

# Winners & Losers in Football Broadcasting: Some Interesting Implications

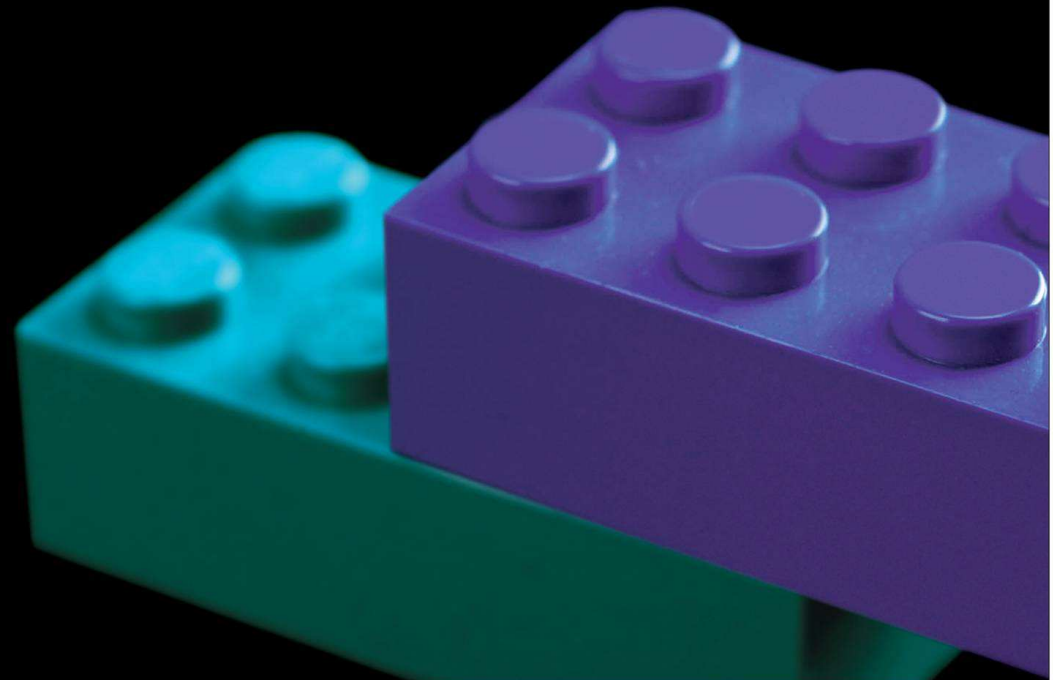
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2nd March 2011



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# A bit about me

EU and Competition Regulatory lawyer

Also advise clients in the football sector on:

- Broadcasting issues;
- PL, FL, FA and UEFA ownership rules;
- Third party ownership of players;
- UEFA Financial Fair Play Rules;
- Free movement of footballers in the EU; and
- Club takeovers and 'fit and proper person tests'

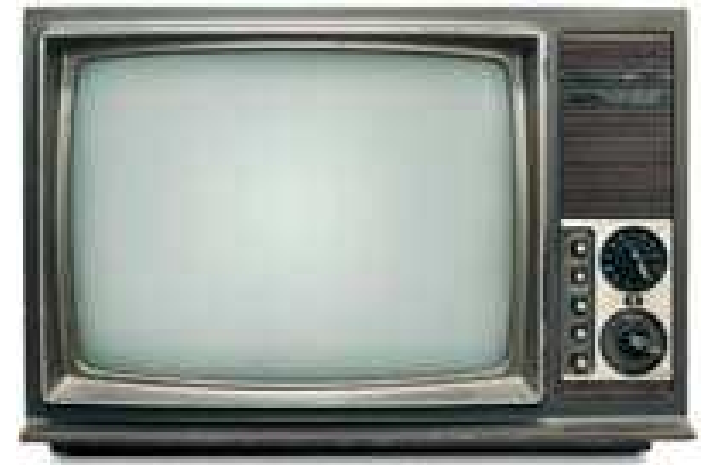
# Structure of the Talk

- A few general themes
- Pub decoder case
- Listing of Events case
- Ofcom investigation into live Premier League match distribution
- Inter-linkages
- Potential Consequences
- Questions



# A few disclaimers!

- Not directly involved in any of the cases I am talking about
- These are my personal opinions



# Two Decisions one week apart

- Not in a decade has there been such important cases to decide the future trajectory of football broadcasting
- QC Leisure and the challenge to the listing of events legislation came out a week apart



# Themes to bear in mind

- Murphy/QC Leisure- Reference to the ECJ on whether a European citizen can purchase a cheaper decoder card and decoder from another Member State - right as a European citizen to seek out the cheapest priced product- single market ambition
- Listing of Events- intervention in the market to the benefit of terrestrial viewers with the side effect of protecting terrestrial broadcasters
- Ofcom Decision- UK Regulator effectively demanding BSkyB sell its wholesale Sky Sports 1 and Sky Sports 2 channels at a regulated price

Convergence towards greater:

- access to 1. free to air, 2. regulated price/pay-TV broadcasts?
- regulatory and legal intervention in the sports broadcasting market necessary?

# Collectivity and Exclusivity

- Collectivity is where a group of clubs act together to form a league, play in competitions and negotiate commercial deals as one entity. PL acting as a cartel/monopoly?
- Exclusivity is the means by which a broadcaster can effectively guarantee large audiences for a popular product. By paying an exclusivity premium to the FAPL, broadcasters can ensure that consumers can only view the event through its platform.
- Length of exclusivity- must not be too long otherwise market foreclosure unless new entrant E.g. Sky in 1992

# Value of Recent Football Deals Quiz

Competition	Period	Value (£millions)	Details
Champions League	2009 – 2012	405	Sky: £240m ITV: £165m
FA Premier League	2007 – 2010	1,706	Sky: £1,314m; Setanta: £392m
FA Premier League	2010 – 2013	1,782	Sky: £1,623m ; /ESPN: £159m
FA Cup (+ England matches)	2008 – 2012	425	ITV: England home internationals, England away friendlies, FA Women's Cup Final; Setanta: England home friendlies and away internationals, England women's internationals, England U21 matches, Community Shield, Youth Cup, FA Trophy, FA Vase N.B. Breakdown of price paid not known
Carling Cup (+ Coca-Cola Championship)	2009 – 2012	264	BBC: 10 Championship matches, Carling Cup both legs of both semi-finals and final; Sky: 65 Championship matches and all play-offs, Carling Cup – 2 matches from each round, both legs of both semi-finals and final.



# Premier League Broadcasting Cases

- There are currently two cases in which the PL is involved; they relate to Karen Murphy and QC Leisure. Mrs Murphy is a pub owner and QC Leisure is a stockist and supplier of foreign decoders to pubs and the general public in the UK. References have been made to the European Courts of Justice (ECJ)
- They argue that the PL's contractual provisions restrict
  - the ability of PL rights holding broadcasters to screen live pictures outside their own designated territory.
  - the capacity of Mrs Murphy or QC Leisure to either view, or purchase decoders to view, live PL matches from any source other than the exclusive national PL rights holding broadcaster (i.e. Sky and Setanta can only broadcast their exclusive pictures in their allotted UK territory).
- The PL argues that the system of national Member State restrictions is needed to protect the value that is attached to their product and that the products' live and exclusive characteristics create the value which has made the PL such a success story.
- Rights holders wishing to guard their valuable licensing and intellectual property rights versus European free movement legislation which in this instance safeguards European consumers' right to purchase live PL matches from the cheapest provider in the EC.

# Analysis of AG Kokott's Opinion

## Choice Quotes

She describes such territorial restrictions as a

- *"serious impairment on the freedom to provide services"*
- the territorial exclusivity granted by the Premier League to Sky as *"tantamount to profiting from the elimination of the internal market."*
- *"there is no specific right to charge different prices for a work in each Member State. Rather it forms part of the logic of the internal market that price differences should be offset by trade".*
- Similarly, protection of the intellectual property rights in live football transmissions is given short shrift: *"a partitioning of the internal market for the reception of satellite broadcasts is not necessary in order to protect the specific subject-matter of the rights to live football broadcasts".*

# Pan EU rights auction?

- New way of selling?
- Will national court ask PL to change the way its auctions its rights 1 year into a three year deal?
- Tear up the contract or transitional period until next deal?
- European Commission Intervention?

# Could the PL start its own pay-TV channel in the UK?

- Take a big step for PL to move away from Sky
- PL channel available on all platforms
- Start selling internet rights to compete with piracy issues
  - Presumably the reason PL do not at present is that it would undermine the value that is attached to the granting of licenses to broadcasters in different territories

# Authorised Premier League Broadcasters Quiz

France	Canal Plus SA
Germany	Sky Deutschland
Greece	Nova Sports
Holland	Sport 1
Italy	Sky Italia
USA	Fox Soccer Channel & ESPN
Cook Islands	Fiji TV

# Listed Events 1

- UEFA has challenged the European Commission's decision to approve the listing of the entire UEFA European Championship Finals Tournament by the UK, whilst FIFA have challenged the listing of the entire 64 matches of the FIFA World Cup by both Belgium and the UK.
- government's duty to safeguard certain sporting and cultural events (an artificial barrier to entry)

v

- having concern for business enterprise and the need for a competitive market in the sale of sports rights.

## Listed Events 2

- Article 3a of Television Without Frontiers Directive provides:  
*‘1. Each Member State may take measures in accordance with Community law to ensure that broadcasters under its jurisdiction do not broadcast on an exclusive basis events which are regarded by that Member State as being of major importance for society in such a way as to deprive a substantial proportion of the public in that Member State of the possibility of following such events via live coverage or deferred coverage on free television. If it does so, the Member State concerned shall draw up a list of designated events, national or non-national, which it considers to be of major importance for society. ’*

# Listed Events 3

## Group A (Full Live Coverage Protected)

- The Olympic Games
- The FIFA World Cup Finals Tournament
- The European Football Championship Finals Tournament
- The FA Cup Final
- The Scottish FA Cup Final (in Scotland)
- The Grand National
- The Derby
- The Wimbledon Tennis Finals
- The Rugby League Challenge Cup Final
- The Rugby World Cup Final

## Group B (Secondary Coverage Protected)

- Cricket Test Matches played in England
- Non-Finals play in the Wimbledon Tournament
- All Other Matches in the Rugby World Cup Finals Tournament
- Six Nations Rugby Tournament Matches Involving Home Countries
- The Commonwealth Games
- The World Athletics Championship
- The Cricket World Cup - the Final, Semi-finals and Matches Involving Home Nations' Teams
- The Ryder Cup
- The Open Golf Championship



## Listed Events 4- Two sides of the coin

Jeremy Darroch, chief executive of UK pay-operator BSkyB, said that he will lobby for the abolition of listed-events legislation.

*“It’s not for me to dictate to a rights holder how they should sell their rights. What we want is the chance to pitch and show what we can do to showcase their sport. There is no such thing as free sports coverage. We all pay our licence fee.”*

Roger Mosey, who at the time was head of sport at the BBC, defended the present free-to-air “crown jewels” list.

*“Pay-TV can hardly claim it's starved of good content by the current framework” and that if the list was reduced the UK would “lose an important part of our national life”.*

# Listing of Events- The General Court Decision

- *“A Member State may, in certain circumstances, prohibit the exclusive broadcast of all World Cup and EURO football matches on pay television, in order to allow the general public to follow those events on free television.”*
- *“When those competitions are, in their entirety, of major importance for society, the restriction on freedom to provide services and freedom of establishment is justified by the right to information and by the need to ensure wide public access to television broadcasts of those events”*
- *“the ‘prime’ and ‘gala’ matches and, in the case of the EURO, matches involving a relevant national team are accepted to be of major importance for the public of a given Member State and may, therefore, be included in a national list specifying the events to which the public should be able to have access on free television.”*



# Listing of Events- The General Court Decision

- *“[for] other matches of the World Cup and the EURO, the Court holds first that those competitions may be regarded as single events rather than as a series of individual events divided into ‘prime’ and ‘non-prime’ matches or into ‘gala’ and ‘non-gala’ matches. Thus, the participation of the teams in ‘prime’ and ‘gala’ matches may depend on the results of ‘non-prime’ and ‘non-gala’ matches, which may therefore generate a particular interest for the public to follow those matches.”*
- *“the Court holds that the fact that certain ‘non-prime’ or ‘non-gala’ matches may affect whether a team advances to the ‘prime’ or ‘gala’ matches may justify a Member State’s decision to consider that all of the matches of those competitions are of major importance for society.”*
- *“although the categorisation of the World Cup and the EURO as events of major importance for society is liable to affect the price which FIFA and UEFA will obtain for the grant of the rights to broadcast those competitions, this does not destroy the commercial value of those rights because it does not oblige FIFA and UEFA to sell them on whatever conditions they can obtain. Similarly, although such a categorisation restricts freedom to provide services and freedom of establishment, that restriction may be justified, since it is intended to protect the right to information and to ensure wide public access to television broadcasts of events of major importance for society.”*



# Ofcom Consultation



# OFCOM Decision

- Demanding BSkyB sell its wholesale Sky Sports 1 and Sky Sports 2 channels at a regulated price
  - Why?
    - because no other broadcasters are able to get access to Premier League matches (bar Virgin through a wholesale agreement and ESPN as a license holder)
    - Ofcom argue Sky has an incentive to withhold supply in order to protect its retail business and reduce the risk of stronger competition for content rights
  - Alliances
    - Sky and rights holders
      - Rights holders concerned that their largest income source will contract.
      - Sky argues it will not be incentivised to pay millions of pounds for exclusive English Cricket Board (ECB) or Premier League rights if other platform providers can simply purchase the live rights at knock-down prices.
    - Ofcom, BT, Virgin, Top Up TV
      - decision has been viewed by Sky's competitors as a victory against a company that they believe, and Ofcom agrees, to have market power in the wholesale distribution and retailing of its Sky Sports channels.
  - Temporary solutions
  - What will happen?





Latest Auction UK rights

1/6 packages



5/6 packages



Wholesale Level

Available platforms:



Pre April 2010:



Post April 2010 :



Retail Level

# Inter-linkages 1

- Rights holders v consumers
  - Consumers pay for sport or expect it free of charge (minus license fee)?
  - Protection of rights through:
    - PL ATP; or
    - National legislation to protect broadcasts of national resonance
    - With the effect of rights inflation or deflation
- Protection of competition?
  - Ofcom- there needs to be more upstream competition
  - Listed Events- UEFA/FIFA argue they require more competition to get better value for their rights
  - ATP- a national broadcaster who has exclusivity is protection protected from competition within that territory



# Inter-linkages 2

- Ofcom investigation
  - Do the main competition issues fall away if the ECJ backs the AG's Opinion?
    - Issue of not enough upstream competition as Sky holds the majority of the wholesale rights.
    - If ECJ backs AG's Opinion then,
      - Consumers will be able to go to another MS to acquire the authorised decoder and card- not restricted by only choosing the national incumbent
      - Could (for example) a UK broadcaster go to another MS broadcaster who won the national PL auction and purchase the wholesale rights?





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LAW FOOTBALL BROADCASTING COMPETITION  
FOOTBALL AID PREMIER LEAGUE BOSMAN  
UEFA ARTICLES FIFA RULES & REGULATIONS  
LEGAL FOOTBALL SECTOR PAY-TV



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