

Copyright, Football and European Media Rights

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Introduction

The position of copyright in the arena of sports content rights and property rights of sporting organizations is an area of growing legal and commercial interest in the digital age. At its core is the issue of whether copyright can be incorporated into sports rights contracts as it has been for many years. This article identifies the ramifications of this debate in a European context for the existing business models for both specifically football rights holders (FA Premier League, UEFA) and pay-TV broadcasters such as BSkyB and members of the European Broadcast Union (EBU). Drawing on interviews with key stakeholders this research analyzes the strategic responses of pan-European broadcasters in the field, and key football content rights holders at both the national and European level. How will these developments affect both the pan-European and national markets for football rights? How does copyright law affect live and recorded games and what are the implications for the wider European audio-visual sector of changes in the rights regime for European cultural content?

The Sports Rights Market and Growing Value

As the UEFA Champions League kicked into full swing for 2015/16, live coverage in the UK can only be found on BT. Having paid £897m for exclusive live UK coverage for 3 years it is just another reminder of the value of football rights to media companies. UEFA, the governing body of European football secures 80% of its revenue from the sale of media rights to all its competitions (with the Champions League alone worth well over a £1billion a season), so policing the copyright value of these rights is a major concern for rights holders.

The sale of rights for sport, particularly football to broadcasters has become an international activity worth around \$30 billion (Evans et al, 2013: 31). The switch from an analogue to a digital environment has also reshaped the sports rights market in the last decade or so, although strong elements of continuity remain, such as the centrality of television in the rights market as a platform and the importance of live rights. As Ben Nicholson, Head of Global Digital Strategy at the largest international distributor of sports content IMG Media argues:

We still have to get our revenues for television because broadcasters still pay all the money, but it means we have to look for other access points in terms of highlights, short clips on mobile, longer long form highlights on digital platforms, and with certain broadcasters – creation of channels,

which is a mixture of content of highlights, clips, features, behind the scenes, that we carry on say YouTube. What it means is there is a lot more different types of content other than just the live rights that get sold to the broadcasters. So you have to be completely across your rights in order that you can then carve out niches for digital media (Interview with author, 21 March, 2013).

Thus as media convergence has finally transformed media production and consumption (Meikle and Young, 2011), football has become compelling content in many of the major international media markets. In 2013, football dominated sports related television viewing around Europe, in a year without a FIFA World Cup or a UEFA European Championships (Eurodata TV, 2014). As Philip Grothe, CEO of Kentaro a major sports rights agency argued:

Live football has come to dominate the global broadcast rights market as it is the only product than can consistently deliver young and upmarket mass audiences in a fragmenting media landscape (SportBusiness International, No.186. February 2014: 21)

What has also changed however in the last few years is the ability of media organisations to exploit these rights as they develop and extend their own range of digital platforms that they simply didn't have even five years ago. So for example in the UK, the pay-TV organization Sky have developed Sky Go, Sky Anytime and Sky Catch-Up which allows them to use content across a range of digital platforms, while at the same time the exclusive live event remains central to the Sky package. Another important shift in the strategic ability of an organisation to exploit rights has been the move from platforms to windows that has occurred in the last few years. As Brendan Knox-Peebles, Head of Legal at BBC Sport notes there has 'been a shift from contracted deals with specific platforms, to contracted deals with what is being transmitted, is it live, is it delayed, is it highlights, is it clips, and the platform by which is it delivered is to a large extent not an issue' (Interview with author, 26 November, 2013).

This shift is also been noted across the European sports rights market. Pascal Fratellia, Head of Sports Rights with the European Broadcasting Union (EBU) argues that for sports rights the debate has increasingly been centred on the value of linear and non-linear rights. He suggests:

Linear rights are the rights for which the viewer doesn't choose offered by the content provider but linear means on every possible platform. So, you have the live, you have the delayed etc. Live being 99% of the value of the linear rights. And then you have the non-linear rights which are the on demand content where the viewer is deciding (Interview with author, 30 August, 2013).

Clearly the significant growth in smartphone usage in Europe in the last few years and the more robust nature of mobile internet infrastructure has facilitated this strategic re-thinking and has resulted in a continual review of how best rights holders manage their content. For football rights holders this

has been a particular challenge as Stuart Turner, Commercial Director of the English FA argues:

if you look at the Premier League rights that have recently been awarded (2013) both in this territory and overseas, the struggle that we have always had, even going back 5 years, was defining what is a mobile device and what is an internet device, I can quite easily look at websites on my mobile phone, so you know, where does the line end? A mobile App can only be seen on a mobile, so it does make sense to create rights within a mobile App, for obvious reasons, it can't be viewed anywhere else, so yes, mobile applications and the walled garden approach of putting content into that application is very useful for us (Interview with author, 28 February, 2013).

The issue of live internet streaming of content has also been a growing factor for rights holders. What David and Millward (2012: 350) have called the growth in, 'digital parallel importing technologies' (broadcasting and live streaming) have seen the latter benefit from more a robust broadband internet service and companies willing to carry live streams or act as aggregator sites.

Rights holders have used copyright to pursue these sites, with the 2013 case between the FA Premier League (FAPL) and its pursuit of FirstRow Sports a streaming service carrying Premier League football a recent example. The High Court decision in London ordered the six main retail ISPs in the UK to block the site that acted as a gateway providing links to other sites that carried these live football streams. The key issue for the court was the notion of communicating copyright material to a new public and its decision was indicative of the robust approach UK courts in particular have taken to the protection of copyrighted material. Live streaming is not simply an issue for football rights holders and March 2013 also saw the Court of Justice of the European Union confirm that the streaming of all television broadcasts requires the consent of the copyright owners even when being streamed to those who can lawfully receive the original broadcasts.

Another significant dimension of the rights landscape identified in their overview of the political economy of television sports rights across a number of countries from Europe, Asia and North and South America, by Evens et al (2013) is that for them 'the balance between commerce and culture in sports broadcasting has shifted too far in favour of the commercial interests of dominant pay-TV broadcasters and sports organizations seeking to maximize their income from the sale of sports rights (2013: 224). They also identified two key aspects of the legal terrain on which regulatory intervention into the rights market of sport had taken place. The first was listed events regulation and the second was competition law. Both are important contested areas within the broader sports rights environment and been addressed elsewhere (Scherer and Rowe, 2013; Davies, 2009). At the core of Evans et al (2013) argument was that the rigorous implementation of competition law was required as was additional regulation focused on the relationship between television sport and citizenship to ensure the cultural and social aspects of access to sports was protected.

In addition, they suggested that the backdrop against which these regulatory issues were being played out was one shaped by the international trends of privatization, liberalization and the re-orientating of regulatory intervention away from public interest towards the promotion of 'fair' competition and corporatization, as public bodies such as the BBC were being encouraged to maximize their revenue from the market (Evans et al, 2013: 5/6). Rowe and Hutchins (2013) argue that while television remains an important part of the landscape, it's the developments taking place within the networked media sports environment that is disrupting and reshaping established arrangements.

The arrival of digital media companies facilitated by digital television and the internet have resulted in established broadcasters and media companies adopting a range of strategies to ensure their continued survival and the protection of the investments they are making in securing football related content.

Debates about football and media rights are of course not new as football has been a key driver of pay-TV across Europe since the late 1980s, early 1990s (Boyle and Haynes, 2004: Boyle and Haynes, 2009). A report commissioned by the European Union (Asser Institute, 2014) into the issue of sports organizers' rights recognized that the sports industry is a complex arena where commercial and cultural drivers are often intertwined not least as the sports industry represents one of the fastest growing sectors of the European economy. In their review of the situation with regard to sports rights and the issue of copyright regimes in the 28 Member States of the European Union they noted that:

The answer to the question whether sports events as such are copyrightable, or protectable by rights related to copyright, is unsurprisingly negative for all 28 Member States. A sports event as such is not a work of authorship under common principles of copyright law and all 28 Member States adhere to this view in their national legal systems. The absence of any original or creative form of expression, the uncertainty enveloping the execution of the game, race, or competition, and the structural lack of a script or plot –a large part of the interest in a sports event being its unpredictability and randomness –are mentioned by national correspondents as the reasons why sports events generally fail to qualify as a works of authorship. Some correspondents reported that the legislative history or preparatory works of their copyright acts explicitly left sports events outside the scope of copyright protection as they do not fulfill the prerequisites of a work of authorship (Asser Institute, 2014: 29)

What we see emerge in the case studies below is while the sport event remains exempt from copyright legislation, the broadcast content that is a core part of the mediated coverage is bound by copyright issues. Although interesting the European Commission report also suggested that simply clustering sport as single category that was beyond copyright may be challenged in the future. They reported that:

some of the national correspondents (e.g. in the UK and Belgium) have speculated whether under certain specific circumstances some particular sports events, such as gymnastics, figure skating or synchronized swimming, or other events that strictly follow a certain script, could be seen as artistic works subject to copyright protection by virtue of their similarities with, for example, choreographic or dramatic works. This eventuality - acknowledged as a remote possibility by our correspondents - would be relevant only for a handful of sports that border on the arts, and seems to be refuted by the limited case law available on the subject (Asser Institute, 2014, 30).

While this possibility remains a debate for another day, what is of interest here is examining some of the recent cases that have highlighted the interface between football rights and copyright, and in so doing argue that they bring into focus a broader range of rights related issues that stretch beyond a narrow concern with the copyright regime.

Tales from the front line.....The Murphy Case...

The Murphy case (Case C-403/08 FA Premier League v QC Leisure and Case C-429/08 Karen Murphy v Media Protection Services Limited) and its ramifications had potential implications for the main UK media organizations in sports rights. The case saw a public house owner in Portsmouth England, Karen Murphy challenge the FA Premier League (FAPL) and its contractual arrangement to sell exclusive territorial rights to watch live English Premier League football to Sky. Murphy purchased a subscription with the Greek broadcaster Nova who had the Greek rights to screen live FAPL matches. She then imported a Greek decoder and card and showed the Greek coverage of the FAPL in her pub (public house). Sky, the UK rights holder, have a two tier subscription package that differentiates between a private/domestic subscription to Sky Sports and a commercial subscription which allows you to communicate that broadcast to a public. For the Portsmouth pub it was costing them £700 a month to screen Sky Sports, while the Greek Nova subscription was around £800 a year. In 2013, the average domestic subscription package was £40 a month, while the average for a public house was £400, but this can vary and there have been reports of pubs paying over £2000 a month to screen Sky Sports (Britcher, 2013).

Murphy was pursued in 2008 for breaching UK copyright law and the High Court in London referred the case to the European Court of Justice (ECJ). Both the initial statement and final ruling delivered by advocate general Julianne Kokott from the ECJ in 2011 upheld the Murphy complaint under EU law on free movement of goods across the European union (Article 56 of the EU Treaty). The case was then referred back to the UK High Court who also upheld the ECJ ruling that Murphy was entitled under EU *competition law* to purchase a subscription and decoder from another EU member state. However of equal significance, the ruling also noted that as certain parts of the broadcast were covered by copyright legislation (e.g. graphics, logo and music) she was not able to communicate this on to a new public and in so doing with infringing copyright.

What the ruling made clear was that exclusive clauses that prohibit other EU individuals purchasing broadcast content were in fact illegal. However as the 2014 European Commission report makes clear:

In the case of Premier League v QC Leisure the (European) Court of Justice (CJ) has clarified that sports events as such do not qualify for copyright protection under EU law. The same does not hold true, however, for the audiovisual production, recording and broadcasting of sporting events. The images of sporting events attract the interest of constantly growing shares of TV and on-line audiences, and are often of enormous commercial value. The various media products resulting from the audiovisual recording and broadcasting of sports events give rise to a variety of intellectual property rights, especially in the field of copyright and rights related to copyright (neighbouring rights) –areas that are largely harmonized at the EU level. These rights include the copyright in the cinematographic work (film work) that, in many cases, is the result of audiovisual coverage, as well as an array of related (neighbouring) rights in the recording and broadcasting of the audiovisual registration of the sports event. While many of these rights find their origin in EU secondary law, some related rights occur only in distinct Member States, such as the special sports organizers right that exists in France under the Code du Sport, or the Italian sports audiovisual related right (Asser Institute, 2014: 2).

Thus the key issue to emerge was the continued importance of copyright material in football broadcasts to protect rights holders and further clarification that the matches themselves were not deemed subject to copyright.

Daniel Geey, experienced sports rights lawyer and Competition and E-Regulatory expert at FFW in London argued that the ruling also raised an interesting issue around what the outcome might have been had Murphy purchased a commercial subscription from the Greek broadcaster:

QC Leisure won on the competition law and free movement arguments, you can import a decoder in, you can purchase it, you have legitimately paid a price for it, but what you can't do, unless you have the right card is broadcast those copyrightable images. [] Murphy bought a residential foreign card [] I think if a publican was able to get their hands on a commercial card from abroad, there would be strong arguments for saying the Premier League as a rights holder wouldn't need consent because they have already provided that consent at point of sale in Greece (Interview with author, 28 February, 2013).

There remains uncertainty about what this position would be given how difficult it appears to secure commercial subscriptions from other EU countries. While the notion of a 'new public' being constituted by the audience in an English pub was what enabled Article 3(1) of the EU Copyright Directive to be invoked, some lawyers remain convinced that this is a term that will require further clarification (Giles, 2014).

One of the impacts of the ruling was for the FAPL to examine the range of copyrighted material that was included in the broadcasts. Thus by introducing 'watermarks' of the FAPL logo into coverage and embedding the graphics and other aspects including audio material, video sequences and pre-recorded highlights even more tightly with the coverage of the game, they were able to strengthen their argument regarding any infringement of this copyright material. In 2014 for example a number of cases were successfully pursued by Sky for copyright infringement in both the English and Scottish courts regarding public houses carrying Sky matches using either foreign decoders (including from the Danish broadcast rights holder Viasat) or not having the correct commercial viewing agreement in place, all of which resulted in heavy fines for the managers of the premises.

Contractually the FAPL also altered the number of games that could be screened at 3pm UK time in the overseas rights agreements from six to only one. The FAPL operate a window when no matches can be screened live on UK television at 3pm on a Saturday in order to avoid adversely impacting on live attendance. Indeed November 2013, saw both the middle east right holder Al Jazeera and the Italian rights holder Fox Sports Italia reprimanded by both the FAPL and Sky as coverage of games from these broadcasters were found being screened in the UK. The Italian broadcaster had its rights to show UK 3pm games revoked following numerous warnings of breach of contract.

Bill Bush, Director of Policy at the FAPL viewed the ECJ ruling as not having a dramatic impact on its rights environment. He argued:

we do accept we can't copyright the match itself, but there are clearly copyrightable elements which the ECJ agrees with, so it does mean quite obviously that our production values will tilt slightly, it won't be dramatic changes, we will tilt slightly more towards copyrightable content as you'd expect [] another change would be a very straightforward one, in that we sought and we warned the open institutions that these are the sorts of things that might happen, we used to make all out Saturday at 3 o'clock matches available across Europe, but now limit this (Interview with author, 28 March, 2013).

The infringement of competition law identified by the ECJ ruling also looked like it might impact on the ability to sell football rights on a country by country basis within the EU. This 'territoriality' of rights sales has become an important part not just football rights but also in other sectors of the creative industries across the EU. For Bush this entailed writing broadcast requirements into the FAPL contracts limiting the ability of broadcasters to offer English language match commentary for example. He notes:

What we sell in Poland is our rights in the Polish language, so they can't put on a German service or an English language service that would otherwise be legitimate if they bought the rights. If we gave them the rights for that, they could then do that, because under the ECJ they can

exploit across border, so now if a Polish migrant worker in London wishes to have Polish pay TV, and why not, he or she can bring in the Polish card and all the rest of it, they can watch it, but the market for that Polish card is restricted domestically, it's in the Polish language, it's got Polish movies, Polish soap operas, why would non Poles want to pay the Polish monthly subscription for that just to get your football match? And in the commercial market for the bar and pub market, it's communication to a new public, so the card would not be lawful anyway, so our territorial model has of course had to adjust, but it's an adjustment not a complete reconfiguration (Interview with author, 28 March, 2013).

The partitioning of the EU marketplace along national boundaries and markets that was identified by the ECJ ruling as being in contradiction of competition law has always been justified by corporations given the significant national, cultural and linguistic divisions that exist across a supposedly 'common market'. As such it has allowed media organizations and sports rights holders to differentiate prices across markets using copyright as an important mechanism in this process.

Another unintended consequence of the ruling was that the FAPL adjusted its overseas contracts, and in the process took a marginal hit on revenues, the net result was to limit the choice and range of matches available for viewers across the EU wishing to watch the FAPL (Hornsby, 2013). For football rights holders the issue of protecting the value of live rights remains absolutely central to their business model. As Ben Nicholson from IMG Media notes:

the biggest issue about all of it is preserving the value in the live rights – the big value that broadcasters pay, in order that the value is still preserved in mainstream rights – that is the key. [] We carve out digital clip rights that are going to go on the web and on mobile. We carve out sometimes simultaneous live streaming rights that will go on the web. We carve out a multitude of different rights – the only issue is whether it decreases the broadcast value because you have created so many carve outs. So the copyright laws do their job and we are pretty adept in managing those copyright laws. The real issue is the about the values – and at the moment what I will say is broadcast bodies haven't been too much impinged by the amount of carve out rights that we are forced to do, and that is the key (Interview with author, 21 March, 2013).

Throughout the case the focus of the ECJ was on satellite television and it was careful not to stray into other areas of content generated by the creative industries sector nor to move the debate onto differing platforms to disseminate this content, but by focusing on competition law, by default it has probably opened that wider debate with implications for the screen industries. Indeed the European Commission opened antitrust proceedings in 2014 to examine territorial provisions in premium pay-TV content licensing agreements between US film studios including Sony Pictures Entertainment, NBC Universal, Warner Bros and Paramount Pictures and EU pay TV broadcasters.

Rights, Policing and Innovation

For major rights holders such as the FAPL, the ability to innovate in part shaped by the stability of the rights regime they operate within. Most recognize that this will evolve and change as technology and broader media consumption patterns continue to evolve. For Bill Bush (FAPL) the debate around rights, the use of copyright and open access is driven by the position of any stakeholder in the value chain and the continuing battle to establish value from particular configurations of sports content. He argues that this tension is taking place at a number of pressure points in the value chain, with companies and organizations often taking up contradictory positions to defend their business model.

Google or anyone who wants to aggregate content and anyone who wants to carry content wants to be able to do those two things with the minimum number of encumbrances. So it's in their interest to attack the rights of everyone else upstream of them who they regard as impacting on their business model yet Google will absolutely go toe to toe with anyone that they think is taking liberties with their patents and designs and all the rest of it. So I think you need to look at who is making the case and what is their economic motivation for them making that case (Interview with author, 28 March, 2013).

What emerges from this research is the rather more complex landscape that is often characterized in political policy debates around the role that accessing content and liberalizing the copyright regime may play in driving innovation and sustaining new business models in the digital era. At the core of this is the developing of partnerships often between rights holders and digital partners. Recent examples in 2015 include golf's PGA's Skratch TV, a golf network created with the media company Bedrock to drive the game's profile and augment its European Tour TV with its partner Microsoft Windows Azure Media Services launched in 2013 and offering free-to-air content and streamed live golf in markets that it doesn't have broadcast deals (Squires and Cutler, 2015: 44).

Will Muirhead has been a digital sports business pioneer in the UK. In the late 1990s he developed sports websites and built a number of online digital businesses either as stand alone companies or in partnerships with other media and sporting bodies. In 2011 he moved in the app creation business, launching Fanatics a sports app that has evolved into a version of a sports fans facebook platform that creates 'huddles' of users around sports clip content and sports events.

For Muirhead blockages to scaling his companies over the years have included; a less than robust digital infrastructure (no longer a significant issue); developing a sustainable business model (he argues that the advertising models is once again back in vogue thanks in part to increased user numbers) and accessing rights to content. On the latter he feels there have been major shifts in the last decade, with for example bundling of rights now being less of an issue as companies such as Sky develop platforms to utilize those rights once viewed as having little value. Thus for Muirhead, in his part of the digital sports

environment, the copyright regime is not a major issue for his company. He argues that:

So whoever buys the rights is pretty much guaranteed to put them out on a free to air model – and if you are putting them out on a free to air model, then you want audience numbers – and that enables partnerships and drives partnerships and should enable young, innovative companies to get access to the rights, to those clip rights, just because that is the business model. I think we are at a stage where that is sort of working – the area that it might not be working is because it is so straightforward for the owner of those rights to partner with a limited number of outlets in order to get the maximum amount of eyeballs that it can actually sell advertising on – means that it might end up just partnering with the *Daily Mail*, *Daily Telegraph* and the *Guardian*, and not need to partner with any smaller entities because they can't sell any more advertising than the eyeballs that they can currently get off those big players [] the young innovative company needs to come and say I can sell the advertising as well' (Interview with author, 28 February, 2013).

This while challenges exist, in Muirhead's experience of the apps and clip rights sector, it is the lack of initial and long term financial backing and investment in start up companies, not the IP regime that is a significant disabling factor. This is not a view that echoes in all digital sports markets however.

A recent study from Australia (Hutchins, In Press) that examined attempts in that country to develop a cloud-based mobile television service, driven by sports content, identified a concerted response by dominant media groups to shut down and stifle innovative competition through mobilizing the regulatory telecoms framework in that country. Hutchins (In Press: 7) concludes that:

Understood as a structurally conditioned response to the volatility of contemporary mobile media and digital content systems, the case of TV Now highlights the resilience of market structures, corporate power, and institutional processes under the conditions of informational capitalism.

So contrasting patterns emerge across national markets and frameworks and as we see below in a differing part of the digital sports landscape, different challenges exist.

Bundling, Monetising and Piracy

One of the key issues to emerge from this research is that the position you occupy as an organization within the value chain attached to football rights helps shape you attitude to the broader regulatory framework. In an interview in August 2015 for example, Javier Tebas, President of the Spanish Football League (LFP) indicated that he felt that piracy in the Spanish market was costing the league 300m Euro a season and that IP law modification was part of the solution (Dunne, 2015: 31). This is important as Spanish football returns to the centralized league selling of its rights, after years of allowing clubs to sell their rights individually.

Yet the position you occupy in the value change means that uneven patterns emerge and across national football associations this is clearly evident. Take for example the issue of warehousing rights, where you either effectively buy a piece of content that someone else may want to stop them getting access to that material and you yourself don't use, or where you are forced to purchase rights that you think have little value to get access to the rights that you really want to secure, and again do not use them. This is of course illegal and was viewed as a practice that may block innovation by freezing out new digital platforms who may have been willing to showcase these supposedly lesser rights to an albeit niche audience.

For some businesses in the digital sports market this can be an issue and a blockage to development. Jack McGill is founder and MD of Quipu TV a digital content agency that specializes in live streaming of minority sports. McGill recognizes that there are considerable differences around the management of rights among sports rights holders. Some rights holders such as the Bundesliga in Germany are taken their digital football rights back in-house and using their own platforms to disseminate this content, others such as England and Wales Cricket Board (ECB) have according to McGill:

arguably one of the most restrictive rights agreements in place anywhere in UK sport which is their commercial agreement with Sky sports, and in order to maximize the financial benefits to them the ECB has thrown in virtually every imaginable game or highlights that you can imagine into their commercial bundle with Sky which includes the women's game, youth and development stages of the sport, a lot of university level cricket matches. The difficulty with that comes when Sky chooses not to activate their rights over those matches and what is a wealth of material, wealth of properties and assets that go completely unseen by most people (Interview with author, 26 November, 2013).

For Cricket Scotland and Cricket Ireland for example this means that they do not control the rights to their matches and can't use potentially innovative platforms to reach niche audiences or even build new online audiences for cricket in these countries.

Yet for others such as Ben Nicholson from rights broker IMG Media, bundling is no longer a significant issue. He argues that:

we say to platforms, to broadcasters and so on, is that if you buy all those other carved out rights, you have to exploit them – if you do not exploit them, we will go and re-sell them somewhere else. So it is kind of the “use it or lose it”. So if you don't use the rights then we are going to go and find another platform that will use it. This used to be an issue probably more five years ago than it is now, because what we find now because rights fees have remained pretty high generally and broadcasters who buy them, they actually want to use those rights more than they used to – so what we find is broadcasters are buying less rights, they are paying good money but buying less amounts of rights, because

they want to “sweat their assets” much more than they used to. So they want to make sure that they do the highlights, that they do the digital exploitation, they do X, Y and Z – and we forced them to do that – but there is no reason why they wouldn’t do that anymore, as I was saying before, they didn’t use to have the wherewithal or the products or whatever to do that (Interview with author, 21 March, 2013)

One issue this process clearly highlights is that for smaller start-up companies seeking to access supposedly less lucrative rights it can be more difficult, not, as in the past, due to the ‘warehousing’ of rights, but as organisations reach out across in-house platforms they have the capacity to exploit at marginal cost.

Organisations are re-thinking the brand value that rights may have at all levels. In the case of the FA in England attempting to take a longer term view of the importance of building value in the women’s game in that country. Stuart Turner is Commercial Director of the FA Group with responsibility for a range of sub-brands of the FA including the English national teams. He also has previous commercial experience of having worked at the pay-TV broadcaster Sky and notes how the FA have taken a decision to unbundled both the broadcast and sponsorship rights from the national women’s game from those of the other activities of other English national teams. He notes how:

When Vauxhall take sponsorship of all 23 England teams that we operate, I want them to look after the 23rd team as well as they look after the main senior team, and I want them to value that relationship. With the Women’s game we want a focus on it and to make sure that people valued it and who knows, in 20 years time when somebody else is signing these rights; they will be signing them for a decent amount of money, because they are valued. So we are putting them onto the BBC and actually have ceded the rights to the BBC free of charge, so we have got a platform and off the back off that I can build a commercial programme for women’s football (Interview with author, 28 February, 2013).

However for other national associations, such as the Scottish FA (SFA), the bundling of some rights has actually been of significant value and importance for them.

For all FAs there have traditionally been three main rights available through broadcast football content. These have been, first party rights and refers to the home nation territory in a fixture, then second party rights that refer to the opposition territory, while finally third party rights refer to the rest of the world. The SFA, in keeping with other national associations often sold their rights to an agency, such as IMG Media, who having paid for them then sell them across territories. Kenny McLeod the then Commercial Director at the Scottish FA Group and argued that for a small country like Scotland accessing some markets, such as the Indian television market would be difficult without Scottish football being part of a bundled package:

We can benefit from bundling, mainly on third party rights. If you are IMG and own a number of rights, then you can go to a TV channel in India with a portfolio that includes maybe other key matches, they may buy us for a highlights package. We analyse which countries buy us the most, and where we

get the most income, and in the last campaign that's now finished (2013), in the top 5, most of the countries were obvious, but Iran was spending more on Scotland matches than most other countries in the world, now did they buy them in isolation, not really, but they bought big packages of matches that included Scotland, so our share of that was quite significant, so bundling when it comes to third party is, for a country like Scotland, quite valuable (Interview with author, 1 March, 2013).

Again where you are positioned in the rights value chain, and the level of market value attached to your rights plays a key role in determining the impact that bundling may have on your business model. For new digital content companies this has the potential, rather than the copyright regime to inhibit their development, for other more mature rights holders bundling brings benefits that simply would not accrue in any stand alone selling of rights.

The issue of policing copyright has often been a central aspect of the debate about its impact on the public. Jack McGill at Quipu TV views the march of technology as having forced some rights holders to embrace the digital space and indeed become more nuanced in how they police copyright. He argues:

It's also becoming easier to make money off the people that try and infringe that copyright, particularly in terms of how YouTube now allows content creators to register what content as theirs [through the Content ID process]. Where somebody is trying to make money from that content, then the money goes back to the content creator rather than the person who has uploaded it. I think that's quite a big change in terms of, you know, the governance of content (Interview with author, 26 November, 2013).

Indeed McGill echoes an argument also made by Maurice Tollenaar Head of Media Rights for Uefa, the European governing body of football, who argues that forms of copyright infringement both highlight potential new markets for content producers to potentially address, and also that simply removing content may not always be the best mechanism in protecting your rights. As McGill notes:

We will not pursue copyright infringers unless we think they're making money from it and that's when we'd use something like Content ID on YouTube to police it. But we wouldn't demand that that content is removed from YouTube, we would simply demand that if they're making money off it, it's coming back to us, which is one of the benefits of having a partnership with YouTube, being able to activate that kind of service (Interview, 26 November, 2013).

The fast moving nature of this area is also evident as few would have predicted a few years ago that YouTube would have developed this specific proprietary solution for copyright.

It is worth noting that where these rights are at the high value end of the spectrum, particularly around live streaming of copyrighted television football content than more direct approaches are often evident. Ben Nicholson from IMG Media outlines the fact that:

we employ companies that search out piracy thieves, and actually we have an agreement with a third party company that supply all of our channels to YouTube So basically if we have the right to a certain piece of content, a right to something, what they do is they go on the web and search out a number of illegal streams of other people who are sharing that content. They then shut down all those streams, and also then when people are putting adverts against those illegal streams, they claim that back so we, or the rights holder, get the advertising money from the illegal stream. So they do two things – they claim cash they otherwise previously had, but also they shut down the feed and that is what we so want. Or they can also let that feed continue with the rights holder permission, in order that we can claim more revenue from advertising that has been sold against that content by the illegal company. So there are a number of things that are in place now that are much more sophisticated than they used to be [] So this way, where you work out a financial solution as well as a stopping solution, it seems to have taken on its own life and it has been very successful for us so far (interview with author, 21 March. 2013)

The issue of policing differing types of football content continues apace as new ways to share content evolve. The FIFA 2014 World Cup in Brasil saw the growth in vines being used on micro-blogging sites such as Twitter as fans, aided by the ease that one can pause and replay live television, started posting vines (6 second looping videos) of goals from the Brasil tournament. As season 2014/2015 started the EPL announced a clamp down on the usage of these vines showing goals from that league. They argued that it infringed copyright and was thus illegal. The situation is far from clear cut in legal terms as some lawyers such as Henderson et al (2014;7) have argued that:

There are equally strong arguments that defences to such copyright infringement could apply providing, of course, that the posting such clips could be seen as fair dealing.

While the growth of vines may impact on the value of the clips rights package that the FAPL had sold to the *Sun* and *The Times* newspapers, you could also see in future the FAPL focusing on getting the best promotional *value* out of these rights as opposed to simply getting *revenue*, given the gap between this £20m clip deal and the importance of maintaining the core £3billion broadcast deal. So again, depending on the sport, its specific value in particular markets, the level of direct concern around copyright infringement will vary considerably.

In an era of live-streaming apps such as Periscope and Meerkat and ubiquitous access to digital content, policing the intellectual property from live coverage has become integral to rights holders' business models. They're up against increasingly tech savvy fans who are only interested in seeing live sport, wherever and whenever they can – not to mention media organisations seeking

new ways to satisfy them. Consequently both in football and elsewhere, some of the most interesting battles are no longer taking place on the field.

Recent 2015 flashpoints include the Rugby World Cup, where there will be no accredited journalists from News Corp Australia, Fairfax Media or Australian Associated Press. They couldn't agree with the organisers on the amount of video content they would be allowed to carry on their websites, claiming that the restrictions meant they would be unable to offer their own audience the level of 24/7 mobile multi-platform coverage that they would expect.

Over in PGA golf, American golf journalist Stephanie Wei's media accreditation was withdrawn for the rest of the season back in May because she used her Twitter feed for Periscope golfer Jordan Spieth during a practice round (for the uninitiated, Periscope is a live DIY video broadcast platform). The PGA said it owned all video rights for the entire week of the event, not simply the actual tournament.

European Single Digital Market

The European Commission interest in this broader area is of course not going to disappear anytime soon. A consultation on EU copyright laws was undertaken in 2014 by the Commission (1). While the issue of the proposed digital single market has increasingly occupied sports rights holders, although its original focus was to increase cross national digital trade in the EU (Robinson, Ahmed and Waters, 2015). One of the key areas are proposals to prevent the geo-blocking of digital content, something that has been integral to the ability of rights holders to sell rights territory by territory, thus maximizing their commercial value.

As Uefa's Head of Media Rights and Services, Maurice Tollenaar notes, policy interventions in one area often have untended consequences in others:

Everything should be open to everyone. I mean, I'm from Holland. I'm living in Switzerland and it would be nice for me to get access to certain sports that are more typical for Holland or if a match is taking place and I want to see it, I would like to actually see the Dutch presenters. On the other hand, it would have a knock on effect on a lot of things and ultimately I think you don't cater demand for the mass consumer but for the few individuals living in different countries, but I think the negative impact it would have on sports in general is massive compared any benefit [] it would definitely change the way people and rights holders sell their rights and you would actually ultimately harm the consumer because we would start selling our rights differently (Interview with author, 6 September, 2013).

While EC proposals on geo-blocking will not appear until early 2016, and any implementation sometime after this, already the re-writing of sports contracts and the re-structuring of how rights are sold is happening. Previous experience

tells us that while the end of geo-blocking could be highly significant, we remain some way of this happening to the extent that pan European rights for sport will become the norm.

Conclusion

It can often appear that debate about the copyright regime is often crudely distilled as to appear that on one side of the argument are those calling for increased liberalisation particularly curators and aggregators of content – and at the other end of the spectrum calling for more rigorous policing of the regime are organisations that represent content producers. This research argues that this polarised critique masks a myriad of more complex and nuanced aspects of the position of IP within the sports rights arena. Of key importance in shaping attitudes are the existing scope, scale and value of your rights and your position in the value chain as you look either up or downstream.

It is worth re-stating the immense range and diversity that exists in what is often aggregated together under the creative industries rubric and that the reading across from one sector to another is often unhelpful given the peculiarities of particular cultural forms and activities. As Ross Biggam, DG of the Association of Commercial television in Europe argues in the case of the television industry across Europe:

We frequently see examples from the music sector being quoted as evidence that therefore something must change in the copyright world. However music rights and their trading and management and licensing are completely different from say the publishing world or newspaper sector or the TV sector. And even when in television we would argue that you have to subdivide two different genres of content, we distinguish between news programming which is fairly portable, co-produced content which is independently produced while the producer may have retained the rights to the distribution, movies which is complicated again because of the windowing, and sport which is different because all the value is in live. So they have really got differing sectors of television content. I think anyone who calls for copyright to be overhauled should understand all these different sectors and the differing implications of what change might mean (Interview with author, 15 March, 2013).

For Bill Bush at the FAPL, a major rights holder they also see issues not necessarily with altering the existing IP regime, but rather with a rush to change it for the wrong reasons, with possible unintended consequences. He argues:

I have heard it said in the context of music, ah yes but the decline in revenues from recorded music have been a fantastic stimulus to live performance. Our (football) players can't play any more matches than they do now so that is not something that we can do. I mentioned earlier about the advertising market, we can't go much further in exploiting the advertising market, so being able to sell exclusive rights to broadcasters, audio visual distributors is critical, so we are not against change, we are against the existing rhetoric of change. [] if the British Government is

serious about enabling successful British industries to continue to be successful in a highly competitive world future, is needs to recognise that IP is at the heart of what a lot of those industries do and to make ill-thought through over-enthusiastic changes could well play against the interests of UK based operations like ourselves. [] There may well be economic gains, but they may well be global players who neither invest here nor recruit here or pay tax here, and a little bit of dispassionate economic analysis would be helpful (Interview with author, 28 March, 2013).

For many the issue of copyright is less of a blockage to innovation than the rigorous implementation of competition law in regulating and opening certain digital markets. Brendan Knox-Peebles, Head of Legal at BBC Sport argues that:

European competition law and territorially restrictive markets, that's a developing area of law [] I think in one sense, the UK copyright law is sufficiently flexible to deal with the issues if the parties wish to reach a kind of commercially sensible, viable agreement, they can probably do so within competition and copyright law. But if they ever hit a stone wall then there's clearly a tension, and I think changing the law is not necessarily how you're going to resolve that, but there is that tension there (Interview with author, 26 November, 2013).

The ECJ ruling discussed above has focused on satellite television and has resulted in a re-adjustment rather than a revolution and indeed re-stated the importance of copyright in protecting value for rights holders. The broader digital terrain is of course one of often growing complexity as technological innovation continues apace with regulators often trailing in its wake. The issue of live streaming of games for example across the internet is not something that is likely to disappear, as infrastructure becomes more robust and the appetite to watch live sport on a range of mobile devices grows (Dunne, 2014). As Kirton and David (2013: 92) argue:

With technical capacities and competencies constantly developing, free content reproduction and circulation looks set to become a growing challenge for those clinging to the broadcasting arrangements of the past in soccer and elite sport as a whole.

Thus the continual adaption and tweaking of business models for rights holders is increasingly simply part of the new conditions of doing business.

A notable characteristic of the sports media environment has been that it has often over the decades been at the leading edge of technological change and media innovation (Boyle and Haynes, 2009). New partnerships and the development of alliances between sports organizations and digital content managers and platforms is evolving at pace in this sector already. At the core of the value of sports such as football is the centrality of the live event, this shapes the sports market and means that debate about access to these often national

events among both consumers and citizens is not going to disappear anytime soon.

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Notes:

(1) Public Consultation on the review of the EU copyright rules; http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/index_en.htm

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