

“Transfrontier Broadcasting of World Cup Qualifying Games”

By Paul Harris¹
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WITH EXTRAORDINARY SPEED, the House of Lords² has recently given judgment in the case of TVDanmark³, which concerned the broadcasting of the 5 ‘away’ 2002 World Cup qualification matches (“the matches”) of the Danish national football team. The broadcast rights had been acquired exclusively, and at considerable cost, by a relative new-comer to the Danish TV market, TVDanmark (“TVD”), as a ‘driver’ for channel subscriptions.

The principal issue was whether TVD was entitled actually to *broadcast* exclusively in(to) Denmark the rights it had *acquired* exclusively, given that TVD has only a limited coverage (approximately 60%) of the Danish TV market⁴. In the House of Lords, the Independent Television Commission (“the ITC”), with the aid of an intervention by the Secretary of State for Culture, Media and Sport⁵, successfully argued that the answer to this principal issue is no - exclusive broadcasting of these matches is not permitted, nor is exclusive broadcasting of other similar sports events permitted, save in most unusual circumstances. The reason that it is not permitted is that the matches are “designated” by Denmark as events of “major importance to society” and, as such, are governed by the *special, protective* legal regime set down in Article 3a of the “TV Without Frontiers Directive”⁶ (“the Directive”). A resounding 5-0 judgment on this issue was important, in light of the mistaken view taken by all 3 members of the Court of Appeal, and the clear potential implications of that Court of Appeal judgment for UK “listed” events.

¹ The author, Paul Harris, is a practising barrister and appeared for the Secretary of State in TVDanmark. A copy of this article appeared in Volume 9, Issue 2 (2001) of the BASL Journal.

² The case was fought in the English courts because TVD is established in the UK, though its business consists principally of transfrontier broadcasting, namely, from the UK into Denmark.

³ R v. Independent Television Commission, ex parte TVDanmark 1 Limited: judgment of 25th July 2001, [2001] UKHL 42. The matter first was heard by way of judicial review before Jack Beatson QC, sitting as Deputy Judge of the High Court, on 1st September 2000, immediately prior to the first of the matches being played. It was then appealed with extreme expedition – given that the timetable for the remainder of the matches remained unchanged - to the Court of Appeal on 3rd October 2000, with judgment on 5th October. Leave to appeal to the House of Lords was given on 14th December 2000 and the hearing took place on 3rd and 4th July 2001. Of the 5 matches, there remains 1 to play - in September 2001.

which is well below the “substantial proportion of the population” requirement of 90%, as set out in the Danish rules. There may, of course, come a time when pay TV broadcasters, in fact, meet the coverage requirement. The balance of argument may then shift, because it may no longer be the case that a substantial proportion of the population is being “deprived of the possibility of following such events”.

⁵ and of combined written intervention submissions from the BBC and ITV.

⁶ Directive 97/36/EC, OJ 30.7.97 L 202/60

The secondary issue, more vexed as a matter of Community and domestic law, was the manner in which the ITC should exercise its discretion to permit, or prohibit, exclusive transfrontier broadcasting; in particular, (i) the extent to which the ITC should have regard to the views of the authorities of the other Member State in question and (ii) the weight to be given to a fair, free and open auction process by which the rights to an event are acquired in the first place.

Again, the ITC and the Secretary of State successfully argued that the answers to these questions are (i) that decisions taken by authorities in other Member States are determinative on some issues, such as the events which are designated, and persuasive on others, such as the reasonableness of the price paid to acquire the rights and (ii) that the auction acquisition process is a relevant factor to be taken into account, but it is not determinative, either way.

The judgment helpfully and correctly clarifies some aspects of the law in an area in which there is a great deal of interest, in which increasingly huge sums of money are expended and in which there is another brewing dispute, namely, the sale by the Kirsch Gruppe of rights to the 2002 World Cup tournament itself. It does not, however, answer all the difficult questions posed by the Directive either as to designation, or as to reciprocal, transfrontier enforcement.

The purpose of Article 3a of the Directive: why designate an event?

The key consideration in the case is the purpose of Article 3a of the Directive. Article 3a(1) permits a Member State to designate events⁷ which “are regarded by that Member State as being of major importance for society...” and allows them to “take measures... to ensure that broadcasters under its jurisdiction do not broadcast [them] on an exclusive basis...”. It is the backbone of the relevant parts of the domestic implementing legislation in the Member States.

To appreciate the purpose of Article 3a fully, regard should be had to its genesis.

Subscribers to pay TV still represent a relatively small part of the total viewing audience in the Member States. Accordingly, a large section of the community will be deprived of the possibility of viewing events, if those events are broadcast exclusively on pay TV. Indeed, in the past 15-20 years that is precisely what has happened. Pay TV broadcasters have continued to acquire the exclusive rights to many top flight sports events, precisely because they are so important for driving subscriptions and extracting value from a relatively small number of viewers and from advertisers.

As such exclusive acquisitions have increased, particularly during the 1990's, a conflict of interest has crystallised between the pay TV broadcasters (and, to an extent, the sports bodies, event organisers and sports participants), on the one hand, and the general viewing public (and the ‘public’ broadcasters), on the other hand.

It was, and is, widely perceived that the interest of the general viewing public is culturally and socially more profound in relation to certain ‘special’ events that have come to enjoy a special national resonance, such as, in the UK, the FA Cup Final, the Grand National and Derby horse races, and the Wimbledon Tennis Finals or, for example in France, the Tour de France⁸.

The general public interest dimension of broadcasting is frequently and expressly recognized in the Community. Thus, in the Services of General Interest in Europe Communication from the Commission (COM (96) 443 final) it is stated, under the heading “Broadcasting”, that:

“television and radio have a general interest dimension... being linked to moral and democratic values, such as pluralism, information ethics and protection of the individual...”

⁷ In practice nearly all the events designated have been sporting events, with the notable exception of the San Remo music festival in the Italian list.

⁸ In Commission of the European Communities v. The Hellenic Republic Case C- 198/89 [1991] 1 ECR 727, the ECJ recognized that similar social and cultural interests (in that case relating to the “...artistic and archaeological heritage of a country...”, as opposed to “events of major national importance”:.) constituted “...an overriding reason justifying a restriction on the freedom to provide services...”: see page 741, paragraph 21.

Put another way, it is commonly considered that, in light of their traditional and cultural importance, the general public has a 'right' to see these 'special' events on widely accessible, free-to-air television. Certainly, history has shown that these 'special' – sometimes called "Crown Jewel" events – consistently attract very large TV audiences on free-to-air TV. Accordingly, such "events of major national importance" constitute important aspects of the public's (human) right to freedom of information: this point is expressly recognized at Recitals 15 and 18 of the Directive.

In addition, widespread viewing access to major sporting events plays an important role in the so-called "European Model of Sport", which prides itself on the social and cultural benefits of access to, and participation in, sport. As the Committee of the Regions (COR) put it (in 1999):

"The COR sees pay-TV as posing a risk to sport if pay-TV channels acquire exclusive rights with excessively lengthy, and therefore generally unacceptable, lifespan. They could be tempted to pay large sums of money for such exclusive rights in order to secure a foothold and develop markets. Public access to televised major sporting events would then be seriously impeded and market distortion would result. So as to safeguard the aforementioned social role of sport, it is necessary to ensure that public channels retain broadcasting rights to sports events and consequently to regulate in an appropriate manner the world of pay-TV which, because of its exclusive rights to broadcast certain sporting events, is undermining the right of everyone to enjoy sport as a spectator."

Yet, precisely because they are so enthusiastically and regularly watched by the general public, and form such an important part of the national sporting calendar, the Crown Jewel events are highly valued by pay TV broadcasters who, absent legal safeguards, would have powerful incentives to outbid public, free-to-air broadcasters for the rights to those events, just as they have increasingly done for other high profile sports events.

Against that background, Member States began to legislate domestically to 'protect' such 'special' events against exclusive broadcast by limited-coverage, pay TV broadcasters. In the Broadcasting Act 1990, for example, the UK protected certain "listed events", including those UK events mentioned above⁹. Gradually, other Member States did likewise, according to their own traditions and tastes. Accordingly, the protection of special events began to occur on a fragmented, piecemeal and purely domestic-law basis across the Member States.

Whilst differing in the detail of their operation, all the various domestic measures inevitably recognised that 'special' events were to be precisely that, 'special'. Almost by definition, they were not to be subject to the ordinary market forces of supply and demand, precisely because those market forces provided insufficient protection to the general viewing public. In other words, a legislative balance was struck by individual Member States between the competing interests, and the balance came down clearly in favour of wide, free-to-air broadcast of a handful of Crown Jewel events.

At the same time as fragmented domestic protection occurred, the general development of TV market(s) proceeded rapidly, giving rise to many more possibilities of transfrontier provision of TV services. By 2000, for example, there were over 580 TV channels (terrestrial, satellite, or cable) broadcast in the EU with potential national coverage, an increase of 170% since 1996, and over 50 channels which target mainly markets in countries other than their country of establishment.

Not surprisingly, the differing national protective regimes created actual and potential problems in the developing market for the free transfrontier movement of television broadcasts.

⁹ At that time the "listed events" were protected against pay-per-view TV: see s.182 of that Act.

The Directive was first promulgated in 1989¹⁰. Its purpose then was to co-ordinate provisions of the Member States in a host of *other* broadcasting areas, such as jurisdiction, television advertising and sponsorship, the protection of minors and the right of reply, where the differences between them were such as to create impediments to free movement of services. As the Recitals to the Directive then put it:

“Whereas the laws, regulations and administrative measures in Member States concerning the pursuit of activities as television broadcasters and cable operators contain disparities, some of which may impede the free movement of broadcasts within the Community and may distort competition with the common market.”

The idea was that adherence to a set of coordinated rules would mean that, provided a broadcaster complied with the rules set down in its own Member State of establishment, its broadcasts could be received and retransmitted without further hindrance throughout the remainder of the Union, thereby facilitating the free flow of broadcasting and related services.

By 1997 sufficient political impetus had been built up for the Member States to add protection for “designated” events into the coordination framework of the Directive. That protection was added in the form of a brand new Article 3a.

Thus, the genesis of Article 3a expressly involved:

- an attempt to facilitate *improved* transfrontier provision of broadcasting services for major events, in light of the then-prevailing disparate national restrictions;
- a recognition of the importance to society of widespread, free-to-air broadcasting of a handful of “events of major national importance”;
- a recognition that, inevitably, ‘protection’ of such events, even when coordinated and reciprocally respected among Member States, would involve restrictions both on competition and on freedom to provide services.

There were 2 other elements of the coordinated framework in Article 3a. First, there was a provision (in Article 3a(2)) for the designated events and the domestic measures to be notified to the European Commission in order to verify their compatibility with Community law and to facilitate their prompt communication to other Member States. This provision may not have been strictly necessary and gives rise to some interesting, unresolved questions, such as the legal effect of notification and verification of compatibility.

Second, there was a provision (in Article 3a(3)) effectively to ensure reciprocal enforcement in Member States of the rules relating to events that had been designated by other Member States. Without this latter provision, of course, the purpose of the Article could, and probably would, largely have been frustrated by broadcasters simply setting up in a neighbouring Member States and exclusively broadcasting from there, particularly given developments in technology.

Once the principal purpose of Article 3a is recognised, it becomes clear that TVD’s case was doomed to failure. It had acquired exclusive rights to broadcast Danish designated events, and it sought to broadcast exclusively¹¹ those events into Denmark from the UK, notwithstanding that Danish free-to-air broadcasters (with greater than 90% coverage) continued to wish to broadcast the same events – and were prepared to pay for the right to do so.

When might exclusive pay TV broadcasting be permitted?

There are perhaps only 3 genuinely conceivable - albeit unusual - sets of circumstances in which a pay TV broadcaster might have succeeded against that sort of background:

¹⁰ Directive 89/552/EC, OJ 17.10.89 L 298/23

¹¹ and actually did broadcast exclusively 4 of the 5 matches, prior to the House of Lords judgment.

- a) the free-to-air broadcasters were not willing to pay any reasonable price for the rights to the events;
- b) the free-to-air broadcasters were not even interested in broadcasting the events;
- c) there was genuinely too little time available post-acquisition, but pre-performance, of the events for the free-to-air broadcasters to take advantage of the rights.

As to a), a crucial point was recognised by the House of Lords. A “reasonable” price to one category of broadcaster may legitimately differ from a “reasonable” price to a different category of broadcaster. This case was a good example of the point. The nascent TVD *needed* the exclusive rights to the matches to drive subscriptions, boost advertising, and establish itself on the Danish TV market. Accordingly, it was “reasonable” for TVD to pay a large amount for the rights (if exclusive) – which it did. In contrast, the free-to-air broadcasters could not reasonably afford to pay such high prices for the matches (whether exclusive or not), given their other public service broadcast commitments and their limited ability to extract specific, extra value from either the audience or from advertisers¹². This point is fundamental to the operation of TV markets, but was not appreciated by the Court of Appeal. It means necessarily that the argument that a mere free, open and fair auction process for designated rights – in which auction the pay TV broadcaster emerges as the victorious highest bidder – is sufficient protection for the events could never succeed by itself. Such an auction is the epitome of the free market, but that is precisely what the Directive is designed to avoid for the Crown Jewel events¹³.

As to b), lack of interest is a possibility, but not likely. Almost by definition, the free-to-air broadcasters are interested in the Crown Jewel events and have a history of broadcasting them¹⁴. Perhaps the most likely application of this point is in the context of a designated tournament or major, multi-sport event. For example, a dead-rubber between 2 minor, overseas teams in a football championship may be of no interest to a broadcaster. This point could, though, merge into point c) below: the free-to-air broadcasters do not manifest an interest *in time*.

As to c), the hypothesis is that there is a scheduled, designated event and, for some reason, the broadcast rights are not sold until the event is almost ready to be performed. The rights are then acquired exclusively by a pay TV broadcaster who is, logistically, just able to broadcast the event in time. Thereafter, the free-to-air broadcaster continues to insist on a right to (pay to) broadcast the same event, but there is insufficient time left to negotiate the sale of shared rights and allow the free-to-air broadcaster actually to put itself in a position to broadcast. In these circumstances, there is a reasonable argument that exclusive pay TV broadcasting should be permitted, but it would depend on a number of key factors:

- what was the reason for the delay in the initial sale – if it was a deliberate ruse, by pay TV broadcaster and/or by event organisers, it may be proper for consent to exclusive broadcast to continue to be refused (even though that may mean that the event is not broadcast at all);
- was there a fair, free and open auction in the first place – if not, then consent may again be refused.

¹² It should not be overlooked that there is often competition between free-to-air broadcasters to obtain the broadcasting rights to the listed events, meaning that there is a real incentive for them to make respectable, realistic bids.

¹³ Exactly what figure is “reasonable” to any category of broadcaster is a difficult question, though its difficulty should not be exaggerated in light of the experience of broadcasters in performing precisely this calculation. Regard is, and should be, had to previous prices paid for the event, to potential advertising revenue, to time of broadcast and other relevant factors.

¹⁴ Indeed, in the UK, under s.97(2) of the Broadcasting Act 1996, the Secretary of State is obliged to consult the BBC when drawing up or revising the list of protected events.

Whilst very late sale presents a window for exclusive pay TV broadcasters, it is unlikely that there will be a great rush towards last-minute dealing, principally because it does not suit those pay TV broadcasters for other reasons. For an exclusive right to be of greatest value to a pay TV broadcaster it has to be capable of being both advertised and marketed in advance. Without advance advertisement an exclusive right cannot itself hope to increase subscriptions to any significant degree, particularly given the lead-in times for physical hook-up. Likewise, without advance marketing, a pay TV broadcaster cannot realistically hope to maximise advertising revenue for a particular event. Indeed, last minute acquisition of rights could be counterproductive, if it leads to high levels of frustration for subscribers and/or advertisers.

Reciprocal enforcement

In the UK, the decision to provide, or refuse, consent lies in the hands of the ITC. It is to be made in accordance with familiar public law principles. However, under Article 3a(3) regard must be had to the overseas protective regime that is, effectively, being enforced. Certain aspects of the overseas regime are binding on the ITC, that is:

- which events are “designated”;
- whether the prohibition should relate to live, or deferred, coverage;
- what proportion of the general public needed to be covered by a broadcast.

Without domestic authorities deferring to overseas authorities on these issues there would be no meaningful reciprocity.

That said, the key question under Article 3a(3) of whether, in fact, there has been a deprivation “of the possibility of following events...” remains in the hands of the domestic authority, the ITC.

Sensibly, and reasonably, the House of Lords confirmed that regard can, and should, also be had to the views of the overseas authority on this key question, including, perhaps most importantly, on the question of reasonableness of prices paid/offered at the auction of the rights. The overseas authority ought to be in a position, perhaps the best position, to give reasons, supported by data, on reasonableness of price. If timing of the auction is an issue, then, again, the views of the overseas authority could also be persuasive.

Perhaps the UK system could be improved in this area. Under the Danish, and the German rules, provision is made for reference to an independent body on the question of reasonableness of price. The UK public law system would probably be made more transparent, if it had a similar provision, perhaps reference to an arbitrator or to a specialist body. Likewise, timing issues could also be dealt with in revised UK rules, so as to clarify this additional area of uncertainty.

It will be interesting to see how the question of price is affected by the continued development of the TV market(s). For example, as digital technology expands, will the increased marketing opportunities that it presents, for both free-to-air broadcasters and pay TV broadcasters, be introduced into the price equation?

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