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Free Movement & Copyright: A Review of the Decoder Cases



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The Basic Facts

- Football Association Premier League (FAPL) organised filming of football matches in English Premier League
- Rights to broadcast were licensed territorially
- Games were encoded before broadcast by satellite
- Broadcasts receivable across EU, but decoder cards only available nationally
- Price differentials – cheaper in Greece than UK
- Arbitrage occurred – cards bought in Greece then resold for use in UK pubs

The Cases

- FAPL brought
 - civil action against traders and pubs (*QC Leisure*)
 - criminal action against pubs (*Murphy*)
- English Court referred two cases to ECJ in July 2008
 - C-403/08 (*QC Leisure*) and C-429/08 (*Murphy*)
- ECJ Judgment on 4 October 2011

- Civil case: judgment 3 February 2012, sent to PCC for inquiry on damages [2012] EWHC 108 (Ch)
- Criminal case: judgment 24 February 2012, costs to pub on 8 March 2012 [2012] EWHC 529 (Admin)

The Big Issues

- Were the **territorial restrictions** compatible with EU law?
 - Free movement of goods/services
 - Competition
- Does showing a football match in a pub constitute a “**communication to the public**” of the underlying artistic works, musical works, films and sound recordings?

Territorial Restrictions 1

- Territorial restrictions on the use of IP to restrict the movement of goods have been prohibited in the EU for a long time
 - 1966: *Consten & Grundig* (competition law) [1966] ECR 299
 - 1971: *Deutsche Grammophon* (free movement) [1971] ECR 487
- However, position had seemed different for services
 - 1980: *Coditel I* (free movement) [1980] ECR 881
 - 1982: *Coditel II* (competition law) [1982] ECR 3381
- Issue of increasing importance with move to digital distribution of music, books, films etc

Territorial Restrictions 2

- ECJ grasped nettle and found territorial restrictions breached rules on free movement and competition law
- Very broad approach to “freedom to provide services”, to prohibit legislation which restricts freedom to receive services even where service provider wishes to restrict
- Major implications for ability to price-differentiate when supplying broadcast/digital content across EU
- Pending *C/SAC* cases (heard Sept-Nov 2011)

Communication to the Public 1

- Was showing broadcast in the pub a communication to a “public not present at the place where the communication originates” of the underlying works?
- English Court, Commission, Advocate General thought not communication to the public
- ECJ held it was – communication “originated” at the football ground, not at the pub, and pub patrons were “new public”
- English court found UK-based exception for films

Communication to the Public 2

- C-306/05 *SGAE* [2006] ECR I-11519
 - Spanish hotel rooms – YES (authors)
- C-135/10 *SCF* (15 March 2012)
 - Italian dental surgery – NO
- C-162/10 *PPL* (15 March 2012)
 - Irish hotel rooms – YES (performers/producers)
- C-607/11 *TV Catchup* (reference 28 Nov 2011)
 - UK simulcasting - PENDING

Conclusions

- Ruling on territorial restrictions unsurprising
 - Single market for digital age
 - Consumer-focussed construction of freedom to provide services
- Ruling on “communication to the public” more surprising and positive for copyright owners
 - More extensive exclusive rights
 - Limits impact of territorial ruling to individuals

Any questions?

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“Copyright and the EC Treaty: music, films and football” [2009] EIPR
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“Copyright owners cannot require satellite broadcasters to impose territorial restrictions on the use of decoder cards” [2012] JECLAP
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