Court of Justice of the European Union: FA Premier League et.al. v. QC Leisure et al. and Karen Murphy v. Media Protection Services

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In its groundbreaking judgment of 4 October 2011 the Court of Justice of the European Union has essentially legalized the import, sale and use of foreign satellite television decoder cards. The judgment, which was given in two joined (originally British) cases, concerned decoder cards that provide access to encrypted satellite transmissions from Greece of British Premier League football matches. Foreign decoder cards such as these are widely sold and used in the United Kingdom, both for private viewing and in public houses, because they provide access to televised Premier League football at substantial lower cost than asked in the British domestic market.

In response to a request for a preliminary ruling by the British High Court (see IRIS 2011-3/2), the Court of Justice held that provisions in UK law that prohibit the import, sale or use of foreign decoder cards are in conflict with the freedom to provide services, and cannot be justified by the objective of protecting intellectual property rights, since the Greek broadcasts were duly licensed by the Premier League and charges for the foreign decoder cards were being paid. By the same token, such cards were held not to be 'illicit devices' within the meaning of Directive 98/84/EC (Conditional Access Directive), even if the cards were procured by providing false names and addresses and in breach of contractual restrictions, because the cards were originally manufactured and placed on the market with the authorisation of the provider of the satellite service.

Most importantly, the Court of Justice also held that a system of exclusive broadcasting licenses that creates absolute territorial exclusivity in a Member State (i.e. Greece) by prohibiting the sale of decoder cards to foreign television viewers, is contrary to EU competition law. According to the Court these impediments to the freedom to provide services and freedom of competition are not justified because license income from encrypted satellite transmissions can be based on actual audiences both in the Member State of the broadcast and in other states where the broadcasts are received. In this connection the Court observed that partitioning markets with the sole aim of creating artificial price differences between Member States and thereby maximizing profits (price discrimination) is irreconcilable with the Treaty.

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The judgment is likely to have far-reaching ramifications for current business practices in the broadcasting sector, as broadcast licenses conferring absolute territorial exclusivity are common, not only as regards televised football matches and other sporting events, but also in respect of motion pictures and other premium content.

The thirty-page judgment of the Court additionally contains important holdings on issues of harmonized copyright law, in particular concerning the interpretation of Directive 2001/29 on copyright in the information society. Transient (i.e. temporary) copies of copyright works made in the memory of satellite decoder equipment are excepted from the reproduction right, because they serve a lawful use. By contrast, showing television broadcasts on a television screen to customers of a pub amounts to communication to the public, and therefore requires permission of the rightsholders.

Joined Cases C-403/08 and C-429/08, FA Premier League et al. v. QC Leisure et al. and Karen Murphy v. Media Protection Services, Judgment of the Court of Justice of the European Union (Grand Chamber) 4 October 2011

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