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

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Introduction

Since the beginning of the twentieth century sport has developed into an enormous global industry. In 1912 twenty international sports events took place worldwide and this number included the summer Olympic Games in Stockholm. By 2005, a year in which no Olympic Summer or Winter Games were held, the number of international sports events had grown to more than 1000 per year or an average of more than three per day.[3] This means that, at any given time, there is at least one international sports event taking place somewhere on earth. One can therefore, to borrow an old saying from the British Empire, claim that the sun never sets on the sports fields of the world.

With so much sport taking place daily it is inevitable that sport will be an important element of the world economy. The annual worldwide spend on sport totals approximately € 600 billion.[4] This includes a global market for sports goods with an annual value of about € 250 billion.[5] The annual income that sports federations worldwide earn from gate money, sponsorships, media fees and commercialisation exceeds € 100 billion.[6] By far the greatest single contributor to this income – approximately € 60 billion per year – is the fees that sports federations impose on media networks for sports broadcasts.[7] It is therefore no wonder that sports federations jealously guard over the so-called media rights which they supposedly own.

Initially it was reasonably easy to control the broadcasts of sports meetings. Until quite recently it was very expensive to broadcast sports live or otherwise as such broadcasts were only possible with the use of expensive bulky equipment which was transported to sports meetings in large trucks. If a television network or radio station had obtained the so-called broadcasting rights for a specific sports event, the only infringement that could have taken place was if another network or station would have tried to also broadcast the event. On the whole, television networks and radio stations honoured the exclusivity of broadcasting rights and cases where competitors tried to infringe on the rights of others were few.[8]

The technology of the twenty-first century has, however, greatly changed things. Sophisticated camera equipment has become reasonably compact and inexpensive and anyone with a cell phone can nowadays virtually immediately distribute images or commentary of a game over the internet. In addition, equipment capable of intercepting television signals is also generally available with the result that it is not very difficult to distribute images on the internet without the knowledge of the broadcaster.[9] Sports federations and networks that have obtained the rights to broadcast sports meetings must thus continuously guard against efforts that threaten to prejudice the exclusivity of their rights.

In addition, the enormous amounts of money which networks pay for the so-called media rights have led to internal conflicts in some sports. The owners of sports clubs have not been content to see how the income from broadcasts landed in the purses of national or international sports federations.[10] Everyone involved in a particular sport now wants to share in the riches which are generated from media rights.[11]

An additional consequence of the astronomical amounts networks are willing to pay for media rights for especially the more popular sports, is that public networks with their limited means cannot compete with the pay channels of satellite and cable networks.[12] This has again led to great dissatisfaction amongst sports enthusiasts as the majority of them cannot afford the high subscription fees of the pay channels and are therefore excluded from the broadcasts of their favourite sports meetings.[13] In the end telecommunication and competition authorities in different jurisdictions had to intervene to limit the monopolies of pay channels and ensure that the masses could still access their favourite sport on the box.[14]

All these problems and challenges require that the so-called media rights for sports events must come under review. This article will mainly address three fundamental issues. Firstly it is essential to establish if any media rights with respect to sports events do in fact exist. In other words, are there any significant interests, which should be safeguarded, that are inherent in sports events and in the run of play on the field that could provide the foundation according to which stadium owners, sports federations, sports clubs, sports leagues, promoters or participants can lawfully control or even prevent media coverage of sports meetings. Secondly, if such rights do exist, it has to be established what the nature and extent of those media rights are. Thirdly, it is important to establish to whom these media rights belong and as a result thereof who is entitled to dispose of it and collect the profit.

These questions around media rights in sport have not in any way gained pertinent attention in the South African law, neither by way of legislation nor through judgments of the courts. In the absence of any legislation which directly addresses the above questions, the common law position in South Africa requires further reflection. In the first place this requires a historic overview to establish if any support for the recognition of a protectable proprietary interest can be found in the Roman, Roman-Dutch or old English law. As sports broadcasts are a relatively new phenomenon, the historic overview would not be complete without investigating the historic origin of the controversy around sports broadcasts. It is indeed essential to establish why the issues originated in practice and how the need for meaningful solutions developed.

In the light of the lack of attention that

media rights have so far enjoyed in the South African law, it would make sense to supplement the historical overview with a comparative law review to establish how other jurisdictions, where questions around media rights have been considered, attended to the controversy and what solutions, if any, had been found for the problems. Here one could especially investigate the position in legal systems which have close historical ties with the South African law, such as the English and Dutch law, legal systems of countries with which South Africa has strong sporting ties, such as Australia, as well as countries which are world leaders in the field of sport like the United States of America, Germany and France. From this point of departure the South African law can be investigated.

Historical overview

Sports broadcasts originated as a result of the erection of telegraph networks.[15] Operators like Western Union kept sports enthusiasts informed about the progress of baseball matches by relaying the score at the end of each innings to telegraph offices throughout the United States of America.[16] The development of telephone networks enabled the more frequent relay of the progress of games per telephone to sports enthusiasts who wanted to phone in.[17]

The first live radio broadcast of a sports event took place on 4 April 1921 when a radio station in Pittsburgh broadcast live commentary on the boxing match between Johnny Dundee and Johnny Ray from the Pittsburgh Motor Square Garden to listeners in the Pittsburgh area.[18] This was followed in 1936 by the first live television broadcast of sport when sports enthusiasts at 21 public television halls in Berlin and Potsdam watched the 100m sprint during the Olympic Games in Berlin and saw how the legendary Jesse Owens won the first of his four gold medals.[19] Eventually more than 72 hours of live broadcasts were televised to the television halls during that event.[20]

As sports broadcasts are a relatively new development one would expect to find little guidance in Roman and Roman-Dutch law concerning the controversy around media rights. The analysis of the applicable principles with respect to sport and games nevertheless provides interesting food for thought, which could explain the present position in the South African law with regard to sports broadcasts. The Romans are after all infamous for extravagant and elaborate games held in the Circus Maximus, the Flavian amphitheatre (or Coliseum) and elsewhere.

Sport is as old as mankind itself. Prehistoric rock art apparently depicts scenes of prehistoric people participating in sprints, swimming, archery and wrestling in front of spectators.[21] The archaeological records of every great civilisation from Mesopotamia, Sumeria, Phoenicia, Babylonia and Persia to Egypt provide evidence of enthusiastic spectators who cheered on participants in a variety of ancient sports.[22] In Amrit, the old Phoenician city, the remains can be found of what is believed to be the oldest sports stadium, built around 1500 BC to make spectators more comfortable and provide a better view on the playing field.[23]

The old Greeks would take sport and the building of sport stadia to new heights, especially during the celebrations of the quadrennial ancient Olympic Games.[24] However, it was the Romans who would eventually take sport to the level of entertainment spectacle. Where other communities up to that time had practised sports for the sake of fitness and skill for daily survival, preparedness for war or to honour the gods in religious festivals, the Romans to a large extent abandoned these principles and presented sport for the sake of sport with the sole purpose of entertaining the masses.[25]

The focus on sport as entertainment and the watering down of religious rituals and survival or preparedness considerations would play an important role in the approach which Roman law followed in relation to sport and games. According to tradition the Roman emperors presented games in the valley between the Palatine and Aventine hills since the founding of Rome.[26] Spectators who attended the games initially stood on the slopes of the hills to watch participants.[27] In the sixth century BC Tarquinius Priscus, the fifth king of Rome, built a race track for chariots and erected wooden stands with seats from where the nobility could watch the races.[28] The last king of Rome, Tarquinius Superbus, later extended the seats to also accommodate the general citizenry.[29] This stadium became known as the Circus Maximus and would, after regular upgrades by various Roman rulers, for nearly one thousand years remain the centre of the extravagant Roman games.[30] After improvements made by Julius Caesar in the first century BC, the Circus Maximus could eventually seat 250,000 spectators[31] – more than one quarter of the total population of Rome at the time.[32]

The Romans were probably also the first to allow women as spectators to the games. According to Ovid[33] the games were especially the place where single people (and probably quite a few married people) could meet members of the opposite sex. If a married woman attended the games without the consent of her husband, that constituted valid grounds for divorce.[34] Women, however, did not have the same remedies against their husbands![35]

The games in the different arenas were *ludos civitati*[36] or civilian games. Access to the games was therefore free and enthusiastic spectators queued up even before dawn to get the best seats.[37] The Romans found different means to finance the lavish games, such as funds allocated from the fiscus,[38] fines which were levied for specific crimes,[39] donations[40] or bequests[41] from rich Romans and amounts which Roman officials had to provide from their own pockets when appointed to specific posts.[42] In 230 AD the emperor Alexander Severus even instituted a special tax on pimps and prostitutes to restore the arenas in Rome.[43] But the Romans never demanded entrance fees from spectators – entry was always free. In fact, if someone was prevented from watching the public games without a valid reason, that person could claim reparation[44] from the person who had prevented him from attending as it was seen as a loss if someone was unable to enjoy the benefit of the public facility.[45]

It therefore seems as though Roman law did not recognise any proprietary interest in sport which could be vested in an organiser or donor and which could provide the basis for the recognition of a legal interest. Consequently there was also no interest which could be traded.

The practice that spectators had free entry to games and sports meetings would persist for approximately two thousand years. The decline of the Roman Empire in the east and the west brought the large extravagant games in the arenas to an end. But sport survived in various forms during the Middle Ages and eventually provided as much entertainment to spectators. The ancient era of sport stadia which could hold hundreds of thousands of spectators

may have been over, but sports events in the Middle Ages often coincided with fêtes and annual markets and could endure for days or even weeks on end.[46] The annual markets were organised by the feudal landlords on the authority of the different kings and were accompanied with pomp and ceremony.[47] Merchants came together from all over to sell a variety of merchandise, cattle and draught animals.[48] Knights in shining armour with ornate shields and bright banners participated in lance fights,[49] while other sport like horse racing, archery, sprinting, boxing, wrestling and cock fights also took place.[50] The merchants had to pay toll and taxes to sell their wares or livestock at the fêtes[51] and knights had to pay a tax to the king to participate in a tournament.[52] There are no indications that spectators ever had to pay entry fees to attend sports tournaments. Wooden structures with standing room or seats for the nobility were normally erected. The rabble had to stand where they could find a space.[53] When tournaments were held in market squares of towns, spectators congregated in the windows and on roofs of houses adjoining or overlooking the squares. When tournaments were held outside towns, the spectators watched from the town's protective walls and even climbed trees to get a better view.[54] Everyone was welcome especially as it provided an opportunity for the nobility to exhibit their wealth and demonstrate their eminence to their subjects.[55]

The market squares or terrains where annual markets were held were deemed to be public places for use by all.[56] Van Leeuwen[57] mentions that it was not permissible to arrest a debtor during the annual market, although the debtor's possessions could be confiscated to bring about the individual's appearance in court after the closure of the market. In The Netherlands there were also the *doele* – halls where the town guard convened and practised archery, gymnastics and other exercises – which were deemed to be public places.[58] In Scotland attendance of a foreign annual market was a ground for *essoin*[59] or the legitimate non-appearance at court. But it seems as though the English were not as lenient.[60]

Other sports were also practised[61] and the origin of nearly every kind of sport being practised today can be found in the Middle Ages.[62] However, there were nearly no areas which were exclusively set aside for playing sport. This situation resulted in sport being played in market squares and other public places and no clear lines were drawn to separate players from spectators.[63] This often led to spectators massing together around players and jostling them with the result that fights often broke out between spectators and players.[64] On feast days everyone in the town, man and woman, old and young, gathered on the communal grounds for a type of football – to watch and to participate.[65]

Sport still belonged to the community and it seems as though neither the Roman-Dutch law nor the old English law acknowledged any proprietary interest which could vest in the estate of an organiser or landowner and which could legally be the foundation for a protectable interest.

The practice of taking entrance fees or gate fees at sports events had its origin in the middle of the nineteenth century. This was also the time during which modern sport, as we know it today, began to appear. During this time it was particularly the private schools and universities in England that experienced a need to compete with one another. This led to the first efforts to standardise the rules of sport and to standardise the size of playing fields.[66] In an effort to maintain order, spectators were separated from players, initially by painting white lines on the ground, later by fencing them off with rope and even later by erecting stands.[67]

Standardising the rules was one factor which led to the establishment of sports clubs where enthusiasts could gather to play their favourite sport.[68] Another factor was that market squares had, as a result of increased urbanisation, been taken over by more and more business premises and merchants were less tolerant towards the often ill-disciplined games around their shops and stalls.[69] This in turn led to the moving of sport from the market squares and other public places to private premises. The founding of clubs in turn led to the creation of leagues[70] and leagues would eventually lead to professional sport where players were remunerated for their services.[71]

Cricket was in this sense the pioneer which had towards the end of the eighteenth century already been played according to standardised rules in England.[72] A differentiation was made from an early stage between "g*entlemen*" (amateur players) and "*players*" (professional players).[73] Initially the number of professional players in each team was limited, but in time especially urban cricket clubs would make exclusive use of professional players.[74] The development of cricket clubs with their own cricket fields was mainly the result of the fact that, by the end of the eighteenth century, betting on cricket games had become one of the favourite pastimes of the aristocracy.[75] The cricket fields initially provided other sports clubs, especially football clubs, with the ideal playing fields where they could play their matches.[76] In time other sports clubs would eventually, as their particular sports codes became more popular, develop their own playing fields.[77]

The costs involved in establishing and maintaining sports fields, the remuneration being paid to professional players as well as the costs of travelling from one town to the next for league games, presented new challenges to clubs. Initially a hat was passed around during a match and donations were requested from spectators.[78] These funds could not provide in the growing need for funds. The clubs did, however, have a powerful weapon. As they were the owners of the sports fields, these were private premises and the right of admission could be reserved.[79] This meant that spectators could not watch sport unless they had gained entry to the sports fields or stadia. The clubs quickly realised that sports enthusiasts were so fanatical that they would be willing to pay for the privilege to watch their favourite sport and the clubs could refuse entry to anyone unable or unwilling to buy an entrance ticket.[80] Where sport was for millennia played in public places and spectators were always welcome to attend, high performance sport had now moved to playing fields or stadia which were fenced off and where entry was strictly controlled.

Charging gate fees and the accompanying entry control did not have its origin in any proprietary rights inherent in sport which the stadium owners, sports federations, sports clubs, sports leagues, donors, sponsors, promoters or participants in the league had in the game or in the course of the play on the playing field. Neither the Roman law, nor Roman-Dutch law nor the old English law had ever developed to such a level that such a right with respect to sport had ever been acknowledged. The access control to sports events and the taking of gate fees had its origin in the private ownership or proprietary rights over playing fields or sport stadia and the enforcement of the normal rights of any posses-

sor or owner with respect to immovable property.

It is against this background that radio stations arrived on the scene in the 1920s and started broadcasting live commentary on sports events. Just as spectators could not attend a game if they had not been granted access, so radio stations could in general not broadcast live commentary on sports events unless they had gained entry to the playing fields or stadia for their commentators and equipment.[81]

It seemed as though sport and radio were made for one another. Ingenious publicity of the boxing match in July 1921 between Jack Dempsey and Georges Carpentier led to 300,000 enthusiastic spectators filling the stadium. It was the first time in history that more than US$ 1 million had been taken in gate fees at one single sports event.[82] In addition chain stores in the area reported that their turnover in radio sets in the two weeks before the match totalled approximately US$ 90,000 and about 500,000 listeners on the east coast of the United States tuned in for the broadcast.[83]

This astonishing success resulted in other sports codes like horse racing, baseball, tennis, American football and ice hockey also seeking the exposure the radio could offer and sometimes even paid radio stations to broadcast their matches.[84] Sports broadcasts became more and more popular and in 1922 about five million listeners on three continents tuned in for live commentary during the baseball World Series.[85] By 1927 approximately 40 million listeners tuned in on the live broadcast of the boxing match between Jack Dempsey and Jack Sharkey.[86]

But the seed of strife had already been sown with the first sports broadcast which had been relayed by the telegraph. Newspaper magnates saw the "new" technology as a threat to their newspapers.[87] At the time newspapers were the only medium which brought sports news to sports enthusiasts.[88] Sports broadcasts brought this monopoly at risk. In addition leagues, club owners and promoters were quickly worried that the number of listeners who tuned in to live sports broadcasts would lead to a gradual reduction in attendance of spectators at matches and that their income from gate fees would be negatively affected.[89] Sports broadcasts were also the source of conflict which still endures today and will probably never be solved. In houses everywhere men who wanted to tune in to sports broadcasts had to compete with women (and teenagers) who wanted to tune in to soapies.[90] A discussion of this conflict falls outside the scope of this article.

Leagues, club owners and promoters initially tried to stem the possible negative impact of live broadcasts on gate fees by stopping sports broadcasts.[91] But the demand had already been created with sports enthusiasts and leagues, club owners and promoters had to find a way to protect their income and simultaneously make live sports broadcasts possible. In fact, they already had a clear solution to their problem. Just as the spectators had to pay to attend matches, leagues, club owners and promoters had by the 1930s started to impose "licence fees" on radio stations who wanted to broadcast their matches live.[92] Radio stations that wished to present a live broadcast of the boxing match between Joe Louis and Max Schmeling in 1935 each had to pay a "licence fee" of US$ 27,500.[93]

It was also during this time that radio stations began to air advertisements for a fee and it would be a logical next step to link advertising with sport to enable large companies to sponsor the broadcasts and introduce their brand names and products to millions of listeners. In 1935 the Ford motor company paid US$ 100,000 to the radio station WMAQ to be the broadcast sponsor for the baseball World Series.[94] or radio stations paying licence fees for the live broadcast of sports events, it was a wise investment which paid good dividends. The expense of licence fees faded in comparison with the advertising fees which radio stations could rake in during the broadcasts.[95]

Initially radio stations were handled on the same basis as all other spectators – any person who was willing to pay entry fees or licence fees was allowed to attend matches and to broadcast live.[96] The huge profits which radio stations could generate from advertising during live broadcasts resulted in competition between radio stations. Radio stations were willing to pay much more in order to have exclusive broadcasting rights and thus gain an advantage over their competitors.[97]

It was inevitable that clashes would take place amongst media networks as well as between media networks and leagues, club owners or promoters. As early as 1883 a dispute developed over a team photograph which had been taken of the Australian cricket team at the Oval in London.[98] The defendant had taken the photograph with the consent of the Australian cricket captain and on the instruction of the claimants, who had been operating as the London Stereoscopic and Photographic Company. The claimants had also, in accordance with the copyright law of the time[99], registered the copyright of the photograph in the name of the London Stereoscopic and Photographic Company. The defendant had also made copies of the photograph, framed them and sold them commercially. This case relied on the correct interpretation of the relevant copyright law[100] and it was on that basis that it was decided in favour of the defendant. It did underline that the point of contact between sport and the media would become a source of much conflict.

Who would have thought that a meeting of a women's association would lead to huge consternation and eventually provide the basis in accordance with which English law would approach sports broadcasts for almost a century? That is exactly what happened in *Sports & General Press Agency Ltd v. Our Dogs Publishing Co Ltd.*[101] In June 1915 the Ladies' Kennel Association held a dog show in the London botanical garden and granted the exclusive right to take photographs at the show by contract to a particular photographer. That photographer in turn awarded the exclusive rights to publish the photographs to the claimants. The defendants also sent a photographer to the show and despite objections and requests not to do so, he continued to take photographs of the show which were published in their magazine *Our Dogs*. The claimants thereupon brought an application, amongst others, for an interdict against the defendants and relied on the so-called exclusive rights which the Ladies' Kennel Association had given the photographer and the exclusive rights which the claimants had in turn received from the photographer. The court found that the Ladies' Kennel Association did not own any exclusive rights to take photographs during the dog show and was thus not in a position to transfer any rights to the photographer. As a consequence, the photographer was also not in a position to transfer any rights to the claimant. The Ladies' Kennel Association could at most, as a result of their contractual right to occupy the specific premises for the show, enforce entry control and prevent any other person from bringing a camera onto the premises. They had neglected to do so. The claimants took the ruling on appeal, but the ap-

peal was eventually turned down in the Court of Appeals.[102]

It is against this backdrop that the courts in the United States of America and Australia subsequently had to attend to issues with respect to media rights in sport. A 1931 boxing match in Brooklyn, New York, between Jack Sharkey and Mickey Walker, would bring two media houses into conflict.[103] The promoters of the boxing match had contractually given the exclusive rights to Rudolph Mayer Pictures Inc to produce images of the boxing match and to distribute them. A competitor, Pathe News Inc, had sent photographers to the stadium and had also mounted a camera on the roof of an adjacent building and took images of the boxing match. Pathe News compiled a film journal from the images with the aim of releasing it commercially. Rudolph Mayer Pictures thereupon successfully applied for an interdict to prevent the violation of their exclusive right. The interdict was upheld on appeal by the New York Court of Appeals,[104] ostensibly because the court was of the opinion that the promoters indeed did have proprietary rights (or rights of ownership) over the boxing match and were therefore able to transfer any accompanying rights, like that of making exclusive images, to Rudolph Mayer Pictures.[105]

The next salvo in the battle for sports broadcasts was fired in 1936 in the district court of New York in the case of *National Exhibition Co v. Teleflash Inc*.[106] The claimant was the owner of a baseball stadium. He had contractually transferred the exclusive rights for live ball-by-ball broadcasts of the games at the stadium to the Western Union Telegraph Company. The defendant had, however, also broadcast live commentary of the games to listeners by telephone. The court questioned if there were any grounds on which it could be found the claimant had retained any proprietary rights in the baseball games at the relevant stadium. Although it was not clear how the defendant could have obtained the necessary information for the broadcasts, Judge Caffey found that it could have been accomplished in one of two ways: the information was either obtained from spectators who were on the premises of the baseball stadium, or it was obtained from individuals who had taken up position somewhere outside the stadium. If it was obtained from spectators, they were by virtue of their entry tickets rightfully on the premises and there was no indication that the entry tickets placed any contractual limitation on the distribution of information about the games. If the commentary was based on the course of the game which was observed from outside the stadium, there was no basis on which the defendants could have been prevented from doing the live broadcast. Consequently Judge Caffey found that the plea documents of the claimant did not disclose a cause of action.[107]

During the same year the high court of New South Wales had to determine in *Victoria Park Racing and Recreation Grounds Co Ltd v. Taylor*[108] whether the owners of a horse racing course could prevent a radio station from presenting live broadcasts without permission. The third defendant, the Commonwealth Broadcasting Corporation, had erected a platform on the property of the first defendant with the permission of the first defendant, the owner of the land adjoining Victoria Park. From this vantage point the second defendant, a commentator, could with the use of binoculars observe the horse races at Victoria Park, as well as the notice boards on which the draws, withdrawals and results were announced and give commentary on the horse races which were broadcast live on the radio station 2UW of the third defendant. This resulted in the claimant collecting less gate fees as fewer spectators attended the races and more and more chose to listen to live commentary on the radio. The claimant had, mainly based on neighbour law and *nuisance*, applied for an interdict which would require that the first defendant had to see to it that his land was not used to watch horse races on Victoria Park; which would prohibit the second defendant from commenting on horse races; and would prohibit the third defendant from broadcasting the commentaries on the horse races. Judge Nicholas explained that *nuisance* existed when someone used his or her property in such a manner that it posed a threat to others or that it violated an existing right in such a way that the rights holder suffered losses or could not enjoy the reasonable use of his own property.[109] The defendants had, however, in no way interfered with or prevented anyone from attending the horse races. The mere fact that the land of the first defendant had been used in an uncommon manner and that the third defendant made a profit from the live broadcasts of horse races were not sufficient to find that the defendants had violated the rights of the claimant. As a result Judge Nicholas found that there were no grounds to grant the interdict.[110]

The appeal in *Victoria Park Racing and Recreation Grounds Co Ltd v. Taylor* left the high court of Australia divided.[111] The court took note of the "new approach" which was at the time developing in the United States.[112] Nevertheless, the majority referred[113] in their judgment to the English verdict in Our Dogs[114] and found that there were no legal grounds on which the defendants could be prevented from watching the horse races from the adjoining land or be prevented from broadcasting live commentary from there. Chief Justice Latham explained that anyone was entitled to erect a fence around his or her property to prevent others from seeing what took place on that property. Especially sports grounds could be properly fenced to ensure that anyone who did not have an entry ticket was unable to share in what transpired on the sports fields. The law could, however, not be used to effectively erect fences which the claimant himself or herself was unwilling to erect.[115] The minority was of the opinion that the law had to be developed to make provision for new imaginative use of property which could negatively impact on neighbours. They distinguished this case from *Our Dogs*[116] as the photographer in Our Dogs[117] was on the premises, while the broadcaster in Victoria Park[118] was watching from the outside.[119] Our Dogs,[120] according to the minority, could not be seen as authority for anyone to look in onto the property of someone else from the outside without limits.[121] The majority, however, turned down the appeal and the claimant was left without remedy.[122]

The "new approach" in the United States took further shape only a few days after the ruling in the Victoria Park appeal,[123] and found expression in the case of *Twentieth Century Sporting Club v. Transradio Press Service*.[124] The first and second claimants were the promoters of a boxing match between Joe Louis and Thomas Farr which would take place in August 1937 in the New York Yankee stadium. The first and second claimants had granted the exclusive rights for the live broadcast of the match from the ring to a third claimant, the National Broadcasting Company. The defendant had, however, announced that they would also broadcast round-for-round commentary and ignored a written request from the claimant's attorneys to refrain from such a broadcast. The defendant would compile their commentary by listening in on the broadcast of the third claimant and information collected from journalists seated around the boxing ring.

Judge Pecore found that the boxing match could only take place as a result of the investment of a lot of time, money and effort by the claimants. In addition the claimants had expressly indicated on the entry tickets that no spectator could, without the required authorisation, capture images of the boxing match or have it broadcast.[125] Furthermore, the defendant would make unreasonable use of the broadcast of the third claimant to compile its commentary. With reference to the Rudolph Mayer case[126] Judge Pecore found that the defendant would indeed violate the rights of the claimants and granted the application for the interdict *pendente lite*.[127]

This verdict would almost a year later provide the basis for the *locus classicus* with respect to sports broadcasts in the United States in *Pittsburgh Athletic Co v. KQV Broadcasting Co*.[128] The district court in Pennsylvania had to rule whether the live broadcast of ball-by-ball commentary of baseball games by Forbes Field in Pittsburgh was admissible. The claimant was the owner of the Pirates baseball team which was playing all their home games on Forbes Field. There was a high fence around Forbes Field and spectators could only attend baseball games by buying an entry ticket. The entry ticket clearly stated that ticket holders were not entitled to pass on any news about the progress of the games to anyone outside the stadium during the game. The claimants had transferred the exclusive right to broadcast live ball-by-ball commentary on the games to General Mills Inc who in turn transferred the rights to the National Broadcasting Company. The defendant placed observers on buildings outside Forbes Field from where they could view the progress of the baseball games taking place on Forbes Field and could enable the defendant to broadcast ball-by-ball commentary while the games were being played. Judge Schoonmaker ruled that the exclusive right to broadcast baseball games from Forbes Field was a proprietary right of the claimant and that the defendant violated this proprietary right when it broadcast ball-by-ball commentary on baseball games. The result was that the action of the defendant constituted wrongful competition.[129] He further explained that the exclusive right was deemed to be a proprietary right as the *court in casu* sat as court of equity and as such the court could only concern itself with the protection of property. Any proprietary interest is, however, for this purpose deemed to be a proprietary right.[130] In addition he differentiated this case from the English ruling in Our Dogs[131] and the Australian ruling in Victoria Park[132] as his verdict was based on wrongful competition which would not be tenable under English (or Australian) Common Law.[133] Judge Schoonmaker emphasised[134] that the law, title and interest in baseball games were vested in the owners of the baseball teams. This included the exclusive right to disseminate or publish news, reports, commentary or descriptions of games, as well as the right to transfer such rights to licence holders. In view of the fact that the broadcasts of the defendant would infringe on the exclusive rights of the claimant and thus amount to wrongful competition, he granted an interdict *pendente lite* against the defendant.[135]

The recognition of media rights then apparently suffered a setback in New York. In *Madison Square Garden Corp v. Universal Pictures Co*[136] the claimant was the owner of the well-known Madison Square Garden sports arena where various sports codes, including ice hockey, regularly played matches. The claimant was also the owner of the New York Rangers ice hockey team which played all their home encounters at Madison Square Garden. The defendants had made a movie *Idol of the Crowds* and in it made elaborate use of images and photographs which apparently depicted hockey matches and crowds in Madison Square Garden, as well as New York Rangers players. In addition the advertising material for the movie included references to Madison Square Garden. The court *a quo* granted the motion of the defendants to turn down the case as it had found that the claimant's pleas had not disclosed any protectable proprietary interest which had been detrimentally affected by the defendants.[137]

However, it was only a temporary setback as the New York Court of Appeals held, in a unanimous verdict that the claimant had built up a valuable business which had generated a considerable income from the awarding of licences to take photographs and images of the New York Rangers at Madison Square Garden.[138] The claimant had, with considerable effort and cost built up an established right in its good name, reputation and goodwill and the defendants violated these rights by making use of the relevant images and photographs in their film.[139] The court found that the defendants had used the images and photographs of the New York Rangers and the reference to Madison Square Garden with the sole aim of usurping the financial value of the team and the arena, which had been created with the effort, cost and skill of the claimant. They could only do that with the consent of the claimant.[140] Without referring to the Pittsburgh Athletic[141] verdict, the New York Court of Appeal reached the same conclusion as the Pennsylvania District Court with respect to the existence and nature of media rights in sport.

The second and concluding part of this article will be published in the March 2015 issue of GSLTR.

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1 The second and concluding part of this article will be published in the March 2015 issue of *GSLTR*. An earlier Afrikaans version of the complete article appeared on *Litnet Akademies Regte* at www.litnet.co.za/Article/die-regsaard-van-mediaregte-in-sport (accessed 26 October 2014).

2 BIuris LLB (SA) LLD (Pret) FA Arb SA, L Akad SA. Professor in private law, Director of the Centre for Intellectual Property Law and Co-Director of the Centre for Sports and Entertainment Law, Faculty of Law, University of Pretoria; member of The Hague International Sports Law Academy; Advocate of the High Court of South Africa.

3 Andreff, *Globalisation of the sports economy* (2008) 15 *ff*.

4 Andreff (2008) 14.

5 In this regards see WIPO "Sport and intellectual property" at www.wipo.int/ip-sport/en (accessed 14 April 2014).

6 *Ibid*.

7 Andreff (2008) 14.

8 For a few examples see eg *Rudolph Mayer Pictures Inc v. Pathe News Inc 255 NYS 1018; National Exhibition Co v. Teleflash Inc* 24 F Supp 488; *Twentieth Century Sporting Club v. Transradio Press Service* 300 NYS 159.

9 WIPO, "Broadcasting & Media Rights in Sport" at www.wipo.int/ip-sport/en/broadcasting.html (accessed 14 April 2014).

10 Eshed, "The battle over broadcasting rights in Israeli football", in: 2004/1-2 *Int Sports LJ* 72; Whittaker, McDonnell and Singh, "United we stand: Collective media rights sales under challenge in England", in: 2003/3 *Int Sports LJ* 11; Ferrari, "Legal aspects of media rights on football events under Italian law: ownership, exploitation and competition issues", in: 2003/3 *Int Sports LJ* 4; Verheyden, "Ownership of TV rights in professional football in France", in: 2003/3 *Int Sports LJ* 17.

11 *Ibid*.

12 *Ibid*.

13 *Ibid*.

14 *Ibid*.

15 See e.g. *National Exhibition Co v. Teleflash Inc*, 24 F Supp 488 489.

16 *Ibid*.

[17] *Ibid.*
[18] Beck and Bosshart, "Sports and media", in: 2003 *Communication Research Trends* 3 9.
[19] Beck and Bosshart, 2003 *Communication Research Trends* 3 11.
[20] Bowman, "Social media, spaghetti westerns and modern spectator sports", in: Coombs and Batchelor (eds), *American History Through American Sports: From Colonial Lacrosse to Extreme Sports* (2013) 35.
[21] Craig, *Sports and Games of the Ancients* (2002) 96; Womack, *Sport as Symbol: Images of the Athlete in Art, Literature and Song* (2003) 30.
[22] For a comprehensive discussion on sport in the ancient civilizations see: Crowther, *Sport in Ancient Times* (2007).
[23] Boutros, "Phoenician Olympics?" at http://phoenicia.org/phoenicianolympics.html (accessed 17 April 2014).
[24] Crowther (2007) 45 *ff.*
[25] Szymanski, *Playbooks and Checkbooks: An Introduction to the Economics of Modern Sports* (2009) 6.
[26] Varro, *De Lingua Latina* 6.20.
[27] Potter, *Life, Death, and Entertainment in the Roman Empire* (1999) 290.
[28] Livius, *Ad Urbe Condita Libri* 1.35.7 *ff.*
[29] Potter (1999) 290.
[30] Potter (1999) 289 ff.
[31] Plinius, *Naturalis Historiae* 36.102.
[32] Gilliver and Whitby, *Rome at War: Caesar and His Legacy* (2005) 17.
[33] *Ars Amatoria* 1.135 ff.
[34] *C* 5.17.8.3.
[35] *C* 5.17.8.2.
[36] See e.g. *D* 33.1.6.
[37] Ammianus, *Res Gestae* 28.4.28 ff.
[38] See e.g. the *Senatusconsultum de Ludis Saecularibus*.
[39] See e.g. the *Lex municipii Tarentini*, cap. 4.
[40] Paterculus. *Historiarum Libri Duo* 2.27 for example tells of the annual games in the *circus* which had been initiated by Sulla to celebrate his victory over Marius in 82 BC, as well as (2.79) the games that Marcus Titius presented in the *Teatrum Pompei*. See also *Tabula Heracleensis* cap. 19; *D* 50.12.10.
[41] *D* 30.1.122; *D* 33.1.6; *D* 33.1.24; *D* 33.2.17.
[42] See e.g. the *Lex Colonia Genetiva Julia*, cap. 70-71, according to which each *duumvir* and *aedile* of the colony annually had to individually from their own pockets pay 2,000 sestertii to organise the games in the *circus*, while the state coffers for this purpose could provide 2,000 *sestertii* for the games of *duumviri* and 1,000 *sestertii* for the games of *aediles*. Although it is very difficult to establish the present day value of the money of antiquity, it would seem that 1 *sestertius* would be the present day equivalent of approximately US$ 10 (see "How much is that in real money?" at www.globalsecurity.org/military/world/spqr/money-1.htm (accessed 21 April 2014)). This means that 2,000 sestertii would be the present day equivalent of approximately US$ 20,000.
[43] *Historia Augusti – Severus Alexander* 1.24.
[44] *D* 43.8.2.9.
[45] *D* 43.8.2.11.
[46] Johnston, *All Things Medieval: An Encyclopedia of the Medieval World* (2011) 228 ff.
[47] Johnston (2011) 229.
[48] *Ibid.*
[49] Hopkins, *Tournaments and Jousts: Training for War in Medieval Times* (2004) 9 ff.
[50] Newman, *Daily Life in the Middle Ages* (2001) 176.
[51] Johnston (2011) 228. See also Blackstone, *Commentaries on the Laws of England* 2.3.7
[52] Newbury, *Historia rerum Anglicarum* 5.4.1.
[53] Guttmann, "Sports Crowds", in: Schnapp and Tiews (eds), *Crowds* (2006) 117.
[54] Guttmann (2006) 117 *ff.*
[55] Guttmann (2006) 117 *ff.*
[56] De Groot, *Inleydinge tot de Hollandsche Regts-Geleertheyt* 2.1.35-36; Van Leeuwen, *Het Rooms-Hollands-Regt* 2.1.14; Domat, *Les Lois Civiles Dans Leur Ordre Naturel, Livre Pre'Liminaire* 3.1.3.
[57] 5.7.26.
[58] De Groot 2.1.35-36; Van Leeuwen 2.1.14.
[59] *Regiam Maiestatem Scotiae* 1.8.30.
[60] Glanvill, *Tractatus de Legibus et Consuetudinibus Regni Angliae* 1.30.
[61] Newman (2001) 161 *ff.*
[62] Coulton, *Medieval Panorama: The English Scene from Conquest to Reformation* (2010) 590 *ff.*
[63] Dunning and Malcolm, *Critical Concepts in Sociology: Sport Volume 2: The Development of Sport* (2003) 62 *ff.*
[64] Dunning and Malcolm (2003) 64.
[65] Guttmann (2006) 118.
[66] Dunning and Malcolm (2003) 64).
[67] *Ibid.*
[68] Baker, *Sports in the Western World* (1988) 104.
[69] *Ibid.*
[70] Szymanski (2009) 20.
[71] *Ibid.*
[72] Pycroft, *The Cricket-field* (1862) 74.
[73] *Ibid.* 29-30.
[74] *Ibid.* 63.
[75] Hawkins, *Bookie Gambler Fixer Spy: A Journey to the Heart of Cricket's Underworld* (2012) 3-4; Szymanski (2009) 20.
[76] Harvey, *Football: The First Hundred Years: The Untold Story* (2005) 153.
[77] Bentley, "Is football a business?", in: Polley (ed.), *The History of Sports in Britain, 1880-1914: Volume 4 Sport and Money* (2004) 153.
[78] See "Baseball in New Jersey: The definitive history" at www.njsportsheroes.com/baseball.history.html (acccessed 25 April 2014).
[79] Szymanski (2009) 130.
[80] *Ibid.*
[81] *Ibid.*
[82] Jensen, "Holy cow! How the advent of early sports broadcasting dramatically changed how professional sports teams in the United States are marketed", in: Coombs and Batchelor (2013) 20 *ff.*
[83] *Ibid.*
[84] *Ibid.*
[85] *Ibid.* 23.
[86] *Ibid.* 26.
[87] *Ibid.* 21.
[88] *Ibid.*
[89] *Ibid.*
[90] *Ibid.*
[91] Jensen, *Ibid.* 21 *ff.*
[92] *Ibid.*
[93] *Ibid.* 33.
[94] *Ibid.* 23, 28 *ff.*
[95] Szymanski (2009) 130.
[96] *Ibid.*
[97] *Ibid.*
[98] *Nottage v. Jackson* (1882-83) LR 11 QBD 627.
[99] Stat 25 & 26 Vict c 68.
[100] Stat 25 & 26 Vict c 68.
[101] [1916] 2 KB 880.
[102] *Sports & General Press Agency Ltd v. Our Dogs Publishing Co Ltd* [1917] 2 KB 125.
[103] *Rudolph Mayer Pictures Inc v. Pathe News Inc* 255 NYS 1016.
[104] *Ibid.*
[105] See the discussion of the *Rudolph Mayer* case (n 101) in: *Madison Square Garden Corp v. Universal Pictures Co* 7 NYS 2d 845 851.
[106] 24 F Supp 488.
[107] 490.
[108] 37 SR (NSW) 322.
[109] 338.
[110] 342 *ff.*
[111] (1937) 58 CLR 479.
[112] 508 *ff.*
[113] *Loc cit.*
[114] 494.
[115] 494.
[116] *Loc cit.*
[117] *Loc cit.*
[118] *Loc cit.*
[119] 517-518.
[120] *Loc cit.*
[121] 518.
[122] 498, 511, 527.
[123] *Loc cit.*
[124] 300 NYS 159.
[125] 161.
[126] *Rudolph Mayer Pictures Inc v. Pathe News Inc* 255 NYS 1016.
[127] 162.
[128] 24 F Supp 490.
[129] 492.
[130] 493.
[131] *Loc cit.*
[132] *Loc cit.*
[133] 493.
[134] 493 *ff.*
[135] 494.
[136] 7 NYS 2d 845.
[137] 24 F Supp 490 460.
[138] 464.
[139] 466 *ff.*
[140] 467.
[141] Barr-Smith, "United Kingdom", in: Blackshaw, Cornelius and Siekman (eds.), *TV Rights and Sport: Legal Aspects* (2009) 549.

