

Premier League copyright infringed but High Court calls time on anti-competitive contracts

Following the recent landmark decision of the Court of Justice of the European Union (CJEU), the UK High Court has ruled that using decoder cards imported from other Member States to show live Premier League football matches in UK pubs constitutes a “communication to the public” and can give rise to copyright infringement of the “works” contained in those broadcasts. However, the Football Association Premier League (FAPL) cannot prevent companies from supplying the UK market with decoder cards through privately agreed contractual provisions prohibiting such activity, as this constitutes a restriction on trade within the European Union.

Football Association Premier League Ltd and others v QC Leisure and others [2012] EWHC 108 (Ch)

The High Court has held that, to the extent Premier League broadcasts contain copyright works, publicans are infringing the rights of the FAPL when they screen live matches in their pubs using decoder cards imported from other Member States into the UK without the FAPL’s permission. Companies supplying decoder cards to publicans are authorising infringement of those works, to the extent that any infringement occurs. However, the High Court reiterated the CJEU’s decision from October 2011 that contractual provisions prohibiting the sale of decoder cards from one Member State into another are void as they constitute a constraint on trade in breach of Article 101 of the Treaty on the Functioning of the European Union (TFEU) and will make a declaration to that effect.

Background

The FAPL commercialises Premier League football matches by granting exclusive rights to broadcasters on a per-territory basis, requiring them (i) not to exploit their rights outside their allocated areas, (ii) to encrypt

their programmes so that they cannot be seen outside their territory and (iii) not to sell decoding cards outside their territories.

When the FAPL found out about the use of foreign decoders in UK pubs, it took action against QC Leisure (and others) who were supplying decoder cards, as well as against a number of landlords. The FAPL alleged infringement of its copyright in various works present in the broadcasts, including the Premier League anthem, highlight sequences and on-screen graphics and logos. It claimed that these actions breached provisions of the Copyright, Designs and Patents Act 1988 (the CDPA).

In June 2008 the High Court referred a number of questions to the CJEU on various aspects of Community law. For the purposes of the CJEU’s judgment, the case was linked to that of Karen Murphy, the Portsmouth publican who had appealed her criminal conviction for showing live Premier League matches in her pub using a Greek decoder card. The CJEU was asked to consider questions relating to the compatibility of the FAPL’s licence terms with Article 101 TFEU, and the interpretation of various Directives, including Directive 98/84/EC (the Conditional Access Directive), Directive 93/83/EEC (the Satellite Broadcasting Directive) and Directive 2001/29/EC (the Copyright Directive).

As discussed in our [Legal Update of October 2011](#), the CJEU ruled that:

- Any contractual provisions aimed at conferring absolute exclusivity in a national market and making the penetration of that national market difficult for competitors from outside the territory contravene common market principles and the EU prohibition on anti-competitive agreements in Article 101 TFEU (previously Article 81 EC).

- Contracts concluded by the FAPL with broadcasters were restrictive by their very nature (or “object”) and so could not qualify for exemption from Article 101 TFEU. The restrictions imposed by the FAPL could not be justified on the basis that they protect the rights of the intellectual property holders by ensuring that they are appropriately remunerated.
- National legislation that makes it unlawful to import, sell and use foreign decoding devices that give access to broadcasts from another Member State constitutes “a restriction on the freedom to provide services” and is prohibited by Article 56 TFEU.
- The screening of Premier League matches in pubs and bars constitutes “communication to the public” within the meaning of the Copyright Directive, and the authorisation of rights holders is therefore necessary in order to show the works.

High Court decision

ARTICLE 101 DECLARATION

The High Court gave a declaration on Article 101 TFEU at the request of the defendants, who argued that a clear statement should be made about the judgment of the CJEU in order to avoid pressure being placed on licensees. Kitchin LJ agreed that it was in the interests of justice to declare that the relevant obligations in exclusive licensing agreements, prohibiting the supply of decoder cards from other Member States into the UK market, were prohibited by Article 101 TFEU and were void under Article 101(2) TFEU. However, he added that the declaration should not prejudice any right of FAPL in respect of copyright infringement.

COMMUNICATION TO THE PUBLIC

The High Court held that Section 20 of the CDPA effectively transposes Article 3(1) of the Copyright Directive into UK law, which means that publicans are communicating works to the public when they screen live matches in their pubs using foreign decoder cards. Without permission to do so they infringe copyright. However, Section 72(1)(c) of the CDPA provides a defence against infringement of the copyright in the broadcast or film within the broadcast when the screening is made to members of the public who have not paid for admission.

AUTHORISATION OF INFRINGING ACTS

To the extent that any infringement of works belonging to the FAPL occurs in the screening of live games, companies supplying the decoder cards are authorising infringing acts for the purposes of Section 16(2) of the CDPA.

DECLARATION ON COPYRIGHT INFRINGEMENT

Counsel for the FAPL asked the High Court to make a declaration on the scope of copyright infringement in the case in broad terms, stating that the defendants had infringed copyright in some or all of the works. However, due to the large number of claims put forward and the wide interest in this case, the Court held that it will make a more narrow declaration, setting out the acts of infringement precisely.

INJUNCTION OR UNDERTAKING

The defendants argued against the grant of an injunction to prevent future copyright infringement on the basis that the FAPL would use it as a weapon to convince the public that they had been successful and could prevent the sale of decoder cards from other Member States in the UK. The High Court was instead prepared to accept an undertaking from the defendants that they would take steps to tell their customers not to, for example, play the Premier League anthem out loud. If, however, an injunction was granted, the Court noted that it must precisely identify the works that were being infringed as the defendants were entitled to carry on their business in a way that avoids infringement.

The consequences

The FAPL can use its copyright in the parts of the broadcasts containing works to bring actions against publicans using decoder cards imported from other Member States to show live matches. However, pubs will not infringe copyright if they can find ways of displaying the games without protected elements, although it remains to be seen how this can be achieved in practical and technical terms. The game of “cat and mouse” between publicans showing matches through decoder cards distributed for use in another EU country and the owners of the rights in Premier League football looks set to continue.

The CJEU decision represents a significant challenge to the business models used by the Premier League and other rights holders that license their content on an exclusive territorial basis. Its significance has not been lost on the European Commission who announced on 11 January 2012 it will report on the implications of the ruling and table proposals to create “a legal framework for the collective management of copyright, with a view to enabling multi-territory and pan-European licensing”.

Interested parties will now look forward to the end of February 2012, when Mrs Murphy’s case is due back in the UK courts.

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