

Major Events and Reporting Rights

by Max Schoenthal

EDITORIAL

2006 is a year of major events, particularly in the world of sport. As well as annual events such as the Tour de France, in addition the Olympic Winter Games in Turin, the European Handball Championships in Switzerland and the football World Cup in Germany are all taking place this year. Hardly a day goes by without previews, live coverage or reports of such events in the media. The legal framework governing broadcasts of major events is not just topical from a sporting perspective. But in addition, recent legal developments, which are discussed in more detail in this article, appear to suggest that a thorough examination of the rules on the broadcasting of major events is appropriate: these particularly include the Commission's proposal for an amendment of the "Television without Frontiers" Directive (COM(2005) 646 final), published on 13 December 2005, and the European Court of Justice ruling in the "Infront" case. It is therefore appropriate that an IRIS *plus* should be devoted to this subject.

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Major Events and Reporting Rights

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Major events play a very important role in society. This investigation will show once again that sporting events in particular are prominent in the minds of the public and legislators alike, which is why they are given special emphasis.

Starting with a brief explanation of the various links between major events, media and society, this article describes the provisions of European law on the broadcasting of major events. It considers European law in its broader sense, including regulatory instruments of the Council of Europe. However, it also discusses the situation in the Member States, not so much in relation to individual country-specific legal issues, but looking at the origins of particular regulations and their development in relation to relevant European provisions. Finally, the suitability and consistency of the European legal framework are discussed with regard to the objectives that underpin it.

A. Major Events and Media

I. Major Events' Importance for Society

In modern societies, it is usually impossible for everyone who is interested or involved in an event to physically attend that event. This problem can, to a large extent, be resolved with the help of the media, particularly the audiovisual media. Mainly through live coverage, but also via news-style summaries, viewers who are unable to attend an event are able not only to access information about the event, but also to share in or relate to the emotional experience of watching the event and therefore to slip into the role of a live spectator.

Not least for this reason, elite sport and the media increasingly developed a "symbiotic relationship" during the second half of the last century. This is partly due to the immense social importance of sport and its appeal to the general public, and partly to the mutual benefits that those involved gain from a close relationship between sport and the media. Sport, as a social phenomenon which involves much more than the physical training of the individual, has been an integral part of national life for some time. The social significance of sport has also been expressly acknowledged by the European Court of Justice.¹ Sport fulfils important democratic, integrative and social functions² and often attracts the attention of politicians. Sports events are extremely attractive for television companies, who merely have to transmit events that are already happening. This is relatively inexpensive, and the event organiser plays a part in producing the programme. Interest among viewers is also relatively easy to predict. Sports broadcasts guarantee high viewing figures, which in turn mean substantial advertising revenue and good publicity for the broadcaster. This also leads to larger audiences for other programmes that are advertised during the sports broadcasts. In return, the audiovisual media – mainly television at present – give sport enormous public exposure and the potential for successful marketing. For top-level sport is (co-)funded by the audiovisual media both directly (through the sale of broadcasting rights) and also indirectly (via the mass effect of perimeter and shirt advertising, sale of naming rights and the publicising of dates and brands).

As well as television, other media are being brought into this relationship as different audiovisual media converge and (live) reporting possibilities increase. Early signs of this phenomenon include the rise in the sale of sports rights to telecommunications companies and their exploitation via broadband Internet or mobile phone platforms.

Although sport is an important example, there are other kinds of major events. Parliamentary elections, speeches by heads of state, one-off events such as the fall of the Berlin wall, and not least cultural events such as concerts, also help to form the collective consciousness, the sense of a common bond and the identity of a society. Major events therefore also include simple components of democratic and cultural processes.

Quite apart from the practical impact and importance of each event, access rights play an important role in the division of society into groups with different levels of media provision. This phenomenon is described in discussions concerning digital and on-line media as the *digital divide*. From an abstract perspective, access to the media has a major impact on a person's ability to participate in social life as well as on their professional and educational opportunities. In this context, anything which creates or exacerbates the problem of social groups who are underprivileged in terms of media access is unacceptable and must be avoided. Access and short reporting rights can play a part in this, albeit a limited one.

II. Economic Significance of Reporting on Major Events

Sport has always contributed to economic growth, since it is a catalyst of technical progress and helps to popularise technical innovations in the audiovisual media sector. It has the same catalytic effect on media law.³ Exclusivity agreements play a particularly important role in the development of new media and therefore in the continuing development of European and national competition (law).⁴

In 1954, for example, the football World Cup was used in Germany to boost sales of television sets, particularly to private households.⁵ The 1974 World Cup gave new impetus to sales of colour televisions. In a similar way, the 2006 World Cup is expected to assist the HDTV standard. Some pay-TV companies will already be providing high-resolution transmission at this year's World Cup. The level of acceptance of Handheld TV (DMB/DVB-H) should be increased.

These examples show that broadcasting rights can help promote certain products or branches of industry. Legislators could, in principle, act accordingly. Granting short reporting rights for new services, for example, would be one conceivable way of increasing consumers' acceptance of these services.

The economic value of (exclusive) broadcasting rights was recently illustrated when the stock market value of German pay-TV company *Premiere* was halved within minutes after it lost the pay-TV rights for the football Bundesliga to cable companies.



B. Legal Provisions on the Reporting of Major Events in Europe

I. Introduction

Audiovisual media law regulates major events in two main ways:

- Guaranteeing public access to broadcasts or full-length reports on events of major importance for society on free-to-air television (see Article 3a of the “Television without Frontiers” Directive⁶ and Art. 9a of the Convention on Transfrontier Television⁷).
- The right to short reporting, which is currently not included in the “Television without Frontiers” Directive, but is mentioned in the Convention on Transfrontier Television and is also found in some Member States’ domestic legislation.⁸

Even though reporting on particularly significant events is an important starting point in the observations made in this article, it should not be forgotten that such reporting restricts exclusive marketing⁹ and therefore always also affects contrary interests and equally important legal positions. The two aforementioned aspects of regulation of major events should therefore be considered from two different perspectives:

Regulations such as Article 3a of the “Television without Frontiers” Directive strengthen the position of television viewers, for whom broadcasts of major events are made more accessible. Equally, the right of media representatives without broadcasting rights to transmit short reports – at least under directly applicable provisions of national law – is a subjective right, i.e. a special right to access to information that is (mostly) privately owned.¹⁰ Article 3a therefore also strengthens the legal position of those media representatives.

On the other hand, rules such as Article 3a of the “Television without Frontiers” Directive limit the opportunities for rightsholders, broadcasters and other rights purchasers to exercise their rights. Broadcasting rights are regularly derived from the “householder’s rights” of event organisers. As the owner, the organiser is able to regulate access to the event under private law. This includes the possibility of allowing television broadcasters to record or broadcast the event.¹¹ Sometimes, the rights to sports events are assigned by law to associations or organisers.¹² Copyright is only relevant if the event is considered to be a work within the meaning of copyright law, something which is often not the case with sports events in particular.¹³ Once a TV broadcaster has produced a broadcast signal, this in turn is protected by performance law provisions.¹⁴

The aforementioned rules on public access to coverage of events in which such rights exist can reduce the commercial value of these rights. The original rightsholder is the first to lose out, since such depreciation affects the income of the event organiser. The problem with granting reporting rights to third parties is the loss of exclusivity for the primary rightsholder and the fact that short reporting rights, for example, cannot be sold on. For event organisers, the sale of short reporting rights at market prices is jeopardised. There is also the danger of a slight drop in the value of broadcasting rights and possibly of purchased primary and secondary exploitation rights.¹⁵

The right to short reporting, just like rules on public access to broadcasts of major events, therefore represents a restriction of private autonomy in the form of freedom of contract.¹⁶ Compared with list regulations, the loss incurred by the original rightsholder as a result of short reporting rights being granted to third parties is

smaller if the reporting is of a news-type character and is therefore limited to the highlights of an event.¹⁷ The slow build-up of suspense which makes sports events so attractive and unique is therefore only present in the original broadcast.¹⁸

Both the right to short reporting and list regulations can help to achieve the freedom of expression enshrined in Art. 10 of the European Convention on Human Rights (ECHR). This protects, *inter alia*, passive freedom of information, i.e. the right to receive information. However, this right concerns the receipt of information in general rather than specific information.¹⁹ The European Court of Human Rights recognises the public’s right to reasonable information,²⁰ which is mainly provided by the media.²¹ The signatory states are obliged to organise their information systems so that individual citizens are able to obtain information about important issues. In view of their significance, as described in this article, certain major events constitute important issues in a modern society. The duty to guarantee public access to reports on such events can therefore be founded on Art. 10 ECHR. How this is achieved through list regulations or short reporting rights varies within the aforementioned provisions, since no individual rights are laid down (e.g. right of access to a particular event). Rather, the state creates a system under which the individual is entitled in a general way to appropriate information.

II. Broadcast of Major Events

1. Article 3a of the “Television without Frontiers” Directive

a) Content and Origin

Article 3a of the “Television without Frontiers” Directive²² provides that Member States may draw up lists of events which, on account of their importance for society, should not be broadcast exclusively on pay-TV. This rule was not included in the first version of the “Television without Frontiers” Directive of 1989, the Commission’s initial proposals as part of the revision of the Directive,²³ nor in the Council’s Common Position of 11 June 1996.²⁴ The European Parliament tackled the theme of encrypted exclusive broadcasts comparatively late in the legislative process and adopted a Resolution on the broadcasting of sports events.²⁵ In the Resolution, it stressed that it was the task of the European Union to determine the appropriate instruments to guarantee access for the whole population to certain sports events of general interest through the unencrypted broadcasting of those events. This initiative was triggered by the Kirch Group’s acquisition of comprehensive exclusivity rights for the 2002 and 2006 football World Cups. Only when the Committee on Culture, Youth, Education and the Media issued a Recommendation²⁶ was the subject raised again as part of the legislative process.²⁷ The proposal suggested that a binding basic list be established for all Member States, which could be extended by each Member State. Free access to these transmissions could be offered via private free-to-air TV providers. The fundamental decision to regulate only the exercise of exclusive broadcasting rights and not their acquisition was taken through a Parliament Decision.²⁸

Most representatives of the Member States and the Commission agreed with the Parliament’s proposal that the public should be guaranteed access to events of particular importance. However, the notion of a binding Europe-wide list was rejected.²⁹ Instead, the Member States were to be responsible for drawing up their own lists and only supporting measures for national list regulations were to be proposed. Article 3a of the “Television without Frontiers” Directive is therefore designed to provide the Member States with an effective way of preventing exclusive reporting of events of considerable

rable importance for society. It is aimed at preventing exclusive reporting that deprives a substantial proportion of the public of the possibility of following such events via live or deferred coverage on free television. Member States can achieve this by drawing up a list of events, not necessarily national, which they consider to be of major importance for their citizens.

At the heart of this provision is the mechanism of mutual recognition, whereby the Member States must help to enforce the list regulations of other Member States. They are obliged to take appropriate measures to ensure that broadcasters under their jurisdiction do not exercise the exclusive rights they have purchased in such a way that a substantial proportion of the public in another Member State is deprived of the possibility of following events listed in that other Member State. This duty to respect and enforce the lists of other states applies irrespective of whether or not the Member State concerned has drawn up such a list itself.

Article 3a essentially has three objectives. Firstly, Member States wishing to take such measures must, for the sake of legal certainty, quickly make very clear which events they are intending to protect. Secondly, the Member States' decisions should be verified through a monitoring procedure established in accordance with Community law. Thirdly, the circumvention of Member States' national legislation by means of broadcasts from other Member States should be prohibited.³⁰

The provision covers all forms of organised and non-organised events. Article 3a of the "Television without Frontiers" Directive does not limit the Member States' freedom to decide whether an event is of major importance. The only restrictions here arise from general principles such as the arbitrariness standard.

b) The *Infront* Ruling of the Court of First Instance

In a judgment of 15 December 2005,³¹ the Court of First Instance decided whether a Commission decision taken in relation to Art. 3a para. 2 on the compatibility of measures taken by a Member State, i.e. a list of events of major importance for society, was open to challenge.

The case followed an action brought by *Infront WM AG* (previously the Kirch Group) against the list drawn up by the United Kingdom. As holder of the rights to some of the events contained in the list, *Infront* considered that its rights had been breached. The object of the proceedings was a letter from the Commission, informing the relevant British authorities that it had no objections to the measures notified and would therefore proceed to publish them. The Court found that this letter was open to an action because, by triggering the mechanism of mutual recognition, it had binding legal effects. The Court annulled the decision on the grounds that the Commission lacked the necessary jurisdiction. The College of Commissioners had not been consulted and the Director-General, who signed the decision, had received no specific power from the College. Since the action was upheld on the grounds of procedural infringements, the judgment does not comment on the material legitimacy of measures taken by the Commission under Art. 3a or of list regulations adopted by Member States.

2. Article 9a of the Convention on Transfrontier Television

Since it was revised by the Protocol of 1 October 1998, the Convention on Transfrontier Television also now contains, in Art. 9a, provisions on public access to events of major importance. Both the content and terminology of Art. 9a are deliberately adapted to Art. 3a of the "Television without Frontiers" Directive. Reference can

therefore be made to the above comments on the latter provision. One difference is that lists have to be submitted to the Standing Committee established under the Convention. According to the guidelines issued by this Standing Committee for the implementation of Article 9a,³² the level of importance of an event depends on four criteria: the event itself or its outcome has a special general resonance in society, not just for those who ordinarily follow the sport or activity concerned; the event has cultural importance; it involves national teams or representatives; and the event has traditionally commanded large audiences on free television. At least two of these conditions must be met for an event to be deemed as being of major importance.

The proposal for a *Recommendation on the right of the public to information on major events where exclusive rights have been acquired* was dropped at the end of 2005, since the Steering Committee on the Media and New Communication Services could not agree on its content.³³

III. Right to Short Reporting

1. Council of Europe

a) Article 9 of the Convention on Transfrontier Television

In contrast to its role in relation to lists of major events, the Council of Europe's Convention on Transfrontier Television has led the way as far as short reporting rights are concerned. Article 9 of the Convention states that parties should examine and, where necessary, take legal measures to prevent exclusive broadcasts which undermine the right of the public to information, *such as by introducing the right to short reporting on major events*. The Convention does not therefore impose a binding obligation for Member States to introduce the right to short reporting, but invites them to examine such measures.

The current wording of Article 9 dates back to the 1998 Protocol. The original version of 1989 mentions only a very vague duty to examine measures to prevent exclusive broadcasts. The current version, in contrast, explicitly refers to the right to short reporting.

b) Recommendation

In 1991, the Committee of Ministers of the Council of Europe adopted a Recommendation³⁴ putting in more concrete terms the comparatively vague provisions of Article 9 as it stood at the time. However, this Recommendation is not a legally binding instrument.³⁵

The Recommendation begins by discussing the need to weigh up the rights of a broadcasting organisation which has acquired broadcasting rights – the so-called "primary broadcaster" – and the right of the public to information, the protection of which means limiting the rights of the broadcaster. It recommends that any "secondary broadcaster" should be allowed to broadcast short reports on major events, either by recording the signal of the primary broadcaster³⁶ or by obtaining direct access to the event in order to produce a short report. Where a major event is composed of several self-contained elements, each self-contained element should be deemed to be a major event. If an event takes place over several days, secondary broadcasters should be allowed to broadcast at least one short report per day. In general, the authorised duration of a short report should depend on the time needed to communicate the information content of the event.

The Recommendation also contains provisions on the use of short reports. They should be used exclusively by the secondary

broadcaster and only in regularly scheduled news bulletins. In the case of organised events, short reports should not be broadcast before the primary broadcaster has had the opportunity to carry out the main broadcast. Also, where the short report has been made from the signal of the primary broadcaster, it should mention the name of the primary broadcaster as the source of the material. In principle, a short report should not be reused and all original programme material used by the secondary broadcaster should be destroyed after production of the short report.

Finally, the primary broadcaster should not be allowed to charge a fee for the short report. In any event, the secondary broadcaster should not have to contribute towards the cost of broadcasting rights. Nevertheless, the organiser of a major event should be able to charge for any necessary additional costs incurred if the secondary broadcaster is granted access to the event site.

2. Proposal for an Article 3b of the "Television without Frontiers" Directive

The current version of the "Television without Frontiers" Directive does not mention the right to short reporting. However, under the Commission's proposal of 13 December 2005, the right to short reporting is included in Article 3b. This states that Member States should ensure that, for the purposes of short news reports, broadcasters established in other Member States are not deprived of access to events of high interest to the public which are transmitted by a broadcaster under their jurisdiction. Short news reports should be chosen freely from the transmitting broadcaster's signal with the identification of their source. There is no rule on the charging of fees.

The right to short reporting is reserved for television broadcasters, i.e. providers of linear audiovisual media services. However, it should also be granted³⁷ to intermediaries, such as news agencies, for example. Providers of non-linear services therefore remain dependent on the willingness of the rightsholders to co-operate. This contrasts with the notion mentioned in section A, above, that sports coverage can help new services to make a breakthrough. In other words, the right to short reporting would, in some situations, also enable providers of new media to publicise their services thanks to their news content.

IV. Current Regulations at Member State Level

An examination of national regulations in the Member States should try to pinpoint Europe-wide trends and developments rather than specific elements of individual legal systems. There is a certain correlation between European law and the status quo in individual states. Interestingly, provisions on both access to broadcasts of major events and the right to short reporting first appeared in the domestic legislation of certain Member States. The mutual influence of the "Television without Frontiers" Directive and the Council of Europe's Convention on Transfrontier Television is also worth noting. For example, as a result of measures taken on the basis of the right to short reporting enshrined in the Convention, corresponding rights are recognised in many national laws in Europe. This in turn increases the need for the harmonisation of standards within the European Community and the likelihood of relevant rules being introduced into Community law.

Efforts to ensure the public enjoys access to important events through the media date back to the 1950s. For example, the 1954 British Broadcasting Act contained provisions in this area, making it possible to guarantee public access to key events via the enactment

of decrees containing lists of such events. Even though this option was never taken up, the rule clearly shows that the basic need for such measures was acknowledged at an early stage. Although in very early cases when reporting rights were denied, individual journalists unpopular with organisers were excluded from events,³⁸ and the conflict between exclusive rights and the reporting rights of other media also attracted a great deal of attention during the 1950s.³⁹

1. Complete Transmission

List regulations that have been published in the EU Official Journal exist in Belgium, Germany, Ireland, Italy, Austria and the United Kingdom. Only Denmark has withdrawn a list that was previously adopted. Similar provisions which have not been published in accordance with Article 3a, either because the country concerned was not an EU member at the time or for other reasons, exist in Bulgaria, France, Malta, the Netherlands, Poland, Portugal, Romania, Switzerland, Slovenia, Spain, the Czech Republic and Cyprus. Some countries have adopted the legal basis for a list to be drawn up, but have not yet established such a list. Finland is one example. The Dutch system is particularly unusual, since the public service broadcaster has the option to purchase the rights to certain major events.⁴⁰

The overwhelming majority of the events found on national lists are sports events. However, some lists also contain events such as concerts, the Vienna Opera Ball, and film and music festivals.

In 2001, the British House of Lords ruled on a dispute concerning the mechanism of mutual recognition described in Article 3a of the "Television without Frontiers" Directive.⁴¹ *TV Danmark 1*, a private pay-TV broadcaster whose programmes could be received via cable and satellite in Denmark, but which was established in the United Kingdom and therefore licensed by the British Broadcasting Authority, had acquired the rights to five of Denmark's World Cup qualifying matches, which it intended to broadcast in encrypted form. Under Danish law, the broadcaster was considered as a free-to-air broadcaster because of its low subscription charge. However, it was only available to around 60% of the Danish public and had not offered to sell secondary rights to other broadcasters. Although under British law the regulator could have given its consent, it refused to do so, referring to Art. 3a para. 3 of the "Television without Frontiers" Directive. It argued that the matches were included in the Danish list of major events under Art. 3a and should be freely available to at least 90% of the Danish public according to Danish law. The House of Lords upheld this verdict in the final instance, arguing that there had been no breach of property law, competition law or other EC law.⁴²

It is interesting to note the different interpretations of the phrase "substantial proportion of the public". In order to ensure that a substantial proportion of the population is not excluded from receiving coverage of listed events, such events must be broadcast in Spain on channels that can be received throughout the country, i.e. with virtually 100% coverage. In the United Kingdom, 95% coverage is required, in Italy it is 90% and in Germany only two-thirds. In the latter case, it can be inferred that a proportion of around 30% of the population is not considered as substantial. This seems hard to understand, but in view of the fact that Article 3a does not make it a binding requirement for countries to draw up a list in the first place, it cannot be described as a breach of Community law.

2. Right to Short Reporting

Not least due to the Council of Europe's provisions, many countries have already introduced legislation establishing the right to

short reporting. These include Belgium, Germany, France, Greece, Italy, Austria, Portugal, Switzerland and Spain. Generally speaking, individual states usually deal with major events in a comprehensive way, i.e. if they take action in this area, they tend to produce a list of events as well as establishing short reporting rights.

There is no right to short reporting in Denmark, the Netherlands or the United Kingdom, although short reporting agreements have been concluded by the main Dutch broadcasters. In the United Kingdom, the Code of Practice for News Access is a self-regulatory instrument which makes provision for such a right.

The legal situation with regard to short reporting rights in two countries is described below.

a) Germany

In Germany, Art. 5 of the *Rundfunkstaatsvertrag* (Inter-State Broadcasting Agreement) mentions the right to short reporting. The provision was introduced after an exclusive rights contract was signed in 1988 by the German Football Association and *UFA Film- und Fernseh-GmbH*. The contract threatened to jeopardise extensive public access to information on matches in the German football Bundesliga.⁴³ As a result, legal provisions were drafted and adopted, firstly in individual *Bundesländer* and later at national level.

Under Art. 5, every licensed television broadcaster in Europe is entitled to produce short reports free of charge concerning functions and events which are open to the public and of "general interest". This includes the right of access, the right to make short live transmissions and the right to pass material on to other broadcasters in some cases. Short reports are restricted to news-type coverage. The permissible duration is the length of time needed to convey the news content and is normally no more than 90 seconds. Several short reports may be summarised, as long as their news character is preserved.

It is interesting to note the distinction between events that are planned and organised and one-off events that are usually not foreseeable, such as natural spectacles or disasters. The right to short reporting mainly concerns organised events, where the typical conflict of interests between exclusive reporting and short reporting usually occurs. The difference is particularly relevant to the rules on charging for short reports. As well as the admission fee usually charged and the reimbursement of any necessary expense, the organiser of a professionally organised event can demand a "low fee" appropriate to the nature of the event. When disputed, the size of the fee is determined by an arbitration procedure.⁴⁴ This rule is designed to make the intrusion upon the organiser's rights as harmless as possible and therefore proportionate. It was introduced in response to a judgment of the *Bundesverfassungsgericht* (Federal Constitutional Court),⁴⁵ which declared the right to short reporting fundamentally compatible with the Constitution. However, it considered the lack of an obligation to pay some form of compensation in return to be a breach of the professional freedom of the holders of rights to professionally organised events. Since the right to short reporting benefited not just the public, but also broadcasters who had originally competed to buy the broadcasting rights to an event, the organiser and rightsholder missed out on revenue that they could have generated if they had not been required to allow reporting by other broadcasters.

A second key element of the judgment concerns the time between the end of the event and the broadcast of short reports, the

so-called waiting period. If such a period is agreed between the rightsholder and a broadcaster when the rights are sold, it must also be respected by other broadcasters who exercise the right to short reporting. However, such a waiting period need not be respected if the event is broadcast live, even in encrypted format.⁴⁶ A waiting period agreed for a free-TV broadcast that takes place in parallel to a pay-TV broadcast should only be relevant to the right to short reporting if the broadcast seriously harms coverage of the event.⁴⁷

b) Austria

In Austria, the issue of short reporting was first discussed independently of European law. At the time, there was no right to short reporting. However, in a 1976 ruling, the *Österreichische Oberste Gerichtshof* (Austrian Supreme Court) gave the legislator a clear instruction to adopt new legislation. The public's need for information on certain events was expressly recognised in the ruling. Appropriate rules were finally introduced after Austria joined the EU. In 2001 the *Fernseh-Exklusivrechtgesetz* (Exclusive Television Rights Act - *FERG*)⁴⁸ entered into force, based on the aforementioned Recommendation of the Committee of Ministers of the Council of Europe.

Events of general interest are a key concept in Art. 5 *FERG*. According to para. 1.2 of this Article, an event is classified as such if it is expected to attract significant media attention in Austria or in a State Party to the Convention on Transfrontier Television. These events may or may not be organised. The concept of "*Veranstaltung*" (organised event) found in German law does not exist here. A TV broadcaster which has acquired exclusive rights to such an event or which is in fact the only one capable of covering it must allow all TV broadcasters licensed in countries covered by the Convention to produce short reports on reasonable conditions. However, in contrast to the German rule, secondary broadcasters are only entitled to record the signal. They are not necessarily granted access to the event or allowed to broadcast brief live reports. The Austrian legislator therefore opted for the first of the two possible ways of granting short reporting rights suggested in the Council of Europe Recommendation.

Short reporting is limited to news-type reporting appropriate to the event. Its duration depends on the length of time needed and must not exceed 90 seconds. If the event takes place over more than one day, the broadcaster is entitled to produce a short report each day. Short reports may not be transmitted before the start of the primary broadcaster's programme.

A dispute recently decided by the Austrian *Verwaltungsgerichtshof* (Administrative Court - *VGH*)⁴⁹ is particularly relevant to this article because the judgment reflects a supreme court's interpretation of rules designed to transpose the European provisions we are discussing.

The case involved pay-TV broadcaster *Premiere Deutschland*, which had acquired the exclusive rights to broadcast the Austrian football Bundesliga and had sold them to its subsidiary *Premiere Österreich* and, in a limited way, to *ATV Privatfernseh-GmbH*, a private free-to-air broadcaster. Public service broadcaster *ORF* had then asked the *Bundeskommunikationssenat* (Federal Communications Office - *BKS*) to grant it the right mentioned in Art. 5 *FERG*. However, the *BKS* had made the right to short reporting dependent on several conditions, which *ORF* disputed in complaints to the *VGH*. The *VGH* decided that the parent company *Premiere Deutschland* could not be forced to comply with the *FERG*, since it was not subject to



Austrian law. It also ruled that the right to short reporting could not be granted by Austrian company *ATV*, since it did not own exclusive rights to broadcast the Bundesliga. With regard to the claim against *Premiere Österreich*, the *VGH* had to decide whether the maximum length of 90 seconds prescribed by the law for each short report applied to each matchday⁵⁰ or to each individual match. According to the *VGH*, each football match represents an event subject to short reporting rights and up to 90 seconds can therefore be devoted to it as part of a short report. Meanwhile, the *BKS* has amended its ruling in view of the *VGH*'s interpretation.⁵¹

c) Interim Assessment

Since not all the provisions of European law are binding, it is not surprising that the situation is different from one Member State to the next. The right to short reporting may be granted in the form of a right for third parties to access the signal of the transmitting broadcaster, or as the right of access to the event venue, where secondary broadcasters can film their own reports. Depending on which system is used, these rights are claimed from different parties: in the first case, the transmitting broadcaster and, in the second, the event organiser.

In some situations, however, simply granting access to an event is not enough, since broadcasters may not be able to report from the venue due to lack of financial resources or the limited capacity of the venue. Therefore, it is necessary either just to guarantee direct access to the signal (as in Austria) or to force broadcasters who produce short reports to transmit them to other broadcasters who cannot be admitted for capacity reasons (as in Germany). The highest possible level of protection would be achieved if a broadcaster who wished to transmit short reports were allowed to choose between these options.

The right of access to other broadcasters' signals throws up the question of the obligation to mention the source. Such an obligation would not be considered harmful to the right of short reporting, since it would not adversely affect the function of short reports, i.e. to inform the public. The broadcaster transmitting the report would automatically be expected to mention the source, and the intrusion on the primary broadcaster's rights would be lessened if its name were mentioned. However, the Austrian legislator, for example, has not laid down such an obligation.

Although the Council of Europe Recommendation favours the right to produce short reports free of charge, a fee is usually payable. In many legal systems, the requirement that a fee be charged is derived directly from constitutional law.

The 90-second upper limit is usually applicable. However, if this rule is liberally interpreted, as in Austria, the news-type character of such reporting can be lost if a large number of short reports are broadcast. For example, if 90 seconds is devoted to each of 10 matches played in a 20-club football league on a single day, along with comments between matches, studio interviews and league tables, the news programme concerned in fact becomes a sports programme.

As the situation in Germany shows, the right to short reporting tends to be only indirectly significant if contractual agreements are regularly concluded. Nevertheless, in such cases, the very existence of this right facilitates the agreement, under acceptable conditions, of contractual rights that extend beyond what is required by the law.

C. Conclusions

The principal danger linked to the development of the modern Information Society, alongside all its benefits, is the risk of splitting society into groups with different levels of access to information. A strategy that seeks to reduce this risk must, on the one hand, attach great importance to the public's right of access to information held by the State.⁵² On the other hand, it must be able to deal with private law agreements that threaten to exclude the general public (or sections of it) from information. Obstacles to access mainly affect major events that can be marketed profitably. Over the past 20 years, conflicts between access and broadcasting rights have become increasingly common. For many years, it has no longer been a matter of individual cases, but of the general question of how these long-term conflicts of interest can be resolved.

Nobody disputes the legitimacy of granting exclusive rights. This process is not only a demonstration of private autonomy, but is often also interrelated with events themselves, insofar as it contributes substantially to their financing. It is immensely important for the electronic media in particular and absolutely essential where some business models are concerned.

There are numerous parallels between list regulations and provisions on the right to short reporting with regard both to the factual background against which each regulation was adopted and to the basic pattern of the legal problem they are designed to resolve. Nevertheless, they tend to belong to completely separate regulatory structures, even though the relevant measures are often introduced at the same time.

Based on the need to resolve the aforementioned conflicts of interest as fairly as possible, Art. 3a of the "Television without Frontiers" Directive is an example of the principle of proportionality (and the subsidiarity principle) being exercised in EC law. Rather than deny pay-TV providers exclusive access to certain sports across Europe, this only happens when actually required by the importance of the event for society. Ultimately, the acquisition of certain rights is not prohibited, but rather the exercise of those rights is regulated. Instead of having to implement a Europe-wide list, in which a cricket tournament, for example, could be classified as being of major importance to society, even in countries where the sport is virtually unknown, each Member State is able to bring its own social characteristics into the equation. Rather than implementing compulsory EU regulations, countries which introduce their own lists are rewarded because all other Member States are obliged to respect those lists. As a result, a pay-TV operator may, for example, purchase the rights to a whole tournament in a particular sport and must "only" provide access via free-TV to individual events or to those listed in certain countries.

The right to short reporting enables broadcasters to produce news reports in situations where, for private law or practical reasons, they would be otherwise impossible, for example because exclusive broadcasting rights to an event have been granted or access to the event venue is restricted (an example could be the increasingly remote venues chosen for inter-governmental conferences due to fear of disruption by anti-globalisation protesters).

Despite the aforementioned formal separation of the two areas, the existence of both types of regulation within a legal system appears to comply perfectly with the provisions of Article 10 of the ECHR by guaranteeing public access to information about important events. The proposed introduction of a right to short reporting for television broadcasters will complete the Community law provisions in this area. It will also ensure comprehensive protection at European level of the public's right of access to information and reports on certain events.

- 1) The Bosman ruling, for example, mentions the considerable social importance of sport, see ECJ, C-415/93, Rec. 1995, I-5040.
- 2) See Berengeno, Die exklusive Berichterstattung über sportliche Großereignisse im Pay TV, Cologne 2001, pp. 14 et seq., available at: <http://kups.uni-koeln.de/volltexte/2003/348/pdf/11v4303.pdf>
- 3) See Schneider (ed.), Sport und Medien in Europa – Beiträge zu den 5. Saarbrücker Medientagen, MDV, Saarbrücken 1997.
- 4) See Scheuer/Strothmann, Sport as Reflected in European Media Law, Part 1, IRIS plus 2004-2, pp. 5 et seq.; and Scheuer, Abschluss der Bereichsuntersuchung zu Sportinhalten über 3G, MMR 2005, vol. 11, p. XIV.
- 5) The first live football broadcast took place in Germany in 1952, not long after regular broadcasting began. As well as sport, other important events, such as the coronation and state visits of Queen Elizabeth II, were transmitted live in the early days of TV broadcasting.
- 6) Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ L 298 of 17 October 1989, p. 23, as amended by Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997, OJ L 202 of 30 July 1997, p. 60 (“Television without Frontiers Directive”).
- 7) European Convention on Transfrontier Television of 5 May 1989; amended by the Protocol of 1 October 1998.
- 8) In many cases, organisers also grant short reporting rights on the basis of private-law agreements in order to expose as many people as possible to the event. For the 1996 Olympic Summer Games, for example, the International Olympic Committee introduced guidelines which were meant to give competitors short reporting rights independently of the rightsholder. Football’s major governing bodies FIFA and UEFA also often reserve the right to grant short reporting rights to third parties when they sell broadcasting rights.
- 9) See Holznagel, Der Zugang zu Premium-Inhalten: Grenzen einer Exklusivvermarktung nach Europäischem Recht, K&R 2005, pp. 385 et seq..
- 10) For detailed discussion of the right of access to information, see Ader/Schoenthal, Access to Information on Government Action, especially from the Media Point of View, IRIS plus 2005-2.
- 11) Scheuer/Strothmann, op.cit., p. 3; ruling of the German *Bundesgerichtshof* (Federal Supreme Court) of 11 December 1997, case no. KVR 07/96, point B I 5 b) aa), IRIS 1998-1:7; and ruling of 8 November 2005, case no. KZR 37/03, IRIS 2005-10: 9.
- 12) In France, for example, Art. 18-1 of the Act of 16 July 1984 as amended by the Act of 1 August 2003, supplemented by Decree 2004-699 of 15 July 2004, see IRIS 2004-8: 8.
- 13) Scheuer/Strothmann, op.cit., p. 3.
- 14) For more details, see Guibault/Melzer, The Legal Protection of Broadcast Signals, IRIS plus 2004-10.
- 15) It has been argued, however, that these losses are relatively insignificant. See Kruse, Wirtschaftliche Wirkungen einer unentgeltlichen Sport-Kurzberichterstattung im Fernsehen, Baden-Baden 1991. Short reporting rights have also been shown to have an advertising effect for the event itself or, where longer reports are concerned, a beneficial impact on the effectiveness of advertising carried out at the event venue (perimeter advertising). However, rightsholders could also achieve these benefits via contractual agreements. They therefore do not perceive the need for a legally imposed right to short reporting.
- 16) Gröpl, Rechtsfragen bei der Rundfunkübertragung von Sportereignissen, ZUM 2004, p. 865 (867).
- 17) See the decision of the German *Bundesverfassungsgericht* (Federal Constitutional Court) in vol. 97, p.228 (259 et seq.), IRIS 1998-3: 7.
- 18) See Gröpl, op.cit., p.865 (869).
- 19) Ader/Schoenthal, op.cit., p.3; T. McGonagle, in: Political Debate and the Role of the Media, IRIS Special 2004-2, p.8; Villiger, Handbuch der EMRK, Schulthess Verlag, Zürich 1993, Rz. 599.
- 20) ECHR, EuGRZ 1979, 386 (390) - Sunday Times; ECHR, EuGRZ 1995, 16 (20) - Observer & Guardian.
- 21) ECHR, Guerra/Italy; EuGRZ 1999, 188, Rz. 53.
- 22) Since the provisions of Article 3a do not cover providers of non-linear audiovisual services, the proposal for an amendment to the Television Without Frontiers Directive does not alter the legal situation. See European Commission, Proposal for a Directive of the European Parliament and of the Council amending Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, COM(2005) 646 final, of 13 December 2005, available at: http://www.europa.eu.int/information_society/newsroom/cf/itemlongdetail.cfm?item_id=2343
- 23) Proposal for a Directive of the European Parliament and of the Council amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities of 21 May 1995, COM(95) 86 final, p. 27, OJ C 185/4 of 19 July 1995; Amended proposal for a Directive amending Directive 89/552/EEC, COM(96) 200 final, OJ C 221 of 30 July 1996, p.10.
- 24) Common Position (EC) No. 49/96 adopted by the Council on 8 July 1996 with a view to adopting a Directive of the European Parliament and of the Council amending Directive 89/552/EEC, OJ C 264 of 11 September 1996, p.52.
- 25) Resolution of 22 May 1996 on the broadcasting of sports events, OJ C 166 of 10 June 1996, p.109.
- 26) Recommendation for second reading on the common position established by the Council with a view to the adoption of a European Parliament and Council Directive amending Directive 89/552/EEC, Committee on Culture, Youth, Education and the Media (Rapporteur: Gerardo Galeote Quecedo), 31 October 1996, doc. no. A4 - 0346/96, proposed amendments nos. 28 and 29.
- 27) Decision of the European Parliament of 12 November 1996 on the common position adopted by the Council with a view to the adoption of a European Parliament and Council Directive amending Council Directive 89/552/EEC, OJ C 362 of 2 December 1996, p.56.
- 28) Ibid.
- 29) For more information, particularly regarding the German position, see Knothe/Bashyan, AFP 1997, 849, 856.
- 30) Craufurd Smith/Böttcher, European Public Law 2002, März, p. 107.
- 31) Judgment of the Court of First Instance of 15 December 2005, T-33/01, Infront WM/Commission, published in the Official Journal of 10 February 2006.
- 32) The guidelines are available at: http://www.coe.int/T/E/Human_Rights/media/2_Transfrontier_Television/default.asp#TopOfPage
- 33) See the Committee’s meeting report, doc. CDMC(2005)028, available on the Council of Europe website: <http://www.coe.int>
- 34) Recommendation No. R (91) 5 of the Committee of Ministers to member states on the right to short reporting on major events where exclusive rights for their television broadcast have been acquired in a transfrontier context, adopted by the Committee of Ministers on 11 April 1991 at the 456th meeting of the Ministers’ Deputies.
- 35) Jung, Die Empfehlungen des Ministerkomitees des Europarates, in: Festschrift für Georg Ress, Carl Heymanns Verlag, Köln-Berlin-München 2005, pp. 519 et seq..
- 36) However, the primary broadcaster’s transmission does not necessarily have to be recorded, particularly since in some circumstances this renders it impossible to complete the short report in time and can result in a loss of quality. Usually, access to the “clean feed” signal is possible at the rear of the primary broadcaster’s outside broadcast unit.
- 37) At present, this is only mentioned in the German language version. The other versions that have been published refer to intermediaries in Recital 27, but not in Article 3b.
- 38) See, for example, the ruling of the *Reichsgericht* (German Supreme Court) of 7 November 1931, RGZ 133, p. 388 (392).
- 39) Beck’scher Kommentar-Michel/Brinkmann, Verlag C.H. Beck, Munich 2003, § 5, para. 31.
- 40) Article 71j of the *Mediawet* (Media Act). See Hins, Uitzendrechten voor belangrijke evenementen en de EG-Televisierichtlijn, Mediaforum 1998-11/12, pp. 318 et seq..
- 41) Judgment of 25 July 2001, available at <http://www.parliament.the-stationery-office.co.uk/pa/ld200102/ldjudgmt/jd010725/dan-1.htm>
- 42) IRIS 2001-8: 9.
- 43) Beck’scher Kommentar-Michel/Brinkmann, § 5, para. 33.
- 44) A clue to the size of these fees is given by the Austrian *Bundeskommunikationssenat* (Federal Communications Office - BKS). Referring to “typical international” fees of EUR 1,000 to 9,000 per minute or part thereof, it considered a fee of EUR 1,000 per minute, calculated to the nearest second, for the Austrian football Bundesliga to be appropriate. See the judgment of the Austrian *Verwaltungsgerichtshof* (Administrative Court) of 20 December 2005, case no. Zl. 2004/04/0199-11, IRIS 2006-3: 10.
- 45) Judgment of 17 February 1998, case no. 1 BvF 1/91, BVerfGE 97, p.228.
- 46) Beck’scher Kommentar-Michel/Brinkmann § 5 para. 111.
- 47) Ibid.
- 48) The Act also contains provisions on lists of events, see Articles 2-4; see also Art. 55 *Privatfernsehgesetz* (Private Television Act) and Art. 12 *Bundesgesetz über den Österreichischen Rundfunk* (Federal Act on the Austrian Broadcasting Corporation).
- 49) See footnote 44.
- 50) Here, “matchday” means a day on which one or more league matches are played. A “round of matches” is a different concept and can consist of several matchdays (eg Friday, Saturday and Sunday). In its judgment, the VGH stressed that the Austrian rules were based on the Council of Europe Recommendation, which it took into account in its interpretation.
- 51) IRIS 2006-4: 7.
- 52) See Ader/Schoenthal, op.cit..