THE PREMIER LEAGUE CASE - WHY FOLLOWING THE ADVOCATE-GENERAL WOULD BE A PYRRHIC VICTORY FOR FREE MOVEMENT

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SUMMARY

The AG's Opinion in the Premier League case, delivered last February, raises several fundamental issues.

Most significantly, it revisits the question of the interaction between copyright and the freedom to provide services within the EU, which was the subject of the 1980 decision in Coditel. Following the AG would significantly expand the doctrine of exhaustion as it applies to services and enormously reduce the scope for territorial licensing. While ultimately this may enforce uniform pricing of copyright services throughout the EU, it cannot be expected to harmonise pricing downwards. It is far from clear that the result benefits consumers, rights holders or indeed any other party.

A second interesting feature of the AG's approach comes in the unequivocal recognition of an EU failure to implement a Berne Convention/TRIPS obligation; an obligation which the EU complained before the WTO that the US failed to implement. This point of the Opinion illustrates the extent to which recitals do, and treaty obligations do not, play a part in construing EU legislation.

INTRODUCTION

This talk looks at Advocate General Kokott's Opinion in the Premier League[2] case. The Opinion was delivered last February and an ECJ judgment should follow later this year. The Opinion raises several fundamental issues - in fact, it covers a great deal of ground – but I want pick it up on just two fundamental points.

The first is the interaction between copyright and the freedom to provide services within the EU. The ECJ considered this point in the 1980s, in Coditel[3]. Advocate-General Kokott's Opinion stretches the Coditel decision, arguably to breaking point. I'll be suggesting that the ECJ got it right in Coditel.

The second point I will cover, if time allows, is the AG's approach to the communication to the public right - I'm going to look in particular at what we should take away from the AG's observation that the EU has deliberately failed to comply with its Berne and TRIPS obligations.

THE FACTS

First, though, the facts. The facts are very involved but the essential details are these. The case concerns televising Premier League football matches in UK pubs. The Premier League grants broadcasters territorially exclusive licences. Sky is the exclusive UK licensee. Nova is the Greek equivalent. In the UK, Sky charges pubs thousands of pounds a year for a card. In Greece, Nova's charges pubs £700. The issue is whether a UK pub can use Nova's Greek decoder cards and show its punters the Greek satellite broadcast of UK football matches.

The Premier League says that Greek decoder cards are illicit devices under the Conditional Access directive. It also says that showing the Greek broadcast in the UK infringes copyright because, among other things, it infringes the communication to the public right.

FUNDAMENTAL FREEDOMS AND THE RETREAT FROM CODITEL

The AG goes through conditional access and copyright infringement in considerable detail and raises a raft of interesting points on the way. But that all gets resolved with one underlying answer to any infringement, when she comes to the EU fundamental freedoms - particularly the freedom to provide services. The AG considers that restricting access to content is a serious impairment of this freedom that is unjustifiable in the public interest. While the protection of intellectual property may constitute such a reason, the AG did not find appropriate circumstances in this case. She says, in particular, that the specific subject matter of the rights in question is not endangered by permitting the use of a Greek decoder card in the UK. The fact that it is less remunerative for the rights holder does not mean it is necessary to partition the market.

The AG's reasoning on this point is underpinned by just three paragraphs of the opinion. In the course of those paragraphs the AG moves from saying that it is uncertain whether the funadmental freedoms prohibit absolute territorial restrictions to determining (without resolving the uncertainty she identifies) that the restriction is particularly intensive since the partitioning is on a national basis. She concludes in that there is a serious impairment to the freedom to provide services – thereby apparently resolving, without reasoning, the uncertainty found two paragraphs earlier.

Now, in 1980, the ECJ considered a similar question, in Coditel. That case concerned films on German television being rebroadcast by a Belgian cable network. The court held that the copyright owner has a legitimate interest in calculating royalties on the basis of the actual or probable number of performances. And similarly, that the copyright owner has a legitimate interest in authorising television broadcast only after cinematic release. It held that an essential function of copyright is that a copyright owner has the right to require fees for any showing of a film. When it came to territorial restrictions, the court in Coditel held that, where television is organised in member states largely via legal broadcasting monopolies, a limitation other than by geographical is impracticable.

AG Kokott sought to distance the Premier League case from Coditel. In the AG's Opinion, the partitioning of the market for live football is not intended to protect any other form of exploitation of the transmitted match, but rather to optimise the exploitation of the same work within different markets. She goes on to say that partitioning of the market is inessential to the protection of the specific subject matter of the rights in question.

What the Opinion does not do is to lay down a proper foundation for this conclusion. The treatment of what constitutes the specific subject matter of live football transmissions is cursory: in fact, all that the AG says on that point is that the specific subject-matter of a live football transmission can be seen in its commercial exploitation. She notes that the transmission of football matches is exploited through the charge for the decoder cards. And she appears to treat charging as a binary phenomenon. So she says that exploitation is not undermined by the use of Greek cards, since charges were paid for those cards. The AG adds that marketing the broadcasting rights on a territorially exclusive basis amounts to profiting from the elimination of the internal market. And finally, that although the activity in question is a service, the case falls within the case-law on exhaustion of rights with respect to goods.

This really amounts to a wholesale rejection of the right to license on national lines. There is a huge leap between identifying commercial exploitation as part of the specific subject matter and concluding that once there has been any commercial exploitation anywhere in the community, there can be no objection to further marketing. Taken to a logical conclusion, the same approach applies to any form of exploitation. Indeed, the AG points out that the issue in question extends to films and books.

And from this starting point, it is difficult to see what logical justification there can be for other forms of geographic differentiation. If national boundaries are bad, how can one uphold regional or single-premises licences – unless the point is that partitioning on national boundaries is of such fundamental significance that this, and this alone, is unacceptable. And, if any commercial exploitation is sufficient to exhaust the rights, there appears to be no basis for differentiating between use by a large or a small pub, or between home and pub use.

Is the result a victory for consumers? Well, maybe in the short term. But the AG recognises that removing the ability to distinguish between geographical markets affects commercial incentives. And, in particular, that rights holders may choose in future to offer transmission rights at the prices that are only viable in the most lucrative markets. So ironically, the net effect of a legal guarantee of the right to free of movement of services may be a commercial guarantee that services are priced so that they reach fewer people in more concentrated markets. Far from helping consumers, if the court follows the AG the result can be expected to do nothing to lower prices for the English pub-goer and to price Greek pub-goers out of the market.

What should rightsholders do? Rely on technical rather than legal mechanisms to protect their pricing models. The AG acknowledges that language and technical protection may protect commercial interests without engaging the fundamental freedoms. Rightsholders might also consider relying on property rights. Query whether, if the rightsholders insisted on holding title to the decoder cards and provided them to licensees and end-users as bailees, would an action lie in conversion against unauthorised card holders?

Finally, what should the ECJ do? The answer is simple: stick to Coditel where it got the balance right. If it is necessary to move from that position, then at least it could expressly confine the case to live football. While that is a bad and in my view unjustified result for football, at least it might stop the contagion from spreading. I am not optimistic on that score. While the court might well confine itself expressly to the facts and perhaps avoid some of the fact-finding exercises in the AG's Opinion, it is not likely that the court will go out of its way to explain why the decision is applicable only to football. And without that sort of express containment, it seems inevitable that rights owners over a broad swathe of industry are going to feel the effects of any decision following the AG's Opinion.

INTERNATIONAL TREATY OBLIGATIONS

The final point I wanted to cover is what the AG has to say about the EU and its Berne Convention obligations. The AG notes that the right of communication to the public, provided for in Berne Article 11*bis*(iii), grants authors the exclusive right of authorising the public communication by loudspeaker or any other analogous instrument transmitting…the broadcast of the work.

Now this is a treaty obligation that the EU sought to enforce against the US back in 1999 in a dispute before the WTO[4]. The US was said to be falling short by permitting the playing of radio and television music in bars without royalty payments. The EU was pressing that case before the WTO when the copyright in the information society directive was enacted. This was the directive that implemented Art.11*bis*, or so the Commission said in its explanatory memorandum. And the relevant operative wording was enacted unchanged from the proposal.

So it might seem surprising that the Commission argued in the Premier League case that the directive did not in fact enact Art 11*bis*(iii) after all. Art 11*bis*(iii) was, said the Commission, excluded by virtue of a recital. The recital says that the restrictions on retransmission are limited to retransmission by wire or wireless means only, and that excludes loudspeakers and

television sets. The AG accepted this to be the case, and noted that this means the EU has not enacted Art 11*bis*(iii).

The AG was not persuaded to interpret the directive to comply with treaty obligations, and the if the Opinion is followed it will be an express acknowledgement that the EU has deliberately refused to comply with its treaty obligations. Any correction will be a matter for new legislation, and in the meantime we'll have to see if it forms the subject matter of intervention by another WTO member state (although this is unlikely to be the US since matters were temporarily resolved in 2004). I doubt I am alone in feeling uneasy that what purported to be a directive complying with a treaty obligation turns out to have been nothing of the sort, and in thinking that, in retrospect, the EU's complaint against the US now does the EU little credit.

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[2] Cases C-403/08 and C-429/08 Football Association Premier League & others v QC Leisure and others, Karen Murphy v Media Protection Services, 3 February 2011-04-20
[3] Case 62/79 Coditel v Ciné Vog, [1980] ECR 881
[4] WTO Dispute DS160, Section 110(5) of the United States Copyright Act