

COMMENT

An End to the Country-by-Country Selling of TV Rights within the European Union?

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Background

Watching Premier League football on a big screen at a local pub in the company of a few mates and a couple of pints of beer is a common weekend activity in the United Kingdom. But this relatively harmless pastime has been the subject of a recent English High Court decision which could have ramifications for the selling of TV rights to sport events throughout the EU.

In order to show English Premier League matches, pubs in the United Kingdom may have taken out a BSkyB subscription, enabling them to show Sky broadcasts. Alternatively, they may have purchased a foreign decoder box and decoder card enabling them to show a foreign broadcaster's programming of the same matches. The latter is generally a much more cost-efficient option. The case in question (*Football Association Premier League Ltd v QC Leisure*¹) relates to the use by pubs of this latter option. In essence the FA Premier League (FAPL) argues that this use of foreign decoder cards is unlawful, while their opponents, the publicans and the distributors of the foreign decoder cards, argue that their activities are perfectly legitimate, amounting as they do to parallel trade of genuine goods.

If the publicans succeed in their defence the impact on the sale of sports TV rights could be

wide-ranging. Currently it is fairly common practice for exclusive rights to broadcast live events to be divided on a territorial basis. The FAPL, for example, organises the filming of Premier League matches and licenses the rights to broadcast them on a territorial basis for specific periods of time. BSkyB is currently the exclusive licensee for live broadcasts of matches in the United Kingdom. The FAPL argues that exclusivity is necessary in order to realise the optimum commercial value of the rights since broadcasters are prepared to pay a premium in order to acquire exclusivity. It argues that the practice of licensing sports rights on a territorial basis is seriously threatened by those who deal in foreign decoder cards. By selling foreign decoder cards these traders are undermining the exclusivity granted to companies such as Sky and therefore are undermining the value of the rights licensed in any particular territory. It is argued that whoever sells the cheapest decoder cards has the potential to become the EU-wide broadcaster with the result that TV rights would have to be licensed on an EU-wide basis, resulting in a loss of revenue to the FAPL. Presumably other governing bodies who currently license their TV rights on a territorial basis within the EU would suffer the same fate.

As a result of the perceived threat to the value of its TV rights the FAPL brought test actions against importers and suppliers of decoder cards and boxes to pubs in the United Kingdom and against various pubs at which live Premier League matches were screened using decoder cards. The pubs in question had avoided considerable expense by purchasing decoder equipment from, among other countries, Greece.

It is important to understand how a foreign broadcaster's coverage is created. While filming matches, the FAPL produces a "World Feed" output which in addition to the recording of the relevant match itself contains various logos, video sequences, on-screen graphics, music (including the Premier League anthem) and English commentary. The World Feed is then encrypted and transmitted by satellite to the foreign broadcaster which decrypts the World Feed to add its own logo and possibly some commentary. The signal is subsequently encrypted again and transmitted by the foreign broadcaster to its subscribers. The subscriber's decoder box will decrypt the signal with the aid of a decoder card.

It is also important to note that the foreign broadcasters licensed by the FAPL agree not to authorise the viewing of any transmission outside the relevant territory for which they are licensed and not to supply decoder cards for use outside the relevant territory.

1. *Football Association Premier League Ltd v QC Leisure* [2008] EWHC 1411 (Ch).

Summary of the allegations and defence

The FAPL argued that the defendants' actions in using non-UK decoder cards and boxes to screen live Premier League matches contravened s.298 of the UK Copyright, Designs and Patents Act 1988 (CDPA). That section gives the holders of rights in broadcasts similar rights and remedies in respect of "illicit devices" designed to circumvent conditional access technology (e.g. pirated decoders) as copyright owners have in respect of infringement of their copyright. This legislation stems from an EC Directive known as the Conditional Access Directive (Directive 98/84).

For good measure the FAPL also argued that the defendants had infringed its copyright in various artistic and musical works (including the Premier League anthem), films and sound recordings comprised in the match coverage by creating copies of those works in the internal operation of the satellite decoder and by displaying the works on screen (contrary to s.17 CDPA); by playing, performing or showing the works in public (contrary to s.19 CDPA); and by communicating the works to the public (contrary to s.20 CDPA).

The defendants countered by claiming that the FAPL's case was wholly misconceived—this was not a case about pirate decoder cards since all the cards in question had been issued and placed on the market by the relevant satellite broadcaster. As far as the defendants were concerned this was a case about the cross-border trade in lawful decoder cards and the cross-border reception of broadcasting services within the single EU market. The defendants argued that what FAPL was in fact trying to do was to interfere with that cross-border reception in an effort to divide the single EU market into differentially priced zones and to restrict competition between FAPL licensees. They invoked EC rules on free movement of goods and services, EC competition laws and various EC directives.

Illicit devices and the Conditional Access Directive

One of the key elements of the case was whether the use of decoder cards by the defendants fell within the category of "illicit devices" as defined in the CDPA and the Conditional Access Directive.

The defendants argued that their use of decoder equipment in the United Kingdom (which had been legitimately purchased in another European Member State) was perfectly lawful and that the term "illicit device" was limited to pirate or counterfeit decoders. It did not extend to decoder equipment which had been lawfully

manufactured and then parallel imported into the United Kingdom.

Article 1 of the Conditional Access Directive states that its object is to approximate provisions in the Member States concerning measures against illicit devices which give unauthorised access to protected services (e.g. a television broadcast which is provided against remuneration and on the basis of conditional access). The definition of illicit device is set out in Art.2 of the Conditional Access Directive and reads: "any equipment or software designed or adapted to give access to a protected service in an intelligible form without the authorisation of the service provider".

The FAPL argued that this definition was broad enough to include decoder cards which are used to give access to a protected service without authorisation, even if the cards in question have been issued by the service provider. This would mean that a decoder card which was lawful could become an illicit device if it was used to access a protected service without authorisation (for example, if it was being used to access a protected service outside the territory in which it was intended to be used, as was the case with the Greek cards purchased by the defendant publicans).

In support of their position the FAPL argued that (1) the essential purpose of the Directive is to outlaw unauthorised access to protected broadcasts and protect the remuneration of the service provider; (2) the focus of the Directive is on the *effect* of illicit devices; (3) the Directive draws no distinction between pirate and non-pirate devices; (4) on a plain reading of the definition of an illicit device the devices used by the pubs are illicit: they are clearly devices (decoder cards) which (when used with an appropriate decoder box) are "designed to give access" to a protected service within the United Kingdom and it is clear that there is no authorisation from the service provider for such access in the United Kingdom; and (5) the remuneration of the service provider is undermined as much by parallel imports as it is by pirate devices.

The judge ruled that the meaning of the term "illicit device" was a question for the European Court of Justice (ECJ) to decide since it involved the interpretation of the Conditional Access Directive; however, the judge indicated that he preferred the defendants' arguments on this point.

The judge was persuaded in his views by, among other things, the wording of Recitals 13 and 15 of the Directive which suggested to him that the Directive is concerned with the production and placing on the market of devices which do not have their *origin* in a legitimate service provider rather than the unauthorised *use* of devices which do originate from a legitimate service provider. He disagreed with the assertion that the Directive is concerned only with the effect of the devices since if this

were the case there would have been no need to limit its scope to "illicit" devices. Rather, it would have been directed to all devices which are used to give unauthorised access. In other words if the critical issue was whether the use of the device had been authorised, Art.1 would merely have referred to *any* device which gives unauthorised access, rather than referring to any *illicit* device which gives unauthorised access. This view is reinforced by the wording of the definition of a "conditional access device" which refers to equipment "designed or adapted" to give access to a protected service. The judge concluded from this that it is the physical nature of the device which has to be looked at, not whether the use of the particular device has been authorised.

If the ECJ agrees with the judge's views on the Conditional Access Directive and the defendants therefore succeed on the "illicit device" issue, the only claim remaining to FAPL is the claim for copyright infringement.

The copyright infringement issues

General defence based on Satellite and Copyright Directive

As regards the allegations of copyright infringement, the defendants denied that they had contravened any provisions of the CDPA. They sought to rely as a general defence on an EC Directive known as the Satellite and Copyright Directive (Directive 93/83). That Directive in essence stipulates that communication of a broadcast to the public is deemed to take place in the country from which the broadcast is made. Therefore, the defendants argued, the relevant country in this case was Greece, being the country from which the relevant broadcasts were made, and all that was relevant was whether the act of transmission in Greece was authorised. They argued that they could not infringe UK copyright law merely by receiving the broadcast in the United Kingdom. Again the judge referred this issue to the ECJ, although his view was that the Directive did not provide a general defence.

Allegations of copying in the decoder or on TV screen

Turning to the particular allegations of infringement, the judge held that the copying of a film or broadcast in a decoder or on a TV screen did not amount to the copying of a substantial part of the relevant work since a few frames (which is all that is copied into a decoder at any one time) could not amount to a substantial part of the film or broadcast. Consequently this activity did not amount to

an infringement of the copyright in the film of the matches or the broadcast of that film.

However, as regards artistic works (such as the Premier League logos) which were reproduced in the decoder and on screen, there *was* copying of a substantial part which would amount to infringement unless the defendant could establish any defence. The defendants sought to rely on a defence relating to transient/incidental copying which had been introduced by Art.5(1) of Directive 2001/29 (the Copyright and Information Society Directive). In order to rely on this defence four elements must be satisfied: (a) the temporary copy must be transient or incidental; (b) it must be an integral and essential part of a technological process; (c) the sole purpose must be to enable either a transmission of the work in a network between third parties by an intermediary or a lawful use of the work; and (d) it must have no independent economic significance.

The first two elements of the transient copying defence were clearly met. As to the third element, whether the use was lawful would depend on the ECJ's views on the "illicit device" question. As to the final element, the judge explained that the exception is concerned with transient copies which have no value in themselves and which do not prejudice the right holder by interfering with the normal exploitation of the work in question. In the judge's view the transient copies made in the decoder appeared to have no independent value, save insofar as they participate in the flow of video and audio data comprised in the broadcast to the television screen. As regards the transient copies of artistic works created on the screen, the judge pointed to the extent to which the transient copies of those works (i.e. the Premier League logos) constituted only a small part of the programming and queried whether it was reasonable for FAPL to seek to extract further fees in relation to the use of these logos in addition to those already paid. Whether this defence did indeed apply was again referred by the judge to the ECJ, although on this point the judge indicated that he believed the defendants had a valid defence.

If the judge is correct in his interpretation of the transient/incidental copying defence, the FAPL's claim under s.17 CDPA relating to copying in the decoder and on the TV screen will fail.

Infringement by performing, playing or showing in public

As regards the allegation that the defendants had infringed copyright by performing, playing or showing the broadcast in public contrary to s.19 CDPA (which relates to certain sound recordings, films and broadcasts), the judge noted that there was a general defence to infringement in respect of the

free showing of the broadcasts under s.72 CDPA. While this defence clearly applied to infringement of copyright in the broadcast and in the film works comprised in the broadcast, owing to the particular wording of s.72 his view was that the playing of the Premier League anthem during the broadcast would infringe the musical copyright in that anthem.

From the point of view of the publican, it is possible that a solution to this particular issue could be for the publican to mute the sound on his TV whenever the anthem is played, although how practical this would be remains to be seen, especially if the anthem were to be played in the background on a random basis during each broadcast of live match footage.

Infringement by communication to the public

The FAPL argued that the re-broadcasting of the live matches from the pub's satellite dish to the public bar area amounts to a communication of that broadcast to the public and that by displaying the visual works on the pub's TV screens and playing audio works through the TV speakers those works are also being communicated to the public contrary to the exclusive rights granted by Art.3 of the Copyright and Information Society Directive (implemented in the United Kingdom by s.20 CDPA).

The defendants acknowledge that there is a communication to the public involved in a satellite broadcast, but argue that that act is deemed, by virtue of the Satellite and Copyright Directive, to take place solely in the Member State of transmission—hence there could be no infringement of copyright by reception and display in the United Kingdom. Again the judge decided to refer this question to the ECJ although his provisional view was that there had been no communication to the public within the meaning of Art.3 since there had been no retransmission by the publicans whether by wire or otherwise. All that they had done was to receive the signal, decode it and display it on a TV which did not in his view fall within the meaning of the act of communication to the public, which required some re-transmission.

Articles 28–30 EC Treaty (free movement of goods) and Article 49 EC Treaty (freedom to provide services)

The defendants sought to argue as a general defence that the FAPL was seeking relief which would amount to a quantitative restriction on trade between Member States or a measure having

equivalent effect within Art.28 EC or which would amount to a restriction on the freedom of foreign broadcasters to provide services and the freedom of customers to receive those services contrary to Art.49 EC. This was on the basis that the Court of Justice has consistently ruled that under Arts 28–30 the owner of an IP right is not permitted to interfere with the free circulation from state to state of goods which have been placed with his consent on the market anywhere within the single market. Again the judge decided that this was a question which should be referred to the ECJ.

Article 81 EC Treaty

The restriction on the circulation of authorised decoder cards (outside the particular territory licensed to foreign broadcasters) was according to the defendants contrary to EC competition law and therefore void. The defendants sought to argue that it was enough for them to show that the object of the restriction was to restrict or distort competition and that there was a danger that trade between Member States would be appreciably affected. The FAPL on the other hand argued that in order for the defendants to succeed they had to do more than just plead that there was a danger of trade being appreciably affected. The judge referred this point to the ECJ, suggesting that the court should indicate what legal test should be applied by the national court and the areas it should take into account in deciding whether the export restriction engages Art.81.

Conclusion

The ECJ's decision, which will be eagerly anticipated by the protagonists and onlookers alike, has the potential to affect dramatically the manner in which sports bodies exploit their TV rights. If the defendants succeed it is highly possible that the number of pubs using foreign decoder cards to show Premier League matches in the United Kingdom will increase. Recent press reports indicate that the rising cost of Sky satellite subscriptions has prompted 20 per cent of pubs to abandon screening Sky Sports over the past five years. Those very same pubs may see the chance to show foreign transmissions using cheaper foreign decoder cards as a viable alternative, even if they do have to mute the sound during any playing of the Premier League anthem. Will broadcasters such as Sky be prepared to pay the same price as currently paid for the FAPL TV rights where those rights are not as exclusive as they thought? And will sports bodies such as the FAPL

find themselves forced into the selling of TV rights to one broadcaster across the whole of the EU?

The loss of revenue which the FAPL anticipates if the defendants succeed would not affect just those clubs who play in the English Premier League. The FAPL points out that TV revenues provide financial support for grass roots football and the numerous football-related projects supported by FAPL. As an example, FAPL agreed to provide the Football League with a solidarity package estimated to be worth potentially in excess of £90 million over

the 2007–2010 seasons which is targeted towards youth development, community grassroots projects, redistribution to lower league clubs and payments to clubs relegated from the Premier League. The FAPL states that its ability to make these levels of payment is a direct result of its ability to maximise the value of its broadcast rights. The stakes are therefore high and the impact of the ECJ's decision has the potential to send shockwaves through the sports industry.