

ASSER International Sports Law Series

For further volumes:
<http://www.springer.com/series/8858>

Katrien Lefever

New Media and Sport

International Legal Aspects

T · M · C · A S S E R P R E S S

 Springer

Katrien Lefever
Faculty of Law
Interdisciplinary Centre for Law and ICT
KU Leuven
Leuven
Belgium

ISSN 1874-6926
ISBN 978-90-6704-872-9 ISBN 978-90-6704-873-6 (eBook)
DOI 10.1007/978-90-6704-873-6

Library of Congress Control Number: 2012940957

© T.M.C. ASSER PRESS, The Hague, The Netherlands, and the author 2012

Published by T.M.C. ASSER PRESS, The Hague, The Netherlands www.asserpress.nl
Produced and distributed for T.M.C. ASSER PRESS by Springer-Verlag Berlin Heidelberg

No part of this work may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, microfilming, recording or otherwise, without written permission from the Publisher, with the exception of any material supplied specifically for the purpose of being entered and executed on a computer system, for exclusive use by the purchaser of the work. The use of general descriptive names, registered names, trademarks, etc. in this publication does not imply, even in the absence of a specific statement, that such names are exempt from the relevant protective laws and regulations and therefore free for general use.

Printed on acid-free paper

Springer is part of Springer Science+Business Media (www.springer.com)

Series Information

Books in the *ASSER International Sports Law Series* chart and comment upon the legal and policy developments in European and international sports law. The books contain materials on interstate organisations and the international sports governing bodies, and will serve as comprehensive and relevant reference tools for all those involved in the area on a professional basis.

The Series is developed, edited and published by the ASSER International Sports Law Centre in The Hague. The Centre's mission is to provide a centre of excellence in particular by providing high-quality research, services and products to the sporting world at large (sports ministries, international—intergovernmental—organisations, sports associations and federations, the professional sports industry, etc.) on both a national and an international basis. The Centre is the co-founder and coordinator of the Hague International Sports Law Academy (HISLA), the purpose of which is the organisation of academic conferences and workshops of international excellence which are held in various parts of the world. Apart from the Series, the Centre edits and publishes *The International Sports Law Journal*.

Series Editors

Dr. Robert C. R. Siekmann, Director Asser International Sports Centre
e-mail: r.siekmann@asser.nl

Dr. Janwillem Soek
e-mail: J.soek@asser.nl

M. A. van der Harst LL.M.
e-mail: m.van.der.harst@asser.nl

Editorial Office

ASSER International Sports Law Centre
T.M.C. Asser Institute
P.O. Box 30461
2500 GL, The Hague
The Netherlands
www.sportslaw.nl



Foreword

The summer of 2012 is often referred to in the popular media as the Summer of Sports. High-profile sporting events followed each other in quick succession. In early June, the Spanish tennis superstar Rafael Nadal was crowned for an unprecedented seventh time as the ‘king of clay’ at Roland Garros in Paris. Some weeks later, his compatriots in the Spanish national football team continued their unparalleled winning streak at international tournaments during the European Championships in Poland and Ukraine. One week later, on the holy grass of Wimbledon, Roger Federer proved once again why he is the Swiss Maestro. In the Tour de France, two British riders from Team Sky mainly decided amongst themselves which one of them would ultimately take the yellow jersey home to Great Britain. Bradley Wiggins’ historic victory was the ideal appetizer for the *pièce de résistance* that was about to come thereafter, the 2012 Olympic Games. During the next sixteen days, the performances of the likes of Usain Bolt, Michael Phelps or Epke Zonderland in London dominated the headlines in the media worldwide. Only when the IOC Chairman Rogge drew the curtain over the ‘happy and glorious games’ did the 2012 Summer of Sports come to an end.

A great deal of sports history was written in a time span of merely three months. Hundreds of millions of people all over the globe were able to follow all these sporting highlights in one way or another. Nowadays, we live in an information society. This book even speaks of an ‘information rollercoaster’. The times when the only means to be directly informed about a sporting event were to actually go to the venue, to watch television or to listen to the radio belong to the past. During the last decade, the number of providers of sports content in the media has substantially increased. Moreover, new platforms such as the internet or mobile phones enable them to provide more sports. Almost inevitably, these developments in the media landscape influence the relationship between the media and the sporting world. As the public’s access to sports content is valuable—which is the working hypothesis of this book—these developments also entail legal repercussions. The overall objective of this book is precisely to examine the impact of our rapidly evolving information society on the existing legal framework relating to the public’s access to sports content, especially media law and competition law.

Adopting both an interdisciplinary and intra-disciplinary approach, it specifically purports to assess how competition and media law guarantee access to live and full sports coverage for the audience in the new media landscape.

The subject of this book by Ms. Lefever is important and topical. Sport and the law have long been uneasy bedfellows. Sporting federations traditionally operated under the assumption that they enjoyed complete autonomy in organizing and regulating sports and thus that they were immune to legal intervention from the ‘outside world’. This general attitude may have been contested or even (successfully) challenged in court on a given concrete occasion, but ultimately it was only in a judgment of December 15, 1995 by the Court of Justice of the European Union that sporting federations would definitely lose their self-proclaimed aura of being legally ‘untouchable’. In the already legendary *Bosman* case, the Court of Justice first dispelled every doubt about its previous statement that sport is part of EU law insofar as it constitutes an economic activity, before subsequently outlawing certain aspects of the traditional transfer system and also the so-called ‘3+2’ nationality clauses in professional football in Europe for infringing the free movement rules laid down in the European Treaties. Since that day, the Court of Justice has been laden with all the sins of Israel in sporting circles. *Bosman* is widely regarded as the main culprit for everything that has gone wrong in professional football and beyond the last fifteen years: in particular, that the sporting and financial equilibrium between clubs is disturbed and the gap between rich and poor clubs has widened, or that many clubs no longer invest time and money in the development and training of young players. The sporting establishment has often been so occupied with criticising the *Bosman* decision and looking for ways to circumvent or overturn it, that other plausible explanations were simply overlooked or did not receive appropriate attention. More or less contemporaneously with the *Bosman* judgment, professional sports became increasingly commercialised. Revenues from the sale of the broadcasting rights of sporting events reached unprecedented heights. It is submitted that this – and the unequal distribution of this wealth—is the principal reason for the financial and sporting imbalances that have occurred over the last few years. One of the intrinsic strengths of this book is therefore its overall topic: the regulation of the laws concerning the broadcasting of sports events.

Besides this, the book also tackles several of the important concrete sub-issues in this regard. To mention but a few; firstly, it addresses the specificity of the sports sector, emphasizing the social and economic function of sport. This so-called specificity of sport is also important in legal terms. For instance, sports associations often refer—with varying degrees of success—to the argument of the specific nature of sport to justify a *prima facie* infringement of EU law or even to call for an exemption from the scope of EU law. Secondly, the book also inquires whether the freedom of expression and the right to information, enshrined in article 10 of the European Convention on Human Rights, can play a role in protecting the public’s access to sports content, as consumers and as citizens. Thirdly, concerning media law, the focus is on the analysis of the ‘list of major events’ mechanism. Sport is an important weapon in the ‘battle for the audience’ between broadcasters. In an attempt to attract more viewers and more

advertisement revenue, media operators often try to acquire exclusive broadcasting rights to sports events. This has led to the situation that some of these events are no longer available to all on free-to-air television. Therefore, a list of major sporting events has been drawn up that must be accessible to all viewers. The book examines the suitability and the necessity of this list. Fourthly, the book addresses a number of competition law concerns triggered by the fierce competition for these sports broadcasting rights. Through regulation and case law, the national and European competition authorities have created the conditions of open and fair competition for the sale, acquisition and exploitation of sporting broadcasting rights. The book studies whether, and if so, how, the rise of new media operators has influenced these competitive conditions. In this respect, attention is primarily paid to issues such as joint selling, sublicensing obligations and ‘must-offer’ obligations.

All in all, this book by Ms. Lefever deals with the right topic in the area of sports and the law, it asks many of the right questions and provides various useful insights, analysis and answers. I warmly recommend this book to broadcasters, sports governors, lawyers and all those with a general interest in the issue.

Stefaan Van den Bogaert
Professor of European Law & Director of the Europa Institute,
Leiden University, The Netherlands
Visiting Professor of European Sports Law, Vrije Universiteit
Brussel, Belgium

Contents

1	Introduction	1
	References	4
 Part I Setting: Notions, Issues and Legal Background		
2	Sports/Media Complex in the New Media Landscape	7
2.1	Introduction	7
2.2	Sports/Media Complex in the Analogue Media Landscape	8
2.2.1	Sports Clubs and Sports Organisations	8
2.2.2	Media Companies	9
2.2.3	Sponsors	11
2.2.4	Public: Fans	12
2.2.5	Sports/Media Complex in the Analogue Media Landscape: Summary	12
2.3	Sports/Media Complex in the Digital Media Landscape	13
2.3.1	The Media Landscape in the Twenty-First Century: From an Analogue to a Digital Media Landscape	14
2.3.2	Sports/Media Complex in the Digital Media Landscape	18
2.3.3	Sports/Media Complex in the Digital Media Landscape: Summary	23
	References	25
3	Specificity of Sport: The Important Role of Sport in Society	31
3.1	Introduction	31
3.2	Economic Dimension of Sport	31
3.3	Societal Dimension of Sport	34
3.3.1	Specificity of Sport: Introduction	35
3.3.2	Specificity of Sport Before the Lisbon Treaty	41

3.3.3 Specificity of Sport After the Lisbon Treaty 43

References 48

4 Article 10 of the European Convention on Human Rights and the Public’s Right to Information Regarding Sports Events 55

4.1 Introduction 55

4.2 Article 10, § 1 of the ECHR: Freedom of Expression and the Right to Information Without Interference by Public Authority 56

4.2.1 What is Protected Under Article 10, § 1 of the ECHR 56

4.2.2 No Interference by Public Authority Allowed 62

4.3 Article 10, § 2 of the ECHR: Restrictions Regarding the Freedom of Expression and the Right to Information 66

4.3.1 Prescribed by Law 66

4.3.2 Legitimate Aim 67

4.3.3 Necessary in a Democratic Society. 69

References 72

5 The Public in Its Role as Citizen and Consumer 77

5.1 Introduction 77

5.2 The Viewer as Consumer 77

5.3 The Viewer as Citizen 78

5.4 The Viewer: Summary 80

References 81

6 Changing Sports/Media Complex and Its Impact on the Regulatory Process of the Broadcasting Sector 83

6.1 Introduction 83

6.2 From Scarcity to Abundance 84

6.3 From One-to-Many to Many-to-Many Communication 86

References 92

7 Conclusion Part I 97

References 100

Part II Competition Law

8 Competition Law: General Introduction 105

8.1 Competition Law: Relevant Provisions 105

8.1.1 Relevant Markets for Selling, Buying and Exploiting Sports Broadcasting Rights 105

8.1.2	Antitrust Rules	108
8.1.3	Merger Regulation	112
8.1.4	State Aid Rules	116
8.2	Competition Law and Non-Economic Considerations	118
8.2.1	Introduction	118
8.2.2	Objectives of Competition Law	119
8.2.3	Competition Law and Cross-Sectional Provisions.	120
8.2.4	Competition Law and Particularities of Sectors	123
	References	128
9	Joint Selling Remedies Package.	135
9.1	Introduction	135
9.2	Article 101 (1) of the TFEU and Joint Selling Agreements	137
9.2.1	Exclusive Contracts	137
9.2.2	Individual Circumstances of Exclusive Contracts	138
9.3	Article 101 (3) of the TFEU and the Joint Selling Agreements.	139
9.3.1	Joint Selling Agreements: Exemption Under Article 101 (3) of the TFEU	139
9.3.2	Development of New Media and the Public’s Access to Sports Content	145
	References	158
10	Sublicensing Obligation	165
10.1	Introduction	165
10.2	Sublicensing Obligation and Joint Buying Agreements	167
10.2.1	Introduction	167
10.2.2	Article 101 (1) of the TFEU and Joint Buying Agreement.	167
10.2.3	Article 101 (3) of the TFEU and Joint Buying Agreement.	168
10.3	Sublicensing Obligation and Public Service Broadcasters’ Funding.	172
10.3.1	Introduction	172
10.3.2	Unused Rights and The Flemish Public Service Broadcaster (VRT)	174
10.3.3	Unused Rights and the German Public Service Broadcasters.	175
	References	177
11	Must-Offer Obligation	181
11.1	Introduction	181
11.2	Development of New Media and the Public’s Access to Sports Content	183

11.2.1	Introduction	183
11.2.2	Must-Offer Obligation and Competition in the Changed Media Landscape	184
11.2.3	Must-Offer Obligation and the Public’s Access to Sports Content	186
11.3	Must-Offer Obligation: Wholesale Versus Retail Obligations	190
11.3.1	Wholesale Must-Offer Obligation	190
11.3.2	Retail Must-Offer Obligation	191
	References	194
12	Conclusion Part II	199
	References	204
 Part III Media Law		
13	Content Regulation: General Introduction	211
13.1	Introduction	211
13.2	Scope of the Audiovisual Media Services Directive	212
13.3	Two-Tiered Regulation	214
13.4	Right to Information and the Audiovisual Media Services Directive	215
13.4.1	Introduction	215
13.4.2	Short News Reporting	215
	References	220
14	‘List of Major Events’ Mechanism	225
14.1	Introduction to the ‘List of Major Events’ Mechanism	225
14.1.1	Origin and Philosophy	225
14.1.2	Events of Major Importance for Society	229
14.1.3	(Whole or Partial) Live or (Whole or Partial) Deferred	236
14.2	The ‘List of Major Events’ Mechanism and its Problematic Notions in a Digital Media Landscape	240
14.2.1	Free Television	241
14.2.2	Substantial Proportion	253
14.3	The ‘List of Major Events’ Mechanism and its Implementation Problems	264
14.3.1	Introduction	264
14.3.2	A Voluntary Mechanism for Member States	265
14.3.3	A Voluntary Mechanism for Broadcasters	268
	References	291

15 Conclusion Part III	307
References	311
16 Conclusion	313
References	318
Index	319