

Abstract
Introduction
Background
The Issue At Hand
Mechanics Of The Broadcast
The Legislation
Origin Of The Signal
Dishonest Intention
Inconsistencies Between Decisions - Subjectivity
Fall-out from the Prosecutions- Back to the Tactics Board?
Civil, Not Criminal Courts?
A Good PR Exercise?
'Like-It-Or-Lump-It' Theory
Are Suppliers of the Decoders and Encryption Cards Acting Legally?
Sky v Foreign Broadcaster Supply Chain
Conclusion
References

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

INTRODUCTION

In the recent European Commission investigation (Commission, 2006) into the exclusive supply of PL broadcasting rights, the Commission's rationale for breaking up the live exclusive arrangement between Sky and the PL concerned, among other issues, the lack of choice that is afforded to consumers and a lack of competition in the marketplace for producers (other broadcasters). This will change in 2007, when consumers can watch games on Setanta as well as Sky. However such choice is stifled for publicans through Sky and Setanta reaching a joint deal for single supply of games by both companies to pubs. If the nature of the marketplace for the PL product is that smaller scale broadcasters are unable to buy any rights because only the largest broadcasters have the financial capacity to bid over £1bn for them, then there is even less choice for publicans. Until quite recently there was thought to be only one source from which PL broadcasts could be purchased. That has changed. 1

BACKGROUND

For the last few years pubs have been screening matches at the UEFA stipulated black-out time of 3pm on Saturday afternoons. This became a concern when certain pubs began subscribing to foreign satellite channels through third party suppliers in the UK. Overseas broadcasters can screen PL games at 3pm because the UEFA restriction is imposed only on the domestic broadcaster. Thus, for example, an Italian pub could not subscribe to a British feed of Italian games on a Sunday afternoon (which is Italy's designated back-out period) as they would be in breach of the same UEFA statute. This practice of pubs finding alternative sources of PL games in order to broadcast these pictures in their pubs (i.e. not subscribing to Sky's package to view PL games) has become endemic in the UK. Many pubs pay a much lower subscription to view foreign images of games that should not be viewed on a Saturday afternoon (because of the UEFA statute) and more importantly such viewing breaches Sky's domestic exclusive distribution of live PL matches. Within the last few years the PL and Sky have been attempting to curtail this practice by bringing prosecutions against many publicans who have bought decoders and encryption cards from UK suppliers and used various feeds from around the world, including North Africa and Greece. 2

Under UEFA statute 48, the national association has the ability to stop broadcasts of its domestic league for around 2 hours each weekend, the main reason for which is to protect lower league attendances. A type of protectionism is afforded to the lower leagues so that supporters who may usually go to see Bournemouth v 3

Crewe Alexandra on a Saturday afternoon for example, cannot watch Liverpool v Manchester United in the comfort of their own home (or pub) instead. The larger clubs whose matches are televised would deny the lower clubs the prospect of higher attendances (Forrest, Simmons and Szymanski, 2004). The European football associations all subscribe to a similar view that the lower leagues must be protected but it is not incumbent upon each member to have the same closed period time.

The current situation began with an investigation by Sky and the PL into illegal broadcasting during the closed period and expanded dramatically to include the general ability of publicans to broadcast PL football throughout the week. As this escalated, there were initial concerns because Sky had always adhered to the UEFA black-out statute (as the exclusive distributor to pubs and homes across the country) by not broadcasting between 2.45pm and 5.15pm on Saturdays. Many of the recent prosecutions undertaken by the Media Protection Service (MPS) a private company on behalf of Sky and the PL, have examined how programs have been received from foreign television stations including a Greek station Supersport 3 and a North African station ART. The publicans being prosecuted cite two reasons, among others, to explain why they have taken the non-Sky sanctioned route to broadcasting PL matches in their premises: 4

1. Cost effectiveness. One publican complained that Sky had put up its pay-per-view prices from £400 to £1800 in one year (http://www.morningadvertiser.co.uk/news_detail.aspx?articleid=17283). These pay-per-view games are at a supplemental price and in addition to the games in the main package of matches shown by Sky. This compares to the non-Sky £1150 package that can be purchased from pubfootball.co.uk for every PL, Champions League, Carling Cup and FA Cup match screened. Sky assesses the price to be paid by a pub by the rateable value of the property and not its capacity. Therefore a pub in the centre of London with room for 5 viewers may pay more for broadcasting pictures than a pub in Liverpool with room for 200.

2. No conclusive evidence that what they are doing is illegal. There have been positive assertions about the legality of the system from solicitors that purport to legitimise a pub broadcast which circumvents Sky's exclusive live rights deal (<http://www.pubfootball.co.uk/law>) but as will be highlighted subsequently there has been no definitive ruling

THE ISSUE AT HAND

The PL owns copyright in all of the matches played by their clubs and as such, they can licence it to whoever they choose. As far as the UK is concerned, the only broadcaster currently authorised to show live PL matches in this country is Sky. Anybody who receives a transmission of the matches during the closed period infringes UEFA's statute 48 legislation on closed periods. Anybody who seeks to broadcast a match inside or outside of the closed period requires a commercial agreement with the sole rights owners in the UK namely the PL. 5

Foreign broadcasters have bought the rights to show PL games in their respective countries, and for that right they have undertaken to encrypt their own signal so it can only be received by their own customers within their assigned territory. The problem occurs when satellite equipment suppliers in the UK obtain supplies of the foreign card and import them for use, thereby by-passing the Sky feed. MPS have accused publicans of dishonestly using the signal that was destined for the overseas user and not for the UK market. 6

MECHANICS OF THE BROADCAST

Just as Sky can legitimately broadcast live PL games in the UK (i.e. within its own territorial region) so too can Supersport 3 in Greece and ART in North Africa. The problem arises when live pictures that neither station is authorised by the PL to broadcast in the UK spill into the UK via satellite and decoder equipment supplied by various companies. The judgment in *Media Protection Service v Karen Murphy* unreported 27 May 2006 explains how: 7

[the] footprints of the satellites used by Supersport 3 and ART cover the UK and for that reason it is technically possible with the appropriate Greek or North African equipment to watch copyright material not licensed for viewing in the UK. In order to receive programs a dish, decoder box...and the appropriate smart card are required (*Murphy* p. 2).

THE LEGISLATION

Section 1(1)(b) of the Copyright, Designs and Patents Act 1988 (the Act) provides that copyright is a property right which subsists, in this instance, in broadcasts. Under s. 297(1) prosecution by the MPS primarily relates to the offence of fraudulently receiving programs which is committed when 8

[a person]...*dishonestly* receives a program 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 program

(emphasis added).

As noted below, one of the defences raised by publicans related to the provenance of the broadcast as outlined above. However the main thrust of the publicans' argument is based on the previously highlighted concept of dishonesty, which in this context forms the subjective element of the test outlined in *R v Ghosh* [1982] 2 All ER 689. 9

The offence of importing the decoder is an offence under s. 297 1 (a) of the Act if a person 10

[makes], imports, distributes, sells or lets for hire or offers or exposes for sale or hire any unauthorised decoder.

In considering how the above provision may work, it is likely that because the encryption card is used by the publican for the purposes of broadcasting the PL matches, it would most probably become illegal only when the card is inserted into the decoder and not the act of importing the decoder in the first place. The decoder is not authorised by the PL but more importantly it allows foreign territorially blocked pictures of PL games to be used in this country. The provision, therefore, may put at risk suppliers of the decoders and subscription cards as well as publicans. 11

ORIGIN OF THE SIGNAL

One of the main substantive legal points raised in many of the prosecutions is whether there is a continuous signal in the UK as defined in the Act. One current assertion relates to the transmission of the signal from its origin in the UK to the hundreds of foreign rights holders. The transmission of a match that the foreign right holders receive (in Greece for example) is then encrypted with commentary added. It is sent via satellite and then bounced back for receipt by the customers of the foreign rights holders via their own decoder cards in their respective countries. 12

Various defendants have tried to argue that the signal does not originate in the UK, but instead originates in the territory of the foreign broadcaster. No-one has yet succeeded on such a submission. Throughout the various MPS prosecutions, a common defence submission has been that when the signal reaches the foreign broadcaster it is halted and/or interrupted so that they can apply certain individual changes (i.e. encryption and commentary). PL and MPS expert evidence has countered the defence claim by contending that the broadcasts are not interrupted because if there is any delay, it is merely a micro second which is similar to the delay in certain live satellite news broadcasts when a presenters lips are out of synch with the picture on the screen. The extension to this argument is that such a characteristic does not make it a fresh signal. 13

Dicta relating to the origin of the signal was briefly mentioned in *Gannon v F.A.C.T* [2006] A20050128, 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 judgment did not conclusively rule that the signal originated overseas. 14

The *Murphy* judgement by its analysis of the evidence of two expert witnesses (Mr Brain and Mr Holliday) provided the most comprehensive review of the issue of whether the transmission is an uninterrupted signal and therefore falls inside the statutory provisions. The evidence of Mr Holliday, for the prosecution, was preferred although unfortunately no explanation was given for this choice. The issue between the two experts centred on what delay if any occurred when the broadcast was encrypted and whether that in itself interrupted or indeed stopped the broadcast whilst the transferring process occurred. 15

Mr Brain was firmly of the view that the processes interrupted the signal, in that the signal stops whilst the process is undertaken, and he therefore concluded that Mrs Murphy did not receive the matches shown in the form of a broadcast from the United Kingdom via an uninterrupted chain of communication (*Murphy*, 2006, p. 5). 16

This view was not shared by the judges, but other interested parties are insistent that the signal actually originates outside the United Kingdom: the solicitors firm representing the European Satellite Television Association stated that the "broadcasts are not from the UK and are not covered by the Act that Sky are using to prosecute" (http://www.morningadvertiser.co.uk/news_detail.aspx?articleid=18276&categoryid=35). 17

DISHONEST INTENTION

The word 'dishonestly' appears in the Act and all the successful defences of the MPS prosecutions have been based on the subjective test of dishonesty. 18

I personally have prosecuted for BSkyB over the last 14 years probably 1,000 or more cases. We've only

effectively lost a handful. [The ones that have been lost] have all been lost on the basis of dishonesty. We have yet to have a case against us on the origin of the signal or in any of the other matters. It's purely been on the dishonesty angle.

Raymond Hoskin of MPS interviewed June 2006

The *Murphy* prosecution failed because the Court accepted that she was told the equipment she was sold was legitimate, and that the supply and broadcast of PL rights was endorsed by her brewery because she went to a 'promotional event supported by the brewery of whom she was a tenant and which led her, not unreasonably to believe that the equipment was endorsed by the brewery and legitimate' (*Murphy*, 2006, p7). The prosecution did not establish that Mrs. Murphy had the mens rea of dishonesty for the s. 297 offence in that '[t]here was no evidence to suggest that at any stage she had received impartial advice beyond what she was told by the brewery' (*Murphy*, 2006, p. 7). 19

In *Gannon* the publican produced a witness who had sold her the card and had stated that he had researched the law and disagreed with MPS. He told her that he thought the transaction was in fact legal and on that basis the court found that there was a doubt as to dishonesty of the publican. Unfortunately, the *Ghosh* dishonesty benchmark has become the overriding principle and has led magistrates to consider the more general merits of the case less. 20

This and the other judgments that have gone against the PL only serve to illustrate the lack of an effective statutory provision for these circumstances. The primary purpose of the Act in the 1980s and early 1990s was to catch certain types of video and music piracy which clearly had a dishonest principle at its core. The current situation based on dishonesty as the basis of the offence is an attempt to fit a square peg in a round hole and MPS is trying to make the best of a statute for circumstances and proceedings which probably had not foreseen by the draftsmen. 21

In the publicans' defence, there are many suppliers queuing up to supply cheap access to live PL football content given that such material will be guaranteed to pull in the crowds. Although the mere existence of ready suppliers does nothing to prove the legality of the scheme (as there is confusion arising from the use of the subjective approach to dishonesty) the legal merits as to substantive objective points of law (the origin of the signal or the exclusive proprietary rights of Sky) are yet to be clearly established. The application of the *Ghosh* test, coupled with the intention to avoid payment, either triumphs or fails depending on the exact circumstances of each publican's case. To some publicans, this alternative avenue is the only way to afford the broadcasts and bring in customers who wish to view live PL football. 22

INCONSISTENCIES BETWEEN DECISIONS - SUBJECTIVITY

The judgments have found a way to deal with arguments relating to dishonesty in two of the earliest decisions that have been successfully appealed. The irony is that the more publicans who successfully defend a prosecution, the clearer it becomes that they cannot continue to broadcast PL matches through any other format other than the authorised Sky route. Publicans would find it extremely difficult to show evidence that they were not dishonest for a second time. In *Murphy*, the judgment makes explicit reference to the fact that 'the only way in which one can lawfully receive broadcasts is in accordance with an agreement with B SkyB.' The mere fact that they did not know the first time and were saved under the subjective dishonesty test is not a defence that would likely to be open to them the second time round. Dan Johnson, the PL's chief spokesman has said that 'the more these cases are reported and the more prosecutions there are, the less justification publicans have for claiming they were unaware they were breaking the law' (*Morning Advertiser*, 2006). 23

FALL-OUT FROM THE PROSECUTIONS- BACK TO THE TACTICS BOARD?

After the appeal hearing involving Brian Gannon, the publican's solicitor Paul Dixon commented that: 24

This is a landmark case. Not only is it the first significant legal authority on this emerging area of law, but it reinforces my view that prosecutions such as this are being driven by the PL and Sky to protect their commercial monopolies. Whilst this case was about a 'closed period' match, the generic principles apply to all live satellite broadcasts of PL matches. It is a benchmark decision on the issue of criminal liability (<http://www.pubfootball.co.uk/law>).

Without modifying Mr Dixon's emphasis on the significance of the *Gannon* verdict, given there is no precedent set (there has been no leave to appeal on the substantive issues to a higher court) it may be more revealing to question whether the fact-specific basis for each case which has considered the subjective approach to dishonesty, serves to deflect attention away from the critical issues, with the net result only generating uncertainty in this area of law. 25

Some publicans have argued that the PL and Sky have too much to lose by securing a definitive ruling on the subject, but the fact is that no decision of the Magistrates Court or appeals section of the Crown Court can create a precedent. Until a substantive decision is given which would enable an appellate court to set down definitive rankings, inadequacies caused by the use of the Act will continue to prompt see-saw decisions based on subjectivity. The legislation has only heightened and not removed the confusion: 26

We would dearly love to appeal a case so that, because at the moment there is a lot of misinformation coming out via the solicitors who act for the suppliers of the cards ... the longer they can delay a definitive answer the more time their clients have got to sell their cards.

Raymond Hoskin of MPS interviewed June 2006

It has been noted by different sources that the PL might be trying to delay any decisive ruling in order to create continuing uncertainty, because it is concerned about the possibility of appealing a decision that may have adverse consequences for the organisation (<http://www.pubfootball.co.uk/law.php>). If this was to happen (although unlikely), the way exclusive rights are sold across Europe and the world would certainly change. The value that a rights holder obtains by creating a scarce product could vanish in a post-exclusive, free movement of broadcasts territory-less, broadcasting era. 27

In *Murphy*, as quoted above, it is worth re-emphasising that '[t]he only way in which one can lawfully receive broadcasts is in accordance with an agreement with B Sky B.' This is an extract from the judgment that found for the publican. There can be no doubt that the Act in its present form is going to produce anomalies as illustrated in *Murphy*, in which the overall point was to protect Sky's proprietary rights and not to determine whether a pub landlord is subjectively dishonest. That MPS has targeted the Act as the closest fit for prosecutions has led to a precarious position. Decisions such as *Gannon* and *Murphy* though correct in their determination are very much at odds with any exclusive content-holders' rights. 28

Subject to European case law including European copyright cases like *Coditel* Case 262/81 and European Commission press releases stating their satisfaction with the current way PL broadcasting rights are sold, in a deregulated broadcasting world there may be scope for various companies competing on a European and world wide footing for customers who could view a range of what otherwise would be exclusive premium content broadcasts. Prices could indeed fall dramatically, as of course would the price that broadcasters would pay to the rights holder if exclusive rights became an obsolete commodity. Although this may be an extreme example, it could be seen as catastrophic to the largest rights holders, if exclusive broadcasting deals for events such as Olympics and World Cups, which maximised broadcasting revenue potential, were curtailed by the ability of any broadcaster to relay their product outside of their allotted territory because national legislation is insufficiently clear in delineating territorial broadcasting boundaries. 29

CIVIL, NOT CRIMINAL COURTS?

Both sides have asserted that the Magistrates Court is not the correct forum: given the complex and complicated nature of the arguments, the subject matter is one for a higher court. Even the magistrate in *Gannon* noted that 'such issues would probably be best determined in either the Chancery Division of the High Court or, possibly, the Technology and Construction Court' (*Gannon*, 2006, p. 14). 30

Each case was decided on the dishonesty principles set out in *Ghosh* and was based upon its own facts. However the same fundamental principles, of the origin of signal and legality of broadcast, apply and have not been addressed significantly in any of the judgments. If the civil courts become involved in proceedings (see below) then definitive rulings may be given. 31

It is worth asking why MPS or the PL took action through the criminal as opposed to the civil courts. The theory that MPS were using an outmoded criminal statute may illuminate reasons why they have not sought so far to pursue anyone through the civil courts. Such tactics may have been supported for several reasons: 32

Publicans lose their licence if they are found guilty of a criminal offence. If a publican is found guilty of a s. 297 offence under the Act, s/he will have their licence terminated. A publican's livelihood vanishes. This focuses on the root of the question throughout this discussion: if you do not/cannot subscribe to Sky, what is the alternative? Sky's legitimate position is that if publicans do not want to have Sky and then seek alternative sources to view matches, publicans should lose their licence. This is why criminal sanctions carry such significance.

Civil remedies may only result in only a small fine for publicans (though there may be other remedies open to MPS like injunctions for example). Whilst it is true that both sides have argued that the lack of any substantive ruling is a hindrance to them, (i.e. only dealing with the dishonesty issue and for example not conclusively ruling on the substantive legal issues of the origin of signal or copyright breaches) it would probably leave Sky

with much more to lose in the civil setting than by prosecuting the publicans. If rulings in the substantive legal issues were adverse to Sky, then its pub related revenue streams would almost automatically fall to zero unless its prices were reduced to the levels of the non-Sky authorised broadcasts because everyone would switch to the cheaper alternative. This is a much bigger gamble for Sky than succeeding on all the substantive issues in a civil court because although publicans may be subject to a small fine, they would still be able to continue to subscribe to the channels, keep their licence and off-set the fines against the massive savings that they would still be making by subscribing to the non-Sky authorised broadcasts.

Interestingly, if MPS do decide to start issuing claims against the UK suppliers, the remedy for breaching s. 298 of the Act is civil in nature. The only provision which could potentially be breached alongside s. 297A (for unauthorised decoders) is s. 298, which only provides for a civil remedy. It has been assessed that s. 298 would be used against the UK suppliers even though it has been argued that the DTI have authorised the decoders for use in the UK (See www.pubfootball.co.uk). As a result PL/Sky/MPS would either have to find another statute as a basis for prosecution or open up the possibility of the substantive issues of law being ruled against them which as set out above would do Sky much more harm than the publicans or suppliers.

It strengthens Sky's hand to stop publicans through the criminal courts with the ultimate sanction that publicans may lose their licence and that Magistrates do not have the ability to conclusively rule on issues which could be more damaging to the commercial interests of Sky, than to the publicans. MPS/Sky/PL have been tactically very astute. 33

A GOOD PR EXERCISE?

In prosecuting the end user (the publicans) rather than the suppliers of the decoders and cards, MPS may have been trying to contain the situation rather than attack its root cause. The suppliers of the decoders and cards are the persons apparently acting illegally in by-passing the contractual provisions applicable in each country which limit the use of the card to the defined jurisdiction. 34

It is akin to treating the symptoms of a virus instead of finding a cure for the underlying infection. Although easy to point out in hindsight, without the cards and decoders no publicans would have had the opportunity to broadcast the matches. By going after the publicans rather than the UK suppliers, the technology remains available. Tactically this route can only further damage publican-broadcaster relations because ultimately, both have interests which should forge a mutually beneficial reciprocal relationship. Similarly the PL and Sky have commercial interests to protect and it is their prerogative actively to seek an end to what they see as the siphoning off of legitimately held and expensively purchased rights. Although they have sought to protect legitimate rights under an exclusive territorial broadcasting agreement, if MPS, Sky and the PL had foreseen the results of the criminal prosecutions that have emerged over the last year they may have not envisaged at the outset the number of verdicts that have gone against them. 35
http://www.morningadvertiser.co.uk/news_detail.aspx?articleid=17975&categoryid=35.

'LIKE-IT-OR-LUMP-IT' THEORY

It may well be the case that MPS has not been totally successful in prosecuting all the targeted publicans, but regardless of the lack of dishonest intention among certain publicans, one of the substantive legal issues that may yet be tackled is whether the suppliers of the publicans' broadcasts are acting legally. This is a question of the utmost importance (along with the origin-of-signal argument discussed earlier) because if either argument were to be ruled in favour of the publicans, Sky would almost certainly no longer have the ability to market live PL games exclusively in the UK as alternative subscriptions could be purchased from external sources. 36

Is it to be believed that, as Sky has the exclusive territorial right to broadcast PL matches (up until the start of the 2007-2008 season when these live rights will be shared with fellow broadcasting channel Setanta) and has paid a huge premium for the privilege of restricting the ability of anyone else to broadcast within a territory, a third party supplier can circumvent this exclusive hold? Put more broadly, how can a rights holder protect its exclusive interest if the supplier's conduct in the UK is deemed to be legal? Conversely, the publicans and suppliers argue that they should be allowed to go and buy these packages elsewhere, as it is the Sky price which is making publicans do so, and that there must be something wrong with the current infrastructure that allows this restriction and effectively promotes a practice of non competition (i.e. a lack of other ready competitors in the market). There is no alternative outlet and there is no competition on price. This question is one that has been touched upon in the criminal prosecutions but has not been fully developed. 37

ARE SUPPLIERS OF THE DECODERS AND ENCRYPTION CARDS ACTING LEGALLY?

Suppliers have so far questioned the need in the UK to go through the national incumbent broadcaster to supply the necessary pictures. Although the packages offered by a foreign broadcaster are inferior to that of Sky (both the commentary and on-screen graphics will be in a foreign language and there is no access to Sky features such as the 'Playercam' through its digital platform) the main focus value of the product is the fact that the 38

picture is broadcast.

From a tentative EU Competition Law perspective it may well be that the grant of an exclusive licensed rights package to Sky for a particular territory may be damaging intra-Member state trade. It has been assessed previously that PL football has been defined as its own market in the UK: 39

We do not see grounds for a wider definition involving the whole of football, as it does not seem credible to us that matches involving clubs drawn exclusively from divisions other than the Premier League would be acceptable substitutes for matches between leading teams (MMC 1999, para 2.3). 40

The Restrictive Practices Court in its decision related to the PL however was not so clear cut: 41

We think that it is putting it too high to say that there is no substitute for Premier League football so far as Pay-TV is concerned, for this underrates such football competitions as the FA Cup and the UEFA Champions League (*Re: F.A. Premier League Ltd. Agreement Relating to the Supply of Services Facilitating the Broadcast of Premier League Football Matches* (Restrictive Practices Court, 28th July, 1999, para 161).

In the more recent Decision of the Director General of Fair Trading in *BSkyB investigation: alleged infringement of the Chapter II prohibition* (17th December 2002 No CA98/20/2002), the OFT agreed with the Monopolies and Mergers Commission that the economic market for televised football matches could be defined as narrowly as that for PL games: 42

'the Director finds that ... the relevant markets are no wider than the wholesale and retail supply of channels containing sports content that is unique to pay TV. The content that he has identified as falling within this category during this investigation is live FAPL football' (para 169).

With this and the Monopolies and Mergers Commission decision in mind, it would seem possible that if there is indeed a separate economic market for the broadcasting of PL matches a large section of consumers in this market (i.e. the publicans) are being constrained by a lack of choice and potentially high subscription levels based on an arbitrary (i.e. rateable value) pricing method. 43

If the Monopolies and Mergers Commission Report and the OFT Report are favoured in their analysis of the PL product market then Sky faces no competition from anyone else in the market to supply live PL matches to publicans. (This changes from the 2007/8 season with Setanta gaining live rights to PL matches). An effective 100% market share coupled with the potential 'hard-core' restriction of absolute territorial protection (i.e. no-one else has the exclusive UK licence to broadcast live PL pictures) means publicans are given a zero-sum choice which is akin to the position of UK consumers before the European Commission became concerned about only one broadcaster having the sole right to bid for one packaged rights bundle. There is no current choice for a publican in the UK. 44

Equally, an exclusive agreement should not have restrictions on passive sales (subject to European case law exceptions) throughout the EU. Commentary on this subject suggests that 45

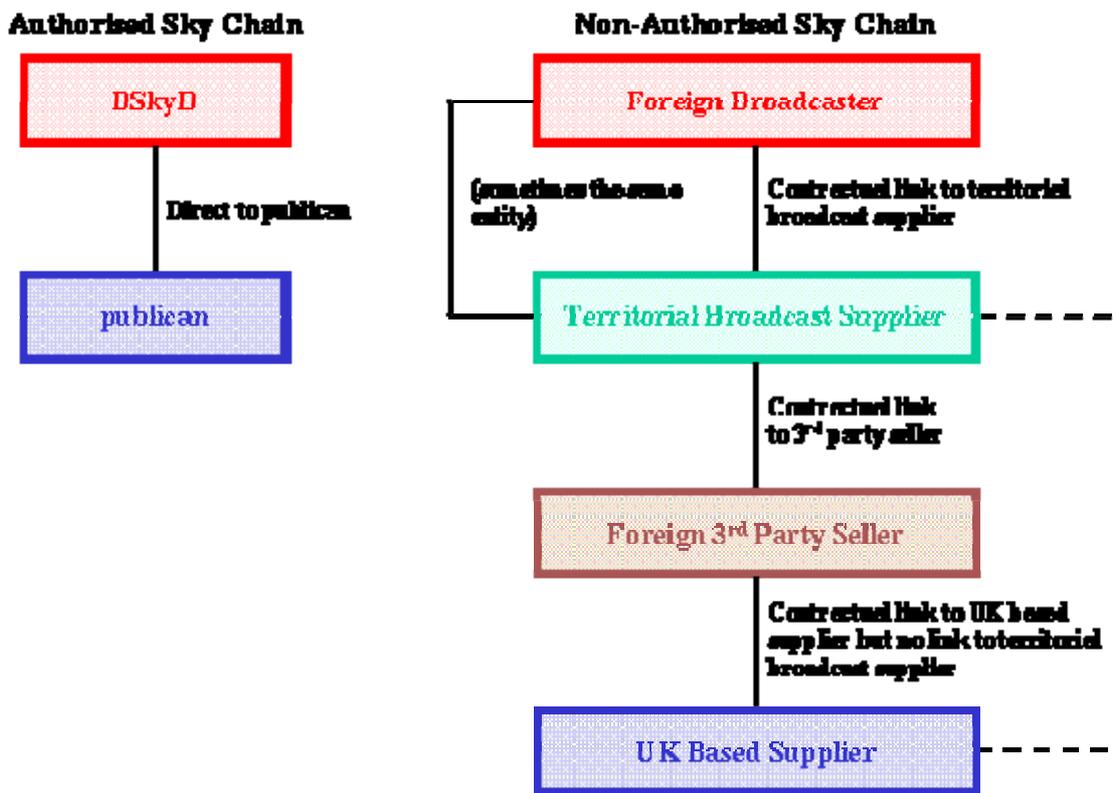
'Restrictions on passive sales are hardcore restrictions under the block exemption regulation on vertical restraints and can only be considered indispensable in exceptional circumstances.'

Guidelines on the application of Article 81(3) of the Treaty Official Journal C101, p. 97, 2004/04/27, Notice 2004/C101/08

This suggests that whilst it may not be legal to actively seek customers from another exclusive territorial Member State market, other broadcasters outside the territory should not have to refuse the unsolicited approaches of a consumer looking for a cheaper price to subscribe to PL matches. 46

SKY V FOREIGN BROADCASTER SUPPLY CHAIN

Table 1
Table 2



UK Suppliers concede that they cannot deal with the national broadcaster directly (e.g. Premiere in Germany), as this would breach the foreign broadcaster's contract with the PL not to sell its encryption cards outside of their allotted territory. As the above diagram illustrates, in Table 2 the UK suppliers buy the cards from a (German) third party supplier who resides within the allotted territory and has purchased the card from the territorial broadcaster. The third party supplier unlike the territorial broadcaster has no contractual duty to the incumbent broadcaster. The (German) third party supplier then resells the card to the UK supplier. There is no link between the territorial broadcaster and the UK supplier. The third party German supplier is not bound by any of the terms and conditions that bind the territorial broadcast supplier, whilst the UK supplier is able to purchase the cards free of any prohibition. This is in contrast to Table 1 where there is only one direct contractual link between the broadcaster and the publican. 47

One suspects that PL/Sky/MPS would argue that regardless of an extra contractual stage, UK suppliers are still purchasing another broadcaster's exclusive ability to broadcast solely within an allotted territory. This leaves open the question as to whether there might there be a future contractual stipulation that anyone buying the card cannot deliberately or knowingly sell-on the card for use outside the allotted territory, but this in itself may be a violation of European freedom of movement provisions for those countries inside the EU. 48

Indeed there have been accusations that Sky's decoder cards are being used around Europe to view PL games and Hollywood films which are only authorised for distribution in the UK. Some suppliers on their websites have claimed that there upwards of 3 million Sky subscription boxes broadcasting live PL matches being used in the EU (companies like <http://www.skydigitalspain.com> or <http://www.skyforeurope.com> provide such a service). Many would argue that if MPS/Sky/PL won a legal battle in the UK to forbid all non-UK authorised decoders and cards from showing PL matches, then other national regulators in different Member States would be all within their rights to expel Sky cards from inside their country. Of course it would be for those national jurisdictions to stop Sky doing this. Some would point to this being akin to double standards in that although not specifically marketing the PL out of its UK jurisdiction (but in allowing PL football to be viewed even though it is only licensed for the UK) they are not doing anything to stop this practice taking place; the very practice they are trying to outlaw in the UK. 49

The issue at hand remains a simple choice but resulting in a complex matter. Is it fair that publicans cannot have any right to chose between broadcasters? Even if it may be the case, is it right that they have their subscription valued as a rateable value of their property rather than the number of viewers in their pub. Like any system, it will have flaws, some creating greater imbalances than others but so far there has been no regulatory intervention from Europe or the OFT. If as assessed above, the broadcast of PL matches in pubs is its 50

own economic market which has very few associatable substitutes then price becomes non-negotiable. There is no point in Sky having competition from Setanta from 2007 if a package is then marketed to publicans collectively as a take-it-or-leave-it offer; it merely reinforces the problem.

CONCLUSION

Plotting the development of this issue began with the MPS prosecutions of publicans. When proceedings were put on hold many thought that the emphasis may have switched towards the UK suppliers of the equipment. 51

The problem that still remains is one of misinformation, from sensationalist quotes about the landmark nature of certain cases and the right of publicans to broadcast matches whilst not subscribing to Sky, to one broadsheet newspaper's lack of understanding of the reason why certain decisions were reached with regard to the issue of the dishonesty (Morning Advertiser, 2006). No side has really won. PL/Sky/MPS are perhaps in more of a difficult situation than when they started because the more often they lose cases the worse the publicity will inevitably become and the greater the prospect that the wider public would believe it is legal to receive the feeds, (Morning Advertiser, 2006) whilst conversely, had they been more tactically astute in court, losing publicans could have kept their licences. 52

To conflicting approaches to this issue have surfaced. The first relates to a free-market approach to price and choice. The second safeguards rights holders' value of a product through exclusive territorial barriers. One could argue that a consumer should be able to search Europe for the best price available, creating total price transparency, yet a broadcaster will not pay the huge sums required for exclusive content if this can be easily circumvented by consumers shopping around outside their designated territory. It would be doubtful that rights holders, who have paid millions of pounds to screen an event and gain the exclusive right to market that event within the defined territory, could be by-passed from another Member State broadcaster who has paid much less for the rights, beaming the same pictures to its consumers. With reference to the competition law implications involving passive sales (Regulation 2790/99 on vertical agreements), can broadcasters be legally entitled to reply to requests from customers from any potential Member State territory? Indeed would it be possible to continue the current trend of territorial protection with the ability of passive sales (i.e. a legitimate leakage) of broadcasts outside of a designated broadcasting boundary? It remains to be seen whether the European Commission or domestic OFT, as both have done previously in matters relating to the PL's home viewing customers, intervene in the pub setting, in an area of law which may be about to hit the front and back pages alike. 53

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