

Governing bodies and the ownership of television rights

Introduction

Collective marketing of television rights to sports events by sports governing bodies, one of the most controversial issues in European sports, has been the subject of several actions by courts and competition authorities throughout Europe in recent years.

In Germany, for example, as reported in the January/February 1998 edition of SLAP, the Federal Supreme Court prohibited the collective sale of television rights to the home matches of German football clubs participating in the UEFA European football competitions by the German Football Federation.

In the UK, the Office of Fair Trading referred BSkyB's exclusive deal for live coverage of the Premier League's football games to the Restrictive Trade Practices Court. In Holland, the Ministry of Economic Affairs disapproved the collective sale of television rights for highlights by the Dutch Football Federation. In Spain, the courts have also been involved in disputes over rights ownership, and, in Italy, professional football clubs will start to market television rights to their games separately by the end of the next season.

The FIA case

A recent German case heard by the Regional Court Frankfurt a.M. may have a profound impact on the way in which collective sales of broadcasting rights are assessed in the future. The case concerned the collective sale of television rights for the European Truck Racing Cup which had been arranged by the Federation Internationale de l'Automobile (FIA), the governing body of international motor sport. In its decision of 18 March 1998, the court found in favour of FIA concluding that the collective sale by FIA was not anti-competitive. The court decided that FIA may sell the rights collectively because of its position as "co-owner" of the television rights.

This conclusion establishes a precedent in intellectual property law that affirms original (co-)ownership of an event by a governing body through its general organisational activities and could have a major impact on the way in which national courts and European Regulatory Authorities approach cases dealing with the collective sale of television rights to sporting events.

Background

Previously, AE TV, a German television production and marketing company, owned by Wolfgang Eisele, televised races of the European Truck Racing Cup and sold rights to various TV stations. Contracting with the organisers of each individual event of the series, AE TV was given the right to broadcast an event in consideration for disposal of a free copy of the broadcast to the event organisers.

This contrasted with the policy adopted by FIA in relation to certain other events. For example, Formula One, Formula 3000, and the World Rally Championship were marketed centrally by FIA. In 1995 and 1996, FIA amended Article 26 of its International Sporting Code. Under the amended Code, television rights to all international motor racing series, including the European Truck Racing Cup, were to be owned by FIA from the beginning of January 1997 and it was made a condition of holding such series that the television rights would be marketed centrally by FIA.

Subsequently, FIA entered into an exclusive marketing contract for all its motor racing series with International Sportsworld Communications Ltd (ISC). As a consequence of these developments, AE TV lost its right for television coverage of truck racing events.

Injunction

AE TV issued proceedings in Germany and on 4 June 1997, the Regional Court Frankfurt a.M. granted AE TV

an interim injunction, based on a violation of Article 85 of the EU Treaty, preventing FIA from marketing centrally the television rights to the European Truck Racing Cup. It held that the television rights belonged to the organisers of each individual event since the organisers created the main economic achievements for the individual events and also bear the financial risk.

However, the interim injunction was repealed by the Court's ruling in the principal proceedings of 18 March 1998, in which the court ruled in favour of FIA.

Definition of ownership

A legal definition of the nature or ownership of television rights does not exist in German law. Ownership of a television right, the right to allow someone else to broadcast and market an event, is derived from two so-called defensive rights. First, ownership of the property on which an event takes place gives the property owner the right to control access, and to prevent television companies from filming there without express permission. Second, and more important, the organiser of a commercial undertaking may claim unfair competition if a third party broadcasts an event without his permission.

Event organiser

The crucial question for a court to decide, therefore, is who is the organiser and, thus, the original right owner. As confirmed in the German Federal Supreme Court's decision on football television rights, referred to above, an event organiser is the one who creates the main economic achievements and takes the general and economic responsibility for an event. The court hinted that such economic responsibility could include: the obligation to make a stadium available for a home game; and local organisational tasks such as

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ticket sales, marketing, food service within a stadium and coordinating safety precautions with the local police.

Adopting this reasoning, the Regional Court Frankfurt a.M. held that the local organisers of each individual event in the international motor racing series were event organisers and, thus, original owners of the television rights to their event. However, the court did not finish its analysis at this point. Rather, the court stated that the finding of ownership on the part of local organisers does not give the final response as to ownership in television rights and that it was necessary to consider the concept of "co-ownership" when deciding organisation of events and therefore ownership of television rights.

Co-ownership of FIA

Having considered the role of FIA as the organising and governing body of the European Truck Racing Cup and other international motor sports series, the court concluded that FIA was in reality a co-organiser of these events, and, thus, co-owner of the television rights.

The idea of co-ownership of federations in television rights was first introduced in the German Federal Supreme Court's decision on football television rights. In that case the court did not decide whether the clubs own the rights exclusively or in conjunction with the organising federation UEFA. On the facts of that case the court did not need to resolve this issue and could leave the role of UEFA undecided.

The court did however, indicate that it might be possible to derive ownership from the organisational function of a federation, implying that it might have ruled differently if UEFA as the organising federation had been a party to the proceedings.

Organisational measure

The Regional Court Frankfurt a.M. picked up this indication and derived original co-ownership from the organisational function of FIA as governing federation of international motor sports.

It particularly stressed the essential contribution of the organisational measures by FIA to the existence and public popularity of the product "racing event". Such organisational

measures include, for example, regulating individual races and the whole competition, regulating qualification and admission of race drivers, supervising observance with its regulations, and documenting these measures by granting licenses for the use of the name for motor races. A racing event only becomes a marketable, commercial product through these organisational measures. The interest of viewers, television stations, television producers, or sponsors in racing events would decline dramatically without these essential contributions. A withdrawal of FIA from the organisation of a racing event would result, and has resulted in the past, in the termination of that racing event.

Joint venture

The court thus concluded that the television rights to the European Truck Racing Cup are owned both by FIA as the governing federation and the individual race organisers. FIA and local organisers establish, as co-owners of the television right, a joint venture pursuant to the German Civil Code. In general, parties of a joint venture may set up their own regulations and arrange their internal affairs independently. The court considered the agreement between FIA and local organisers to centrally market the television rights though FIA as internal elements of the joint venture.

The decision to entrust FIA with the marketing of the joint television rights fell within the affairs of the joint venture and was a mere internal allocation of tasks. It could be decided by the parties on their own discretion. Internal affairs of an association or a joint venture may generally not be challenged by third parties, such as AE TV, on competition law grounds. FIA, as one of the joint owners, therefore may market the television rights without acting in an anti-competitive manner.

The court did not consider whether the collective sale by FIA was anti-competitive due to negative effects to the market, but merely based its decision on whether the television rights to an event were sold by a non-owner or a (co-)owner of the rights.

Conclusion

The central issue of the majority of cases that deal with the collective sale of television sports rights is whether the inherently anti-competitive collective sale is justified by an underlying public interest in the collective sale.

In the decision of the Regional Court Frankfurt a.M., however, neither public interest or the impact of collective sale to the market were considered. The court held that the collective sale of television rights is not anti-competitive due to the co-ownership of FIA. It concluded that both the local organisers of each individual event and FIA as the organising and governing body of motor sports were organisers and, thus, original owners of the television rights.

This decision establishes a precedent in intellectual property law that affirms original co-ownership of an event by a governing body through its general organisational activities.

It will be interesting to observe whether other national courts and European Regulatory Authorities will pick up the idea of the co-ownership of governing bodies. Possibly FIA reached a decisive points victory on behalf of the sports bodies in the European-wide legal battle for television rights between sports bodies and other event owners.

Update – German Government acts to protect its domestic sports federations

The German Government has taken the step to exempt the collective sale of television rights from its competition law. Pursuant to the newly amended competition law, the provision of prohibition of cartels is not applicable to

"the collective sale of television broadcasting rights to sports competitions organised under the authority and pursuant to the regulations of sports federations, which, in compliance with their socio-political responsibility, are committed to the promotion of youth and amateur sport and fulfil this responsibility by means of a reasonable participation in the revenues from the collective marketing of the television rights".

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