

Summary of ECJ judgment in Premier League broadcasting case

In a judgment of 4 October 2011, the European Court of Justice (ECJ) ruled in disputes concerning the licensing of broadcasting rights to Premier League football matches.

Background

The broadcasting rights for the live transmission of Premier League matches in the United Kingdom are licensed by the Football Association Premier League (FAPL) on a territorial basis and for three year terms. In order to protect the territorial exclusivity of each broadcaster, all broadcasters undertake in the licence agreement to prevent the public from receiving their broadcasts outside the licensed territory. To that effect: (i) the broadcasters must ensure that all broadcasts that are capable of being received outside their territory - in particular those transmitted by satellite - are securely encrypted, and (ii) the broadcasters are prohibited from supplying decoding devices giving access to the football matches for the purpose of being used outside their licensed territory. In accordance with these contractual undertakings, broadcasters issue decoder cards subject to the condition that customers do not use them outside the territory of that broadcaster.

Certain restaurants and pubs in the United Kingdom, however, have started to use foreign decoding devices to access the Premier League matches. They buy a decoder card and box – sometimes using a false name and address – which allow them to receive a satellite channel that is broadcast in another EU Member State (in this case: Greece) at a less expensive subscription fee than charged by the licensed broadcaster in the United Kingdom (BSkyB).

The judgment

The key conclusions in the ECJ's decision are as follows:

- Decoder cards sold in one Member State cannot be prohibited from importation, sale and use in another Member State. National legislation which prohibits such importation, sale and use of decoding devices which give access to encrypted satellite broadcasting services from another Member State is a violation of the free movement of services. This conclusion is not affected by the fact that the foreign decoding device was procured or enabled by giving a false identity or address, with the intention of circumventing the territorial restriction. It is also not affected by the fact that the device was used for commercial purposes (screening of football matches in a pub) although it was restricted to private use.
- A licence condition obligating broadcasters not to supply decoder cards for use outside the licensed territory has an anticompetitive object and is a prohibited restriction under European competition law. Such condition prohibits the broadcasters from effecting any cross-border provision of services relating to those matches and enables each broadcaster to be granted absolute territorial exclusivity. Thus, all competition between broadcasters in this field of services is eliminated.
- There is no copyright in a football match as such, as a sporting event cannot be regarded as an author's own intellectual creation. The FAPL can, however, assert copyright in certain works contained in the broadcast of the football matches

such as the opening video sequence, the Premier League anthem, pre-recorded films showing highlights of prior Premier League matches and various graphics used in the broadcast.

- Although gaining access to the football matches with the use of foreign decoder cards involves the reproduction of fragments of the program (including the copyrighted elements thereof) within the memory of a satellite decoder and on a television screen, this reproduction is not subject to a copyright holder's authorization. However, by transmitting the matches in a pub on a television screen, the matches are made available to an additional public not contemplated by the copyright holder and for profit-making purposes, thus constituting a communication to the public that does require the copyright holder's authorization.

Impact

The judgment has an impact on rights-holders' ability to license broadcasting rights on a territorial (country-by-country) basis. Such licensing model may be less viable in respect of programs broadcasted by satellite, if decoder cards allowing for cheaper access to the broadcasted programs in one Member State can be imported, (re)sold and used for private viewing purposes in another (more expensive) Member State. The judgment may also affect licensing models for the distribution of content other than through satellite broadcasts, such as over the internet.

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