The Over-Protection of Intellectual Property Rights in Sport in the United States and Elsewhere*

J. GORDON HYLTON
Marquette University Law School

In the modern era intellectual property rights have become a major source of revenue for the sports industry. Legal theories of copyright, trademark, right of publicity, and even patent have been successfully invoked to permit individual sports teams and the leagues and associations to which they belong to capture more and more revenue from their fans. Broadcasting rights have enabled the operators of teams and competitions to play before millions of spectators who are present vicariously rather than physically. Teams and leagues enter into lucrative licensing agreements for their logos and trademarks with a wide variety of manufacturers of consumer products, and athletes continually find new ways to capitalize on their image and publicity rights.

As a consequence of these developments, multi-billion dollar broadcasting contracts have become the norm in the world of sport. In the United States, the National Football League, Major League Baseball, the National Basketball Association, the men's football and basketball divisions of the National Collegiate Athletic Association (NCAA), and the National Association of Stock Car Auto Racing (NASCAR) all have annual broadcasting revenues in excess of one billion dollars. Even larger amounts of revenue are generated by the licensing of team trademarks and service marks—the supposedly amateur NCAA alone generates more than $3 billion dollars a year from such sources—and individual athletes reap multi-million dollars contracts for the licensing of their images.[1] As NFL executive vice-president and legal counsel

---

*. An earlier version of this article was presented at the *Arab Sports Lex Sportiva*, held in Sharm El Sheikh, Egypt, April 23-24, 2010. This conference, sponsored by the Sharm El Sheikh International Arbitration Centre, was the first sports law conference held in the Arab world.

1. For a recent discussion of broadcasting contracts in the United States, see MATTHEW MITTEN, TIMOTHY DAVIS, RODNEY SMITH, & ROBERT BERRY, SPORTS LAW AND REGULATION: CASES, MATERIALS, AND PROBLEMS 1023-1024 (2nd ed. 2009).

Jeff Pash recently remarked, "Professional sports league general counsel used to focus on antitrust and labor issues, now their focus is on intellectual property issues."[2]

This is by no means a uniquely American phenomenon. The British Premier League signed a £1.782 television deal in 2009 for the rights to its domestic games. [3] Spanish football clubs Barcelona and Real Madrid, which sell their televisions rights individually, entered into contracts in 2006 that called for a total of € 2.1 billion for the two teams over a seven year period.[4] FIFA, the governing body of world football took in € 1.20 billion in television and new media broadcast rights in 2006,[5] while the International Olympic Committee received $3.8 billion in television revenue for the 2010 and 2012 Olympic Games, an increase of 40% over the total for 2006 and 2008.[6]

There is no question that the most popular teams, leagues, competitions, and athletes, benefit enormously from this system that assigns intellectual property rights in a way that guarantees significant transfers of wealth to the individuals that control the sports industry. However, a strong case can be made that we seriously over-protect intellectual property rights in sports. The excessive protection is not necessary for the operation of the sports industry, and the public derives very little benefits from the practice. This article examines four examples of the way in which the intellectual property systems over-protect certain interests in the sports industry to the detriment of the larger public interest. Although most of these examples are drawn from the United States, the legal principles that they represent have been embraced throughout the world. At the conclusion of the article, the implications of modern developments in the world of intellectual for the Arab sports world are also examined.

THE OWNERSHIP OF SPORTS FACTS

World renowned athletes like Michael Jordan and Tiger Woods have earned millions of dollars above and beyond their income from competing in sports by successfully exploiting their own names and images. This is made

---

2. *Id.* at 1024.

3. *See* Tom Dunmore, *La Liga To Follow Premier League Television Revenue Sharing Model?*, PITCH INVASION, Feb. 10, 2010, http://pitchinvasion.net/blog/2010/02/10/la-liga-to-follow-premier-league-television-revenue-sharing-model/.

4. *Id.*

5. *FIFA Is the One Sure-Fire Winner*, THE TELEGRAPH, June 9, 2006, http://www.telegraph.co.uk/finance/2940670/Fifa-is-the-one-sure-fire-winner.html.

6. Matthew Glendinning, *Olympic TV Revenue to Increase*, SPORTBUSINESS, May 8, 2008, http://www.sportbusiness.com/news/167610/olympic-tv-revenue-to-increase.

possible by the widespread recognition of personality rights or, as it is known in the United States, the right of publicity. This is the right to control the commercial exploitation of one's name, image, likeness, or other aspect of personal identity. As a property right, the right of publicity is of relatively recent vintage in the United States where it has developed in a context largely defined by judicial cases involving celebrities, many of whom were from the sports industry.[7] Until the 1950s, the publicity rights of athletes were conceived of as a variation on the right to privacy. That changed in 1953, in a case involving Major League Baseball players and their contracts with competing baseball card companies, when a federal appellate court rejected an earlier ruling that "fame is not merchandise" and defined publicity rights as a form of private property.[8] Although many have questioned whether a property right in one's identity is really a socially desirable concept, the right has been widely adopted.

By the late 1960s, a number of American courts were pushing the boundaries of the right of publicity by defining individual life "facts" and statistics pertaining to individual athletic accomplishment as aspects of an athlete's personality. The earliest cases involved companies that produced games that purported to simulate professional sporting events, based upon the statistical performances of current players. Although there was no precedent for doing so, courts ruled that the companies could not use the names and statistics of the players involved without permission because to do so would violate the players' right of publicity.[9] Subsequent cases focused on other aspects of the athlete's personality.[10] Because of First Amendment Free Speech concerns, there was always an inconsistency in the American right of publicity. The press and, to some extent, authors had a right to exploit the identity of celebrities without the risk of liability but not so for those engaged in other forms of commercial enterprise.[11]

---

7. J. GORDON HYLTON, DAVID CALLIES, DANIEL MANDELKER, & PAULA FRANZESE, PROPERTY LAW AND THE PUBLIC INTEREST 36-48 (3rd ed. 2007).

8. Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866 (2d Cir. 1953). The previous standard is taken from *Hanna Mfg. Co. v. Hillerich & Bradsby Co.*, 78 F.2d 763, 766 (5th Cir. 1935). *See* J. Gordon Hylton, *Baseball Cards and the Birth of the Right of Publicity: the Curious Case of* Haelan Laboratories v. Topps Chewing Gum, 12 MARQ. SPORTS L. REV. 273 (2001).

9. Early cases included: Palmer v. Schonhorn Enterprises, 96 N. J. Super. 72 (N. J. Super. Ct. Ch. Div. 1967); Uhlaender v. Henrickson, 316 F. Supp. 1278 (D. Minn. 1970). *See* J. Gordon Hylton, *The Major League Baseball Players Association and the Ownership of Sports Statistics: The Untold Story of Round One*, 17 MARQ. SPORTS L. REV. 87 (2006).

10. Abdul-Jabbar v. General Motors Corp., 85 F.3d 407 (9th Cir. 1996); Newcombe v. Adolph Coors Co., 157 F.3d 686 (9th Cir. 1998).

11. Montana v. San Jose Mercury News, 35 U.S.P.Q.2d 1783 (Cal. App. 1995).

Allowing professional athletes to establish a proprietary interest in their names and statistics so that someone not affiliated with the press cannot make use of such facts is clearly pushing the protection of intellectual property too far. It provides a windfall for the athlete who has done nothing additional to earn this additional right, and it forces sports fans to pay for information that had previously been free of charge. Fortunately, there appears to be a movement in the United States to check the extension of this sort of control, as courts have begun to recognize that freedom of expression should take priority over the athlete's ability to exploit his or her fame.[12]

A similar constriction on the "ownership" of sports facts appeared in early broadcasting cases in the United States. Prior to 1977, American intellectual property law did not recognize a copyright interest in live sporting events. Consequently, disputes over broadcasting rights in the radio era and the early years of television could not be resolved under the federal copyright statute and instead had to be dealt with under the common law of unfair competition. Basic property law principles permitted team owners to control who broadcasted a game from inside the stadium by making an agreement not to broadcast a condition of entry on to the premises. However, in some cases it was possible to broadcast an event without entering the premises, either by relying on a view from outside the stadium or by listening to an authorized broadcast on the radio and then rebroadcasting the same information.

The defendants in these cases were not projecting a visual image of the game; they were only reporting real time (or very recent) facts regarding an ongoing game. Courts had a difficult time with the question of the nature of the property interest in such cases, although most ended up concluding that the operator of the game had a "quasi-property" interest in the game itself, and that the subsequent broadcast interfered with these rights.[13] However, courts often fumbled in their attempts to explain what precisely it was that the second

12. See, for example, Gionfriddo v. Major League Baseball, 94 Cal. App. 4th 400 (2001); ETW Corp. v. Jireh Publishing, Inc., 332 F.3d 915 (6th Cir. 2003); C. B. C. Distribution and Marketing, Inc. v. MLBAM, 505 F.3d 818 (8th Cir. 2007), *cert. denied*, 128 S. Ct. 2872 (2008).

13. The best known examples are Twentieth Century Sporting Club v. Transradio Press Service, 300 N.Y.S. 159 (N.Y. Sup. Ct. 1937); Pittsburg Athletic CO. v. KQV Broad. Co., 24 F.Supp. 490 (W.D. Pa. 1938); Johnson-Kennedy Radio Corp. v. Chicago Bears Football Club. 97 F.2d 233 (7th Cir. 1938); Mutual Broadcasting System v. Muzak, 30 N.Y.S.2d 419 (Sup. Cot. N.Y. County 1941); Southeastern Broadcasting Co. v. Oil Center Broadcasting Co., 210 S.W.2d 230 (Tex. Civ. App. 1947); Liberty Broadcasting System v. National League Clubs, 1952 Trade Cases (CCH) ¶ 67,278 (N. D. Ill. 1952); and National Exhibition Co. v. Fass, 143 N.Y.S.2d 767 (N.Y. Sup. Ct. 1955).

broadcaster had done wrong, and there were occasional cases in which the unauthorized broadcaster actually prevailed.[14]

Whether in regard to the right of publicity or to quasi-property rights in a live sporting event, courts should be reluctant to intervene on behalf of individuals who are trying to monopolize factual information that is not the product of literary or artistic creation and which would otherwise be in the public domain.

Team Names and Symbols as Trademarks

Similar to the right of publicity, contemporary American trademark law provides much greater property protection for those in the sports industry than it did fifty years ago. The traditional purpose of American trademark law was to protect consumers from producers who misleadingly labeled and attempted to "pass off" their goods as being from a different source. At the same time, it provided manufacturers with an incentive to produce high quality goods under their own identifiable brand name or symbol. Since 1947, American trademark law has been defined by the Lanham Act, an act of the United States Congress designed to reorganize and improve existing trademark law. The key phrase in the original version of the Lanham Act was "likely to cause confusion, or to cause mistake, or to deceive,"[15] and in its original form, the Lanham Act provided protection for consumers and for the products identified by the mark, but not for the mark itself (which would be protected under copyright law, if at all).

American professional sports teams began to license their names and images in the 1950s.[16] Their original licensing activities were not based on a theory of trademark, but on a theory of "false endorsement" or "false advertising" derived from a division of tort law known as the law of unfair competition. Essentially, professional sports teams and leagues authorized their licensees to sell merchandise "endorsed" by the team or the league; without the license the producer would arguably have been guilty of "false advertising." Much of the "logoed" merchandise of the 1950s and 1960s was

---

14. For examples of cases exhibiting a reluctance to use the law of unfair competition to extend property right protect to sports teams, *see* National Exhibition Company v. Teleflash, Inc., 24 F. Supp. 488 (S.D.N.Y. 1938); Loeb v. Turner, 257 S.W.2d 800 (Ct. Civ. App. Tex. 1953); Intermountain Broadcasting & Television Corp. v. Idaho Microwave, Inc., 196 F.Supp. 316 (D. Idaho 1961) (similar logic, though not a sports case); WCVB TV v. Boston Athletic Association, 926 F.2d 42 (1st Cir. 1989).

15. 15 U. S. C. A. § 1114 (2011).

16. MICHAEL MACCAMBRIDGE, AMERICA'S GAME: THE EPIC STORY OF HOW PRO FOOTBALL CAPTURED A NATION 183-185 (2004).

commissioned by the professional teams and leagues themselves to sell directly to their fans, the leagues and teams produced no consumer goods on their own.

There is little evidence in the 1950s or 1960s of widespread marketing of unlicensed goods bearing professional team logos, and it appears that teams and leagues were not particularly aggressive in trying to prevent the production of unlicensed products with team names and logos that did occur. Professional team owners apparently did not attempt to secure licenses from sports card manufactures whose products showed professional athletes (whose consent was secured by contract) wearing their team uniforms.[17] This began to change at the end of the 1960s. In 1969, however, the Topps Chewing Gum Company for the first time entered into a formal licensing agreement with Major League Baseball to secure its right to use Major League team names and trademarks on its baseball cards.[18]

Since sports teams were the producers of sporting events and not consumer goods, it was not at all obvious that team names or logos were (or even should be) protected by trademark law, except to the extent necessary to prevent confusion as to the real identity of a team participating in a particular game. The New York Yankees baseball club would clearly have been entitled to enforce their trademark against another professional baseball team playing games under the name New York Yankees, but that was hardly the problem. In regard to clothing bearing the name or the symbol of the Yankees, it was unlikely that any purchaser interested in such a jacket would be under the false impression that the jacket was manufactured by the baseball team itself. Moreover, a label could easily be attached to the jacket disclaiming any connection to the team.[19]

---

17. *See* Hylton, *supra* note 7. *See also*, University of Pittsburgh v. Champion Prods., Inc., 682 F.2d 1040 (3rd Cir. 1982), *cert. denied*, 495 U.S. 1087 (1982) (failure to object to unauthorized use of the name and logo of its sports team over a period of 36 years).

18. For a reference to the 1969 agreement, see the September 28, 1995 agreement between the two parties archived at, Major League Baseball Properties, Inc., *Letter Amendment,* ONECLE: SAMPLE BUSINESS CONTRACTS, Sept. 28, 1995, *available at* http://contracts.onecle.com/topps/mlb.lic.1995.09.28.shtml. *See also*, The Topps Company, Inc., Major League Baseball Properties, Inc., *License Agreement*, Contract No. 914(mb), *available at* http://content.edgar-online.com/edgar_conv_pdf/2007/01/04/0000812076-07-000005_EXHIBIT10-1.PDF (last visited April 21, 2011).

19. For a judicial opinion adopting such an interpretation, *see* Boston Professional Hockey Assn. v. Dallas Cap & Emblem Mfg., 360 F.Supp. 459 (N. D. Tex. 1973), which stated

> In this area of the economy the protection of the trademark law must give way to the public policy favoring free competition. To hold that plaintiffs can prohibit the imitation of the team symbols because of the trademark registration would be to grant to the mark owners protection which is

The "problem" of unlicensed goods appears to have arisen in the late 1960s and early 1970s, when it became apparent that there was much greater consumer demand than previously realized for items of clothing bearing the name or logo of college and professional sports teams. In the early 1970s, professional teams and leagues began to file lawsuits against manufacturers who were making use of teams names and logos without license. What is most interesting about these cases is that they allege, not false adverting or unfair competition, but violations of the Lanham Act, the federal trademark statute.[20] Beginning in 1975, American courts started to agree that the unlicensed attachment of names or logos to clothing constituted an actionable trademark claim. In so ruling, courts discovered that the existing trademark statute provided the holder a right against "dilution" as well as against fraud or "passing off."[21] Why this change in attitude occurred when it did is a fascinating question, especially as no change had occurred in the text of the Lanham Act itself. As the market for such apparel exploded, the new "property" interest in the mark itself made it possible for sports teams to reap large profits that otherwise would have gone uncaptured or else required uncertain tort actions.[22] Moreover, in 1995, the United States Congress confirmed this expansion of property rights of trademark holders with the Federal Trademark Dilution Act, which essentially codified recent case law.[23]

This type of protection is unnecessary for the production of sporting events and only results in a transfer of additional revenue to the teams and their licensees. Permitting fans to purchase unlicensed clothing bearing the name or logo of their favorite team would make it easier for less economically well-off fans to express their support for their teams. It would allow a larger

---

tantamount to a copyright monopoly. Plaintiffs therefore have no right to relief under the Lanham Act against the defendant's copying and selling emblems denoting their team symbols. *Id.* at 464.

20. *See for example*, the cases cited above, in notes 17 & 19.

21. The seminal case was *Boston Prof'l Hockey Assn. v. Dallas Cap & Emblem Mfg., Inc.*, 510 F.2d 1004 (5th Cir. 1975), which reversed the above mentioned decision, supra, note 19..

22. For the way in which this new principle was integrated into the intellectual property law of sport, see National Football League Properties v. Wichita Falls Sportswear, Inc., 542 F. Supp. 651 (W.D. Wash. 1982). Some courts, nevertheless, avoided the result of *Boston Prof'l Hockey* by relying upon the doctrine of laches. See, for example, *University of Pittsburgh,* 82 F.2d 1040.

23. Federal Trademark Dilution Act of 1995, 15 U.S.C. 1125 (2011). A further revision was contained in The Trademark Dilution Revision Act of 2006, 15 U. S. C. § 1125(c) (2011). For criticism of modern developments in American trademark law, including its application to the sports industry, *see* Mark A. Lemley, *The Modern Lanham Act and the Death of Common Sense*, 108 YALE L. J. 1687 (1999) & Mark A. Kahn, *May the Best Merchandise Win: The Law of Non-Trademark Uses of Sports Logos,* 14 MARQ. SPORTS L. REV. 283 (2004). For evidence that courts are willing to use this "dilution" principle to benefit major league sports teams but not to harm them, *see Harlem Wizards Entm't Basketball, Inc. v. NBA Props., Inc.*, 952 F. Supp. 1084 (D. N. J. 1997).

number of individuals to participate in the communal act of supporting a particular team or club. Teams would still be able to market their own merchandise, as they did in the United States prior to 1975, but they would not be able to exercise monopoly control over their names and symbols. At a minimum, returning trademark law to its original moorings would require teams to develop different legal theories if they sought to proceed against others making use of the team name, logos, and colors.

Broadcast Rights

No form of intellectual property has proven to be more lucrative for the sports industry than the broadcasting rights that follow from the contemporary conception of copyright. The broadcast of games on radio and television has dramatically expanded the "live audience" for sporting events. Not only has broadcasting given fans an alternative to live attendance, but it has expanded the potential base of fans for a particular team from its immediate geographic location to a national and, increasingly, international audience. Attendance at live events is limited by the size of the stadium or arena, and arena and stadium sizes are limited by the requirement that spectators must be at least close enough to the field to see the contest that they have paid to see. However, broadcasted games suffer from no such limitations. The number of fans that can watch a game on television, or listen to it on the radio, is limited only by the number of individuals with receivers and access to the broadcast. In recent years, new technologies and platforms like satellite television, and Internet and cell phone broadcasting, have further expanded the virtual audience's access to sporting events.

Because of the great public demand for access to sporting events, professional teams and athletes quite naturally assert property rights to their performances and images and then authorize the use of this "property," albeit in exchange for healthy fees. The costs of these licenses are then passed on to sports fans either directly through subscription fees, or indirectly through the sale of advertising, usually to producers of consumer goods who recapture their advertising expenditures by increasing the cost of their products, or by the increased sale of the products they produce.

Although the concept of copyright in live athletic performances and the power to sell derivative rights to broadcasters has brought in literally billions of dollars to the sporting industry, American professional sports teams were slow to realize the significance of broadcasting. Part of this stemmed from a failure to appreciate the potential of the virtual audience. Many owners initially opposed the broadcasting of games on radio or especially television,

because they feared that the availability of games in electronic form would undercut live attendance.[24] In the early 1950s, Major League Baseball, then the most popular of American sports leagues, earned less than $6 million per year from television broadcasts, while the National Football League earned less than $1 million.[25]

As with the right of publicity and trademark law, the first forays into the commercial licensing of broadcast rights were not based on the same theory of intellectual property in force today. The conventional wisdom until fairly late in the twentieth century was that live sporting events were not subject to protection under the copyright laws. The law of copyright originated out of a desire to protect the investment of authors (and later artists) in their creative efforts so that they would have an incentive to produce such works. Strictly speaking, sporting events are not authored works, as they are purely competitive events that, unlike a play or a film, follow no script. Moreover, individual components of a sporting event could not then and cannot now be copyrighted. A baseball pitcher who develops a new pitch, or a batter who develops a new batting stance, or for that matter, a figure skater who develops a new routine, have no right to request intellectual property protection for their innovations, and they have no right to protest when other competitors begin to imitate their actions.[26]

Copyright protection was not explicitly extended to broadcasts of live sporting events in the United States until 1976, when Congress adopted a revamped copyright statute. Section 102(a)(6) of the new Copyright Act for the first time provided copyright protection for the event, so long as it was recorded on film or videotape (which by 1976 was becoming routine).[27]

---

24. *See* G. EDWARD WHITE, CREATING THE NATIONAL PASTIME: BASEBALL TRANSFORMS ITSELF 206-244 (1996).

25. PAUL C. WEILER, LEVELING THE PLAYING FIELD: HOW THE LAW CAN MAKE SPORTS BETTER FOR FANS 278-296 (2000). A half century later, total National Football League broadcast revenues exceeded $2.2 billion dollars annually while those of Major League Baseball and the National Basketball Association fell just short of $1 billion. (The same 50 year period saw a comparable increase in the value of league licensed consumer merchandise.) In the first decade of the 21st century, these totals have continued to rise. *See* MARK YOST, TAILGATING, SACKS, AND SALARY CAPS: HOW THE NFL BECAME THE MOST SUCCESSFUL SPORTS LEAGUE IN HISTORY 79-81 (2006).

26. *Id.*

27. 17 U.S.C. § 102(a)(6) (2011). Arguably, it was possible to register for protection under Section 12 of the 1909 Copyright Act, but the evidence shows that this approach was rarely, if ever, pursued. For a discussion of pre-1976 practices, see Chris Garmire, *The Super Bowl III Problem*, 2 CHI.-KENT J. INTELL. PROP. 3 (2000). The 1976 Act has also been interpreted to vest the copyright in the team and league rather than in the players. Baltimore Orioles, Inc. v. Major League Baseball Players Association, 805 F.2d 663 (7th Cir. 1986).

Moreover, courts have also ruled that the special techniques of sports broadcasting—instant replays, split screen shots, and commentary by announcers—constitute "creativity" for authorship purposes.[28] Since 1977, when the new act took effect, American courts have consistently upheld the claims of broadcast rights holders to copyright protection, even when the infringement occurs in a new form of media.[29] While the media is recognized as having a right to report on the results of sporting events without securing the permission of those who staged them, that reporting must be limited to factual summaries and if the media outlet's reporting begins to approach the broadcasting, or rebroadcasting, of the event, that conduct is viewed as a copyright violation.

So uniform has been the willingness of American courts to protect the broadcast rights of the sports industry that the primary legal disputes in recent years have pitted claims of individual teams against the leagues in which they participate. In such cases, the issue is not the scope of the intellectual property interest but rather whether the right belongs to the individual team or in the league itself. The controlling view has been that the broadcast rights belonged to the home team rather than the league, and thus each team was free to negotiate for the rights to its own home games. However, since the early 1960s, there has been a growing appreciation in the United States of the advantages of pooling broadcasting rights and permitting them to be sold as a package by the league to one or more television networks. Although this practice was once believed to constitute a violation of the federal antitrust laws, that impediment was removed by the United States Congress in 1961 when it enacted the Sports Broadcasting Act, which specifically authorized that practice, subject to a few minor restrictions.[30]

Ordinarily such disputes revolve around contractual language defining the rights of individual teams within a league structure. Often the question is one of whether or not the individual owner's rights have been fully and legally assigned to the league. However, in some cases, individual team owners have claimed that mandatory intellectual property pooling arrangements, and the granting of exclusive monopolies by leagues, violate the American antitrust laws, but the merits of this claim have not yet been conclusively resolved by the United States judiciary. Such litigation has pitted Americans best known

---

28. National Assn. of Broadcasters v. Copyright Royalty Tribunal, 675 F.2d 367 (D.C. Cir. 1982); *Baltimore Orioles, Inc.*, 805 F.2d 663.

29. NFL v. McBee & Bruno's, Inc., 792 F.2d 726 (8th Cir. 1986) (satellite dish antennae); NFL v. TVRADIONOW Corp., 53 U.S.P.Q.2d 1831 (W.D. Pa. 2000) (Canadian Internet site); Live Nation Motorsports, Inc. v. Davis, 2006 W.L. 3616983 (N. D. Tex. 2006) (pirating of live webcasts).

30. 15 U. S. C. §§ 1291-1295 (2011).

sports teams—the Dallas Cowboys, the New York Yankees, Ted Turner's Atlanta Braves, and Michael Jordan's Chicago Bulls—against their respective leagues, although in most cases the disputes have been settled prior to a final judicial resolution.[31]

However, the development of new technologies, particularly in regard to the live streaming of athletic events over the Internet, have revived the debate over the question of whether real time broadcasts of live sporting events should be subject to copyright laws in the first place.[32] This rethinking is also going on outside the United States. Israel, for example, has recently revised its copyright laws in a way that arguably removes copyright protection for real time broadcasts. In 2008, an Israeli district court ruled that the new statute provided no copyright protection for a live broadcast of a football (soccer) game that originated in the United Kingdom. That the game was simultaneously recorded and that replays were inserted during the broadcast was deemed immaterial.[33]

The ability to control the venue of the sporting event gives the owner sufficient control over the initial broadcast to make broadcasting a valuable source of income whether or not the broadcasts are protected as copyrighted works. Traditional property rights can be used to restrict alternative broadcasts from the venue itself, and the broadcast signal can be encrypted so that the pool of receivers can be limited. Any further protection is unnecessary and imposes unreasonable restrictions on materials that would otherwise pass into the public domain.

The Right to Watch Sporting Events on Free Television

In contrast to the situations discussed above in which the right of intellectual property owners have been expanded, there has been a movement to protect the public's right to "free" broadcasts of major sporting events, notwithstanding the property claims of the holders of broadcasting rights. Traditional property concepts would suggest that sports teams are under no obligation to broadcast their games on free television and that there is no

---

31. WEILER, *supra* note 23. *See for example*, Dallas Cowboys Football Club, Ltd. V. NFL Trust, 1996 WL 601705 (S.D.N.Y. 1996); Complaint, New York Yankees Partnership v. Major League Baseball Enterprises, Inc., 97-1153-CIV-T-2513 (M.D. Fla. Filed May 19, 1997). Both of these actions were settled.

32. *See for example,* Liz Gannes, *Copyright Meets a New Foe: the Real-Time Web*, BLOOMBERG BUSINESS WEEK, May 21, 2009, at http://www.businessweek.com/technology/content/may2009/tc20090521_159692.htm?chan=top+news_top+news+index+-+temp_technology.

33. Football Association Premier League Ltd. V. Netvision 013 Barack Ltd., MCA 011646/08 (Dist. Ct. Tel Aviv, July 16, 2008).

"right" to watch a particular sporting event on open air television. However, because major sporting events have been broadcast on "free" television and radio in the United States and elsewhere for decades, and because these public viewings are important communal events, it is understandable that the public would develop an expectation that such events would continue to be available for public viewing without additional charges. Such broadcasts were historically "free" in the sense that anyone with a television could watch them without having to pay an additional charge. Costs were actually recouped through commercial advertising, general television subscription fees, or state subsidies.

The possibility of popular sporting events being relocated from free to subscription television has attracted concern in different parts of the world, and has led to the imposition of restrictions on the rights of owners of broadcasting rights. In the United States, the Cable Television Consumer Protection and Competition Act of 1992 included an expression of concern about the possibility of such a transfer.[34] The statute authorized the Federal Communications Commission to investigate the situation with sports broadcasting and to report its findings to Congress. The report, issued in 1994, found that while there had been a significant shift to pay television at the level of local sports broadcasting, no such transfer had occurred at the national level in either professional or amateur sports.[35] In the United States, contrary to the situation in other parts of the world, the national networks that control free broadcasting were clearly more than able to compete with pay networks in the market for sports broadcasting rights.

The situation remains largely unchanged from 1994, although there has been some additional movement of early round professional play-off games to pay television. However, the most popular sporting events in the United States—the Super Bowl, the World Series, the NBA championship series, NCAA basketball and football championships, the U.S. Open and Masters golf tournaments, the Daytona 500 and Indianapolis 500 auto races, the Triple Crown horse races, and most Olympic competitions involving athletes from the United States—remain on free television. The shifting of such events to pay television would almost certainly provoke public protests, even though by the end of the twentieth century, approximately three-quarters of American

34. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 26, 106 Stat. 1460, 1502-03 (1992).

35. In the Matter of Implementation of Section 26 of the Cable Television Consumer Protection and Competition Act of 1992; Inquiry into Sports Programming Migration, 9 FCC Rcd 3440 (1994).

households had access to pay television in the form of cable or satellite broadcasting.[36]

In the European Union, the issue of the public's access to sporting events has been addressed since 1989 by the Television without Frontiers Directive (renamed the Audiovisual Media Services Directive in 2007).[37] While the Directive does not require member countries to mandate that sporting events be broadcast on free television, it encourages them to do so and frees them from concerns about violating other European Union broadcast rules if they pursue such a course. Article 3a of the Directive provides:

> Each Member State may take measures in accordance with Community law to ensure that broadcasters under its jurisdiction do not broadcast on an exclusive basis events which are regarded by that Member State as being of major importance for society in such a way as to deprive a substantial portion of the public in that Member State of the possibility of following such events via live coverage or deferred coverage on free television.[38]

Pursuant to the Directive, special sporting events that must be broadcast on free television have been identified in Austria, Belgium, Denmark, Finland, France, Germany, Ireland, Italy, and the United Kingdom.[39] Italy, for example, has identified the following events on its free television list:

(a) the summer and winter Olympic games;
(b) the football World Cup final and all matches involving the Italian national team;
(c) the European football Championship final and all matches involving the Italian national team;
(d) all matches involving the Italian national football team, at home and away, in official competitions;
(e) the final and the semi-finals of the Champions' League and the UEFA Cup where an Italian team is involved;
(f) the Tour of Italy (Giro d'Italia) cycling competition;
(g) the Formula One Italian Grand Prix; and

---

36 MIKE WILSON, RECREATION: HAVING A GOOD TIME IN AMERICA 46 (2001).

37. *See* European Union Council Directive 89/552, as amended by Directive 97/36, 1989 O.J. (L 296) 23 (EC). For the 2007 amendments and the renaming of the directive, *see* European Commission, Audiovisual and Media Policies, *Audiovisual Media Services Directive*, *available at* http://ec.europa.eu/avpolicy/reg/tvwf/index_en.htm (last visited March 28, 2011).

38. Council Directive 89/552, as amended by Directive 97/36, 1989 O.J. (L 296) 23 (EC).

39. For the list, *see* European Commission, Audiovisual and Media Policies, *List of Major Events*, Jan. 24, 2001, http://ec.europa.eu/avpolicy/reg/tvwf/implementation/events_list/index_en.htm.

(h) the San Remo Italian music festival.[40]

Australia has gone even further than the European Union in protecting public rights to sports broadcasting. There, the Australian parliament has adopted both anti-siphoning and anti-hoarding legislation designed to protect free public access to televised sporting events. Under the anti-siphoning provisions of the Broadcasting Services Act of 1992, all sporting events on a list compiled by the Minister of Communications, Information Technology, and the Arts must be aired on one of the state owned television stations or a private, open-air station that reaches at least half of the country's population (and thus cannot be "siphoned off" to a pay station).[41] The current list, which is quite extensive, includes:

(a) all events of the Olympic and Commonwealth Games;
(b) the Melbourne Cup Horse Race;
(c) all matches of the Australian Rules Football Premiership;
(d) National Rugby League premiership games;
(e) the National Rugby League State of Origin Series;
(f) all international rugby league test matches involving the senior Australian team
(g) international test matches involving the senior Australian Rugby Union Football team
(h) all matches in the Rugby World Cup;
(i) all test matches involving the senior Australian cricket team played in either Australia or the UK;
(j) one day cricket matches involving the senior Australian team played in Australia or the UK;
(k) all matches in the Cricket World Cup;
(l) the English Football Association Cup final;
(m) the 2010 FIFA World Cup;
(n) the Australian, Wimbledon, French Open, and U.S. Open Tennis Matches, including all rounds of the Australian Open and Wimbledon;
(o) Davis Cup tennis matches involving Australia;
(p) all international matches involving the senior Australian Netball team;

---

40. Ofcom, *Code on Sports and Other Listed and Designated Events*, *available at* http://stakeholders.ofcom.org.uk/binaries/broadcast/other-codes/ofcom_code_on_sport.pdf.

41. Broadcasting Services Act 1992, §§146e-h (Austl.).

(q) the Australian Masters, Australian Open, U.S. Masters, and British Open golf tournaments; and

(r) four motor sports races: the Formula 1 World Championship, the Moto GP, the V8 Supercar Championship Series, and the Champ Car (Indy Car) World Series when held in Australia.[42]

In addition, the Australian statute also includes an "anti-hoarding" provision, that prohibits a broadcaster that has obtained the right to the open air broadcast of a particular event from declining to exercise the rights. If such a situation occurs, the rights holder is required to transfer the rights to a broadcaster willing to comply with the requirements of the statute.

THE ARAB EXPERIENCE IN 2006

Although public opinion polls almost universally show that individuals believe that there should be a right to watch major sporting events, not all countries have addressed this issue by statute or regulation.[43] The experience of Arab countries with the 2006 FIFA World Cup illustrates the need for such statutes.

In Arab countries, as in most of the world, the most popular sport is football (which is called "soccer" in the United States, Canada, Australia, and South Africa). Although football was not historically a popular game in Arab countries, the broadcast of local and international games on free television in the post-World War II era, combined with the establishment of local professional clubs, converted much of the region's population into football fans.[44] The ultimate competition in football is the World Cup, which along with the Olympic Games is the most closely followed sporting event in the world. Whether or not Arab teams are competing, the quadrennial World Cup arouses intense interest in the Arab world. In 2006, teams from two Arab

---

42. For the current government list, *see* Keep Sport Free, *What's At Risk?*, *available at* http://www.keepsportfree.com.au/Content_Common/pg-whats-at-risk-sms.seo (last visited April 21, 2011).

43. For an example of such polling, see Bashar H. Malkawi, *Broadcasting the 2006 World Cup: The Right of Arab Fans versus ART Exclusivity,* 17 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 591, 597 n.18 & 601 n.35 (2007).

44. My analysis of the Arab world's experience with broadcast of the 2006 World Cup discussed below is deeply indebted to the above cited work of Professor Bashar H. Malkawi, *Id.*, of the Hashemite University of Jordan whose 2007 article in the FORDHAM INTELLECTUAL PROPERTY, MEDIA & ENTERTAINMENT LAW JOURNAL provided a detailed account of these events and Arab legal framework against which they played out.

nations, Saudi Arabia and Tunisia, qualified for the World Cup although neither made it to the knockout round.[45]

The World Cup is organized by Federation Internationale de Football Association (FIFA), which selects a production company as the "host broadcaster" and then licenses the right to show World Cup games on television and radio to individual broadcasters in interested countries. The 2006 World Cup was held in Germany and was televised in whole or in part in 189 different countries whose total populations exceeded five billion people. Although FIFA's primary mission is to expand the popularity of world football, in recent years it has been criticized for placing a desire to enhance revenue over all other objectives.[46]

Historically, World Cup games were aired in Arab countries on free television. Prior to 2000, it was widely accepted that the televising of sporting events in the Arab world was under the control of the Arab States Broadcasting Union (ASBU).[47] One of the goals of the organization was to prevent private satellite broadcasters from gaining control of World Cup and other sporting events. However, in 2000, Arab Radio & Television (ART), a Saudi Arabia-based Arabic language network owned by businessman Sheik Saleh Kamel and which broadcast its signal by satellite to a subscription audience began to negotiate for the exclusive rights outside of the ASBU framework. As a consequence ART was expelled from the ASBU.[48]

Although ART had earlier declared that it had no intention of monopolizing the broadcast of World Cup events in the Arab world, it ignored its explusion from the ASBU, and in 2002 acquired the exclusive broadcast rights for the Arab world for the 2002, 2006, 2010, and 2014 World Cups.[49] It

---

45. *2006 FIFA World Cup Germany: Results*, FIFA.com, http://www.fifa.com/worldcup/archive/germany2006/results/index.html (last visited March 28, 2011)

46. The trend toward increased emphasis on revenue on the part of international sports federations has been going on for the past two decades. For an early discussion of this phenomenon, see James A. R. Nafziger, *International Sports Law: A Replay of Characteristics and Trends*, 86 AM. J. INT'L L. 489 (1992).

47. For the current website of the ASBU and for a statement of its approach to sports broadcasting, *see* Arab States Broadcasting Union, *Objectives in Sports*, 2003, http://www.asbu.net/www/en/doc.asp?mcat=4&mrub=16&msrub=48&dev=true.

48. Chris Forrester, *Sands Shift in the Mideast DTH Business*, MULTICHANNEL NEWS, May 22, 2000, at 48. Normally, only ART's religious broadcasts were available without charge. ART had actually become involved with the broadcasting of the World Cup as early as 1998. *See Cadillac Award,* KHALEEJ TIMES, June 27, 1998 (reporting that the broadcaster had sold out all of its advertising spots for that year's World Cup two days before the beginning of the event).

49. Ammar Ben Aziz, *Can Football Lift Gloom for Arab Fans?*, CNN.COM, Apr. 17, 2002. On earlier promises not to monopolize the broadcast of the World Cup, *see*, Hasan Baswaid, *Paid Channels Do Not Aim at Monopolizing Sports Events*, MIDDLE EAST NEWSFILE, Dec. 29, 1999.

acquired these rights by agreeing to pay FIFA more than $100 million, a sum that significantly exceeded the combined amounts bid by a variety of free-to-air broadcasters in the region.[50] Its acquisition of the exclusive World Cup rights was designed to raise its profile in the world of Arab television; at the time it acquired the rights, ART had only three million subscribers, even though there were nearly 300 million Arab households with television.[51]

ART hoped to recoup its investment in the World Cup by selling subscription services to interested fans in the countries for which it held the broadcast rights. It also planned to license the right to broadcast certain World Cup games to national broadcasters.[52] While the World Cup is carried on free-to-air television in most countries, FIFA rules do not contain a requirement that games be broadcast on free television. Having acquired the exclusive rights to broadcast the World Cup in the Arab world, ART then offered to license the simultaneous broadcast of games to national public television stations in various Arab nations. In 2002, it resold the right to broadcast locally to terrestrial stations for what one Arab news source later described as a "nominal fee."[53] Also, in certain situations, it permitted the free broadcast of some games.[54] In 2002, when the Saudi Arabian national team qualified for the World Cup, ART allowed the free broadcast of games involving the Saudi team in Saudi Arabia, but required viewers in that country to pay subscription fees to see other games.[55] Unfortunately for ART, the strategy of mixing subscription and free broadcasts and the relicensing of broadcast rights to national broadcasters, did not prove to be financially rewarding, and ART failed to recoup its heavy investment in the exclusive rights, resulting in a loss that according to some estimates reached $60 million.[56]

In 2006, ART continued to use satellite technology and encrypted signals to sell its programming throughout the Arab world. However, for the right to view the 2006 World Cup games, the company demanded fees that most Arab

---

50. *Id.*

51. *Id.*

52. ART's own description of its role in the Arab world can be found on its website, Arab Radio & Television Network, *available at* http://www.allied-media.com/ARABTV/art.htm (last visited March 28, 2011).

53. *New Rules May Keep 2006 World Cup Off Most Television Screens*, THE DAILY STAR, June 1, 2006, http://www.zawya.com/printstory.cfm?storyid=DS010606_dsart44&l=064520060601.

54. *Id.*

55. *See Saudi Subscriptions for Satellite TV Double Before World Cup*, XINHUA GENERAL NEWS SERVICE, May 20, 2002; Saleh Fareed, *ART Making Fast Bucks Out of World Cup Mania,* SAUDI GAZETTE, May 30, 2002.

56. *Middle East: Pan-Arab Satellite Pay-TV Losses Mount - Beirut Paper,* BBC SUMMARY OF WORLD BROADCASTS, Feb. 13, 2004.

broadcasters viewed as exorbitant. Rights for Morocco and Egypt, for example, were set at US $13 million and $5.2 million, respectively, and locally based broadcasters almost uniformly declined to pay the fees demanded by ART.[57] In fact, it appears that ART's real strategy in 2006 was to enhance its revenues by-passing regular broadcasters and to deal directly with end users, including the operators of restaurants and coffee shops and other places where football fans gather.

Unfortunately, ART's subscription fees placed access to World Cup games beyond the reach of many Arab football fans. Depending on the country, ART's subscription fee varied between US $160-400. The subscription fee for Jordan was almost US $400, which was almost exactly double the annual income of a Jordanian earning the country's minimum wage. In Lebanon, individual fees for watching the World Cup at home were between US $150-$160, while restaurant fees ranged from $1000 to $6000, which prompted a boycott on the part of restaurant owners.[58] Once it became clear that the games were not likely to be broadcast on free television, numerous Arab countries began to protest the ART monopoly and some scrambled to develop alternative plans. In Egypt, the head of the state satellite Nile Sport Channel urged United Nations intervention to protect what he called a "human right."[59] Negotiations between that country's ruling National Democratic party and ART reached a stalemate, causing members of parliament and sports officials promised to set up huge screens in public squares in most provinces.[60]

A similar approach was taken in Jordan, where King Abdullah distributed 23 free receivers to the military and ordered that public screens be set up so low-income citizens can watch.[61] Shortly thereafter, Egypt announced a similar plan.[62] Saudi Arabia's ruler ordered that his nation's games be

---

57. Malkawi, *supra* note 40, at 603 n40.

58. *Soccer-mad Arabs Fear Missing World Cup Because of High Cost of Broadcast Rights,* ASSOCIATED PRESS FINANCIAL WIRE, June 7, 2006.

59. *World Cup: Billionaire Snaps Up Arab TV Rights*, TAIPEI TIMES, June 9, 2006, at 23, http://www.taipeitimes.com/News/sport/archives/2006/06/09/2003312606.

60. *Id.*

61. For the Jordanian response, *see Jordan King Helps Make World Cup Viewing Accessible to the Public*, INFOPROD, June 7, 2006.

62. For an extended account of the Arab response to the ART broadcast monopoly, *see* Mahfoud Amara, *When the Arab World Was Mobilised Around the FIFA 2006 World Cup,* 12 J. N. AFRICAN STUD. 417 (2007). For a discussion of Arab attitudes toward intellectual property generally, *see* John Carroll, *Intellectual Property Rights in the Middle East: A Cultural Perspective,* 11 FORDHAM INTELL. PROP. MEDIA & ENT. L. J. 555 (2001). *See also, Egyptians Await World Cup Fate*, BBC

broadcast on national TV while Algeria's president sent his communications minister to negotiate directly with ART.[63] In Morocco, the nation's communications minister confessed in parliament that the two national public TV stations cannot afford the $13 million broadcast fee that ART is demanding, prompting King Mohammed VI personally to intervene on behalf of his citizens.[64] In other countries, like Yemen, entrepreneurs emerged offering low cost illegal cable hookups as an alternative.[65] In many places, decoders could be had for roughly US $3.50.[66]

Under FIFA guidelines, local broadcasters who lacked authority to broadcast games in their entirety were also limited to twenty minute long highlight programs in the evenings after the day's games were already completed.[67] Thus, only those who were able and willing to pay for ART's signal had access to the games; others had to be content with relatively brief summaries. A compromise of sorts with ART was eventually reached in Lebanon, but in most parts of the Arab world, access to the games was severely limited. Only near the end of the tournament did ART relax its insistence that access be limited to those who paid subscription fees. Shortly before the World Cup Final match between France and Italy, ART authorized their broadcast on free television in Egypt.[68]

While there was widespread anger about the fact that World Cup games were not broadcast on free television in 2006, Arab legal systems failed to address the problem until it was too late to do anything productive. There were a number of reasons for the inaction. First of all, television in the Arab world was traditionally viewed as a state-owned monopoly, and few Arab states adequately considered the full consequences of the introduction of privately owned television stations and services into Arab society, let alone regional satellite broadcasters. Moreover, recently amended Arab intellectual property laws actually supported the monopolistic strategy undertaken by ART.

SPORT, June 8, 2006, http://news.bbc.co.uk/sport2/hi/football/africa/5060570.stm &d *Analysis: The Politics of World Cup-Watching,* BBC MONITORING WORLD MEDIA, June 12, 2006.

63. *World Cup: Mideast: Fans Find Ways to Avoid High Prices*, VARIETY, June 12, 2006, at 20.

64. The intervention was a success and Moroccans were able to watch the opening round and the semi-finals and finals of the 2006 World Cup on public television. *Brazil Ponders Weighty Question*, PITTSBURGH POST-GAZETTE, June 10, 2006, at E-3.

65. *Arabs Fear Missing World Cup Over Rights*, AFX INTERNATIONAL FOCUS, June 7, 2006.

66. *See also*, *Jordan Football Fans Take Drastic Measures to See World Cup*, INFOPROD, June 15, 2006.

67. See Malkawi, *supra* note 43, at 594.

68. *Egypt TV to Air World Cup Final*, IPR STRATEGIC BUSINESS INFORMATION DATABASE, July 9, 2006.

The protection of intellectual property was not an important goal in the traditional Arab legal system, and until fairly recently Arab copyright law was, from a western perspective, "underdeveloped." Under traditional Arab intellectual property laws, ART would not have possessed a recognized property interest in its broadcasts, and it would not have been able to block the efforts of other area broadcasters, like, for example, Lebanese cable companies that acquired broadcast signals by admittedly questionable means and who sold them to their customers for modest sums.[69] However, when Arab countries began to seek the benefits of membership in the World Trade Organization, they were required to enact western style copyright laws.

This was not really a matter of choice as WTO membership was conditioned upon the adoption of the copyright principles incorporated into the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS).[70] Prior to the adoption of the TRIPS standards, the holders of broadcasting rights would not have had standing to sue to protect its rights under Arab copyrights laws. However, because of the desire to comply with the requirements of the WTO, Arab copyright law by 2006 recognized television broadcasts as "copyrightable works of authorship."[71] Even in those countries where uncertainty remained as to the extent to which ART could enforce its monopoly against local competitors (as in Lebanon), government officials were reluctant to intervene for fear that such actions would be viewed as inconsistent with commitments necessary to remain in good standing with the WPO and under the European Union Association Agreement.[72] Furthermore, even though there is a strong argument that the ART-FIFA agreement, combined with ART's failure to share the broadcast rights with local stations violated the strongly anti-monopoly and "abuse of dominant market power" provisions of Arab antitrust laws, no serious efforts appear to have been made to challenge the ART contract on antitrust grounds, presumably because of concerns regarding WPO compliance.[73]

---

69. *See Malkawi*, *supra* note 43.

70. Gary G. Yerkey & Daniel Pruzin, *U.S. Wants moreProgress on IPR before Allowing Jordan to Join WTO*, 16 INT'L TRADE REP. 866 (May 19, 1999); Malkawi, supra, note 43 at 599.

71. See Malkawi, *supra* note 43. *See also* Jordan Provisional Copyright Law No. 52, art. 3, 23 (2001); Copyright Law, Royal Decree No: M/41, art. 9.1, 2nd Rajab 1424 H (Aug. 30, 2003) (Saudi Arabia); Arab Republic of Syria Law No. 12/2001, art. 13 (Feb. 27, 2001); Federal Law No. (7) of 2002 Concerning Copyrights and Neighboring Rights, art. 19 (2002) (UAE).

72. See Malkawi, *supra* note 43. *See also* Jordan Provisional Copyright Law No. 52, art. 3, 23 (2001); Copyright Law, Royal Decree No: M/41, art. 9.1, 2nd Rajab 1424 H (Aug. 30, 2003) (Saudi Arabia); Arab Republic of Syria Law No. 12/2001, art. 13 (Feb. 27, 2001); Federal Law No. (7) of 2002 Concerning Copyrights and Neighboring Rights, art. 19 (2002) (UAE).

73. *Id.* at 602-605.

Initially, a repeat of the 2006 experience appeared likely in 2010. In April of 2009, ART informed the Egyptian government that the license fee for free television for the 2010 Cup would be $20 million, and it began a campaign to bolster its defenses against piracy.[74] However, on November of 2009, ART sold its exclusive World Cup broadcasting rights to Al Jazeera, a competing satellite broadcaster based in Qatar, for a reported price of $1 billion.[75] If that figure is accurate, Al Jazeera obviously needed to generate as much revenue as possible. To some extent, the 2010 experience did duplicate that of 2006, as Al Jezeera sought to sell private satellite subscriptions throughout the Arab world, and it was the only listed broadcaster for the Arab region on the final FIFA list of Media Rights Licensees.[76] In the end, free-to-air broadcasts of the 2010 World Cup were available everywhere in the world except for Hong Kong, the Indian Subcontinent, and the Arab states of North Africa and the Middle East.[77]

However, the intensity of the controversy in the Arab World was not quite as great in 2010 as it was in 2006. There are a number of reasons why this may have been the case. First of all, Al Jazeera was generally more highly regarded in the Arab world than ART, and prior to 2010, it had shown some sensitivity on the access to sporting events issue.[78] It had, for example, earlier placed certain highly anticipated games involving Arab teams in the Africa Cup of Nations competition on one of its free channels.[79] Moreover, under apparently new FIFA guidelines, Al Jezeera was required to show the opening ceremony and the World Cup final game free of charge. It also announced that it would likely show the semi-finals and all games involving Algeria (the

74. *ART Demands $20 Million for World Cup Broadcasting,* DAILY NEWS EGYPT, Apr. 7, 2009.

75. *Al Jazeera Wins TV Rights for 2010 World Cup*, ARABIAN BUSINESS.COM, Nov. 25, 2009, http://www.arabianbusiness.com/digital-broadcast-powerlist/feature/574535.

76. *FIFA World Cup South Africa 2010: Media Rights Licenses*, Nov. 27, 2009, http://www.fifa.com/mm/document/afmarketing/tvnewmedia/01/04/69/56/fifaworldcup2010mediarightslicenseelist-publicrelease20091127.pdf. However, the list is dated November 27, 2009, only a few days after the rights were acquired by Al Jazeera.

77. Colin Mann, *Al Jezeera Sport Nets World Cup Rights*, ADVANCED TELEVISION, March 28, 2011, http://www.advanced-television.tv/index.php/2011/01/26/al-jazeera-sport-nets-world-cup-rights/.

78. On the role of Al Jazeera generally in Arab society, *see* MARC LYNCH, VOICES OF THE NEW ARAB PUBLIC: IRAQ, AL JAZEERA, AND MIDDLE EAST POLITICS TODAY (2005) & HUGH MILES, AL-JAZEERA: THE INSIDE STORY OF THE ARAB NEWS CHANNEL THAT IS CHALLENGING THE WEST (2005).

79. Keach Hagey, *Scrambled Signal in TV Takeover*, THE NATIONAL (ABU DHABI), Jan. 10, 2010, http://www.thenational.ae/apps/pbcs.dll/article?AID=/20100120/BUSINESS/701209944/1052/rss.

only Arab team in the finals) free of charge as well.[80] Also, while it charged viewers for access to its signal, Al Jazeera's basic rates--$100 U.S. for existing subscribers and $130 for new viewers (plus $^0-$70 for a digital receiver--while not inexpensive, were accessible to many in the Arab World.[81] On the other hand, Al Jazeera remains Moreover, the interest in the World Cup in the Arab world may not have been quite as intense as it was in 2006 as Algeria was the only Arab team to qualify for the 2010 finals.

Nevertheless, the Al Jazeera broadcast of the World Cup did not occur without incident. Shortly before the beginning of the final round, negotiations with the government of Jordan fell through as the result of a disagreement as to how much the government would have to pay to carry the Al Jazeera signal on terrestrial television.[82] Shortly thereafter, during the live broadcast of the first match of the 2010 World Cup (Mexico and South Africa), the Al Jazeera signal was jammed by an unknown source which interrupted the transmission and forced Al Jazeera to transfer its live feed to an open channel.[83] In the words of the British newspaper, *The Guardian*, the interference "produced blank screens, pixelated images and commentary in the wrong languages."[84] Similar disruptions occurred seven more times, almost always during the tournament's biggest games.[85]

Initial speculation focused on Egypt and Saudi Arabia, known to harbor anti-Al Jazeera sentiments based on the news service's political reporting, as the source of the jamming, a subsequent investigation by the United Kingdom's The Guardian provided persuasive evidence that the source of the unwanted interference was Jordan.[86] Even prior to the jamming of the satellite signals, the BBC had reported widespread resistance to paying the fees charged by Al Jezeera for the World Cup broadcasts. In Jordan, even discounted satellite cards cost approximately 40% of the monthly wages of low-paid workers making it well beyond what many could afford. According to the BBC, business in black market satellite cards, pirated signals captured

---

80. *Make Good Use of FIFA Billions*, THE STRAITS TIMES (Singapore), June 11, 2010.

81. Andy Sambridge, *Al Jazeera Sport Announces World Cup Coverage Costs*, ARABIANBUSINESS.COM, May 12, 2010, http://www.arabianbusiness.com/al-jazeera-sport-announces-world-cup-coverage-costs-269015.html.

82. *Al Jazeera Sets "Unacceptable Conditions" For Airing World Cup On JTV*, JORDAN TIMES, June 11, 2010.

83. *Intentional Jamming on Al Jazeera*, NATIONAL NEWS AGENCY LEBANON, June 11, 2010.

84. Ian Black, *Al-Jazeera World Cup Broadcasts Were Jammed From Jordan*, GUARDIAN.CO.UK, Sept. 29, 2010, http://www.guardian.co.uk/media/2010/sep/29/al-jazeera-world-cup-jordan.

85. *Id.*

86. *Id.*

through the Internet, and illegal satellite receivers were all flourishing in Jordan on the eve of the World Cup, very much reminiscent of the situation in 2006.[87]

One could argue that there is absolutely no reason why residents of one or two parts of the world should be required to pay to watch what most of the world can see for free, particularly when those areas are characterized by great disparities of wealth within the population. The obvious solution to the "viewing the World Cup" problem would be for individual Arab countries to do what Australia and several European countries have done and mandate that certain sporting events, including the World Cup (either the entire competition or final rounds and games involving Arab countries), be carried on free television. An alternative might be the adoption of a compulsory licensing system that would require the holders of broadcast rights to license them to local free broadcasters at a predetermined fee.[88]

The approach taken by the European Union and Australia and indirectly by the United States to the free access to televised sporting events issue represents a far more attractive approach to the problem of balancing of intellectual property rights with the public interest than does the approach taken by the same countries in regard to the proper scope of publicity rights, trademarks, and copyrights. Sport is a common commodity in the modern world, and laws should be designed to encourage the maximum amount of public involvement as both participants and spectators and not merely to enrich those who control the production of the premier sporting events.

CONCLUSION

The current regime of intellectual property in the United States and elsewhere creates substantial profits for those who control the production of sporting events, at least for those events which the sports fans of the world consider important. It would be a much more equitable sporting landscape if the law of sports were able to strike a more fair balance between the wishes of those who control the production of sport and those who view the consumption of sports as an important part of their lives. To suggest as much is not to propose a utopian fantasy, since the traditional relationship of sport and intellectual property recognized a much broader public domain than is currently fashionable. Only time will tell if the sports fans of the world will

87. *Jordanian Satellite TV Piracy Peaks During World Cup*, BBC MONITORING WORLD MEDIA, June 14, 2010.

88. For a similar list of options available to Arab countries, *see* Malkawi, *supra* note 40, at 601, 605-608.

someday reclaim their natural entitlement to the unrestricted enjoyment of sports.

ABOUT THE AUTHOR

J. GORDON HYLTON, Professor of Law, is a specialist in the history of sport and comparative sports law. He teaches at Marquette University, in the law school and the college, and in the summer law programs sponsored by Murdoch University in Perth, Australia and the University of Giessen, Germany. From 1997 to 1999, he was the Interim Director of the National Sports Law Institute, and in 2006 served as the chair of the Association of American Law Schools Section on Law and Sports, and is the current Chair-Elect of that organization. He is the author of *Sports Law and Regulation* (1999) (with Paul Anderson), a forthcoming book on sports law from Oxford University Press (with Paul Haagen of Duke University), as well as a series of articles on the legal history of sport. Professor Hylton is a graduate of Oberlin College and the University of Virginia Law School, and he holds a Ph.D. in the History of American Civilization from Harvard University. He joined the Marquette University Law faculty in 1995, after teaching at the Illinois Institute of Technology and Washington University. He has also taught at the law schools of the University of Virginia, and Washington and Lee University, and is a former Fulbright Scholar in law in Ukraine.

REFERENCES

Abdul-Jabbar v. General Motors Corp., 85 F.3d 407 (9th Cir. 1996).

Al Jazeera sets "unacceptable conditions" for airing World Cup on JTV. (2010, June 11). *Jordan Times*.

Al Jazeera Wins TV Rights for 2010 World Cup. (2009, November 25). *Arabian Business.Com*. Retrieved March 28, 2011, from http://www.arabianbusiness.com/digital-broadcast-powerlist/feature/574535.

Amara, M. (2007). When the Arab world was mobilised around the FIFA 2006 World Cup. *Journal North African Studies, 12*, 417-438.

Analysis: The politics of World Cup-watching. (2006, June 12). *BBC Monitoring World Media*

Arab Radio & Television Network. (n.d.). Retrieved March 28, 2011, from http://www.allied-media.com/ARABTV/art.htm

Arab Republic of Syria Law No. 12/2001, art. 13 (Feb. 27, 2001); Federal Law No. (7) of 2002 Concerning Copyrights and Neighboring Rights, art. 19 (2002) (UAE).

Arab States Broadcasting Union. (2003). Objectives in sports. Retrieved March 28, 2011, from http://www.asbu.net/www/en/doc.asp?mcat=4&mrub=16&msrub=48&dev=true

Arabs fear missing World Cup over rights. (2006, June 7). *AFX International Focus.*

ART Demands $20 Million for World Cup Broadcasting. (2009, April 7). *Daily News Egypt.*

Associated Press. (2006, June 7). Soccer-mad Arabs fear missing World Cup because of high cost of broadcast rights. *Associated Press Financial Wire.*

Aziz, A.B. (2002, April 17). Can Football Lift Gloom for Arab Fans? *CNN.com*

Baltimore Orioles, Inc. v. Major League Baseball Players Association, 805 F.2d 663 (7th Cir. 1986).

Baswaid, H. (1999, December 29). Paid channels do not aim at monopolizing sports events. *Middle East Newsfile.*

Black, I. (2010, September 29). Al-Jazeera World Cup broadcasts were jammed from Jordan. *Guardian.co.uk.* Retrieved April 21, 2011, from http://www.guardian.co.uk/media/2010/sep/29/al-jazeera-world-cup-jordan

Boston Professional Hockey Assn. v. Dallas Cap & Emblem Mfg., 360 F.Supp. 459 (N. D. Tex. 1973).

Brazil ponders weighty question. (2006, June 10). *Pittsburgh Post-Gazette*

Broadcasting Services Act 1992, §§146e-h (Austl.).

C. B. C. Distribution and Marketing, Inc. v. MLBAM, 505 F.3d 818 (8th Cir. 2007), *cert. denied*, 128 S. Ct. 2872 (2008).

Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 26, 106 Stat. 1460, 1502-03 (1992).

Cadillac Award (1998, June 27). *Khaleej Times.*

Carroll, J. (2001). Intellectual property rights in the Middle East: A cultural perspective. *Fordham Intellectual Property, Media & Entertainment Law Journal, 11,* 555-600.

Complaint, New York Yankees Partnership v. Major League Baseball Enterprises, Inc., 97-1153-CIV-T-2513 (M.D. Fla. Filed May 19, 1997).

Copyright Law, Royal Decree No: M/41, art. 9.1, 2nd Rajab 1424 H (Aug. 30, 2003) (Saudi Arabia).

Council Directive 89/552, as amended by Directive 97/36, 1989 O.J. (L 296) 23 (EC).

Dallas Cowboys Football Club, Ltd. V. NFL Trust, 1996 WL 601705 (S.D.N.Y. 1996).

Dunmore, T. (2010, February 10). La Liga to follow Premier League television revenue sharing model? *Pitch Invasion.* Retrieved March 30, 2011, from http://pitchinvasion.net/blog/2010/02/10/la-liga-to-follow-premier-league-television-revenue-sharing-model/

Egypt TV to air World Cup final. (2006, July 19). *IPR Strategic Business Information Database.*

Egyptians await World Cup fate. (2006, June 8). *BBC Sport.* Retrieved March 28, 2011, from http://news.bbc.co.uk/sport2/hi/football/africa/5060570.stm

ETW Corp. v. Jireh Publishing, Inc., 332 F.3d 915 (6th Cir. 2003).

European Commission. (n.d.). Audiovisual and Media Policies, Audiovisual Media Services Directive. Retrieved March 28, 2011, from http://ec.europa.eu/avpolicy/reg/tvwf/index_en.htm

European Commission. (n.d.a.). Audiovisual and Media Policies, List of Major Events. Retrieved March 28, 2011, from http://ec.europa.eu/avpolicy/reg/tvwf/implementation/events_list/index_en.htm

European Union Council Directive 89/552, as amended by Directive 97/36, 1989 O.J. (L 296) 23 (EC).

Fareed, S. (2002, May 30). ART making fast bucks out of World Cup Mania. *Saudi Gazette.*

Federal Trademark Dilution Act of 1995, 15 U.S.C. 1125 (2011).

FIFA (2009, November 27). FIFA World Cup South Africa 2010: Media rights licenses. Retrieved March 28, 2011, from http://www.fifa.com/mm/document/afmarketing/tvnewmedia/01/04/69/56/fifaworldcup2010mediarightslicenseelist-publicrelease20091127.pdf.

FIFA is the one sure-fire winner. (2006, June 9). *The Telegraph.* Retrieved March 30, 2011, from http://www.telegraph.co.uk/finance/2940670/Fifa-is-the-one-sure-fire-winner.html

FIFA. (n.d.). 2006 FIFA World Cup Germany: Results. *FIFA.com.* Retrieved March 28, 2011, from http://www.fifa.com/worldcup/archive/germany2006/results/index.html

Football Association Premier League Ltd. V. Netvision 013 Barack Ltd., MCA 011646/08 (Dist. Ct. Tel Aviv, July 16, 2008).

Forrester, C. (2000, May 22). Sands shift in the Mideast DTH business. *Multichannel News*, p. 48.

Gannes, L. (2009, May 21). Copyright meets a new foe: The real-time web. *Bloomberg Business Week.* Retrieved March 30, 2011, from http://www.businessweek.com/technology/content/may2009/tc20090521_159692.htm?chan=top+news_top+news+index+-+temp_technology

Garmire, C. (2000). The Super Bowl III problem. *Chicago-Kent Journal of Intellectual Property, 2,* 3-9

Gionfriddo v. Major League Baseball, 94 Cal. App. 4th 400 (Cal. Ct. App. 2001).

Glendinning, M. (2008, May 8). Olympic TV revenue to increase. *SportBusiness.* Retrieved March 30, 2011, from http://www.sportbusiness.com/news/167610/olympic-tv-revenue-to-increase

Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866 (2d Cir. 1953).

Hagey, K. (2010, January 10). Scrambled signal in TV takeover. *The National (Abu Dhabi).* Retrieved March 28, 2011, from http://www.thenational.ae/apps/pbcs.dll/article?AID=/20100120/BUSINESS/701209944/1052/rss

Hanna Mfg. Co. v. Hillerich & Bradsby Co., 78 F.2d 763 (5th Cir. 1935).

Harlem Wizards Entm't Basketball, Inc. v. NBA Props., Inc., 952 F. Supp. 1084 (D. N. J. 1997).

Hylton, J.G. (2001). Baseball cards and the birth of the right of publicity: The curious case of *Haelan Laboratories v. Topps Chewing Gum. Marquette Sports Law Review, 12,* 273-294.

Hylton, J.G. (2006). The Major League Baseball Players Association and the ownership of sports statistics: The untold story of round one. *Marquette Sports Law Review, 17,* 87-108.

Hylton, J.G., Callies, D., Mandelker, D., & Franzese, P. (2007). *Property law and the public interest.* 3rd ed. Charlottesville, Virginia: Lexis Law Publishing.

In the Matter of Implementation of Section 26 of the Cable Television Consumer Protection and Competition Act of 1992; Inquiry into Sports Programming Migration, 9 FCC Rcd 3440 (1994).

Intentional jamming on Al Jazeera. (2010, June 11). *National News Agency Lebanon.*

Intermountain Broadcasting & Television Corp. v. Idaho Microwave, Inc., 196 F.Supp. 316 (D. Idaho 1961).

Johnson-Kennedy Radio Corp. v. Chicago Bears Football Club. 97 F.2d 233 (7th Cir. 1938).

Jordan football fans take drastic measures to see World Cup. (2006, June 15). *InfoProd.*

Jordan king helps make World Cup viewing accessible to the public. (2006, June 7). *InfoProd.*

Jordan Provisional Copyright Law No. 52, art. 3, 23 (2001).

Jordanian satellite TV piracy peaks during World Cup. (2010, June 14). *BBC Monitoring World Media.*

Kahn, M.A. (2004). *May the best merchandise win: The law of non-trademark uses of sports logos. Marquette Sports Law Review, 14,* 283-317.

Keep Sport Free (n.s.). What's at risk? Retrieved April 21, 2011, from http://www.keepsportfree.com.au/Content_Common/pg-whats-at-risk-sms.seo

Lemley, M.A. (1999). The modern Lanham Act and the death of common sense. *Yale Law Journal, 108*, 1687-1715.

Liberty Broadcasting System v. National League Clubs, 1952 Trade Cases (CCH) ¶ 67,278 (N. D. Ill. 1952).

Live Nation Motorsports, Inc. v. Davis, 2006 W.L. 3616983 (N. D. Tex. 2006).

Loeb v. Turner, 257 S.W.2d 800 (Ct. Civ. App. Tex. 1953).

Lynch, M. (2005). *Voices of the new Arab public: Iraq, Al Jazeera, and Middle East politics today.* New York: Columbia University Press.

Maccambridge, M. (2004). *America's game: The epic story of how pro football captured a nation.* Random House: Westminster, MD.

Major League Baseball Properties, Inc. (1995, September 28). Letter amendment. *ONECLE: Sample Business Contracts.* Retrieved April 21, 2011, from http://contracts.onecle.com/topps/mlb.lic.1995.09.28.shtml

Make Good Use of FIFA Billions (2010, June 11). T*he Straits Times (Singapore).*

Malkawi, B.H. (2007). Broadcasting the 2006 World Cup: The right of Arab fans versus ART exclusivity. *Fordham Intellectual Property, Media & Entertainment Law Journal, 17*, 591-609.

Mann, C. (n.d.). Al Jezeera Sport nets World Cup rights. *Advanced Television*. Retrieved March 28, 2011, from http://www.advanced-television.tv/index.php/2011/01/26/al-jazeera-sport-nets-world-cup-rights/

Middle East: Pan-Arab satellite pay-TV losses mount - Beirut paper. (2004, February 13). *BBC Summary of World Broadcasts.*

Miles, H. (2005). *Al-Jazeera: The inside story of the Arab news channel that is challenging the west.* Jackson, TN: Grove Press.

Mitten, M., Davis, T., Smith, R., & Berry, R. (2009). *Sports law and regulation: Cases, materials, and problems.* 2nd ed. Aspen Publishers: New York.

Montana v. San Jose Mercury News, 35 U.S.P.Q.2d 1783 (Cal. App. 1995).

Mutual Broadcasting System v. Muzak, 30 N.Y.S.2d 419 (Sup. Cot. N.Y. County 1941).

Nafziger, J.A.R. (1992). International sports law: A replay of characteristics and trends. *American Journal of International Law, 86*, 489-518.

National Exhibition Co. v. Fass, 143 N.Y.S.2d 767 (N.Y. Sup. Ct. 1955).

National Assn. of Broadcasters v. Copyright Royalty Tribunal, 675 F.2d 367 (D.C. Cir. 1982);

National Exhibition Company v. Teleflash, Inc., 24 F. Supp. 488 (S.D.N.Y. 1938).

National Football League Properties v. Wichita Falls Sportswear, Inc., 542 F. Supp. 651 (W.D. Wash. 1982).

New rules may keep 2006 World Cup off most television screens. (2006, June 1). *The Daily Star.* Retrieved March 28, 2011, from http://www.zawya.com/printstory.cfm?storyid=DS010606_dsart44&l=064520060601

Newcombe v. Adolph Coors Co., 157 F.3d 686 (9th Cir. 1998).

NFL v. McBee & Bruno's, Inc., 792 F.2d 726 (8th Cir. 1986)

NFL v. TVRADIONOW Corp., 53 U.S.P.Q.2d 1831 (W.D. Pa. 2000)

Ofcom (n.d.). *Code on Sports and Other Listed and Designated Events.* Retrieved March 31, 2011, from http://stakeholders.ofcom.org.uk/binaries/broadcast/other-codes/ofcom_code_on_sport.pdf.

Palmer v. Schonhorn Enterprises, 96 N. J. Super. 72 (N. J. Super. Ct. Ch. Div. 1967)

Pittsburg Athletic CO. v. KQV Broad. Co., 24 F.Supp. 490 (W.D. Pa. 1938).

Remedies; infringement; innocent infringement by printers and publishers, 15 U. S. C. A. § 1114 (2011).

Sambridge, A. (2010, May 12). Al Jazeera Sport announces World Cup coverage costs. *ArabianBusiness.com.* Retrieved April 21, 2011, from http://www.arabianbusiness.com/al-jazeera-sport-announces-world-cup-coverage-costs-269015.html

Saudi subscriptions for satellite TV double before World Cup (2002, May 20). *Xinhua General News Service.*

Southeastern Broadcasting Co. v. Oil Center Broadcasting Co., 210 S.W.2d 230 (Tex. Civ. App. 1947).

Sports Broadcasting Act, 15 U. S. C. §§ 1291-1295 (2011).

Subject matter of copyright: In general, 17 U.S.C. § 102(a)(6) (2011).

The Topps Company, Inc. (n.d.). Major League Baseball Properties, Inc. License agreement. Contract No. 914(mb). Retrieved April 21, 2011, from http://content.edgar-online.com/edgar_conv_pdf/2007/01/04/0000812076-07-000005_EXHIBIT10-1.PDF

The Trademark Dilution Revision Act of 2006, 15 U. S. C. § 1125(c) (2011).

Twentieth Century Sporting Club v. Transradio Press Service, 300 N.Y.S. 159 (N.Y. Sup. Ct. 1937).

Uhlaender v. Henrickson, 316 F. Supp. 1278 (D. Minn. 1970).

University of Pittsburgh v. Champion Prods., Inc., 682 F.2d 1040 (3rd Cir. 1982), *cert. denied*, 495 U.S. 1087 (1982).

WCVB TV v. Boston Athletic Association, 926 F.2d 42 (1st Cir. 1989).

Weiler, P.C. (2000). *Leveling the playing field: How the law can make sports better for fans.* Harvard University Press: Cambridge, Massachusetts.

White, G.E. (1996). *Creating the national pastime: Baseball transforms itself.* Princeton University Press: Princeton, New Jersey.

Wilson, M. (2001). *Recreation: Having a good time in America.* Coldwater, Michigan: Information Plus.

World Cup: Billionaire snaps up Arab TV rights (2006, June 9). *Taipei Times.* Retrieved April 21, 2011, from http://www.taipeitimes.com/News/sport/archives/2006/06/09/2003312606

World Cup: Mideast: Fans find ways to avoid high prices. (2006, June 12). *Variety.*

Yost, M. (2006). *Tailgating, sacks, and salary caps: How the NFL became the most successful sports league in history*. Chicago: Kaplan Publishers.