The legal nature of media rights in sport: part two[1]

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The United States

The legal position in the United States relating to media rights in sport is still largely as laid down in *Pittsburgh Athletic*.[3] The court in this case noted a number of reasons why a proprietary interest worthy of protection indeed existed in sports events:

1 the specific baseball club had built a sports stadium at great cost and continued to incur expenses for the maintenance thereof;
2 the club ensured that players were well compensated for their participation in the relevant matches;
3 the club created a spectacle by organising the games;
4 the club controlled access to the stadium and the games played there and baseball fans who wished to attend the games were required to pay an entry fee for the privilege to do so.[4]

The effort and cost which the club was prepared to incur for staging baseball games resulted in the proprietary interest being vested in the club. These included the exclusive rights, at least while games were in process, to disseminate or publish news, reports, commentary or descriptions of the games, as well as the right to transfer such rights to licencees. Any unauthorised broadcasts of games infringed on these exclusive rights of the club and constituted wrongful competition.[5]

The ruling has since been followed by courts in some US states in actions relating to media rights in sport[6], while the courts in other states had, apparently as a result of their own analysis of the applicable law, come to similar conclusions[7].

In the *Madison Square Garden* case[8] the New York Court of Appeals followed a similar approach[9] and added that the owners of a sports arena and the *New York Rangers* ice hockey team had with great diligence and at great cost built up a particular goodwill. They were consequently entitled to protect their name, reputation, goodwill and business interests against wrongful competition.[10] In *University of Notre Dame Du Lac v. Twentieth Century-Fox Film Corp*[11] the New York Court of Appeals further stated that the mere use of the claimant's name and symbols, including images of the claimant's football team, boiled down to the defendant assuming the proprietary interest of the claimant, commercially exploiting the interest without the authority of the owner, diluting the economic value of the interest and thereby creating a risk of loss for the claimants. This in itself amounted to wrongful competition and it was not necessary for this purpose that the claimant had to demonstrate any degree of passing off.[12]

Edwards[13] is of the opinion that there is a close link between media rights in sport and every individual's common law right of publicity which is derived from the right to privacy in a number of US states. The right to privacy is protected by way of the tort of *invasion of privacy.*[14] This *tort* can be committed in any one of four ways. Privacy is violated by:

1 intruding into the physical and intimate sphere of the claimant;
2 through publication in breach of the general values of decency and respectability;
3 through publication which puts the claimant in a false light, and
4 by using the images of the claimant for commercial gain without his or her consent.[15]

The fourth category is also known as the *tort of commercial appropriation* or the *tort of violation of the right to publicity*.[16] This relationship between media rights in sport and the common law rights to publicity of the individual is abundantly clear. The *locus classicus* with respect to the individual's right to publicity in the United States is the judgment of the Second Circuit of the Federal Court of Appeals in *Haelan Laboratories Inc v. Topps Chewing Gum Inc*,[17] where the court, referring to the *Madison Square Garden* case[18], held that a right to publicity indeed exists. Such a right can only be meaningful if the holder of the right could exploit it exclusively and prevent others from using the image for commercial gain without the consent of the rightful owner. The basis for the protection of the right to publicity in accordance with these principles therefore lies exclusively in the financial interest inherent in the image of the individual.[19] It is consequently clear that media rights in sport in general, just like publicity rights of each individual, are protected in the United States based on the principle that everyone is entitled to protect their name, reputation, goodwill and business interests against wrongful competition.[20]

However, this protection is not absolute and in the *Notre Dame* case[21] the New York Court of Appeals explained that the right to freedom of speech in the First Amendment placed a restriction to allow room for news reporting, discussion, criticism and satire.[22] However, if the broadcast had taken place with the intent of gaining a commercial advantage from the goodwill and reputation of the sports club, reliance could not be placed on the First Amendment for protection.[23] In *Wisconsin Interscholastic Athletic Association v. Gannett Co Inc*[24] the Seventh Circuit of the Federal Court of Appeals distinguished between reporting or news coverage of a sports event which is protected by the First Amendment and thus permissible, as opposed to the broadcast of the entire event, which is not protected and not permissible without the necessary consent. The court ruled that the First Amendment does not allow the media to usurp the labour of others without consent or rendering some consideration in return.[25]

Conversely the Federal district court in *National Football League v. Governor of the State of Delaware*[26] ruled that the Delaware lottery, which in effect allowed par-

ticipants to gamble on the weekly results of American football matches, was not unlawful as the defendants had in no way used any symbols, trademarks or trade names of the claimant and only made use of information – match fixtures and final results – which the claimant had already published and the defendant could have obtained from several public sources. The mere fact that the defendant had benefited from the popularity of football was not sufficient for the conduct to be classified as wrongful competition.[27] In *CBC Distribution and Marketing Inc v. Major League Baseball Advanced Media LP*[28] the Eighth Circuit of the Federal Court of Appeals reached the same conclusion with respect to fantasy sports leagues.[29]

England

Questions with regard to the nature and extent of media rights in sport as such have never served before the English courts. Nevertheless, it is often indicated[30] that, as a result of the judgments in *Our Dogs*[31] and *Victoria Park Racing*,[32] English law does not acknowledge that there is any proprietary interest inherent in sport and that media rights in sport as such therefore cannot exist.[33] In accordance with this approach sports broadcasts in English law are therefore controlled by the person who holds the keys to the stadium.[34] Media rights are created and managed by contract only. By exercising control over access to the stadium, stadium owners, sports federations, sports clubs, sports leagues or promoters also control who would be in a position to broadcast the specific sports event.[35] By printing a restraint on tickets to an event which prohibits ticket holders from disseminating any images, photographs or other information concerning the sports event, the exclusivity of the media rights can be protected.[36]

Just as the ladies' dog show[37] a century ago provided an indication of how the early disputes regarding media rights in sport would have been decided, a more recent unusual case gave an indication that English law may have moved on from that position. It seems that future disputes regarding media rights could move in a direction where a protectable proprietary interest inherent in sport and the attendant media rights could indeed be recognised. The case of *Douglas v. Hello! Ltd*[38] dealt with the wedding of two famous movie stars, Michael Douglas and Catherine Zeta-Jones, and the publication of photographs taken during the wedding. Before the wedding the couple had granted the exclusive rights to take and publish photographs of the wedding to the publishers of *OK!* magazine for a fee of £ 1 million. The contract also provided that the couple could exercise strict control over the selection of the photographs destined for publication. However, a *paparazzo* had, without the knowledge of the couple, gained access to the proceedings, taken photographs without consent and offered them for sale to various publishers. The publishers of *Hello!* magazine eagerly snapped up the photographs. The end result was that, after an effort to obtain an injunction from the publishers of *Hello!* was turned down,[39] the issue of *Hello!* with the unauthorised photographs of the wedding was published on the same day as the issue of *OK!* with the authorised photographs.

The couple and *OK!* instituted claims against, amongst others, *Hello!* and the *paparazzo* involved and the court of first instance found in favour of the claimants.[40] On appeal the Court of Appeal upheld the judgment in so far as it related to the demands of the couple. Lord Phillips ruled that the taking and publication of the unauthorised photographs alone had violated the couple's privacy.[41] But more importantly for this discussion, Lord Phillips also examined the actions of the respondents to the extent that the taking and publication of the unauthorised photographs had jeopardised the couple's contract with the publishers of *OK!*. He ruled that the couple had taken reasonable steps to restrict access to the wedding as well as to limit the taking and publication of photographs, that the publishers of *Hello!* had been aware that the couple were intent on the commercial gain to be made from the privacy of their wedding and publication of authorised photographs, that the publishers of *Hello!* had been aware that the photographs had been taken without consent and that they had nevertheless published the unauthorised photographs.[42] Lord Phillips summarises the English law in this regard as follows.[43]

Where an individual (the owner) has at his disposal information which he has created or which is private or personal and to which he can properly deny access to third parties, and he reasonably intends to profit commercially by using or publishing that information, then a third party who is, or ought to be, aware of these matters and who has knowingly obtained the information without authority, will be in breach of duty if he uses or publishes the information to the detriment of the owner. We have used the term "the owner" loosely.

He consequently found no reason to set aside the trial court's findings regarding damages and putative license fees. He added that the couple had a strong case, that their initial application for an injunction should have been successful and that damages in these circumstances could not be an adequate remedy.[44]

But the court rejected the claims of *OK!* as the court believed that confidentiality only existed with respect to the authorised photographs and that no such obligation in respect of the unauthorised photographs could be found. In addition *OK!* could not prove that *Hello!* had published the unauthorised photographs with the intention of interfering in the business interests of *OK!* or to prejudice *OK!*.[45] On further appeal the former House of Lords was requested to reconsider the claims of *OK!* against those of *Hello!*,[46] but *Hello!* accepted the ruling of the Court of Appeal with respect to the claims of the couple.

In a majority decision the House of Lords held that the claim of *OK!* was concerned with the protection of confidential commercial information. The publication of the unauthorised photographs by *Hello!* had violated this confidentiality. This situation therefore entitled *OK!* to damages and the amount of just more than £ 1 million, which the trial court had originally granted, was therefore appropriate.

Lord Hoffmann explained that firstly it was of no importance that the confidential information had any bearing on the personal life of the couple. It may as well have been information about anything else for which a newspaper would be willing to pay.[47] What is important is that the couple had arranged their wedding in such a way that they could achieve confidentiality and would be able to control the flow of information. There is no reason why the couple could not use that confidentiality to exclusively release specific information like photographs to *OK!* for publication, in which case the specific photographs would also become confidential information with a commercial value to *OK!*. The manner in which *Hello!* had obtained the unauthorised photographs was a clear violation of the confidentiality and the later publication of the authorised photographs could not undo this violation.[48] In addition,

Lord Brown opined that the publication of the authorised photographs was only a partial disclosure of the wedding and that it therefore did not remove or set aside the confidentiality of the wedding itself and by implication that of other photographs of the wedding.[49]

Lord Hoffmann further explained that the information was worthy of protection, not because it would affect the image or privacy of the couple, but simply because it was information of commercial value over which the couple had exercised sufficient control to make it confidential.[50] Lord Brown added that the couple, regardless of any right to privacy, was entitled to transfer their exclusive rights for taking and publishing photographs relating to the marriage. As OK! had paid to acquire those exclusive rights, they should be able to protect those exclusive rights and obtain the necessary legal remedy.[51]

If the couple is replaced with a sports club, the wedding is replaced with a sports event, the photographs are replaced with images and the magazines are replaced with media networks, the ruling of Lord Phillips in the Court of Appeal[52] together with the judgments of Lords Hoffmann and Brown in the House of Lords,[53] give a clear indication that a sports club, according to English law, has a commercial interest in the matches that it organises, that the sports club can control the flow of information regarding the matches and that such control will mean that information regarding a match is confidential. A sports club can also grant a media network the exclusive right to disseminate information of a match in the form of images or the broadcast of live commentary. The rulings of Lords Hoffmann and Brown in the House of Lords[54] would imply that a media network which had acquired such exclusive rights could in English law protect these rights from infringement by competitors.

Germany

German law regarding media rights in sport is at first glance remarkably similar to English law. Media rights in sport are derived from the so-called *Hausrecht* or (house) occupier's rights which are recognised under the protection of ownership in Buch 3 Abs 1 of the *Bürgerliches Gesetzbuch*.[55] German law does not recognise media rights in sport as such,[56] but the occupier's rights allow the owner or occupier of premises to decide who may enter, under what conditions the premises may be entered and to whom access can be refused.[57] This means that a sports club, as the occupier of a sports stadium, may reserve the right of admission and may set conditions such as charging admission before anyone may enter the relevant premises. It includes the power to reserve access to the media and to charge fees for the provision of so-called *Hörfunkrechte* or radio rights, as well as *Fernsehrechte* or television rights.[58] The terminology is somewhat misleading because granting approval for broadcasting of a sports event is not legally considered as the transfer of any rights, but would be derived from lawful occupation of the premises if the organiser of the event authorised certain media networks to access the premises and stipulated that it would endure their particular disturbances on the premises.[59]

However the *Bundesgerichtshof,* in a case[60] pertaining to cartel activities around the central marketing of television rights for home matches in the European football leagues by the *Deutscher Fussball-Bund,* gave an indication that sports clubs indeed could have proprietary interests in the matches which they organised. The court held that every football club promoted the marketability of its club and thus was the sole holder of the *Vermarktungsrechte* or marketing rights of the club. Matches are arranged with much zeal and financial inputs from the home clubs. Home clubs provide the stadiums with all their facilities, ensure that tickets for the matches are sold, control the access and egress of spectators as well as the sale of merchandise, food and drinks on the premises. In addition the players, coaches, assistants and managers of the home club, just as those of the visiting club against whom they play, create the product which stimulates the interest of the spectators. Consequently the home clubs are, at least from a competition law point of view, the original co-owners (with their opponents in every match) of the marketing rights with respect to every home match the club presents.[61] This allows clubs to protect the marketing rights under art. 823 (1) (liability for damages) and art. 826 (wilful damage caused contrary to public policy) of the *Bürgerliches Gesetzbuch*.[62] The *Bundesgerichtshof* also held that an enterprise which printed and distributed programme booklets regarding various sports events, wrongfully competed with the organisers of boxing tournaments who planned to sell their own programme booklets to spectators before and during tournaments.[63]

But the broadcast of short video clips depicting only a few scenes from a match or event does not constitute wrongful competition with the sports league and is not a violation of any other rights of the sports league, even if the video clips are posted on an internet website that relies on advertising to generate income.[64] In addition art. 5 of the *Rundfunkstaatsvertrag* or state broadcasting agreement stipulates that television networks may freely compile and transmit footage for use in short news features of events that are open to the public and elicits some general interest.

The Netherlands

The position in The Netherlands is similar. In a dispute between the *Koninklijke Nederlandse Voetbalbond (KNVB)* and the *Nederlandse Omroep Stichting (NOS)* regarding the charging of media fees to broadcast football matches, the *Hoge Raad*[65] in The Netherlands ruled that competitions organised by the KNVB are held in stadiums or on private premises organised in such a manner that they are accessible to the public, but in order to obtain an income from such matches, only against payment of gate fees. Part of what makes attending matches attractive to the public can be provided by television and radio broadcasts and depending on the extent of the broadcast a more complete picture of the match can be shown, and if not coinciding with the match itself, it can follow shortly thereafter. As a result it may be expected that a portion of the public could choose to watch the broadcasts instead of attending the match concerned. In this regard it is to be expected that the *KNVB* and the clubs will only give permission for broadcasts on payment of a reasonable fee and will prohibit such activities as far as practically possible in the absence of payment. In principle the *KNVB* and the clubs may attach restrictions to the permission to access the stadium or match premises, thus using the powers deriving from their ownership or user rights of such stadium or premises.

The *KNVB* can therefore claim protection with respect to the broadcasting of matches. This means that if someone broadcasts whole or partial matches without the necessary consent, they do so wrongfully. News releases to keep the public abreast of developments during matches, as well as reports that describe the progress of the game after the conclusion of the match are not affected by this.[66]

This ruling would later bring the *KNVB* in conflict with one of the leading football clubs in the Netherlands when Feyenoord violated the *KNVB* rules and decided to market the media rights to all their home matches in *De Kuip* stadium individually and made no payments to the *KNVB* in this respect. The *KNVB* was of the opinion that the media rights of all the matches being played in the *KNVB* leagues collectively belonged to the *KNVB* and all the clubs. The *Hoge Raad*[67] was called upon to reconsider the ruling in *NOS/KNVB*[68] and found that the responsibility for arranging matches mostly rested with the home clubs and that the home clubs largely carried the economic risk of the matches. Consequently the media rights for football matches belong to the home clubs and neither the ruling in *NOS/KNVB*[69] nor the mere fact that the *KNVB* had for dozens of years collectively traded the media rights, meant that the *KNVB* was jointly entitled to the media rights. The media rights also do not belong to the players and the granting of media rights does not violate the *portretrechten* or image rights of players because players are firstly well compensated for their services and secondly the players participate in football matches as members of a specific club's team.[70]

In addition the court in *KNVB/Feyenoord*[71] held that the KNVB rules which required the joint marketing of media rights and effectively appointed the KNVB as "*a "central sales office'*"", are in contravention of applicable competition laws. At the same time the court came to the conclusion that the verdict in *NOS/KNVB*[72] in no way indicated that media rights could not be a protectable proprietary interests under art. 3:6 of the *Burgerlijk Wetboek*. The implication is that when sports broadcasts take place without the authorisation of the organiser, the media network involved could be guilty of a wrongful act in accordance with art. 6:162 of the *Burgerlijk Wetboek* and may accordingly be held accountable.

Australia

In contrast the Australian authorities, partly in response to *Victoria Park*,[73] but mainly with a view to the games of the sixteenth Olympiad which would take place in Melbourne in 1956, sought to obtain greater clarity regarding broadcasting rights in sport through legislation. The *Broadcasting Act*[74] was amended[75] by adding art. 115 which prohibited the telecast of a sports event if the event was held at a place where an entrance fee is charged and the telecast is produced using equipment stationed outside the premises. It was a rather half-hearted attempt at reform since art. 115 only referred to telecasts (and thus did not prohibit radio or other broadcasts) and only prevented someone from taking images outside the sports field for telecasting (and thus did not cover taking unauthorised footage inside the stadium). The article did not acknowledge that there was any proprietary interest vested in a sports event and therefore as far as this aspect is concerned, the legal position laid down in *Victoria Park*[76] was not affected. This law was repealed in 1992[77] and although the *Broadcasting Services Act*[78] contains various provisions regarding sports programmes[79] and sports channels[80], there is no provision which acknowledges a proprietary interest in a sports event as such. This means that the finding in *Victoria Park*[81] still contains the prevailing principles in accordance with which media rights are handled in Australian law.

France

The French were more cautious when they embarked on the process to extensively legislate for the control of media rights in sport. Art. L333 of the Code du Sport recognises media rights or more specifically a *droit d'exploitation* or the right to exploit a sports event. The article determines that sports federations as well as some organisers of sports events are the owners (*propriétaires*) of the relevant media rights regarding the sports events or competitions that they organise. The organisers to whom it refers are any natural person or juristic person, other than a sports federation, who organises a sports event where the prize money or other prizes exceed the value prescribed by the minister responsible for sport. Art. L331-5 requires that consent to broadcast such an event must be obtained from the relevant sports federation. The *Code du Sport* does not define the precise extent of the media rights, but audio-visual exploitation is mentioned while art. L333-1-1 states that it may also include the right to authorise betting on the relevant matches. In addition the *Cour de Cassation* ruled that media rights also include the distribution of photographs of a sports event.[82]

Any sports federation may in part or in full transfer their audio-visual media rights with respect to any particular season to sports clubs which participate in a professional league. The league may then exploit the audio-visual media rights for the benefit of all the clubs in the league.[83] Professional leagues may commercially trade the audio-visual rights subject to any restrictions which the French parliament may impose. The rights must be bundled and granted for a limited period, taking into account competition law.[84]

Journalists and employees of print as well as electronic media have free access to sports events, subject to considerations of public safety and the capacity of the premises to accommodate them.[85] Sports federations may compile their own rules regarding access to information. These rules must be presented to the *Conseil supérieur de l'audiovisuel* or administrative authority for electronic media for approval.[86] The rules must specify which restrictions apply to a specific event as well as which areas are available for use by journalists and employees of the media.[87] Representatives of the electronic media to whom no media rights had been sold, may not take images of the event or match itself without the consent of the organiser.[88]

The sale of media rights may not prevent other electronic media services from providing information to the public. Neither the purchaser nor the seller of the media rights may prevent other media networks from utilising brief excerpts from the right holder's footage free of charge for this purpose.[89] Such excerpts must identify and acknowledge the rights holder of the material. The sale of media rights further does not prevent the live or deferred broadcasting of match commentary on the radio.[90]

South Africa

The issue concerning the nature of media rights has not yet been put to South African courts. As previously stated, neither the Roman law nor the Roman-Dutch law recognised any protectable proprietary interest inherent in sport. Moreover, there is no statutory provision in South Africa which describes or safeguards any proprietary interest in sport. Consequently it is sometimes stated that there is no basis in South African law on which media rights in sport can be recognised.[91] Therefore there is no direct way in which sports events can be protected against unauthorised transmissions.[92]

The position is that media rights are mere

personal rights which are exclusively created and regulated by contract and that protection must be indirectly created through normal contractual remedies and the common law ownership or occupier's rights that a sports club may have in respect of a sports stadium.[93] Through the exercise of access control to the stadium, sports clubs can control who would be in a position to broadcast the particular sports event.[94]

A contract for the allocation of media rights in general provides that a media house agrees to pay an agreed amount to the organiser of a sports event in exchange for the organiser's consent to provide a measure of exclusive access for the particular media house so that the media house can provide live or deferred coverage of the match by radio, television, the internet or otherwise.[95] According to this view it is possible to protect the exclusivity of the media rights by limiting the access of other media houses and by stipulating on the entry tickets that ticket holders are prohibited from disseminating any images, photographs or other information about the sports event.

This analysis poses three insurmountable problems.

1 The view that media rights are mere personal rights that arise by contract means that the general principles of the law of contract would apply to media rights. The most important of these is the doctrine of privity of contract in terms of which only the parties to the contract are generally bound to the terms of the contractual obligations.[96] Consequently the granting of media rights by contract will only be binding on the parties to the contract, while third parties who also want to broadcast the particular match will not be bound by the particular contract and can therefore not in this way be prevented from broadcasting the match or event.

2 Any restriction prohibiting ticket holders from disseminating any images, photographs or other information pertaining to the sports event would infringe on the common law freedom to trade and therefore constitutes a restraint of trade.[97] A restraint of trade is only valid if the restraint is aimed at protecting a legitimate interest.[98] If there is no proprietary interest inherent in sport and if no media rights in sport as such exist, there can consequently be no legitimate interest which can be protected through a restraint of trade. In addition, the courts have found that the mere limitation or exclusion of competition is not a legitimate interest which could be protected by means of a restraint of trade.[99] This means that restrictions which are printed on entry tickets will be unenforceable and will not necessarily be able to prevent spectators from producing any images, taking photographs or disseminating other information regarding the sports event.

3 The approach that media rights depend on access control provides no protection where a particular sports event, like the Comrades Marathon, takes place in public facilities. In such cases the organiser cannot claim any ownership or occupier's rights and therefore entry cannot be reserved.

The analysis also creates an absurd situation: if someone for example buys a watch (or any other item) for € 50 and a third person infringes on the purchaser's property rights, the buyer would have property law and other civil remedies at his disposal to protect his interests. If a media network pays hundreds of millions of euros for exclusive media rights in sport, and a third person infringes on the exclusivity, there is according to this point of view, no legal remedy at the disposal of the media network to protect that investment. Or, if someone hastely takes a photograph with a mobile phone and a third party publishes the photograph without authorisation, the person who had taken the photograph[100] has statutory and other civil remedies at his disposal to protect his copyright and related rights. If a sports club, however, spends millions of euros and expends thousands of hours of labour to make a sports event possible, and a third party broadcasts the event without the required authority, there is in accordance with this point of view no remedy at the disposal of the sports club.

It is simply not tenable in a modern legal system that someone can simply feed on the labour and investment of another by effectively depriving him of the fruits of his labour and investment. The point is that sports bodies bear the financial and other risks for the sports events which they organise. And as courts elsewhere have indicated, sports events are only possible if sports bodies with great diligence and cost contract, coach and remunerate players, referees and other officials, make stadiums with all their facilities available and maintain them, see to it that entry tickets are sold for the matches and control the entry and egress of spectators on the premises in the interest of public order and security.

Sports bodies primarily have five sources of income from which expenses with respect to sports events can be recovered:

- government subsidies,
- gate fees,
- commercial sponsorships,
- merchandising, and
- media rights.

If sports bodies are unable to protect these resources, professional sport (and many amateur sports) simply would not be possible. Government subsidies contribute less than one percent to the total revenue of sports federations in South Africa[101] and therefore other sources must be sought. Gate fees are protected by the general principles of property law according to which the right of admission can be reserved,[102] merchandise is protected in terms of trademark law,[103] the common law prohibition on passing off[104] and assimilation[105] and statutory measures aimed at counterfeit goods[106], while commercial sponsorships can be protected against illicit advertising by implementing statutory measures against ambush marketing.[107]

To still maintain that media rights cannot as such be legally protected is just not tenable, especially if one considers that sports federations in South Africa earn about 60% of their revenue from the trading of media rights. Media networks like Supersport for example pay hundreds of millions of euros annually in television rights for various sports.[108] Media networks clearly make huge investments in sport and professional as well as amateur sport will barely be able to survive without these investments.

Moreover there is also a greater public interest which has to be considered. Sport fulfils various socio-economic and political functions in our society.[109] One of these is the promotion of fitness and public health, which in turn aims to promote productivity and reduce the demands on public health services.[110] Sport also offers the opportunity to grow a sense of national unity, especially in a country like South Africa that has a sad history of division.

One needs only to refer to the iconic occasion when president Nelson Mandela, during the final match of the Rugby World Cup in 1995, wore a Springbok jersey with captain Francois Pienaar's number 6 on the back, to really understand the clear impact of sport in this regard. In addition, sport makes a real contribution to the economy and the creation of jobs.[111] Sport annually contributes about R 6 billion (approximately € 400 million) in direct spending to the South African economy.[112] But some big sports events in themselves make a huge impact:

- the rugby tour of the British and Irish Lions in 2009 attracted about 37,000 tourists to South Africa and in six weeks contributed about R 1.5 billion (approximately € 100 million) to the gross domestic product of South Africa;[113]
- the dress rehearsal for the FIFA World Cup, the Confederations Cup, also held in 2009, attracted some 15,000 visitors to South Africa and contributed approximately R 700 million (approximately € 55 million) to the economy;[114]
- in the same year the Indian Premier League cricket tournament was moved to South Africa as a result of security fears surrounding the general elections in India. This tournament contributed about R 1 billion (approximately € 80 million) to the economy;[115]
- the FIFA World Cup held in 2010 attracted an estimated 400,000 tourists to South Africa who contributed about R 12 billion (approximately € 1 billion) to the gross domestic product.[116]

When one considers that all these events occurred during the worst economic crisis since the Great Depression, the figures are stunning. To this must be added the jobs which were created directly or indirectly as a result of the above-mentioned sports events in the construction industry, the tourism industry and other fields. Then it is clear that it is in the public interest to protect sport as an economic industry. This can only be done if the investments that make sport possible are also protected.

The mere fact that there seems to be no common law basis in South Africa for the recognition of media rights in sport, does not mean that such rights cannot be recognised. The courts have an inherent power, after all, and in some cases a constitutional duty[117] to develop the common law.

If the position in the United States is carefully analysed, a clear answer for the recognition and protection of media rights in sport, can be derived in South African law. As already explained above, the protection of media rights in sport in the United States is based on the principles relating to wrongful competition and in the United States there is a close link between the recognition of media rights in sport by the courts in some states, and each individual's common law right of publicity which is derived from the right to privacy in various states. The basis for the protection of the right of publicity in terms of these principles is solely the financial interests which the individual has in his image[118] while media rights in sport, just like the publicity rights of every individual, in the United States in general, are protected under the principle that everyone is entitled to protect their name, reputation, goodwill and business interests against wrongful competition.[119]

The principles regarding wrongful competition can be applied to recognise and protect media rights in sport in South African law. The law has long since recognised that every business has a subjective right to goodwill.[120] A sports federation as an enterprise thus also has the subjective right to goodwill. This goodwill is not just a mere manifestation of the reputation of the company. Reputation is primarily a personality interest[121], but goodwill is indeed a proprietary interest which is vested in the estate of the relevant company.[122] Goodwill is probably the most important asset of any business, because without the ability to attract customers no company would be able to exist meaningfully.

Goodwill is an immaterial asset in the patrimony of an enterprise just as confidential information or trade secrets would be immaterial assets for such an enterprise. As Judge Diemont explained regarding the latter[123], a company acts unlawfully when it uses confidential information, which a competitor had developed with great diligence and skill, for its own benefit. The unauthorised use of confidential information involves usurping a commercial asset which is the result of the diligence and skill of another. According to Judge Diemont it is difficult to see how such presumption would in principle differ from the case where someone steals merchandise from a shop. If it is established that goodwill is an asset, there can surely in principle not be any differentiation between the wrongful use of goodwill on the one hand and the wrongful use of any other trade asset, like confidential information, on the other hand. Judge Van Dijkhorst in fact explains[124] that the misuse of confidential information or trade secrets in itself, would also constitute an infringement of goodwill. Consequently, there is no underlying difference between the abuse of confidential information and misuse of goodwill. Eventually both boil down to specific forms of unlawful competition. The questions then are:

- Is the goodwill attached to a specific sports event not an asset which has been developed with zeal and ingenuity by the relevant sports federation?
- Is the progress of the game and the run of play where the right of access to the stadium is reserved, not confidential information?

The customers of a sports federation are to a large extent the spectators who follow the fortunes of their favourite sports teams with great enthusiasm. Media networks compete directly with sports federations to acquire the patronage of these spectators. Spectators who pay gate fees to attend a game, in general do not follow the game on television or radio, while sports enthusiasts who follow sports on television or radio usually do not pay gate fees at the stadium. Is the unauthorised broadcasting of a sports event then not also a clear violation of the sports federation's goodwill?

In addition to the proprietary interest in goodwill, there are also personality interests at stake.[125] Especially for the purpose of this discussion it is of the utmost importance that it is not only natural persons who have personality rights, but juristic persons like companies, in so far as it is appropriate, have personality rights like reputation and identity.[126]

It is a matter of fact that the proprietary interest in goodwill has a strong link with the personality interest in reputation.[127] However, goodwill as well as reputation is inextricably linked to identity. Goodwill or reputation is after all meaningless if it is not linked to a particular individual or enterprise which can be identified as such.[128] The unique attributes which underlie the right to identity, are at the same time also the characteristics which differentiate one individual or enterprise with a particular goodwill and reputation from another with a different goodwill or reputation.[129]

In this context identity refers to that uniqueness or peculiarity which identifies

a person or enterprise as an individual or individualises it and differentiates it from others. Identity includes the collection of attributes which differentiates the individual or enterprise from others.[130] In the case of an enterprise it firstly entails the registered and common law trademarks of that enterprise, but it entails much more. For example, it includes the manner in which stores are laid out – one could for instance enter any McDonald's fast food outlet anywhere in the world and immediately have a sense of familiarity. Identity also involves the specific merchandise of an enterprise and the manner in which it is packaged. In the case of a sports federation the "merchandise" is the sports event and the federation's identity is reflected in the tournaments and matches which are presented by that sports federation and which set it apart from other sports federations. When one for example thinks of the International Olympic Committee, it involuntarily conjures up the image of the Olympic emblem of the five coloured rings on a white background. At the same time one thinks of the grand opening ceremony of the Olympic Games, the lighting of the torch, the competition in a variety of sports codes, the presentation of medals to the winners and so on. These are all integral features of the identity of the International Olympic Committee. The same can be said of other sports federations and the tournaments they present.

The right to identity is violated if the unique characteristics of a person are used by another person for commercial gain without authorisation.[131] In addition to the unauthorised use of the image of the individual or company, such use primarily has a commercial motive which is solely aimed at promoting a product or service to recruit patrons.[132] This violation of the right to identity is therefore primarily linked to the unauthorised use of the individual or company's core characteristics with the intention of benefitting from it financially. The unlawfulness in this case is mainly vested in the violation of the right to freedom of association and the commercial exploitation of the individual or company.[133]

If it is established that every sports federation also has personality rights, and more specifically a right to identity, there can be no logical distinction between the case where the image of an individual was used without authorisation and the case where broadcasts of a sports event took place without the sports federation authorising the use of its image.

These personality rights could also form the basis for the recognition of a proprietary interest in sport. In South African common law[134] it is already accepted that the violation of personality rights could lead to financial loss and there is considerable authority that suggests that damages in such circumstances may be granted to an injured party whose personality rights have been violated.[135]

This has important implications regarding the right to identity. As a personality right is linked to the individual or company, it cannot be traded, but as a proprietary right, the right stands apart from the individual or company and in effect constitutes an immaterial asset which can be traded.[136]

The recognition and protection of a proprietary interest in sport can therefore legally be derived from the recognition and protection of several related proprietary and personality interests, namely goodwill, reputation and identity.[137] Consequently there is an important proprietary interest which can be traded in order for a sports federation to transfer the so-called media rights in an event exclusively to a particular media network. Where unauthorised broadcasts infringe on any of these rights of the particular sports federation, it is wrongful and the particular sports federation or other party concerned can take steps in accordance with the ordinary civil remedies to protect their interests. There is then also a legitimate business interest which may be protected by way of a restraint of trade by indicating on entry tickets that spectators may not disseminate any images, photographs or other information regarding the match.

If media rights in sport in South Africa can be derived from the recognition and protection of goodwill, reputation and identity, the next logical question would be to whom the rights belong. The answer is obvious – the sports body whose goodwill, reputation and identity are at stake – but in most sport there is not necessarily a single interested party. In a *Currie Cup* rugby match, for instance, the goodwill, reputation and identity of the home team and the visiting team are involved. It also involves the goodwill, reputation and identity of the South African Rugby Union, who organises the *Currie Cup* competition.

But it is not strange that several parties may have an interest in respect of the same legal matter. When a book is published, copyright in the text vests in the author, the photographer or artist has copyright in respect of any photo or image that appears in the book and the publisher has the copyright in the printed edition.[138] Just as the relationship between the rightful owners in the latter case is mutually regulated by way of contract, the various sports bodies that have an interest in a sports event can contractually regulate the transfer of media rights.

It is important to note that media rights in sport are not unlimited. In any action taken as a result of the infringement of a subjective right, a variety of conflicting interests will have to be weighed up against one another. When unauthorised sports broadcasts occur, the goodwill, reputation, right to identity and right to freedom of association of the sports federation are often weighed against the broadcaster's right to freedom of expression. It goes without saying that any unauthorised sports broadcast has to be wrongful before a sports federation can succeed with any civil action against a broadcaster. There are consequently some grounds of justification that could result in the unauthorised broadcast of a sports event not being wrongful. These grounds include, among others, consent[139], truth and public interest[140], fair comment[141] and parody[142].

Consent as justification speaks for itself, not only because of the rule volenti *non fit iniuria*, but also as the controversy regarding media rights in sport mainly revolves around the *unauthorised* broadcasts. The other grounds of justification, namely truth and public interest, fair comment and parody are similar to the grounds of justification such as news reporting which is allowed elsewhere in the world regarding sports events.[143]

Conclusion

Although there is no clear historical basis for recognising a proprietary interest in sport, it must be taken into account that sport in earlier times was more of a pastime than an economic enterprise. Modern sport has become a huge business which makes an important contribution to the world economy. As in any other industry, sports federations and sports clubs can rely on goodwill which has been built up with much expertise, diligence, effort and expense. It is consequently essential that the law must develop to take these realities into consideration.

Modern sport is only possible as a result of the huge investments media networks make in sport due to the fees they pay for the acquisition of media rights in sport. The goodwill that sports federations or sports clubs accumulate and the astronomical amounts of money media networks are prepared to pay for the right to broadcast sports events are a clear sign that a proprietary interest in sport exists; that such an interest can be traded by sports bodies; and that the right should be legally protected in the hands of the particular sports body or the media network to whom the interest has been traded. For the sake of convenience and in following the existing practice in industry, the proprietary interest could be referred to as "media rights".

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1 Part one of this article was published in the December 2014 issue of GSLTR at p. 6-12.

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3 Wolohan, "Sports broadcasting rights in the United States", in: *International Sports Law Journal* 52, 2007/3-4.

4 24 F Supp 490 492, 493 *ff.*

5 494.

6 For example see *Cable Vision Inc v. KUTV Inc* 211 F Supp 47 (Idaho); *National Basketball Association v. Sports Team Analysis and Tracking Systems Inc* 939 F Supp 1071 (New York); *Zacchini v. Scripps-Howard Broadcasting Co* 433 US 562 (Ohio); *Philadelphia Eagles Football Club Inc v. City of Philadelphia* 823 A 2d 108 (Pennsylvania); *Southwestern Broadcasting Co v. Oil Center Broadcasting Co* 210 SW 2d 230 (Texas).

7 For example see *Boston Professional Hockey Association Inc v. Commissioner of Revenue* 820 NE 2d 792 (Massachussetts); *Wisconsin Interscholastic Athletic Association v. Gannett Co Inc* 658 F 3d 614 (Wisconsin).

8 Loc. cit.

9 850 *ff.*

10 852.

11 15 NY 2d 940.

12 947.

13 "What's the score? Does the right of publicity protect professional sports leagues?", in: *Albany Law Review* 579, 1998.

14 For example see *Allison v. Vintage Sports Plaques* 136 F3d 1443; *Venturi v. Savitt Inc* 468 A2d 933; *Vassiliades v. Garfinnckel's Brooks Bros* 492 A2d 580; *Martin Luther King Jr Center for Social Change Inc v. American Heritage Products Inc* 296 SE2d 697; *Reeves v. United Artists Corp* 765 F2d 79.

15 *Ibid.*

16 *Ibid.*

17 202 F2d 866.

18 *Loc. cit.*

19 868.

20 852.

21 *Loc. cit.*

22 954.

23 953.

24 658 F 3d 614.

25 624. See the ruling of the federal high court in *Zacchini v. Scripps-Howard Broadcasting Co* 433 US 562.

26 435 F Supp 1372.

27 1377.

28 505 F 3d 818.

29 A fantasy sports league usually follows the events of real sports leagues. Participants act as "team managers" and can put together teams for their fantasy league from a pool of players who indeed participate in games of the different teams in the real league. If a player in the real league scores a point, that point is also given to any participant whom the particular player had included in his fantasy team. The winner of the fantasy league is the participant who by the end of the real league season has accumulated the most points in this way.

30 Barr-Smith "United Kingdom", in: Blackshaw, Cornelius and Siekmann (eds), *TV Rights and Sport: Legal Aspects* (2009) 549; Whittaker, McDonnell and Singh, "United we stand: collective media rights sales under challenge in England", in: *International Sports Law Journal* 11, 2003/3.

31 *Loc. cit.*

32 *Loc. cit.*

33 Whittaker, McDonnell and Singh, in: *International Sports Law Journal* 11, 2003/3.

34 Barr-Smith (2009) 549.

35 Barr-Smith (2009) 552 ff.

36 *Ibid.*

37 *Sports & General Press Agency Ltd v. Our Dogs Publishing Co Ltd* [1916] 2 KB 880.

38 [2005] All ER 128 (CA).

39 *Douglas v. Hello! Ltd* [2001] 2 All ER 289 (CA).

40 *Douglas v. Hello! Ltd* [2003] 3 All ER 996 (Ch).

41 *Douglas* (CA) 155.

42 *Douglas* (CA) 158 *ff.*

43 *Douglas* (CA) 158.

44 *Douglas* (CA) 193 *ff.*

45 Douglas (CA) 167 *ff.*

46 *OBG Ltd v. Allan; Douglas v. Hello; Mainstream Properties Ltd v. Young* [2007] 4 All ER 545 (HL).

47 *Douglas* (HL) 584.

48 *Douglas* (HL) 584 *ff.*

49 *Douglas* (HL) 627.

50 *Douglas* (HL) 584 *ff.*

51 *Douglas* (HL) 626.

52 *Douglas* (CA).

53 *Douglas* (HL).

54 *Douglas* (HL).

55 *Hörfunkrechte* 2006 *NJW* 377 BGH Urt v 08-11-2005 – KZR 37/03.

56 *Sportübertragungen* 1990 *NJW* 2815 BGH Urt v 14-03-1990 – KVR 4/88 2817.

57 *Hörfunkrechte* 379 par. 28-29.

58 *Hörfunkrechte* 379 parr 26 *ff.*

59 *Sportübertragungen* 2817.

60 *Europapokalheimspiele* 1998 *NJW* 756 BGH Beschl v 11-12-1997 – KVR 7/96.

61 *Europapokalheimspiele* 758 *ff.*

62 *Sportübertragungen* 1990 *NJW* 2815 BGH Urt v 14-03-1990 – KVR 4/88 2817.

63 *Box-Programme* 1958 *NJW* 1486 BGH Urt v 22-04-1958 – IZR 67/57.

64 *Hartplatzhelden* 2011 *NJW* 1811 BGH Urt v 28-10-2010 – IZR 60/09.

65 *NOS/KNVB* 1988 *NJ* 310 1266 1291-1292.

66 *NOS/KNVB* 1292.

67 *KNVB/Feyenoord* 2003 *NJ* 494 3823.

68 *Loc cit.*

69 *Loc cit.*

70 *CSR/de Clubs* 2014 *NJF* 222.

71 *KNVB/Feyenoord* (n x) 3848.

72 *Loc cit.*

73 *Loc. cit.*

74 33 of 1942.

75 *Broadcasting and Television Act* 33 of 1956.

76 *Loc. cit.*

77 s 28 of the *Broadcasting Services (Transitional Provisions and Consequential Amendments) Act* 105 of 1992.

78 110 of 1992.

79 For example see ss 1, 121G (5), 146D (2) - (4).

80 For example see ss 1, 130ZX (7).

[81] *Loc. cit.*
[82] *Société Andros/Motor Presse France et CDO Chamonix Defi Organisation Arrêt* nº 542 C Cass 17 mars 2004 nº 02-12.771.
[83] Art. L333-1.
[84] Art. L333-2.
[85] Art. L333-6.
[86] *Ibid.*
[87] *Ibid.*
[88] *Ibid.*
[89] Art. L333-7.
[90] *Ibid.*
[91] For example see Van Gaalen, "Who owns sport broadcasting rights", in: Panagiotopoulos (ed), *Sports Law Implementation and the Olympic Games* (2005); Cornelius, "South Africa", in: Blackshaw, Cornelius and Siekmann (eds) (2009) 491.
[92] *Ibid.*
[93] *Ibid.*
[94] *Ibid.*
[95] Burns, *Communications Law* (2009) 521 *ff.*
[96] *Johannesburg Country Club v. Stott* 2004 5 SA 511 (SCA).
[97] *Sunshine Records (Pty) Ltd v. Frohling* 1990 4 SA 782 (A) 794B-E; *CTP Ltd v. Argus Holdings Ltd* 1995 4 SA 774 (A).
[98] *Reddy v. Siemens Telecommunications (Pty) Ltd* 2007 2 SA 486 (SCA) 497C.
[99] *Automotive Tooling Systems (Pty) Ltd v. Wilkens* 2007 2 SA 271 (SCA) 277G.
[100] I hesitate to use the word "photographer" in this context.
[101] Moodie (2014).
[102] *Kingsway Caravan Park (Pty) Ltd v. Rudman* [1999] JOL 4884 (SE).
[103] Trade Marks Act (Act No. 194 of 1993). Also see Klopper and Van der Spuy (2012:142 ff.).
[104] Klopper and Van der Spuy (2012:109 ff.).
[105] Klopper and Van der Spuy (2012:122 ff.).
[106] Counterfeit Goods Act (Act No. 37 of 1997).
[107] a 15A Merchandise Marks Act (Act No.17 of 1941).
[108] Moodie, "Stricter regulations loom for SA sports broadcast rights", in: *Moneyweb*, 8 March 2010. Available at www.moneyweb.co.za/moneyweb-soapbox/stricter-regulations-loom-for-sa-sports-broadcast- (accessed 1 June 2014).
[109] Coakley and Pike, *Sport in Society: Issues and Controversies* (2009). See also Cornelius, "European imperialism in sport", in: *International Sports Law Journal* 28, 2003/2.
[110] *Ibid.*
[111] In this respect also see Cornelius, "Ambush Marketing in Sport", in: *GSLTR* 2011/4.
[112] Slabbert, "Nuwe buro vir konferensies moet uit Wêreldbeker leer", in: *Beeld Sake* 2, 7 May 2010.
[113] Thys, "Rugbytoer lewer leeue-bydrae tot SA toerismesektor", in: *Beeld Sake* 13, 21 November 2009.
[114] Slabbert, op *cit.*
[115] Buchner, "IPL 'n goeie advertensie vir SA, sê Zuma", in: Beeld Sake 11, 26 May 2009.
[116] Smith, "Sowat 400 000 buitelanders by WB", in: *Beeld Sake* 2, 1 November 2010.
[117] s 8 (3) Constitution of the Republic of South Africa, 1996.
[118] *Haelan Laboratories Inc v. Topps Chewing Gum Inc* 202 F2d 866 868.
[119] *Ibid.*
[120] Neethling, Potgieter and Visser, *Deliktereg* (2010) 326 *ff.*
[121] Neethling, Potgieter and Visser (2010) 349 *ff.*
[122] Pepsico Inc v. United Tobacco Co Ltd 1988 2 SA 334 (W) 347B-G.
[123] *Stellenbosch Wine Trust Ltd v. Oude Meester Group Ltd*; Oude Meester Group Ltd v. Stellenbosch Wine Trust Ltd 1972 3 SA 152 (C) 185A-D.
[124] *Atlas Organic Fertilizers (Pty) Ltd v. Pikkewyn Ghwano (Pty) Ltd* 1981 2 SA 173 (T) 183D-F.
[125] In this respect also see Cornelius (2011).
[126] Neethling, Potgieter and Visser (2010) 340 *ff.*
[127] Cornelius, in: GSLTR 2011/4.
[128] *Ibid.*
[129] *Ibid.*
[130] Neethling, Potgieter and Visser (2010) 369 *ff.*
[131] Cornelius, in: GSLTR 2011/4.
[132] *Wells v. Atoll Media (Pty) Ltd* [2010] 4 All SA 548 (WCC).
[133] *Ibid.*
[134] D 9.2.5.1; Voet, *Commentary on the Pandects* 47.10.18.
[135] *Fichard Ltd v. The Friend Newspapers Ltd* 1916 AD 1; *Bredell v. Pienaar* 1924 CPD 203; *Caxton Ltd v. Reeva Forman (Pty) Ltd* 1990 3 SA 547 (A).
[136] Cornelius, in: *GSLTR* 2011/4.
[137] *Ibid.*
[138] See the description of "author" in s1 Copyright Act 98 of 1978.
[139] Neethling, Potgieter and Visser (2010) 89.
[140] *Idem 313.*
[141] *Idem 315.*
[142] *Idem 317.*
[143] Cornelius, in: *GSLTR* 2011/4.