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The Court of Justice Speaks On Licensing Of Satellite Broadcasting

Thomas Graf (Cleary Gottlieb Steen & Hamilton LLP) · Monday, October 10th, 2011

On October 4, the European Court of Justice rendered its judgment in [Premier League v QC Leisure](#). For a discussion of the background to the case and the opinion of the Advocate General see [here](#). The Court concludes that blocking the importation of Greek pay-TV decoders into the UK restricts the freedom to provide services without justification on grounds of IP protection. The Court also holds that a contractual prohibition to sell the decoders outside Greece infringes Article 101 TFEU. At the same time, the Court makes clear that it does not challenge the possibility to conclude exclusive, territorially limited broadcasting licenses. The Court's reasoning – unlike the [Advocate General's opinion](#) – is more narrowly tailored to the facts of the case and avoids the broader implications proposed by the Advocate General.

A number of comments have focused on the Court's application of Article 101 TFEU. But to understand that portion of the analysis it is useful to start with the Court's review of copyright related issues, because the two are intimately linked. An initial question in this connection was whether sport events can be subject to copyright at all. The Court holds that this is not the case because sport events do not represent an intellectual creation. But this finding is not determinative for the Court's conclusions because the Court proceeds on the assumption that sport events may be subject to IP protection under national rules. The Court moreover recognizes that the broadcasts at issue embody copyrightable works, including the opening sequence, the Premier League anthem, pre-recorded film sequences, and graphics. More generally, there are grounds to argue that the filming of a sport event constitutes in itself a copyrightable work.

Accordingly, the real issue was to identify the relevant acts of exploitation that are subject to copyright and therefore require authorization from the rightholder. In the present case, a number of different acts were involved:

The first act was the broadcasting of the matches by the Greek broadcaster in Greece. This clearly represents an independent act of exploitation that is subject to copyright. But the Greek broadcaster had received a license for Greece and its broadcast was therefore lawful. The spill-over of the broadcast into other territories, including the UK, did not represent a distinct act of exploitation because the Satellite Broadcasting Directive expressly limits the act of communication to the public to the uplink of the broadcast. Or as Article 1(2) of the Satellite Broadcasting Directive (that the Court referenced) puts it, "*the act of communication to the public by satellite occurs solely in the Member State where [...] the programme-carrying signals are introduced into an uninterrupted chain of communication*".

The second act was the accessing and watching of the broadcast by private viewers in the UK. It was undisputed that viewing creates ephemeral copies in the memory of decoders and TVs. But the Court (contrary to the Advocate General) concluded that such copies have no independent economic significance. According to the Court, these temporary acts of reproduction “*form an inseparable and non-autonomous part*” of viewing the broadcast and therefore are exempt from copyright pursuant to Article 5(1) of the Copyright Directive.

In the case at hand, there was also a third relevant act, namely the display of the broadcast by UK pub owners to their customers. The Advocate General had held that such a display did not constitute communication to the public within the meaning of Article 3 Copyright Directive because, in her opinion, the requirement that the public must not be present at the place of origin of the communication was not met. The Court, on the other hand, construed this criterion narrowly as only excluding instances of direct physical contact between performer and public. Such a direct physical contact did not take place here. The Court therefore held that the display of the broadcast in a pub constitutes a distinct act of communication to the public that requires separate authorization by the rightholder.

The Court’s copyright findings help to understand the Court’s conclusions on both free movement and competition law. Given that, in the Court’s analysis, private (as opposed to public) viewing of the Greek broadcast in the UK does not constitute an independent act of exploitation, a block on the importation of Greek decoders restricts the free movement of services without justification on grounds of IP protection. The only act of IP exploitation within the chain of broadcast, reception, and (private) viewing is the broadcasting of the matches by the Greek broadcaster, which takes place in Greece. That act is authorized by the rightholder and compensated by the Greek license fee. At the same time, the rightholder remains free to prevent the public viewing of the broadcast in pubs or other public places. Within the logic of the Court’s reasoning, it was therefore consequent for the Court to conclude that an interest in securing a premium for exclusivity in the UK cannot justify blocking the sale of Greek decoders since such an interest goes beyond the IP exclusivity afforded by the Satellite Broadcasting Directive.

Similarly, a contractual restriction prohibiting the sale of Greek decoders outside Greece exceeds the scope of copyright exclusivity as construed by the Court. The Court therefore concludes that such a prohibition conflicts with Article 101 TFEU. At the same time, the Court expressly confirms that it is legitimate for a rightholder to grant an exclusive broadcasting license to a “*sole licensee*” for the territory of “*a single Member State*”. The Court emphasizes that such exclusive licenses are “*not called into question*”. The Court only takes issue with what it describes as an “*additional obligation*” not to sell decoders outside the allocated territory.

The Court is quite brief on the possibility of exemption under Article 101(3) TFEU, which it dismisses without much discussion. This is surprising, given that the application of Article 101(3) TFEU requires a detailed factual assessment, as the Court recognized in its *GlaxoSmithKline Spain* judgment. The mere fact that a contractual limitation exceeds the scope of protection afforded by IP rights does not automatically preclude an exemption under Article 101(3) TFEU. This is confirmed by *GlaxoSmithKline Spain*, which concerned restrictions of parallel trade in physical products for which no IP rights could be invoked. In the present case, there may be a number of factors independent of IP rights that might support an exemption. For example, the Court did not consider that the attraction and hence the value of a national sport event will regularly be much higher in its home country than abroad. A valid question therefore arises whether contractual clauses of the type at issue here cannot be justified under Article 101(3) TFEU to protect the

inherent value that a sport event has in its home country. This is distinct from a right to a premium price for exclusivity that the Court rejected. Imposing a legal framework that requires granting access to a sport event in its home country under commercial terms that apply outside that country is arguably discriminatory because it fails properly to distinguish between situations that are inherently different. More generally, the Court did not discuss the possible efficiency gains arising from differentiated pricing systems, which was at the heart of the *GlaxoSmithKline* matter.

The practical implications for rightholders flowing from the judgment are therefore ambiguous. On the one hand, the Court confirms that rightholders are entitled to grant exclusive broadcasting licenses, i.e., they can commit not to grant licenses to other broadcasters within the same Member State. On the other hand, the judgment implies that they may not be able to guarantee a licensee absolute protection against spill-over from broadcasts in other Member States since rightholders cannot impose an absolute ban on the export of decoders. However, it follows from the judgment that rightholders may exclude the sale and use of decoders for public viewing. In addition, consistent with past case law it should be permissible to prohibit active selling of decoders outside the licensed territory. The judgment also does not preclude limiting the grant of a license to specific language versions, which may help to limit spill-over effects.

As a legal matter, it is important to note that the Court's judgment is narrowly based on the facts of the case. While the Advocate General sought to formulate principles that apply to all dissemination of non-physical content, including online dissemination, the Court's conclusions are limited to the transmission and viewing of satellite broadcasts. This follows directly from the Court's analysis of the copyright situation.

First, because the Court finds that viewing of the broadcast does not involve an independent act of exploitation the Court avoids the issue of exhaustion. The Advocate General's opinion was based on a theory that services, like the sale of physical goods, are subject to exhaustion. The Court's analysis, on the other hand, does not seek recourse to such a theory.

Second, the Court's conclusions on both free movement and competition law rest on the special rules for communication to the public that are set out in the Satellite Broadcasting Directive. In particular Article 1(2) Satellite Broadcasting Directive, which limits the act of communication to the country of origin represents a *lex specialis* that applies solely to satellite broadcasts. The same principle cannot be transposed to the making available right for online content under Article 3(2) Copyright Directive because the act of making available takes place in the country of destination. This is apparent from Article 3(3) Copyright Directive, which expressly excludes exhaustion of the making available right. It is also confirmed by the Commission's [Simulcasting](#) decision, which recognized the country of destination principle for the calculation of online license fees.

Moreover, in contrast to satellite broadcasting, online transmission also implicates the reproduction right under Article 2 Copyright Directive. This is evident in the case of online downloading, which creates permanent copies in the country of destination that have independent significance. Similarly, interactive, on demand online streaming involves acts on the destination side that cannot be characterized as mere passive consumption and therefore require separate authorization.

In sum, the Court's judgment provides a number of important clarifications on the application of the rules on copyright, free movement, and competition law for the licensing of satellite broadcasts, although questions about the application of Article 101(3) TFEU remain open. At the same time, the Court takes care to limit its clarifications to the facts of the case and therefore

avoids potential conflicts with the rules on online dissemination of digital content as set out in the Copyright Directive.

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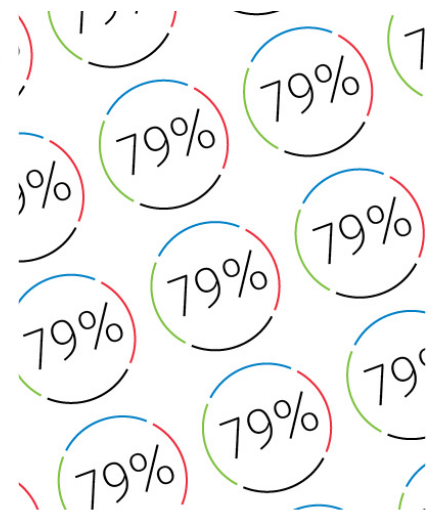
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