

A horizontal collage of images related to law and justice, including a scale of justice, a judge's gavel, and a computer keyboard. The text "JONES DAY COMMENTARY" is overlaid on the collage in white, bold, sans-serif font.

JONES DAY
COMMENTARY

PUB LANDLADY OBTAINS LANDMARK RULING OF ECJ OVER RIGHT TO USE FOREIGN DECODER TO SHOW FOOTBALL MATCHES

In its judgment delivered on October 4, 2011, the ECJ declared that the English Premier League's business model—whereby the rights to broadcast Premier League matches are sold to different companies on a country-by-country basis—is in contradiction to the principle of the single European market. The Court stated that national legislation that prohibits the import, sale, or use of foreign decoder cards is contrary to the freedom to provide services and can be justified neither in light of the objective of protecting intellectual property rights nor by the objective of encouraging the public to attend football stadiums.

BACKGROUND

The Football Association Premier League Ltd. ("FAPL") runs the Premier League, the leading professional football league competition in England. The FAPL

also markets the television broadcasting rights and grants its licensees (at present, BSkyB and ESPN) the exclusive right to broadcast and exploit Premier League matches economically within their respective broadcasting areas. In order to safeguard this exclusivity, licensees must prevent their broadcasts from being available for viewing outside their respective broadcasting areas.

To protect the territorial exclusivity of all broadcasters, each licensee must encrypt its satellite signal and transmit it in encrypted form to subscribers within its assigned territory. Subscribers can decrypt the signal using a decoder, which requires a decoder card. The exclusivity agreement also imposes restrictions on the circulation of authorized decoder cards outside the territory of each licensee.

FACTS

Karen Murphy, the landlady of the Red, White and Blue pub in Portsmouth, England, was not willing to pay more than £ 8,000 a year to BSkyB for a commercial license to screen Premier League matches in her pub. Therefore, she opted for a cheaper means of showing Premier League football at a cost of £ 800 per year by taking out a subscription, complete with decoder box and viewing card, with Greek satellite broadcaster NOVA.

In January 2007, Ms. Murphy was convicted of fraudulent reception of transmissions under Section 297(1) of the British Copyright, Designs and Patents Act, as she had allegedly dishonestly received “a programme included in a broadcasting service provided from a place in the United Kingdom with intent to avoid payment of any charge applicable to the reception of the programme.”

Ms. Murphy appealed to the High Court of Justice, which decided to stay proceedings for a preliminary ruling of the ECJ (C-429/08). The ECJ was also requested by the High Court of Justice of England and Wales, Queen’s Bench Division to issue a preliminary ruling on the action brought by the FAPL against companies importing such decoder cards from Greece and certain Middle Eastern countries into the United Kingdom, where they were offered to pubs at more favorable prices than those available from the licensed broadcaster (C-403/08).

ECJ’S KEY FINDINGS

The ECJ judgment addressed 18 specific questions referred by the UK Court and answered them in terms of how European Law applies.

“Illicit Device” and Conditional Access Directive. Firstly, the Court stated that decoder cards purchased in Greece and imported into the UK are not prohibited as “illicit devices” within the meaning of the Conditional Access Directive (Directive 98/84).

Under Article 2(e) of this Directive, an “illicit device” is said to mean any equipment or software designed or adapted

to give access to a protected service in an intelligible form without the authorization of the service provider.

The ECJ held (para 66) that “illicit device” must be interpreted as not covering foreign decoding devices, foreign decoding devices procured or enabled by the provision of a false name and address, or foreign decoding devices that have been used in breach of a contractual limitation permitting their use only for private purposes. Furthermore, the ECJ observed that all such devices are manufactured and placed on the market with the authorization of the service provider and do not allow access free of charge to protected services or facilitate the circumvention of technological measures designed to protect the remuneration of those services, since remuneration has been paid in the Member State where they have been placed on the market (in this case, Greece).

Consequently, the ECJ held that neither the activities in question that resulted in the use of foreign decoder devices, nor national legislation prohibiting those devices, fall within the scope of the Conditional Access Directive.

Free Movement of Services. The ECJ went on to examine questions in relation to the freedom to provide services (Article 56 of the Treaty on the Functioning of the European Union (“TFEU”)), as the decoder cards are merely a means of obtaining access to a broadcasting service (para 76ff.).

UK legislation prevents the use of foreign decoding devices and therefore prevents people resident in the UK from accessing satellite broadcasting services transmitted from another Member State.

While the ultimate source of the restriction lies in the contractual provisions that preclude the supply of Greek decoder cards for use in the UK, the ECJ nevertheless found that it is the national legislation that is restrictive here, as it gives further effect to such contractual provisions.

Restriction on the freedom to provide services is prohibited by Article 56 TFEU unless objectively justified, and the ECJ rejected the justifications submitted in this case (para 93—125).

The Court observed that FAPL cannot claim copyright in the Premier League matches themselves, as those sporting events cannot be considered to be the author's own intellectual property creation and, therefore, to be "works" for the purposes of copyright in the European Union (para 98, 99). Copyright protection is available only for works contained in the broadcasts, in particular, the opening video sequence, the Premier League anthem, pre-recorded films showing highlights of recent Premier League matches, or various graphics (para 149).

Discussing the legitimacy of selling exclusive national rights at a premium, the ECJ stated that (para 115):

such a premium is paid to the right holders concerned in order to guarantee absolute territorial exclusivity which is such as to result in artificial price differences between the partitioned national markets. Such partitioning and such an artificial price difference to which it gives rise are irreconcilable with the fundamental aim of the Treaty, which is completion of the internal market.

The ECJ concluded that national legislation making it unlawful to import, sell, and use foreign decoding devices that give access to encrypted satellite broadcasting services from another Member State is contrary to EU law.

Competition Law. Moreover, the ECJ did not only rule that UK legislation protecting the Premier League's revenue is contrary to internal market rules. It also held that the Premier League's contracts with foreign licensees such as NOVA breach European Union competition law, specifically Article 101 TFEU, since it constitutes an agreement whose object is the prevention, restriction, or distortion of competition (para. 139):

an agreement which might tend to restore the divisions between national markets is liable to frustrate the Treaty's objective of achieving the integration of those markets through the establishment of a single market. Thus, agreements which are aimed at partitioning national markets according to national borders or make the interpenetration of national markets more difficult must

be regarded, in principle, as agreements whose object is to restrict competition within the meaning of Article 101(1) TFEU.

The ECJ did not condemn the exclusive licenses granted by the FAPL as such (para 141), but only what it regarded as the additional obligations on broadcasters not to supply decoding devices with a view to their use outside the territory covered by the license agreement. This was on the grounds that these provisions "prohibit broadcasters from effecting any cross-border provision of services," "granted absolute territorial exclusivity," and eliminated "all competition between broadcasters."

Furthermore, the Court found (para 145) that the exception provided for in Article 101(3) TFEU would not apply here, for the same reasons as given for the rejection of the justifications put forward in response to the free movement arguments.

The ECJ therefore concluded that, although exclusive licenses may be granted in conformity with Article 101 TFEU, the ancillary prohibition on broadcasters supplying decoding devices with a view to their use outside the territory (designed to protect the system of exclusive licenses) is prohibited by Article 101 TFEU.

Copyright. As regards copyright, the Court (para 147) raised the question of whether the reception of broadcasts containing Premier League matches and associated works, and their display on television screens, is subject to restriction implied by the Copyright Directive (Directive 2001/29) by reason of (1) the fact that it results in reproductions of those works in the memory buffer of a satellite decoder and on a television screen; or (2) the showing of those works to the public by the proprietors of pubs.

As mentioned earlier, the ECJ noted (para 149) that there was no copyright in the live footage of the matches themselves but that the FAPL can assert copyright in various works contained in the broadcasts, in particular the Premier League anthem and pre-recorded films showing highlights of recent Premier League matches.

“Reproduction.” According to Article 2(a) of the Copyright Directive, Member States must provide for the exclusive right of authors to authorize or prohibit direct or indirect, temporary or permanent reproduction of their works by any means and in any forms. The ECJ held (para 159) that “reproduction” extends to transient fragments of works within the memory of a satellite decoder and on a television screen, provided that those fragments contain elements that are the expression of the authors’ own intellectual creation.

However, referring to the exemption under Article 5(1) of the Copyright Directive, the Court pointed out that acts of reproduction within the memory of a satellite decoder and on a television screen fall within the scope of this provision since temporary acts of reproduction are not economically significant (para 177). Therefore, temporary acts of reproduction may be carried out without the copyright holder’s authorization.

“Communication to the Public.” Finally, the Court answered the question of whether “communication to the public” within the meaning of Article 3(1) of the Copyright Directive must be interpreted as covering the transmission of the football matches in pubs. This would grant authors the exclusive right to authorize or prohibit any such transmissions.

In this regard, the ECJ held that “communication to the public” must be interpreted as covering the transmission of the broadcast works, via a television and speakers, to the customers present in a pub. The ECJ stated that “communication” must be construed broadly, as referring to any transmission of the protected works, irrespective of the technical means or process used (para 190).

Furthermore, the Court pointed out (para 197) that the communication must be to a “new public,” *i.e.*, one that was not taken into account by the authors of the protected works when they authorized their use by the communication to the original public. The Court stated (para 202) that the clientele of the public house in question constitutes a new public for these purposes and that this public is not present at the

place where the communication originates within the meaning of the Copyright Directive.

Finally, the Court deemed it relevant that the communication to the public in this case was of a profit-making nature. Consequently, “communication to the public” must be interpreted as covering transmission of the broadcast works, via a television screen and speakers, to the customers present in a public house.

CONCLUSIONS

The ECJ’s judgment is significant, both for rights owners and users of copyright works such as Karen Murphy. It now has to be applied by the High Court, so at this point, it is possible to draw only some general conclusions.

Although the ruling went in favor of Ms. Murphy, all the Premier League graphics, video, and music in the opening titles are subject to copyright. The latter can therefore not be screened in commercial premises. Since the transmission in a pub of broadcasts containing these protected works constitutes a communication to the public, it requires authorization of the author of the works.

The ECJ’s reasoning makes clear that anyone in the EU should be able to use decoder cards from within the EU in order to access broadcasts from outside their country.

The ECJ’s judgment might, however, apply only to private noncommercial use. Using a decoder card in a pub would not be for such a purpose, since there would be a “communication to the public” under both UK and EU copyright law.

Since the Court did not decide the dispute itself, it is now for the High Court to render a judgment in the case in accordance with the ECJ’s ruling, which is also binding on other national courts or tribunals before which a similar issue is raised.

UEFA AND *BRITISH SKY BROADCASTING LTD* v *EUROVIEW SPORT LTD.*

A similar case is currently still pending before the ECJ: The Union of European Football Associations (“UEFA”) initiated proceedings against Euroview, an importer of decoder cards into the United Kingdom. Use of the cards allows users in the United Kingdom to show UEFA Champions League and Europa League football matches broadcast outside the United Kingdom.

At UEFA’s request, the High Court referred the case to the ECJ for a preliminary ruling. The ruling on FAPL’s case is likely to indicate the outcome of UEFA’s case.

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