SPORTS LAW CASEBOOK

As the business of sport becomes more sophisticated the web of regulation, legislation and case law in which it operates becomes ever more complex. **Matthew Glendinning** asked some of the world's top sports lawyers to reflect on recent cases and what they mean for businesses operating in the sector.

PUTTING THE GENIE BACK IN THE BOTTLE – CAN LIVE SPORTS CONTENT BE CONTROLLED?

By **Bradley I. Ruskin** and **Robert E. Freeman**, partners in Proskauer Rose LLP

LIFE USED TO BE SIMPLE. Until recently, the only place you could get your daily fix of live sports content was through "old school" mediums like the radio (what?) or something known as a TV (huh?). In this digital age, new distribution means such as video-on-demand, blogs, Twitter® micro-blogging, and viral video transmissions have left many sports properties a twitter (pun intended) as they scramble to take advantage of the multitude of new distribution platforms, while at the same time protecting the jewels in the crown: their live content.

On the legal side of the ledger, the NBA was among the first sports properties to wrestle with this issue. In NBA v. Motorola, Inc., the NBA sought to enjoin Motorola from transmitting its "STATS" service based on NBA scores and results. It was eventually ruled that Motorola did not infringe the NBA's copyright because they reproduced only facts from the broadcasts, not the expression or description of the game that constitutes the broadcast.

In a more recent case, the PGA Tour successfully employed credentialing requirements to prevent third parties from on-selling 'real-time' golf score information that had been compiled using the PGA's proprietary on-site system. Prior to gaining access to the PGA's media center, the PGA required all parties to agree to certain terms and conditions, including that they would not syndicate such information without first obtaining a license from the PGA.

Plaintiff Morris Communications sued, claiming that the credentialing requirements were illegal under US antitrust laws. The Courts, however, distinguished Motorola and found that the PGA was justified in preventing third parties from free-riding on PGA's technology, which enabled it to collect 'real-time' golf scores from its tournaments.

Since Morris Communications, sports properties appear to have stepped up their efforts to protect the rights (and associated revenues) that flow out of live events using strategies similar to that of the PGA. For example, in 2006, through the use of credentialing requirements, FIFA sought to limit the number of images from live World Cup matches that could be used online by the media. Similarly, in 2007, a blogging ban was instituted at the PanAm Games for all athletes and team personnel. And, last summer, the NCAA removed a newspaper reporter from the press box due to his unauthorised blogging of real-time information from a college baseball game. Later, the NCAA codified its blogging policy for the credentialed media, which placed further restrictions on what the media could and could not do during live games.

Similarly, the NFL imposed limitations on the amount of online video per day a media organization may use, and how long such material may remain posted.

Finally, both NBC and the IOC implemented restrictions on the use of their live content from the Beijing Games and issued blogging guidelines to all "accredited persons" preventing bloggers, including members of the media, from posting certain photos, audio or video of sporting action, interviews with athletes, or Opening or Closing ceremonies.

Such contract oriented strategies for controlling the distribution of content may not be absolute preventative measures. However, they have provided sports properties with an effective legal weapon to limit the flow of content coming from their events.

INTERNATIONAL FEDERATIONS V EU LAW

By **Jean-Louis Dupont**, who represented Meca-Medina and Majcen in their ECJ Case

THE RELATIONSHIP BETWEEN international football's governing bodies and EU institutions has never looked like a perfect marriage. Currently, the fashionable issues at stake seem to be the "6+5" project and the envisaged 'foreign ownership' rules.

Could such rules be compatible with EU Law bearing in mind competition law, free movement of workers, freedom of services, freedom of establishment and free movement of capital?

Rather than focusing directly on those two issues, let's try to find the answer by having a quick look at the more general pattern established by the Meca-Medina judgement (ECJ, 17 July 2006). This case concerned two of the best long-distance swimmers in the world, David Meca-Medina and Igor Majcen, who tested positive for nandrolone in 1999 and were suspended for four years by the International Swimming Federation (FINA).

After appeal to the Court of Arbitration for Sport, the penalty was reduced to two years. However, the swimmers filed a complaint with the European Commission arguing that the IOC rules on doping (as implemented by the FINA) were against the competition provisions (Articles 81/82) of the EC Treaty.

In this case the European Court of Justice has provided the sports world with a sort of deciphering tool to assess the compatibility of any rule adopted by a given sports governing body with EU law.

This issue was remarkably addressed by Professor M. Wathelet, the former Vice-Prime Minister of Belgium and former Judge of the ECJ, in his article titled 'Sport Governance and EU Legal Order: Present and Future' published in The International Sports Law Journal, 2007/3-4):

- In the light of the Meca-Medina and Majcen judgement, even the fact that a rule is adopted and implemented by a federation or the IOC in its capacity as regulator (anti-doping rules certainly being one example of this) and not as an economic agent, under no circumstances [does this] result in this rule being exempted from the scope of Community law in general and articles 81 and 82 of the EC Treaty in particular, the moment that it has economic consequences and affects one or more freedoms drawn by third parties from the EC Treaty.

It is after a concrete examination of the rule's objective and its effects, within the field of application of Community law, that a compatibility report can be drawn up, with no means of deducing, a priori, compatibility with Community law of any rule.(...)

In other words, for each rule, one will examine if the negative effects it produces on EU freedoms is necessary and proportionate in order to attain the supposedly noble objective pursued by this rule. With this standard in mind, each of us will have his own opinion regarding the compatibility of "6+5" (or even of the UEFA home-grown players rules) and 'foreign ownership' projected FIFA rules with EU Law.

In my view, this compatibility is far from being obvious...

Sponsorship

BE CLEAR FROM THE OUTSET

Jason Smith and **David Bentham** of Brabners Chaffe Street LLP Solicitors

LIKE ANY RELATIONSHIP, that between a rights holder and a broadcaster/sponsor is likely to have both its high and its low points. However, with the recent economic downturn more than ever licensees will be keen to justify and gain value from every penny spent and may seek to part ways from rights holders when they believe that they are not deriving sufficient value for their rights fees.

The recent example of the Spanish commercial broadcaster, Antena 3, refusing to broadcast its rights for two UEFA Cup matches featuring the Spanish football club, Sevilla, because of Antena 3's perceived devaluation of the UEFA Cup as a competition resulting from structural changes over recent years, is a prime example of a licensee taking action where it believes it is not getting what it paid for. It shows how precise parties need to be when setting out in any agreement the rights being granted including, if relevant, the precise nature of the event being broadcast or sponsored. The parties should then also decide what the licensee's redress will be if circumstances change or something happens which reduces the value of the rights. Setting this out in the agreement will then hopefully prevent the parties from ending up in dispute and possibly court or arbitration if the landscape does change.

For example, a sponsor of a sports event may in its agreement with the rights holder seek rights to terminate and or to reduce payments if certain expected key participants do not take part in the event for whatever reason (such as in darts, where historically competitors split into two separate associations leading to a division of competitors between tournaments). Similarly, the shirt sponsor of a football team may look to protect itself in the event that the sporting performance of the team falls significantly leading to relegation from the country's premier league and far less broadcasting exposure for the sponsor's brand, perhaps in overseas markets such as Asia which are key to the sponsor's future business strategy. For sponsorship of individuals, so-called "morality clauses" have become a staple tool for sponsors. Essentially, these clauses provide that the relevant individuals will not misbehave and are often used in conjunction with incentivisation clauses, under which individuals are rewarded (often through the payment of "bonuses") for good behaviour. Conversely, rights holders faced with a well-advised sponsor should equally try to restrict the scope of such remedies as much as possible to protect the relationship and its revenue streams. Equally, the rights holder may not just want to rely on the licensee exploiting it rights to justify its rights fee. It may wish to oblige the licensee to exploit its rights, ensuring promotion of its brand whether through a broadcaster's coverage or a sponsor's promotional activity.

Where the negotiations will end up will depend on the bargaining positions of the respective parties but as the Sevilla case shows there are clear advantages for both rights holder and licensee in looking at these issues as early as possible and setting out what they agree in the contract.

DON'T GET CAUGHT OUT

By **Ashley Blake** from Hamlins LLP's Sports Group, formerly in-house lawyer for Viasat Broadcasting and Bet24"

THE ANNOUNCEMENT THAT the 'Stanford Twenty20 for 20' match will proceed on 1 November as planned signalled the end of weeks of uncertainty over the richest match in cricket's history.

A London International Court of Arbitration panel had ruled that, as the match between England and the 'Stanford Superstars' (a team comprising the top players from the West Indies) had been sanctioned by the West Indies Cricket Board ("WICB"), it fell within the WICB's $20m sponsorship agreement with telecommunications operator Digicel. Sir Allan Stanford had planned to offer key sponsorship inventory, including the positioning of a logo on the team shirt, to other sponsors.

For Stanford and the WICB, the outcome could prove costly – it has been reported that under the settlement reached, Digicel will receive all one-day sponsorship inventory it enjoys under its sponsorship agreement (including its logo on the Superstars team shirt), assurances that arch-rival Cable and Wireless will not be involved in the sponsorship programme and its legal fees paid.

The golden rule that an event organiser mustn't offer rights over which it does not have control may seem a simple one, but it's easy to become entangled in a complex web of commercial rights in today's high value sporting world.

In ascertaining the rights it is able to offer sponsors, an organiser must consider individual player arrangements (whether personal endorsement, club or national team image rights), broadcast sponsorship and advertising, participating team sponsorship, governing body sponsorship and, increasingly, stadium naming rights deals.

It is essential that the interplay between these potentially competing rights is provided for in all relevant contracts and subordinate rights are identified and acknowledged as such by all parties. For example, if an event organiser wishes for a 'clean' venue in which to host its event (i.e. one without any existing signage rights/pouring rights for a brewer) in order that it may offer that inventory as part of a lucrative sponsorship package, not only must this be expressed in its staging agreement, but also in legally binding assurances from the controller of the stadium that it has excluded the event from any prior rights granted to its sponsors. It is not always possible to offer complete exclusivity to a sponsor, even where the rights holder is in an extremely strong bargaining position with the teams or participants involved. Certain essential items of equipment (bats, boots etc) are commonly accepted as 'tools of the trade' and it is usually open to a participant to use whichever tools he wishes. For that reason a team must usually provide for a carve-out of such items in its kit sponsorship agreement. Attempts to overcome this convention are rarely popular, as highlighted by the latest dispute involving Korean footballers and their national FA over the proposed $18.1m four-year extension of a Nike sponsorship which requires players to cover any non-Nike boot markings. Identifying, providing for and agreeing on these issues at the negotiation stage of a deal is essential - there are few things less productive to a relationship with a commercial partner than a court date prior to kick-off.

Broadcasting

EVENT BROADCASTING – THE LEGAL HURDLES

By **Oliver Hunt**, Partner and **Leo Avery**, solicitor, Onside Law

FOR BROADCASTERS of events with global interest the extent of the rights granted is key. Advice to any new event centres on the need to ring fence exclusivity by way of territory, language or platform and to deal with spillage.

When an event organiser negotiates exclusive deals with both nationals and pan-regional broadcasters it is important to avoid 'doubling-up' of exclusivity to broadcast in any given territory or in any language by carve outs or limiting the exclusivity to national/pan-regional categories.

Further, where a broadcaster transmits via satellite, cable, or the internet, it is possible to stipulate that all coverage outside of the exclusive territory of that broadcaster must be encrypted or blocked and that any permitted 'spilled-over' coverage can only be transmitted at an agreed time and in an agreed language. Nick Faldo's burgeoning US broadcasting career illustrates the point in that he has deals in the US with CBS on Network and the Golf Channel on cable, with other roles from time to time on the BBC and Sky in the UK. Each broadcaster wants protection of some form of exclusivity but the rights holder has ultimate control and if Augusta wants to sell CBS's coverage of the Masters containing Faldo's commentary to a rival cable channel or if the Golf Channel sells its rights to Setanta in the UK then the rights become harder to police in this globalised market.

Given normal roaming agreements, mobile licenses for a specific licensed territory often include an acknowledgement that third parties have rights to transmit footage outside that specific licensed territory and that their footage might be accessible to that third party's customers in that licensed territory.

The principle is often accepted provided there are restrictions on the international roaming service being marketed or promoted outside of the relevant territory. Other possible breaches of exclusivity need to be acknowledged and waived such as mobile devices being capable of receiving radio/audio signals and of accessing the internet.

Internet and mobile technology have made rights harder to pin down but the sophistication of new media provides new platforms to broadcast, webcast and phonecast a new event and new revenue streams. Events face numerous hurdles, with broadcasting issues being just one of many, but sport will always be a sought after commodity and the race to capitalise on this interest remains fierce.

THE SPORTING CROWN JEWELS

By **Nick Fitzpatrick**, partner, DLA Piper

THE PROTECTION given to 'crown jewel' sporting events (our so called 'listed events'), coverage of which is preserved for free-to-air television ('FTA'), faces an uncertain future.

The list itself is a political must-have: the debates around the recent Audiovisual Media Services Directive ('AVMSD') only serve to reaffirm that. But whilst the AVMSD enables EU Member States to designate events to be of 'major importance' to society, technology and some sports authorities are challenging the raison d'être for the list.

In the UK, the listed events legislation has long faced attack as having disproportionate effect, and these issues are neatly summarised by UEFA's challenge before the European courts. Essentially, UEFA is questioning whether certain parts of listed events really are of 'major importance to society' at all. Is a UEFA European Championship group game played between Russia and Sweden really of 'major importance' to a UK resident?

Currently, only the UK and Belgium list the European Championships in their entirety. UEFA have suggested that games involving the home nations, the opening game and the later knock-out rounds should be protected whilst most group games should not.

If UEFA's challenge is successful, all lists will be open to attack from rights owners. The packaging of future European Championships would inevitably be altered and it goes without saying that other listed rights owners would seek to follow suit in order to maximise rights fees.

To be successful, UEFA will have to persuade the court that Member States are wrong to list all matches in the European Championships, as this is disproportionate to the aim of ensuring events of major importance are widely viewed. In effect, the European courts would have to be prepared to overturn a government's own determination of its national interest.

FIFA has similarly appealed the approval of the Belgian list, which includes all matches at the World Cup Finals. This case is also pending in Europe.

If this were not enough, the UK Government faces an additional challenge. Following the digital switch-over in 2010, the number of channels theoretically capable of providing 'universal coverage' of listed events will significantly increase. This will help rights holders (as it's good for competition and should increase the number of potential bidders), but broadcasters too - for large events this should free up broadcasters to make more full and innovative sports offerings.

Increasingly, it looks like the law needs to be significantly reconsidered if it is not to become anachronistic.

IMAGE RIGHTS LAW IN SPAIN

By **Miquel Terrasa** and **Jorge Pecourt**, Cuatrecasas Sports Law Group

WHEN FOOTBALLERS IN SPAIN exploit their image rights themselves, they are subject to income tax at a rate of around 43 per cent. Players' image rights, however, can also be exploited through companies, either resident for tax purposes or non-resident.

Owing to the different tax rates levied on the various forms of exploiting image rights, we have in recent years seen image rights being assigned to companies that the players themselves hold, although they had no real image rights management activity, the rights being assigned simply to avoid higher tax rates.

This, combined with the fact that Spanish clubs began to channel the remuneration paid to players through image rights, gave rise to the 85/15 rule in Spain. This rule basically consists in paying players, as regular employment income, the amounts clubs pay to acquire the right to exploit their images. The rule obtains as long as the employment income players receive within a tax period is less than 85 per cent of the total amount they receive from employment plus the payment received for assigning their image rights. Because there are many ways to manage footballers' image rights, it is necessary to examine the specific circumstances of each player, especially when the image rights are assigned to a company. It is necessary to check whether the company carries out the necessary activity and has the means to manage image rights; if not, the tax authorities could consider the revenue the company receives from the player's image rights as the player's regular income i.e. income from employment, which would have a marginal tax rate of 43 per cent.