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Sport as Reflected in European Media Law

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Introduction

The following article aims to explain the main legal principles behind the coverage of sports events in the electronic (audiovisual) media. It tries to identify the impact of the relevant provisions of European law on sports rights in particular.

I. Origins and Ownership of Rights to Sports Events

The first question we must consider is how sports and broadcasting rights come into being and who owns them. In the U.S., no major federal law exists to regulate the intellectual property of sporting events. As discussed later, the television sports blackout rule, former FCC "anti-siphoning" rule, and cigarette ad bans affect sports broadcasts.[1] Are there any European Community (EC) law provisions that are binding on, or can at least influence, the legal systems of Member States?

1. European Community Regulations

Article 295 of the EC Treaty stipulates that the Treaty does not prejudice the rules in Member States governing the system of property ownership. Therefore the protection of industrial and commercial property rights established in the national legislation of the Member States is guaranteed. The Treaty does not lay down practical rules on the form that existing legal provisions in this field should take. Neither are such rules derived from the rights to freedom to choose an occupation and to engage in work, freedom to conduct a business and to protection of property, guaranteed by Articles 15, 16 and 17 of the Charter of Fundamental Rights,[2] nor from the inviolability of

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[1] *See* discussion at footnote 16 infra. *See also* Phillip M. Cox, *Flag on the Play? The Siphoning Effect of Sports Television*. http://law.indiana.edu/fclj/pubs/v47/no3/cox.html#I. *See also* text at footnote 94 *et. seq., infra.*

[2] OJ C 364, 18 December 2000, p. 1.

the home or business activities (Art. 7 of the Charter). Copyright, the various performance protection rights and "home rights," which might all be connected to the aforementioned rights, may in turn be the basis for rights to sports events.

Although Community law does not directly regulate the form and ownership of intellectual property, it does impose important limits on it, particularly through its provisions on the internal market and competition.

As far as the internal market is concerned, conflict between Community and national law may be caused by two factors. Firstly, differences between national provisions can distort the internal market, particularly if they concern the free movement of goods or freedom of establishment. This is why standards in the Member States have been harmonised by means of Directives and the definition of minimum standards. Secondly, there can be a conflict of aims between national copyright law and Community law. Under copyright law, the creator of a work is entitled to determine whether and under what conditions he will agree to his work being exploited (e.g. published or reproduced for public consumption). Since the rightsholder can choose to give such permission to just one or several specified Member State(s), there may be a conflict with basic freedoms. This is the case, for example, when the owner of a copyright-protected product who is resident in one country wishes to sell that product in another Member State, where the author has not (yet) given permission for his work to be exploited. This leads to import restrictions and the foreclosure of national markets. These restrictions could, in principle, be justified with reference to intellectual and commercial property rights. In order to combat this foreclosure of national markets, the European Court of Justice has developed the so-called exhaustion doctrine for the free movement of goods, *i.e.* trade in products. If a product has been marketed in a member state legitimately, *i.e.* with the rightholder's permission, the latter can no longer oppose its free circulation because he has lost his right of exclusivity.[3]

The U.S. has no comparable structure of jurisprudence between Federal and State law. The Federal government controls both broadcasting laws (through the Federal Communications Commission) as well as copyright law (through the U.S. Copyright Office). State laws governing both of these are trumped by federal regulations, statutes and cases.

[3] For exceptions to this principle for certain exploitation rights, *see* Lenz/Borchardt-Lux, *EU- und EG-Vertrag. Art. 30 Rn 16 et seq.* (p.22).

The European Court of Justice (ECJ) has had to deal with the same conflict of aims - the compatibility of copyright with the freedoms guaranteed by the EC Treaty – in its *Coditel-I* ruling. Referring to the freedom to provide services in relation to television broadcasting, enshrined in Arts. 49 and 50 of the EC Treaty, it considered the protection of intellectual property to be a compelling reason in the general public interest to justify a restriction of the provision of services. The Court cited the reason expressly set out in Art. 30 of the EC Treaty for an admissible restriction, through national law, of the freedom to provide services.[4] However, it did not at the same time apply the exhaustion doctrine to "industrial and commercial" uses of services.

Competition law, particularly the ban on abuses of a dominant market position, enshrined in Art. 82 of the EC Treaty, sets out certain rules on the exercise of intellectual and industrial property rights. New criteria have been developed in recent case-law, under which it is crucial to determine whether a restrictive measure is necessary for the protection of the rights derived from copyright and performance protection rights (e.g. exploitation rights). In the ECJ's view, copyright includes all personality rights related to a work, as well as permission to exploit it by marketing it commercially. However, it is up to the Member States to define intellectual or industrial property rights, *i.e.* to determine their precise form and effects.[5]

Nor are Community law guidelines found in any relevant harmonised provisions on the protection of authors in the broader sense.[6] Article 2 para. 2 of Directive 92/100/EEC proposes a standardised definition of authorship insofar as it states that the principal director of a cinematographic or audiovisual work shall be considered as its author or one of its authors. However, the origins and scope of rights to (sports) events are not dealt with in this Directive.[7]

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[4] ECJ, Case 62/79, Coditel I, Rec. 1980, p.881, para. 28.

[5] ECJ, C-10/89, S.A. CNL-SUCAL NV/Hag, Rec. 1990, p. I-3711, para. 12; C-61/97, FDV, Rec. 1998, p. I-5171, para. 13.

[6] For more detail, *see* Müßig/Scheuer, *European Copyright Law and the Audiovisual Media: Are we moving towards cross-sectoral regulation?* in: *IRIS plus*, supplement to *IRIS* 2003–4. The relevance of industrial property rights (especially trademark and patent rights) is not discussed in the present article.

[7] Council Directive 92/100/EEC of 19 November 1992 on rental rights and lending rights and on certain rights related to copyright in the field of intellectual property, OJ L 346, 27 November 1992, p. 61. In its report on the application of the Directive, the Commission states that the provisions of the Directive do not really provide for an overall harmonisation of the notion of authorship, since the definition is restricted to the "purposes of this Directive," Point

2. National Regulations

As we have mentioned, the Member States are therefore responsible for defining the content, scope and ownership of rights to sports events, as well as related exploitation rights (broadcasting rights, public distribution rights, public accessibility rights). The main regulations on this subject differ - sometimes quite substantially from country to country. For that reason, we can only give a cursory description here of the different legal provisions and the protection provided by laws, which can be restricted in particular by constitutional provisions. We shall include examples from selected Member States, i.e. Germany, France, Italy and the Netherlands.

a) Basis of Rights to Sports Events

aa) Do Organisers Have Their Own Rights?[8]

Private organisers may be entitled to certain rights. The extent to which sports events are directly protected by copyright is much debated. Do they constitute works in the sense of copyright law? Under Italian law, for example, the event (e.g. a football match) constitutes a game, the rules of which are not protected by copyright, but which when played on a specific occasion is considered as a work if it is recorded on a fixed medium.[9]

However, this approach is frequently criticised on the grounds that a sports event is not in any degree created by a natural person.[10] As a consequence of its competitive nature, a sporting performance can never be exactly reproduced, but is always unique and new.[11] A work in the sense of copyright law cannot therefore be created by playing sports.

Copyright protection of a recording of an event - as opposed to protection of the event itself is therefore not ruled out in principle if the organiser himself produces an audiovisual recording of the event. The recording would then be

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III.1.; report *available at* http://europa.eu.int/comm/internal_market/en/intprop/docs/report-authorship_de.pdf.

[8] The notion of organiser is understood as the natural or legal person who organises the sports event.

[9] *See* Pedriali/Peifer, *Der Schutz des Veranstalters von Sportereignissen nach italienischem Recht*, ZUM 1994, pp. 461, 462.

[10] Eckstein, *Exklusivverträge und Pay-TV*, München 2000, p. 28.

[11] Henning-Bodewig, *Die Kurzberichterstattung über Sportveranstaltungen im französischen Recht*, ZUM 1994, pp. 454, 455.

protected if it represented a created intellectual work.[12] In principle, however, even if it is created at great technical expense, a recording is only a documentation, and therefore a reproduction of reality, which does not have the necessary character of a created work. As a rule, therefore, even a recording is not protected.[13]

Another topic of debate is the unwritten general rule that the organiser of a sports event owns the exclusive economic exploitation rights over that event.[14] However, this is not an absolute right (i.e. one which can be defended against everybody) to the organised event, but merely a kind of legally regulated transfer of exploitation rights. The organiser can decide the extent to which forms of exploitation of the event, such as television broadcasting, should be allowed. An exploitation right attached to the effort involved in organising a sports event is provided for under French law in the Sports Act of 16 July 1984, for example.[15]

Furthermore, organisers enjoy certain rights of protection vis-à-vis third parties as part of their "home rights," which are usually based on ownership or possession of the venue of the event. The protection or exclusion rights of the owner vis-à-vis third parties include the right to control access to the event venue in accordance with private law.[16] Certain terms and conditions for

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[12] Pedriali/Peifer, *op.cit.* footnote 9, p. 463.
[13] *Id.*
[14] Regarding the origins of the relevant Italian law, *see* Pedriali/Peifer, *op.cit.* footnote 9, pp. 464, 465.
[15] Art. 18-1 Act no. 84-610 *relative à l'organisation et à la promotion des activités physiques et sportives et portant diverses dispositions relatives à ces activités*, introduced by Art. 13 of Act no. 92-652 of 12 July 1992, OJ of 16.7.92 and amended by Art. 4 of Act no. 2003-708 of 2 August 2003: "*Les fédérations visées aux articles 16 et 17, ainsi que les organisateurs tels que définis à l'article 18, sont propriétaires du droit d'exploitation des manifestations ou compétitions sportives qu'ils organisent.*" Henning-Bodewig, *op. cit.*, footnote 11, considers – in contrast to other legal systems which do not recognise such a right that this gives the organiser an original performance protection right, which establishes the right of exploitation (p. 456) and exists alongside other protection rights such as that of broadcasting companies. Such protection rights for broadcasters are granted for the programme itself. The rights are therefore owned by the broadcasting companies, which provide the broadcasting service, rather than the organiser himself. Examples include para. 87 of the German Act on Copyright and Related Rights and Art. 79 of the Italian Copyright Act.
[16] Under the amended Sports Broadcasting Act of 1961 (15 USC §1291, 2005), organized professional team sports are exempt from anti-trust laws in regards to the telecasting of professional sports contests. Some organizations such as the National Football League (NFL) allow franchises to protect their local markets by requiring local stations within 75 miles of the franchise to only carry a local franchise's home games provided the franchise sells out the stadium at least 72 hours in advance or the local franchise's away games. If the home

access can therefore be laid down. This also includes the right to allow TV broadcasters to record or broadcast the event.[17]

Event organisers may also enjoy protection rights under the terms of competition law. This is conceivable if, under domestic law, there is considered to be a competitive relationship between sports organisers and broadcasters, based on the fact that, by broadcasting the event live, the latter reduced the number of potential spectators at the event, to the disadvantage of the organiser. Claims derived from competition law are often granted, since TV broadcasters that broadcast a sports event benefit directly from the organisational and financial investment of the organiser. An example of an unfair act which would justify a claim under competition law would be unauthorised reporting of an event for the purpose of economic gain if the organiser was deprived by a third party acting in a kind of "parasitic"[18] manner of the "legitimate benefits derived from the result of his effort and expense."[19]

bb) Protection of Sports Organisers by Virtue of Derived or Acquired Rights

Can the organiser of a sports event derive protectable rights by acquiring and exploiting the rights of the participating athletes?

As mentioned above, sports performances generally do not constitute works as defined by copyright law and, for the most part, are not covered by performance rights. Consequently, athletes are considered performing artists only in exceptional cases[20] and therefore cannot transfer such rights to event

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franchise does not sell out tickets to the stadium 72 hours in advance, the NFL has the power to "black out" local games. *See* http://www.fcc.gov/Bureaus/OSEC/library/legislative_histories/938.pdf.

[17] Decision of the German *Bundesgerichtshof* (Federal Supreme Court) of 11 December 1997, case no. KVR 07/96, point B I 5 b) aa). Regarding Dutch law, *see Hoge Raad der Nederlanden*, ruling of 23 May 2003, *Koninklijke Nederlandse Voetbalbond (KNVB)/Stichting Feyenoord*, LJN No. AF4607, *see IRIS* 2003-10:9.

[18] Regarding Italian law, *see* Pedriali/Peifer, *op. cit.*, footnote 9, p. 468, which mentions, as examples of anti-competitive behaviour, the circumvention of precautions taken by the organiser and the broadcasting of a whole event despite access being granted only for short reporting.

[19] Regarding German law, see the judgment of the *Bundesgerichtshof*, BGHZ 51, 41, 46.

[20] Exceptions include riding performances which constitute a form of dance if they involve certain choreographed moves performed to a certain piece of music, e.g. the Spanish Riding School in Vienna, or performances by the Harlem Globetrotters; *see* Fromm/Nordemann-

organisers. However, organisers can acquire from athletes the rights to their personal images. These image rights, which are mainly derived from personality rights, cover pictures that are created by filming or TV recording. Personal image rights are usually transferable, which means that the person pictured can give permission for pictures to be taken and distributed. If an athlete is pictured by a third party without permission, the organiser can take legal action if it has acquired the relevant rights.[21]

In the United States, event organisers may enjoy protection rights under the common law "right of publicity." This provides an individual with the right to use his or her persona for his or her benefit and provides a cause of action to stop the unauthorized use of that persona for commercial purposes.[22] This cause of action is one of many provided by the laws of unfair competition, trademark infringement, copyright infringement, and false advertising.[23] The use of right of publicity as a cause of action can be traced to the Supreme Court decision in *Zacchini v. Scripps-Howard Broadcasting Co.*, where a television station violated an entertainer's right of publicity by secretly taping his "human cannon ball" act without authorization.[24] The right of publicity also stems from the well-settled law of right of privacy articulated by Warren and Brandeis, (an Associate Justice of the United States Supreme Court from 1916-1939), in their 1890 *Harvard Law Review* article.[25] Similarly, in the U.S., an athlete may have a cause of action against the unauthorized use of his or her personal image under the common law right of publicity.

b) Ownership and Object of "Sports Rights"

Now that we have considered in principle the origins of rights to sports events, the crucial question is to determine what constitutes an organiser and who

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Hertin, *Urheberrecht: Kommentar zum Urheberrechtsgesetz und zum Urheberrechtswahrnehmungsgesetz,* Stuttgart u. a. 1998, § 73, para. 17.

[21] Pedriali/Peifer, *op.cit.*, footnote 9, p. 469. The relevant image rights may also be transferred to the respective clubs; *see* ruling of the *Oberlandesgericht Hamburg* (Hamburg Court of Appeal), 16 December 2003, case no. 7 U 41/03, which concerned the protection rights held by athletes against unauthorised use of their image in computer games. Some people question whether (under German law) these image protection rights apply to athletes; *see* Winter, *Fußball im Radio: Live aus dem Stadion?,* ZUM 2003, pp. 531, 536.

[22] W. Mack Webner & Leigh Ann Lindquist, *Transformation: The Bright Line Between Commercial Publicity Rights and the First Amendment*, 37 AKRON L. REV. 171.

[23] *Id.*

[24] Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 563 (1977).

[25] Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

therefore may own these rights.

Community law does not define the notion of organiser or rightsholder. Only the Cable and Satellite Directive,[26] with its provisions on broadcasting rights, has some relevance. It stipulates that the Member States shall provide in their domestic legislation the exclusive right for the author to authorise the communication to the public by satellite of copyright works; the notions of organiser or rightsholder are not defined. Reference must therefore be made to the Member States' own laws.

Occasionally, the notion of organiser is clearly defined in law. For example, Art. 18-1 of French Act no. 84-610 states that the exploitation rights for sports events belong to either the sports federations (*fédérations*) pursuant to Art. 17 of the Act or to the organisers (*organisateurs*) pursuant to Art. 18 of the Act. Only the relevant national federation is allowed to organise sports events or qualification rounds for events at which international, national or regional titles are awarded. According to Art. 18, organisers may be private individuals.[27]

In other countries, however, the definition of organisers and therefore ownership of rights is disputed. In principle, the organiser should be defined as the person who is responsible for most of the organisational work and who bears the most risk.[28] For purely commercial sports events organised by private bodies (firms, natural persons), for example, this criterion is all-important. For professional football leagues, other sports leagues and series of regular sports events involving participants who are all members of a particular federation or organisation, the home club is often considered to be the organiser. This is based on the fact that the home club bears responsibility for the event from both the organisational and financial points of view.[29]

For regular national or international one-off events organised under the

[26] Articles 2 and 4 para. 1 of Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, OJ L 248 of 6 October 1993, p. 15, protect, in accordance with Articles 6, 7 and 8 of Directive 92/100/EEC, recording and reproduction rights and regulate public broadcasting and reproduction with reference to broadcasting organisations.

[27] Art. 18 I: "*Toute personne physique ou morale de droit privé, autre que celles visées à l'article 16, qui organise une manifestation ouverte ...*"

[28] *See*, for example, the German *Bundesgerichtshof*, BGHZ 27, 264, 266.

[29] Lehr/Brosius-Gersdorf, *Kurzberichterstattung über Fußballbundesligaspiele*, AfP 2001, pp. 449, 451.

auspices of a federation, but not as a series, the clubs or associations whose teams participate are considered, by some at least, to be co-organisers of such events held on their own grounds – even if the umbrella federations are heavily involved in organising the event. For even though the national and international federations have created an organisational framework for competitive sport, the club that organises an event (or the relevant national association with regard to individual matches forming part of international competitions) remains the one which makes substantial economic investments in the marketing of TV broadcasting rights. In particular, the clubs provide the players who actually create the product and carry out the necessary organisational work at the venue. The clubs are therefore considered at least to be original co-holders of the marketing rights.[30] According to this view, not only does the whole competition constitute an event, but also every individual match (home game) can be marketed even though it forms part of the overall competition. Others question whether federations might have a joint claim to marketing rights at all.[31]

As far as content is concerned, the organiser is granted exploitation rights. Since, as mentioned above, these rights are based on provisions in the different Member States, they vary in terms of form. Each set of national regulations concerning organisers' rights therefore determines how these rights may be transferred usually under civil law agreements whether organisers own broadcasting rights for copyright works and/or the right to broadcast sports events (for the case where sports events are not considered to be works, see above).

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[30] According to the judgment of the German *Bundesgerichtshof* of 11 December 1997, case no. KVR 7/96. In this case (concerning cartel law), the court did not decide whether with regard to the marketing of rights to home matches in the European Cup Winners' Cup and UEFA Cup the participating clubs provided the marketable service on their own and were therefore the sole owners of the marketing rights. However, the court referred to the contributions of the national federation (coordination of marketing) and UEFA (creation of the competitions and prestige for the audience, management and organisation of individual measures) in this field, which in general could support the idea that they were co-organisers. Pichler, MMR 1998, pp. 309, 310, also says that this distribution of organisational responsibility also applies to national leagues. Regarding Dutch law, *see Hoge Raad der Nederlanden*, *op.cit.*, footnote 18: the fact that the national federation organises the league and provides referees does not affect the "home rights" of the clubs and therefore their rights to the sports event.

[31] Heermann, *Kann der Ligasport die Fesseln des Kartellrechts sprengen?* SpuRt 1999, pp. 11, 12. Agreements between several parties concerning relevant rights and their exercise can be significant in terms of cartel law in pursuance of Art. 81 of the EC Treaty *see* II 2, below.

II. Conditions for the Sale and Acquisition of Rights

Further down the exploitation chain, the sports rights arising from national provisions may be transferred by the rightsholder and acquired by interested parties or brokers. There are Community law provisions for the acquisition and transfer of these rights, mainly enshrined in competition law. Basic rights must also be taken into account.

1. Limits to the Right of Transferral

It is often debated within what limits a sports rightholder, e.g. the organiser of a sports event or a rights agency, is authorised to transfer the exploitation rights to the event.

In practice, there are two main circumstances that limit the right of transferral: firstly, possible conditions for the conclusion of exclusivity agreements with (pay-TV) broadcasters which exclude other TV broadcasters from showing an event,[32] and secondly the right to short reporting.

a) Regulations Linked to the Sale of Rights

There are no European regulations governing the sale of exclusive broadcasting rights (licences) to (pay-)TV broadcasters in general, as opposed to those that restrict such rights in individual cases.

However, in some situations, basic rights may be relevant to the sale and acquisition of sports rights. Art. 11 para. 2 of the Charter of Fundamental Rights of the European Union[33] states that the freedom and pluralism of the media should be respected. A pluralistic media system is therefore vitally important for ensuring freedom of the media.[34] In order to achieve the

[32] Regarding the particular economic significance of exclusivity agreements for TV broadcasters, *see* Commission, Case No. IV/36.539, BIB/Open, OJ L 312, 6 December 1999, p. 1, para. 28.

[33] Art. 11 of the Charter of Fundamental Rights, *op.cit.* footnote 1, was developed from Art. 10 ECHR and the constitutional traditions of the Member States. *See* ECJ, case no. 352/85, Bond van Adverteerders *et al.* v. The Netherlands – *Kabelregeling*, Rec. 1988, 2085.

[34] Bröhmer, *Die innerstaatliche und europarechtliche Bedeutung von Art. 10 EMRK für die Medienordnung, Europäisches Medienrecht – Fernsehen und seine gemeinschaftsrechtliche Regelung*, Schriftenreihe of the Institute of European Media Law (EMR), vol. 18, Munich/Berlin 1998, pp. 79, 89 *et seq.*; Schwarze, *Die Medien in der europäischen*

objective of "plurality," opposing basic economic principles (freedom of contract) and fundamental rights (property rights, freedom to choose an occupation and to engage in work) may be restricted, at least inasmuch as the organiser's right to sell (exclusive) rights may be based on them.

Looking from the opposite perspective, can the Member States be obliged to amend national broadcasting laws in order to promote plurality or citizens' rights to information, e.g. by restricting the sale of exclusive broadcasting rights? The answer is "no." Rather, the wording of Art. 11 stresses the freedom of the Member States to determine their own media system.[35] Nor does Art. 51 para. 1 of the Charter of Fundamental Rights give the Community legislative or monitoring powers, since it states that the institutions and bodies of the Union promote the application of these rights in accordance with their respective powers under Community law – this is confirmed by the wording of Art. 51 para. 2.

Another aspect to consider is *competition law*, which represents a general barrier to the sale of rights. In relation to copyright, performance and industrial property rights, the ECJ ruled in the *Coditel-II* case[36] that the granting of exclusive exploitation rights in itself did not breach Art. 81 of the EC Treaty. The individual circumstances of a sale of rights, however, occasionally trigger reservations regarding compatibility with European cartel law. In the *Magill* case, the ECJ, referring to Art. 82 of the EC Treaty, queried the exercise of protection rights by a company in a dominant market position. Such behaviour can breach Art. 82 of the EC Treaty if it is used to preserve a dominant market position.[37] In this context, access to "*essential facilities*"

Verfassungsreform, AfP 2003, pp. 209, 211; Stock, *EU-Medienfreiheit – Kommunikationsgrundrecht oder Unternehmerfreiheit?* K&R 2001, pp. 289, 300.

[35] Hesse, *Der Funktionsauftrag des öffentlich-rechtlichen Rundfunks – Neue Aspekte oder alte Diskussion im neuen Gewand?* in: *Nice, the Charter of Fundamental Rights and its Importance for the Media in Europe*, Schriftenreihe of the Institute of European Media Law (EMR), vol. 23, Baden-Baden 2001, p. 39; Schwarze, *op.cit.*, footnote 34, pp. 210, 211.

[36] ECJ, case no. 262/82, *Coditel-II*, Rec. 1982, p. 3381, para. 15.

[37] ECJ, joined cases C-241 and 242/91, Magill, Rec. 1995, p. I-743, para. 25. The fundamental conflict between industrial property rights and the ban on abuse of a dominant market position as enshrined in cartel law is also at the heart of the case of IMS Health, C-418/01, in which Advocate General Tizzano takes up the idea of limiting industrial property rights linked to the patenting of drugs. Article 82 of the EC Treaty is to be interpreted as meaning that the refusal of a licence to exploit a copyright-protected immaterial good represents an abuse of a dominant position in the sense of the Article concerned if (1) the refusal has no objective justification and (2) the exploitation of the immaterial good is essential for activity in a derived market, so that the rightsholder, by refusing the licence, ultimately eliminates any competition in this market.

becomes significant in other words, the extent to which companies must make it possible for competitors to participate in competition, such as through the non-discriminatory opening of essential facilities or - as here of access to (sports) events or broadcasting rights.[38] However, other than in relation to these special situations, competition law does not impose any specific limitation on the sale of exclusive rights.

The best analogies in U.S. law are the issues surrounding access to telecommunications facilities, such as those in *AT&T v. City of Portland.*[39] In that case, AT&T sought approval from the local franchising authority to effectuate a merger between AT&T and Telecommunications, Inc. AT&T would provide both cable services and cable broadband transmissions to the Portland area. The 9th Circuit Court of Appeals held that for purposes of the Communications Act of 1934, cable broadband transmissions qualified as a "telecommunications service" under Section (3)(A) and thus a franchising authority may not impose any requirements conditioning the approval of a telecommunications service or impose an open access requirement for Internet services. The 9th Circuit subsequently affirmed *AT&T* in *Brand X Internet Services v. FCC,*[40] holding that cable broadband service was not a "cable service" but instead was part "telecommunications service" and part "information service." That case currently is pending before the Supreme Court.

The resolution of the conflict between freedom of information and broadcasting freedom on the one hand and the right to sell exclusive broadcasting rights on the other is discussed in various rules of European law relating to specific cases. The right to short reporting (see below) and the conditions and procedures set forth in competition law (see point II 2. b, below) are relevant to the position of the organiser. There are also specific provisions on broadcasting, such as the rules on the transmission of events of major interest to society contained in Art. 3a of the "Television Without Frontiers" Directive and Art. 9a of the European Convention on Transfrontier Television (see under point III. 1. b). These take on board the tension between the two and try to produce a careful, reasonable balance. It is largely the

[38] For general information on the access issue, *see* European Audiovisual Observatory (ed.), *Regulating Access to Digital Television*, *IRIS Special* 2004; Helberger/Scheuer/Strothmann, *Non-Discriminatory Access to Digital Access Control Services*, *IRIS plus* 2001-2.
[39] AT&T v. City of Portland, 216 F.3d 871 (9th Cir. 2000).
[40] Brand X Internet Servs. v. FCC, 345 F.3d 1120 (9th Cir. 2003), *reh'g en banc denied*, No. 02-70518 (9th Cir. March 31, 2004), *cert. granted*, 125 S. Ct. 655 (U.S. Dec. 3, 2004) (No. 04-291).

responsibility of the Member States to balance these interests.[41]

b) Regulations Linked to Exclusivity

The right to short reporting is a particular form of restriction, imposing a kind of legal limitation on the sale and exercise of exclusive TV rights. It takes away the event organiser's right to grant exclusive access to picture and sound material to the broadcasters of his choice, to the exclusion of other broadcasters.

At Council of Europe level, Art. 9 of the European Convention on Transfrontier Television deals with the issue of short reporting. This instrument contains provisions on public access to information and, in the version of the 1998 Protocol, advises the contracting states to include rules restricting exclusive rights for broadcasters in domestic legislation.[42]

Even before Art. 9 of the Convention was amended, Recommendation No. R (91) 5 of the Committee of Ministers on the right to short reporting on major events was adopted.[43] According to the first principle set out in the Recommendation, limitations should, if necessary, be placed on the property rights of the holder of the exclusive primary broadcasting rights. This should happen in such a way that the public in a particular country is enabled to exercise its right to information. The purchaser of the exclusive rights, known as the primary broadcaster, is obliged to allow any broadcaster who wishes to acquire information about the event concerned ("secondary broadcaster") to provide information about the event in the form of a short report. Two alternatives are suggested for the fulfilment of this obligation: (1) filming at the site of the event or (2) recording the signal produced by the primary broadcaster in order to make a short report. According to para. 8 of the Explanatory Memorandum,[44] the Recommendation is designed to provide the Member States with guidelines for national legislation. It does not aim to

[41] For discussion of the sale to pay-TV broadcasters of exclusive rights to broadcast sporting and major events, *see* Diesbach, *Pay-TV oder Free-TV*, Baden-Baden 1998.

[42] Art. 9 of the Agreement: "Each Party shall examine and, where necessary, take legal measures such as introducing the right to short reporting on events of considerable interest for the public..." Regarding the legal position in the European states, *see Beck'scher Kommentar zum Rundfunkrecht*-Michel/Brinkmann, München 2003, § 5, para. 68 *et seq.*

[43] Recommendation No. R (91) 5 of the Committee of Ministers of 11 April 1991 on the right to short reporting on major events where exclusive rights for their television broadcast have been acquired in a transfrontier context.

[44] Explanatory Memorandum to Recommendation No. R (91) 5 of 11 April 1991; *available at* http://cm.coe.int/ta/rec/1991/ExpRec(91)5.htm.

create a direct legal tie, e.g. between broadcasters. According to a more recent draft Recommendation, however, the right to short reporting can be limited.[45] For example, the duration of a short report should be limited to the time needed to communicate the information content of the event. The report should not be broadcast before the programme of the primary provider has been shown and the source of the material shown should be clearly indicated. The draft states that the primary broadcaster may not charge for the short report, although the event organiser is allowed to charge for any additional expenses incurred.

It is also a matter of debate whether Art. 10 of the ECHR might justify a claim to access to information sources that are subject to an exclusive right, more than just the right to details of generally accessible sources and information.[46] Although the scope of Art. 10 ECHR covers freedom of the press and broadcasting as well as freedom of information, this idea is generally disputed.[47]

Examination of the Charter of Fundamental Rights produces similar conclusions. The wording and origins of Art. 11, even taking into consideration Art. 52 para. 3, suggest that it does not create a right that extends beyond Art. 10 ECHR and therefore there is no obligation to introduce the right to short reporting. The "Television Without Frontiers" Directive of the European Community does not contain any regulation comparable with Art. 9 of the Convention, since the Directive is essentially concerned with the creation of the internal market and free competition and trade in television services in the Community.[48] Nevertheless, in the Work Programme annexed to its Fourth Application Report on the "Television

[45] Group of Specialists on the Democratic and Social Implications of Digital Broadcasting (MM-S-DB), Draft Recommendation on the right to short reporting, 16 April 2003, MM-Public (2003) 3, *available at* http://www.coe.int/T/E/human_rights/media/1_Intergovernmental_Cooperation/02_Draft_texts/MM-PUBLIC(2003)003%20E%20Right%20to%20short%20reporting.asp#TopOfPage.

[46] EGMR, EuGRZ 90, 255, Groppera; EGMR, EuGRZ 90, 261, Autronic; EGMR, EuGRZ 94, 549, Lentia.

[47] *Beck'scher Kommentar*-Michel/Brinkmann, *op.cit.*, footnote 42, § 5 para. 64, 65; Hartstein/Ring/Kreile/Dörr/Stettner, *Medienrecht, Kommentar zu § 5 Rundfunkstaatsvertrag (Stand April 1997),* para. 5; Sidler, *Exklusivberichterstattung über Sportveranstaltungen im Rundfunk*, Bern 1995, p. 119.

[48] However, the European Parliament covered this topic in Resolution of 22 May 1996 on the broadcasting of sports events. As well as the rule on unrestricted access for the general public to certain sports events, the Resolution establishes a right to short reporting in the form of free access to TV signals as a way of resolving the conflict between exclusive rights and freedom of information, OJ C 166 of 1 June 1996, p. 109, nos. 5 and 11.

Without Frontiers" Directive, the European Commission, referring to Art. 11 of the Charter of Fundamental Rights,[49] raised the question of whether provisions regarding the right to short reporting should be included. In its Discussion Paper on the Review of the "Television Without Frontiers" Directive,[50] the Commission explains that there are differences between the legal provisions in the Member States with regard to the recognition and form of such a right. It therefore raises the question of whether the lack of consistency is such that the free movement of services is restricted. If it was thought necessary to include the right to short reporting in the "Television Without Frontiers" Directive, the precise form and conditions of the exercise of that right would have to be clarified.

2. Competition Law

a) General Meaning

Community law also covers the area of sports, at least professional sports and the sports federations. This was particularly illustrated in the *Bosman* case.[51] Community competition law must therefore be respected by sports, which is often organised into federations.

With the deregulation of television markets and technical advances in broadcasting, broadcasting services are constantly developing very rapidly, affecting the type (pay-TV, pay-per-view) and number of TV channels and the saturation of transmission networks. In this highly competitive market of broadcasting services and new media, respect for competition rules in the sale and acquisition of sports broadcasting rights is particularly important for the development of the media landscape.[52] This is also illustrated by the fact that the European Commission has recently had to deal more regularly with issues connected with the application of competition law in the area of sports broadcasting rights.[53]

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[49] Fourth Application Report on Directive 89/552/EEC "Television Without Frontiers", COM(2002) 778 final.

[50] Discussion Paper: Review of the "Television Without Frontiers" Directive, Theme 6, *available at* http://europa.eu.int/comm/avpolicy/regul/review-twf2003/twf2003-theme6_de.pdf.

[51] ECJ, C-415/93, Bosman, Rec. 1995, p. I-4921.

[52] Wachtmeister, *Broadcasting of Sports Events and Competition Law, Competition Policy Newsletter* No. 2/1998, *available at* http://europa.eu.int/comm/competition/speeches/text/sp1998_037_en.html.

[53] Commission, COMP/C.2/37.398, Joint selling of the commercial rights of the UEFA Champions League, OJ L 291 of 8 November 2003, p. 25; COMP/C.2/37.214, Joint selling of the media rights to the German Bundesliga, OJ C 261 of 30 October 2003, p. 13; Case

U.S. competition law has several specific statutes with requirements of mandatory licensing. The Cable Television Consumer Protection and Competition Act of 1992 ("Act") does require dominant competitors to license cable channels to competitors. The Act seeks to (1) promote the availability to the public of a diversity of views and information through cable television and other video distribution media; (2) rely on the marketplace, to the maximum extent feasible, to achieve that availability; (3) ensure that cable operators continue to expand, where economically justified, their capacity and the programs offered over their cable systems; (4) where cable television systems are not subject to effective competition, ensure that consumer interests are protected in receipt of cable service; and (5) ensure that cable television operators do not have undue market power vis-a-vis video programmers and consumers.[54]

b) Distinction Between Markets

The definition of markets is crucial for the decision-making process of the EU bodies, since it has a decisive impact on the assessment under competition law of a particular action or agreement. The narrower the relevant market is, the easier it is to identify a dominant market position and therefore an abuse or an anti-competitive merger. These principles also apply to the application of competition law to the media sector.[55] Since the importance of the definition of relevant markets can be seen throughout the provisions of EC competition law,[56] its importance to sports broadcasting rights should first be explained.

IV/32.150, Eurovision, OJ L 151 of 24 June 2000, p. 18; COMP/M.2876, Newscorp/Telepiù, Decision of 2 April 2003, *available at* http://europa.eu.int/comm/competition/mergers/cases/index/by_nr_m_57.html; press release of 8 May 2003 on the investigation regarding the acquisition of broadcasting rights to Spanish football by Audiovisual Sport, *available at* http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.getfile=gf&doc=IP/03/655|0|AGED&lg=DE&type=PDF.

[54] 47 USC §521.

[55] In German law, Art. 31 of the *Gesetz über Wettbewerbsbeschränkungen* (Act on Competition Restrictions) – introduced not least because of the *Bundesgerichtshof* decision mentioned in footnote 30 – makes an exception for the central marketing of sports rights.

[56] Regarding the growing importance of market definition against the background of European cartel law reforms and markets in the media sector, *see* Institute of European Media Law (EMR), *Market Definition in the Media Sector – Comparative Legal Analysis*, Chapter 1, Point B, *available at* http://europa.eu.int/comm/competition/publications/studies/media/chapter_1_ec.pdf; Palzer, *Marktdefinition im Bereich der audiovisuellen Medien nach dem Wettbewerbsrecht der Europäischen Gemeinschaft*, ZUM 2004, (No. 4) p. 279 et seq.

We will then consider the specific problems relating to the sale and acquisition of rights that have been dealt with by the Community bodies.

Sports broadcasting rights in general can be distinguished from other programme markets on account of their huge economic importance. In this respect, it is irrelevant whether they relate to pay-TV or free TV. Sports broadcasting rights can be subdivided further into separate product markets.[57]

The market for exclusive broadcasting rights to football matches held regularly all year round has been defined as a separate market. This particularly includes national league and cup competitions, the Champions League and the UEFA Cup. In general, broadcasters can use football rights to create a specific brand image for their TV channels. According to the Commission, football is the most effective way of attracting pay-TV subscribers. For free-to-air-TV, football broadcasts attract categories of viewers and therefore advertisers that cannot be reached using other types of programme.[58]

In the *Newscorp/Telepiú* decision, the Commission narrowed down the relevant market even further. The market only included exclusive rights to broadcast named football matches involving domestic (in this case Italian) teams. According to the Commission, the market investigation had clearly confirmed that these rights were a *stand-alone "driver"* for pay-TV. In view of the characteristics of this type of content and the prices (which were clearly higher than for other regular sports events involving either national domestic teams), this could be considered to be a separate product market, clearly distinguishable from other contents acquisition markets.[59]

The market for rights to broadcast football matches that are not held every year (e.g. World Cup and European Championships) and in which national teams take part is also a separate market.[60]

It has not yet been established whether there is a separate market for the acquisition of football broadcasting rights in the new media (UMTS and Internet) because these markets are still in their infancy. However, from what is already known, the Commission has concluded that rights to content are as

[57] Commission, UEFA Champions League, *op.cit.* footnote 53, para. 60 *et seq.*
[58] Commission, UEFA Champions League, *op.cit.* footnote 53, para. 57, 71 et seq.; *Newscorp/Telepiù*, *op.cit.* footnote 53, para. 64 etc.
[59] Commission, Newscorp/Telepiù, *op.cit.* footnote 53, para. 66.
[60] Commission, UEFA Champions League, *op.cit.* footnote 53, para. 62; *Newscorp/Telepiù*, *op.cit.* footnote 53, para. 65, 52.

necessary for the development of these new services as for the TV industry. Since it will be possible with new media to identify and provide services to much smaller categories of users, it is likely that relatively narrow content markets will be defined. As in the TV sector, football would be used to entice customers, so it is likely to constitute a separate market. In general, it is anticipated that new media markets will develop in parallel to pay-TV markets.[61] In order to investigate the current status of access to this type of content, the Commission has launched an inquiry into the sale of audiovisual sports rights to Internet companies, other new media and UMTS networks.[62]

Broadcasting rights for other special, usually international sports events, e.g. tennis tournaments, boxing matches, golf tournaments and motor sport events, constitute another separate market, distinct from other content markets. Although these are less significant than football as *key drivers* for pay-TV subscriptions, they are nevertheless important for pay-TV providers insofar as they are events that could generate interest among numerous end-users. In the Commission's view, the characteristics of the content and price structures suggest that this is a separate market. It remains questionable whether it can be broken down further with a separate market for each sport. In the *Eurovision* ruling, the Commission had found that viewing behaviour (at least in relation to the Olympic Summer and Winter Games, the Wimbledon final and the football World Cup) did not appear to be influenced by other major sports events being broadcast simultaneously or nearly simultaneously. That was why TV broadcasters were willing to pay much higher prices for these events.[63]

c) Central Marketing (Rights Infrastructure)

Sports rights markets are therefore essentially defined through decisions, particularly those of the Commission. What specific problems are inherent in

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[61] Commission, UEFA Champions League, *op.cit.* footnote 53, para. 81 *et seq.*; in the decision on the German Bundesliga, *op.cit.* footnote 53, para. 7, the Commission also assumes the existence of such a separate market; for more information, *see* Ungerer, *Commercialising Sport: Understanding the TV Rights debate, available at* http://europa.eu.int/comm/competition/speeches/text/sp2003_024_en.pdf, footnote 1.

[62] Commission press release of 30 January 2004, *available at* http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.getfile=gf&doc=IP/04/134|0|RAPID&lg=DE&type=PDF.

[63] *Newscorp/Telepiù*, *op.cit.* footnote 53, para. 52, 70; supported but in the end left open in the Eurovision decision, *op.cit.* footnote 53, para. 44. This decision was annulled by the Court of First Instance, although the market definition it gave was not criticised: joined cases T-185/00, T-216/00, T-299/00 and T-300/00, Eurovision system, not yet published in the official journal, para. 57.

the assessment under competition law of the sale of rights?

Rights to a sports event are often marketed centrally, e.g. by rights agencies or federations. In the UEFA and German *Bundesliga* decisions in particular, the Commission set out a number of conditions under which central marketing of media rights can comply with EC competition law.

Firstly, the rights must be sold in several packages in a transparent, non-discriminatory procedure. Before the rights are awarded, an "invitation to tender" must be issued, giving all qualified broadcasters an equal opportunity to bid for the rights.[64] The division of the TV broadcasting rights into different packages, which must also be acquired separately, is vitally important. Independently of the central marketing process, the federations can leave certain rights for the clubs to exploit themselves. New media rights (Internet, mobile communications) can also be covered by individual packages. The sale of exploitation rights for new media is expressly mentioned in the contract.[65]

The Commission confirmed these conditions in its negotiations with the English FAPL concerning rights to broadcast the Premier League. Balanced rights packages for live coverage of the whole English top division were to be created and no one broadcaster would be allowed to buy all of the packages. Other packages would cover the transmission of recorded matches and real-time delivery of pictures to mobile phones.[66]

Further conditions under which central marketing is acceptable are that broadcasting rights should not be granted for too long a duration and should not be automatically renewable.[67]

Exploitation rights that are not included in any packages or not sold should

[64] Commission, UEFA Champions League, *op.cit.* footnote 53, para. 27 et seq.; German *Bundesliga*, *op.cit.* footnote 53, para. BL 10.
[65] Commission, UEFA Champions League, *op.cit.* footnote 53, para. 27 *et seq.*; German *Bundesliga*, *op.cit.* footnote 53, para. BL 10, 11; Ungerer, *Commercialising Sports*, *op.cit.* footnote 52, p. 11.
[66] The Commission was initially critical of the marketing rules of the English Premier League, COMP/38.173 PO/The Football Association Premier League Limited, although an agreement has now been reached, *see* Commission press release of 16 December 2003, *available at* http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.getfile=gf&doc=IP/03/1748|0|RAPID&lg=DE&type=PDF.
[67] Ungerer, *Commercialising Sports*, *op.cit.* footnote 61, p. 10.

revert back to the participating clubs, which can then sell them individually.[68]

d) Procurement / Central Purchase

Another competition law issue, alongside central marketing, is that of central procurement of rights, which prevents competitors from gaining access to acquired rights.[69]

As far back as 1989, the Commission had already ruled on whether the exclusive agreement of a *single buyer* was compatible with cartel law. On the basis of the *Coditel-II* decision of the ECJ, which examined the specific circumstances of an agreement to sell exclusive rights from a cartel law point of view,[70] the Commission explained the principles for exclusive agreements in the programme procurement market. It stated that the admissibility of such an exclusive agreement depended on the number of rights involved and the duration and scope of the right of first negotiation.[71]

Access for competitors to broadcasting rights was and remains a key aspect of a possible exemption under Art. 81 para. 3 EC Treaty for the so-called Eurovision system, by which the EBU coordinates sales negotiations for broadcasting rights to sports events, etc and organises an institutionalised exchange for acquired broadcasting rights. A key point of the discussion concerned the extent to which the EBU members should allow commercial non-members access to the Eurovision system. The Commission considered a closed system to be a fundamental restriction of competition in the sense of Art. 81 EC Treaty. Following amendments made by the EBU, guaranteeing contractual access for third parties to broadcasting rights, the Commission approved the system. It considered the various advantages of the Eurovision system to be crucial. By approving it, the Commission said that viewers could be provided with an optimal service and smaller EBU members would also profit from the coordinated approach. Since its members were fulfilling a particular public mission, the EBU system would contribute to the

[68] German *Bundesliga*, *op.cit.* footnote 53, para. 22.
[69] Regarding this issue, *see* Mendes Pereira, *Scope and duration of media rights agreements: balancing contractual rights and competition law concerns*, speech at the 8th IBC annual conference "Communications and EC Competition Law", Brussels, 10 October 2003, *available at* http://europa.eu.int/comm/competition/speeches/text/sp2003_027_en.pdf.
[70] ECJ, Coditel II, *op.cit.* footnote 36, para. 15. *See also* Magill and IMS Health cases, *op.cit.* footnote 36.
[71] Commission, IV/31.734, Film purchases by German television stations, OJ L 284 of 3 October 1989, p. 36, para. 43.

development of a single European television market, which was in the public interest.[72]

However, the Court of First Instance annulled the Commission's decision, arguing that the public interest was only relevant as part of an overall evaluation of all the circumstances. However, it said that the Commission, which had taken into account the fulfilment of a public mission in the sense of Art. 85 para. 3 EC Treaty, had neglected to explain its existence in a suitable way.[73]

In 1999 the EBU re-submitted for Commission approval its regulations on the granting of sub-licences for the exploitation of Eurovision rights, together with a rule on pay-TV. The Commission authorised the system subject to certain conditions. It stated that contractual access for third parties to TV broadcasting rights for sports events acquired through Eurovision should be guaranteed in the contracts with the rightsholders. The same applied to the possibility to grant sub-licences to EBU non-members.[74]

The Court of First Instance again declared the approval incompatible with European competition law.[75] The Court described the Commission's assumption that the Eurovision system guaranteed sufficient access for third parties to broadcasting rights and recordings under appropriate conditions as a "manifest error of assessment." For under the EBU rules, an EBU member could reserve the rights to broadcast live the majority of the competitions of a sporting event (live broadcasts being particularly profitable). Third parties competing in the same market would therefore be excluded from acquiring sub-licences for the direct transmission of the whole event and even the competitions that the EBU member was not broadcasting live. The Court concluded that through the joint acquisition and exchange of TV rights via the EBU, competition between its members as well as that with third parties was unfairly restricted, since the broadcasting licences were normally awarded on an exclusive basis within the EBU.

The degree of exclusivity of broadcasting rights in terms of duration and scope also determines how much access competitors have to content. These

[72] Commission, IV/32.150, EBU/Eurovision System, OJ L 179 of 22 July 1993, p. 23, para. 60, 62, 63, 74.
[73] Court of First Instance, joined cases T-528, 542, 543 and 546/93, Rec. 1996, p. II-649, para. 118, 123.
[74] Commission, Eurovision, *op.cit.* footnote 53, para. 35, p. 115.
[75] Court of First Instance, Eurovision, *op.cit.* footnote 63.

and other criteria were dealt with in a new Commission decision on the merger of the Italian pay-TV platforms (acquisition of Telepiù by Stream), which also looked at the companies' holdings of sports rights, which would have been strengthened by the merger.[76]

Access to sports rights for third parties was already restricted prior to the merger, since each company owned exclusive rights which, on account of their duration, prevented competitors from gaining access. Also, in terms of content, the exclusivity of the rights was not limited to a single means of transmission, but covered several technical platforms. The rights strengthened the broadcasters' position as dominant buyers from the content providers.[77] The promises made by the Italian pay-TV platforms concerned in order to gain the Commission's approval therefore also related to access to sports broadcasting rights. Newscorp, for example, waived exclusive rights to content that was not transmitted via satellite. According to the Commission, this would enable terrestrial or cable TV broadcasters and Internet service providers to acquire content directly from football clubs or owners of sports broadcasting rights. In addition, competitors who did not broadcast via satellite would be able to acquire premium content from Newscorp through a "wholesale offer." According to the promises made by the companies involved, the whole offer would be made on an unbundled and non-exclusive basis. The Commission also thought that access to content would be easier for potential competitors involved in satellite broadcasting because the rightsholders would be able unilaterally to terminate ongoing contracts with the Newscorp platform (Sky Italia) without penalty. The duration of future contracts between Newscorp and football clubs was set at two years.

The approval of the merger between the pay-TV providers Sogecable and Vía Digital by the Spanish competition authorities imposed certain conditions concerning the parties' use of football broadcasting rights.[78] These included the requirement that Audiovisual Sport (AS) give up its option to extend the football rights agreement,[79] guaranteed access for other companies to these

[76] Mendes Pereira, *op.cit.* footnote 69, p. 7, which, with reference to the Commission's UEFA decision considering 3 years to be an acceptable limit; Commission, *Newscorp/Telepiù*, *op.cit.* footnote 53.

[77] Regarding this question, *see* Mendes Pereira, *op.cit.* footnote 69, p. 6.

[78] Also, at the national level, the French *Conseil de la concurrence* (Fair Competition Board) temporarily suspended the rights of Canal+ to broadcast French first division football matches. The competitor TPS had lodged a complaint against the French professional football league and Canal+, claiming that the granting of exclusive broadcasting rights represented an abuse of a dominant market position, *see IRIS* 2003–2: 9.

[79] *See* Strothmann, MMR 2003, No. 7 VIII.

rights on a fair, sensible, non-discriminatory basis, and the relinquishment by the merged company of exclusive football rights in the new media. An arbitration procedure was also to be established to deal with access issues.

e) Vertical Aspects

Alongside these horizontal aspects of central marketing and exclusive acquisition of sports rights, there are also vertical aspects. These relate to cases in which exclusive rights are transferred from a central rightsholder to a provider of TV services with the result that a dominant market position is either created or strengthened even further. Moreover, a combination of horizontal and vertical effects can occur if companies own exclusive rights and exercise those rights themselves as broadcasters with a dominant position. This can particularly be the case with live broadcasting rights for sports events.[80]

In the *Groupe Jean-Claude Darmon* case, the Commission had to decide whether it could approve the acquisition of joint control of this sports rights agency by the French pay-TV broadcaster Canal+ S.A. and the RTL Group. Canal+ and RTL were planning to merge their own sports rights agencies into the joint venture. In the Commission's opinion, the venture would result only in insignificant and limited overlaps in the market for TV sports broadcasting rights. Canal+'s position in the downstream pay-TV market would not be strengthened any more than RTL's position (in the free-TV market) in Europe. KirchMedia and the EBU remained strong competitors in the broadcasting rights market.[81]

From the vertical point of view, new media and other markets closely related to broadcasting are also relevant. In these cases, it is important to apply very rigorously the conditions described in c) and d) above.[82]

3. How Does the Acquisition of Sports Rights Fit into the Public Service Remit?

[80] Ungerer, *Impact of Competition Law on Media – some comments on current developments, 4th ECTA Regulatory Conference*, Brussels, 10 December 2003, *available at* http://europa.eu.int/comm/competition/speeches/text/sp2003_062_en.pdf, p. 4.
[81] Commission press release of 13 November 2001, *available at* http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.getfile=gf&doc=IP/01/1579|0|AGED&lg=DE&type=PDF.
[82] Ungerer, *Impact of Competition Law on Media*, *op.cit.* footnote 80, pp. 6, 7.

Is the acquisition of sports rights part of the service that public broadcasting organisations are specially mandated to provide? This question is crucial when assessing the financing of public service broadcasting from licence fee revenue (or otherwise from state resources) in the light of the EC Treaty rules on state aid.[83] Recent Commission decisions make it clear that the application of Article 87 of the Treaty depends upon whether state support for public broadcasting constitutes a permissible level of adjustment or over-compensation for the costs involved in fulfilling the public service remit.[84] The framing of that remit and any conditions that European law may place upon it are thus increasingly important. European Court of Justice (ECJ) rulings have established the basic principle that it is lawful to give public service television broadcasters a specific programming mandate.[85] Referring to the importance of public service broadcasting in its social policy function and to the Amsterdam Protocol, the Commission has deemed a "wide definition" of the public service mandate to be consistent with the rules on state aid. It has also declared that within such a wide definition it is permissible to provide programming that preserves a "certain level of audience."[86] The Commission's stance here is based implicitly on the Resolution of the Council on public service broadcasting, which actually declares that it is legitimate for public service broadcasters to "seek to reach wide audiences."[87] In the Commission's view, too, there is nothing in the rules on state aid to prevent the creation of programming slots that can be marketed to meet the costs of programme making. It considers that a wide definition of the public service mandate reflects the aim of meeting society's democratic, social and cultural needs and sustaining pluralism, including cultural and linguistic pluralism. As regards the definition of public service in the

[83] See most recently the Commission's request for information from the Federal Republic of Germany, CP 43/2003. A particular issue addressed here is the accusation by the private sector that public service broadcasters have been able to pay inflated prices for certain sports rights only thanks to licence fee revenue; *see also epd medien* Issue 32/2004, 28 April 2004, p. 19.

[84] For more detail *see also* Roßnagel/Strothmann, *Die duale Rundfunkordnung in Europa – Gemeinschaftsrechtliche Rahmenbedingungen und aktuelle Ansätze zum dualen System in ausgewählten Mitgliedstaaten*, Vienna 2004, p. 99 *et seq.*

[85] The cornerstone ruling was in ECJ Case 155/73, Sacchi, Rec. 1974, p. 409, paras 13–15.

[86] Communication from the Commission on the application of state aid, OJ C 320, 15 November 2001, p. 5, para. 33. Reference to the significance of the Amsterdam Protocol and the Resolution of the Council and of the Representatives of the Governments of the Member States meeting within the Council of 25 January 1999, concerning public service broadcasting, OJ C 30, 5 February 1999, p. 1, is also to be found in the Commission Decision of 22 May 2002, State aid No. N 631/2001, BBC licence fee, para. 37.

[87] Council of 25 January 1999, concerning public service broadcasting, para. 7.

broadcasting sector, the Commission states that its own role is limited to checking for manifest error.[88] Definition of the public service remit would be in manifest error if it included activities outside the scope of the Amsterdam Protocol, *i.e.* ones that went beyond meeting society's democratic, social and cultural needs.[89] This limitation notwithstanding, the Commission generally affords the Member States considerable latitude in defining services that are in the general interest in the realm of broadcasting. In this respect it goes beyond the terms of its Communication[90] on services of general interest in Europe.

Thus the public service remit may include the acquisition of sports rights in order to achieve more attractive and rounded programming. In the process of making their own TV and radio productions, as well as in buying and exploiting rights for TV and radio productions made by others, broadcasting organisations must fulfil certain conditions. Specifically, they must act within the remit given to them. The acquisition of sports rights is part of a broadcaster's programme procurement function if sport is included in its remit and sports rights are required for particular programmes.[91]

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[88] Commission, Application of rules to public service broadcasting, *op. cit.* footnote 86, para. 36. The Commission takes the view that it is not for it to decide whether a programme is to be provided as a service of general economic interest, nor to question the nature or quality of a certain product.

[89] Commission, Application of rules to public service broadcasting, *op. cit.* footnote 86, para. 36. Here the Commission mentions the example of e-commerce. It states that the public service remit describes only the services offered to the public in the general interest and does not cover the definition of a financing mechanism. Public service broadcasters may therefore perform commercial activities such as the sale of advertising space, but such activities cannot be regarded as part of the public service remit. How should we judge the situation where a public service broadcaster makes the point (publicly) that the cost of acquiring sports rights has to be met predominantly by revenue from the sale of advertising space? With regard to the rules on state aid it is possible that this constitutes a gray area. In approaching such a situation, a series of parameters applies. If we assume that the programme content in question is in line with the programming remit, then it is certainly legitimate to acquire it using resources already allocated to the fulfilment of that remit. In the case of particularly marketable programmes, there will also be considerable interest from the private sector. The attractive nature of the advertising slots makes it possible to finance in full the acquisition of the programme rights. Where a public broadcaster has to use such additional resources to cover the cost of programme rights, it means creaming off funds from the advertising market in order to acquire content within its public service remit. In effect, it is argued, the broadcaster uses the sale of advertising space – an activity that, as explained above, is not part of its public service remit – as a means of fulfilling its programming remit.

[90] Communication from the Commission on services of general interest in Europe, 2001/C 17/04, OJ C 17, 2001, p. 4.

[91] *Beck'scher Kommentar zum Rundfunkrecht-Libertus*, Munich 2003, § 12, para. 101; Pleitgen, *Der Sport im Fernsehen, Arbeitspapiere des Instituts für Rundfunkökonomie an der Universität zu Köln*, Issue 127, Cologne 2000, p. 15.

In the U.S., both Congress and the Federal Communications Commission (FCC) have attempted to promote the broadcast of sporting events on public television stations. The problem with broadcasting sporting events on public television in the U.S. is that too many networks have financially overcommitted themselves to broadcasting sports. For example, the FOX network signed a four-year deal with the National Football League (NFL) to broadcast games for $1.5 billion.[92] The increase of sporting options for viewers has diluted the exclusivity of sporting programming by spreading the viewing population, which decreases the ratings for each sport. A byproduct of a decrease in ratings for each sporting event is that networks have had to lower advertising charges while still paying top dollar to broadcast the sporting events.[93] In 1994, baseball team owners were forced to reimburse advertisers $95 million.[94] Reimbursements such as the one made in 1994 seem to be the reason why pay-per-view and subscriptions to cable networks seem to be a better financial bet for professional sports leagues, since sport franchises are guaranteed to produce revenue regardless of advertising incentive.

While historically there have been a variety of sports broadcasting on public television, expensive licensing contracts and slipping advertising revenue seem to be decreasing the frequency of sporting events on public television. Congress authorized an ongoing FCC investigation of the migration of sporting events from public television stations to cable and pay-per-view networks in Section 26 of the 1992 Cable Act. The FCC responded to the request in 1993.[95] While at the time of the report the FCC stated that it would take no action to counteract sports programming migration, it would act in the future if it found any significant threat to the public's access to televised sporting events.[96] So far, it has not. Congress has also reacted negatively to sports leagues experimenting with Pay-Per-View access. The NFL received a strong negative response from Congress when it made a pay-per-view

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[92] Leonard Shapiro, *And the Fourth Shall be First: How FOX Stalked the NFL and Bagged TV Deal,* WASH. POST, Dec. 26, 1993, *at* D1.
[93] Ken Fidlin, *Baseball Whiffs as NFL, NBA Cash In,* POST (Toronto), Dec. 22, 1993, at 39.
[94] Phillip M. Cox II, *Flag on the Play? The Siphoning Effect on Sports Television,* 47 FED. COMM. L.J.571, 587 (citing *ABC World News Tonight* (ABC Television Broadcast, Dec. 15, 1994)).
[95] *See generally In the Matter of Implementation of Section 26 of the Cable Television Consumer Protection and Competition Act of 1992 Inquiry into Sports Programming Migration,* 8 FCC RCD. 4875 (July 1, 1993).
[96] *Id.*, para. 180.

proposal at the end of the 1993 season.[97] While there is indeed a threat to the public broadcasting of sporting events in the U.S., the federal government and courts have maintained the public availability of many of these events.[98]

III. Conditions for Broadcasting/Dissemination

Having looked in Section II at the conditions governing the sale and acquisition of rights, we will now consider whether European law imposes any conditions on the dissemination of sports programmes on different media.

1. Television

a) Conditions for Satellite Dissemination

The acquisition and transfer of rights to broadcast a sports event on television are governed by national (civil) law. The framing of contracts depends upon how the underlying rights of the event organiser are classified.

In advance of the 2002 World Cup, pay-TV providers and free-to-air broadcasters were involved in discussions about the extent of contractual rights for the non-encrypted broadcasting of matches by satellite. The problem was that the intended transmission of certain content (namely the matches) would have impinged upon the broadcasting rights of other rightsholders, who might in some cases have been able to prevent its dissemination.[99] Entitlement

[97] Senator Arlen Specter (R-Pa.), upon learning of the NFL's Pay-Per-View plans, sent a letter to NFL Commissioner Paul Tagliabue stating, "I do not believe it is appropriate for the NFL to have Pay-Per-View as long as the league enjoys anti-trust exemptions." *See* Cox II, *supra* footnote 94 at 587 (citing Keith St. Clair, *Congress Tops List of Toughest and Most Influential Critics,* WASH, TIMES, May 10, 1991, at D3).

[98] In an effort to increase broadcast revenue, the NFL attempted to delve into markets outside of a local viewer's broadcast, for example, the Pittsburgh Steelers fan located in Los Angeles who is unable to receive broadcasts of Pittsburgh Steelers games. The NFL decided to jointly sell their rights to a satellite broadcast distributor, DirecTV who in turn would sell those games to individual viewers. In *Shaw v. Dallas Cowboys*, 172 F.3d 299 (3rd Cir. 1999), the 3rd Circuit Court of Appeals held that "the subscription satellite broadcast of NFL games is not a part of the rights to the sponsored telecasting of those games and therefore not within the Sports Broadcasting Act's exemption to the anti-trust laws."

[99] In Germany, for example, the public service broadcasters ARD and ZDF acquired the World Cup broadcast rights for Germany from the KirchMedia group but the broadcasts could also be picked up via satellite in other European countries. The agreement between ARD and ZDF and the KirchMedia group stipulated that the licensees were entitled to broadcast the matches on a digital satellite platform only if this did not impinge upon the exclusive transmission rights of licensees in other countries. Problems started when the draw for the World Cup was broadcast in December 2001, with a dispute between the German

to broadcast therefore depends crucially on the extent of the rights afforded by "copyright" (in its widest sense) to the holder of broadcasting licences in relation to the transmission of programmes by satellite. For example, the BBC's switchover to non-encrypted digital broadcasting meant it could no longer cover Scottish Premier League matches as part of its Scottish regional programming. The BBC made the switch from the encrypted BSkyB platform to non-encrypted broadcasting via ASTRA on 10 July 2003. This meant that its regional reception window was no longer delimited by BSkyB's CA encryption system. Its non-encrypted programming would have been freely available throughout the United Kingdom. However, the BBC held the Premier League broadcasting rights for Scotland only, rights for the remainder of the UK being held by the pay-TV company Setanta, which acted to defend itself against nationwide broadcasting by the BBC. In order to avoid a legal battle, the BBC was forced to suspend its coverage of Scottish Premier League matches and the Scottish cup final until the expiry of its contract at the end of the 2003-2004 season.[100]

To what extent does European law influence the rightsholders' practice – which underlies the above examples – of splitting broadcasting rights on a territorial basis?

According to the definition in principle of the State in which the act of communication occurs, as set out in Article 1 (2) of Council Directive 93/83/EEC, it is no longer possible on a practical level to allocate rights on an exclusive territorial basis.[101] The Directive only applies, however, to works in the sense of copyright law. As explained in Part 1 of this report, sports events are not generally deemed to be works in this sense with regard to rights for

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rightsholders and the Spanish licensee Via Digital. ARD came up with a proposal to alter the digital transmission making reception possible only in Germany. The World Cup matches would thus be broadcast using a special signal that could not be processed by pay-TV decoders in other countries. The disadvantage of this solution was that German viewers with digital sets would have had to start a new channel search and for that reason ZDF initially came down against the proposal. Its counter-suggestion was simply not to use digital satellite transmission for the World Cup broadcasts. ARD's proposed solution was tested and it was found that standard pay-TV decoders in Spain and Poland were indeed incapable of receiving programmes transmitted using the special signals. Nonetheless, the KirchMedia group turned down this solution in favour of encrypting digitally transmitted satellite signals. In the end the broadcasting organisations decided not to broadcast the matches on a digital satellite platform.

[100] *See* press release *at*: http://www.waveguide.co.uk/latest/news030804.htm. In the interim the Scottish Premier League concluded an exclusive deal with Setanta for the live broadcast rights. *See* press release *at* http://www.scotprem.com/Article.asp?ARTICLE=188156.

[101] Roßnagel/Sosalla/Kleist, *Der Zugang zur digitalen Satellitenverbreitung*, Berlin 2003, p. 171.

their transmission.[102]

For broadcasting rightsholders to insist on encryption raises issues with regard to cartel law, and the same applies in relation to encryption agreements concluded with broadcasting companies. Such issues emerge in particular where the purpose of the agreements is to split off viewing markets within the EC Single Market and protect them against one another. There is a (not undisputed) view that it is an abuse of the broadcasting rightsholder's dominant position in the sports rights market to use that position as a means of generating an unfair advantage in other, neighbouring markets. The argument is that a powerful position in the broadcasting rights market can be used as a lever to create a monopoly in a third market without any other objective justification for doing so.[103]

U.S. law, through both cases and statutes, also has proven to be very concerned with the protection of licenses held by broadcasters that are impinged upon by satellite broadcasters. Satellite providers cannot offer copyrighted network television programming without permission or a license.[104] Congress passed the Satellite Home Viewers Act (SHVA) of 1988[105] in an effort to both aid consumers and stop satellite providers from taking network broadcasts without compensating the networks. SHVA requires networks to license their signals to satellite broadcasters at a statutorily fixed royalty fee for distribution to viewers who cannot receive a

[102] The BBC was recently involved in a case where, by contrast, the issue was the broadcasting of works in the sense of copyright law. It illustrated the basic problems in relation to programme content that falls within the scope of Council Directive 93/83/EEC. The BBC concluded a deal with Buena Vista International Television (BVITV), the TV distribution arm of the Walt Disney Company, on TV rights for more than 100 films, *see* press release of 8 October 2003 *at* http://www.bbc.co.uk/pressoffice/pressreleases/stories/2003/10_october/08/buena_vista.shtm. The rights transferred were for terrestrial broadcasting within the UK, on the one hand, and satellite broadcasting on the other. The terrestrial broadcasting rights were granted to the BBC exclusively. The satellite rights, however, were non-exclusive and included the right for the BBC to broadcast the films via satellite throughout Europe unencrypted. The deal was reached (surprisingly) despite BVITV's fears that by granting freely receivable Europe-wide transmission rights it would lose out on income from licensing for other European markets. According to the BBC it paid no additional charge for the right to broadcast unencrypted.

[103] Mailänder, *Fernsehen mit verschlüsselten Grenzen – Kartellrechtliche Fragen der Verschlüsselung*, ZUM 2002, 706, 710. Mailänder considers that these factors applied in the ARD/ZDF/KirchMedia case, inasmuch as there was a consequential attempt to impose a particular type of decoder.

[104] Primetime 24 Joint Venture v. NBC, Inc., 219 F.3d 92, 95 (2d. Cir. 2000).

[105] Pub. L. No. 100-667, 102 Stat. 3935 (Nov. 8, 1988), codified in 17 U.S.C. §119 (1995).

sufficiently strong over-the-air broadcast signal.[106] The statute also provides fines for violation of a network's licenses. In 1999, The Satellite Home Viewer Improvement Act of 1999 ("SHVIA") significantly modified the SHVA. SHVIA is designed to promote competition among multi-channel video programming distributors, such as satellite companies and cable television operators while, at the same time, increasing the programming choices available to consumers.[107]

b) Broadcasting Important Events

Further European rules on the broadcasting of sports events are to be found in Article 3a of the "Television without Frontiers" Directive and Article 9a of the European Convention on Transfrontier Television. These articles stipulate that official lists should be compiled in order to ensure that the public has access to coverage of events (including sports events)[108] that are of major importance for society. Unlike the rules on short reporting, these provisions are framed restrictively; they relate only indirectly, if at all, to the questions of sale and acquisition.

aa) Conditions

Article 3a lays down no binding minimum conditions, but leaves it to the discretion of the Member States whether or not to draw up a list at all. If a Member State does compile a list it must observe the procedural stipulations contained in the third sentence of Article 3a(1), and should it seek to secure only deferred coverage of an event it must have objective reasons for doing so, in accordance with the fourth sentence of the same article. Member States are, however, required to be proactive under the terms of the protective provisions in Article 3a(3). They must ensure that broadcasters under their jurisdiction do not act in such a way as to undermine the protective effects of lists drawn up by other Member States.[109]

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[106] *Id.* at 96; *See also* 17 U.S.C. §119 (1995).

[107] *See* http://www.fcc.gov/mb/shva/shviafac.html.

[108] Those lists compiled to date designate many sports events as being of major importance for society. *See* http://europa.eu.int/comm/avpolicy/regul/twf/3bis/implement_en.htm and, on the subject of proposed lists in France and the Netherlands, *IRIS* 2003–4: 8 and *IRIS* 2004–1: 15.

[109] The British House of Lords ruled in accordance with this duty of mutual recognition in its judgment of 25 July 2001 in the case of Regina v. Independent Television Commission, Ex Parte TV Danmark 1 Ltd, *available at*: http://www.parliament.the-stationery-office.co.uk/pa/ld200102/ldjudgmt/jd010725/dan-1.htm. *See also* in relation to this case, *IRIS* 2000–10: 11 and *IRIS* 2001–4: 13.

The "Television without Frontiers" Directive leaves it up to the Member States to define *events of major importance for society*. Recital 21 of Directive 97/36/EC, amending the "Television without Frontiers" Directive, stipulates that they should be outstanding events of interest to the general public in at least an important component of a given Member State. They should also be organised in advance by an event organiser who is legally entitled to sell the rights pertaining to them. Recital 18 names the World Cup and European Championship soccer competitions and the Olympic Games as examples of such events.

The Directive requires the Member States to ensure that *"a substantial proportion of the public"* is not deprived of the possibility of following such events. This indicates that the aim of the list system is not merely to prevent exceptionally high payment being required for broadcasting of the events in question. In order to afford wide public access to the coverage, the Directive's provisions extend to free-to-air broadcasters with limited audiences. It is thus argued that Article 3a is framed in such a way as to require that virtually the entire population, or at least a considerable section of it, has such access.[110]

The Directive requires that listed events receive coverage on *free television*. Recital 22 of amending Directive 97/36/EC explains that "free television" means the broadcasting on a channel, either public or commercial, of programmes which are accessible to the public without any special payment – apart from the normal charges such as licence fee or cable network subscription. Thus, forms of viewing such as pay-TV, pay-per-view or pay-per-channel do not fall within the definition.

There is scope for debate about the extent of protection afforded under Article 3a to exclusive rights acquired before notification of the relevant national list of events to the Commission (*i.e.* the issue of retroactivity). The only relevant reference is to be found in the protective provisions of Article 3a(3) ("exclusive rights purchased (...) following the date of publication of this Directive").[111]

Another open question is that of when an event included on a Member State's list acquires legal protection, *i.e.* from what date must broadcast coverage of

[110] *Beck'scher Kommentar*-Altes, *op. cit.* footnote 42, § 5a, para. 110. Regarding the requirements of Danish law in 2000 in this respect, *see* House of Lords' judgment, *op. cit.* footnote 32.

[111] *See also* Recital 20. For a refutation of the argument that the ban on retroactivity may be infringed, *see* Diesbach, *Pay-TV oder FreeTV*, Baden-Baden 1998, p. 168.

the event be subject to the conditions laid down in Article 3a(1). Article 3a makes no provision in this regard. Recital 20 of the amending Directive, on the other hand, refers to the date of implementation in a given Member State. Thus, if a Member State lists an event only after publication of the Directive and transposition of Article 3a into national law, there is potential for conflict about when the measure becomes applicable in respect of broadcasters based in other Member States. There is a view, based on the provisions of Article 3a(2), that the defining date is that on which the Commission publishes the list of a Member State's measures in the *Official Journal of the European Communities*. An alternative view is that national lawmakers have discretion to fix the date from which their measures are deemed to apply in respect of all Community based broadcasters.[112]

The status of a Commission decision on the compatibility with Community law of measures notified to it by a Member State under Article 3a is unclear. A case has been pending for some time in the Court of First Instance in which the applicant challenges the decision by the Commission to approve measures notified to it by the United Kingdom in accordance with Article 3a. The application is based on the grounds *inter alia* of alleged breach of the principles of proportionality, the right to property, freedom to engage in economic activity, protection of legitimate expectations, non-retroactivity and equality.[113]

bb) Assessment as Part of a Review of the "Television without Frontiers" Directive

In a consultation procedure as part of a review of the "Television without Frontiers" Directive, the Commission found a widespread view, in contributions made to it, that Article 3a was useful, necessary, effective and proportionate.[114] It concluded that there was no urgent pressing need for this provision of the Directive to be revised, although it also raised the possibility

[112] *See*, concerning this debate, *Beck'scher Kommentar*-Altes, *op. cit.* footnote 42, § 5a, paras 58 *et seq.* and 129.

[113] ECJ, Case T-33/01, KirchMedia GmbH & Co KGaA and Kirchmedia WM AG/Commission, OJ C 134, 5 May 2001, p. 24 (now being pursued by Infront WM AG). For more detail regarding possible incompatibility of Article 3a with other Community law, *see* Altes in *Beck'scher Kommentar*, *op. cit.* footnote 42, § 5a, para 69 *et seq.*

[114] The Future of European Regulatory Audiovisual Policy, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, COM (2003) 784 final, Brussels, 15 December 2003, point 3.3.

that it should draw up guidelines providing specific information for Member States on the choice and implementation of national measures.[115] The Commission took the view that the compilation of a European list (which had been discussed) would have no added value and could not be seen to be in conformity with the principle of subsidiarity.

2. New Media and Interactive Services

There remains considerable uncertainty about how the list-based provisions will affect the exercise of transmission rights via new media. As discussed earlier in this report (Section II, 2. b), the economic importance of new media rights is growing as the technology develops (notably with access to broadband). It is likely that sports rights will continue to play a significant role, as they are used to entice customers to new media services. Because, in the process of convergence, new media are likely to replace television to an ever-greater extent, it is conceivable that the list-based rules could be extended to cover new types of provision such as streaming.[116] Under the law as it stands, the services covered must be television services.

Transmission of sports events via new media is not only a phenomenon of growing economic significance, but also, as explained, one which raises fresh questions about future regulatory provisions for the new services – and, *inter alia,* about what requirements European law should impose with respect to its content.[117]

IV. Conditions for Content Transmitted

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[115] Concerning transposition of Article 9a of the European Convention, *see* Standing Committee on Transfrontier Television (T-TT), *Guidelines for the Implementation of Article 9a*, T-TT (2002)18 rev1, *available at* http://www.coe.int/t/e/human_rights/media/2_T-TT/6_Events/PDF_T-TT_2002_018rev1%20E%20Guidelines-2.pdf.

[116] Altes in *Beck'scher Kommentar, op. cit.* footnote 42, §5a, para 148.

[117] Commission press release of 30 January 2004, *available at* http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.getfile=gf&doc=IP/04/134|0|RAPID&lg=EN&type=PDF. *See*, concerning this debate, McGonagle, *Does the Existing Regulatory Framework for Television Apply to the New Media*?, report on experts' seminar on The European Convention on Transfrontier Television in an Evolving Broadcasting Environment, 6 December 2001, T-TT(2001)er2, *available at* http://www.coe.int/t/e/human_rights/media/2_T-TT/3_Texts_and_documents/PDF_T-TT_2001_er3%20E.pdf; and Does the Existing Regulatory Framework for Television Apply to the New Media?, *IRIS plus* 2001-6 *available at* http://www.obs.coe.int/oea_publ/iris/iris_plus/iplus6_2001.pdf.en.

1. Rules on Advertising

Rules on advertising – with their economic implications for the transmission of sports events – feature prominently in European legislation on content. The most relevant instrument in this respect is the "Television without Frontiers" Directive. The rules on advertising contained in the European Convention on Transfrontier Television are not substantially different from those in the Directive. In what follows, the Convention, its development and the texts associated with it will be referred to only in relation to areas where the rules differ or where the Convention's provisions can assist in the interpretation of the Directive.[118]

a) Nature of Television Advertising

The provisions of Article 10 on the form and presentation of television advertising establish principles for keeping the editorial parts of programming separate from the various types of advertising. These include the requirements that optical and/or acoustic means be used to make the distinction and that isolated advertising and teleshopping spots remain the exception, as well as a prohibition on subliminal techniques and surreptitious advertising.

The principle that advertising should be separate assumes particular relevance in sports broadcasts in relation to what is known as "graphic sponsorship." This is where a time clock, scoreboard, or other measurement indicator at an event is linked to a corporate logo. In programming terms it can be classed as information in those cases where it is a form of source indicator, showing which company is responsible for the measurement in question.[119] Where there is no such connection between the information and the company, it constitutes advertising. The same considerations apply in respect to so-called "crawls" – strips of text running across or along the edge of the screen, which are regarded as isolated advertising spots and have to be counted as part of the broadcaster's hourly or daily advertising time quota. The issues raised here are also relevant in connection with the regulation of new forms of advertising such as split screen and virtual advertising (see below).

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[118] *See* ECJ, Case C-245/01, RTL Television GmbH/NLM, judgment of 23 October 2003, not yet published in the European Court Reports; C-6/98, ARD/ProSieben Media, Rec. 1999, I-7599.

[119] Kreile, *Die Neuregelung der Werbung im 4. Rundfunkänderungsstaatsvertrag*, ZUM 2000, pp 194, 197.

It is argued in some quarters that advertising inside a sports stadium need not be regarded as surreptitious advertising by the broadcaster of an event – even when it is directed primarily at a television audience. At the same time there is a view that broadcasters should be required at least to ensure that event organisers do not permit dishonest, unlawful or immoral advertisements to be placed where they will be shown on television.[120]

b) Rules on Quantity

The Directive also places restrictions on the amount of advertising. Under Article 18, the total proportion of transmission time for all forms of advertising (teleshopping spots, advertising spots and other forms of advertising), with the exception of teleshopping windows, may not exceed 20 % of daily transmission time. Transmission time for advertising spots may not exceed 15 % of daily transmission time. The proportion of advertising spots and teleshopping spots within a given hour may not exceed 20 %. There are specific rules, set out in detail in Article 11, on the way that advertising spots are to be inserted between or during programmes.

The Federal Communications Commission of the United States does not place the same blanket restrictions on advertising similar to the "Television Without Frontiers" Directive. Beginning in 1984 under the Reagan Administration, the FCC deregulated all limits on the amount of advertising times and the restriction on program-length commercials.[121] There was a private NAB limit imposed by a trade association, the National Association of Broadcasters, in its Code, which the FCC enforced, but this was later repealed by the NAB. As the deregulation impacted every genre of broadcasting, special exceptions were deemed necessary for children's programming. The District of Columbia Circuit of the U.S. Court of Appeals ordered the FCC to reconsider its decision. Before the FCC replied to the court's ruling, Congress enacted the Children's Television Act of 1990 which limited the type and amount of advertising that may be aired in TV programming directed to children 12 and younger. Broadcast stations are required to air, at a minimum, 3 hours of children's programming per week.[122] For children's programming on the weekends, commercial television stations may air no more than 10.5 minutes of commercials per hour and for weekdays, no more than 12 minutes per hour.

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[120] Ladeur, *Neue Werbeformen und der Grundsatz der Trennung von Werbung und Programm*, ZUM 1999, pp 672, 677; *see also* below.

[121] *See* Table 6 of the Chronology of Key Events in US Regulations on Advertising to Children *available at* http://www.ijbnpa.org/content/1/1/3/table/T6.

[122] *FCC Report and Order* (FCC 96-335), Aug. 8, 1996, para. 5.

Under Article 18(3) of the Directive, a broadcaster's announcements about its own programmes and ancillary products do not fall within the definition of advertising. The article does stipulate, however, that it relates only to the broadcaster's "own" programmes and to products "directly derived from those programmes." This provision is relevant with regard to the classification of ancillary material derived from sports programmes, such as videos, CD-ROMs or books about sports events. Other merchandising items (such as towels with sports logos etc.) cannot, however, be regarded as deriving directly from a programme.[123]

The Commission, in its communication of 15 December 2003, stated its position on possible amendments to the Directive's provisions on advertising.[124] It noted that most Member States supported the existing rules on the duration of advertising. In the consultation process on possible revision of the Directive, however, submissions from *inter alia* certain Member States and most commercial broadcasters advocated a greater degree of flexibility. The Commission therefore declared its intention to explore, with the help of experts, how the rules on duration might develop, taking account in particular of the degree of control exercised by viewers and the wider choice of programmes on offer.[125]

c) Insertion of Advertising during Programmes

The provisions of Article 11 paragraphs 1, 2 and 4 of the "Television without Frontiers" Directive are particularly important in relation to the transmission of sports events.

Paragraph 1 lays down the principle that advertising and teleshopping spots must be inserted between programmes. Only exceptionally can they be inserted during programmes. Paragraph 2 provides for one type of exception in this regard. It stipulates that in programmes consisting of autonomous parts,

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[123] *Beck'scher Kommentar*-Ladeur, *op. cit.* footnote 42, §15, para. 6.

[124] Commission, Communication COM(2003) 784 final (*op. cit.* footnote 114), section 3.5 *available at* http://europa.eu.int/eur-lex/en/com/cnc/2003/com2003_0784en01.pdf. *See IRIS* 2004-1: 6 *available at* http://merlin.obs.coe.int/show_iris_link.php?language=en&iris_link=2004_1:6 &id=4326.

[125] Commission, Communication COM(2003) 784 final, *op. cit.* footnote 114, section 3.5 last paragraph *available at* http://europa.eu.int/eur-lex/en/com/cnc/2003/com2003_0784en01.pdf. Contributions submitted during the consultation process are *available at* http://europa.eu.int/comm/avpolicy/regul/review-twf2003/contribution.htm.

or in sports programmes, advertising and teleshopping spots may only be inserted between the parts or in the intervals. This must be done – in accordance with the second sentence of Article 11(1) – in such a way that the advertising and teleshopping spots do not prejudice the integrity and value of the programme, taking into account natural breaks in it as well as its duration and nature, and that the rights of the rightsholders are not prejudiced.

The concept of sports programmes covers all forms of sports broadcasting, *i.e.* both live and deferred transmission. It does not, however, include programmes that are editorially and journalistically structured and chiefly concerned with contextual reportage and analysis. For these programmes the general rule on insertion of advertising applies, as laid down in Article 11(4) of the "Television without Frontiers" Directive; in other words a period of at least 20 minutes should elapse between advertising breaks.[126]

In some countries, however, it is customary to slot more numerous short advertising spots into sports and other programmes. In Slovakia, for example the Broadcasting Council has ruled that the insertion of advertising during breaks in a match (*i.e.* not just in the intervals prescribed in the rules of the game) is compatible with national broadcasting legislation.[127] Italian broadcasters also insert advertising spots of about five seconds' duration during the transmission of soccer matches, both in short unplanned breaks and during play. This practice developed with the approval of the communications authorities because the provision transposing Article 11 of the Directive, word for word, into Italian law does not include any definition of an "interval." There are therefore deemed to be "breaks" in a soccer match for free kicks and corner kicks, and also when substitutions are made during play.[128] The counter-argument is that intervals in sports events must be those that occur in accordance with the rules of the respective sports. Unintended breaks cannot thus count as intervals. An interval has to be part of the structure of the game, with time allocated for it under the rules, and this is not the case, for example, when play is interrupted as a result of a foul, and a free kick ensues. The same principle should also be applicable in sports other than football. Thus intervals

[126] Hartstein/Ring/Kreile/Dörr/Stettner, *Medienrecht, Kommentar zu § 44 Rundfunkstaatsvertrag* (Loseblattkommentar, Stand April 2000), paras 17 and 18.
[127] *See IRIS* 2004–6:16 *available at* http://merlin.obs.coe.int/iris/2004/6/article32.en.html.
[128] Based on: European Audiovisual Observatory (ed.), *The Insertion of Short Advertisement Spots During Football Matches and its Compliance with the "Television without Frontiers" Directive and the European Convention on Transfrontier Television*, Strasbourg 2002; *available at* http://www.obs.coe.int/online_publication/expert/ad_football.html.en (*see* the first paragraph of the introduction and the contribution concerning Italy in the comments).

for a change of ends, or between sets in a game like tennis, may be regarded as natural breaks for the purposes of Article 11(2). In competitions involving a series of individual bouts or similarly distinct sections, advertising can also be inserted in accordance with this stricter conception of the rules.

There is a view that motor sport events such as Formula 1 races do not follow a particular order of play and are not spatially focused to the same extent as team sports. The argument is that, by switching camera position or focusing on a different part of the race, the broadcaster itself can thereby impose segmentation and insert advertising.[129] The counter-argument is that because such events do not have prescribed intervals they do not fall within the scope of Article 11(2) at all. In this case the only relevant stipulation on the insertion of advertising would be that of Article 11(4).

As it undertook to do in its communication of December 2003,[130] the Commission adopted a position on the question of possible amendments to the advertising provisions in the "Television without Frontiers" Directive. In an interpretive communication of April 2004 it clarified the provisions on insertion of advertising during sports events.[131] The communication states that sports programmes which do not contain natural pauses or objective intervals within the meaning of Article 11(2) fall within the scope of paragraph 4. This means that a period of at least 20 minutes should elapse between each successive advertising break within the programme.

Irrespective of these considerations, the Commission states that national authorities must ensure that the broadcast of so-called mini-spots during transmission of a sports event does not undermine the key principles laid down in Article 10 of the Directive. Such forms of advertising must be

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[129] *Beck'scher Kommentar*-Ladeur, *op. cit.* footnote 42, § 44, para. 11. The Standing Committee on Transfrontier Television (T-TT), in its Opinion No 4 (1995) on certain provisions on advertising and sponsorship, also found that artificial breaks, introduced by the broadcaster in particular types of sport events that had no natural breaks, could be justified in some cases, and that Member States might enjoy a margin of appreciation in the interpretation of Article 14(2); *see* http://www.coe.int/t/e/human_rights/media/2_TTT/3_Texts_and_documents/PDF_T-TT_2002_ref%20E%20Opinions%20&%20Recommendations.pdf.

[130] Commission, Communication COM(2003) 784 final, *op. cit.* footnote 114, section 3.5 *available at* http://europa.eu.int/eur-lex/en/com/cnc/2003/com2003_0784en01.pdf.

[131] Commission Interpretive Communication on Certain Aspects of the Provisions on Televised Advertising in the "Television without Frontiers" Directive, C(2004) 1450 of 23 April 2004, *available at* http://europa.eu.int/comm/avpolicy/legis/key_doc/legispdffiles/1450_en.pdf, para 23.

"readily recognisable as such and kept quite separate from other parts of the programme service by optical and/or acoustic means." Furthermore, under Article 10(2) of the Directive, mini-spots should be broadcast only exceptionally in accordance with the rule that isolated advertising must remain the exception.[132]

d) Sponsorship

Article 17 of the "Television without Frontiers" Directive lays down minimum standards for the regulation of television programme sponsorship. In particular it prohibits the exercise of influence by sponsors, and requires that sponsored programmes be clearly identified as such. By formalising programme sponsorship and requiring transparency this provision counters the multiple possibilities for surreptitious advertising and product placement.[133]

The regulation relating to sponsorship identification is similar in the United States. When broadcasters present any programming which was paid for, they must state that the matter is sponsored, paid for, or furnished by an identified sponsor.[134] Sponsorship identification is particularly essential for advertising aired during children's programming, due to the generally accepted inability of children to differentiate between advertising and program content.

Unlike advertising programmes or spots, sponsorship may not be designed to promote products or services but simply to support specific programmes, with a view to enhancing the sponsor's image or transferring it by association. The transmission of international soccer matches involving the German team is thus frequently sponsored by beer manufacturers. Beyond the basic definition, however, national lawmakers are permitted a degree of latitude in framing practical stipulations. They may, for example, allow reference to a sponsor to appear in the form of a moving image or may permit such reference to include a logo alongside or in place of the sponsor's name. Likewise they may choose to allow or prohibit the insertion of spots advertising the sponsor's products or

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[132] *Id.*, paras 20, 21. On the basis of the explanatory report to the European Convention on Transfrontier Television, the Commission identifies only limited scope for derogations under Article 10(2). Examples are the case of a single long advertisement, or where the particular nature of the programme makes the period available for advertising or teleshopping very short.

[133] *Beck'scher Kommentar*-Brinkmann, *op. cit.* footnote 42, §8 para. 6.

[134] *See* Title 47 of the code of Federal Regulations Part 76 Section 221 *available at* http://frwebgate.access.gpo.gov/cgibin/gecfr.cgi?TITLE=47&PART=76&SECTION=221&YEAR=2000&TYPE=TEXT.

services during the sponsored programmes.[135]

e) New Forms of Advertising

Many new forms of advertising have been developed for sports broadcasts, or at least are of particular importance in that context. Examples are split screen advertising and virtual advertising.[136]

The split screen technique involves using part of the screen to present advertising, with editorial and advertising content being broadcast in parallel.[137] In Germany this form of advertising was first used during the transmission of Formula 1 racing and boxing matches. Images of the sports events were shown in a reduced window on the screen alongside a larger window where advertising was broadcast.[138] In terms of broadcasting law, the split screen technique is problematic with regard to the principle that advertising must be separate from other content. In this respect Article 10(1) of the "Television without Frontiers" Directive needs interpretation. Does it require that advertising be separated spatially and temporally, or can the requirement of separation be met by either a temporal distinction (as with traditional advertising spots) or a spatial one?[139] The European Court of Justice has ruled in relation to the "Television without Frontiers" Directive, that where the Community legislature has not drafted a provision of the Directive in clear and unequivocal terms, it must be given a restrictive interpretation.[140] It is therefore argued that a spatial separation should suffice and that what is required is a "dividing line" to prevent an imperceptible merging of the advertising and the programme. Similarly the Standing

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[135] Examples from *Beck'scher Kommentar*-Brinkmann, *op. cit.* footnote 42, § 8 para. 7.

[136] Blair, *How to Regulate New Advertising Techniques, Expert Seminar of the Standing Committee on Transfrontier Television* (T-TT) *on The European Convention on Transfrontier Television in an Evolving Broadcasting Environment*, 6 December 2001, T-TT(2001) 1, describes emerging problems and attempted solutions in the United Kingdom and Germany, *available at* http://www.coe.int/t/e/human_rights/media/2_T-TT/3_Texts_and_documents/PDF_T-TT_2001_er1%20E.pdf.

[137] Hartstein/Ring/Kreile/Dörr/Stettner, *Medienrecht, Kommentar zu § 7 Rundfunkstaatsvertrag* (Loseblattkommentar, Stand April 2000), para. 32b.

[138] *See IRIS* 1999–4: 25 *available at*: http://merlin.obs.coe.int/iris/1999/4/article25.en.html.

[139] The Standing Committee on Transfrontier Television (T-TT) raises this question in its *Memorandum No. T-TT(2002) 19 on advertising rules and principles in the Convention*, 12-13 September 2002, p. 3, *available at* http://www.coe.int/t/e/human_rights/media/2_T-TT/3_Texts_and_documents/PDF_T-TT(2002)019%20E%20Advertising%20rules%20Convention.pdf.

[140] ECJ, C-6/98, ARD/ProSieben Media, *op. cit.* footnote 118, para. 30.

Committee on Transfrontier Television in its Opinion on Split-Screen Advertising calls for a clear and recognisable separation of programming and advertising content.[141] The Commission has also taken this view.[142] It stipulates that the division must be such as to make "advertising and teleshopping [...] readily recognisable as such and kept clearly separate from other parts of the programme." The weight of opinion supports the view that the duration of split screen advertising must be counted against the total advertising time. Thus, this form of advertising cannot be used to extend the amount of advertising.[143] The same applies in respect to "crawls" (see *a* above), strips of text that run along the edge of the screen and carry advertising content.[144]

Another new form of advertising is virtual advertising. This is a technique whereby images can be modified either by the superimposition of new advertising or by altering existing advertising messages (e.g. pitch-perimeter advertising in a stadium). From a legal standpoint there remains considerable uncertainty about the extent to which the requirement of separation must be observed with this form of advertising. Some pointers are to be found in a Council of Europe recommendation.[145] This stipulates that the presence of virtual advertising should be indicated to viewers, by appropriate means, at the beginning and the end of the programme concerned. There are also conflicting views on the question of how virtual advertising should be inserted into programmes. While rules in some countries stipulate that virtual

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[141] Standing Committee on Transfrontier Television (T-TT), Opinion No. 9 (2002) on Split-Screen Advertising, 29-30 April 2002, p.4 *available at* http://www.coe.int/t/e/human_rights/media/2_T-TT/3_Texts_and_documents/PDF_T-TT_2002_010%20E%20Compendium%20split-screen%20ad.pdf.
Hartstein/Ring/Kreile/Dörr/Stettner, *Medienrecht, Kommentar zu § 7 Rundfunkstaatsvertrag* (Loseblattkommentar, Stand April 2000), para. 32a; *Beck'scher Kommentar*-Ladeur, *op. cit.* footnote 42, § 7, para. 39.

[142] Commission, Communication C(2004) 1450, *op. cit.* footnote 131, paras 45 *et seq.* English version *available at* http://europa.eu.int/comm/avpolicy/legis/key_doc/legispdffiles/1450_en.pdf.

[143] Commission, Communication C(2004) 1450, *op. cit.* footnote 131, para. 50. English version *available at* http://europa.eu.int/comm/avpolicy/legis/key_doc/legispdffiles/1450_en.pdf.

[144] *Beck'scher Kommentar*-Ladeur, *op. cit.*, footnote 42, § 7, para. 39; Kreile, *Die Neuregelung der Werbung im 4. Rundfunkänderungsstaatsvertrag*, *op. cit.* footnote 36, p. 196.

[145] Recommendation (97) 1 of the Standing Committee on Transfrontier Television (T-TT), 20-21 March 1997, concerning the Use of Virtual Advertising Notably During the Broadcast of Sports Events, *available at* http://www.coe.int/t/e/human_rights/media/2_T-TT/3_Texts_and_documents/PDF_T-TT_2002_ref%20E%20Opinions%20&%20Recommendations.pdf.

advertising can only be used to replace advertising already in existence at the place (e.g. a stadium) from which the event is broadcast – virtual advertising could, for instance be run along a pitch-perimeter barrier[146] – the effect of other provisions is that it may appear wherever advertising boards are commonly available.[147] Nor are there as yet any European rules on forms of virtual advertising in which figures move over the screen or advertisements are projected onto the field of play (e.g. where the originator of the transmission signal or the broadcaster inserts virtual advertising into the centre-circle or over the entire field of play).[148]

In its interpretive communication the Commission sets out how the principles enshrined in Chapter IV of the Directive should be applied to virtual advertising.[149] One of its stipulations is that broadcasters and viewers must be informed in advance of the presence of virtual images. In addition, virtual advertising may be used during broadcasts of sporting events only on those surfaces of the site or stadium where advertising can be affixed materially, and which are usually intended for such promotional purposes. The Directive's provisions on sponsorship must be complied with in full.

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[146] *See*, for example, the German provision in §7(6)(2) of the State Treaty on Broadcasting.

[147] *See* point 6, 3rd indent, FIFA Regulations for the Use of Virtual Advertising, December 1999, *available at* http://images.fifa.com/fifa/handbook/VA/downloads/VirtualRegs_e.pdf: "Outside the field of play, VA may only be applied during the transmission to appear on existing flat surfaces which may or may not be used in reality for publicity purposes (including advertising boards standing beside the field of play)."; point 2, European Broadcasting Union (EBU) Memorandum on Virtual Advertising, 25 May 2000, *available at* http://www.ebu.ch/departments/legal/pdf/leg_virtual_advertising.pdf: "Virtual advertising may be inserted only on surfaces at the venue which are customarily used for advertising, subject to point 3 below."

[148] *See*, however, point 6, 4th indent, FIFA Regulations, *op. cit.* footnote 147: "VA may be applied to appear on the field of play in the centre-circle and in the two penalty areas (including the arc of each area) until the moment when the players enter the field of play before the start of each half of the match, from the moment when they leave the field of play at the end of the first half, and from the moment they leave the field of play after the match has officially finished (normal time, golden goal, penalty shoot-out)."; point 3 Memorandum EBU, *op. cit,* footnote 147: "Virtual advertising may be inserted on the field of play/surface, only outside competition times and only if there are no players/competitors on the field of play/surface."

[149] Commission, Communication C(2004) 1450, *op. cit.* footnote 131, paras 66 *et seq.* English version *available at* http://europa.eu.int/comm/avpolicy/legis/key_doc/legispdffiles/1450_en.pdf. The Standing Committee on Transfrontier Television (T-TT) in its Memorandum No. T-TT(2002) 19, *op. cit.* footnote 115, p. 4, *available at* http://www.coe.int/t/e/human_rights/media/2_T-TT/3_Texts_and_documents/PDF_T-TT(2002)019%20E%20Advertising%20rules%20Convention.pdf, also sees a need for reform inasmuch as there is no consensus yet on which advertising rules should be applied to virtual advertising.

In the U.S., the absence of a legal framework to regulate the use of virtual advertising has resulted in a number of business and legal disputes. While digital ads are mainly used in sports coverage, it is starting to influence television and cinema in the form of digitally altered products inserted during post-production. For example, in 2002, the owners of several buildings in New York's Times Square sued Sony Pictures when they learned that the filmmakers had digitally removed a *USA Today* billboard prominently displayed on their building and replaced it with a different advertisement, a Samsung sign, in the "Spider Man" movie trailers.[150] The complaint alleged trademark violation and unfair competition for superimposing advertisements on billboards appearing in the movie and trailers. Although the court dismissed the complaint against Sony, the lawsuit brought more attention to the growing practice of using virtual advertising and highlighted the need for advertisers and broadcasters to consider the ramifications of using the technology without the use of disclaimers. Also, the FCC has a dormant, unenforced policy against subliminal advertising.[151]

f) Article 3 of the "Television without Frontiers" Directive

An important provision in terms of advertising legislation is Article 3(1) of the "Television without Frontiers" Directive, stipulating that Member States shall remain free to require television broadcasters under their jurisdiction to comply with stricter or more detailed rules in the areas covered by the Directive. It is a measure of discretion that works in only one direction, however, for the Directive lays down minimum requirements that may only be made more – and not less – stringent in their application to domestic broadcasters. Thus it does not prohibit the application of stricter rules to a Member State's own broadcasters and it is clearly not intended to prevent what is known as "reverse discrimination."[152]

Where Member States avail themselves of this regulatory discretion, problems

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[150] Sherwood 48 Assocs. v. Sony Corp. of Am., 213 F.Supp.2d 376 (S.D.N.Y. 2002).

[151] *See* discussion *at* http://www.fcc.gov/Speeches/Tristani/Statements/2001/stgt123.html.

[152] European Audiovisual Observatory, *Transfrontier Television in the European Union: Market Impact and Selected Legal Aspects*, background paper prepared for a Ministerial Conference on Broadcasting organised by the Irish Presidency of the European Union, Dublin & Drogheda, 1-3 March 2004, *available at* http://www.obs.coe.int/online_publication/transfrontier_tv.pdf.en; Roßnagel/Strothmann, *op. cit.* footnote 84, p. 185.

can arise with programmes brought in from other countries and broadcast by domestic companies.

In the case of *Bacardi-Martini and Cellier des Dauphins v. Newcastle United Football Company Ltd*,[153] the European Court of Justice rejected a British court's application for a preliminary ruling, on the grounds that it was not sufficiently clear what the impact on the case would be if the French legislation at the core of the dispute were found to be incompatible with Community law.[154]

In a similar case, however, Advocate General Tizzano argued that a prohibition on the televised advertising of alcoholic drinks was compatible with Community law.[155] He stated first that the obligation to use all available means to prevent advertising for alcoholic drinks from being shown on French television did indeed constitute a restriction on the principle of free movement of services. The restriction was, however, justified with reference to the protection of public health, inasmuch as it was proportionate to the aim it served. The French rule did not exceed what was required in pursuit of the aim of promoting public health. The Advocate General expressed the view that broadcasters did not possess the means to make advertisements for alcoholic drinks unrecognisable. Modern techniques for fading out televised images (and inserting virtual advertising space) were too costly to be deemed an alternative solution. Moreover, the brief duration of the appearance of this form of advertising (in this case on pitch-perimeter barriers) did not allow for either content control or for the inclusion of a warning about the dangers associated with alcohol consumption. Generally, the ECJ had found in

[153] ECJ, C-318/00, *Bacardi-Martini SAS and Cellier des Dauphins v. Newcastle United Football Company Ltd.*, Rec. 2003, I-905.

[154] The applicants, who produce and sell alcoholic drinks as a company constituted under French law, took a case in the British courts claiming compensation against a company constituted under British law, which owns a football club and a stadium. French law prohibits the televised advertising of alcoholic drinks. In the case of events that take place in other countries but are broadcast chiefly for a French audience, all those who conclude contractual agreements with the holder of the transmission rights are required, if advertising for alcoholic drinks is legally permitted in the host country, to use every available means to prevent the brand names of such drinks from being broadcast. On the basis of these rules the applicants and their advertising agency were barred from placing their advertising at a football match taking place in the UK and involving a French team because coverage of the game would also have been broadcast in France by a French broadcaster who had acquired the transmission rights.

[155] GA Tizzano, C-262 and C-429/02, Commission/France and Bacardi France/Télévision Française TF1 *inter alia*, concluding arguments, 11 March 2004, not yet published in the European Court Reports.

previous cases that the application by another Member State of less stringent rules on the advertising of alcohol did not imply that stricter provisions were disproportionate.

It is interesting that the Advocate General regarded the indirect advertising of alcoholic drinks via the appearance on television of advertisements at sports events (pitch-perimeter advertising) as lying outside the scope of the "Television without Frontiers" Directive. He made the point *inter alia* that it did not fall within the legal definition laid down in Article 1(b) in the version of Directive 89/552/EEC on which the case was based (the article in question is now Article 1(c)). This provision referred only to sequences of televised images produced solely for the purposes of advertising and for which, as such, the broadcaster received payment. The only question to be examined, therefore, was whether the French legislation in question was compatible with the free movement of services.

g) Advertising in the U.S.

In the U.S., the Federal Trade Commission has the primary responsibility for determining whether an advertisement is false or misleading.[156] The government may not take action against subjectively "offensive advertising" unless it directly violates any law or regulation. Besides obscene material and indecent speech aired at certain times, federal law prohibits the advertising of cigarettes or tobacco products on any electronic communication medium under the FCC's jurisdiction.[157] There is currently no regulation for the advertisement of alcoholic products, although broadcasters and the alcohol industry have adhered to voluntary standards. The National Association of Broadcasters (NAB) set voluntary standards by which broadcast stations would conduct themselves in regards to violence and alcohol during certain times of the day. The Distilled Spirits Council of the United States, the trade association for the nation's largest liquor manufacturers, ended its voluntary ban of liquor advertising on radio and television in 1996, although it continues to follow the industry's advertising guidelines, the Code of Good Practice.[158]

There is also no specific statute in the U.S. prohibiting the use of split-screen on television; the issue of the blurred line between content and advertising is a

[156] *See* The Public and Broadcasting *available at* http://www.fcc.gov/mb/audio/decdoc/public_and_broadcasting.html#RATES.
[157] Capitol Broadcasting Company v. FCC, 324 F.2d 402 (D.C. Cir. 1963).
[158] Stuart Elliot, *Liquor Industry Ends Its Ad Ban In Broadcasting*, NY TIMES, Nov. 8, 1996, *at* A1.

subject of much debate. Federal law requires disclosure of sponsored broadcast materials. The FCC has consistently upheld sponsorship identification requirements:

> When a broadcast station transmits any matter for which money, service, or other valuable consideration is either directly or indirectly paid or promised to, or charged or accepted by such station, the station, at the time of the broadcast, shall announce: (1) That such matter is sponsored, paid for, or furnished, either in whole or in part, and (2) By whom or on whose behalf such consideration was supplied...[159]

However, this rule is not adequate to the new challenges posed by imbedded advertising. Program producers and television networks are shifting advertising from commercial breaks to programming itself. They are inserting branded products directly into programs in exchange for substantial fees or other consideration. This "product placement" has become so closely integrated into the programs that the line between programming and advertising has become increasingly blurred. There are one or two failed lawsuits about motion pictures.

With the advent of technologies such as TiVo, which allows consumers to edit out TV commercials, product placement is taking on an even greater importance. Television producers are looking for new ways to integrate advertising and content. Basing an entire show around a product is one technique; giving viewers the capability to immediately purchase products featured on the program is another.

2. Prohibitions and restrictions on advertising

The strongest checks on television advertising during sports broadcasting are in the form of prohibitions and restrictions on certain types of advertising.

a) The "Television without Frontiers" Directive

Article 13 of the "Television without Frontiers" Directive provides for the prohibition of tobacco advertising on television. The provision has been

[159] 47 C.F.R. §73.1212 (November 12, 2004). 47 USC §154 (2004).

ineffective – notably in the case of motor sport events, including Formula 1 racing – because although no tobacco advertisements have been inserted into the relevant TV programmes the manufacturers have advertised on the vehicles and at the venues.

b) Other secondary Community legislation

Article 3(1) of the so-called "Tobacco Advertising Directive,"[160] 98/43/EC, placed a ban on all forms of advertising and sponsorship of tobacco products. Its provisions were intended to apply, though, independently of the "Television without Frontiers" Directive, which had primacy as the instrument regulating the transmission of television programmes. The European Court of Justice annulled Directive 98/43/EC, however, on the grounds that the Community had insufficient basis for jurisdiction.[161]

Subsequently, on 26 May 2003 a new Directive, 2003/33/EC,[162] came into force with the aim of approximating the Member States' laws and regulations on the advertising and sponsorship of tobacco products. With its comprehensive ban on tobacco advertising, the new Directive is intended to regulate the advertising of tobacco products, and the sponsorship associated with it, in the media. Its aim is to remove barriers to the free movement of products and services between Member States. Again, with the new Directive, television is excepted from the scope of the provisions – there already being specific Community provision for television in this respect in Article 13 of the "Television without Frontiers" Directive. Article 5(1) of the 2003 Directive, however, prohibits sponsorship of events involving or taking place in several Member States or otherwise having cross-border effects (for example through television broadcasts). The purpose of this provision is to avoid distortions of the conditions of competition due to differences in Member States' national legislation. Recital 1 of the Directive makes the point that such distortions have already been noted in connection with the organisation of major sporting events with cross-border effects. Article 2(c) of the Directive contains a broad

[160] Directive 98/43/EC of the European Parliament and of the Council of 6 July 1998 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products, OJ L 213 of 30 July 1998, p. 9.

[161] ECJ, C-376/98, Germany/European Parliament and Council of the European Union, Rec. 2000, I-8419.

[162] Directive 2003/33/EC of the European Parliament and of the Council of 26 May 2003 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products, OJ L 152 of 20 June 2003, p. 16.

definition of sponsorship, namely:

> any form of public or private contribution to any event, activity or individual with the aim or direct or indirect effect of promoting a tobacco product. Tobacco advertising is thus prohibited not only on barriers at sports stadiums and other venues but also on vehicles and on competitors themselves at events or activities of a cross-border character.

The U.S. Congress passed the Federal Cigarette Labelling and Advertising Act of 1971[163] which prohibited cigarette advertising on any medium of electronic communication subject to the jurisdiction of the FCC. In enforcing this Act, the Department of Justice's Office of Consumer Litigation obtained consent decrees that forced the removal of tobacco-related signs from various sports facilities. One decree required Madison Square Garden to remove a eye-catching Marlboro sign from its strategic courtside location at televised New York Knicks' basketball games.[164] Another decree[165] required Philip Morris Incorporated to remove prominent Marlboro billboards from professional baseball, football, basketball, and hockey stadiums and arenas around the country.

Final Remarks

In recent years the economic significance of sports rights for television and the new media has grown markedly. As a result of this increased economic interest, new laws and regulations have tended to be introduced.

The discussion above has concentrated on two complex issues: firstly, it has shown that the Member States' own regulations determine the legal framework for the origins, content and ownership of sports rights. It was then explained how (European) competition law has a significant influence on the sale, acquisition and exercise of sports broadcasting rights, mainly for television. Due to its exclusive nature, coverage of sports events that attract large audiences is very important, not only for pay-TV broadcasters. European media policy aims to protect citizens' right of access to information and to maintain a varied broadcasting landscape in Europe. On several occasions, the view has been expressed that, in light of these objectives, it is inappropriate for the owners or brokers of rights to premium content to be

[163] 15 U.S.C. §1335 (2005).
[164] United States v. Madison Square Garden, L.P., No. 95-2228 (S.D.N.Y. filed Apr. 4, 1995).
[165] United States v. Philip Morris, Inc., No. 95-1077 (D.D.C. filed Jun. 6, 1995).

based outside the territory in which European media and competition law applies. The provisions of competition law concerning the sale of (exclusive) broadcasting licences do not apply to rightholders domiciled outside the EU/EEA (at least as a rule). Therefore, additional regulations on the broadcasting of sports programmes are of particular interest. These include the rule that events of major interest to society should be broadcast on free to air TV. The (European) provisions that apply to advertising and sponsorship of sports broadcasts and which therefore concern consumer protection are also relevant. These legal questions relating to the broadcasting of sports events in the audiovisual media will be discussed in the next subsection.

Of relevance here are not only those provisions regarding the televised transmission of sports events that form part of broadcasting legislation as such, but also the interfaces between broadcasting legislation and other areas of law, and the influence of those other areas – copyright law and competition law, for example. In respect of the new media, too, there has been increased legislative activity. The development of the new media and their growing importance in the transmission of sports events may make it necessary to revise and/or adapt broadcasting laws.