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Keeping an Eye on the Ball: ECJ to Consider Broadcast Football Licensing Regime

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British pub landlords have long bemoaned the steep licence fees for Premiership football broadcasts charged by BSkyB. After a number of battles before Magistrates' Courts and the High Court in England, two major cases have now been referred to the European Court of Justice (ECJ) under the Article 234 EC procedure. The stakes for the FA Premier League and BSkyB are high and the response from Luxembourg may well spell the end of the business model currently operated by BSkyB and the FA Premier League to licence football broadcasts. Essentially, it is a clash between copyright and competition law, two uneasy bedfellows vis-à-vis the EU Single Market programme which proclaims free trade between the member states.[1]

Murphy v Media Protection Services[2]

The crusade of pub landlord Karen Murphy has been well documented.[3] BSkyB holds the exclusive licence to show live Premiership football matches in the UK. There is, of course, almost global interest in these matches, and their screening is also licensed by the FA Premier League to broadcasters in other countries, to other - usually much cheaper - licence fees. One such broadcaster is the Greek entity NOVA. Since the 'footprint' left by satellite broadcasts is larger than the territory of the respective nation state, broadcasts may be received in other countries if the respective decoders are used. These are available for purchase. Ms Murphy, rather than shelling out the licence fee asked for by BSkyB, opted to buy a Greek decoder to show the Greek broadcasts of live English football matches in her pub. The rights enforcement company of BSkyB, Media Protection Services (MPS) raised a legal action against the errant former customer arguing that her behaviour was in contravention of s.297 of the Copyright Designs and Patents Act 1988 (CDPA): "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 (...)".

Ms Murphy argued that she was not intent to avoid any charge, as she paid Nova's subscription fee and had purchased the decoder card. Also, the broadcasting service she received was supplied by a company based in Greece, not in the UK. Pumfrey LJ rejected both of these readings of s. 297.If it can be shown that Ms Murphy knew that BSkyB had an exclusive licence for the broadcasts in question, this would be sufficient to bring s.297 into the equation: "The fact that a charge is paid to a broadcaster who the Defendant knows does not have the right to broadcast in this country is not inconsistent with an intent to avoid the UK broadcaster's charge."[4] In addition, Pumfrey LJ opined that the programme content itself originated from football stadia in the UK. The fact that Greek commentary and the NOVA logo were added did not make this a programme originating in Greece.

Allgrove and Cox[5] question whether Parliament or indeed the European Commission intended such a wide interpretation of s.297 and the relevant provision of the Conditional Access Directive. The section of CDPA at issue was intended to provide a tool against illegal hacking of satellite broadcasts, aiming at illegal decoders, i.e. to prevent individuals to get illegal access to BSkyB broadcasts, for example. This view is supported both by Recital 13 of the Directive, and comments made by Westminster Parliamentarians. Recital 13 says that "it seems necessary to ensure that Member States provide appropriate legal protection against the placing on the market, for direct or indirect financial gain, of an illicit device which enables or facilitates without authority the circumvention of any technological measures designed to protect the remuneration of a legally provided service." Allgrove and Cox point to a recent comment made by James Purnell MP, the Minister for Culture, Media and Sport that "it is not illegal for a pub/publican to subscribe to a foreign satellite channel as opposed to BSkyB and, as the DTI have stated, nor is it illegal to import decoder cards from the European lJnion."[6] Naturally, this goes contrary to the finding of Pumfrey LJ.

These issues will now be dealt with by the ECJ under the preliminary reference procedure, which also includes a question on the applicability of Article BL EC, a point that is illustrated by the next case.

The FA Premier League Ltd v QC Leisure and others[7]

This action is similar to the scenario at issue in Murphy. The holders of the copyright in the Premier League matches sued QC Leisure, importers of foreign decoders like the one used by Ms Murphy, as well as several pub landlords. The claimant, seeking damages for infringement of their copyright, argued that the import and use of foreign decoder cards is in breach of anti-circumvention provisions found in ss. 298 and 299 CDPA. These sections give broadcasters the same rights and remedies to those a copyright owner has got against anyone who makes, imports, distributes, sells, offers or exposes for sale or advertises for sale any apparatus designed (or adapted) to enable persons to access programmes or transmissions when they are not entitled to do so. In providing unauthorised decoder cards, the respondents' conduct allowed others to copy the football matches which underpins the damages claim of the claimant.

The respondents rejected these claims and based their defence on Article 81 EC. This provision contains the well-known prohibition of 'all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between the member states and which as their object or effect the prevention, restriction or distortion of competition within the common market.' The respondents aim directly at the distribution agreements which prohibited broadcasters to supply foreign decoder cards in the UK, thereby carving up the market for football broadcasts in contravention of Article 81 EC. The FA Premier League failed in their attempt to strike out this defence as having no real prospect of success at trial. They offered in support their reading of the *Coditel* decisions handed down by the EC] in the early 1980s.[8] These cases revolved around Coditel's Belgian cable TV service. It picked up a movie broadcast made by a German company, and showed it to its Belgian subscribers. Cine-Vog, however, held an exclusive licence to show the film in Belgium and sued for copyright infringement. On appeal, a reference was made to the ECJ in respect of the applicability of Article 49 EC (free movement of services) and Article 81 EC. The ECI famously held that the act that a licence is of exclusive character, for a limited time, does not lead to an infringement of Article 81 EC. At the preliminary stage Mr Justice Barling held, though, that the claimants tried to stretch that principle too far by both granting exclusive licences and asking the licence holders to enforce the exclusive nature by strictly recruiting subscribers from within their respective territories only:

> "The scope of the judgment in [Coditel II] was narrow being restricted to 'the mere fact' of the grant to a licence of exclusive rights in a particular territory. The contractual provision with which we are concerned does not consist merely of a grant of such exclusive rights (...). The provision appears to impose certain obligations upon the foreign broadcaster, namely to undertake to 'procure' that non-UK decoder cards are not authorised or enabled by the licensee or any sub-licensee (...) to enable anyone to view the foreign broadcaster's transmission outside the latter's territory. In other words, foreign licensees are apparently required to prevent use of the decoder cards outside their licensed territory."[9]

In the subsequent full hearing Mr Justice Kitchen held that both copyright and competition law issues were of such fundamentally important nature that the case should be referred to the ECJ, as urged by both parties, stating in particular that "this case raises very serious questions which (...) are of the greatest importance to the European single market. "[10] Recognising that the FA Premier League see the respondents' conduct as a challenge "to the way in which sports (and indeed virtually all) broadcast rights are licensed in the EU", Kitchen J opined that this was the right step to take, rather than wait until the Court of Appeal reached the same conclusion:

> "The defendants say there are millions of expatriate workers in Member States who want to watch satellite television from their own country and that the claimants are seeking to bolster a system of barriers against the free circulation of decoder cards between Member States to the commercial advantage of programme providers and broadcasters who want to maintain price differentials between the markets in different Member States, to the serious detriment of consumers as regards both price and choice. Moreover, they continue, the whole trend of EC Directives in this field has been to try and create a single audiovisual area - a process which the claimants are trying to frustrate. These rival arguments raise serious policy issues and I believe it to be highly desirable they should authoritatively decided by the Court of Justice as soon as possible."[11]

And while a reference to the ECJ may mean uncertainty for all parties concerned, it may be shorter than allowing an appeal to the Court of Appeal which may then make use of the reference procedure.

A waiting game

After initial success against individual publicans, the FA Premier League, BSkyB and MPS are now finding themselves plunged into uncertainty regarding their legal footing as well as the viability of their business plan as

to how to exploit their broadcasts. The opinion of the Advocate-General is keenly awaited as is the final decision of the ECJ judges on the matter - both will take some time to materialise. It appears doubtful whether a policy which allows different pricing strategies in different territories, leaving licensees to police enforcement can survive this process unscathed.

Footnotes:

1. For background, see Geey, D. "The legality of football broadcasts in the UK and the lack of choice for publicans in the Premier League broadcasting market", (2007) *Entertainment and Sports Law Journal*, vol.5, No. 1 (Aug), http://go.warwick.ac.uk/eslj/issues/volume5/number1/geey/. There is also a lively and informative website dedicated to the subject matter: http://www.pubfootball.co.uk/law.php.
2. [2008] EWHC 1666 (Admin).
3. See, for example, Geey, D. note 1. Also, Allgrove, B. and Cox, A. "Last orders for cut-price foreign football" (2008) *Society of Computers & Law*, http:///www.scl.org/ ; Thornton, P. and Takase, K. "*Sky and the Premier League v. Pub Landlords*" (2008) Computer law & Security Report 181; O'Flynn, T. and Smith, P., "Protecting the value of sports broadcasting rights" (2008) Sports Law Administration & Practice, Vol. 15, No. 1 (Feb), 9.
4. At paragraph 42 of the judgment.
5. Allgrove and Cox, note 3.
6. Ibid., and Hansard, 31. January 2006.
7. [2008] EWHC 1411 (Ch).
8. Case 62/79 *Coditel SA v Cine-Vog Films SA* [1980] ECR 881 ('Coditel I) and Case 262/81 *Coditel SA v Cine-Vog Films SA* [1982] ECR 3381 ('Coditel II).
9. [20081 EWHC 44 (Ch) at para. 38.
10. [2008] EWHC 1411 (Ch) at para.371.
11. Ibid.