Murphy/QC Leisure Judgment: Enforcement of Territorial Exclusivity is Contrary to EU Law  
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Football Association Premier League - V - QC Leisure and  
Karen Murphy - V - Media Protection Services

Sports rights holders and sports broadcasters around the world will be re-assessing their business models today. This follows yesterday’s Court of Justice of the European Union (“CJEU”) ruling that the enforcement of territorial exclusivity within EU Member States – which is central to the current European sports broadcasting model – is contrary to EU law.

In this alert, our European sports and media legal team assesses yesterday’s judgment and what it means for the sports rights holders who license their media rights in the EU on a per-territory basis, and the broadcasters who acquire those rights.

Brief Background

The case concerns action taken by the English Football Association Premier League Limited (“Premier League”) to prevent owners of commercial premises and others in the UK from showing matches via foreign satellite services, and to prevent the importation of foreign satellite decoder cards into the UK, which enable access to those services.

The Advocate General’s Opinion of 3 February this year (“AG’s Opinion”) came down heavily against the Premier League. For our report on that opinion (including additional background on the case), click here.

In this alert, when we refer to “foreign decoder cards”, we mean the satellite decoder cards of a broadcaster authorised by a sports rights holder to broadcast matches in one Member State, but which are used to access those broadcasts in a different Member State.

Yesterday’s Judgment

Yesterday’s judgment has, in large part, followed the AG’s Opinion. The key point from it is that the reception of satellite broadcasts of sports events across the EU - and the import, sale or use of foreign decoder cards to achieve that - cannot be prohibited by national law or by a system of exclusive licensing.

The legal basis for that conclusion is that:

- the use of foreign decoder cards cannot be restricted for being “illicit devices” within the meaning of Article 2(e) of the EU Conditional Access Directive - they cannot be “illicit devices” because they have not been “manufactured, manipulated, adapted or readjusted without the authorisation of the service provider”;

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under EU free movement rules, both the partitioning of national markets in the Premier League’s rights agreements to create territorial exclusivity, and section 297(1) of the UK’s Copyright Designs and Patents Act 1988 (“CDPA”) on which the case against Karen Murphy was based, constitute restrictions on the freedom to provide services. This is prohibited by Article 56 of the Treaty on the Functioning of the European Union (“TFEU”) – and overriding that freedom cannot be justified by the objectives of protecting intellectual property rights or encouraging attendance in stadiums; and

under EU competition law rules, contractual obligations which prevent broadcasters from supplying decoding services enabling access in other Member States have an anti-competitive object, and “constitute a prohibited restriction on competition for the purposes of Article 101(1) TFEU”.

In other words, the current practice falls foul of competition law rules and the rules regarding free movement of services within the EU.

Copyright Issues
The judgment also makes interesting copyright law points.

It states that, under the EU Copyright Directive, which creates rights for copyright holders to control both reproduction and communication to the public of their works:

- the acts of reproduction within the memory of the satellite decoder box and on the screen fall within an exception to the Copyright Directive (transient and incidental reproduction), so can be carried out without authorisation by the copyright holder; but
- transmission of the broadcast via a television screen in commercial premises is a protected communication to the public, which cannot be carried out without the copyright holder’s authorisation (a point on which the CJEU differs from the AG’s Opinion).

Accordingly, an owner of commercial premises in one Member State showing broadcasts of a football match using a foreign decoder card authorised only for domestic use, whether in that or any other Member State, will be breaching copyright.

Separately, the judgment states that “sporting events cannot be regarded as intellectual creations classifiable as works within the meaning of the Copyright Directive ... Accordingly, those events cannot be protected under copyright”. In other words, whilst there will be copyright in the broadcast of such events, and whilst the Premier League has copyright in the opening credits, graphics and Premier League anthem, there is no copyright in the matches themselves.

However, the judgment goes on to state that sporting events can be “worthy of protection comparable to the protection of works, and that protection can be granted, where appropriate” by national laws.

Possible Impact on Sports Media Rights Exploitation
We may now witness a shake-up in the way sports media rights are exploited in the EU. For example, we might see:

- partial exclusivity - a continuation of the existing practice of licensing rights to a sole licensee in each Member State, but without the restrictions on passive selling into other Member States. This would mean that licensees could respond to unsolicited inquiries from customers in other Member States, and would not be obliged to refer such customers to their “local” licensee;
- exclusive licensing based on language rather than territory (although that might have its own difficulties);
• pan-European licensing, with the principal licensee having the right to sub-license (within the EU on a non-exclusive basis) where it wishes to do so;
• sports rights holders creating their own channel and distributing it as they wish (as the Premier League already does in certain jurisdictions);
• a move towards licensing rights to broadcasters who do not have the ability to distribute their broadcasts beyond geographic borders, such as cable broadcasters (at least in those jurisdictions where sports are not already predominantly broadcast on cable);
• either UK licensees being able to broadcast more live matches so as to match the offering of overseas broadcasters, or (if protection of attendances at matches is the priority), Saturday 3pm matches no longer being made available to overseas licensees;
• a clearer distinction being made between the markets for viewing in domestic and commercial premises, such as rights for home viewing being auctioned separately from rights for viewing in pubs and other public venues.

On that final point, the CJEU judgment makes clear that foreign decoder cards sold for use in the home can be prevented from being used in commercial premises (see above). The market for foreign decoder cards in people’s homes is generally relatively small due to the importance of commentary language (apart from truly multi-lingual countries), the tailored nature of the events available and the support programming. It is unlikely, therefore, that the market for domestic viewing will be materially affected by the judgment. It may be, therefore, that the partial territorial exclusivity (described above) will be the preferred business model for home viewing, but with the pan-European licensing model used for viewing in commercial premises.

Of course, sports organisations are not the only rights holders who license their rights on an exclusive territory-by-territory basis. Whilst there have long been restrictions on preventing passive sales, industries such as music, film, computer games and software may need to consider their own licensing models in the light of yesterday’s judgment.

Other Consequences

For existing arrangements:
Current licensing arrangements will need to be reviewed in light of this judgment.

For Broadcasters:
This judgment might initially be seen as a victory for smaller overseas broadcasters who would benefit from selling their cheaper subscriptions into other Member States. If share price movements witnessed yesterday are maintained and reflective of the impact, that may well be the case. However, it seems likely that the larger broadcasters may still have a greater bearing on the way sports rights holders think about packaging their rights in the future.

For some, such as broadcasters with the ability to acquire pan-European rights, or non-satellite broadcasters who might be able to offer territorial exclusivity by virtue of the geographical limits of their distribution network, the judgment may present more of an opportunity than a threat.

For Sports Rights Holders:
In its judgment, the CJEU recognised that the value of sports rights could fall as a result of its decision. The judgment states that “the specific subject-matter of the intellectual property does not guarantee the right holders concerned the opportunity to demand the highest possible remuneration ... – only appropriate remuneration”. It remains to be seen whether that will be the case.
Also, it will be interesting to see how future sports media rights values are affected between those with an even spread of interest in their products across a number of Member States (e.g. UEFA in relation to the Champions League) and those with more of a national appeal.

For Member States:

Finally, the judgment also raises important legal questions that will need answering – for example:

- will Member States take up the suggestion of the CJEU to grant sports events protection which is equivalent to copyright?
- If so, who will own that copyright – the teams, the participants, the competition organiser, or the governing body?
- Will the prospect of any such protection impact on the current debate and the lobbying over a new legal right to obtain a share of betting profits?
- How will Member States deal with their laws that may be similar to, or the same as, section 297(1) of the CDPA, now that provision has been found to be contrary to EU law?

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