

# Case law update: QC Leisure and Football Dataco

In February and March 2012, the High Court and European Court of Justice (the “ECJ”) delivered two landmark judgments on the scope and interpretation of copyright and competition law. The decisions are certain to have a lasting impact on sport industry practises, potentially leading to structural changes in the broadcasting market and possibly limiting the availability of a supplementary revenue streams.

## **Football Association Premier League Ltd and Others v QC Leisure and Others [2012] EWHC 108 (Ch)**

On 3 February 2012, the High Court ruled that unauthorised transmissions of broadcasts containing protected works in public houses constitute an infringement of copyright law. The Court did, however, acknowledge the availability of a partial defence where customers in the public house are able to watch the broadcasts for free.

The decision provides clarity in respect of the scope of protection provided by English copyright law and is likely to have an immediate effect on how broadcasting rights are licensed in the European Union.

### **Legal background**

Before analysing the High Court’s ruling, it is worth setting out the legal foundations that support its reasoning. Kitchin LJ, who gave judgment in the case, made reference to the provisions of three statutory instruments:

#### **1. The Treaty on the Functioning of the European Union (“TFEU”)**

Article 56 of the TFEU prohibits any form of restriction on the freedom to provide services within the European Union. Article 101(1) of the TFEU further prohibits all agreements, decisions and concerted practices that affect trade between Member States and which have the objective or effect of preventing, restricting or distorting competition within the internal market.

#### **2. EU Directive 2001/29/EC (the “Copyright Directive”)**

Article 3(1) of the Copyright Directive (as implemented in the UK by the Copyright and Related Rights Regulations 2003) requires Member States to provide authors with the exclusive right to authorise or prohibit any communication to the public of their work by wire or wireless means.

#### **3. Copyright, Designs and Patents Act 1998 (“CPDA”)**

Section 20(1) of the CDPA provides that:

*“the communication to the public of the work is an act restricted by the copyright in a literary, dramatic, musical or artistic work, sound recording or film, or a broadcast.”*

“Communication to the public” is defined in Section 20(2) as:

*“...[a] communication to the public by electronic transmission, and in relation to a work include –*

- (a) the broadcasting of the work;*
- (b) the making available to the public of the work by electronic transmission in such a way that members of the public may access it from a place and at a time individually chosen by them.”*

However, it should be noted that section 72(1) of the CPDA provides an important exception to this offence:

*“The showing or playing in public of a broadcast ... to an audience who have not paid for admission to the place where the broadcast ... is to be seen or heard does not infringe any copyright in –*

- (a) the broadcast;*
- (b) any sound recording ... included in it [except in so far as its author is not the author of the broadcast]; or*
- (c) any film included in it.”* (Emphasis added)

### **Factual background**

The Football Premier League Ltd (“FAPL”) is the governing body of the English Premier League. FAPL licences to foreign broadcasters the exclusive right to broadcast Premier League matches within their respective territories. The broadcasts are made by encrypted signals via satellite, with the broadcasters supplying decoder cards to individual customers. The licence agreements entered into between FAPL and the broadcasters impose limitations on the circulation of decoder cards outside the territory of each licensee.

FAPL brought claims against a number of businesses that were allegedly supplying public houses with Greek decoder cards, as well as the public houses themselves. FAPL alleged that the publicans had infringed copyright in a number of its works and that the decoder card suppliers had authorised the infringing acts by supplying the means by which the infringement was committed.

The said copyright works fell into three distinct categories:

- (a) Film: the football coverage’s opening sequence, the football matches and the matches’ highlights.
- (b) Artistic: various logos, graphics and visual devices.
- (c) Musical: a sound recording of the Premier League anthem.

The High Court referred a number of questions to the ECJ, which held that:

- (1) The import, use and sale of decoding devices constituted an unlawful restriction on access to services in the European Union. The restriction could not be justified by FAPL’s aim to protect its intellectual property rights; FAPL was entitled to reasonable remuneration for the services it provided, but could obtain this without such a restriction.
- (2) Granting exclusive licences to licensees in individual member states and prohibiting those licensees from supplying decoding cards outside of their individual territories restricted competition contrary to Article 101 of the TFEU.
- (3) Under Article 3(1) of the Copyright Directive, “communication to the public” included the transmission of works, via television and speakers, to the customers of a public house.

### **High Court Decision**

Kitchin LJ ruled on a number of issues on the resumption of the High Court trial. His decision can be divided into two parts:

#### **1. Copyright infringement**

##### *(a) Communication to the public*

At the original hearing, FAPL claimed that, by transmitting FAPL’s broadcasts via television screens and speakers to public house customers, the publicans were communicating FAPL’s copyright works to the public.

With reference to the ECJ’s comments on how “communication to the public” was to be interpreted, Kitchin LJ held that s20 of the CDPA was an effective transposition of Article 3(1) the Copyright

Directive and so the publicans were indeed communicating FAPL's copyright works to the public by showing FAPL's matches to their customers.

### *(c) Defence under s72(1) of the CDPA*

Kitchin LJ adopted a literal interpretation of s72(1) of the CDPA, ruling that the showing or playing of a broadcast in a public house to members of the public who had not paid for admission constituted an exception to s20 of the CDPA. A "free" broadcast therefore infringed neither copyright in the broadcast nor copyright in certain sound recordings and films included in that broadcast.

Importantly, his Lordship rejected claims from FAPL that the s72(1) defence applied only to copyright infringements under s19 of the CDPA, which, without reference to public communications via electronic transmission, provides that the playing or showing of a sound recording, film or broadcast in public infringes copyright.

It should be noted, however, that excluded from the scope of the s72(1) defence was the Premier League anthem, having not been performed, composed or recorded by FAPL, and various artistic works that FAPL included in its broadcasts. For the sake of clarification, Kitchin LJ agreed to issue a declaration identifying those FAPL works in which copyright had been infringed following his judgment.

### *(c) Authorisation*

As for the suppliers of decoder cards, Kitchin LJ found they had infringed copyright in FAPL's works by authorising the infringing acts of their customers. His Lordship held that the provision of decoder codes did not merely "enable" the customers' infringement but positively authorised the purpose for which those decoder cards were supplied. In Kitchin LJ's view, that purpose was to allow the publicans' customers to watch encrypted FAPL broadcasts.

### *(d) Injunction*

During the proceedings, FAPL sought an injunction to prevent further infringement of their copyright works, including the Premier League anthem and a number of artistic works included in their broadcasts.

In response, Kitchin LJ explained that such an injunction would need to be drafted with precision and identify all works in which copyright had been infringed. As many of these works had not been properly identified, his Lordship considered injunctive relief to be inappropriate.

Further, Kitchin LJ noted that a number of the defendants had stopped trading and that others had offered undertakings to ensure copyright works, such as the Premier League anthem, were not broadcast in their public houses. His Lordship therefore concluded that the defendants should be entitled to carry on their businesses in a way that avoided infringement of FAPL's copyright, on the assumption that they were able to do so.

## **2. Competition restrictions**

Kitchin LJ declared that FAPL's agreements with its territorial licensees, to the extent that they prohibited the licensees from supplying decoder codes for use in Member States different to their own, constituted a restriction on competition contrary to and therefore void under Article 101 of the TFEU. This declaration was, for the avoidance of doubt, said to be without prejudice to any rights of FAPL in respect of copyright infringement.

## **Analysis**

Despite press reports suggesting that the High Court's decision is a victory for publicans and decoder suppliers, the result should be considered an, albeit limited, victory for FAPL and its main licensees, BSkyB and ESPN. Indeed, the ruling is not a *carte blanche* for publicans to show FAPL's foreign broadcasts to their customers, as the

Premier League anthem and all associated logos, graphics and visual devices will need to be muted, covered or otherwise removed from football coverage before the broadcasts are shown.

The FAPL's present three-year domestic rights deal, worth £1.78 billion, expires at the end of next season. The Court's decision could have an impact on the tendering of matches in the subsequent rights auction, with the possibility of a single European-wide licence potentially being granted to one deep-pocketed broadcaster (subject to competition law clearances). Alternatively, we may see the existing broadcast structure remain but with coverage being broadcast in a number of languages rather than restricted on a territorial basis, on the assumption that football fans do not want to watch and therefore publicans will not be keen to broadcast games where commentary and analysis is in a foreign language. Whilst in the short-term both of these options might seem unfavourable for Sky and ESPN, the companies are two of a limited number of corporate entities that have the logistical capabilities and resources to service customers in a restructured market.

As for the immediate future, FAPL will be required to review the agreements it currently has in place with broadcasters, their territorial exclusivity provisions now being void and unenforceable. Whilst this will undoubtedly have cost implications, the cumbersome copyright restrictions on publicans and other users of decoder cards are likely to deter a large number from exploiting foreign broadcasts, meaning losses incurred by the broadcasters as a result of loss of exclusivity are likely to be limited.

## **C-604/10 Football Dataco Ltd and Others v Yahoo! UK Limited and Others**

On 1 March 2012, the ECJ confirmed that a football fixture list shall not attract Database Copyright protection unless the selection or arrangement of its data amounts to an original expression of the creative freedom of its author.

In line with Advocate Mengozzi's Opinion of 15 December 2011, the ECJ stressed that the effort spent in producing data from which a fixture list is compiled is irrelevant for the purposes of copyright protection. The case is certain to have an impact on those looking to exploit sporting databases for commercial purposes.

## **Legal background**

It is again important to set out the key statutory provisions on which this decision was made.

EU Directive 96/9/EC (the "Directive"), implemented in the UK by the Copyright and Rights in Databases Regulations 1997, provides for two separate forms of intellectual property protection for databases:

### **1. Database copyright**

The structure of a database, the way in which it has actually been put together through the selection of the data or the way in which that data is presented, is protected under Article 3 of the Directive.

### **2. Database right**

The extraction and/or reutilisation of the whole or a substantial part of a database is prohibited under Article 7 of the Directive, so as to compensate the effort expended in obtaining, verifying and presenting the data that database contains.

## **Factual background**

Football Dataco Ltd and the other claimants ("Football Dataco") are responsible for drawing up and publishing fixture lists for the English and Scottish football leagues. Football Dataco charges for the use of its fixture lists by way of a licence fee.

Football Dataco alleged that the defendants were using the fixture lists without a licence in breach of their rights, namely;

- (a) the database right under Article 7 of the Directive;
- (b) database copyright under Article 3 of the Directive; and
- (c) copyright under the CDPA.

The High Court and Court of Appeal held that Football Dataco's fixture lists did not meet the requirements for copyright protection under the CDPA or database right protection under Article 7 of the Directive. In particular, the drawing up of a fixture list – the entry of a series of pre-existing components into an ordered list – was said not to require sufficient investment in the obtaining, verification or presentation of its contents.

The English Courts were, however, undecided on whether producing a fixture list involved sufficient skill and labour for the purposes of database copyright protection and so turned to the ECJ for guidance.

### **Decision**

The ECJ held that, for the purposes of the Article 3 of the Directive:

- (1) The effort expended in the creation of data cannot be taken into account for the purposes of assessing a database's eligibility for copyright protection. Only the effort spent selecting or arranging data in a database is of importance. It follows that neither the effort spent in producing data from which a fixture list is compiled, be it dates, team names or stadia, nor the addition of "important significance" to data at the selection or arrangement stage, is relevant.
- (2) Copyright protection is conditional upon a database being characterised by a "creative" aspect. It is not sufficient that the

creation of the database requires labour and skill; the author must express a degree of originality and creative freedom in the data's selection and arrangement. After all, the purpose of the Directive was to promote the creation of data processing and storage systems, not to protect data capable of being collected in a database.

- (3) The Directive has harmonised the copyright protection of databases; further rights cannot be conferred at a national level, for example, under the CDPA. The only exception is for databases that pre-date the Directive, which may be subject to different criteria under the Directive's transitional provisions.

### **Comment**

As noted in the author's analysis of the Advocate General's Opinion in this case (see *Sports Law Administration and Practice*, February 2012 (Vol. 19, No. 1)), many sports governing bodies and leagues derive additional income from the commercial exploitation of data that they compile. However, this is a revenue stream that is susceptible to challenge, with fixture lists and similar databases now only protected from reproduction and resale where their creator has structured or presented them in a sufficiently "creative" way in order to "add value".

*Oliver Howley is a Trainee Solicitor in the Sports and Entertainment Group at Squire Sanders in London.  
oliver.howley@squiresanders.com*

This article originally appeared in **Sports Law Administration & Practice** April 2012 (Vol. 19, No. 2), on page 8.