

Report Session I



The protection of sports events by Intellectual Property and unfair competition

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- Speakers: Richard BUCHEL
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- Antonio CAMPINOS
(Trademark Director, National Trademark
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- Alexander LIEGL
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The first Forum Session dealt with the “Protection of Sports Events by Intellectual Property and Unfair Competition”. The panel consisted of Dr. Alexander Liegl (Attorney-at-law, Germany), Mr. Gianni Infantino (Director of Legal Services UEFA, Switzerland), Mr. Richard Buchel (Attorney-at-law for FIFA, France) and Mr. Antonio Campinos (Trademark Director NTPO, Portugal) accompanied by Mr. Dariusz Szeleper (AIPPI) and Jochen Bühling (AIPPI). The session was quite well attended with around 200 participants.

Mr. Szeleper opened with a general introduction into the topic which had been limited by excluding questions of TV rights. The importance of (major) sports events has different facets and in particular economic and social dimensions of great importance. One of the indications is the fact that sports celebrities are very often more famous and better known than politicians, scientists or artists. This merits to look at how such sports events can be and should be protected by IP rights and unfair competition and what this means to the public and third parties in general.

In the first presentation Dr. Liegl gave a vivid example of the 1954 Football WorldCup finals in Berne, Switzerland (the so-called “miracle of Berne”). The 2006 FIFA WorldCup in Germany will be the biggest event in Germany in a long time and is certainly the world’s greatest media event. It has already triggered a lot of commercial activities of all kinds. In this context, the term of “ambush marketing” plays a significant role. It has been defined by FIFA as comprising “all unauthorised activities in the fields of marketing, promotion and advertising in any form in connection with the FIFA WM 2006 by persons who have not been granted authorisation for such activities”. In Dr. Liegl’s view, the term can have a positive and a negative meaning. It will give third parties the option to act commercially even without being an official partner or sponsor of the event. Third parties will have to find ways around infringing FIFA’s rights. Those rights are based on various legal instruments and comprise copyright, trademark rights, competition law, domiciliary rights and personality rights. Dr. Liegl also found some critical words regarding the alleged efforts of FIFA and other organisers of major sports events to try to monopolize those events and to exclude non-official sponsors and advertisers. As one example he referred to “public viewing” of the matches. It is FIFA’s

position that commercial public viewing requires the consent of FIFA and other right holders. In Dr. Liegl's opinion the basis for FIFA's right regarding public viewing is at least dubious and cannot lead to a total monopoly of FIFA.

Dr. Liegl then talked about the legal situation under German law which, in many aspects, is similar to the situation in other countries. Trademark rights bring problems of the distinctive or descriptive character of the trademark and also questions of the use as a mark by third parties as well as the legitimate interest in a free use. Also the cancellation for non-use after 5 years or on the grounds of an absolute obstacle to protection may be an issue. Only recently did the German Federal Patent Court issue a (not yet final) judgment regarding the protection of "World Cup 2006" and "Football World Cup 2006" which was at least partially rejected. Also the law against unfair competition gives some rights to the organisers when third parties imitate the signs or logos of those events or if they misuse the notoriety and the reputation of those events. Dr. Liegl's conclusion was to link creativity and law so that third parties who are not official sponsors of the event can still use the event in advertising or other commercial activities while at the same time respecting the rights and legitimate interests of the organisers and avoiding blatant parasitism.

Mr. Infantino and Mr. Buchel confirmed that certainly no private person will be prevented from participating and benefiting from the event and that their activities are aimed at commercial infringements of the rights of the organisers. In his presentation Mr. Infantino focussed on the economic aspects of major sport events organised by UEFA, namely the EURO (European championship of national teams) and the Champions League (European championship of club teams). Profits made by UEFA are distributed to the national associations as well as to the competing national teams and are used for the development of football in Europe. Given the size and the significance of such major sports events the contribution of the official partners is essential for the realisation of the events. Without the official partners it would be impossible to organise the event so at a high level. That is one of the reasons why sponsors and licensees need a comprehensive protection for their efforts. UEFA's strategy relates to various rights, such as IP rights, broadcast rights, ticketing and others. When it comes to IP rights the main signs of UEFA (logo, mascot, designations of events) are protected by copyright, trademarks and designs on a worldwide basis for a huge variety of products and services. For example, the official logo for the EURO 2004 in Portugal was registered in relation to 37 categories of products and services by 17 national registrations and an international registration in 52 countries. Furthermore, protection was sought through a community design registration. Limits of the protection are the costs, the duration of registration proceedings and the difference of regimes for registration and protection in different jurisdictions.

Mr. Infantino then referred to problems of infringement. This includes trademark infringement, copyright infringement, ticketing infringement and ambush marketing. Although trademarks are registered widely, one can still find many infringers who try to make quick money without looking at anybody's IP rights. The same applies to ambush marketing which is defined as the unauthorised commercial association with the event (with or without the use of registered IP rights). During the EURO 2004 some extra measures were taken against infringement. Portugal passed a special law on infringement and protection of the EURO 2004. In addition, national and local authorities participated in anti-counterfeiting and anti-ambush actions before and during the event.

For the future, it is UEFA's view that additional changes are desirable for the protection of such events. The goal must be to balance economic and social benefits of sports with essential freedoms and to protect private and governmental (public) investment against economic parasites. One effective solution could be a sui generis legislation for the protection of major sporting events which would comprise consistent protection for year marks and consistent anti-ambush protection and remedies as well as protection of key ticket terms (e.g. non-transferability).

Mr. Buchel followed the same approach from the FIFA point of view. Also on a worldwide basis protection is essential for major sporting events, since the sponsors are vital for the event from an economic standpoint. Massive protection programmes are in place. However, protection is not everything. What is needed at the same time is a strong commitment and a clear policy to enforce those rights after grant.

As opposed to "blatant parasitism" Mr. Buchel would prefer to speak of "illicit commercial association". This term has three criteria and characterizes the activities which are harmful for the event. "Illicit" follows from not being authorised by the organisers or the right holders. "Commercial" distinguishes from private activities and "association" is everything which is linked with the event in any form.

Also according to Mr. Buchel the current systems give good but not sufficient protection. An alternative could be a sui generis protection which could follow the system of Art. 6ter of the Paris Convention. The advantage of such a sui generis protection would be that it is in place for many events whereas ad-hoc legislation in the specific country involved with the sporting event is difficult to obtain when it has to be done 6-8 years prior to the event. At that time legislators are in many cases not prepared for such a legislation and may also face difficulties internally for various reasons.

The last speaker of the panel was Mr. Campinos who gave an insight view of how Portugal dealt with the EURO 2004 and the problems described by the previous speakers. In terms of financial investments, mobilization of the Portuguese population, responsibility and international image the EURO 2004 was considered a top priority. That was one of the major reasons why Portugal decided to issue a specific law on the protection of this event, namely of the designations and symbols of the EURO 2004. The law stated that the right holder has an exclusive right in the names and symbols of EURO 2004 and prohibited registration and the use of business names, brands, names, logos, titles of publications of any type or other copyright-protected works irrespective of the sphere of activity. The main impact of this law was that counterfeiting in Portugal during the EURO 2004 was not a major problem. It also allowed the authorities to deal with all cases where an illegitimate association was made to the event. At the same time problems related to the question of distinctiveness of the trademarks designating the sport event could be overcome.

As a solution besides national legislation Mr. Campinos suggested to consider a European regulation which would give protection along the lines of Art. 6bis and 6ter of the Paris Convention. One has to recognise the need for an international and European protection for major sport events regarding their specific nature which has to be accompanied by the political will for such a protection.

The contributions of the panel illustrated the difficulties to find a balance between the various interests involved in major sports events and their enormous economical impact. On the one hand, they are a public factor and as many people and entities as possible wish to benefit from them. On the other hand, these events are privately organised and also privately funded to a great deal which requires the corresponding protection of the IPR.

The following discussion added some interesting views from the audience with different backgrounds to the session. The Greek experience from the Olympic Games in Athens showed that not only the legal framework is important but that also the time of enforcement and the necessary remedies have to be quick and effective. Otherwise, there is no efficient way to prohibit infringement when the laws cannot be enforced due to deficiencies of the judicial system. In particular, ad-hoc measures are important.

One of the problems in connection with trademark protection is the requirement of fair use after 5 years of registration. This is in particular important when trademark protection is sought a long time before the event. One needs to create the sufficient awareness of the use requirement early on to avoid such problems.

Although the subject was triggered by the Football World Cup 2006 in Germany the discussion revealed some examples where similar situations occur in other fields of sport events, such as the cricket world cup 2007 in Jamaica or also in South Africa. There a special law was created which does not define what a major sports event is. The designation is left to the minister so that some flexibility is given. The law also contains a definition of ambush marketing which comes very close to the understanding of FIFA.

A representative of the European Commission observed that before introducing new rules one should evaluate whether the existing rules are sufficient and how the existing problems could be solved. One of the examples is the EU Directive on Enforcement of IP Rights or the laws on criminal sanctions which do not only apply to major sports events. Another important aspect is the cooperation with the local authorities. If there is a need for further legislation the Commission would be prepared to take up the issue and to look into further solutions. Nevertheless, the underlying problem needs to be clearly identified beforehand. This view was also shared by a representative of WTO who made reference to TRIPS and to the border measures against counterfeiting.

The session highlighted a number of interesting issues around the topic of protecting major sports events. It did not only give an insight into the existing possibilities of protection but also identified practical problems in applying the existing measures of protection. The main question will be whether the instruments currently available offer sufficient protection and can serve as a means for balancing the interests of the various groups involved or whether additional protection, e.g. through a sui generis right is desirable or even necessary.