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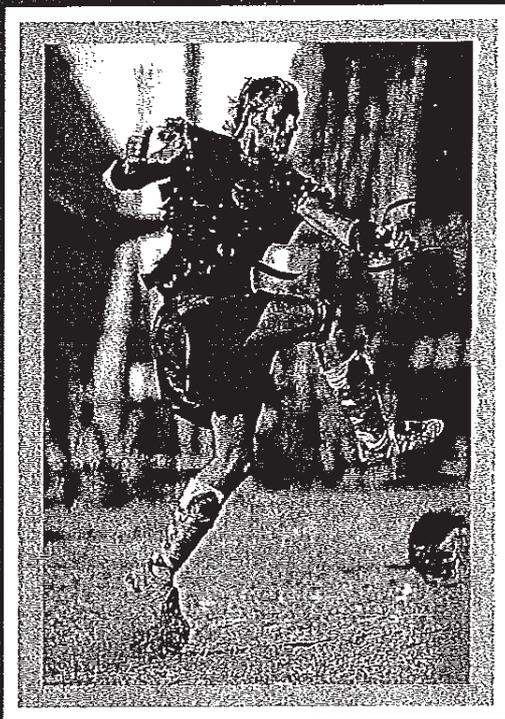
TV RIGHTS AND SPORT LEGAL ASPECTS



T.M.C. ASSER INSTITUUT

TV RIGHTS AND SPORT LEGAL ASPECTS

Ian Blackshaw / Steve Cornelius / Robert Siekmann
/ Editors /



T.M.C. ASSER PRESS

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Laura DONNELAN

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ITALY

Luca Ferrari*

1. INTRODUCTION

In this chapter, we explore the Italian scenario of the very current and ever controversial subject of the ownership of and access to special information with extraordinary commercial and entertainment value -the voice and video dissemination of sports events. The contending parties include the sports leagues and associations, the sports clubs, the players, the powerful media conglomerates, the fans and the public, the regulatory agencies and, of course, the politicians. With such diverse interests and so much economic power at stake, public policies and the rules are fluid and often enigmatic. We strive here to give the reader a workable understanding of this changeable mosaic.

2. THE OWNERSHIP OF BROADCASTING RIGHTS: FROM INDIVIDUAL TO COLLECTIVE SELLING

2.1 The legal background

Italian scholars traditionally tend to emphasize the importance of a dogmatic and systematic collocation of the situations, which require legal recognition and protection. In relation to broadcasting rights, they have proposed, tried and rejected several possible juristic conceptualizations. All seem to reject the possibility to have such rights fall directly into the notion of copyright. Not so unanimously rejected is the more general classification of the media right to a sport event as a new kind of intellectual property, although it is noted that Italian law does not provide a general discipline and definition of this category of rights, but rather a limited number of specific and narrowly defined rights (copyright; trademark; patent right, etc.) none of which fits the idea of a right to commercially exploit a football game. No matter how entertaining, a football match does not involve any intellectual creation.

The scholars' effort is not just an academic exercise. Effective legal protection must be found for a value, which undeniably is the object of investment, interest and negotiation. Hence the importance of its identification as a value, whose ownership or whose control can be affirmed by a court of law. UK courts have come to the prevailing conclusion that such value cannot be the object of an intangible right. Rather, the only available protection

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is that provided by the property or tenancy of the venue where the event is staged and, by its organization, the right to control access to the stadium or racecourse, admitting spectators under contractual restrictions.

A similar approach has been adopted in several continental European jurisdictions including Italy.¹ However, the latest tendency seems to be that of providing a protection based on the idea of an exclusive right in the sporting event as the result of the specific economic activity (value creation) of the organizer or investor. From an idealistic perspective, it is the right of the organizer of the game not to be deprived of (the results of) its economic activity and investments, in other words the sports spectacle as a new kind of entertainment not protected by copyright and yet whose value cannot be 'siphoned away' to benefit other entities without the consent of the 'owner'.² This perspective coincides with that of the USA, where the Courts recognize a right in the commercial value of a sports competition and protection is afforded against 'commercial misappropriation' of related goodwill.

Recognition and protection of business investment is still the principle underpinning of the legal protection afforded to organizers of sports competition, affirming ownership and goodwill in relation thereto. However, while this legal reasoning is generally applicable to any sports event, which commands a relevant TV audience and entails a corresponding broadcasting value, professional team sports broadcasting rights have been the object of specific statutory regulation. In particular, Legislative Decree (D. Lgs) No. 9 of 9 January 2008,³ the only existing Italian statute governing ownership and commercialization of sports broadcasting rights, applies to professional team-sports' tournaments or championships. The latter, based on current qualifications of the Italian Olympic Committee (Comitato Olimpico Nazionale Italiano; CONI), are football and basketball top national competitions. Volleyball and rugby, which are certainly well developed and largely professional sports in Italy, are not subject to the statutory provisions as they are still qualified, even at the top level, as amateur sports. On the other hand, professional cycling - also a professional team-sport - is not subject to D. Lgs No. 9/2008, since there are no national cycling competitions organized as a championship or tournament.⁴

¹ Corte di Cassazione, decision no. 2118/1963; Pretura di Bari, 29 December 1982 *Società cooperativa Olimpico v. AS Roma*.

² Tribunale di Roma, 21 July 1981 - *Società Televisiva Lazio v. Società Sportiva Lazio*; Corte di Appello di Roma, 10 November 1980 - *Televisloun v. Società calcio Roma e altri*; Pretura di Roma, 3 July 1981 - *Lega nazionale professionisti FIGC v. Società Dimensione P*; Pretura di Varese, 1 June 1984 - *Hockey Club mobilificio Anna v. Radio City Varese*.

³ A 'Legislative Decree' is a set of regulations enacted by the Government pursuant to specific appointment by the Parliament and under the guidelines set forth by the relevant enabling act. In this case the enabling act is Law No. 106 of 19 July 2007.

⁴ As a general rule, media rights are marketed by the Leagues or national sports federations, sometimes through wholly controlled private companies or licensed intermediaries. In rugby, LIRE (Lega Italiana Rugby d'Eccelesim), as stated in Art. 3g) of its own charter, 'represents the clubs participating in the top championship (named 'Gruppo Assicurazioni Super 10') for the management and negotiation of collective image rights, broadcasting, promotion and publicity, protection of collective trademarks and the safeguard in general of collective interests of a financial nature. The same article also foresees that this objective may also be entrusted to third parties, which are controlled by the League. Volleyball Serie A-I (Men's and Women's) championship rights are marketed by the respective leagues and have been licensed to Sky, the pay-TV satellite channel for three years, from season 2007-2008 to season 2008-2009. As to Cycling, and particularly concerning the 'Giro d'Italia', the organizer, RCS Sport, a public limited company affiliated with the International Cycling Federation is in charge of marketing the audiovisual rights.

For the reasons stated above, most of the chapter will focus on the broadcasting regulation applicable to professional football and basketball.

2.2 Law No. 78 of 29 March 1999 and the age of individual selling

In 1999, limited to football matches, the ownership issue was settled by statute: 'Each Serie A and Serie B football Club is the owner of the television broadcasting right in codified format.'⁵ Article 2 of Law 78/1999 has been for years the only Italian statutory provision, which expressly affirmed ownership of (pay) television broadcasting rights; it certainly constituted an important statement as it reinforced (the then prevailing opinion that rights to football events belong to the clubs rather than to the league or federation).⁶

It must be noted that the statute did not define the content and the nature of the pay-TV rights. Indeed, the provision appeared as marginal within a law, whose stated objective was the pro-competitive regulation of the pay-TV market, introducing a 60 percent cap in the ownership of football pay-TV rights by a single operator in a multi-platform TV context. However, the underlying assumption of the mainstream commentators and jurisprudence, recognizing the existence of a commercial property in spoiling events had been established.

As to the actual owner of such commercial rights, the 1999 legislator stated that, as to football, the broadcasting rights belonged to each club, individually. This appeared in conformity with the broad principle whereby the goodwill inherent in a sports event would be controlled by whoever 'holds the keys of the door'. By the same token this statutory provision clashed with the ambition of the event organizer - the National Professional League in the case of the Serie A and Serie B championships - to be recognized as the actual owner of such goodwill.

Although it did not offer a definition and statement of the right to broadcast a sports event, Article 2 of Law 78/99 and European Directive No. 89/552 of 3 October 1989 ('Television without Frontiers Directive') provided a rather solid argument for the legal protection *erga omnes* of the 'sports property', in addition to or in lieu of mere recognition of the power to restrict access to the event. Notably, the object of the act was very narrow, since it was limited to football and 'codified' pay television, with the exclusion, arguably, of other forms of transmission including cable TV, free-to-air TV, radio broadcasting, Internet and mobile telephone transmission. Nonetheless, there seemed to be no compelling reasons preventing an extension of the principle, if not the actual rule, affirmed by Law 78/99 to other sports events and other technologies for the broadcasting and transmission thereof.

The conclusion that envisaged an original right of commercial exploitation of the sports event did not resolve whether original ownership of media rights to championships' or tournaments' matches rested with the hosting club or both clubs participating. Moreover,

⁵ Art. 2 of the Italian Law No. 78, of 29 March 1999 (L. 20 March 1999, n. 78 - Urgent dispositions for the balanced development of television broadcasting and for the avoidance of the establishment or strengthening of dominant positions in the TV and radio market).

⁶ At the time, in addition to Law 78/99, a further statutory reference to television, rights to sports events was contained in UE Directive No. 89/552 of 3 October 1989, (as amended on 30 June 1997 by the European Parliament and Council Directive No. 97/36) on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities, commonly known as 'Television without frontiers Directive'.

the question of individual or collective ownership of matches scheduled within a tournament or championship was, and possibly still is, the object of divergent decisions elsewhere in Europe.⁷ In Italy, however, the individual ownership of such rights by the clubs was generally undisputed at the time.⁸ This precept, in conformity with the then only existing statutory statements, rested with the vast majority of the scholars⁹ as well as with the sports regulators.

This conclusion was further supported by recent court decisions concerning the commercialization of images of the football games by certain mobile telephone companies. We will later discuss this interesting jurisprudence, but here we stress that all decisions move from the premise that the *hosting* club is the holder of the rights to the economic exploitation of the game, including its transmission through all media.¹⁰

Indeed, as we know, Italian clubs had been selling pay-TV rights individually for some years before statutory recognition in 1999 and their entitlement to the negotiation and fruits of such agreements had never been seriously challenged.

⁷ The debate unfolded along two different lines of reasoning: on one side, the one traced in the decision rendered by Bundeskartellamt, VI di V., on 2 September 1994, DFI, according to which the media rights belong to the hosting clubs, which organize access to and staging of the event and are responsible for the safety of the viewers and participants; on the other side, the viewpoint adopted by the Restrictive Practice Court of England and Wales - now Competition Commission - on 2K July 1999, according to which the English Premiership is a product *per se*, since 'the product which has a value is the Premier League Championship as a whole, rather than the individual matches played in the course of that championship' and 'while a club can prevent a broadcaster's cameras from entering its ground, this is a mere power of veto and does not enable the home club to sell the rights without the agreement of the away club'. At today's date, the position expressed by the English authorities seems to have prevailed. In fact, between 2003 and 2006 the European Commission rendered some decisions whereby it acknowledged, subject to given conditions, the legitimacy of the collective selling of media rights for UEFA Champions League (July 23rd, 2003), for Bundesliga (September 14th, 2004) and for Premier League (March 22nd, 2006). Such view has been outlined again in the White Paper on Sport of 11 July 2007 and confirmed by a very recent Resolution of the European Parliament of May 8th 2008 (p. 16). Accordingly, the collective ownership or at least collective licensing of media rights is now accepted and allowed in most of the European countries, such as Germany (where however the Bundeskartellamt is monitoring the media rights selling market), England, France (where the Law 'Lamour' of 2003 confirmed the joint selling system) and, now, Italy. Only Spain, among the 'big' football countries, is embracing the individual system of selling, mitigated by a mutuality system from which Real Madrid and Barcelona are the only clubs exempted.

⁸ We here recall Tribunale di Catania, 20 October 1958 - *Socle/a Caldo Catania v. Sodetei Tekcolor International*, in which it is specifically stated that 'the exclusive owner of a sports competition is the entity organizing the event which - in the case of football - coincides with the club in whose field the game takes place'; originally stating ownership of clubs as 'organizing entities'; Prelum di Roma, 18 September 1987 - *Radio Roma North. Lega Caldo*; Pretura di Roma, 10 December 1982 - *Societa Tetromet 56 v. Lega nazionale pro/essionisti*; also see decisions recalled in footnote 1.

⁹ Roberto Pardolesi and Crisoforo Osli, 'Avvisi di Durasca: antitrust e diritti TV su manifestazioni sportive' in *Rivista di diritto sportivo-1996*, Giuffrè editore page 11 and following; Roberto Simone, 'Diritti televisivi sport esiphoning effect: mtela degli spettatori o delle emittenti in chiaro?', in *Rivista di diritto sportivo - 1097*, Giuffrè editore, p. 50; Massimo Coccia, 'Diritti televisivi sugli eventi sportivi e concorrenza', in *Mereato Concorrenza Regale*, no. 3/1999, Il Mulino editore, p. 530; Massimo Coccia, 'Lo sport in TV e il diritto antitrust' in *Rivista di Diritto sportivo nn.2/3 - 1999*, imago Media editrice, p. 310.

¹⁰ See Para. 5.3. Interim decision of Tribunale di Roma, 29 March 2003, *Juvenilis FC, AC Milan Spa and H3G Spa v. TIM Telecom Italia Mobile and Ansa*, interim decision of Tribunale di Brescia of 6 August 2003, *Brescia Calcio v. TIM Telecom Italia Mobile*, sentence of January 5th 2006 of Tribunale di Milano, case *MP Web S.r.l. and A.C. Parma S.p.A. v. TIM Telecom Italia Mobile S.p.A. and ANSA*. In all these cases the courts, in their preliminary considerations, held that sports clubs and associations must be considered as business entities, which, mainly, stage sports shows and events. Sports events are, by and large, products. The principal income of the clubs derives from the sale of the sports events. The selling of tickets, of radio and television broadcasting rights, of advertising spaces etc. demonstrate, in the opinion of the court, that the clubs, which host and organize the event should be considered the legal owners and legitimate beneficiaries of profit, deriving therefrom.

Based on this practice, and possibly taking into consideration the notion that the visiting club may also have rights in the single game and be entitled to a share of the profit thereof, the League had promoted specific agreements among its affiliated clubs to redistribute part of [the revenues from gate receipts as well as season tickets and TV rights licensing. It is noteworthy that these agreements and the ambivalent language of Article 2 of Law 78/99 did not address the issue of possible co-ownership of the visiting club.

However individual selling and related juristic conceptualizations were swept away, as it often happens, by a stroke of the legislator's pen,

3. LAW NO. 106 OF 19 JULY 2007 AND LEGISLATIVE DECREE NO. 9 OF 9 JANUARY 2008"

3.1 Introduction

At the end of football season 2005-2006 a hurricane hit Italian Serie A, in the form of criminal and disciplinary proceedings against representatives of (top clubs, referees and prominent members of the football establishment (including the President of the Italian Football Federation). A network of secret alliances and relationships had been discovered, capable of influencing the activity of referees. Although investigations, mainly based on months-long tapping of mobile telephones, did not prove any match fixing or corruption, they opened the public eyes to the abusive and illegitimate power of top Italian clubs. Juventus bore the worse of it and was relegated to Serie B, but other clubs like AC Milan, Fiorentina and Lazio were sanctioned heavily, with a deduction of points in the upcoming season 2006-2007. The ensuing scandal prompted a radical reform of the sports judicial system and the need to reduce the huge financial imbalance between top football clubs and the rest of the league. Under mounting public contempt and resolute press campaigns against the rich and famous, the Italian government decided it was time to shift from individual to collective selling. A new law was enacted, introducing for the first time in the pay-TV era, the concept of joint ownership of sports broadcasting rights between the organizer of the championship and participating clubs as well as the 'centralized commercialization' of such rights.

As explained in the introduction to this chapter (see footnote 11.3), the new law regulating the ownership of broadcasting rights on sports events and related marketing was passed in the form of dedicated legislation: Law No. 106 dated 19th July 2007, which defined the aims, principles and criteria of the new discipline, directing the Government to issue a legislative decree defining and setting the new regulations. The Italian government accomplished the task with Legislative Decree No. 9 of 9 January 2008.

3. Scope and purposes of the new regulations

The scope of the new regulations is limited to the audiovisual rights market concerning 'professional championships and tournaments organised for team sports at national level'.

¹¹ The new set of rules is commonly referred to as 'Melandri Reform' and legislative Decree No. 9/2008 QS 'Melandri Decree'. Giovanna Melandri was the Minister of Sports who promoted the new regulations in 2007. A short reference to 'legislative decree' is D. Lgs. The foregoing references will be used alternatively in this chapter.

Therefore, it only applies to the two professional team sports, namely football and basketball, and does not apply to: a) 'amateur' team sports such as volleyball and rugby; b) professional individual sports like tennis or golf; or, c) to professional team sports that are not organized in championships or tournaments, as in the case of cycling.

The central and stated purpose of the Law is to ensure transparency and efficiency of the broadcasting rights market while improving the competitive balance among participating clubs. To this end, the legislative decree introduces the centralised commercialization of the TV rights through the League, with great similarity to the UEFA Champions League model.

It also regulates the allocation of financial resources ensured by the collective sale of such rights among participating clubs.

Furthermore, the law reserves a quota of the proceeds for the development of the youth sectors in professional clubs, for the promotion of amateur categories, for the safety of sports facilities as well as for the financing of at least two projects a year in support of sporting disciplines other than football, as long as they are of particular social importance.

3.3 Co-ownership of Audiovisual rights and individual ownership of library rights

In reform of the 1999 statutory recognition of clubs' individual ownership of (pay-)TV rights, the new law affirms the co-ownership of the broadcasting rights between the 'competition (i.e., the championship) organiser', the Lega Calcio, and the 'event (i.e., the match) organisers', the clubs.

For the first time the Italian legislator also defines and acknowledges the 'library' right, i.e., the property of 'archived audiovisual recordings of matches played at least eight days before'. Unlike the broadcasting rights, the audiovisual library of home matches played by each club is the exclusive property of the 'event organizer*', i.e., the hosting club. However, each hosting club must allow the visiting club, on a reciprocal basis, to store and include audiovisual recording of the relevant match in its own library.

3.4 The marketing of TV rights

The sale of audiovisual rights is exclusive to the championship's organiser, i.e., the League. In other words, the new Law appoints the League as joint-owner of the broadcasting rights and as the exclusive worldwide agent for the licensing of such rights in the interest of all clubs.¹²

In order to increase the overall income generated from such centralized marketing, the League is bound to offer the broadcasting rights to each available platform by means of

¹² As mentioned in the foregoing paragraph, dealing with the old (individual) selling system, the League used to exploit the Coppa Italia, the radiophonic rights and the Serie A and B highlights under specific appointment from all members. Regulations of Serie A and B League (LNP) still include such provisions, which are applied during the 'transitory period': under Art. 1.3.d), the LNP represents, upon specific appointment for each single contract by each single club, the clubs participating to official tournaments' in the licensing of: 1) TV rights limited to the free-to-air highlights of the Serie A and B championship; 2) radio broadcasting rights to the Serie A and B championship; and 3) TV and radio broadcasting rights to the Coppa Italia matches'. The foregoing provisions were obviously based on the principle that such rights belonged originally to the clubs. Moreover, Art. 25.1 of the same regulations requires each club to submit to the LNP (the agreements individually concluded for the licensing of (pay) TV rights, for the inspection of their content relating to certain obligations concerning access of the media to football stadiums and to protection of the championship logo.

distinctive, competitive procedures for the national market; the international market and the radio phonic platform.

The League is bound to establish the guidelines for the marketing and licensing of audiovisual rights, defining the criteria of the offer, allocation of rights and formation of packages.¹³ The Italian Communications Authority and the Italian Competition Authority check the compliance of the guidelines with the decree's principles and provisions and approve them within sixty days of receipt of the same.

The rights are licensed by means of a number of separate and competitive licensing procedures dedicated to the national, to the international and to the radio phonic markets respectively. As to the national market, the League can organize separate tenders for each platform, or multi-platform tenders, putting terrestrial, satellite and cable operators in competition, or both. In case different platforms are placed in competition, the competition organiser shall be bound to offer more packages of comparable value. In particular, each package shall include prime matches. Within these limits, and provided all the platforms are given an equal possibility of gaining access to the rights, the League shall be free to create the packages at its own discretion.¹⁴

Participation in the bidding procedures shall be granted to broadcasters who have the prescribed legal qualifications and independent intermediaries. In the case of multi-platform tenders, participation in the tender shall be granted to broadcasters who have the qualification for at least one platform.

Rules and limitations to the licensing are defined under Article 11. Broadcasters are only permitted to exercise licensed rights on the platforms where they are authorized to operate and it is forbidden for any licensee to sub-license the rights. It is also forbidden for any single operator to purchase the exclusive rights to all live packages ('No Single Buyer rule'). These restrictions are an expression of the enabling law's directives against the creation of dominant positions on the buyers' side. The aim is to ensure direct negotiation with broadcasters operating on different platforms, in order to increase the overall income from the licensing process and avoid rights being purchased that are not directly exercised by the purchaser but rather resold to third parties with a profit. As we shall see later in this chapter, such restraints and the privileged position granted to the League may, on the contrary, put the Melandri Reform in an off-side position, resulting in a breach of Articles 81 and 82 EC.

Rights that remain unsold are reverted to the clubs and may be directly exercised through the club's thematic channel or licensed individually. Finally, the League may decide in its own discretion to exclude from the licensing packages certain live events. These live matches are not considered unsold events and may not be individually marketed or exploited by the clubs.

¹³ The guidelines must be defined within 4 months of the entry into force of the D. Lgs 9/2008, i.e., no later than the end of May 2008. At the time this chapter is being written (early May 2008) such guidelines have not yet been issued by the League. The latter has engaged negotiations with interested sports rights agencies and advisors, which, upon being appointed as exclusive brokers, would assist in defining the marketing and licensing criteria. The League should approve the guidelines by two-thirds majority of the general assembly; if such majority is not achieved after three votes their approval only requires simple majority.

¹⁴ In this respect, D. Lgs 9/2008 also prescribes that tenders are launched and completed well before the beginning of the relevant season (Art. 7.2) and that a sufficient number of live matches are available to each broadcaster (An. 7.3).

The licence agreements shall have a maximum duration of three years. The League must, in any case, foresee a duration of the licence agreements that guarantees equal treatment among broadcasters.

The Italian Communications Authority periodically defines (at least once every two years) the emerging platforms. The audiovisual rights allocated for the emerging platforms are offered on a non-exclusive basis. The League, in order to sustain the development and growth of the emerging platforms, shall undertake to directly grant licences to those platforms. These licenses shall include a significant quota of the rights relative to the live or earliest transmission, and shall be suitable to each emerging platform's technological characteristics, at prices (that are in proportion to their effective market potential). In order to avoid the formation of dominant positions, the licensing of the audiovisual rights allocated for the emerging platforms shall take place separately for each individual platform.

A single package for radio broadcasting, limited to transmission in Italian, can be allocated to a single operator.

The League organizes the marketing and licensing of audiovisual rights in the international market, through licensing arrangements aimed at reaching Italian communities residing abroad and enhancing the image and appeal of the competition.

3.5 Distribution of revenues

The League shall allocate no less than 4 percent of the licensing revenues for the following uses: the development of the professional sports clubs' youth sectors, enhancement of the amateur categories, stadium safety and financing of at least two social projects a year in support of sporting disciplines other than football. In order to achieve these objectives, a 'Foundation for general mutuality in professional team sports' has been established.¹⁵

The League, shall allocate an annual quota of no less than 6 percent of the total resources ensured by the licensing of the audiovisual rights for the financial support of the three lower professional leagues: Serie B, C1 and C2.

The distribution of revenue among the competition participants is divided in such a way as to guarantee an equal allocation of a prevailing quota of said resources and the allocation of the remaining quotas on the basis of each club's audience and sporting achievements.

From the start of 2010-2011 sporting season, the distribution of the license fees generated by the Serie A Championship, after deducting the general mutuality quotas (4 percent) and those for the lower professional categories (6 percent), shall be divided as follows:

- e a quota of 40 percent, in equal parts, among all the participants in the Serie A championship;
- a quota of 30 percent on the basis of the sporting results achieved;
- « a quota of 30 percent according to the Television audience commanded.

¹⁵ The Foundation's Board of Directors is made up of twelve members: six, including the Chairman, are appointed by the Serie A and B League, three are appointed by the FIGC (the Italian Football Federation), one by the Federazione Italiana Pallacanestro (the Italian Basketball Federation), one by the Basketball Serie A League and one by CONI (the Italian Olympic Committee). The Foundation annually reports its activities to the Ministry for Youth Policies and Sports Activities.

The 30 percent quota relative to the sporting result is divided as follows: 10 percent of the amount (one-third of the quota), on the basis of the 'historical results', that is, those achieved by each of the clubs since the 1946-1947 sporting season; 15 percent on the basis of the results achieved over the last five sporting seasons, and; 5 percent on the basis of the result achieved in the last championship. The 30 percent quota relative to the television audience commanded by each club is divided as follows; 25 percent of the amount based on the number of supporters of each of the participants in the competition, as calculated by three different and independent polls, taken by three different agencies appointed by the League, and; 5 percent on the basis of the population of the town of reference.

3.6 Regulation of the transitory period (until 2010-2011 season)

The effects of the licensing, assignment or transfer of audiovisual rights agreements entered into prior to 31st May 2006 shall be secured until 30th June 2010 at the latest. The effects of the licensing, assignment or transfer of audiovisual rights agreements entered into after 31st May 2006 but before the entry into force of the new regulations (1st February 2008) shall be secured until 30th June 2010 'only if such contracts were executed between entities different from the ones that were party to the contracts concluded before 31st May 2006'. This rather obscure provision means that media licensing contracts entered into after May 2006 - and possibly after the enactment of the enabling law in July 2007 - will be considered valid only if they were not simply renewals of pre-existing licenses. Clubs that, on the entry into force of the D. Lgs. 9/2008, are not party to licensing agreements, are allowed to license the broadcasting rights *until* 30 June 2010, pursuant to specific authorization by the League (Art. 27.4). The situation of clubs, whose licensing agreements expire *after* the entry *into* force of the Decree but before the starting of the collective marketing, i.e., during the transitory period (February 2008-June 2010) is not foreseen by the Decree. Commentators tend to conclude, that licensing during the transitory period should follow the same discipline set by Article 27.4: contracts may be entered into by single clubs, with expiry date no later than June 30 2010 and subject to authorization by the League. However, the issue is of no practical relevance, since none of the current individual licensing agreements are due to expire during the transitory period. In any event, individual selling of broadcasting rights are not allowed after 1st February 2008 and any licensing agreement entered into after that date would be null and void under Article 4 of D. Lgs 9/2008.

In order to guarantee fair distribution of the economic resources during the transitory period, and anticipate some of the effects of the new rules, the Serie A clubs shall allocate a percentage quota of the total resources ensured by the individual sale of the audiovisual rights, for redistribution among all Serie A clubs. The quota was to be defined by the Serie A League general meeting within sixty days of the entry into force of the D. Lgs. no. 9/2008. In fact, such agreement has not been defined yet at the time this chapter is being written (May 2008), although it appears within reach. It will probably reflect to some extent the mutuality system adopted during the individual licensing era, as explained above. However, under the new rules the League shall define a percentage of the total resources ensured by the individual sale of the audiovisual rights to be allocated to the newly constituted Foundation for general mutuality in professional team sports and shall define a percentage of the total resources ensured by such individual sale to be allocated to the lower professional categories.

4. ATHLETES' IMAGE AND BROADCASTING OF SPORTS EVENTS

As explained above, Law 106/2007 enabled the Government to issue the D. Lgs. 9/200S, which defines ownership of broadcasting rights to football and basketball championships. The enabling law indicated that media rights belong jointly to the entity that organizes the championship (the League) and to the 'subjects, which participate thereto'. The Melandri Decree spelled out the notion of 'participating subject', stating that co-owners with the League are the 'Event Organizers', defined under Article 2.1c of the same Decree as the clubs that host the match in their stadium under their control and responsibility. The ownership issue, at least with reference to Football and Basketball is thereby settled, save for future antitrust or constitutional challenges to the Melandri Reform.

As to other sport disciplines, ownership of the rights is typically regulated by the articles of association of the relevant sports federation, at the international or national level. Athletes are never recognized as part-owners of the broadcasting rights. On the contrary, most sports associations' by-laws or regulations include provisions whereby athletes, upon registration, agree to waive any rights or claims over the broadcasting of the matches, races or competitions to which they participate.⁶⁴

However, to change perspective, there may be room for discussion about the way in which image rights of individual players may interfere with full and exclusive right to extract commercial value from sports events. This challenge is no doubt remote and so far completely embryonic. Yet one could argue that players are the legitimate owners, under Italian Law, of their own image rights, that their image cannot be utilised without their consent, absent the public interest exceptions listed by the Law, and finally that an employment contract does not necessarily imply an assignment or a licence of such image rights. The issue is whether under the (professional) player employment agreements the training and playing services of footballers constitute their only obligation under the contract or, in view of the value of the remuneration, the players necessarily grant the club the right to 'market a movie' in which they are the leading if not exclusive actors. Along a similar line of reasoning, one could question whether it is legitimate for a monopolistic sports federation to require that athletes, upon registration, acknowledge its exclusive property of broadcasting rights and waive any participation in the goodwill generated by the broadcasting of events in which they perform and compete.

Football offers a good example of the complexity of this issue. It is typical doctrine in Italy that a part of the players' image rights used by the club are acquired almost automatically through the 1981 Convention in force on the regulation of advertising and promotional activities executed between the Associazione Italiana Calciatori (AIC)⁶⁵ and Professional Leagues (the Lega Nazionale Professionisti and the Lega Professionisti Serie

⁶⁴ See Art. 7.1 of the Olympic Charter, which is applicable to all Olympic sports at national level through Art. 12 and Art. 22.5 of the Italian Olympic Committee's articles of association. See also, for tennis, ATP and WTA's Official Rulebooks under Arts. 1.14 and G. 10, respectively.

⁶⁵ Under Art. 25 Para. 2 of the AIC's Articles of Association, it is foreseen that those footballers who wish to join the Union are obliged without any temporal limits to assign to the association: 'the rights to use their likeness in the case in which the likeness is displayed, reproduced or sold together with or in concurrence with that of other footballers and, in any case, within the ambit of the commercial marketing that refer to products involving the entire category'. These are, clearly, restrictions that greatly hinder the marketing potential of one's image rights (see Giorgio Resta, 'Diritto all'immagine, right of publicity e disciplina antitrust', in *Rivista di diritto sportivo* (Aprile-Giugno 1997) p. 351).

C). On the basis of this Convention, the players, in consideration for the granting of their image rights as members of the team, would be collectively entitled, unless they waive them, to a part of the profits derived from the promotional and advertising activities of the club including licensing of broadcasting rights. Such a waiver has, *indeed*, become a standard, thanks to a brief clause that is always inserted in the contractual forms. But the player contract does not, however, resolve the doubts relative to image rights.

In the first place, the Convention embarks with the fallacious supposition that the football players' image rights are not freely exploitable by the player (an assumption in opposition to Arts. 1 and 5 of the same). Over the years (his assumption has been repudiated by the conduct of clubs and players and the decisions of the courts. It is, indeed, a fallacy that could eviscerate the entire Convention. Moreover, numerous doubts arise both as to the efficacy of the Convention towards individual players, especially if they come from foreign federations and are not registered with *the AIC*, as well as to its hallmark as an agreement in restraint of trade. Furthermore, since their inception many of the provisions contained therein (in particular Arts. 4, 5, 9, 10, 14 and 15) have never been applied, which leads to the conclusion that they are no longer effective. From the invalidity or inefficacy of the Convention, it would follow that the clubs should not be entitled to undertake commercial activities, which, in some way, imply the use of the players' image, ranging from the addition of the sponsor's name or logo on the jersey to the licensing of broadcasting rights.

But even if contrary to this evidence one wished to uphold the Convention as totally valid and effective, it would still be possible for players with sufficient economic power to refuse to have the customary wording added to their playing contracts agreements, by which they renounce their part in promotion and advertising revenues. They would then be entitled to 10 percent of such revenues. If we include the proceeds derived from the sale of TV rights to this income, we can easily reach 70 percent of the club's overall turnover. One can easily understand what unsettling effects would result if this problem, which heretofore has never been raised, were to emerge. Arguably, the Melandri Reform and the legal reasoning about the broad and implied content of a players' employment contract could withstand this kind of claims. Yet, to ward off these risks, it might be wise for the club to explicitly confirm its exclusive entitlement to the goodwill generated by the sports events it organizes and to the full income generated by each business activity conducted in the media and advertising sectors, notwithstanding inclusion in it of the player's image as a member of the team.¹⁸

5. COMPETITION AND THE COLLECTIVE SELLING OF TELEVISION BROADCASTING RIGHTS

5.1 Collective selling in the Italian football broadcasting market: general considerations

Competition issues related to the sale and acquisition of TV rights to football matches have generated controversy and litigation throughout Europe and within the European

¹⁸ Lucn Ferrari, *Spons Image Rights and the Law*, *Jdraltsjuridisk skrtAserie* Nr. 7, *Artikelsammling* 2002, *Svensk Idrotts Juridisk Fdrening*.

Union. The antagonists include professional football leagues as well as international associations such as UEFA and FIFA. Italy, of course, has not avoided the fray.

As already indicated, before the Melandri Reform came into force, pay-TV and similar rights were sold individually, while the League marketed the free-to-air rights. This marketing system was in line with a set of decisions (No. 6633 and No. 6662 of 1995, No. 7340 of 1999 and No. 8386 of 2000) rendered by the Italian Antitrust Authority (*Autorità Garante della Concorrenza e del Mercato*, hereafter also referred to as the 'Authority' or 'AGCM'), whereby the latter endorsed the principle that the host clubs were to be considered the owners of the media rights to matches. In particular, the Authority stated that Articles 1 and 25 of the League regulations, which at the time entitled the League to jointly sell all TV rights including pay-TV, constituted a price-fixing cartel in breach of antitrust law (Law No. 287 of 10th October 1990, Art. 2, II paragraph, letter a).¹⁵ More precisely, the Authority outlawed the joint selling of pay and free-to-air TV rights for individual games, while granting an exception (pursuant to Art. 4, 1st paragraph of Law 287/1990) for the collective sale of rights to the 'Coppa Italia' and to the Serie A and B free-to-air highlights. The reasons for those exceptions were that the 'Coppa Italia' is a competition based on the direct knock-out system, which makes it impossible for TV broadcasters and individual clubs to know how many matches each club is going to play during the course of the tournament. Similarly, Serie A and B highlights constitute a package of the most interesting images from the games of the day, which could not be sold individually by the clubs. With its decisions, the Authority followed a similar reasoning made at the time by the Bundeskartellamt, which had considered that collective agreements were anticompetitive by definition. Under this premise, exceptions were only allowed by compelling evidence demonstrating that an individual sale is impossible or unreasonable under the circumstances, or that collective selling has beneficial effects for the relevant market or the end-consumer that outweigh the negative ones.²⁰

Of course, such a view was supported with enthusiasm by the richest and most popular clubs while accepted with resignation by the others. To the smaller clubs, individual selling appeared more in line with the interests of the then so-called 'Big Five' (Juventus FC, AC Milan, FC Internazionale, AS Roma, SS Lazio) than a strict consequence of the legal requirements of competition law. In any case, in light of the Authority decisions, the Serie A and B clubs, not without robust discussion and internal negotiation,²¹ voted in the general assembly of the league to amend Articles 1 and 25 of the League's regulations,

¹⁵ In decision No. 7340 of July 10 1999 the Authority stated that the agreement between the single clubs allowing the collective sale of the Serie A and B TV rights by the League - according to the provisions contained in Arts. 1 and 25 of the LNP Regulations - is 'price-fixing (...) and is, therefore, to be considered anticompetitive in the market of the premium sports TV rights, in violation of article 2 of Law n. 287/90'.

²⁰ In the same decision, the Authority, with regards to the TV rights to 'Coppa Italia' games, held that as there is a large number of clubs participating in the national tournament and (that such number is 'uneven in terms of commercial value', and 'in the event of the relevant television rights being sold on an individual basis, the broadcasting stations would be forced into a multiplicity of negotiations with the clubs which own the rights. The additional costs could be so high as to make the transmission of the games not convenient from an economic point of view'. The Authority continued by stating that 'the TV broadcasting stations have held that - with regards to the present characteristics of the national tournament - undoubtedly they prefer collective selling by the League of the Coppa Italia TV rights'.

²¹ The rather generous redistribution of revenues derived from individual selling, was the result of such negotiations.

limiting the collective sale to the championship's highlights and to the 'Coppa Italia' games,²²

Now, the clock appears to have been turned back. Even before the Melandri Reform, the Italian antitrust Authority, on the wave of a different approach adopted by the European Commission,²³ changed its viewpoint on the matter.

A new orientation in favour of collective selling already emerged as a result of the Investigation into the *Sector of Professional Football*, started by the Authority in March 2005 and concluded at the end of 2006. In the Final Report, published at the beginning of 2007, the AGCM stated, on page 51: 'the current broadcasting rights marketing system has determined inequalities and imbalances among the football clubs of the same league'. This conclusion is little less than a formal condemnation of the system of individual selling.

The reasoning underpinning said final statement clearly recalls the arguments previously mirrored by the European Commission. Facing the question as to whether a system of joint selling of sports media rights could be legitimate in light of EU competition rules, the Commission stressed that the specificity of sports may lead to the granting of an exception to the uniform application of competition and price fixing rules: the quality of sporting competitions is directly proportional to the balance among competitors, granting uncertainty of the final result. Therefore, inasmuch as a rule (or, more precisely, a rule of competition which disciplines football in its business aspects) leads to increase the gap between rich and poor clubs, it must be sacrificed to the 'good of the game' and to the interests of the end-consumer.

The individual selling of media rights had increased the financial imbalance among Serie A clubs. In the 2005-2006 season, for example, the TV rights licensing revenues of top clubs were ten times higher than those of lesser clubs. It is still disputable whether the financial gap was responsible for a less competitive and less attractive championship. However, the Commission concluded that the joint selling of media rights, inasmuch as it would reduce financial imbalances, could eventually increase the competitiveness of smaller clubs and make both the Serie A championship and each match more attractive in the interests of the spectators.

This new attitude of the AGCM certainly paved the way for the *Melandri Reform*.

However, according to various news reports,²⁴ in March 2008, just a few weeks after the Decree entered into force Sky filed a formal complaint to the European Commission against the new rules, claiming that certain provisions of the Melandri Reform were restricting trade and in violation of freedom of competition among football clubs as well as among TV networks. From what has transpired through the press, Sky focused its complaint on the creation, by the Melandri Reform, of a League's monopoly on the supply side of the football broadcasting rights market. Such monopoly and the marketing options granted to the League by the Decree, would allow the latter to impose rights packages in which, for

²² Art. 1 of the League's Regulations was amended by the Italian Professional Football League in 1999. In fact, its previous version entitled the League to be the exclusive representative of the clubs for the sale and negotiation of *all image and broadcasting rights* regarding all events organized by the League (Serie A and Serie Championships and Coppa Italia) and provided for specific obligations for the clubs to preserve this representative power of the League.

²³ For subsequent reference, see the 'Independent European Sport Review 2006', the White Paper on Sport of 11 July 2007, recently followed by the 'Resolution of the European Parliament of 8.5.2008 on the White Paper on Sport'.

²⁴ See for example 11 Sole-24 Ore, 14 March 2008, p. 26.

example, much less attractive Serie B matches are offered in combination with Serie A, or artificially reduce the variety and amount of available events. A critical eye has been also turned to provisions whereby single clubs are granted the exclusive rights to the audiovisual production of the events, and to the League's power to restrict licensing of (collectively) *unsold* rights by the single clubs. Article 11.6 poses another major competition issue, by forbidding licensors from sub-licensing the rights. Finally, advantages reserved in support of emerging platforms, which may be more easily developed by network operators, may alter the competitive balance among broadcasters.

The Melandri Reform and its anticompetitive effects will undoubtedly raise fierce debate and further legal challenges. Its bold interference with market forces and its provisions directing TV rights revenues distribution among football clubs and in favour of minor sports and the youth sector denotes a policy of State control.²⁵ The new rules may in time prove their ultimate pro-competitive effects, i.e., a more attractive Serie A and better access to premium football on TV. But from the early signals one could seriously doubt the new regulations will be a Herd an appropriate testing period.

5.2 The pay-TV market

Since the 2002-2003 season, Sky Italia, a merged entity between Stream and Canal+ controlled Tele+ authorized by the European Commission, - had been enjoying a virtual monopoly in the pay-TV market.

In fact, during the first season following the merger (here was an attempt to establish a rival platform, named 'Gioco Calcio', owned by Plus Media Trading, a consortium constituted by a sizable number of small and medium Serie A and Serie B clubs. Gioco Calcio, other than threatening the early strategic plans of Sky Italia, struggled to operate under enormous difficulties through its first season, only to collapse in the end, failing to find investors willing to provide the necessary medium-term financial resources. After consulting with the Authority for Telecommunications, the Antitrust Authority, authorized Sky, the only pay-TV provider, to exceed the limit which otherwise at the time prohibited any single operator from acquiring more than 60 percent of the pay television rights of games of the Serie A Championship.²⁶ However, the Authority set specific pro-competitive restrictions on Sky. In particular, Sky was prevented from entering license agreements exceeding three years duration. A further limitation was imposed by the European Commission, prohibiting Sky from combining satellite and digital terrestrial pay-TV rights.

At the time of the creation of Sky Italia, digital terrestrial technology seemed far from the kind of development that would make it a platform able to support the distribution of competitive pay-TV service and consequently it was believed that for a painfully indefinite time Murdoch's TV would be the only player on the market of pay-TV contents.

However, Sky's monopoly did not last long.

On 3 May 2004 the Italian Parliament passed a law²⁷ (commonly referred to as 'Legge Gasparri' after Maurizio Gasparri, the Minister for Communications) introducing and regulating digital terrestrial technology.

²⁵ See [FT.com](#) 'Italian Law to Shake Up Broadcasting Rights', 10 December 2007.

²⁶ See Para. 1.2.

²⁷ Legge 3 maggio 2004, No. 112.

In order to accelerate the dissemination of the new broadcasting technology, the law in question and the subsequent decrees promulgated for its application required that decoders should be sold to the public at 'accessible' prices.² In order to facilitate the fulfilment of such condition and provide an incentive for the growth of the new technology, the Government soon made available a state contribution for each decoder purchased.

Availing itself of such a favourable opportunity, in July 2004, Mediaset, the Italian television operator owned by then Premier Silvio Berlusconi, unexpectedly announced its EUR 86 million purchase of the rights to the transmission through digital terrestrial technology of domestic games of the three *main* Serie A clubs: Internazionale, Juventus and Milan for the seasons 2004-2005, 2005-2006 and 2006-2007. Furthermore, Mediaset obtained a right of first negotiation and a right of first refusal for the transmission of the games of the same clubs through satellite television technology starting from the season 2007-2008. Mediaset was soon followed by the entry in the pay-TV market of another broadcasting channel, La 7, controlled by Telecom Italia, which equally decided to invest in digital technology and acquire the rights of other Serie A clubs. As of today's date, the two *main* terrestrial operators collectively control all Serie A games and have agreed to exchange between themselves (the highlights of the games broadcasted, so as to enable each of them to offer to their clients the highlights of the day's fixtures in addition to the single game purchased. On 23 January 2005, Bologna-Cagliari and Inter-Cievo were the first games offered by La 7 and Mediaset on the digital terrestrial platform.

Bolstered by the low prices of the viewing offered by Mediaset, selling pre-paid cards for only 3 euros per game and by the State contribution to the purchase of the decoders, the market for digital terrestrial pay-TV surged.

Sky was not *commercially* prepared for this unexpected early challenge and it was undermined by the appealing offers proposed to the audience by Mediaset and by La 7. Customers were keen to pay and view each single game for merely three euro, rather than having to purchase the entire season package.

Unquestionably, the two new competitors have taken advantage of the fact that while the Commission had prevented Sky from cumulatively utilizing digital and satellite pay-TV technology, no such limitation had been imposed on Mediaset and La 7. As a consequence, Mediaset was able to exact from clubs like Inter, Juventus and Milan a right of first negotiation and a right of first *refusal* for the transmission of their games through satellite television technology starting from the season 2007-2008, Mediaset thus obtained an - unfair - advantage, which would fully blossom upon the expiry of the contracts *between* Sky and the top Serie A clubs. Many were wondering whether Mediaset had secret plans to launch a new satellite channel or, rather, it simply intended to carve out territories between it and Sky.

With hindsight, we can now say that Mediaset had neither the intention to oust Sky, nor to engage in a war over the satellite platform.

Due to the blatantly unequal treatment between the competing channels, which the above mentioned circumstances had produced, Sky Italia was considering a claim addressed to the European Antitrust Authority, requesting it to revise the restrictions im-

² Two other conditions were introduced by the law: a) the percentage of population covered by digital terrestrial channels should not be less than 50 percent; b) the programmes broadcasted by digital terrestrial channels must provide a variety of programm.es, which should differ from those broadcasted on ordinary non pay-TV channels.

posoc! on ii, with special reference to the prohibition to cumulate satellite and digital technologies. According to Murdoch's pay-TV management, the disparity at case was alone sufficient to distort competition.*

Sky's belligerent plans were most likely put on hold as the Melandri Reform was taking shape. Today, as described in Paragraph 2, a new regulatory balance has been set within the football pay-TV market and new antitrust concerns have arisen, as described in the preceding Paragraph 4.1, which seem to be shared equally by Sky, Mediaset and La7.

6. BROADCASTING RIGHTS AND FREEDOM OF THE PRESS

6.1 The difficult co-existence of two fundamental rights: the pursuit of profit and the right to information

Once the primary forms of selling and the streams of revenues are identified, our analysis of the economic exploitation of broadcasting rights cannot ignore the relevant issue concerning the permissible extent of such exploitation. As difficult as it may be to identify the owner of media rights, the picture is not complete if we do not *define* their extent as well.

In this respect, the freedom of the press has always been the crucial issue. To what extent can the media's access to sporting events and the dissemination of related information and images be limited?

The existence of the right to information is not disputed under Italian law. It has always been held that Article 21 of the Italian Constitution, which establishes the fundamental right to freedom of expression, also implies the right to information concerning events of public interest. Moreover, several statutes mention this right, thus confirming its legal recognition and protection (for instance, Article 5 of Law No. 422/1993 according to which 'the transmission of images and sound material and of information concerning all events of general interest (...) is allowed for the purposes and within the limits of the exercise of freedom of the press').

On account of the above, public interest in sporting events allows the press (i.e., authorized media operators) to invoke a right of free access to the venues where, for example, football games are held and a right to the press coverage thereof.

However, statutory provisions that declare such principle do not define its contents and scope. Theoretically, the right to information compared to the right of marketing of sporting events have different context and fields of exercise. In practice, it is disputable where one should place the threshold at which the right to information crosses the line of free speech into commercialization and entertainment.

It is of course no secret that news organizations are businesses as are football clubs and that, to this extent, they are commercial competitors in the broadcasting market. The business of media operators is to broadcast news on sporting events under the umbrella of public interest and the right to information, which collides with the clubs' aspirations to

* Concerns have also been raised about the limits of the utilization of digital terrestrial technology in pay-TV or pay per view mode. More precisely, a decision passed by the Communication Authority in November 2001 (AGCOM Delibera 435/01 'Approvazione del regolamento relativo alla radiodiffusione terrestre tecnica digitale') stated that a quota of the television digital terrestrial programming, to be specified before 31 March 2004, must be offered on a free basis. However, such specification has not been made. As a consequence the 'broadcasting capacity' for pay-TV programmes via digital terrestrial television is still unlimited.

exclusively own and control the goodwill generated by the same sporting events. This obviously causes hostility between the right to information of the press, on one side, and the right of the owner or licensee thereof to fully exploit their media property, on the other.

As previously explained, the focal question is to define the limits of the media's free access to and press coverage of sports events in order to reconcile public interest to information with the clubs' and leagues' right to enjoy the economic benefits of their business activity and investment. As such limits are not circumscribed by statute and not clearly defined by the Italian jurisprudence, the Football League has thus far been issuing internal regulations which, upon the media representatives' endorsement, supplied rather detailed guidelines for television and radio broadcasting.

Today, the Melandri Decree has finally provided a statutory definition of the right to information.

Even if the Decree 9/2008 only expressly applies to professional team sports (i.e., soccer and basketball), its provisions regarding the right to information will be considered influential and authoritative guidelines for other sports.

However, an analysis of the new rules introduced with regards to the right to information will show that the new discipline is not exhaustive. In fact, the Decree requires a specific implementation of its general provisions through regulations issued by the Communication Authority,³⁰ which have not yet been issued at the time this article is being written. Therefore, our analysis must be read bearing in mind that a relevant piece of the puzzle is currently missing.

6.2 The right of information in the Melandri decree

The relevant provisions for our analysis of the Melandri Decree are set forth under Article 5, which is entitled 'right of information'.

In its initial sentences, Article 5 basically reaffirms commonly acknowledged principles.

Section 5.1 states that media operators have the right to report to the public about the single matches of the competition.

Section 5.2, after stating that 'the exercise of the right of information may not prejudice the normal exploitation of the media rights by the licensee of the same, nor cause unfair prejudice to the interests of the competition or event organizer', clarifies that the bare communication to the public whether orally or written including in real time, of the result of the game or of updates thereof, in no case may represent a prejudice to the full exercise of broadcasting rights. This principle, too, was well consolidated prior to D. Lgs 9/2008.

More substantial provisions are provided under Section 5.3, defining the extent to which the broadcasting of images of the games must be held as information. The Decree affirms more or less the rules contained in the regulations issued by the Football League. Obviously, the statutory regulations prevail and any inconsistent League provisions are replaced or voided thereby (e.g., former limits for the duration of highlights have been slightly increased).

³⁰ The Communications Regulatory Authority (Autorità per le Comunicazioni, or Agcom) is an independent authority, established by Law No. 249 of 31st July 1997. Agcom is first and foremost a 'guarantor'. The two main tasks assigned to it by Law No. 249 are to ensure equitable conditions for fair competition and to protect the fundamental rights of all citizens in the telecommunications, broadcasting and audiovisual* markets.

The broadcasting of match highlights is allowed provided that:

- * it takes place within news reports;
- e it takes place no less than three hours and no more than forty-eight hours after the end of the match;
- * each highlights broadcast does not exceed eight minutes for each day of the Championship with a maximum of four minutes per calendar day and a limit of three minutes per game.

As long as media operators respect these rules, they must be held as acting within the scope of the fundamental right to information.

As mentioned above, this discipline represents a minimal framework, and requires implementation by regulations from the Communication Authority. However, this is not the only reason why the Melandri Decree itself does not respond to all possible questions.

In fact, one could have expected a clear definition of the right of information on one side and of marketing on the other, so as to guide the interpreters through any dispute, instead, the Legislator simply confirmed well-known principles and listed some specific, individual cases that fall into the scope of one category (the right to information) or of the other (marketing).

Such legislative style avoids the nebulous divide between information and commercial exploitation: out of the scope of listed cases, no criteria or definitions are provided for in that respect.

Therefore, the related burden will be supposedly left to the Courts, with a case-by-case approach, unless more clarity will be provided by the AGCOM.³¹

It is, however, difficult to characterize this as a missed opportunity for our Legislature. Arguably, flexibility might be the most suitable option in a growing and developing area such as media and communications. A practical application of this principle has been experienced at the beginning of this century in relation to well-publicized disputes involving Serie A mobile telephone broadcasting via UMTS and MMS technology.

6.3 Freedom of the press and telephone broadcasting rights

At the beginning of 2000, the Courts had already expressed their opinion about matches being shown via *videos* displayed on mobile phones. In that respect, it was held that freedom of the press was not fostered by the transmission of videos of the games and that only the clubs themselves or their legitimate licensees were entitled to transmit them. The same conclusion was reached for the so-called *slideshows* (sequences of photos).

However the practice of transmitting *individual photos* on mobile phones had not been directly considered at that time. Related legal quarrels started in 2003, when the Italian mobile telephone company Telecom Italia Mobile and the news agency Ansa were sued in a series of legal disputes concerning the practice of transmitting football match highlights on mobile telephones without having been licensed by the football clubs, nor having paid any fee, but simply relying on the right to information, in keeping with the old adage that one picture is worth a thousand words.

See footnote 30.

Obviously (his practice was hotly opposed by the clubs and by other entities, such as the rival telephone company and sports agencies, which had paid considerable amounts in order to obtain a license to broadcast images and videos through mobile telephones. The legal claims *thus* sought to protect the financial advantages deriving from exclusive economic utilisation of a sporting event.

In brief, the point was: should the unauthorized transmission of individual pictures of a game be allowed as an exercise of the freedom of the press?

The case law responses to this question were not univocal.

In the first instance, with an order issued on 29th March 2003,³⁷ concerning (the dispute between AC Milan, Juventus FC, as legal owners of the rights to their home matches, joined by H3G (the exclusive licensee of the right to transmit photos and footage of the domestic games) against TIM (Telecom Italia Mobile), the Court of Rome prohibited TIM from broadcasting photos of goals and video highlights during the games.

The Court recognised football clubs as exclusive owners of the broadcasting rights based on the premise that a sporting event is the product of the economic activity of a business enterprise and that Article 41 of the Italian Constitution, in guaranteeing the freedom of economic endeavour, also implies protection of the business investments and the results (hereof,³⁸ Accordingly, any exploitation of such rights by third parties without previous authorization from the holders of the rights was held unlawful.

In its reasoning the Court noted (that sporting competitions produce events which generate great public interest and that information about them should be available on TV, Radio, Internet and any other media, including mobile phone technology. This is indeed an exercise of the freedom of expression and related freedom of the press under Article 21 of the Italian Constitution. However, the constitutional right to be informed cannot be abused in order to justify the exploitation of a sporting event by interlopers who are not investing in the business. The right to be freely informed should be satisfied by reporting the development of the event to the public and does not entail the private broadcasting and transmission of live spectacular images and highlights.

Again, the distinction between entertainment and information is crucial and malleable. The Court declared that even still images of a game if transmitted and viewed before the relevant game is over could be spectacular and thus constitute entertainment. Such transmission diminishes the exclusivity of possessing the goodwill generated by the event.

However, this reasoning did not pass muster in the following similar cases.

In an interlocutory order rendered only a few months after, the Court of Milan³⁴ started from the same premise and came to a contrary conclusion. The judge decided to allow TIM to transmit live still images of the games, notwithstanding the fact that MP Web, to whom the relevant broadcasting rights had been sold by A.C. Parma, had not sub-licensed its rights, which were in fact part of the package sub-licensed to TIM's competitor H3G.

According to the Court of Milan, football events are a source of great interest for the public and any information concerning them represent real news, which may be broad-

³⁷ *Tribunale di Roma, 29th March 2003, Juventus FC, AC Milan SpA and IDG Spa v TIM Telecom Italia Mobile and Ansa.*

³⁸ Such statements were in line with the legal definition of broadcasting rights prior to the Melandri Reform, as reported under previous Para. 1.2. Today, according to the Melandri Decree, clubs are only joint-owners of media rights. See Para. 2 above.

³⁴ *Tribunale di Milano, 14th July 2003 case MP Web S.n.l. and A.C. Parma S.p.A. v. TIM Telecom Italia Mobile S.p.A. and ANSA.*

casled by virtue of the principle of the freedom of the press. Such news, which shall be transmitted exclusively for information purposes, may also include still pictures capturing a certain instant of the event, as long as this reporting activity is not entertaining to the point of completely satisfying the spectator's desire to watch the sports show instead of other programmes. This satisfaction would, indeed, allow the alleged information activity to compete with the clubs' licensees.³³

The Court of Milan concluded that the live transmission of a photo representing a goal would not exhaust a spectator's interest to watch (the football match, or even part of it). This ruling stressed the fragmented and disjointed characteristics of a still picture when compared to the representation of an entire playing action. According to the Milanese judge, the transmission of a picture may even stimulate the spectator to search for a more detailed and complete vision of the event in hand, the same way a brief piece of news would encourage the reader or the spectator to find out more about the event by reading other articles or exploring other sources of information.

Moreover, this reasoning would apply to live broadcasting of the image, should that be technically possible, because the freedom of the press, according to the Court, does not admit any temporal limitations to the circulation and broadcasting of the news.

This view, founding the interim decision in 2003, has been wholly confirmed by the final judgment rendered on January 5th 2006.

First of all, the judge upheld the principle according to which still images of the game do not fulfil the spectator's need to watch the game, but actually stimulate it. Consequently, it has been argued that by sending still images via MMS (text messages carrying pictures taken by Ansa), Telecom does not provide entertainment, but information.

Therefore, as still images are a means to circulate news, within the limits stated above, licensing agreements between football clubs and companies concerning transmission of match images may not restrain such right of information.

The Court of Milan underlined that TIM provided the MMS service using images shot, by Ansa, i.e., by a press agency, which is granted access to the Serie A stadium and authorization to take photos. What is of interest is that the Court reaffirmed the principle, which had already been expressed in other judgements, that 'the purposes of information must be reached through legitimate informative sources'. In short, only authorized press reporters can access the venues where the sporting event is held to collect information. Therefore, authorized reporters can send photos to telephone companies in just the same way as they normally do to the newspapers they work for. Telephone companies can in turn render such photos available to the public in real time.

³³ The same line of reasoning had been followed by Corte d'Appello di Roma, Decision of 10 November 1980,