

**Central and Eastern European Moot Court Competition 2009**  
**Timsnart TV and Louf Entertainment SIA,**  
**(Appellants)**

v

**Rafoot Broadcasting Agency and Rafoot Ice Hockey League**  
**(Respondents)**

1. For almost a hundred years ice hockey has been the national sport in the State of Rafoot, a Member State of the European Union. Rafoots are such avid followers of the sport that public life practically stops whenever more important games are played in the Rafoot Ice Hockey League (the RIHL), and certainly for international games. On these occasions, Rafoots particularly enjoy meeting up in bars and watching the games live, cheering on their favourite sides, while consuming large quantities of the very good local beer.

2. The RIHL forms part of the Rafoot Broadcasting Agency (RBA). It is the practice of the State of Rafoot to delegate certain regulatory or supervisory functions to private entities under the terms of enabling state legislation. The Broadcasting Act 2000 has designated the RBA, which is a private company, as the supervisory and regulatory body for all aspects of television broadcasting in the State of Rafoot; among its obligations is the duty to both propose and/ or draft broadcasting legislation which is then formally implemented by the State in the form of delegated legislation. The RBA is also the primary enforcement body of such delegated legislation. The RBA's funding is provided through two main sources: (1) mandatory Rafoot TV licence fees, payable by all those people who own a television, which forms 25% of its income; and (2) income received through its commercial activities. The majority of this income is derived from the RIHL. RIHL's biggest source of revenue is the sale of the television broadcast rights for league games, which are popular not only in Rafoot but also in other countries throughout the world. For years, the exclusive rights to broadcast the games live have been sold at auctions to the highest bidder, usually to pay-TV satellite broadcasters which charge their customers for the decoding equipment (which includes satellite dish, decoders and decoder cards) which allow them to watch games.

3. The rights packages are divided territorially and on three-year terms. The system of contracts includes a covenant of exclusivity that RIHL will appoint only one broadcaster within any particular territory. To protect this territorial exclusivity, each broadcaster undertakes in its licence agreement with RIHL to encrypt its satellite-delivered signal, and accepts various restrictions against the circulation of the decoding equipment it then produces to de-encrypt this signal outside the territory of each licensee. The price paid for the broadcast license for any one territory varies widely, depending on how popular ice hockey is in the territory in question and how many viewers the games are consequently likely to attract.

4. The broadcast rights for the territory of Rafoot for the 2008 to 2011 seasons have been bought for more than 200 million euros by Heaven, an international pay-TV satellite broadcaster established in Rafoot.

5. In Etilletas, another Member State of the European Union, the licensee which bought the broadcast rights for the same period is Timsnart TV, a national Etilletas pay-TV satellite broadcaster. Etilletas is a country where most people have never seen ice or snow and hardly anybody watches ice hockey games. Timsnart TV was, as a consequence, able to purchase its licence from RIHL for as little as 40,000 euros. Timsnart TV's licence prohibited it by way of a contractual stipulation from supplying its decoding equipment outside Etilletas.

6. In technical terms, each game throughout the season is filmed by RIHL accredited camera crews. An outside production facility at the game selects which camera's output is to be used at any moment for the live broadcast. This is transmitted to a production facility where logos, video

sequences, on-screen graphics, music and commentary are added. The resulting signal is referred to as "the World Feed". The World Feed is then compressed and encrypted and transmitted by satellite to the various licensed broadcasters. These broadcasters then decrypt and decompress the World Feed, so that they can add their own logo and possibly some commentary. The signal is then compressed and encrypted again, and transmitted via satellite to the broadcasters' subscribers. Subscribers receive the signal using a small satellite dish. The signal is decrypted and decompressed in a decoder, which requires for its operation a decoder card. The relevant satellite dishes, decoders and decoder cards are produced by the relevant licensed broadcasters in each territory, such as Heaven and Timsnart TV. The whole process of transmission of the live signal from the ice rink to the subscriber takes approximately 5 seconds.

7. It has come to the attention of Heaven and RIHL that a large and increasing number of Timsnart TV's decoder cards are being used in Rafoot to watch RIHL games. This is technically possible because, although Timsnart TV and Heaven use different satellites to broadcast their programmes, both satellites cover most of Europe and there is no way of limiting the area to which either satellite broadcasts to a smaller territory. Anybody with a Timsnart TV decoder card, decoder and a satellite dish can thus watch Timsnart TV's programmes almost anywhere in Europe, in the same way that Heaven's programmes can in principle be watched anywhere in Europe with a Heaven satellite dish, decoder and decoder card.

8. Initially, it was just a few Etilletas migrant workers working in Rafoot who used Timsnart TV decoder cards so that they could watch television in their mother tongue. It however soon became notorious among Rafoots that RIHL games were broadcast live on Timsnart TV and that obtaining Timsnart TV decoding equipment was the cheapest way of watching these games: while an annual Premium Package with Heaven, including all RIHL games, costs over 600 euros for individuals and between 10,000 and 30,000 euros for business subscribers, a basic Timsnart TV subscription, which also includes all RIHL games, is merely 60 euros a year. The fact that all the live commentary on Timsnart TV is in the Etilletas language does not bother Rafoots, who will usually turn off the volume on their television sets and listen to live radio commentary on normal Rafoot radio while watching the games on Timsnart TV.

9. Recognising this commercial opportunity, a number of companies have set themselves up to market Timsnart TV decoding equipment in the region. These companies are also granted a license by Timsnart TV to supply and maintain their satellite dishes and decoders. Louf Entertainment SIA (a company set up and based in Etilletas which carries out the majority of its sales over the Internet) is the biggest of such companies. Louf have put together a standard package for sale to the public in which they include the decoder, decoder card a satellite dish and an annual maintenance contract. It is not clear whether or not Timsnart TV itself actively encourages the sale of its decoding equipment in Rafoot, but there is a widely held suspicion in the industry that Timsnart TV knows full well that certain particularly large quantities of the decoding equipment ordered by some of its wholesalers (including Louf) are not destined for the Etilletas market. Nevertheless, Timsnart TV does not impose any geographical conditions or restrictions on its supplies to any of its wholesalers.

10. RIHL and Heaven are particularly worried about the use of Timsnart TV decoder cards by Rafoot businesses, who have subscribed to Timsnart packages. These businesses include bar owners who have been publicly screening RIHL games and fast food shops which screen RIHL games whilst serving their customers.

11. In a quest to put a stop to the large scale use of Timsnart TV decoding equipment in Rafoot, RIHL has raised the matter with the legal department of the RBA which has advised them that in Rafoot the Broadcasting Regulation 320/2002 (the "Broadcasting Regulation"), drafted by RBA and then enacted by the State under the auspices of the Broadcasting Act 2000, was intended to implement the terms of Directive 98/84/EC, known as the Conditional Access Directive (the "CA Directive"). The Regulation sets out the basic scheme of legal protection given to copyright owners

and broadcasters by Rafoot national law, and grants companies such as RIHL remedies against any person or body unlawfully copying or dealing with their broadcasts within the territory of Rafoot. It adopts all the definitions of the CA Directive but notably also contains the following provisions:

*§1. For the purposes of this Broadcasting Regulation:[...]*

*(m) "commercial purpose" shall include all the activities of profit-making commercial entities:[...]*

*§10 A person or undertaking who-*

*(1) charges for the reception of programmes included in a broadcasting service provided from a place in Rafoot or any other EU member State,(to also include undertakings who contribute encrypted content to be used in any such broadcasting service); or*

*(2) provides conditional access services from a place in Rafoot or any other EU member State shall, for the purposes of this Regulation, be deemed to be providing a protected service.*

*§35. A person who -*

*(1) for commercial purposes manufactures, imports, distributes, sells, rents or possesses, or installs, maintains or replaces, illicit devices, or*

*(2) uses commercial communications (including all forms of advertising, direct marketing, sponsorship, sales promotion and public relations) to promote illicit devices, is guilty of an offence.[...]*

*§36. A person guilty of an offence under § 35 shall be liable on summary conviction to a fine not exceeding 2,000 euros or to imprisonment for a term not exceeding 12 months, or to both.*

*§37. The provider of protected services whose interests are adversely affected by a person engaging in, or having engaged in, an infringing activity may bring an action for damages and/or obtain an injunction restraining such person from engaging in the infringing activity. In an action for damages, the court may award such damages as, having regard to all the circumstances of the case, it considers just.*

12. While accepting that the situation was very complicated, RBA's lawyers advised RIHL that it could immediately refuse to supply Timsnart TV with the World Feed and terminate its licence. Furthermore, they advised that a claim should be brought against Louf Entertainment SIA and its Rafoot business customers, under §37 of the Broadcasting Regulation. Accordingly, RIHL formally terminates the exclusive licence held with Timsnart TV and begins proceedings in the Rafoot High Court against Timsnart TV and Louf, as well as a selection of Louf's business customers, seeking both

- an injunction to restrain Louf from supplying any decoders equipment to customers resident in Rafoot ; and
- punitive damages against Timsnart TV and Louf.

The High Court gives summary judgment in favour of RIHL against all the defendants including granting the requested injunction against Louf, enabling the local Rafoot police to seize the decoding equipment held by Rafoot business customers on the basis they were possessed for commercial purposes, contrary to §35 of the Broadcasting Regulation. The High Court judge also states that, in addition to financial penalties, he is considering the imposition of a prison sentence against the Directors of Timsnart and Louf and so, in accordance with the Rafoot rules of criminal procedure, proceedings are adjourned to await the necessary social reports.

13. Timsnart TV and Louf (which has agreed to defend the interests of all of its customers) immediately appeal against the High Court judgment to the Rafoot Court of Appeal. At this stage the RBA also requests leave to intervene in the proceedings and upon there being no objection from the parties in the case, it is formally joined as a defendant to the appeal proceedings. The appellants cite the following as their grounds of appeal:-:-

(1) That the combined actions of RIHL and RBA in, firstly, enacting the Broadcasting Regulation and, secondly, entering into exclusive licence contracts to supply the "World Feed" are contrary to the principles of free movement of goods and/or services contained in Articles 28 and 49 TEC. These actions represent unlawful restrictions on these freedoms and constitute an abuse of rights conferred by national law upon RIHL and RBA which aim to prevent parallel imports from other Member States. Reliance is placed in this respect on the Musik-Vertrieb Membran and

Dansk Supermarked (cases).

(2) That these actions are not capable of justification under the industrial and commercial property derogation set out in Article 30 TEC and/or the jurisprudence of the European Court of Justice, since they amount to disguised restrictions on trade which are both disproportionate and discriminatory.

(3) That the Broadcasting Regulation improperly implements the CA Directive, in that it (a) purports to extend the terms of the Directive outside its intended ambit of regulating only pirate devices, (b) widens the definition of service provider to include a body that does not broadcast to the public (here RIHL) and (c) extends the definition of commercial purposes far beyond the terms of the CA Directive, as a result the regulation should be disapplied by the Court.

(4) In the event that the Regulation is disapplied by the Court, then the CA Directive will not have been implemented in Rafoot and as the Directive is not capable of being relied upon directly against the appellants before a national court, in the absence of such implementation, then it can have no effect in Rafoot.

(5) That even if the CA Directive were capable of direct effect, it would not provide rights to RIHL as a service provider, nor would it regulate devices such as the TimsnartTV decoding equipment or decoder card, nor the actions of Louf or its business customers.

(6) That the sanction of imprisonment set out both in the CA Directive and the Broadcasting Regulation is disproportionate and excessive.

TimsnartTV and Louf also lodge a complaint with the Rafoot competition authorities, arguing that both RBA and RIHL are acting contrary to EU competition law. This investigation is continuing but the initial impression is that the Rafoot competition authorities do not plan to take any action.

14. RBA and RIHL respond that the practice of licensing sports broadcast rights on a territorial basis is both justifiable and well established. However, the practice of territorial licensing of sports broadcasting rights is seriously threatened by the activities of those who deal in foreign decoder cards, or use them to watch programmes. RIHL further argues that if it were not able to sell different broadcast rights packages for different territories, it would have to stop selling broadcast rights to territories where its games are not very popular and try to recoup the lost revenue by increasing the price of rights in its core territories. Consumer interests would thus manifestly be harmed: consumers in the core territories would end up paying more, whilst consumers in minor territories would not be able to watch games altogether.

In response to the grounds pleaded by the Appellants the Defendants specifically contend:-

(1) That Article 28 is not capable of being relied upon in this case, since it relates solely to measures adopted by Member States and not to those of private individuals or companies which fall within the areas of competition law and so should solely be a matter for the competition authorities and not form part of this case.

(2) That performance rights, such as copyright in broadcasts, may be validly licensed and enforced within the EU on national territorial lines because of the specific subject-matter and essential function of such copyright protection. Accordingly, even in the event that there was found to be a breach of Article 28 or Article 49 TEC, this would be capable of justification either:-

a) in accordance with the terms of the CA Directive, which in its preamble makes specific provision for national provisions protecting intellectual property rights and/ or

b) in accordance with the jurisprudence of the ECJ (particular reliance is placed on the

Metronome Musik, Coditel I and Coditel II cases and upon the industrial and commercial property derogation contained in Article 30 TEC.

(3) That, even in the event that doubts arose as to the legality of the Broadcasting Regulation, the position of RIHL and RBA would still be protected as they would be able to rely directly upon the provisions of the CA Directive before a national court.

(4) That, given the extent of harm caused by large-scale abuses of IP rights, it is entirely appropriate and proportionate for national law to permit a sentence which includes large fines and even imprisonment.

15. In 2006, a new government of Rafoot was elected. The "Law and Justice Party" had, while in opposition, criticised the competence and standards of the judiciary in Rafoot (particularly in the lower courts) and immediately implemented a series of reforms aimed at improving standards among newly recruited judges. Following widespread academic criticism of the quality and comprehensibility of Article 234 preliminary ruling requests made by the judiciary in the lower courts, the Rafoot government created the "Article 234 Preliminary Rulings Commission" (the 'PRC') in order to review the manner in which the lower courts drafted Article 234 referrals.

16. The composition and functioning of the PRC are contained in the Preliminary Rulings Act 2007 which was described by the Rafoot Minister of Justice as being "...the only short-term way of ensuring that the lower courts judiciary no longer bring our country into disrepute by sending Article 234 referrals to the ECJ that are poorly drafted and fail clearly to highlight the issue of Community law that the national court seeks guidance on."

17. The PRC is composed of representatives from each of the senior courts, plus representatives from the legal profession, academia and a Parliamentary draftsman.

The relevant sections of the PR Act 2007 state:

*Where a court, other than the Supreme Court of Rafoot, wishes to request a preliminary reference ruling from the European Court of Justice, pursuant to Article 234 of the EC Treaty, it shall firstly submit a suggested draft of the questions upon which it seeks guidance to the PRC.*

*The PRC shall be obliged to assess the draft submitted by the first instance court to ensure that the questions for referral to the European Court of Justice demonstrate the following criteria:*

- (a) comprehensible and clear drafting;*
- (b) logical and apparent structure of the legal issues upon which the first instance court seeks guidance;*
- (c) knowledge and appreciation of existing European cases and legislation in the relevant legal areas.*

*In the event that the PRC considers that the submitted draft fails to adequately meet these criteria, the PRC shall be entitled to re-draft the questions so as to ensure their compatibility with the stated criteria.*

*The PRC shall, within one month of receiving the original draft, return an approved version of the questions to the first instance court. The first instance court shall retain absolute discretion as to whether or not to lodge some/all of these questions for consideration by the European Court of Justice, pursuant to the Article 234 procedure. Nevertheless, should the first instance court decide to do so, it shall be bound to refer the question in the form as contained in the PRC's approved version.*

22. When the issues are heard before the Court of Appeal, the judges are somewhat confused by all the arguments, but gratefully accept the contention of the parties' lawyers that it would be appropriate to refer a number of issues to the Court of Justice of the European Communities pursuant to Article 234 EC. The provisional reference questions are drafted, but when referred to PRC an amendment is proposed to Question 4 a) in the terms shown marked with a [\*] in the final

reference. Although the Appeal judges do not agree with this amendment they do include it while also adding a question of their own motion concerning the compatibility of these provisions of the PR Act 2007 with Community law.

**Question 1: Applicable law**

To what extent should the actions undertaken by

a) RIHL against TimsnartTV; and

b) RIHL against Louf

on the aforementioned facts be regulated by:- (1) Article 28 TEC; and/or (2) Article 49 TEC, Directive 89/552 ("the TV Without Frontiers Directive") and Directive 98/84 ("the Conditional Access Directive) and/or (3) national law?

*In the event of any conflicts between these various sources of law, which should prevail?*

**Question 2: Direct Effect of certain Articles of Directive 98/84 EC (the CA Directive)**

Are the provisions of Articles 2, 3, 4 and 5 of the Conditional Access Directive capable of giving rise to directly effective rights which citizens and/or legal persons established in the Union can invoke before national courts or tribunals?

**Question 3: Treaty Articles**

1) Should Article 28 TEC be interpreted as precluding any of the following activities as measures having equivalent effects:-

a) A Member State delegating to a body such as the RBA the sole power to draft broadcasting regulations such as the Broadcasting Regulation?

b) The imposition of an injunction against a body such as Louf on the basis of such regulations?

c) The power to impose criminal sanctions upon such bodies as TimsnartTV, Louf or their customers?

2) If the answer to Question 1 a) or b) or to Question 3 a), b) or c) indicates that these actions fall within the scope of Articles 28/49 TEC, would such actions be capable of justification in reliance on Article 30 or Article 129A TEC and/or the jurisprudence of this court, by virtue of the fact that such actions are intended to protect consumers or industrial and intellectual property?

**Question 4: Interpretational Issues Concerning Directive 98/84 EC (the CA Directive)**

a) Where a conditional access device is made by or with the consent of a service provider (here Timsnart) whose broadcast consists partly of material it receives under the terms of an exclusive license granted by another body (here RIHL) does that device become an 'illicit device' within the meaning of Article 2(e) of Directive 98/84 if it is used to give access to that protected service in a place or in a manner or by a person outside that territory (here in another Member State),[\* or is the term 'illicit device' intended to refer solely to so called pirate devices which are per se unlawful (words added by PRC)]? Whose broadcast consists partly of material it receives under the terms of an exclusive license granted by another (here RIHL)

b) If the answer to question 4a) is in the affirmative does it include within the definition of a service provider a body (RIHL in this case) which broadcasts that content onwards to the public indirectly through the broadcast of another service provider (here Timsnart) either because both of these undertakings are providing a 'protected service of television broadcasting' or that it is the provision of conditional access to such [services and so] considered as a service in its own right' within the meaning of Article 2(a) of Directive 98/84?

c) Does 'possession for commercial purposes' in Article 4(a) of the Directive relate only to possession for the purposes of commercial dealings in (for example, sales of) illicit devices, or does it also extend to the possession of a device by an end user in the course of a business of any kind?

**Question 5: Sanctions**

*5. Is a national provision which allows for criminal sanctions such as those contained in § 36 of Broadcasting Regulation N° 320/2002 compatible with the enforcement measures allowed under Article 5(1) of Directive 98/84 in being "effective, dissuasive and proportionate to the potential impact of the infringing activity"?*

**Question 6: Preliminary Rulings Procedure**

*Are the provisions of the Preliminary Rulings Requests Act 2007, in making a reference for a preliminary ruling to the ECJ subject to the condition that the form of the referred questions must firstly be approved by the PRC, compatible with Community law?*