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A Bosman moment for online content delivery?

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A BOSMAN MOMENT FOR ONLINE CONTENT DELIVERY?

Ken Daly analyses the EU's task of creating a comprehensive framework for territorial licensing of broadcasting and digital rights, and the wider ramifications of AG Kokott's Opinion in *Murphy* and *QC Leisure*

In 1995, a judgment of the European Court of Justice ("ECJ") in *Bosman*[1] sent shockwaves through the world of sport, as it required a total re-think of the player transfer system in football.

In two more recent football-related cases, *Murphy* and *QC Leisure*,[2] the ECJ has been advised by its Advocate General (Juliane Kokott) that territorial exclusivity agreements relating to the broadcast of football matches are contrary to European Union law.

If the ECJ follows this advice when it issues its decision within the coming months, there could be profound implications for the way in which films, music, software, games, e-books, sporting rights and other content may be exploited online or via broadcast within the EU.

This article looks at the current EU rules on territorial licensing (in sport and more generally), and examines some of the many questions that AG Kokott's opinion raises.

Free movement of goods v. protection of IP

One of the central goals of the EU is the creation of the internal market: an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.[3]

On the other hand, IP rights are national in nature and have traditionally been granted on a state-by-state basis and with legal effects only in the territory of the state concerned.

This means that authors and/or producers of an original work have, in each territory, exclusive monopoly rights to exploit the creative content for which they own rights. In general, authors are free to sell or assign rights; can choose not to license the use of their copyrighted work; can impose different conditions in different territories or even decide to license in one country but not another.

To strike a balance between the internal market objective and the national and territorial focus of IP rights attaching to goods, the doctrine of exhaustion of rights has been developed. Under this doctrine, once an owner has put a copyright-protected product on the market within the EU, the rights are exhausted and the owner loses all further ability to control through copyright the onward sale of the goods in question (hence once a CD is sold in Europe by or with the permission of the rights owner, the rights owner cannot use copyright to restrict its later resale).

A different regime for performances and other media services?

The above considerations principally apply to the free movement of tangible goods. However, a somewhat different approach has emerged through the case law in relation to the freedom to provide (intangible) services, including the transmission and broadcasting of television signals,[4] where, up until now, it had been widely assumed that principles of exhaustion would not apply.[5]

Coditel I[6] concerned a Belgian cable company that had retransmitted a film in Belgium from a broadcast on German television. The film was still showing in Belgian cinemas and the film's exclusive Belgian distributor claimed against the cable company for breach of copyright. The Belgian cable company argued in its defence that the agreement granting exclusive territorial rights to the film's Belgian distributor was unenforceable because it was contrary to the freedom to provide services.

The court disagreed and confirmed that there were circumstances in which the restrictions on the freedom to provide services could be justified, even where the effect is to partition national markets.

In *Coditel I*, the court drew an important distinction between literary and artistic works made available to the public by

performances, such as film, which may be "indefinitely repeated" and those whose placing at the disposal of the public is *"inseparable from the circulation of the material form of the works"* (such as perhaps a DVD). In the former case, the court found *"the owners of the copyright in a film … have a legitimate interest in calculating the fees due in respect of the authorisation to exhibit the film on the basis of the actual or probable number of performances and in authorising a television broadcast of the film only after it has been exhibited in cinemas for a certain period of time."* [7] Thus, the court in that case allowed the partitioning of the internal market on the basis that the right of the copyright owner to require fees for repeat showings of a cinema film was part of *"the essential function"* of the copyright in question. Put another way, the court found that the possibility of repeat performances was exactly what made the copyright valuable, and the protection of this value justified dividing the internal market through the grant of territorial exclusivity.

In a follow-on to the case above, *Coditel II*[8], the ECJ considered the application of competition law to the same arrangements and reached largely the same substantive conclusion.

From this and similar rulings (including a number of European Commission decisions that have specifically endorsed territorial licensing) it had generally been accepted that under free movement of services and competition law, the organisers of sports events were free to sell the media rights to broadcasters on an exclusive, territorial and closed-licence basis. Equally it was understood that, while each case is different, vendors of software, games, e-books, music, films for online delivery etc. were also not in principle prevented from doing so on a territory-by-territory basis.

The stark finding in the Opinion is that territorial exclusivity agreements relating to the broadcast of football matches are contrary to EU law

The Murphy and QC Leisure cases

Murphy and *QC Leisure* relate to attempts to circumvent the territorial licensing model for sports rights. The Football Association Premier League Ltd ("the FAPL") markets the rights to the English Premier League and grants its licensees the exclusive right to broadcast matches and exploit them economically on a territory-by-territory basis. By their nature satellite television signals cross borders. Licensees are therefore obliged to prevent their broadcasts from being viewed outside their respective broadcasting areas, and so must encrypt their broadcast signal. Subscribers decrypt the signal using a decoder, which requires a decoder card. The territorial exclusivity agreement also requires licensees to limit the use of decoder cards outside their territory in their contracts with end-users.

The FAPL had different licensees for the UK and Greece. Decoder cards in Greece were cheaper, in light of the lower demand in Greece for Premier League matches. A company acquired decoder cards from Greece (allegedly after false names and addresses had been given to the Greek licensee) and imported into the United Kingdom and offered them to pubs at lower prices than were available from the UK's exclusive licensee. Thus, pubs in the UK were able to show live transmissions of Premier League football matches using a Greek decoder card (with the Greek commentary turned down but with English language radio commentary playing), even though neither the FAPL, the UK's licensee nor the Greek licensee had authorised this use. The FAPL sought a judicial ruling to prevent the Greek cards from being used in this way, leading to the High Court of England and Wales referring a series of questions in the cases to the ECJ. In particular the ECJ was asked whether the FAPL can be permitted to enforce a territory-by-territory model.

AG Kokott's opinion

In issuing her (non-binding and advisory) opinion on 3 February this year, AG Kokott found that although the broadcasts in question do indeed come within the parameters of freedom to provide services, enforcing the rights in the way sought by the FAPL would impair that freedom. She added that *"this impairment of freedom to provide services is particularly intensive as the rights in question not only render the exercise of freedom to provide services more difficult, but also have the effect of partitioning the internal market into quite separate national markets."* [9]

She went on to advise that a restriction upon the freedom to provide services in relation to the exploitation of IP can be justified only if the restrictions are necessary to safeguard rights which are the specific subject matter of the IP in question. In her view, the specific subject matter of the rights in live football transmissions *"lies in their commercial exploitation"* (meaning that the opportunity to sell is the essence of the right) which in this case occurs through the charge imposed for the decoder cards. Kokott opined that the commercial exploitation of the rights in question is not undermined by the use of foreign decoder cards, as charges have been paid for those cards (in this case in Greece).

While those charges are not as high as the charges imposed in the UK, there is, according to the Advocate General, no specific right to charge different prices for a work in each member state. Rather, she says *"it forms part of the logic of the internal market that price differences between different member states should be offset by trade."* For this reason she advises that 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 transmissions. She concludes that *"the marketing of*

broadcasting rights on the basis of territorial exclusivity is tantamount to profiting from the elimination of the internal market."

As this appeared to run counter to *Coditel I* (mentioned above), Kokott sought to distinguish the cases. She noted that the court had held in *Coditel I* that the essential function of the copyright in question in that case was to allow the right owner to charge fees for repeat entries to cinemas which, without territorial restrictions, could not be achieved because Coditel could re-broadcast a German television signal on Belgian television, undermining the incentive for consumers to pay cinema entry fees. In *QC Leisure/Murphy*, a fee was actually charged for each showing of the broadcast, albeit on the basis of lower Greek rates and thus, according to Kokott, the situation in *Coditel I* is not comparable because *"the partitioning of the internal market for live football transmissions is precisely not intended to protect any other form of exploitation of the transmitted football match. Rather, the direct aim of partitioning the markets is to optimise exploitation of the same work within the different market segments."*

Kokott confirmed that the gravamen of the case was not the (essentially valueless) decoder cards themselves (i.e. goods), but the valuable services to which they gave access. Despite this, she found that the principle of exhaustion should apply noting: *"FAPL takes the view that, in the field of the provision of services, there is no exhaustion comparable to the movement of goods. This is surprising, because restrictions on the fundamental freedoms must, as a rule, be justified by reference to the same principles."* [10]

She noted that some services differ from goods in that they cannot be passed on per se (she noted, for example, that the services of a hairdresser cannot be passed on). In this sense, there is no scope for an exhaustion of the right to the service. However, she opined that *"other services, by contrast, do not differ significantly from goods. Computer software, musical works, e-books, films etc. which are downloaded from the internet can easily be passed on in electronic form. … In these areas, such a strict delimitation of the two fundamental freedoms would be arbitrary."* [11] For this reason, Kokott saw no reason why exhaustion should not also apply to various categories of service where the content delivered by that service can physically be passed on.

Kokott's opinion also proposes to find the territorial licensing model contrary to EU competition law (Article 101 TFEU). The opinion does not give a detailed explanation on this point, other than to say that absolute market partitioning is incompatible with the internal market and that in assessing any possible justifications for such a restriction, similar considerations should apply to the antitrust assessment as in the examination of whether a restriction of freedom to provide services is justified.[12]

Territorial restrictions may be maintained, provided the "form of exploitation" is different in each territory

Consequences and open questions

The implications of the *Bosman* case were far-reaching for football across Europe and beyond, because they required a re-design of the football-transfer system, and led to a reassessment of the relationship between EU law and sport. Commentators at the time had difficulty believing how so radical a change could be brought about by an ECJ judgment (and in the absence of legislation).

If the ECJ substantially follows Kokott's opinion,[13] the consequences could be far more radical than in *Bosman*. Just how radical would depend on the reasoning ultimately chosen by the court, as Kokott's opinion leaves a number of key legal and policy questions open. These questions relate to sports broadcasts, but equally appear relevant to many other forms of digital content delivery. Among these key questions are the following.

Consequences for all digitally delivered content?

The stark finding offered in the opinion is that territorial exclusivity agreements relating to the broadcast of football matches are contrary to EU law.[14] However, the reasoning could apply well beyond football, and Kokott expressly acknowledges that the issues she opines on have *"considerable importance for the functioning of the internal market beyond the scope of the cases in the main proceedings."*

Kokott acknowledges that her proposed finding could herald significant changes in the way sports rights are sold in the EU, although she did not explain in any detail how the different rights potentially making up 'sports rights' (including broadcast, performance, reproduction and other rights) might be affected in different ways by the proposed findings. If territory-by-territory sales are not permitted, rights-owners may be faced with a number of choices, including whether to offer rights for sale to all EU territories at the same time on the same conditions, or whether only to offer rights where appropriate prices can be charged. Kokott merely muses that *"that would be an economic decision to be taken by the holder of the rights."*

The same choices would be open to those delivering other forms of online content. This could involve – over time – a significant dismantling of existing distribution structures. Deliverers of digital and broadcast content may have to re-adjust their practices to make pan-European offerings where territorial licensing is no longer possible. In some sectors and for some content, this may work very well. However, it should be recognised that this outcome could also drive ever greater

homogenisation (as content providers may invest less in locally tailored content if they cannot recoup their investment in local content through territorially restricted exploitation), and it may drive an ever greater dependence on English as the language of the internet as pan-European offerings replace more tailored national and local offerings.

Is Kokott's opinion technology-proof?

The manner in which Kokott distinguished her opinion from the *Coditel I* case raises several important questions. The circumstances of *Coditel I*, she argues, involved an acceptable territorial restriction because its objective was the protection of another form of exploitation of the film in question (i.e. providing access to the film via a cinema attendance rather than via television). On the other hand, in relation to the facts of *Murphy* and *QC Leisure*, she opines that the partitioning of the internal market was not intended to protect any other *"form of exploitation"* of the transmitted football match, but was intended to optimise exploitation of the same form of exploitation within the different market segments.

It is abundantly clear that the commission favours the development of broader pan-EU or multi-territory licensing models

If this is a valid distinction, then it implies that territorial restrictions may be maintained provided the *"form of exploitation"* (i.e. the delivery method) is different in each territory. This focus upon the form of exploitation does not seem entirely logical and is hard to reconcile with the commission's policy focus on platform and technology neutrality, and also the fact that these forms of exploitation are overlapping and merging as technology advances. In *Coditel I*, attending the cinema was regarded as a separate form of exploitation, in part because of the possibility of showing the content to ever greater numbers of people on a paid-entry basis.

However, the distinction between cinema as a way in which a film can be exploited on a person-by-person basis and television services (where the content is made available to large segments of the population at the same time and on a one-off basis) is now largely obsolete (e.g. with streaming services, TV-recording devices, advertising revenue funded catch-up TV, paid video on demand, etc).

Why should it be contrary to EU law for a territorial licensing model to be used for the distribution of a film to two countries via download, if having a territorial licensing model for the same film would be acceptable when one is offered by broadcast in one country, and by video-on-demand in another? Or are all forms of performance that may be passed on to be viewed in the future as a single form of exploitation (to be contrasted only with live performances)?

Is everything that can be passed on exhaustible?

Kokott's reasoning for applying exhaustion principles to delivery of intangible services (as opposed to goods) implies that everything that can be passed on should in principle be exhaustible, unless exemption conditions can be met.

To date, the starting assumption in selling most copyright services (such as providing access to software over the internet, or a digitally delivered musical track) has been that exhaustion will not apply and that those delivering the content can rely on national copyright law to protect against later unauthorised sales, for example, into other countries. If exhaustion were applied, the starting assumption would be that rights-owners may not assert copyright in a national court in a way that segregates national markets, unless they can come up with satisfactory justifications for doing so. By turning the assumption on its head, a multitude of possible challenges to national distribution practices will likely arise.

For example, if a software maker has realised the value of the software from making a first sale and is thereafter unable to prevent customers from reselling the software,[15] is the next logical step that software providers may be forced to deliver their content in a form that permits resale to avoid interference with a purchaser's resale rights? The potential consequences for copyright protection and enforcement of such an outcome would be vast.

A merging of the tests – goods, services and competition?

The conditions under which the freedom to provide services may be restricted have been set out in decades of case law. Equally, the court has carefully developed the exception to the free-movement-of-goods principles and the conditions under which the competition principles in Article 101 TFEU may apply, and when an Article 101(3) exemption may be available. One curious feature of Kokott's opinion is an apparent merger of – or at least blurring of the boundaries between – the three distinct concepts.

At paragraph 183, Kokott comments that *"restrictions on fundamental freedoms must, as a rule, be justified by reference to the same principles"* and, based on this logic, extends free movement of goods principles (such as exhaustion) into the freedom to provide services domain. When later considering the competition-law aspects of the cases referred, she comments that an agreement to divide territories is contrary to competition law, and that *"the examination of freedom to provide services confirms this conclusion, since conflicting assessments of the fundamental freedoms and competition law*

are to be avoided in principle."[16] Later, when briefly considering whether the competition-law exemption conditions in Article 101(3) might apply, she opines that *"similar considerations should apply as in the examination of whether a restriction of freedom to provide services is justified."*[17]

In essence this suggests that little turns on which legal test one would apply. Historically, this has not been the case. It might be suggested that instead of assessing each element against its own legal test, Kokott has assessed the distribution practice against a policy goal: the achievement of the internal market. One might ask whether this is the court's role and, even if the court shares the goal, whether a judgment could take the same "broad brush" approach to the Treaty's legal tests.

Active and passive sales

In the field of competition law, territorial exclusivity is generally acceptable provided it is not absolute, i.e. provided that passive (essentially, unsolicited) cross-border sales are not prohibited. If Kokott's opinion were followed, could rights-owners continue with territorial licensing, provided passive sales remained possible?

In the digital world, the active/passive sales distinction is already a highly strained concept as websites are available from anywhere. The distinction between actively selling into a territory and having a website available in that territory is sometimes extremely fine.

If, in practice, national selling practices cannot be maintained, how will this be reconciled with the commission's clearly acknowledged position that the distribution of goods on a territorial basis can sometimes have economic and consumer benefits? For example, why would a national distributor invest heavily in national brand-building and improving consumer knowledge when it may be distributors in other member states that will benefit?

Conclusion

It is abundantly clear that the commission favours the development of broader pan-EU or multi-territory licensing models, and has for some time advocated pan-European IPRs. However, despite its policy statements, the commission has also repeatedly endorsed or at least accepted national and territory-by-territory licensing models in relation to music, film, sports content, games and other digital and IP-based content that is easily transmitted across borders. Thus, the commission has simultaneously allowed and discouraged national licensing, but has not so far succeeded in putting forward a comprehensive policy framework which allows rights-owners to be properly compensated and protected while also facilitating access to content. As happened in *Bosman*, is the commission waiting for judicial intervention to achieve what it has not been able to through legislation? Will the ECJ see the *QC Leisure* and *Murphy* cases as an opportunity to force a radical re-think of the EU's digital delivery framework? And is it the court's role to bring about such changes when the legislature may be better placed to conduct an impact assessment and study the many potential unintended consequences? ■

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Footnotes

1 Case C-415/93 *Union Royale Belge des Sociétés de Football Association ASBL & others v. Jean-Marc Bosman*, ECR I-4921.

2 Cases C-403/08 and C-429/08 *Football Association Premier League Ltd & Others v QC Leisure & Others; Karen Murphy v Media Protection Services Ltd* (pending). The cases are separate, though the Court is dealing with them together as the issues are common.

3 Art 26 TFEU

4 See, in particular, Case C-17/00 *De Coster* [2001] ECR I-9445, paragraph 28.

5 For example, recital 29 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society provides that *"the question of exhaustion does not arise in the case of services and on-line services in particular."*

6 Case 62/79 *Coditel I* [1980] ECR 881.

7 Case 62/79 *Coditel I* [1980] ECR 881, paragraphs 12 and 13.

8 *Coditel II*, paragraph 17.

9 Opinion, paragraph 175.

10 Opinion, paragraph 183.

11 Opinion, paragraph 185.

12 Opinion, paragraph 250.

13 AG opinions are not binding though the ECJ follows them in the majority of cases.

14 Opinion, paragraphs 252 (7) and (8)

15 Indeed the German Supreme Court has recently referred exactly this question to the ECJ.

16 Opinion, paragraph 249

17 Opinion, paragraph 250