

Mrs Murphy, QC Leisure and the Future: An Opinion

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Introduction

Many column inches have been dedicated to unravelling the implications and consequences of the decisions by the Court of Justice of the European Union ("the CJEU") in the Karen Murphy and QC Leisure football broadcasting cases. The detailed facts of the case can be found in various articles in this and other prominent journals and are briefly set out below¹.

Karen Murphy is a pub landlord. She was prosecuted after purchasing a Greek decoder and decoder card in order to broadcast live Premier League (PL) matches in her pub. She argued that as a Member State citizen she should not be prevented from finding the cheapest subscription in the European Union to broadcast the live matches. The PL alleged that Murphy's actions, among other things, breached its IP rights. The PL argued that the way they sold their rights was backed up by European Court precedent supporting the notion of exclusive territorial licensing.

Mrs Murphy's case was joined with a supplier of the decoder cards QC Leisure, in a reference to the CJEU. In October 2011, the CJEU answered the EU law questions on issues that included free movement, competition law and copyright posed by the English High Court.

The CJEU Decision

In summary, the CJEU held that restricting the importation of a Greek satellite decoder and decoder card to view the live PL games and clauses prohibiting an authorised PL broadcaster selling its service to a Member State citizen outside of its allocated territory were contrary to EU law. However, the CJEU did conclude that the PL owned copyrighted works such as the anthem and the logo which were embedded in the broadcast. As Mrs Murphy was deemed to be making a further communication to the public under the Copyright Directive (by broadcasting the pictures), Murphy required authorisation from the PL to show the copyrighted works in order to broadcast the live pictures.

The extremely tricky balancing act for the CJEU involved the need to safeguard the fundamental EU free movement freedoms whilst giving a degree of intellectual property protection to the PL as a rights holder. Many have suggested that the judgment is actually unbalanced; on one hand it extols the virtues of free movement whilst curtailing the very same freedoms through protection granted to ancillary copyrighted materials.

¹ See <http://www.danielgeey.com/pdf/a-geey.pdf>

The CJEU judgment is set in the context of Mrs Murphy using a Greek domestic, residential subscription for commercial use. The CJEU appears to have said that even if free movement principles and competition law apply, Mrs Murphy still needs authorisation because it was not granted by the PL in Greece to enable the communication of a domestic subscription broadcast to a wider public in a commercial setting. Thus the CJEU has taken the specific facts of Mrs Murphy's case and narrowly construed them.

The CJEU's rationale is that the PL authorised the Greek broadcaster to sell live PL matches to residential premises and whilst such residential subscriptions appear to be legitimately available to domestic UK subscribers, the PL did not authorise the Greek broadcaster to sell the subscription to a commercial subscriber. Therefore Murphy is using the wrong decoder subscription and appears to be in breach of the domestic copyright laws by showing the pictures.

Based on the current Murphy facts, it would appear difficult for the High Court to interpret the answers given by the CJEU in relation to the Copyright Directive in such a way that would permit Murphy to screen matches without PL authorisation.

What happens however if Mrs Murphy argues that she would have purchased a commercial decoder subscription, but was restricted by the Greek national broadcaster who was following the apparently anti-competitive contractual stipulations imposed by the PL? Whereas the CJEU appears satisfied that broadcast of a private, domestic subscription to a public venue in another Member State country is a further communication to the public, would the same apply if Murphy had bought a commercial Greek subscription²?

The real question is whether Murphy will argue in the High Court that she was prevented from purchasing a Greek commercial subscription and therefore the CJEU needs to consider whether such a subscription would be a further communication to the public under the Copyright Directive. Murphy would no doubt argue that the PL authorised the Greek broadcaster to sell the commercial subscription in Greece and therefore no further communication to the public would occur when that broadcast was shown in the UK. It is not beyond the realms of possibility that further questions may need to be referred back to the European Court for further European law assessment.

Another conundrum the High Court will be faced with relates to the contractual prohibitions within the PL contract that the CJEU ruled contrary to EU law³. As such, the High Court has the ability to strike out the anti-competitive restrictive clauses. If, after removing the clause, the remainder of the agreement can reasonably be carried out, it can be enforced. The High

² Interestingly in the *ITV v TVC* judgment on 14/11/11 see (http://www.mlex.com/Attachments/2011-12-05_63557897HOKD7U2T/ITV%20v%20TVC.pdf) a referral has been made to the CJEU regarding what constitutes a further communication to the public in certain circumstances.

³ Any agreement that infringes the Chapter I prohibition is void and cannot be enforced (section 2(4), Competition Act).

Court may need to consider this in some detail because there should be over a year left on the deal with, for example, Sky and ESPN which would be worth over £500m. It is common practice in such contracts for there to be standard clauses to allow either party to look again at the deal in case of significant regulatory or legal intervention impacting on the contract.

The Next Premier League Tender

Against this background, the question arises as to how the next PL auction will work in practice. It is believed that the PL will publish its EU rights tender document in the first half of 2012. The quandary for the PL is what to do. It may be that the High Court rules by that time and is definitive in its judgment. However, the ramifications of the CJEU's answers with specific reference to the contractual restrictions in the PL contract it entered into with national broadcasters, would suggest that regardless of the ultimate decision in the High Court, it will have to amend its tender document accordingly. Indeed Mathieu Moreuil who is head of European public policy at the PL, explained that:

"Some clauses might be illegal, but the principle of exclusivity was not called into question. Territorial exclusivity is not dead. We feel confident for the future. Will we have to change contracts? Yes. How we will do it, I do not know."⁴

I did not believe that any European court was going to rule that exclusivity would be per se illegal. Almost all vertical distribution agreements entered into in the EU allow for a licensor to allocate exclusive territories, customers or regions to licencees. The CJEU agreed that competition law was not at odds with such exclusive allocation. However it was the PL's additional contractual restrictions entered into with national broadcasters, which forbid broadcasters to sell the broadcasts outside of their territory, effectively partitioning markets and foreclosing inter-Member State trade, which was contrary to EU competition law.

From a domestic viewing perspective, it appears that a Member State citizen in the UK can subscribe to the authorised Greek broadcaster for live PL matches. Practically, whether this will have a cooling effect on the price UK broadcasters are willing to pay remains uncertain. This is because the likelihood of consumers buying two domestic decoders and subscriptions to view a game (possibly only available in another language) for a similar price for Sky Sports 1-5 may make this avenue rather limited. Many believe the larger price differential is the subscription for commercial broadcasts. Broadcasters may be insulated from such commercial switch-over because at present it appears that Mrs Murphy requires PL authorisation.

In an excellent recently published article⁵, the authors pointed to the practical fact that the impact of the judgment will depend on whether the exclusive PL broadcasters, especially

⁴ <http://www.mlex.com/EU/Content.aspx?ID=194657>

⁵ 'It isn't all over: The Full impact of the recent FA Premier League case is not yet clear' Philipp Werner and Christoph Volk, Competition Law Insight 15 November 2011

BSkyB and ESPN in the UK, will be happy to pay the large rights sums for "*territorial exclusivity without absolute protection.*" The PL will have to understand the commercial imperatives of the broadcast purchasers in determining how it may maximise its commercial rights revenues.

Alternatives to the way the current live matches are sold in each Member State territory may include a pan-EU offering of a number of exclusive packaged rights. Such a scenario does pose as many questions as it answers with few, if any, broadcasters having the resource, capability and capacity to serve the whole of the EU market. Any pan-EU tender could provide incumbent broadcasters with the ability to sub-licence particular broadcasts for certain low demand territories. Similarly, it may be possible that the satellite footprint which currently extends across the EU, which allows Mrs Murphy to broadcast the Greek feed, to be narrowed, so that each authorised broadcaster can only link to the satellite that covers their territory. Whether that would be feasible or legal would be another matter. Lastly, the PL may try to build licences based on commentary and production language into its tender documents, so that, for example, a Greek broadcaster would be able to purchase the right to broadcast the game so long as it added only Greek language commentary and graphics, thus restricting the language used in the broadcast.

It may ultimately depend on whether UK broadcasters like Sky or ESPN or new entrants like Al Jazeera are happy with less territorial protection. The PL may decide that all it needs to remove from its tender documents are the prohibitions requiring national authorised broadcasters not to sell to other Member State citizens outside of their allotted territory. Just as Sky considered live football rights to be the "battering ram" for its pay-TV offering back in the early 1990's, Sky may still be willing to pay large sums for rights to retain its subscriber base. An added reason why Sky may still wish to retain the live rights is because an alternative scenario where the PL starts its own channel may be even more unpalatable.

A Channel for the PL?

There is one alternative option that the PL is no doubt considering which would strike at the very heart of Sky's business model. If the PL considers that it is not able to extract maximum value from broadcasters for the live and associated PL rights, the PL may consider starting its own channel. This has been mooted before but may shift back into focus due to the more limited ways the PL may be able to auction its rights to maximise revenues. The channel in the UK for example, could be sold on each of the available platforms (Sky, Virgin, Top Up TV, BT Vision etc), just like ESPN, by paying a carriage fee for an allocated platform channel. The Dutch Eredivisie sells its rights in such a cross platform manner⁶.

⁶ See <http://www.danielgeey.com/UserFiles/WSLRsept10geey.pdf> and <http://www.danielgeey.com/UserFiles/WSLRoct10geey.pdf>

The PL would be faced with some very large risks, none more so than starting with zero subscribers and no revenue. This could be offset by venture capital money to guarantee each club at least the previous deal's revenue levels. Put in context however, the overseas non-EU broadcasting deals the PL has entered into would also cushion any initial shortfall. Another large burden would include infrastructure and start up costs though this could be outsourced to established industry companies. The Dutch Eredivisie partnered with Endemol to set up, produce and distribute its channel.

Many may argue that there would be a number of competition law concerns with clubs going straight to the downstream market. Similar arguments were raised by the Commission and were set out in some detail with the PL, UEFA and Bundesliga commitment packages in mid 2000's⁷. Such competition law discussions could form the basis of another article, but in summary competition issues could relate to a PL channel charging a higher price because it is in a position of strength. This may not however be any different to the way Sky price their subscription service at present⁸.

Some point to the fact that Sky Sports subscribers pay for a whole raft of packaged rights that they may never watch but pay for as part of their monthly subscription (cricket, darts, speedway, powerboat racing, tennis etc). The PL could price its channel accordingly because it has the one crucial product that most Sky Sports viewers subscribe for. It could potentially give consumers the choice of a variety of platforms from which to purchase that channel and in time that channel could even become a purchaser of other live football matches.

In the alternative it may be in everyone's interest for Sky to keep the majority of live UK rights (if they are still sold on a territory by territory basis). It would mean the PL receiving a level of revenue they are happy with and the PL not removing Sky's battering ram. From a cost-benefit analysis, Sky may ultimately believe it would be significantly cheaper to pay over the market odds for the rights rather than compete downstream with the PL channel on its own platform.

Conclusion

The prompt timing of the listing of the High Court QC Leisure hearings for late December 2011 demonstrates the parties are keen to quickly head back to the English courts to receive judgment⁹. It is in part understandable for the PL who requires a degree of certainty in order to

⁷ See <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:291:0025:0055:EN:PDE>, http://ec.europa.eu/competition/antitrust/cases/dec_docs/38173/38173_134_9.pdf and http://ec.europa.eu/competition/antitrust/cases/dec_docs/37214/37214_90_1.pdf

⁸ See Ofcom's reports and consultations into the UK Pay-TV market http://stakeholders.ofcom.org.uk/consultations/third_paytv/statement/

⁹ Indeed, the QC Leisure civil hearing before Kitchin J is expected to reach judgment, if there are not any unforeseen complications, in early 2012. At the time of writing no set date has been set for the Murphy hearing.

structure its next EU broadcasting tender procedure to ensure EU law compliance. The opening of the tender process is believed to be imminent.

As they have in the past, the PL will be closely liaising with the European Commission to receive a degree of comfort that an extension or revision of the commitments package that was originally entered into in 2006 will be possible. Whilst the contractual implications of what is permitted in the tender arrangements are debated on by the PL, Mrs Murphy has a real fight on her hands to legitimately broadcast live PL matches in her pub. If PL authorisation is not forthcoming, which appears likely, she will require a commercial licence. The debate for the High Court, or possibly the CJEU, will be whether a Greek commercial licence will suffice. However, with only one and a half years left of the current three year UK PL deal, it may be that at the end of the 2012-13 season, the option for Mrs Murphy to purchase cheap Greek decoder cards is not even available because of the reformatted PL tender process. Presumably the tender process is likely to change more radically if Mrs Murphy is allowed to broadcast games. Less fundamental revisions may be needed if pubs ultimately require consent from PL to show the matches.

With so many potential outcomes still possible in the High Court, the first step is to ascertain how the High Court interprets the CJEU's answers and which side of the line it comes down on. When the PL gains the certainty of the High Court judgment in tandem with the CJEU's answers, the PL's lawyers will structure the new tender accordingly. The options for the PL tender range from only removing the EU infringing contractual clauses to the 'nuclear' option of starting its own channel. One of the fascinating elements of the entire case is that should the High Court agree with the copyright elements of the CJEU's judgment, the PL may be content that at least in the commercial setting, pubs in the UK will be effectively outlawed from broadcasting live PL matches without its consent. In doing so, Mrs Murphy arrives back at square one.