

UK pubs and football

The final result is still in doubt

by *Edward S Miller, Katherine Holmes and Angela Gregson**

Can publicans be prevented from purchasing foreign decoder cards to screen Football Association Premier League (FAPL) matches in their pubs in the UK? If they do buy and use such cards, does this breach FAPL's copyrights? As well as generating substantial press attention, these questions have resulted in a number of European and national judgments in recent months.

Following the decision by the Court of Justice of the European Union (CJEU) on questions referred to it in two related cases, the English High Court has now moved the game on. The CJEU found that provisions in FAPL licences requiring licensees not to sell decoders outside the licensed territory had an anticompetitive purpose contrary to article 101 of the treaty on the functioning of the European Union (TFEU). Any victory felt by the publicans was Pyrrhic, though, since the court also found that, under European law, the showings of the broadcasts in pubs would infringe FAPL's copyright in elements of the broadcast such as the opening video sequence, Premier League anthem and prerecorded highlights of historic matches. But the High Court, has found that, under English law, showings of prerecorded "film" content included in the broadcasts, do not infringe FAPL's copyrights due to a specific exception in UK legislation. However, the communication to the public of other types of copyright material included in the broadcasts – such as Premier League logos and the Premier League anthem – would infringe FAPL's copyrights.

On 24 February 2012, the related series of judgments culminated in the quashing by the High Court of the convictions of Mrs Murphy, the Southsea pub landlady, under the Copyright, Designs and Patents Act 1988 (the 1988 Act).

Background

The FAPL granted licences to broadcasters for the live transmission of Premier League games. These licences were granted on a territorial basis for three-year terms, and obliged broadcasters to prevent the public from receiving the broadcasts outside the territory covered by the licence. Broadcasters were required to ensure that their broadcasts were securely encrypted and that decoding devices were not supplied to persons intending to use the device outside the licensed territory.

In 2008, the High Court was charged with determining two joined cases relating to the supply and use of foreign decoder cards in the UK. The first – *FAPL v QC Leisure* – concerned an action brought by FAPL against both suppliers of decoders to pubs in the UK and four pubs that used non-UK decoders to show live Premier League matches transmitted by Greek and North African broadcasters. The second case – *Murphy v Media Protection Services Ltd* – concerned an appeal by Ms Karen Murphy against her criminal convictions under section 297(1) of the 1988 Act for showing Premier League matches in a pub using a Greek decoder card. The High Court referred

certain preliminary questions to the CJEU for determination. On 4 October 2011, the CJEU decided the following:

- Provisions in the FAPL licences requiring licensees not to sell decoders outside the licensed territory were provisions absolutely protecting territorial exclusivity, which have an anticompetitive purpose contrary to article 101 TFEU that could not be exempted under article 101(3).
- UK national laws supporting such restrictions are unlawful as they are contrary to the fundamental freedom to provide services within the European Union under article 56 TFEU, and cannot be justified.
- Decoding devices purchased in breach of contractual territorial restrictions are not "illicit devices" under the Conditional Access Directive (98/48/EC), even where a false name and address have been given. This is because they are not "designed or adapted" to give access without the consent of the rights holder under article 2 of the Conditional Access Directive.
- The live transmission of an FAPL football match itself is not protected by copyright, but the opening video sequence, Premier League anthem and prerecorded highlights of previous matches included in the broadcast are protected by copyright.
- The reproduction within the decoder memory or on a TV screen does constitute "reproduction" under article 5 of the Copyright Directive 2001/29/EC, but no authorisation from the copyright holder is needed because this reproduction is (among other things) temporary and transient or incidental.
- The showing of the broadcasts in pubs constituted a communication to the public, requiring the consent of the copyright owner.

The *FAPL v QC Leisure* decision

■ **Provisions protecting absolute territorial exclusivity and competition law.** On 3 February 2012, Lord Justice Kitchin in the High Court declared, in line with the CJEU judgment, that licence conditions requiring broadcasters not to sell decoders outside their licensed territory constituted a restriction on competition prohibited by article 101 TFEU, and were unenforceable.

The High Court's bolstering of the CJEU finding that licence conditions designed to provide absolute territorial exclusivity in broadcasts of Premier League matches have an anticompetitive purpose contrary to article 101 TFEU will reinforce concerns among owners of other valuable media properties traditionally licensed territorially in Europe (and their exclusive licensees) about the implications of the decision for their businesses. Film and television distributors, and the broadcasters who are their customers, have been given no comfort by the High Court.

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■ **Copyright infringement.** The High Court's decision on whether there was any copyright infringement is more nuanced. The CJEU had found that while a Premier League football match itself is not protected by copyright, there is copyright protection for some elements included in the Premier League's feed of the matches to its licensee broadcasters, such as the opening video sequence, the Premier League anthem, and prerecorded highlights of previous matches. The CJEU also held that the transmission of these copyright works to a pub audience constitutes a "communication to the public", which requires authorisation from the rights holder. The CJEU's decision therefore appeared to leave the publican defendants with a Pyrrhic victory, since, although they could not be prevented from obtaining and using foreign decoder cards to show foreign broadcasts of Premier League matches, they would seemingly be in breach of copyright if they did so.

However, the High Court has departed from expectations raised by the CJEU judgment. Ruling in the publicans' favour, the High Court said that although the airing of FAPL matches in pubs does involve communication of copyright works to the public, there is a valid exception under section 72(1)(c) of the 1988 Act on which the publicans can rely: "The showing or playing in public of a broadcast to an audience who have not paid for admission to the place where the broadcast is to be seen or heard does not infringe any copyright in ... (c) any film included in it".

The prerecorded highlights and video sequences included in the broadcasts of Premier League matches fall within the definition of a film.

The High Court decided that, although there is no express equivalent provision to section 72 in the exhaustive list of permitted exceptions to copyright set out in the EU Copyright Directive, Parliament clearly intended to allow certain types of copyright works included in broadcasts to be viewed in public places such as pubs without the need to obtain the consent of the copyright owner. In support of this position, the High Court relied on the clear and unambiguous wording used in section 72(1)(c) as well as Hansard debates on the section. Lord Beaverbrook summed up the intention of the legislature in Hansard House of Lords Debates on 23 February 1988 recorded in vol 493 cols 1191-1192 as follows:

"We have always taken the view... that it is not reasonable to impose a requirement for multiple copyright licences on shops, pubs, restaurants, cafes and the like, where a radio or TV set is played or shown. The public exposure of films... in that way is a relatively minor form of exploitation.

"The owners of the rights concerned are not going unremunerated since they have a right to control whether or not their works are broadcast in the first place. The burden on the retail sector, both administrative and financial, of having to obtain additional copyright licences would be considerable, linked as it would be to something that was only secondary to their main activity."

As an aside, it is worth noting the High Court recognised that, while the Copyright Directive does not explicitly permit a defence as provided for by section 72(1)(c), this did not mean the High Court could artificially construe this section to be in line with the Copyright Directive. Due to the unambiguous nature of the provision and the clear intention of the

legislature, there was a limit to how far the court could imply words into its meaning or adopt an unnatural interpretation. Lord Justice Kitchin stated:

"I am conscious that the obligation on this court to construe domestic legislation consistently with Community law obligations is both broad and far reaching. It may require the court to depart from the unambiguous meaning of a statute and to read it down by implying words into it. It may also require the court to adopt an interpretation which is not the natural one..."

"Nevertheless, there are limits to the doctrine and I believe that the exercise... [of construing the national provision in a different way to the unambiguous wording of that provision and contrary to the clear intentions of the legislature] would exceed them."

In its judgment in the recent case of *Alstom Transport v Eurostar International Ltd* (2012), the High Court adopted a similar approach to the interpretation of national legislation where inconsistent with a Community directive.

The *Murphy* case

In the related High Court case of *Murphy v Media Protection Services Ltd*, Lord Justice Burton confirmed (in his judgment on 24 February 2012) the CJEU's finding that the foreign decoder used by Mrs Murphy to screen FAPL football matches was not an "illicit device" within article 2E of Directive 98/84EC. He also ruled that, because of the fundamental freedom to provide services under article 56 TFEU, the offence of fraudulently receiving programmes under section 297(1) of the 1988 Act could not be applied to Mrs Murphy's use of the decoder. The unlawfulness of the territorial restrictions imposed on the use of the foreign decoder cards was reiterated.

In a final blow to copyright holders, the High Court therefore quashed Mrs Murphy's convictions under the 1988 Act for dishonest receipt of programmes.

Implications of the High Court's decisions

The CJEU made an unequivocal pronouncement that provisions absolutely protecting territorial exclusivity have an anticompetitive purpose contrary to article 101 TFEU. The High Court followed suit, declaring that these provisions were unenforceable. The extent to which this principle will apply beyond the specific facts of this case remains to be seen. However, the position in respect of copyright infringement, following the High Court judgments, is less clear cut.

Publicans in the UK wishing to use foreign decoders to show Premier League matches in their pubs may now be lulled into a false sense of security and think they can do so without infringing the Premier League's copyrights. However, the exception in section 72(1)(c) relied on in these cases applies only to films included in the broadcasts. It does not apply to literary, artistic or musical works. In order to avoid infringing the Premier League's copyrights, publicans will have to avoid showing the prerecorded opening sequence, obscure any Premier League logos, and turn down the volume so that music such as the Premier League anthem cannot be heard. The FAPL has, it seems, already taken steps to increase the copyright works in its coverage of matches, which may make it difficult for publicans to avoid copyright infringement in the future.