In-venue streaming and broadcasting of live sporting events – key legal issues for sports clubs and leagues

Media, Sport and Entertainment Alert

25 MAR 2019
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It’s the night of the big game, and the stadium is packed. The most prevalent garb is the jerseys of the opposing team and the crowd periodically executes the wave. It’s virtually the same scene as it has been for decades. But it doesn’t take much observation to notice a more recent phenomenon: spectators are holding their smart phones aloft to capture the action, and some of them are uploading – even live-streaming – high-quality footage of the match on the Internet. Meanwhile, “cord-cutters” on the other end of the transmissions are getting their sports fix without having to pay for “authenticated” feeds provided via cable distribution or by other subscription models.

This is an emerging behavioral phenomenon. As things currently stand, the degree of social media sharing of real-time play in the manner described above appears not to be so serious as to have triggered a significant backlash from sports leagues and teams. Generally, it is not sufficiently continuous or of high enough quality to compete with professional distribution, and in its current form has even been regarded as a useful promotional tool. But as technology advances and recording/transmission devices become smaller, less detectable and more powerful, attendees at live sporting events could soon have the technical capability to significantly disrupt subscription distribution models for sporting events and may even disrupt solely advertiser-supported distribution by providing an ad-free viewing environment.¹
In light of the problem posed by peer-to-peer distribution of live sporting events, this article examines:

1. the broader legal landscape on the matter, including recent cases in the UK, and protections provided by France that may help prevent or limit in-venue, peer-to-peer broadcasting
2. how such statutory protections differ from the legal landscape in the United States, which lacks equivalent protections and
3. how the United States' current intellectual property, contract law, and unfair competition regimes – including case law recognizing a property interest in sporting events – is now, and might be, deployed to address this issue.

The legal landscape

LawInSport previously reported on the copyright protection provided to broadcasters when social media users capture clips of broadcast footage (i.e., the pictures and sound created by cable and network broadcasters), then upload and share that content online. In the case *English Cricket Board (ECB) and Sky UK Limited v. Tixdaq Limited and Fanatix Limited*, the defendant, Fanatix, had created a mobile app for iPhones and iPads, which allowed users to upload short clips of sports broadcast footage, often filmed on their mobile phones from television broadcasts. Users could then share these clips (which were made searchable), for free, with other users of the mobile app.

The UK High Court found that such video clips, which were reproduced and communicated online, infringed copyright in the original broadcasts. For further discussion, please see LawInSport articles here and here.

However, the Fanatix case did not consider the circumstance of "match clips created and uploaded by spectators on, and from, their own devices whilst in stadia." In such cases, copyright law provides no remedy. Unlike an audiovisual recording of a game, match or race, which fixes the event in a tangible medium of expression and is therefore presumptively copyrightable, a sporting event itself is not copyrightable under US law. Game day may deliver high drama, but sporting events do not qualify as "dramatic works" under the United States Copyright Act.

In this legal landscape, what avenues are available for US event organizers to prevent or control unauthorized, peer-to-peer distribution of live sporting events?

Statutory protection of sporting events in France

US event organizers and sports law practitioners may look to France for inspiration, where Article L.333-1, Paragraph 1 of the French Sports Code provides that "sports federations and organizers of sports events mentioned in Article L.331-5 are the owners of the exploitation right of the sports events or competitions that they organize" (emphasis added). Effectively, the French Sports Code sets forth a statutory, sui generis right (i.e., a unique or distinct type of legal right) that provides sporting event organizers with a monopoly over the right to broadcast their events.

This right is similar to copyright in that it affords ownership rights to those persons responsible for creating a work, along with attendant rights to control the "exploitation rights" to that work (including the audiovisual exploitation rights). It is different, however, in that it protects not a work of authorship, but a spontaneous, unscripted contest. Both laws seek to encourage the creation of the protected works, but copyright encourages the authors of works (e.g., artists, writers), while the sui generis (unique) right encourages those who invest in facilitating and staging the protected works (e.g., leagues and teams, not players).

The French Sports Code aims to balance the valuable ownership rights conferred on sports federations and organizers by imposing certain limitations in the public interest, including limitations that:

1. aim to balance the monopoly conferred upon sports federations and organizers with the public's right to information (recognizing news reporting and news access interests) and
2. in certain cases, make mandatory bidding processes for the award of broadcast rights to broadcast licensees (recognizing the importance of transparent, non-discriminatory processes).

Protections available for sporting events in the United States

Unlike France, the US lacks a statutory regime providing distinct protection to sporting events. In the absence of statutory law that expressly recognizes and confers ownership rights in sporting events to their organizers, such organizers will
likely have to resort to a patchwork of existing legal rights, including those arising under state common law, to deal with in-venue, peer-to-peer transmission of events. The following section discusses several such legal avenues below, along with the advantages and disadvantages of each.

**Contractual protections**

A ticket is a spectator’s contract of admission to an event, and typically contains restrictions on filming and photography. To combat unauthorized peer-to-peer broadcasting, event organizers could increase enforcement of ticket contracts, as well as strengthen or add certain provisions to ticket terms, including providing for:

1. liquidated damages for established instances of peer-to-peer broadcasting or
2. lifetime bans for repeat offenders who recording footage for commercial purposes or transmit footage over the Internet.

From a purely legal perspective, contract law provides a rather clean solution to combating peer-to-peer broadcasting. However, the enforcement of ticket contracts poses practical issues.

First, as noted above, social media distribution of venue-sourced event coverage is not yet an acute problem, and we expect it would become so only after detection of spectators who are breaching their contracts becomes more difficult (for example, as a result of such spectators’ use of powerful but concealable devices).

Second, enforcement depends on control over venue, and may not be possible at open air events like the New York City Marathon or Tour de France.

Third, there is risk that overzealous enforcement of ticket contracts will damage fan goodwill, perhaps irreparably. This is akin to the public relations issues encountered by the music industry in trying to enforce their copyrights against individual uploaders. It is one thing to eject a professional pirate uploading a continuous stream from an intentionally concealed camera, and quite another to manhandle a family who has spent significant money on playoff tickets and travel, and who are determined to capture on video the fun of the moment.

The dearth of cases on point may reflect such practical difficulties, as well as the fact that in-venue recording and uploading is not yet a significant problem – we are not aware of any case in which an event organizer has commenced offensive litigation against a ticket-holder (as opposed to asserting a ticket contract as a defense to a claim commenced by a spectator/attendee).

**Intellectual property law**

Even though sporting events themselves are not copyrightable, the capture and transmission of such events might constitute infringement of intellectual property rights in various constituent elements of the event, such as the marks and logos of the team, stadium and leagues or federations (protected by trademark and possibly copyright law); team uniforms (protected by copyright law, with trademark law protection over certain elements); rights of publicity (protected via state statutory and common law); and background music (protected by copyright law).

At first blush, combating unauthorized peer-to-peer broadcasting through enforcement of intellectual property rights in such elements of the event may appear attractive, because there are many legal theories on which to base claims. However, there are significant practical and legal disadvantages to this approach.

From a practical standpoint, developing a cohesive enforcement strategy is likely to be difficult when potential infringement claims will be based on the disparate rights of so many stakeholders (such as teams, leagues, players, venues – and in the case of background music, music publishers), and will require their cooperation. From a legal standpoint, infringement claims based on the capture of “background” elements of an event have been viewed skeptically, with some courts holding that fortuitous or incidental capture of such elements is non-infringing or fair use.

To our knowledge, these theories have not formed the basis for a league or team claim that video recordings not owned by them infringed their rights.

**A sui generis (unique) protection for sporting events arising under common law?**

One of the most promising avenues for enforcing asserted rights in sporting events against unauthorized peer-to-peer
broadcasters may arise under common law – in particular, theories of unfair competition and misappropriation. A long-standing line of US state and federal court decisions have either recognized or implied a sui generis property right in sporting events arising under common law.

The INS decision and following case law

These common law rights date back over a century to the US Supreme Court’s decision in International News Service v. Association Press5 (INS). INS introduced a common law rule to protect compilers of facts and information not ordinarily protected under copyright law. Recognizing that news organizations gather news at significant pain and expense, the Supreme Court held that news organizations own an equitable quasi-property interest in the news. On this basis, a competitor who appropriates such news for its own gain may be held liable for misappropriation under principles of unfair competition.

Nearly 20 years later, the principles of INS were applied in one of the earliest cases involving broadcast rights in sporting events. In Twentieth Century Sporting Club, Inc. v. Transradio Press Service,10 Twentieth Century Sporting Club had obtained exclusive rights to broadcast a boxing match. On the night of the match, Transradio Press Service planned to provide “up to the minute descriptions” of the fight. Citing INS, the Supreme Court for the State of New York held that such action would “[o]bviously … constitute an unlawful appropriation of the exclusive property rights of [Twentieth Century Sporting Club].” (Paragraph 73 - emphasis added).

Just one year later, the US District Court for the Western District of Pennsylvania followed INS in Pittsburgh Athletic Co. v. KOV Broadcasting Co.11 in which the defendant was making unauthorized radio broadcasts of Pittsburgh Pirates games from a building with a view into the stadium. In that case, the court held,

“it is perfectly clear that the exclusive right to broadcast play-by-play descriptions of the games played by the ‘Pirates’ at their home field rests in the plaintiffs… That is a property right of the plaintiffs with which defendant is interfering…” (at 492 - emphasis added).

The New York Supreme Court again revisited INS in the context of sporting events in National Exhibition Co. v. Fass,12 holding:

“[I]n order to produce National League championship games, [National Exhibition Company], at great expense, has employed, and is employing, a large number of the most highly skilled players or performers who have been and are available… [National Exhibition Company] is the owner of the professional baseball exhibitions which it produces; and its property rights … include the proprietary right to sell to others … licenses or rights under which the purchasers are authorized to … transmit such descriptions for broadcast …” (Paragraph 770 – emphasis added).

Other cases recognizing organizers' ownership and right to control broadcast rights

Other cases have not cited INS, but have recognized the right of event organizers to control broadcasting of their events against claims by third parties of a First Amendment right of access to broadcast sporting events.

In Southwestern Broadcasting Co. v. Oil Center Broadcasting Co.,13 a Texas court recognized the right of an independent school district to grant exclusive broadcast rights in football games to third parties, and the rights of such duly licensed third parties to enjoin others from encroaching on those licensed rights. In Oklahoma Sports Properties, Inc. v. Independent School District #11 of Tulsa County, Oklahoma,14 an Oklahoma court reached a similar conclusion, holding that the power to charge and collect broadcast rights fees for high school athletic events was implicit in the statutory rights granted to school districts.

In 1977, the Supreme Court of the United States again revisited performance rights in sporting events, but this time without reference to or reliance on INS. Zacchini v. Scripps-Howard Broadcasting Co.15 involved allegations by Zacchini, performer of a human cannonball act, that Scripps-Howard Broadcasting Co, which filmed and subsequently broadcast Zacchini’s entire act, was liable for “appropriation of his professional property.”

The Supreme Court held that “[t]he broadcast of a film of petitioner’s entire act poses a substantial threat to the economic value of that performance” and affirmed that the economic value of such performance lies in “the right of exclusive control over the publicity given to his performance.” (Paragraph 575 - internal citations omitted). The Supreme Court also
rejected the defendant's claims that broadcasting of the event was privileged under the First or Fourteenth Amendments of the US Constitution.

Although Zacchini's precise holding recognized only the right of an individual to control broadcast of his or her performances based on a right of publicity theory, subsequent courts have not applied Zacchini so narrowly. In Post Newsweek Stations-Connecticut, Inc. v. Travelers Insurance Co., 510 F. Supp. 81 (D. Conn. 1981), the plaintiff moved for a preliminary injunction to obtain access to the 1978 World Figure Skating Championships, even though the plaintiff refused to execute a contract limiting the plaintiff's broadcast rights. The district court rejected the plaintiff's reliance on Zacchini to support its argument that the contract was an unconstitutional restriction on the plaintiff's rights under the First and Fourteenth Amendments. Instead, the court held, "[t]he court is clear that the International Skating Union (ISU) has a legitimate commercial stake in this event, and they, like Zacchini, are entitled to contract regarding the distribution of this entertainment product." (Paragraph 84).

Finally, in Wisconsin Interscholastic Athletic Association v. Gannett Co., Inc.,16 the US Court of Appeals for the Seventh Circuit, applying Zacchini, held that a high school athletic association's exclusive broadcasting agreements with third parties for Internet streaming of athletic tournaments were consistent with the First Amendment.

Advantages and disadvantages of basing claims on such common law rights

Each of the cases above recognizes ownership rights in sporting events, and legal protection of those rights. Through common law, US courts have, for the better part of a century, effectively acknowledged and developed a sui generis property interest in sporting events that is analogous to what France has expressly codified. The legal theories underpinning these cases are likely to provide event organizers with a common law cause of action that may be:

1. easier to enforce than contract claims based on event tickets and
2. more cohesive and unified than claims based on the disparate intellectual property rights of various event stakeholders.

One area of uncertainty is how courts will reconcile the foregoing authority against the holding in National Basketball Association v. Motorola, Inc.17 In that case, the defendants distributed a pager-like device that dispensed statistics about games in progress, which they compiled by watching television broadcasts of those games. The US Court of Appeals for the Second Circuit held that extracting purely factual information from those telescasts was not a copyright infringement. More importantly, the Second Circuit held that the Copyright Act by its terms preempted state laws that purported to provide "legal or equitable rights that are equivalent to one of the bundle of exclusive rights already protected by copyright law" (Paragraph 848), and that in this case, the NBA could not assert a common law right to prevent copying of facts and information contained within copyright works (the broadcasts), when the Copyright Act did not provide such a right.

A defendant confronted with a common law claim for recording and transmitting a sporting event without authorization could assert that because the Copyright Act does not protect sporting events, laws that purport to provide copyright-like protection to such events are preempted and can provide no remedy. The Motorola court did, however, leave open possibilities:

• First, the court expressly limited its ruling to cases "analyzing the preemption of a misappropriation claim based on copying or taking from the copyrightable work [the broadcasts]," (Paragraph 849 - emphasis added), leaving open the possibility that where a taking is based on the game itself, any preemption analysis may differ.
• Second, the court clearly left open the possibility of an enforceable "hot news" exemption to preemption, one feature of which is that the defendant be "free riding" off the efforts of, and be in competition with, the claimant.

The court did not find these elements present in Motorola, but we wonder whether a court would find that the expense and effort of staging an event, to the end of selling media rights thereto, would be sufficient underpinning to allow a non-preempted claim to go forward against an in-venue recorder/transmitter.

Conclusion: top tips to consider when confronting peer-to-peer broadcasting of sporting events

In the absence of legislation recognizing a sui generis (unique) property interest in sporting events, US sporting event organizers seeking to combat peer-to-peer broadcasting of live events should consider approaches under contract law,
intellectual property law, and – in particular – under common law. In considering available legal and business strategies, organizers and federations should:

- Revisit and review ticket terms and conditions with a view toward prohibiting, and providing appropriate contractual penalties for, unauthorized broadcasting of events.
- Carefully consider the business and public relations risks inherent in suiting or otherwise enforcing against fans, and select appropriate cases for enforcement.
- If litigation is necessary, consider and weigh all available legal theories, and select appropriate test cases for initial enforcement efforts.

Learn more by contacting either of the authors.

An earlier version of this article appeared on LawinSports.com on March 20, 2019.

1 See, eg, Barry Libert, Megan Beck and Jerry (Yoram) Wind, “How Platforms Will Disrupt the Future of Media and Entertainment,” Knowledge@Wharton (November 18, 2016) (“Facebook Live and YouTube will continue to grow in importance as user-generated content on digital platforms become direct competitors to intentionally generated content on traditional mediums – whether distributed through traditional means or online.”); Nelson Granados, “5G: The Next Tech Disruption in Media and Entertainment is Coming,” Forbes (July 17, 2017) (“With 5G, negligible latency will bring a new era of professional live-streaming of sports and other live events. User-generated live streams will also proliferate...”).

2 English Cricket Board (ECB) and Sky UK Limited v. Tixdaq Limited and Fanatix Limited [2016] EWHC 575 (Ch).


5 Two things of note: (i) US copyright law does provide that ownership of certain works, such as audiovisual works, can reside in the person or entity who commissioned the work, and not its actual creators; and (ii) certain European countries protect rights in “data bases” (collections of factual material) based on the substantial investments incurred to create these works. The US, however, does not protect collections of facts except to the extent reflecting some degree of creative “expression.” See Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340 (1991).

6 Some typical language is “The ticket holder will not transmit or aid in transmitting any picture, account or description (whether text, data or visual) in any media now or hereafter existing of all or any part of the football game or related events. Breach of the foregoing may result in legal action against the holder.”

7 For copyright cases, see, eg, Italian Book Corp. v. American Broadcasting Cos., Inc., 458 F. Supp. 65 (S.D.N.Y. 1978) (music publisher claimed copyright infringement arising from defendant's broadcast of a parade during which music copyrighted by plaintiff was played; such background use was fair use); but see Schumann v. Albuquerque Corp., 664 F. Supp. 473 (D.N.M. 1987) (distinguishing Italian Book Corp., holding that fair use doctrine would not apply where the defendant broadcast the entirety of copyrighted songs, and the broadcast was for commercial, entertainment purposes and was not a news show). For a trademark case, see Caterpillar Inc. v. The Walt Disney Co., 287 F. Supp. 2d 913 (unauthorized use of one of the plaintiff's bulldozer products in a feature film would likely not constitute trademark infringement or dilution). For right of publicity cases, see, eg, Marshall v. ESPN, No. 15-5753, 2016 U.S. App. LEXIS 15292 (6th Cir. Aug. 17, 2016) (holding that the plaintiffs' statutory right of publicity claim under the Tennessee Personal Rights Protection Act was meritless, because that Act expressly permitted use of a player's name or likeness in connection with a "sports broadcast"); Dryer v. Nat'l Football League, 55 F. Supp. 3d 1181 (D. Minn. 2014) (holding that the newsworthiness defense barred the plaintiff's right of publicity claims under California law).

8 In fact, in one notable case, Bouchat v. Baltimore Ravens Ltd. P'ship, 619 F.3d 301 (4th Cir. 2010), the claimant successfully sued a professional football team for distributing video footage owned by the team, but which featured players whose uniforms bore a copyrighted logo that the claimant alleged belonged to him and not the team. Professional sports teams have, to our knowledge, not chosen to try to turn this precedent to their favor in instances in which they clearly own their own logo.

9 248 U.S. 215 (1918) (last accessed March 20, 2019)
10 300 N.Y.S. 159 (1937) (last accessed March 20, 2019)
12 143 N.Y.S.2d 767 (1955) (last accessed March 20, 2019)
13 210 S.W.2d 230 (1947)
16 658 F.3d 614 (7th Cir. 2011) (last accessed March 20, 2019)
17 105 F.3d 841 (2d Cir. 1997) (last accessed March 20, 2019)