

[Exclusivity and its boundaries in sports(law)

KSW

KUNZ SCHIMA WALLENTIN
RECHTSANWÄLTE GMBH

KSW

Thomas Wallentin
EUROSAF AGM 2018

Limassol (Cyprus) 21.04.2018



AGENDA



1. Introduction
2. Sports organizers
3. Media rights
4. Advertising rights
5. Labor law
6. Jurisdiction
7. Cyberattack 😊

EXCLUSIVITY IN SPORTS LAW

- **BASIS - sports autonomy** as globally recognized principle indicates exclusivity in sports related legal issues.
- **BUT - exclusivity in sports law is not absolute** and may change from country to country (= “principle of territoriality”) and in time (= increasing awareness of different stake holders (eg athletes; media enterprises; sponsors; sports associations; regulatory authorities) initiate more legal cases; even if concerning other sports than sailing, most of their legal “impacts” apply to sailing sport too).
- **BECAUSE** – such **private law** (as opposed to public law) regulations may **conflict with compulsory state law(s)**, including EU law, concerning (ia) issues such as:
 - Antitrust and Unfair Competition law
 - Trademark law
 - Copyright/personality rights
 - Media Regulation law
 - Labor law
 - Competence of state courts.

[SPORTS ORGANIZER

When we think of exclusivity in the context of sports events what first comes to our mind are **sports organizers**.

- The **organizer** can be defined as *‘the natural or legal person who bears the responsibility for the organization of the event’*.
- Although **de facto we know** what a sports organizer does – Most National or International/EU law do not provide for a definition.
- **Some (EU Member) States** provide special rules for sports organizers (eg, list is not comprehensive)
 - **France** (Art L 331-1 of the French Code du sport);
 - **Italy** (Italian Decreto legislativo 9/2008 of 9 January 2008 (*legge Melandri*));
 - **Bulgaria** (Article 13 (3) of the Bulgarian Physical Education and Sports Act 128)
 - **Spain**



- So there may be some uncertainty which of **many entities involved** in organizing a sports event is recognized as its organizer de jure,
- Nevertheless we need to know the “legal” organizer; **why:**
- **Firstly** organizers seek exclusivity in being the **only legitimate organizer** of certain events; and
- **Secondly** they claim **exclusivity in all aspects with regard to** media and commercial **exploitation** of the event.
- In practice, many sport events may be “**(co)owned**” by a number of parties – usually in a **vertical hierarchy** - with **individual** and **collective rights** in connection to the event, and not all rights of those event’s owner(s) are absolute or unlimited.



OWNERSHIP OF RIGHTS IN SPORT EVENTS

What are those rights related to a sports event?

Contrary to for example a classic or pop music concert, a **sports event** as such is **not protected by copyright** and therefore its organizer does not benefit from a specific organizers copyright (as does the organizer of a concert).

BUT – there are **other rights** involved in sports events, such as

- the **‘house right’** (‘home right’) as a property right (according to civil law); and
- “surrounding” **Intellectual Property Rights** (Copyright, Trademark rights),

conferring to sports organizers **exclusivity** at least to a **certain extent**.



HOUSE RIGHT

- Sports events are usually **hosted** in specific venues, such as **arenas, stadia, circuits** or **race tracks**.
- The “**race village**” or – as is my assumption – as even **sailing** events evolve (for marketing purposes must) more and more into **arena sports events** also the “**race area**” are such dedicated venues.
- The sports organizer may **own** such venue.
- Very often the venues are **owned by third** (private/public) parties and the sports organizer has to acquire certain (exclusive) rights to use this “**property**” (rent or lease) for his event.
- **AND:** As a consequence of digitalization – there are **virtual race villages** and **race areas** established in the virtual world.
- **PLUS:** In near future (or already?) those two (**real/virtual**) worlds **merge** into a new world = AR (**augmented reality**).
- We all know the ‘**race village**’ (e.g., ‘The Volvo Ocean Race Village’) or as even sailing events evolved into **arena sports events** (eg “Extreme Sailing Series”) the “**race area**” are such dedicated venues.



Volvo Ocean
Race Village in
The Hague
(Pitstop in
2015).

<http://www.mysailing.com.au/offshore/the-hague-announced-as-finish-port-for-the-2017/18-volvo-ocean-race>

©Photo Marc Bow / Volvo Ocean Race .

HOUSE RIGHT – SCOPE OF PROTECTION

- **Scope of house right:**
- Allows the organizer to **control admission** to the location and to **determine the terms and conditions for attendance** of the event.
- Including the right to **exclude unauthorized media** from the venue.
- This **exclusivity creates leverage** for the organizer to negotiate (exclusive) sponsoring, advertising contracts or for media coverage.
- **Open question** – is there – and if yes, to which extend (100 meters, 1 kilometer, more?) a **territorial overspill** extending the protection beyond the strict and sometimes physical borders of the place of venue? Eg the area outside the stadium, arena.



HOUSE RIGHT – CASES

Court decisions in Austria



© Axel P Ringelhann, 2010



- In the **landmark decision** *Boxkampf-Fernsehberichterstattung* (OGH 23.3.1976, 4 Ob 313/76, ÖBI 1976, 113) the Austrian Supreme Court (OGH) held that the organizer of a boxing match can invoke its '**Hausrecht**' pursuant to the rules of the General Civil Law Code (§§ 354, 339, 344ss, 362ss ABGB).
- Therefore he was entitled to **exclude the Austrian broadcasting organisation** ORF from filming and reporting of a boxing match even though that sports event was not protected under copyright law.
- Furthermore, the house right in accordance to Austrian law was **more detailed** in a **more recent** judgement (22.10.2013) of the Austrian Supreme Court.



- There, the **event organizer** (defendant) entered into a contractual agreement with the municipality of Kitzbühel (claimant) as the owner of the venue (= the finish area of the famous „Hahnenkamm Race“). The sports organizer **established rules** („**Haus Platzordnung**“) governing organisational terms, such as the supply of food, promotional activities and commercial activities. Interested persons had to file for an authorization one month prior to the event. On the **fan zone premises** the claimant supplied alcohol testing services without the event organizer’s authorisation.
- The Supreme Court dismissed the claim in holding that the **house right confers** to the event organizer the **right to exclude others** from exercising a trade if the conditions the former establishes, are not satisfied (OGH 22.10.2013, 4 Ob 147/13s, MR 2014,34 - *Fanzone Kitzbühel*).



Court decisions in Germany

http://www.bundesgerichtshof.de/SharedDocs/Bilder/DE/FreieBilder/FreieBilderGrosseDarstellung/palais2013_mitBrunnen_vorschaubild_miletzki.html?nn=557450



- In Germany the sports organizers house right has been confirmed in various court decisions
- In *Hartplatzhelden*, the defendant operated an internet forum [„www.hartplatzhelden.de“](http://www.hartplatzhelden.de) (which translates into „hard court heroes“). There the users can share their own video clips of amateur football matches. These clips are accessible to other internet users, free of charge. The claimant, the Württembergischer Fußballverband e.V. (WFV), a non-profit organization, organizes football games. The WFV claimed unlawful interference with its right as an established and operative business. WFV based its claims, inter alia, however not successfully, on ‘anti-competitive obstruction’ pursuant to UWG (Unfair Competition Act) and ‘unlawful interference with its rights to an established and operative business’ according to sec 832(1) of the BGB.

- The court of first instance upheld the claim. The court of appeal confirmed the decision.
- On appeal, the **BGH denied an exclusive exploitation right** of the claimant and dismissed its case. The BGH held that the publication of the video clips on the *hartplatzhelden.de* forum could not be considered as an anti-competitive obstruction according to UWG.
- **BUT:** The BGH further found that the claimant could **adequately ascertain its commercial exploitation of the football games** held by its member clubs through providing **under its house rules (*Hausrecht*)** that visitors were prohibited from making video recordings of the games. The court did not accept the claimant's further arguments, including the existence of an exclusive exploitation right of sport associations, and thus denied the claimant's exclusive exploitation right.

HOUSE RIGHT – DOMINANT POSITION ? ABUSE ?

- **BUT:** Does (and if yes, under which circumstances) the exclusive house right amount to **abuse of dominant position** according to antitrust law?
- This contentious question seems to have been asked in what appears to be a follow-up case to *Hartplatzhelden.de*. In the case of the *Bayerische Fussball-Verband e.V.* the Munich Higher Regional Court decided that a sports federation may regulate the recording of audiovisual content regarding amateur football. The **exercise of house rules** (*Hausrecht*) by issuing **appropriate** media and accreditation **guidelines does not violate antitrust law** and in that specific case could not be considered as abuse of a dominant position of the association (Judgement of the Oberlandesgericht München 23.03.2017; U 3702/16 Kart).



COPYRIGHT AND RELATED RIGHTS

Intellectual Property Rights

- Intellectual property rights are the second **important category of legal protection** – at least indirectly – available to organizers of sports events.
- Regarding EU law, the *Premiere League vs Murphy* case provided valuable guidance in 2011.
- One (negative) major finding was that the CJEU clarified that **sports events as such are not eligible for copyright protection under EU law** (CJEU 4.10.2011, joined cases C-403/08 and C-429/08, *Premiere League v QC Leisure and Kareem Murphy*, paras 96ss).
- **Not clarified** so far for **eSports events**.



By contrast,

- Sports having a **choreographic element** (e.g. figure skating on ice) can be protected by copyright.
- Not clarified so far: eSports events.

BUT: the **audiovisual production, recording and live broadcasting (including streaming) of sports events** usually is protected by a bundle of copyright/related rights. Therefore it is essential for the organiser to decide on who is allowed to make such productions, recordings, broadcasts. These rights include:

- Copyright in the cinematographic work (audiovisual work);
- Neighbouring right in the recording
- Neighbouring right in the broadcasting signal (including streaming?)

- The Austrian Supreme Court (OGH) has held in *Live-Sportübertragung* that the **live transmission** of a sporting event can also be a **cinematographic work** as long as it is the authors's (primarily: the director/Regisseur) own intellectual creation. Elements of the expression of the authors's own intellectual creation include, eg, the camera work, the image direction, in particular regarding replays, fading in of graphics or comparable design media or accompanying comments (OGH 21.3.2016, 4 Ob 208/15i MR 2016, 37 (38) - *Live-Sportübertragung*).
- **Broadcastings of sailing events** like Americas Cup, with **complex informations being visualized electronically** (wind direction/speed, boat heading/speed, current direction/speed, etc) and **incorporated** into the (real) filmed pictures certainly **qualify as a cinematographic work protected by copyright**.

- **Trade marks (TM)** may **provide** sports organizers with **another set of exclusive rights**.
- In order to market one's sports event, it is common practice that sport event organizers protect their events (including their venues) by TMs.
- **BUT:** We should not forget that also for event TM, general TM rules apply.
- Thereby
 - the applied for/registered sign must not be **descriptive**; thus, trade marks which consist exclusively of signs, names or indications which may serve - in trade - to designate the kind, quality, quantity, intended purpose, value, geographical origin or the time of production of the goods or of rendering of the service, or other characteristics of the goods or service, **shall not be registered**.

- In addition, the sign must be able to fulfil the primary function of a TM, which is to distinguish the applicant's/owner's services from those of competitors (**distinctiveness**), and to be recognized by the public as an **indication of the commercial origin** of the goods/services.
- **However**, descriptive or non-distinctive signs may overcome absolute grounds for refusal if they have (already) **acquired distinctiveness** through – **substantial and usually long time** – use.
- The **question of descriptiveness** can sometimes be very hard and **burdensome** to answer on a **absolute binding legal level**.



REGISTERED TRADE MARKS - CASES

- EUTM Nr 009128232

VOLVO OCEAN RACE ROUND THE WORLD

Registered since 19/10/2010 for goods in Class
18, 25, 28



- EUTM Nr 003743028 - **VOLVO OCEAN RACE** (word mark)

Registered since 04/08/2005 for goods and services in Class 16, 18, 25, 28, 35, 36, 41 [*Entertainment, organization of sport competitions and sport events; education and training services, also in sports; rental of sports equipment (except vehicles)*], 43



- **Descriptive or non-descriptive ? That is the question!**
or: **In court and on the high seas, one is in god's hand**
- Additional problem – national jurisdiction and EU-jurisdiction may not be compliant
- In a series of court and other legal proceedings, ending at the **BGH** (German Federal Supreme Court) it has been decided that for most goods and services the German national mark **FUSSBALL 2006** and **WM 2006** are **lacking** the necessary **distinctive** character (Joined Cases 32 W (pat) 238/04 and 32 W (pat) 237/04, 3 August 2005). However such goods as “unexposed films; tanning substances; artificial sweeteners; Culture earth; Fertilizer; Peat as fertilizer; Cosmetics; Soap; cosmetic bath additives; perfumes; Cologne“ were registered.
- This was an important finding and a **major set-back for FIFA** as it allows all traders to use these terms on their goods and for their services and consequently take advantage of the Football world cup in their efforts to market and advertise their products. The court ruled that the terms are free for all to use and should remain available to the general public to describe the event and products and services surrounding the event using these terms without restrictions.
- **BUT: FIFA WM 2006 was protected** (EUTM Nr 2811339, expired in 2013).



- Regarding **WORLD CUP 2006 GERMANY** already (!) registered as **EUTM** (then: CTM) registered for Classes 6, 9, 14, 16, 18, 20, 21, 24, 25, 26, 28, 35, 36, 38, 39, 41, 42 relating to or associated with football **the TM was declared invalid in 2008** (Boards of Appeal of EUIPO [then OHIM] 30 June 2008 – R 1470/2005-1 – *WORLD CUP 2006 GERMANY*)

Image of the EUIPO building:

[https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/contentImages/presentacion_edificio/originales/new_building_ohim%20\(1\).jpg](https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/contentImages/presentacion_edificio/originales/new_building_ohim%20(1).jpg)



Image of the Wembley Stadium:
https://commons.wikimedia.org/wiki/File:Wembley_Stadium.jpg

CC 2.0 Wonker, <http://flickr.com/photo/94056408@N00/5485260587>.

- The **EUTM application ‘Wembley’** for goods and services in Classes 9, 16, 18, 25, 28, 35, 39, 41 and 43 the application was **objected for the services in Class 41** (sporting and cultural activities; football academy services; coaching; provision of facilities for sports events etc)
- The examiner of the European Intellectual Property Office (EUIPO) found that
“The relevant consumer will understand ‘Wembley’ as a meaningful expression: it is a geographical name, part of the Greater London borough of Brent and site of the English national soccer stadium”
The examiner, therefore, objected the application on the grounds of lack of distinctiveness (=being not imaginative) and of being descriptive (= geographical term)

- On appeal, the Board of Appeal (at the EUIPO) held that as **‘WEMBLEY’ is a particular, individual facility** which is operated commercially by one provider, this prohibits the assumption of a geographical indication. The indication ‘WEMBLEY’ therefore **does not designate the geographical origin of any services**, since, insofar as they are **offered at this stadium, can inevitably only come from one provider** (by analogy, 04/072012, R 60/2012-4, NURBURGRING DRIVING ACADEMY, § 16-17). Therefore, Article 7(1)(c) EUTMR (descriptive mark) does not apply in this case and the **registration** was considered **valid**.
- Since the examiner had derived the lack of distinctive character mainly from the descriptive nature of the mark, the Board considered that Article 7(1)(b) EUTMR does not apply in the present case either (Boards of Appeal of EUIPO 16 January 2018, R 1415/2017-2, *WEMBLEY*).
- Note the comparable case *NEUSCHWANSTEIN*, currently pending before the CJEU (C-488/16 P). The General Court had argued, like the Boards of Appeal, that the sign was seen as referring to the castle as a museum location and as the castle is not a place where the goods or services are manufactured (in that case mostly souvenir goods), it also could not be seen as a reference to the geographical origin of the products.



- **TM vs Protected Geographical Indication**

- On 21 March 2016 the applicant applied for an EUTM for certain goods and services in Classes 14, 14, 16, 25, 28, 32, 33, 35, 38, 41 and 43



- With regard to the Class 33 (alcoholic beverages – except beer) the examiner indicated that the **sign applied for incorporated the name ‘SIERRA NEVADA’, which was a significant part of the Protected Geographical Indication for wine ‘Altiplano de Sierra Nevada’.**
- In consequence, the examiner **refused the application (only)** for alcoholic beverages on the basis of Article 7(1)(j) EUTMR.
- The Boards of Appeal upheld this decision (04/12/2017, R 186/2017-4, *ANDALUCIA SIERRA NEVADA 2017 CAMPEONATOS DEL MUNDO FIS FREESTYLE SKI & SNOWBOARD SIERRA NEVADA 2017 (fig.)*).

[OLYMPICS

- The IOC has registered several TMs around the world, inter alia, for the EU-territory. The EUTM, registration nr IR 1127014 (**word mark**) „**TOKYO 2020**“ was registered on 31.01.2012. Tokyo was officially chosen as the host city beginning of September 2013 (note the early application!).
- The **complementary figurative** EUTM was registered on 6.9.2016 (note: there was also a **copyright issue** concerning a previous version of the graphic design).
- Trademark rights cover only one aspect of protection of protection of a *figurative sign*, if it is (**in parallel**) a **copyrighted work** of fine arts/graphics (which normally is the case).
- With regard to the Olympic Games taking place in Paris 2024, the city of Paris had registered a French figurative mark (nr 4241082) on 15.1.2016. In September 2017, the IOC decided in favor of Paris.





EXCURSUS: THE ATHLETE'S „RIGHT TO FREELY PARTICIPATE IN EVENTS“

Federations exclusivity to decide vs athletes freedom of choice to participate in sports events

- Sports federations may want to have the right to exclude their member athletes from participating in other events. However, these **rules** have to **be based on objective, transparent and non-discriminatory criteria** and not be intended simply to exclude competing independent event organizers.
- A **recent antitrust case** (Case AT.40208) decided by the European Commission in December 2017 defines the athlete's position vis-à-vis sports federations with regard to the choice of athletes to participate in independent (of the federation) competitions.



- The International Skating Union (ISU), the sole body recognised by the International Olympic Committee (IOC) to administer the sports of figure skating and speed skating on ice, imposed severe penalties on athletes participating in speed skating competitions that are not authorised by the ISU. ISU's members are national ice skating associations. The ISU and its members organize and generate revenues from speed skating competitions, including major international competitions such as the Winter Olympic Games, World and European championships.
- Following a complaint by two Dutch professional speed skaters, in 2016, the European Commission instigated proceedings against ISU.



- Under the ISU eligibility rules (since 1998) speed skaters participating in competitions that are not approved by the ISU face severe penalties up to a lifetime ban from all major international speed skating events. The ISU can impose these penalties at its own discretion, even if the independent competitions pose no risk to legitimate sports objectives, such as the protection of the integrity and proper conduct of sport, or the health and safety of athletes.
- The Commission considered that even though in June 2016, ISU changed its eligibility rules, the rules restrict competition and enable the ISU to pursue its own commercial interests to the detriment of athletes and organizers of competing events. Thus, athletes are not allowed to offer their services to organizers of competing skating events and may be deprived of additional sources of income during their relatively short speed skating career. **The Commission ordered ISU to abolish or change its rules.**



EXCURSUS: COPYRIGHT PROTECTION FOR RACING RULES

- A **trigger for exclusivity** in sports is sometimes to be found, where it is the least expected, e.g. in **sport rules**.



- Sport **rules** may constitute a **literary work**, eligible for **copyright protection**. And any unauthorized use of a literary work infringes the copyright of the right holder.



EXCURSUS: COPYRIGHT PROTECTION FOR RACING RULES OF SAILING

- Such a **copyright infringement** was claimed by WS (then: ISAF) in the case involving the 32nd America's Cup Racing. Eventually, the event organizer (a consortium of the municipality of Valencia and Alinghi) agreed to pay ISAF a seven-figure US \$ sum of money for using the (then) Rules of Sailing (RRS) and the casebooks.

Image of the America's Cup:

https://de.wikipedia.org/wiki/America%E2%80%99s_Cup#/media/File:The_America%27s_Cup.jpg

EXCURSUS: EXCLUSIVITY AND PERSONAL RIGHTS

- The **right of portrayal** confers to the athlete the right to prohibit or allow (the reproduction and) publication of his personal image under certain circumstances.
- **IF:** such depicting **conflicts** with his **legitimate interests**. That is – eg – the case if used for commercial purposes.
- **NOTE:** already **confusingly similar** images of athletes, including the so-called “**sports-image**” may constitute an **infringement**.
- **How far reaching** is this exclusivity, where are its boundaries?
- **DECIDE** yourself: According to “worldsoccer.com” Samsung had used a confusingly similar image of Pele in an advertisement (<http://www.worldsoccer.com/news/pele-sue-samsung-30million-369543>).



- Image of Pele’s “bicycle kick”:
- <https://www.sportskeeda.com/football/how-pele-made-bicycle-kick-famous>
- Allegedly, Pele (Pele IP Ownership LLC, which owns the former player’s trademark and publicity rights) claimed \$30m for the unauthorized endorsement.



Image of the advertisement
appeared in the New York Times:
https://static.independent.co.uk/s3fs-public/styles/story_medium/public/thumbnails/image/2016/03/29/16/pele1.jpg



- This **right of portrayal/ the personal rights** – in Austria stipulated in sec 78 of the Austrian Copyright Code (in Germany in KUG 22ss , in France Art 9 Code Civil) – also extends to the athlete’s voice and his integrated “**sports image**”. The Austrian Supreme Court even confirmed protection for a bodybuilder’s **poses** (OGH 14.3.2006, 4 Ob 266/05d – *Profi-Bodybuilder*).
- The athlete may claim **compensation for unjust enrichment** if his image is marketed without his consent (in Austria according to sec 1041 ABGB). In practice, the athlete assigns these rights in favor of his sponsor/the sports federation **sponsor** (see also later on with regard to Advertising Rights).



- **Side note:**
- **Since March 2017, in France**, the French Code du sport provides sports clubs and players the possibility to **enter into a separate image rights agreement** alongside the main employment contract. (Similar as since always with regard to agreements with film-authors and their (copy)rights).
- Provided that **certain conditions are met**, the remuneration paid under a separate image rights agreement will not be classified as a salary and thus will **not be subject to the social tax paid** by the employer and employee under an employment agreement (French Code du sport Article L 222-2-10-1).

MANAGEMENT OF AUDIOVISUAL RIGHTS

- One of the most **important areas** in sports law where **exclusivity** comes into play is the field of media, in particular the **management of audiovisual rights**.
- **Broadcasting:** The live transmission of sports events plays an essential economic role. They are the most important and valuable right. This attracts the highest TV audiences, interest falls abruptly once the event concludes;
- **Webcasting:** live streaming on the Internet is gaining greater audiences. Many events are webcasted live and in high definition in numerous territories; adapted since long time for sailing events in remote areas (eg. VOR; Jules Verne Trophy)
- Delayed **on demand** “time shifted broadcasting/streaming”: this format still attracts large additional audiences;
- **Packaging of highlights:** commonly used for informational purposes, this has become a popular source of online content. It enables online users to view their preferred highlights on demand and on a time shift basis.
- **Social media** – rights – and **strategy** (includes **user generated content**).

- Up until about 30 years ago the European markets were characterized and dominated by **public quality free TV monopolies**.
- Accordingly the prices for pay-TV in sports were rather low. Along with progressive liberalization of the European broadcasting markets (development of so called “**dual-systems**” = private and public TV) and with technological progress (“digitalization”) **competition increased**.
- Nowadays **additional new players** in the field of **digital channels**.
- Given the scarcity and exclusivity of attractive sporting events, the adjustment was made by price. As a consequence, the **sale of sports media rights became a lucrative business** capable of attracting enormous revenue.



LICENSING OF AUDIOVISUAL RIGHTS

How are audiovisual rights in sports business licensed?

- Usually the sports event organizer negotiates with the **media content providers** and licenses event related audiovisual rights. If there are various media providers interested in acquiring rights, it comes to a **bidding process**, which leads to an increase of the rights fees.
- **Live audiovisual rights** regarding domestic football are **mainly licensed to pay-TV** broadcasters, and there are only a few countries in which free-to-air broadcasters manage to retain significant rights to the live games of the top domestic leagues. Only recently (2017) the pay-TV broadcaster Sky acquired the exclusive audiovisual rights for the UEFA Champion's League. Sky, and in order to finance its purchase, has sublicensed streaming rights to DAZN.



- **Free-to-air broadcasters** have **previously** held rights to the major national team championships, such as the World Cup and the European Championship. Public service broadcasters usually negotiate the joint purchasing of TV rights through the European Broadcasting Union (EBU).
- **However**, this has changed.
- The most prominent **shift from free-to-air broadcasters to pay-TV** represents the audiovisual rights of Olympic Games. In 2015, the IOC licensed the audiovisual rights for the **Olympic Games** for the period **2018 – 2024** to the US-American Company ‘**Discovery Communications**’ (which also owns the well-known broadcaster ‘**Eurosport**’) for a price of 1.3 bn Euro.
- The same happened for the football Champions League (“Sky”).

JOINT SELLING OF AUDIOVISUAL RIGHTS

- Usually, **sport clubs assign** their audiovisual rights to their **national** association, which in turn, licences the rights to broadcasting companies on the basis of territorial exclusivity.
- In order to prevent (price) competition amongst the clubs, the **associations bundle all rights** to **sell** them **collectively** to a single broadcaster in a each country. However, such joint selling **may restrict competition between broadcasters**, and eventually limit consumer choice. Therefore Anti Trust and Competition Authorities have a close eye on such deals.
- In three decisions (UEFA Champions League in 2003; Bundesliga in 2005; Premier League in 2006) the **European Commission** has clarified that **joint selling is permitted from an antitrust perspective** under **certain conditions** are met. These include, amongst others, open and transparent tender procedures, a limitation of the rights' duration, a **debundling** to different (sub)licensees, etc.



AUDIOVISUAL RIGHTS AND ANTITRUST

- Earlier **debundling obligations** asked for a **split of free TV and pay TV** rights, later on **Pay TV** rights had to be additionally **shared** at least by two licensees.
- Still **no clear decision or opinion** to where **digital rights** reside.
- Since the license model of audiovisual sports rights is based on **territorial exclusivity**, as a result, **price levels vary** in each territory.
- **BUT:** In its *Premier League* judgement the CJEU ruled that partitioning markets with the **sole aim of creating artificial price differences** between member states infringes **antitrust regulations**.



Image of the Court of Justice
of the European Union:

[https://de.wikipedia.org/wiki/
/Gerichtshof_der_Europ%C3
%A4ischen_Union#/media/Fil
e:Quartier_Europ%C3%A9en
_Nord,_Kirchberg_\(28468120
66\).jpg](https://de.wikipedia.org/wiki/Gerichtshof_der_Europ%C3%A4ischen_Union#/media/File:Quartier_Europ%C3%A9en_Nord,_Kirchberg_(2846812066).jpg)

CC-BY-SA [sprklg](#);
<https://www.flickr.com/people/59731892@N00>



Premier League vs Murphy judgement (CJEU 4.10.2011, joined cases C-403/08 and C-429/08, *Premiere League v QC Leisure and Kareen Murphy*).

FACTS:

- The FAPL administers the Premier League and markets the television broadcasting rights for the matches of this commercially by far highest ranked soccer league world wide.
- Under an open competitive tender procedure, it grants broadcasters an exclusive broadcasting **right for live transmission** of the Premier League matches on a **territorial basis**.
- In practice, the **territory** usually corresponds to a **single Member State**, which means that viewers can watch only the matches broadcasted by the broadcasters established in the Member State in which they are resident.



- In order to protect such territorial exclusivity and to prevent the public from receiving broadcasts from outside the Member State concerned, each broadcaster undertakes, in a **license agreement** concluded with the FAPL, to **encrypt its satellite signal** and to transmit it, thus encrypted, by satellite only to the subscribers of the territory awarded to it.
- **Subscribers** then require decoder **devices to decrypt** the signal; the license agreement also imposes **restrictions** on the **circulation** of such devices outside the territory of each licensee.
- The disputes at the origin of the present cases concerned attempts to **circumvent this exclusivity**. The owner of a pub in the United Kingdom started to use a (cheaper) foreign decoder card, issued by a Greek broadcaster to subscribers resident in Greece, to access Premier League matches in her pub in the United Kingdom.



- **Decision:** Firstly the CJEU ruled that public showing in a pub of broadcasts containing protected works constitutes a ‘**communication to the public**’ **under** the InfoSoc Directive (Copyright Directive), **requiring prior authorization** by the holder of copyright in the work (= the broadcasted film).
- Secondly, the CJEU held that **contractual restrictions** prohibiting the **sale and use of decoder devices** by a broadcaster in one Member State to enable viewers in another Member State to access its encrypted satellite broadcasts, and national legislation to this effect, **are contrary** to the competition and free movement of goods and services in the Common Market.

ANTITRUST – RECENT DEVELOPMENTS

- **NOTE:** On **10 April 2018**, officials of the **European Commission** have carried out **unannounced inspections** in several Member States at the premises of **companies active in the distribution of media rights** and related rights pertaining to various sports events and/or their broadcasting.
- The Commission has **concerns** that the companies involved may have **violated EU antitrust rules** that prohibit cartels and restrictive business practices (Article 101 of the Treaty on the Functioning of the European Union). The Commission officials were accompanied by their counterparts from the relevant national competition authorities.
- However, the fact that the Commission carries out such inspections does not mean that the companies are guilty of anti-competitive behaviour nor does it prejudice the outcome of the investigation itself.

EXCLUSIVITY AND ADVERTISING RIGHTS

- Regarding the **Olympics**, in the 1970s, as expenses rose, the **IOC** introduced the **Partners Program (TOPP)**. Thereby, exclusive rights to be associated with the Olympics are granted to official sponsors for specific sectors or territories.
- This Program provides **different categories of sponsorship** ‘official sponsor’, ‘official supplier’ and ‘official licensee’. Depending on the category of sponsorship and territory, the IOC grants different marketing rights.
- The rights granted to sponsors **included the right to use Olympic emblems** and the right to feature the sponsors’ logos on the event venues or athletes.



Olympic Charter (in force as from 15 September 2017) Chapter 1, Article 7 - Rights over the Olympic Games and Olympic properties*

1. *As leader of the Olympic Movement, the IOC is responsible for enhancing the values of the Olympic Movement and for providing material support in the efforts to organise and disseminate the Olympic Games, and supporting the IFs, NOCs and athletes in their preparations for the Olympic Games. **The IOC is the owner of all rights** in and to the Olympic Games and Olympic properties described in this Rule, which rights have the potential to generate revenues for such purposes. It is in the best interests of the Olympic Movement and its constituents which benefit from such revenues that all such rights and Olympic properties be afforded the greatest possible protection by all concerned and that the use thereof be approved by the IOC.*

2. ***The Olympic Games are the exclusive property of the IOC which owns all rights relating thereto**, in particular, and without limitation, all rights relating to (i) the organisation, exploitation and marketing of the Olympic Games, (ii) authorizing the capture of still and moving images of the Olympic Games for use by the media, (iii) registration of audio-visual recordings of the Olympic Games, and (iv) the broadcasting, transmission, retransmission, reproduction, display, dissemination, making available or otherwise communicating to the public, by any means now known or to be developed in the future, works or signals embodying audio-visual registrations or recordings of the Olympic Games.*



3. The IOC shall determine the conditions of access to and the conditions of any use of data relating to the Olympic Games and to the competitions and sports performances of the Olympic Games.

4. The Olympic symbol, flag, motto, anthem, identifications (including but not limited to “Olympic Games” and “Games of the Olympiad”), designations, emblems, flame and torches, as defined in Rules 8-14 below, and any other musical works, audio-visual works or other creative works or artefacts commissioned in connection with the Olympic Games by the IOC, the NOCs and/or the OCOGs, may, for convenience, be collectively or individually referred to as “Olympic properties”. All rights to the Olympic properties, as well as all rights to the use thereof, belong exclusively to the IOC, including but not limited to the use for any profit-making, commercial or advertising purposes. The IOC may license all or part of its rights on terms and conditions set forth by the IOC.

These provisions aim at exclusively defining by the IOC as being on top of the sports organisational hierarchy its rights and exclusivity therein.

- One (positive) side-effect of exclusivity is an **increase in prices for sponsorships**.
- **BUT:** Not everyone who desires to be associated with the event is willing and able to pay for exclusive rights. Some marketers believe they can associate and intrude upon the event's venue with their own methods rather than through official channels. They may then **ambush**.
- **Another downside** of exclusivity is the possible **abuse of dominant market position**. As a matter of fact, currently in Germany, the question of whether **advertising restrictions imposed by the IOC** encroaches on antitrust rules.

[MARKET TEST ON COMMITMENTS OF DOSB AND IOC

- The **German Bundeskartellamt** is **currently** conducting administrative proceedings against the German Olympic Sports Confederation (DOSB) and the International Olympic Committee (IOC).
- The Bundeskartellamt **suspects** that the advertising restrictions on athletes and companies (**Rule 40 of the Olympic Charter for athletes and sponsors**) restricts competition and that DOSB and IOC are abusing their dominant position.
- The proceeding was **initiated** on the basis of a **complaint by the Federal Association of the German Sports Goods Industry** and in connection with press reports on the last Olympic Games.

- By-law 3 to Rule 40 of the Olympic Charter (referred to as Rule 40) states that:

“Except as permitted by the IOC Executive Board, no competitor, coach, trainer or official who participates in the Olympic Games may allow his person, name, picture or sports performances to be used for advertising purposes during the Olympic Games.”

- This advertising restriction **covers all advertising and social media activities** and is valid from nine days before the opening ceremony of the games until the third day after the closing ceremony (so-called “**frozen period**”). The **athletes** nominated for the Games **must sign** up to the DOSB and IOC Olympic Charter and comply with it.



DOSB and IOC offered to **loosen the restrictions** on advertising activities exclusively targeted at Germany by means of the following commitments:

- The **standard for advertising measures** will be the ***Olympia-Schutzgesetz*** (Olympic Protection Act) **and the case law** of the German Federal Court of Justice. The IOC Guidelines on Rule 40 will be, insofar, limited in their application;
- The rules for the approval of applications will be amended. The **deadline will be significantly reduced** and will not constitute a cut-off period. Additionally, the rules foresee an **assumption of approval**;



- the notions of “Olympic” and other **Olympic related terms** will be **defined conclusively** and in a **much narrower** way;
- **generic advertising**, as well as greetings or congratulatory messages from the sponsors to athletes will be also **permitted** during the "frozen period" **under certain conditions**;
- according to the proposed commitments, athletes will be **able to share or retweet content** from the IOC / OCOG / DOSB / Team Germany and also link it with **greetings or acknowledgments to the sponsors**.



- These **loosened revised rules** were already applied during the Winter Games in **Pyeongchang** in February 2018.
- https://alt.dosb.de/fileadmin/Bilder_allgemein/Veranstaltungen/Pyeongchang_2018/PyeongChang_Rule40_OlympischeCharta_PC2018_20122017.pdf
- We will see, if that **satisfies** the European Commission and the non-IOC sponsoring industry



EXCLUSIVITY AND LABOR LAW

- **Belgium 1995**
- **Bosman case** (15.12.1995, C-415/93, *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman*).
 - **Before that ruling**, a soccer player could not leave his club at the end of his deal unless that club agreed to let him go, or received an agreed fee (“transfer money”) from a buying club.
 - The **ruling allowed** a player to leave a club on a free transfer as soon as his contract expired, meaning they had leverage to demand considerable signing-on fees and salaries from new clubs.
 - “**Post-Bosman**”, clubs were not bound by the EU players quota any more and free to sign any players from European Union countries.

EMPLOYMENT CONTRACT

- **Austria 2017**
- **Sahinovic case** (Austrian Bundesverwaltungsgericht, BVwG 10.3.2017, W145 2128879-1, Causa Sport 2017, 387).
 - The then 15 year old Austrian synchronized swimmer Vanessa *Sahinovic* was **run over by a shuttle** in the athlete city of the European Games in Baku, in June 2015.
 - The legal question was, whether the injured athlete was at the time of the accident subject to a health service based on her **employment with the Austrian Olympic Committee (ÖOC)**. This would entitle her to a disability pension.
 - The BVwG decided that the **federation, which nominated the athlete** to participate in the games (= ÖOC) is to be considered her **employer**.



TERM OF THE EMPLOYMENT CONTRACT

- **Germany 2017**
- **Müller case** in Germany addressed the question as to whether a fixed-term employment contract for a goal keeper complies with German labor law.
 - In essence, the German Bundesarbeitsgericht considered that

„in the commercialized and publicized top football sport, a football club is entitled to expect an excellent performance from a top football player and its team. Such a performance, however, can only be provided for a limited time. This is a **peculiarity**, which as a rule **justifies a legitimate interest** in the term of the employment relationship”.
- Might apply to **trainer contracts**?



France

- *eSports*
 - The French *Décret n° 2017-872 du 9 mai 2017 relatif au statut des joueurs professionnels salariés de jeux vidéo compétitifs* lists the conditions under which an **eSports player's contract** can have a (limited) duration of **even less than 12 months** which “normally” is not allowed under French labor law.



EXCLUSIVITY AND JURISDICTION

Image of the CAS:

https://commons.wikimedia.org/wiki/File:Court_of_Arbitration_for_Sport_-_Lausanne_2.jpg

Tribunal
Arbitral du
Sport /
Court of
Arbitration
for Sport in
Lausanne

Fanny Schertzer, CC BY 3.0



EXCLUSIVITY AND ARBITRATION AGREEMENTS

- Since almost all major Sports Bodies have made it a mandatory condition for participating in their sports events, **sports jurisdiction** respectively **sports arbitration agreements** can be considered to have an exclusive nature.
- Many **athletes**, especially professional players in team sports, however, **feel forced** to accept a system which refuses them – in their view – fundamental rights compared to ‘normal’ (= non-sports) employees.
- This **lack of free consent** has been the **key issue** of the **Pechstein- Saga**.



PECHSTEIN CASE

- In early **2009**, the decision of the Disciplinary Commission of the International Skating Union (ISU) ordered a 2 years suspension for the athlete Ms Pechstein because of alleged blood doping (her argument was: inherited genetic blood anomaly) .
- On **appeal**, the Court of Arbitration for Sport (CAS) confirmed the suspension (**25.11.2009**).
- In two proceedings before the Swiss Federal Tribunal, in which she tried to challenge the CAS decision, Pechstein's claim was dismissed (Decision of the *Swiss Federal Tribunal* rendered on **28.09.2010**).
- Consequently, Pechstein instigated proceedings before the state courts in Germany requiring damage (about € 4 mio) from ISU and – for procedural reasons – from the German federation Deutsche Eislauf-Union e.V. (DEU) – for lost income during the time of her suspension.

- The **Regional Court of Munich** upheld the CAS decision on **26.2.2014** (LG München I, 26.02.2014 - 37 O 28331/12)
 - It held that the issues were **res judicata** as Pechstein had not challenged the jurisdiction of CAS before
 - In addition, the court found that the **arbitration agreement** signed by Pechstein **was void** because the ISU had a monopolistic structure. It considered that the athletes had no choice but to sign the agreement.

- On appeal, the Higher Regional Court of Munich upheld the decision on **15.1.2015** (OLG München, 15.01.2015 - U 1110/14)
 - It found that the **requirement** by a dominant sports organization **to sign an arbitration agreement** as a condition for an athlete to participate in an international competition does **not** make the agreement **void per se**.
 - **However**, the court held that in 2009, when Pechstein signed the agreement, the **regulations governing CAS did not provide for a fair balance** with regard to the influence of the sport bodies on the one hand and the athletes on the other in choosing the arbitrators.
 - At that time a majority of the CAS arbitrators had been nominated by sport bodies, thus giving the athletes' side significantly less impact on the composition of the tribunal.



- On appeal, on **12.7.2016** the (BGH) sided with CAS (BGH, 12.07.2016 - KZR 6/15).
- The BGH **confirmed**
 - **CAS** as being a **genuine arbitral tribunal** according to German law.
 - the dominant market position of the sport organization ISU, but saw **no abuse** of this position.
- The BGH **did not see a structural imbalance**, as the CAS is not integrated in another organization, like disciplinary bodies within sport organizations.
- The BGH **did not consider** that the **list of arbitrators leads to a structural imbalance** when establishing the panel **in an individual case**.
- The BGH **stresses** that it is in the **athletes' own interest** to have such a system in place and **sign an arbitration agreement**.
- **Next step:** German Federal Constitutional Court



ESPORTS

- New developments **challenging sailing as being exclusively a “real” sport** can be found in the emerging business field of **eSports**

Image of an eSports Arena:

https://image.redbull.com/rbcom/010/2013-10-05/1331614343538_4/0010/1/1600/1067/1/league-of-legfaker-of-skt-t1-atlol-world-championship-at-the-staples-center-lol-world-championshipends-world-championships.jpg



FACTS AND FIGURES

- In **2015**, **worldwide revenues** generated in the eSports market amounted to **325 million U.S. dollars**.
- in **2017**, the global eSports market was valued at nearly **493 million U.S. dollars and still increasing**
- In **2017**, the number of frequent eSports **viewers** and enthusiasts amounted to **143 million**. This number is projected to reach 250 million in 2021.
- In **2016**, out of **424** eSports events,
 - North America **hosted** 28%
 - Wester Europe 26%
 - Eastern Europe 13%
 - China 8%
 - The Rest in Asia, Latin America, Oceania and Africa



- Besides traditional e-Sport games CS, Halo, Quake, Warcraft III, more recently even **Sailing e-Sport games** have entered the **market**:
 - **Volvo Ocean Race Game** (the 2014-2015 edition had more than 200.000 users) (<https://www.volvoceanrace.com/en/game.html>)
 - **Volvo Ocean Race Tracker** (<https://www.volvoceanrace.com/en/tracker.html>)
 - **The App Virtual Regatta Offshore** (more than 1 mio users) (<https://itunes.apple.com/us/app/virtual-regatta-offshore/id387893495?mt=8>)
 - **Virtual Skipper 5** (America's Cup Game) (<http://www.virtualskipper.com/en/>)
- Potential marketing tools or open even know how transfer possibilities
- Such as in **soccer** - clubs which engage high potential eGamers = Pro-Gamers)



E-SPORT

Screenshot of the Volvo Ocean Race game:

https://www.volvoceanrace.com/en/news/9986_Volvo-Ocean-Race-teams-up-with-Virtual-Regatta-for-2017-18-race-game.html



Screenshot of the VOR Tracker:

<https://freelance.infojobs.net/freelance/Inobius/skxlc8sxemm3np0ajyz/portfolio/85u16whlkyw3jias0ut?numItem=0>



Image of the America's Cup Game „Virtual Skipper 5“

https://www.wired.com/2012/08/ff_americascup_ellison/



ROBOTIC SAILING

- Another “competitor” facing exclusivity of “traditional” (= human steered) sailing-sports is **robotic sailing**. This scientific sport is increasingly getting popular.
- The **World Robotic Sailing Championship** (RSC) is a competition open to fully autonomous and unmanned sailing boats up to 4m in length.
- This year's WRSC/IRSC is being held in Southampton, UK from August 28th to **September 1st 2018**. It is the **eleventh edition** of the regatta, with previous events held in Austria (2008), Portugal (2009 and 2016), Canada (2010), Germany (2011), Wales/UK (2012), France (2013), Ireland (2014), Finland (2015) and Norway (2017).



Image of a robotic boat:

<http://www.dailymail.co.uk/sciencetech/article-3774272/Forget-self-driving-try-self-SAILING-Robotic-boat-scour-oceans-data-without-need-sailors.html> - San Francisco 2015 – special Sairdrone



KSW

KUNZ SCHIMA WALLENTIN
RECHTSANWÄLTE GMBH

Thank you for your attention!

KSW

Kunz Schima Wallentin Rechtsanwälte GmbH

Attorneys at Law

Porzellangasse 4, 1090 Vienna

Tel: +43 - 1 - 313 74

Fax: +43 - 1- 313 74 80

E-Mail: thomas.wallentin@ksw.at

www.ksw.at

www.ksw.at

