

It isn't all over: the full impact of the recent FA Premier League case is not yet clear...

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Copyright in Live Broadcast: *Football Association Premier League v QC Leisure and Karen Murphy v Media Protection Service Ltd*

The Court of Justice of the European Union (CJEU) has recently given its much anticipated ruling in the joined cases of *Football Association Premier League v QC Leisure and Karen Murphy v Media Protection Services Limited*, referred to it by the High Court of England and Wales. The ruling relates to a number of aspects of IP rights, as well as the interplay between IP rights, freedom to provide services and competition law.

Factual matrix

The Football Association Premier League Ltd (FAPL) owns copyright in the live transmission by satellite of football matches and grants exclusive territorial broadcast licences for the matches, which gives licensees the right to exploit them financially.

The principal licensees in the UK are BSkyB and ESPN; NetMed Hellas, a Greek satellite broadcaster, holds a licence too.

Licensees are required to prevent their broadcasts from being viewed outside the exclusive territory through encryption and restrictions on the

sale and use of decoders outside their territory. This is because the rights are not of equal value: BSkyB and ESPN, for instance, charge their subscribers considerably more than their European counterparts. In the UK, this restriction is underpinned by the provisions of the Copyright Designs and Patents Act 1988 (CDPA), which create criminal sanctions for use of decoder equipment to access broadcast signals without paying the appropriate fee.

Aided by intermediaries, some English pubs acquired Greek decoder cards and used them to show Premier League matches in the UK at a significantly lower cost than if they had paid BSkyB or ESPN.

The holder of broadcast rights in the UK claimed copyright over the telecast. It argued that the terms of the licence agreement prohibited satellite service providers from selling decoders outside their exclusive territory.

Main findings

The CJEU said that the sale and use of Greek decoding devices cannot be prohibited on the basis of the Conditional Access Directive (CAD). A foreign decoder will not be treated as an “illicit” device for the purposes of the CAD where it has been manufactured and marketed with the authorisation of the service provider, even if false information has been used to obtain it.

On the issue of the nature of IP rights in the broadcast, the Court held that the broadcasting of live matches from the country of origin – in this case, Greece – is an act of exploitation subject to IP rights and, according to the Satellite Broadcasting Directive, the authorisation for the broadcast by satellite must be granted for the country of origin. As NetMed Hellas had such an authorisation, the broadcast was lawful.

However, the CJEU ruled that the satellite broadcast in other countries that originates from Greece is not subject to IP rights. Even though EU law does not preclude a Member State from conferring protection on sporting events by virtue of protection of IP, Premier League matches are not eligible for protection under EU law. They cannot be classified as works within the meaning of the EU Copyright Directive, as they are not an intellectual creation of an author.

Despite the fact that the reproduction of the satellite decoder signal amounts to an act of reproduction within the meaning of Article 2 of the Copyright Directive, a defence to the reproduction right in Article 5(1) of that Directive applies. The act of reproduction—in addition to being temporary, transient or incidental, an integral part of a technological process, and a lawful use of a work—has no independent economic significance because it is incapable of generating an additional economic advantage beyond that derived from the reception of the broadcast. It is sufficient that the broadcast from Greece is authorised – no further authorisation for private reception is required.

While sporting events themselves cannot be protected under EU copyright law, copyright can exist in the opening and closing video sequence, the Premier League Anthem and logo, and pre-selected match highlights. Therefore, the act of broadcasting using a foreign decoder would amount to the communication to the public and therefore is an infringement.

The Court held that the broadcasting of the live matches in a pub constitutes an act of “communication to the public” under Article 3(1) of the Copyright Directive, and requires authorisation by FAPL.

The Court also found that provisions of the exclusive territorial licences and the provisions of the CDPA impose restrictions inconsistent with one of the fundamental principles of the functioning of the EU – the

freedom to provide services and the free movement of those services. Those restrictions cannot be justified on the basis of protecting any interest FAPL may have in the IP content of the broadcast. Any legitimate interest FAPL may have in such a content – including receiving appropriate remuneration – does not extend to charging a premium for absolute territorial exclusivity of exploitation of live football matches.

Implications

Even though the Court's conclusion that no authorisation is required for the broadcast that originates in one country in other countries can be viewed as an expansion of the exhaustion doctrine, whereby the first unrestricted sale of a patented item exhausts the patentee's control over that item, the CJEU carefully avoided the issue of exhaustion of rights as it would have very serious consequences for the broadcasting business.

In the European context, the ruling does not affect the ability of sports rights holders such as FAPL to grant exclusive licenses for the transmission of live football matches under EU law. However, it considerably limits the ability of such rights holder to invoke national legislation or contractual clauses concerning territorial limitations, which prevent the importation of the decoder equipment required to view the satellite transmissions. Nonetheless, rights holders will be able to prevent unauthorised use of the part of the broadcast content which is subject to copyright.

However, it is potentially open to right holders to sustain a degree of protection through limiting the licensees' broadcasting rights to a certain language version, as well as applying territorial limitation clauses to prevent active sales of decoders, as opposed to absolute restrictions which also cover passive sales.

In addition, the judgement may be applicable to the broadcast by satellite of all copyright works. Further, it may be relevant not only to the use of decoders, but to all restrictions designed to grant absolute territorial protection.

The scope of the judgement is, to some extent, limited due to the fact that it relies on the specifics of the Satellite Broadcasting Directive and the country of origin principle integral to it – both in terms of its relevance to other broadcasting modes where the country of origin doctrine principle is not at play (e.g. online broadcasting), and applicability outside the EU. Nonetheless, New Zealand courts are likely to take the judgement into consideration when deciding similar cases.

The full impact of the ruling will become clear when the High Court gives its judgment, applying the CJEU decision to the facts of the case.

Written with assistance from Anna Parfjonova.