

Premier League football: showings of foreign broadcasts in UK pubs. The High Court decides.

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On 3 February 2012, the English High Court (Kitchin LJ) handed down its judgment in the case of Football Association Premier League Ltd and Others v QC Leisure and Others [2012] EWHC 108 (Ch). No doubt this will be swiftly followed by a parallel decision in the criminal proceedings against the Southsea pub landlady, Mrs Murphy. The court's decision follows on from the rulings made by the European Court of Justice (CJEU) in October last year on questions which the High Court had referred to it for determination (see Reed Smith's alert on the CJEU judgment [here](#)).

The High Court has declared, in line with the CJEU judgment, that licence conditions requiring broadcasters not to sell decoders outside their licensed territory constitute a restriction on competition prohibited by Article 101 of the Treaty on the Functioning of the European Union (TFEU). However, departing from expectations raised by the CJEU judgment, the High Court has also found that showing a broadcast which includes filmed elements such as highlights of previous matches to members of the public in a public place who have not paid for admission to that place does not infringe the copyright in those works.

The High Court's bolstering of the CJEU finding that licence conditions designed to provide absolute territorial exclusivity in broadcasts of Premier League matches have an anti-competitive purpose contrary to Article 101 TFEU will reinforce concerns among owners of other valuable media properties traditionally licensed territorially in Europe – and their exclusive licensees – about the implications of the decision for their businesses. Film and television distributors, and the broadcasters who are their customers, have been given no comfort by the High Court.

The High Court's decision on whether there was any copyright infringement is altogether more nuanced. The CJEU had found that whilst a Premier League football match itself is not protected by copyright, there was copyright protection for some elements included in the Premier League's feed of the matches to its licensee broadcasters, such as the opening video sequence, the Premier League anthem, and pre-recorded highlights of previous matches. The CJEU held also that the transmission of these copyright works to a pub audience constitutes a "communication to the public", which requires authorisation from the rights holder. The CJEU decision therefore appeared to leave the publican defendants with a pyrrhic victory since, although they could not be prevented from obtaining and using foreign decoder cards to show Premier League matches, they would seemingly be in breach of copyright if they did so.

The High Court has however come to their rescue, at least to some extent. It has found that, although the airing of FAPL matches in pubs does involve communication of copyright works to the public, there is a valid exception under section 72(1)(c) of the Copyright, Designs and Patents Act 1988 on which the publicans can rely:

"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 ... (c) any film included in it".

The pre-recorded highlights and video sequences included in the broadcasts of Premier League matches fall within the definition of a film.

The High Court found that, although there is no equivalent provision to section 72 in the EU Copyright Directive, Parliament clearly intended to allow certain types of copyright works included in broadcasts to be viewed in public places such as pubs without the need to obtain the consent of the copyright owner. In support of this position the High Court relied on the clear and unambiguous wording used in section 72(1)(c) as well as Hansard debates on the section.

The High Court recognized that whilst the Copyright Directive does not explicitly permit a defence in the terms of section.72(1)(c), this did not mean that the High Court must artificially construe the section to be in line with the Copyright Directive. Given the unambiguous nature of the section and the clear intention of Parliament there was a limit to how far the Court could imply additional meaning or adopt an unnatural interpretation.

Following the High Court's decision, publicans wishing to use foreign decoders to show Premier League matches in their pubs may think they can do so without infringing the Premier League's copyrights. They will need to take extreme care. The exception in section 72(1)(c) applies only to films included in the broadcasts. It doesn't apply to music, to literary or artistic works or to the sound recording of the Premier League Anthem. The publicans in the case avoided having an injunction granted against them by offering to turn off the sound. How many publicans will remember to do that? Will the Premier League find ways of including literary and artistic works in the coverage so as to make it practically impossible for publicans to avoid infringement?

It seems very unlikely indeed that the Premier League will admit defeat in its long-running battle to limit the televising of Saturday afternoon matches and to protect an important revenue stream.

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