

Levelling the playing field

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The European Court of Justice (ECJ) today gave its judgment in cases brought by the FA Premier League (FAPL) and its licensing partners against the sellers and users of satellite TV decoder cards shipped from Greece to the UK and used in British pubs to screen live Premier League games.

The ECJ, in a sweeping judgment, ruled that the FAPL could not prevent UK users from buying decoder cards in other European countries, and held that contract terms which the FAPL had with all its European broadcasters, and which tightly enforced territoriality, were unlawful and unenforceable.

The cards in the case had been bought in Greece legitimately and using fake addresses from the Greek satellite provider, Nova. Nova were under contract with FAPL to ensure that they broadcast only to Nova subscribers and not to sell their decoder cards outside Greece. Needless to say, as the Nova subscription cost a lot less than the UK satellite provider, enterprising middlemen shipped the cards to the UK and sold them to UK pubs who could show matches to their patrons (and presumably mute the Greek language commentary). FAPL sued the middlemen and criminal proceedings were started against licensees of some of the pubs using the cards. As UK law is mainly derived from EU directives, the UK court referred a number of questions to the ECJ.

The ECJ looked at a number of issues:

- It ruled that the laws against encryption bypass technology could not be used to prevent use of authorised cards from one EU country in another.
- The use of contract and IP laws by FAPL to carve up the European market into national markets was not justified by any motive other than maximising revenue and that motive did not satisfy the test for the exception to the general rule that people must be free to provide and receive services across EU borders.
- The ECJ accepted this would apply even though false Greek addresses had been given to purchase the decoder cards.
- FAPL's contracts which prohibited broadcasters from allowing export of the cards (and so the broadcast services) from Greece were a prima facie breach of the rules on anti-competitive agreements, and as FAPL had no economic justification for this, they were unlawful.

- Simple receipt on a decoder box and TV while watching a broadcast would not infringe copyright and so cannot be prevented where the recipient has a valid decoder card.
- However, the ECJ went on to say that airing a broadcast in a pub was a separate “communication to the public” and so required a specific licence for this purpose.

Although its primary impact will be on the broadcasters of sports events, who will now have to deal with the fact that they will no longer be able to shield local markets from broadcast competitors from other EU countries, this does have wider implications for the media and sports industries.

However, it balanced the judgment by making it clear that airing a TV broadcast in a pub did amount to a separate infringement of the broadcaster’s rights; the effect is that venues and pubs which want to show TV broadcasts must make sure they have a commercial premises licence from a broadcaster (even if the licence is from a broadcaster in a different EU country).

The key decision is that the rules on broadcasts and download services – which would include content – are subject to the same rules of free movement as goods are. There is no “special case”; the ECJ expressly rejected arguments that FAPL were entitled to maximise revenue through absolute territorial exclusivity restrictions.

Territorial restrictions on content resellers or aggregators will therefore be difficult to enforce, and should be avoided. An example is e-books, where an author who gives English language rights to different publishers in different European countries; just as copyright cannot be used to prevent physical books crossing borders regardless of the licence territory, now resellers cannot be restricted from marketing and selling e-books outside agreed territories within Europe.

Restrictions which wrongly partition the EU market are not only unenforceable, they can result in competition law penalties for the parties who enter into them.

Media companies should check their electronic content distribution and reseller agreements and consider reviewing their arrangements to ensure that revenue generation is not undermined by this new landscape.

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