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"ONE RIGHT" -SYSTEM FOR SPORTS EVENT ORGANISERS
- A Mission for IP?*

Abstract

The exploitation of sports events is regularly under debate and (de)construction; The focus has been on the concepts of ownership of or (intellectual) property rights in events, on the control of disseminating information and coverage as well as on the rights to otherwise commercially exploit the events. Currently it is usually the sports event organiser that is able to control – from its central and vital position – nearly every aspect of exploitation regarding the event. The position is, however, still mainly unregulated and unprotected as such – i.e. in the meaning of being granted e.g. a particular exclusive right protected worldwide. Instead, the position consists of various aspects; It is the IP and other rights and economic value residing in and stemming from the events that are exploited e.g. by means of contracts, licences and/or (other) contractual arrangements. The position of the sports event organiser, thus, already to a large extent resembles that of an exclusive rights owner – only (usually) without the somewhat clearly defined legal position or status and the crucial limit(ation)s and restrictions the law could possible provide.

A good example is provided by the IOC, which evaluates, among other things, the level of rights protection and (other) legal aspects and guarantees in the applicant cities (countries) to host the Olympic Games. Furthermore, absolute compliance with e.g. the Olympic Charter and all other rules, instructions and conditions possibly established by the IOC is required. In the event of non-compliance or a breach of the obligations the IOC is entitled to withdraw, the organisation of the Olympic Games from the host city.

In this paper, the central and vital position of the event organiser is tentatively examined from the point of view of (private) ownership, the markets and freedom of trade and commerce. Furthermore, various dimensions of freedom of speech are relevant in the context and provide therefore important yardsticks for the examination as well. In addition, some trends concerning the exploitation of sports events by the event organisers are discussed; Special focus is on the possibility of creating a new (sui generis) exclusive right, an exploitation right (droit d'exploitation, Leistungsschutzrecht) for sports event organisers, a part of which would consist of

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control over the dissemination of coverage of and information about the events i.e. the ownership of media rights.

This paper, hence, aims to outline some crucial and critical points of departure for further study and research of the current and potential rights of sports event organisers, particularly the media rights. This is done on a more general level i.e. by introducing the regulation and practise of the IOC in electing host cities for the organisation of the Olympic Games; by referring to some relevant case law and landmark cases from several countries and by introducing the course of development in some countries, like the provisions on "droit d'exploitation" in Code du Sport (2006) in France and the London Olympic Games and Paralympic Games Act (2006) in the UK. Furthermore, alongside the introduction and tentative examination of the new trends, some questions are raised regarding this (future) development – most importantly:
- *What problems might/does the current position of sports event organisers bring about?*
- *Is regulating and clarifying the position of (sports) event organisers a mission for IP law? What – if any – additional value or (dis)advantages could/would the introduction into the IP regime bring to the exploitation of events by event organisers?*

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1 Sports Events – What Is There for Who to Exploit?[1]

1.1 What Value and Rights Reside in Sports Events?

There are various IP and other rights and economic value residing in and stemming from the (sports) events that are commercially exploitable. All of these commercial rights are not (necessarily) IP rights, let alone copyrights; IP law does not recognise for example commersialisation or productisation, inter alia, in the form of official partnership.[2] Moreover, various rights regarding the dissemination of the events by (mass) media can be referred to as (exclusive or non-exclusive) media rights. These rights include, inter alia, radio and TV broadcasting rights and new media rights. For example, a TV broadcasting right usually consists of the *right to film/cover or record* the event and the *right to transmit it* (to the public) live or deferred with several packages for e.g. free-TV or pay-TV and the rights are usually granted for a given territory (e.g. a country) on an exclusive basis.

> For instance, in the European Commission's decision relating joint selling of the commercial rights of the UEFA Champions League[3] various media rights were identified: *TV broadcasting rights, Internet rights, wireless 3G/UMTS rights, audio rights* and *physical media rights* i.e. DVD, VHS, CD-ROM etc. to archive material. In addition, *other commercial rights* were identified which associate third parties with the brand in question, such as sponsorship rights, suppliership rights (e.g. for computer and telecommunications suppliers, which provide technical support to the broadcast graphics service and, in return, receive on-screen credits), licensing rights ((i.e. the licensing concept allows for selected companies to produce products related to the brand in question, for example, video games or CDROMs) and also other intellectual property rights, such as trademark and design rights in logos and/or names and copyright in the official music.

Regarding the *event itself* "[c]opyright is only relevant if the event is considered to be a work within the meaning of copyright law, something which is often not the case with sports events in

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[1] The terms "sports event" and "sports event organiser" are loosely defined in this paper; However, for the problems and questions concerning the organisers position – and discussed in this paper – to have any actual relevance the sports event has to be of a certain magnitude. The organiser, in turn, refers to any physical or legal person organising sports events of a certain magnitude. In the French *Code du Sport* (2006) the "*organisateur*" refers first and foremost to a sports federation, but also to "*toute personne physique où morale de droit privé*" under certain conditions (see Art. L333-1 and L331-5). See also the Working Paper: Rechtsgutachten "Leistungsschutzrecht für Sportveranstalter?" at 55-56.
[2] Halila 2006 at 216.
[3] UEFA Commission Decision COMP/C.2-37.398.

particular."[4] The broadcasting signal produced by a TV broadcaster is, instead, protected via copyright or neighbouring right.[5] In addition, the architecture, music, mascots[6], certain performances, recordings, photographs, reports, commentaries[7], interviews and even scores[8] may be protectable and/or copyrightable.

The right to exploit the sports event is not as such a (globally recognised) exclusive exploitation right or a *sui generis* or other IP right nor is the position of sports event organiser (usually) *as such* copyrightable or otherwise protectable.[9]

> As regards one aspect of the organisers position the disputes over who has *the right to broadcast* sports events already arose in the 1930s and it was the club owners (at first mainly in the U.S.) who began to challenge broadcasters producing play-by-play descriptions of games without even seeking a consent or authorisation from anyone.[10]

In addition, the goodwill of certain (major) sports events and their attractiveness to large audiences are of particular value to the event organisers and of great interest to e.g. sponsors, media operators and advertisers.

1.2 The Private (Elements) in Public (Events)

Publicity on Private Property

The right to exploit sports events as "home rights" or "householder's rights" *vis-à-vis* the private property rest on some particular interest[11] of the club owner or event organiser in the land, building or some other place of venue.[12]. The right to exploit the event is, thus, seen to accompany *the power and ability to control access to the venue*.

When the sports event would, however, occur in a *public* place the situation would obviously be different; Access to the venue of the general public cannot, namely, be (efficiently) restricted or prohibited, and the event or spectacle cannot be 'effectively exclusive'. Instead, it could be regarded as a public event about which anyone could report and the dissemination of information about which could, thus, not be forbidden.[13] It was in the *WCVB-TV* -case[14] in 1991 that the district court – although it confirmed the control of the club owners or event organisers over the teams' game performances in, for instance, *privately owned* stadiums – nevertheless, found it

[4] Schoenthal 2006, at 3.
[5] See more about the protection of broadcasting signal in Guibault-Meltzer 2004 and Ogawa 2006.
[6] See e.g. the case *Jules Rimet* -case (2007) which was about IP issues in relation to World Cup Willie – a cartoon lion dressed in the England football strip which was the official mascot of the 1966 World Cup Finals and the very first World Cup mascot ever. The dispute concerned the ownership of rights in the trademark "World Cup Willie" and a device consisting of a cartoon type lion.
[7] See e.g. the judgement of the Supreme Court of Finland (KKO 1988:52) concerning the copyright in oral performance; A sports commentator was afforded copyright protection for his/her commentary on a televised football match. The commentator was entitled to compensation from a company recording the commentary without authorization.
[8] The ECJ gave several judgments on 9 Nov. 2004 that concerned, *inter alia*, the exploitation of horse racing data and fixtures list data in betting coupons. See ECJ C-203/02 (the *BHB* -case); ECJ C-46/02; ECJ C-338/02 and ECJ C-444/02 (the *Fixtures Marketing* -cases).
[9] See e.g. the situation in Germany in the Working Paper: Rechtsgutachten "Leistungsschutzrecht für Sportveranstalter?"at 51: "Das Deutsce Recht kennt de lege lata kein Recht, das geziehlt die Veranstaltung von Sportsvaranstaltungen regelt oder aus dem sich ein originäres absolutes Recht des Veranstalters von Sportereignissen ableiten lieβe."
[10] See e.g. Murphy1996 at 215. The means of challenging was at first in the field of (tele)communication law, namely requesting the authorities not to renew licenses for the broadcasters in question. This, however, resulted rarely in the situation hoped by the event organisers. See ibid.
[11] Be this interest ownership, freehold, leasehold, right to exclusive occupation, tenancy in possession or license with exclusive possession. Mere occupation would, however, not be enough. See e.g. Spilsbury 2000 at 311 - although in the context of indirect protection for privacy.
[12] See also Spilsbury 2000 at 310-311 (pp. 310) - although in the context of indirect protection for privacy.
[13] See Murphy 1996 at 219.
[14] *WCVB-TV* -case (1991)

problematic to prevent broadcasting newsworthy events occurring in public places, such as the public streets. The Court, thus, found that in the absence ability to restrict access the dissemination of news of the (public) event cannot be forbidden. Mere production or sponsorship of the event in question did not amount to the property rights in the broadcasts of the event.[15]

> Consistent with this line of argumentation is the point of view that when privately own land, building or place was the subject of interference by a third trespass could be invoked (i.e *entering or remaining on the premises* without permission). If the happenings would, however, be photographed or filmed outside the premises, for instance from a public road, land or (high enough) from the air, no trespass could be at hand. Nuisance, on the other hand, would rather mean an *interference with some right incident to the ownership or possession of realty*. Nuisance could, perhaps, also be evoked in this context.[16]

It can always be also a question of *others* (real) property (rights) as well; This was the case in, for example, the 2002 *Chicago Nat'l League Ball Club* -case[17] where a group of rooftop owners had charged fans to watch the so-called Chicago Cubs' games from their rooftops, which had a magnificent view of the ballpark.

> The Cubs alleged that the game itself was copyrighted, that the Cubs have a property right in the performance of the Major League baseball games played at Wrigley Field and that the rooftop owners were profiting from the players, the team's name, trademarks, copyrighted telecasts and images without authorisation or consent.[18] The dispute concerned mainly "the ownership of the view"; On one hand, the Cubs claimed a property right in the view but on the other hand, the rooftop owners claim the right to watch Cubs games (i.e. the view) from their own rooftops.[19] In addition, there was the question of rebroadcasts of telecasts without licenses.[20]

In addition, the whole concept of "ownership" of or "property right" in an event or sport as such is to be questioned; Who 'owns' sports (events)? In the *Victoria Park Racing* -case judge Latham was of the opinion that " [a] "spectacle" cannot be "owned" in any ordinary sense of that word.[21] On the other hand, sports events may be considered as a national or a regional possession that simply transcends ownership.[22] Furthermore, in the *Our Dogs* -case[23] – mentioned also in the *Victoria Park Racing* -case – it was stated that "news" is not property in the strict sense, and that a person who creates an event or spectacle does not thereby entitle himself to the exclusive right of first publishing the news of the event or spectacle.[24]

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[15] Ibid. See also Murphy 1996 at 219-220.

[16] The law of nuisance could have been seen an extension of the idea of trespass. There could, however, be a real distinction between trespass and nuisance even when they were combined; The cause of action in trespass was interference with the right of a possessor in itself, while in nuisance it was the incommodity which was the (natural and necessary) consequence of such interference. See e.g. Street 1907 at 211, available at www.jstor.org/pss/784011; accessed Sept 11, 2008.

[17] *Chicago Nat'l League* –case (2002) cf. also an almost analogous case from over a hundred years ago, the *Detroit Base-Ball Club* -case (1886). See also Jarvis - Coleman 2001 and Bitman 2004.

[18] *Chicago Nat'l League* –case (2002)

[19] Ibid. See also Shifley-Shifley 2003, available at www.law.northwestern.edu/journals/njtip/v1/n1/6; accessed Sept 2, 2008.

[20] The rooftop clubs' use of televisions for displaying the Cubs' games, in turn, was a different situation; The telecasts were copyrighted and the clubs had no licenses. Even the "dentist's office exception" did not justify more than one television nor did it justify televisions of overly large size. See e.g. *Broadcast Music* -case (1991) at 1482, 1489.

[21] *Victoria Park Racing* –case (1937), Judgement by Latham. "Even if there were any legal principle which prevented one person from gaining an advantage for himself or causing damage to another by describing a spectacle produced by that other person, the rights of the latter person could be described as property only in a metaphorical sense. Any appropriateness in the metaphor would depend upon the existence of the legal principle. The principle cannot itself be based upon such a metaphor." (Ibid.)

[22] See e.g. Cox-Schuster 2004 at 9-10.

[23] *Our Dogs* -case (1916)

[24] See *Victoria Park Racing* –case (1937), Judgement by Evatt.

…From Real Property to Intellectual Property…

In the *WCVB-TV* -case[25] presented above, the Court of Appeals concentrated entirely on trademark law concluding that there was no such confusion or deception as to amount to an infringement;[26] According to the court, the viewers want to see the game, race or other event in question and they want to see the result. Thus, the public is not getting any less nor is it being deceived or confused by watching the event on Channel X instead of Channel Y.[27] The case, however, concerned a marathon race occurring on the *public* streets.

As regards *copyright*, two questions can be asked: Whether sporting events and/or the athletic performances in and of themselves are copyrightable? And: Whether something in or stemming from the (sports) events is copyrightable? The answer to the first question is traditionally "no". The answer to the second question, instead, is a definite "yes". There are various IP rights in and stemming from (sports) events – as already mentioned in 1.1.1.

In the *NBA*-case[28] the Court determined that NBA games were *not within the subject matter of copyright*.[29] According the Court "[s]ports events are not 'authored' in any common sense of the word. --- Athletic events may also result in wholly unanticipated occurrences---."[30] A game, sport or other publicly displayed performance was, hence, seen as nothing more than an accumulation of facts, and although the broadcasters were (and are) protected under copyright law, mere reproduction of *facts from the broadcasts* (even if often acquired by viewing) – not the *expression* i.e. *the constituent elements of the broadcast*– did not infringe copyright.[31]

Furthermore, sports events – or the position of the organiser *as such* – would not be protectable via related rights nor via database protection:[32] Performers are, according to WPPT[33] Article 2 (a), "---actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise *perform literary or artistic works or expressions of folklore*" (Italics supplied)[34] Sports performances by athletes are not (usually) seen to qualify for this protection.[35] It may, however, be possible to claim copyright protection in a choreographed sequence in e.g. gymnastics or ice dancing.[36] As regards database protection, [e]in Schutz der unternehmerischen Leistung, die in der Ausrichtung, Koordinierung, Kontrolle etc. von Sportereignissen besteht, ist

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[25] *WCVB-TV* -case (1991)
[26] Ibid. at 2, 6. See also Murphy 1996 at 220.
[27] Ibid. at 9. See also Murphy 1996 at 220.
[28] *NBA*-case (1997)
[29] Ibid. at 12, 18.
[30] Ibid. at 19. "[A]lthoug the list [of copyrightable works] is concededly non-exclusive, such events are neither similar nor analogous to any of the listed categories." (Ibid. at 18) "What "authorship" there is in a sports event, moreover, must be open to copying by competitors if fans are to be attracted. If the inventor of the T-formation in football had been able to copyright it, the sport might have come to an end instead of prospering." (Ibid. at 20)
[31] Ibid. at 32.
[32] See Gardiner, Simon et al. 2001 at 450 and the Working Paper: Rechtsgutachten "Leistungsschutzrecht für Sportveranstalter? " at 40.
[33] WPPT 1996.
[34] The position of circus performers was analysed in a Committee Report concerning amendments to the Finnish Copyright Act; Circus acts are, arguable a form of art and undoubtedly, technically demanding and require years of intensive training. Nevertheless, even they were not seen to qualify for protection as performers' rights. See KM 1987:7at 28.
[35] See e.g. Gardiner et al. 2001 at 450.
[36] See e.g. ibid. See also Halila 2006 at 215.

grundsätzlich nicht geeignet, den Schutz "als Datenbank"---."[37]

Even if the players' performances were not seen to possess the modest (possible) creativity required for copyrightability, the cameramen and director can be seen to contribute creative labor to the telecasts of the games;[38] The many decisions to be made during the broadcast of a game were specified in the *Baltimore Orioles* -case so that these decisions concern "camera angles, types of shots, the use of instant replays and split screens, and shot selection".[39] These were then seen to supply the creativity required for the copyrightability of the telecasts.[40] The statement was subsequently cited in the NBA-case; It was what the cameramen and the director were doing that constituted authorship.[41]

> It should be noted that the protection of the broadcasting signal (which was created largely due to (live) sports broadcasts being considered *unprotected*) is occasionally justified in the same manner; It can, namely, be argued that the skill and labour in a live broadcast of a sporting event "must lie in the preparation of a broadcast of a game and the direction of the transmission" while the work "encapsulating this skill and labour that is protected" would be defined by the definition of broadcast.[42]

However, it was stated in the *NBA*-case that information, such as the score, time remaining, and field goals per player, is unaffected by the camera angles, close-ups and particular shots selected for broadcast; This was seen as *purely factual information* which could be acquired from the venue without any involvement from the director, cameramen or others who contribute to the originality of a broadcast.[43]

The *Zacchini* -case[44] is of particular interest; The majority in the Court of Appeals held that petitioner's complaint stated a cause of action for infringement of a *common-law copyright*.[45] The Supreme Court of Ohio, in turn, rested petitioner's cause of action under state law on his "right to publicity value of his performance";[46]

> In the Court's opinion syllabus, it is stated that petitioners complaint is that respondent filmed his entire act and displayed it on television for the public to see and enjoy – and this was, according to him, an appropriation of his *professional property*.[47]
>
> The Supreme Court, in turn, held that the broadcast of a film of petitioner's *entire act* posed a substantial threat to the economic value of that performance. It further stated that – as the Ohio court recognised – this act was the product of petitioner's own talents and energy and the end result of much time, effort and expense. "Much of its economic value lies in the "right of exclusive control over the publicity given to his performance"; if the public can see the act free on television, it will be *less willing to pay to see it at the fair*. --- The --- effect of a public broadcast of the performance is similar to preventing petitioner from charging an admission fee."[48] (Italics supplied) The Court also cited legal literature as follows: "The

[37] Working Paper: Rechtsgutachten "Leistungsschutzrecht für Sportveranstalter?" at 40.
[38] See *Baltimore Orioles* -case (1986) at 668, 669 and *NBA*-case (1997) at 30.
[39] *Baltimore Orioles* -case (1986) at 668.
[40] Ibid.
[41] *NBA*-case at 30.
[42] See Hobson-Edwards 2007 at 20.
[43] *NBA*-case at 33.
[44] *Zacchini*-case (1977)
[45] See ibid., Justice White, opinion of the Court.
[46] See ibid.
[47] See ibid. (II).
[48] Ibid. The Court, however noted in footnote 12 that "[i]t is possible, of course, that respondent's news broadcast *increased the value of petitioner's performance by stimulating the public's interest in seeing the act live*. In these circumstances, petitioner would not be able to prove damages and thus would not recover.---" (Italics supplied)

rationale for [protecting the right of publicity] is the straight-forward one of preventing unjust enrichment by the theft of good will. No social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay."[49]

1.3 The Central and Vital Position of the Event Organiser – the Root of All Evil?

It was the courts (at first in the U.S.), with the opening by the *Pittsburgh Athletic Company* -case[50] in 1938, who started to vest concepts of property rights in favor of the club owners.[51] The *Pittsburgh Athletic Company* -case can, thus, be seen as the case to promote the establishment of property rights of a professional sports team particularly in the news, reports, descriptions, accounts and broadcast of its games. Further solidification of this line of argumentation was provided by the *Zacchini*-case in 1977 where the Court stated the liability for the appropriation over one's objection and in the absence of license or privilege, of the right to publicity value of one's performance. The Court, thus, protected *"the right to the publicity value of one's performance"*. In the *Baltimore Orioles* -case in 1986 the owners of sports clubs where granted rights to their teams' performances along with copyright in the fixed broadcasts.[52]

Currently the position of sports event organiser is central. From its position the organiser can control nearly every aspect of exploitation of the event including the dissemination of coverage of and (other) information about the event – exclusivity can be achieved through the central position; On one hand, the organiser gathers, collects and reserves rights, on the other hand, it spreads and distributes them – it receives from the roots and supplies for the (rest of the) plant. It has a vital position between the rootstock and the (actual) plant; For example, the athletes usually transfer (all or some of) their IP-rights to their clubs or societies,[53] and the clubs and associations, in turn, are (usually) obliged to transfer (some of) their rights – e.g. broadcasting rights – to the ((inter)national) umbrella organisations.[54]

The broadcasting contract is then concluded between some media operator[55] and the eventual right(s) owner or holder.[56] This contract, albeit concluded with the primary intention to sell and purchase broadcasting rights of a given event, may – and usually does – include conditions concerning access to venue and other things such as copyright and/or other rights in e.g. the material; The host broadcasting organisation may, for example, be obliged *not* to allow third parties to carry out coverage of the event and *not* to allow any use of its video and sound signal (or of its parts) by any third parties. The purpose, hereby, is mainly to guarantee *the exclusivity* of

[49] See ibid. and Kalven 1966 at 326, 331, available at www.jstor.org/pss/1190675; accessed Sept 10, 2008.
[50] *Pittsburgh Athletic* -case (1938)
[51] See also Murphy 1996 at 215.
[52] In the Baltimore Orioles decision the Court held that, where games were fixed by broadcasting, players' right of publicity claims were pre-empted. *Baltimore Orioles* -case (1986) at 663, 675-676.
[53] See e.g. Halila 2006 at 217.
[54] See e.g. the UEFA Commission Decision COMP/C.2-37.398 at 1: "The Regulations of the UEFA Champions League provide UEFA, as a joint selling body, with the exclusive right to sell certain commercial rights of the UEFA Champions League on behalf of the participating football clubs." See also about the pyramid structure in the organisation of sport in Europe in The European Model of Sport at 2 pp. See 2.1, available at www.sport-in-europe.com/SIU/HTML/PDFFiles/EuropeanModelofSport.pdf; accessed Sept 11, 2008.
[55] The media operator can, of course, also engage in *joint purchasing* i.e. forwarding the acquired rights to several other media (sub)operators. See e.g. the *EBU*-case (2000) and 2.1 below.
[56] See the *joint selling arrangements* in e.g. UEFA Commission Decision COMP/C.2-37.398. See 2.1 below.

the exclusive broadcasting right acquired by the broadcaster in question. Reasons for the zeal for exclusivity are obvious:

> "Broadcasters depending financially on advertising revenue try to attract as many viewers as possible in order to generate revenue. Sports, particularly football, attract large audiences and are therefore a prime target for broadcasters. *Exclusive broadcasting rights allow the broadcasters to offer programmes not available on other channels*, thus, building up audience, substantially increasing revenue and differentiating themselves from other broadcasters. For the organisers, on the other hand, *exclusive broadcasting rights ensure maximum short-term profitability of an event.*"[57] (Italics supplied)

Especially the organisation of international (sports) events and the requirements accompanying the organisation of these events have – especially during the past decade or so – added to the pressures of the states to meet the requirements, comply with the conditions and provide (sufficient) economic and legal guarantees, safety and security.

A good example is provided by the Olympics. The Olympic Charter[58] (OC) regulates the election of the host city in Chapter 5 Rule 34 (Election of the host city) as follows:

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> 2. The IOC Executive Board determines the procedure to be followed until the election by the Session takes place. Save in exceptional circumstances, such election takes place seven years before the celebration of the Olympic Games.
> 3. The National Government of the country of any applicant city must submit to the IOC *a legally binding instrument by which the said government undertakes and guarantees that the country and its public authorities will comply with and respect the Olympic Charter*. (Italics supplied)
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> Bye-law to Rule 34
> 1. Application to host Olympic Games – Applicant Cities:
> ---
> 1.2 Any application to host Olympic Games must be submitted to the IOC by the competent public authorities of the applicant city together with the approval of the NOC of the country. Such authorities and the NOC *must guarantee that the Olympic Games will be organised to the satisfaction of and under the conditions required by the IOC*. (Italics supplied)
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> 1.5 *Each applicant city has the obligation to comply with the Olympic Charter and with any other regulations or requirements issued by the IOC Executive Board*, as well as with all technical norms issued by the IFs for their respective sports. (Italics supplied)
> 1.6 *All applicant cities shall comply with a candidature acceptance procedure*, conducted under the authority of the IOC Executive Board, which shall determine the contents of such procedure.--- (Italics supplied)

For instance, in 2008 host city candidature acceptance procedure the following criteria were considered when assessing the applications:

> 1.4.1 The ability of the Applicant Cities — including their countries — to host, organise and stage high level international multi-sports events;
> 1.4.2 *Compliance with the Olympic Charter*, the IOC Code of Ethics, the Olympic Movement Anti-Doping Code, this Candidature Acceptance Procedure *and all other rules, instructions and conditions which may be established by the IOC*; and
> 1.4.3 *Any other criteria which the IOC Executive Board in its sole discretion may deem reasonable to consider*.[59]

[57] The European Model Of Sport at 15.

[58] The Olympic Charter, available at in multimedia.olympic.org/pdf/en_report_122.pdf; accessed Sept 2, 2008. The introduction to the Olympic Charter states that the OC is the codification of the Fundamental Principles of Olympism, Rules and Bye-Laws adopted by the International Olympic Committee (IOC). It governs the organisation, action and operation of the Olympic Movement and sets forth the conditions for the celebration of the Olympic Games. In essence, the Olympic Charter serves three main purposes: a) The Olympic Charter, as a basic instrument of a constitutional nature, sets forth and recalls the Fundamental Principles and essential values of Olympism. b) The Olympic Charter also serves as statutes for the International Olympic Committee. c) In addition, the Olympic Charter defines the main reciprocal rights and obligations of the three main constituents of the Olympic Movement [the IOC, the International Federations and the National Olympic Committees and the Organising Committees for the Olympic Games] all of which are required to comply with the Olympic Charter. (OC, at 9)

[59] See Host City Candidature Acceptance Procedure 2008, Chapter 1 – General Rules, 1.4 Criteria for Assessment of Applications, available at multimedia.olympic.org/pdf/en_report_295.pdf; accessed Sept 2, 2008.

Thus, in deciding which applicant cities were to be accepted as candidate cities for the 2008 Olympics, the IOC Executive Board considered the criteria referred to above. In addition, the IOC Executive Board, however, reserved its *right to take into account any other consideration relating to the reinforcement of the principles and rules which are at the basis of Olympism*.[60] The OC further regulates the evaluation of candidate cities in Bye-law to Rule 34 paragraph 2 (Candidate Cities – Evaluation) as follows:

> 2.1 Candidate cities are those applicant cities which will be eligible for a decision by the IOC Executive Board to be submitted to the Session for election.
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>
> 2.4 Each candidate city shall provide *financial guarantees* as required by the IOC Executive Board, which will determine whether such guarantees shall be issued by the city itself, or by any other competent local, regional or national public authorities, or by any third parties. (Italics supplied)

In addition, the election is regulated in Bye-law to Rule 34 paragraph 3 (Election of the host city – Execution of Host City Contract):

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>
> 3.2 The election of the host city takes place after the Session has considered the report by the Evaluation Commission.
>
> 3.3 The IOC enters into *a written agreement with the host city and the NOC of its country*. Such agreement, which is commonly referred to as the Host City Contract, is executed by all parties immediately upon the election of the host city. (Italics supplied)

The OC also regulates liability[61] and sanctions in Chapter 5 Rule 37 (Withdrawal of the organisation of the Olympic Games). Rule 37 paragraph 2 states that in the event of non compliance with the OC or other regulations or instructions of the IOC or a breach of the obligations entered into by the NOC, the OCOG or the host city, the IOC is entitled to withdraw *at any time and with immediate effect* the organisation of the Olympics without prejudice to compensation for any damage thereby caused to the IOC.

The results of the evaluation of the (then) candidate cities for the 2012 Olympics (i.e. Paris, New York, Moscow, London and Madrid) are presented in the IOC Evaluation Commission's report[62]. For the evaluation procedure each of the cities was individually evaluated and analysed (and also visited);[63] for example, various legal aspects and guarantees were under scrutiny.

> As regards legislation, the French stated that if Paris were awarded the Games, a special "Olympic Law" would be passed which would facilitate the organisation of the Games.[64] As to New York, no major changes to legislation would be required to host the Olympic Games according to the report. However, the State of New York was committed to implementing technical changes to clarify existing state law which

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[60] See ibid., Chapter 1 – General Rules, 1.5 Criteria for Acceptance of Applications.

[61] See Rule 37 para. 1 The NOC, the OCOG and the host city are jointly and severally liable for all commitments entered into individually or collectively concerning the organisation and staging of the Olympic Games, excluding the financial responsibility for the organisation and staging of such Games, which shall be entirely assumed jointly and severally by the host city and the OCOG, without prejudice to any liability of any other party, particularly as may result from any guarantee given pursuant to BLR 34. The IOC shall have no financial responsibility whatsoever in respect of the organisation and staging of the Olympic Games.

[62] See Report of the IOC Evaluation Commission (2012), available at multimedia.olympic.org/pdf/en_report_952.pdf; accessed Sept 2, 2008.

[63] The Evaluation Commission carries out a detailed, technical analysis of the candidate cities to assist the IOC in the decision of electing the host city and to underline the challenges that could be faced in each of these cities. The Commission's task is, thus, a technical one and a fact-finding one i.e. its task is mainly to verify the information stated in the candidature files, to determine whether proposed plans are feasible and to make a qualitative assessment of risk. (See ibid., at 5)

[64] The Report of the IOC Evaluation Commission (2012) – Paris: Legislation, at 11.

would e.g. increase the protection of Olympic marks.[65] In Moscow, the Commission received information – during its visit – concerning a proposed new law called "Olympic Games 2012" which would facilitate the organisation of the Games.[66] The Spanish legislative body, also, was prepared to approve specific legislation facilitating the organisation of the Olympic Games in case Madrid was awarded the Games. This legislation would have covered finance and ambush marketing amongst other areas.[67] During its visit in the UK, the Commission received documentation outlining the provisions that would be included in UK legislation to facilitate the organisation of the Games and passed by Parliament after 6 July 2005, if London were awarded the Games. An Act establishing a new lottery to be used for the funding of the infrastructure was, in turn, already passed by UK Parliament.[68]

Rights protection was actually a specific legal issue under scrutiny. In France, legislation already existed to protect Olympic marks and IP rights and to prevent street vending and illegal advertising.[69] The Mayor of New York, in turn, had signed an executive order to establish the Mayor's Enforcement Board on Olympic Brand Protection which would have coordinated the various government agencies empowered to prevent ambush marketing and illegal street vending.[70] In Russia, federal legislation already prohibited unfair competition and ambush marketing and protected IP rights. Special measures were, however, promised.[71] Also in Spain, the combination of national, regional and municipal legislation and guarantees were considered sufficient to protect the IOC and OCOG sponsors against ambush marketing. Madrid had also proposed to set up a single department under the OCOG, in collaboration with the public authorities, to deal promptly with any cases of ambush marketing.[72] In the UK, in turn, legislation already existed e.g. to protect Olympic marks and IP rights and to control street vending and illegal advertising. Nevertheless, the UK government guaranteed to introduce new legislation to enhance the protection of Olympic and Paralympic emblems, marks, logos and mascots. In addition, setting up a Brand Protection Task Force to control outdoor advertising and eliminate ambush marketing had been proposed.[73]

Furthermore, financial guarantees, local sponsorship and licensing – among various other things – were evaluated.[74] Ever so aptly, it is stated in the report that bidding for the Olympic Games was proving to be a catalyst not only for the regeneration of city areas, accelerated construction of both general infrastructure and sports facilities but also for *high-level political, financial and administrative collaboration*. This is seen to show "the unique nature and influence of the Olympic Games".[75]

London was elected the host city of the 2012 Olympics. Subsequently, a new piece of legislation – namely the London Olympic Games and Paralympic Games Act – came into force in 2006. This act creates a new right protecting official sponsors or partners, the "London Olympics association right", which confers exclusive rights in relation to the use of any representation in a manner likely to suggest to the public that there is an association between the London Olympics and goods or services or a person who provides goods or services.[76] The right is managed by the London OCOG. The Act also amends previously existing legislation protecting the Olympic symbol.[77]

1.4 Positioning the Sports Event Organiser(s)

The position of sports event organisers' *as such* cannot be based on "home rights" (alone),[78] Firstly, the position is not confined to power to control the dissemination of information (and even

[65] Ibid. – New York: Legislation at 29.
[66] Ibid. – Moscow: Legislation at 48.
[67] Ibid. – Madrid: Legislation at 83.
[68] Ibid. – London: Legislation at 65.
[69] Ibid. – Paris: Rights protection at 15.
[70] Ibid. – New York: Rights protection at 33.
[71] Ibid. – Moscow: Rights protection at 51.
[72] Ibid. – Madrid: Rights protection at 86.
[73] Ibid. – London: Rights protection at 70.
[74] Ibid. at 15, 32-33, 50-51, 69-70 and 86-87.
[75] Ibid. at 5.
[76] See London Olympic Games and Paralympic Games Act 2006, Chapter 12 - *Miscellaneous*; 33 London Olympics association right: "Schedule 4 (which creates the London Olympics association right) shall have effect." and the Schedule 4.
[77] See ibid., Chapter 12 - *Miscellaneous*; 32 Olympic Symbol etc. (Protection) Act 1995 "Schedule 3 (which amends the Olympic Symbol etc. (Protection) Act 1995 (c. 32)) shall have effect." and the Schedule 3.
[78] See e.g. the arguments in the Working Paper: Rechtsgutachten "Leistungsschutzrecht für Sportveranstalter?" at 38, 42 and 51.

this would be difficult in the era of new media and digital technology) – instead there are aspects related to e.g. sponsoring and official partnerships. Secondly, sports events do not always occur in restricted areas and there are, *inter alia*, issues related to trade and competition that have to be taken into account – not merely the interests in lands or buildings *per se*.[79] In addition, it appears to be clear that IP rights do not (currently) provide protection for the position of sports event organisers *as such* and the event itself is not considered protected matter as such[80] – merely certain aspects of the position may be afforded protected.[81]

The position of sports event organisers is currently not a clearly defined and demarcated legal position or status. Instead, it consists of or unites the various IP and other rights and economic value residing in and stemming from the events, and the exploitation of these. "The (exploitation) right of sports event organisers" is rather an umbrella term and a means to describe the protection(s) and guarantee(s) of the economic investments in and the risks accompanying the organisation of events, it is "ein Sammelbegriff für all emit der Veranstaltung von Sportereignissen zusammenhängenden tatsächlichen und rechtlichen Fragen---. Letzlich geht es jedoch um den Schutz und die Garantie der kommersiellen Verwertbarkeit des durch die Sportveranstaltung geschaffenen Wirtschaftsgutes."[82]. The forms and means of protection available seem to be based either on *rights to prohibit* – especially in the form of "home rights" or fair competition – or, otherwise, on *contractual arrangements* (only binding *inter partes*).[83]

2 The Sports Event Organiser and Its Surroundings

2.1 The Mighty Markets

There are certain economic, market and trade-related issues surrounding the position of sports event organisers. Legal aspects, such as (private) ownership, freedom of contract, freedom of trade and commerce and free and fair competition along with access to markets, that are to be assessed not only from the perspective of the event organiser, but also from the perspective of e.g. the rights holding or primary media, the non-rights holding or secondary media and finally the public (as consumers).

In the *Victoria Park Racing* -case[84] the plaintiff company argued that persons who otherwise would attend race meetings stay away because they listen to the broadcast made by the defendant from the tower overlooking the course:

> "--- [T]he price charged, or the absence of any charge, may be shown to have caused or induced persons who would otherwise attend the ground to stay away, but at the same time enabled them to observe or

[79] Ibid. at 42, 36-37.
[80] See e.g. Murphy 1996 at 220 and Scheuer-Strothmann 2004-4 at 3.
[81] See also the situation *de lege lata* in Germany in the Working Paper: Rechtsgutachten "Leistungsschutzrecht für Sportveranstalter?" at 43-44.
[82] Ibid. at 37.
[83] See ibid. at 51.
[84] *Victoria Park Racing* –case (1937)

> listen to a running description of the race."[85]
>
> Especially the dissemination via *broadcasting* was seen to strike at the plaintiff's profitable use of its land and precisely at the point where the profit must be earned i.e. the entrance gates. A newspaper, in turn, would have had competed only with other newspapers, and could have had little or no effect upon the profitable employment of the plaintiff's land.[86] Not only was the broadcasting company seen to make its own business profits from the broadcasts of the plaintiff's races; it was seen to do so (at least in part) "by conveying to its patrons and listeners the benefit of being present at the racecourse without payment"[87].

However, in the *Victoria Park Racing* -case , judge McTiernan was of the opinion that it was not a legal right of the plaintiff always to be able to carry on its undertaking without loss.[88]

Various collective or joint arrangements in acquiring and selling the rights may constitute arrangements *restrictive of competition*. For example, the joint acquisition or purchasing[89] of (sports) broadcasting rights may restrict competition among the media operators, and joint selling arrangements can be seen as horizontal[90] restrictions of competition in the sense that they have an effect of coordinating the pricing policy and all other trading conditions in preventing the clubs themselves from competing in the sale of their respective rights. Consequently, they may also restrict competition between media operators and, finally, lead to consumer harm.[91] Joint selling arrangements are, however, frequently considered to have, *inter alia*, potential of improving production and distribution to the advantage of the clubs, the broadcasters and even the viewers, since they lead to the creation of a single point of sale for the acquisition of a branded league media product. This can, in turn, provide efficiencies by reducing transaction costs and by contributing to the product getting a wider recognition and thereby wider distribution.[92]
Furthermore, the restrictive effects can be remedied by unbundling the media rights and selling them in several packages ("splitting"), hence permitting several broadcasters and other media operators to compete for the rights.[93] The European Commission's approval[94] of the UEFA Champions League joint selling arrangement offers a good example of exempting this type of arrangement with certain amendments:

> "It is concluded that UEFA's joint selling arrangement leads to the improvement of production and distribution by creating a quality branded league focused product sold via a single point of sale. Moreover consumers receive a real fair share of the benefits deriving from it. Furthermore, the restrictions inherent in UEFA's joint selling arrangement are indispensable for achieving these benefits, save for the provision prohibiting individual football clubs from selling live TV rights to free-TV broadcasters. Finally, it is concluded that the joint selling --- is unlikely to eliminate competition in respect of a substantial part of the media rights in question. It is therefore appropriate to grant an exemption ---"[95]

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[85] Ibid., Judgment by Evatt.
[86] Ibid.
[87] Ibid.
[88] Ibid., Judgment by McTiernan.
[89] See more about these arrangements in e.g. the *EBU*-case (2000).
[90] The setting could, however, also be seen as *dominance of a single undertaking* – namely the umbrella association or federation. See e.g. Cox-Schuster 2004 at 443.
[91] See also Toft 2005 at 5. A joint selling arrangement must not, either, unduly restrict clubs in exploiting club related rights nor must it lead to a situation where restrictions in the joint selling arrangement create unused rights. If there is consumer demand for rights, the rights owners should be at liberty to satisfy this demand. New media rights should not be held back in a manner which prevents the development of new media. See e.g. ibid. at 5-6.
[92] Ibid. at 5.
[93] See also ibid.
[94] See UEFA Commission Decision COMP/C.2-37.398.
[95] Ibid. at 201. See also 194-195.

It could also be argued that the broadcasters are competitors – not only of each other – but also of the event organisers in the business of entertainment. They would, thus, be equally entitled to protection in the legitimate exercise of *their* line of business and trade.[96] However, in the *Victoria Park Racing* -case it was argued that "what the broadcasting company does is, by means of broadcasting, to incorporate in its own entertainment, simultaneously with the plaintiff's entertainment, precisely so much of the latter as an expert verbal representation can give, the plaintiff having to expend capital and labour in providing its entertainment, and the company contributing nothing and taking everything. --- The implied basis of all such competition is that each competitor is providing goods or services to the customer which are entirely the result of its own efforts, and that there is no "appropriation" or "borrowing" of the goods or services of the other.---"[97]

2.2 Freedom of Speech and the Sports Event Organisers (In)visible Hand

There are several issues concerning the position of the sports event organisers to be considered from the perspective of freedom of speech and its dimensions, such as access to information or media content, freedom of expression, freedom of the press and the (mass) media in general and also media pluralism. These considerations should be take into account from the perspective of the media, be it rights holding, primary, non-rights holding or secondary media, other commercial actors, the participants (such as the athletes), spectators or, of course, the public (as citizens) in general.

> Because of the "peculiar double nature" or Janus-face of the (mass) media in the western democracy,[98] the amount of free(ness of) expression and degree of access to information is, understandably, bound to have an effect on how the business (of profit making) goes – and perhaps vice versa; The dimensions of freedom of speech are, thus, inseparably intertwined with the economic aspects in the context.

The (Mass) Media and other commercial actors

The sports event organiser is usually (as analysed above) regarded as the holder of the position to control access to the venue; This also concern the (mass) media, with its different (plat)forms, such as. audio(visual), print and new media, and involves, thus, the power to control reporting on and dissemination of coverage and information about the event. The media, namely, has to go through an accreditation process which involves committing to various obligations and conditions.

In the *NBA*-case it was stated that – according to NBA's 1995-96 Media Pass – TV and radio stations may use excerpts of NBA games only in the manner and on the terms and conditions set forth in the NBA's Video and Audio Highlights Licenses, and that any other use would require a prior written approval from the NBA.

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[96] See also *Victoria Park Racing* -case (1937), Judgement by Evatt.
[97] Ibid.
[98] The "peculiar double nature" refers here to the fact that the (mass) media has on the one hand enlightening and moral-cultural function and is, on the other hand, commercial profit-making activity.See e.g. Nieminen 2002 at 7.

In addition, it was stated in the Media Pass that "[t]he use of any photograph, film, tape or drawing of the game, player interviews or other arena activities taken or made by the accredited organization or the individual for whom this credential has been issued shall be *limited to news coverage* of the game by the organization to which this credential is issued unless expressly authorized in writing by the NBA. --- *All ownership, copyright and property rights in the NBA games, telecast thereof and in the events and activities conducted in the arena shall remain the sole property of the NBA* ---."[99] (Italics supplied)

In addition, the electronic media restrictions forbade any electronic media personnel from transmitting "scores and/or other game information out of an NBA arena (by telephone or by any other means) more than three times during each quarter and once during each of the two quarter breaks without the prior specific written approval of the NBA"[100].

The IOC, in turn, asks all broadcast rights-holders (except if otherwise agreed in the broadcast rights agreements between the IOC and the particular broadcaster) to respect the principles of its guidelines – while (still) "developing suitable promotional opportunities on-line".[101]

The use of Olympic *results content* is regulated so that the broadcast rights-holders may feature Olympic results content (that is to say any material other than moving images and audio play-by-play commentary of the Beijing 2008 Olympics) which the rights-holders have obtained by virtue of their accreditation and access to the Games or provided by the IOC and/or BOCOG on their generic website, in a news capacity and to complement their broadcast rights already acquired. Use by third parties is restricted, for example content from rights-holder's websites cannot be syndicated to third parties e.g. sold to a written press website without a licence from the IOC. In addition, all use of Olympic results content must prominently carry a copyright tag line.[102]

Other Olympic Games content on a rights-holder's website should, according to the guidelines, support the broadcasts; Rights-holders are, for instance, encouraged to use the Internet for cross-promotion, by including complementary stories and news features that encourage viewers to "tune-in" to the Olympic broadcast coverage. The IOC also encourages rights-holders to make the broadcast schedule a central feature of their website's Olympic content area. Still photographic pictures can only be published on broadcast rights-holders' websites for editorial purposes and provided that such pictures are not reproduced in a sequential manner, so as to simulate, in any way, moving images. In addition, in order to preserve the integrity of the IOC's intellectual property rights, broadcast rights-holders are asked to note that the dissemination of moving images and play-by-play audio commentary over the Internet are covered by broadcast licences. However, no sound or moving images of any Olympic events, which occur within accredited zones (competition sites and practice venues, Olympic Village, etc.) may be disseminated over the Internet, whether on a live or delayed basis, unless authorised by the IOC. For the same reasons stated for video above, no audio coverage of the Games is permitted on broadcaster websites, whether on a live or delayed basis, regardless of source unless authorised by the IOC. Broadcast rights holders wishing to feature audio interviews with athletes may do so only on the condition that such audio is not taken from within accredited zones (e.g. interview by mobile phone).[103]

According to the IOC, it has an obligation to ensure that any use of the Internet to cover the Olympic Games is in accordance with the Olympic Charter and in the best interests of the Olympic Movement as a whole.[104]

Furthermore, the dissemination of moving images of the Games, including over the Internet, is said to form a part of the IOC's IP rights, the granting of which to the licensed rights-holders of the Games helps provide the funding necessary to stage the Games and to train athletes. Consequently, the IOC will not

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[99] *NBA*-case (1987) at 26.
[100] Ibid. at 28.
[101] See IOC Internet Guidelines for Broadcast Rights-holders (2008) at 1, available at www.dif.dk/OL2008/Forside/Presse/~/media/Interessenter/DIF/difdk/OL2008/OL%20PDF%20filer/2008%2003%2025%20%20%20IOC%20Internet%20Guidelines%20for%20broadcast%20rights%20holders.ashx; accessed Sept 8, 2008.
[102] Ibid. at 1 (1. a)-b)).
[103] Ibid. at 2 (2.a)-d)).
[104] See IOC Internet Guidelines for the Written Press and other Non-Rights Holding Media (2008) at 1, available at www.dif.dk/OL2008/Forside/Presse/~/media/Interessenter/DIF/difdk/OL2008/OL%20PDF%20filer/2008%2003%2025%20%20%20IOC%20Internet%20Guidelines%20for%20the%20written%20press%20and%20other%20non%20rights%20holding%20media.ashx; accessed Sept 8, 2008.

> allow any use of the Internet that would infringe these rights. In particular, persons without the appropriate licence will not be permitted to disseminate moving images or play-by-play audio coverage of any Olympic events at the Games.[105]

The guidelines for all non-rights holding media (except if otherwise agreed in the IOC's News Access Rules) are formulated by the IOC in order for it to illustrate how press and other non-rights holders can use the Internet *while respecting the IOC's rights*.[106]

> It is stated, however, that nothing contained within the guidelines is intended as limiting either the freedom of the media to provide and independent news and pictorial coverage of the Olympic Games and related events or the editorial independence of the material photographed and published by the media on their websites. Media organisations are given the permission to use their own websites to disseminate written and photographic coverage of the Olympics, for example to post news, results, articles and photographs such as those that would appear in a newspaper, for normal journalistic or editorial use only. Still photographic pictures can be published only for editorial purposes and provided that such pictures are not reproduced in a sequential manner, so as to simulate, in any way, moving images. Media organisations may not, in turn, create stand-alone Olympic-themed websites to host coverage of the Games.[107]
>
> The dissemination of moving images of the Games, including over the Internet, is, according to the guidelines, covered by the IOC's IP rights. Thus, media organisations may not disseminate moving images or playby-play audio coverage of the Games over the Internet except as permitted by the IOC News Access Rules or except as permitted by the exceptions to the guidelines. These exceptions include that *bona fide* news organisations may broadcast via the Internet all or portions of press conferences that take place in the Media Press Centre, provided there is a delay of at least thirty minutes from the conclusion of the press conference. In addition, exceptions to the IOC News Access Rules may be granted by the broadcast rights-holders in specific territories, subject to the prior written approval of the IOC.[108]
> The guidelines also state that "[s]hould any fair dealing or similar provisions contained in any applicable national law permit the use by bona fide news organisations of Olympic Material for news purposes on the Internet, then the broadcast of such Material on the Internet must not be accessible to persons outside the specific territory. Any broadcast of such Material on the Internet must be restricted to the territory in which the fair dealing or similar provision applied i.e. it must be geoblocked. Any broadcast on the Internet without Territorial Integrity will breach the IOC's intellectual property rights and the rights of other broadcast rights-holders in other territories, and as such is expressly prohibited."[109]

Monitoring and sanctions are provided for in the same manner in both guidelines; The IOC monitors on-line content to ensure that the integrity of broadcaster and sponsor rights is maintained, and the accreditations of any organisation or person may be withdrawn without notice, at the discretion of the IOC, for purposes of ensuring compliance with the guidelines. The IOC also reserves the right to take other appropriate measures with respect to infringements of the guidelines (including taking legal action) and imposing other sanctions.[110]

The availability of media of all kinds is, however, crucial from the point of view of media pluralism and in guaranteeing the abundance of expressions – it can even be seen as the "first prerequisite of the free flow of information"[111]. Especially in TV broadcasting "broad access to content and content from different sources" should be guaranteed to further these ends.[112] According to Thorgeirsdottir, the right to receive information (as a dimension of freedom of

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[105] Ibid.
[106] Ibid.
[107] Ibid. (1.)
[108] Ibid. (2.)
[109] Ibid.
[110] See IOC Internet Guidelines for Broadcast Rights-holders (2008) at 3-4 and IOC Internet Guidelines for the Written Press and other Non-Rights Holding Media (2008) at 3.
[111] Thorgeirsdottir 2002 at 90.
[112] See ibid. at 81 and Helberger 2006 at 3. How conditional access changes the way viewers access broadcasting, Contractual conditions, para. 1, available at www.ivir.nl/publications/helberger/ELR_2006_2.html; accessed Oct 18, 2007.

speech) also "projects the need to guarantee *press freedom* in its entirety"[113]. (Italics supplied)
In the *Zacchini*-case it was stated that *the press has a privilege to report matters of legitimate public interest* even though such reports might intrude on matters otherwise private.[114]

> There is, however, a notable difference between what is *in the public interest* and what is *interesting to the public* – and this difference is to be kept in mind.
> The Court also held that while entertainment, as well as news, enjoys protection as a matter of free speech, and while entertainment itself can actually be important news, neither the public nor the media was deprived of the benefit of the performance(s) although the commercial stake in the act was or would have been appropriately recognised.[115]

The Ohio Supreme Court held that the press "must be accorded broad latitude in its choice of how much it presents of each story or incident, and of the emphasis to be given to such presentation" [116], and that "[n]o fixed standard which would bar the press from reporting or depicting either an entire occurrence or an entire discrete part of a public performance can be formulated which would not unduly restrict the 'breathing room' in reporting which freedom of the press requires."[117]

> In the *BBC v BSB* -case[118] – where world cup football was considered a current event for the purposes of *fair dealing* provisions – both the *quantity* and *quality* of what was taken from the footage were important in the assessment (e.g. duration; short and pertinent to the news reporting character, highlights, even "best peaces" such as goals, normal and obvious way of illustrating the news report).[119]

Furthermore, protecting the goodwill and symbolism of certain sports events, such as the Olympics, may be problematic vis-à-vis freedom of expression enjoyed by various commercial actors (besides the sponsors and official partners). The "London Olympics association right" offers a good example of this since it confers exclusive rights in relation to the use of *any representation* in a manner likely to suggest an association between the London Olympics and goods or services or a person providing these, and strengthens the protection of the *Olympic symbol*.[120]

The Participants and the Public

As regards the (accredited) participants and the public in general – including the 'mediated audience' (viewers, listeners, on-line audience etc.) – a compulsion to refrain from disseminating information about the (sports) event are usually included in various conditions or contract clauses in e.g. the entrance tickets; Admittance to the game is, thus, usually conditional on the requirement that those purchasing tickets refrain from disseminating news, pictures and footage of the event while it is in progress.[121] In addition, in order to ensure that athletes, coaches,

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[113] Thorgeirsdottir 2002 at 81.
[114] *Zacchini*-case (1977) (I)
[115] Ibid. Syllabus 2.b.
[116] Ibid. (II), 47 Ohio St. 2d at 235, 351 N.E. 2d at 461.
[117] Ibid. Freedom of speech was not, however, considered to prevail over one's right to capitalise on the broadcasts of one's performances. All three judges, namely, agreed that the First Amendment did not privilege the press to show the entire performance on a news program without compensating petitioner for any financial injury he could prove at trial. (Ibid.) The broadcast of a film of petitioner's entire act was seen to pose "a substantial threat to the economic value of that performance"; If the public could see the act free on television it would be less willing to pay to see it at the venue. The broadcast, thus, goes "to the heart of a petitioner's ability to earn a living as an entertainer". (Ibid. Syllabus 2.a)
[118] *BBC v BSB* -case (1991)
[119] Ibid. See also Spilsbury 2000 at 269.
[120] See London Olympic Games and Paralympic Games Act 2006, Chapter 12 - *Miscellaneous*; 32-33 and the Schedules 3 and 4.
[121] This was the case also in the *Pittsburg Athletic* -case (1938). See also Murphy (1996) at 216.

trainers, officials and any other accredited participants do not inadvertently breach any of the eligibility provisions of the Olympic Charter, the IOC has produced e.g. Internet Guidelines[122] for the(se) accredited participants. For example, the guidelines applying to Beijing Olympics regulate, inter alia, reporting from the games as follows:

> "Rule 49, Bye Law 3 states that "*Under no circumstances, throughout the duration of the Olympic Games, may any athlete, coach, official, press attaché or any other accredited participant act as a journalist or in any other media capacity.*" Nothing herein restricts athletes from being interviewed by an accredited journalist, but they cannot act as journalists themselves."[123]
>
> In addition, the athletes may not create a web site for the Olympic Games. To the extent that the Athlete has a permanent web site, the Athlete may maintain that site – provided, however, that none of the advertising or commercial arrangements breach the rules of the NOC. Athletes are allowed to report on their own personal views and comment, but on no other issues. The Athlete's web site may contain pictures taken by accredited journalists.[124] There are also specific IOC blogging guidelines[125] subject to which cameras (including mobile phones equipped with a camera) are allowed for personal use only. Images taken by athletes, coaches, trainers, officials and any other accredited participants in Olympic Venues or in the Olympic Village may not be used in any public manner or broadcast capacity (including display on a web site) unless the written consent of the IOC is obtained beforehand. In addition, athletes, coaches and any other accredited participants may not use any audio device, such as a recorder or a mobile phone, to record their voice or transmit from within an accredited venue for eventual use on TV, radio or the Internet. The accredited participants participation in on-line chats is also regulated; Chatting is allowed as this is akin to being interviewed (by the public at large) and provided that this activity is unpaid. Even the usage of chips and telemetry is under scrutiny; The accredited participants may not carry or allow a third party to place any electronic device on their person in order to send physiological data or other information to a third party.[126]
> Monitoring and sanctions are provided for in the same manner as in the guidelines for the media.[127]

In the Victoria Park Racing -case the defendants actually relied strongly upon the decision in *Our Dogs* -case where it was considered that the occupier should have protected himself by regulating the terms of the contract of admission and so preventing the use of photographs by unauthorised persons.[128] Otherwise the communication could not (have) be(en) prohibited.[129] Judge Latham argued that it was by expenditure of money that the plaintiff would have created a spectacle and that the plaintiff therefore would have had a quasi-property (in this spectacle) which the law would have protected. According to the judge this would, however, really mean that there is – or would have to be – some principle (apart from contract or confidential relationship) which prevents people in certain circumstances from opening their eyes and seeing, and then describing what they see.[130]

> ".... It would ... be absurd to claim that persons lawfully on the property of the buildings near Wrigley Field must avert their eyes in order to avoid "misappropriating" these games."[131]

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[122] See IOC Internet Guidelines for athletes, coaches, trainers, officials and any other accredited participants (2008), available at www.dif.dk/OL2008/Forside/Presse/~/media/Interessenter/DIF/difdk/OL2008/OL%20PDF%20filer/2008%2003%2025%20%20%20IOC%20Internet%20Guidelines%20for%20athletes%20%20coaches%20trainers%20%20officials%20and%20any%20other%20accreditied%20participants.ashx; accessed Sept 8, 2008.
[123] Ibid. at 1 (2.).
[124] Ibid. at 1 (2. a)).
[125] See IOC Blogging Guidelines (2008)
[126] IOC Internet Guidelines for athletes, coaches, trainers, officials and any other accredited participants (2008) at 1-2 (2. b)-f)).
[127] Ibid., at 2 (4.-5.). See above.
[128] See *Victoria Park Racing* -case (1937), Judgement by Evatt and *Our Dogs* -case (1916).
[129] Judge McTiernan held that it was, in fact, competent for the plaintiff to impose a condition on the right it granted to enter the racecourse that he would not communicate to anyone outside the venue the knowledge about the racing. But where the communication was not in breach of contract its dissemination would not be a matter in respect of which the court can give any relief. See the *Victoria Park Racing* -case (1937), Judgement by McTiernan.
[130] *Victoria Park Racing* –case, Judgement by Latham.
[131] Spielman 2003 at 7.

As regards broadcasting, it can be argued that the "right to information" as it (usually) is referred to in broadcasting law "has little to do with a right of the individual citizen to access broadcasting information, notably information of major importance for democracy, culture, society, or the creation of knowledge."[132] Furthermore, the right to information in the context of major events and their broadcasts might (still) reach beyond the current protection of freedom of expression in ECHR.[133] In addition an *individual* right of access to information in the meaning of media content could in this context even conflict with the media operators' protection to impart information if and how they wish as a part of freedom of expression.[134] However, it is undoubtedly mainly through live coverage and also via news-style summaries that the *viewers who are unable to attend an event* are able "not only to access information about the event, but also to share in or relate to the emotional experience of watching the event and therefore to slip into the role of a live spectator"[135].

3 *Leistungsschutzrecht* or *Droit d'Exploitation* for the Sports Event Organisers?

3.1 The Exclusivity…

The aim in creating a specific right for sports event organisers is to have appropriate protection for the (whole) position *as such* as opposed to protecting merely *some aspects* of the position via several – but still insufficient and partly overlapping – (legal) instruments.[136] The overall protection could be achieved via creating one somewhat clearly defined (IP) right, via a particular exclusive right covering e.g. the power to control the dissemination of information and coverage (i.e. broadcasting and other media rights) as well as other forms of commercial exploitation regarding the event (sponsoring, advertising etc.).

In France, it was unclear for a long time what rights and economic value reside in and stem from the organisation of sports events, and who can exercise these rights and exploit the value(s).[137] Regulating was to bring about legal certainty and alleviate the uncertainties (e.g. vis-à-vis the limitations).[138] Currently it is the French *Code du Sport* (2006)[139] that includes a particular *droit d'exploitation* for the sports event organisers in its *Partie législative:* Livre III: *Pratique Sportive,* Titre III*: Manifestations Sportives,* Chapitre III*: Retransmission des manifestations sportives*, Section 1:

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[132] Helberger 2006, 2. Whose "right to information"? "For the time being, at least in the concept of broadcasting regulation, such a right has yet to be created." (Ibid.) Could it, however, be different in sports law?
[133] For example Weatherill is of this opinion (Weatherill 2004 at 143-144). See also Helberger 2006 at 2. Whose "right to information"?, para. 2. On the other hand, Schoenthal states that "certain major events constitute important issues in a modern society. The duty to guarantee public access to reports on such events can therefore be founded on Art. 10 ECHR." (Schoenthal 2006 at 3)
[134] Helberger 2006 at 5.1 Individual right of access for viewers? See also Weatherill 2004 at 144.
[135] Schoenthal 2006 at 2.
[136] "Die de lege lata in Betracht kommenden Schutzmöglichkeiten daher sind nicht mehr als Hilfkonstruktionen, die punktuellAbhilfe scaffen, jedoch die grundlegende Problematik unberührt lassen." (Working Paper: Rechtsgutachten "Leistungsschutzrecht für Sportveranstalter?" at 51)
[137] Working Paper: Rechtsgutachten "Leistungsschutzrecht für Sportveranstalter?" at 52. See also Geiger 2004 at 278 and Henning-Bodevik 1994.
[138] Working Paper: Rechtsgutachten "Leistungsschutzrecht für Sportveranstalter?" at 56.
[139] *Code du sport* (2006)

Article L333-1
Les fédérations sportives, ainsi que les organisateurs de manifestations sportives mentionnés à l'article L. 331-5, sont propriétaires du droit d'exploitation des manifestations ou compétitions sportives qu'ils organisent.
Toute fédération sportive peut céder aux sociétés sportives, à titre gratuit, la propriété de tout ou partie des droits d'exploitation audiovisuelle des compétitions ou manifestations sportives organisées chaque saison sportive par la ligue professionnelle qu'elle a créée, dès lors que ces sociétés participent à ces compétitions ou manifestations sportives. La cession bénéficie alors à chacune de ces sociétés.[140]

Despite the provisions residing under the title *"Retransmission des manifestations sportives"* the exploitation right is not (necessarily) confined to the ownership of broadcasting (or even media) rights. It would, thus, be a more general right to exploit the event by various means.[141] It should be noted that *Code du Sport* is not in the field of IP law; Nevertheless, *droit d'exploitation* is a right resembling an IP right in the form of a *sui generis* right or neighbouring right.[142]

Also in Germany establishing a specific right for sports event organisers has been discussed and researched; For example in a working paper[143] the possibility of a specific *Leistungsschutzrecht für Sportveranstalter* is discussed. In the paper, the *scope* of the potential right is discussed so that content wise the "Veranstalterrecht" should be wide enough "um diejenigen Aspekte abzudecken, die das Wirtschaftsgut „Sportveranstaltung" ausmachen.

Soweit ersichtlich, bestehen diese zurzeit im Ticketverkauf, den audiovisuellen Übertragungsrechten, im Merchandising (Fanartikel), in Werbe- und Sponsoring-verträgen sowie (bezüglich der Verbände) im Erstellen von Spielplänen. Die Definition sollte offen genug sein, um künftige Entwicklungen abzudecken."[144]

3.2 ...and Its Limit(ation)s

Behind the development of creating a specific right for sports event organisers is not only the regulation of the exclusivity of the position but also the accompanying possibility to regulate *the limit(ation)s* of the position. The position of sports event organisers can, namely, be seen already to resembles (to a large extent) that of an exclusive right holder – only without the clarity, forseeability and the crucial limitations the law could (possibly) provide.[145] Legislating would allow for the possibility of regulating not only the exclusive right itself i.e. its exclusive function(s) but also – and at least as importantly – on the *limitations and restrictions* of this exclusivity.[146] For example, in the French *Code du Sport* several (potentially) limiting and restricting aspects to *droit d'exploitation* can be identified. Actually, the whole Article L333 is

[140] See also Article L333-5: L'accroissement d'actif résultant, pour les sociétés sportives bénéficiaires, de la cession des droits d'exploitation audiovisuelle prévue à l'article L. 333-1 n'est pas pris en compte pour la détermination de leurs résultats imposables au titre de l'exercice où cette cession intervient. Les charges afférentes à l'accroissement d'actif de ces sociétés ne peuvent venir en déduction de leurs résultats imposables. // La cession par les fédérations sportives de leurs droits d'exploitation audiovisuelle prévue au deuxième alinéa du même article est également sans incidence sur les résultats qu'elles dégagent au titre de l'exercice au cours duquel intervient l'opération.
[141] See the wording of the articles. See also the Working Paper: Rechtsgutachten "Leistungsschutzrecht für Sportveranstalter?" at 55.
[142] See e.g. Geiger 2004 at 280. See also the Working Paper: Rechtsgutachten "Leistungsschutzrecht für Sportveranstalter?" at 57.
[143] Working Paper: Rechtsgutachten "Leistungsschutzrecht für Sportveranstalter?" See also Hilty - Henning-Bodewik 2007.
[144] Ibid. at 88.
[145] See e.g. the Working Paper: Rechtsgutachten "Leistungsschutzrecht für Sportveranstalter?" at 52, 56 and 87: "In der Praxis wird das gegenwärtige amorphe Gebilde „Veranstalterrecht" mit allen Konsequenzen wie ein Ausschließlichkeitsrecht gehandhabt, ohne dass die für Ausschließlichkeitsrechte erforderliche Klarheit der Interessenlage, Festlegung der Schutzvoraussetzungen und -schranken, Rechtsfolgen etc. bestünde. Dies führt jedenfalls teilweise zu von „bargaining power" bestimmten Vertragslösungen, zu einer Flucht ins Markenrecht, etc. Ein Ausgleich dieser Diskrepanz zwischen Realität und Rechtslage kann durch die Rechtsprechung nicht bewirkt werden."
[146] See e.g. the Working Paper: Rechtsgutachten "Leistungsschutzrecht für Sportveranstalter?" at 87.

about alleviating the tension between exclusivity and information needs;[147] be it the freedom of speech and expression of the athletes or the right of the public to information.

> Article L333-2
> Les droits d'exploitation audiovisuelle cédés aux sociétés sportives sont commercialisés par la ligue professionnelle dans *des conditions et limites précisées* par décret en Conseil d'Etat.
> Cette commercialisation est effectuée avec constitution de lots, *pour une durée limitée et dans le respect des règles de concurrence.* (Italics supplied)
> ---
> Article L333-4
> Les fédérations sportives, les sociétés sportives et les organisateurs de manifestations sportives *ne peuvent*, en leur qualité de détenteur des droits d'exploitation, imposer aux sportifs participant à une manifestation ou à une compétition *aucune obligation portant atteinte à leur liberté d'expression.* (Italics supplied)

In Section 2 (Liberté de diffusion) the freedom of the media is also taken into account e.g. in the form of access to venue or right to short extracts:[148]

> Article L333-6
> L'accès des journalistes et des personnels des entreprises d'information écrite ou audiovisuelle aux enceintes sportives est libre sous réserve des contraintes directement liées à la sécurité du public et des sportifs, et aux capacités d'accueil.
> Toutefois, sauf autorisation de l'organisateur, les services de communication au public par voie électronique non cessionnaires du droit d'exploitation ne peuvent capter que les images distinctes de celles de la manifestation ou de la compétition sportive proprement dites.
> ---
> Article L333-7
> La cession du droit d'exploitation d'une manifestation ou d'une compétition sportive à un service de communication au public par voie électronique ne peut faire obstacle à l'information du public par les autres services de communication au public par voie électronique.
> Le vendeur ou l'acquéreur de ce droit ne peut s'opposer à la diffusion, par d'autres services de communication au public par voie électronique, de brefs extraits prélevés à titre gratuit parmi les images du ou des services cessionnaires et librement choisis par le service non cessionnaire du droit d'exploitation qui les diffuse.
> ---
> Article L333-8
> La cession du droit d'exploitation d'une manifestation ou d'une compétition sportive à un service de communication au public par voie électronique ne fait pas obstacle à la diffusion partielle ou intégrale de cette manifestation ou de cette compétition par un autre service de communication au public par voie électronique lorsque le service cessionnaire du droit d'exploitation n'assure pas la diffusion en direct d'extraits significatifs de la manifestation ou de la compétition sportive.
> ---

The London Olympic Games and Paralympic Games Act also contains some limitations of or exceptions to the Olympics association right. In Schedule 4 (London Olympics association right) "*other exceptions*" – besides authorised use – are listed e.g. as follows:

> 8 (1) The London Olympics association right is not infringed by the use of a representation –
>
> (a) in publishing or broadcasting a report of a sporting or other event forming part of the Olympic Games,
>
> (b) in publishing or broadcasting information about the Olympic Games,
>
> (c) as an incidental inclusion in a literary work, dramatic work, artistic work, sound recording, film or broadcast, within the meaning of Part I of the Copyright, Designs and Patents Act 1988 (c. 48) (copyright), or
>
> (d) as an inclusion in an advertisement for a publication or broadcast of a kind described in paragraph (a) or (b).
>
> (2) But the exceptions in subsection (1)(a) and (b) do not apply to advertising material which is published or broadcast at the same time as, or in connection with, a report or information.
>
> ---

[147] See e.g. ibid. at 53.
[148] See also the EU regulation below.

In addition, the restricting or balancing regulation of the EU[149] should not be forgotten. For instance, broadcasting *events of major importance* in particular is regulated via the former TVWF Directive – currently the AVMS Directive;[150] On the one hand, *public access to broadcasts* on events of major importance is guaranteed, and on the other hand, the right to short reporting or *the right of access to and to use short extracts* (for the purposes of general news programmes)[151] of events of high interest is promoted.[152] This regulation is not intended to cover solely and exclusively *sports* events, but in practice the national lists thus far contain mainly sports events. The right to short reporting, for example, may have effect not only on the *ex lege* protection of broadcasting signal – and thus to media-media[153] relationship – but also on the (event organisers') power to control access to the venue.

> It should, namely, be noted that according to the Council of Europe Recommendation ((91)5) the right to short reporting [154] can be exercised in two ways:
>
> a. by recording the signal of the primary broadcaster for the purpose of producing a short report and/or
> b. by having access to the site to cover the major event for the purpose of producing a short report[155]
>
> Also in Article 3k(3) of the AVMS Directive the Member States are expected to guarantee such access by allowing broadcasters to freely *choose short extracts from the transmitting broadcaster's signal* or as an alternative – in Article 3k(4) – they may establish *an equivalent system* which achieves access on a fair, reasonable and non-discriminatory basis through other means.

4 Today, Tomorrow? – Checking the Vital Signs…

During the past years, IP-related legal problems, lawsuits and regulation regarding (major) sports events and their exploitation have flourished. The sports industry is obviously struggling to keep up with the technological development since claims exist about e.g. copyright violations occurring, in particular, because of the 'uncontrollable' new media and because of the advanced technology that favours the users.[156] The mission desired for IP law is, thus, maintaining 'the balance',[157] but the claims also serve as fruitful ground for (purely) strengthening the position(s) of the organisers and for tightening their grip on the (new) media and (other) commercial actors as well as on the public.

Moreover, the fusion of regulatory and commercial functions in the sports industry is problematic – especially in the light of the tightening grip; This was recognised as a problem also (and

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[149] See more about the EU and the (future) position of sports event organiser in the Working Paper: Rechtsgutachten "Leistungsschutzrecht für Sportveranstalter?" at 7 pp.

[150] See Directive 2007/65/EC, Chapter IIC (Provisions Concerning Exclusive Rights and Short News Reports in Television Broadcasting) Articles 3j and 3k.

[151] The right to short reporting has, however, already existed as business practice. In addition, it has been codified in Article 9 of the ECTT (Access of the public to information).

[152] See more about major events and reporting rights e.g. in Schoenthal 2006.

[153] It is, however, only *broadcasters* in this case.

[154] Short reporting is defined in the Recommendation so that it means "brief sound and picture sequences about a major event such as to enable the public of the secondary broadcaster to have a sufficient overview of the essential aspects of such an event" (R (91) 5 – Definitions)

[155] Ibid. - Principle 2.

[156] "Legal experts say technology – specifically the Internet – is revolutionizing the way fans view and participate in sports while simultaneously creating a host of new legal headaches for the sports industry." (Baldas 2005, available at www.law.com/jsp/article.jsp?id=1109128216973; accessed Sept 2, 2008)

[157] Ogawa has stated the same – although with somewhat different conclusions – about protecting broadcasters' rights. See e.g. Ogawa 2006 at 113, 128, 130 and 177-179.

already) in the European Model of Sport in 1998 in which it is admitted that "[u]p to the 1980s sports federations were mainly regulatory bodies" but as "TV rights grew in importance, they began to negotiate these rights, thus acting like any other commercial company".[158] The question that hereby arises then is "whether the federations can be *regulatory bodies and private business entities at the same time*"[159]. (Italics supplied)

For example, the IOCs position raises many questions and problems; The IOC is, namely, not only providing sports-related regulation but (in)directly imposing legislation, rules and regulation, reaching beyond sport from international to the national level (countries aspiring to host the Olympics) – and yet it is not an (elected) legislative body. The requirements and conditions set forth by the IOC for the host cities (and countries) may deprive the national legislators and other actors their own decision-making in matters concerning the organisation of (certain) sports events – and even contribute to the creation of (global) regulatory or legislative model(s).

> Furthermore, the consequences of non-compliance and withdrawal of the organisation of the Olympics can be detrimental to the parties and country in question if the requirements are not met; Rule 37 paragraph 2 of the OC, namely states that in the event of withdrawal of the organisation the NOC, the OCOG, the host city, the country of the host city and all their governmental or other authorities or any other party, whether at any city, local, state, provincial, other regional or national level, shall have no claim for any form of compensation against the IOC.
>
> And: How do the requirements of the IOC relate to national legislation, such as *Code du Sport*?

Besides the transfer and sale(s) of e.g. media rights on an exclusive basis, the IOC provides e.g. various guidelines (including sanctions) concerning the dissemination of information, and is, thus, limiting *freedom of speech and expression* and the *freedom of the media* with instruments that lack the fundamental characteristics of law(s) and legislation. In addition, controlling, for example, what kind of information, by who, how and when is disseminated has immense potential to infringe freedom of the media and media pluralism – and to start resembling censorship and privileges. (Free) reporting on (major) newsworthy sports events is, also, an important aspect from the point of view of *competition* and *access to markets* but also from the point of view of the *right of the public to information*.[160]

The current position of sports event organisers is a fuzzy and peculiar mixture of uncertainty and underprotection and of (potentially) anti-competitive and/or unfair agreements, conditions and regulation(s), of dominant position(s), rights holding and reserving and foreclosure of competitors on several levels – and, finally: of even neglecting the public.[161] This is concerning – and of particular concern from the perspective of copyright since the aims of disseminating

[158] European Model of Sport at 7.
[159] Ibid. It is stated, however, that "[i]n general the monopolistic role of the federations is not called into question, as their institutional structure is recognised to be the most efficient way of organising sport." (Ibid. at 8) The Court of Arbitration for Sport has, actually, maintained that sports governing bodies resemble governmental bodies as far as their structure and their role as regulatory bodies are concerned. The Court stated that similar principles therefore govern their actions, for example when changing the legislation or (other) rules. (See CAS 98/200) See also The European Model of Sport at 8.
[160] And are not the events supposed to be *public* in the sense of providing spectacles, flowers and nectar, *for*(?) the public to enjoy – not mere flytraps for the organisers, media, sponsors and advertisers to catch and trap the flies and bees with...
[161] "---die gegenwärtige Rechtslage zu Rechtsunsicherheit und damit zu einem teils überschießenden, teils suboptimalen Schutz führt.---" (Working Paper: Rechtsgutachten "Leistungsschutzrecht für Sportveranstalter?" at 87)

information and fostering communication and the free flow of information are (at least are *supposed* to be) inherent in the justification of the right and characteristic for the doctrine. Communication as such is, in any case, unlikely to be thoroughly privatisable (even in the context of major sports events) as it is fundamentally social and, at least to a certain extent, inevitable.

Is, then, regulating and clarifying the position of sports event organisers a mission for *IP law*? Possibly – the answer arguably lies in evaluating the possible additional value and in weighing the (dis)advantages the IP regime might bring to the exploitation of sports events by event organisers. In considering the creation of a new exclusive right – be it IP or not – it should, however, be remembered that the issues concerning communication (also in the context of major sports events) are at least as much – if not even more[162] so – cultural and social as they are trade-related. The holder of the *vital* position has as an inherent obligation to provide for the vitality of the other(s) as well (for the actual plant to assimilate and blossom).

[162] …and originally – long before market economy existed. Also during the Ancient Olympics, the Olympic festival brought huge numbers of visitors to Olympia; Among others merchants, craftsmen and food vendors arrived to sell their wares. The festival also included religious ceremonies, including sacrifices; speeches by well-known philosophers; poetry recitals; parades and victory celebrations. See The Ancient Olympics Perseus Digital Library Project, in www.perseus.tufts.edu; accessed Sept 1, 2008.

N.B

The (then) latest version of this paper and the complete list of bibliography will be available at the Conference.

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C Treaties and Conventions

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F The Internet

G Others