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ASSER International Sports Law Series

New Media and Sport

International Legal Aspects



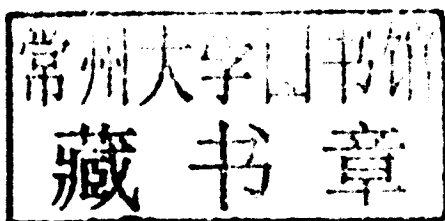
Katrien Lefever

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Series Information

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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.

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Chapter 1

Introduction

When do new media become old media?

Boyle and Haynes 2004, p. 3

During the past decade, the media landscape and the coverage of sports events have changed fundamentally. The emergence of new communication technologies, such as Internet and digital television, the convergence of these technologies, the multiplication of the number of devices through which content can be accessed and the rise of the active ‘prosumer’ have put their stamp on the way fans can consume sports content. Watching television is no longer a ‘sit back and relax’-experience. Due to technological changes, everybody can now consume the sports content of his choice, on the platform he prefers and at the time he wants. To be connected with the public, sports organisations and media operators exploit all opportunities provided by the different platforms. Early in the morning, when a sports fan wakes up and switches on his mobile phone, he will receive SMS alerts or pictures about the latest sports news. On his way to work, he can listen to the radio in the car or get more information on his mobile phone in the train. At work and during lunch break, he can consult highlights on different sports websites. On his way home, he can listen to the downloaded podcast with the most recent news. And finally, in the evening, he can watch the live matches on his television set at home. Especially the year 2008 was the dawn of this 360° sports multi-platform coverage approach¹: it was the year of a 24/7 experience of the Beijing Olympics, Wimbledon, Tour de France and EURO 2008. Although this evolution sounds very exciting, it is necessary for all actors involved, such as the public, the audiovisual media service providers, organisers of sports events, sports organisations, policy makers, etc., to be aware of the legal challenges this new media landscape is presenting.

Without a doubt, digitalisation has changed the media sector. Analogue broadcasting was characterised by scarcity. Due to spectrum scarcity and the pervasive influence of broadcasters, the perception reigned that regulatory control over television content was needed to ensure that normative goals, such as quality

¹ This 360° sports multi-platform coverage approach was presented by Gallop in Gallop 2008 at the Westminster eForum—The role of new media in sports and special events coverage.

of content, protection of minors, were met. As a result, legislators have adopted detailed rules for broadcasters on the protection of minors, advertising, etc., while media regulators monitor whether these content requirements are respected in practice. However, the rise of digital technology has increased the information flow and the amount of channels available, using only a fraction of the valuable capacity resources that were employed in the analogue past.² As a result, the validity of traditional media regulation in the digital environment is questioned. Moreover, it was sometimes proposed to leave the regulation of the broadcasting market solely to competition law. According to Ungerer, for example, “[w]e will move [...] to an environment that will be less subject to the sector specific rules built for the traditional broadcasting sector, and more to the general market regulation under competition rules”.³ Ariño referred to this way of thinking as a trend “to progressively abandon regulation and move towards a competition-law based model that will ultimately prevail”.⁴ Furthermore, in the past, the dissemination of information was the exclusive domain of the professional media, such as television, radio and written press. Thanks to electronic devices and the Internet, audiovisual content can now be created and distributed by every citizen. Additionally, digitalisation has brought about a shift from a ‘lean back’-experience of watching television and consulting information to a ‘lean forward’-experience. In the past, professional media decided which information would reach the public and when it would reach the public. Currently, the public itself decides where, when and on which device it will watch television or consult information. Once again, due to the increased participation of the public in creating and distributing content, the question needs to be asked whether government intervention in the broadcasting sector is still justified. As a result, the question rises whether the premise on which media regulation was based will still serve as the basic assumption for the regulation of the media sector in the future. Or in other words, would the shift from scarcity to abundance and from mass media and passive consumers to media for mass self-communication and active ‘prosumers’ undermine the premises from which current media regulation starts, i.e. scarcity and one-way selection of information at the central level of the broadcaster. In this book, it will be examined whether media regulation has still a role to play in guaranteeing access to live and full sports coverage in the new media landscape.

Considering the importance of digital content regulation and the current concerns regarding access to sports content in the new digital media environment, the need for legal research is pressing. It is clear that new technologies and new media models pose challenges for industry, academics and policy makers. There exists no doubt that legal uncertainties will increase in the coming years. Hence, it is important to build a solid basis of legal expertise around this issue, so that appropriate input can be presented in sight of regulatory initiatives in a setting of

² Cowie and Marsden 1999, 54–55; Tambini and Verhulst 2001, 5–6.

³ Ungerer 2005, 3.

⁴ Ariño Ariño 2004, 101.

new media. Despite the omnipresence of sport in the media, the level of research focussing on the relationship between media and sports was only recently established as a significant academic field. One should realise that in the Treaty of Rome sport was not even included in the competences of the European Economic Community. Only when the Lisbon Treaty entered into force, for the first time in European history, sport has been integrated in the primary law of the EU. Unfortunately, the White Paper on Sport, the cornerstone of the European Commission's actions regarding its new power, only briefly touches upon the public's access to sports coverage. Given that the latter plays an important role when dealing with the societal function of sport, this book aims at contributing to a more in-depth analysis of the public's right to access to live and full coverage of sports events. The objective of this book is to study the impact of the rapidly changing information society on the existing legal framework guaranteeing the public's access to sports content, especially media and competition law.

Access to sports content covers a broad area of topics, going from access at downstream level to access at upstream level or access to live and full coverage of sports events to access to short news reports. However, it is not the objective of this book to examine all these issues. As already indicated above, the aim of this book is to examine how competition and media law guarantee access to live and full sports coverage for the public in the new media landscape. This implies that the following issues will not be dealt with in detail, but only be highlighted when necessary: right to short news reporting, copyright, image rights, ownership of sports broadcasting rights, etc.

This book is composed of three main parts and is followed by a conclusion. Part I gives a detailed overview of the synergies between actors of the sports/media complex and explains how the changing media landscape has driven this sports/media complex into a new dimension. Second, the specificity of the sports sector will be described. In doing so, both the economic and societal function of sport will be highlighted. This includes a description of the new Article 165 of the Treaty on the Functioning of the European Union, which is officially recognising the specificity of sport. Third, it will be examined whether sports coverage, particularly live and full coverage of sports events, could be protected under Article 10 of the European Convention on Human Rights. Fourth, the distinction between a viewer as a citizen and a viewer as a consumer will be described. In particular, it will be examined whether Article 10 of the European Convention on Human Rights protects the public's access to sports content, both in its role as consumer and citizen. Finally, the question whether the changing media landscape and the changing sports/media complex would have an impact on the regulatory process of the broadcasting sector will be touched upon. Once the concepts and the building blocks of the book are clearly demarcated in Part I, Part II will focus on the question whether the technological changes in the media landscape have influenced the way competition authorities are dealing with the public's access to sports coverage. The European Commission and national competition authorities have made use of competition rules in order to ensure that access to exclusive broadcasting rights of sports events is not unduly restricted by anti-competitive practices. In order to

ensure access to those rights, competition authorities have shaped the conditions for selling, acquiring and exploiting sports broadcasting rights to establish open and effective competition. In this Part, the *UEFA Champions League* case, *German Bundesliga* case, *FA Premier League* case, *EBU/Eurovision system* case, *German public broadcaster state aid* case, *Newscorp/Telepiù* case, *Audiovisual Sport* case, *BSkyB* case and the *Telenet/Canal+* case will be discussed in detail. The *Flemish public broadcaster state aid* will be briefly highlighted. In Part III, the sector-specific measure that is in place in EU Member States to safeguard the public's right to information, namely the 'list of major events' mechanism, will be critically analysed and discussed. The aim of Part III is to evaluate in detail the 'list of major events' mechanism and to examine whether this mechanism is still adapted to guarantee the public's right to information in the digital media landscape. As a way of conclusion, Part III proposes the introduction of a 'must-broadcast' obligation in order to render the 'list of major events' mechanism more effective. In the conclusion, the findings from the previous Parts will be integrated.

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