The International Sports Law Journal

T.M.C. ASSER INSTITUUT

ASSER International Sports Law Centre

2003/1

Griffith UNIVERSITY

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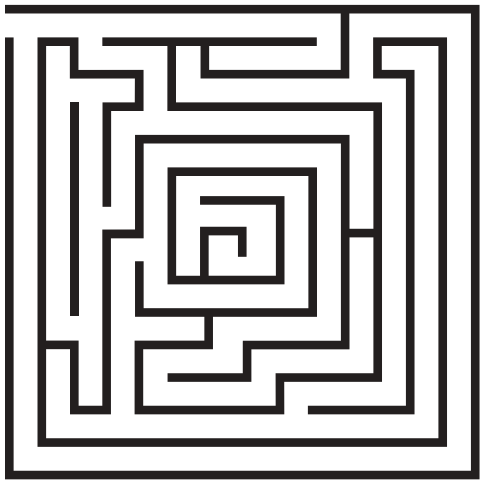

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CONTENTS

EDITORIAL

This first issue of the International Sports Law Journal in 2003 is by sheer coincidence characterized by the fact that it contains Dutch/non-Dutch 'twin contributions' on several topical subjects from mainly practicing lawyers.

Having lectured on the topic on 17 December last in The Hague, Marjan Olfers of the ASSER International Sports Law Centre in this issue deals in writing with the legality of *state aid* to (Dutch) professional football clubs under European law, while Michael Gerlinger of Taylor Wessing Munich focuses on infrastructure measures, in particular the public financing of football stadiums, in Germany in the context of the World Championship 2006 to be held in this country.

The second theme concerns *information in sport*. Mary Still, Kate Jordan and Toby Ryston-Pratt of Clayton Utz, Sydney, Australia, have contributed their views on TV rights related to major sports events and the Olympic Games, going back as far as the 1936 Berlin Games when television was first involved. The focus of their article is of course on the Sydney Games in 2000, but only after having discussed the 1956 Melbourne Games when 'the birth of television' took place in their country. In the final paragraph of this article, the question of the IOC and its relationship with the new media is brought up. It just so happens that last year, on 17 October, the Second Asser International Sports Law Lecture was delivered by Annette Mak and Bert-Jan van den Akker of CMS Derks Star Busmann, precisely concerning 'Information and New Media: Legal Aspects'. The elaborated version of this Lecture is now published here under the title 'Restrictions on the freedom of information in sport: Finding a proper balance between the interests of sports organizations and the free flow of information'.

The third 'twin' theme is the *relocation* of professional football clubs. Adrian Barr-Smith, Elliott Payne and Lee Sennett of Denton Wilde Sapte in London discuss the legal aspects of the move of Wimbledon FC to another venue under the title 'Franchise United'. Could this herald the beginning of franchise football? Pieter Verhoogt, senior manager at KPMG BE, considered this same issue of the relocation of clubs from an economic perspective in an opinion for a Dutch daily paper, which we have added here as additional food for thought.

Ambush marketing is the fourth 'twin' theme: Ian Blackshaw, contributing editor for ISLJ, presents a major feature article on the special Chinese Law for the 2008 Olympics (full text added), and Steve Cornelius, a member of ISLJ's Advisory Board, contributes an opinion on the new South African penal legislation which was adopted in view of the Cricket World Cup Tournament this year.

Finally and especially, the contribution on the CAS Mediation Rules by Ousmane Kane, First Counsel to the Court of Arbitration for Sport and responsible for *mediation*, should be mentioned. He discusses among other things the CAS' mediation practice, including two cases related to administrative disputes and three to commercial disputes. Mr Kane's article is based on the speech which he delivered at the first Asser-Griffith Round Table Session on international sports law in London on 10 December 2002, which concerned sport and mediation.
The Editors

State aid to Professional Football Clubs: Legitimate Support of a Public Cause?

by **Marjan Olfers***

1. Introduction

In order to stave off the involuntary liquidation of second division football club MVV, which for the past hundred years already has been closely connected to the town of Maastricht, the burgomaster and aldermen of the town made a decision concerning a guarantee for the purpose of a loan to the amount of € 1.36 million. Following the intermediation of the Municipality the loan was eventually granted by the *Bank Nederlandse Gemeenten* (*BNG*) (Netherlands Municipalities Bank).

Given the recent reports that many professional football clubs are financially unhealthy and in order to prevent the *KNVB* (Royal Dutch Football Association) from refusing them licences for the upcoming season, many other Dutch Municipalities besides Maastricht (such as e.g. Zwolle (home of FC Zwolle) and Breda (NAC) proved willing to aid 'their' clubs financially. Partly because of this support from the Municipalities the *KNVB's* licensing appeals committee was in the end prepared to license NAC Breda, Fortuna Sittard, TOP Oss, FC Den Bosch and Sparta Rotterdam for this season.

But also clubs that are not in direct financial need have proven successful in their appeals to local government; clubs have, for example, been given the use of a stadium at prices far below market value. This is not a typically Dutch phenomenon, but is seen to happen everywhere, both in and outside Europe,[1] such as in the United States where since the urge for expansion displayed by Major Leagues[2] as of 1960 cities have attempted to elicit commitments from professional teams by subsidizing stadiums.[3] In the United States, the debate mainly focuses on the question 'Why should Americans shell out millions in tax dollars to subsidize professional sports teams?'[4]

In economic discourse the fact of the 'wealthy owners [team owners, ed.] and their extraordinarily well paid employers [players, ed.]' is also taken into consideration.

The discussion however barely touches upon possible competition law aspects, even though especially in the United States competition law is considered as the Magna Charta of free market competition.[5]

In Europe, though, apart from the funding of facilities (infrastructure) which is still usually regarded as a government task, the issue is also the fact that governments are saddled with the professional clubs' financial mismanagement. Different grounds, both in the US and in Europe, however, are being used to justify the various kinds of support. Clubs and Municipalities, for example, emphasize among other things that the clubs have recreational, sportive, cultural and social meaning for the towns as well as economic significance and they point out that what is at stake is the 'legitimate support of a public cause'.[6] In addition to these noble grounds for justification there are almost certainly emotional factors at play, possibly fuelled by threats from fanatical fans aimed at local administrators.

The political choices at the local level may, however, conflict with Community law rules, among which the provisions concerning state aid (Articles 87 and 88 EC). This is clearly shown by a letter sent by Director General A. Schaub (competition) of the European Commission to the Dutch Representative in Brussels indicating that a number of Dutch Municipalities had violated the rules concerning state aid[7]

The European Commission thus uses the rules concerning state aid to test the legality of favours that are valuable in money and that are granted by local governments to professional clubs. It is my belief, however, considering the situation in the United States, that this does not address the actual problem and that Community competition law should in this case be made subservient to the local-level political process of decisionmaking.

2. Competition law, state aid, a Common Market?

2.1. Competition law

In Western economies the adage 'competition between undertakings is a good thing' is taken as law.[8] That less prosperous undertakings are the casualties in the race for the survival of the fittest is all in the game. For this reason, the EC Treaty provides rules which have to safeguard the competition in the Common Market and these rules do not only address (private) undertakings, but Member States as well (Articles 87 and 88), among which the decentralised authorities. These rules are the prerequisite for realizing the European Community's objective: the creation of a Common Market (Articles 2 and 3 of the EC Treaty).[9] After all, granting state aid will usually imply that the receiving party is given an advantage over its competitors in other Member States.[10]

However, competition between professional football clubs shows certain special characteristics. As opposed to other undertakings in the course of trade the product, i.e. the match or the competition, cannot be produced without the willingness of one or more other clubs to compete. In other words, even the fittest club always needs another club or clubs to achieve a match or competition. This necessary mutual dependence of the clubs is a direct result of the test of strength in the game of competing as between the parties under equal circumstances, which is an essential characteristic of organized competitive sports.[11]

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1 The German town of Munich let a piece of land to local football club Bayern Munich FC at a rent of 6.079,50 DM a year.

2 The four most important federations, called 'Major Leagues', in the United States are 'Major League Baseball (MLB)', 'National Basketball League (NBA)', 'National Football League (NFL)', 'National Hockey League (NHL)'.

3 F.E. Noll, Roger, E. & Zimbalist, Andrew, (ed.), *Sports, Jobs and Taxes: The economic impact of sports teams and stadiums,* Washington D.C.: Brookings institution Press, 1997, p. 5.

4 Rosentraub, Mark S., *Major League Lo$ers: The real cost of sports and who's paying for it,* revised edition, New York: Basic Books, 1999.

5 In the 90s of the 20th century around 11 billion dollars of tax payers' money was allegedly spent on new sports facilities. Cf. Weiler, Paul, *Leveling the Playing Field*, Harvard University Press, Cambridge Massachusetts, 2000, p. 263.

6 *NRC Handelsblad* newspaper of 10/1 2002, '*Maastricht lokt proefproces uit*' (Maastricht commences test case).

7 European Commission, DG Competition, Alexander Schaub, July 2002. Every newspaper reported the letter mid-November, inter alia *NRC Handelsblad*, 18 November 2002, front page 'EU valt over steun aan voetbalclubs' (EU takes umbrage at aid to football clubs).

8 In Western economies it is assumed that efficiency is achieved by competition between undertakings, as competing undertakings ensure further innovation and motivates undertakings to come up with better and more efficient methods of production. This leads to lower prices, high-quality products and ample choice for consumers.

9 The practice of sports falls within the scope of the EC Treaty to the extent that it constitutes an economic activity within the meaning of Article 2 of the Treaty. *Walrave Koch*, Case 36/74, ECR 1974, p. 1405, para. 4 and *Donà*, Case 13/76, ECR 1976, p. 1333, para. 12.

10 First report on Competition Policy 1971, under 133.

11 J.Quirk & R. D. Fort, *Pay dirt: the business of professional team sports*, Princeton, New Jersey: Princeton University Press, 1992, p. 243.

2.2. State aid

Article 87 in general terms provides that in principle, any state aid which can distort competition in the Community is incompatible with the common market and is (implicitly) prohibited.[12] Although it can be said that the receiver of aid is also given an advantage over competitors on the home market, the Member States of the Community, including the Netherlands, lack a similar provision in their national legislation, such as for example Article 6 of the Dutch Competition Act as the national equivalent of the European prohibition on cartels under Article 81 of the EC Treaty. And neither does the liberal country of America, where the first federal competition laws were introduced as early as at the end of the 19th century and served as a model to our European competition law, provide a similar state aid provision.[13] This warrants the conclusion that both in the United States and in the individual countries of Europe the *democratic legitimacy* of possible aid comes before any possible negative competition law effects on the national market. Article 87 of the EC Treaty should therefore, in my opinion, mainly be approached in the light of the creation of a Common Market. It is expected, for example, that the European Commission as the competition law watchdog of the European Community will soon have its hands full with the former East bloc countries' aid to e.g. the steel industry. Its intervention in that case serves the higher purpose of safeguarding the conditions under which the game of supply and demand can function with optimal effect on the Common Market, such as guaranteeing a level playing field where the steel industry is concerned.

2.3. A Common Market for sport?

Apart from the fact that competition in the sports sector displays the special characteristics mentioned, it is also apparent that the attempt to bring about a common sports market is as yet no more than an illusion.

In its judgment in the Bosman Case the Court of Justice of the EC held that the free movement of workers (ex Article 48 of the EC Treaty) precludes the application of rules concerning transfer fees after the expiry of the player's contract and besides that this Article also precludes rules which limit the number of players who are nationals of other Member States and by this decision opened up the international players market. Paradoxically though the Court at the same time opposed the merger of national sports markets by holding that the free movement of workers does *not* preclude clauses containing restrictions concerning the number of players who are nationals of other Member States (known as nationality clauses) in *international matches* (between national teams).[14]

Thus the Court does go in the direction of a common labour market but at the same time leaves the national product markets in the sports sector intact. After all, given the fact that international competitive sport is mainly based on the rivalry between the individual countries, a common sports market will only come about after Europe, like the United States, begins to participate as a party in the international game of competition.[15] This distinguishing factor to my mind calls for at least a reconsideration of the role of state aid rules in relation to the sports sector.

3. Background: state aid to professional clubs in the United States and the Netherlands

3.1. Clubs, wins or profits?

That clubs often turn out to be a less than profitable investment was already known early on in the United States. A standard joke doing the rounds among team owners in the US in the 1930s and 40s was: 'Do you know how to make a small fortune? Start with a big fortune and buy a sports team'.[16] By now in the United States running a sports team is more than an expensive hobby and a professional team will be managed much like any other undertaking.[17]

By contrast, in Europe, the Netherlands included, increasing numbers of professional football clubs find themselves in an awkward financial position mainly due to disappointing transfer and TV revenues. Furthermore, small clubs in small markets are hard hit by the structural disadvantages of their location, which include a relatively small number of supporters and less sponsoring options, often causing them to run into financial trouble sooner than the major clubs within the league. These drawbacks have more serious consequences for clubs in the Dutch competition than they do for clubs in the US competition. This is the result of the different historical development of organized competitive sport.

3.2. American competition structure: win(ning)s?

The American league structure, as opposed to for example the Dutch competition, is among other things characterized by the *limited* and *specific* number of teams taking part. This is because in the United States it is the custom for the league members, i.e. the team owners, to vote on the admission of a new team to the league whereby the financial structure of the potential admittee is a deciding factor. This is why the leagues (federations) consist of far fewer clubs than would be the case under free market conditions (entry barriers). On the one hand, this explains why a small number of clubs is able each to collect a large share of the common income and why these clubs are less prone to financial difficulties, while on the other hand it explains why government authorities are prepared to use tax payers' money to try to bind the existing professional team to the city or to act as bait for another professional team by financing the renovation or construction of a stadium. The local authorities believe they will be able to make themselves better known by means of a professional team and vie for the team's favour on the sponsor market. Sport after all is characterized by the fact that the measure of identification with a team is largely determined by its home town (known as the locality principle). Both in the United States and in Europe this characteristic is actually fuelled by the fact that the teams bear the names of their home locations.

3.3. Dutch competition structure: losses?

In the Netherlands a club which fulfils the requirements of the *KNVB* is allowed to enter the professional football competition. In order to ensure a certain competitive balance under relatively equal circumstances and to prevent clubs from having to withdraw from the competition prematurely due to, for example, lack of funds the *KNVB* has developed a licensing system which, among other things, lays down technical and financial conditions for the clubs to meet.[18] When a club is unable to fulfil these criteria the *KNVB* licensing committee

12 Implied prohibition cf. Case 78/76 *Steinike v. Germany* 1977.

13 Bellamy &Child, *Common market law of competition,* London: Sweet & Maxwell 1993.

14 *Koninklijke Belgische Voetbalbond v J.-M. Bosman*, Case C-415/93, ECR 1995, I-4921.

15 See, even before the Bosman ruling, H.T. van Staveren, *Op de grens van sportregel en rechtsregel* (Between a rule of play and a rule of law) (inaugural lecture *Vrije Universiteit* Amsterdam), Deventer Kluwer 1992, p. 23, further elaborated in 'Arbeidsverhoudingen in de (beroeps)voetbalsport' (Industrial relations in (professional) football), *NJB* 1999, p. 810-811 and in 'The Bosman Ruling and Nationality Clauses- A critique of the treatment of nationality clauses in the jurisprudence of the European Court of Justice', *The International Sports Law Journal*, Asser Institute, The Hague: the Netherlands, 2002/1, p. 13-17.

16 Quirk & Fort, 1992, *Pay dirt: the business of professional team sports*, Princeton, New Jersey: Princeton University Press, 1992, p. 23.

17 What are the central issues involved in running a sports association like an undertaking? They concern matters like acquiring and hanging on to the necessary facilities, such as pitches and stadiums. Matters related to the purchase of players and goods, the organization of events, getting publicity, advertising, sponsoring, etc. All these decisions have to be made at the lowest possible costs. These are all 'ordinary' activities of an undertaking. The management needs to have planning skills, coordinating skills, people management skills and has to ensure financial stability.

18 Section 1 of the Financial chapter licensing system professional football (part of the Licensing Regulations) provides that 'the main objective of the licensing system is to safeguard the continuity of professional football in the Netherlands, using the means provided under these Regulations'.

debars it from participation in the competition.[19] Appeal from this decision lies to the *KNVB's* licensing appeals committee.

Because of the financial difficulties of half the professional football clubs for a long time their exclusion from the competition was imminent. For this reason, clubs applied to their Municipalities in droves and were able to turn the financial tide thanks to the aid they received from the authorities. A shakeout of the professional football competition was narrowly avoided and the competition managed to keep all clubs aboard.

A future shakeout may still be unavoidable due to the inability of the clubs to keep their heads above water in the long run as well. Whether this is such a disaster remains to be seen. Where possible, clubs, unlike in the United States, have the option of relegating and quietly preparing for their possible return to a higher division.[20] It often seems that this discussion is ruled by emotions and insisting on participation in the professional football competition appears to be just a matter of pride.

3.4. Lenient authorities

Although the teams in the United States are financially better off as a result of the closed competition structure and the limited number of teams, professional teams in the US still receive financial aid from local authorities. Between 1992 and 1998, for example, the renovation and construction costs of the 34 stadiums ran to 6.3 billion dollars, 70% of which was government-funded. In addition, American teams received government aid of a different kind, for example, in the shape of 'soft' lease agreements.[21]

According to the *Volkskrant* in our small country of the Netherlands over € 1.36 million found its way from local government to the professional football clubs in the shape of subsidies, loans or shares in stadiums during the past five years alone.[22] Although the arguments given for granting financial aid to professional clubs are by and large the same, in the United States democratic legitimacy is everything, whereas in Europe the granting of aid is mainly placed within the Community context of competition law.

4. Same arguments in United States and Europe: different approach

4.1. Arguments

The advocates of the public funding of professional clubs, both in the United States and in the Netherlands, mostly proffer the same arguments, as put into words by the then mayor of Nashville, Phil Bredesen, to justify the construction of a stadium (costs: 200 million dollars) for the team that was prepared to trade in Houston for Nashville Tennessee (the *Tennessee Oilers*) in 1996:

'First the economic impact, which does not totally justify the investment but justifies a piece of it. Second, the intangible benefits of having a high-profile NFL [National Football League, ed.] team in the community at a time when cities are competing for attention is a positive. Third, it is an amenity that a lot of people want. We build golf courses and parks and libraries and lots of things because people in the community want them, and certainly there are a substantial number of people who want this. Fourth the location of the stadium represents the redevelopment of an industrial area close to downtown, certainly a positive in its own right and a significant factor in the public mind. Taken together, it makes a very compelling argument for going ahead with this.'[23]

4.2. Political considerations: United States

In the United States, politics in the shape of (local) authorities, or the electorate itself (in the case of a referendum) has the final say. They eventually determine whether the new stadium will be renovated or built with government funds in order to lure the professional team or to keep it if the team otherwise threatens to relocate to another city.

The political and social debate in the US centres on the theme 'why should tax payers line the professional teams' pockets?' Especially considering the enormous amounts of players' salaries and the no less wealthy team owners.

In order properly to assess this question the mostly economics-oriented American literature casts doubt on the arguments that most catch the eye.

Is it realistic to assume that the club will stimulate employment and business, considering, for example, substitution effects? Will a sporting activity create a sufficient spillover effect (for example, will the audience go into town after the game to visit pubs or restaurants)? Will the stadium attract enough visitors from out of town, tourists? Will the club lend added value to the city and will it really serve to promote it?[24]

Conspicuously absent in the American approach is the lack of attention paid to the fact that the receiver of aid is given an advantage over its competitors on the American national sports market. The consumer's well-being in the form of freedom of choice for the electorate as a logical consequence of the democratic decision-making process is accorded more weight in this discussion.

4.3. Considerations concerning the Community competition law framework: the Netherlands

The same arguments are put forward where the legitimacy of government aid to professional football clubs in the Netherlands is concerned. The club's, for example, recreational, sportive, cultural, social and economic significance to the town is pointed out. However, contrary to the United States where democratic legitimacy is the focus, in Europe the legitimacy of government aid to professional football clubs is placed in a Community competition law framework. Apart from the fact that leaving the national product markets intact as a result of the nationality and locality principles in sport runs counter to the objective of the state aid rules, i.e. safeguarding equal conditions for competition on the Common Market, the democratic decision-making process in my opinion offers more opportunities, as experience in the United States has shown, to asses the granting of aid to professional clubs on its proper merits. A purely competition law approach, as set out below, impedes this.

5. Articles 87 and 88 of the EC Treaty

5.1. Content

Article 87(1) of the EC Treaty stipulates that, save as otherwise provided elsewhere in the Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the common market. At the same time, paragraphs 2 and 3 of the Article provide a number of exceptions.

Exceptions apart, a Municipality has a duty under Article 88(3) of the EC Treaty and Article 2(1) of the Procedure Regulation to notify any plans to grant new aid. Article 3 of the Procedure Regulation furthermore provides that notifiable aid shall not be put into effect before the Commission has taken a decision pursuant to Article 88(3) and, or Article 88(2) of the EC Treaty authorising such aid (known as the standstill clause).[25]

19 That the licensing system could possibly come into conflict with the prohibiton on cartels under Article 81 of the EC Treaty or the abuse of a dominant position under Article 82 of the EC Treaty is not considered in the present article.

20 In the Netherlands one division, in other European countries several divisions.

21 Quirk & Fort, 1992, *Hard ball: the abuse of power in pro team sports,* Princeton, New Jersey: Princeton University Press, 1999, p. 140.

22 Jan Meeus, John Schoorl, 'Betaald voetbal teert op overheid' (profesional football lives off government), *Volkskrant*, 17 August, 2002.

23 Included in J.Quirk & R. D. Fort, *Hard ball: the abuse of power in pro-team sports*, Princeton, New Jersey: Princeton University Press, 1999, p. 150.

24 After: Len Sherman, *Big League, Big Time: the birth of the Arizona Diamondbacks, the Billion-dollar Business of Sports, and the Power of the media in America*, Pocket Books: New York, 1998, p. 294.

25 See Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (now Article 88).

5.2. Position of the Dutch government

All criteria of Article 87 of the EC Treaty must be fulfilled for the duty of notification to exist.[26] Probably supported by opinions discussing the financial favours granted by the Municipality in the case of MVV Maastricht and anticipating a potential decision of the European Commission the government took the position that financial aid granted by Municipalities to professional football associations to prevent clubs from financially going under and, or to support the renovation or construction of a stadium does *not* constitute state aid under Article 87 of the EC Treaty and does therefore not need to be notified.[27]

5.3. The European Commission's response

In its response to the Dutch government's position the European Commission stated, however:

'Under certain conditions financial aid to professional football clubs could be something other than state aid. This could be the case when the aid is granted in the context of the national system of education or when the aid may be regarded as funding for infrastructure'.[28] Apparently the European Commission, after a systematic examination of elements, reached a different conclusion than the Dutch government.

5.4. Systematic discussion of elements

5.4.1. Aid granted by a Member State or through State resources in any form whatsoever

Article 87 of the EC Treaty does not provide a description of the term state aid. However, within the European Community advantages which are granted directly (e.g. through central government, provinces or municipalities) or indirectly (e.g. through public or private bodies established by the state) through state resources are to be regarded as state aid within the meaning of Article 87 of the EC Treaty.[29] The scope of the term moreover extends further than that of subsidy and therefore includes measures which in various forms relieve the burden which normally weighs on the undertaking's budget without strictly speaking going so far as to constitute a subsidy.[30] The term includes, for example, the lower than market value rent charged by a government authority to a professional football club for the lease of a stadium.

5.4.2. Favouring certain undertakings or the production of certain goods

5.4.2.1. The term undertaking

Ever since *Höfner v Macroton*[31] it has been established that an undertaking 'encompasses every entity engaged in *an economic activity, regardless of the legal status of the entity and the way in which it is financed*'. Professional clubs offer their services on the market, i.e. they are engaged in an economic activity and for this reason they are to be regarded as *undertakings*. For the purpose of establishing this it is irrelevant whether they make an actual profit. Whether this means that amateur clubs are automatically outside the scope of application is, as far as I am concerned, not a foregone conclusion. Apart from the fact that it is impossible to draw a clear dividing line between an amateur club and a professional club, as amateurs also often perform paid work, an amateur club's activities may also well be economic.[32] For example, amateur clubs can be active on the sponsor market or the players market.

5.4.2.2. Selectiveness

Article 87 of the EC Treaty only applies in cases of what is called selectiveness, when only one undertaking or one entire branch of industry profits from the favouring measure, so as to distinguish this situation from the one where general measures favour *all* undertakings in a Member State.[33] In the case of state aid to professional football clubs the aid involved always concerns individual measures, thereby automatically fulfilling this condition. Even if a national government were to grant aid to all clubs within a certain competition the aid would be selective. In the game of football this latter scenario is not inconceivable now that the demise of a media group could imply the involuntary liquidation of several clubs within one competition.[34] This is caused by the fact that the existence of professional clubs these days largely depends on the income derived from the sale of TV rights.

5.4.3. Which advantage these undertakings would not have obtained by commercial means

This is the framework in which it can be said that the abovementioned loan to MVV Maastricht, for example, but also the sale of land or the leasing of stadiums at favourable conditions, more favourable than the club would have been able to obtain commercially (known as the market economy investor principle) come within the term's scope. After all, if the local authority were to act on market terms as other players on the market, like banks, there would be no state aid and notification would not be necessary.

For the event that a Municipality like Zwolle 'merely' wishes to act as guarantor a Commission Notice states that guarantees generally fall within the scope of Article 87(1).[35] The guarantee enables the club to obtain a loan or to obtain better financial terms for a loan than those normally available on the market. Competitors, clubs that find themselves in equally dire straits and have not been given a guarantee, will be put at a disadvantage compared with the beneficiary of the guarantee.

If the state sells land to the club it will have to take account of this principle, assisted by the guidelines established by the Commission for this purpose.[36]

5.4.4. (Threatens to) distort competition and affects trade between Member States

'Concerning State aid, the conditions under which trade between Member States is affected and competition is distorted are as a general rule inextricably linked.'[37] 'When State financial aid strengthens the

26 The Dutch government as a matter of fact failed to support its position by proper reasoning.

27 Letter of the Dutch Permanent Representative to the European Commission, June 2002. According to newspaper reports: 'Kabinet: hulp clubs geen staatssteun' (Cabinet denies that aid to clubs is state aid).

28 European Commission, DG Competition, Alexander Schaub, July 2002.

29 *Sloman Neptune*, C72/91 and C-73/91, ECR 1993, p. I-887: 'As the Court held in its judgment in Case 82/77 Openbaar Ministerie of the Netherlands v Van Tiggele ([1978] ECR 25, paragraphs 23-25), only advantages which are granted directly or indirectly through State resources are to be regarded as State aid within the meaning of Article 92(1) of the EEC Treaty. The wording of this provision itself and the procedural rules laid down in Article 93 of the EEC Treaty show that advantages granted from resources other than those of the State do not fall within the scope of the provisions in question. The distinction between aid granted by the State and aid granted through State resources serves to bring within the definition of aid not only aid granted directly by the State, but also aid granted by public or private bodies designated or established by the State.'

30 See Judgment of the Court of 23 February 1961. *De Gezamenlijke Steenkolenmijnen in Limburg v High Authority of the European Coal and Steel Community*. Case 30-59, ECR 1961 p. 1, para. 40 and Case C-200/97, *Ecotrade*, ECR 1998 p. I-7907, para. 34. However, as long as no distinction is made between the various undertakings or branches of enterprise such measures do not fall within the prohibition under Article 87(1) ('selectiveness requirement'), this is the case, for example, when tax cuts benefit all undertakings.

31 *Höfner and Elser v Macroton*, Case C-41/90, ECR, 1991, I-1979.

32 Otherwise: Hessels, Bart, Neven, Annelies, *Staatssteun en EG recht* (State aid and EC law), p. 38.

33 This is in fact not always to establish, especially when prohibited aid to a certain sector and general industrial policy are difficult to tell apart. Cf. Advocate General Capotorti in *Commission v Ireland*, Case 249/81, ECR 1982.

34 Media magnate Kirch, for example, has to pay an annual _ 358 million in order to be allowed to broadcast the *Bundesliga* games.

35 OJ 2000, C 71, p. 14, 'Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees'.

36 OJ 1997, C 209, p.3, 'Commission Communication on State aid elements in sales of land and buildings by public authorities'.

37 *Mauro v. Commissie*, Joint Cases T-298/97, 15 June 2000, ECR 2000, p. II-2319, para. 81.

position of an undertaking compared with other undertakings competing in intra-Community trade the latter must be regarded as affected by that aid.'[38] Every advantage valuable in money which is being extended by a Municipality to a club affects the competitive position of the club in question compared with its horizontal competitors, i.e. the other clubs within the competition or the other club in a match. Financial aid granted to a club in trouble will therefore by definition result in a distortion of competion, with the only remaining question being whether trade is adversely affected.

It has been argued that in the case of MVV Maastricht intra-Community trade would not be affected. MVV is part of the creation of a product, the national *Gouden Gids* League (second division), and as such is mainly active on the national market. The distortion of competition is therefore mostly felt at the national level. Partly due to the lack of a national law equivalent of the Treaty provision it would seem that in keeping with these arguments the democratic legitimacy at the local level takes precedence over possible competition law effects at the Community level. This does not change the fact, however, that from a competition law perspective it is justified to decide that the trade between Member States is likely to be affected.

The European Commission only needs to indicate in its decision which circumstances it feels may result in the aid being *likely* to affect trade and *threatening* to distort competition. It does not need to determine the relevant market or examine the market structure and competitive conditions.[39] Although there has to be an actual impact as opposed to a purely theoretical impact, it is *not* necessary to demonstrate that there is a 'noticeable' impact.[40] This latter condition is, however, a requirement for the application of the prohibition on cartels under Article 81 of the EC Treaty.[41] For the purpose of the scope of application of Article 87 both the Court of Justice of the European Communities and the European Commission therefore readily tend to accept that trade between the Member States is affected.

Trade between the Member States in the case of professional football clubs may be shown by the fact that national clubs take part in European and other international games or competitions. Also the fact that the professional football clubs are active on the international players market and, as the Dutch saying goes, 'all fish the same pond' for talented players and the fact that clubs compete for the spectators' favour with other branches of sport and entertainment may be used to demonstrate that to give clubs a financial advantage affects or is likely to affect trade between the Member States. It goes without saying that the impact will be considerably greater where clubs like Ajax, PSV and Feyenoord are concerned and considerably less where the minor clubs within the competition are concerned.

In other words, from a competition law point of view, the fact that the main playing field is the national market does not change the fact that clubs are also (potentially) active on international markets.

5.4.5. Exceptions?

Considering the above, financial favours granted by local authorities to clubs will generally have to be notified, although a number of exceptions exist to this duty to notify. For example, the de-minimis Regulation which provides that aid to the same beneficiary not exceeding a ceiling of € 100 000 over any period of three years does not fall under Article 87(1) (known as the de-minimis rule).[42] In cases of financial aid to clubs the amount of aid exceeds this ceiling by several times: besides the amount mentioned which was granted to MVV Maastricht, other clubs, like Sparta Rotterdam and NAC Breda have received several millions of euros.[43]

Furthermore, the European Commission has laid down in a Regulation that certain categories of aid are *compatible* with the Common Market and are *not* subject to the duty to notify. These categories concern, for example, certain kinds of aid to *small businesses, research and development, environmental protection, employment and education*, on the condition that certain requirements are fulfilled.[44] In addition, *regional aid* is concerned on the condition that it is granted with due regard for the map which the Commission has adopted for each Member State for this purpose.[45] It is therefore possible that in some cases the Small and Medium-sized Enterprises Regulation could be invoked, as '(teams are nothing more than relatively small businesses and 'small potatoes' in an economy'.[46]

The replies to a questionnaire sent out by the Asser Institute last year show that Member States put forward in justification of the aid that the funds are used for *the training of young players.*[47] This ground is probably adduced because the encouragement of clubs that train and educate young players, especially smaller clubs, was considered a legitimate aim in sport, more specifically, the sport of football, in the Bosman ruling.[48] The question is whether this legitimate aim, involving the *specific training* of the player at the club itself, may be used to bring the aid outside the scope of application. Self-evidently, this sit-

38 *Philip Morris v. Commission*, Case 730/79, 17 September 1980, ECR p. 2671, para. 11.

39 *Philip Morris v. Commission*, Case 730/79, 17 September 1980, ECR p. 2671, para. 12. *Leeuwarder Papierfabriek v. Commission*, Case 296 & 318/82, 13 March 1985, ECR 1985, p. 809, para. 24.

40 *Vlaamse Gewest v. Commission,* Case T-214/95, 30 April 1998, ECR 1998, p. II-717, para. 37.

41 In its letter to the Ministry the European Commission does not discuss the possible lack of trade between the Member States. However, in an earlier case concerning a subsidy of 2 million DM favouring an undertaking which was trying to keep an insolvent swimming pool from closing in Germany the European Commission has held that the pool was used by residents of the town and the direct vicinity and that therefore no trade between the Member States was involved. Had the pool been situated in a border region and had there been no alternative (substitution effect) voor the visitors from across the border the Commission would probably have decided that trade was (potentially) affected.
By analogy, the same could be said of a football club in a border region. Whether a professional football club in the Netherlands would attract spectators from a neighbouring country, however, is doubtful. The nationality principle as well as the locality principle in sport causes the identification with the club (partly despite or thanks to the unification of Europe) to be largely dependent on the club's home location. However, such identification is hardly affected by the fact that several players from abroad are part of the team.

42 Commission Regulation (EC) No 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to de minimis aid, OJ 2001, L 10 p. 30.

43 Erik Oudshoorn, *KNVB: aantal clubs krijgt geen licentie,* NRC, 2 July 2002.

44 Small and Medium-sized Enterprises, Commission Regulation (EC) no. 70/2001, OJ 2001, L 10, p.33; Commission Regulation (EC) No 68/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to training aid.

45 Aid to certain areas, Art. 87(3) under a and c, see Council Resolution of 20 October 1971, OJ 1971, C111, p. 7 and guidelines on national regional aid OJ 1998, C74, p. 9.

46 Paul Weiler, *Leveling the playing field: How the law can make sports better for fans,* Cambridge, Massachusetts: Harvard University Press, 2000, p. 239.
Application to Small and Medium-sized Enterprises, Commission Regulation (EC) no. 70/2001, aims to facilitate the development of economic activities of small and medium-sized enterprises by exempting to certain maximum percentages aid for investment (in tangible and intangible assets, Article 4) or consultancy and other services or activities. Commission Recommendation of 3 April 1996 concerning the definition of small and medium-sized enterprises (OJ 1996, L 107, p. 4): Small enterprises: fewer than 50 employees and with an annual turnover not exceeding € 7 million or an annual balance-sheet total not exceeding € 5 million. Medium-sized: fewer than 250 employees and with an annual turnover not exceeding € 40 million or an annual balance-sheet total not exceeding € 27 million.
Application to Small and Medium-sized Enterprises, Commission Regulation (EC) no. 70/2001: It is conceivable, for example, that a subsidy for a certain investment in a stadium (not falling within the term infrastructure) is exempted and does not have to be notified on the condition that certain percentages and thresholds are observed. However, it is out of the question that state aid in the shape of a loan for the purpose of covering a deficit in the running costs falls within the terms of the exemption under the Regulation. The gross aid intensity shall not exceed 15 % in the case of small enterprises or 7.5 % in the case of medium-sized enterprises. Where the investment takes place in areas which qualify for regional aid higher ceilings apply.
In order to be eligible for aid the aid must be fixed (Article 7), meaning that the club must have applied for aid to the Member State or that the Member State has adopted legal provisions according to objective criteria establishing a legal right to aid.

47 Questionnaire not published. Carried out in support of a study of national and international aspects of state aid to professional football clubs. The questionnaire was sent to Ministries of Sport and national football associations in the EU Member States requesting them to supply relevant legal and/or other information related to the topic in question.

48 Helsinki report, Brussels, 1 December 1999, Com (1999) 644 and *Koninklijke Belgische Voetbalbond v. J.-M. Bosman*, Case C-415/93, 15 December 1995, ECR 1995, I-4921. Cf. AG Lenz in his Opinion in this case, ECR 1995, I-4921, p. 5033.

uation does not concern a general measure (see below, under 5.5.1) nor does it concern 'general training', leaving only the 'specific training' as a ground for exemption.[49]

In order to qualify for exemption the application must be based on proper reasoning demonstrating both the necessity and the proportionality of the aid, as the state aid mainly benefits the club in question (selectiveness). In addition, the dividing line between the training of players and the economic activities of sport clubs is difficult to determine, especially since the successful training of a player is usually linked with the transfer of that player whereby the club will be the recipient of a transfer fee. As yet it would appear however that such reasoning is lacking and that the aid is essentially intended to compensate the club's losses, which as yet precludes any reliance on the grounds for exemption.[50]

5.5. Duty to notify specific types of aid?

5.5.1. General measures fall outside the scope of Article 87

General measures, like national systems of education, do not constitute the *favouring of certain undertakings or of the production of certain goods*, but benefit persons or employees in general and therefore remain outside the scope of Article 87 of the EC Treaty.[51]

In a case before the European Commission, the Commission held, for example, that professional (football, basketball, rugby and volleyball) clubs in France which had centres for the education and training of youths, were permitted to be subsidized by the local authorities. The funds concerned were used to provide a school education in addition to the sports training.

As a condition for the aid the Commission stipulated that the French authorities were to keep a close eye on the allocation of the subsidies: *'to prevent any overcompensation of the net cost of the training and hence any cross-subsidisation, chiefly by requiring separate accounts to be kept for training measures and for the economic activities of the professional sports clubs'.*[52]

In other words, the Commission emphasized, entirely in keeping with the Helsinki Report and Advocate General Lenz' reasoning in his opinion in the Bosman Case, that the funding was not to exceed the costs, or else there would be a risk that the subsidies would be used for the economic activities of the clubs.[53]

Based on the case-law mentioned above the European Commission concludes in its reply to the position of the Dutch government that government funding paid to professional football clubs for the purpose of providing a *school education* as part of the national education system falls outside the scope of the Treaty. This expressly does not concern the training of young players as provided by the club itself; to that end the possible application of the Training Regulation discussed below must be pointed out.

5.5.2. Financing infrastructure may fall outside the scope of the Article

In its letter the European Commission indicated that the funding could remain outside the scope of application if it could be considered as funding for *infrastructure*. The financing of facilities is after all usually regarded as a typical government task and a stadium, like, for example, a theatre, serves a public interest. This public interest is partly based on the declaration appended to the Treaty of Amsterdam to which the Court also refers in its case-law and which stresses the social function of sport. In the Netherlands most of the public funding is spent on renovating or constructing stadiums.

A stadium is constructed in several stages. When the club buys land from the Municipality the guidelines applying to such purchases have to be consulted in which it says that the sale has to take place by means of an unconditional public bidding procedure or after valuation by an independent expert so that the selling value equals the market value.[54] A Municipality (Alkmaar) is therefore not supposed to sell a piece of land for € 1 to the property development company of the chairman of the professional football club (AZ) located there.[55]

Where there is a lease the rent payable by the club to the lessor, also when this is a government authority that owns the stadium, has to be determined in accordance with the market value *(market economy investor principle)*.

In order to bring the funding of a stadium outside the scope of application of Article 87 the stadium has to be made available to different undertakings (see 5.4.2.2 above : *Selectiveness*) and has to be the location for different events. The trend nowadays is for complex sports centres which, apart from the football club, house other sports clubs as well and offer additional entertainment, such as pop concerts, etc. Furthermore, economic activity in and around the stadiums is given a boost through the opening of shops, offices, cinemas, leisure centres and other amusements.

In case the club is the owner of the stadium or the stadium is managed by private parties the Commission in its letter provides that the following cumulative requirements must be fulfilled for the aid to fall within the term 'infrastructure':

- The State concession or financial contribution must be made conditional on the approval of a running requirement. This requirement will have to guarantee that the nature of the stadium as a facility open to *different users and activities* is maintained; and
- It has to be demonstrated that the amount of government funding was the minimum necessary to enable the project to go ahead, or, in case of a concession, that an appropriate rent is paid by the concession holder;
  and
- The granting of the funding or the concession has to take place by means of a public bidding procedure and, where this is not possible, by means of a valuation by an independent expert who is able to demonstrate the minimum necessary funding.

5.5.3. Financial aid from local authorities to sport clubs in difficulty

Save exceptions, it can be assumed that there is an obligation to notify. At the moment, where aid to professional football clubs in the Netherlands is concerned, the aid involved is usually *considerable* and is intended to save the sport club from financial ruin. This is insufficient reason for invoking one of the exemptions.[56] Thus, other than the Dutch government claims, it must be deemed likely that the granting of favours to professional clubs which are valuable in money constitutes state aid which must eventually be assessed by the European Commission.

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49 Commission Regulation (EC) No 68/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to training aid, OJ 2001, L 10, p. 20. Training aid when necessary and proportionate and on the condition that certain requirements are met is compatible with the Common Market. However, a ceiling of _ 1 million has to be observed for any single training scheme to one undertaking, The Regulation distinguishes between aid for *general training* and aid for *specific training*.
According to the Regulation, general training involves tuition which is not applicable only or principally to the employee's present or future position in the assisted firm, whereas specific training involves tuition directly and principally applicable to the employee's present or future position in the assisted firm (Art. 2 (d) and (e)). Where the training involves an inextricable combination of both types of tuition it is considered to be specific.
Aid for specific training may reach an intensity of 25% for large enterprises and 35% for small and medium-sized enterprises. These maximum intensities may be increased when the enterprise is eligible for regional aid under Article 87 under (a) or (c) of the EC Treaty.

50 *Matra v. Commission,* Case C255/91, 1993, I-3203, p. 609.

51 Communication of the Commission, Framework on training aid, OJ 1988, C 343, p. 10. Cf. *Belgium v. Humbel and Edel*, Case C-263/86, 27 September 1988.

52 IP/01/599, 25/04/2001 'Commission does not object to subsidies for French professional sport clubs'. The European Commision´s official decision of 25 April 2001 is available only in French: Aide d'État: N 118/00 - France, Subventions publiques aux clubs sportifs professionnels.

53 Helsinki report, Brussels, 1 December 1999, Com (1999) 644 and *Koninklijke Belgische Voetbalbond v. J.-M. Bosman*, Case C-415/93, 15 December 1995, ECR 1995, I -4921.

54 Commission Communication on State aid elements in sales of land and buildings by public authorities, OJ 1997, C 209, p. 3.

55 Hans Bekkers, *Voetbal International*, 16 August 2002, week 13.

56 Information from the Commission - Community Guidelines on State aid for rescuing and restructuring firms in difficulty (Notice to Member States including proposals for appropriate measures), OJ 1999, C 288, p. 2, under 17.

5.6. (In)compatibility

Aid falling within the scope of application may in principle not be carried out until the Commission has reached a decision. Until recently, Municipalities have failed to observe this obligation. Failure to notify, however, does *not* result in the incompatibility of these aid measures with the Common Market, especially now that the Commission is given a wide margin of appreciation under Article 87(3) to declare the aid compatible with the Common Market.[57] This very same European Commission has furthermore once before lent a willing ear to the football lobby and has tried to create special conditions for the football industry.[58] The Commission may, however, order the Member State to suspend the aid.[59] In the worst-case scenario, when an aid measure is declared incompatible with the Common Market, the value of the aid including interest must be paid back, even if this were to imply the club's involuntary liquidation.

5.6.1. Exceptions to incompatibility with Article 87(3)

European competition law is to be interpreted in the context of the objectives of the EC Treaty. In this, the emphasis lies on economic and social justification grounds. Generally speaking, aid which is proportionate and necessary with respect to the advantages to be gained of which it is assumed that they are in the Community's interest will be compatible with the Common Market. The Commission has a wide margin of discretion in deciding this.

The Guidelines and Framework Regulations serve to provide insight into the process of weighing the competition law drawbacks against the public interest. Again, however, the non-binding Declaration to the Treaty of Amsterdam should be called to mind here, in which the social function of sport is stressed. Remarkably, the Commission in its letter does not venture to weigh the proportionality and necessity of the alleged restriction of competition against the advantages to be gained in the Community context.

Often the authorities and the clubs stress the economic, recreational, sportive, cultural and social function of the club, besides which emotional factors are known to play an additional role in the granting of aid, like a sense of 'national' or 'local' pride or perhaps other feelings, like a sense of security or the lack of it on the part of local administrators as a result of serious threats. Community competition law offers little scope for critically weighing arguments such as these.

5.6.2. Aid to clubs in difficulty compatible after all?[60]

According to the Commission's Guidelines state aid intended to stave off the involuntary liquidation of undertakings in difficulty (rescue aid) or to encourage restructuring may be justified in certain conditions. The Guidelines list, for example and among other things, social or regional policy reasons or the need to take account of small and medium-sized enterprises.[61]

One of the Guidelines concerns rescue aid and at first glance this often appears to be the case for aid to clubs in financial difficulty. However, the Guidelines dictate that rescue aid has to be *temporary* and is to enable the enterprise in difficulty to stay afloat for the time needed to work out a restructuring or liquidation plan and / or for the length of time the Commission needs to reach a decision on that plan.[62] The other requirements are also very strict, among which the fact that the rescue aid in question has to consist of liquidity support in the form of loan guarantees or loans and be linked to loans that are to be reimbursed over a period of not more than twelve months after disbursement of the last instalment to the firm.[63]

It does not appear from the reports that the clubs have fulfilled strict requirements like the above. Furthermore, a number of clubs has received financial favours from the Municipality in question before, thereby undermining the temporary nature of the aid and making it in principle incompatible with the Common Market.

5.6.2.1. Sport as a cultural activity?

Since the EC Treaty's amendment in Maastricht it also contains an exception clause for culture under point d of Article 87(3). In the Bosman Case the German government pointed out that in its opinion sport resembled culture. The Court of Justice held that the freedom of movement for workers, as one of the fundamental freedoms in the Community system, cannot be limited by the Community's obligation to respect the national and regional cultural diversity of the Member States when it uses the powers of limited extent conferred upon it by (former) Article 128(1) of the EC Treaty in the field of culture.[64] Although it seems to me that sport actually does resemble culture, it would appear that the Court has blocked the possibility to have sports categorized as culture under Community law.[65]

5.7. Concluding on the competition law approach

In its letter the European Commission stated that aid in the context of for example the national system of education or of infrastructure in some cases could fall outside the scope of Article 87 of the EC Treaty. In my view, however, on the condition that it is properly reasoned and that all requirements are fulfilled, aid for the purpose of saving a club from financial ruin could also be compatible with the rules concerning state aid. The Commission did not discuss this in its letter, but indicated that other aid is to be examined on a case-by-case basis. In the light of the Commission's workload, considering for example the tangle of liberalization, concentrations, joint ventures and (considerable) illegal state aid in the potentially new EU Member States, this is all the more remarkable.

6. Emphasis on competition law unjustified

A competition law approach thwarts the political decision-making process at the local level, as local authorities in the past used to grant financial advantages to clubs on an enormous scale without paying any attention to the rules concerning state aid. That aid was nevertheless granted, by the way, is more elucidating concerning ourselves as the electorate than it is concerning sport. The strict application of state aid rules encourages local authorities to look for contrived escape mechanisms in the jumble of exempting Regulations and Guidelines.

In applying the Community rules concerning state aid the arguments in the realm of the public interest which are put forward to justify the Municipalities' actions, such as among other things the essential social and cultural function which the club fulfils in the town, have to be translated into a European Community interest and function. This causes the local arguments to remain insufficiently heard.

Apart from this, other clubs within the competition who have been put at a competitive disadvantage have never bothered to argue the distortion of competition due to the granting of state aid. This warrants the conclusion that it is an accepted fact that some clubs within the league have wider sponsoring options than others, no matter if the sponsoring in question comes from private parties or from the government. In other words, the alleged disadvantage of the competing clubs is inherent in the competitive conditions on the sponsor market.

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57 *France v. Commission*, Case C-301/87, 14 February 1990, ECR 1990 p. I-307, para. 11 et seq.

58 M. Olfers 'Nieuw transfersysteem in de voetbalsport. Staat het kartelverbod van art. 81 EG Verdrag buiten spel?' (New transfer system in football. Has the prohibition on cartels under Article 81 of the EC Treaty been pushed to the sidelines?), *NJB* 5, blz. 211.

59 *France v. Commission*, Zaak C-301/87, 14 February 1990, ECR 1990 p. I-307, para. 19 et seq.

60 Information from the Commission - Community Guidelines on State aid for rescuing and restructuring firms in difficulty (Notice to Member States including proposals for appropriate measures), OJ 1999, C 288, p. 2.

61 Under 1 Introduction, final paragraph of the Guidelines.

62 Under 2.2 nos. 10 and 11.

63 The interest must be comparable to current interest rates, be warranted on the grounds of serious social difficulties and have no unduly adverse spillover effects on other Member States and be accompanied, not later than six months after the rescue aid measure has been authorised, by a restructuring plan or a liquidation plan or proof that the loan has been reimbursed in full and/or that the guarantee has been terminated. Especially points 23-25 of the Guidelines.

64 *Koninklijke Belgische Voetbalbond v. J.-M. Bosman*, Case C-415/93, 15 December 1995, ECR 1995, I-4921, para. 7.

65 Albers, H.S.J., *Europees Gemeenschapsrecht en Cultuur: Eenheid en Verscheidenheid* (European Community Law: Unity and Diversity) in European Monographs, Kluwer: Deventer 1999, p. 31.

It is my contention that in the end a national standard in these matters would be *more* evidence of rational government policy. Mainly because the major arguments in favour of granting aid to clubs are not sufficiently brought to the fore when considered from a purely Community competition law perspective. Eventually, it all comes down again to the essential question whether the taxpayer should contribute to the renovation or construction of stadiums and whether he should be left to shoulder the clubs' financial burden.

7. Conclusion

The rules concerning state aid should be applied exclusively in the light of the creation of a Common Market. A Common Market for sport does *not* exist, on the contrary, the Court of Justice of the European Communities itself leaves the national product markets intact. This is the result of, among other things, the special structure of sport, which, as opposed to most other branches of industry, is mainly based on inter-country rivalry. Although the exceptions and exemptions in Regulations and Guidelines offer footholds for escaping the stranglehold of competition law, only contrived solutions remain for what is by and large a local social problem.

Now that there is no Common Market for sport democratic legitimacy has to be accorded more weight, as is the case in the United States, than any possible competition law effects on the national market, let alone the Common European Market. Local authorities, given their public responsibility, will have to weigh the social pros against the social cons. In this, realistic economic considerations will have to play a part, but so should local and national sentiments, the fans' well-being, the safety of local administrators, the security of the Municipality and the direct vicinity, etc.

To only have eyes for the Community state aid rules impinges upon the economic and social context at the national and local level.

The International Sports Law Journal

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Stadiums for FIFA World Cup Germany 2006 and European Law on State Aid: A case of Infrastructure Measures?

by **Dr. Michael Gerlinger***

1. Introduction

Only very recently has the question been raised whether the public financing of venues like sport stadiums is subject to the European rules on State aid, Articles 87 (1) et seq. of the EC Treaty.

On November 20, 2002, the spokesman of Commissioner Mario Monti, Tilman Lüder, confirmed that the Commission had received two complaints concerning public aid for the expansion of the stadium in Hannover, the AWD-Arena.[1] This stadium hosts the matches of Bundesliga soccer club Hannover 96. The site is also fit to be used for athletics. Finally, it is also one of the sites which are scheduled for use during the FIFA World Cup in Germany in 2006.

In an article in the German edition of the Financial Times of that same day it was reported that Commissioner Mario Monti plans to tackle the issue of public financing concerning at least five stadiums selected for the FIFA World Cup Germany 2006, namely those of Cologne, Munich, Leipzig, Berlin and Hannover.[2] Up to then the German government as well as the organising committee, the clubs and the companies operating the stadiums had seemed very much at ease concerning this issue. Contrary to the newspaper report, the Commission, however, denied any intention to question the compatibility of the financing with the European Community rules on State aid.[3]

The Commission seems to share the opinion that the expansion of stadiums is intended to benefit the community in general. Only if special benefits are granted to certain beneficiaries the Community rules on State aid apply.

On this basis we will now compare the available case law on infrastructure measures with the public financing of the above-mentioned stadiums.

2. European law on State aid: Art. 87 et seq. of the EC Treaty

Article 87 (1) of the EC Treaty provides that

any aid which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the common market.

The decisive criterion in this provision is the question whether *certain undertakings* benefit from State aid. If only *certain, i.e. specific undertakings* are favoured by State aid to the detriment of competitors, the aid disrupts normal competitive forces and falls within the scope of Article 87 (1) of the EC Treaty. If, however, the public measures, such as the building of infrastructure, provide general access to the infrastructure for *all potential users*, then Article 87 (1) of the EC Treaty in principle does not apply.[4]

3. Powers of the Commission

The Member State must recover illegal aid immediately in accordance with domestic procedures. In Germany this is done by means of interpreting administrative law in conformity with European law.[5] The Commission is exclusively competent to decide whether measures including elements of State aid are illegal. If the Commission considers State aid to be illegal, it has to demand repayment.

4. Commission practice concerning general infrastructure measures

The Commission's practice concerning the distinction between favouring certain undertakings on the one hand and general infrastructure measures on the other hand has until recently been only sparingly to decide that State aid in favour of certain undertakings had taken place.[6]

4.1. General

According to the Commission the construction of infrastructure projects (such as airports, motorways, bridges, etc.) in most cases constitutes a general measure of economic policy and will only become the special subject of the Commission's supervision in case of the preferential treatment of specific companies in the use of the infrastructure in question.[7] The European Court of Justice confirmed this view in its decision in *Matra S.A. v. Commission*.[8]

For this reason the Commission has to apply these principles when assessing the public financing of the venues for the FIFA World Cup

* M.A., TaylorWessing Munich. Grateful acknowledgement is made to my colleague Dr. Andrés Martin-Ehlers, Munich, for his kind support and suggestions.

1 Press release of the *dpa (Deutsche Presse Agentur)*, 20 November 2002.

2 *Financial Times Deutschland*, 20 November 2002, p.40

3 *Supra,* see footnote 1.

4 EC *Vademecum Community Rules on State Aid*, p. 10.

5 Bundesverwaltungsgericht (Federal Administrative Court), Neue Juristische Wochenschrift (NJW) 1993, 2764.

6 Lübbig/Martin-Ehlers, *Beihilfenrecht der EU* (München: C.H. Beck 2002), p. 111.

7 See: EC Communication 94/C 350/07 Official Journal C 350 of 10 December 1994 *(Application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA agreement to State aids in the aviation sector).*

8 Case C-255/91 *Matra* [1993] ECR I-3203, paragraph 29.

T·M·C·Asser Press
The Hague – The Netherlands

Mediating Sports Disputes:
National and International Perspectives

Ian S. Blackshaw

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Ian Blackshaw is a member of the Court of Arbitration for Sport (CAS) and of the Arbitration and Mediation Panels of the UK Sports Dispute Resolution Panel.

2002, ISBN 90-6704-146-7
344 pp., hardbound
EUR 95.00 / USD 87.00 / GBP 60.00

Distributed for T.M.C. Asser Press by Kluwer Law International:

For North, Central and South America:
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in Germany in 2006. It has to examine whether the respective measures can be considered general infrastructure measures which provide access to all potential users, or whether the State aid only favours one particular identifiable undertaking or a group of undertakings, such as the undertakings operating the stadium, thereby putting competitors at a disadvantage.

The Commission did not define general infrastructure measures as opposed to measures favouring only certain undertakings. Rather, such measures are identified by their special characteristic of providing equal services in the public interest, which is generally also true in the case of venues for sporting events.[9] These venues provide the infrastructure for various potential users, such as sports clubs, event organizers, etc. It is therefore very well possible that the State aid serves the community without favouring certain identifiable undertakings.

4.2. Infrastructure measures involving property

As part of the distinction between general infrastructure measures and measures which favour certain undertakings, the Commission - in the case of property measures - distinguishes general measures from inner and outer measures:[10]

Inner infrastructure measures concern operations on the premises of a certain undertaking, such as the construction of a parking area on the business site of an undertaking. The Commission considers the public financing of inner measures as State Aid under Article 87 (1) of the EC Treaty, if the beneficiary does not itself bear the costs or the state does not charge appropriate fees.[11]

The cases concerning outer measures are rather more problematic. Outer measures consist of work carried out outside the business premises of the undertaking, but still in connection with them, such as the construction of link roads to the premises.[12] In these cases the work's character of general infrastructure measures might come under doubt, if there are no actual other potential users apart from the undertaking which owns the premises. The deciding factor is therefore whether there are any other potential users of the infrastructure or just the one identifiable beneficiary.[13] If the latter is the case, the measures are to be considered State aid under Article 87 (1) of the EC Treaty.

In this regard, a case-by-case analysis is necessary in order carefully to identify the true beneficiary of the aid and to assess this aid correctly.

5. Venues selected for the FIFA World Cup Germany 2006

In principle, the models for financing stadiums hosting professional football matches may be structured in three different ways:

First, the club may construct or expand the stadium at its own expense. These cases mostly concern stadiums which belong to financially fit clubs, which either own the stadium directly or through a holding company.

Secondly, the construction or expansion of the stadium may be completely financed by public authorities. In these cases, the stadium's main owner is the municipality which lets the premises to the club directly or to an operating company.[14]

Thirdly, public authorities, the club and private investors may decide to cooperate in a Public-Private Partnership (PPP). This partnership may again be controlled by the public authorities, e.g. when they are the majority stakeholder. The PPP may also take the form of the stadium's holding company, which may subsequently let the stadium to the operating company.[15] The operating company is responsible for the use and exploitation of the stadium.

As regards State aid within the meaning of Article 85 of the EC Treaty, the different models may pose different problems.

5.1. Measures financed by the club

There are various ways in which public authorities can support clubs in the building or expanding of a stadium. In case of a completely new stadium public authorities may act as guarantor for bank loans or transfer the property under very favourable conditions.

Such measures not only concern the public function and social importance of sport, but also constitute an economic activity within the meaning of Article 2 of the EC Treaty and therefore have to comply with Treaty provisions.[16] They favour the club or operating company as the borrower or as the buyer of the land. Article 87 (1) of the EC Treaty might therefore apply.

In its Notice on the application of Article 87 and Article 88 of the EC Treaty to State aid in the form of guarantees[17] the Commission points out that it regards all guarantees given by a State as falling within the scope of Article 87 (1) of the EC Treaty. In section 4 of the Notice the Commission lists the requirements under which individual State guarantees do not constitute State aid within the meaning of Article 87 (1) of the EC Treaty, i.e. when

- the borrower is not in financial difficulty and
- the borrower would in principle be able to obtain the loan on market conditions without State intervention and
- the guarantee is linked to a specific financial transaction, is for a fixed maximum amount, does not cover more than 80 % of the outstanding loan or other financial obligation, is open-ended and
- the market price for the guarantee is paid.

As regards the transfer of real estate the Commission issued a similar Communication on State aid elements in sales of land and buildings by public authorities. According to the Communication

a sale of land and buildings following a sufficiently well-publicised, open and unconditional bidding procedure, comparable to an auction, accepting the best or only bid is by definition at market value and consequently does not contain State aid...

Thus, when supporting clubs in the construction or expansion of stadiums, public authorities will usually need to comply with these principles. In particular, public authorities have to act as if they were regular private investors.

5.2. Measures financed by public authorities

Public authorities may also support the club or the stadium's operating company by financing the stadium's construction or expansion and letting it to them at a more favourable rent than they would be able to obtain from a private investor. This would constitute the preferential treatment of the lessee and would therefore fall within the scope of Article 87 (1) of the EC Treaty. In this context, public authorities must in principle charge the rent that a private investor would.

However, the exclusively public funding of stadiums also raises specific questions concerning State aid for the purpose of the construction of the stadium as opposed to its mere use. The potential ways of utilizing a sports stadium are limited. Some stadiums may be used for athletics events, rock concerts or similar activities. Football league

9 C. Koenig/ J. Kühling, *EG-Beihilfenrecht, private Sportunternehmen und öffentliche Förderung von Sportinfrastrukturen*, Zeitschrift für Sport und Recht (SpuRt), No.2 (2002), p. 55.

10 Commission Official Journal C 369/6 of 24 December, 2000, Fritz Egger Spanplattenindustrie GmbH und Co. KG Brilon, p. 7; Commission Official Journal L 12/1 of 15 January, 2002, Scott Paper S.A., p.22; see also: U. Soltész, *Öffentliche Finanzierung von Infrastruktur- und Erschließungsmaßnahmen und das EG-Beihilfenrecht*, Europäische Zeitschrift für Wirtschaftsrecht (EuZW), No.4 (2001), p. 108.

11 Commission Official Journal L 137/1 of 8 June 2000, Sangalli Manfredonia Vetro, p.5; Commission Official Journal C 369/6 of 24 December 2000, Fritz Egger Spanplattenindustrie GmbH und Co. KG Brilon, p. 7.

12 U. Soltész, *Öffentliche Finanzierung von Infrastruktur- und Erschließungsmaßnahmen und das EG-Beihilfenrecht*, Europäische Zeitschrift für Wirtschaftsrecht (EuZW), No.4 (2001), p. 108.

13 Commission Official Journal C 253/4 of 4 September 1999, Lenzing Lyocell GmbH & Co. KG, p. 11; Commission Official Journal L 61/4 of 8 March, 2000, Weida Leder GmbH, p. 7; Commission Official Journal L 137/1 of 8 June 2000, Sangalli Manfredonia Vetro, pp. 5.

14 See: Nord/LB, *Global Markets Die Finanzierung von Fußballstadien*, 2001, pp. 51.

15 Ibid., see p. 57.

16 ECJ joined cases C-51/96 and C-191/97 *Deliège*, para. 41

17 Official Journal C 71 of 11.03.2000

matches, however, still constitute the main source of revenue; other events can only improve the utilization capacity, but not secure it.[18] The operation of stadiums, such as the ones selected for the FIFA World Cup Germany 2006, is completely dependent on league football. By building a stadium, public authorities provide an infrastructure which is practically closed to a variety of potential other users, but entirely tailored to the needs of a certain club or an operating company. In its decision in *Weida*[19] the Commission pointed out that infrastructure which exclusively serves the need of one undertaking might distort competition and has to be examined in accordance with the general rules governing the granting of State aid. Only if there are other actual potential users, the construction may be considered to serve the general community.[20]

As the utilization of professional football stadiums is limited, public authorities should duly consider the European rules on State aid, in particular when letting a stadium to a club or operating company on the basis of a long-term agreement, which excludes other users for a long period of time. Many stadiums selected for the FIFA World Cup Germany in 2006 have been expanded at the expense of public authorities and are to be let to operating companies of which the club usually playing the stadium forms a part. For example, a company owned by the municipality, the Kölner Sportstätten GmbH, is carrying out the renovation of the stadium in Cologne. After completion the stadium shall be let to the first team of FC Köln. Similarly, the stadium in Hannover is to be let to an operating company in which the football club 'Hannover 96' is a participant. In Leipzig a private investor is to renovate and operate the town's stadium. The question as to whether the public authorities have to consider the European rules on State aid in this case depends on the extent to which the stadium will be used by different users, the duration of the leases, etc. If the stadium will in fact be almost exclusively tailored to the needs of the club or the operating company, the general principles on State aid will apply. As a result, the public authorities would then have to claim appropriate consideration for their services.

5.3. Public-Private Partnerships

Some of the stadiums selected for the FIFA World Cup Germany 2006 are financed by PPPs, i.e. a cooperation between State-financed and private undertakings. In its *Vademecum Community Rules on State Aid* the Commission clearly states that the public support in a PPP may entail consideration under State aid rules and should be arranged so that it is compatible with the State aid rules.[21] Therefore, the same principles apply for the State acting as partner in a PPP.

Public authorities may or may not hold a majority interest in a PPP. If they do, the partnership is considered a public undertaking according to Commission Directive 2000/52/EC[22] on the transparency of the financial relations between Member States and public undertakings. In this case, the respective findings above under 5.2. apply.

In case the public authorities hold a minority stake, they are to act on the same terms as if they were a private investor.[23] In Berlin, for example, a building company is currently refurbishing the Olympic stadium. This company is to engage in a PPP (37,45 %) together with the club Hertha BSC Berlin (37,45 %) and the 'land' Berlin (25,1 %). Operating the stadium as a partner in this PPP, the 'land' Berlin should avoid favouring its partners. It should act in the same way that a private company would act within the partnership.

6. Conclusion

The construction or expansion of professional football stadiums does not in general serve the interests of the community. Instead, it usually favours certain clubs or operating companies by providing infrastructure which is tailored to their needs.

It is likely that measures such as these are not considered general infrastructure measures. They aim to benefit certain undertakings and fall within the scope of Article 87 (1) of the EC Treaty. Public authorities should therefore not restrict their consideration of the European rules on State aid to the granting of guarantees, the sale of property or the letting of stadiums to clubs or companies. The construction or expansion of the stadium itself may also constitute the favouring of certain undertakings. In such cases the general principles on State aid apply and it becomes necessary to examine the consideration owed for the services performed by the public authorities.

18 Ibid., see p. 45.
19 Official Journal L 61/4 8 March 2000, p. 5 and 8.
20 See: Commission Official Journal L 137/1 of 8 June 2000, *Sangalli Manfredonia Vetro*, p.5; Commission press release of 17 June, 1998, IP/98/539 *Ems flood barrier*; ECJ Case C-255/91 *Matra* [1993] ECR I-3203, paragraph 29.
21 Commission, *Vademecum Community Rules on State Aid 01.01.2002*, p. 10.
22 Official Journal L 193/75 of 29 July 2000.
23 Ibid.

'Franchise United': The Beginning of 'Franchise Football'?

The Relocation by Wimbledon F.C.

by **Adrian Barr-Smith, Elliott Payne and Lee Sennett***

1. Introduction

On 28 May 2002, an Independent Commission of Inquiry (*IC*) appointed by the English Football Association (*F.A.*) supported the proposed relocation by Wimbledon FC ('*the Club*') from their current base in South London to an area approximately 50 miles away in Milton Keynes. This decision was met with widespread condemnation from followers of the 'Dons' and other members of the football community ranging from journalists, The Football League, the F.A., Supporters Associations to Members of Parliament.

As the Club hopes to move into the National Hockey Stadium in Milton Keynes, the physical relocation of the Club away from South London is imminent. The Club hopes to commence playing its fixtures at this temporary venue shortly (with a February fixture against Nottingham Forest FC tentatively pencilled in as the first game) and intends to have a permanent 25,000 all-seater stadium in Denbigh in place for the start of the 2004-2005 season.

This article will examine the background to the move, the rationale behind the IC's ground breaking decision and whether it really does represent the 'doomsday scenario' many have predicted - that of opening up the proverbial floodgates to franchise football.

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2. Wimbledon FC

In acknowledging the 'exceptional circumstances' behind the IC's decision, it is necessary to understand a little about the character and background of the Club. Despite being formed in 1889 as Wimbledon Old Centrals, the Club was only elected to the English Football League in 1977. In the period 1982-1986, the Club rose from the English Fourth Division to what was then the First Division (now the F.A. Premier League). The Club has always been considered as a shining example for small teams and will forever be associated with its victory over the mighty Liverpool FC in the 1988 F.A. Cup Final. Having been one of the founding members of the F.A. Premier League at its inception in 1992, the Club played in the top flight on limited resources until 2000 when it was relegated to the First Division and where it has played ever since.

From 1912 to 1991, the Club played its home games at Plough Lane in Merton, South London. Plough Lane was an intimidating and spartan ground which suited the image of the 'Crazy Gang' perfectly. However, the site did not meet the requirements of the Taylor Report following the Hillsborough disaster of 1989[1] and the Club sought temporary relocation whilst the Plough Lane site was modernised. The F.A. granted the Club permission to move to the ground of Crystal Palace FC, Selhurst Park in Croydon, South London since the ground was only 5 miles from Plough Lane and the Club would still be within its 'conurbation'[2]. However the move did not prove to be temporary. Plough Lane was not redeveloped and was sold to the supermarket chain, Safeway plc in 1994. The Club has now played its 'home' games at Selhurst Park for over a decade.

The proposed relocation to Milton Keynes was not the first time that the Club had considered leaving Selhurst Park. In 1997, the Club investigated the possibility of relocating to Dublin in the Republic of Ireland. The initial response to the proposed move was in fact encouraging.

When the Club's application to relocate was placed before the Premier League Clubs not one objected. However, any hope that the Club had was quickly dispelled as the Football Association of Ireland (the *FAI*), FIFA and UEFA all objected to the move.

Graham Kelly, the Chief Executive of the F.A informed[3] the Club's then chairman Sam Hamman that it was bound by the principle of the '*Comité des nations*' and had to respect the views of its sister association (the FAI). The F.A would not undertake any action or assist the Club unless and until the FAI removed its objections. UEFA stated[4] that it:

'does not support such a move, because of the damaging effect it would have on domestic football in European countries. Furthermore, UEFA emphasises that in accordance with its Statutes, football played within a national territory is the responsibility of the UEFA member association of the territory concerned. For this reason, UEFA is against any move to play domestic football outside a national territory.'

The final 'nail in the coffin' came at a meeting of FIFA's executive committee in Paris in June 1998. The congress ruled that it was '*neither desirable nor reasonable*' to allow clubs domiciled in the territory of one association to take part in competitions whilst in the territory of another. Following this final and fatal blow, the Club had to look elsewhere and was later linked to a move to Cardiff in South Wales but this bid also failed (coincidently Sam Hamman, is now the chairman of Cardiff FC). Many Club officials hoped that Milton Keynes was a case of 'third time lucky'.

3. Why did the Club need to relocate from Merton?

The Club argued that unless it was permitted to relocate, it would be forced into immediate liquidation due to crippling financial losses and a lack of assets and Wimbledon FC would die. It highlighted the following factors:

- Financially unsustainable to construct a stadium at Plough Lane;
- No land site in Merton or elsewhere in South London was viable;
- Secondary tenant at Selhurst Park - a position at that time shared by no other professional club in the English Leagues;
- The colours, branding and traditions at Selhurst Park remain those of Crystal Palace FC;
- Under the terms of the sub lease 10 % of gate receipts[5] are paid by way of rent;
- The Club is liable for 50% of all expenses incurred in the maintenance and operation of the stadium;
- The Club's image is not projected in any way as no branding can take place at hospitality and entertainment areas[6] in the stadium;
- The Club is not receiving any income from the sale of concession products;
- Ticket prices are frozen at not less than 80% of the prices charged by Crystal Palace FC to prevent undercutting.

These factors have had a detrimental effect on the Club's bank balance and League position. Deloitte & Touche estimated that the Club loses (3-4 million per annum due to the fact it does not own its own stadium. The Club and its fans feel like visitors at their own home games and this has led to a steady decline in home attendances despite a general rise throughout Division One. The IC noted that in season 2001/2002 the Club won more away games than home games.

4. So why did the Club choose Milton Keynes?

In August 2000, Peter Winkleman of The Milton Keynes Stadium Consortium (MKSC)[7] approached the Club. MKSC were seeking to build a major development in the Denbigh area of Milton Keynes, which included a modern, 28,000 all-seater stadium which could be expanded to a capacity of 45,000. Mr Winkleman highlighted some of the advantages of moving to the area:

- Site (affordable, accessible and available;
- No foreseeable regulatory problems to the Club;
- No significant capital cost to the Club;
- Excellent road and rail infrastructure;
- A large fan base - 2.2 million people within a 30 minute drive and 8 million within 1 hour's drive (Milton Keynes - a 'new city' - is the largest population centre in Europe without a professional football team).

Following a Board of Directors Meeting in July 2001, the Club agreed to pursue the Milton Keynes option and agreed heads of terms with MKSC. Faced with arguably the most important decision in the Club's history, many Board members dissented. The Club then commenced the process of obtaining the approval of the Football League.

5. Application process

By a letter dated 2 August 2001, the Club made a formal application for the Football League's approval of the move to Milton Keynes. The Football League Board met on 16 August 2001 and unanimously rejected the application. The Club asserted that this decision was '*unfair, unlawful and procedurally flawed*.'[8] In response to this assertion and in accordance with Rule K of the Football Association Rules[9], the Club and the Football League entered into an arbitration scheme. The arbitration panel, which included Arsenal FC's Vice Chairman David Dein, unanimously decided on 22 January 2002 that the Football League Board's decision had '*not been properly taken in the legal sense and that the procedures had indeed not been fair*'.[10]

The matter was remitted back to the Football League Board which met on 17 April 2002. It was felt that the matter should be considered by a Commission appointed by the F.A. and so the Football League Board officially referred the matter to the F.A. in accordance with Regulation 76.1 of the Football League Regulations.

In accordance with F.A. Rule F6, the F.A. appointed the IC to hear

1 Clubs in the top two divisions of the English Football League were required to play in all-seater stadia.
2 The locality where the club was created and where the club has taken its name.
3 Letter dated 19 May 1998.
4 UEFA press release 9 February 1998.
5 Including revenue from season tickets and executive boxes.
6 This includes not being able to exploit rights in the stands, enclosures, suites, lounges, bars and corporate boxes.
7 A group of local business people who along with community groups have been working to secure the provision of professional football to Milton Keynes.
8 Paragraph 24 of the Summary of the Commission's Decision.
9 Rule K sets out the procedure necessary to commence an arbitration scheme in order to solve a dispute.
10 Paragraph 25 of the Summary of the Commission's Decision.

and resolve the application. In considering the matter the IC had to apply the F.A. Rules and Regulations[11]. Whilst these Rules provide that there is no absolute prohibition against relocation, if a club wishes to move outside its conurbation, the Football League Board has the discretion to approve or reject such a move.

The role of the IC in this instance was to make a judgment in place of the Football League Board and to exercise the discretion to approve or reject the application. The IC acknowledged that they had to act proportionately by balancing the arguments put forward by the Club, fans, the Football League and the F.A. The fact that permission had not been granted for a move of this nature before, or (for some) such a move would contradict the core principles of football's pyramid structure[12] were not sufficient reasons to refuse the application without due consideration.

6. The IC Decision

On 28 May 2002, the IC announced their decision. It found by a majority (2:1) that, in light of 'its exceptional circumstances', the Club should be given permission to relocate to Milton Keynes. The IC was of the opinion that by giving the Club permission in this instance, the cherished and fundamental principles of football in this country in relation to the pyramid structure and promotion and relegation would not be circumvented. The IC believed that the pyramid structure would be better served by ensuring the survival of the Club, albeit in a different conurbation, than condemning it to liquidation and extinction in Merton.

In its decision, the IC referred to the geographical nature of the Club's fanbase. It noted that as the vast majority of the fans do not live in Merton or Wimbledon (20% of season ticket holders live in Merton and 10% in Wimbledon) the Club's links with the community in Merton are: '*not so profound, or the roots go so deep, that they will not survive a necessary transplant to ensure the Club's survival*'[13]. The IC contended that this relatively low Merton resident fanbase combined with its tenure at Selhurst Park did not suggest that the Club was at 'the heart and soul' of its community.

As most professional football clubs own their own stadia and have strong fanbases within their immediate vicinity, the IC was of the opinion that its decision did not create a general precedent nor would the floodgates be flung open to franchise football. The IC further reiterated that they could not conceive of a comparable club which shared with the Club the following characteristics[14]:

- The Club has no stadium of its own and has been a secondary tenant for some 11 years and its shareholders are not prepared to continue to finance its operation in its present financial circumstances;
- The Club needs to relocate to have a commercially viable future or, given the level of losses it will continue to sustain, it will go into liquidation. There is no viable South London alternative;
- Milton Keynes provides a suitable and deserving opportunity in its own right where none exists in South London; and
- The Club's links or roots in its community are of a nature that can be and are agreed should be retained by the Club and MKSC albeit in a new location. The Football League can ensure these links are put in place and reserved.

Following the decision of the IC, the F.A. stressed that the decision was binding on everyone under the Football League Rules. The F.A. and Football League also agreed in accordance with paragraph K5b of the F.A. Rules that the IC was the final forum for this matter and consequently there could be no appeal.

7. Reaction

The Club's fans have turned their back on the Club re-naming it 'Franchise FC' and have created a trust which has funded the creation of an amateur club playing in the Seagrave Haulage Combined Counties League by the name of AFC Wimbledon (playing 'home' matches at the ground of Kingstonian FC - Kingsmeadow). AFC Wimbledon is enjoying gates of 2,000 spectators or more (compared to the non-league's average attendance of approximately 200) while attendances at the Club's 'home' matches at Selhurst Park have plummeted and on 5 November 2002 only 664 spectators watched the Club's victory over Rotherham FC in the Worthington Cup.

Many commentators have asserted that this decision represents the commencement of a franchise system of football, particularly that smaller sides living in the shadow of Premier League clubs will look now to relocate away from their roots and history to bigger catchment areas. Others highlight the possibility, similar to North American cities, where consortia will commence bidding wars to tempt clubs to move to their locality. The F.A. have sought to quell such fears by asserting that:

'*The Commission has made it clear that their decision is based on exceptional circumstances particular to Wimbledon Football Club. They see Wimbledon FC as a one-off. This is not the beginning of a franchise system.*

The Football Association is greatly concerned that this decision should not in any way be seen as a precedent. The view of The Football Association is that for clubs to move is not in the best interests of the game. However, this is binding on everyone under the Football League rules - there is no appeal.'[15]

8. Is this a Precedent?

The IC and the F.A. were at pains to stress that the relocation was approved due to exceptional circumstances. When one examines the background and history of the Club it is clear that the Club should be viewed as a 'special case'. To reinforce the stance adopted by the IC and the F.A. that the decision will not have fundamental implications for the game as a whole, it should be noted that relocations of football clubs have taken place since the dawn of the professional game. Queen's Park Rangers FC has moved an incredible 18 times (14 different locations) in and around London. Many teams relocated in the 1940's as a result of the second world war, with Manchester United FC playing their matches at Maine Road the home of their local rivals Manchester City FC. In recent times, the Football League has allowed several *temporary* relocations, many outside the particular club's conurbations. Examples include Bristol Rovers FC, Brighton & Hove Albion FC, Middlesbrough FC and Charlton Athletic FC.

The IC decision concerns the *permanent* relocation of a club outside its conurbation. However, such a move is not without precedent in the British game. In 1996, the Scottish Football League allowed Meadowbank Thistle FC to permanently relocate from a site in Central Edinburgh to a 'new town' Livingston over 18 miles away. The Club was also permitted to change its name to Livingston FC. This decision has had no discernible impact on the cherished and fundamental principles of football and has in fact proved to be an unqualified success. Before its relocation, Meadowbank Thistle FC was floundering in the bottom division of the Scottish Football League. Livingston FC is now competing in the upper echelons of the Scottish Premier League and in 2002 played for the first time in the UEFA Cup having finished third in the Scottish Premier League the previous season. Fans from Central Edinburgh are able to travel to home games relatively easily and the long term viability of the club and Scottish football generally has been improved following the relocation.

It should be noted that the extreme resistance of football fans to relocation - even when it is necessary to safeguard the continued existence of their club - has not been reflected in other sports and territories. Following the dawn of a professional area in the mid 1990s, many rugby union clubs - particularly those in and around London - have felt the need to relocate mainly to non Premier League football stadia. Wasps RUFC have relocated from their spiritual base of Sudbury in North West London to Loftus Road (the home of Queen's

11 Football League Regulation 76.3.

12 The pyramid system is the structure of the English football system. At the bottom level, there are many amateur leagues with many teams and as you move up the pyramid, the number of leagues and teams decrease in size until you reach the pinnacle of the pyramid, the F.A. Premier League. The system is based on relegation from and promotion to each league purely on sporting grounds.

13 Paragraph 109 of the Summary of the Commission's Decision.

14 Page 2 of the Summary of the Commission's Decision.

15 Statement released by the F.A. on 28 May 2002.

Park Rangers FC) and now play their matches at Adams Park (the home of Wycombe Wanderers FC). London Irish have relocated from their base in Sunbury in South West London and now play at Madejski Stadium (the home of Reading FC). These clubs have very proud histories and traditions (Wasps RUFC was formed in 1867) and a loyal, if small, fanbase. However their decisions to move have not caused the mass outrage which the Club's decision to relocate to Milton Keynes has. It may be the case that rugby fans are aware that the professionalism of their game comes at a price and the move from prime residential sites to pastures further afield is a financial necessity. Others may point to the sorry plight of rugby union's Richmond FC (formed in 1861) who were in the first wave of clubs to embrace the professional era in 1996, yet became insolvent three years later following the withdrawal of support from their financial backer.

In the US, the relocation of teams is a regular and largely non controversial[16] occurrence. This is partly due to the professional leagues being set up on a franchise basis with the absence of a relegation/promotion pyramid system. Franchises were traditionally awarded to wealthy businessmen who based their teams in areas where they would be most profitable (a simple market forces principle). When/if the owner could secure better financial terms, the teams would simply relocate. The movements of the NFL's Raiders are fairly typical in this regard. The Raiders were based in Oakland between 1960-1981 - then decided to relocate to Los Angeles between 1982 - 1994 and have now moved back to Oakland!

One interesting example which may give hope to all involved in the Club's move to Milton Keynes (both for and against) is the case of the NFL's Cleveland Browns. The Browns were established in Cleveland in 1946 and were largely accepted as having one of the most fervent fanbases in the league. However, in 1996, their owner Art Modell (prompted by an outdated stadium and a decline in financial resources) made the unpopular decision to relocate the team to Baltimore renaming them the Baltimore Ravens. Following this move, the city authority struck a deal with the NFL to bring an expansion team (i.e. a new team) to the city and arranged for a $240m reconstruction of the ageing stadium. This sum was partly raised by increasing alcohol and cigarette taxes in the county. Art Modell agreed to relinquish the name, colours and team history so that the Cleveland Browns could live again. Ironically the Baltimore Ravens went on to win Super Bowl XXXV.

9. Conclusion

As emphasised in the *Bosman*[17] ruling, the peculiarities of football and those persons who operate therein are subject to basic principles of European law. If a club fails in its bid to relocate in order to seek a more prosperous future, it may raise an argument that a rejection of such an application would be contrary to the fundamental principles of European Law particularly (freedom of establishment: Art. 43 (52) EC Treaty). Whether such a highly speculative argument will be used remains to be seen. The writers of this article are inclined to agree with the views of the F.A., in that the facts surrounding the relocation of Wimbledon FC make this particular application so exceptional, that the decision cannot be regarded as having any precedential value. The Club is unlike any of the other professional clubs in the English Football League and consequently the decision made by the IC was a one-off. Until the next time.

16 Whilst the US Congress has considered the possibility of restricting the relocation of National Football League (NFL) teams, it was determined that any such restrictions would contravene anti-trust provisions, impair franchise values and lower revenues resulting in a threat to the financial viability of franchises.

17 Union Royale Belge des Societes de Football Association v Bosman C-415/93 [1996] All ER [EC] 97.

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TV Rights Related to Major Sports Events: The Example of the Olympic Games

by **Mary Still, Kate Jordan and Toby Ryston-Pratt***

1. Introduction

The Modern Olympic Games (the 'Games') are, without question, one of the biggest events of any nature conducted in the world today. A major reason, if not the major reason, why the Games have become the mega event that they are today is the association which the Olympics have had with television.

It is true that '[m]ost of us could not imagine the Olympic Games without television'.[1] Since grainy black and white footage was broadcast at the Melbourne Games, Olympic broadcasting has developed into an unsurpassed technological feat.[2] In 2000, the Games were broadcast in more than 220 countries and generated in excess of 36.1 billion television viewing hours.[3] Effectively 9 out of every 10 individuals on the planet with access to television, saw some part of the Sydney Games.[4]

Television and sport are now intertwined. Modern sport, be it football, tennis, cricket or golf, is by and large supported by advertising revenue derived from television. The relationship between television and sport is nowhere clearer than in the example of the Olympic Games. As early as 1974 the IOC drew over 98% of its income from the sale of television rights to the Olympic Games.[5] Today, official Olympic sources suggest that TV rights continue to account for approximately 50% of Olympic revenue.[6]

However, while hindsight tells us that television has been largely responsible for the growth of the Olympic movement, the Games have not always had such a comfortable relationship with television.[7] In 1956 organisers of the Melbourne Games faced staunch conservatism when trying to sell Olympic TV rights. In the lead up to the Melbourne Olympics, then International Olympic Committee (the 'IOC') President, Avery Brundage commented that 'the IOC has managed without TV for 60 years, and believe me, we are going to manage for another 60'.[8] Although the Games have clearly moved on since Brundage's comment, broadcasting the Games has continued to cause debate and controversy.

* Mary Still and Kate Jordan (Partners, Clayton Utz), Toby Ryston-Pratt (Paralegal, Clayton Utz). This paper was presented by Mary Still and Kate Jordan at the Union Internationale Des Avocats 75th Anniversary Congress, Sydney, 30 October 2002.

1 Helen Wilson, 'Hosting the Olympic Broadcast', *Media International Australia incorporating Culture and Policy*, no. 97, November 2000, at 23.

2 Olivia Hill-Douglas, 'TV's Quantum Leap to Sydney', *The Age*, 14 September 2000 'http://www.apsattv.com/history/september2000.html' (accessed 11/10/02).

3 'The Sydney 2000 Olympic Games' 'multimedia.olympic.org/pdf/en_report_249.pdf' (accessed 25/08/02), at 12.

4 Ibid.

5 Stephen R Wenn, 'Growing Pains: The Olympic Movement and Television, 1966-1972', *OLYMPIKA: The International Journal of Olympic Studies*, vol. IV, 1995, at 15.

6 'Olympic Broadcasting'.

7 'Olympic Broadcasting' 'www.olympic.org' (accessed 25/08/02).

8 Quotation discussed in: 'Olympic 2000 milk the TV cash cow'; Bernhard Warner, 'Analysis: Internet Media Band from the Olympics' 'www.cnn.com' (accessed 25/08/02); Steven Klein, 'Back

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Arbitral and Disciplinary Rules of International Sports Organisations

Edited by Robert C.R. Siekmann and J.W. Soek

Co-publication with the T.M.C. Asser Instituut, The Hague, The Netherlands

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2001, ISBN 90-6704-133-5
456 pp., hardcover
EUR 124.00 / USD 114.00 / GBP 78.00

Distributed for T.M.C.Asser press by Kluwer Law International:

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In this paper I examine the evolution of Olympic TV rights by first considering the problems which surrounded the 'birth of television in Australia' during the Melbourne Games.[9] I will then consider the extent to which the origins of TV rights in the Melbourne Games have continued to have ramifications for TV rights in the Olympic movement more generally focusing mainly on the Sydney Games. Finally, I will move on to consider where Olympic broadcasting may go in the future and focus on the changing role of new forms of media.

2. The Melbourne Games

Television was first involved with the Olympic Games during the 1936 Berlin Games. A closed circuit telecast was used to show the Berlin Games to 162,000 people in inner-city taverns.[10] At the time, radio was still an important component of Games media and the official Olympic film, made by Leni Riefenstahl, was seen as the main means of publicising the Games.[11]

It was not until 1948 that Olympic TV rights were first sold. The rights to the London Games were reportedly purchased by the BBC for 1000 guineas - approximately $4000 in modern terms[12]. The BBC broadcast 64 hours and 27 minutes of footage to 80,000 television sets, but only within a radius of 50 miles of London.[13] Although reports from the time indicate that the London Organising Committee never cashed the cheque out of gentlemanly regard for the 'desperate poverty' of the BBC, the fundamental principle of broadcast rights fees had been established.[14]

Sensing an opportunity, the cash-strapped Melbourne Organising Committee for the Olympic Games (the 'MOCOG') sought to capitalise on the possibility of selling TV rights. However, despite the advances made in London, MOCOG found the task of selling rights difficult. Indeed the conservative approach of the IOC did not help matters. The IOC was concerned that allowing payment for TV rights would be contrary to the Olympic ethos and may result in the Games being tainted by commercialism.[15] In the lead up to the Melbourne Olympics Brundage asserted: 'I have deplored on more than one occasionYthe idea of financial considerations being introduced into Olympic affairs. For the first time serous arguments have been provoked and I do not like it!'[16]

Regardless of Brundage's damning words, the Melbourne Olympic Committee pushed on with selling TV rights. The development of television internationally meant that the market for rights was a growth area and the networks in the United States, such as the National Broadcasting Corporation (the 'NBC'), had already laid out then significant sums for television rights to sports including ice hockey, basketball and American football.[17] Nevertheless, US networks refused to invest money in the Melbourne Games - partly because of the logistical difficulties involved in broadcasting from Australia. The only international interest in the TV rights to the Melbourne Games came from Britain's principal broadcaster, Associate Rediffusion, who offered 25,000 pounds and secured a US$500,000 sponsorship deal with Westinghouse.[18]

Following the Rediffusion offer, it appeared that MOCOG's hope of a lucrative TV deal had been successful. However, the US networks continued to apply pressure. The networks claimed that the Games were a news event, not entertainment. They appealed to the constitutional rights of free press and demanded free and equal access to the Games.[19] As a compromise, the MOCOG offered the networks three minutes of free footage per day but maintained that any more would damage the commercial distribution of the official Olympic film being produced by film maker, Peter Whitchurch.[20] The US networks were not satisfied with the MOCOG offer and demanded up to nine minutes per day.[21] Amidst the furore, Rediffusion cancelled the exclusive contract and aligned with the US networks in arguing that the right to televise the Games should be free.

The end result was a stalemate between the MOCOG and the international networks which resulted in the networks boycotting the Melbourne Games. Local stations, principally Channel 9 who secured a sponsorship deal with Ampol, did transmit to an estimated 100,000 people in Melbourne, but the international dispute effectively resulted in a black out of the Games.[22] Jack Gould of the New York Times remarked that 'the Olympic Games as an institution, Australia as a nation and television as a medium of the free worldYall have suffered from the consequences of the extensive black out.'[23]

As a result of the dispute over TV rights which centred around the Melbourne Games the IOC launched an investigation into the role of TV rights in the Olympic movement. This was a key turning point in the marketing of Olympic TV rights and the approach of the IOC.

Even so, Brundage remained sceptical about the possibilities of TV rights. In 1957 he predicted '[i]t isn't going to be easy to get money for the television rights to the Olympic Games'.[24] Brundage could not have been more wrong.

In 1960 CBS paid in excess of US$394,000 for the TV rights to the Rome Games.[25] The Games were broadcast by more than 100 television stations with recorded broadcasts in 18 European countries and a time lag to the US, Canada and Japan.[26] The true value of TV rights emerged from the Mexico Games in 1968. ABC acquired US rights for US$4.5 million. Through advertising deals with Coca Cola, Ford Motor Company, Texaco, Pan American Airlines and the Good Year Tyre Company, ABC brought in over US$20 million in revenue.[27]

Since 1956 the price of Olympic TV rights has risen exponentially.[28] From 1984 until 2008, the IOC has concluded broadcast agreements worth more than US$10 billion.[29] For the Sydney Games, It is public

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to the 20th century: The Olympics and the Internet' 'www.content-exchange.com' (accessed 25/08/02); Shane Cahill, 'The battle over Olympic Television rights returns to Australia, where it all began', *ABVzINE*, Spring 2000, at 14.

9 Richard Cashman, *Paradise of Sport: The Rise of Organised Sport in Australia* (Melbourne: Oxford University Press, 1995) at 178.

10 Stephen R Wenn, 'Lights! Camera! Little Action: Television, Avery Brundage, and the 1956 Melbourne Olympics', *Sporting Traditions*, vol. 10, no. 1, November 1993, at 50; and K Toohey and A J Veal, *The Olympic Games: A Social Science Perspective* (Wallingford: CABI Publishing, 2000) at 127.

11 For a discussion of Riefenstahl's film, 'Olympia', see C C Graham, *Leni Riefenstahl and Olympia* (New Jersey: Scarecrow Press, 1986). For further historical information about the relationship between the Games, radio and film see: Linda Fuller and Scott Crawford, 'Olympic Films', in J Findling and K Pelle (eds.), *Historical Dictionary of the Modern Olympic Movement*, Greenwood, Westport, 1996, at 405-18; N Masumoto, 'The Film 'Tokyo Olympiad': A Conflict between Artistic Representation and Documentary', in R K Barney et al. (eds.), *Olympic Perspectives* (London Ontario: ICOS, 1996) at 201-9; John McCoy, 'Radio Sports Broadcasting in the United States, Britain and Australia 1920-1956 and its Influence on the Olympic Games', *Journal of Olympic History*, vol. 5, no. 1, Spring 1997, at 20-5.

12 Toohey and Veal, *The Olympic Games* at 127. See also John Slater, 'Changing Partners: The Relationship between Mass Media and the Olympic Games' in R K Barney et al. (eds.), *Global and Cultural Critique: Problematizing the Olympic Games* (University of Western Ontario: 1998) at 53.

13 'Olympic 2000 milk the TV cash cow' 'www.dawn.com/2000/09/05/spt12.htm' (accessed 25/08/02).

14 Toohey and Veal, *The Olympic Games* at 127.

15 Ibid., at 128.

16 Wenn, 'Growing Pains', at 2.

17 'Olympic 2000 milk the TV cash cow'.

18 Cahill, 'The battle over Olympic Television rights', at 14.

19 Ibid., at 15.

20 Wenn, 'Lights! Camera! Little Action', at 44.

21 Ibid.

22 SOCOG Public Information on Melbourne Olympic Games, 'Melbourne Olympic Games - 1956 - Comparison - Now and Then' 'www.gamesinfo.com.au' (accessed 25/08/02); Cahill, 'The battle over Olympic Television rights', at 15.

23 Quoted in Wenn, 'Lights! Camera! Little Action' at 45-6.

24 Allen Guttman, *The Games Must Go On: Avery Brundage and the Olympic movement* (New York: Columbia University Press, 1984) at 218.

25 Slater, 'Changing Partners' at 53.

26 'Rome 1960: Did you know?', 'www.olympic.org/uk/games/pas/innovations' (accessed 25/08/02).

27 Wenn, 'Growing Pains' at 8. For more information about the value of the Games see Neil Shoebridge, 'Add five circles to today's budgets - the Olympic Games and sponsorship', *Business Review Weekly*, 1 October 1993, at 36-7.

28 The rise in the sale of the Olympic TV rights prices is reflected in sport generally. See David A Klatell and Norman Marcus, *Sports for Sale: Television, Money and the Fans* (New York : Oxford University Press, 1988). For more information about the history of Olympic TV rights see Miquel de Moragas Spà, Nancy K. Rivenburgh, James F. Larson, in cooperation with researchers from 25 countries, *Television in the Olympics* (London : J. Libbey, 1995); Vyv Simson and Andrew Jennings, *The lords of the rings : power, money and drugs in the modern Olympics* (London : Simon & Schuster, 1992).

29 'Broadcast rights' 'www.olympic.org/uk/organisation/facts/revenue/broadcoast_uk.asp' (accessed 25/08/02).

knowledge that Seven Network Limited ('Seven') paid AUS$45 million for Australian television rights and NBC paid US$705 million for the US rights.[30] While the price has gone up, so have the numbers watching. While only 100,000 people saw the Melbourne Games live on TV, an estimated 3.7 billion viewed the Sydney Opening Ceremony live.[31]

3. Covering The Sydney 2000 Games

Televising the Games is now a major event in itself and requires a legal and support infrastructure of significant magnitude.

3.1. Rights holders and SOBO

The IOC sells Olympic TV rights on an exclusive territorial basis to television organisations who bid for the rights. The successful organisations then become Olympic 'rights holders'. Through contracts with the IOC, rights holders acquire the right to broadcast the Olympics on free-to-air television, cable television and closed circuit television and to a limited extent, satellite and high definition television. The rights generally include 'pre-Olympic' events and 'cultural events' as well.

For the Sydney Games, rights holders acquired footage from two main sources. The primary source of Olympic footage was the live feed produced by SOBO, the host broadcaster for the Sydney Games. SOBO produced international television and radio coverage of every Olympic competition and non-competition event. This coverage was then provided as a service to rights holders. SOBO also acted as the primary liaison for rights holders and assisted in co-ordinating the relationships within the broadcast network.[32] To fulfil this service, SOBO employed more than 3500 staff, televised more than 3400 hours of live Olympic coverage and utilised more than 900 cameras and 400 video tape machines.[33] Compare this to the Melbourne Games where only three cameras were used to capture footage from the main arena.[34]

Rights holders for the Sydney Games were also provided with facilities to broadcast the Games including office space, video and audio circuits and at venues commentary positions, compound space and camera positions.[35] These facilities were based in the International Broadcast Centre (the 'IBC'), a 70,000 square metre building constructed in the Olympic precinct. More than 12,000 television network personnel worked out of the IBC,[36] which featured, among other technological feats, the world's largest monitor wall consisting of 440 screens displaying signals from every signal distributed by SOBO.[37]

The second source of Olympic footage for rights holders at the Sydney Games was individual footage. Rights holders were allocated camera positions at the venues and filmed elements such as close ups of national athletes to tailor broadcasts for particular viewing audiences.

3.2. Coverage of the Games by non-rights holders

In addition to rights holders, other members of the television media sought access to the Olympic Games for the purposes of reporting news, interviewing athletes and documenting the Games in Sydney.[38] Known as 'non-rights holders', these media members were largely regulated by an accreditation system. In the main, these accreditations were distributed by each national Olympic Committee.[39] For example, Australian non-rights holders such as Channel 9 and the Ten Network, received accreditation from the Australian Olympic Committee (the 'AOC').[40]

With the exception of press conferences, ENR accreditation did not entitle a non-rights holder to originate any programming or feed from the Olympic venues.

4. Use Of Games Footage - Protecting Rights Holders

The major issue relating to Olympic TV rights, particularly in light of the vast sums which are paid for those rights, is protecting exclusivity. It is particularly important that rights are not diminished in any way, particularly by an unauthorised broadcast of Games events or the use of Olympic indicia and images in a manner which could suggest another network was affiliated with the Games or detract from the Games. During, and in the lead up to, the Games I repeatedly advised Seven on various issues relating to the protection of their rights ranging from the association of other major Australian networks with the Olympic Games to illegal piracy of footage over the internet.

4.1. Rights holders and IOC copyright ownership

While being a Sydney Games rights holder entitled a broadcaster to transmit images and sounds of the Games it did not amount to a grant of ownership in Olympic footage nor an exclusive licence for the purposes of the *Copyright Act 1968* (Cth.).[41] The IOC retains copyright in Olympic material and is responsible for controlling the use of its copyright material. The retention of ownership by the IOC had important consequences for rights holders at the Sydney Games.

First, because Sydney Games rights holders did not own copyright in relation to any Games footage, their use of that footage outside the scope of any agreement with the IOC was subject to IOC approval. This applied to all footage except that which was defined as the rights holder's own material, for example, commentary, interviews, profiles, historical features, music, graphics, promotions or advertisements. With respect to broadcasts such as internet transmissions, identifying whether something fell within the rights could prove difficult, especially given the IOC's reluctance to embrace new forms of media.

Similarly, if the rights holder wished to sub-licence its rights the sub-licensee had to enter into an agreement with the IOC and SOCOG.

During the Games I had to advise Seven in relation to such things as the potential use of Olympic footage in a closed circuit feed to a cinema, the sale of an Olympic sports program to an international airline and provision of footage to third parties for the purposes of advertising. On more than one occasion these advices were further complicated by other relationships in place between the IOC and World Wide Olympic Partners such as Coca-Cola.

Subject to the specific terms of the contracts between the rights holders, the IOC and SOCOG, other restrictions were also placed on Sydney Games rights holders including that:

- no advertising, promotion or publicity could be superimposed on, or appear on a split screen at the same time as, the coverage of the Games (without prior approval of IOC/SOCOG);
- the international signal could not be embellished (eg, by adding words, cartoons, changing colours etc);
- sponsor credits could appear immediately before or after each commercial break and at the beginning and end of each broadcast program; but
- in no event, could sponsor credits occur during the same time as any sporting action, medal ceremony or recognisable image of a participant.

Just as Sydney Games rights holders did not have unlimited rights

30 SOCOG 'Melbourne Olympic Games - 1956 - Comparison - Now and Then'. For more information on the NBC bid see: 'The Peacock Struts its Stuff', *Time*, vol. 146, no. 26, 25 December 1995, at 47; and 'Olympians play, US TV pays', *New York Times*, vol. 139, 27 September 1989, at C2(N) and D2(L) col 1. For Seven see: Clive Mathieson, 'Running to win: Seven Network executives pulled off the biggest sporting coup in Australian history when they secured exclusive television rights to all Olympic Games until 2008', *Australian*, 4 June 1996 at 25; John Lehmann, 'Network Games', *Australian*, 17 June 1999, at Media 2-3.

31 SOCOG 'Melbourne Olympic Games - 1956 - Comparison - Now and Then'.

32 Ibid., at 17.

33 'Olympic Broadcasting'.

34 Hill-Douglas, 'TV's Quantum Leap to Sydney'.

35 'Official Report of the XXVII Olympiad' 'http://www.gamesinfo.com.au/postgames/en/volume_en.htm' (accessed 25/08/02).

36 'The Sydney 2000 Olympic Games', at 11.

37 'Official Report of the XXVII Olympiad'.

38 Bridget Godwin, Susan Oddie, Georgina Waite and James McLachlan, 'Let the games begin', *Communications Update*, September 1996, at 2-4.

39 With the exception of three international press agencies and the Australian Associated Press, which received their accreditation from the IOC: John Fairbairn, 'Olympic broadcasting - what are the rules?', *TeleMedia*, vol. 4, no. 4, August 2000, at 39.

40 Ibid., at 37.

41 An example of the disputes which can arise from Olympic footage is *Australian Olympic Committee Inc v The Big Fights Inc* (1999) 46 IPR 53 which involved disputed ownership of copyright in films of the 1956 Melbourne Olympic Games.

in relation to Olympic broadcasts, stringent restrictions were also placed on the use of Olympic symbols. This aspect is governed by Rule 17 of the Olympic Charter which provides that the IOC may take steps to prohibit any use of the Olympic symbol which is contrary to the Olympic Charter and, during the Sydney Games period, required SOCOG to protect the emblems that they devised. Similarly, under the Host City Contract SOCOG and the AOC were to protect the intellectual property associated with the Games including the rights associated with the torch. The Olympic Insignia Protection Act 1987 provided that for the purposes of the Australian Copyright Act 1968, the Olympic symbol was an original artistic work in which copyright subsisted.

This latter aspect had particular consequences in relation to any alleged breach of a rights holders' Olympic TV rights. Although under section 31 of the *Copyright Act 1968* (Cth.), copyright in relation to an artistic work includes the exclusive rights to include the work in a television broadcast, because a rights holder is neither an exclusive licensee for the purposes of the *Copyright Act* nor the owner of the copyright, it was necessary to rely on the IOC, SOCOG and/or the Olympic Co-ordination Authority (the 'OCA') to institute any infringement proceedings to protect their exclusive rights.

A major concern for Sydney Games broadcasters was that some body could enter a venue and independently film events, take Seven's broadcast, intercept the SOBO feed or the feeds of non-Australian rights holders and convert that material into digital format using a video capture card or other device. This material could then have been uploaded as live stream video and audio content. The internet service provider could then have made the footage available to the public in the usual manner. Clearly, the most suitable remedy for such a problem would be an injunction, however, because of the ownership structure of the Olympic footage, the proper plaintiff in such an instance had to be the IOC or AOC and not the rights holders themselves. Thus in the event of a breach, rights holders must rely on the IOC or SOCOG to protect their exclusive rights.

In addition to copyright protection, the IOC also had the power to protect Olympic footage under sections 52, 53(c) and 53(d) of the *Trade Practices Act 1974* (Cth.). These sections prohibit the making of a false representation or engaging in misleading or deceptive conduct. Seven was also able to benefit from these provisions in circumstances where other broadcasters or advertisers were making representations that they were in some way a licensed broadcaster or had some connection with the Olympic Games that it did not have.

Two important cases illustrate the effect of the provisions of the *Trade Practices Act*. In *Pacific Dunlop Ltd v Hogan* (1989) 23FCR 553 the Federal Court of Australia, on appeal, decided that an advertisement which was a 'take-off' of a scene in *Crocodile Dundee*, a Paul Hogan movie, was misleading because it conveyed that a commercial arrangement had been concluded between Paul Hogan and the shoe company promoted in the advertisement.

Similarly, in *Talmax Pty Ltd v Telstra Corporation Ltd* (1996) ATPR 41-484 the Court concluded that the use of the image of Australian swimmer Kieran Perkins in advertisements without his approval misrepresented that the Perkins was sponsored by the respondent. At the time the photograph was taken Perkins was a member of the Telstra sponsored Australian team but he was not at the time Telstra used the photographs in one of its 'pre-selection' promotions. The Supreme Court of Queensland, Court of Appeal, finding in favour of Perkins, held that the photograph falsely represented to members of the public that Perkins was sponsored by Telstra, and held that '[t]he ordinary reader would have gained the impression that Mr Perkins supported the Respondent in the pre-selection process by the Respondent's use or its association with Perkins in that context.'

When Australia was first awarded the Games in 1996, the Federal Government enacted the *Sydney 2000 Games (Indicia and Images) Protection Act 1996 (Cth)* which specifically targeted ambush marketing and unauthorised use of Games symbols and logos.[42] The protected symbols included the word '*Olympic*' and expressions '*Games City*' '*Sydney Games*' and '*Summer Games* '. The act prohibited the use of any of these indicia or images for a purpose which suggested some connection with the Olympic Games or the Paralympic Games. This Act was repealed at the end of 2000.

Prior to being awarded the Games, the Federal Government had enacted the Olympic Insignia Protection Act designed to grant a monopoly in the Olympic symbol, the 5 ringed device and certain Olympic Designs such as the Olympic Torch to the Australian Olympic Committee. The Olympic Insignia Protection Amendment Act 2001 extended the protection of this Act to well known 'Olympic expressions' such as 'Olympic', 'Olympics', Olympic Games', Olympiad', and 'Olympiads'. This amending Act gave, and was intended to give, enormous power to the AOC as the money raised from licensing the rights to use these expressions was to be used in the development of our athletes.

4.2. Restrictions on non-rights holders and the News Access Rules

Although it is imperative for the IOC and rights holders alike that Olympic TV rights are protected, it is also important that Olympic organisers strike a balance between protecting rights holders and maintaining harmony with the non-rights holders who are responsible for generating the public perception of the Games through the mass media. In order to achieve this balance, regulations control the activities of both rights holders and non-rights holders during Olympic periods.

Under the News Access Rules television organisations who are non-rights holders can not broadcast coverage of any Olympic events, medal ceremonies, opening and closing ceremonies or any other activities which occurred at Olympic venues except in accordance with the IOC's 'Television News Access Rules'.[43] In a manner which reflects the distinction between news and entertainment asserted by US networks at the 1956 Games, the News Access Rules allow non-rights holders to use a certain proportion of Olympic footage for news purposes as part of regularly scheduled news programs.[44] According to Rule 1 of the Sydney Games News Access Rules, the news element of the program must constitute the 'main feature' and the program must not be promoted as an Olympic program.[45]

While the News Access Rules were developed by the IOC, the IOC permits them to be modified in each country so that they comply with local laws including local copyright law.

During the Sydney Games, the use of such footage was subject broadly to the ''3 x 3 x 3' convention which provided that:

- Olympic material could appear in no more than three news programs per day;[46]
- the duration of the Olympic material used in any one news program was not to exceed a total of three minutes and the Olympic material not exceed one third of the duration of a particular event or 30 seconds of a particular event. If the duration of a particular event was less than 15 seconds, which includes events such as 100m sprint, the whole of the event could be shown;[47] and
- news programs in which the Olympic material appeared were separated by at least three hours.[48]

The 3 x 3 x 3 convention can be traced back to the 1960 Rome Games and is now a widely accepted convention for the use of sporting footage in the Australian television industry.[49] The enforcement of the News Access Rules, particularly with the assistance of the AOC through mechanisms such as linking access to athletes with the Rules, sparked considerable complaint from Australian non-rights holders who questioned 'what right does the AOC have to take the fullness of

42 For more information see: Odette Gourley, 'Ambush Marketing - Olympic Experience', *Communications Law Bulletin*, vol. 19, no. 4, 2000, at 20; Christopher Kendall and Jeremy Curthoys, 'Running Rings Around Sponsors: Sydney Olympics and 'Ambush Marketing"', *Australian Intellectual Property Journal*, vol. 11, no.1, 2000, at 5.

43 International Olympic Committee, *Television News Access Rules Applicable to the Sydney 2000 Olympic Games*, Rule 1. Discussed in Fairbairn, 'Olympic Broadcasting', at 38. The Television News Access Rules applicable to the Sydney Games are attached at the Appendix.

44 Fairbairn, 'Olympic Broadcasting', at 38.

45 *News Access Rules*, Rule 1.

46 Ibid., Rule 2.

47 Ibid., Rule 3. Discussed Fairbairn, 'Olympic Broadcasting', at 38.

48 *News Access Rules*, Rule 4.

49 Ibid.

the Olympic experience away from the people of Australia in world and give it to the highest bidder.'[50]

Under the News Access Rules further provisions restricted the use of Olympic material including that non-rights holders could only use Olympic material if:

- less than 48 hours had elapsed since the earliest time at which broadcasts of such Olympic material began;[51]
- the Olympic material had already been broadcast by the rights holder on free to air television;[52]
- they complied with the IOC's requirements in relation to advertising;[53] and
- an on-screen credit was given to the rights holder in the particular territory.[54]

These rules have resulted in some rather unusual news excerpts over the years. For example, when Steven Bradbury won Australia's first ever Winter Olympics gold medal, viewers tuning into the Ten Network evening news were told of Bradbury's success in a bulletin featuring only footage of Bradbury training and a pre-Olympic interview. The reason for this unusual occurrence was that Seven, rights holder to the Salt Lake City Winter Olympics, had not yet screened the event in their evening Olympics package and thus, any screening by Ten would have amounted to an infringement.

4.3. Statutory prohibitions on non-rights holders

Like the Melbourne Games, television rights were not without dispute during the Sydney Olympics.

Guidelines were developed by the OCA, a body set up by the New South Wales Government, and SOCOG to establish a framework for the television and radio activities of non-rights holders within the common domain at Sydney Olympic Park.[55] According to the *Official Report of the Games of the XXVII Olympiad*, the Guidelines were designed to facilitate communications to Sydney residents and visitors during the Games by providing an environment which television and radio news effectively supported Games-time official public communications messages.[56] At the same time, the Guidelines were designed to protect 'to the maximum extent possible, the entitlements of Olympic media rights holders.'[57] The Guidelines incorporated restrictions including:

- No non-rights holding broadcaster was permitted to record images or sound in the Common Domain unless access to the common domain was permitted in accordance with the Guidelines.
- No material filmed or recorded in the Common Domain could be made available to any third party except that international non-rights holders could make such material available with the consent of the IOC. No such material could be transmitted or communicated by the internet or any other electronic media.
- The OCA could limit the number of non-rights holders with media access permits accessing the Common Domain in accordance with the Guidelines at any particular time for security, safety and crowd control reasons. Crew members could not distribute any promotional or advertising material while within the Common Domain.
- The OCA, at its discretion, could require crew members to cover up or remove advertising, promotional and other identification material worn by crew members or on crew equipment.
- No vehicle access was available to non-rights holding broadcasters under the Guidelines.
- Non-rights holders could not erect any free standing facilities within the Common Domain at any time.
- Non-rights holders had to comply with all limitations imposed by the OCA.
- All non-rights holdings broadcasters had to sign the declaration contained within the application form indicating that their organisation and crew representatives would comply with the application form, the Guidelines, the *Homebush Bays Operations Act 1999* (NSW) and the supplement to the IOC television and radio news access rules.[58]

The OCA derived its power to regulate the media in part from the *Homebush Bay Operations Act 1999* (NSW) which provided that no person could use audio, loudspeaker or broadcasting equipment or camera (whether photographic, cinematic or video) without the permission of the OCA. This prohibition operated in the Homebush Bay Olympic sites and was supplemented by the *Olympic Arrangements Act 2000* (NSW) which provided that a person must not, without the approval of the OCA:

a broadcast, telecast, or transmit by any means whatever, any sound or image of an Olympic Games event or activity, or any part of any Olympic Games event or activity; or

b make any sound recording, or any film, television, video or digital recording of moving images, of an Olympic Games event or activity, or any part of an Olympic Games event or activity, or profit of gain or for a purpose that includes profit or gain, at or from a base within or outside an Olympic venue or facility or an Olympic Live Site.

Olympic Games events or activities included events such as sailing, marathon, triathlon and road cycling and the official closing night activities in the city involving fireworks across the harbour and entertainment at which it was more difficult to prevent independent filming.[59]

The OCA issued a total of eight media passes each day for Australian non-rights holders and eight passes for international non-rights holders.[60] This compromise was the result of international complaint, from organisations including Reuters and Associated Press, stemming primarily from the fact that access for accredited non-rights holders was limited to areas which were not even venues.[61] US Olympic Committee member, Mike Moran, stated 'local broadcasters like ABC television and Channel 10 will have much better access to Olympic venues than foreign broadcasters, but the big overseas TV companies want similar powers to the locals, they want to use Homebush Bay as a visual backdrop and they want to interview athletes at designated sites.'[62]

5. New Media

Like the introduction of television at the time of the Melbourne Games, the introduction of new forms of media has caused concern for the IOC. In circumstances similar to the reluctance of the Olympic movement to embrace television in 1956, the IOC has to date refused to accept internet technology in any real sense.[63] In 1956, IOC President Avery Brundage cautioned that the Olympic movement could do without television, Dick Pound, when he was Vice-President of the IOC remarked, 'the Internet is not ready, broadband is not ready. TV is the engine.'[64] This comment by Pound highlights the two main factors which have, to date, kept the internet largely out of the Olympic broadcast equation.

The first factor, which is understandable to anyone who has tried to watch a broadcast over the internet, is a lack of technology making it difficult to provide high quality access to online streaming of

50 Godwin et al., 'Let the games begin', at 4. See also Australian Olympic Committee, '2000 Australian Olympic Team Media Guidelines' 'www.australian.olympic.org.au' (accessed 28/08/02).

51 *News Access Rules*, Rule 5.

52 Ibid.

53 *News Access Rules*, Rule 9.

54 *News Access Rules*, Rule 10.

55 'Official Report of the XXVII Olympiad'.

56 Ibid. See also 'Procedure for allocation of permits - *Guidelines for Media Access of Non-Rights Holders to the Common Domain, Sydney Olympic Park, Homebush Bay (Television and Radio)*' 'www.gamesinfo.com.au/vn/OP/ARSOPMA.html' (accessed 28/08/02).

57 *Sydney 2000 Olympic Games: Guidelines for Media Access of Non-Rights Holders to the Common Domain, Sydney Olympic Park, Homebush Bay (Television and Radio)*, at 1.2.

58 'Procedure for allocation of permits - *Guidelines for Media Access of Non-Rights Holders to the Common Domain, Sydney Olympic Park, Homebush Bay (Television and Radio)*'.

59 'Guide to Non Venue Broadcast and Filming' 'www.gamesinfo.com.au/sy/ARNRBR.html' (accessed 28/08/02).

60 Ibid.

61 Fairbairn, 'Olympic broadcasting', at 39.

62 Discussion involving Mike Moran and Rafael Epstein, 'US media reconsiders Olympic coverage' 'www.abc.net.au/worldtoday/s132113.htm' (accessed 25/08/02).

63 This similarity highlighted in Warner, 'Analysis: Internet Media Band from the Olympics'.

64 Quoted in Klein, 'Back to the 20th century'.

video.[65] Video streaming, particularly through the common place modem, does not work well and is prone to dropping out and breaking up.[66] Stephan Kanah, IOC spokesperson states, 'you simply cannot transmit the emotion of the Games through a window two inches by three inches.'[67]

The second factor is the attempt of the IOC to protect the investment made by rights holders in Olympic TV rights.[68] As with the Melbourne Games where MOCOG was cautious of undercutting the value of the official Olympic film, today the IOC recognises the importance that TV rights means for the financial viability of the Games and understandably does not want to compromise that position. As illustrated above, TV has been 'the biggest boom for the Games'.[69] For example, NBC paid $4 billion for exclusive US rights to the Olympics through to 2008.[70] However, as Gary Zenkel, Senior Vice President of Business Development and Marketing for NBC's Olympic programming points out, '[o]ur rights and the reason that we pay an enormous premium for them is totally locked up in their exclusivity.'[71] The IOC will not act in any way which might damage TV rights and is insistent, not without reason, on protecting the value of TV deals.[72]

In its current form, the internet does not offer the same opportunities as TV as a broadcast medium. The major difficulty is how internet rights can be sold. Unlike TV, which is limited to territorial broadcasts and can be sold to networks and consortiums individually, the internet is an international medium.[73] If the BBC, for example, broadcast footage over the internet, there would be nothing stopping me in Australia, connecting to the relevant site and viewing the footage unless of course the site was subscription based and limited to UK subscribers. At a recent IOC World Conference on Sport and New Media, Dick Pound remarked 'historically, we have sold in a particular territory. Until you can guarantee that the signal will be restricted to your territory, you cannot put real time video or real time audio on the Internet.'[74]

These factors have resulted in reluctance from the IOC to embrace the internet as a medium and to separately sell internet TV rights. Rather the approach of the IOC is to bundle these rights. Although '[h]istorically, the Olympic Games have been a privileged space for experimenting with new information technologies'[75], the internet has had only a minor connection with the Games to date. The presence of information technologies dates back to the 1960 Winter Olympics, held at Squaw Valley, where IBM collaborated results management and there were some telematic forerunners at Barcelona and Albertville.[76] However, the internet was really only first associated with the Games in Atlanta 1996 where the first official website was that of the Atlanta Organising Committee (www.atlanta.Olympic.at/). 185 million people visited the site during the Games.[77] Since that time the Olympic internet sites have developed in popularity.

Because of the ban on broadcasting Olympic footage over the internet, except international and territorial boundaries, producers have had to develop different techniques to capture the Olympic experience. For the Sydney Games, NBC embarked on a joint venture with Quokka, an on-line media outlet. The NBC/Quokka venture included elements such as commentaries from NBC sports casters, athlete profiles, news, results, schedules of events, and an explanation of sporting rules.[78] However, such initiatives have not resulted in comparable demands with television audiences. Official IOC sources suggest that approximately 3.7 billion individuals viewed the Sydney Games on television while only 20 million logged on to web sites for Olympic related information, and many of these were directed there from television broadcasts.[79] Indeed, until the internet audience expands, advertisers will continue to focus on television[80] and the internet will remain a minor source of Olympic revenue.[81]

The IOC has certainly not shut out the possibility of introducing the technology for future Games. Partly in response to the strong criticism of the IOC and Olympic organisations for shutting out on-line journalism at the Sydney Games - a move said to be against the Olympic spirit - internet technology trials have begun. These trials are by TV rights holders. Programmers have worked to develop technologies to limit internet access on a territorial basis and the result was a digital subscriber line service of Swisscom's Bluwin in Zurich, Basel and Geneva designed for internet broadcast of the Salt Lake Games. The service provider worked in conjunction with Swiss National Television and Schlumberger the IOC's partner.[82] The service was offered free for three days and then a fee was introduced. Technologies were also experimented with during the Sydney Olympic Games, Paralympics and the Soccer World Cup.[83]

The IOC will have to continue to address the issue of internet broadcasting sooner rather than later. As historian, Stephen Wenn, points out '[a]ll of these new forms of media, broadcasting, production and access to information question the Olympic movement and will force it to redefine its communication policies and strategies in the Internet era.'[84] Just as the development of satellite technology enabled television to be broadcast live internationally rather than relying on the transport of tapes from place to place, new technologies, including cable and satellite and use of digital transmissions will see the internet develop as an option for broadcasting images. Although it is unlikely that this development will supersede television broadcasts, at least in the short term, it will have an effect, particularly in the more developed nations. In any event, the future of Olympic broadcasting will have to continue to deal with the development and possibilities of internet broadcasting in any future negotiations and planning for future events. In the mean time and at least until 2010, the IOC's tough stance towards the internet and internet piracy is set to be a feature of upcoming Olympic Games.[85]

65 Martyn Williams, 'Olympic Games Go for the Gold Online' 'cssvc.pcworld.compuserve.com' (accessed 25/08/02). See also the Mara Bellaby, 'The 'Net Dragnet: Violators Caught as Olympic Video Is Monitored on Internet' 'abcnews.go.com' (accessed 25/08/02).

66 Steve Kettmann, 'Let the Games Be Streamed' 'www.wired.com/news/print/0,1294,37849,00.html' (accessed 25/08/02).

67 Williams, 'Olympic Games Go for Gold Online'.

68 Ibid.

69 Warner, 'Analysis: Internet Media Band from the Olympics'.

70 'Websites demand greater Olympic access' 'www.usatoday.com/life/cyber/tech/cti610.htm' (accessed 25/08/02).

71 Klein, 'Back to the 20th century'.

72 Warner, 'Analysis: Internet Media Band from the Olympics'.

73 73 Staci D. Kramer, 'Frustration: A New Demonstration Sport' 'www.ojr.org/ojr/business/p1017712999.php' (accessed 25/08/02).

74 Quoted at World Conference on Sport and New Media, Lausanne, December 2000, in Klein 'Back to the 20th Century'. See also IOC spokesperson Stephan Kanah who states that '[u]ntil the technology allows us to restrict access to the feed by nation, there won't be any live feed of the Games', quoted in Williams, 'Olympic Games Go for the Gold Online'.

75 Miquel de Moragas Spá, 'The Olympic Movement and the Information Society: New Internet Challenges and Opportunities' (Part of the book *Television in the Olympic Games: the new era: International Symposium, Lausanne, 1999* (Lausanne: International Olympic Committee, 1999)) 'http://www.blues.uab.es/olympic.studies/pdf/OD011_eng.pdf' at 32.

76 Ibid., at 32.

77 Ibid., at 34.

78 Kettmann, 'Let the Games Be Streamed'.

79 Klein, 'Back to the 20th Century'.

80 For example, NBC TV revenue from the Sydney Games totalled 900 million dollars compared with $20 million for the internet'. See J B Houck, 'International Olympic Committee Scorns Streaming in Game of Greed' 'www.wirelessnewsfactor.com/perl/printer/11304/' (accessed 25/08/02).

81 Warner, 'Analysis: Internet Media Band from the Olympics'. See also Bernhard Warner, 'Cybersquatters face Olympic-sized lawsuit' 'www.cnn.com' (accessed 25/08/02).

82 Williams, 'Olympic Games Go for Gold Online'. See also 'IOC to Allow Internet Journalists to Cover Salt Lake Games' 'english.peopledaily.com.cn' (accessed 28/08/02).

83 Kendra Mayfield, 'World Cup: An Olympian Web Event' 'www.wired.com/news/print/0,1294,52205,00.html' (accessed 25/08/02); Stewart Taggart, 'Finally, Games That are Webcast' 'www.wired.com/news/print/0,1294,39300,00.html' (accessed 25/08/02).

84 Spá, 'The Olympic Movement and the Information Society', at 32.

85 Mark Ward, 'Net faces 10-year Olympic shutout' 'news.bbc.co.uk/1/hi/sci/tech/1054108.stm' (accessed 25/08/02).

Appendix

Television News Access Rules applicable to the Sydney 2000 Olympic Games

Introduction

The IOC has granted Seven the exclusive right to broadcast the Sydney 2000 Olympic Games in Australia. No other organization may broadcast sound or images of any Olympic event, including sporting action, Opening, Closing and medal ceremonies or other activities which occur at Olympic venues in Australia except as permitted by the Television News Access Rules, set out below.

For the sake of clarity, these News Access Rules apply only to television broadcasting. Olympic material may not be transmitted or communicated over the Internet or using any other electronic medium without the express prior written approval of the IOC.

News Access Rules

1. Olympic Material may be used only as a part of regularly scheduled News Programmes. News Programmes can not be positioned or promoted as Olympic programmes and Olympic Material can not be used in any promotion whatsoever.
2. Subject to the exception for all-news networks as set out in paragraph 5 below, Olympic Material may appear in no more than three News Programmes per day.
3. The duration of Olympic Material used in any one News Programme shall not exceed a total of three (3) minutes. Further, the broadcast of Olympic Material contained in a News Programme will not exceed one third of the duration of any Olympic event or thirty (30) seconds, whichever is the lesser time, provided however, that if the duration of an Olympic event is less than 15 seconds, the whole of the event can be shown in a News Programme.
4. Subject to paragraph 6 below, News Programmes in which Olympic Material appears must be separated by at least three hours. However, if a broadcaster regularly telecasts multiple Hard News Programmes from 16:00 hours to 19:30 hours local time, it may broadcast reports utilising excerpts of Olympic Material during one locally-orientated Hard News Programme and also during one network Hard News Programme during this time period, so long as the combined broadcast time of Olympic Material shown in both programmes does not exceed a total of three minutes.
5. In the case of an all-news network, the network may use Olympic Material during multiple News Programmes, as long as the Olympic Material is used in no more than six News Programmes per day and does not exceed a total of one and one half minutes in any one News Programme.
6. Broadcasts of Olympic Material shall cease no later than forty-eight (48) hours after the earliest time at which broadcasts of such Olympic Material may begin.
7. Non-rights holders must not broadcast any Olympic Material unless that Olympic Material has already been broadcast by the rights holder on free to air television without the express written permission of Seven.
8. Non-rights Holders, provided they are holders of ENR accreditation and subject to OCA's permit requirements, will have access, with equipment, to all official press conferences held in the MPC as well as access, without equipment, to other Olympic venues. ENR access shall not entitle a non-Rights Holder to originate any programming or feed from the Olympic venues, including the MPC. However, notwithstanding the other provisions of these News Access Rules, they may broadcast all or portions of any press conference held in the MPC with a delay of at least thirty minutes from the conclusion of that press conference.
9. The IOC and SOCOG, in collaboration with OBO, will establish the ONA which may enter into agreements with non-Rights Holders or news agencies with respect to the supply of Olympic Material copyright in which is owned by the IOC. Olympic Material obtained through the ONA shall not be used except as expressly authorised by these News Access Rules.
10. Olympic Material shall not be provided by the ONA to non-Rights Holders or news agencies unless they provide a prior written guarantee, in a form and substance satisfactory to the IOC, that they will fully comply with all terms and conditions of these News Access Rules.
11. Non-Rights Holders and news agencies will:
    a not make available or provide Olympic Material to any third party without the express prior written consent of the IOC;
    b ensure that no advertising or other message appears at the same time (be it superimposed or on a split screen or otherwise) as Olympic Material or at the same time as any other coverage of the Olympic Games which contains any Olympic imagery or Olympic marks; and
    c ensure that no advertising or other message is placed before, during or after the broadcast of Olympic Material, in such a manner as to imply an association or connection between any third party, or third party's product or service, and Olympic Material or the Olympic Games.
12. Each broadcast of Olympic Material shall give an on-screen credit to the Rights Holder in the particular territory.
13. The accreditation of any person(s) accredited at the Olympic Games may be withdrawn without notice, at the discretion of the IOC, for purposes of ensuring compliance with these News Access Rules.
14. These News Access Rules shall come into effect when an Olympic accreditation card is required to obtain access into any of the Olympic venues. From the time that these News Access Rules come into effect until 48 hours following the conclusion of the Olympic Games, their operation shall be monitored and enforced by the Executive Group of the IOC Radio and Television Commission in consultation with the Director of Legal Affairs of the IOC. The IOC Executive Board shall be the final authority with respect to the interpretation and implementation of these News Access Rules.

Definitions

Hard news means News Programmes focussing primarily on multiple, local, regional, national or international current events;
IOC means the International Olympic Committee;
MPC means the Main Press Centre;
News Programmes means regularly scheduled daily news programmes of which the actual news element constitutes the main feature;
OBO means Olympic Broadcasting Organisation;
OCA means the Olympic Co-Ordination Authority;
Olympic Material means sounds or images of any Olympic event, wherever and whenever broadcast, including sporting action, Opening and Closing ceremonies, medal ceremonies or other activities which occur at Olympic venues and pre-Olympic events and cultural events which are owned and are under the control of the IOC and SOCOG in the case of pre Olympic events and SOCOG in relation to Cultural events;
Olympic venues shall include all venues which require an Olympic accreditation card to gain entry, including the Olympic village, the competition sites and the practice venues. The site(s) at which medal ceremonies take place shall also be considered as an Olympic venue(s)

during the time when the medal ceremonies actually take place;
Olympic Games means the Sydney 2000 Olympic Games;
ONA means Olympic News Agency ;
Rights Holder means the corporation who has been granted the exclusive right to broadcast in a particular territory;
Seven means Seven Network Limited;
SOCOG means the Sydney Organising Committee for the Olympic Games.

Restrictions on the Freedom of Information in Sport

by **Annette Mak and Bert-Jan van den Akker***

Finding a proper balance between the interests of sports organizations and the free flow of information.

1. Introduction

Top sport nowadays is inseparable from commerce. In some branches of sport this is taken to the point where, if commerce were to withdraw from that sport, its future existence would be threatened. In Formula One, the teams no longer select the drivers based on their talent, but based on the sponsoring they managed to acquire. In the case of some football clubs the main sponsors, bearing in mind the adage 'he who pays the piper calls the tune', publicly involve themselves in the selection of the team and the possible dismissal of coaches, and events such as the Olympic Games and the football World Cup could not exist in their present form without commerce. The present economic climate is responsible for ruthlessly exposing these practices.[1]

The reason why commerce has been able to secure such an important place in top sport is that sport has both entertainment and news value. These combined elements render sports ideally suited to exploitation, as they ensure worldwide mass attention to top sport, which therefore represents enormous economic value. The broadcasting rights of major sporting events and competitions[2] are currently being sold at billions of euros and sponsors and clubs reserve many millions of euros in order to sponsor events and competitions, to develop and sell merchandise or to see their corporate name affixed to cars, shirts or stadiums.

With the arrival of the new media the possibilities to exploit sports have become almost infinite. In today's environment it is, for instance, possible to be informed of the course of a match by mobile phone. Internet sites are making grateful use of the news value of matches and other sports events. For example IBM, by using a virtual scoreboard, provides internet users with the most up-to-date rankings and positions during major sporting events such as the Olympic Games, Wimbledon and recently also during the Davis Cup matches. Match pictures, press conferences and interviews can be followed on websites via live streaming, either paid or free of charge. In accordance with these new possibilities the International Olympic Committee has recently announced, after a request to that effect from European Commissioner Monti, that it intends to separately sell the broadcasting rights to the Olympic Games in Athens next year to the new media and the conventional media.[3] This obviously means more income for the IOC.

It is of the utmost interest to sponsors, purchasers or other legitimate users of the rights sold to them by the sports organizations to ensure that these rights which they have acquired so expensively remain exclusive and are properly protected against use by third parties. When these rights are not protected properly their value will decrease.[4] Both the purchaser and the vendor therefore have a stake in ensuring that the forms of exploitation concerned are properly protected. On the other hand, it will not be disputed that other parties - like the press - have a legitimate interest in informing the public concerning the sports events and that they cannot - up to a certain degree - be prohibited to do so. This subsequently raises the question to what extent the rightful owners are allowed to protect their interests. In other words, to what extent can the rights of national and international sports organizations, athletes and entitled parties restrict the free flow and use of information by third parties?

In this article we will try to answer the questions raised above. Although we will take Dutch law as a starting point, foreign (case) law will also be discussed since we believe that the outcome should be more or less the same in the entire (Western) world. We will first look at the position taken up by the freedom to distribute and collect information in the present information society in the Netherlands. We will then address the means and rights available to the holders of broadcasting rights to protect their expensive entitlements from being used by others who justify the infringement of these entitlements by referring to the gathering of information. In describing the above we will also describe the continuous struggle between the interests involved and the balance between them as created by the lawmakers and courts of the Western world.

Despite the length of this article it does not claim to dispense legal advice. Our intention is to create a proper understanding of the problems involved and to open up discussion in order to create an efficient and fair system which serves the interests of all parties involved.

2. Freedom of information

In the Netherlands the right to distribute information is based on Section 7 of the Constitution. Section 7 inter alia provides that no one shall require prior permission to publish thoughts or opinions through the press, without prejudice to the responsibility of every person under the law.

The Netherlands, like - we presume - all countries in the Western world, thus provides a constitutional freedom to distribute information. However, the Dutch Constitution does not provide a right to

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1 At present there are associations, clubs and teams in all branches of sport which are in such dire financial straits that their existence is threatened. As a result of the poor economic climate the sponsors and financial backers have tightened their purse strings.

2 For example, the American broadcaster NBC paid nearly 1.6 billion euros to be allowed to broadcast the Summer Olympics in Sydney and the Winter Olympics in Salt Lake City. The German media conglomerate Kirch paid 1.7 billion euros for the 2002 and 2006 Football World Cups.

3 Netherlands Government Gazette, 2003, no. 33, p.1.

4 Belgian football experienced a low point in that respect in September 2002 when the national team's European Championship qualifying match against Andorra was not shown on TV. The reason was that the broadcasting organizations refused to pay the asking price of the holders of the broadcasting rights, with the result that Belgian football fans were deprived of pictures of the Red Devils in action.

receive and/or gather information. Citizens who wish to claim such a right will have to invoke Section 10 of the European Convention on Human Rights (which makes express mention of the freedom to receive information (or Article 19 of the International Convention on Civil and Political Rights, which literally acknowledges a right to the free gathering of information. Since Dutch citizens can invoke both Conventions, ultimately and indirectly both the right to receive and the right to distribute information exist in the Netherlands.

With the audiovisual and technical developments of recent decades and the rise of the new media associated with these developments many new ways of gathering and disseminating information have been added to the conventional methods. Suffice it here to refer to what has been stated in the introduction of this article. The question is now whether the Dutch Constitution in its present form still provides the protection it initially intended to ensure. This question was answered in the negative by the Dutch legislator, which led to the establishment in the late 1990s of the Franken Committee. One of the tasks of the Franken Committee was to find the technically independent wording that would suit the Constitution to the digital age[5]. Its report *'Fundamental rights in the digital age'* was published on 24 May 2000[6] and includes a text proposal for the according amendment of Section 7 of the Constitution.[7] Although this draft appears to modernize Section 7 it is remarkable that it still fails to include the freedom to gather information. The Committee justified its choice as follows:

In view of the variety of activities in which the freedom to gather information can be expressed it is in the committee's opinion not possible to form an overview of what methods of restriction are needed in a general sense.

In addition the Committee stated that it considered that this fundamental right is conclusively protected by Section 19 of the International Convention on Civil and Political Rights, thereby apparently taking the point of view that this would render the addition of this right to the Dutch Constitution superfluous.

In our view, however, the Committee should have opted for its incorporation and demarcation in the Dutch Constitution so as to emphasize the importance of this right to the citizens of the Netherlands and to clarify its scope. The fact that the boundaries of this right cannot be precisely determined is insufficient reason to disregard it entirely on a national law level.[8] The Dutch courts have always been able to deal with the interpretation of the wording of the law. There is no reason to believe that this talent could not be used in the interpretation of the Constitution (and the decrees promulgated thereunder).[9]

For now, however, it may be observed that in today's information society the Netherlands constitutional legislators still continue to hide behind the two human rights conventions. In itself this is of course perfectly possible, but according to us, far from ideal.[10]

Still, in the Netherlands, there is therefore, be it directly or indirectly, a right to distribute, receive and gather information, as will quite probably be the case in most countries in the Western world. Below these rights will conjunctively be referred to as "the freedom of information". As indicated in the introduction to this article it can be rightfully argued that the freedom of information is detrimental to the rights of associations, clubs, athletes, sponsors and owners of exclusive rights granted to them by the sports associations. Practice shows that these organizations base the protection of their interests on typical intellectual property rights such as copyright, trademark law and database law, as well as on broadcasting rights (tort) and competition law.

3. Copyright

A theatre performance of the musical Cats is undoubtedly protected by copyright. Since most countries are members of the Berne Convention this will be the case practically worldwide.[11] This means among other things that the consent to record and broadcast the performance should be obtained from the owners of the musical's copyright. Without such consent the copyright holders can prohibit the recording and broadcasting of the musical. This right of the copyright owner surely limits (to a certain degree (the freedom of information of parties who want to inform others about the musical by broadcasting (part of) a reproduction of the musical on, for instance, television.

How is a football match or a gymnastics contest different from a theatre performance of 'Cats'? The main difference between sports events and theatre plays is how they are valued by the public. Historically, more especially since the industrial revolution, sports events have appealed to the populace much more than drama or other forms of art. The reason might be that games of sport frequently involve players from one village, city or nation who test their strength against players from another. This difference in perception might underlie the general understanding that a sports contest cannot be protected by copyright and that therefore the recording and television broadcasting of sports contests cannot be prohibited under copyright law. From a dogmatic point of view, however, the non-copyrightability of sports contests is much more complicated. Why would a musical, ballet or play be protected by copyright when the world gymnastics championships are not? The answer to this question may be found in the *NBA/Motorola* Case of which there is no equivalent in Dutch case law.

The United States Court of Appeals for the Second Circuit[12] rendered its judgment in the *NBA/Motorola* Case in 1997[13]/[14]. The outcome of this case held few surprises, but the case itself and the Court's reasoning clearly expound the dogmatic reasons why sports contests are not protected under copyright law and how a balance should be reached between the rightful interests of the sports organizations on the one hand and other parties' right of information on the other. The NBA organizes basketball games in the United States. At some point, Motorola launched a so-called SportsTrax device which passed live information to the user concerning basketball games taking place, more particularly as regards the teams that were playing, the scores, who was in possession of the ball, the quarter of the game, etc. This information was relayed in writing by Motorola employees who were watching the games live on television for that purpose in the offices of Motorola.[15] No virtual broadcasting of the game itself by Motorola

5 Criticism of this task was expressed by G.A.I. Schuijt, 'Section 7 of the Constitution in the 21st century', *Mediaforum* 1999-11/12, p. 303 and F. Kuitenbrouwer, 'Government paternalism threatens digital fundamental rights', *NRC Handelsblad* 9 April 1999.

6 The report and appendices can be ordered from the Netherlands Ministry of the Interior tel. +31 (0)70 4266038; http://www.minbzk.nl/gdt. It was discussed by L.F. Asscher, 'Trojan horse', *Mediaforum* 2000-7/8, pp. 228-233; E.J. Dommering, 'The new Dutch constitution and information technology', *Computerrecht* [Computer Law] 2000-4, pp. 177-185; F. Kuitenbrouwer, 'How strong are the digital fundamental rights?', *Computerrecht* 2000-4, pp. 171-176; S. Nouwt et al., 'Fundamental rights in the digital age. A response to the report', *NJB* 2000-27, pp. 1321-1327; R.E. de Winter, 'Renewed fundamental rights', *NJB* 2001-7, p. 297-299; see also http://www.ivir.nl/grondrechten.html.

7 L.F. Asscher, 'Trojan horse', an analysis of the report of the Committee on Fundamental Rights in the Digital Age, *Mediaforum* 2000-7/8, pp. 228-233.

8 We are supported in this by Asscher among others.

9 This has been understood in Germany; the German Constitution states in Section 5 GG: '*Jeder hat das Recht sich aus allgemein zugänglichen Quellen zu unterrichten.*' ['Everyone has the right to obtain information from all generally accessible sources.'] (Section 5 GG).

10 Incidentally, this is not a major problem, as Article 10 of the European Convention on Human Rights provides adequate protection via freedom of receipt, cf. ECHR 23 September 1994 (*Jersild*), *NJ* 1995, 382, note: EJD.

11 This treaty sets forth a number of material rules which should be complied with by a number of states and on which subjects of the Member States can directly rely in other Member States. Compare in this respect Art. 2 of the Berne Convention.

12 This is the Court of Appeals for the districts of the states of New York, Connecticut and Vermont.

13 Nos. 822, 824 August term 1996. Argued October 21, 1996. Decided January 30, 1997, Nos. 96-7975, 96 - 7983 (CON), 96 - 91233 (XAP). For text of judgment see also www.Bitlaw.com.

14 See also NBA v. Motorola and Stats, Inc: The Second Circuit properly limits the 'Hot news Doctrine', Alan D. Lieb, The John Marshall Journal of Computer & Information Law, Fall 1997, Volume XVI, number 1.

15 It is important to note that Motorola's information gatherers were not present in the stadiums but instead watched the games on television. This is not important from a copyright point of view, but from a broadcasting rights point of view it is, as will be discussed in the following paragraphs.

European Racquetball Championships

From 6 to 12 July 2003, Zoetermeer (The Netherlands) will host the European Racquetball Championships. The European Championships will be held for the 12th time, and participants are expected from Belgium, Germany, France, Ireland, Italy, Great Brittain and The Netherlands. Both an individual competition and a team competition will be played. The German men's team and the Irish women's team are the favourites for the titles.
Racquetball is the fastest racketsport and was born in the USA in the 1950's. Since 1978 the sport is also played in Europe.

More information about racquetball and the European Racquetball Championships can be found on the web-site www.racquetball.nl

therefore took place. The SportsTrax device could best be compared with a live newspaper. The NBA objected to these events.

The NBA took the position that Motorola had infringed its copyrights by 'copying' the information from the games themselves as well as from the television broadcasts. As regards the games themselves the Court of Appeals considered the following:

Sports events are not 'authored' in any common sense of the word. There is of course at least at a professional level, considerable preparation of the game. However, the preparation is as much an expression of hope or faith as a determination of what will actually happen. Unlike movies, plays, television programs, or operas, athletic events are competitive and have *no underlying script*. Athletic events may also result in wholly unanticipated occurrences, the most notable recent event being a baseball game in which interference with a fly ball caused an umpire to signal erroneously a home run. What authorship there is in a sports event, moreover must be open to copying by competitors if fans are to be attracted. If the inventor of the T-formation in football would have been able to copyright it, the sport might have come to an end instead of prospering. Even where athletic preparation most resembles authorship - figure skating, gymnastics, and, some would uncharitably say, professional wrestling - *a performer who conceives and executes a particularly graceful and difficult - or in the case of wrestling, seemingly painful - acrobatic feat cannot copyright it without underlying competition in the future. A claim of being the only athlete to perform a feat doesn't mean much if no one else is allowed to try*.

The Court of Appeals thus found the dogmatic basis for the non-copyrightability of the games/movements themselves in the fact that they are not authored, whereas in the event that they are, the copyright holders (by using the movements in a sports contest (have forfeited their rights to object to the copying of the movements by television cameras and/or competitors. The Court of Appeals then addressed the NBA's claim that Motorola had infringed its copyrights on the television images of the games. It is generally understood that television images of matters that are not protected by copyright are themselves (like photographs (in principle protected by copyright. The reason is that the creator of the images has to make numerous choices in order to arrive at the final broadcast. The total of these choices makes his copy of the facts (which are not by themselves copyrightable (subject to copyright law[16].

In the *NBA/Motorola* Case, however, Motorola did not copy the actual television images, but instead used them to relay in writing information which could have been obtained by anyone attending the game in the stadium. This passing on of information is, like any newspaper review, free and cannot be prohibited by the originator of the facts on the basis of copyright. The Court of Appeals took the same view, stating that:

We agree with the District Court that the defendants provide purely factual information which any patron of a NBA game could acquire from the arena without any involvement from the director, cameraman, or others who contribute to the originality of the broadcast.

It appears that the same reasoning as was applied in the *NBA/Motorola* Case was also followed in a more recent case,[17] which does not come as a surprise. The case in question was between the BBC and Talksport, which covered the European football championships Euro 2000. It concerned a live radio broadcast by Talksport. Talksport's coverage of the event was not made in the stadiums themselves but came from a room in the Talksport offices where radio commentators watched the games on television. The BBC (whose television broadcasts were involved (objected to this activity. Since the BBC knew (from the experience of the *NBA/Motorola* Case (that a copyright infringement claim would fail, it claimed instead that Talksport had misled the public by causing it to believe that the radio report came from inside the stadium itself. It seemed obvious that this claim would not stand much of a chance in court: the case was settled and therefore never went to trial.

The interim conclusion must therefore be that games and sports movements are not protected by copyrights and that copyright law therefore in principle does not interfere with the right of information. Copyrights only prohibit the copying of the images themselves (bar the consent of the copyright holder[18]). From a copyright point of view anyone inside the stadium is therefore allowed to record/broadcast the game itself. It is clear that this result does not serve the (reasonable) interests of the sports organizations who these days have the wish and a very real need to exploit their games/contests, as was explained in the introduction to this article. Other solutions had to be found (and were therefore found (to create a proper balance in this respect.

4. Trademark law

Contrary to copyright law, trademark law is by nature more commercially oriented. Indeed, trademark rights are specifically intended to identify goods/services.[19] A recent judgment of the European Court of Justice provides clear evidence of this commercial nature of trademark rights. First, however, we will give a few examples of how trademark rights might interfere with the right of information.

In one case, a newspaper commented on a Juventus football match against Real Madrid. Obviously the paper had to mention the names of the clubs. It will not be disputed that mentioning and subsequently using the names Juventus and Real Madrid could never be qualified as a trademark infringement. Nor will it be contested that a fan of Australian swimmer Ian Thorpe may wave a banner in the stadium stating 'Go go Ian Thorpe Australia loves you!'[20]. What, however, about the sports magazine which in an Olympic year published an issue entitled: 'Special: The Olympic Games' using the official IOC font as well as the well-known multiple-ring logo? And what about the Arsenal fan who in his shop sold T-shirts with 'Arsenal' printed on them, but in a different way from how Arsenal itself uses its name on the club's official T-shirts? Can the IOC and Arsenal prevent such use of their trademarks? In other words, where does the freedom of information end and trademark infringement begin?

Most people will agree that everyone should be able to comment on sports events without being limited by trademark rights. That the comments in question will be made in a commercial context is no reason immediately to conclude that a trademark is being infringed. Obviously newspapers and broadcasting networks will (nearly) always have a commercial interest in reporting major sport events. A newspaper sells (among other reasons (because of its sports commentaries. And television stations obviously make money from the advertising surrounding the games which they broadcast. What then is the criterion that should be used, now that it is clear that football clubs and other sports organizations nowadays are major commercial organizations that need to obtain funds through the exploitation of their trademarks in order to maintain their operations?

As mentioned earlier, the European Court of Justice has recently delivered a judgment indicating the European line of reasoning which is to be followed in cases like the examples provided above. The case in question concerned the use of the Arsenal trademark by a Mr Reed[21] who owned a shop near Highbury, the Arsenal stadium. In this shop he sold Arsenal T-shirts, which were markedly different from the

16 Compare Article 2 of the Berne Convention.

17 The information about this case has been obtained from newspaper clippings.

18 Numerous national copyright acts as well as the Berne Convention contain exceptions to the general principle that the copyright holder can prohibit the copying of the pictures. Often the copying of small parts of the pictures by news agencies and alike is for instance allowed.

19 In the European Union trademark law has been substantially harmonized, which means that in principle the same trademark rules apply throughout. Compare in this respect Article 1 of European Directive 89/104 of December 21, 1988 in respect of the harmonization of trademark law in the member states (EU Official Journal February 1 1989 L 40/1).

20 Some doubts might be raised in respect of a new article in the Benelux Trademark Act where in violation of the European Trademark Directive the words 'in economic life' have been deleted which theoretically would mean that a trademark owner could indeed under certain circumstances act against fans who use the club names in a way the trademark owner does not want. The discussion will remain theoretical since the European Court of Justice in the Arsenal/Matthew Reed case - infra - decided that to trigger the trademark laws the trademark must be used 'in the context of a commercial activity with a view to economic advantage and not as a private matter'.

21 European Court of Justice, November 12, 2003 Case C-206/01 (Arsenal Football Club Plc v. Matthew Reed).

official T-shirts marketed by Arsenal itself. Arsenal wanted to prohibit Mr Reed from using the Arsenal logo and claimed that Mr Reed was infringing Arsenal's trademark rights for clothing.[22] Mr Reed however contested the claim by stating that he had not used the Arsenal logo as a (commercial) trademark but as an expression of support, loyalty and devotion to the club and that apart from that there could be no infringement of Arsenal's trademark rights since the public would never confuse his T-shirts with those marketed by Arsenal bearing the Arsenal logo as registered by Arsenal as a trademark.

The English court applied to the European Court of Justice for a preliminary ruling in which it was determined that in the circumstances shown there would be a trademark infringement which the owner of the trademark would be allowed to prohibit if, as a result of the use of the allegedly infringing logo, the public had been led to believe that an economic relationship existed between the goods as sold by the alleged infringer and the trademark owner.[23] The Court added that the fact that the infringer acted out of loyalty was irrelevant when a commercial activity such as the present one was involved. The European Court of Justice subsequently went on to interpret the law (as opposed to the mere facts (and surprisingly considered that in this particular case there was a risk of confusing consumers as to the origin of the goods bearing the unofficial Arsenal sign. The referring English court had rightfully supposed that the European Court of Justice was competent only to determine the correct interpretation of the law and moreover the English court had already determined that there was no risk of the consumer believing that Mr Reed's T-shirts were in any way related to the official Arsenal T-shirts. The English court had therefore already rejected Arsenal's claim.[24] Apart from showing up an error on the part of the European Court of Justice, the difference in the interpretation of the facts demonstrates the difficulty involved in determining whether there is indeed a risk of confusion.

The interim conclusion in respect of trademark law must therefore be that following the European Court of Justice's point of view trademark rights do not interfere with the right of information as applied to sports events solely due to the fact that the trademark is used for commercial purposes. However, trademark rights will be infringed if the trademarks of the sports organizations are used in a manner which may cause the public to believe that there is a link between the goods marketed by the trademark owner and those marketed by the alleged infringer. This seems to strike a proper balance.

5. Database rights

Database rights are rights which under certain conditions protect compilations of data within the European Union based on an EC Directive.[25] Common examples of databases which could be protected by database rights are telephone directories, the list of restaurants in the Michelin restaurant guide and the games overviews of national sports organizations. Databases are only protected within the European Union if the gathering, verification or presentation of the content of the database are evidence of a substantial investment[26]. The European Directive states that, for instance, the list of songs on the back of a CD does not constitute a database in the meaning of the Directive since the list itself does not meet the substantial investment test. It goes without saying that the freedom of information will be restricted if (substantial parts of) games overviews and other data compilations can no longer be used without the permission of their rightful owner.[27]

The law on database rights came into force in 1998. All over Europe courts have struggled or are struggling with the substantial investment test. How should the Directive be interpreted in this respect? Two recent cases in the context of sports pose clear examples of the problems of interpretation that are involved and in both the national courts have turned to the European Court of Justice for guidance.

The first case concerned the overviews which are prepared by the British Horseracing Board Ltd. for each race to be held under its supervision.[28] Each year the BHB decides when certain races will take place. The list in question contains sub-lists with the names of the initial participants, the jockeys riding the horses, the owners of the horses and other such information. During the year the data on the list(s) change: owners change, horses might become ill and jockeys might go and work for another owner. The BHB incorporates these (new) data into its official lists for each race so as to keep them completely up to date. William Hill, a well-known bookmaker in England, showed parts of the BHB's lists on its internet site in order to inform clients about the races. The BHB objected to these actions based on the database rights protecting the lists.

The English High Court in London, following the arguments brought by William Hill, held that when an entity itself creates the data or gathers them for purposes other than the creation of the lists it is difficult to determine when the database meets the requirements of the substantial investment test since the gathering of the data for the lists itself did not cost much. The data were already available and it did therefore not take a substantial investment to simply compile them into a list or lists. The Court then went on to state that the BHB did, however, meet the substantial investment test in that it combined the data and verified all information on the lists (compare: 'verification or presentation'). William Hill subsequently denied that it had copied a substantial part of the database. The High Court, however, decided that although William Hill had only copied a small part of the database, it had nevertheless relied on the database's accuracy and thereby had copied a substantial part of it. After all further arguments had been rejected William Hill was ordered to desist from any further display of the lists on its website.

William Hill subsequently appealed from this decision to the Court of Appeal which in turn applied to the European Court of Justice for a preliminary ruling concerning the interpretation of the substantial investment test, more especially concerning the interpretation of the term 'gathering' under the Directive. The European Court's judgment is expected in the course of this year.

The second case concerned the copying of the games list for the Premier League by Finnish bookmaker Veikkaus. In this case, too, the European Court of Justice was asked questions concerning the interpretation of the term "substantial investment". It is expected that here, too, the European Court of Justice, like it did in its trademark approach, will attempt to strike a balance between the right of information and the commercial interests of the sports organizations involved. It is likely that the European Court of Justice will find in favour of the BHB, but reject the claim of the Premier League. Until these judgments are delivered the protection of database rights (and especially the substantial investment test (will, however, remain a topic of debate.

6. Broadcasting rights

A very important restriction of the freedom of information which the interested parties can impose in sports is based on what is known as broadcasting rights. In an action between the Dutch public broadcasting corporation *NOS* and the Royal Netherlands Football Association (*KNVB*), the Dutch Supreme Court formulated a rule which gives organizers of sporting events the right to decide who is allowed to make recordings of the event and on what conditions.[29] The question raised here was whether *NOS* - while being present in the stadiums (compare the *NBA/Motorola* and *Talksport* Cases above where the defendants were not physically present in the stadiums) -

22 Arsenal´s claim was based on the English equivalent of Article 5 1 a and b of the European Trademark Directive.

23 Compare the reasoning of the Court concerning the use of trademarks in respect of goods which are freely traded on the market: European Court of Justice February 23, 1999 case C - 63/97 (BMW/Deenik).

24 The High Court of Justice Chancery Division December 12, 2002, [2002] EWHC 2695 (Ch).

25 European Directive 96/9/EEC of the European Parliament and Council of March 11, 1996 in respect of the protection of databases (Official Journal L 77/20).

26 Compare Article 7 of the European Database Directive.

27 Compare Article 7 of the European Database Directive: the rightful owner can prohibit the use of a substantial part of the databases in question.

28 See for the judgment in first instance The High Court of Justice Chancery Division Patents Court, February 9, 2001, Case no: HC 2000, 1335.

29 NOS/KNVB HR 23 October 1987, NJ 1988, 310.

was free to broadcast flashes (live radio reports not exceeding one minute) of professional football matches organized under the auspices of *KNVB* in its radio programme *NOS langs de lijn* without payment to *KNVB*.[30]

The District Court and the Court of Appeal answered this question in the negative. The Court of Appeal first recognized that, although it was true that *NOS* had the same rights as the printed media and photographers that are allowed to report matches without payment, the flashes broadcast by *NOS* had the added element of also conveying the excitement of the match to the radio audience. The District Court and the Court of Appeal therefore held that *NOS* was following *KNVB's* performance too closely and concluded that the broadcasting of the flashes constituted an unlawful act against *KNVB*. According to both courts the reason why the performance of *KNVB* was entitled to protection was that this performance - i.e. the organization of games - equalled absolute rights, such as patent rights and copyrights. In this context the Court of Appeal applied the doctrine of equivalent performance and therefore found in favour of *KNVB*.[31] *NOS* subsequently appealed to the Supreme Court.

The Supreme Court in turn resolutely denied the existence of equivalent performance. According to the Supreme Court there was no evidence of such a right. Nevertheless, it ultimately found in favour of *KNVB* on the following grounds:

The owner of, or any party entitled to the use of, a stadium or pitch where a sporting event takes place is entitled to demand reasonable payment from any person recording [the sporting event] for the purpose of exploitation.

The Supreme Court reasoned that *KNVB* had a financial interest now that the course of the match could also be followed at home, free of charge, by means of the radio flashes, whereas the spectators in the stadium had had to pay an entrance fee. This could obviously result in the situation that some of the potential spectators would decide not to go to the stadium, but to stay at home and follow the match from there. Consequently *KNVB*, as the organizer, missed out on revenues and thus had a legitimate (financial) interest in imposing the condition that reasonable payment was owed for radio or television recordings for the purpose of broadcasting (live) from the stadium. *KNVB* could enforce these rights on the basis of a right of ownership or, as the case may be, the right to the use of the stadiums.[32]

Some argue, however, that this somewhat contrived legal reasoning shows many defects.[33] For example, when this line of reasoning is followed, one result would be that no action could be taken against the exploitation of a sporting performance which is not associated with entering the space where it takes place. The *NBA/Motorola* and *Talksport* Cases are indicative in this respect. In the event that a radio reporter were to hover over a stadium by Zeppelin, or provide what is called off-tube coverage, broadcasting rights could not be invoked by the rightful owners to prevent these actions. Nor is it clear how the term 'reasonable payment' should be interpreted and whether it would be possible to conclude exclusive contracts when third parties also offer reasonable payment.

However, contrary to the criticism cited above, we believe that, like the European Court of Justice and the American courts before it, the Supreme Court has found a proper balance here between the interests of the rightful owners and those entitled to the freedom of information, which in this scenario does not need to be amended so as to apply to the new media. It is clear from the *NBA/Motorola* and *KNVB/NOS* Cases that when a game is recorded inside the stadium and the images are then put onto the internet this will constitute a violation of broadcasting rights. In this respect, the internet is no different from television. The same applies in the case of the copying of broadcasts put on by networks which have been officially licensed for that purpose by the sports organizations. This will in many cases also lead to a copyright infringement. The only problem that still remains is with (live) radio broadcasting and other types of written/spoken information, since these types of information can be derived from television pictures without actually infringing the copyrights of the rightful owners. Depending on the special circumstances of the case, here tort law might be a last resort (compare the *Talksport* and *Motorola/NBA* Cases).

6.1. Who can invoke broadcasting rights?

In the Supreme Court case *KNVB* acted both for itself and for the clubs and there was no discussion as to who - *KNVB* or the clubs - were the rightful owners of the broadcasting rights. Immediately after the favourable judgment Rotterdam football club Feyenoord questioned *KNVB's* right exclusively to exploit the broadcasting rights, as the club took the position that the television broadcasting rights for its own home matches remained with Feyenoord. The dispute eventually resulted in court proceedings.[34] It was determined that the rights did indeed belong to the clubs themselves and that *KNVB* could not dispose of them at will, unless (of course) the clubs had agreed with *KNVB* that *KNVB* could exploit the rights. This case law subsequently resulted in the establishment of the public limited company *Eredivisie N.V.* which now exploits the broadcasting rights for all *Eredivisie* (Premier League) clubs.[35]

6.2. Improper use

Following this decision in its favour, Feyenoord - like Manchester United had done before it - launched its own media policy by creating a newspaper, a television special and the Feyenoord News Clip service. Feyenoord therefore now has an interest in keeping journalists off its premises during and after matches, as having the monopoly on the information it generates will result in higher prices and ensured sales of this information. These activities as carried out by Feyenoord cannot be prohibited, although careful attention should still be paid to the freedom of information, especially in this kind of case.

One example of possible unlawful interference with the rights of the press has already occurred when journalists from Italian broadcaster *RAI* who were trying to cover a Champions League match on the Feyenoord premises in September 2002, were banned from filming on the grounds that the exclusive broadcasting rights to the match from inside the stadium had already been sold to Italian pay channel Stream. Feyenoord would not permit *RAI* to prepare its own report prior to the match, but was only given the opportunity to purchase the interviews which Feyenoord itself had prepared for the press. Under these circumstances it can be argued that Feyenoord abused its broadcasting rights - if they existed in this respect - especially where it concerned coverage of the ambiance and not the match itself. Unfortunately *RAI* did not decide to take legal action.

6.3. Belgian situation

A similar case, however, arose in Belgium, which was different in this respect that Belgium has a law which contains the right to the free gathering of news in the Flemish community concerning, among other things, football matches. This law extends to all television broadcasters the right to record inside the stadium a certain number

30 The parties agreed on the fact that *NOS* was not allowed to put on television broadcasts of entire matches free of charge. The exploitation of the visual images of the match was therefore not at issue in this case. Nor was the fact that audiences could be informed of the course of the matches after they had been played in dispute. The action exclusively concerned the familiar circuits round the pitches.

31 Wichers Hoeth (NJ 1988, 311) came up with this term to name the rule formulated in *Decca/Holland Nautic* (Supreme Court 26 June 1986, NJ 1987, no. 191).

32 Here, as early as 1987, the Supreme Court is seen to apply a criterion which would later be deemed to be of decisive importance by the American court deciding the *NBA/Motorola* Case.

33 S.A. Klos, IER 1997, p. 87.

34 Amsterdam Court of Appeal 8 November 1996.

35 This company is the organization which looks after the interests of all the clubs at the highest levels of professional football. The company currently finds itself in a difficult situation as in November 2002 the Netherlands Competition Authority decided that the exploitation of broadcasting rights had been wrongfully allocated to *Eredivisie N.V. ENV*, on behalf of the clubs, sold on the rights to the direct images of matches to Canal Plus to the detriment of consumer and smaller clubs' interests. ENV has since appealed from the decision of the Netherlands Competition Authority.

of minutes of visual material for transmission, provided that in so recording they respect the rights of the holder of the exclusive rights. This law, which deserves to be copied all over Europe, led to a judgment in favour of a Belgian party who found itself in a similar position as *RAI*.

Each year the European football association UEFA organizes the Champions League. In Belgium, UEFA sold to *VRT* the exclusive rights to broadcast Champions League images to the Flemish community for the years 1999 to 2003. At some point during this time football club *RC Genk* played its first ever match in the Champions League and *TV Limburg* (the regional broadcaster (wanted to report this newsworthy fact from inside the stadium. *VRT*, however, denied *TV Limburg* access to the stadium before the game, whereupon *TV Limburg* initiated injunctive relief proceedings. On 16 September 2002 the Brussels Court of First Instance ruled that *TV Limburg* had to be given access to *RC Genk's* stadium so that, in accordance with the law, it could produce images and carry out interviews before, during and after the match. The only restriction imposed on the regional broadcaster was that it was not allowed to record any images of the match itself.[36] This judgment is clearly a victory for the codified freedom of information and again the courts managed to find the proper balance between all parties involved.

The law concerning broadcasting rights has been created by the Netherlands Supreme Court and other foreign courts with a view to protecting the commercial interests of sports organizers against certain forms of the freedom of information. Caution should, however, be applied to prevent this right from degenerating into an excuse to keep journalists out of stadiums, before, during and after matches, or from being used by parties in situations where it is doubtful whether they can lawfully rely on it. The Belgian legislator and courts have to some extent blown the whistle on the organizers of sports events, but this will probably not be enough in practice. The developments as they stand are still worrying.

7. Restrictions imposed by governments

As indicated above the influence of top sports is enormous. The popularity of sports and the enormous budgets have also led to increased attention from the national and European authorities. By using competition law, governments have begun to play an active role in balancing the major commercial interests of the holders of rights on the one hand and the accessibility of sports for television viewers on the other.

In 1997, the *Television without frontiers* Directive was revised. Under the revised Directive Member States are allowed to draw up a list of major cultural events or sports events which must be accessible to the public at large via unencoded transmissions. The amendment of the Dutch Constitution referred to above enables the identification by law of 'events of major importance for society' which are not allowed to be transmitted exclusively via subscription television, but must be reserved for transmission via a public television network.[37] The draft list - which has already been prepared - in the Netherlands covers mainly sports events, such as the European football Championship, and certain cultural events.[38] The flip side is, however, that certain sports organizations whose events are on the list are now being deprived of their additional sources of income. The European Committee nevertheless defends this decision by commenting that the sports organizations who need the money most, will not appear on the list of unique events, so that (again) a certain balance will be achieved.

8. Conclusion

The right to receive and gather news freely is a major achievement and has been regulated in, among other Constitutions, the Dutch Constitution and in various treaties. As indicated in this article, however, there is always a danger that this right is unjustifiably limited. Certainly in times of economic decline and against the background of the huge financial interests at stake, there is little more tempting than to invoke broadcasting rights in order to scare off those tedious competitor journalists, to play TV companies off against each other, to invoke trademark rights so as to ban loyal fans from producing merchandise only so that the clubs may sell more themselves or, by relying on copyright and database rights, to pretend to own exclusive rights so as to safeguard a certain income. We take the point of view, therefore, that legislators must not only address the problems using competition laws, but in order to create absolute clarity must above all codify the freedom of information including the limitations that may be applied to it, some of which have already been created by case law. It is true that the present position taken by the Netherlands is realistic, but at the same time it is also overly simplistic. Precisely now, when we are experiencing an economic downturn and the pots of gold in sport have receded to beyond the rainbow, it might be a good thing to categorize all options and boundaries. It will in any case be a fascinating discussion in which in accordance with our freedom of information we can all participate.

The International Sports Law Journal

36 *TV Limburg/VRT*, 16 September 2002, Brussels Court of First Instance.

37 Kroniek van het Nederlandse mediarecht [Chronicle of Dutch media law] 1998-2001, published in *Auteurs & Media* 2001-3, Prof.G.A.I. Schuijt.

38 *Parliamentary Documents II* 1999/00, 26256, no. 19 and *Parliamentary Documents II* 1999/00, 26256,no.30d.

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Beijing Introduces 'Ambush Marketing' Law for 2008 Olympics

by **Ian Blackshaw***

1. Introduction

In this article, we will take a look at the new 'Ambush Marketing' Law which Beijing has introduced in the run up to the hosting of the Olympic Games in 2008. But, before doing so, it would be useful to put this significant development in International Sports Law into context.

2. Background

The award by the International Olympic Committee (IOC) last year to Beijing of the Summer Games in 2008 was, to say the least, a rather controversial one. It provoked quite a hostile reaction around the world, particularly in view of China's human rights record.

In a comment I published in 'The Times' of London on 17 July 2001, I characterised the IOC's decision as being courageous and defended it, *inter alia*, in the following terms:

'As an International Sports lawyer with a particular interest in Human Rights in the sporting arena, I would applaud the IOC for its courage in not avoiding but engaging with China, whose importance in the new post-cold war world political and economic order cannot be overstated nor overlooked.

With their newly elected President, Jacques Rogge, at the helm, I

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am confident that his organisational and diplomatic skills will ensure that the Games will be a great success and also strike a significant blow for the humanitarian and unifying values inherent in sport.

China already counts on a new Law on Physical Culture and Sport, which promotes physical and mental health at the 'grass roots' and 'elite' levels as well as sportsmanship and fair play!'

This provoked mixed - and, at times, hysterical and irrational - reactions from readers of 'The Times'. I was branded as being 'naïve' and told to 'grow up'. One correspondent became quite personal and scathing and wrote:

'If you as a lawyer are prepared to give a convicted human rights abuser total benefit of the doubt before they've shown a shred of contrition or the slightest willingness to change -and with no sanctions if they don't - then I'm glad you're not acting for me!'

To correspondents who wrote in this vein, I did not deem them worthy of any reply.

However most correspondents were more measured, objective and rational in tone and content. For example, one correspondent wrote:

'I admire your optimism, but would temper it with a cartload of caution. Also, I am not certain that it was so much courage that the IOC showed as dread at the political consequences of rejection. It should also be borne in mind that such brutal regimes as China don't give two hoots for humanitarianism or unifying values inherent in whatever, nor do they think twice about ditching any law, new or otherwise, that does not continue to suit. That all said, if all goes well, the games, along with other sports, must contribute to the nibbling process that some day will topple those genocidal butchers. Good luck to you and your efforts.'

I replied to him as follows:

'My main point for saying that the IOC should not ignore or overlook but engage with China is that in the post 'cold war' world China is a significant political and economic power. The best way, in my view, of bringing about reforms in China, especially in the human rights field, is to engage with the leaders and sport is a good medium and catalyst for doing so. To isolate China is dangerous! That is why I also support Chinese membership of the World Trade Organisation.'

Irrespective of public opinion on the award of the Summer Games to Beijing in 2008, one cannot ignore the following facts and statistics on China, which need to be considered in a global context in relation to a major global sporting event such as the Olympic Games:

- China has 1.3 billion people.
- China has an economic growth rate of between 7 & 9%.
- China is a nuclear power.
- China has a permanent seat on the UN Security Council.
- China is the fifth world trading power and the latest member of the WTO.
- China has a new comprehensive Sports Law which, amongst other things, promotes fair play and mediation for the settlement of sports disputes.

A word or two about the Chinese Bid itself and its merits:

- The Chinese Bid to Host the 2008 Summer Games in Beijing was intrinsically and technically the best Bid according to the IOC Bidding Commission.
- I was in Monaco in 1993 when China was narrowly beaten by two votes by Sydney to host the 2000 Summer Games - their presentation, at that time, was a very professional and cogent one. And I think that it was obvious that next time they would be successful - as, indeed, they were.

And, finally, what about Human Rights abuses?

- I am a keen supporter of Human Rights and do not condone any abuses of them.
- However, you cannot change things by ignoring or isolating a 'sleeping giant' like China - you need to engage with the Chinese and use sport as good catalyst for promoting fair play, human values and the integrity and dignity of human persons.
- By engaging with the former Soviet Union, the fall of Communism, the re-unification of Germany and the opening up of Eastern Europe was made possible.
- It may take time, but one has to keep chipping away!

Leaving politics aside, let us now concentrate on the legal aspects.

3. New Chinese Sports Law

China is already working hard and co-operating with IOC officials to make the 2008 Games open and successful, from a sporting, logistical and also a financial point of view. And, apart from the Sports Law of the People's Republic of China, passed on 29 August 1995 in the wake of the failure of the Chinese to secure the 2000 Olympics (referred to above) and effective on 1 October 1995, the Municipal People's Government of Beijing has passed another ground-breaking sports legal measure. Namely, a set of Regulations on the Protection of Olympic-related Intellectual Property dated 11 October 2001 and effective on 11 November 2001.

Before commenting on this latest measure, it is worth mentioning a particular provision, namely article 33, of the 1995 Sports Law. This article provides for the establishment of a special body to mediate and arbitrate disputes arising in competitive sport, of which, nowadays, with the growth of sport as a global business, are on the increase. This approach to the extra-judicial settlement of such disputes is very characteristic of the normal preference of the Chinese to resolve disputes generally by mediation and arbitration rather than adjudication by the Courts. The text of article 33 (in English translation) reads as follows:

'Any disputes arising in competitive sports shall be subject to mediation and arbitration by a sports arbitration body.

Rules governing the establishment of a sports arbitration body and the scope of its mandate shall be adopted by the State Council'.

In an article, entitled, 'China's Sports Law', published in The American Journal of Comparative Law Summer 1998 (vol. XLVI, no. 3, at pp. 453 B 483), Professor James Nafziger and Li Wei have welcomed article 33 in the following terms:

'China, doing what comes naturally, is in the vanguard of a global trend toward shunning the courtroom to resolve disputes involving athletes and sports activity. Taking an approach that is traditional for it but progressive for the global system, China may better avoid the risk and complexity of dispute avoidance and resolution that so beset the sports arena in other countries.'

For a discussion and the text of the 1995 Chinese Sports Law, see ISLJ No. 5/6 (2001).

4. New Chinese 'Ambush Marketing' Law

An English translation of the text of the new 'Regulations of Beijing Municipality on Protection of Olympic-related Intellectual Property' is set out in the Appendix to this article. The provisions are largely self-explanatory but a few comments on them now follow.

The Regulations are quite comprehensive and very much in the mould and spirit of the statutory and other measures adopted for the Sydney Summer Olympics in 2000 and the Winter Salt Lake City Olympics in 2002. According to article 1, they are designed to protect Olympic-related intellectual property and the rights of all those lawfully authorised to use them to ensure and promote 'the sustained and healthy development of the Olympic Movement'. A high ideal indeed!

Article 2 defines the term 'Olympic-related intellectual property' as 'any Olympic-related trademarks, special symbols, patents, works and creations as stipulated in the Olympic Charter and agreements concluded by the Municipal People's Government of Beijing and Chinese Olympic Committee (COC) with the International Olympic Committee'.

Article 3 goes on to provide further clarification of this definition of 'Olympic-related intellectual property' as including:

'1 The Olympic symbol (five Olympic Rings), Flag, Anthem, Motto as well as the terms or designs of OLYMPIC, OLYMPICS, OLYMPIAD, OLYMPIC GAMES, or the combination thereof.
2 The emblem and name of the COC.
3 The logos, mascots, names, symbols (including 'Beijing 2008'), anthem and slogans developed by the Beijing 2008 Olympic Bid

Committee and the BOCOG [Organizing Committee of Games of the XXIX Olympiad] or others entrusted by them for their use during the period when Beijing bid for or host the Games of the XXIX Olympiad.

4 Other objects of Olympic-related intellectual property rights.'

The Regulations are limited in geographical scope, that is, they only apply to anything done within the administrative area of the Beijing Municipality (article 4). It will be interesting to see, therefore, whether the State Council will issue any similar Regulations protecting Olympic-related intellectual property throughout the PRC.

Article 5 provides that the protection of the Olympic-related intellectual property must comply with the principles of safeguarding 'the dignity' of the Olympic Movement and the general law.

Article 6 lays down that the Olympic-related intellectual property may only be used after approval by IOC, BOCOG or COC (as the case may be).

Article 7 prohibits any organization or individual from using the names of the IOC and the BOCOG for seeking contributions or sponsorship or producing or publishing advertisements or 'organizing propaganda'.

Article 8 lists a wide range of acts, which constitute infringements of Olympic-related intellectual property, including infringing website and domain names, and its final sub-paragraph contains a 'catch-all' provision as follows:

6 Other infringements in violation of relevant laws and regulations of the State'.

Article 9 expressly brings advertisers, advertising agents and publishers within the purview of the Regulations.

Article 10 gives the tasks of overseeing and enforcement of the Regulations respectively to the Municipal Intellectual Property Office and the Industry, Commerce, Intellectual Property and Copyright Administrative Departments of the Municipality. And article 12 gives these Departments a wide range of practical measures that they can take as part of the enforcement process, including seizure and destruction of offending items, including moulds, printing plates and other tools directly used in producing such items.

Article 11 encourages any organisation or individual to report any infringements of the Regulations and to be given rewards (!) where cases reported by them are proved to be true.

Articles 13 and 14 lay down civil and criminal penalties for infringements, including minimum and maximum fines of 1,000 Yuban and 30, 000 Yuban respectively and other 'criminal liabilities' (*quaere* custodial sentences). And, reflecting, as noted above generally and in the 1995 Sports Law, the traditional Chinese approach of resolving disputes extra-judicially, wherever possible, article 15 provides for mediation by the relevant Administrative Department as a first step, before, in the event of mediation being unsuccessful, a complainant make take the matter to court. The relevant part of this article reads as follows:

'In dealing with a case of infringement according to law, the relevant administrative department may conduct mediation according to law; where the mediation fails, the right owner may file a lawsuit with the people's court according to law.'

Article 16 introduces some limited retroactive enforcement measures for infringements predating the coming into force of the Regulations, namely, 11 November 2001.

5. Conclusion

The new Chinese Sports and 'Ambush Marketing' Laws, together with other measures, initiatives and procedures being taken and put in place by the Chinese Civil and Sports Authorities in preparation for Beijing 2008, should help to dispel any lingering doubts - amongst even the most hardened opponents -about the competence and eligibility of the Chinese to organise and host these Olympics and make them a great success and memorable sporting event in the annals of the Olympic Movement.

Appendix

Regulations of Beijing Municipality on Protection of Olympic-related Intellectual Property

Promulgated by Decree No. 85 of the Municipal People's Government of Beijing on October 11, 2001

Article 1

These Regulations are formulated for the purposes of strengthening the protection of Olympic-related intellectual property, protecting the lawful rights and interests of the owners and related right owners and ensuring and promoting the sustained and healthy development of the Olympic Movement.

Article 2

Olympic-related intellectual property mentioned in these Regulations refers to the exclusive right of the Olympic-related intellectual property owners over any Olympic-related trademarks, special symbols, patents, works and creations as stipulated in the Olympic Charter and agreements concluded by the Municipal People's Government of Beijing and Chinese Olympic Committee (hereinafter referred to as the COC) with the International Olympic Committee (hereinafter referred to as the IOC).

Olympic-related intellectual property owners and the related right owners refer to the IOC, COC, the Organizing Committee of Games of the XXIX Olympiad (hereinafter referred to as the BOCOG), and legally authorized licensees.

Article 3

The Olympic related trademarks, special symbols, patents, works and creations mentioned in these Regulations refer to:

1 the Olympic symbol (five Olympic Rings), Flag, Anthem, Motto as well as the terms or designs of OLYMPIC, OLYMPICS, OLYMPIAD, OLYMPIC GAMES, or the combination thereof.
2 the emblem and name of the COC.
3 The logos, mascots, names, symbols (included 'Beijing 2008'), anthem and slogans developed by the Beijing 2008 Olympic Games Bid Committee and the BOCOG or others entrusted by them for their use during the period when Beijing bid for or host the Games of the XXIX Olympiad.
4 other objects of Olympic-related intellectual property rights.

Article 4

These Regulations shall apply to any acts related to Olympic related intellectual property occurred in the administrative area of this Municipality.

Article 5

The protection of Olympic-related intellectual property shall comply with the principles of safeguarding the dignity of the Olympic Movement, no infringement on exclusive rights, protection in accordance with law and lawful application.

Any organizations and individuals should safeguard the Olympic-related intellectual property.

Article 6
The use of the Olympic-related intellectual property shall help the development of Olympic Movement.

The Olympic-related intellectual property specified in Item 1, 3 and 4 of Article 3 of these Regulations may only be used after the use has been approved or authorized by BOCOG or organizations authorized by the IOC; the Olympic-related intellectual property specified in Item 2 of Article 3 of these Regulations may only be used after the use has been approved or authorized by COC.

Article 7
No organization and individual may assume the names of IOC, COC and BOCOG for such activities as soliciting contributions or sponsorship, producing or publishing advertisements and organizing propaganda.

Article 8
The following acts which infringe upon Olympic-related intellectual property are prohibited:

1 using same or similar trademarks, special symbols, patents, works and other creations without authorization in production, business operations, advertising, propaganda, performance and other activities;
2 forging or making without authorization representations of same or similar trademarks or special symbols, or selling representations of trademarks or special symbols that are forged or trade without authorization;
3 using same or similar trademarks, special symbols, patents, works and other creations in a disguised form;
4 using same or similar trademarks, special symbols, patents, works and other creations without authorization in registration of enterprises, social organizations, institutions, private non-enterprise units, and in the names of web-sites, domains, toponomy, buildings, structures, places, etc.
5 Providing facilities for place, storage, transport, mailing or concealing the infringement;
6 Other infringements in violation of relevant laws and regulations of the State.

Article 9
Advertisers, advertising agents and advertisement publishers shall not infringe upon the Olympic-related intellectual property in such activities as advertisement designing, production, provision of agent service and publishing; advertising agents and advertisement publishers shall strengthen the examination and strictly examine and check the certifying documents in the advertising activities (including public welfare advertisements).

Article 10
The Municipal People's Government authorizes the Municipal Intellectual Property Office to be responsible for such work as investigation, study, overall planning and overall coordination for protection of Olympic-related intellectual property.

The administrative departments of industry and commerce, intellectual property, copyright, etc. of this Municipality shall enforce the law enforcement work In the protection of Olympic-related intellectual property. The administrative departments of press, culture, customs, public security and urban management and inspection, etc, shall do well in the protection of Olympic-related intellectual property in accordance with their respective duties and responsibilities,

Article 11
Any organizations and individuals may report the acts involving infringements on the Olympic-related intellectual property to the administrative departments of industry and commerce, intellectual property, copyright, etc.; rewards will be given where the case reported proves to be true.

Article 12
With regards of any infringement on the Olympic-related intellectual property in violation of these Regulations, the administrative departments of industry and commerce, intellectual property, copyright, etc. may take the following measures:

1 ordering to stop the infringement and eliminate the negative effects;
2 sealing up the relevant property articles or materials, according to law, that may be transferred, concealed and destroyed;
3 removing from the existing objects the counterfeit trademarks, special symbols, patent marks, works and other creations;
4 seizing and destroying the counterfeit trademarks, patent marks and special symbols.
5 seizing the moulds, printing plates and other tools directly used in infringements.
6 ordering and supervising the destruction of the articles where it is impossible to separate the counterfeit trademarks, special symbols, patents, works and other creations from them.

Article 13
The infringer of the Olympic-related intellectual property shall bear the corresponding civil liabilities according to law.

Article 14
Where an infringement on the Olympic-related intellectual property in violation of these Regulations violates relevant laws, regulations or rules, the case shall be handled according to law; where there is no provisions in the relevant laws, regulations or rules, a fine of no less than 1,000 yuan and but no more than 30,000 yuan shall be imposed; where a crime is constituted, criminal liabilities shall be investigated for.

As for the administrative penalty stipulated in the preceding paragraph, the infringement involving trademarks, special symbols, advertisements, enterprise registration and names of web-sites shall be investigated and handled by the administrative department of industry and commerce; the infringements on patents shall be investigated and handled by the administrative department of intellectual property; the infringements on copyrights shall be investigated and handled by the administrative department of copyright; the infringements involving other areas shall be investigated and handled by the administrative department of intellectual property jointly with the administrative departments of relevant industries.

Article 15
The Olympic-related intellectual property owners and the related right owners may lodge a complaint with the relevant department in the place where the infringement occurred or directly file a lawsuit with the people's court according to law when they have discovered that their rights were infringed on.

In dealing with a case of infringement according to law, the relevant administrative department may conduct mediation according to law; where the mediation fails, the right owner may file a lawsuit with the people's court according to law.

Article 16
With regards of the acts infringement on the Olympic-related intellectual property that occurred before the implementation of these Regulations, the infringer shall immediately cease the act and eliminate the negative effects; the acts that were registered and authorized shall be corrected by the relevant administrative department.

Article17
These regulations shall be implemented as of November 11, 2001.

The CAS Mediation Rules

by **Ousmane Kane***

Defined as a procedure whereby the parties endeavour, with the help of a mediator, to find an amicable solution to their dispute, three essential characteristics distinguish mediation from arbitration:

- it is not formalistic
- the proceedings are determined by the parties
- the undertakings given and signed are not binding.

Arising out of the practice of arbitration, which it is now tending to supplant, particularly in the USA, mediation has become a highly-valued means of settling disputes in many different sectors of activity. Its many virtues include:

- the speed and low cost of the procedure;
- confidentiality, which enables the parties to reach a settlement more easily, knowing that what they reveal and accept will not be used against them in other proceedings;
- the flexibility and simplicity of the procedural rules, which are accessible to all, being drafted using as little technical vocabulary as possible (the CAS mediation rules consist of 14 articles);
- the parties control the procedure themselves, enabling them to settle the dispute as soon as it arises through agreements which respond specifically to their needs, and in which they are constructively involved. This constructive approach enables the parties to maintain their relations in the future, as, going beyond the particular result, the process may lead them to change the behaviour and habits which might have led to the dispute. This anticipatory work is a notable element in the growing success of mediation.

These different advantages have enabled mediation proceedings to achieve a significant, not to say spectacular success rate. According to the figures given by the American Arbitration Association in the May 1998 edition of its Dispute Resolution Journal, the figure within the Association is 85%.

The International Council of Arbitration for Sport took the initiative to introduce these rules alongside arbitration. As they encourage and protect fair play and the spirit of understanding, they are made to measure for sport.

The mediation rules were adopted in Bled, Republic of Slovenia, on 18 May 1999.

What disputes may be submitted to mediation? (I) How does the procedure work? (II) How is it terminated? (III). How much does the mediation procedure cost? (IV). What is the CAS's experience of mediation? These are the essential questions that I shall try to answer.

1. Scope of application of the mediation rules

To be submitted to CAS mediation, a dispute must fulfil two conditions. It must:

- be of a pecuniary nature;
- be related to sport.

1.1. Pecuniary nature of the dispute

A dispute may be submitted to the CAS mediation rules only if it comes within the ordinary procedure of the CAS, that is to say it is of a pecuniary nature.

The following are thus excluded:

- disputes related to disciplinary matters;
- doping cases.

These exclusions mark the distinction that should be made between the CAS mediation rules and the conciliation that exists in certain countries, and which is an unavoidable step of the procedure for some of these disputes.

The CAS submits such disputes to the appeals arbitration procedure, given the need to have a position of principle rather than a negotiated solution for these issues.

* **First Counsel to the CAS, responsible for mediation.**

1.2. Link with sport

The dispute must have a contact surface to sport, to use an expression taken from Private International Law. That may be the result of a sponsorship contract, a player's employment contract, etc.

This criterion must be relaxed, however, as nothing prevents the CAS from agreeing to be seized of a dispute by two parties which have confidence in it, even if their dispute has nothing to do with sport. The flexibility of the mediation procedure and its non-formalistic nature should permit such bending of the rules.

2. The mediation process

From the moment the request is filed to the actual mediation process, all the CAS rules are characterised by their simplicity.

2.1. Filing the request

Any natural or legal person with capacity to enact a legal transaction may have recourse to CAS mediation. However, there are certain preliminaries and forms to be completed.

2.1.1. The preliminaries

These are the same as for arbitration. The parties must have agreed in advance to seek CAS mediation through a mediation clause included in a contract. They can also agree to submit their dispute to CAS mediation by means of a document signed after the dispute has arisen.

There is no standard CAS mediation clause. The existing clause is simply indicative, as the parties are free to draw up their own clause on condition that they unambiguously state their wish to submit their dispute to CAS mediation under CAS rules.

2.1.2. Form of the request

The mediation request must be submitted in writing, in French or English, by one of the parties or the parties seeking CAS mediation. It must contain the identity of the parties and their representatives, a copy of the mediation clause or agreement and a brief description of the dispute.

The request must be accompanied by payment of the administrative fees of SFr. 500.

2.2. The mediation process

Upon his nomination, the mediator, and the parties, play a role established by the rules until the close of the proceedings.

2.2.1. Nomination of the mediator and his role

The CAS has for the parties a list of mediators selected on the basis of their prestige, competence and above all negotiating skills. Unlike the arbitrators, the mediators need no legal training in order to be included on the list of mediators, as the above criteria are the only ones required.

There are two possible ways of choosing the mediator:

- The parties agree on a mediator chosen from the list provided by the CAS secretariat. This choice is then confirmed without further formality, and the file passed to the CAS mediator.
- The parties cannot agree on a particular name or do not choose at all. In this case, the CAS President chooses the mediator from the list, after consulting the parties.

The mediator thus chosen must be independent of the parties, and it is up to him to disclose any circumstances which could affect this independence. However, if duly informed of such circumstances, the parties may confirm the mediator for the task in a signed joint declaration.

If one of the parties is opposed to the mediator continuing his mission, or if the mediator himself deems that he is not able to perform this mission, he will stand down and inform the CAS President

accordingly, whereupon the latter will make arrangements to replace him after consulting the parties.

In performing his task, the mediator plays the role of facilitator, with a view to bringing the divergent positions of the parties together, but without ever being able to impose a solution on them.

The question of his liability may be raised pursuant to the rules of ordinary law, in the event of any fault or negligence.

2.2.2. Role of the parties

The parties have a primordial role to play. They determine the was in which the proceedings will be conducted, and the mediator intervenes here only in the event of a disagreement. Each summarises his understanding of the dispute, identifying the points of disagreement and setting out their claims, which will enable the mediator to have a clear view of their predisposition to reach a negotiated solution.

The parties may be represented, on condition that the representative has the power to decide on a final settlement of the dispute. They may also bring with them experts and witnesses at their own expense.

To ensure the smooth running of the proceedings, the parties agree to respect a duty of confidentiality, whereby they undertake not to rely, in any arbitral or judicial proceedings, on:

- any views expressed or suggestions made by a party with respect to a possible settlement of the dispute;
- admissions made by a party in the course of the mediation proceedings;
- proposals made or views expressed by the mediator;
- the fact that a party had or had not indicated willingness to accept a proposal.

Such confidentiality includes the mediator and everyone involved in the mediation: interpreters, representatives, witnesses and experts.

The only limits on confidentiality are those imposed by the law in order not to commit or encourage the commission of a crime or offence, confidentiality not meaning immunity, or when a court requires confidential information to be divulged in order to stop a manifest injustice.

Confidentiality is essential in the conduct of mediation proceedings, in that it enables the parties to reach an agreement without any pressure.

3. Termination of mediation

Each party may leave the mediation at any time, thereby terminating it.

The mediator enjoys the same prerogative when he deems that further efforts at mediation are no longer appropriate, its being understood that he will incur liability if such interruption is made in bad faith.

The proceedings end officially after a 90-day period when the parties have adopted the additional CAS clause which opens the way to the simplified arbitration procedure once this period has elapsed. This time limit may be waived by the CAS President at the request of the mediator, of his own motion or at the initiative of the parties.

The procedure also ends with the signing of an agreement that the parties must execute of their own free will. Failing such execution, each party may raise this before a judicial or arbitral body without being bound by the confidentiality restrictions.

Finally, if the mediation fails, each party may enforce its rights before an court of arbitration or justice, depending on the rules applicable in the courts concerned.

4. Cost of the mediation procedure

Each party pays SFr. 500 upon filing its request for mediation, and pays the costs of its own experts, interpreters, witnesses, etc.

The final costs, including the fees of the mediator, are calculated by the CAS secretariat and shared by the parties.

5. CAS mediation practice

So far, five cases have been proposed for mediation by the CAS. The parties have not always agreed. Two cases relate to administrative disputes, three to commercial disputes.

5.1. Administrative cases

Case no.1 (South America)

A President of a National Olympic Committee excluded several affiliated national sports federations from his organisation, following a personal dispute. One of the federations sanctioned, the swimming federation, then requested CAS arbitration, but, at the proposal of the CAS court office, the parties agreed to submit their dispute to mediation. The arbitration proceedings were therefore suspended and a mediator appointed by the CAS President. One month later, the parties and the mediator met in Mexico City and reached an agreement bringing the dispute to an end for the swimming federation, but also for all the other federations sanctioned.

Case no. 2 (Europe-Asia)

A sports federation had spent a long time trying many different ways to obtain recognition as an independent international sports federation. Its efforts had always been in vain, being blocked at all levels, particularly by the International Olympic Committee, and an existing international federation (IF), which regarded the sport in question as merely a branch of the sport it already governed. It should be recalled that the IOC recognises only one IF for each sport, and such recognition is the main condition for participation in the Olympic Games. Tired of the unequal struggle, the federation seeking recognition submitted a request for arbitration to the CAS against the existing IF. This request was *a priori* inadmissible, given the lack of an arbitration clause or agreement referring to the CAS. However, at the suggestion of the CAS court office, the parties agreed to submit the dispute to CAS mediation. The CAS President appointed a mediator as the parties could not agree on who this should be, and after several exchanges of documents, a meeting was organised at the CAS headquarters. In spite of notable progress in bringing their positions together, the parties were unable to find a solution. Some cultural difficulties with political consequences B the sport in question being intimately linked to the civilisation of certain Asian countries B prevented the parties from taking the final decisive steps needed to reach a compromise.

5.2. Commercial disputes

Case no. 3

A cyclist had entrusted an agency with the exclusive right to manage his image in relation to his professional activities. The agency was thus responsible, on the athlete's behalf, for securing funding and signing all sponsorship contracts related to this. As payment for its services, the agency received:

- 10% of the amounts paid to the cyclist by his employer;
- 20% of the amounts received by the cyclist on the basis of all other contracts;
- the agency was entitled to its commission, whether or not it was involved in the negotiation and execution of these contracts.

The agreement provided that the CAS would have jurisdiction in the event of any dispute, which was not long in coming, as the agency filed an arbitration request with the CAS seeking payment of FF 800,000 As usual, the CAS court office proposed mediation. The agency agreed, but the cyclist did not. The arbitration procedure thus followed its course before the sole arbitrator designated, but the parties reached an agreement before an arbitral decision was pronounced.

Case no. 4

As in the previous case, an agency and an athlete had signed a contract providing that the CAS would have jurisdiction in the event of a dispute. The request for arbitration came from the agency, which was seeking payment of USD 95,000. At the suggestion of the CAS court office, the parties agreed to suspend the arbitration proceedings and submit the dispute to mediation. A mediator was appointed, but the parties refused to cooperate, preferring to continue negotiations with each other. The mediator thus terminated the proceedings, the file was returned to arbitration and a sole arbitrator designated. However, some months later, the parties reached an amicable solution

without the intervention of the arbitrator, who had to adopt the agreement in the form of an amicable decision.

Case no. 5
This was another dispute between an agency and an athlete involving the sum of 250,000 euros. When the agency filed a request for arbitration with the CAS, as usual the court office proposed that the dispute be submitted to mediation. The parties agreed. The CAS President appointed a mediator, and the case is still continuing.

6. Conclusion
The development of mediation is held back by the prevalence of cases submitted to the appeals procedure (80% of the cases registered), for which the mediation procedure is prohibited.

However, I regard the speed with which the number of cases is growing as satisfactory, given that CAS arbitration has taken more than 10 years to get going. The three years of experience enable me to make the following comments:

- Those who claim that Europe is not culturally open to mediation are right. Evidence of this is the fact that, in all the cases submitted for mediation, the parties have never been able to agree on the choice of mediator, and in two cases, one of the parties refused mediation only for the dispute to be settled amicably during the arbitration phase!
- The parties never consider mediation as their first choice as a means of settling their dispute. In all the cases registered by the CAS, the parties have had to drop, at times provisionally, the arbitration proceedings under way, at the sometimes insistent request of the CAS court office, which has sung the praises of mediation in relation to their case.
- Intense persuasion work needs to be done among lawyers. All the refusals noted have come from the counsels to the parties, even when the parties themselves were *a priori* favourably disposed to beginning mediation, but preferred to leave the decision to their lawyers.

Sporting Injury Claims Spiral

Sports personal injury claims are on the increase - some would say they are spiralling out of control. In England, 19 million sports injuries occur each year costing (500 million in treatment and absence from work. This is not surprising, given the spread of the US blame and compensation culture, fuelled by no win no fee arrangements with lawyers, and the fact that sport is now worth more than 3% of world trade and 1% of the combined GNP of the EU member states.

And this crisis not only adversely affects sport at the elite level, but is also exacting a heavy toll at the grass roots level.

The widow of Jeff Astle, a leading footballer in his day, has recently announced that she is suing the English Football Association over his premature death. According to the coroner, he died of an industrial disease: the result of repeated heading of the old-fashioned heavy leather football. Hot on the heels of this revelation comes the news of an Italian study that shows a disproportionately high number of deaths amongst footballers in the top two Italian divisions from motor neurone disease.

Both of these developments could lead to massive compensation claims if a causal link is proved between heading a football and degenerative brain conditions. Perhaps on a scale similar to smokers' claims against tobacco companies. So, who is to blame? FIFA, football's world governing body, which draws up and enforces the 'Laws of the Game'; UEFA and national football federations, in whose prestigious competitions footballers play; football clubs, the players' employers; or the manufacturers of the balls? It will be interesting to see what the courts decide.

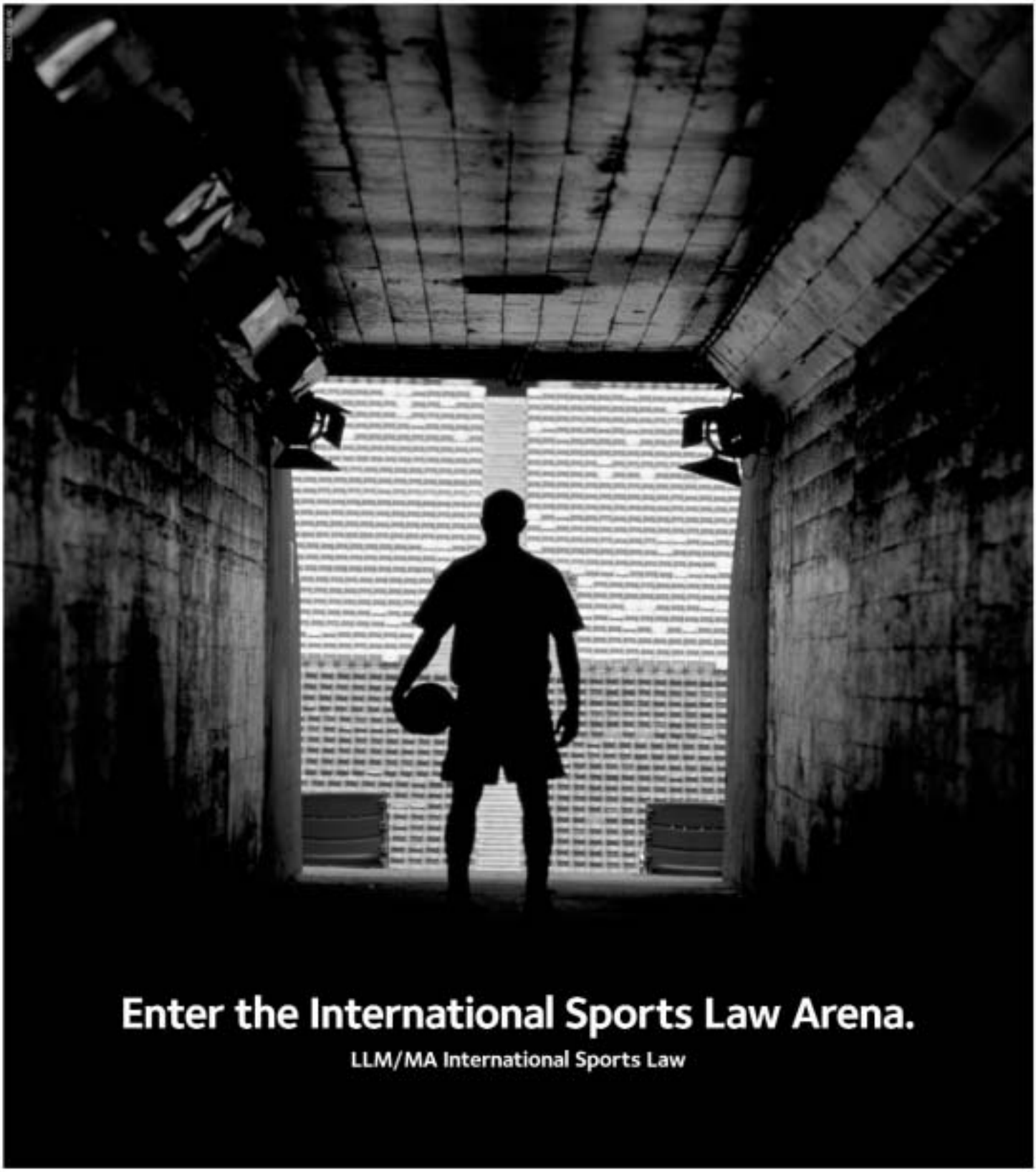
Not only are claims growing exponentially, but the frontiers of legal liability are also being extended. In England, claims against sports officials and organisations have been upheld for injuries suffered on the field of play. And just before Christmas, this principle of '*vicarious liability*' - someone being held responsible for another's mistakes - has been extended to sports organisations. The English High Court, in addition to the referee, held the Sports Governing Body, the Welsh Rugby Union, vicariously liable for a player's devastating injuries resulting from a failed scrum. According to the judge, the sports body could insure against such claims and is responsible for the 'Laws of the Game' whose overriding priority is players' safety.

Several commentators regret the intrusion of the law into contact sports, such as football and rugby, where the normal legal principle of assumed risk - '*volenti non fit injuria*' - seems to apply less and less. But, as a leading English jurist has put it: 'we cannot resolve issues... on the basis of sympathy or personal predilection even though finding for claimants will emasculate and enmesh in unwelcome legal toils a game which gives pleasure to millions.'

These developments are not confined to England alone (cf. 'Footballer found guilty of causing broken leg', *NRC Handelsblad* newspaper of 31 January 2003: 'The judgment in Ghent could have far-reaching consequences, according to Jan Peeters, the chairman of the Belgian football federation. 'I would regret if this judgment would lead to a cascade of lawsuits, because that could warrant the end of the game of football; it would then no longer be possible to play it.' According to jurist and former juvenile court judge Peeters the judgment also goes against the classical doctrine of risk assumption. 'This doctrine claims that a participant in a game of sports has assumed the risks it involves. This does not apply to each and every risk. Obviously, there are exceptions. If a player deliberately elbows another player when off the pitch this does not fall within the boundaries of the game. If the public prosecutor's office consequently wishes to prosecute I can understand that. But if someone executes a tackle during the game and he comes in a fraction too late and makes contact with another player this falls within the ordinary risks of the game."

And an even more recent example of vicarious liability was to be found in *Trouw* newspaper of 10 February 2003: 'Club has to pay for player's foul'. 'Clubs are responsible for the consequences of the fouls committed by its players. This is the judgment of the highest French court of law. Ten years ago, Jean-Luis Mazzeo, then a player for Sedan in the secondary league, broke his leg in four places following a serious foul from a Martigues player. Mazzeo was forced to end his career and sued Martigues as the employer of the guilty party. He claimed damages for loss of income. Twice he came away empty-handed when his claim was rejected. He was more successful in the highest instance. This court finally ordered Martigues' insurance company to pay Mazzeo 315 000 euro in damages.'

Ian Blackshaw



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For Sale: Modern Football Stadium, Wanted: Professional Football Club

'One more Dutch city has recently joined the game of musical chairs involving the two 'homeless' professional football clubs. Not for the first time a city paid big money to acquire and modernize its football stadium only to find itself tenantless as a result of the involuntary liquidation of the local professional football club. In several weeks' time the two seeking licence holders, both of whom receive insufficient managerial and financial support from the cities they are currently located at, will announce where they intend to move.'

Let us reassure all football fans: this press release is a piece of fiction. For the time being the current thirty-six professional football clubs will continue to play in the same cities they have been playing in for the past few decades. That is, at least, if no involuntary liquidations occur and if chairman of AZ Alkmaar does not execute his threat to exchange Alkmaar (which is accused of offering too little support) for another location. But the above press release is not entirely made up. Cities (not just in the Netherlands (seem to be prepared to invest large amounts of money in football stadiums. A few weeks ago Nijmegen and Breda decided to buy the football stadiums of NEC Nijmegen and NAC Breda for 12 million and 15,7 million euros respectively. During that same period the city of Groningen decided to invest 15 million euros in the construction of a new football stadium. And there are many more examples. The reason for cities to invest money is often the poor financial situation which the local professional football club has got into. There are two reasons why the financial injections do not go directly towards the club, but more often towards the football stadiums. First, financial-managerial considerations lie at the root of this choice. Governments do not want to take any chances and therefore in general prefer to invest in infrastructure rather than subsidize the exploitation of the clubs. Secondly, there is a serious legal argument in that the European Commission has established that professional football clubs are enterprises and therefore subject to the regular rules concerning competition and state-aid. This means that direct financial support from cities is prohibited because this may affect competition between the sports enterprises. The financing of football stadiums by cities is, however, allowed under specific circumstances. Considering the recent debate concerning the financial problems in professional football it will be interesting to analyze the relationship between the stadium and the club more closely and to add a sports-economic comment.

First of all it can be established that, although from a legal point of view there is a clear distinction between financially supporting a club or a stadium, this distinction is not as obvious from an economic perspective. Club and stadium are one when it comes to exploitation. A club has no rationale for its existence without a stadium to play its home matches in. Likewise, a stadium can impossibly balance the books without the income generated by the home team. This income concerns both the lease instalments and the fans' expenditures. Even large multifunctional stadiums are not able to run on pop concerts and other events alone. This implies that future involuntary liquidations of professional football clubs will have severe consequences for the exploitation of their home stadiums. From an economical perspective it is understandable that the party financing the stadium should wish to lend a helping hand when the home club is in (temporary) financial difficulty. In order to avoid loss of capital and to leave intact the possibility of getting a return on investment it is essential that the main tenant survive.

It is interesting to note that public funders of stadiums encounter a problem at this point. As opposed to private investors, government authorities are not allowed to 'protect' their stadium investment as a result of state aid regulations. They are forced to sit by and watch their main source of income dry out, which in turn will jeopardize the exploitation of the stadium (not only as a football arena, but also as part of society's infrastructure (hosting pop concerts, festivals, etc.). This raises questions concerning the strict distinction made in Brussels between the professional football club as an enterprise and the stadium as a public cause. The situation calls for a closer examination of the legal and sports-economic arguments involved when it comes to financially supporting professional football. A second lesson which may be drawn from our reflections on the intimate and exploitative relationship between the stadium and its club is that giving financial support to a stadium is only slightly more 'safe' than financially supporting a football club.

Now let us return to our previous image of the threatening liquidation of a professional football club which is the main tenant of a stadium. When this occurs, and a restart of the home team is impossible, there are strong economic arguments for attracting another professional football club to move into the vacant stadium. The more expensive the stadium, the more it seems that to seek a new professional football licence is the only option open to avoid loss of capital. The North American sports market is proof that this is not mere theorizing. Professional sports clubs there regularly swap one city for another, mainly driven by economic arguments. In our country such actions may seem practically inconceivable. But the costly expansion and renovation of stadiums that has taken place over the past few years, the dire financial situation of many professional football clubs and the limited possibilities for financial support due to restrictive legislation contribute to a situation where the events described in the press release above may well come true. After all, money makes the world go round, especially the world of professional sports.

The International Sports Law Journal

Pieter Verhoogt and Harro Koot
Consultants at KPMG Economic Consulting (*KPMG Bureau voor Economische Argumentatie*) in Hoofddorp, the Netherlands.

SPECIAL ASSER INTERNATIONAL SPORTS LAW GUEST LECTURE

- in cooperation with the *W.J.H. Mulier Instituut* for sport research (social sciences) -

Tuesday 8 April 2003
Venue T.M.C. Asser Instituut, The Hague
Opening 16.00 hours

Transformation in South African Sport

by Dr Steve Cornelius
Director of the Centre for Sports Law
Rand Afrikaans University, Johannesburg

Moderator: Janwillem Soek
ASSER International Sports Law Centre

Registration is free. Please, contact Ms Marian Barendrecht, Conference Manager, T.M.C. Asser Instituut, phone: 070-3420321, e-mail: m.barendrecht@asser.nl.

South African Measures to Combat Ambush Marketing in Sport

In anticipation of the Cricket World Cup tournament which has recently taken place in South Africa, the South African Parliament passed legislative measures during 2001 and 2002 in an attempt to assist sports bodies and sponsors of major sports events in their battle against ambush marketing.

The Trade Practises Amendment Act 26 of 2001 inserted section 9 (d) into the Trade Practises Act 76 of 1976. Section 9 (d) prevents a person from making, publishing or displaying false or misleading statements, communications or advertisements which suggest or imply a contractual or other connection with a sponsored event or the person sponsoring that event. A person who contravenes section 9 (d) commits a criminal offence and may be liable to a fine of approximately ZAR 4,000.00 or up to two years' imprisonment for a first offence and a fine of approximately ZAR 10,000.00 or up to five years' imprisonment for a subsequent offence.

The Merchandise Marks Amendment Act 61 of 2002 was adopted to prohibit the abuse of trade marks in respect of certain events. The significant aspect of the Amendment Act is the insertion of section 15A into the Merchandise Marks Act 17 of 1941. Section 15A applies to an event of any exhibition, show or competition of a sporting nature which is held in public, likely to attract the attention of the public or to be newsworthy and is financed by commercial sponsorship. This also includes any broadcast of such an event. In terms of section 15A, the National Minister of Trade and Industry in South Africa may, by notice in the official *Government Gazette*, designate an event as a protected event, if the staging of the event is in the public interest and the Minister is satisfied that the organisers of the event have created sufficient opportunities for small businesses. In the notice, the Minister must indicate the exact period before, during and up to one month after the event, during which it will be a protected event.

While an event is protected under section 15A, no person may use a mark or trade mark in relation to the event in a manner which is calculated to achieve publicity for that mark or trade mark and to derive benefit from the event, unless prior authority of the event organiser has been obtained. The use of a mark or trade mark includes any visual or audible representation of the mark or trade mark which is intended to be brought directly or indirectly into association with an event or to allude to the event.

Any person who contravenes the provisions of section 15A commits a criminal offence and may be liable to a fine of approximately ZAR 6,000.00 or up to three years' imprisonment for a first offence and a fine of approximately ZAR 10,000.00 or up to five years' imprisonment for a subsequent offence. In addition, if a person is convicted of an offence in this regard, the court may order confiscation of all the goods in respect of which the offence has been committed.

These measures have certainly provided the organisers and sponsors of sports events with a powerful weapon in their fight against ambush marketing - one that has until now been sorely missed in South Africa and elsewhere. It also recognises a right that should, apart from the criminal sanction, enable a party to claim relief in civil law if these rights are infringed. However, it will have to be seen how effective these measures will be and how stringent they will be applied. At the time of writing, hardly any legal action had been taken against any apparent contravention of these provisions during the Cricket World Cup tournament.

Steve Cornelius
Director of the Centre for Sport Law, Rand Afrikaans University (RAU), Johannesburg, South Africa.

ASSER ROUND TABLE SESSION ON INTERNATIONAL SPORTS LAW

- in cooperation with *CMS Derks Star Busmann* -

Tuesday 10 June 2003
Venue CMS Derks Star Busmann, Utrecht
Opening 15.00 hours

Licensing systems and the financing of professional football in Europe

Speakers **Henk Kesler, *Director, Professional Football, KNVB;***
Dolf Segaar, *CMS Derks Star Busmann* and others

Chairman **Robert Siekmann, *Director, ASSER International Sports Law Centre***

Registration is free. Please, contact Ms Marian Barendrecht,Conference Manager, T.M.C. Asser Instituut, phone 070-3420321, e-mail: m.barendrecht@asser.nl

Second Asser International Sports Law Lecture, The Hague, 17 October 2002

The first Lecture took place last year November at HV & Partners voor juristen, one of the sponsors of the Asser International Sports Law Centre, in the Groothandelsgebouw in Rotterdam. The speaker was Mr Cor Hellingman, Frank de Boer's lawyer, concerning the legal aspects of the UEFA doping case in which De Boer had been involved as a player for CF Barcelona. Over a hundred relations of both HV and Asser Sports Law attended that meeting on the occasion of the festive opening of HV's new accommodation. This year the Lecture took place in the Institute itself.

This year the Lecture concerned the topic 'Sports information and new media: legal aspects'. Speakers were Ms Annette Mak and Mr Bertjan van den Akker from CMS Derks Star Busmann Amsterdam and Utrecht respectively (see above in this issue). The immediate reason for the Lecture had been a request made in 2001 by Infostrada Sports Intelligence in Nieuwegein, one of the largest sports information agencies in the world, to investigate the question how far the right of national and international sports organizations, sports federations, clubs, match organizers, etc. extends to restrict or make conditional the free dissemination by third parties, especially those known as the new media (the internet), of information concerning their own sports events, championships, etc., such as results, scores, statistics and the like. Behind this question, which leads the person considering it into a field of tension between intellectual property law, the free gathering of news, the freedom of speech and competition law, lay the fact that over the years sports organizations and clubs have increasingly attempted to control the news supply concerning their own championships, leagues and matches. During the Sydney Olympics the IOC painstakingly kept the door shut to the new media in order to secure all broadcast and publicity rights. The IOC was afraid that vision and sound excerpts would be distributed for free via the World Wide Web, while TV networks had paid billions of dollars for them. And IBM, which as a sponsor had obtained the right to publish all results, feared that their exclusives would leak away via the Web. The internet was considered a major threat to the Olympic Movement, as press releases at the time claimed.

In my introduction to this (twin(lecture I pointed out a recent example of the problem under discussion, which branches into many directions, whereby federations and clubs wish to market and cash in on their sports product to the best possible extent and where opposed to that we find the general interest of society in the free gathering of news, not just by means of regular journalism. I took this example from an item in *Voetbal International*, Netherlands leading weekly football magazine, of 14 August last in the section headed 'Football and the media'. Feyenoord Rotterdam was, if so desired, to provide the TV broadcasting corporations with news itself. Under the name *Feyenoord News Clip* self-recorded video items would be offered for broadcasting. To this end, the club had invested a lot of money in technical equipment and manpower in recent years. They had their own cameraman and their own editors to provide the news, such as recordings of press conferences, training sessions and quotations from coaches and players concerning current events in De Kuip stadium. Feyenoord also had the ability to edit the items that had been shot and deliver them ready-made to the networks, where necessary also using the image archives of the club. Judging by the interview with Gerard Dielesen (the new head of the TV programme Studio Sport) in *Voetbal International* of 25 September last the *NOS* (Netherlands national public broadcasting organisation) is not at all pleased with the idea. The central question is and remains where the private domain (in this case: the domain of football clubs as profit-oriented enterprises) ends and the public domain of the free gathering of news begins and how these opposing interests are to be considered from a legal point of view.

Annette Mak and Bertjan van den Akker had put a great deal of effort into their introduction, which came complete with extensive volumes of documentation for those present. Together they filled a total of two hours speaking-time instead of the planned one! *NRC Handelsblad* newspaper carried a report of the Lecture under the heading 'Commerce makes sport a legal matter'. While the speakers where giving their lecture, however, my thoughts suddenly swerved to the fact that Johan Cruijff in our country has always been a great protagonist of the protection of one's own identity. In other words, portrait rights, liquidifying your own popularity. His Welfare Foundation was even created because at some point he decided he wished to maintain control over the exploitation of his name for charity purposes and no longer wanted to make appearances for all sorts of companies who would then make off with his name. Still, in the book *Ieder z'n voetbal - het voetbal in de beeldende kunst 1900-2000* (To each his own football - football as portrayed in visual art 1900-2000), published on the occasion of EURO 2000, journalist Henk Spaan writes on a critical note: 'Cor Coster (father-in-law to... RS) and Johan Cruijf have done many good things in the short history of the professionalization of football. They have also given rise to excrescences. The insane abuse of portrait rights is one. I still remember warning the silk-screen printer of Marlene Dumas' double portrait of Johan Cruijff not to advertise the series. The man was stupefied. How, after all, could any clear-headed human being grasp the idea that there may be characters out there who would want to share in the artist's slim pickings? It is time that society reclaims a few fundamental rights. A society is entitled to its icons and icons are traditionally portrayed. End of story. That a footballer does not have to sit idly by while he is used to promote chewing gum or toilet paper is self-evident. But that visual artists or writers who have the gift of enhancing ordinary reality, who are able to zoom in on it or rotate it, can be told off by this same ordinary reality, is not what football deserves. Football is becoming common. This so-called right of portrait is for the most part being abused for tax avoidance. These sly characters have part of their salary, say a couple of millions a year, paid out to them in the shape of bought off portrait rights. The money goes into a portrait rights ltd. on a British Channel Island and wealth is guaranteed. We do not begrudge footballers their wealth. But we also feel that artists deserve the right to portray the superman in question. It is a matter of civilization. All that remains is to put the necessary legislation in place.' I empathize with these remarks.

During the concluding discussion of the Lecture it became clear, according to *NRC Handelsblad*, that in sport the battle over trademark rights is being fought more frequently. Especially sports umbrella organization NOC*NSF ever more often has to arm against abuse of the registered designation 'Olympic'. Sponsors of sports federations are becoming more original in finding constructions whereby they can identify with the Olympic Games. NOC*NSF, however, has exclusively reserved the image rights and name rights for its nine major sponsors and is being tightly monitored by the IOC where abuses are concerned. In order to stem excrescences the national umbrella organization is busy codifying the rights and duties involved in the use of its name and logo. This has, for example, caused the Dutch Skiing Association considerable trouble finding major sponsors of its own accord, as these prefer to advertise expressly using the Association's Olympic status, as became clear from an intervention by the attending director of the Association.

Robert Siekmann

Conference on the Social Dialogue in Sport, Brussels, 5-6 November 2002

Because the ASSER International Sports Law Centre is directly involved in initiating the social dialogue in European professional football (see earlier the Round Table Session of 30 May last in The Hague, the report of which was published in ISLJ No. 1 (2002) p. 26), the present author attended the conference mentioned in the title. Also attending were, inter alia, the colleagues from the FBO (Netherlands Federation of Professional Football Clubs) and the recently established (through the drawing up of articles of association) EFFC (European Federation of Professional Football Clubs), which is intended to function as a platform for the creation of a representative equivalent of the worldwide players union FIFPro. Football as usual follows its own course, also where this matter is concerned, and has also made much more progress than the rest of the sporting world, especially in Europe. On the employee side, FIFPro consists of 40 national member federations from all over the world and, even though at this point an equal counterpart is still lacking on the employer side, the employers represent their interests (apart from through the as yet 'empty shell' of the EFFC) in three configurations of recent years, i.e. the G14 (now 18 European top clubs / Champions League level), seated in Brussels, the loosely knit association of 102 European sub-top clubs called the European Club Forum (UEFA Cup level) and the Association of European Union Premier Professional Football Leagues. These are interest groups which focus mainly on organizational issues, such as competition structures, the central marketing of TV rights, the overcrowded games schedule (the relationship with the international football calendar), etc. Compelled by the current economic slump the G14 have now also become involved with the financial situation of professional football and whoever wishes to reorganize this will automatically run up against the high players' salaries and in order to realize cuts (e.g. by introducing a salary cap after the American example) it will be necessary to come to agreements which would need to influence the licensing of clubs by the national football federations and the UEFA. However, interfere with the salaries and you will be faced with not just competition law, but also labour law. Only through the conclusion of a European collective bargaining agreement could one avoid that and this therefore leads to the need for a fully-fledged social dialogue between employers and employees! This also applies to the exclusion of fixed-term contracts - like under the Dutch Flexibility and Security Act - by means of a collective bargaining agreement. And, in two years' time, the new FIFA transfer rules will have to be evaluated under the auspices of the FIFA. Who will then be ready to speak for the employers' side? The G14, however, is not at all representative of the sector, but if the members of the European Club Forum were to join it, one could speak of representativeness where the sub-sector of clubs is concerned which regularly make it to the European level of football and this, of course, is relevant from an EU perspective for reasons of transnationality. Crucial in all this is the position of the national football federations, UEFA and FIFA. They keep a close watch on the developments surrounding the social dialogue, because they are the 'governmental' NGO's in this field. The federations organize the football competitions as if they were central governmental bodies, but as they are by definition supposed to serve the general interest they cannot take part in collective bargaining on behalf of the clubs, even though the clubs are their members and even though the clubs are represented in UEFA and FIFA via the national federations. In collective bargaining situations the federations can only be observers from a distance or, at the very most, third parties, whereby it stands to reason that the two sides of industry also keep an eye on the position of the federations in the course of their negotiations.

The conference in Brussels with the title 'Preparing for a Social Dialogue Committee in the Sport Sector' was based on a (bilingual: English/French) feasibility study dated 25 September 2002 performed by organizing institution EOSE (European Observatoire of Sports Employment, a part of the European Network of Sport Sciences in Higher Education/ENSSEE). Those attending the conference were witnessing the birth of the social dialogue in sport and this report was just as much a complete novelty! Its *auctor intellectualis* was French Professor Jean Camy, of the Université Claude Bernard, Villeurbanne, who is also affiliated to the Scuola dello Sport of CONI (the Italian Olympic Committee). This study nearly completely charts the state of affairs in the EU. Among other things it finds that the 'associationism' in sport, that is to say, the pyramidal structure of federations (FIFA/UEFA/e.g. KNVB (Netherlands Royal Football Association - in the game of football) to which clubs and players are subordinated, has not helped to promote the social dialogue. Furthermore, sport is not only fragmented in the sense that it is made up of different branches (there are 35 official Olympic sports alone), but also in the sense that apart from organized sports there are commercial types of sport, such as gyms, fitness centres and other, non-competitive, recreational sports (horse riding, skiing, squash, etc.). Organized sport itself is subdivided into competitive amateur and professional sports. In addition to the players, coaches and further supporting staff many volunteers are active in organized sport.

Where the social dialogue is concerned - between employers' organizations on the one hand and trade unions on the other - the report distinguishes some five different systems in sport. This configuration is, of course, closely connected with the general situation per EU country that was studied. Opposites are the centralized system of among others France, i.e. with a single umbrella collective bargaining agreement for the entire sports sector, and the situation where there is no collective bargaining agreement at all (for example, in Germany and England). In addition, a country like Belgium has its own particular system with individual collective bargaining agreements for professional sports, for amateur sports, for fitness centres, etc. In professional football in the Netherlands we find, on the one hand, the FBO (the clubs as employers) and, on the other hand, the VVCS and the Unie ProProf (the players as employees). The professional coaches are further united in the CBV (Professional Football Coaches), while the referees (via the BSBV, the Interest Group for Referees in Professional Football) conclude contracts with the KNVB. The VVBW is the professional cyclists' union. In addition, there are organizations of a more general scope: the WOS (Employers' Organization in Sport), FNV Sport (employees) and NL Sporter, which is a new interest group/ trade union for athletes originating from the NOC*NSF's Athletes' Committee. FNV Sport is an example of a sports union that is part of a general, nationwide union. Then there is the Swedish non-industrial employers' organization Arbetsgivar Alliansen, which also includes the sports sector. VEBON is the Dutch association of outdoor sports enterprises and, finally, FIT!VAK and the NBFO are the employers' organizations in the fitness branch.

At the international, European level there are no trade unions or employers' organizations other than those in professional football.

In Brussels an introductory speech was of course also made on behalf of the European Commission (DG Employment and Social Affairs and DG Education and Culture) which had financed the Conference and the trajectory leading up to it (especially the feasibility study) from its social dialogue budget. It had been the first time that recourse was had to this particular budget for sporting purposes! 2000 was in fact the first time altogether that the EU spent any money on sport research; at the end of 2001 this had resulted in the participation of 'Asser Sport' in two studies concerning the issue - one on the harmonization of legislation concerning doping in sport and the other concerning the question whether the commercialization of

sport had resulted in the increased use of doping, whereby the Asser Institute dealt with the legal aspects.

A further two speakers had been invited from two other sectors where a social dialogue has existed for some time already to talk about their experiences ('good practices'!): the cleaning industry and the private security sector. Why these particular sectors had been chosen would have been a logical question to ask, which was, however, not discussed by the participants in the conference. Privately, I established a coincidental link with sport, especially football: stadiums need to be cleaned and security needs to be present in them.

The meeting resulted in a Final Declaration of which the core passage read:

'In order to sustain progress towards social dialogue in the sport sector, representatives of the social partners state their commitment and ownership to the setting up of a joint task force to take all necessary steps to formulate a working programme to start and/or improve the social dialogue at a national and European level.'

It is hoped that in any event UNI-Europa, the general European trade union movement, will lend its logistical support.

Three working groups took place prior to the adoption of the Final Declaration. These all had the same two questions put before them: 1. according to which model could the social dialogue be structured (with or without a centralized umbrella organization, coordinated social dialogues between sub-sectors (football/fitness, etc.) or independent dialogues at the sub-sector level)?; 2. what activities should be carried out? The working group of which the present author was part decided to start with question 2, as the preliminary question is of course whether we actually need a social dialogue to begin with! After all, content should always come before format. That there is a need in the branch of professional football has been amply shown (see above); this branch of sport urgently needs a European collective bargaining agreement. But what about the rest of the sporting world? Our working group came up with a list of pertinent issues, which in random order ran as follows:

- legislation: general European legislation is sometimes hard to swallow for sport because it is not made to fit this branch; for me at least, this was an eye-opener in this particular context: the EU wants social dialogue to be introduced in sport, but in fact also has a direct influence to bring to bear as the producer of rules and regulations;
- networks within sport;
- job creation;
- doping;
- mutual recognition of diplomas;
- free movement of workers;
- image;
- ethical and moral values.

Unfortunately this list was not included in the Final Declaration. It was believed that such a list could be dangerous. For a minute I believed I had stumbled into the world of major politics! But isn't job creation entirely politically correct, like everybody is always in favour of world peace?! And the remaining issues are not controversial either and can be properly reasoned. However, those present did at least have the sense to leave the answer to question 1 above, concerning institutional structures, open for now.

Robert Siekmann

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CMS Derks Star Busmann Seminar on Sport, Liability and Insurance, Utrecht, 28 November 2002

Each year, at the beginning of March, in the framework of the course on sports law of Anglia Polytechnic University, Chelmsford, United Kingdom, an intensive week takes place in The Hague in cooperation with the T.M.C. Asser Institute and, as of 1 January 2002, by means of the ASSER International Sports Law Centre. Traditionally part of this intensive week is a visit to a top sports event and participation in an Asser Round Table Session at CMS Derks Star Busmann in Utrecht. This year, the Round Table was organized for the third time and concerned the topic 'Sport and pensions'; the year before the theme was the likewise less current topic of 'Sport and taxation'. Both times the sessions were the result of an express request of Kaarsemaker Hutchison accountants and tax advisers, who were consequently willing to sponsor these Round Tables. As of 2003, by the way, the cooperation with the Sports Law Centre of Anglia University will be replaced with that of the Law School of Griffith University, Brisbane, Australia. In Utrecht the Round Table trio of sports and taxation/pensions/insurance was completed. Earlier this year, through the Dutch Federation of Professional Football Organizations (FBO), the Centre had been brought into contact with AON Risk Services, who are also the largest sports insurers in the Netherlands, where former hockey international and current chairman of Laren hockey club 'Kik' Thole is the head of sport sponsoring. CMS Derks also became involved, as they wished to dedicate their annual sports law seminar (in cooperation with the T.M.C. Asser Institute) to liability. This is how the idea for the seminar on 28 November 2002 in Utrecht on 'Sport, liability and insurance' was born. The material was divided into fours for the forty-odd participants: liability around the field, on the field, directors' and officers' liability and insurance aspects of the different types of liability.

The present author opened with liability 'around the field', because others, especially the speakers on behalf of the Royal Dutch Football Association (KNVB), had been unable to come. The topic, which is largely that of football hooliganism, is not unfamiliar to me, as since the end of the seventies/beginning of the eighties I have been a member (in a personal capacity) of monitoring committees with respect to research carried out by the University of Amsterdam's Baschwitz Institute for mass psychology and public opinion into the causes of the phenomenon and the measures to be taken for the prevention and suppression of football hooliganism. The underlying causes of the phenomenon, which had then come over from England, and how to counteract it have always intrigued me as a football fan. Hans van der Brug from the Baschwitz Institute obtained his doctorate with a dissertation on the topic in 1986, but to my knowledge a legal dissertation has still not been written about hooliganism and has therefore been high on the wish list of the ASSER International Sports Law Centre for quite a while now, especially where the cross-border, international law type is concerned.

So, liability around the field. A further distinction can be made between: misbehaviour off the field which does not affect the game or even has anything to do with it and situations where this is different. The by now classic and extreme Dutch example of the former is the case of Beverwijk where hard-core Ajax and Feyenoord sides had agreed to meet in a meadow along the motorway (football hooligans these days play a match of their own) and one person was killed (Ajax supporter Carlo Picornie). The clubs in question were not even playing each other that day! This resulted in a criminal court case against

the perpetrators(s) which went all the way to the *Hoge Raad* (Dutch Supreme Court) in 2001. Journalist Paul van Gageldonk wrote a fascinating book about it, 'Actions speak louder than words - The Beverwijk tragedy and how the Feyenoord hooligans fared afterwards', (*Geen woorden maar daden (Het drama van Beverwijk en hoe het verder ging met de hooligans van Feyenoord*), which was published in 1999 and was the result of participant journalism. His complete works, by the way, were published as the 'Handbook Hooligan' (*Handboek Hooligan*) (pp. 684) in 2001.

Then there is the situation that the game is influenced by an external factor. This formed the essence of my speech, as important case law is available in which attempts to recover the damage from the perpetrators have proven successful, or which have at least resulted in a court order to that effect, because, as the Dutch saying goes, it's hard to pluck a bald chicken(This mainly concerns what has become known as the 'bombing incident' and the 'iron bar incident' (see below).

The third type of misbehaviour, i.e. running from the field or match site to the outside, was not discussed by me, but also by sports lawyer Eric Vile of CMS Derks Star Busmann in accordance with the mutual division of tasks (Vile discussed liability on the field, Diederik Molier of CMS Derks Star Busmann discussed directors' and officers' liability and Gerard Butterman of AON discussed the insurance aspects). Here, one could think of unintentional misbehaviour, i.e. recklessness or plain accidents such as in car and motorcycle racing, mechanical sports where spectators could become the victim of flying debris, etc. In this context, football has the unique karate kick dealt by French Manchester United player Eric Cantona to a spectator who provoked him!

I dealt with the aspect assigned to me taking the sport of football as an example, because other sports show a complete lack of specific case law concerning aggressive behaviour by supporters. Such misbehaviour can be tackled in three ways: through criminal law (prison sentences or fines for malicious damage to property, assault, or acts of violence in a public place, committed either as a group or alone), through disciplinary law and through civil law, i.e. for unlawful acts committed either as a group or alone. The disciplinary law in question is, of course, that of the KNVB. Based on Article 38 of the Professional Football Matches Regulations (*Reglement Wedstrijden Betaald Voetbal*) the Rules concerning the Organization of Matches (*Voorschriften Wedstrijdorganisatie*) have been issued and in addition there is what is known as the Blue Book, i.e. the Security Handbook (*Handboek Veiligheid*) based on the Licensing Regulations (*Licentiereglement*). The Licensing Regulations in this respect provide the following: 'The behaviour of the supporters or a group of supporters of the professional football organization may not give rise to a situation where the continuation of a competition is structurally endangered (()' (Art. 9 sub n). Thus, via the security and supporters policy, a striking parallel exists with the financial licensing regulations which have to ensure that a club is not removed from the competition prematurely! Finally, Article 20 of the Professional Football Disciplinary Law Regulations (*Reglement Tuchtrechtspraak Betaald Voetbal*) is the detailed core provision which makes the home sides responsible for order and security inside the stadium and in addition essentially provides that clubs are also responsible for the unruly behaviour of their own supporters at away games and outside the stadium, unless the club in question is able to show that adequate measures were taken 'of such a far-reaching and strict nature that the chances of misbehaviour by its supporters are negligible' (due care rule). This also more particularly implies that the club is not responsible for misbehaving supporters travelling by themselves if the club has made every possible attempt to avoid this. In the same way, clubs are accountable for the banning of matches by mayors unless they can exculpate themselves. Possible sanctions in this respect are, among others, reprimands, fines, exclusion, deduction of three ahead points, one or more home games without spectators.

Besides criminal law cases, there have been around thirty civil law judgments from Dutch courts concerning football hooliganism since 1979 (*Telstar* v *KNVB*, District Court of Groningen, 'knife incident'). These mainly involved testing the legality of stadium bans imposed on individual supporters and of game bans imposed by mayors. The defendants were mainly the governing bodies - both public bodies (apart from the mayors, also the Minister of Justice and the State of the Netherlands) and the KNVB - and individual clubs. A mere three cases concerned civil liability, more especially attempts of the match organizers (KNVB or clubs) to recover the damage from the perpetrator(s): *KNVB* v X, District Court of Den Bosch (1989), the 'bombing incident', Ajax v X, District Court of Amsterdam (1992), the 'iron bar incident', and Go Ahead Eagles v X, District Court of Zutphen (1998). Especially important are the comparable 'incident judgments', because it appears from these that the courts divide the liability in accordance with the contributory negligence of the organizer. In both cases, the suit against the respective match organizers had earlier been heard by the UEFA disciplinary tribunal in two instances, and these decisions had served to guide the Dutch civil courts in its own judgment. In both cases, it had coincidentally been the goal keeper who had become the victim of hooliganism: the Cyprus goal keeper in the European Championship qualifier against the Netherlands in Rotterdam ('bombing incident') and the goal keeper of Austria Wien in the European cup match against Ajax in Amsterdam ('iron bar incident').

In the case of the 'bombing incident' the court set the perpetrator's liability at 100%, because the KNVB had not been negligent with respect to safeguarding security. In the 'iron bar incident' the disciplinary tribunal of UEFA had already held that the Ajax stewards had remained much too passive. Moreover, stadium speaker Freek de Jonge had, albeit in the form of cabaret, acted highly offensively and had in fact incited violence against Austria by a fictive announcement of a telephone call for Mr Waldheim, the then prime minister of Austria with an alleged war past, who, according to De Jonge, was asked urgently to call back Mr Wiesenthal. This eventually resulted in a division of liability of 70% for Ajax and only 30% for the thrower of the iron bar. It is moreover interesting that in both cases the costs incurred by the match organizers in two instances before the UEFA tribunal were judged to be refundable. Ajax had to go without European cup football for a year and had to play its next three European home matches at a distance of 100 kilometres from Amsterdam. The Dutch national football team had to replay the match against Cyprus without spectators, but would go on to become the European football champion in 1988!

The lesson to be learned from the case law is the following: not only by means of criminal law, but also with the aid of civil law it is possible in principle to contribute to the special and general prevention of football hooliganism, namely by means of the deterrent of allowing high amounts of damages (2 to 3 hundred thousand former Dutch guilders). To make this kind of mistake could ruin a supporter's life financially.

Robert Siekmann

3rd ASSER / CLINGENDAEL INTERNATIONAL SPORTS LECTURE

Wednesday 12 November 2003
Venue: Instituut 'Clingendael'

'Sport for Development and Peace in the UN perspective / the Netherlands - Surinam case'

Speaker: Mr Adolf Ogi, *Special Advisor to the UN Secretary-General on Sport for Development and Peace, Geneva*

Participation is by invitation only.

Two-Day Conference in Cape Town, South Africa, 6 and 7 February 2003

Sport: The Right to Participate

Helicopters traversed the blue sky over sunny Cape Town. With the exception of one, they were all police helicopters. One flew an enormous South African flag. Cape Town was one of the venues where a World Cup Cricket match was scheduled to be played. On 6 and 7 February, the Law Faculty of the University of Cape Town hosted a two-day conference organised by Steve Cornelius and Rochelle le Roux of the Centre for Sport Law of the Rand Afrikaanse Universiteit (RAU) in Johannesburg and the Institute of Development and Labour Law of the University of Cape Town (UCT) respectively. The conference took place in the Oliver Tambo Moot Court, which is a special room within the Law Faculty dedicated to the former President-General of the ANC of that name. In this room the noises of the outside world did not penetrate. The theme of the conference was: Sport: the right to participate.

In his welcoming address Professor Hugh Corder[1] pointed out that the conference was organised in an attempt to stimulate an emerging area of research in South Africa. The theme of the conference had been specially selected to encourage debate on issues such as discrimination, transformation and affirmative action in sport. He felt that the programme not only achieved this purpose, but would also highlight other contemporary legal issues in sport. Corder further believed that the conference would also provide an opportunity for the delegates to network and exchange valuable ideas.

Day 1, 6 February 2003

Session 1 - Chairperson: Mr Justice Deon Van Zyl

Steve Cornelius[2]

Some Semantic Aspects of the Right to Participate

The right to participate, and whether it exists at all, is a matter of seminal importance that underpins the entire world of sport. The question whether or not a right to participate exists in any given context, cannot be addressed unless the concepts of 'participation' and 'participant' are defined. It is only in the context of the particular participant and the way in which he or she chooses to participate, that the existence or non-existence of a right to participate can be determined. Cornelius intended to deconstruct the concepts of 'participation' and 'participant' and to expose the generalised perceptions that seem to perpetrate violence against the unique and the singular, against the participant and the way in which he or she (or it) participates. The question as to whether or not a right to participate exists at all, can, according to Cornelius, only be answered in a particular context involving a particular kind of participant taking part in a certain determined way. Beyond that, even the identity of the participant and the notion of 'participate exceeds our grasp so that the question can never be settled in a way that will always be conclusive in all circumstances, in respect of all participants and in relation to all modes of participation.

Simon Gardiner[3]

Quotas in Sport: some reflections from Europe

Gardiner evaluated the legitimacy of quotas concerning participation in sport on the basis of nationality and ethnicity. In Gardiner's view there are distinctions between the operation of restrictive quotas on the grounds of nationality and those of ethnicity. In terms of nationality, the increased international mobilisation of labour is a positive feature created by the process of globalisation - quotas restricting such migration are overtly protectionist and undesirable. On the other hand, affirmative action programmes including quota policies are legitimate and should be legally supported where institutionalised practices of discrimination on the grounds of ethnicity exist. But it is not only engaging with structures created in the past, it involves the processes to change structures in the future. Both in the British and South African context such policies are about black empowerment and not as argued by some about 'racism in reverse', which extends to ethnic minorities privileges over whites. This principled argument needs to be firmly applied to challenge attempts such as seen recently in the US with moves by the Bush administration to challenge the constitutionality of affirmative action programmes concerning the admissions procedure at the University of Michigan. This could force US universities to stop using race as a factor in deciding whom to admit.

Brad Reich[4]

All athletes are equal, but some are more equal than others: An objective analysis of the real world interpretation and application of Title IX and recommendations for the future

Title IX of the Education Amendments of 1972 to the Constitution reads: 'No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any education program or activity receiving federal fund assistance'. Reich suggested that Title IX was created to prevent gender-based discrimination that resulted in women having disproportionately fewer opportunities to pursue higher education. There are now more women than men pursuing higher education in the United States. Intercollegiate athletics was not the intended focus of Title IX. Title IX was expanded by the Office of Civil Rights (OCR) and the courts to encompass intercollegiate athletics. While the OCR and the courts may have acted with good intentions, the result has been to replace objective analysis with subjective morality. In Reich's opinion much of the current treatment of Title IX rests on the unproven assumption that females and males have equal interests in athletic opportunities. That assumption has turned Title IX from a law requiring the effective accommodation of interests and abilities to one mandating numerically equal athletic opportunities, regardless of interests or abilities. As a result the level of female athletic interests must be fully, if not more accurately 'overly', accommodated while male athletic interests are not.

Janwillem Soek[5]

The Legal Nature of Doping Law

Soek started his address with the thesis that in the disciplinary law concerning doping, use has to be made of the principles and doctrines which have evolved in the sanctioning systems of the states, i.e. criminal law, and which are universally recognised, in order to attain a just and fair balance between the interests of the prosecuting sport organisation and the prosecuted athlete who is suspected of having used doping. For reasons of transparency, coherence, predictability and, most of all, in order to protect the position in the doping trial of the athlete who is suspected of having used doping against the almighty sport organisation, it is advocated that the disciplinary law concern-

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2 Dr. Steve Cornelius is a Senior Lecturer in Mercantile Law at RAU University in Johannesburg, South Africa and Director of the Centre for Sport Law at RAU.
3 Simon Gardiner is adjunct Professor in Sports Law at Griffith University and Senior Research Fellow at the Asser International Sports Law Centre in The Hague.
4 Brad Reich is an instructor in legal research at the University of St. Thomas, Minnesota, USA.
5 Janwillem Soek is a Senior Research Fellow at the Asser International Sports Law Centre in The Hague.

ing doping be considered 'organisational criminal law', in which the principles of the field of law with which it has the most in common, i.e. criminal law, must be applied. It is not only in the nature of things that in a sanctioning system use should be made of principles and concepts which have for centuries been developing and evolving in the public sanctioning system, but the application to doping law of such principles and concepts moreover contributes to the harmonisation of this body of law.

Session 2 - Chairperson: Dr Paul Singh

Barbara Helly[6]
James A. Michener and the right to participate in sports
As the author of numerous bestsellers in the United States, James A. Michener raised the question of the right to participate in sports on many occasions. He addressed the issue in a book dedicated to sports in his country, in some of his novels, in newspaper articles and even in a three-part documentary made for American TV. The videos of that documentary last an hour each and they each tackle a separate chapter of sports in America: the right to participate of young children, women and blacks. Michener, who was the narrator and conducted the interviews, did not avoid some ugly scenes from the past. For example, when showing footage of Jesse Owens winning the gold medal in 1936 in Nazi Berlin, Michener reminds the viewer that in America Owens was only allowed to race animals and shows images of Owens racing a horse. On the whole, however, Michener remained conservative when discussing more recent political events in the sports world. Between the launch of the 'Sports in America' programme and the broadcasting of the recordings four years had gone by and in 1980, political and sporting news focused on the boycott of the Moscow Olympic Games. It was significant that Michener started the part of the series which was dedicated to sports and young children by highlighting the rivalry between the USA and East-bloc countries. The main question there was how to raise the level of skill in American children, as East Germany, which had opted for mass education in sports, was proportionally more effective in competition. Even though this type of rivalry predominated and confrontation between the two blocs marred the issue, in a way Michener still managed to promote the right to participate in sports for everyone. In Helly's view, however, Michener had also used sports to claim his own right to participate in politics.

Debbie Hamman[7]
Banning pregnant netballers: has Cinderella lost her ball?
In June 2001, Netball Australia called for an open forum on pregnancy and sport. At the same time, the Association implemented an interim measure banning pregnant netballers from participating in on-court activities. Some of the concerns of the Association included the absence of medical research confirming the safety of playing contact and collision sports while pregnant, the uncertainty surrounding the inability of the participating player to waive the rights of the unborn child to sue and the fact that many sports injury insurance policies do not cover pregnancy-related injuries. The ban was successfully challenged, compelling Netball Australia to reverse the measure in March 2002. Hamman believes that banning pregnant athletes from participation will more often than not violate national anti-discrimination laws. However, it is also true that in most legal systems, the law of tort (or delict or unlawful act) places a duty of care on among others sports bodies and administrators towards the mother and the unborn child. A child born with injuries caused by the mother's participation in sport could bring a claim against the association in question, e.g. when the association was negligent due to its failure to advise the pregnant athlete to seek medical approval for continued participation. A claim against an association may also be successful where the association, due to exceptional circumstances, needed to do more to satisfy the duty of care and failed to take the necessary additional measures. Sports bodies may be well advised to secure comprehensive insurance as a single claim could easily bankrupt an association.

Session 3 - Chairperson: Barbara Helly

Rochelle Le Roux[8]
Is Tsimba chipped? Reflecting on the IRB rule that a player may only represent one country
The International Rugby Board (IRB) has decreed in Regulation 8 that, as from 1 January 2000, a rugby player is only entitled to play rugby for the senior 15-a-side national team, the next senior 15-a-side national team or the senior national sevens team of one country. Once selected and present as either a replacement, substitute or playing member of that team at a match played by such a team, it will no longer be possible to represent a national team of another country. Although one may envisage situations where naturalised citizens may be excluded - for instance due to the political sensitivity of the position - it is clear that the player's previous citizenship or the fact that he represented the national team of his previous country has absolutely no bearing on his ability to play rugby and that the interests of his (new) team cannot be compromised by it - unless it is feared that he will pass some secret strategies on to his former team. Based on that statement Le Roux submitted that naturalised citizens, despite the fact that they have represented the national team of their former country, have a very strong case to challenge their continued exclusion form the Super 12 competition. She suggested furthermore that the same applies to permanent residents. Le Roux concluded her address by stating that international governing bodies are not above the national laws of their Member States. She suggested that the time had come for both national and international governing bodies to revisit this particular aspect in an effort to avoid the costs of expensive litigation.

After the first day of the conference had been brought to a close the delegates were invited to a cocktail function which took place at the Bantry Bay in Cape Town. A much-discussed topic of conversation that day was England's request to switch its Harare cricket game to a venue in South Africa because the team had grave concerns about its safety in Zimbabwe. Should the International Cricket Council decide to award the points to Zimbabwe it meant that the English team faced a huge task to still reach the second round of the tournament and so its World Cup aspirations could well be shattered by politics. Another much-talked-about event was the enforced return home of Australian leg-spinner Shane Warne after testing positive for diuretics.

6 Barbara Helly teaches in the Sports Department of the Université René Descartes (Paris V), France.
7 Deborah Hamman is a Professor at the Faculty of Law of the University of Stellenbosch, South Africa.
8 Rochelle le Roux is a Senior Lecturer at the Institute of Development and Labor Law, UCT, South Africa.

Day 2, **7 February 2003**

Session 4 - chairperson: Prof. Debbie Hamman

Lucio Colantuoni[9]
Youngsters' rights in sport: European and Italian perspectives
The 1989 International Convention on the Rights of the Child is a kind of universal Constitution with programmatic and juridical value for the States Parties. The value of this document should be formally acknowledged since it is a starting point in the protection of Children's rights. A similar document is certainly desirable also for sport. In recent years money and the media have thoroughly changed sport and many defects of the system have been highlighted. Now a new situation can be added, i.e. the circumstances surrounding the

transfer of young non-European athletes. Talented teenagers are too often and too early considered champions, while actually they are simply adolescents or, even worse, children. In particular, early and intensive training may result in unbalancing symptoms such as learning difficulties, decreased motivation, hyperactivity, aggression and social isolation, which are all signs indicating stress and psychological suffering. Children and baby champions need to be reassured about their capabilities. All opportunities for stimulating their technical development and ability to cope with increased levels of competition should be highly valued. Finally, these children must be encouraged to face risks head-on in order to counterbalance any negative feelings such as boredom, fear of failure, withdrawal into oneself. Colantuoni is of the opinion that young athletes should grow up in a positive, stimulating, self- and socially supportive environment where they may feel to be appreciated. The dissemination, enforcement and general application of the Charter for the Rights of the Child in Sport, would certainly be an important step in this direction. The interest of the child, the protection of his health and offering him opportunities for retraining should have top priority. No economic or sporting objective can justify putting at risk the health and future of young people. All parties involved in sporting activities must, on their own level, and according to their own possibilities, ensure that these priorities are actually applied.

Paul Singh[10]
Child protection in sport
The constitutions of several countries as well as a number of international conventions contain the right of children to have the full opportunity for play. Children have a right to appropriate care and to be protected from abuse. However, as Singh pointed out, children who have been abused do not have the support mechanisms to make them confident enough to report the incident. Most sport organisations developed codes of conduct in order to address their legal responsibility to provide a safe environment. While they describe what are ethical and unethical practices, they provide only a limited view of ethical practice, namely a contractual one. This could devalue the idea of individual virtue and responsibility in sport. To prevent this from happening, Singh formulated points that can be used by sport organisations as initial guidelines for protecting children from abuse in sport: 1. Adopt a child protection policy. Make a clear statement that child abuse is criminal behaviour and is not acceptable; 2. Develop a code of conduct for all personnel, with specific instructions on how to behave when dealing with children; 3. Implement an education and training programme to raise awareness of abuse in sport, and acceptable treatment of children; 4. Only utilise accredited coaches and officials; 5. Use a screening procedure whereby the backgrounds of all personnel are checked, including a police screening where circumstances warrant it; 6. Designate an Abuse Contact Officer, and develop procedures to ensure that allegations of child abuse are dealt with appropriately and effectively; 7. Adopt thorough recruitment practices, such as creating job descriptions, interviewing and checking references.

Allison McFarland[11], **Deborah Copeland**[12] **and Kathryn Gardner**[13]
Discrimination and home-schooled students in the United States: Should these students be allowed to participate in public school sports?
A girl from New York State was denied the right to try out for the varsity team at her local high school not because she was female, of minority descent, or physically or mentally disabled, but solely because she was home schooled. The speakers raised the question whether students, whose parents have chosen to educate them at home, have a legal right to participate in sport programmes at their local public schools. Or could it be that homeschoolers are the last disfavoured class legitimately targeted for disparate treatment by such schools? In their address they summarised the arguments for and against permitting access by homeschoolers to extracurricular activities, presented an overview of the responses of national and state governing associations and analysed legal theories that have been successfully used in establishing a right for homeschoolers to participation. In their conclusion the speakers stated that all educators, at home and at school, maintain a viable interest in enriching children's education by the provision of extracurricular activities. Currently, the flexible nature of the educational enterprise accommodates numerous students on a part-time basis. As the number of high-school age home-schooled students continues to increase, so must communication regarding equal access between school and athletic administrators, state representatives, and the home school community.

Session 5 -chairperson: Steve Cornelius

Andrew Caiger[14]
The question of access to sport: Sports contracts and the image, as asset and governance
The servility of sportsmen and women is no longer consistent with community norms in several countries. Image is but one interesting example of a locus of control over the lives and financial fortunes of sportsmen and women in the world. A recent example of the latter is the insistence of the ICC that players in the cricket World Cup to be held in South Africa breach contracts, validly entered into between players and their sponsors, as a prerequisite for participating in the World Cup. The protection of the image of sports persons is well recognised in most legal systems as constituting a proprietary interest worthy of protection. The problem of image these days is to what extent the sports person is allowed to exploit his or her celebrity status to endorse products without getting into trouble with his/her club or the relevant sport's authority. Yet there is a need to move beyond restraint of trade and a narrow contract paradigm. There needs to be a clearer recognition that the public/private divide is often artificial and unrealistic and constitutes a denial of the proprietary rights of the individual. It is no answer to say that a contract was entered into, since the contractual relationship is not always between equals and the sports person who wants to exercise his profession is obliged to sign up to the rules of the game without a choice. Most of these rules are necessary, but where commercial interests are concerned, can it be said that sports authorities serve any interest but their own. Image rights are beset with the same problems as other proprietary interest. The attitude of courts to the sports relationship between the athlete and the authority and the construction of these arrangements by many courts constitutes a serious problem of proper access to the game and the fruits of the game.

André Oosthuizen[15]
The sanctity of employment contracts in the professional sports world
Most contracts of employment are terminable by either party on reasonable notice. If an employee does not want to fulfil his contractual obligations, he may therefore simply terminate the contract by the giving of notice. Different rules and principles could, however, come into play in the case of fixed-term contracts. How do such common law principles impact on the enforcement of contracts of service in the world of professional sport? These contracts have a number of dis-

9 Lucio Colantuoni is a Professor at Genoa University and Milan University Law School, teaching business law, business contracts and sports law. He is a member of the Commissione Disciplinare Lega Calcio Professionisti Serie A-B (disciplinary board of premier league football), a member of the disciplinary and consultative boards in national sports federations and leagues, advisor to leagues, teams and athletes (mainly in football, basketball and water polo). Finally, he is a member of the scientific boards of the International Association of Sports Law and Panathlon International.

10 Paul Singh is a Professor at the RAU Centre for Sport Law. His specialisation is sport and leisure management and sport law.

11 Allison J. McFarland is assistant Professor of Sport Management at Western Michigan University, Kalamazoo, Michigan.

12 Deborah Copeland is assistant Professor of Education Administration and Foundations at California State University in Fresno, California.

13 Kathryn Gardner is a law clerk to the Honorable Sam A. Crow, of the United States District Court for the District of Kansas.

14 Andrew Caiger is a member of the Cape Bar. He previously was a Senior Lecturer in Sports Law at Anglia Polytechnic University.

15 André Oosthuizen is an advocate at the Cape Bar. His practice is primarily focussed on labour law, administrative law and intellectual property.

tinguishing characteristics, which include the following: 1. In order to secure the contract, the employer frequently parts with a large sum of money in the form of transfer fees, payable over and above the contractually agreed wages; 2. Invariably, such contracts are entered for a specified and normally relatively short period of time; 3. The skills possessed by the particular coach or athlete are often unique to that person, and he cannot necessarily be replaced simply by hiring someone else. Can the employer build safeguards into the contract, to strengthen the right to specific performance? Oosthuizen suggested that one effective mechanism might be to incorporate a restraint of trade provision in the contract. A remedy to similar effect is based on the so-called garden leave clause, the effect of which is that an employee may be required to work out a long period of notice before his resignation can take effect, during which period he does not enter the workplace or have contact with other employees but continues to receive full salary entitlement. Another remedy which might bolster the enforcement of the contract is an effective claim for damages. The development in the law of remedies aimed at effectively enforcing professional sports contracts is, in Oosthuizen's view, to be welcomed and will have a stabilising influence in the world of professional sport. It will be a benefit both to the clubs and to the staff they employ to know that a contract, properly entered into, will be upheld by the courts and that employers of professional sports personnel will be able to derive the benefit for which they contracted and for which, frequently, they paid considerable sums of money.

Dalton Odendaal[16]

The right of a sports person to exploit his/her own image and success in the United Kingdom

The absence of any specific law recognising and protecting image rights per se in the UK means that there is currently no easy way for sports persons to protect their image rights from unauthorised commercial exploitation and has led sports persons to try to protect their image rights by constructing arguments based upon ill-fitting causes of action (such as trade mark infringement, passing off, copyright infringement, defamation and breach of advertising regulations), often with very little success. Odendaal is of the opinion that it is time for English law to acknowledge and protect the substantial investment that a sports person makes in maintaining his/her public image, which can only be properly done by recognising the sports person's exclusive right to exploit his/her image for his/her own benefit - this is achieved by treating the sports person's image/persona as a separate form of intellectual property right and asset worthy of legal protection in its own right. This will in turn enable the sports person to prohibit the unauthorised commercial exploitation of his/her image rights in all forms of marketing activities. English law needs to recognise the commercial reality of the market place (like advertisers do who would not use the image of a sports person unless they thought that it would be of benefit to their product) which is that sports persons do exploit their names and images by way of endorsement and merchandising activities, and has to further recognise image rights as a freestanding proprietary right in order to protect them properly. Only then will English law have caught up with commercial reality and with the legal protection afforded to sports persons in other jurisdictions throughout the world.

Session 6 - Chairperson: Craig Bosch

Elliot Wood[17]

Liability for sports injuries: Local and international perspectives

With the ever-increasing pursuit of leisure and sporting activities, the need to be aware of the potential liabilities flowing from these pursuits is becoming paramount for all those involved in sports, whether they are participants, administrators, insurers, coaches and/or adjudicators. Almost all sports have some form of risk attached to them. However, these risks may be more obvious in some sports than in others. The crucial question is whether liability attaches and, if so, to whom, in the event that risk is realised and damage is sustained as a result. There has been widespread concern that the court decisions holding participants, officials and sporting bodies liable will lead to difficulties in pursuing sport in any form. However, this has not been true to date, so far as is known. However, Wood suggested that preventative steps must be taken to avoid such difficulties in pursuing sporting activities. Players, officials and administrators must take action to protect themselves against unwanted and career-threatening claims. Whether we like it or not, the courts in most sporting countries have held participants and other persons involved in sports liable for their conduct on the sports field.

Jan Doleschal[18]

Sport events and risk management measures are not a contemporary phenomenon in the sports world

Within a period of 10 years 4 stadium disasters occurred in South Africa. The most recent tragedy occurred at Ellis Park on 11 April 2001 at which 43 people were killed - crushed to death in a stampede - and 158 were injured. How could this happen? To Doleschal's mind because of a lack of attention to past incidents, a lack of coordination, inadequate monitoring of spectators and incidents as they evolved, inadequate traffic control and a lack of adequate emergency procedures. Tort litigation and excessive monetary verdicts awarded to plaintiffs will eventually come to South Africa if these types of disasters continue to occur as a result of inadequate risk management. Proactive steps are necessary as soon as possible to ensure the safety of all spectators and to mitigate the losses that most assuredly will come about as a result of tort litigation. The cooperation of the national sports bodies, privately contracted security, the police, the media and the transit systems will be necessary to accomplish coordinated risk management, but the efforts will save lives, decrease costs of insurance, decrease or eliminate judgment costs due to negligence, and create a safer and more professional environment in the stadiums.

Session 7 - Chairperson: Andre Oosthuizen

James Gray[19] **and Paul Singh**

Current legal and economic issues in sports-based drug testing

The experience of being accused of a sports-based doping violation can be compared to the resort island owner going through a hurricane or cyclone: both are filled with sudden shock and surprise, followed by fear, and ending with financial suffering, feelings of abandonment, and a sense of overwhelming loss. Singh and Gray reviewed some of the current legal issues of being confronted with sports-based drug testing systems from the athlete's point of view. While it is acknowledged that various doping control efforts have enjoyed some success in catching rule violators, it has also spawned some controversies with unforeseen, and at times, uncomfortable, conclusions and results. From the athlete's perspective, Singh arrived at the following recommendations: 1) An Office of the Public Defender for doping matters should be immediately established to ensure that accused athletes

16 Dalton Odendaal is a Senior Associate in the Sports Group at Harbottle & Lewis. He is involved in providing advice on all aspects of sports law, including player representation, merchandising and sponsorship and on the exploitation of commercial sports rights. He is the legal advisor to the company that owns the commercial rights to the FIA World Rally Championships.

17 Elliot Wood is a practicing attorney in the Republic of South Africa at Werksmans Inc. in Johannesburg. He is a founding member and serves on the executive committee of the Sports Law Association of South Africa.

18 Janis K. Doleschal was for 28 years the Commissioner of Sports and Athletics for the Milwaukee Public Schools in Milwaukee, Wisconsin, USA. Prior to her retirement, she managed all sports programmes within the school district for pre-kindergarten through senior adults. She was responsible for all of the security at high school indoor and outdoor athletic events for 18 high schools and 19 sports. In collaboration with James T. Gray, she is the director of the Start Playing Safe Risk Management programme.

19 James Gray, who was unfortunately unable to come, is a partner of the Milwaukee law firm, Pierski & Gray, LLP, where he practices in the areas of sports and entertainment, real estate, trust and wills and tort law. He teaches sports law as an adjunct associate professor to the International Sports Law Centre at Griffith University Law School in Brisbane, Australia, and is a Visiting Fellow to the International Sports Law Centre at the T.M.C. Asser Institute in The Hague, The Netherlands and Anglia Polytechnic University in Chelmsford, United Kingdom.

have satisfactory legal counsel and medical experts at their disposal. 2) Strict liability should be amended in both the culpability and penalty phase. At the very least, the current anti-doping rules should be amended to permit greater flexibility in the application of the penalty phase as dictated by the facts. 3) All doping-related decisions, particularly CAS decisions, should be published in their entirety, without editing, in both English and French and made easily available on the CAS web site. 4) As recently suggested by the National Football League Players Association, both management and labour should select a few supplement manufacturers so as to guarantee the purity of the supplements and that supplements supplied by those manufacturers can be used by athletes without violating any anti-doping rules. 5) Doping rules should be amended to include not only athletes, but administrators, coaches, trainers, and others. Since sport federations insist on implementing anti-doping measures, it will enhance their credibility among the public, media and the athletes if they agree to be bound by their own systems.

At 17:30 Steve Cornelius concluded the final day of the conference. He highlighted several topics which had been discussed and thanked the speakers for their contributions, which he considered had been of a very high scientific level and the audience for its enduring attention during two long days. He wished all present a safe journey home.

The conference was well organised and the issues presented were well balanced. The only point of critique, if pressed to name one, would concern the overburdened programme. The number of presentations (16) was so great that they left insufficient time after each presentation for genuine discussion, but all in all the organisers deserve nothing but praise. The International Sports Law Journal

Janwillem Soek

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BOOK REVIEW

Zulässigkeit einer supranationalen Fussball-Europaliga nach den Bestimmungen des europäischen Wettbewerbsrechts

By Christian Hellenthal, Salzburger Studien zum europäischen Privatrecht, Band 9, Peter Lang, Frankfurt am Main 2000, pp. 209, ISSN 1435-6090, ISBN 3-631-36797-X

Christian Hellenthal's thesis '*Zulässigkeit einer supranationalen Fussball-Europaliga nach den Bestimmungen des europäischen Wettbewerbsrechts*' (Admissibility of a supranational European football league in view of European competition law) has its starting point in Article 45(3) (now Article 49(3)) of the Statutes of the *Union des Associations Européenes de Football*, UEFA (hereinafter: UEFA Statutes). According to this provision the member associations of UEFA, such as, for example, the German Football Association (Deutscher Fussball-Bund e.V., DFB) and its affiliated football clubs are not allowed to establish international football competitions besides the official UEFA competitions (e.g. UEFA Champions League, UEFA Cup, etc.) without the UEFA's permission. Hellenthal rightly points out that the UEFA Statute is not binding on other institutions (e.g. media enterprises).

Hellenthal's thesis begins with a careful examination of Article 45(3) of the UEFA Statute in view of the pertinent EU competition law. He rightly qualifies the UEFA and its member associations as both undertakings and associations of undertakings as defined by Article 81(1) of the Treaty establishing the European Community (hereinafter: EC Treaty). He then goes on to qualify Article 45(3) of the UEFA Statutes both as an agreement between undertakings and as a decision by an association of undertakings as defined by the same Article 81(1) of the EC Treaty. After a thorough and comprehensive evaluation of this provision of the EC Treaty Hellenthal arrives at the conclusion that the object and purpose of Article 45(3) of the UEFA Statutes is to restrict competition within the common market for European competitions for club teams as between the member associations of UEFA and that this affects trade between the EU Member States.

In a crucial passage of his book Hellenthal discusses whether this infringement of Article 81(1) of the EC Treaty can be justified by the fact that Article 45(3) of the UEFA Statutes is *necessary* for the *functioning* of football, which, legally speaking, is a neutral objective in terms of competition law and would therefore be able to create an admissible exception to Article 81(1) of the EC Treaty. Hellenthal's conclusion that Article 45(3) of the UEFA Statutes is in fact *not* necessary for the functioning of football might in the end be acceptable. However, his argument that the liberalization of European football competitions would provide the necessary balance of team qualities (which according to Hellenthal is essential to maintain the attractiveness of football) to the same extent as the UEFA system does, because, due to general market mechanisms, only the economically strongest teams would have access to such alternative competitions, is unsatisfactory. Hellenthal fails to take into account that the majority of European clubs might not have the economic power to join such alternative competitions. Hellenthal's assumption that new structures would be adopted in the field of European club competitions is too general. The necessity of a system of transfer payments to support the less powerful clubs is only touched upon in the different (but no less important) context of whether the strict prohibition of alternative competitions in Article 45(3) of the UEFA Statutes is itself a proportional measure. This aspect would have been worth considering in more detail.

The second focal point of Hellenthal's book is the potential infringement of Article 82 of the EC Treaty. Hellenthal contends that under Article 82 the UEFA must be considered to have a dominant position within the common market for European football competitions for club teams. He also points out that the permission requirement in Article 45(3) of the UEFA Statutes affects trade between the EU Member States. In his view, the latter provision is not an instrument for improving competition but rather aims solely to control the relevant market and to exclude potential competitors.

Hellenthal consequently concludes that Article 45(3) of the UEFA Statutes violates European competition law as laid down in Articles 81 and 82 of the EC Treaty. In his view, therefore, Article 45(3) of the UEFA Statutes should be considered null and void.

Starting from there, Hellenthal subsequently describes some potential structures of a European Football League, particularly what he calls a 'closed model' with a fixed group of participants and an 'open model' which to a limited extent allows promotion and relegation from or to the connected national leagues. He argues that both the closed and the open model would initially constitute infringements of Article 81(1) of the EC Treaty, as both are anti-competitive and therefore incompatible with the common market. However, it is his opinion that the open model could be justified, because, on the one hand, access in this model is generally open to all national clubs while, on the other hand, the 'exceptional character' of the promotion/relegation process, which is 'necessary for the functioning of a league pyramid', can be preserved.

Finally, Hellenthal discusses the options which the national associations and the UEFA have, to impose sanctions on clubs that decide to participate in a European football league which has been established without the UEFA's permission. In his view, any legal basis for such sanctions is lacking. A possible measure open to the national associations and/or UEFA, however, would be to refuse to license a club for general national and/or UEFA competitions in the case that this club is relegated from such a European League. Hellenthal however leaves open the question whether such a refusal would stand up

under legal scrutiny before an arbitration tribunal or regular court.

In his book, Hellenthal indicates that the envisaged European Football League will not be possible without the consent of the main actors in European football as it stands today. In the end, Hellenthal supports the idea of HeHea European Football League that is integrated at the top of the current European football pyramid. While this extension of the current system might be the only practicable solution at present, it also rather takes the edge off Hellenthal's primary, purely competition law-orientated approach. Also, the close examination of Article 45(3) of the UEFA Statutes at the beginning of the book gives it a perspective which is rather 'association-focussed'. Hellenthal should have begun by introducing potential alternatives, i.e. other league models (both open and closed), and only then have moved on to the potential problems with relevant association regulations. This approach would have allowed the legal questions surrounding this interesting idea to follow a consistent and logical order.

The International Sports Law Journal

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Sport: Law and Practice

By Adam Lewis and Jonathan Taylor (Editors), Butterworths LexisNexis London 2002, hardback, pp. 1162 + LXXXIV, ISBN 0 406 945 926, Price: £130

Although at pains not to enter into the academic debate of whether there is such a thing as 'Sports Law', the editors acknowledge that the law is increasingly intruding into sport and having to deal with the particular problems that it engenders in practice. As the Lord Chief Justice, Lord Woolf, points out in his Foreword to the book: 'Although the general principles of the law are the same in the filed of sport as they are in relation to other activities giving rise to similar problems, the application of those principles to sport does give rise to particular difficulties, especially because of the constraints as to time peculiar to sport.' This 'specificity' of sport, and the maturing of the sport 'sector', is the stated rationale of the editors for publishing another book on 'Sports Law'. In addition, as the book is based on the syllabus for the part-time Post Graduate Certificate in Sports Law offered by King's College, London, of which Jonathan Taylor is Director of Studies and Adam Lewis is one of the lecturers, the work also satisfies the need for a text book for students doing this course.

However, the editors claim that the book is also intended to satisfy the practical day-to-day needs of all those involved in the business of sport, describing it as a 'resource and a tool'. On the whole, this aim is realised, although I would have liked to have seen the kind of practical approach taken by the authors of the chapter on 'Sports Image Rights' adopted by the contributors of several of the other chapters. In particular, the one on 'Risk Management in Sport' was, I thought, rather weak, despite having three authors! - only twelve pages of very basic information on an increasingly important subject, as the organisers of last year's 'World Cup' and, more recently, the Welsh Rugby Union and other sports governing bodies have found to their financial cost. The book, therefore, suffers from a certain amount of unevenness, which, I suppose, in any case, is inevitable when there are so many different contributors (32 + the editors!). So, perhaps the editors should have been more ruthless and demanding with their contributors to ensure a consistent overall quality and standard of the work. There are also one or two editorial lapses - for example, the Advocate General in the famous - or infamous depending on your point of view - *Bosman* case is Lenz not Lens.

To be fair, however, the range of topics covered is quite extensive and comprehensive. The book is divided into four main sections: *Part A - Legal Control of the Sports Sector*; *Part B - European Community Law and Sport*; *Part C - Organisational Issues for Sports Entities*; and *Part D - The Commercialisation of Sports Events*. In Part C, I was particularly pleased to see that an extensive chapter on the 'Taxation of Sports Organisations' has been included - a subject often overlooked or neglected bearing in mind that sport is now big business with serious financial and tax consequences. However, apart from a few suggestions on mitigating the effects of VAT, there was no guidance offered on tax planning and mitigation generally. But, then, I suppose that would have been giving away too many professional secrets!

It would also have been helpful to include a 'Glossary of Acronyms and Abbreviations' to make the text more transparent. Also, page references in the 'Table of Contents' would have aided the reader to find particular topics more easily.

Throughout the text and in footnotes, there are copious references to cases, articles, books and other useful sources, especially relevant websites. The book is completed with a workmanlike Index and Tables of Statutes, Statutory Instruments and Cases.

All in all, this book can be safely recommended to students, but, I fear, that practitioners may find it deficient in a number of respects.

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Ian Blackshaw

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PRINTED BY
Krips BV
P.O. Box 1106, 7940 KC Meppel

DESIGN AND LAYOUT
MMS Grafisch Werk, Amsterdam

SUBSCRIPTIONS
The International Sports Law Journal (ISLJ) can be ordered via
ASSER International Sports Law Centre.
Price € 100,- (three issues), € 115,- (including Sports Law Bulletin), as from 2003

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€ 250,- (full page), € 100,- (half page)

ISLJ No. 1 (2003) © by T.M.C. Asser Instituut

ISSN 1567-7559

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