Competition Rules and Sports Broadcasting Rights in Europe

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Competition Rules and Sports Broadcasting Rights in Europe

by Marios Papaloikas

I. Sports TV broadcasting rights

Under Article 345 of the EC Treaty "The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership."

Nor are there direct regulations pertaining to intellectual property, stipulating its type and/or the rules of possession of intellectual property rights.

One should start by defining the extent to which sports events can be considered as original audiovisual pieces of work, thus generating intellectual rights on behalf of their creator. In this case, there is usually a distinction between the creator’s intellectual rights and the property rights resulting from their commercial exploitation.

In the case of sports events an obvious problem emerges though, i.e. how this “piece of work” can generate intellectual property rights protection given the competition involved, since the "piece of work" cannot be repeated as such, no matter how many times the specific sports event takes place. Contrary to the sports event itself, an audiovisual recording by modern technical means can imprint an event as a particular piece of work. In this case, however, there is no original audiovisual intellectual creation so that the rights of the person recording it are protected nor is that person to be considered its creator. This marketable audiovisual material is nothing but a simple recording of an event or perhaps of an intellectual creation (as would be taking a picture of a sculpture).

Defining the creator of a sports event examined as an audiovisual piece of work is the second problem one should deal with. The matter gets even more complicated when recording team sports events, since in this case there is more than one person involved in the sports spectacle.

Of course, from the old times, there is an unwritten rule, according to which, the organiser of a sports event holds the exclusive rights to its commercial exploitation.6 This unwritten rule aside, these exclusive rights may also result from the fact that the organiser owns the event venue or has the right to commercially exploit this venue. The organiser may also establish broadcasting rights to a particular sports event on the basis of competition rules, claiming that live coverage by a third party may lead to poor attendance at his venue.

Therefore, if the sportsperson is not considered as the creator of a piece of work, it is obvious that he/she cannot transfer the creator’s commercial rights to the organiser, simply because nemo dat quem non habet. The organiser may, however, acquire the sportsperson’s rights to his/her image, which result from the sportsperson’s rights on his personality. It is in this way that the organiser shall legally establish the right to commercially exploit a sports event broadcast.5

On the 10th of March 2009 the European Parliament adopted a resolution on the integrity of online gambling.3 In this resolution the European Parliament called on the Commission to examine whether it would be possible to give competition organisers an intellectual property right (a type of portrait right) over the sports events they are organising4.

II. The competition rules within the European Union

One of the main targets of the EEC was to create a system ensuring free competition within the Internal Market as one may see in Article 52(f) of the Treaty of Rome for the European Economic Community (EEC) in 1957. The basic regulations pertaining to competition were stipulated in Articles 81 to 86 of the Treaty of Rome and were included in the following European Treaties as well.3 According to article 81 of the Treaty of European Union, all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within Internal Market are not compatible with it and are thus strictly prohibited.5

As an exception to this rule, Article 81(3) provided that this prohibition may be declared inapplicable in case of agreements, decisions and concerted practices which contribute to improving the production or distribution of goods or to promoting technical or economical progress, while allowing consumers a fair share of the resulting benefit provided that:
1. no restrictions which are not indispensable to the attainment of these objectives are imposed upon the interested undertakings, and
2. such undertakings are not given the possibility of eliminating competition in respect of a substantial part of the products concerned.

III. Specificity of the Sports broadcasting Market

Sports broadcasting is among the most popular of television programmes. The viewers watching such programmes are usually the ones with the highest purchase capacity, i.e. male viewers between 16 and 30 years of age. This audience is of particular interest to publishers, as it is considered a very special audience not easily attracted by other programmes. As a result, the competition on publicity transmission during these programmes as well as on acquiring TV broadcasting rights to sports events is much higher.

Sports television broadcasting is of a very individual nature in comparison with the broadcast of other events. Firstly, broadcasting sports events has an ephemeral value; viewers are particularly interested in live coverage at least as long as the result is still unknown. After the event takes place and the result is announced the product loses most of its broadcasting value.

Secondly, sports events are not easily interchangeable in the sense that it is difficult to have a particular sports broadcast substituted by another television product without displeasing viewers. To state an example, a viewer wishing to watch the Football World Cup will, most likely, not be satisfied with watching the Boxing World Cup instead.

Apart from the above, granting broadcasting rights to sports federations and, subsequently, creating television packages including many sports events, on an exclusive and long-term basis, makes this product extremely expensive: only the most powerful market players can actually bid for these products.

It is a common practice that sports broadcasting rights are offered

for sale by each sport federation as a package. In this way the clubs do not compete with each other in order to sell this product and the competition between possible purchasers of these rights is correspondingly restrained; this is the so-called horizontal restraint of competition. It should also be noted that the exclusive rights are sold at a high price (especially when sold as a package), thus economically powerful networks stand more of a chance to be granted the broadcasting rights in comparison to smaller networks. Quite often though the purchaser of these rights may then decide to broadcast the most important matches only and to only partially broadcast the remaining ones. In this way the viewer is offered fewer options. This is the case of vertical restraint of competition. Instead the purchaser could have decided to sublicense the broadcasting rights of the remaining matches to other networks instead, thus allowing the sub-licensee to broadcast them live too.

On the one hand, sublicensing popular sports events (EURO and Champions League in football, for instance) is rather difficult and may decrease the product value. The difficulties lie in the nature of the product itself, since the clubs qualifying to the next round are not known in advance. So an eventual purchaser of the broadcasting rights only to the final round would not know the exact value of this product and the way to promote it, since they are not able to predict which audience in which country the broadcast of the final round would be of interest to.

On the other hand, the value of the product as a whole is increased, when promotion can be made at an early stage advertising the total product and the championship as a whole, thus attracting the attention of all viewers regardless of whether their team participates in the finals or not. On the contrary, advertising a particular game of a particular championship is not possible since it is not known in advance which team will play against which and on which date. This factor of unpredictability is in fact what makes the product of great commercial value.

IV. EBU and the Eurovision system

The European Broadcasting Union, usually referred to as EBU,10 plays a significant role in the field of TV broadcasting. Founded in 1950 as a non-profit association of radio and television broadcasters11 EBU aimed at promoting the exchange of radio and television programmes amongst its members. Being a non-profit association, membership to EBU is not open to purely commercial undertakings. So, its first members were public broadcasters providing a public service, which is reflected on the kind of programmes they offer and their transmission range. They should provide good quality programming that is of interest even to smaller sections of the population regardless of the resulting commercial value. Their transmission range should also cover the entire national population or at least a substantial part thereof. The Eurovision system has been operated by the EBU since 1954 and consists in the joint acquisition of television rights to programmes and the exchange of these programmes amongst its members. As far as national sports events are concerned, the EBU members compete with each other and with private networks. The Eurovision system, therefore, applies to international sports events only and consists of the exchange, based on the principle of reciprocity, of news on sports and cultural events, which may be of interest to other members. So whenever a member (public broadcaster) covers a sports event in its territory, it offers this footage free of charge to the other members.

When the EBU was established in 1950 radio and audiovisual broadcasting was State controlled. Nowadays, however, there are plenty of private wide-range networks in Europe, which compete with the public networks and in most of cases they manage to attract the biggest share of the market. As a result, it was only a matter of time before there was a conflict between public and private networks about broadcasting the most profitable sports events.

It should be taken into consideration that unlike private networks the public ones, members of the EBU, are due to their national character subject to certain restrictions; the amount of publicities is limited and they are obliged to broadcast even sports events which may not be widely popular. On the other hand, private networks are interested in the most important and thus the most profitable sports events. There is no doubt that the Eurovision system as well as joint negotiation, acquisition and share of broadcasting rights amongst the EBU members, restricts and even eliminates competition amongst these public networks at the expense of private networks competing with the public ones. The question now is whether this system falls under the exemptions stipulated in Article 81(3).12

V. The decisions of the Commission and the ECJ Case Law

Most cases pertaining to sports events broadcasting rights have not been brought before the ECJ; the procedure is usually completed at the Commission level and very scarcely brought before the ECJ. Already in 1991 the Commission issued a decision in the case of SCREENSPORT VS EBU, in which SCREENSPORT initiated proceedings against the Eurovision system.13 This sports channel registered a complaint against the Eurovision system, which excluded non-EBU members from being granted sports broadcasting rights, given the fact that some EBU members participated in EUROSPORT, a channel competitive to SCREENSPORT. In fact, non-EBU members could be granted sports broadcasting rights, subject to many restrictions; EUROSPORT channel, however, could broadcast these sports events unconditionally.

According to the Commission, this practice contravened the principle of free competition in the Common Market. Nevertheless, the Commission in a later decision issued in May 2000, acknowledged that the Eurovision system might improve the production and distribution of programmes and contribute to technical and economical progress for the benefit of consumers. The Eurovision system would then fall within the scope of the Article 81(3) EC Treaty exception, according to which, any agreements, decisions and concerted practices which contribute to improving the production or distribution of goods or to promoting technical or economical progress, while allowing consumers a fair share of the resulting benefits provided are granted an exemption.14

In 2002 the Commission Decision was appealed at the ECJ (in joined cases T-8/00, T-216/00, T-299/00 and T-300/00)15 by a French television station called MÉTROPOLE TÉLÉVISION, which had, in fact, submitted a request to become member of the EBU six times in the past, in order to enjoy the benefits in acquiring sports broadcasting rights. As their request was denied, MÉTROPOLE TÉLÉVISION could get broadcasting rights only to those sports events the EBU members did not wish to broadcast. In cases where any EBU member wished to broadcast an event or even just a part of it, the non-EBU members were denied access to it and were allowed delayed transmission only. The ECJ ruled that this practice distorted competition and was, therefore, prohibited.

The conflict between private and public EBU-member broadcasters is more intense when it comes to exclusive broadcasting rights to the Olympic Games. A lot has changed since 1960 when the Rome Olympic Games were the first to have been broadcasted on television. Nowadays, acquiring these exclusive rights involves billions of euros.

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which European private broadcasters can hardly offer. Public service broadcasters, on the other hand, have enormous economical potential, given the fact that they levy large sums of money through duties compulsorily imposed by the Law upon the citizens of the European countries. This conflict reached its climax in July 2004 when the International Olympic Committee (IOC) accepted the offer the EBU had made to acquire the rights of first broadcast of the 2010 and 2012 Olympic Games. Private broadcasters, among which was the German channel PREMIERE, submitted offers. Although private broadcasters outbid EBU the IOC opted for the latter. The IOC justified their decision on the grounds that, by granting the broadcasting rights to the EBU, a larger part of the population had access to the event since the EBU-members are public broadcasters with a wider transmission range than the private ones. PREMIERE registered a complaint against the EBU at the Commission claiming that the EBU was a cartel, monopolising sports broadcasting rights in Europe, and based its argumentation on the recent ECJ ruling in the METROPOLE case. It was, perhaps, under the pressure of these events that the EBU has accepted many private broadcasters as its members.

There are also two other very important football cases which have never been brought before the ECJ: the UEFA case and the Deutsche Fussball Bund (DFB) case.

In the first case, UEFA submitted a request to the Commission in 1999 in order to get permission to a collective sale of the commercial rights of the Champions League as a package. Apart from the broadcasting rights, the package included sponsorship rights, publicity rights and intellectual property rights. UEFA claimed that it was, at least, a co-owner of the commercial rights of the Champions League because it had created this product and established it in the market as a separate institution with its own identity and its own consumers. UEFA also stressed it was responsible for a wide range of organisational burdens, such as organising matches, establishing regulations and monitoring their implementation, organising match venues, insurance etc. Their major contribution, however, lay in their bearing the financial risk for the success of such an organisation, since they guaranteed all participating clubs a minimum amount, irrespective of the fans attendance at the venue. As a matter of fact, in 2003 UEFA had already amended its regulations concerning sports broadcasting by granting rights to the participating clubs as well. Thus, the clubs retained the rights to the Champions League qualifying rounds, whereas UEFA would hold exclusive rights to the group stages and the final phase. If, however, UEFA did not manage to sell the rights within one week after the draw for the group stage, the clubs would regain their right to sell the matches as well, in the same time frame as UEFA. The Commission ruled that the joint selling of these rights satisfied the criteria for exemption laid down in Article 85(3) EC.

The second case pertained to the request of the Deutsche Fussball Bund (DFB) for a permission concerning the collective selling of the television and radio broadcasting rights of certain football competitions in Germany. The DFB put forward a number of arguments, namely concerning the benefits the weaker clubs would get as a result, since the Federation would see to a proportional revenue distribution to all the clubs. Additionally, the distribution system would not totally exclude the clubs from broadcasting rights, so the Commission ruled once again in favour of this practice.

VI. Application of the Principle of Proportionality in Sports Broadcasting

A case has recently been brought before the ECJ, which may give the exclusive sports broadcasting rights a new perspective. It is the case of UEFA vs Commission, in which the question is brought up as to whether some major sports events should fall under Article 3a of the Council Directive 89/552/EEC as "of major importance to society" and thus, cannot be subjected to exclusive radio and television broadcasting rights, otherwise a substantial proportion of the public in a Member State would be prevented from watching the event via live coverage or deferred coverage on free television. UEFA put forward many counter-arguments, the most important being the principle of proportionality, in the sense that the Commission's decision ruling that a sports event such as the EURO could be considered as "of major importance to society" and thus, should not be subject to exclusive television and radio broadcasting rights, was neither adequate nor necessary for the objectives it purported to achieve.

This case is of great importance. It is usually the sports institutions who argue in favour of the importance of sport for society and of its public service, in their effort to establish the so-called specificity of sport that accounts for the particular status of sport and its exclusion from the competition rules. The aim is to show that sport is not yet another profitable activity but something more than that, which should be treated in a particular way. The specificity argument was used by sports authorities as well as member states as a shield against the efforts of European Institutions to include the sports sector in the range of European Competition law and it was the ECJ that used the principle of proportionality as a compromising solution. Now that the specificity of sport is widely recognised, it is a member State that claims the specificity and public service of sports and it is sports authorities that invoke as a shield for the principle of proportionality.

The proportionality rule has been applied by the ECJ in the most important sports related matters so far. The specificity of sports cases, sporting exemption cases and sports betting cases are all being decided by the application of the principle of proportionality. In fact, this rule has been the answer to all sports related cases. In all cases pertaining to whether sport is included in the competition rules or not, the Court will invoke the proportionality rule. It remains to be seen whether this rule will also apply in sports broadcasting cases.

20 See case IV/57.598-UEFA
21 See case IV/57.344-DFB
24 See case T-150/08, UEFA v Commission.