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THE SPORTS EVENTS EXPLOITATION RIGHTS

The sports media rights

ABSTRACT

Sport is a multifaceted activity, with a social, cultural and economic dimension. Business matters have increased their importance in the world of sport. Sport encompasses modern spectacles followed by millions of people across the world. People attend the matches in the arena, but they also view the events from potentially everywhere. Indeed, sport is meant to be distributed through an increasingly number of means and devices and it plays an essential role for traditional broadcasters and new operators. Sport is not simply an event anymore, but it became a product, specifically an audio-visual content.

Actually, sport events draw the attention of many viewers, because of the uncertainty of the outcome of any sporting contest. Such uncertainty creates a sense of excitement and expectation, which render this kind of programs as *premium*, both for the operators and the viewers. On the one hand, sport provides a valuable content for operators on multiple sectors. It gathers large audience and induce many people to pay for several services. Whilst on the other hand, the sums paid by operators provide the fundamental source of revenues for sports organisations.

This thesis highlights how professional sports have developed into a highly valuable entertainment industry and tries to investigate the symbiotic relationship between media and sports organisations under a legal perspective. Each chapter examines respectively how property, competition and media laws affect the sport events in view of assessing an overall legal framework.

First, the thesis considers the commodification process that the sport has been involved in. Sport events represent the centre of many interests including organisers, media, marketing agencies, sponsors, as well as associations, clubs and athletes. This sports–media–business complex requires a clear understanding of the extent of the rights pertaining the events and the identification of who holds and can exploit them. Only once such rights are clearly assessed, then it is possible to both encourage and safeguard each step of the value chain that stems from the sport events. Part one gives a detailed overview about the positions scholars have elaborated in order to give to the sport events a legal contour. The starting point is that sport organizations are becoming commercially aware and are realising their particularly large business

potential through intellectual property rights (in particular through copyright). Consequently sport events have experienced a “*commodification*” process, despite they are significantly different from the usual subject matter of IP law, which instead commonly deals with original works. Part one tries to evaluate a new perspective on this regard and to draw the path of a possible evolution, especially with reference to new form of exploitation pertaining sport events.

Despite its undoubted value, the sport is something that, from a legal point of view, is still relegated to a kind of limbo. Doctrine and jurisprudence have long debated about the legal nature of sport events. In particular, in Italy scholars have elaborated two main theses. One considers games subject to an absolute right, considering them as authorial works, or as the result of the organizer's economic effort. According with this view, the entity realizing the events holds the control and rights over the result of such commercial activity, due to value of its contribution and investment. The opposing thesis entrusts the organizer of the event with a contact-based right, pursuant to which the person who holds the power over the hosting venue is entitled with a credit right toward the public who access to it.

The European Court of Justice gave its contribution to the debate. In the Premier League v. Murphy case the Court stated that sporting events cannot be classified as protected works under copyright law, at least from the European law perspective. The Court explained that in order to be classified as a work, the subject matter concerned would have to be original in the sense that it must be the result of the author's own intellectual creation. However, sporting events cannot be regarded as intellectual creations. The decision, however, does not deny a protection at all. The Court expressly acknowledges the economic value of sporting events and the related interests deserving to be protected. In the view of the Court, sporting events, as such, have a unique and, to that extent, original character which can transform them into subject matter that is worthy of a protection comparable to the protection of works. Such protection can be granted by the various domestic legal orders. Therefore, the ruling saves the provisions issued by national legislation for the protection of sporting events. For example, it is possible to find national forms of protection, as neighbouring or rights related to copyright, in France and Italy.

In 2008, Italian legislators granted the organizer of the events and professional competitions with a neighbouring right. The D.lgs 9/2008 amended the Italian Copyright Act and creating a new Article 78-*quater* titled “audiovisual sports rights”. Organiser of the competition and the organiser of the event are joint owners of sports audiovisual rights. Audiovisual rights are defined as the exclusive rights, lasting fifty years from the date of the event, which include the fixation and the reproduction live or delayed,

temporal or permanent, in any manner or form; the communication to the public of the recordings, fixations, and reproductions, and their making available to the public on demand; distribution in any form, including sale, of the original or copies of recordings, fixations, or reproductions of the event; rental and lending; fixation, elaboration, or reproduction, of the whole or a part, of the broadcast of the event, for new broadcasts or rebroadcasts of the event; use of the images of the event for promotional and advertising purposes, as well as for purposes of combining the images of the event to gambling and bets, and for the operation of such activities; the storage of the fixations of the images of the event with the purpose of the constitution of an archive.

The law expressly provides for archive rights, which pertain only to event organiser. Nevertheless, pursuant to the law, with reference to each event the hosting club allows, under conditions of reciprocity, the visiting club to access and exploit the archive of the match. The event organiser holds the control of the audiovisual production of the match, unless it renounces in favour of the competition organiser. Notwithstanding the foregoing, the event organiser is however entitled with the property rights in and to the recordings of the matches.

Aside the safeguard granted by neighbouring rights, sport events may be protected through other means. Trademarks law or unfair competition rules entail the right respectively to commercially exploit the signs pertaining a product or service on an exclusive basis and to hamper competitor's practices, which may be harmful. On one side, trademark protects brand names and logos used on goods and services. On the other side, the organiser may resort on rules based on unfair competition and misappropriation.

While a sports event as such under current EU and national rules does not qualify for copyright, the same does not necessarily hold true for the audiovisual recording of a sporting event, nor for its broadcasting. The audiovisual recording of sporting games, as broadcast on TV, normally amounts to a work of authorship protected by copyright law, as a film or cinematographic work. Broadcasting organizations enjoy neighbouring rights protection for the transmission for public reception of their broadcast signals.

In this last regard, it should be noted that the nexus between media and sport is also reflected on the legal level. When legal systems have protected sporting events, the attention by the legislator has mainly focused on the audiovisual dimension of sport, despite the broadcasting of matches is only one of the possible way of their commercial exploitation. For this reason, the considerations on the protection of the sporting events often coincide with those relevant to the protection of television broadcasting.

Sport is one of the most widespread modern forms of entertainment. It is a show meant to a wide audience everywhere. Media and sport have developed a symbiotic relationship. Both have benefited from the complementary interests. Sports have provided valuable contents and audiences for the media, whilst media granted revenues and promotion for sports.

However, considering the sport events as audio-visual contents to be communicated to the public, issues arise since the privatisation of sport events creates a tension between property rights and the interests of the market as well as of the community. All media operators want to have the possibility to exploit sport events, because they are a must-have source for their business activity. Alongside, people want to access to sport events as well, because they are a so appealing form of entertainment.

Consequently, this work explores how the nexus of interests surrounding sport events has been reflected in different approaches by the regulation. Competition policy aims to facilitate free, fair and effective competition (both upstream and downstream) in the market. Media regulation aims to guarantee the regular dissemination of contents and ensure public with to information and free access to the main sporting events. These two perspectives move alongside and each one contributes to create a special legal regime regulating the exploitation of sport events rights.

A chapter of the thesis is devoted to the analysis of sport audio-visual rights under the competition standpoint, exploring how antitrust rules and especially authorities' decisions have affected the market. The activities of selling, buying and exploiting of sports broadcasting rights have attracted the attention of the European Commission and national competition authorities as well as the one of the European Court of Justice.

Sport broadcasting rights are usually marketed by exclusive license agreements. The thesis outlines the fact that exclusivity has become an integral part of the broadcasting industry. The rights-holders can increase their revenues, because the exclusivity entices the investment by broadcasters. For media operators the exclusivity is a prime way to capture customers and to recoup the huge costs borne for acquiring premium contents. The price paid for the exclusivity by one broadcaster is probably higher than the sum of the amounts, which would be paid by several broadcasters for non-exclusive rights.

Nevertheless, exclusive agreements arise issues as well. They create territorial monopolies and limit the access to a content, which represents a must-have for the entire broadcasting market. As highlighted by the ECJ any exclusive license with regard to sports broadcasting would be assessed on its duration,

quality, and horizontal and vertical effect. In particular, in the opinion of European Commission, the analysis of the exclusive license aims to ensure that the market acts properly and the sports fans can benefit from a wider coverage of top sports events. According to the Commission the joint selling of the broadcasting rights *ex se* has highly anti-competitive effects by foreclosing television markets and ultimately limiting television coverage of those events for consumers. The Commission's approach on the joint selling of football rights is exemplified by its decision on UEFA Champions League case (2003), which represents the first of a series of judgements. Consequently, antitrust authorities, during the time, have established several undertakings rights-holders must comply with, in order to ease such foreclosing effects.

Furthermore, another antitrust issue arises from the fact economic rights pertaining an entire sport competition are usually offered to the market through a centralised system. The competition is considered as a single product. Obviously, this implies that the rights are managed jointly by a sole entity, usually for the team sports this role is played by the league, which acts on behalf of all the participants to the competition. Therefore the competition organiser manages the rights over the entire tournament, instead of each club selling the rights to its own matches. This consists on horizontal agreements and usually places restrictions on the ownership of live events. While recognising that the practice of joint selling leads to efficiency gains, the European Commission indicated that this practice constitutes a restriction of competition under Article 101 (1) of the TFEU. Nevertheless, it takes into account the market's benefits and particularly those favouring the consumers. Accordingly, European Commission has accepted, in principle, the practice of joint selling of sports broadcasting rights, albeit with strings attached.

At the same time, in the thesis it is widely commented how the joint selling reflects a hierarchical system, which characterizes the sport organization. Moreover, the restrictive nature of collective selling actually causes an increase in the price of purchasing sport for the broadcast industry. Alongside, there are efficiency reasons, which support the joint selling and justify such solution before the antitrust rules. These characteristics are often referred to as the specificity of sport. Recently, this concept has been officially recognised by Article 165 of the TFEU. In the joint selling system, the redistribution of revenues across clubs achieve ensure sporting balance and maintain competitiveness.

Besides its economic dimension, sport has an important social significance. It can play an educational function and has the ability of representing and strengthening the spirit of a nation. The free-to-air

television coverage of sports competitions has eased mutual viewing experiences, which have fostered a sense of national identity and cultural citizenship. Therefore, the public's access to live and full sports coverage may play a pivotal role in a given society. This object can be protected by specific rules, rather than by competition regulations or authorities' interventions.

To address this matter the thesis refers to the European regulation on the audiovisual sector, starting from the Television Without Frontiers Directive of 1989. This Directive was substantially revised in 1997 and again in 2007, when the same was repealed by the AudioVisual Media Services Directive, aiming to extend the rules from television broadcasting services to all forms of audiovisual media services.

The abovementioned regulations expressly deal with sport events matters, in order to grant the public with the right to access to their images on a free basis. The national law in Italy includes several provisions regulating the public access to sport. In compliance with European regulations the news reporting access is granted, in order to allow all the operators interested in providing information regarding main sport event to access to the images and to use them. At the same time, Italy is among the countries to have adopted a special list of the events that must be broadcast via free-to-air television and cannot be exploited by pay television on an exclusive basis. In the view of public authorities people must have access to certain events without any payment.

The main aim that inspires this thesis and its analysis of the legal framework to be applied to the sport events exploitation rights is because the balance achieved heretofore is going to be shook as a consequence of the evolution the entertainment market is facing nowadays. During the past decade, the media landscape and the coverage of sports events have changed dramatically. The technological development has strongly influenced how spectators can follow sports. The means of transmission have become interchangeable, thanks to the wide availability of connected devices. The current landscape is characterized by the emergence of new communication technologies (Internet and digital television) and by the convergence of these technologies, with an ensuing multiplication of the number of ways the contents can be accessed through. Everybody can now consume the sports content of their choice, on the platform they prefer and at the time they want. Media used to decide which information would reach the public and when it would reach the public. The ways to follow the sport have, instead, multiplied over time. Nowadays, the public itself decides where, when and on which device it will watch contents or consult information. Moreover, the event has turned into a commodity whose packaging today presents increasing degrees of originality.

Due to the increased transmission capacity, both the number of broadcasters and the hours devoted to the transmission of sports contents has substantially increased. This digital evolution also allows the broadcasting of a wider variety of sports events to a niche public. Second, new platforms, such as Internet and mobile phones, have created the opportunity for content providers to expand their offerings. The digitalisation process has also drastically lowered the cost of content production and distribution. Furthermore, the same event organisers are now able to engage the public directly, without any intermediaries. The technological development has greatly affected the way sports viewers can follow sports events. During the day, fans can consult highlights on sports or news websites, receive news alerts or pictures on their mobile phone and listen to downloaded podcasts with the most recent news. In the evening, they can watch the game on their television set at home. As a result, the public can now be informed about sports events on an on-going and limitless basis, being accessible at any place and time that suits them.

In view of the foregoing, it is possible to affirm that the solutions envisaged in the past must be reconsidered in view of the new landscape, but always reminding the main interests at stake. First, the necessity to protect the best incentives along the value chain, through which each sport event is created, financed and distributed to the public. Any entity contributing to the realization of sport events should be remunerated. Before that, the rights over any forms of exploitations of the same events must be clearly assessed as with reference to their extent as with regard to their entitlement. Secondly, it has to be duly evaluated the concern to safeguard the audience and its right to be informed and access to a content that enshrined a unique meaning for the society. The commodification of sports cannot become a reason to exclude the rights of the public, provided that they are reasonably addressed and balances with those related to the market.