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### The legality of football broadcasts in the UK and the lack of choice for publicans in the Premier League broadcasting market

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#### ABSTRACT

*Exclusive distribution of Premier League (PL) broadcasting rights throughout the world safeguards the broadcast value for each individual rights holder. This is essentially achieved by limiting the viewing of the broadcast through*

*restricted encrypted channels. In the UK, BSKyB (Sky) paid £1.024 billion in 2004 to have the exclusive right to broadcast live PL matches and more recently Sky along with Setanta (a relatively new sports subscription television provider) has paid £1.7bn to screen matches from the 2007/8 season. A publican (for commercial use) or a private consumer (for domestic use at home) can lawfully receive broadcasts in line with the current Sky deal. Accordingly, some argue that the price that publicans must pay to receive such broadcasts is excessive. The problem for many publicans wishing to view PL matches, is that there is no alternative to paying Sky the price that they charge.*

#### KEYWORDS

Broadcasting - Football - Premier League - BSKyB - Publicans - Public houses

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## INTRODUCTION

In the recent European Commission investigation (Comr PL broadcasting rights, the Commission's rationale for b between Sky and the PL concerned, among other issues consumers and a lack of competition in the marketplace will change in 2007, when consumers can watch games choice is stifled for publicans through Sky and Setanta r games by both companies to pubs. If the nature of the r smaller scale broadcasters are unable to buy any rights have the financial capacity to bid over £1bn for them, th Until quite recently there was thought to be only one so purchased. That has changed.

## BACKGROUND

For the last few years pubs have been screening match 3pm on Saturday afternoons. This became a concern w foreign satellite channels through third party suppliers i screen PL games at 3pm because the UEFA restriction is broadcaster. Thus, for example, an Italian pub could not games on a Sunday afternoon (which is Italy's designat breach of the same UEFA statute. This practice of pubs f order to broadcast these pictures in their pubs (i.e. not games) has become endemic in the UK. Many pubs pay images of games that should not be viewed on a Saturc statute) and more importantly such viewing breaches Sk PL matches. Within the last few years the PL and Sky ha by bringing prosecutions against many publicans who h from UK suppliers and used various feeds from around tl Greece.

Under UEFA statute 48, the national association has the league for around 2 hours each weekend, the main reas attendances. A type of protectionism is afforded to the usually go to see Bournemouth v Crewe Alexandra on a watch Liverpool v Manchester United in the comfort of tl clubs whose matches are televised would deny the lowe (Forrest, Simmons and Szymanski, 2004). The Europea similar view that the lower leagues must be protected b to have the same closed period time.

The current situation began with an investigation by Sky the closed period and expanded dramatically to include broadcast PL football throughout the week. As this esca Sky had always adhered to the UEFA black-out statute ( homes across the country) by not broadcasting between of the recent prosecutions undertaken by the Media Prof behalf of Sky and the PL, have examined how programs stations including a Greek station Supersport 3 and a Nc being prosecuted cite two reasons, among others, to ex sanctioned route to broadcasting PL matches in their pr

1. Cost effectiveness. One publican complained th prices from £400 to £1800 in one year ([http://www.morningadvertiser.co.uk/news\\_detail\\_per-view\\_games\\_are\\_at\\_a\\_supplemental\\_price\\_and\\_i\\_package\\_of\\_matches\\_shown\\_by\\_Sky](http://www.morningadvertiser.co.uk/news_detail_per-view_games_are_at_a_supplemental_price_and_i_package_of_matches_shown_by_Sky)). This compare: that can be purchased from [pubfootball.co.uk](http://pubfootball.co.uk) for Cup and FA Cup match screened. Sky assesses th

rateable value of the property and not its capacity. London with room for 5 viewers may pay more for Liverpool with room for 200.

2. No conclusive evidence that what they are doing is an assertion about the legality of the system from a public broadcast which circumvents Sky's exclusive licence (<http://www.pubfootball.co.uk/law>) but as will be seen there has been no definitive ruling.

### THE ISSUE AT HAND

The PL owns copyright in all of the matches played by the clubs whoever they choose. As far as the UK is concerned, the only way to show live PL matches in this country is Sky. Anybody who attempts to show live PL matches during the closed period infringes UEFA's statute 48 which prohibits anyone from seeking to broadcast a match inside or outside of the closed period without an agreement with the sole rights owners in the UK namely Sky.

Foreign broadcasters have bought the rights to show PL matches in their own countries for that right they have undertaken to encrypt their own transmissions so that their own customers within their assigned territory. The problem for publicans in the UK is that they obtain supplies of the foreign card at the Sky feed. MPS have accused publicans of dishonestly using the overseas user and not for the UK market.

### MECHANICS OF THE BROADCAST

Just as Sky can legitimately broadcast live PL games in the UK so too can Supersport 3 in Greece and ART in North Africa. However, neither station is authorised by the PL to broadcast live PL matches. The decoder equipment supplied by various companies. The judgment in *Murphy* unreported 27 May 2006 explains how:

[the] footprints of the satellites used by Supersport 3 in Greece and ART in North Africa. That reason it is technically possible with the appropriate equipment to watch copyright material not licensed to the public is that a person can receive programs a dish, decoder box...and the appropriate equipment. (*Murphy* p. 2).

### THE LEGISLATION

Section 1(1)(b) of the Copyright, Designs and Patents Act 1988 creates a property right which subsists, in this instance, in broadcast. The offence under s.1(1)(b) MPS primarily relates to the offence of fraudulently receiving a program.

[a person]...*dishonestly* receives a program included in a broadcast provided from a place in the United Kingdom with intent to use the program in a way which is applicable to the reception of the program (emphasis added).

As noted below, one of the defences raised by publicans is that the broadcast as outlined above. However the main thrust of the case is the previously highlighted concept of dishonesty, which in turn is defined by the test outlined in *R v Ghosh* [1982] 2 All ER 689.

The offence of importing the decoder is an offence under s.1(1)(b) MPS.

[makes], imports, distributes, sells or lets for hire or otherwise makes available to the public any unauthorised decoder.

In considering how the above provision may work, it is important to note that it is not used by the publican for the purposes of broadcasting the match.

become illegal only when the card is inserted into the decoder in the first place. The decoder is not authorised to receive foreign territorially blocked pictures of PL games to be used therefore, may put at risk suppliers of the decoders and

## ORIGIN OF THE SIGNAL

One of the main substantive legal points raised in many cases is the origin of the signal in the UK as defined in the Act. One of the main points of the signal from its origin in the UK to the hundreds of thousands of viewers of a match that the foreign right holders receive (in Greece and elsewhere) is that the signal is sent via satellite and then broadcast to the foreign rights holders via their own decoder cards in their own territory.

Various defendants have tried to argue that the signal originates in the territory of the foreign broadcaster. No such argument was successful in the *Murphy* case. Throughout the various MPS prosecutions, the prosecution has argued that when the signal reaches the foreign broadcaster it can apply certain individual changes (i.e. encryption and decryption) and has countered the defence claim by contending that the delay between the signal reaching the foreign broadcaster and there is any delay, it is merely a micro second which is insignificant in the context of live news broadcasts when a presenter's lips are out of sync with the picture. An extension to this argument is that such a characteristic delay is not unusual in live broadcasts.

In the *Murphy* case, dicta relating to the origin of the signal was briefly mentioned in *Attorney General v. British Broadcasting Corporation* [2005] 1 All ER 128, the Court stated that the MPS had failed to prove that the signal originated in the UK. However this may be tempered by the fact that the judge in *Murphy* found that the signal originated overseas.

The *Murphy* judgement by its analysis of the evidence of the signal (as presented by Holliday) provided the most comprehensive review of the origin of the signal and therefore falls inside the statutory definition of "broadcast" in the Act. Holliday, for the prosecution, was preferred although Mr Brain's view was also a possible choice. The issue between the two experts centred on whether the signal broadcast was encrypted and whether that in itself interrupted the signal whilst the transferring process occurred.

Mr Brain was firmly of the view that the processes interrupted the signal whilst the process is undertaken, and he therefore concluded that the signal shown in the form of a broadcast from the United Kingdom was not a communication (*Murphy*, 2006, p. 5).

This view was not shared by the judges, but other interveners have argued that the signal actually originates outside the United Kingdom: the Solicitor General for the Satellite Television Association stated that the "broadcasts covered by the Act that Sky are using to prosecute" ([http://www.morningadvertiser.co.uk/news\\_articleid=18276&categoryid=35](http://www.morningadvertiser.co.uk/news_articleid=18276&categoryid=35)).

## DISHONEST INTENTION

The word 'dishonestly' appears in the Act and all the successful prosecutions have been based on the subjective test of dishonesty.

I personally have prosecuted for BskyB over the last few years. We've only effectively lost a handful. [The cases have] been lost on the basis of dishonesty. We have yet to win a case on the origin of the signal or in any of the other matters. I will continue to argue this angle.

Raymond

The *Murphy* prosecution failed because the Court accepted that the signal originated overseas.

was sold was legitimate, and that the supply and broadcast brewery because she went to a 'promotional event sup tenant and which led her, not unreasonably to believe t brewery and legitimate' (Murphy, 2006, p7). The prosec had the mens rea of dishonesty for the s. 297 offence ir that at any stage she had received impartial advice bey brewery' (Murphy, 2006, p. 7).

In *Gannon* the publican produced a witness who had so researched the law and disagreed with MPS. He told he fact legal and on that basis the court found that there v publican. Unfortunately, the *Ghosh* dishonesty benchma has led magistrates to consider the more general merit:

This and the other judgments that have gone against th effective statutory provision for these circumstances. Th and early 1990s was to catch certain types of video and principle at its core. The current situation based on dish attempt to fit a square peg in a round hole and MPS is t circumstances and proceedings which probably had not

In the publicans' defence, there are many suppliers que football content given that such material will be guarant mere existence of ready suppliers does nothing to prov confusion arising from the use of the subjective approac substantive objective points of law (the origin of the sig Sky) are yet to be clearly established. The application of to avoid payment, either triumphs or fails depending on case. To some publicans, this alternative avenue is the bring in customers who wish to view live PL football.

#### INCONSISTENCIES BETWEEN DECISIONS - SUBJECTIVE

The judgments have found a way to deal with argumen earliest decisions that have been successfully appealed. successfully defend a prosecution, the clearer it become PL matches through any other format other than the au extremely difficult to show evidence that they were not judgment makes explicit reference to the fact that 'the c broadcasts is in accordance with an agreement with BSk the first time and were saved under the subjective dish likely to be open to them the second time round. Dan Jc that 'the more these cases are reported and the more p publicans have for claiming they were unaware they we 2006).

#### FALL-OUT FROM THE PROSECUTIONS- BACK TO THE T/

After the appeal hearing involving Brian Gannon, the pul that:

This is a landmark case. Not only is it the first sig emerging area of law, but it reinforces my view th being driven by the PL and Sky to prtect their corr was about a 'closed period' match, the generic pri broadcasts of PL matches. It is a benchmark decis (<http://www.pubfootball.co.uk/law>).

Without modifying Mr Dixon's emphasis on the significar precedent set (there has been no leave to appeal on th may be more revealing to question whether the fact-spe considered the subjective approach to dishonesty, servi

critical issues, with the net result only generating uncer

Some publicans have argued that the PL and Sky have t ruling on the subject, but the fact is that no decision of the Crown Court can create a precedent. Until a substar an appellate court to set down definitive rankings, inad continue to prompt see-saw decisions based on subjecti and not removed the confusion:

We would dearly love to appeal a case so that, be of misinformation coming out via the solicitors wh the longer they can delay a definitive answer the sell their cards.

Raymond

It has been noted by different sources that the PL might order to create continuing uncertainty, because it is con decision that may have adverse consequences for the o (<http://www.pubfootball.co.uk/law.php>). If this was to f exclusive rights are sold across Europe and the world w rights holder obtains by creating a scarce product could of broadcasts territory-less, broadcasting era.

In *Murphy*, as quoted above, it is worth re-emphasising lawfully receive broadcasts is in accordance with an agre the judgment that found for the publican. There can be going to produce anomalies as illustrated in *Murphy*, in v proprietary rights and not to determine whether a pub l. has targeted the Act as the closest fit for prosecutions f such as *Gannon* and *Murphy* though correct in their dete exclusive content-holders' rights.

Subject to European case law including European copyr European Commission press releases stating their satis broadcasting rights are sold, in a deregulated broadcas companies competing on a European and world wide foc of what otherwise would be exclusive premium content dramatically, as of course would the price that broadcas exclusive rights became an obsolete commodity. Althoug could be seen as catastrophic to the largest rights holde events such as Olympics and World Cups, which maxim curtailed by the ability of any broadcaster to relay their because national legislation is insufficiently clear in delir

### CIVIL, NOT CRIMINAL COURTS?

Both sides have asserted that the Magistrates Court is r and complicated nature of the arguments, the subject r magistrate in *Gannon* noted that 'such issues would pro Chancery Division of the High Court or, possibly, the Tec 2006, p. 14).

Each case was decided on the dishonesty principles set facts. However the same fundamental principles, of the apply and have not been addressed significantly in any c involved in proceedings (see below) then definitive rulin

It is worth asking why MPS or the PL took action througl courts. The theory that MPS were using an outmoded cr they have not sought so far to pursue anyone throug t supported for several reasons:





It may well be the case that MPS has not been totally successful in its publicans, but regardless of the lack of dishonest intent, the substantive legal issues that may yet be tackled is whether Sky's broadcasts are acting legally. This is a question of the utility of the signal argument discussed earlier) because if either argument is correct, publicans, Sky would almost certainly no longer have the right to broadcast in the UK as alternative subscriptions could be purchased.

Is it to be believed that, as Sky has the exclusive territorial rights for the start of the 2007-2008 season when these live rights are broadcast (channel Setanta) and has paid a huge premium for the right to broadcast within a territory, a third party supplier could also broadcast more broadly, how can a rights holder protect its exclusive rights in the UK is deemed to be legal? Conversely, the publicans are not allowed to go and buy these packages elsewhere, as it is not possible to do so, and that there must be something wrong with the restriction and effectively promotes a practice of non-competitive competitors in the market). There is no alternative outlet for the question is one that has been touched upon in the criminal law developed.

### ARE SUPPLIERS OF THE DECODERS AND ENCRYPTION

Suppliers have so far questioned the need in the UK to require a broadcaster to supply the necessary pictures. Although the quality of the broadcaster are inferior to that of Sky (both the commercial and foreign language and there is no access to Sky features on the platform) the main focus value of the product is the fact that it is a live broadcast.

From a tentative EU Competition Law perspective it may be possible to license rights package to Sky for a particular territory rather than to all publicans. It has been assessed previously that PL football has been found to be a separate market.

We do not see grounds for a wider definition involving television matches credible to us that matches involving clubs drawn exclusively from the League would be acceptable substitutes for matches between publicans (2.3).

The Restrictive Practices Court in its decision related to the following:

We think that it is putting it too high to say that that the market for League football so far as Pay-TV is concerned, for the purposes of the competitions as the FA Cup and the UEFA Champions League. *Agreement Relating to the Supply of Services For the Live Broadcast of League Football Matches* (Restrictive Practices Court Decision).

In the more recent Decision of the Director General of Fair Trading, *Infringement of the Chapter II prohibition* (17th December 1999) with the Monopolies and Mergers Commission that the relevant market for live football matches could be defined as narrowly as that for PL games.

'the Director finds that ... the relevant markets are the retail supply of channels containing sports content and the content that he has identified as falling within this market is live FAPL football' (para 169).

With this and the Monopolies and Mergers Commission's findings that if there is indeed a separate economic market for television content for a section of consumers in this market (i.e. the publicans) ; and potentially high subscription levels based on an arbitrary price.



If the Monopolies and Mergers Commission Report and the analysis of the PL product market then Sky faces no competition to supply live PL matches to publicans. (This changes from live rights to PL matches). An effective 100% market share restriction of absolute territorial protection (i.e. no-one can broadcast live PL pictures) means publicans are given a position of UK consumers before the European Commission, a broadcaster having the sole right to bid for one package for a publican in the UK.

Equally, an exclusive agreement should not have restricted European case law exceptions) throughout the EU. Commission

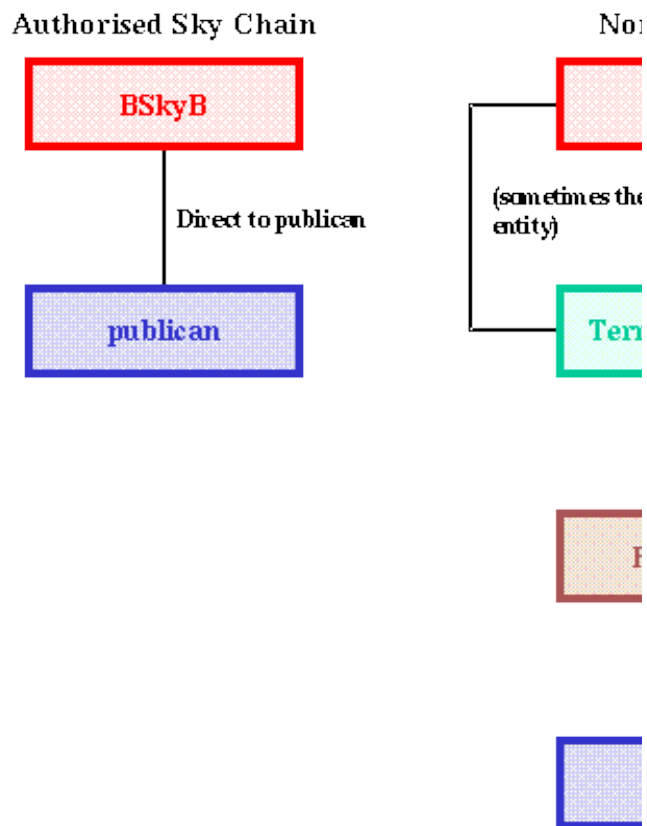
'Restrictions on passive sales are hardcore restrictions under EU regulation on vertical restraints and can only be justified in exceptional circumstances.'

Guidelines on the application of Article 81(3) of the Treaty  
2004/04/27, Notice 2004/C101/08

This suggests that whilst it may not be legal to actively solicit a territorial Member State market, other broadcasters outside the UK face the unsolicited approaches of a consumer looking for a

### SKY V FOREIGN BROADCASTER SUPPLY CHAIN

Table 1 Table 2



UK Suppliers concede that they cannot deal with the national broadcaster (Germany), as this would breach the foreign broadcaster's encryption cards outside of their allotted territory. As the UK suppliers buy the cards from a (German) third party in another territory and has purchased the card from the territorial broadcaster, unlike the territorial broadcaster has no contractual duty to the (German) third party supplier then resells the card to the territorial broadcaster and the UK supplier. The third party

the terms and conditions that bind the territorial broadcaster to purchase the cards free of any prohibition. This is in a direct contractual link between the broadcaster and the

One suspects that PL/Sky/MPS would argue that regard suppliers are still purchasing another broadcaster's exclud alloted territory. This leaves open the question as to w contractual stipulation that anyone buying the card canr card for use outside the allotted territory, but this in itse of movement provisions for those countries inside the E

Indeed there have been accusations that Sky's decoder view PL games and Hollywood films which are only autho suppliers on their websites have claimed that there upw broadcasting live PL matches being used in the EU (com or <http://www.skyforeurope.com> provide such a service), won a legal battle in the UK to forbid all non-UK authori matches, then other national regulators in different Mer to expel Sky cards from inside their country. Of course it stop Sky doing this. Some would point to this being akir specifically marketing the PL out of its UK jurisdiction (b though it is only licensed for the UK) they are not doing the very practice they are trying to outlaw in the UK.

The issue at hand remains a simple choice but resulting publicans cannot have any right to chose between broac right that they have their subscription valued as a ratea number of viewers in their pub. Like any system, it will t imbalances than others but so far there has been no req OFT. If as assessed above, the broadcast of PL matches has very few associatable substitutes then price becom having competition from Setanta from 2007 if a package as a take-it-or-leave-it offer; it merely reinforces the prc

## CONCLUSION

Plotting the development of this issue began with the M proceedings were put on hold many thought that the er UK suppliers of the equipment.

The problem that still remains is one of misinformation, landmark nature of certain cases and the right of public subscribing to Sky, to one broadsheet newspaper's lack certain decisions were reached with regard to the issue 2006). No side has really won. PL/Sky/MPS are perhaps they started because the more often they lose cases the and the greater the prospect that the wider public woul (Morning Advertiser, 2006) whilst conversely, had they t publicans could have kept their licences.

To conflicting approaches to this issue have surfaced. TI to price and choice. The second safeguards rights holde territorial barriers. One could argue that a consumer sh price available, creating total price transparency, yet a l required for exclusive content if this can be easily circun outside their designated territory. It would be doubtful t of pounds to screen an event and gain the exclusive rig territory, could be by-passed from another Member Stat the rights, beaming the same pictures to its consumers. implications involving passive sales (Regulation 2790/96 be legally entitled to reply to requests from customers fi Indeed would it be possible to continue the current tren

passive sales (i.e. a legitimate leakage) of broadcasts c  
boundary? It remains to be seen whether the European  
have done previously in matters relating to the PL's hon  
setting, in an area of law which may be about to hit the

## REFERENCES

Forrest D, Simmons R and Szymanski S (2004)  
'Broadcasting, attendance and the inefficiency of  
cartels,' 24 Review of Industrial Organization 243 –  
265

CoditelSA, Compagnie générale pour la diffusion de la  
télévision, and others v Ciné-Vog Films SA and others.  
Reference for a preliminary ruling: Cour de cassation -  
Belgium. Copyright and right of distribution: Cable  
diffusion of television. Case 262/81.

*Gannon v F.A.C.T* [2006] A20050128

MMC (1999) Monopolies and Mergers Commission  
Report into the Proposed Merger between B SkyB  
Group plc and Manchester United Football Club plc  
(Cm 4305).

*Murphy v F.A.C.T* (2006) unreported, 27 May

The European Commission (2006), 'Commission  
makes commitments from FA Premier League legally  
binding', IP/06/356 22<sup>nd</sup> March

The Independent (2006) 'Pubs win the right to show  
football on Saturday afternoons', April 5

The Morning Advertiser (2006), 'Pub trade slams Sky  
price hike', 19 June

The Morning Advertiser (2006), 'Sky offers half-price  
Prem Plus packages' 26 October

The Morning Advertiser (2006), 'Sky abandons old  
foreign satellite prosecutions' 1 August

The Morning Advertiser (2006), 'Sky and FAPL suffer  
football defeat,' 4 July

The Morning Advertiser (2006), 'Foreign satellite  
football warning for pubs' 7 August

The Morning Advertiser (2006) 'MP calls for Sky  
monopoly probe' 22 June

The Morning Advertiser (2006) 'Judge tells Sky and  
FAPL to go after satellite suppliers' 2 November

The Publican (2006), 'Portsmouth licensees may  
escape fines over foreign broadcasts' 5 July

[http://www.footballeconomy.com/rep\\_may\\_03.htm](http://www.footballeconomy.com/rep_may_03.htm)

<<http://www.pubfootball.co.uk/law.php>>

<[http://www.morningadvertiser.co.uk/news\\_detail.asp](http://www.morningadvertiser.co.uk/news_detail.asp)>

articleid=17283>

<[http://www.morningadvertiser.co.uk/news\\_detail.asp?articleid=21315&categoryid=35](http://www.morningadvertiser.co.uk/news_detail.asp?articleid=21315&categoryid=35)>

<[http://www.morningadvertiser.co.uk/news\\_detail.asp?articleid=18276&categoryid=35](http://www.morningadvertiser.co.uk/news_detail.asp?articleid=18276&categoryid=35)>

<[http://www.morningadvertiser.co.uk/news\\_detail.asp?articleid=17975&categoryid=35](http://www.morningadvertiser.co.uk/news_detail.asp?articleid=17975&categoryid=35)>

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