

Joined Cases C-403/08 and C-429/08

Football Association Premier League Ltd and Others

v

QC Leisure and Others

and

Karen Murphy

v

Media Protection Services Ltd

(References for a preliminary
ruling from the High Court of Justice of England and Wales,
Chancery Division,
and from the High Court of Justice of England and Wales,
Queen's Bench Division (Administrative Court))

(Satellite broadcasting — Broadcasting of football matches — Reception of the broadcast by means of satellite decoder cards — Satellite decoder cards lawfully placed on the market in one Member State and used in another Member State — Prohibition on marketing and use in a Member State — Visualisation of broadcasts in disregard of the exclusive rights granted — Copyright — Television broadcasting right — Exclusive licences to broadcast in a single Member State — Freedom to provide services — Article 56 TFEU — Competition — Article 101 TFEU — Restriction of competition by object — Protection of services based on conditional access — Illicit device — Directive 98/84/EC — Directive 2001/29/EC — Reproduction of works within the memory of a satellite decoder and on a television screen — Exception to the reproduction right — Communication of works to the public in public houses — Directive 93/83/EEC)

Opinion of Advocate General Kokott delivered on 3 February 2011 I - 9090

Judgment of the Court (Grand Chamber), 4 October 2011 I - 9159

Summary of the Judgment

1. *Freedom to provide services — Legal protection of services based on, or consisting of, conditional access — Directive 98/84 — Illicit device — Meaning — Decoding devices lawfully placed on the market in one Member State and used in another Member State — Not included*
(European Parliament and Council Directive 98/84, Art. 2(e))
2. *Freedom to provide services — Legal protection of services based on, or consisting of, conditional access — Directive 98/84 — Scope — National legislation prohibiting the use of foreign decoding devices — Not included*
(European Parliament and Council Directive 98/84, Art. 3(2))
3. *Freedom to provide services — Free movement of goods — National legislation relating to these two fundamental freedoms — Examination in the light of the one that is predominant*
(Art. 56 TFEU)
4. *Freedom to provide services — Restrictions — Decoding devices lawfully placed on the market in one Member State and used in another Member State for the purpose of the broadcasting of sporting events*
(Art. 56 TFEU)
5. *Competition — Agreements, decisions and concerted practices — Agreements between undertakings — Adverse effect on competition — Exclusive licence between a holder of intellectual property rights and a broadcaster — Prohibition on supplying devices for decoding the broadcasts outside the territory covered by the licence agreement — Not permissible*
(Art. 101 TFEU)
6. *Approximation of laws — Copyright and related rights — Directive 2001/29 — Harmonisation of certain aspects of copyright and related rights in the information society — Reproduction right — Partial reproduction — Scope*
(European Parliament and Council Directive 2001/29, Art. 2(a))

7. *Approximation of laws — Copyright and related rights — Directive 2001/29 — Harmonisation of certain aspects of copyright and related rights in the information society — Reproduction right — Exceptions and limitations*
(European Parliament and Council Directive 2001/29, Art. 5(1))
8. *Approximation of laws — Copyright and related rights — Directive 2001/29 — Harmonisation of certain aspects of copyright and related rights in the information society — Communication to the public — Meaning*
(European Parliament and Council Directive 2001/29, Art. 3(1))
9. *Approximation of laws — Copyright and related rights — Directive 93/83 — Effects — Lawfulness of the acts of reproduction performed within the memory of a satellite decoder and on a television screen — No effects*
(Council Directive 93/83)

1. 'Illicit device' within the meaning of Article 2(e) of Directive 98/84 on the legal protection of services based on, or consisting of, conditional access must be interpreted as not covering foreign decoding devices (devices which give access to the satellite broadcasting services of a broadcaster, are manufactured and marketed with that broadcaster's authorisation, but are used, in disregard of its will, outside the geographical area for which they have been issued), foreign decoding devices procured or enabled by the provision of a false name and address or foreign decoding devices which have been used in breach of a contractual

limitation permitting their use only for private purposes.

That provision defines 'illicit device' as any equipment or software 'designed' or 'adapted' to give access to a protected service in an intelligible form without the authorisation of the service provider. This wording is thus limited solely to equipment which has been the subject of manual or automated operations prior to commencement of its use and enables protected services to be received without

the consent of providers of those services. Consequently, the wording refers only to equipment that has been manufactured, manipulated, adapted or re-adjusted without the authorisation of the service provider, and the provision does not cover the use of foreign decoding devices.

does not fall within the field coordinated by that directive.

(see para. 74, operative part 2)

By contrast, the aforementioned devices are manufactured and placed on the market with the authorisation of the service provider, they do not allow access free of charge to protected services and they do not enable or facilitate the circumvention of a technological measure designed to protect the remuneration of those services, given that remuneration has been paid in the Member State where they have been placed on the market.

(see paras 63-64, 66-67, operative part 1)

2. Article 3(2) of Directive 98/84 on the legal protection of services based on, or consisting of, conditional access does not preclude national legislation which prevents the use of foreign decoding devices, including those procured or enabled by the provision of a false name and address or those used in breach of a contractual limitation permitting their use only for private purposes, since such legislation
3. Where a national measure relates to both the free movement of goods and the freedom to provide services, the Court will in principle examine it in the light of one only of those two fundamental freedoms if it is apparent that one of them is entirely secondary in relation to the other and may be considered together with it. Although, in the field of telecommunications, those two aspects are often intimately linked, one not capable of being regarded as entirely secondary in relation to the other, that is not the case where national legislation is not directed at decoding devices in order to determine the requirements which they must meet or to lay down conditions under which they can be marketed, but deals with them only as an instrument enabling subscribers to obtain the encrypted broadcasting services.
4. Article 56 TFEU must be interpreted as precluding legislation of a Member State which makes it unlawful to import into

(see paras 78-79, 82)

and sell and use in that State foreign decoding devices which give access to an encrypted satellite broadcasting service from another Member State that includes subject-matter protected by the legislation of that first State. This conclusion is affected neither by the fact that the foreign decoding device has been procured or enabled by the giving of a false identity and a false address, with the intention of circumventing the territorial restriction in question, nor by the fact that it is used for commercial purposes although it was restricted to private use.

broadcasting of the protected subject-matter from the Member State of broadcast in which the act of broadcasting is deemed to take place – in accordance with Article 1(2)(b) of Directive 93/83 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission – and in which the appropriate remuneration is therefore payable and they may ask, in that Member State, for an amount which takes account of the actual audience and the potential audience both in the Member State of broadcast and in any other Member State in which the broadcasts including the protected subject-matter are also received.

That prohibition cannot be justified in light of the objective of protecting intellectual property rights.

It is true that sporting events, as such, have a unique and, to that extent, original character which can transform them into subject-matter that is worthy of protection comparable to the protection of works. However, since safeguarding of the rights which constitute the specific subject-matter of the intellectual property concerned guarantees the right holders concerned only appropriate remuneration and not the highest possible remuneration for the commercial exploitation of the protected subject-matter, those rights are safeguarded where the right holders are remunerated for the

The premium paid by broadcasters in order to be granted territorial exclusivity is such as to result in artificial price differences between the partitioned national markets. Such partitioning and such an artificial price difference are irreconcilable with the fundamental aim of the Treaty, which is completion of the internal market. In those circumstances, that premium cannot be regarded as forming part of the appropriate remuneration which the right holders concerned must be ensured and, consequently, its payment goes beyond what is necessary

to ensure appropriate remuneration for those right holders.

order to determine whether it contains such elements.

(see paras 100, 106-108, 113-117, 125, 131, operative part 3)

(see para. 159, operative part 5)

5. The clauses of an exclusive licence agreement concluded between a holder of intellectual property rights and a broadcaster constitute a restriction on competition prohibited by Article 101 TFEU where they oblige the broadcaster not to supply decoding devices enabling access to that right holder's protected subject-matter with a view to their use outside the territory covered by that licence agreement.

7. Acts of reproduction which are performed within the memory of a satellite decoder and on a television screen fulfil the conditions laid down in Article 5(1) of Directive 2001/29 on the harmonisation of certain aspects of copyright and related rights in the information society and may therefore be carried out without the authorisation of the copyright holders concerned.

(see para. 146, operative part 4)

(see para. 182, operative part 6)

6. Article 2(a) of Directive 2001/29 on the harmonisation of certain aspects of copyright and related rights in the information society must be interpreted as meaning that the reproduction right extends to transient fragments of the works within the memory of a satellite decoder and on a television screen, provided that those fragments contain elements which are the expression of the authors' own intellectual creation, and the unit composed of the fragments reproduced simultaneously must be examined in

8. 'Communication to the public' within the meaning of Article 3(1) of Directive 2001/29 on the harmonisation of certain aspects of copyright and related rights in the information society must be interpreted as covering transmission of the broadcast works, via a television screen and speakers, to the customers present in a public house.

Where a broadcast work is transmitted, in a place accessible to the public, for a public which is additional to the owners

of television sets who, either personally or within their own private or family circles, receive the signal and follow the broadcasts and which is permitted by the owner of a 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. That is so 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.

present at the place where the communication originates within the meaning of recital 23 in the preamble to Directive 2001/29, that is to say, at the place of the representation or performance which is broadcast.

(see paras 198-203, 207, operative part 7)

In addition, so far as concerns transmission of the broadcast work to a 'public not present at the place where the communication originates', within the meaning of recital 23 in the preamble to Directive 2001/29, that directive, like the Berne Convention for the Protection of Literary and Artistic Works, does not cover 'direct representation or performance', in other words, interpretation of the works before the public that is in direct physical contact with the actor or performer of those works. Such an element of direct physical contact is specifically absent in the case of transmission, in a place such as a public house, of a broadcast work, via a television screen and speakers, to the public which is present at the place of that transmission, but which is not

9. Directive 93/83 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission must be interpreted as not having a bearing on the lawfulness of the acts of reproduction performed within the memory of a satellite decoder and on a television screen.

(see para. 210, operative part 8)