications to the public. However, the national laws geared toward protecting intellectual property owners from unauthorized use of their property will be subject to the principle of proportionality.[88]

From the perspective of Karen Murphy and other similarly situated individuals, *Murphy* can be understood as establishing an extension of the principle of mutual recognition for broadcasting services. This principle ensures a well-functioning internal market by requiring that goods lawfully produced in one Member State can be marketed in other Member States.[89] Moreover, the judgment in *Murphy* ensures that a person that has acquired a valid license to decode the broadcast in one Member State may also do so in another Member State without fear of consequences from the latter's government. If that foreign license only includes private viewing, it is not extended to public viewing merely because the subscriber accesses the broadcast from another Member State. Conversely, a Member State may not take actions to prevent a licensee from publicly displaying a foreign broadcast when holding a valid license.[90]

Courts and other public entities may, however, uphold the contractual obligations that the licensee accepted vis-à-vis the broadcaster. Thus, using foreign equipment may have direct and immediate legal consequences for an individual such as Karen Murphy, who had a foreign subscription for private viewing purposes but used it for public viewing. Of course, a necessary condition for incurring legal consequences on contractual grounds is that the contractual obligation be valid.[91]

B. Consequences from the Right Holders' Perspective

The Union of European Football Associations, the film industry, and TV production entities have expressed fears over *Murphy*'s consequences for them as

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[87] *Murphy*, ¶¶ 127–28 (2011).

[88] Op. Advoc. Gen., *Murphy*, 1 C.M.L.R. 29, ¶¶ 216–32. It should be noted that the Advocate General approached the questions referred by the national court sequentially, in a slightly different manner than the ECJ.

[89] The principle applies to intra-union trade of goods and states that a product lawfully marketed in one Member State should be allowed to be marketed in any other Member State. Case 120/78, Rewe Zentral AG v. Bundesmonopolverwaltung für Branntwein, 1979 E.C.R. 649, ¶ 14. *Cf.* Case C-340/89, Vlassopoulou v. Ministerium für Justiz, Bundes-und Europaangelegenheiten Baden-Württemberg, 1991 ECR I–2357, ¶¶ 15–16 (establishing a similar principle imposing a duty on Member States to recognize foreign educational degrees, thereby supporting the free movement of workers and the freedom of establishment).

[90] *But see* Paul Kelso, *Premier League Lose Case on Selling of Lucrative Television Rights at European Court of Justice*, TELEGRAPH, Oct. 4, 2011 (reporting that some interpret *Murphy* as only applying to private viewing license and never to public viewing licenses).

[91] *See also supra* notes 68–69 and accompanying text.

rights holders.[92] Rights holders in non-Member States who consider promoting their works within the European Union face similar concerns. The most pressing worry for rights holders following *Murphy* is that they cannot contractually grant broadcasters territorial exclusivity.[93]

Clauses seeking to grant and enforce territorial exclusivity have been particularly important when licensing rights include rights to netcast or broadcast over the Internet, since technology removes all practical obstacles for physical and legal persons to subscribe to services from providers in other Member States. A common technical solution for upholding territorial exclusivity in netcasting has been geo-blocking, whereby users from outside the specified territory are prevented from accessing the Internet content.[94] The Court's reasoning on clauses preventing extra-territorial broadcasting[95] applies equally to a clause preventing extra-territorial netcasting, which would therefore also "constitute a prohibited restriction on competition for the purposes of Article 101(1) TFEU."[96]

The ruling in *Murphy* steers rights holders towards both more radical and less radical strategies for exploiting their rights. One strategy that would not interfere with *Murphy* would be for the rights holders to establish their own television network and thereby circumvent all legal issues with licensing, as is done in the United States by various professional sports leagues that run their own subscription-based TV networks.[97] However, experiences with other pan-European television networks suggest that such a network would need to be localized in order to be successful.[98] Moreover, much sports content is not in as high demand as Premier League matches, making private networks economically difficult to sustain.

An alternative strategy would be to sell pan-European broadcasting rights.[99] Following *Murphy*, there have been speculations that Al-Jazeera, Canal+, or Sky/ESPN could bid for such rights.[100] One would think that some of the major media entities in each Member State could pursue new avenues of joint venture with other Member States' media giants, possibly morphing into new European broadcasting conglomerates so as to compete with the likes of Sky/ESPN. However, as FAPL learned in the past, particularly in the period between 2001 and 2006 and

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[92] Stephen Garrett, *One Football Result Could be the End for Spooks*, THE TIMES, Oct. 4, 2011; *see also* Duncan White, *What You Need to Know about the Premier League TV Ruling*, TELEGRAPH, Oct. 4, 2011.

[93] *See* discussion *supra* Part III.C.

[94] Dan Jerker B. Svantesson, *Geo-Location Technologies and Other Means of Placing Borders on the 'Borderless' Internet*, 23 J. MARSHALL J. COMPUTER & INFO. L. 101 (2004).

[95] *Murphy*, 1 C.M.L.R. 29, ¶¶ 136–44 (2011).

[96] *Id.* ¶ 144.

[97] *See* Daniel Geey, *4th October: Premier League Broadcasting D-Day?*, TOMKINS TIMES, Sep. 22, 2011, *available at* http://tomkinstimes.com/2011/09/4th-october-premier-league-broadcasting-d-day (Sept. 22, 2011, 2:30pm). There is the comparative of the Dutch *Eredivisie*, where the subscription channel is available on every platform on a non-discriminatory basis. In the UK, that would mean a subscription PL TV channel being available on each of the Sky, Virgin, BT Vision, Top Up TV, and FreeView platforms.

[98] *See* Jean K. Chalaby, *Transnational Television in Europe – The Role of Pan-European Channels*, 17 EUR. J. COMM. 183 (2002).

[99] Geey, *supra* note 97.

[100] *See* Alan McKinlay, *Murphy's Law is Not a Result Yet*, MIRROR, Oct. 8, 2011, at 44; *Sky Face Premier League TV Rights Battle as Al Jazeera Ponder Rival Mega Deal*, DAILY MAIL, Oct. 23, 2011.

through the intense scrutiny of the European Commission over the exclusive licensing of Premiership matches,[101] collective selling of media rights can also easily violate competition law, absent a sports broadcasting rights' exemption from such EU Directives as the Television Without Frontiers Directive,[102] the Satellite Broadcasting Directive,[103] or the Copyright Directive.[104] Also, rights holders that lack the leverage of the FAPL may have trouble finding interested buyers for such pan-European rights.

A solution that ought to be compatible with EU law is one pointed out by the *Murphy* Court itself: that the rights holders should conduct auctions where broadcasters bid for the right to broadcast, and where remuneration is based on actual and potential viewership.[105] Such auctions could be for exclusive pan-European broadcasting rights but, as described above, it may be difficult to find competitive buyers interested in such rights for many works.[106] These auctions could also be for non-exclusive broadcasting rights. That could mean a combination of economies of scale, with high volume of licenses for an average price feasible for most European consumers,[107] and scope with an increase in combination offerings/customizable content/language versions.[108]

It is clear from *Murphy* that it would not be lawful to divide the auctioned broadcasting rights on the basis of geographical territory. The only suggestion that the *Murphy* court gives for a lawful division of broadcasting—a suggestion that is made only in passing—is a division based on language.[109] Thus, rights holders could possibly employ a licensing system lawfully based on language exclusivity. This would somewhat alleviate FAPL's problems, as Karen Murphy presumably would be less interested in subscribing to the Greek broadcast of Premier League games.[110]

As a general matter, rights holders and partner broadcasters will attempt to fully exploit the opportunity to attract new customers across the Continent and aggressively pursue infringers who may be providing live streaming of sporting

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[101] *See supra* note 52 and accompanying text.

[102] Directive 97/36 of the European Parliament and of the Council of 30 June 1997, 1997 O.J. (L 202) 60 (EC).

[103] Council Directive 93/83, *supra* note 79.

[104] Parliament and Council Directive 2001/29, *supra* note 13.

[105] *Murphy*, 1 C.M.L.R. 29, ¶¶ 112–13 (2011). *See also* text accompanying note 44.

[106] *See* note 99 et seq. and accompanying text.

[107] Where, for example, the FAPL will attempt to go for maximization of European media operators' outreach through regional broadcasters wishing to expand, such as NOVA, while the overall cost of broadcasting fees would initially decrease, possibly increasing progressively to yield a higher profit margin for FAPL.

[108] Where, for example, FAPL and other leagues/sports and entertainment organizations will offer more customized packages, language combinations, regular and post-season competitions, different delivery systems, etc. so that the partnership between FAPL and broadcasting networks may attract more subscribers.

[109] *See Murphy*, 1 C.M.L.R. 29, ¶ 110 (2011). *See also* Op. Advoc. Gen., *Murphy*, 1 C.M.L.R. 29, ¶¶ 160, 186, 202.

[110] Naturally, pub owners may subscribe to a foreign-language operator (NOVA provided commentary in both Greek and English), if the price is reasonable, and simply mute the broadcast for their pubs' clientele. Some may even complement the foreign live video feed with live radio broadcast of the same match, if available in their region. Any video-audio discrepancies and signal delays may be well recompensed by the pub managers' savings.

events in an unauthorized fashion. An excellent example of such monitoring and policing actions is Major League Baseball's strategy to combat online streaming piracy.[111]

V. CONCLUSION

The ECJ scored quite a few goals in *Murphy*. The Court's reasoning was extensive and normative, and thus provided guidance for the application of EU law to related cases. It left comparatively little room for national courts.[112] For the purpose of protecting the internal market, the ECJ interpreted Article 56 of the TFEU to severely restrict Member States' ability to discourage "parallel import" of broadcasting services, finding that such restrictions cannot be justified on either intellectual property or sporting interest grounds.[113] Similarly, viewed through the competition law lens, the ECJ did not engage in an elaborate analysis weighing pro-competitive and anti-competitive effects. Rather, it concluded that compartmentalization of the internal market for the purpose of maximum exploitation is inherently anti-competitive. In sum, *Murphy* provides far-reaching repercussions in many business fields based on intellectual property rights, including media, entertainment, TV broadcasting, and sports.

Although *Murphy* is an unusually long and detailed judgment, it leaves many important questions unanswered. First, the full implication of the ECJ's finding that sporting events are not *per se* copyrighted works will probably only become clear from future case law.[114] Second, *Murphy* steers rights holders towards exclusive pan-European licensing[115] without addressing its compatibility with competition law.[116] Third, by voiding territorially exclusive broadcasting rights, which are central in the sector and for which remuneration has been paid, *Murphy* raises complex questions regarding damages and unjust enrichment.[117] Fourth and finally, it is foreseeable that the Court will be called upon to address the validity of territorially restrictive terms in subscriber agreements and, in particular, whether they are subsequently void.[118]

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[111] *See* Michael J. Mellis, *Internet Piracy of Live Sports Telecasts*, 18 MARQ. SPORTS L. REV. 260 (2008).

[112] Consider, alternatively, a more than twenty-year case law history on gambling services and state monopolies, during which the ECJ consistently deferred the most crucial aspects of protectionism and preservation of monopoly power over state-aided gaming operators to national courts. *See* Anastasios Kaburakis & Ryan Rodenberg, *European Union Gambling at the intersection of policy and litigation*, 5 J. GAMBLING BUS. & ECON. 1 (2011); Anastasios Kaburakis & Ryan Rodenberg, *Odds. Gambling, Law, and Strategy in the European Union*, 13 BUS L. INT'L. 63 (2012).

[113] *Murphy*, 1 C.M.L.R. 29, ¶¶ 90–133 (2011) (revolving around the key finding of such legislation as incompatible with EU law in ¶ 125).

[114] *Id.* ¶¶ 96–98 (not classified as original works for copyright protection).

[115] *See* discussion *supra* Part IV.B.

[116] *Murphy*, ¶ 141.

[117] *See* discussion *supra* Part III.C.

[118] *See* discussion *supra* Part IV.A.