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Case No: A3/2012/1557

IN THE HIGH COURT OF JUSTICE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM CHANCERY DIVISION
LORD JUSTICE KITCHIN
INTELLECTUAL PROPERTY
HC06C04418, HC07C00082, HC07C01749

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20th December 2012

Before :

LORD JUSTICE EHERTON
LORD JUSTICE LEWISON
and
LORD JUSTICE MUNBY

Between :

FOOTBALL ASSOCIATION PREMIER LEAGUE LIMITED

Appellant

-and-

(1) QC LEISURE
(2) DAVID RICHARDSON

Respondents

(1) AV STATION PLC
(2) MALCOLM CHAMBERLAIN

Respondents

(1) MICHAEL MADDEN
(2) SANJAY RAVAL
(3) DAVID GREENSLADE
(4) S.R. LEISURE LIMITED
(5) PHILLIP GEORGE CHARLES HOUGHTON
(6) DEREK OWEN

Respondents

(Transcript of the Handed Down Judgment of
WordWave International Limited
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Official Shorthand Writers to the Court)

Mr James Mellor QC and Ms Charlotte May (instructed by DLA Piper UK LLP) Appellant

Mr Martin Howe QC, Mr Andrew Norris, Mr Thomas St Quintin (instructed by **Smithfield Partners**) on behalf of Mr Richardson, QC Leisure, Mr Raval, Mr Greenslade and SR Leisure Ltd
and
(instructed by **Molesworth & Smithfield Partnership**) for the **Respondents**

Hearing dates : Monday 26th November 2012

Judgment

LORD JUSTICE EHERTON :

Introduction

1. This is an appeal from part of an order dated 3 February 2012 of Lord Justice Kitchin, sitting in the Chancery Division of the High Court, pursuant to a judgment handed down by him on that day in three actions tried together. Those actions arose out of the use of foreign decoder cards in the UK to access foreign transmissions of live Premier League football matches. One of the many issues that has arisen in the litigation is whether the defendants in one of the actions (HC07C01749) (“the Madden action”), who are the owners or licensees of public houses, have infringed the copyright of the appellant (“FAPL”), one of the claimants in the actions, by performing, playing or showing the works in public contrary to the Copyright, Designs and Patents Act 1988 (“the CDPA”) section 19 (“section 19”) and by communicating the works to the public contrary to section 20 of the CDPA (“section 20”). Related to that issue was the question whether the Defendants in the other actions (HC06C04418 and HC07C00082), each of whom supplied foreign decoder cards to publicans, authorised such infringement by those publicans.
2. This appeal is from that part of the order of 3 February 2012 as dismissed the actions insofar as they are based on a cause of action for infringement of copyright in the Film Works (as defined in the order) by communication to the public by electronic transmission contrary to section 20.

Factual context

3. These proceedings arose out of the showing in pubs of live Premier League football matches. The Premier League is the leading professional football league competition for football clubs in England. FAPL is the vehicle through which the 20 Premier League clubs operate the competition. Each of those clubs owns one share in FAPL. FAPL’s activities include organising the filming of Premier League matches and licensing the rights to broadcast them. In the UK one of the licensees for UK live broadcasts is British Sky Broadcasting Limited (“Sky”).
4. The matches are broadcast by way of an encrypted signal. Publicans who wish to screen Premier League football matches in their pubs must access the broadcast via a licensed broadcaster, for example by having a Sky subscription and using a Sky satellite decoder card. The three sets of proceedings have arisen because foreign satellite decoder cards, some of which can be obtained considerably more cheaply than under a Sky subscription, have been sold in the UK to allow Premier League matches to be shown in pubs.

5. Two of the actions are brought against suppliers of equipment and satellite decoder cards to pubs and bars, which enable the receipt of non-Sky satellite channels. The third action, the Madden action, is against licensees or operators of four pubs that have shown live Premier League matches broadcast on channels produced by Arab Radio and Television Network (“ART”). The reception of those channels is enabled by an ART or “Arabesque” satellite decoder. They are transmitted by an uplink leg through Italy.

The legal framework

European legislation

6. Article 8(3) of Directive 92/100/EEC on (among other things) certain rights related to copyright in the field of intellectual property (subsequently incorporated into Directive 2006/115/EC) provided as follows:

“Article 8

Broadcasting and communication to the public

...

3. Member States shall provide for broadcasting organisations the exclusive right to authorise or prohibit the rebroadcasting of their broadcasts by wireless means, as well as the communication to the public of their broadcasts if such communication is made in places accessible to the public against payment of an entrance fee.”

7. The recitals in that Directive acknowledged that Member States might provide for more far reaching protection for owners of rights related to copyright than that required by Article 8.
8. Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society (“the Copyright Directive”) was enacted pursuant to the policy of the European Council (1) to create a general and flexible legal framework at European Community level in order to foster the development of “the information society” in Europe, and (2) so as to harmonise the legal framework on copyright and related rights in order to foster substantial investment in creativity and innovation, leading to growth and increased competitiveness of European industry.
9. The recitals to the Copyright Directive record that any harmonisation of copyright and related rights must take as a basis a high level of protection. They refer to the “digital agenda” reflected in two treaties of the World Intellectual Property Organisation (“WIPO”), namely the WIPO Copyright Treaty and the WIPO Performance and Phonograms Treaty. Recitals (23), (31), (32), (38) and (44) concern respectively the intention of the Copyright Directive to harmonise further the author’s right of communication to the public (recital 23); the undesirability of existing differences between Member States in the exceptions and limitations to certain acts of copyright infringement (recital 31); the intention of the Copyright Directive to provide an exhaustive enumeration of exceptions and limitations to the copyright owner’s right

of reproduction and right of communication to the public (recital 32); the greater latitude allowed to Member States for certain exceptions and limitations in the case of analogue private reproduction as distinct from digital private copying (recital 38); and the need for any exceptions and limitations provided for in the Copyright Directive to be exercised in accordance with international obligations, including (in accordance with the Berne Convention for the Protection of Literary and Artistic Works) the obligation not to prejudice the legitimate interests of the rightholder and not to conflict with the normal exploitation of the rightholder's work or other subject-matter (recital 44). Those recitals are set out in the Appendix to this judgment.

10. Article 2 of the Copyright Directive ("Article 2") requires Member States to provide for, among other things, the exclusive right of authors to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part, of their works, and a similar right for broadcasting organisations in respect of fixations of their broadcasts, whether those broadcasts are transmitted by wire or over the air, including by cable or satellite.
11. Article 3 of the Copyright Directive ("Article 3"), which is one of the provisions at the heart of this appeal, requires Member States to provide that authors shall have the exclusive right to communicate their work to the public and that broadcasters and certain others shall have the exclusive right to make available to the public other subject matter. Article 3 is as follows:

"Article 3

**Right of communication to the public of works and right
of making available to the public other subject-matter**

1. Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.
2. Member States shall provide for the exclusive right to authorise or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them:
 - (a) for performers, of fixations of their performances;
 - (b) for phonogram producers, of their phonograms;
 - (c) for the producers of the first fixations of films, of the original and copies of their films;
 - (d) for broadcasting organisations, of fixations of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite.

3. The rights referred to in paragraphs 1 and 2 shall not be exhausted by any act of communication to the public or making available to the public as set out in this Article.”

12. Article 5 of the Copyright Directive (“Article 5”) specifies certain exceptions and limitations to the rights provided for in Article 2 and Article 3. It provides as follows, so far as relevant:

“Article 5

Exceptions and limitations

....

3. Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases:

....

(l) use in connection with the demonstration or repair of equipment

...

(o) use in certain other cases of minor importance where exceptions or limitations already exist under national law, provided that they only concern analogue uses and do not affect the free circulation of goods and services within the Community, without prejudice to the other exceptions and limitations contained in this Article.

....

5. The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in special cases which do not conflict with a normal exploitation of the work or other subject matter and do not unreasonably prejudice the legitimate interests of the rightholder.”

13. Article 13 of the Copyright Directive provided that Member States shall bring into force laws complying with its provisions before 22 December 2002.

The CDPA

14. The relevant domestic legislation is contained in the CDPA. Its provisions were amended in 2003 by the Copyright and Related Rights Regulations 2003 (SI

2003/2498) (“the 2003 Regulations”), by which the UK intended to give effect to the Copyright Directive. The arguments before Kitchin LJ and on this appeal turn to a large degree on the effect of those amendments. It is necessary, therefore, to set out certain provisions in their form both before and after the amendments introduced by the 2003 Regulations.

15. Section 1(1), in Chapter 1 of Part 1 of the CDPA, provides that copyright is a property right which subsists in accordance with Part 1 in, among other things, sound recordings, films and broadcasts. The effect of the 2003 Regulations was to substitute the word “broadcasts” in section 1(1) for the words “broadcasts or cable programmes”, but nothing in this appeal turns on that amendment. Section 1(2) provides that in Part 1 of the CDPA “copyright work” means a work of any of the descriptions in section 1(1) in which copyright subsists.
16. Chapter II of Part I of the CDPA sets out the rights of a copyright owner. Sections 19 and 20 appear in that part of Chapter II headed “The acts restricted by copyright”. Section 19 provides as follows, so far as relevant:

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

...

(3) The playing or showing of the work in public is an act restricted by the copyright in a sound recording, film or broadcast. ...”

17. Again, the 2003 Regulations substituted the word “broadcast” for the words “broadcast or cable programme”, but nothing in this appeal turns on that amendment.
18. Section 20, as originally enacted, provided as follows:

“20. Infringement by broadcasting or inclusion in a cable programme service

The broadcasting of the work or its inclusion in a cable programme service is an act restricted by the copyright in—

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

19. The 2003 Regulations substituted an entirely new section 20 as follows:

“20. Infringement by communication to the public

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

in—

- (a) a literary, dramatic, musical or artistic work,

- (b) a sound recording or film, or
- (c) a broadcast.

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

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

20. Sections 28, 34 and 72 are in Chapter III of Part 1 of the CDPA, which sets out acts permitted in relation to copyright works.

21. Section 28(1) provides as follows:

“28. Introductory provision

(1) The provisions of this Chapter specify acts which may be done in relation to copyright works notwithstanding the subsistence of copyright; they relate only to the question of infringement of copyright and do not affect any other right or obligation restricting the doing of any of the specified acts.”

22. Section 34(2) of the CDPA (“section 34(2)”) provides as follows:

“34. Performing, playing or showing work in course of activities of educational establishment

...

(2) The playing or showing of a sound recording, film or broadcast before such an audience at an educational establishment for the purposes of instruction is not a playing or showing of the work in public for the purposes of infringement of copyright.”

23. Again, the 2003 Regulations substituted the word “broadcast” for the words “broadcast or cable programme”, but nothing in this appeal turns on that amendment.

24. Section 72(1) of the CPA (“section 72”), as originally enacted, provided as follows:

“72. Free public showing or playing of broadcast or cable programme

(1) The showing or playing in public of a broadcast or cable programme to an audience who have not paid for admission to the place where the broadcast or programme is to be seen or heard does not infringe any copyright in—

- (a) the broadcast or cable programme, or

(b) any sound recording or film included in it.”

25. It was amended by the 2003 Regulations so as to provide as follows:

“72. Free public showing or playing of broadcast

(1) The showing or playing in public of a broadcast to an audience who have not paid for admission to the place where the broadcast is to be seen or heard does not infringe any copyright in—

- (a) the broadcast;
- (b) any sound recording (except so far as it is an excepted sound recording) included in it; or
- (c) any film included in it.

(1A) For the purposes of this Part an “excepted sound recording” is a sound recording—

- (a) whose author is not the author of the broadcast in which it is included; and
- (b) which is a recording of music with or without words spoken or sung.

(1B) Where by virtue of subsection (1) the copyright in a broadcast shown or played in public is not infringed, copyright in any excepted sound recording included in it is not infringed if the playing or showing of that broadcast in public—

- (a) forms part of the activities of an organisation that is not established or conducted for profit; or
- (b) is necessary for the purposes of—
 - (i) repairing equipment for the reception of broadcasts;
 - (ii) demonstrating that a repair to such equipment has been carried out; or
 - (iii) demonstrating such equipment which is being sold or let for hire or offered or exposed for sale or hire.”

The 2008 hearing

26. The trial of the actions originally took place over several days in April and May 2008. There were numerous issues. During the course of the trial the parties identified no fewer than 40. Yet more emerged in correspondence after its conclusion, requiring a further hearing day. Kitchin J, as he was then, decided some of them, but he also referred a series of questions to (what is now) the Court of Justice of the European Union (“the CJEU”).

27. One of the claims was that the Madden action defendants had infringed FAPL's "communication to the public" right in various film works by transmitting the claimants' broadcasts, via television screens and speakers, to the customers present in the Madden action defendants' pubs. The defendants argued that the claim was completely misconceived. Although they accepted there is a communication to the public involved in a satellite broadcast, they said that act takes place solely in the Member State of transmission. That Member State was Italy in the case of the ART broadcasts and hence no infringement of UK copyright law could occur by reason of the act of reception taking place here.
28. Kitchin J addressed the rival submissions on this aspect of the actions at paragraphs [245]-[262] of his judgment following the 2008 trial ([2008] EWHC 1411 (Ch)). As he explained, section 20 purports to implement Article 3 of the Copyright Directive. He expressed a provisional view preferring the submissions of the defendants. He said:
- "262. I come then to consider how these principles should be applied in the context of the present case. Have the publicans communicated the copyright works to members of the public not present at the origin of those communications? They have plainly displayed them and played them to members of the public (subject to the discussion in the next section). The audience is far wider than the publicans and their families. But it is my provisional view they have not communicated them to the public within the meaning of Article 3. There has been no retransmission by the publicans whether by wire or otherwise. They have simply received the signal, decoded it and displayed it on a television. The only acts of communication to the public have been those of ... ART. In short, there has been no act of communication to the public within the Directive separate from the satellite broadcast itself."
29. Nevertheless, recognising the issue was not clear, he referred a question ("Question 6") to the CJEU asking whether:
- " ... a copyright work [is] communicated to the public by wire or wireless means within the meaning of Art. 3 of [the Copyright] Directive where a satellite broadcast is received at a commercial premises (for example a bar) and communicated or shown at those premises via a single television screen and speakers to member of the public present in those premises. ...".
30. There were various further ancillary questions posed in Question 6, but it is not necessary to refer to them.

The CJEU's judgment

31. On 4 October 2011 the Grand Chamber of the CJEU gave its judgment (Case C-403/08) on the questions referred by Kitchin J.

32. The CJEU said in paragraph 193 of its judgment that the concept of communication must be construed broadly, as referring to any transmission of the protected works, irrespective of the technical means or process used. It said in paragraph 196 that the proprietor of a pub effects a communication when he intentionally transmits broadcast works, via a television screen and speakers, to the customers present in that establishment. The CJEU then went on to identify in paragraphs 197 and 200 two further requirements for there to be a “communication to the public” within the meaning of Article 3(1). The first is that it is necessary for the broadcast work to be transmitted to a new public, that is to say, to a public which was not taken into account by the authors of the protected works when they authorised their use by the communication to the original public. The second is that the work must be transmitted to a “public not present at the place where the communication originates” within the meaning of recital 23 of the Copyright Directive. The CJEU held that both those requirements are satisfied in the case of the transmission of broadcast works to customers present in a pub. The CJEU therefore gave its decision on Question 6 as follows:

“207. In light of all the foregoing, the answer to the question referred is that “communication to the public” within the meaning of Article 3(1) of the Copyright Directive must be interpreted as covering transmission of the broadcast works, via a television screen and speakers, to the customers present in a public house.”

The resumed trial

33. The trial of the three actions resumed before Kitchin LJ, sitting for the purpose as a judge of the Chancery Division of the High Court, in December 2011. Again, there were a series of issues for his determination. The Secretary of State for Business, Innovation and Skills intervened and made written submissions. So far as concerns the present appeal, the important issue for determination at the resumed trial was whether any of the defendants had communicated any of the copyright works of FAPL to the public within the meaning of section 20, and, if they had, whether section 72 provided them with a defence.
34. The parties advanced many arguments at the resumed trial. The judgment of Kitchin LJ addressed them and was closely reasoned. A faithful recitation of his careful analysis would substantially enlarge this judgment. The arguments on this appeal, to which I refer subsequently, reflect the same or similar arguments advanced before him. In the interests of economy, therefore, I shall give only the following brief overview of his judgment.
35. Having set out the background briefly and the rival contention of the parties, Kitchin LJ referred to Case C-91/92 *Faccini Dori* [1994] ECR I-3325, Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentation SA* [1990] ECR 4135, Cases C-397/01 to C-403/01 *Pfeiffer v Deutsches Rotes Kreuz* [2004] ECR I-8835, *HMRC v IDT Card Services Ireland Ltd* [2006] EWCA Civ 29, [2006] STC 1252, *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557 and *Vodafone 2 v Revenue and Customs Commissioners* [2009] EWCA Civ 446, [2010] Ch 77. Those cases set out the well known *Marleasing* principle of conforming interpretation, and its limitations, under which Member States must, so far as possible, interpret national

legislation in the light of the wording and purpose of a European directive in order to achieve the result pursued by it. Kitchin LJ then referred to the material provisions of the CDPA and of the relevant European directives. Having considered them, and the *Marleasing* principle, in the light of the rival submissions of the parties, he concluded that section 20 is an effective transposition of Article 3(1) into national law. He said:

“47. That brings me to s.20 CDPA and the question whether or not it is an effective transposition of Article 3(1) of the Directive into national law. In my judgment it is. In words which reflect the explanatory note to the 2003 Regulations, it defines communication to the public as communication to the public by “electronic transmission”. Further, when considered in light of the reasoning and answer provided by the Court of Justice, I believe this expression is entirely apt to encompass the activities of the publicans. They are “transmitting” FAPL’s relevant copyright works, including its artistic works, to a “new public”. Are they doing so by electronic means? In my view they are. They are using televisions and speakers which are electronic instruments. If and in so far as there may be any doubt about this, I see no difficulty in a conforming interpretation of s.20 and in meeting the obligation upon this court to interpret s.20, so far as possible, in light of the wording and purpose of the Copyright Directive and in order to achieve the result pursued by it.”

36. He further concluded (in paragraph [63]) that there is an overlap between section 19 and section 20 because transmission by publicans of the claimants’ broadcasts to members of the public in their public houses constitutes the playing or showing in public of FAPL’s films included in those broadcasts and so falls within both sections.
37. He then concluded, in favour of the defendants and contrary to the submissions of FAPL, that section 72(1)(c) is a complete defence to the allegation of infringement of FAPL’s film copyright under section 20 (in addition to section 19). He said that section 72(1)(c) cannot be interpreted, even under the *Marleasing* principle, as applying only to section 19 or as limited to analogue use (within the exception in Article 5(3)(o)). He acknowledged that the Copyright Directive does not permit a defence in the terms of section 72(1)(c) and that the legislature intended section 20 to implement Article 3. He considered that, nevertheless, it would exceed the limits of the *Marleasing* principle of conforming interpretation to limit section 72(1) as FAPL contended. He gave the following reasons.

“75. First, the words of s.72(1)(c) are clear and unambiguous. If there were any doubt about it, reference to the White Paper and Hansard would confirm that Parliament intended to allow films included in broadcasts to be seen and heard in public houses without the consent of the owners of the copyright in those films.

76. Second, the 2003 Regulations amended s.72 to remove “excepted sound recordings” from its scope. Mr Howe [counsel for the defendants] submitted, and I agree, that the failure of the

2003 Regulations to amend s.72(1)(c) must be regarded as a conclusive indication of a legislative intention to maintain the full breadth of protection against film copyright.

77. It follows that the interpretation for which Mr Mellor [counsel for FAPL and two other claimants] contends does not involve reading into the provision words which go further than those used by the draftsman. To the contrary, it involves recasting the provision in a way which largely removes the protection it appears to provide. It changes the substance of the provision completely and does so in a way which goes against the grain of the legislation and contradicts the plain intention of the legislature.”

38. Kitchen LJ gave permission to appeal.

The appeal

39. The oral submissions of James Mellor QC, for FAPL, fell into two parts. His primary case is that section 72(1)(c) should be interpreted, in accordance with the *Marleasing* principle, as applying only to the restricted act specified in section 19(3).

40. The steps in Mr Mellor’s analysis can be simply and briefly described as follows. Firstly, as appears to be common ground, prior to the amendments introduced by the 2003 Regulations section 72(1)(c) had no application to section 20. Section 20 concerned “broadcasting”, which was generally accepted to be not the same as “showing or playing” in public within section 19 (3) and section 72 (1)(c).

41. Secondly, the overriding intention of the UK Government in making the 2003 Regulations was to implement and comply fully with the Copyright Directive. In that connection Mr Mellor referred to (1) the Government’s consultation paper on the implementation of the Copyright Directive, which was issued in August 2002, including (2) the Draft Regulatory Impact Assessment annexed to it, (3) the analysis of responses to the consultation, including the Government’s conclusions, (4) the transposition note which accompanied the 2003 Regulations, and (5) the Explanatory Note at the end of the 2003 Regulations. It is clear, he said, that the Government intended to give effect to the exclusive right of communication to the public specified in Article 3, and it carried out that intention by the wholesale amendment of section 20. The Government did not consider that it was necessary to make any significant amendment to section 19 because that section was dealing with something quite different from the amended section 20.

42. Thirdly, the Government’s intention was to preserve existing defences in so far as, but only in so far as, they were consistent with the Copyright Directive. Mr Mellor relied upon the same published material as I have mentioned in the last paragraph.

43. Fourthly, while it is clear that the Government intended to implement the Copyright Directive by, among other things, amending section 20, it did not appreciate that “communication to the public” within the amended section 20 would include the act

of “showing or playing [a broadcast] in public” within section 72(1). In short, the Government thought that “showing or playing in public” meant a public performance and not a communication to the public by wire or wireless means. It was for that reason, Mr Mellor said, the Government did not consider there was any need to amend section 72(1) in order to comply with the Copyright Directive, other than to narrow the exception in relation to sound recordings to reflect the Berne Convention pursuant to Article 5(5).

44. Mr Mellor emphasised that there is no evidence whatsoever that the Government ever formed a positive intention to extend the section 72(1) defence to the restricted act specified in the amended section 20. His submission, therefore, was that the Government did not intend the scope of section 72 to extend beyond section 19 (3) since the Government’s intention was to comply with the Copyright Directive, and the Copyright Directive did not allow a defence to section 20 in the broad form specified in section 72(1).
45. Fifthly, Mr Mellor submitted that the *Marleasing* principle of conforming interpretation requires section 72(1)(c) to be interpreted consistently with the Copyright Directive by limiting the defence to the restricted act specified in section 19(3). In that connection, he referred to the judgment of Grand Chamber in Case C-212/04 *Adeneler & Ors v Ellinkos Organismos Galaktos*, especially at paragraphs 110 and 111 as follows:

“110. It is true that the obligation on a national court to refer to the content of a directive when interpreting and applying the relevant rules of domestic law is limited by general principles of law, particularly those of legal certainty and non-retroactivity, and that obligation cannot serve as the basis for an interpretation of national law *contra legem* (see, by analogy, Case C-105/03 *Pupino* [2005] ECR I-5285, paragraphs 44 and 47).

111. Nevertheless, the principle that national law must be interpreted in conformity with Community law requires national courts to do whatever lies within their jurisdiction, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by domestic law, with a view to ensuring that the directive in question is fully effective and achieving an outcome consistent with the objective pursued by it (see *Pfeiffer and Others*, paragraphs 115, 116, 118 and 119).”

46. In the same connection, Mr Mellor referred to the well known judgment of Lady Justice Arden in *HMRC v IDT Card Services Ireland Ltd* [2006] EWCA Civ. 29 and the judgment of the Chancellor in *Vodafone 2 v HMRC* [2009] EWCA Civ. 446. He relied on those cases as showing that, when applying the *Marleasing* principle of conforming interpretation, the court takes account of the scheme of the domestic legislation, that is to say the court identifies the “grain” of the legislation, at a “high level” – in the present case, the intention to comply with the Copyright Directive. He submitted that, for that reason, his suggested interpretation of section 72(1)(c) was not “against the grain” of the legislation, as amended by the 2003 Regulations, since the

overriding intention of the Government, in making the 2003 Regulations, was to implement the Copyright Directive. He further supported that conforming interpretation by relying on *Vodafone 2* for the proposition that, if a problem has not been foreseen by the legislator, that is a good reason for applying a conforming interpretation.

47. Mr Mellor further underscored his submission that Kitchin LJ's judgment failed to apply a proper conforming interpretation of section 72(1)(c) by contrasting Kitchin LJ's treatment of section 72(1) with his approach to section 34(2). In paragraph [58] of his judgment Kitchin LJ said that section 34(2) is effectively tied to section 19. His reasoning was that 34(2) provides that particular activities in relation to any of the defined works do not constitute a "playing or showing of the work in public for the purposes of infringement of copyright", and that, in so far as section 20 also confers rights in respect of some of the activities falling within section 19, a conforming interpretation should be applied with the result that section 34(2) cannot provide a defence to a restricted act within section 20. Mr Mellor submitted that there is no sound ground for taking, and Kitchin LJ did not explain why he took, a different approach to conforming interpretation in relation to the scope of section 34(2), on the one hand, and section 72(1), on the other hand, bearing in mind that in both cases there is a reference to playing and showing in public and also a reference to the same types of work as are specified in section 19(3).
48. Mr Mellor's alternative argument, if FAPL fails in its primary argument, is that a conforming interpretation should be given to section 72(1)(c) by restricting it to analogue transmissions. The rationale of this part of his argument was that such an interpretation would reflect recital (38) of the Copyright Directive, the exception in Article 5(3)(o) of the Copyright Directive, the Government's intention to comply with the Copyright Directive and the Government's intention to maintain the widest range of legitimate exceptions to the copyright and related rights specified in the Copyright Directive. He submitted that, if section 72(1)(c) was limited in that way, the respondents could nevertheless not take advantage of it since their communication to the public will have involved digital transmission. He contended that, contrary to the respondents' submissions, the communication of the broadcast to their customers cannot properly be described as analogue merely because it involves receiving a satellite broadcast and showing it on a screen, with speakers, to members of the public in a bar or restaurant.

Discussion

49. This appeal has been well argued on both sides. Despite Mr Mellor's attractive submissions, I would dismiss the appeal for the following reasons.
50. I agree with many of the points made by Mr Mellor. It is clear that, prior to the amendments to the CDPA pursuant to the 2003 Regulations, section 72(1) provided a defence to infringement of copyright by a restricted act within section 19(3) but not to infringement of copyright by a restricted act within section 20. It is also clear from the contemporaneous documents to which Mr Mellor referred (the Government's 2002 consultation paper on the implementation of the Copyright Directive, the Draft Regulatory Impact Assessment annexed to it, the analysis of responses to the consultation, including the Government's conclusions,

the transposition note which accompanied the 2003 Regulations, and the Explanatory Note at the end of the 2003 Regulations) that the Government intended to comply with, and fully to implement, the Copyright Directive. It is also clear that, at the time the 2003 Regulations were made and the CDPA was amended to give effect to them, the Government did not appreciate that “the communication to the public of the work” in the amended section 20 included the “showing or playing in public of a broadcast” within section 72(1). In the language of Mr Mellor’s oral submissions, the Government did not understand that the act of receiving a broadcast and showing it on a television to a public audience that had not paid for admission fell within the restricted act of communication to the public.

51. I do not agree with Mr Mellor, however, that it is therefore in accordance with the *Marleasing* principle to interpret section 72(1)(c) as implicitly limited to restricted acts within section 19(3) on the ground that such an interpretation would give effect to both the Government’s intention to comply with the Copyright Directive and also to the Government’s belief that section 72(1)(c) would continue to be limited to restricted acts within section 19(3) as before. I consider that such a conforming interpretation would go beyond the principles of legitimate statutory interpretation.
52. The starting point is that the wording of section 72(1) is clear and unambiguous in embracing within its ambit any “showing or playing in public of a broadcast” to an audience who have not paid for admission to the place where the broadcast is to be seen or heard. The mere fact that statutory language is clear and unambiguous, if the words are given a literal meaning, is not necessarily an insuperable obstacle to a conforming interpretation in accordance with the *Marleasing* principle. In the present case, however, the language of section 72(1) must be seen in the context of the clear intention of the Government, apparent from contemporaneous documentation, including its published conclusions on the 2002 consultation, to maintain to the fullest extent possible the UK’s existing exceptions to copyright infringement. The retention of the same clear and unambiguous introductory language in section 72(1) after the Copyright Directive is a strong indication of the Government’s intention to make no alteration to its ambit (save in relation to excepted sound recordings). In short, the clear and unambiguous introductory wording to section 72(1) supports the proposition in the present case that the corollary of the Government’s mistake as to the ambit of section 72(1) is that the Government did not intend to introduce a specific new limitation to its ambit other than the express provision relating to sound recording. That is supported by the following further considerations.
53. In view of the overlap between “playing or showing of the work in public” in section 19(3) and “communication to the public of the work” in section 20 an implied limitation of section 72(1)(c) to restricted acts within section 19(3) would in practice mean no defence to breach of copyright in the case of pre-recorded films broadcast to the public, without the copyright owner’s consent, where the public has not paid for admission to the place where the broadcast is seen or heard. As was observed by Mr Martin Howe QC, for the respondents, that would have been a major change from the previous statutory regime because broadcast output is regularly pre-recorded but section 72(1) (on FAPL’s conforming interpretation) would only apply in practice to live broadcasts.
54. Although Mr Mellor’s submissions were directed specifically at the exception in section 72(1)(c), it was unclear whether he was asserting, or accepting, that FAPL’s proposed limitation of section 72(1) would apply also to section 72(1)(a) and (b). If he was, that would make the practical implications of the suggested conforming interpretation even more significant. Undoubtedly, if the Government had intended that section 72(1)(c) should bear

the meaning attributed to it by FAPL, it would have focused on whether there were implications for sound recordings and broadcasts within section 20 in addition to pre-recorded films.

55. Whether or not FAPL's suggested limitation of section 72(1) is confined to films, or extends also to broadcasts and sound recordings, it would affect, for example, shops, hotel lobbies, restaurants, pubs and other public places where televised programmes are shown, and would concern not just satellite channels but also terrestrial channels. There can be no doubt that, if the Government had intended such consequences, it would have flagged up the issue expressly in its 2002 consultation exercise. Importantly, as Mr Howe said, it is impossible to say precisely what steps the Government might have taken domestically or in Europe to address the point and its practical consequences.
56. Furthermore, FAPL's suggested limitation of section 72(1) is at odds with the Government's intention to provide in section 72(1B) a defence to copyright infringement in respect of an excepted sound recording where the broadcast is necessary to repair equipment, to demonstrate that a repair has been carried out or to demonstrate equipment prior to its sale or hire. Section 72(1B) was undoubtedly intended to give effect to the exception or limitation in Article 5(3)(l) of the Copyright Directive. Section 72(1B) is expressed to be dependent on subsection (1) being effective in accordance with its terms, but, as I have said, the consequence of FAPL's conforming interpretation would deprive section 72 to a greater or lesser degree of any practical application in the case of broadcasts of pre-recorded works. The effect, therefore, of FAPL's conforming interpretation would be not merely to impose a limitation on the defence in section 72(1) to which the Government never directed its mind, but also to negate to a significant extent a limitation on liability in section 72(1B) to which the Government undoubtedly did direct its mind and for which it did intend to provide.
57. These consequences relate to an important part of the legislation. They cannot be described as minor or unimportant matters in the overall statutory scheme merely because they concern a limited number of sections. In considering the legitimate limits of a *Marleasing* conforming interpretation in the present case, the practical consequences of that interpretation, the plain absence of any intent on the part of the Government to bring them about and its equally plain mistake as to the relationship between the amended section 20 and the amended section 72(1) and (1B), the impact on the coherence of the statutory scheme, and the lack of any certainty as to how the Government or Parliament would have addressed those issues if they had appreciated them (including initiating a debate within the EU), cannot simply be swept aside by pointing to an overall intention on the part of the Government to comply with the Copyright Directive. All those matters are a clear indication that to limit the clear and unambiguous introductory words in section 72(1) as FAPL suggests would go beyond legitimate interpretation by the Court and would encroach on Parliament's legislative role.
58. Furthermore, I do not agree with Mr Mellor that section 34(2) takes the matter any further. Section 34(2) has materially different wording from that in section 72(1) and is directed at different considerations. Section 34(2) specifies that something does not constitute a playing or showing of the work in public for the purposes of infringement of copyright. Section 72(1) specifies that something which is a restricted act, because it is a showing or playing in public, nevertheless does not constitute infringement of copyright. In other words, section 34(2) qualifies what is a restricted act within section 19(3) whereas section 72(1) is concerned with the quite different issue of when a restricted act will not constitute infringement of copyright.

59. I can see no proper basis for Mr Mellor’s alternative argument that section 72(1)(c) should be interpreted as implicitly limited to analogue reproduction. The exception in Article 5(3)(o) only applies in cases of “minor importance”. While it is true that recital (38) of the Copyright Directive acknowledged that digital private copying was likely to be more widespread and of greater economic impact than analogue private reproduction, Mr Mellor accepted that a restriction of section 72(1)(c) to analogue would have been of practical importance in relation to films in December 2002 (the time for compliance with the Copyright Directive by Member States). We were not referred to any evidence on the point, but there must be some doubt, therefore, whether even an implied limitation of section 72(1)(c) to analogue would have complied with the Copyright Directive.
60. Furthermore, it is perfectly clear that the Government at no stage brought its mind to bear upon the possibility of a restriction of section 72(1)(c) to analogue. It did not consult on it, and indeed no rational reason has been given for distinguishing between digital and analogue in the context of films or for distinguishing in that respect between films and other copyright works in section 72(1). I do not consider, in those circumstances and in the light of the clear and unambiguous opening words in section 72(1), that it is permissible to restrict section 72(1)(c) to analogue simply on the ground that the over-arching intention of the Government was to give effect to the Copyright Directive.
61. Mr Howe also advanced arguments that FAPL’s suggested conforming interpretation of section 72(1) would conflict with EU jurisprudential principles of legal certainty and retrospectivity. I am not immediately attracted by those arguments, but, since I am satisfied that FAPL’s suggested interpretation should be rejected for the reasons I have already given, there is no need to consider them here or to express any concluded view about them.
62. The result is that, in my judgment, the respondents have a defence under section 72(1)(c) but only because the UK has failed to implement the Copyright Directive by giving a wider exception to the Article 3 right than is permitted under Article 5.

Conclusion

63. For those reasons I would dismiss this appeal.

APPENDIX

Copyright Directive Recitals

- (23) This Directive should harmonise further the author's right of communication to the public. This right should be understood in a broad sense covering all communication to the public not present at the place where the communication originates. This right should cover any such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting. This right should not cover any other acts.
- (31) A fair balance of rights and interests between the different categories of rightholders, as well as between the different categories of rightholders and users of protected subject-matter must be safeguarded. The existing exceptions and limitations to the rights as set out by the Member States have to be reassessed in the light of the new electronic environment. Existing differences in the exceptions and limitations to certain restricted acts have direct negative

effects on the functioning of the internal market of copyright and related rights. Such differences could well become more pronounced in view of the further development of transborder exploitation of works and cross-border activities. In order to ensure the proper functioning of the internal market, such exceptions and limitations should be defined more harmoniously. The degree of their harmonisation should be based on their impact on the smooth functioning of the internal market.

- (32) This Directive provides for an exhaustive enumeration of exceptions and limitations to the reproduction right and the right of communication to the public. Some exceptions or limitations only apply to the reproduction right, where appropriate. This list takes due account of the different legal traditions in Member States, while, at the same time, aiming to ensure a functioning internal market. Member States should arrive at a coherent application of these exceptions and limitations, which will be assessed when reviewing implementing legislation in the future.
- (38) Member States should be allowed to provide for an exception or limitation to the reproduction right for certain types of reproduction of audio, visual and audiovisual material for private use, accompanied by fair compensation. This may include the introduction or continuation of remuneration schemes to compensate for the prejudice to rightholders. Although differences between those remuneration schemes affect the functioning of the internal market, those differences, with respect to analogue private reproduction, should not have a significant impact on the development of the information society. Digital private copying is likely to impact. Due account should therefore be taken of the differences between digital and analogue private copying and a distinction should be made in certain respects between them.
- (44) When applying the exceptions and limitations provided for in this Directive, they should be exercised in accordance with international obligations. Such exceptions and limitations may not be applied in a way which prejudices the legitimate interests of the rightholder or which conflicts with the normal exploitation of his work or other subject-matter. The provision of such exceptions or limitations by Member States should, in particular, duly reflect the increased economic impact that such exceptions or limitations may have in the context of the new electronic environment. Therefore, the scope of certain exceptions or limitations may have to be even more limited when it comes to certain new uses of copyright works and other subject-matter.

Lord Justice Munby

64. I agree.

Lord Justice Lewison

65. I also agree.