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UK Pubs And Greek Decoders – The Implications Of The Premier League Case For The Dissemination Of Digital Content

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The European Court of Justice is expected to render its judgment in *Premier League v QC Leisure* in the next few months. At the heart of the case, lies the question whether licensing of intangible media content in one EU Member States exhausts the rights to that content across the EU. The answer of the Court of Justice will have important implications beyond the case at hand.

Advocate General Kokott rendered her opinion on the case on February 3, 2011. She proposes that the licensing of intangible content should be subject to exhaustion in the same way as the sale of physical products. If upheld, that conclusion would have serious repercussions for the licensing of all intangible content beyond sports broadcasts, including for example online music, movies, software, and ebooks.

The case was triggered by the sale of Greek decoder cards to pubs located in the UK, which enabled the viewing of live Premier League football matches in the UK, without paying for an UK subscription. The decoder cards were not pirated copies. They were sold by an official Greek Premier League licensee. But the license that the Premier League had given was limited to enabling access to Premier League broadcasts in Greece. The Premier League therefore maintained that both the sale of Greek decoder cards in the UK and the display of the matches by UK pubs, without UK subscription, represented a violation of the Premier League's UK copyrights. The defendants, on the other hand, took the position that by granting a license for Greece and receiving royalty payments for the Greek decoders, the Premier League had exhausted its rights.

As an initial point, Advocate General Kokott notes in her opinion that the case should be analyzed under the Treaty rules governing free movement of services, not the rules on free movement of goods, even though decoder cards are physical products (Opinion para 167-170). This is because decoder cards are merely a "key" for obtaining access to the broadcast. They have no material independent value. Instead, the center of gravity here is in the provision of access to Premier League broadcasts, which is an intangible service.

This then raises the question whether the Premier League's attempt to prevent the use of Greek decoder cards for accessing its broadcasts in the UK was compatible with the free movement of services. The Premier League argued that this was justified by its interest to protect its UK copyrights. These rights were not exhausted because services are not subject to exhaustion.

The Advocate General disagrees. She suggests that the principle of exhaustion applies to services in the same way as to physical products. According to the Advocate General, the dissemination of intangible content, such as a broadcast or the downloading of online music, movies, software, or ebooks, is no different from the sale of a physical product. In her view, it would therefore be “arbitrary” to treat the two differently (Opinion, para 185). The Advocate General considers that such an outcome does not “undermine” the specific subject matter of the Premier League’s rights because the Premier League receives remuneration from the license fees paid for the Greek decoder cards (Opinion, para 190-191).

Yet, contrary to what the Advocate General suggests, there is a critical difference between the sale of a physical medium, such as a DVD or CD, and the dissemination of intangible media content: The sale of a physical good involves a single copy of the copyrighted work. A subsequent second sale of that particular copy does not create additional copies. In contrast, the dissemination of intangible content results in additional copies. Each act of downloading or access to a broadcast creates new copies, which require distinct authorization. This is why the principle of exhaustion cannot be transposed to the dissemination of intangible content. As Advocate General Reischel put it in *Coditel II*, in the case of a film copyright, the issue of parallel trade does not arise “*because it does not manifest itself [...] in tangible form, so that no circulation of goods as such can occur, only the surrender of exploitation rights*”.

Exhaustion is based on the rationale that the rightholder should not obtain remuneration twice for the same copy. Once a physical copy has been lawfully put on the market, that specific copy should travel freely within the EU. But the dissemination of intangible content does not involve the onward sale of the same copy supplied by the rightholder. It involves the grant of a license to create additional copies. The opinion of Advocate General Kokott therefore does not simply apply the exhaustion principle to services. It substantially expands that principle. The opinion’s implication is that any license given within the EU is automatically given for the whole of the EU. This is very different from the principle that a particular copy once lawfully sold should be able to freely travel. It implies that a licensee who has obtained a license to make copies in Greece can in fact make or sub-license the making of copies across the EU while paying the price of a Greek license.

The Advocate General’s suggestion that payment of a Greek royalty is enough to exhaust copyrights across the EU is based on the premise that the specific subject matter of a copyright is limited to obtaining some remuneration for the copyrighted work. This is not correct. A central and essential element of a copyright is the right to decide whether or not to authorize a copyrightable act. This is expressly enshrined in Articles 2 and 3 of the Copyright Directive. It has also been confirmed in several court judgments, which have held that a duty to license interferes with the subject matter of a copyright, even if compensation is paid (*Volvo*, *Renault*, *Magill*).

Suggesting that the grant of a limited license for one Member State exhausts copyrights across the EU therefore interferes with the specific subject matter of copyright. It imposes in effect a duty to license. A license for Greece only authorizes the creation of copies in Greece. In the Premier League case, neither the Greek licensee nor the UK pub owners were authorized to create copies in the UK, which result from accessing the broadcast. Declaring the UK copyrights to be exhausted therefore imposes a de facto license where no such license was given.

It is also questionable to suggest that the payment of a Greek license fee represents proper remuneration for the exploitation of UK copyrights. National IP rights can have substantially

different value in different Member States. An English football match will naturally be of higher value in England than in Greece. The Greek license fee therefore does not compensate for an exploitation of UK copyrights. The observation made by the Advocate General that a copyright does not entail a specific right to charge different prices in different countries is not determinative (Opinion, para 192). What matters is that copyrights by their nature are national in scope. A copyright for Greece is not the same as a copyright for the UK. A license for one therefore does not entail a license for the other. Crucially, while a copyright does not guarantee a specific price, it allows the rightholder to define the scope of the license that he is willing to grant in return for a particular price.

This was recognized by the Court of Justice in the two Coditel cases. The Advocate General seeks to distinguish Coditel on the grounds that it involved two different forms of exploitation – cinemas and TV (Opinion, para 196). But the findings in Coditel do not turn on differences in the form of exploitation. The point of Coditel is that a rightholder is entitled to limit the authorization that he grants, including by limiting its territorial scope. A license to show a film in a Brussels cinema does not authorize the showing of the film in London just as it does not authorize the broadcasting of the film via TV. Broadcasting or downloading in the UK, rather than in Greece, is a distinct act of exploitation, requiring distinct authorization, in the same way as cinema exhibition is a distinct act from broadcasting.

The principle established in Coditel that it is legitimate for a rightholder to limit the territorial scope of a license has been repeatedly confirmed by the European Commission. For example, in PMI-DSV, the Commission held that “the licensor remains free [...] to choose his licensee and the size of the territory which he grants him”. The Commission has also recognized that it is legitimate for a rightholder to calculate a royalty based on the country in which the media content is consumed. Thus, in Simulcasting, the Commission noted that “use of a phonogram should be assessed under the legal, economic and commercial conditions of each of the countries where the use takes place” and that “the value of the rights for each territory should be determined according to the exploitation in such territory”

The opinion of the Advocate General runs counter to these well established principles. But perhaps most fundamentally, the opinion stands in conflict with EU legislation. Article 3(3) of the EU Copyright Directive expressly holds that the communication to the public right is not subject to exhaustion. The Advocate General does not discuss Article 3(3). But side steps the issue by holding that the showing of Premier League broadcasts in pubs does not constitute a communication to the public covered by Article 3(1) (Opinion, para 147).

Yet, the Advocate General recognizes that accessing the Premier League broadcast creates copies of independent economic significance (Opinion, para 95). Article 3(3) of the Copyright Directive merely represents one manifestation of the more general principle that intangible copyrights are not subject to exhaustion. Indeed, recital 29 of the Copyright Directive holds as a general manner that “*the question of exhaustion does not arise in the case of services and on-line services in particular. [...] Unlike CD-ROM or CD-I, where the intellectual property is incorporated in a material medium, namely an item of goods, every on-line service is in fact an act which should be subject to authorization*”. Importantly, Article 3(3) of the Copyright Directive manifestly contradicts the Advocate General’s broad contention that services, such as communications to the public covered by Article 3(1) and making available of online content covered by Article 3(2) are subject to the same exhaustion principles as physical goods.

It will therefore be interesting to see what position the Court of Justice will take in the case. For the

reasons discussed here, it is to be hoped that the Court of Justice will make clear that services are not subject to exhaustion. Only such a conclusion can be reconciled with the legal and economic context within which the exploitation of intangible copyrighted works takes place.

Should the Court of Justice, however, wish to preserve the outcome of the Advocate General's opinion in the case at hand, but avoid its broader implications, it could simply deal with the case under the rules governing free movement of physical products, given the involvement of physical decoder cards. But this would deprive the Court of an opportunity to clarify the EU rules for the licensing of intangible media content.

In any event, even if the Court were to find that the Premier League exhausted its UK copyrights by granting a license for access to its broadcasts in Greece, this conclusion could not be applied to the online dissemination of media content. In particular, the doubts that the Advocate General raises about the application of Article 3 Copyright Directive to the viewing of broadcasts in pubs, do not apply in the case of dissemination of online content. It is clear from the wording of the Copyright Directive that such dissemination falls under the making available right of Article 3(2) and therefore is excluded by Article 3(3) from exhaustion. Any conclusion to the contrary, would run counter to the clear principles established by EU legislation.

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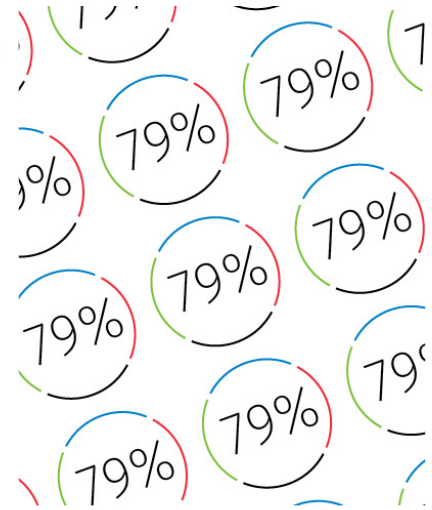
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