

European Court Delivers its Verdict on Premier League Broadcasting Cases

Background

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 Portsmouth pub. She argued that as a Member State citizen she should not be prevented from scouring the European Union for the cheapest subscription to broadcast matches. The PL alleged that Murphy's actions, among other things, breached the PL's IP rights. The PL argued that the way they sold their rights was backed up by ECJ precedent supporting the notion of exclusive licensing.

Mrs Murphy, whose case was joined with a supplier of the decoder cards and decoders QC Leisure, asked for questions of EU law to be referred to the Court of Justice of the European Union (CJEU) by the High Court. The ruling on Tuesday by the CJEU answers questions posed by the English High Court based on free movement, competition and copyright principles.

The Ruling

The CJEU ruling at first glance appeared to suggest an historic and monumental victory for the publican from Portsmouth. The CJEU ruled that the way in which the PL tendered its rights, by prohibiting viewers from watching the broadcasts with a decoder card in other Member States, was contrary to EU law. In particular, the CJEU held that the prohibition restricted the free movement of services and had the object of partitioning national markets. This ran counter to the objectives of the internal EU market.

What appears beyond doubt is that importing a decoder card to screen live matches for personal use is permitted under EU law. Such a ruling will throw into question UEFA's 3-5pm blackout period prohibition.

However, Mrs Murphy's fate, as a commercial user, is still far from clear. The sting in the tail is the CJEU's contention that when broadcasting the live rights, pubs in the UK would need the permission of the rights holder (the PL) to broadcast the logos, graphics and anthem that appear throughout the broadcast. Such authorisation appears to be distinguishable depending on whether the pub is using a residential or commercial Greek subscription. One interpretation of the ruling is that if Mrs Murphy purchased a commercial Greek subscription no further copyright authorisation will be required from the PL. Without speculating too much, it means the English High Court will have the tricky job of unpicking the CJEU answers.

Impact

As interesting as what the CJEU says in its ruling, it is important to understand what it does not say.

- At present, the PL will not yet have to re-tender their rights. The High Court will have to first formally rule that the PL tender process is contrary to EU law as well as rule on the copyright issues.
- PL clubs will not be able to sell their rights individually to the highest broadcasting bidder. Such a scenario could only occur with the support of at least 14 PL clubs voting for a change in the way the rights are sold.
- It is not envisaged that even the High Court ruling will push clubs closer to European Super League. Domestic competition in the PL appears as popular as ever.
- No one as yet will be able to conclusively assess whether the PL will be able to recoup more or less money for their rights. This is because it is not clear whether the PL will be forced to renegotiate its rights packages with the relevant authorised broadcasters.

What is definite is that the way the PL, through authorised broadcasters, restricts the resale of decoder cards outside of allotted Member State territories is contrary to EU law. That on its own may push the PL to change the way it retenders its rights because broadcasters have, in the past, benefited from a captive audience who have paid subscriptions which justify the rights outlay. If UK broadcasters Sky and ESPN are not happy to pay similar amounts for the rights, then that may effectively force the PL's hand.

Conclusion

Lawyers for the parties will need time to digest the 211 paragraph decision. The focus will now shift to the English High Court who will have the vital task of interpreting the CJEU answers, particularly on copyright. Such interpretation will ultimately allow or deny Mrs Murphy the ability to broadcast live PL football in her pub. Practically, it is possible that the High Court may not even come to a decision before the end of this PL season. In any case, the PL will have contingency plans in place and a plethora of options available. The vast majority of the EU revenue (just under £600m per season) for PL rights comes from UK subscriptions. Whatever model the PL ultimately chooses, it appears likely to be based on how best to extract that value from the UK market.

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