

Premier League v Luxton: The impact of QC Leisure reconsidered

Introduction

The decision in *Football Association Premier League Ltd v QC Leisure* [2012] EWCA Civ 1708 was recently applied by the High Court when granting summary judgment in a dispute between the Football Association Premier League (“FAPL”) and a Swansea publican (*Football Association Premier League Ltd v Luxton* [2014] EWHC 253 (Ch)).

Whilst the Court confirmed that FAPL’s enforcement of its IP rights could not necessarily imply anti-competitive conduct, Mrs Justice Rose’s analysis calls into question the impact of the “market-liberating” decision in *QC Leisure* and, at points, acknowledges that FAPL’s licensing practices may yet be vulnerable under EU competition law. Although such considerations did not provide a defence to the FAPL’s infringement claims in this case, the Court’s comments come within weeks of the European Commission’s report on sports media rights, in which it was stated that, despite the lauding of *QC Leisure* as a victory for publicans, decoder suppliers and the general public, consumers are in fact “worse off” than ever (see http://ec.europa.eu/sport/news/2014/docs/study-sor2014-executive-summary-gc-compatible_en.pdf).

The scrutiny of these issues at both national and EU level hints that the landscape is being laid for change, as the competing interests of commercial and consumer stakeholders, and the tensions between intellectual property rights and competition law, begin (inevitably) to resurface.

Legal background

It is essential, firstly, to set the *FAPL v Luxton* decision within its legal context. The key legislative provisions at issue, and the central case to which the High court referred, are as follows:

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 which have an appreciable effect on trade between Member States and which have the objective or effect of preventing, restricting or distorting competition within the internal market.

EU Directive 2011/29/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.

Copyright, Designs and Patents Act 1998 (the “CDPA”)

Section 20(1) 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, a sound recording or film, or a broadcast.”

“Communication to the public” is defined in s20(2) as follows:

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

- (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.”*

Football Association Premier League Ltd v QC Leisure [2012] EWCA Civ 1708¹

FAPL brought copyright infringement claims against broadcasters and UK publicans for use of decoder cards (each of which was licensed for domestic-only use in the same Member State as the broadcaster which supplied it). The decision comprised two limbs:

Copyright infringement

By showing the matches in their pubs, the publicans were communicating FAPL’s copyright works to the public for the purposes of s20 of the CDPA. As the customers were not paying, a limited defence applied under s72(1) of the CDPA and copyright was infringed only in relation to certain elements of the broadcasts such as FAPL’s logos, artistic works etc. The broadcasters supplying the foreign cards also infringed FAPL’s copyright by authorising the publican’s infringing acts.

Article 101 declaration

To the extent that they prohibited the supply of decoder cards for use in foreign Member States, FAPL’s agreements with its territorial licencees constituted a restriction on competition and were therefore void under Article 101. This declaration was given without prejudice to FAPL’s rights in respect of copyright infringement.

Factual background

FAPL is the governing body of the English Premier League. It is authorised by its member clubs to license rights to broadcast coverage of Premier League matches. These licences are sold to broadcasters worldwide, generating billions in revenue each year. In turn, the broadcasters sell subscriptions and supply their customers with satellite decoder cards, which enable the customer to view the coverage of Premier League matches. This coverage contains the logos, graphics, imagery and sound recordings of FAPL in which copyright subsists.

Mr Luxton is the licence holder of a public house in Swansea. He acquired from one of FAPL’s licensed Danish broadcasters, Viasat AS, a decoder card relating to a subscription for domestic use. FAPL alleged that Mr Luxton had used this domestic card for commercial purposes by showing Premier League football matches to customers in his pub. This, FAPL said, was an unequivocal infringement of its IP rights, Mr Luxton had “no real prospect” of raising a successful defence, and the High Court should enter summary judgment in its favour. FAPL sought injunctive relief and an inquiry as to damages.

Mr Luxton filed a Defence and Counterclaim contending that, in light of the ruling in *QC Leisure*, which permits broadcasters within the EU to transmit their broadcasts to people in the UK who have purchased a valid decoder card:

“[i]n licensing its copyright to foreign broadcasters, the claimant has already consented to the communication of the said copyright works to the public. Consent is only required in the event that the works are broadcast to a ‘new’ public, not originally contemplated by the claimant ... [A]n audience is not capable of constituting a ‘new public’ simply by virtue of

the fact that it is based in a different Member state to that foreign broadcaster.”

The Defence and Counterclaim further alleged that FAPL’s real concern was to prevent the use of a *foreign* decoder card, rather than a *domestic* one.

Mr Luxton’s Defence went on to contend that FAPL was in practice precluding the use of foreign Member State decoder cards by employing “covert” contractual clauses or mutual understandings with its UK exclusive licensees (in breach of Articles 101 and 56 of the TFEU). FAPL emphasised in its reply that domestic decoder cards are generally sold at substantially lower prices than their commercial counterparts, as they are not authorised for use in public locations.

It is of interest to note, briefly, the evidence adduced by the parties. This included, inter alia, a witness statement made by Mr Luxton’s solicitor describing various enquiries he made (in November 2013) of foreign broadcasters as if he were a normal commercial purchaser wishing to purchase a commercial subscription to show FAPL’s matches in a UK pub. Every one of his requests was refused and met with responses including that this was “forbidden”, that there was “simply no way for us to be able to provide you with... [this] content in the UK legally”, and “[t]he only legitimate licence providers of Premier League in the UK are Sky and BT Sport”. It is not clear whether this evidence was intended to imply (i) that FAPL has deliberately sought to maintain division of the market following *QC Leisure*, or (ii) that the copyright infringement limb of the *QC Leisure* decision has dampened the “market-liberating” effect of the Article 101 declaration.

The decision

Mrs Justice Rose noted that the court in *QC Leisure* held, firstly, that territorial licensing restrictions could not be justified by a need to prevent potential commercial misuse of domestic decoder cards but, secondly, that this was a separate issue to copyright infringement. She examined *FAPL v Luxton* on the same basis.

On the question of copyright, Mrs Justice Rose considered Mr Luxton’s response to FAPL’s application, which advanced the argument that the CJEU has yet to consider the question of whether a communication to a “new” public would occur in relation to a commercial decoder card, used in a foreign Member State. Counsel for Mr Luxton submitted that this point was in fact the crux of the matter, as FAPL’s true objective (and its underlying reason for issuing proceedings) was covertly to maintain the very division of the market which was found to be unlawful in *QC Leisure*. Mr Luxton had a real prospect of advancing a successful defence on the basis that FAPL’s practices in breach of EU law were collateral to the IP rights it was seeking to enforce. As such, in light of the complexities of the issues at stake, the matter should be allowed to proceed to a full trial.

Mrs Justice Rose, applying the analysis and decision in *QC Leisure*, concluded that such considerations were irrelevant as regards a defence to the specific action of infringement in question. In doing so, she emphasised the importance of maintaining the distinction between the matter of copyright infringement and the separate question of breach of competition law. It followed that the respondent’s contention as to the true motivation for FAPL’s infringement proceedings was rejected.

Ultimately, there was not a sufficient nexus between Mr Luxton’s infringement and the alleged unlawful activity undertaken by FAPL to provide a realistic prospect of a successful defence at trial. In other words, Mr Luxton’s lack of defence turned on the essential fact that his infringing action was not the use of a foreign card but the commercial use of a domestic-only card. This action of infringement could not be said to be a result of FAPL’s allegedly anti-competitive activity and therefore FAPL’s activity was not

capable of triggering a defence to the infringement in question. In this respect, Mrs Justice Rose applied Lord Sumption’s reasoning in his judgment in *Oracle America Inc v M-Tech* [2012] UKSC 27, in which he cautioned against conflating anti-competitive activity and the practice of vigorously enforcing one’s intellectual property rights. He stated that a party such as FAPL

“cannot be prevented from doing something which is in itself entirely lawful [in other words, the enforcement of IP rights] ... simply because it proposes to do something else as well which is unlawful [such as use of contractual provisions which have the effect of breaching EU competition law].”

In Mrs Justice Rose’s judgment, the fact that FAPL’s alleged unlawful activity was now taking place covertly rather than expressly could not be seen as creating a stronger nexus than that in the *QC Leisure* case.

In granting FAPL’s application for summary judgment, Mrs Justice Rose was of the opinion that Mr Luxton’s defence was defeated by the *QC Leisure* decision, as, in order for it to succeed, the aforementioned nexus would have to be established (which would in itself mean that the outcome in *QC Leisure* would have been different, given that the defendants in that case were also using domestic cards for commercial purposes). It is clear, following *QC Leisure*, that the showing of matches in a pub constitutes a communication to the public within the meaning of s20 of the CDPA and that use of a domestic card in such a commercial manner constituted communication to a “new” public.

Analysis

This application of *QC Leisure* should be viewed by FAPL as a comfort insofar as it robustly affirms the courts’ approach to the protection of copyright subsisting in certain aspects of match broadcasts. The distinct analyses of competition law issues and copyright infringement rebuffed the respondent’s attempts to circumvent the key issue in the proceedings, which was the improper commercial use of a domestic card. This leaves open the enforcement of IP rights as an avenue by which to protect FAPL’s legitimate interests in respect of revenue derived from the broadcasting of its events.

However, in her analysis Mrs Justice Rose appears, at points, to accede to the suggestion that, in spite of the decision in *QC Leisure*, the market remains largely unchanged. In particular she expressed concern at the responses of foreign broadcasters to queries regarding commercial subscriptions to show FAPL matches in UK pubs, stating that “[t]hey certainly raise a *prima facie* case that the status quo is being maintained despite the ruling of the Court of Justice”.

This sentiment is echoed in the European Commission’s recent Report on Sports Organisers’ Rights in the EU, which concludes:

“Initially, the [CJEU]’s Premier League v QC Leisure judgment was considered a game-changer for the way in which sports media rights would be marketed in the EU. So far little seems to have changed.”

Whilst the evidence certainly sheds light on the impact of *QC Leisure*, when both limbs of that decision are viewed together, its minimal effect is not unsurprising. In practice, the copyright limb was bound to curtail the impact of the Article 101 declaration. As numerous commentators have noted, for publicans, the practicalities of complying with this ruling are, at the least, highly inconvenient. As regards broadcasters, it is important to assess the apparent reluctance to supply decoder cards in foreign Member States in the context of the risk of exposure to an infringement claim (by authorising an infringing act).

More broadly, the Commission’s report indicates an intention to scrutinise the competitive state of the market and the exclusive licensing structures employed by FAPL. Such an exercise will necessarily entail consideration of the balance between enforcement of IP rights and the facilitation of competition. As a result, the parameters

within which IP rights are capable of justifying activities with an effect on competition may be narrowed, fundamentally altering a key method by which FAPL has traditionally protected its revenue streams and its broadcasters' investment. Whilst the rationale behind this scrutiny is the protection of consumers, the counterweight is the potential to cause detriment to consumers by another route. Damage to FAPL's ability to protect the investment of its broadcasters risks reducing levels of investment (and, consequently, revenue and reinvestment) in the sport and may ultimately affect the quality of content on offer to consumers.

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