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Premier League broadcasting deals

The European Commission published its second report on the protection afforded to rights holders under the Conditional Access Directive - designed to enable the development of an integrated European pay-TV. Daniel Geey and Mohammed Karim, of Field Fisher Waterhouse LLP examine new and existing challenges that face rights holders - including the English Premier League - in protecting the value of their broadcasts from non-territorially authorised entities.

Introduction

With the advent of cross-border sales of decoder equipment to view encrypted pictures and online streaming of high value subscription based content, rights holders like the Premier League (PL) are keener than ever to ensure their product is only used by those broadcasters who have paid for the privilege. This article highlights the tactics of the PL in stamping out online piracy whilst simultaneously fighting a European battle with companies and individuals buying PL broadcasts from non-territorially authorised entities. The aim of this article is to illustrate new and existing challenges that continue to face rights holders in protecting the value of their product.

As court proceedings gather pace in the PL cases against QC Leisure and Others and publican Karen Murphy¹, the outcome of these cases will have the effect of either consolidating and reaffirming how rights holders sell their precious broadcasting rights or blow a massive hole in how rights holders can market their pan-European televised products. Some have argued that these cases have all the hallmarks to be the Bosman equivalent to the broadcasting industry. Whilst liberalisation of the labour market for out of contract footballers was Bosman's ultimate legacy, these two cases offer the prospect of a new pan-European market for broadcasters.

Both parties in national court proceedings have sought to use a piece of European Community legislation called the Conditional Access Directive² (the Directive) to further their own arguments about the legality of screening foreign PL broadcasts on UK screens. Although this is only one of a number of arguments put forward by the parties, the Commission published a report³ (the Report)

which summarised its current thoughts on the protection afforded to rights holders under the Directive which is discussed below. The two cases are now with the European Court of Justice (ECJ) because the English courts referred several questions of European law to the court for its views.

Whilst the arguments will continue for QC Leisure and Karen Murphy in the ECJ for some time, the PL currently has its hands full in dealing with alleged internet based infringements. The PL has in the past battled against websites hosting highlights of PL matches. Over the last few years live media streams have been available to those with the technical know-how and sufficiently quick internet services to access the broadcasts. This newer area of concern for the PL means that further enforcement resources continue to be needed to protect the value of broadcasts for legitimate rights holders.

Pubs and decoders

The cases themselves have been discussed at length in previous articles⁴ but in summary, the Premier League has brought an action against QC Leisure and other parties because Premier League pictures that are not from Sky or Setanta (who are the incumbent UK broadcasters) are being screened in the UK. The PL markets its live matches to broadcasters worldwide and in the European context, to separate EU states. These actions are to ensure that there can be no seepage of broadcasts between authorised broadcasters in different EU Member States.

The PL argues that this is necessary as different European markets have diverse levels of demand and by selling on a territory by territory basis broadcasters are able to match

demand for the product to the price they are willing to bid for the rights and sell them on to subscribers accordingly. It is precisely because the UK has the highest demand for live PL football (meaning in turn the rights for such broadcasts are of greater value to rights holder and broadcaster alike) that subscribers pay a larger fee. As a domestic Greek broadcaster has paid considerably less than the £1.7 billion paid by BSkyB (Sky) and Setanta, they can charge lower subscription fees which of course are highly desirable to non-Greeks, and especially UK consumers wanting a better, cheaper deal. The PL's aim is to outlaw unauthorised access to territorially restricted broadcasts and protect the incumbent national broadcaster from external seepage.

QC Leisure is a distributor of the decoder equipment. One of their arguments is that any European business should be able to sell decoder equipment which then allows any European citizen access to legitimately purchased decoder equipment. This in turn encourages the growth of the single market on a pan-European basis and any restrictions based upon territorial boundaries only inhibit the growth of choice for a European citizen shopping around for the best price. They state that all equipment sourced by QC Leisure is not pirated because the equipment is bought from broadcasters like NOVA, a Greek sublicense, and matches are broadcast on its Supersport channel. It means that QC Leisure can purchase legitimate equipment from NOVA to view its Supersport channel in Greece where it has its license. The debate is whether those pictures can be shown outside of that allotted territory.

It...appears from the Commission's perspective that the Directive has insufficient scope to protect rights holders from territorial seepage

The Directive and the Report

The Directive was designed to enable development of an integrated European pay-TV market. The Report highlights the emergence of a grey market where European citizens are subscribing to pay-TV services from Member States other than those in which they reside. As in the PL cases, such content provided by a pay-TV broadcaster is territorially restricted. While the Commission wishes to facilitate intra-State movement and enable expatriates to gain access to audiovisual services in their native language and culture, it also sympathises with the rights holders of sporting events who are legitimately trying to maximise the value of their product.

The Report distinguishes examples of piracy where blank smart cards are purchased and reprogrammed with programming codes obtained from the internet, from the grey market discussed above. The PL has argued in both cases that the decoders being sold by QC Leisure and being bought and used by publicans such as Karen Murphy are illicit devices under the Directive, whereas the defendants have argued that the purpose of the Directive is to outlaw pirated and 'chipped' decoder equipment where no subscription fee is being paid to any legitimate source. They state that the fact that the decoder equipment is authorised in another country to legitimately receive authorised pictures should not make the equipment illicit.

One of the arguments used by both parties concerns the Directive and its purpose. This is one of the reasons why the Commission's Report is a useful insight into the current lack of protection, that is afforded to rights holders under the Directive. Under Article 1 of the Directive, it states that its

objective is to guard against, 'illicit devices which give unauthorised access to protected services'.

Judge Kitchin's Opinion in the QC Leisure case, before questions were referred to the ECJ, was that the Directive is 'concerned with the production and placing on the market of devices which do not have their origin in a legitimate service provider rather than the unauthorised use of devices which do originate from a legitimate service provider'⁵. Whilst the defendants were obviously happy with this insight, the PL will gain slight comfort from the fact that this was one of the questions that the national court passed on to the ECJ for their deliberation.

The Report concludes that grey market issues need further investigation because, 'this cannot be said to be an entirely 'black market' given that the subscriptions are paid for'⁶.

It, therefore, appears from the Commission's perspective that the Directive has insufficient scope to protect rights holders from territorial seepage. Indeed they sympathise with such rights holders in stressing that, 'rights holders seem perfectly entitled to demand better protection in the absence of provisions directly covering them'⁷.

The Report does recommend a committee be set up to investigate into these issues in more depth. What becomes clear is that this Report coupled with Kitchin's dicta in QC Leisure all point to persuasive evidence that the PL and other rights holders when submitting their arguments to the ECJ, may have difficulty in relying on the Directive to uphold their proprietary rights. There are of course many other arguments that they will put forward in order to protect the current status quo.

Online infringements

Whilst the Directive debate concerns the tale of illicit devices and grey markets, another medium has begun to slowly erode valuable subscription based rights. The emergence of live football coverage streamed over the internet means there are now a variety of means by which a football fan can avoid paying subscriptions.

There are two main methods by which anyone can obtain a live Premiership feed on the internet. This is either via a peer-to-peer (P2P) standalone program or via 'unicasts.' One such site is Justin.tv. The site is used by visitors seeking to watch programming they might otherwise not be able to access. The video-audio stream is held on Justin.tv's servers and converted to a Flash based movie format.

Anyone who has the internet and chooses to gain access to a live stream, is indirectly diminishing the product value. Not paying for Sky or Setanta in the UK may not immediately and directly effect the price at which the PL can sell the rights to its live broadcast but eventually this loss in subscription revenue will be reflected in lower broadcaster bids to obtain rights to show live football.

The PL's war on internet sites has long begun and in February 2008, the High Court granted judgments in favour of the PL ordering injunctions against www.footballon.net, www.freepremierleague.com and www.premiershiplive.net for streaming live PL football. Litigation involving an unauthorised Israeli-registered site offering access to matches was also

recently launched⁸.

Devaluing the product and conclusions

Online streaming and unauthorised decoder issues illustrate the lengths and expense that rights holders are going to, to ensure only those authorised to broadcast the relevant pictures are able to do so. Whether the PL has the resources to continually monitor websites such as Justin.tv and others like it, remains to be seen. All these issues, however, illustrate the new, easily accessible options open to consumers.

When piracy issues hit the music industry legitimate offshoots like iTunes and a reformed Napster joined the market for online music downloads. The problem for the PL is that if they wish to compete online it would be even more difficult to restrict who can view their pictures from different countries. An online PL product putting together a package of live games may not be viable especially if they have to adhere to UEFA states concerning blacked out periods in the UK coupled with its need to segregate national markets.

Whilst this remains a relatively small problem at present and whilst broadcasters continue to be enticed with the lure of PL football, this issue may remain an inconvenience for the PL. The problem lies when subscribers switch from paying money to watch authorised broadcasts to the alternative of watching them for free or at a significantly reduced price. With technology progressing towards integrated home entertainment systems where you

can watch your favourite programmes on your flat screen through your PC, the lure is for many to do just that. If subscribers turn off, the domino effect begins. Any novel ways in which the PL can close down these sites or offer better quality online alternatives will be the full time task for rights holders of popular programming in the coming years.

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1. See FA Premier League v QC Leisure [2008] EWHC 1411 Ch; [2008] C.M.L.R. and Murphy v Media Protection Service Ltd [2008] EWHC 1666 Admin; [2008] F.S.R.
2. Directive 98/84/EC.
3. Report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, Second report on the implementation of Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access {SEC(2009) 2506}.
4. See Geey and Geey 'Broadcasting: PL rights auction: economic and regulatory challenges' *World Sports Law Report Volume 7 Issue 1 January 2009*.
5. Paragraph 80 Kitchin J in FA Premier League v QC Leisure [2008] EWHC 1411 Ch.
6. Page 4 of the Report {SEC(2009) 2506}.
7. Page 9 of the Report {SEC(2009) 2506}.
8. See <http://www.guardian.co.uk/sport/blog/2008/nov/26/premierleague-bskyb>

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