

ASIA SPORTS 2009™

Partnerships for Success

A Discussion of the Legal Challenges that face the F.A. Premier League's distribution of Audio-Visual Rights to the English Premier League in Asia

by

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1 Introduction

"It was the best of times, it was the worst of times": we may have evolved a long way from eighteenth century Dickensian revolutionary times but 2009 has told an intriguing tale of two extremes in the fortunes of sports rights holders. As the year draws to a close, we find ourselves in somewhat uncertain times for rights holders and, as usual, the English Premier League ("EPL") has played a central role in the plot's myriad of twists and turns. This paper examines two of the potential legal challenges to the EPL's oft-heralded crown-jewel status across pay television platforms throughout Asia.

2 Status Quo for the EPL

During the course of 2009, the EPL lost its pretentious Portuguese protagonist and suffered the ignominy of the world watching it lose its hold on club football's most coveted prize as FC Barcelona not only defeated but outclassed European rivals Manchester United in Rome's Stadio Olimpico to win the UEFA Champions League ("UCL"). Yet if the EPL's performance on the pitch was faltering, it appeared to be comfortably dictating play in the boardrooms. In a year that has seen global economies reel from worldwide financial crisis, the EPL demonstrated itself to be remarkably recession-proof. While English clubs occupy seven out of the top 20 positions in the current Deloitte Football Money League, they lavishly outspent every other league around the world in a recession-busting £450m (US\$755m) spree on player transfers during the summer transfer window. Broadcast rights fees also appeared resilient amidst the financial tumult: 2009 began with breaking news that the domestic broadcast rights tender for 2010-13 launched by the F.A. Premier League ("FAPL") raised £1.782 billion, a marginal increase on the rights fees for the current cycle, despite the global economy falling to its knees around it.

The Asian market for sport's premium broadcast rights has itself experienced a curious mix of fortunes, aptly illustrated by the recent Asian (excluding China, Hong Kong, Macau and Taiwan) tender for 2010-2013 EPL audio-visual rights. The key markets of Singapore and Malaysia saw large increases on the fees paid for the current 2007-2010 cycle of rights and, in India, ESPN STAR Sports ("ESS") is reported to have paid nearly three times the previous rights fee. On the other hand, incumbents ESS successfully retained their rights in South Korea and Indonesia despite offering significantly less than they paid previously.

However, market forces are not the only factors that drive rights fees up or down. In those instances where it is felt that the public's interest is not adequately served by market forces alone, governments have a role to play in the form of market regulation and often impose so-called anti-siphoning or listed events measures. The courts may also affect the tender processes, and both the FAPL and UEFA have, in Europe, had their sales policies in respect of the broadcast rights to the two top annual club competitions, EPL and UCL, reviewed and manipulated by the European Commission.

In a departure from its previous Asian tender, the FAPL extended its invitation to joint bids from pay television broadcasters. The Media Development Authority in Singapore ("MDA"), a statutory board of the Singapore Government tasked with developing and regulating Singapore's growing media industry, has kept a close eye on the market for EPL rights in Singapore. Discussions between interested parties led by the MDA have mooted various solutions: from collusion between pay television operators to prevent the rights fees from escalating, thereby ensuring that increased rights fees are not ultimately passed down to subscribers in exorbitant subscription fees, to imposing upon EPL rights a free-to-air status.

3 Competition Law Issues

The tender processes that dictate the distribution of broadcast rights to football's premium content are no strangers to the courtroom and, in particular, to the scrutiny of competition legislation around the world.

In 1999 the European Commission objected to the sale by UEFA of the rights to all its UCL matches in an exclusive contract to a single broadcaster in any market for up to four years at a time. The result was that not all matches were broadcast live whilst internet and telecommunications operators were denied access to the rights, particularly to those matches that were not broadcast live on television platforms. The Commission found that

this arrangement restricted competition between broadcasters and hindered the development of new technology to the disadvantage of broadcasters, participating clubs, spectators and consumers. UEFA subsequently amended its selling arrangements and obtained Commission approval in 2003¹ by undertaking to sell the rights to live matches in two separate packages so that broadcasters could cherry-pick the best live matches while leaving an opportunity for UEFA to sell the remaining matches, thereby maximising both the value from the content and the audience's access to it.

The FAPL's domestic tender has also been subject to European Commission review. The Commission deemed the process to be anti-competitive on the basis that only British pay television operator BSkyB could afford the considerable premium to acquire the rights to all matches exclusively over the three-year cycle, thereby creating not only an effective monopoly over the market for domestic EPL broadcast rights to the detriment of the clubs and television spectators but also an insurmountable barrier to new entrants into the market. As a result, EPL broadcast rights are no longer available at a substantial premium in exchange for exclusivity; the rights are required to be carved into six packages, all six of which may not be acquired exclusively by a single broadcaster. Ironically, this revised approach that was intended to stimulate competition has since brought about the downfall of BSkyB's closest rival in the UK market for premium sports content, Setanta, who spent beyond their means to acquire just two of the six packages in 2006.

Competition legislation around Asia has broadly adopted the general principles enshrined in the European Union in focusing mainly, for the present purposes, on anti-competitive agreements and abuse of dominant market positions. The result is that those countries in the Asia-Pacific region with sophisticated legal systems will inevitably see tension between rights holders and the law as regulators strive to encourage healthy competition between operators and stimulate technological innovation.

The FAPL's decision to embrace joint bids from pay television operators also engages the attention of competition lawyers: under Singapore law, for example, such joint purchasing arrangements would certainly "have as their object the prevention, restriction or distortion of competition"². However, competition legislation generally recognises that restrictions on

¹ *Commission clears UEFA's new policy regarding the sale of the media rights to the Champions League* (IP/03/1105) 24/07/2003.

² Section 34 of the Competition Act (Chapter 50B) of Singapore.

such cartels should be relaxed if the net effect on “technical or economic progress”³ is a positive one. Therefore a joint bid between two or more competitors within a pay television market would only escape sanction if its net effect is to enhance competition, particularly by allowing joint bidders to bid for rights that would otherwise have been beyond their individual means. There is a fine line between such arrangements that are deemed to be legal and those that fall foul of the legislation: in the UK, free to air terrestrial broadcasters BBC and ITV continue to submit joint bids for the FIFA World Cup and UEFA European Championships despite complaints from rights holders at what are perceived to be artificially lowered rights fees. However, while the matter has been investigated by the Office of Fair Trading in the UK, it is yet to be tested by the courts.

Meanwhile in Singapore, concern over pricing structures and a potentially exponential increase in rights fees prior to the launch of the EPL’s latest tender in September 2009 led the MDA to open “dialogue sessions with the industry on possible regulatory interventions”⁴. In its review of the FAPL’s domestic tender, the European Commission was of the opinion that the sale of rights exclusively to pay television operator BSkyB “deprived media operators and British football fans of choice, led to higher prices and reduced innovation”⁵, a sentiment that echoes much of the heated debate in Singapore regarding local EPL fans’ access to the matches. Any intervention in the Singapore market would likely be in the form of a complaint under Singapore’s Competition Act or the introduction of controversial anti-siphoning provisions.

4 Anti-Siphoning

The concept of a nation’s access to a list of sporting events being protected on free-to-air television is one with which Asia is familiar. Broadcasting authorities may be given a mandate to designate certain key sporting events as being so intrinsic to those patriotic fibres that bind us together as a nation that they become an explicit part of a public service broadcaster’s remit. These key sporting events typically include, in whole or in part, the ubiquitous summer Olympic Games and the FIFA World Cup, but also recognise regional or

³ Paragraph 9 of the Third Schedule, Competition Act (Cap 50B) and Article 81(3) of the EC Treaty, by way of example.

⁴ MDA press release dated 9 October 2009 entitled “*MDA’s Response on EPL Rights Issues*”.

⁵ *Commission makes commitments from FA Premier League legally binding* (IP/06/356) 22/03/2006.

national tendencies towards particular sports, such as cricket in India and Australian Rules Football in Australia.

In 2003, the MDA in Singapore issued a *Code of Practice for Market Conduct in the Provision of Mass Media Services* (the “**Code**”) which codified the free-to-air protection of certain “events of national significance”. The list of events may be reviewed and updated on an annual basis and it is certainly open to the MDA to entertain a discussion about extending the scope of the list. The MDA may even consider casting its net of protected events as wide as the EPL. It would certainly be a heated debate: on the one hand, the list currently protects live coverage of Singapore’s professional football league, the S-League, whose following even in the local market pales into insignificance next to the top EPL teams and whose average television audience is a small fraction of the number of paying subscribers to the sports package offered by the EPL’s incumbent broadcaster, StarHub, despite the S-League’s free-to-air availability. On the other hand, when one considers that the EPL is notably absent from the United Kingdom’s equivalent list, it would certainly be a peculiar addition to a list in Asia.

The Code lists a set of criteria based on which the MDA may impose anti-siphoning restrictions, one of which asks “whether the programme involves major international sporting events, international sporting events in which a Singapore team or personality is participating, or significant local sporting events”⁶. Although the criterion above is part of a non-exhaustive list, the EPL evidently does not fall into any such category of sporting event, suggesting that the MDA would need to tread an extremely creative path through the provisions of the Code in order to arrive at a revised list that includes the EPL.

As a European Union member state, the United Kingdom is entitled by EU law⁷ to draw up a list of protected events that must not be broadcast “in such a way as to deprive a substantial proportion of the public... of the possibility of following such events... on free television”⁸. The inclusion of an event in such a list turns the market for the broadcast rights to such event on its head and it is not surprising that anti-siphoning lists attract heavy scrutiny and flirt constantly with controversy. UEFA and FIFA have both taken exception to

⁶ At paragraph 2.5.1.3(d).

⁷ *Television without Frontiers Directive* (89/552/EEC) (as amended in 1997 by Directive 97/36/EC).

⁸ Article 3a, *ibid*.

the UK's listing of the entire football European Championship and World Cup respectively and their complaints currently rest under the contemplation of the European Court of First Instance. The argument that the current list goes beyond the powers granted to the UK is compelling: South Korea's 2-1 defeat of Togo during the group stage of the 2006 FIFA World Cup received free-to-air protection by force of UK regulation as an event of "major importance for society"⁹ whereas the domestic broadcast rights to England's recent 2010 FIFA World Cup qualification match against Ukraine were infamously discarded to exclusive internet coverage.

In the unlikely event that broadcasting authorities take steps to list the EPL in an Asian country, the EPL would have no recourse to appeal in the way that was available to UEFA and FIFA. The most obvious course of action open to the FAPL would be simply not to sell the broadcast rights in that particular market to protect their value, although this would lead to the nonsensical conclusion that as a result of the EPL's deemed national significance, the public would be deprived of access to it altogether.

The UK list is currently being reviewed by a panel appointed by the Department for Culture, Media and Sport and initial indications are that the list will, much to the chagrin of interested rights holders, be extended rather than abbreviated.

Conclusion

While the EPL rights fees face a period of short term uncertainty in Asia, one can be certain that the FAPL will continue to attract the attention of legal fraternities around the world. Broadcasting authorities and disgruntled broadcasters will eventually follow in the footsteps of their European counterparts by taking firm steps to protect both themselves and their television audiences from rising rights fees and the law has shown itself ready to equip them with the sharp tools they will need to do so.

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⁹ *Ibid.*