**CLA TALK - FAPL CASE - IP ASPECTS - 13 DEC 2011**

- Not advocating one interpretation or another. But there is a question to debate.

**Temporary copying**

- The Adovcate-General ("AG") on the InfoSoc Directive[i] (the "Directive")
    - copies of a broadcast made on the screen of a TV during reception were "copies" for the purposes of copyright and were not covered by the temporary copying exception.

- Art 5(1) - 5 pre-conditions before it can apply; First 3 not disputed
    - - all were agreed that the copies were temporary, transient and formed an integral part of a technological process.

- Condition 4: copy must be to enable transmission in a network by an intermediary or a lawful use.
    - The copies were not made by an intermediary. Therefore, the question was whether the copies were lawful i.e. were they authorised by the rightsholder or otherwise not restricted by law[ii].
    - Held:
        - mere receipt of a broadcast, in private circles, was lawful (albeit that this particular receipt of the Greek broadcast in the UK was not authorised by the rightsholder).

    - UK has no private copy exception - therefore it seems reasonable to conclude that the CJEU was holding that "viewing" a broadcast was lawful notwithstanding the fact that the viewer had no licence to do so.

- Condition 5: the copies in question had no independent economic significance.
    - The AG held that they did. She said that they were the copies being consumed - "the subject matter of the exploitation".

    - The CJEU disagreed. Held: the economic significance had to go beyond mere reception and visualisation of the broadcast.

    - The court said that:
        a) the copies were an inseparable and non-autonomous part of receiving the broadcast; and
        b) the viewers had no influence or knowledge that a copy was being made.

    - The Court further concluded that the TRIPS 3 steps test[iii] in Art 5(5)[iv] of the Directive had been complied with - though unfortunately without reasoning.

- **Conclusion**: the mere receipt of the broadcast in the UK did not infringe copyright in the UK.

- Contrast: The Court of Appeal's decision in NLA v Meltwater[v] that reading a webpage without a licence was not lawful within the meaning of Art 5(1) of the Directive.

- The Court held, that the copy was not lawful and had independent significance.
    - On appeal to the Supreme Court: will look at this in light of FAPL, which came out after the Meltwater decision.

**Communication to the Public**

- Communication to the public in English case law is a question as to the nature of the audience of the communication
    - not whether or not there was a charge or whether there is a distinction between initial audience and subsequent audiences
    - contrasting with the AG view: Mrs Murphy did not charge to watch the football, as a distinct audience, there was no communication to the public.

- CJEU held: disagreed with AG and held that the publican engaged in a new communication to the public when she showed the games in pub.

**Effect of FAPL on territorial copyright licensing**

- Two potential views on the effects of FAPL:
    - 1) Narrow view = FAPL is important but not game changing
    - 2) Broad view = FAPL is a much more significant case from an IP perspective.

- CJEU was very careful not to say that territorial licensing was contrary to EU law.
    - But: compare their reasoning with logic underpinning the evolution of the exhaustion of rights principle in the last 20-30 years. The case law of the 70s and 80s developed precisely because the court sought to reconcile the fragmentation of national IP rights with the creation of a single market.

**Can the court's reasoning apply with equal force to non-satellite cross border services?**

- Arguments for broad view:

    1) Reasoning of court turns on whether the protection afforded to IP under EU free movement and competition law was justified.
        - restrictions on free trade resulting from IP rights need to be objectively necessary to comply with EU free trade laws
            - Deutsche Gramaphone v Metro[vi]
        - Economic benefits to rightsholders sufficient justification?

2) Foundations of case law being eroded?
    - Court's reasoning expressly distinguishes Coditel I[vii] and is unclear as to its attitude on Coditel II[viii], the Court appears to dismiss the arguments raised in respect of Coditel II.

3) Copyright vs internal market
    - On facts, court did not need to reach a view on the copyright / internal market issue
    - But: AG reached a different conclusion on infringement and did consider that there was no justification to charge different prices for different territories.

4) 'New Public' - The recent decision in Airfield[ix] also begins to hint at new angles being formed in its contemplation of the concept of a "new public" when considering whether or not there was a copyright infringement.
    - Contrast with FAPL when the court talks about the "original public" when discussing the SGAE[x] hotel TV case).
    - CJEU noted that the Greek broadcaster was able to measure the number of decoder cards it sold
        - rightsholder would get paid for use outside of the exclusively licensed territory
    - ultimately the rightsholder was paid, just not as much as it was charging for the same service in the UK.

**Result?**

- It is arguably open to argue that there is no copyright infringement where:

    1) The service provider is licensed in the originating state
    2) The rightsholder has agreed to pay for all use
    3) The use can be reliably tracked

    If conditions are met, can we say that the restrictions imposed by national copyright laws are objectively distinguishable from the facts of FAPL?

**Example - Conflicting Jurisdiction?**

- Scenario 1: What if content licensed for Germany provided to a user in France?
    - German copyright licensed,
    - French copyright engaged.
    - Licence to one can't give rights to the other - *prima facie* objectively reasonable justification.

- Scenario 2: What if the same content is owned by the same people?
    - Argument against this scenario may amount to a person using national rights to frustrate the internal market.

- Exhaustion of rights?
    - Art 3(3) of InfoSoc - "The rights referred to in paragraphs 1 and 2 shall not be exhausted by any act of communication to the public or making available to the public as set out in this Article."
- But, overridden by:
    - Art 56 TFEU - "Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may extend the provisions of the Chapter to nationals of a third country who provide services and who are established within the Union"

- So is there infringement?
    - Key question: content made available online where it is hosted or received?
    - This view is currently before the CJEU in the Sportradar[xi] case.

**Where next?**

- Two potential consequences
    - (1) absolute restrictions on cross-border supply at risk
        - - passive sales model?
    - (2) differential pricing cross border at risk

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[i] Art 5(1) of the InfoSoc Directive 2001/29/EC,
[ii] Recital 33, of the InfoSoc Directive 2001/29/EC,
[iii] Art 13 Trade-Related Aspects Of Intellectual Property Rights - 3 step test: "Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder."
[iv] Art 5(5) of the InfoSoc Directive 2001/29/EC - "The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder."
[v] [2011] EWCA Civ 890 - Disclosure: Ben Allgrove acts for Meltwater in this matter
[vi] Deutsche Grammophon Gesellschaft MBH, Hamburg v METRO-SB-GROSSMÄRKTE GMBH & Co. KG, represented by the company Metro-SB-Großmärkte GmbH, Hamburg Deutsche Gramaphone v Metro Case 78/7
[vii] Coditel v Ciné Vog Films SA ("Coditel I") (62/79) [1980] E.C.R. 881, ECJ.
[viii] Coditel SA v Ciné Vog Films SA ("Coditel II") (262/81) [1982] E.C.R. 3381; [1983] F.S.R. 148, ECJ .

[ix] Airfield NV, Canal Digitaal BV v Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (Sabam) (C-431/09), and Airfield NV v Agicoa Belgium BVBA (C-432/09)
[x] SGAE v Rafael Hoteles (Case C-306/05)
[xi] Football Dataco Ltd and others v Sportradar GmbH and another [2010] EWHC 2911 (Ch); Football Dataco Ltd, Scottish Premier League Ltd, Scottish Football League, PA Sport UK Ltd v Sportradar GmbH (a company registered in Germany), Sportradar (a company registered in Switzerland (Case C-173/11)