

# Kluwer Competition Law Blog

## Premier League fans in Europe worse off after Murphy judgment

Ben Van Rompuy (Europa Institute, Leiden Law School) · Tuesday, May 6th, 2014

When the European Court of Justice (CJ) delivered its judgment in joined cases *FA Premier League v QC Leisure and others* (C-403/08) and *Karen Murphy v Media Protection Services* (C-429/08) (*Murphy*), it was deemed a radical game-changer for the way in which sports media rights are sold in the EU. The doom and gloom scenario has been proven false. Even the Premier League is sticking to the old recipe of licensing its media rights on an exclusive territorial basis in the EU. However, a new competition law issue is looming on the horizon.

Prior to the *Murphy* case, the territorial exclusivity that the Premier League granted to licensees was upheld by a combination of public and private measures. First, national legislation prohibited foreign decoding equipment – giving access to satellite broadcasting services from another Member State – from being imported, sold, and used in the UK. The CJ found that this constituted an unjustified restriction on the freedom to provide services prohibited by Article 57 TFEU. Second, the Premier League imposed a contractual condition preventing broadcasters from offering their services to subscribers outside the Member State for which they held the licence. The CJ did not question the principle of granting exclusive licenses. It did make clear, however, that the contractual clauses granting absolute territorial protection were incompatible with Article 101 TFEU. This in itself was not a real innovation: restrictions on passive sales are typically qualified as hardcore restrictions and thus incapable of exemption under Article 101(3) TFEU.

In *Murphy*, the Premier League had argued *inter alia* that the prohibition on the import, sale and use of foreign decoding devices was necessary to ensure compliance with the UK blackout rule, which prohibits the broadcasting of football on Saturday afternoon (3-5 pm) in the UK. The CJ rejected this argument. It stressed that compliance with such a rule, if capable of justifying a restriction on the fundamental freedoms, could be ensured through less restrictive measures, e.g. by incorporating a contractual limitation in the licence agreements with broadcasters, under which the latter would be required not to broadcast Premier League matches during closed periods.<sup>[1]</sup>

The Premier League, who was forced to renegotiate its licensing agreements with all broadcasters in the EU, followed the CJ's suggestion. Instead of the outright prohibition of passive sales, other contractual prohibitions were introduced:

1. Licensees are no longer allowed to offer an optional English language feed to its consumers. They can only transmit Premier League matches with the commentary in the language of that country. The English language feed is now limited to UK and Irish licensees.

2. Non-UK licensees are no longer allowed to transmit more than one live Premier League match on Saturday afternoon. Italian broadcasters were even forced to stop the live broadcasting of any match kicked off Saturday at 3 pm because the Fox Sport Italia signal kept being used by British pubs.

These output limitations sought to take away one of the main benefits that British pub owners, like Karen Murphy, enjoyed by using imported decoders and subscriptions from elsewhere in Europe, namely the ability to show live Premier League matches during the blackout period (when UK broadcasters could not).

As a result, the UK 3 pm blackout rule is now *de facto* imposed across the entire EU, to the detriment of broadcasters and millions of sports fans outside the UK and Ireland. In the midst of their pay TV contract, consumers everywhere in the EU had to accept unilaterally imposed programming changes: less live Premier League matches and no more English commentary (sorry, expats!).

This raises novel questions about the public interest dimension of the blackout rule. In 2001, the European Commission examined UEFA's broadcasting regulations, which allow national football associations to block a number of hours during which football may not be broadcast in their country. At the request of the Commission, UEFA substantially reduced the scope of the blackout period, i.e. a maximum restriction of 2,5 hours during the main kick-off time on Saturday or Sunday. Consequently, the Commission concluded that the regulations, as amended, did not infringe Article 101(1) TFEU because they had no appreciable effect on competition in the internal market.<sup>[2]</sup> The Commission thus conveniently avoided the need to assess whether the alleged purpose of the blackout rules, namely to ensure that the television coverage of professional sport would not undermine stadium attendance or even amateur sport participation, was a valid legal defense.

Considering the current spill over effects of the UK blackout rule, it is unlikely that the UEFA broadcasting regulations can still be considered not to appreciably restrict competition. Moreover, in the present economic and legal context it is doubtful that the restrictive effects of the blackout rule could be deemed inherent and proportional to a legitimate objective. Firstly, the claimed sporting concern has always been disputable. UEFA enabled national football associations to block broadcasting hours at the end of the 1980s. At that time, ticket revenues were a crucial source of revenue for professional clubs. The growing demand for televised sports content, which significantly increased the airtime of football, was perceived as a threat to this volatile revenue stream. Secondly, there are appealing arguments in favour of the contrasting claim that live TV coverage complements, rather than endangers, stadium attendance. The empirical research on the impact of live broadcasting on stadium attendance is far from conclusive. Thirdly, for the season 2013-2014 the number of football associations in the EU exercising the right to block broadcasting hours has decreased to four, namely Austria and the UK (England, Northern Ireland, and Scotland). Why is it that only four UEFA members still see virtue in defining blackout periods?

Interestingly, the US Federal Communication Commission (FCC) recently proposed to eliminate its sports blackout rules. In the US, American football remains the sport most affected by the rules. Under the NFL's longstanding policy, the television broadcast of home games in a team's home territory is prohibited if the event did not sell out all its tickets. According to the FCC, changes in the sports industry over the last four decades "*have called into question whether the sports*

*blackout rules remain necessary”.*<sup>[3]</sup>

Now that the anti-competitive effect of the UK 3 pm blackout rule clearly outweighs any possible justification, it is time, if not long overdue, to abolish this old-fashioned measure (sorry, Premier League!).

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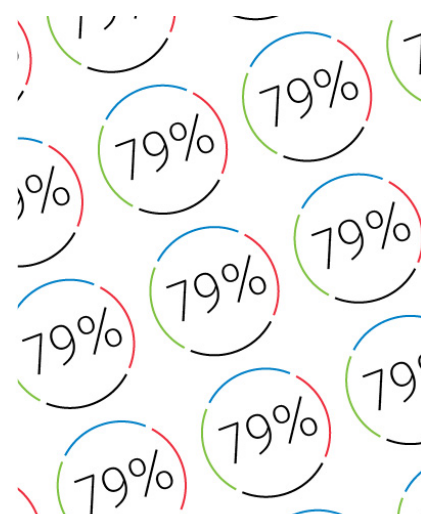
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