THE OVER-PROTECTION OF INTELLECTUAL PROPERTY RIGHTS IN SPORT

By Prof. J. Gordon Hylton, Marquette University Law School and the National Sports Law Institute

In the modern era intellectual property rights have become a major source of revenue for the sports industry. Legal theories of copyright, trademark, right of publicity, and even patent have been successfully invoked to permit individual sports teams and the leagues and associations to which they belong to capture more and more revenue from their fans. Broadcasting rights have enabled the operators of teams and competitions to play before millions of spectators who are present vicariously rather than physically. Teams and leagues enter into lucrative licensing agreements for their logos and trademarks with a wide variety of manufacturers of consumer products, and athletes continually find new ways to capitalize on their image and publicity rights.

As a consequence of these developments, multi-billion dollar broadcasting contracts have become the norm in the world of sport. In the United States, the National Football League, Major League Baseball, the National Basketball Association, the men's football and basketball divisions of the National Association of Amateur Athletics, and the National Association of Stock Car Auto Racing (NASCAR) all have annual broadcasting revenues in excess of one billion dollars. Even larger amounts of revenue are generated by the licensing of team trademarks and service marks--the supposedly amateur NCAA alone generates more than $3 billion dollars a year from such sources—and individual athletes reap multi-million dollars contracts for the licensing of their images. [1] As NFL executive vice-president and legal counsel

[1] For a recent discussion of broadcasting contracts in the United States, see Mitten, Davis, Smith, and Berry, *Sports Law and Regulation: Cases, Materials, and Problems*, 2nd ed. (2009), 1023-24.

Jeff Pash recently remarked, "Professional sports league general counsel used to focus on antitrust and labor issues, now their focus is on intellectual property issues."[2]

This is by no means a uniquely American phenomenon. The British Premier League signed a £1.782 television deal in 2009 for the rights to its domestic games. Spanish football clubs Barcelona and Real Madrid, which sell their televisions rights individually, entered into contracts in 2006 that called for a total of € 2.1 billion for the two teams over a seven year period.[3] FIFA, the governing body of world football took in € 1.20 billion in television and new media broadcast rights in 2006,[4] while the International Olympic Committee received $3.8 billion in television revenue for the 2010 and 2012 Olympic Games, an increase of 40% over the total for 2006 and 2008.[5]

There is no question that the most popular teams, leagues, competitions, and athletes benefit enormously from this system that assigns intellectual property rights in a way that guarantees significant transfers of wealth to the individuals that control the sports industry. However, a strong case can be made that we seriously over-protect intellectual property rights in sports. The excessive protection is not necessary for the operation of the sports industry, and the public derives very little benefits from the practice. This paper examines four examples of the way in which the intellectual property systems over-protect certain interests in the sports industry

[2] Id. at 1024.

[3] See "The Pitch Invasion," February 10, 2010, at http://pitchinvasion.net/blog/2010/02/10/la-liga-to-follow-premier-league-television-revenue-sharing-model/.

[4] "FIFA is the one sure fire winner," The Telegraph, June 9, 2006 at http://www.telegraph.co.uk/finance/2940670/Fifa-is-the-one-sure-fire-winner.html

[5] "Future Olympics will see income increase despite the recession in some parts of the world," Sport Business, May 8, 2008 at http://www.sportbusiness.com/news/167610/olympic-tv-revenue-to-increase

to the detriment of the larger public interest. Although most of my examples are drawn from the United States, the legal principles that they represent have been embraced throughout the world.

A. The Ownership of Sports Facts

World renowned athletes like Michael Jordan and Tiger Woods have earned millions of dollars above and beyond their income from competing in sports by successfully exploiting their own names and images. This is made possible by the widespread recognition of personality rights or, as it is known in the United States, the right of publicity. This is the right to control the commercial exploitation of one's name, image, likeness, or other aspect of personal identity. As a property right, the right of publicity is of relatively recent vintage in the United States where it has developed in a context largely defined by judicial cases involving celebrities, many of whom were from the sports industry.[6] Until the 1950's, the publicity rights of athletes were conceived of as a variation on the right to privacy. That changed in 1953, when a federal appellate court rejected an earlier ruling that "fame is not merchandise" and defined publicity rights as a form of private property.[7] (The decision came in a case involving major league baseball players and their contracts with competing baseball card companies.) Although many have questioned whether a property right in one's identity is really a socially desirable concept, the right has been widely adopted.

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[6] J. Gordon Hylton, et al., PROPERTY LAW AND THE PUBLIC INTEREST, 3rd ed. (2007), 36-48.

[7] *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.,* 202 F.2d 866 (2d Cir. 1953). The previous standard is taken from *Hanna Mfg. Co. v. Hillerich & Bradsby Co.,* 78 F.2d 763, 766 (5th Cir. 1935). See Baseball Cards and the Birth of the Right of Publicity: the Curious Case of *Haelan Laboratories v. Topps Chewing Gum*, 12 Marquette Sports Law Review 273 (2001).

By the late 1960's, a number of American courts were pushing the boundaries of the right of publicity by defining individual life "facts" and statistics pertaining to individual athletic accomplishment as aspects of an athlete's personality. The earliest cases involved companies that produced games that purported to simulate professional sporting events, based upon the statistical performances of current players. Although there was no precedent for doing so, courts ruled that the companies could not use the names and statistics of the players involved without permission because to do so would violate the players' right of publicity. [8] Subsequent cases focused on other aspects of the athlete's personality.[9] Because of First Amendment Free Speech concerns, there was always an inconsistency in the American right of publicity. The press and, to some extent, authors had a right to exploit the identity of celebrities without the risk of liability but not so for those engaged in other forms of commercial enterprise.[10]

Allowing professional athletes to establish a proprietary interest in their names and statistics so that someone not affiliated with the press cannot make use of such facts is clearly pushing the protection of intellectual property too far. It provides a windfall for the athlete who had done nothing additional to earn this additional right, and it forces sports fans to pay for information that had previously been free of charge. Fortunately, there appears to be a movement in the United States to check the extension of this sort of control, as courts have

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[8] Early cases included *Palmer v. Schonhorn Enterprises,* 96 N. J. Super. 72 (N. J. Super. Ct. Ch. Div. 1967); *Uhlaender v. Henrickson*, 316 F. Supp. 1278 (D. Minn. 1970). See "The Major League Baseball Players Association and the Ownership of Sports Statistics: The Untold Story of Round One," 17 Marquette Sports Law Review 86 (2006).

[9] *Abdul-Jabbar v. General Motors Corp.,* 85 F.3d 407 (9th Cir. 1996); *Newcombe v. Adolph Coors Co.,* 157 F.3d 686 (9th Cir. 1998).

[10] *Montana v. San Jose Mercury News*, 35 U.S.P.Q.2d 1783 (Cal. App. 1995).

begun to recognize that freedom of expression should take priority over the athlete's ability to exploit his or her fame.[11]

A similar constriction on the "ownership" of sports facts appeared in early broadcasting cases in the United States. Prior to 1977, American intellectual property law did not recognize a copyright interest in live sporting events. Consequently, disputes over broadcasting rights in the radio era and the early years of television could not be resolved under the federal copyright statute and instead had to be dealt with under the common law of unfair competition. Basic property law principles permitted team owners to control who broadcasted a game from inside the stadium by making an agreement not to broadcast a condition of entry on to the premises. However, in some cases it was possible to broadcast an event without entering the premises, either by relying on a view from outside the stadium or by listening to an authorized broadcast on the radio and then rebroadcasting the same information.

The defendants in these cases were not projecting a visual image of the game; they were only reporting real time (or very recent) facts regarding an ongoing game. Courts had a difficult time with the question of the nature of the property interest in such cases, although most ended up concluding that the operator of the game had a "quasi-property" interest in the game itself, and that the subsequent broadcast interfered with these rights.[12] However, courts often fumbled

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[11] See, for example, *Gionfriddo v. Major League Baseball,* 94 Cal. App. 4th 400, Cal. Rptr. 2d 307 (2001); *ETW Corp. v. Jireh Publishing, Inc.,* 332 F.3d 915 (6th Cir. 2003); *C. B. C. Distribution and Marketing, Inc. v. MLBAM,* 505 F.3d 818 (8th Cir. 2007), cert. denied, 128 S. Ct. 2872 (2008).

[12] The best known examples are *Twentieth Century Sporting Club v. Transradio Press Service,* 300 N.Y.S. 159 (N.Y. Sup. Ct. 1937); *Pittsburg Athletic CO. v. KQV Broad. Co.,* 24 F.Supp. 490 (W.D. Pa. 1938); *Johnson-Kennedy Radio Corp. v. Chicago Bears Football Club.* 97 F.2d 233 (7th Cir. 1938); *Mutual Broadcasting System v. Muzak*, 30 N.Y.S.2d 419 (Sup. Cot. N.Y. County 1941); *Southeastern Broadcasting Co. v. Oil Center Broadcasting Co.*, 210 S.W.2d 230 (Tex. Civ. App. 1947); *Liberty Broadcasting System v. National League Clubs,* 1952 Trade Cases (CCH) ¶ 67,278 (N. D. Ill. 1952); and *Nat'l Exhibition Co. v. Fass,* 143 N.Y.S.2d 767 (N.Y. Sup. Ct. 1955).

in their attempts to explain what precisely it was that the second broadcaster had done wrong, and there were occasional cases in which the unauthorized broadcaster actually prevailed.[13]

Whether in regard to the right of publicity or to quasi-property rights in a live sporting event, courts should be reluctant to intervene of behalf of individuals who are trying to monopolize factual information that is not the product of literary or artistic creation and which would otherwise be in the public domain.

Team Names and Symbols as Trademarks

Similar to the right of publicity, contemporary American trademark law provides much greater property protection for those in the sports industry than it did fifty years ago. The traditional purpose of American trademark law was to protect consumers from producers who misleadingly labeled and attempted to "pass off" their goods as being from a different source. At the same time, it provided manufacturers with an incentive to produce high quality goods under their own identifiable brand name or symbol. Since 1947, American trademark law has been defined by the Lanham Act, an act of United States Congress designed to reorganize and improve existing trademark law. The key phrase in the original version of the Lanham Act was "likely to cause confusion, or to cause mistake, or to deceive,"[14] and in its original form, the

[13] For examples of cases exhibiting a reluctance to use the law of unfair competition to extend property right protect to sports teams, see *National Exhibition Company v. Teleflash, Inc.,* 24 F. Supp. 488 (1938); *Loeb v. Turner,* 257 S.W.2d 800 (1953); *Intermountain Broadcasting & Television Corp. v. Idaho Microwave, Inc.,* 196 F.Supp. 319 (1961) (similar logic, though not a sports case); *WCVB TV v. Boston Athletic Association*, 926 F.2d 42 (1st Cir. 1989).

[14] 15 U. S. C. A. § 1114.

Lanham Act provided protection for consumers and for the products identified by the mark, but not for the mark itself (which would be protected under copyright law, if at all).

American professional sports teams began to license their names and images in the 1950's.[15] Their original licensing activities were not based on a theory of trademark, but on a theory of "false endorsement" or "false advertising" derived from a division of tort law known as the law of unfair competition. Essentially, professional sports teams and leagues authorized their licensees to sell merchandise "endorsed" by the team or the league; without the license the producer would arguably have been guilty of "false advertising." Much of the "logoed" merchandise of the 1950's and 1960's was commissioned by the professional teams and leagues themselves to sell directly to their fans, the leagues and teams produced no consumer goods on their own.

There is little evidence in the 1950's or 1960's of widespread marketing of unlicensed goods bearing professional team logos, and it appears that teams and leagues were not particularly aggressive in trying to prevent the production of unlicensed products with team names and logos that did occur. For example, professional team owners apparently did not attempt to secure licenses from sports card manufactures whose products showed professional athletes (whose consent was secured by contract) wearing their team uniforms.[16]

Since sports teams were the producers of sporting events and not consumer goods, it was not at all obvious that team names or logos were (or even should be) protected by trademark law, except to the extent necessary to prevent confusion as to the real identity of a team participating

[15] Michael MacCambridge, AMERICA'S GAME: THE EPIC STORY OF HOW PRO FOOTBALL CAPTURED A NATION (2004), 183-185.

[16] See Hylton, *Baseball Cards and the Birth of the Right of Publicity,* supra, note 7. See also, *Univ. of Pittsburgh v. Champion Prods., Inc.,* 682 F.2d 1040 (3rd Cir. 1982), cert. denied, 495 U.S. 1087 (1982) (failure to object to unauthorized use of the name and logo of its sports team over a period of 36 years).

in a particular game. The New York Yankees baseball club would clearly have been entitled to enforce their trademark against another professional baseball team playing games under the name New York Yankees, but that was hardly the problem. In regard to clothing bearing the name or the symbol of the Yankees, it was unlikely that any purchaser interested in such a jacket would be under the false impression that the jacket was manufactured by the baseball team itself. Moreover, a label could easily be attached to the jacket disclaiming any connection to the team.[17]

The "problem" of unlicensed goods appears to have arisen in the late 1960's and early 1970's, when it became apparent that there was much greater consumer demand than previously realized for items of clothing bearing the name or logo of college and professional sports teams. In the early 1970's, professional teams and leagues began to file lawsuits against manufacturers who were making use of teams names and logos without license. What is most interesting about these cases is that they allege, not false adverting or unfair competition, but violations of the Lanham Act, the federal trademark statute.[18] Beginning in 1975, American courts started to agree that the unlicensed attachment of names or logos to clothing constituted an actionable trademark claim. In so ruling, courts discovered that the existing trademark statute provided the holder a right against "dilution" as well as against fraud or "passing off."[19] Why this change in

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[17] For a judicial opinion adopting such an interpretation, see *Boston Professional Hockey Assn. v. Dallas Cap & Emblem Mfg.,* 360 F.Supp. 459 (N. D. Tex. 1973) which stated

> In this area of the economy the protection of the trademark law must give way to the public policy favoring free competition. To hold that plaintiffs can prohibit the imitation of the team symbols because of the trademark registration would be to grant to the mark owners protection which is tantamount to a copyright monopoly. Plaintiffs therefore have no right to relief under the Lanham Act against the defendant's copying and selling emblems denoting their team symbols. Id. at 464.

[18] See, for example, the case cited above, note 17.

[19] The seminal case was *Boston Prof'l Hockey Assn. v. Dallas Cap & Emblem Mfg., Inc.,* 510 F.2d 1004 (5th Cir. 1975), which reversed the above mentioned decision

attitude occurred when it did is a fascinating question, especially as no change had occurred in the text of the Lanham Act itself. As the market for such apparel exploded, the new "property" interest in the mark itself made it possible for sports teams to reap large profits which otherwise would have gone uncaptured or else required uncertain tort actions.[20] Moreover, in 1995, the United States Congress confirmed this expansion of property rights of trademark holders with the Federal Trademark Dilution Act, which essentially codified recent case law.[21]

This type of protection is unnecessary for the production of sporting events and only results in a transfer of additional revenue to the teams and their licensees. Permitting fans to purchase unlicensed clothing bearing the name or logo of their favorite team would make it easier for less economically well-off fans to express their support for their teams. It would allow a larger number of individuals to participate in the communal act of supporting a particular team or club. Teams would still be able to market their own merchandise, as they did in the United States prior to 1975, but they would not be able to exercise monopoly control over their names and symbols. At a minimum, returning trademark law to its original moorings would require teams to develop different legal theories if they sought to proceed against others making use of the team name, logos, and colors.

[20] For the way in which this new principle was integrated into the intellectual property law of sport, see National Football League Properties v. Wichita Falls Sportswear, Inc., 542 F. Supp. 651 (W.D. Wash. 1982). Some courts, nevertheless, avoided the result of *Boston Prof'l Hockey* by relying upon the doctrine of laches. See, for example, *University of Pittsburgh v. Champion Products*, supra, note 16.

[21] Federal Trademark Dilution Act of 1995, Pub. L. No. 104-98, 109 Stat. 985 (codified as amended at 15 U.S.C. 1125 (2000). A further revision was contained in The Trademark Dilution Revision Act of 2006, 15 U. S. C. § 1125(c). For criticism of modern developments in American trademark law, including its application to the sports industry, see Mark A. Lemley, *The Modern Lanham Act and the Death of Common Sense*, 108 Yale L. J. 1687 (1999); Mark A. Kahn, *May the Best Merchandise Win: The Law of Non-Trademark Uses of Sports Logos*, 14 Marq. Sports L. Rev. 283 (2004). For evidence that courts are willing to use this "dilution" principle to benefit major league sports teams but not to harm them, see *Harlem Wizards Entm't Basketball, Inc. v. NBA Props., Inc.*, 952 F. Supp. 1084 (D. N. J. 1997).

Broadcast Rights

No form of intellectual property has proven to be more lucrative for the sports industry than the broadcasting rights that follow from the contemporary conception of copyright. The broadcast of games on radio and television has dramatically expanded the "live audience" for sporting events. Not only has broadcasting given fans an alternative to live attendance, but it has expanded the potential base of fans for a particular team from its immediate geographic location to a national and, increasingly, international audience. Attendance at live events is limited by the size of the stadium or arena, and arena and stadium sizes are limited by the requirement that spectators must be at least close enough to the field to see the contest that they have paid to see. However, broadcasted games suffer from no such limitations. The number of fans that can watch a game on television on television or listen to it on the radio is limited only by the number of individuals with receivers and access to the broadcast. In recent years, new technologies and platforms like satellite television and Internet and cell phone broadcasting have further expanded the virtual audience's access to sporting events.

Because of the great public demand for access to sporting events, professional teams and athletes quite naturally assert property rights to their performances and images and then authorize the use of this "property," albeit in exchange for healthy fees. The costs of these licenses are then passed on to sports fans either directly through subscription fees or indirectly through the sale of advertising, usually to producers of consumer goods who recapture their advertising expenditures by increasing the cost of their products or by the increased sale of the products they produce.

Although the concept of copyright in live athletic performances and the power to sell derivative rights to broadcasters has brought in literally billions of dollars to the sporting industry, American professional sports teams were slow to realize the significance of broadcasting. Part of this stemmed from a failure to appreciate the potential of the virtual audience. Many owners initially opposed the broadcasting of games on radio or especially television because they feared that the availability of games in electronic form would undercut live attendance.[22] In the early 1950's, Major League Baseball, then the most popular of American sports leagues, earned less than $6 million per year from television broadcasts, while the National Football League earned less than $1 million.[23]

As with the right of publicity and trademark law, the first forays into the commercial licensing of broadcast rights were not based on the same theory of intellectual property in force today. The conventional wisdom until fairly late in the twentieth century was that live sporting events were not subject to protection under the copyright laws. The law of copyright originated out of a desire to protect the investment of authors (and later artists) in their creative efforts so that they would have an incentive to produce such works. Strictly speaking, sporting events are not authored works, as they are purely competitive events that, unlike a play or a film, follow no script. Moreover, individual components of a sporting event could not then and cannot now be copyrighted. A baseball pitcher who develops a new pitch, or a batter who develops a new batting stance, or for that matter, a figure skater who develops a new routine, have no right to

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[22] See G. Edward White, *Creating the National Pastime: Baseball Transforms Itself* (1996), 206-244.

[23] Paul C. Weiler, *Leveling the Playing Field: How the Law Can Make Sports Better for Fans* (2000), 278-296. A half century later, total National Football League broadcast revenues exceeded $2.2 billion dollars annually while those of Major League Baseball and the National Basketball Association fell just short of $1 billion. (The same 50 year period saw a comparable increase in the value of league licensed consumer merchandise.) In the first decade of the 21st century, these totals have continued to rise.

request intellectual property protection for their innovations, and they have no right to protest when other competitors begin to imitate their actions.[24]

Copyright protection was not explicitly extended to broadcasts of live sporting events in the United States until 1976, when Congress adopted a revamped copyright statute. Section 102(a)(6) of the new Copyright Act for the first time provided copyright protection for the event, so long as it was recorded on film or videotape (which by 1976 was becoming routine).[25] Moreover, courts have also ruled that the special techniques of sports broadcasting—instant replays, split screen shots, and commentary by announcers—constitute "creativity" for authorship purposes.[26] Since 1977, when the new act took effect, American courts have consistently upheld the claims of broadcast rights holders to copyright protection, even when the infringement occurs in a new form of media.[27] While the media is recognized as having a right to report on the results of sporting events without securing the permission of those who staged them, that reporting must be limited to factual summaries and if the media outlet's reporting begins to approach the broadcasting, or rebroadcasting, of the event, that conduct is viewed as a copyright violation.

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[24] Id.

[25] 17 U.S.C. § 102(a)(6). Arguably, it was possible to register for protection under Section 12 of the 1909 Copyright Act, but the evidence shows that this approach was rarely, if ever, pursued. For a discussion of pre-1976 practices, see Chris Garmire, *The Super Bowl III Problem*, 2 Chi.-Kent J. Intell. Prop. 3 (2000). The 1976 Act has also been interpreted to vest the copyright in the team and league rather than in the players. *Baltimore Orioles, Inc. v. Major League Baseball Players Association*, 805 F.2d 663 (7th Cir. 1986).

[26] *Nat'l Assn. of Broadcasters v. Copyright Royalty Tribunal,* 675 F.2d 367 (D.C. Cir. 1982); *Baltimore Orioles, Inc. v. Major League Baseball Players Assn.*, supra, note 25.

[27] *NFL v. McBee & Bruno's, Inc.,* 792 F.2d 726 (8th Cir. 1986) (satellite dish antennae); *NFL v. TVRADIONOW Corp.,* 53 U.S.P.Q.2d 1831 (W.D. Pa. 2000) (Canadian Internet site); *Live Nation Motorsports, Inc. v. Davis*, 2006 W.L. 3616983 (N. D. Tex. 2006) (pirating of live webcasts).

So uniform has been the willingness of American courts to protect the broadcast rights of the sports industry that the primary legal disputes in recent years have pitted claims of individual teams against the leagues in which they participate. In such cases, the issue is not the scope of the intellectual property interest but rather whether the right belongs to the individual team or in the league itself. The controlling view has been that the broadcast rights belonged to the home team rather than the league, and thus each team was free to negotiate for the rights to its own home games. However, since the early 1960's, there has been a growing appreciation in the United States of the advantages of pooling broadcasting rights and permitting them to be sold as a package by the league to one or more television networks. Although this practice was once believed to constitute a violation of the federal antitrust laws, that impediment was removed by the United States Congress in 1961 when it enacted the Sports Broadcasting Act which specifically authorized that practice, subject to a few minor restrictions.[28]

Ordinarily such disputes revolve around contractual language defining the rights of individual teams within a league structure. Often the question is one of whether or not the individual owner's rights have been fully and legally assigned to the league. However, in some cases, individual team owners have claimed that mandatory intellectual property pooling arrangements and the granting of exclusive monopolies by leagues violate the American antitrust laws, but the merits of this claim have not yet been conclusively resolved by the United States judiciary. Such litigation has pitted Americans best known sports teams—the Dallas Cowboys, the New York Yankees, Ted Turner's Atlanta Braves, and Michael Jordan's Chicago Bulls—

[28] 15 U. S. C. §§ 1291-1295.

against their respective leagues, although in most cases the disputes have been settled prior to a final judicial resolution.[29]

However, the development of new technologies, particularly in regard to the live streaming of athletic events over the Internet, have revived the debate over the question of whether real time broadcasts of live sporting events should be subject to copyright laws in the first place.[30] This rethinking is also going on outside the United States. Israel, for example, has recently revised its copyright laws in a way that arguably removes copyright protection for real time broadcasts. In 2008, an Israeli district court, ruled that the new statute provided no copyright protection for a live broadcast of a football (soccer) game that originated in the United Kingdom. That the game was simultaneously recorded and that replays were inserted during the broadcast was deemed immaterial.[31]

The ability to control the venue of the sporting event gives the owner sufficient control over the initial broadcast to make broadcasting a valuable source of income whether or not the broadcasts are protected as copyrighted works. Traditional property rights can be used to restrict alternative broadcasts from the venue itself, and the broadcast signal can be encrypted so that the pool of receivers can be limited. Any further protection is unnecessary and imposes unreasonable restrictions on materials that would otherwise pass into the public domain.

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[29] Weiler, supra, note 23. See, for example, *Dallas Cowboys Football Club, Ltd. V. NFL Trust,* 1996 WL 601705 (S.D.N.Y. 1996); Complaint, *New York Yankees Partnership v. Major League Baseball Enterprises, Inc.,* 97-1153-CIV-T-2513 (M.D. Fla. Filed May 19, 1997). Both of these actions were settled.

[30] See, for example, "Copyright Meets a New Foe: the Real-Time Web," Business Week, May 21, 2009, at http://www.businessweek.com/technology/content/may2009/tc20090521_159692.htm?chan=top+news_top+news+index+-+temp_technology

[31] *Football Association Premier League Ltd. V. Netvision 013 Barack Ltd.*, MCA 011646/08 (Dist. Ct. Tel Aviv, July 16, 2008).

The Right to Watch Sporting Events on Free Television

In contrast to the situations discussed above in which the right of intellectual property owners have been expanded, there has been a movement to protect the public's right to "free" broadcasts of major sporting events, notwithstanding the property claims of the holders of broadcasting rights. Traditional property concepts would suggest that sports teams are under no obligation to broadcast their games on free television and that there is no "right" to watch a particular sporting event on open air television. However, because major sporting events have been broadcast on "free" television and radio in the United States and elsewhere for decades, and because these public viewings are important communal events, it is understandable that the public would develop an expectation that such events would continue to be available for public viewing without additional charges. (Such broadcasts were historically "free" in the sense that anyone with a television could watch them without having to pay an additional charge. Costs were actually recouped through commercial advertising, general television subscription fees, or state subsidies.)

The possibility of popular sporting events being relocated from free to subscription television has attracted concern in different parts of the world, and has led to the imposition of restrictions on the rights of owners of broadcasting rights. In the United States, the Cable Television Consumer Protection and Competition Act of 1992 included an expression of concern about the possibility of such a transfer.[32] The statute authorized the Federal Communications Commission to investigate the situation with sports broadcasting and to report its findings to

[32] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 26, 106 Stat. 1460, 1502-03 (1992).

Congress. The report, issued in 1994, found that while there had been a significant shift to pay television at the level of local sports broadcasting, no such transfer had occurred at the national level in either professional or amateur sports. In the United States, contrary to the situation in other parts of the world, the national networks that control free broadcasting were clearly more than able to compete with pay networks in the market for sports broadcasting rights.[33]

In 2010, the situation remains largely unchanged from 1994, although there has been some additional movement of early round professional play-off games to pay television. However, the most popular sporting events in the United States--the Super Bowl, the World Series, the NBA championship series, NCAA basketball and football championships, the U.S. Open and Masters golf tournaments, the Daytona 500 and Indianapolis 500 auto races, the Triple Crown horse races, and most Olympic competitions involving athletes from the United States--remain on free television. The shifting of such events to pay television would almost certainly provoke public protests, even though approximately two-thirds of American households have access to pay television.

In the European Union, the issue of the public's access to sporting events has been addressed since 1989 by the "Television without Frontiers Directive (renamed the Audiovisual Media Services Directive in 2007)."[34] While the Directive does not require member countries to mandate that sporting events be broadcast on free television, it encourages them to do so and

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[33] *In the Matter of Implementation of Section 26 of the Cable Television Consumer Protection and Competition Act of 1992; Inquiry into Sports Programming Migration*, FEDERAL COMMUNICATIONS COMMISSION, 9 FCC Rcd 3440 (1994).

[34] See European Union Council Directive 89/552, as amended by Directive 97/36, 1989 O.J. (L 296) 23 (EC). For the 2007 amendments and the renaming of the directive, see http://ec.europa.eu/avpolicy/reg/tvwf/index_en.htm

frees them from concerns about violating other European Union broadcast rules if they pursue such a course. Article 3a of the Directive provides:

> Each Member State may take measures in accordance with Community law to ensure that broadcasters under its jurisdiction do not broadcast on an exclusive basis events which are regarded by that Member State as being of major importance for society in such a way as to deprive a substantial portion of the public in that Member State of the possibility of following such events via live coverage or deferred coverage on free television.[35]

Pursuant to the Directive, special sporting events that must be broadcast of free television have been identified in Austria, Belgium, Denmark, Finland, France, Germany, Ireland, Italy, and the United Kingdom.[36] Italy, for example, has identified the following events on its free television list:

(a) the summer and winter Olympic games;
(b) the football World Cup final and all matches involving the Italian national team;
(c) the European football Championship final and all matches involving the Italian national team;
(d) all matches involving the Italian national football team, at home and away, in official competitions;
(e) the final and the semi-finals of the Champions' League and the UEFA Cup where an Italian team is involved;
(f) the Tour of Italy (Giro d'Italia) cycling competition;
(g) the Formula One Italian Grand Prix; and
(h) the San Remo Italian music festival.

Australia has gone even further than the European Union in protecting public rights to sports broadcasting. There, the Australian parliament has adopted both anti-siphoning and anti-hoarding legislation designed to protect free public access to televised sporting events. Under the anti-siphoning provisions of the Broadcasting Services Act of 1992, all sporting events on a list compiled by the Minister of Communications, Information Technology, and the Arts must be

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[35] Council Directive 89/552, as amended by Directive 97/36, 1989 O.J. (L 296) 23 (EC). For the full text of Section 43a see http://ec.europa.eu/avpolicy/reg/tvwf/events/index_en.htm

[36] For the list, see http://ec.europa.eu/avpolicy/reg/tvwf/implementation/events_list/index_en.htm

aired on one of the state owned television stations or a private, open-air station that reaches at least half of the country's population (and thus cannot be "siphoned off" to a pay station).[37] The current list, which is quite extensive, includes:

(a) all events of the Olympic and Commonwealth Games;
(b) the Melbourne Cup Horse Race;
(c) all matches of the Australian Rules Football Premiership;
(d) National Rugby League premiership games;
(e) the National Rugby League State of Origin Series;
(f) all international rugby league test matches involving the senior Australian team
(g) international test matches involving the senior Australian Rugby Union Football team
(h) all matches in the Rugby World Cup;
(i) all test matches involving the senior Australian cricket team played in either Australia or the UK;
(j) one day cricket matches involving the senior Australian team played in Australia or the UK;
(k) all matches in the Cricket World Cup;
(l) the English Football Association Cup final;
(m) the 2010 FIFA World Cup;
(n) the Australian, Wimbledon, French Open, and U.S. Open Tennis Matches, including all rounds of the Australian Open and Wimbledon;
(o) Davis Cup tennis matches involving Australia;
(p) all international matches involving the senior Australian Netball team;
(q) the Australian Masters, Australian Open, U.S. Masters, and British Open golf tournaments; and
(r) four motor sports races: the Formula 1 World Championship, the Moto GP, the V8 Supercar Championship Series, and the Champ Car (Indy Car) World Series when held in Australia.[38]

In addition, the Australian statute also includes an "anti-hoarding" provision which prohibits a broadcaster that has obtained the right to the open air broadcast of a particular event from declining to exercise the rights. If such a situation occurs, the rights holder is required to transfer the rights to a broadcaster willing to comply with the requirements of the statute.

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[37] Broadcasting Services Act 1992, §§146e-h (Austl.).

[38] For the current government list, see http://larissarembisz.wordpress.com/2009/10/05/give-sport-on-free-tv-a-fair-go/

Although public opinion polls almost universally show that individuals believe that there should be a right to watch major sporting events, not all countries have addressed this issue by statute or regulation.[39] The experience of Arab countries with the 2006 FIFA World Cup illustrates the need for such statutes.

In Arab countries, as in most of the world, the most popular sport is football (which is called "soccer" in the United States, Canada, Australia, and South Africa). Although football was not historically a popular game in Arab countries, the broadcast of local and international games on free television in the post-World War II era, combined with the establishment of local professional clubs, converted much of the region's population into football fans.[40] The ultimate competition in football is the World Cup, which along with the Olympic Games is the most closely followed sporting event in the world. Whether or not Arab teams are competing, the quadrennial World Cup arouses intense interest in the Arab world. (In 2006, teams from two Arab nations, Saudi Arabia and Tunisia, qualified for the World Cup although neither made it to the knockout round.)

The World Cup is organized by Federation Internationale de Football Association (FIFA) which selects a production company as the "host broadcaster" and then licenses the right to show World Cup games on television and radio to individual broadcasters in interested countries. The 2006 World Cup was held in Germany and was televised in whole or in part in 189 different

[39] For an example of such polling, see Bashar H. Malkawi, *Broadcasting the 2006 World Cup: The Right of Arab Fans versus ART Exclusivity,* 17 Fordham Intell. Prop. Media & Ent. L.J. 591 (2007), and particularly the sources at fn. 18 and 35.

[40] My analysis of the Arab world's experience with broadcast of the 2006 World Cup discussed below is deeply indebted to the above cited (note 39) work of Professor Bashar H. Malkawi of the Hashemite University of Jordan whose 2007 article in the Fordham Intellectual Property, Media & Entertainment Law Journal provided a detailed account of these events and Arab legal framework against which they played out. Unless otherwise indicated, the factual material that follows is taken from Professor Malkawi's article.

countries whose total populations exceeded five billion people. Although FIFA's primary mission is to expand the popularity of world football, in recent years it has been criticized for placing a desire to enhance revenue over all other objectives.[41]

Historically, World Cup games were aired in Arab countries on free television. However, for 2006, the collective right to broadcast World Cup games in Arab countries belonged to Arab Radio & Television (ART), a Saudi Arabia-based Arabic language network that broadcasted its signal by satellite to a subscription audience. ART had acquired the exclusive broadcast rights for 2002, 2006, 2010, and 2014, by agreeing to pay more than $100 million, a sum that significantly exceeded the combined amounts bid by a variety of free-to-air broadcasters in the region. Although the World Cup is carried on free-to-air television in most countries, FIFA rules do not contain a requirement that games be broadcast on free television.

ART used satellite technology and encrypted signals to sell its programming throughout the Arab world.[42] (Only its religious programming was available on "free" television.) Its acquisition of the exclusive World Cup rights was designed to raise its profile in the world of Arab television; at the time it acquired the rights, ART had only three million subscribers, even though there were nearly 300 million Arab households with television. Having acquired the exclusive rights to broadcast the World Cup in the Arab world, ART then offered to license the simultaneous broadcast of games to national public television stations in various Arab nations. In 2002, it resold the right to broadcast locally to terrestrial stations for what one Arab news

[41] The trend toward increased emphasis on revenue on the part of international sports federations has been going on for the past two decades. For an early discussion of this phenomenon, see James A. R. Nafziger, *International Sports Law: A Replay of Characteristics and Trends,* 86 Am. J. Int'l L. 489 (1992).

[42] ART's own description of its role in the Arab world can be found on its website, http://www.allied-media.com/ARABTV/art.htm

source later described as a “nominal fee.”[43] However, for 2006, it demanded fees that most Arab broadcasters viewed as exorbitant--rights for Morocco and Egypt, for example, were set at US $13 million and $5.2 million, respectively—and locally based broadcasters almost uniformly declined to pay the fees demanded by ART.[44] In fact, it appears that ART’s real strategy in 2006 was to enhance its revenues by-passing regular broadcasters and to deal directly with end users, including the operators of restaurants and coffee shops and other places where football fans gather.

Unfortunately, ART’s subscription fees placed access to World Cup games beyond the reach of many Arab football fans. In 2006, ART’s annual subscription fee was US $331, which was almost exactly double the annual income of a Jordanian earning the country’s minimum wage. In Lebanon, individual fees for watching the World Cup at home were US $160 while restaurant fees ranged from $1000 to $6000, which prompted a boycott on the part of restaurant owners.[45] Under the terms of ART’s contract, local broadcasters were also limited to twenty minute long highlight programs in the evenings after the day’s games were already completed. Thus, only those who were able and willing to pay for ART’s signal had lawful access to the live broadcasts of the games themselves.

While there was widespread anger about the fact that World Cup games were not going to be broadcast on free television, Arab legal systems provided mechanism for addressing the

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[43] “New rules may keep 2006 World Cup off most television screens,” The Daily Star (Zawya), June 1, 2006 at http://www.zawya.com/printstory.cfm?storyid=DS010606_dsart44&l=064520060601.

[44] See Malkawi, *Broadcasting the 2006 World Cup*, supra, note 29, at fn. 40.

[45] See note 43, supra.

problem in 2006, and many disappointed fans turned to extra-legal methods of obtaining broadcast signals.[46]

There were a number of reasons for the inaction. First of all, television in the Arab world was traditionally viewed as a state-owned monopoly, and few Arab states adequately considered the full consequences of the introduction of privately owned television stations and services into Arab society, let alone regional satellite broadcasters. Moreover, recently amended Arab intellectual property laws actually supported the monopolistic strategy undertaken by ART.

The protection of intellectual property was not an important goal in the traditional Arab legal system, and until fairly recently Arab copyright law was, from a western perspective, "underdeveloped." Under traditional Arab intellectual property laws, ART would not have possessed a recognized property interest in its broadcasts, and it would not have been able to block the efforts of other area broadcasters, like, for example, Lebanese cable companies that acquired broadcast signals by admittedly questionable means and who sold them to their customers for modest sums.[47] However, when Arab countries began to seek the benefits of membership in the World Trade Organization, they were required to enact western style copyright laws.

This was not really a matter of choice as WTO membership was conditioned upon the adoption of the copyright principles incorporated into the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS). Prior to the adoption of the TRIPS standards, the holders

[46] For an extended account of the Arab response to the ART broadcast monopoly, see Mahfoud Amara, *When the Arab World was Mobilised around the FIFA 2006 World Cup,* 12 The Journal of North African Studies 417-438 (2007). For a discussion of Arab attitudes toward intellectual property generally, see John Carroll, *Intellectual Property Rights in the Middle East: A Cultural Perspective,* 11 Fordham Intell. Prop. Media & Ent. L. J. 555 (2001). See also, "Egyptians await World Cup fate," BBC Sport, Thursday, 8 June 2006, at http://news.bbc.co.uk/sport2/hi/football/africa/5060570.stm.

[47] See note 43, supra.

of broadcasting rights would not have had standing to sue to protect its rights under Arab copyrights laws. However, because of the desire to comply with the requirements of the WTO, Arab copyright law by 2006 recognized television broadcasts as “copyrightable works of authorship.” Even in those countries where uncertainty remained as to the extent to which ART could enforce its monopoly against local competitors (as in Lebanon), government officials were reluctant to intervene for fear that such actions would be viewed as inconsistent with commitments necessary to remain in good standing with the WPO and under the European Union Association Agreement.[48] Furthermore, even though there is a strong argument that the ART-FIFA agreement combined with ART’s failure to share the broadcast rights with local stations violated the strongly anti-monopoly and “abuse of dominant market power” provisions of Arab antitrust laws, no serious efforts appear to have been made to challenge the ART contract on antitrust grounds, presumably because of concerns regarding WPO compliance.[49]

Unfortunately, a repeat of the 2006 experience appears likely in 2010. In November of 2009, ART sold its exclusive World Cup broadcasting rights to Al Jazeera, a competing satellite broadcaster based in Qatar for a reported price of $1 billion.[50] If that figure is accurate, Al Jazeera will obviously try to generate as much revenue as possible, although a strategy of mixing free television and subscription licenses might turn out to the most effective strategy. Moreover, Al Jazeera has shown some sensitivity in the past on the access to sporting events issue. Recently, it placed on one of its free channels certain highly anticipated games involving Arab

[48] Id.

[49] On Arab antitrust laws, see Malkawi, *Broadcasting the 2006 World Cup*, supra, note 39, at 602-05.

[50] “Al Jazeera wins TV rights for 2010 World Cup,” Arabian Business.Com, November 25, 2009 at http://www.arabianbusiness.com/digital-broadcast-powerlist/feature/574535

teams in the Africa Cup of Nations competition. It may be that the network will adopt that approach to the final game or games of the 2010 World Cup competition or with games involving Algeria, the only Arab team to qualify for the 2010 finals.[51] On the other hand, Al Jazeera remains the only listed broadcaster for the Arab region on the most recent FIFA list of Media Rights Licensees.[52]

As the situation currently stands, free-to-air broadcasts of the 2010 World Cup will be available everywhere in the world except for Hong Kong, the Indian Subcontinent, and the Arab states of North Africa and the Middle East.[53] There is no absolutely no reason why residents of one or two parts of the world should be required to pay to watch what most of the world can see for free, particularly when those areas are characterized by great disparities of wealth within the population. The obvious solution would be for individual Arab countries to do what Australia and several European countries have done and mandate that certain sporting events, including the World Cup (either the entire competition or final rounds and games involving Arab countries), be carried on free television. An alternative might be the adoption of a compulsory licensing system that would require the holders of broadcast rights to license them to local free broadcasters at a predetermined fee.[54]

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[51] "Scrambled Signal in TV Takeover," The National (Abu Dhabi), January 10, 2010. http://www.thenational.ae/apps/pbcs.dll/article?AID=/20100120/BUSINESS/701209944/1052/rss

[52] FIFA World Cup South Africa 2010 Media Rights Licenses, November 27, 2009 at http://www.fifa.com/mm/document/afmarketing/tvnewmedia/01/04/69/56/fifaworldcup2010mediarightslicenselist-publicrelease20091127.pdf. However, the list is dated November 27, 2009, only a few days after the rights were acquired by Al Jazeera.

[53] See "2010 FIFA World Cup broadcasting rights" at http://en.wikipedia.org/wiki/2010_FIFA_World_Cup_broadcasting_rights

[54] For a similar list of options available to Arab countries, see Malkawi, *Broadcasting the 2006 World Cup*, supra, note 29, 601, 605-608.

The approach taken by the European Union and Australia and indirectly by the United States to the free access to televised sporting events issue represents a far more attractive approach to the problem of balancing of intellectual property rights with the public interest than does the approach taken by the same countries in regard to the proper scope of publicity rights, trademarks, and copyrights. Sport is a common commodity in the modern world, and laws should be designed to encourage the maximum amount of public involvement as both participants and spectators and not merely to enrich those who control the production of the premier sporting events.