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Games without frontiers?

An EU Advocate General has sought to overturn the territorial licensing of sports broadcasting rights. **Becket McGrath** and **Jo Love** explore the main issues

On 3 February, Advocate General Juliane Kokott of the Court of Justice of the European Union (CJEU) handed down her opinion as to how the court should respond to a number of questions referred to it by the English High Court in the case C-403/08 *Football Association Premier League Ltd & Others v QC Leisure & Others*; and C-429/08 *Karen Murphy v Media Protection Services Ltd*.

Although the questions referred were wide-ranging in scope, the key issue was whether European Union (EU) law prevented the English Football Association Premier League (FAPL) from taking enforcement action to stop UK publicans showing live coverage of FAPL football matches to customers on their premises when that coverage was provided by a Greek broadcaster (rather than the FAPL's appointed UK broadcaster) and accessed by publicans using satellite decoders and subscription cards that had been imported into the UK from Greece. The Advocate General somewhat controversially recommended that this should be permitted, on the grounds that the present system of exclusive licence agreements unduly limits the freedom to provide services across the EU and is likely to restrict competition.

Advocate General background

The FAPL currently grants the rights to broadcast Premier League football matches on an exclusive

and territory-by-territory basis, to broadcasters who offer to pay the highest amount of money, in a competitive tender. Unsurprisingly, given the level of domestic interest in the competition, the highest amounts are paid for the ability to show live pictures on UK television. Most of these rights are currently held by satellite broadcaster, BSkyB¹.

Certain companies covertly import foreign decoders and cards into the UK and sell them to pubs. In this case, publicans showed Greek broadcasts of FAPL matches, using decoders and subscriptions offered to consumers in Greece by the FAPL's licensed Greek broadcaster, NOVA. This allows the pubs to show live broadcasts of Premier League football matches (albeit without an English commentary), at a considerably lower price than that charged by BSkyB as the FAPL's official UK broadcaster.

Unsurprisingly, the FAPL objected to this, on the basis that its ability to demand high licence payments from BSkyB rested on BSkyB's ability to extract the maximum income from its own customers, which in turn rested on the assurance that its exclusivity would not be undermined by customers switching to cheaper foreign sources. The questions before the CJEU in this case arose from enforcement action by the FAPL and BSkyB against publicans and the companies importing Greek decoders and cards into the UK, which led to two references under Article 267 of the Treaty on the Function of the European Union (TFEU) (ex Article 234 EC Treaty).

As Kitchin J observed in the High Court's judgment on the *FAPL v QC Leisure* case, the FAPL's prohibition on broadcasters allowing viewers to access their services from other EU Member States "creates a tension with the concept of a Community audiovisual area and the principles of an internal market without frontiers, and it is this tension which is reflected in the multitude of claims and defences deployed in this case."² Given the "fundamental" nature of the issues raised,³ the High Court decided in each case that it had little option but to make a reference to the CJEU. The two references were considered jointly by the court, due to the overlap in the issues raised.

Questions referred

The questions referred were both detailed and technical. In essence, however, they fell into two categories:

- What is the legal scope of the rights of owners of copyright and related rights in television broadcasts, as defined by applicable EU legislation? This required consideration of whether
 - rights owners are entitled to prevent importation and distribution of the foreign decoder cards on the basis that they are "illicit devices" permitted under the Conditional Access Directive;
 - unauthorised use of decoders amounted to infringement of the broadcaster's reproduction rights, as guaranteed by

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Article 2 of the Copyright Directive, through temporary storage of frames of the broadcast in the decoder memory and display on TV screens, or whether publicans could rely on the exception which allows temporary storage for technical reasons; and

o reception of a satellite broadcast in commercial premises such as a pub amounts to an infringement of a broadcaster's right to control the making available of their works to the public, as guaranteed by Article 3 of the Copyright Directive.

- Was enforcement action contrary to EU law? Specifically, did the principles protecting the free movement of goods and services within the EU on the one hand, and prohibiting anti-competitive agreements on the other, override the relevant legal and contractual provisions to render enforcement of the FAPL's and BSKyB's rights unlawful?

The opinion

Legal scope of rights

The Advocate General addressed the specific legal questions first. On the first issue concerning the meaning of an 'illicit device', she advised that this term refers only to equipment that has been designed or adapted to give access to a transmission without the authorisation of the service provider. Since the decoders in this case had been made and placed on the market with the authorisation of the service provider (albeit, in a different country to that in which they were ultimately used), and since they could not be viewed as having been 'adapted' merely by virtue of importation into the UK, they were not an illicit device within the meaning of the Conditional Access Directive. Notably, the Advocate General is likely to have found highly persuasive the submissions of the European Parliament to the court on this point, namely that the legislative intention behind the directive was to prohibit the sale of *pirated* devices only, rather than the parallel trade in legitimate devices.

On the second issue, concerning whether use of the decoders in this manner amounted to an infringing act, Ms Kokott advised that the creation of digital audio and video frames in the memory of a decoder, and the display of a broadcast on a television screen, constitutes reproduction. She also advised that the copies displayed on a television screen linked to a decoder have independent economic significance. As a result, the publicans use of imported decoders amounted to reproduction rights in the broadcasts concerned⁴. Whether

this amounted to an infringing act depended on how the court should take account of the fact that remuneration had been paid for that reproduction albeit in Greece. The Advocate General returned to the central question later in the opinion.

More controversially, she determined that showing a broadcast in a pub did not amount to "communication to the public" under Article 3(1) of the Copyright Directive, since there was no retransmission and the members of the public present were not required to pay an entrance fee.⁵ Rather inscrutably, she also advised that the right to communicate copyright works by satellite under Article 2 of the Satellite Broadcasting Directive includes the right to receive and watch that broadcast abroad, notwithstanding that the holder of the former right (the broadcaster) is not the same as the holder of the latter right (the viewer)⁶.

Compatibility with overriding

Treaty principles

The most remarkable and potentially significant parts of the opinion concern the interplay between the national intellectual property rights (IPRs) under examination and the rules of the TFEU guaranteeing the freedom to provide goods and services, and prohibiting anti-competitive agreements, within the European single market. The CJEU has recognised as far back as 1966, in one of the foundation cases of European competition law⁷ that the enforcement of national IPRs (in that case, trademarks owned by Grundig) could be contrary to what is now Article 101(1), if it had the object or effect of preventing parallel trade within the EU and hence maintaining the sub-division of the EU into national markets. The court has taken a similar approach when considering the scope of the Treaty's 'fundamental freedoms', including rules on the free movement of (goods which prohibit restrictions on imports and exports, respectively)⁸ and of services. Time and again, the court has displayed hostility to any use by private parties of national IPRs or commercial agreements to re-erect barriers to interstate trade that had otherwise been removed under the EU's founding treaties. This has been achieved by ruling that (i) any agreement that prevents all cross-border sales is anti-competitive (with only very limited exceptions) and (ii) IPR owners' rights to control the distribution of their products within the EU disappear (or are 'exhausted') once the specific products concerned are placed on the market with their consent anywhere in the EU.

Taking the issue of fundamental freedoms first, the Advocate General decided to treat the importation of decoder cards into the UK as the free movement of services, rather than goods, on the basis that the product being acquired was ultimately the service of providing access to coverage of a football match. In her view, the restrictions put in place by the FAPL and its licensed broadcasters represented a "particularly intensive" and "serious" impairment of freedom to provide services which had "the effect of partitioning the internal market into quite separate national markets"⁹. Although the Advocate General acknowledged that restrictions on the freedom to provide services may be justified by overriding reasons of public interest, which could include the protection of IPRs, she noted that the balance between the two interests is adequately addressed by application of the exhaustion of rights principle. In other words, the initial placing of a product on the market ensures realisation of the economic value of the intellectual property in question, at which point the IPRs involved can no longer be relied upon to restrict cross-border sales.

Until now, it had generally been assumed that the principles governing the exhaustion of rights to control the distribution of physical goods could not be extended to services. This intuitive proposition is based on the fact that, while the sale of goods necessitates a separation between the good in question and its producer once it enters free circulation within the EU, a service involves a more direct relationship between provider and consumer. Furthermore, while the loss of control over distribution of a physical product does not impair the rightsholder's ability to protect his primary rights in the product concerned, such as the right to protect copying of a product's design or its contents or to prevent use of patented technology, this is not necessarily the case with services. It has also been recognised that the particular nature of IPRs could justify a higher level of territorial protection than was accorded to physical goods¹⁰.

In the opinion's most important passage, she advised that, in principle, the exhaustion of rights principle applied with equal force to limit the ability of rightsholders to restrict the cross-border provision of services. Since, in this case, the commercial exploitation of the football matches in question is achieved through charging for cards, she decided that this was not undermined by the sale of Greek decoder cards in the UK, since charges had already been paid for those cards. The fact that the charges

for viewing FAPL matches were significantly lower in Greece than the UK (reflecting the generally lower levels of interest in the English league in Greece) did not assist the FAPL. Rather, the Advocate General concluded, "It forms part of the logic of the internal market that price differences between Member States should be offset by trade. The possibility, demanded by the FAPL, of marketing the broadcasting rights on a territorially exclusive basis amounts to profiting from the elimination of the internal market."¹¹

The Advocate General was clearly not put off by the existing case law that appeared to recognise the right of IPR owners to limit exploitation of media products to particular territories. In particular, she distinguished her approach from that taken by the court in *Coditel I* by reference of "the specific conditions existing on the television and cinema markets at that time" (the 1970s), which justified a rightsholder's ability to block re-transmission of a German film over a Belgian cable TV network. She also explained that the aim of the FAPL's restrictions was not to protect different forms of exploitation of IPRs (as had been the case in *Coditel I*) but rather "the direct aim of partitioning the market as to optimise exploitation of the same work within the different market segments".¹²

The Advocate General skirted over the practical difficulties of applying her approach to the provision of services. (In particular, it may be much harder to ascertain when a service is 'placed on the market' than is the case with a distinct, physical good.) While acknowledging that the principle of exhaustion could not be applied to hairdressing, she explicitly referred to computer software, musical works, e-books and films as services that "do not differ significantly from goods" and which (in her view) "can easily be passed on in electronic form"¹³.

The FAPL and BSKyB may have derived some comfort from the Advocate General's admission that some restrictions on showing games live could be permitted if it could be shown that live transmission of games that were not shown in the UK (because live transmission was prevented by rules imposing closed periods) had "substantial detrimental effects on the attendance at matches and/or participation in football matches". (She noted, however, that evidence from other countries suggested that this was "doubtful").

More helpfully for the FAPL and BSKyB, the Advocate General also acknowledged that the FAPL may be able to enforce contractual

provisions restricting the use of decoders to domestic premises (as was the case with the NOVA subscriptions) to prevent their use in commercial premises. It appears less likely that the FAPL can rely on their copyright in the musical work of the 'premier league Anthem', which was included in broadcasts, to prevent unauthorised access to the NOVA broadcasts, given the relative unimportance of that work for the broadcast as a whole.

The Advocate General took a similarly robust approach on the application of competition law, concluding that the licence provisions requiring the broadcasters to prevent their satellite decoders and cards from being used outside the licensed territory had the object of restricting competition, on the basis that they may be expected to "frustrate the Treaty's objective of achieving the integration of national markets through the establishment of a single market". As a result, the contractual restrictions in question would be void or unenforceable, as contrary to Article 101(1) TFEU, unless they could be shown to meet the requirements for exemption under Article 101(3). Although this is for the national court to decide, the Advocate General's language suggested she had some doubts as to their exemptability, given the nature of the restrictions.

If the CJEU ultimately follows the recommendations of Advocate General Kokott, there will clearly be significant consequences for the FAPL and BSKyB, as more commercial subscribers are likely to defect to cheaper Greek services. When the FAPL rights packages are re-tendered in 2012, this may lead to the FAPL deciding to maximise its revenues from exploitation in the UK only, by not licensing any non-UK broadcasters (which would still be possible). Alternatively, the FAPL may decide that it has no option but to license all its rights on a pan-European basis, which could have wide repercussions for broadcasters across the EU.

In seeking to extend the principle of exhaustion of rights to the cross-border provision of services, the Advocate General has also created uncertainty over current methods for exploiting IPRs across a broad swathe of the economy, including television, films, music, software, computer games and e-books. While different parts of the Commission have been grappling for some time over the complex question of how to facilitate the pan-European exploitation of IPRs, the Advocate General has sought to provide the answer in a single *coup de théâtre*. As the FAPL put it in a terse

statement issued on the same day as the opinion, "If the European Commission wants to create a pan-European licensing model for sports, film and music then it must go through the proper consultative and legislative processes to change the law rather than attempting to force through legislative changes via the courts. The ECJ is there to enforce the law, not change it." The immediate media reaction seemed to side with Karen Murphy and her customers' 'right' to watch cheap sports coverage while enjoying a pint.

However presented, this opinion is a potentially far-reaching development. As it stands, however, it raises more questions than it has answered. The key question now is whether, when they deliver their judgment in some months' time, the judges of the CJEU decide to follow the Advocate General's advice or draw back from adopting what is ultimately a radical change in approach to the territorial exploitation of IPRs. Whether the opinion will mark a turning point in the law or stand as an interesting but academic reminder of a path not taken, therefore remains to be seen.

Footnotes

1. In 2006, Setanta (subsequently replaced by ESPN) acquired the rights to show some FAPL live matches, following a competition law settlement between the FAPL and the European Commission, see Commission press release IP/06/356, of 22 March 2006, available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/356&format=HTML&aged=0&language=EN&guiLanguage=en>. The relevant ESPN channel is currently sold to commercial premises through BSKyB.
2. [2008] EWHC 1411 (Ch) at paragraph 385
3. *Ibid*
4. Opinion, at paragraph 101.
5. Opinion, at paragraph 147.
6. Opinion, at paragraph 164.
7. Cases 56 and 58/64 *Consten and Grundig v Commission* [1966] ECR 299.
8. See, for example, *Centrafarm v Winthrop* [1974] ECR 1183 (trade marks) and *Deutsche Grammophon v Metro* [1971] ECR 487 (copyright in sound recordings).
9. Opinion, at paragraphs 175-6.
10. See, eg *Coditel v Ciné-Vog Films (No.1) (Coditel I)*, *Coditel v Ciné-Vog Films (No.2) Coditel II* and *Tiercé Ladbroke v Commission*.
11. Opinion, at paragraph 192.
12. Opinion, at paragraph 197.
13. Opinion, at paragraph 186.