



THE LEGAL POSITION OF THE NORWICH PUBLICAN'S ABILITY TO SCREEN THE PREMIER LEAGUE MATCH USING FOREIGN DECODER CARD

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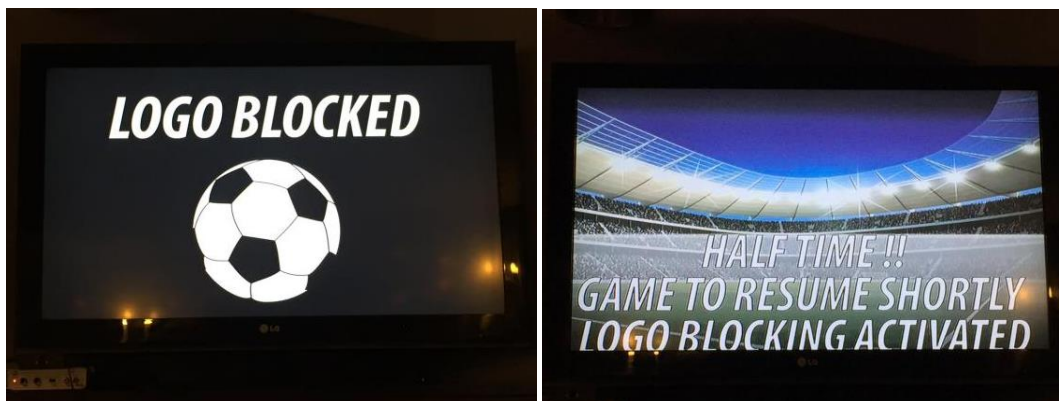
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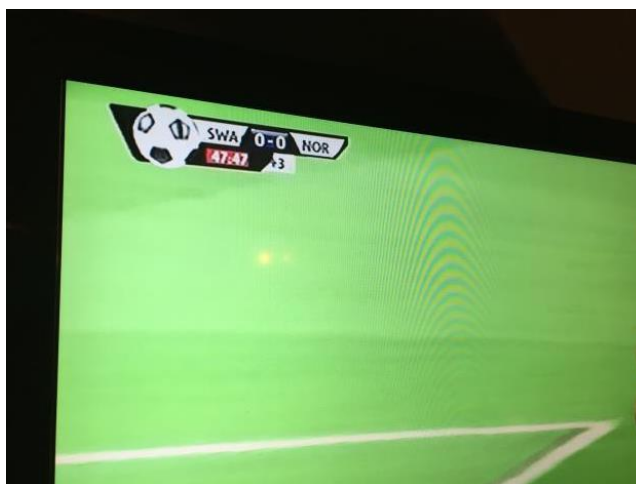
Abstract

This paper examines at two cases: Case C-403/08 and Case C-429/08 of the Court of Justice of the European Union, in which pubs used unauthorised foreign decoder cards to access satellite transmissions of live football matches in the United Kingdom. The emphasis is on the impact of copyright aspects in these cases, such as intellectual property right subject matter, reproduction right scope, and the concept of public communication.

Keywords: intellectual property, public communication, reproduction

1. Introduction





The illustrations above came out throughout the time of a Premier League match which was being broadcast live using a foreign satellite platform in a Norwich pub. As shown in the pictures, certain parts of the broadcast were blocked or covered, for instance, on-screen graphics, recent highlights of the match during half time and Premier League logo which was part of the score caption at the top of the screen. Here such aspects of the broadcast were not shown in the pub raises a question about the legal position of the Norwich publican's ability to screen the Premier League match using foreign decoder card. By reviewing two joined cases¹ concerning the unauthorized use of foreign decoder cards from Greece of the pubs to access satellite transmissions of live football matches within the United Kingdom, this paper focuses on the influence of copyright aspects of the case such as the intellectual property right subject-matter, the scope of the reproduction right and the concept of communication to the public. This paper is divided into four main sections. On the first section, the facts of the relevant cases will be briefly referred to so as to spot any similarity between them and the issue in question or any omitted fact. This is to ensure every aspect is covered. The next three sections including intellectual property subject-matter, the reproduction right and the notion of communication to the public will be disclosed sequentially in the following order: (1) by explaining the ruling of the Court of Justice of the European Union (hereinafter referred to as 'the CJEU') and (2) by indicating the applications of the ruling to the issue.

2. Facts

¹ *Football Association Premier League Ltd and Others v QC Leisure and Others* (Case C-403/08) and *Karen Murphy v Media Protection Services Ltd* (Case C-429/08), Judgment of the Court (Grand Chamber) of 4 October 2011.

In October 2011, the CJEU made a significant ruling² following two joined referrals from the English courts.³ The first case, (Case C-403/08), relates to a civil action brought by the Football Association Premier League (hereinafter referred to as 'FAPL') against QC Leisure and others who were supplying foreign satellite decoder cards in the United Kingdom. The second case, (Case C-429/08), is a criminal action brought against Karen Murphy who ran The Red, White and Blue pub in Portsmouth and who had been using a foreign decoder card to access a Greek satellite signal to allow her customers to watch live broadcasts of Premier League football matches. The claimants relied on their rights to control and exploit the right to broadcast live footage of the Premier League football matches throughout the world. Both cases refer to the unauthorized use of foreign decoder cards from Greece of the pubs to access satellite transmissions of live football matches within the United Kingdom. However, in the issue in question, it has remained doubtful about the origin of the satellite decoder whether it is a EU-based card or a non EU-based one. Thus, in the scope of the paper, the Norwich publican will be assumed that they used a Member State satellite platform to show a live match in the pub.

3. Intellectual Property subject-matter

3.1. The Court's ruling

According to the CJEU, football matches are not classified as copyright works for the reason that they are not an author's own intellectual creation as an original work.⁴ Sporting events in general and football matches in particular cannot be regarded as intellectual creations as they 'are subject to rules of the game, leaving no room for creative freedom for the purposes of copyright'.⁵ However, the CJEU finds that some parts contained in the broadcasts, such as the opening video sequence, the Premier League anthem, pre-recorded films showing highlights of recent Premier League matches and various graphics, are copyright works.⁶

3.2. Applications to the issue

² (n 1).

³ *Football Association Premier League Ltd v QC Leisure (No.2)* [2008] EWHC 1411 (Ch), [2008] 3 CMLR 12; and *Karen Murphy v Media Protection Services Ltd* [2007] EWHC 3091 (Admin), [2008] 1 WLR 1869, and [2008] EWHC 1666 (Admin), [2008] FSR 33.

⁴ Judgment, paras 96–100.

⁵ Judgment, para 98.

⁶ Judgment, paras 149, 152.

FAPL's activities involve the organisation of the filming of Premier League matches. The images and ambient sound are transmitted to a production facility which adds logos, video sequences, on-screen graphics, music, and commentary in English.⁷

The Premier League football match itself is not protected by copyright law but some elements of the broadcast including graphics, highlights as well as Premier League logo (as indicated by the images) are subject to copyright protection.

4. The existence of a reproduction right

4.1. The Court's ruling

The CJEU also has to consider the scope of the reproduction right regarding acts of reproduction within the memory of the satellite decoder and on the television screen in the pub. It holds that the reproduction under Article 2 of Directive 2001/29/EC extends to transient fragments within the memory of a satellite decoder and on a television screen on condition that fragments contain elements which are the author's own intellectual creation.⁸ Furthermore, the unit composed of the fragments reproduced simultaneously must be examined in order to determine whether it contains elements which are the author's own intellectual creation.⁹ After a stiff examination, the CJEU concludes that the acts of reproduction in this case fulfil all the conditions laid down in Article 5(1) of the Directive 2001/29/EC and therefore is provided a derogation from the rule that the copyright holder must authorize any reproduction of his protected work.¹⁰ The copies in the decoder and on the screen are temporary, are transient and form an integral part of a technological process carried out by means of a satellite decoder and a television set in order to enable the broadcasts transmitted to be received.¹¹ They are lawful because of the undermentioned reasons. Firstly, the act of reproduction in question enables the satellite decoder and the television screen to function properly.¹² Secondly, the picking up of the broadcasts and their visual display – in private circles - is not an act restricted by copyright.¹³ They have an economic value and hence an economic significance¹⁴ but not independent economic significance. The CJEU argued that “although the reproduction ensured the screening which in turn

⁷ Erika Szyszczak, 'Karen Murphy: Decoding Licences and Territorial Exclusivity' (2012) 3 JECL & Pract 169.

⁸ Judgment, para 159.

⁹ Judgment, para 159.

¹⁰ Judgment, paras 161-182.

¹¹ Judgment, para 165.

¹² Judgment, para 170.

¹³ Judgment, para 171.

¹⁴ Judgment, para 174.

potentially enticed more customers to the pub, the technological reproduction within the decoder did not in itself have any quantifiable value that was separate from the general value gained by attracting more customers to the pub through the showing of the football match. It was the actual screening that had economic significance and not the technological reproduction that took place within the decoder”.¹⁵ Consequently, the temporary acts of reproduction in question are not capable of generating an additional economic advantage which goes beyond the advantage derived from the mere reception of the broadcasts.¹⁶

5. Applications to the issue

The signal of the match's images and ambient sound is transmitted by satellite to a broadcaster which may add its own logo and additional commentary. Thereafter, the signal is compressed and encrypted and transmitted by satellite to subscribers. The signal is then decrypted and decompressed in a satellite decoder which requires a card.¹⁷ Such technological transformation of the broadcast signal within the memory of the satellite decoder that enabled it to be transmitted on to a television screen is a reproduction for the purposes of Article 2 of the Directive 2001/29/EC. However, the reproduction in question satisfied all the requirements of Article 5(1) of the Directive 2001/29/EC hence there would be no authorisation from the right holder is needed.

6. Communication to the public

6.1. The Court's ruling

In relation to communication to the public by wire or wireless means under Article 3(1) of Directive 2001/29/EC, the CJEU holds that the notion of communication to the public must be construed broadly, as referring to “any transmission of the protected works, irrespective of the technical means or process used”.¹⁸ This includes the transmission of a broadcast work is shown via a television screen and speakers to the customers present in a pub.¹⁹

Also due to the CJEU, when the pub landlord intentionally gives the customers present in that establishment access to a broadcast containing protected works via a television

¹⁵ Adrian Wood, ‘The CJEU's ruling in the Premier League pub TV cases - the final whistle beckons: joined cases Football Association Premier League Ltd v QC Leisure (C-403/08) and Murphy v Media Protection Services Ltd (C-429/08)’ [2012] EIPR 203, 206.

¹⁶ Judgment, para 177.

¹⁷ (n 6).

¹⁸ Judgment, para 193.

¹⁹ Judgment, paras 190-207.

set and speakers, he or she carries out an act of communication.²⁰ In additional, such communication must be to a new public, a public which was not taken into consideration by the authors of the protected works when they authorized their use of the communication to the original public.²¹ In principle, only the owners of television sets and their family circle receive the signal when a broadcast is authorized by the authors.²² Nevertheless, “when a broadcast work is transmitted in a place accessible to the public, for an additional public which is permitted by the owner of the television set to hear or see the work, an intentional intervention of that kind must be regarded as an act by which the work in question is communicated to a new public”.²³ The CJEU concludes that when the works broadcast are transmitted by the proprietor of a public house to the customers present in that establishment, because those customers constitute an additional public which was not considered by the authors when they authorised the broadcasting of their works.²⁴

Therafter, a requirement followed from Recital 23 of Directive 2001/29/EC is stated that the work broadcast must be transmitted to a “public not present at the place where the communication originates”.²⁵

Finally, the Court points out that it is not irrelevant that the communication is of a profit-making nature.²⁶ The pub landlord transmits the football match in the pub in order to benefits from an increased number of customers which also has an effect upon his financial results.²⁷

As a result, transmission in a pub of broadcasts containing protected works constitutes a communication to the public, requiring authorization of the author of the works. This means the pub owner infringes copyright law when broadcast a match (including coyrighted works within it).

7. Applications to the issue

Firstly, a communication to the public within the meaning of Article 3(1) of Directive 2001/29/EC occurs when a live transmission of protected works in a football match are shown via a television screen to the customers in a public house. Here, the protected

²⁰ Judgment, paras 194-196.

²¹ Judgment, para 197.

²² Judgment, para 198.

²³ Judgment, para 198.

²⁴ Judgment, para 199.

²⁵ Judgment, para 200.

²⁶ Judgment, para 204.

²⁷ Judgment, para 205.

works are some elements of the broadcast including graphics, highlights as well as Premier League logo (as mentioned in the foregoing section A). Secondly, there is an act of communication carried out by the publican, and such communication is to a new public. Hence, screening football match broadcast containing protected works in a pub is considered as a communication to the public and requires further consent from the right owner. In another words, if the pub landlord showed the match with copyrighted works being communicate to the public without the owner's permission, he or she would infringe copyright law.

Conversely, in the circumstance in question, the transmission of the copyright protected works shown via the television screen are either blocked or covered. Consequently, there are no longer works that are protected by copyright law in the live broadcast of the Premier League football match. Therefore, a communication to the public within the meaning of Article 3(1) of Directive 2001/29/EC does not occur.

As a result, the publican has the ability to screen the match as long as the judgment is applicable. It is important to address that the pub operator exploits this loophole in the law to avoid prosecution related to copyright infringement by using some kind of technical system which has the ability to pick up any graphics and sounds in a broadcast and replace them with alternative on-screen material so as to cover all coyright works. This aspect of the issue gives a rise to a number of potential problems such as the effectiveness of such facility if the FAPL continuously improves the use of technical means to prevent it or the future of copyright law when such facility is created to breach copyright.

8. Conclusion

To be conclude, blocking or covering certain copyrighted parts of the broadcast has a fundamental impact on the legal position of the Norwich publican's ability to screen the Premier League match in the pub using foreign decoder card. First of all, although the football match is not able to be copyrighted, elements occur during the broadcast namely on-screen graphics, recent highlights of the match during half time and Premier League logo which is part of the score caption at the top of the screen are subject to coyright protection. Next, the acts of reproduction performed within the memory of a satellite decoder and on a television screen which consisted of the creation of transient sequential fragments of the author's own intellectual creations fulfil all the conditions which provides a derogation from the rule that the copyright holder must authorize any reproduction of his or her protected work. Lastly, when copyrighted works in the

broadcast are prevented from being shown in pubs, they are also prohibited from being communicated to the public. As a result, no authorisation from the author is necessary when the pub landlord broadcast a football match.

REFERENCES

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