



WE CARE ABOUT FOOTBALL

Union des associations européennes de football

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The European Commission
DG INFSO and DG MARKT

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LCOM/dra

Date
05.01.2010

UEFA's Comments to the Commission's Reflection Document

1. Introduction to UEFA

UEFA welcomes the opportunity to contribute to the public consultation on the "Reflection Document" published by the Commission on "Creative Content in a European Digital Single Market". For these purposes, we will limit our comments to the area of sport and, in particular, the online distribution of audiovisual media rights to sports events. We hope in this way that our contribution will be useful to the Commission's assessment.

UEFA is the governing body for football in Europe with a membership comprising 53 national football associations. We organise many international football competitions, the most prestigious of which are the UEFA European Football Championship (played once every four years between European national teams), the UEFA Champions League and the UEFA Europa League (premier European club competitions played every year). While these are our best known events, UEFA also organises many other competitions, at both national and club level. These include the UEFA European Under-21 Championship, the UEFA European Under-19 Championship, the UEFA European Under-17 Championship, the UEFA European Women's Championship, the UEFA Women's Champions League (club competition), the UEFA European Women's Under-19 Championship and the UEFA European Women's Under-17 Championship.

Our mission is to develop European football at all levels, to promote the principles of unity and solidarity, and to deal with all questions relating to European football. Article 2 of UEFA's Statutes states that our objectives include the following:

"Redistribute revenue generated by football in accordance with the principle of solidarity and to support reinvestment in favour of all levels and areas of football, especially the grassroots of the game ..."

It is, of course, the most famous competitions that provide the income streams for UEFA to organise lesser known events and which allow us to meet our solidarity objectives, including

financing the development of European football at grass roots level. In this connection, the vast majority of revenues generated by the national team competitions flow back to the national associations – who each have a mandate to nurture the development of football across their country and at all levels.

For example, after deducting the staging and operating costs of EURO 2008, approximately 20% of the money available was distributed to the participating national teams, almost 50% is being distributed among all 53 national associations of UEFA and the remaining 30% is being used to finance UEFA's education and training programmes for national associations and to cover the overheads and expenses involved in organising other UEFA competitions (including women's and youth competitions) for the 4 year period between EURO 2008 and EURO 2012.

In addition, a percentage of the overall revenue generated by the UEFA Champions League is redistributed to smaller clubs and to leagues across Europe, meaning that financial benefits from the "top" club event are also shared with those who have not directly participated in it.

It is clear that the commercialisation of new media rights, in particular on the internet, will become an ever more important part of the media landscape. It is vital, therefore, that UEFA is able to grasp the opportunities offered by the on-line environment to bring new and innovative services to football fans. However, it should not be forgotten that the model of exclusive territorial licensing of audiovisual rights lies at the heart of the strategic plan operated by UEFA and is crucial that we protect this structure if we are to be able to carry on financing the development of European football.

2. UEFA's Online Commercial Practices

UEFA was one of the first (if not the first) sport rights holder to invest in new media platforms. In 2001, UEFA established a separate company (UEFA New Media S.A.) with the express objective of developing new media services in European football and offering these services both to the European football "family" and to the European public.

Subsequently, in the first decision of its kind, UEFA and the European Commission managed to reach a satisfactory solution in 2003 with regard to the commercialisation of television, internet and wireless (3G) rights for the UEFA Champions League. That Decision provided, *inter alia*, an appropriate regulatory framework for the distribution of UEFA Champions League content on line.

However, new media technology has developed rapidly since then, as has UEFA's own practice in relation to new media rights. For example, UEFA now sells media rights on a live "window" basis or "platform neutral" approach. Thus, in UEFA's media rights agreements for its premier competitions (including the UEFA European Football Championship, the UEFA Champions League and the UEFA Europa League), broadcast partners have both a right and an obligation to simultaneously stream live matches online. Furthermore, if broadcast partners do not have this ability, UEFA itself provides the functionality to ensure that the matches are available live over the internet.

In addition, broadcast partners have the right and obligation to deliver such UEFA matches by mobile wireless technology on a live or near live basis (again UEFA provides such functionality if needed). In this way, we believe that our commercial strategy already delivers great choice and innovative services to consumers in Europe which both satisfies demand and also facilitates the development of new media services and the associated technologies within the EU area.

It is worth mentioning that live transmission of UEFA matches over the internet is simply one aspect of this overall integrated strategy. So, for example, it would not make sense to sell "traditional" television broadcasting rights on a national, territorial, basis but, at the same time, sell "internet" rights on a pan-European basis. Our broadcast partners (who mostly operate on a national basis) tailor their programming (including simulcast programming) to national audiences with particular national tastes and interests. In this connection, it is important to bear in mind that it is not the transmission technology or means of delivery that is of primary importance to end consumer: it is the content itself.

In summary, we believe that self-regulation is already working well, that UEFA is continuing to deliver choice to football fans across Europe whilst also protecting the income streams that are necessary to foster the healthy development of the game.

3. Response to Reflection Document

We hope that the "Reflection Document" is the start of a constructive debate on the future of content distribution, including sports content. However, for this debate to be fruitful, we think certain misconceptions regarding the dissemination of sports content must first be addressed. In this connection, of particular concern is the assumption in the "Reflection Document" that there is a "grey market" for "devices" the purpose of which is simply to allow consumers to view encrypted audiovisual media services. In other words, we are concerned that the Commission is applying standard "parallel trade" theories in the sphere of audiovisual media services protected by copyright when such theories are fundamentally inappropriate in this area.

In this connection, the Commission has, in the past, described "parallel trade" as being:

"... a lawful form of trade in goods between Member States of the European Union. It is known as "parallel" to the extent that it takes place outside and – in most cases – in parallel with the distribution network that the manufacturers or original suppliers have established for their products at a Member State, while it concerns products which are in every respect similar to the ones marketed by the distribution networks."¹

The "Reflection Document" then seems to apply this theory to audiovisual media services when it states as follows:

"Both the Commission and Members of the European Parliament frequently receive letters, information requests and complaints from European citizens asking why

¹ Commission Communication on parallel imports of proprietary medicinal products for which marketing authorisations have already been granted, COM (2003) 839.

audiovisual media services (including sport events) are available in some territories and not in others, while reception is technically possible. Efforts by consumers to circumvent territorial restrictions of transmission rights and the growing grey market for devices used for that purpose suggest that there is a demand for multi-territory distribution of audiovisual media services."

Putting to one side the, at best debatable and unsubstantiated comment implying that demand is not being met, this statement misunderstands the legal position as regards "performance copyright". The description of a "parallel" or "grey" market in devices (i.e. decoders) seems to imply that such trade is legitimate and, taken to its logical conclusion, would appear to suggest that rights-holders (such as UEFA) should move towards some kind of pan-European licensing model. However, these theories are unnecessary and have already been rejected, as explained by Advocate General Warner in *Coditel I*²:

"Here the relevant right is an element of copyright, namely the performing right. Everyone who has submitted observations to the Court recognises that one cannot apply in the domain of performing right the doctrine of "exhaustion" as it applies in the domain of the marketing of goods. It is of the essence of a performing right that it enables the owner of it to authorise or forbid each and every performance of the work to which it relates."

This view was reiterated by Advocate General Reischl in *Coditel II*:

*"Neither does it matter, in my opinion, that the interpretation set out above [as adopted by the Court of Justice] automatically has the effect of excluding 'parallel imports', the preservation of which was thought in the Nungesser case to be so valuable. Indeed, it must be borne in mind that – as far as television is concerned – this effect was accepted, in view of the specific subject matter of copyright in a film, in the first *Coditel* judgment. Other forms of 'parallel imports' are, however, not to be countenanced in the case of a film copyright, because it does not manifest itself, like patents and other copyrights, in tangible form, so that no circulation of goods as such can occur, only the surrender of exploitation of rights."³*

These Opinions were followed by the European Court of Justice (ECJ) which stated that a cinematographic film and similar rights belong:

"to the category of literary and artistic works made available to the public by performances which may be infinitely repeated. In this respect the problems involved in the observance of copyright in relation to the requirements of the Treaty are not the same as those which arise in connection with literary and artistic works the placing of which at the disposal of the public is inseparable from the circulation of the material form of the works, as in the case of books or records."⁴

² Case 62/79, *Coditel* [1980] ECR 881 ("Coditel")

³ *Coditel II*, Opinion of AG Reischl, at p.3413. Emphasis in original, footnotes omitted.

⁴ *Coditel I*, paragraph 12.

Exhaustion, as the ECJ has consistently held, would render performance copyright meaningless. It would prevent a right holder from being able to control the use of its performance right and to claim a royalty or licence fee for the performance of its material. This approach also runs counter to the other objective of performance copyright as recognised by the ECJ in *Warner Bros*, namely the right to receive fair remuneration for the investment made in the production of the performance.⁵

Against this background, it is too simplistic to speak in populist terms about the consumers' rights to unfettered access to content. Copyright is not the right of the user; but rather of the individual or entity who created the product. The purpose is to ensure that the provider of the service covered by copyright is fairly rewarded for his efforts. And to receive fair remuneration it is essential that copyright owners should be allowed to license and enforce the grant of audiovisual media rights on an exclusive territorial basis.

It follows that it is wrong to suggest (as the "Reflection Document" seems to) that there is some kind of legitimate "parallel market" for decoder cards the sole purpose of which is to provide access to audiovisual media services that are protected by copyright. In fact, the "Reflection Document" itself seems to acknowledge this inconsistency when it states that the current legal situation (as espoused in *Coditel*) could only be changed by legislation.

We have noted, in particular, the passages from the "Reflection Document" which state as follows:

"Copyright law is territorial. Traditionally this means that states grant and recognise copyright in their own territory via their national legal order. In the context of European integration, the traditional territoriality of copyright has come increasingly into conflict with the imperatives of a borderless single market, created by a supranational legal order. For the moment, in the EU, the author of a single work will enjoy a separate copyright in that work in each of the 27 Member States to the EU. This brings with it the right to prevent a work from being marketed in one Member State, while authorising it in others. As a consequence, today, rights in several Member States will come into play when protected works or other subject matter are traded or otherwise disseminated across national borders.

The territoriality of copyright is mitigated, in the EU, by the doctrine of exhaustion as developed by the European Court of Justice and codified in secondary legislation. This prohibits the owner of an intellectual property right from exercising any control over the resale, import or export of any goods which have been placed on the market with his consent. Thus when a tangible product enshrines a copyright protected work, such as a music CD, the principle of exhaustion applies: the owner of, for instance, the French copyright may not prevent the import in France of a CD lawfully marketed in Germany.

However, the principle of exhaustion only applies to tangible goods sold in the EU. This excludes "performance copyright" in films, where the right of a copyright owner and his assignees to require fees for any showing of a film is part of the essential

⁵ Case 158/86 *Warner Bros* [1988] ECR 2605.

*function of copyright in this type of literary and artistic work. In its Coditel I (or Le Boucher) decision, the ECJ refused, on the basis of the existing state of copyright legislation, to recognise a rule of Community exhaustion in respect of acts of secondary cable transmission. The Court based this on a fundamental distinction between the broadcasting or public performance of films and the circulating of physical copies of a film. In relation to the broadcasting or performance rights, the Court held that the owner of the rights in a film had a legitimate interest in receiving fees on the basis of the number of repeat performances of the film. Owners of films can therefore continue to license their rights territorially under the present state of Community law. Only legislation could change this state of the law.*⁶

UEFA takes issue with the suggestion that: "*the traditional territoriality of copyright has come increasingly into conflict with the imperatives of a borderless single market*". First of all, and from a wider policy perspective, it may be observed that the cross-border availability of broadcasting services is already happening on a significant scale throughout the European Union. For example, a basic cable network in Belgium carries up to 50 different channels in its basic package in at least 7 different languages (French, Dutch/Flemish, English, Spanish, Italian, Polish and Turkish). Community law has helped to create this environment which accrues to the benefit of European consumers.

Secondly, the aim of Community law and policy has never been to attack, dismantle or otherwise sabotage the practice of granting territorial exclusivity for the broadcast of live football, not least because both broadcasters and consumers benefit from this licensing model, in particular, since it creates additional incentives for the creation of bespoke programming tailored for the particular preferences and tastes of national audiences. This is fully consistent with the desired policy aims (as expressed in the "Reflection Document" itself) of having a "culturally diverse and rich online content market for consumers"⁷

Thirdly, there is no "*imperative*" to dispense with the relevance of national borders when it comes to the distribution of audiovisual media services covered by copyright. It would, in fact, be wholly artificial to speak of a "single market" for sports audiovisual media services, not least because there is a radically different demand for certain services as between one EU country compared to another. It follows that there is no logical reason why the price of accessing such audiovisual services should somehow be equalized by, *inter alia*, the activities of "parallel traders" operating in a "*borderless single market*".

The Commission itself has repeatedly recognized that relevant markets for the exploitation of sports audiovisual media rights are national in character. Thus, in the UEFA Champions League case, the Commission noted that the market was national: "*due to the character of distribution, which is national due to national regulatory regimes, language barriers, and cultural factors*"⁸.

If UEFA is not able to preserve the territorial exclusivity of the media rights licensing model then it will no longer be able to grant rights on an exclusive basis at all. This would again be

⁶ Reflection Document, pages 10-11.

⁷ Reflection Document, page 20.

⁸ UEFA Champions League exemption decision, paragraph 88.

contrary to established legitimate commercial practice, as repeatedly recognized by the European Commission.

Exclusive territorial licensing goes to the very heart of the business model operated by sports bodies such as UEFA. Live broadcasting of a football match falls into that special category of performance right which, by its very nature, is only capable of being exploited for a very brief period of time and depends for its value upon the territory in which it is shown. This was explained by a senior Commission official (Mr John Temple Lang) in a paper delivered in 1997, where he noted as follows:

*"For most sports events, the right to televise live is valuable for only a very short time. Exclusivity is important to the broadcaster because it guarantees the value of the rights, makes possible sublicensing which may be profitable, and tends to build up audiences which is important for advertising revenue."*⁹

The Commission has accepted that exclusivity benefits broadcasters as it guarantees the value of the rights and ensures that they may attract viewers by investing in enhanced programming and services which ultimately benefits end consumers.¹⁰ In the *UEFA Champions League* case, the Commission acknowledged that it was "indispensable" that UEFA could sell media rights on an exclusive basis as "*a media operator would be less interested in rights which are available to all of its competitors as there would be a reduced possibility to distinguish its products from those products of its competitors.*"¹¹

Against this background, UEFA is troubled by the suggestion in the "Reflection Document" that territorial licensing of audiovisual media rights should somehow be replaced by a "country-of-origin" clearing system:

*"Transposing the rationale of [the Cable & Satellite] Directive to the internet could imply that once an online service is licensed in one EU territory, for example the territory with which the service provider is most closely linked, then this licence would cover all Community territories."*¹²

For the reasons already explained, there is no good reason to compel sports bodies, such as UEFA, to licence on-line sports media services on a pan-European basis when such content is, because of its very nature, much more interesting to a certain part of the EU than it will be to others. In any event, UEFA observes that the Cable and Satellite Directive does not undermine the practice of granting exclusive sports rights on a national territorial basis. That Directive does not prevent broadcasters from enforcing their intellectual property rights in order to prevent unauthorised retransmissions on cable networks in other Member States. The Directive does not allow cable operators in other Member States to simply take a broadcaster's signal and make it available on a cable network without the explicit

⁹ Temple-Lang, "Media, Multimedia and European Community Antitrust Law", 17 October 1997, (1997) Fordham University Annual Conference on International Antitrust Law and Policy, p.39 (also available on DG Competition's website).

¹⁰ Commission Memo/03/156 "The UEFA Champions League"

¹¹ *UEFA Champions League*, paragraph 176.

¹² Reflection Document, page 17.

authorisation of the broadcaster itself. Article 8 of the Directive makes it clear that Member States are under an obligation to ensure that retransmissions by cable companies only occur on the basis of individual or collective contractual agreements between copyright owners, holders of related rights and the cable operators and cable retransmissions must not occur in the absence of such agreement.

UEFA also disputes the suggestion that there is a “*need for legislative single market solutions with regard to audiovisual content.*”¹³ This assertion seems to be based on the idea that there is some kind of single, homogeneous, market in Europe for sports audiovisual content. However, this does not correspond to factual reality.

It is obvious, for example, that a football match between two teams in the English Premier league will generate considerable interest in England but far less interest in other parts of the European Union. It is therefore normal (and not contrary to “single market” principles) that the value of the audiovisual media rights to that match will be far greater in England than in other countries of the EU. The core market and value of the media rights is in England, the country where the football clubs play most of their matches and where the Premier League competition itself takes place. Other markets (whether in the EU or elsewhere) may be important but are considerably less important than the home market: this is an aspect of the “specificity” of sport.

Similar considerations apply to UEFA matches, so, for example, the live media rights to a UEFA Champions League match between, say, Manchester United and Barcelona, will command a greater financial premium in England and in Spain as there is greater interest in that match from the population in those two countries. However, a match between, say, Barcelona and Inter Milan, will have greater interest from the populations of Italy and Spain but will have less interest in England. When bidding for the live media rights to UEFA Champions League matches, potential broadcaster partners (who must also make the matches available over their own web-sites) will naturally take these matters into account.

An encrypted service provider is entitled to charge different fees depending on the characteristics of the particular market. In other words, the service provider is not only entitled to charge a fee; it is also entitled to decide what fee to charge. These considerations apply irrespective of whether the relevant content is viewed *via* traditional broadcast techniques (e.g. on pay-TV) or over the internet.

Furthermore, it is also important to underline that (unlike the music or film industry) the main value in sport lies in the commercialisation of live audiovisual rights. Thus, any erosion of the ability to license exclusive rights on a territorial basis is most likely to undermine the value of the key assets belonging to sports bodies such as UEFA, namely their live audio visual media rights.

It follows that any application of the doctrine of “exhaustion of rights” or other “single market” type principles would destroy the way in which audiovisual sports content is distributed in Europe, would deprive rights holders (such as UEFA) of the ability to obtain fair remuneration and would seriously undermine the financing model of sport.

¹³ Reflection Document, page 17.

There is, in addition, a further potential risk to football associated with any suggestion that matches should be available live over the internet on a pan-European basis. As the Commission will be aware, Article 48 of the UEFA Statutes and the UEFA Broadcasting Regulations provide a limited degree of protection to national football associations who seek to protect attendance in the stadium (and participation in amateur football) from the contemporaneous transmission of football. The UEFA Broadcasting Regulations were approved by the Commission in 2001 (Decision 2001/478/EC)¹⁴. At the time, the Commission stated as follows:

“The purpose of the broadcasting regulations is to ensure that spectators are not deterred from attending local football matches of any kind and/or participating in matches at amateur and/or youth level on account of transmissions of football matches which may create competition with these matches. Since some of the national associations do not fear this possible negative effect from broadcast football, the broadcasting regulations do not oblige national associations to block hours within their territories. However, the national associations are obliged to observe the blocked hours of other national associations when selling their broadcast rights to football events into the territories of national associations which have actually blocked hours.”¹⁵

The contemporaneous broadcast of live football (whether on “traditional” television or over the internet) would be liable to undermine the effective operation of the “closed period”. For example, there will be no “closed period” in England if people are watching matches on television and/or on the internet at 3 PM on a Saturday afternoon when English domestic matches are being played. This risks to have a negative impact on attendances at matches, particularly for lower league games, as well as participation in amateur and youth matches.

Finally, and with regard to any concerns expressed by consumers on the matter, UEFA would reiterate that it is doing its very best to meet consumers’ expectations and to provide as much choice as possible. UEFA has already performed a pioneering role in this respect when it set up UEFA New Media S.A. in the first place and, as explained, we continue to require our broadcast partners to make premium content available on-line and even provide the functionality ourselves when they are unable to do so.

However, we have little sympathy with the argument (if this is the argument) that a consumer in one Member State of the EU should be able to receive exactly the same coverage of UEFA content on the internet as a consumer in any other Member State of the EU and at exactly the same price. This would be a totally artificial regulatory objective given the nature of the content itself and would seriously undermine the intellectual property regime that has already been recognised by the European Court of Justice.

We believe that the current system of granting exclusive licences to commercial partners on a national territorial basis is the best model suited to effective commercialisation of sports rights and, as explained, our present system is already delivering cutting edge services to the

¹⁴ Commission Decision 2001/478/EC, Case 37.576 — UEFA's broadcasting regulations (2001) OJ L 171/12 (“UEFA Broadcasting Regulations”)

¹⁵ Decision, paragraph 10.

public and helping to develop the distribution of content on line within the European Union. Furthermore, it has long been recognised that in this particular sphere the relevant markets are national in character, not least as a result of different regulatory regimes, language issues, and other cultural factors. These considerations apply equally to new media services.

Conclusion

As mentioned at the beginning of our submission, we have focussed on the issues that we perceive as most relevant to the interests of European football and also to the healthy development of the content online industry in Europe. We hope that the Commission will find our contribution to the Reflection Document to be helpful and we remain available to assist the Commission in any way that we can with this important matter. In this respect, please contact Simon Drake, Head of Commercial Legal Services at UEFA, by email at simon.drake@uefa.ch or by phone on +41-22-707-2752.