



Website: www.sroc.info

E-mail: sportsrights@sroc.info

Introduction

The Sports Rights Owners Coalition (SROC) is pleased to offer its thoughts on this important study on sports organisers' rights in the European Union.

SROC is an informal group of representatives of global, European and national sports bodies, operating as a forum through which sports can share information and experiences. Individually and collectively, we represent a majority of the leading (and most popular) sports and competitions organised both within Europe and on the wider international stage. These sports and competitions, organised by SROC members, attract millions (if not billions) of spectators and participants annually.

SROC members are directly impacted by the legal framework applicable in the Member States of the European Union (EU). For sports organisers, the ability to commercially exploit and benefit from the competitions they organise, and to protect them against any unauthorised exploitation is key to the sustainable financing of both professional and grassroots sport.

1. How important is the sport sector?

1.1. Social importance

According to a Eurobarometer survey published in 2010, 40% of EU citizens practise organised sport at least once a week¹. The number of volunteers involved in sport represents a significant proportion of the adult populations in Finland (16%), Ireland (15%), the Netherlands (12-14%), Denmark (11%), Germany (10.9%) and Malta (9.2%)². If we add the number of volunteers to the number of participants in sport, we can conclude that sport is a very important social phenomenon in Europe. Undoubtedly sport is one of the biggest, if not the biggest, societal movement throughout the EU.

When viewed against the broader societal backdrop, sport is also a very efficient tool in terms of positively influencing and bringing about change within modern society and culture. According to the European Commission (EC) itself, *“Sport has a strong potential to contribute to smart, sustainable and inclusive growth and new jobs through its positive effects on social inclusion, education and training, and public health. It helps limit the rise in social security and health expenditure by improving the health and productivity of the population and by ensuring a higher quality of life through old age. It contributes to social cohesion by breaking down social barriers, and it improves the employability of the population through its impact on education and training. Voluntary activity in sport can contribute to employability, social inclusion and higher civic participation, especially among young people”*³.

For all these reasons, the sport ecosystem, which supports and fosters both amateur and professional sport, deserves the most efficient protection.

¹ Special Eurobarometer 334, March 2010

http://ec.europa.eu/sport/library/documents/d/ebs_334_en.pdf

² Study on Volunteering in the EU, February 201, http://ec.europa.eu/citizenship/pdf/doc1018_en.pdf

³ COM(2011) 12 final, Developing the European Dimension of Sport, page 4

1.2. Economic importance

Sport also represents an important sector of economic activity. According to a recent EC Study⁴, sport-related value added (direct effects) represents 1.76% of total EU Gross Value Added and amounts to € 173.86 bn. The direct effects of sport combined with its indirect effects add up to 2.98% of EU Gross Value Added (€ 294.36 bn). Furthermore, sport-related employment (direct effects) accounts for 2.12% of total EU employment, equivalent to 4,460,888 persons. If indirect effects are added, sport leads to the employment of 7,378,671 persons (3.51% of EU employment). Further, the contribution of professional sports to tax revenues is also worth taking note of - for instance, the UK government tax return from English professional football clubs was around £1.3 billion last season⁵. In Germany, direct sport-related value added represents 0,28% of total GDP (€5.7 bn), indirect effects add up to 2,31% (€43.1 bn.). Sport in Germany directly employs 143,000 people. Indirectly 1.15 million people work in the German sport sector⁶. Macro-economically speaking, German football alone accounts for 110,000 direct and indirect jobs and €1.5 billion of annual payments in taxes and other contributions (2010)⁷.

Grassroots sport is primarily financed through membership, public subsidies, sponsorship and redistribution of revenues from professional sports. Professional sports are usually financed through the exploitation of media rights, sponsorship revenues and ticketing and merchandising. As mentioned by the EC, *“the exploitation of intellectual property rights in the area of sport, such as licensing of retransmission of sport events or merchandising, represents important sources of income for professional sports. Revenue derived from these sources is often partly redistributed to lower levels of the sports chain”* [...] *“The Commission considers that, subject to full compliance with EU competition law and Internal Market rules, the effective protection of these sources of revenue is important in guaranteeing independent financing of sport activities in Europe”*⁸.

Sports organisations and organisers therefore have an already clearly recognised need to be able to protect and enforce their ability to benefit from their commercial rights.

2. New challenges for organisers of sporting events

2.1. Digital Piracy

Sport is a very important part of Europe’s audiovisual landscape in both economic and cultural terms. It is their attractiveness to viewers and spectators that makes major sporting events particularly susceptible to being targeted by content pirates for unauthorised commercial exploitation. All sports have seen an increase in both the number of unauthorised offerings online and the number of viewers illegally watching such content. While football is usually considered the most popular, this issue affects all sports, including notably tennis, basketball and cricket to name just a few. Giles Clarke, Chairman of the England and Wales Cricket Board, has recently branded the illegal streaming of matches *“the biggest problem affecting the game”*⁹.

⁴ Study on the Contribution of Sport to Economic Growth and Employment in the EU, November 2012 <http://ec.europa.eu/sport/library/documents/f-studies/study-contribution-sports-economic-growth-final-rpt.pdf>

⁵ Deloitte Annual Review of Football Finance 2013

⁶ Study on the Contribution of Sport to Economic Growth and Employment in the EU, November 2012, pp. 111/112

⁷ McKinsey & Company Inc, Conclusions of the study „Wirtschaftsfaktor Bundesliga“, March 2010, p. 4

⁸ COM(2011) 12 final, Developing the European Dimension of Sport, p. 8

⁹ <http://www1.skysports.com/cricket/news/12173/7458171/clarke-blasts-illegal-streaming>

As an example of the scale of the issue, during the 2012/13 season, the Premier League has detected approximately 33,000 unauthorised live streams, an increase of 15% from the 2011/12 season. Cease and desist notices have been sent to around 250 sites and there are over 400 linking sites that are constantly reviewed. The popularity of streaming live sporting events is such that the most prolific site appears in the top 500 websites globally on a Saturday afternoon, when most Premier League matches are played. Unauthorised live-streaming of Bundesliga matches has also increased rapidly. During the 2012/13 season around 17,500 unauthorised live-streams have been detected. This is an amazing 647.8% rise compared to the 2009/10 season. The quality of the streams themselves is improving rapidly and their use has evolved beyond the home-user and they are now found in commercial premises.

Very few of the websites and services streaming coverage of sports competitions now charge a fee to the user for access. Clearly this is not because the operators of such sites are embracing some sort of altruistic "anti-censorship", "freedom of the internet" or "free copyright" ideals, believing they are performing a valuable service for end users. The persons behind live internet piracy of sports content are extremely well organised and extremely adept businessmen who now recognise that the revenue they can generate through applying an advertising-funded model would far exceed what they could generate through charging a fee to access content. By way of example, the website which has been the subject of a recent blocking order under UK law (Section 97A of the Copyright, Designs and Patents Act) pursuant to an action by the Premier League (supported by various other SROC members such as UEFA or the European Tour) is purely funded by advertising revenue which the Premier League has estimated to be up to £12m a year. These therefore are significant businesses, making large profits out of the pirate exploitation of rights they have not purchased and where none of the profits are being reinvested into the sport ecosystem.

To make things more complicated, unlike other audiovisual content such as films or music, the value of sports events lies almost exclusively in live viewing and the real window of opportunity to take down illegal content is therefore very limited (basically the duration of the match). The "traditional" notice and take down measures are therefore less worthwhile for live sport content as the internet pirates merely have to delay their response to render these measures totally ineffective. The situation is compounded by the lack of consistent legal rights, processes, procedures, remedies and effective enforcement options, across the EU (and beyond). In addition, the requirements of the current legal rights and remedies dictate a timeframe for action which can only be viewed as inappropriate for tackling the "live" element of delivery and consumption of pirated sport content.

The European Parliament (EP) has reflected these concerns several times, including in its Resolution on the enforcement of intellectual property rights in the Internal Market which reads that *"the violation of IPRs is a problem across the board which affects all sectors of industry, particularly the creative and innovative industries and sport"*¹⁰.

2.2. Ambush Marketing

"Ambush marketing" is a label often applied to either illegal (in the instance of trademark infringement or unfair competition) or at best unauthorised parasitic marketing activities designed or specifically intended to obtain a commercial or other beneficial association with an event and its reputation, identity and goodwill without seeking the organiser's authorisation and also not contributing to the financial or other support of the event and sector. Similarly to the difficulties faced by sports organisers in respect of internet piracy, sports events often have a very short time window in which both the event and the desired association/commercial benefit is realised.

¹⁰ European Parliament resolution of 22 September 2010 on the enforcement of intellectual property rights in the internal market (2009/2178(INI)), Recital H

While there are relatively mature and co-ordinated enforcement frameworks for the policing of trademark and similar IP infringement, the time scales which are required to use such actions and the relevant costs in doing so often mean that such routes are ineffective and/or inappropriate. Any legal action is prima facie only possible after the relevant infringing action has been taken by the infringer yet the relevant event may start and finish within a very short period of time (for example 3 days for the Ryder Cup, 17 days for the London 2012 Olympics, 23 days for EURO 2012, 11 days for the Glasgow 2014 Commonwealth Games). This means that the time necessary to bring proceedings in court may greatly exceed the duration of the event, during which time the infringer has obtained the commercial benefit it was seeking. Another legal basis for action which is at times sought to be relied upon is that of "unfair competition", however, the existence of such a legal framework is not consistent and even when recognised is often unclear.

Of course, trademark and unfair competition issues affect many other industry sectors as well, however, as with internet piracy, the relevant time window for action is a specific difficulty faced by sports organisers – highlighted by the fact that when organising major events, sports organisers often request, through their relevant bidding processes, the co-operation of the relevant national governments in implementing a clear legislative framework and the assistance of national and local authorities to enable the swift and efficient "policing" of IP rights and the protection of the commercial programmes, the revenues from which fund not just the development of the sports as mentioned above but also specifically the very organisation of the events themselves. The problem is more severe in respect of "smaller" and less revenue generating events where the costs of protecting rights could either be disproportionate to the revenues generated or even exceed them if "traditional" courses of action were to be relied upon.

In its Resolution on the White Paper on Sport, the European Parliament acknowledged that *"problems of ambush marketing (...) should be addressed as a priority by Member States and the Commission"*¹¹.

2.3. Sports Betting

Research undertaken by UK Sports in 2007 demonstrated that British Licensed Betting Offices (LBOs) took £12.9 billion of bets on sports events (excluding horseracing or greyhounds) generating profits of £1.57 billion. In LBOs, betting on sport represented 45% of all betting, up from 31% in 1999. On-line betting recorded £6.5 billion of bets on sports events which generated revenues of £470 million. Two thirds of on-line bets are on sports other than greyhounds and horseracing. These are figures which continue to grow and which we would reasonably expect to be appreciably higher today. According to Darren Small, Director of Integrity at betting and sports data analysts, Sportradar, *"the current estimations, which include both the illegal markets and the legal markets, suggest the sports match-betting industry is worth anywhere between £435 billion to £625 billion a year"*¹². Significantly, the betting industry does not want to communicate on the value/level of sports betting. Other than in very limited territories, such as France, where a degree of regulation has been adopted, sports are not afforded the transparency or access to the information necessary to assess with any certainty, what and how much is bet on their competitions.

There is an important distinction to be made in the general nature of the commercial relationships and "investment" by different groups into sports. Firstly, there are commercial relationships where brands and products seek to associate with sports to promote their own product. This is true of shirt sponsorship, advertising, kit deals, even official betting partnerships. These relationships are about visibility and brand promotion. For the beneficiary, this is essentially a form of marketing and is always subject to a commercial agreement.

¹¹ European Parliament Resolution of 8 May 2008 on the White Paper on Sport (2007/2261(INI)), paragraph 70

¹² <http://www.bbc.co.uk/sport/0/football/24354124>

Secondly, sports organisers grant the right to another entity to exploit the sports product directly to create a business product. This is the case most notably for broadcasters, who use the sports product to create and broadcast programming and, in the case of pay television operators, sell subscription services to customers. Their product (or at least significant proportions of them) are dependant directly on sports competitions and would not exist without them, and are also dependent upon and subject to commercial agreements.

The same is, or should be, true of sports betting. It is almost too elemental to state but without the sports event to bet on, the betting company cannot take bets in that area. In creating the sports betting business, there is a direct commercial exploitation of the sports product which is the result of intellectual, financial and human efforts on the part of sports organisers. Despite this, the use of sports events for betting purposes is largely ungoverned by contractual agreements due to there generally being no recognition of a right on the part of the sports organiser which would require a contractual framework before exploitation. The use of sports events by betting companies in this manner is in effect parasitic with there being no reciprocal benefit or investment back to the sports for their continued development and growth.

This lack of statutory relationship between sports and betting operators has been criticised by several European Parliament reports over the last 4 years¹³. The EP indeed considers that protecting sports competitions from any unauthorized commercial exploitation would also enable organisers to determine which aspects of the event may be the legitimate subject of betting and thus reduce the risk of match-fixing and fraud. Hence the recognition of sports competitions organisers' rights would not only be fair legally and economically but would also contribute to the fight to preserve the integrity of sport.

3. Why do sports need better protection?

3.1. To cope with the technological developments and to protect the direct investment made by sports organisers, governments and commercial partners in sporting events

The legal basis available to sports organizations to protect the rights which are marketed appear inadequate and inappropriate when considered against the backdrop of the pace and nature of development and evolution of commercial activity and particularly when viewed against that of technological development and change relating to audiovisual media and the Internet. While judicial proceedings and other courses of action (for example through the police) have been, and continue to be, pursued, the available courses of action and remedies available are of limited impact and usefulness. This is a reality which has also been seen in other audio/visual content industry sectors, but as recalled above, a situation which is made more difficult in the sports sector due to the "live" time-frame.

Along with the continuing and varied benefits delivered by and derived from sports, the cost of organizing events continues to grow and requires frequently the support of many stakeholders including local and national governments by way of commitments such as safety and security services (such as the police and ambulance). The majority of costs however are usually borne by the sport organiser using the revenues generated from its commercial partners (whether sponsors, broadcasters, ticket and hospitality sales etc.). The lack of relevant and effective remedies and enforcement tools risks creating an increasing disincentive for the commercial partners to significantly invest in events subject to ambush marketing. Declines in commercial revenues are likely to lead to either a decline in (or even negative) growth of the relevant sport and/or an increased pressure on limited public funds when governments across Europe and the World are cutting public spending and subsidies.

¹³ See Report on the White Paper on Sport (A6-0149/2008) M. Mavrommatis; Report on the integrity of online gambling (2008/2215) C. Schaldemose; Report on online gambling in the Internal Market (2011/2084) J. Creutzmann; Report on the European Dimension of Sport (2011/2087) S. Fisas; Report on Online gambling in the Internal Market (2012/2322).

The Commission stated that it “*considers that, subject to full compliance with EU competition law and Internal Market rules, the effective protection of these sources of revenue is important in guaranteeing independent financing of sport activities in Europe*”¹⁴. Without the means to protect these revenue sources effectively, this recognized need is simply not being met.

3.2. To correct the sports betting anomaly

In many jurisdictions, prior to the implementation of the EU Database Directive and several rulings of the Court of Justice of the European Union (CJEU), there was either a clear support for an enforceable copyright in collection of data (such as in the UK – Football League v Littlewoods 1959) or an agreed redistribution towards sports from the state monopolies.

When the CJEU decided that fixture lists do not meet the criteria to be protected under the EU Database Directive (Fixtures Marketing and BHB v William Hill), the betting operators began to challenge the existence of any enforceable database rights by sports bodies and as a consequence the value of data licensing across Europe was dramatically reduced.

The EU Database Directive was adopted in 1996 and implemented in the Member States in the late 1990s. It is fair to say that back then the legislator could not foresee the amazing development of internet based business models relying on data. In the digital era, the collection and utilization of data is one of the most important sources of commercial value. This includes sport data in all forms, be it fixture lists, sport statistics or live data from the respective competitions. Interestingly, this has recently been supported by the CJEU in its Football Dataco vs. Sportradar judgment. The Court said that under the assumption that sport had a legal protection of their databases, using the data and making it publicly available to betting operators is an illegal re-utilization of the data.

The business model of all online betting operators is based on the fixtures and the live data of sport events. Without sport events taking place, there would be no sport betting. Still betting operators refuse to negotiate with the organisers of sport events over the terms and conditions for the use of sport data, except in the countries where they have to by law (France and Australia for instance). This leaves sports without a fair financial return for the use of the events they invested time and money in, and presents more integrity issues.

Sport betting has grown exponentially and every sport is now heavily used for betting purposes. Without widespread recognition of a fair financial return for sports organisers, there is no legal or policy framework which would encourage, let alone require, contractual arrangements in this area. The legislator thus accepts the fact that one sector takes all windfall profits without reinvesting in the product which is the sole basis for its business model. Creating the framework for *a priori* negotiations between sport event organisers and betting operators on the terms of use of the respective sporting events would also help the fight against manipulation and match-fixing by defining clearly the rights and obligations of each party.

3.3. To respond to several calls from the EU Institutions

Since 2008, not less than five European Parliament Reports have called on the Commission and the Member States to fully recognise a sports organisers’ right which would cover all kinds of commercial exploitation of sporting competitions, including sports betting¹⁵. Although these reports dealt either with sport or with online gambling, they have been drafted by Members of the European Parliament from different political parties (Conservatives, Liberals, Socialist and

¹⁴ COM(2011) 12 final, Developing the European Dimension of Sport, page 8

¹⁵ See Report on the White Paper on Sport (A6-0149/2008) M. Mavrommatis; Report on the integrity of online gambling (2008/2215) C. Schaldemose; Report on online gambling in the Internal Market (2011/2084) J. Creutzmann; Report on the European Dimension of Sport (2011/2087) S. Fisas; Report on Online gambling in the Internal Market (2012/2322).

even British Conservatives), they all drew the same conclusion - that sports betting is a form of commercial exploitation of sporting competitions and therefore should be subject to legally binding agreements between the sports and betting operators. It is surprising that more than five years later, the European Commission has decided not to follow the voice of the European Parliament, which represents the voice of European citizens.

The report of the Council of Europe Conference of Ministers responsible for sport which was held in Baku in September 2010 was also quite clear on this issue: *"With a view to combating manipulation of sports results, governments are invited to explore the possibility of ensuring that no betting is allowed on a sports event unless the organiser of the event has been informed and has given prior approval, in accordance with the fundamental principles of states' domestic law"* (point 22).

Even the Court of Justice of the EU in its "FAPL v QC Leisure" judgment of 4 October 2011 explains that although IPR law does not cover sport events themselves, the specific nature of sport and its importance would allow Member States to grant organisers a level of protection similar to intellectual property rights. Paragraphs 100-102 (which are set out below) are quite explicit and should be understood as a call on the legislator to better protect sporting events and the respective organisers.

"100. None the less, sporting events, as such, have a unique and, to that extent, original character which can transform them into subject-matter that is worthy of protection comparable to the protection of works, and that protection can be granted, where appropriate, by the various domestic legal orders.

101. In this regard, it is to be noted that, under the second subparagraph of Article 165(1) TFEU, the EU is to contribute to the promotion of European sporting issues while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function.

102. Accordingly, it is permissible for a Member State to protect sporting events, where appropriate by virtue of protection of intellectual property, by putting in place specific national legislation, or by recognising, in compliance with European Union law, protection conferred upon those events by agreements concluded between the persons having the right to make the audiovisual content of the events available to the public and the persons who wish to broadcast that content to the public of their choice."

4. What could better protection look like?

4.1. At national level

As indicated by the CJEU, Member States could adopt national legislation granting sporting organisations with specific protection against unauthorised commercial exploitation of the competitions they organise. National legislation of this nature has already been implemented in France, in Poland, in Hungary and in other non-EU countries (such as Australia, New Zealand, Mauritius). The legal regimes are different in order to take into account the various legal and cultural traditions. They can cover all commercial exploitations (such as in France), or focus on sport betting (such as in Australia and New Zealand as the traditional IP law is not fit for purpose). Some national governments have also adopted very comprehensive and protective legislation (dealing with copyright, betting, trademarks etc.) but only for a short period of time when big sporting events (such as the World Cup and the Olympic Games) are hosted on their territory. This is currently seen as an unusual situation where the national governments are happy to adopt the needed legislation on a one-off basis and for competitions organised every four years, while they remain reluctant to protect their national competitions organised year-in-year-out.

4.2. At European level

Obviously a solution at the European Union level could potentially be more efficient as there would be one harmonised regime. It is of course acknowledged that it may be difficult to justify such intervention in the absence of at least wider spread national legislation throughout a greater proportion of the European Union members. Nevertheless, If the European Commission were to decide to implement changes to any of the existing Directives in related areas to those which would be regulated by a sports organiser's right, within such a wider review we would put forward that it would be remiss not to include provisions to enable the effective protection of those revenue streams of sporting event organisers which, as highlighted above, the Commission has already recognised as being important to be able to protect.

Conclusion

With the dramatic changes in the business and digital landscapes experienced during the past decade and with every indication that such changes will not only continue but even accelerate during the foreseeable future, there is a clear need to better take into account the impact on the ability of sports organisers to effectively protect the commercial interests upon which the sports' stakeholders are dependent.

SROC is therefore calling on the authors of the study to recognise the social and economic importance of the sports sector and to address the new challenges faced by sport organisers. We call for recommendations on the adoption of national legislative arrangements to provide clear and effective legal tools when it comes to the exploitation and protection of sports competitions, particularly in light of the constantly changing digital and online environment, including in the specific areas of piracy and betting. The role of the European Commission should not be overlooked and we would call upon it to respond in a measured and coherent fashion to these needs, and to help adapt the legal framework to better address the challenges faced.

SROC – November 2013