

## Pub football and the future of European broadcasting



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KAREN MURPHY, THE LANDLADY OF THE RED WHITE & Blue in Southsea, Hampshire, was convicted of fraudulent reception of transmissions at Portsmouth Magistrates' Court in January 2007. She had shown Premier League football matches in her pub, having taken out a satellite subscription (complete with decoder box and viewing card) from a Greek broadcaster.

Hers was not the first case to have come before the courts on similar facts. One such example was that of Brian Gannon, the landlord of the Fisherman's Inn near Rochdale, who was also convicted of the offence but successfully appealed to the Bolton Crown Court. Perhaps encouraged by his success, Ms Murphy appealed against her conviction to the Portsmouth Crown Court but the appeal was dismissed. Undaunted, she appealed by way of case stated to the High Court, which rejected her appeal, or part of it, on 21 December 2007.

The cases of *Gannon v FACT* and *Karen Murphy v Media Protection Services Ltd* arose out of publicans subscribing to a foreign satellite service rather than subscribing to the more expensive service made available in this country by BSkyB. Ms Murphy, like Mr Gannon, was charged under s297(1) of the Copyright, Designs and Patents Act 1988 (CDPA), in that on two occasions she:

'... dishonestly received a programme included in a broadcasting service provided from a place in the United Kingdom with intent to avoid payment of any charge applicable to the reception of the programme.'

The High Court found that her conviction should stand, but it did not consider points of competition law and free movement under European law and restored the appeal to allow Ms Murphy to argue them.

### A DIFFICULT AREA

Section 297 is a notoriously difficult piece of legislation. BSkyB and, as of this season (2007/08), Setanta Sports are the only broadcasters licensed by the Premier League to broadcast live matches within the UK. In a written answer dated 31 January 2006 to a question posed by Lindsay Hoyle MP, James Purnell (the Minister who was then responsible for broadcasting) stated:

'It is not illegal for a pub/publican to subscribe to a foreign satellite channel as opposed to BSkyB and as the DTI have stated nor is it illegal to import decoder cards from the European Union. However, the legality of screening live UK football games carried on that channel depends on how the

copyright to those games was sold/distributed (ie whether the foreign channel purchased the rights legally).'

So subscribing to the service may be legal but its screening may not, depending on who has the rights.

Purnell's letter goes on to say that Sky has the right to broadcast live matches in the UK and that:

'... any licensed premises found to be broadcasting live FA Premier League matches via unauthorised means (ie using a decoder or smart card to receive, decrypt and view encrypted match transmissions made by any foreign broadcaster which is not licensed for use in the UK),

is guilty of an offence.

This view is puzzling. Not only is it rather novel to suggest that a pub screening amounts to 'broadcasting' but also the offence consists of the 'reception' of the transmission, not its screening.

Be that as it may, the legitimacy of the purchase of the rights by the foreign satellite channels has never been impugned, but then why should it be when they have paid millions of pounds to be able to broadcast what is arguably the best football league in the world? However, the rights that they have acquired relate only to the territories in which the channels are broadcast and, unfortunately, satellites do not quite work along national geographical boundaries. Should the Premier League not then be seeking some kind of civil redress against foreign broadcasters who broadcast outside of their licensed territories (notwithstanding the inevitability of some overspill)? The answer may very well be 'yes', but instead the criminal law has been invoked against a user in the UK. Section 297 has been relied on to counter a commercial threat. Is this appropriate and how is this compatible with the proposition that subscribing to a foreign satellite channel is legal? Indeed, how is it compatible with BSkyB's practice of supplying decoder boxes and viewing cards to customers on the continent?

### THE HIGH COURT'S VIEW ON s297

The mischief that s297 was designed to prevent was the unauthorised reception of a UK pay television service. It was not intended, in the absence of reciprocity, to protect a foreign service provider, but here Ms Murphy had received a foreign service with the foreign service provider's authority. The High Court, however, took what some may regard as an eccentric view that the television service in question was the live feed from the football ground and not

the service that Ms Murphy bought from the Greek broadcaster or the service that she might have bought from BSkyB. As it happened, the producer of the live feed was BSkyB and, since the feed emanated from a place in the UK, it was held to be a broadcasting service that fell within the section irrespective of the way in which it was subsequently edited or packaged for broadcast.

The *Murphy* decision does create some interesting anomalies, for example it would appear that sports programmes transmitted live from non-UK locations may in fact be pirated without committing a s297 offence. However, it is debatable whether it goes beyond the original intent of the section, which was designed to support the nascent pay television industry against hacking, not to confer what amounts to an exclusive territorial right in a programme irrespective of the service in which it is sold to the public.

It will be interesting to see if the decision is appealed, or indeed whether Ms Murphy takes up the outstanding elements of her original appeal and seeks to challenge her conviction on the wider grounds of competition or free movement within the European Union (EU). Until this is resolved, uncertainty will remain as to whether pub landlords can avoid BSkyB's charges for showing premium sports events by subscribing to a cheaper foreign channel.

#### COMPETITION, CHOICE AND VALUE FOR MONEY

It is not difficult to see why pub landlords should feel aggrieved if there is a cheaper alternative on the market. Competition is meant to lead to choice and value for money. Greece is a member of the EU in which there is meant to be a single market. How strong are the arguments based on competition and free movement? Will they succeed?

As it happens, the arguments have been given an almost simultaneous airing in *Football Association Premier League Ltd v QC Leisure and others*, a case on the closely related provisions of s298 of the CDPA, judgment in which was handed down on 18 January this year.

Sections 297 and 298 were originally introduced together as s53 and s54 of the Cable and Broadcasting Act 1984, to be part of a single code of protection for pay television services. The original version of s297, somewhat in the manner of the criminal sanctions for failing to pay the (BBC) television licence fee, criminalised unauthorised reception, while the original version of s298 conferred a proprietary right on the service provider to prohibit the making, importation and sale of decoding equipment designed or adapted to avoid

payment. It was a two-tier scheme, building on the widely accepted television licence fee regime on the one hand and giving service providers civil remedies against the makers and distributors of pirate decoders on the other.

In the *Premier League* case, the defendants were importers and suppliers of equipment to bars and pubs in the UK including non-UK decoder cards which were not authorised by the Premier League, which sued them for breach of s298. The defendants relied, among other things, on the free movement provisions of the EC Treaty and also Article 81, which prohibits agreements or concerted practices between undertakings which may affect trade between member states and which have the object or effect of restricting, preventing or distorting competition within the common market. The Premier League applied for summary judgment in respect of the Article 81 defence.

The Premier League's application relied on the case law of the European Court of Justice (ECJ), particularly the two *Coditel SA and others v Ciné-Vog Films SA and others* cases, which had established (much to the chagrin of the European Commission with its single market objectives) that exclusive national licences of broadcasting or cable rights in films were not of themselves inimical to rules on free movement and anti-competitive agreements. The defendants in the *Premier League* case argued that the *Coditel* cases were irrelevant to the s298 claim, not being a copyright matter. They also argued that changes in regulatory and market conditions since the early 1980s were such that the competition element of the cases would be likely to be decided differently were it to arise now.

The judge thought that the claimant placed more weight on the *Coditel* cases than they could bear and rejected the application on that ground. Having done so, he did not think it necessary to deal at length with the second line of argument that developments since those cases made it likely that the ECJ would wish to reconsider its decision. He did, however, take the opportunity briefly to rehearse the argument and the claimant's responses and to indicate that there was substance in it. He said it fortified him in his conclusion that the Article 81 defence was a legitimate subject for a trial.

This was, of course, only an interlocutory application. The test under Civil Procedure Rule (CPR) 24.2 was whether the court considered that the defendant had no real prospect of successfully defending the claim and that there was no other compelling reason why the case should be disposed of at trial. Applying this test, the judge was not satisfied that the defence had >

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*Gannon v FACT [2006] (Bolton Crown Court, A20050128)*

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*Karen Murphy v Media Protection Services Limited [2007] EWHC 3091 (Admin)*

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*Football Association Premier League Ltd v QC Leisure and others [2008] EWHC 44 (Ch)*

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*Case 62/79 Coditel SA and Others v Ciné-Vog Films SA and Others [1980] ECR 881*

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*Case 262/81 Coditel SA and Others v Ciné-Vog Films SA and Others [1982] ECR 3381*

no real prospect of success. He did not think it fanciful or outlandish, nor that it was merely arguable. It seemed to him to have some force – enough to satisfy the CPR 24.2 test.

There is, therefore, reason to suppose that the defence may succeed. If it does, not only will distributors be entitled to import and sell foreign broadcasters' decoder cards but, on the basis that similar principles will apply to s297, pub landlords will no longer be vulnerable to prosecution for using them.

This would not mean that s297 and s298 would be undermined – they would still serve their original function of providing a framework for the protection of pay television services – but rather that they could not be used to create or sustain national monopolies.

#### THE CONSEQUENCES FOR BROADCASTERS

On the other hand, if the defence succeeds, certain other things may begin to unravel. Although territorial barriers have come down in some areas, the television industry today remains largely organised in national markets, contrary to the European vision of a single market. This feature of the markets owes its legal rationale in no small part to the *Coditel* cases. If those cases are to be revisited in the light of the great changes that have occurred in the 25 or so years since they were decided, it is entirely conceivable that there could be a different outcome such that the European broadcasting industry would have to reorganise itself to accommodate the single market aspirations of the EC Treaty.

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