Kluwer Copyright Blog

Football, Decoders and Territoriality in Copyright

Bernt Hugenholtz (Institute for Information Law (IViR)) · Thursday, March 10th, 2011

The football leagues in Europe seem to be on a losing streak in Luxembourg. On February 17 the European Court of Justice pronounced that Member States may reserve television coverage of FIFA World Cup events to free-to-air public broadcasters, on the basis of nationally drawn-up lists of 'events of major importance', as defined in the former Television without Frontiers Directive (joint cases T 68/08, T-55/08, T-385/07). Two weeks earlier, an opinion of Advocate-General Kokott was issued in two joint cases that spell even more doom for the football associations (joint cases C 403/08 and C 429/08), and which might have even broader ramifications for the law of copyright in the EU in general.

In brief, these cases turn on the trade in so-called decoder cards that provide access to encrypted foreign satellite transmissions of live Premier League football matches (e.g. from Greece) at lower prices than domestic pay TV services. In response to the British High Court that asks myriad questions of interpretation to the ECJ, the Advocate-General opines (inter alia) that the exclusive broadcasting licensing deals that the Premier League has entered into on a country-by-country basis are in conflict with the freedom to provide services – one of the four freedoms that establish the Internal Market. According to the AG this impediment is not objectively justified, since the Greek broadcasts were duly licensed and the charges for the decoder cards were being paid. According to the AG, this is no *Coditel I* revisited – a case where cable operators retransmitted broadcast works *without* permission. In the present cases, "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" (§ 200). Essentially, the AG is of the opinion that the Premier League's rights in these broadcasts are *exhausted*.

While the language and reasoning of the AG's opinion may and will raise eyebrows, particularly given the generally accepted view that rights of communication are not subject to exhaustion (art. 3 (3) of the InfoSoc Directive), the opinion deserves applause for its audacity and its idealism. What the AG is really saying here is that carving up copyright markets along national borders is fundamentally at odds with the idea and ideal of an internal market, unless special circumstances justify such an impediment. Applying simple economic arithmetic (price discrimination) is however not such a circumstance. According to the AG, "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 between different Member States should be offset by trade" (§ 192).

More generally, the AG's opinion raises the question of whether territoriality in copyright ought to be maintained in the EU. Whereas EU law has long ago tackled the problem of territoriality head-on for the distribution of physical goods, by establishing a rule of Community exhaustion for goods incorporating intellectual property, copyright territoriality lives on in almost unhampered form in the realm of content-based services – the largely dysfunctional Satellite and Cable Directive notwithstanding. With the emergence of the Internet as the primary means of carrying copyright-protected content to consumers across Europe, it is becoming increasingly clear that territorially defined copyrights pose serious obstacles to Community-wide trade. As the European Commission has observed in its Communication on Creative Content Online of 2009, "[A]s a result of copyright territoriality, a content service provider has to obtain the right to make content available in each Member State. These costs incurred may be detrimental to the exploitation of a vast majority of European cultural works outside their national markets." Note that Europe's main competitor in the field of cultural production, the United States, has only a single copyright law – not 27 different laws through which copyright owners and users must navigate in parallel.

The Advocate-General's opinion reminds us that it is high time to fundamentally question the concept, and the pro's and con's, of territoriality in EU copyright. Are we not better off in the long run with a unitary *European copyright law*?

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