

Murphy – 2, Football Association Premier League – 2

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On 4 October 2011 the Court of Justice (the "CoJ") handed down its much awaited judgment on questions referred to it from the English High Court. The questions related to two joined cases, including Ms. Murphy's well publicised challenge to UK national laws that prohibit her from using a foreign TV decoder card to show Premiership football matches in her pub.

Background

The Football Association Premier League (FAPL) grants broadcasting licences for the live transmission of Premier League games. These licences are granted on a territorial basis for three year terms, and oblige broadcasters to prevent the public from receiving the broadcasts outside the territory covered by the licence. Broadcasters must therefore ensure that the broadcasts are securely encrypted and that decoding devices are not supplied to persons who intend to use the device outside the licensed territory.

The High Court considered two cases relating to the supply and use of foreign decoder cards in the UK. One concerned an action brought by FAPL against suppliers of decoders to pubs in the UK and against four pubs that used non-UK decoders to show live Premier League matches included in the channels of Greek and North African broadcasters. The second case concerned an appeal by Ms Karen Murphy against a criminal conviction brought against her under Section 297(1) Copyright Designs and Patents Act 1988¹ for showing Premier League matches in a pub using a Greek decoder card.

The CoJ's Decision

The key points of the CoJ's judgment are:

- provisions absolutely protecting territorial exclusivity in the FAPL licences (by requiring licensees not to sell decoders outside the licensed territory) were held to have an anti-competitive purpose contrary to Article 101 of the Treaty on the Functioning of the European Union (TFEU)² because they "are aimed at partitioning national markets according to national borders" and "make the interpenetration of national markets more difficult". This restriction on competition could not be exempted under Article 101(3)³ because it went further than what was required to provide reasonable remuneration for the licensee (a premium for absolute territorial protection was unjustified), and because the other reason pleaded in justification - safeguarding physical attendance at matches on Saturday afternoons could be achieved simply by preventing licensees from broadcasting those matches live.
- UK national laws supporting such restrictions are also unlawful as they are contrary to the fundamental freedom to provide services within the European Union under Article 56 TFEU⁴, and cannot be justified for the same reasons as outlined in relation to Article 101.

- decoding devices purchased in breach of contractual territorial restrictions are not "illicit devices" under the Conditional Access Directive, even where a false name and address have been given, because they are not "designed or adapted" to give access without consent of the rights holder under Article 2 of the Conditional Access Directive 98/48/EC⁵.
- the live transmission of a premier league football match itself is not protected by copyright, but the opening video sequence, Premier League anthem, and pre-recorded highlights of previous matches are protected by copyright; and that
- the reproduction within the decoder memory or on a TV screen does constitute "reproduction" under Article 5 of the Copyright Directive 2001/29/EC⁶, but no authorisation from the copyright holder is needed because this reproduction is: (i) temporary; (ii) transient or incidental; (iii) an integral and essential part of a technological process; (iv) has the sole purpose of enabling network transmission or lawful use; and (v) has no independent economic significance.
However, the CoJ also found that:
- the transmission of the copyright works to the pub audience constitutes a "communication to the public", which requires separate authorisation from the rights holder, FAPL under Article 3(1) of the Copyright Directive⁷.

Pyrrhic Victory?

The decision is somewhat of a pyrrhic victory for Ms Murphy, and the other publicans and decoder traders. Although purchasers of decoder cards cannot now be prosecuted under national laws, and may use them to watch FAPL games in private, the broadcasts cannot be shown to public audiences outside the licensed territory without first either: (a) separating the copyright elements, such as the opening video sequence, and Premier League anthem, from the broadcast; or (b) obtaining authorisation from FAPL. In practice, it may be difficult to separate the copyrighted works from the non-copyrighted live video footage of a Premier League game.

Where Next?

Whilst the judgment includes very strong pronouncements regarding the illegality of absolute territorial protection in licences of intellectual property rights, it nevertheless upholds the right of a licensor to withhold consent for the use of material outside a licensed territory in so far as that material is protected by copyright. As the case now returns to the English High Court, and is almost inevitably going to be appealed, it will be interesting to see how the English courts deal with the tension between the two seemingly opposing aspects of the CoJ's judgment.

So far as the European Commission is concerned, both previous cases regarding Apple/iTunes and the functioning of the performing rights societies⁸ and the Online Commerce Roundtable's report⁹, which highlighted territorial segmentation as a particular barrier to online retailing, indicate dissatisfaction of the Commission with partitioning of the internal market by holders of copyright. Although the CoJ's ruling in the Murphy case clearly upholds the rights of the copyright owner to withhold consent to reproduction and communication to the public of copyright works, it will be interesting to see how the Commission interprets the CoJ's findings on territorial exclusivity in relation to copyright going forward. At least for now, however, the copyright holder's rights remain secure.

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1. Section 297(1) Copyright, Designs and Patents Act 1988 makes it an offence to fraudulently receive programmes.
 2. Article 101(1) TFEU prohibits agreements that have as their object or effect the prevention, restriction or distortion of competition within the internal market.
 3. Article 101(3) TFEU exempts the prohibition of agreements under Article 101(1) if the agreement contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the benefit, so long as the agreement's restrictive provisions do not go beyond what is necessary and do not give the possibility of eliminating competition in respect of a substantial part of the products.

4. Article 56 TFEU prohibits restrictions on the freedom to provide services within the European Union.
5. Article 2 Copyright Directive gives authors the exclusive right to authorise or prohibit the reproduction of their works.
6. Article 5(1) Copyright Directive provides an exemption that removes the requirement of authorisation for the reproduction of a work.
7. Article 3(1) Copyright Directive gives authors the exclusive right to authorise or prohibit any communication to the public of their works.
8. Case 39154 - iTunes - ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39154
9. ec.europa.eu/competition/consultations/2009_online_commerce/roundtable_report_en.pdf

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