

# Kluwer Copyright Blog

## Events of high interest: exclusive broadcasting rights and freedom of information

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*The CJEU states that Article 15(6) of Directive 2010/13/EU on short news reports is compatible with Articles 16 and 17 of the Charter of Fundamental Rights of the European Union.*

On 22 January 2013 the Court of Justice of the European Union handed down a [decision](#) on the compatibility of Article 15(6) of Directive [2010/13/EU](#) – according to which the compensation that holders of exclusive broadcasting rights are entitled to seek for granting other broadcasters the right to access events of high interest to the public for the purpose of short news reports «shall not exceed the additional costs directly incurred in providing access» – is compatible with Articles 16 and 17 of the [Charter of Fundamental Rights of the European Union](#), which set forth the rights to freely conduct a business and to own, use and dispose of one’s properties.

I have to start by saying that the ruling of the Court is not revolutionary (nor unexpected, after the well-structured [opinion](#) delivered by the Advocate General last June). However, while the CJEU had many chances to deal with the relationships between the protection of intellectual property rights and the protection of other (and conflicting) fundamental rights, there are not many cases where it specifically addresses the issue of the legitimacy of a statutory limitation on an intellectual property right. This, and a certain divergence from the AG’s opinion on a key topic (the very existence of a property right), prompt me a brief comment to this decision.

### Background

The request for a preliminary ruling has been made by the Austrian Bundeskommunikationssenat ([BKS](#)) – the judicial organ which reviews the decisions of the Austrian Communications Authority ([KommAustria](#)) – in relation to the proceedings between the satellite broadcaster [Sky Österreich](#) and the Austrian national public broadcaster Österreichischer Rundfunk ([ORF](#)), concerning the financial conditions under which the latter had the right to gain access to Sky’s satellite signal in order to make short news reports.

Sky Österreich was the exclusive holder of broadcasting rights for the Europa League football matches, which are “events of high interest to the public” within the meaning of the Audiovisual Media Services Directive (AVMSD), i.e. events which any broadcaster established in the EU has the right to access for the purpose of realizing short news reports, despite the fact that they are transmitted on an exclusive basis by a single broadcaster. At the request of ORF, KommAustria decided that, according to Article 15(6) AVMSD, Sky was indeed required to grant the Austrian national public broadcaster the right to access its transmissions for a remuneration which would have not been greater than the additional costs directly incurred in providing access to the satellite signal (amounting to zero in this case).

Both parties appealed against the KommAustria decision before the Bundeskommunikationssenat.

In particular, Sky claimed that Article 15(6) AVMSD was non compliant with Articles 16 and 17 of the Charter of Fundamental Rights of the European Union (CFR). Sky specifically emphasised that, by precluding the possibility to seek a remuneration greater than the costs incurred in providing access to the satellite signal, Article 15(6) of the Directive limited its right to property over the satellite transmissions in a systematic and disproportionate manner.

The argument made by Sky was basically the following: Article 17 CFR allows the limitation (recte, the deprivation, which is the most extreme form of limitation) of the right to property only against the payment of a «fair compensation». If the compensation has to be fair, Sky argued, it has to be (to some extent, at least) proportionate to the economic value of the object of the property right, which is equal to the amount paid for the acquisition of the property right. If, under Article 15(6) AVMSD, the amount which has been paid by the right holder is not an element to be taken into account in order to calculate the compensation for the short news reports, this compensation is intrinsically unfair, thus in contrast with Article 17 CFR.

### **Decision of the Court**

Since Sky’s claim is mainly focused on the contrast between Article 15(6) AVMSD and its property right over the content of its broadcasts, I will start by examining this topic first.

Here one may find the major difference between the CJEU decision and the Advocate General opinion: while the latter recognises that Article 15 AVMSD has the effect of imposing a control on the use of the good (the satellite transmissions) in a way that interferes with the right to property acquired on an exclusive basis by a broadcaster, the former argues that, in this specific case, Sky has not an established legal position protected by Article 17(1) CFR. This is because, according to the Court, an economic operator which has acquired exclusive broadcasting rights by means of a contract after the entry into force of the Directive 2007/65/EC (which introduced in the first place the right to access for the purpose of short news reports) is not able to exercise those rights autonomously, the lack of autonomy consisting in the holder’s preclusion to request specific operators, for a specific object (the access and use of the satellite signal for the creation of short news reports), a compensation exceeding the additional costs directly incurred in providing access to the signal.

I have to say that the holding of the Court on this point does not convince me completely. There is little doubt to me that exclusive broadcasting rights acquired contractually are “lawfully acquired possessions” within the scope of Article 17 CFR. The fact that the exclusive holder of broadcasting rights is not entitled to seek, in a specific case, a compensation greater than the costs incurred in providing access to the satellite signal to a third party does not mean that it cannot exercise its

property rights autonomously (and thus, in the reasoning of the Court, that it has no property right at all), but only that the use of its property is limited by law for purposes of public interest. The compliance of such limitation to Article 17 CFR is exactly the object of the preliminary ruling referred to the CJEU, and stating that the mere pre-existence of a limitation excludes the acknowledgement of a property right seems to me a kind of logical inversion: the limitation to a property right whose legitimacy has been questioned becomes the evidence that there is no property right at all.

However that may be, the assessment of the Court on the (alleged) property of Sky does not change the final outcome of the case.

In fact, as far as the freedom to conduct a business is concerned, the CJEU recognises that Article 15(6) AVMSD actually interferes with this freedom inasmuch as the right holder of exclusive broadcasting rights cannot decide freely (i) with which broadcasters it is willing to enter into an agreement and (ii) the price to be charged for access to the signal for the purpose of making short news reports.

Remembering that the right freely to conduct an economic activity (as well as the right to property, as pointed out in many instances by the CJEU: see e.g. the [FAPL case](#)) is not an absolute right, but it's subject to a broad range of limitations in order to coordinate its exercise with the public interest, the Court proceeds to evaluate if the limitation provided by Article 15(6) AVMSD respects the essence of this right and is compliant with the principle of proportionality (which «requires that measures adopted by European Union institutions do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question»). Here the Court concludes that Article 15(6) reaches a reasonable compromise between the protection of the said right and other fundamental rights, namely the freedom of information (recognised by Article 11 CFR) and the media pluralism (expressly mentioned by recital No. 48 of the Audiovisual Media Services Directive), inasmuch as the limitation of the exclusive rights is duly narrowed:

(i) with regard to the object (since it is only applicable to “events of high interest to the public”);

(ii) with regard to the context (since extracts may be used only for “general news programmes”, with the exclusion of programmes serving “entertainment purposes”);

(iii) with regard to the amount of the extracts, which, as suggested by recital No. 50 of the Directive, «should not exceed 90 seconds» (it's worth remembering that Sky's Italian subsidiary also filed a complain against the rule set by the Italian Communications Authority establishing a 3-minutes limit for short news reports: the Lazio Regional Administrative Court [annulled](#) the said rule in 2011).

Mirroring the reasoning of the Advocate General on this specific point, the CJEU also focuses on the rule adopted in the Directive to determine the amount of the compensation. The Court highlights here that, had the EU legislature adopted a less restrictive principle – e.g. providing for the granting of an “appropriate” compensation, without the limit set forth in Article 15(6) AVMSD – the objectives sought by establishing a right to short news reports would have been less efficiently achieved, the risk being the charge of prohibitive prices which would have deterred secondary broadcasters from exercising that right, in particular in relation to events «likely to attract the attention of a large part of the population and in respect of which the exclusive rights

holders will have had to spend large sums of money to acquire transmission rights.» (see para. 56 of the AG's opinion).

As I said, the decision of the CJEU is not revolutionary. But in an era where «the marketing on an exclusive basis of events of high interest to the public [...] may significantly restrict the access of the general public to information relating to those events», every decision which reaffirms the need to balance the conflicting interests of the rights holders and the public should be welcomed.

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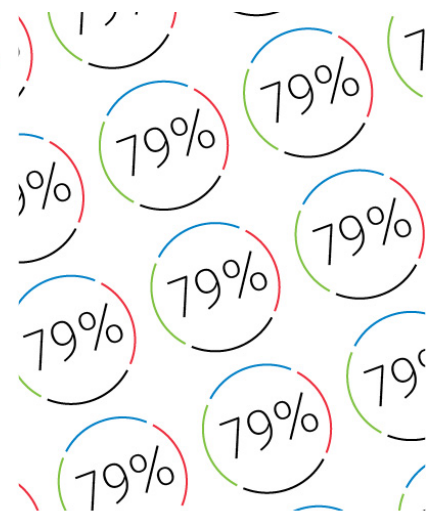
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