



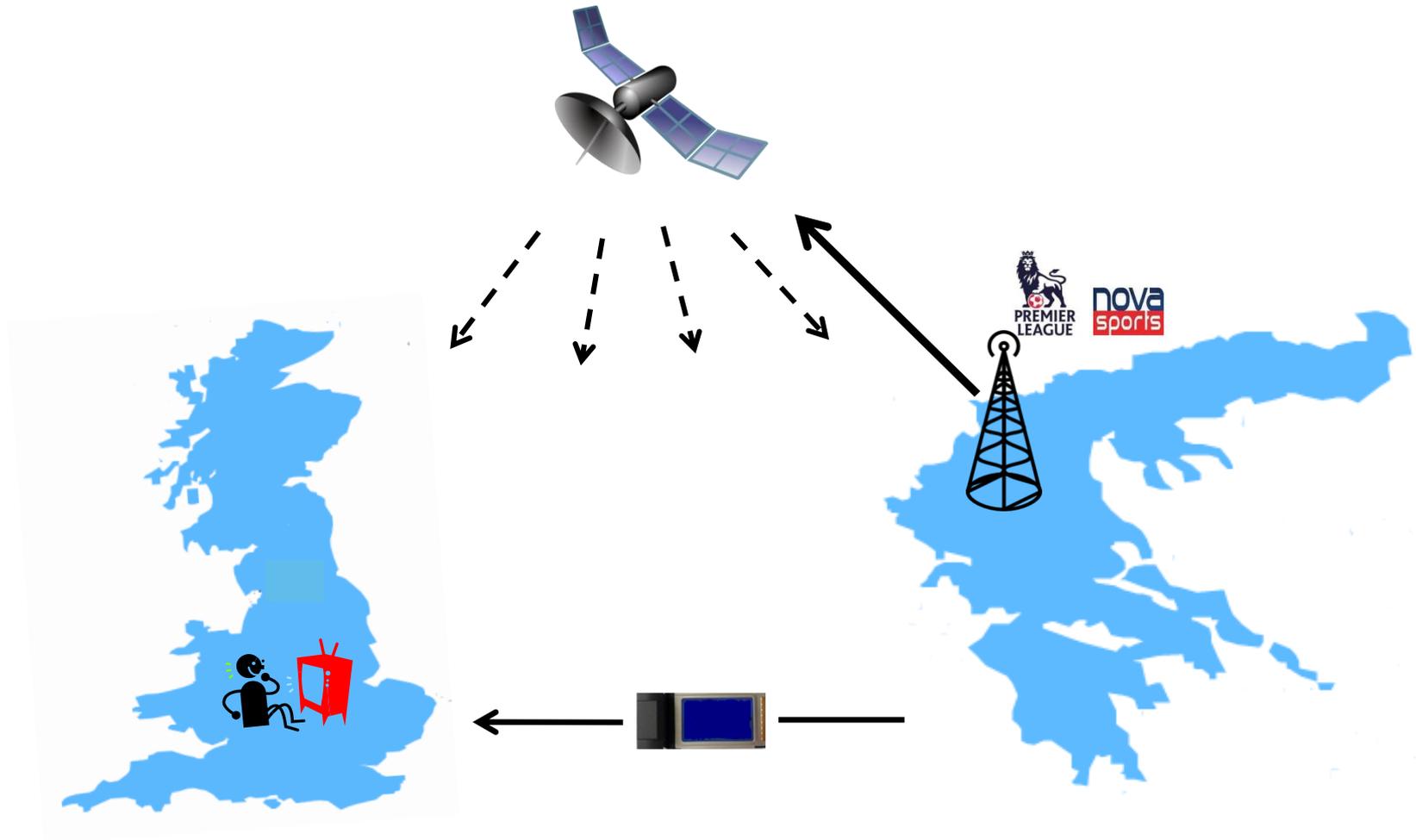
The ECJ's *Premier League* Judgment

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Thomas Graf, December 13, 2011

Cleary Gottlieb represents clients with an interest in the subject matter. This presentation reflects solely the personal views of the speaker.

Background



The Court's Main Conclusions

- Imposing absolute ban on import of decoders conflicts with Treaty rules:
 - Blocking importation of decoders is contrary to the freedom to provide services protected by Article 56 TFEU
 - Contractual prohibitions to export decoders violate Article 101 TFEU
- But Court expressly allows grant of exclusive, territorially limited broadcasting licenses
- Conclusions rest on a close analysis of copyright situation:
 - What are the rights at issue?
 - What acts exploit these rights and therefore are covered by exclusivity?
 - Where do these acts take place?

Broadcast Downlink

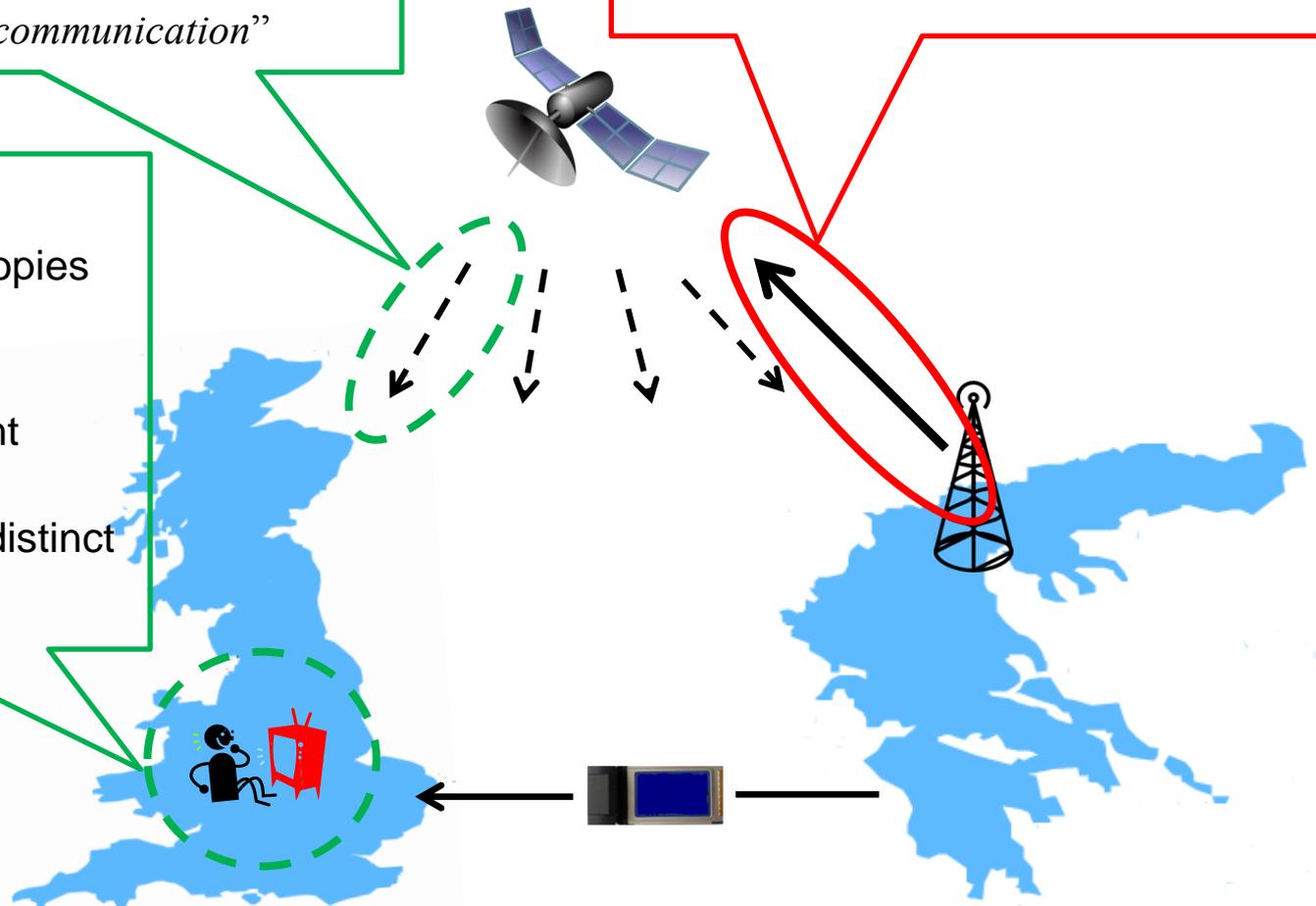
- No distinct exploitation act
- Art. 1(2)(b) BSD: “*the act of communication to the public by satellite occurs solely in the Member State where [...] the programme-carrying signals are introduced into an uninterrupted chain of communication*”

Viewing

- Creates ephemeral copies
- But no independent exploitation act
- Exempt from copyright Art. 5(1) CRD
- But display in pub is distinct communication

Broadcast Uplink

- Constitutes exploitation act subject to copyright
- Communication to the public
- Takes place in Greece



What Does It Mean For The Licensing Of Satellite Broadcasts?

- Exclusive broadcasting license for an individual country is lawful:
 - Rightholder can commit not to allow others to uplink in the same territory
 - Consistent with copyright exclusivity over uplink act

- No absolute ban on decoder export sales:
 - Goes beyond copyright exclusivity as defined by Court – described as “*additional obligation*”

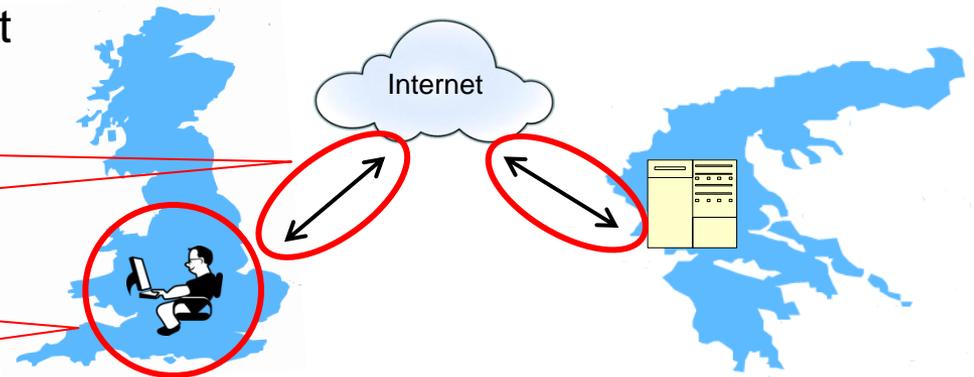
- But rightholder presumably can:
 - Prohibit active sales of decoders outside territory (*Nungesser*)
 - Limit broadcasting to specific language - broadcasting in non-licensed language would be unlawful modification of work
 - Limit use of exported decoders to private use – public display requires distinct authorization

What Does It Mean For Other Forms Of Dissemination Of Non-Physical Content?

- Conclusions of Court rest on specific copyright framework for satellite broadcasts as set out in the Satellite Broadcasting Directive (Judgment, ¶¶ 57, 110, 111, 121)
- Conclusions cannot be transposed to other forms of dissemination of non-physical content, in particular online dissemination
- Online dissemination entails exploitation acts in the country of destination that require distinct authorization

Art. 3(3) CDR: Making available right does not exhaust -> distinct making available act in destination country

Art. 2 CDR: Downloading creates independent copies



- Accordingly, an online license for Greece does not authorize making the content available in the UK
 - Contractual limitations that merely ensure respect for the limits of the license should not conflict with Article 101 TFEU

Findings Of Commission In iTunes Case Remain Valid

- In iTunes, Commission recognized lawfulness of country-specific online licenses, given absence of exhaustion:
 - *“In addition, while the distribution right is subject to the exhaustion principle, the digital transmission of protected works and other subject matter is not covered by the distribution right. Electronic delivery of works or other subject matter is therefore not akin to the supply or delivery of a good”* (DG INFSO and DG MARKT, 2009 Reflection Document)
 - *“Where broadcasters distribute their online services beyond the territory of the initial broadcast, they need to clear the rights for each additional territory”* (2011 Green Paper on Online Distribution)
 - *“In the field of online retailing of music, the iTunes case (see MEMO/07/1262) has shown that there is no EU common market for digital music downloads”* (2011 Green Paper on Online Distribution)

- Judgment is consistent with these findings

Conclusions

- Judgment aligns copyright and competition rules:
 - Contractual restrictions going beyond exclusivity awarded by copyright may infringe competition rules
 - Contractual restrictions within the scope of copyright exclusivity are not questioned

- Judgment preserves *Coditel* precedent:
 - Key criterion is existence of distinct un-authorized exploitation acts in destination country
 - In *Coditel* , there were such un-authorized acts – in the case of (private) viewing of satellite broadcasts, there are not

- Judgment avoids broad conclusions of AG opinion:
 - AG postulated exhaustion for services – would have conflicted with Art. 3(3) CDR
 - Judgment not based on general exhaustion principle, but specific rules of Art. 1(2)(b) SBD for satellite broadcasting

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