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LOGOS AND NO-GOS



A HOLLOW VICTORY?

The Court of Justice's decision in the *FA Premier League case*¹ has the potential to shake-up the European sports broadcasting market, though perhaps not as much as some might hope, or indeed as some others might fear

Few decisions issued by the Court of Justice of the European Union (CJEU) in recent years have attracted quite as much attention, both amongst lawyers and the average man (or at least the average sports fan) on the street, as last week's judgment.

In a landmark ruling, the CJEU held that:

- ◆ national legislation prohibiting the sale and use of foreign satellite TV decoders – such as those used and sold by the defendants in the present case – constitutes a restriction on the free movement of services within the EU which cannot be justified in light of the objective of protecting intellectual property rights;
- ◆ restrictions in a licence agreement that are aimed at partitioning the internal market along national lines, such as those which prevent broadcasters of Premier League football matches from supplying decoding devices to customers outside of their exclusive territories, constitute a prohibited restriction of competition under EU law; and
- ◆ notwithstanding that Premier League matches in themselves are not intellectual "works" covered by copyright protection, broadcasts of matches contain various elements (such as the music and graphics) in which copyright is capable of being asserted, such that the rights owner can legitimately restrict their communication to the public.

As this eBulletin explains, whilst this decision could have far-reaching consequences for the manner in which sports broadcasting rights are licensed within the EU in future, it is questionable whether – in the short-term at least – pub landlords and sports fans alike are likely to reap any great benefit.

BACKGROUND

The CJEU's ruling in this case can to an extent be seen as the latest development in an ongoing struggle between the Football Association Premier League (FAPL) and the elements of EU law aimed at ushering in fair and open competition within a single market for goods and services across all EU Member States.

This tension goes back at least as far as June 2001, when the European Commission launched its investigation into the collective selling of broadcasting rights by the FAPL on behalf of its constituent clubs.

The present judgment by the CJEU was made in response to a request for preliminary ruling by the English High Court in respect of four cases. The first three were brought by the FAPL and two Greek satellite broadcasters against a number of defendants involved in the unauthorised distribution of Greek satellite decoders and the subsequent screening in pubs of Premier League football matches using those decoders. The fourth case is an appeal made by Karen Murphy, a Portsmouth publican now widely hailed as the face of the joined proceedings, against a prosecution for copyright infringement received after she too used an imported Greek satellite decoder to screen Premier League games in her pub.

The questions asked by the High Court in respect of the cases are illustrative of the complex interaction between national, EU and international laws governing the regulation of satellite TV broadcasting, the protection of intellectual property rights, the free movement of services and the maintenance of fair and open competition within the internal market.

RESTRICTIONS ON THE IMPORTING AND USE OF FOREIGN SATELLITE TV DECODERS

The CJEU confirmed that the Greek satellite decoders used by Karen Murphy and other pub landlords, despite being authorised for use only within the territory of Greece, do not constitute "illicit devices" for the purposes of the Conditional Access Directive (the EU Directive which provides legal protection for certain services, including paid-for broadcasting services).

Illicit devices in this context include only equipment or software designed or adapted to gain unauthorised access to a protected broadcast, whereas the decoders in question had in fact been lawfully produced and released onto the Greek market, only to later be imported to England against the wishes of the Greek broadcaster (and the FAPL). As such, the import, sale or use of foreign decoders in the UK cannot legitimately be prohibited on the basis of the Conditional Access Directive. However, the

¹ Football Association Premier League and Others - Joined cases C-403/08 and C-429/08

CJEU also ruled that national legislation which prohibits the use of foreign decoders is not precluded by the Conditional Access Directive, since such legislation does not fall within the field coordinated by that directive.

Nonetheless, the CJEU then proceeded to rule that UK legislation which prohibits the import, sale and use of foreign decoding devices amounts to a restriction on the freedom to provide services within the EU, as enshrined in Article 56 of the Treaty on the Functioning of the European Union (TFEU). As a result, whilst the Conditional Access Directive does not preclude it, such national legislation constitutes an infringement of Article 56 TFEU to the extent that it cannot be objectively justified.

The CJEU held that such a restriction cannot be justified on the grounds of protection of intellectual property rights. This is partly because Premier League matches are not themselves protected “works” for the purposes of the EU Copyright Directive. Whilst the CJEU acknowledged that national legislation might be designed to confer intellectual property protection on sports events, it pointed out that any resulting restriction on freedom to provide services could not go beyond what was necessary to protect the intellectual property in question. The Copyright Directive was intended to ensure that rights holders are entitled to appropriate remuneration for each use of the protected subject matter. In the context of the internal market, a restriction that would allow rights holders such as the FAPL to demand the highest possible licensing fee for broadcasting rights in each national market, actually allows them to charge a premium that cannot be regarded as part of that appropriate remuneration. As a result, such legislation goes beyond what is necessary and cannot be justified by an objective of protecting intellectual property rights.

The CJEU also rejected the argument that the restriction could be justified in light of the objective of encouraging the public to attend football stadiums (the FAPL considers that allowing Premier League matches which kick off at 3pm on Saturdays to be broadcast in the UK will adversely affect attendances at the majority of lower league matches, which take place at the same time). It was held that this objective could in fact be achieved in a way which would have a lesser impact on the freedom to provide services, simply by prohibiting the broadcast, in all territories, of all matches within designated “closed periods.”

PARTITIONING OF BROADCASTING RIGHTS ON NATIONAL LINES

In perhaps the part of the judgment that is most likely to have a direct effect on the FAPL’s licensing strategy, the CJEU addressed the question of whether the licensing arrangements currently employed by the FAPL – whereby exclusive broadcasters are appointed in each national territory and are obliged not to supply decoding devices to customers outside their territory – constitute a restriction on competition in contravention of Article 101 TFEU.

The FAPL’s practice of granting exclusive licences to broadcasters in the various national territories was not at issue before the CJEU. However, it was held that the provisions in those licences which prohibit broadcasters from supplying decoders for use outside their allocated territories have the intentional effect of eliminating all competition in the provision of those services between broadcasters in different member states.

As such, the provisions in question amount to a partitioning of the internal market along national lines, whose object is to restrict competition within the meaning of Article 101 TFEU. The CJEU went further still in confirming that the provisions could not benefit from the exemption under Article 101(3) TFEU as – for the reasons discussed in respect of the protection of intellectual property rights – the restrictions go further than can be considered necessary.

USE OF BROADCASTS ONCE RECEIVED

When a satellite decoder picks up an encrypted broadcast, that broadcast is then reproduced, albeit transiently, both within the decoder’s internal circuitry and on the television screen to which the decoder is connected. The FAPL and the Greek broadcasters had sought to argue that, where decoders are used outside the territory in which their use is authorised, this reproduction occurs without their permission and therefore constitutes an infringement of the copyrighted elements (such as the music, graphics, and highlights footage) within that broadcast.

This argument was rejected by the CJEU as it was held that the processes in question comply with the conditions set out in Article 5(1) of the Copyright Directive, which enables such temporary reproduction to take place without violating the author’s copyright. In particular, it was held that the reception and viewing of the broadcast constitutes a “lawful use” for the purposes of the Article, even where it is carried out using a foreign decoder.

Nonetheless, the Copyright Directive also gives authors of copyrighted works the exclusive right to authorise or prohibit any communication to the public of their works by any means. The CJEU confirmed that making football matches available for customers to watch in a pub – as was done by Ms Murphy and certain of the defendants in the first three claims – constitutes a communication to the public which can therefore be prohibited by the authors of the copyrighted material, in this case the FAPL.

IMPLICATIONS OF THE DECISION

In light of the CJEU's judgment, UK viewers will now lawfully be able to purchase decoders from satellite broadcasters based abroad, with a view to watching Premier League football matches (in private) at a lower price than that currently offered by UK broadcasters. Quite how many people will take up this opportunity remains to be seen, as it is unlikely to prove cost effective when added to the other services which many customers opt to obtain from their telecommunications providers. Moreover, many of those football fans who are determined to watch games at a lower price than that currently charged by UK broadcasters will already have found ways to do so, either through the unauthorised importing of foreign decoders, or via the innumerable illicit streams available on the internet.

At present the decision changes little for pub owners, as the FAPL can still lawfully prohibit the communication to the public of the elements of match broadcasts in which they hold copyright. Since all foreign broadcasters currently obtain their live feeds from a central source controlled by the FAPL, it is not difficult for the latter to ensure that such elements are suitably embedded in the feeds sent out for transmission by foreign broadcasters. It remains to be seen how the High Court will address the issue, given that the protection afforded to ancillary elements within the broadcasts could enable the FAPL to restrict the screening of Premier League matches in a manner which seems at odds with the view taken by the CJEU in respect of the other issues addressed in its judgment.

As for the FAPL, and – by extension – other rights holders in premium content broadcast via satellite, the decision may affect their ability to extract the maximum possible fee for that content from broadcasters. If cross-border competition between satellite broadcasters takes off, it will be harder to justify the vast sums currently charged to broadcasters in return for territorial exclusivity. Whilst the FAPL can likely still legitimately prevent broadcasters from actively trying to sell their service to potential customers in other territories, one can expect there to be a proliferation in businesses such as the defendants in the first three proceedings, who will seek to profit through arbitrage from the difference in subscription prices in different territories.

All eyes will be on the FAPL when it re-auctions the Premier League rights next year (some suggest that it could offer a pan-European package to one or two broadcasters, to avoid having to come up with a suitable structure to accommodate the numerous national broadcasters), as well as the High Court when it decides on the four cases in light of the CJEU's judgment in a few months time.

In both instances, however, it seems unlikely that a certain landlady in Portsmouth will be offering drinks on the house.

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