

# worldsportslawreport

**FEATURED ARTICLE**  
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# ‘Pubcasting’: enforcement and competition concerns

BSkyB's failure to secure successful criminal prosecutions against publicans for the alleged unauthorised screening of live FA Premier League matches highlights the difficulties in securing convictions under UK legislation. However, Sky's refusal to raise civil actions in such cases, coupled with competition concerns over live football broadcasting, has also added to current concerns. Daniel Geey of Jones Day examines the issues.

A Judge sitting at Bolton Crown Court on 24 June 2006 overturned a conviction against Brian Gannon, a Manchester publican who had been convicted in a Magistrates Court, was fined and lost his licence, for screening unauthorised broadcasts of Premier League ('PL') games. Three days later, a Magistrates Court in Portsmouth found that the prosecution had not proved that publican, Karen Murphy, had dishonestly broadcast unauthorised Premier League pictures. These two cases focussed the spotlight of publicity on two publicans, who had taken on BSkyB ('Sky') and the PL and thereby highlighted the wider issue of Sky's exclusive ability to distribute PL matches to publicans in the UK.

Section 1(1)(b) Copyright, Designs and Patents Act 1988 ('the Act') provides that the PL (in this instance) has the property right which subsists in copyright for the protection of PL broadcasts in the UK. Section 297(1) of the Act states that it is an offence to receive programs when an individual 'dishonestly receives a program included in a broadcasting... service provided from a place in the United Kingdom with intent to avoid payment of any charge applicable to the reception of the program.'

The three elements of the offence, namely dishonesty, location and payment have provided the backdrop to many Magistrate courtroom battles. The dishonesty aspect of the offence has been the defining factor, which helps explain why the PL has failed to prove, or has lost on appeal, a number of its prosecutions.<sup>1</sup>

The statute incorporating the dishonesty test unfortunately leads to a misunderstanding of the underlying concepts. Dishonesty should not really lie at the heart of the problem; the act of

broadcasting the pictures should be definitive enough. That is not however what the statute forbids. Magistrates have stated that the copyright decisively resides with the PL, but the question the statute asks of the judges relates to a dishonest intention to broadcast, which is a much more testing threshold for the PL to satisfy.

## Misinformation

Sky will continue to have problems if they persist with the Act, because there is plenty of scope for more acquittals, and the solicitors defending the publicans will only become more adept in pursuing defences. Publicans continue to have problems because little clarification emanates from decisions in Gannon and Murphy, which are cases concerned with particular circumstantial, and evidence based, conclusions. The larger picture is that Sky are trying to find new ways to enforce their rights to safeguard their live PL broadcasts, which now includes the seizing of foreign satellite equipment by local trading standards officers.

It is wholly unsatisfactory that there is no definitive conclusion that can be reached. No one is clearer about the consequences of the statute, and the PL are not keen to bring prosecutions against publicans who can use the dishonesty defence to their advantage. That has not however stopped the PL prosecuting Karen Murphy for a second time, following her initial prosecution, in which MPS (the company prosecuting the publicans on the PL's behalf) could not provide substantive evidence to establish her alleged dishonesty in relation to the broadcasting of the pictures.

## A new tactics board

It seems Sky are intent to limit any action against publicans to the

criminal sphere and avoid action through the civil courts. The rationale for prosecuting publicans in the criminal arena is that there would be:

- the threat of a criminal conviction hanging over the heads of publicans (if convicted they lose their licence under the Licensing Act 2003); and
- only the penalty of a fine for a publican (in the civil courts), which would almost certainly be set-off against the huge savings they would be making in subscribing to the non-Sky authorised broadcasts.

By not initiating civil proceedings, Sky has been astute in not leaving itself open to a ruling on a point of law that would have wider ramifications for their prized product (for example, that the broadcasts did not originate from the UK, therefore the Act does not protect their copyright of live PL matches). Any proceedings in the civil setting carry potential significant risk, because a review of all the issues involved in the case would be appraised and, on appeal, could subsequently be affirmed in terms that may be adverse to their interests. That is to be contrasted to the relatively narrow remit in any criminal proceedings against an individual publican, and the application of a subjective approach to the issue of dishonesty. Even if the broadcaster loses (as it has done), it remains much more important to Sky that issues which could be potentially disadvantageous cannot be raised as matters of principle, and ruled upon to their detriment.

Sky's new tactic to enforce their exclusive copyright of live PL matches has now targeted the equipment the publicans are using. In early November 2006, the Premier League confiscated equipment which had been used to screen PL games from four pubs in

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Blackburn. A pertinent question for publicans to consider is whether the use of equipment to receive the PL broadcasts from abroad is legal? Would the same equipment be confiscated by trading standards if it was televising a programme that a publican was legally entitled to watch, or is it the fact that strict liability applies to the act of possessing the decoders that makes this an offence?

#### Choice

At the very heart of this subject is the choice for publicans, or more precisely their lack of choice. Given that Sky (up until the start of the 2007/8 season) is the exclusive distributor of live PL broadcasts to publicans, the company is a one-stop shop for PL publican football. If publicans do not pay Sky's price, there is no alternative product they can turn to. Unlike home consumers, who can view live PL matches through Sky or various cable operators and if the price is too high, there is the option to switch. A publican's only option is to switch off. That is because there is no price competition for Sky in the market of live PL broadcasts to publicans. That in itself may not be of major concern if the prices quoted were founded on a transparent pricing system, based on the number of punters passing through the doors of each pub to watch the game being broadcast. Instead, it is arbitrarily based on the ratable value of the property. This means a two-seat pub in Chelsea could be paying the same, or perhaps more, than a 200-seat pub in Middlesborough in order to watch the same game. Not only is this potentially unfair, but the prices quoted to publicans illustrated below could well be labelled as excessive.

For example, a pub landlord complained that his pay-per-view

prices (this package is supplemental to the games in the main package of matches provided by Sky) had risen five-fold to £1,800 in one year.<sup>2</sup> Compare this to buying the live broadcasts from pubfootball.co.uk to view every PL, Champions League, Carling Cup and FA Cup match, screened at a price which was less than that or just the pay-per-view matches (£1,150).<sup>3</sup> The temptation therefore for publicans to switch, is based on paying a tenth of the original price, and this has to be balanced against the inherent risks of being prosecuted and having their licence stripped away. This process can be illustrated best by reference to the 25% price increase imposed by Sky for its sports packages marketed to publicans, in the last two years. This has led MP, John Grogan, to call for an enquiry into why Sky is able arbitrarily to increase its prices, while simultaneously being shielded from any form of price competition.

Various authorities may however point to the European Commission (the 'Commission'), with its intention to liberalise the European football broadcasting arena, breaking up the exclusive PL broadcasting deal, which led to the cable operator, Setanta, bidding for and winning two out of the six marketed packages available. Sky then struck a deal with Setanta, enabling the two broadcasters to market their individually bought games under one collective package, through a single subscription to publicans. Until a fee structure is made public, it may be that all the theoretically good work the European Commission did in differentiating the different packaged rights, so that no one broadcaster could exclusively market the rights, has potentially been washed away through a simple agreement between the two

broadcasters, to take effect in August 2007. A similar situation occurred in 2003, when Sky bid for and won all four packaged products that were marketed. The Commission's rationale for packaging the deal in a non-exclusive format was that they were concerned about Sky's dominance in retaining the exclusive PL broadcasting contract in the UK. Then, as now, the differentiated product (i.e. six packages which have been won by Setanta and Sky) are to be collectively marketed. A simple contractual agreement between Setanta and Sky has circumvented the very outcome the Commission was trying to outlaw.

The alleged transparency of the original PL broadcasting auction process seems somewhat tainted. The problem then manifests itself, in that if publicans are not being given a choice based on price (Sky being in an effective monopoly position up until 2007 and then potentially Sky and Setanta from 2007) as the only seller (or joint sellers) of the product, they can arbitrarily set prices. Accordingly, the fact that Sky increased the price of viewing PL broadcasts for publicans by almost 25% in two years speaks for itself.

A new strategy for publicans now is to buy the product from an alternative source, even though the PL state that to do so is illegal/unauthorised. The furore surrounding the decisions in cases in which Sky has not been able to prove dishonest intention has led some, usually unjustifiably, to state that this is some kind of watershed/breakthrough for publicans. Nothing could be further away from the truth, as dishonesty is simply based on the circumstantial and subjectively presented evidence put before Magistrates. The reality is that most publicans have been successfully prosecuted. The PL

however are still rightly concerned that any case that goes against them weakens their exclusive grip, whilst maintaining the belief that any publican found guilty of broadcasting PL pictures is breaching the relevant statute. That belief too may be a fallacy. What then are we left with?

### Penalties?

The question that everyone wants to know the answer to is whether it is legal to use non-UK broadcasters to screen Premier League games in pubs? Hopefully this article has revealed that there is currently no definitive answer. Do Sky own the exclusive copyright in the UK for live PL matches in pubs? Yes. Does the statute provide adequate cover to Sky if publicans wish to view PL matches from another provider? Almost certainly not. The PL certainly hold the copyright, but the only enforcing legislation that has been used has been in the criminal setting. This may prove to be relatively toothless, because decisions have been based on narrow fact specific decisions and have resulted in adverse publicity for the PL when they have lost.

Will there be a definitive answer anytime soon? Not so long as Sky only prosecute publicans in the criminal courts, as the process only centres round the premise of dishonesty, and not the main substantive issues of location (origin of signal), substantive ownership of the copyright or what qualifies as payment for broadcast services throughout the EU. The real answer, unfortunately, is to ask another question. Why is it that Sky have only approached this topic from a criminal perspective? The above paragraphs detail why Sky's careful balancing act is to prosecute publicans, thereby maximising the fear factor that publicans could be stripped of their licences (and livelihoods),

whilst shielding the organisation from wider, intrusive and potentially more damaging civil legal enquiries. Pursuing cases through the criminal courts only illustrates Sky's fear of bringing a civil action, but while this tactic remains, there will be no quick resolution to this ongoing stalemate.

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1. For an in-depth assessment of the legal arguments and conclusions reached, please see 'The Legality of Foreign Football Broadcasts and the Lack of Choice for Publican's in the Premier League broadcasting market ', Daniel Geey, the Entertainment and Sports Law Journal, December Issue.
2. [http://www.morningadvertiser.co.uk/news\\_detail.aspx?articleid=17283](http://www.morningadvertiser.co.uk/news_detail.aspx?articleid=17283)
3. <http://www.pubfootball.co.uk/index/php>



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