

# Sports as Policy Levers in Intellectual Property Lawmaking

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## 1. INTRODUCTION

In the academic community, I know only few people who are as fanatic about intellectual property and sports as Bernt Hugenholtz is. Given his love for both, I reckon that he sometimes has difficulties accepting how the development of intellectual property, as he would favour it, is hindered by the way organisers of sporting events want to protect the sports broadcasting business model. His calls for abolishing neighbouring rights (and other intellectual property rights that are based on a misguided investment rationale),<sup>1</sup> against the adoption of a new broadcasting treaty,<sup>2</sup> for removing unnecessary territorial barriers in intellectual property law,<sup>3</sup> and for creating an EU copyright code,<sup>4</sup> are less likely to be followed if sports organisers could decide on the future directions in intellectual property law.

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1. See P.B. Hugenholtz, 'Neighbouring Rights are Obsolete', 50 *IIC* (2019), 1006–1011; and P.B. Hugenholtz, 'De naburige rechten hebben hun tijd gehad', 6 *AMI* (2018), 243–244.
  2. See P.B. Hugenholtz, 'The WIPO Broadcasting Treaty: A Conceptual Conundrum', 41(4) *EIPR* (2019), 199–202.
  3. See e.g. P.B. Hugenholtz, 'Making the Digital Single Market Work for Copyright. Extending the Satellite & Cable Directive to content services online', in M. Franzosi, O. Pollicino and G. Campus (eds), *The Digital Single Market Copyright: Internet and Copyright Law in the European Perspective* (Diritto e policy dei nuovi media 8, Aracne editrice, 2016), 51–65.
  4. Bernt Hugenholtz is one of the founders of the Wittem Group that drafted the European Copyright Code. See Wittem Group, *European Copyright Code* (2010), <https://www.ivir.nl/copyrightcode/introduction/>. See also P.B. Hugenholtz, 'The Wittem Group's European Copyright Code', in: T.E. Synodinou (ed.) *Codification of European Copyright Law: Challenges and Perspectives*, Information Law Series 29 (Kluwer Law International, Alphen aan den Rijn, 2013), 339–354.

Over the years, major sports organisations such as the International Olympic Committee, FIFA, UEFA, Formula One, the International Tennis Federation, 6 Nations Rugby, IAAF Athletics, the Ryder Cup, World Snooker, the Tour de France and many others have been actively engaged in policy debates at the World Intellectual Property Organization (WIPO) and the EU legislative bodies to safeguard the protection of sports events through intellectual property law. For this purpose, these organisations have combined their efforts and formed the Sports Rights Owners Coalition (SROC).<sup>5</sup> The SROC represents over 50 international and national sports bodies and competition organisers and has been established ‘to enable dialogue and sharing of best practices on key legal, political and regulatory issue[s]; to raise awareness of new developments and innovation in sports rights; [and] to take joint action to protect and promote its members’ rights’.<sup>6</sup> Following its core mission to seek proper recognition of the value of sport by governments around the globe and effective protection for sports rights under national and international law, the SROC urges national and supranational authorities, amongst other things, to prevent the piracy of sports event broadcasts and to get the special nature of sport and sports rights fully recognised, protected and promoted.<sup>7</sup>

This chapter discusses recent endeavours undertaken by sports organisers to preserve the broadcast business model for live sports coverage and contrasts them with critical accounts in legal scholarship, including those of Bernt Hugenholtz. This includes attempts to strengthen broadcasters’ rights (section 2), to establish a new right for sports event organisers (section 3) and to prevent the EU legislator from removing national territorial barriers (section 4). A brief conclusion cautions against the effects of a dominant market player influencing intellectual property law and policymaking (section 5).

## 2. THE PROTECTION OF (LIVE) SPORTS EVENTS THROUGH BROADCASTING RIGHTS

Sports undoubtedly have had an influence on the development of intellectual property law. While sports as such are not protected as subject-matter of intellectual property,<sup>8</sup> legislators around the world have long acknowledged the importance of protecting broadcasting rights to prevent the piracy of telecasts and webcasts of (live) sports events. In 1961, when broadcasting rights were first introduced at the international level by the Rome Convention for the Protection

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5. WIPO, ‘Accreditation of Certain Non-Governmental Organizations’, SCCR/S2/2, Geneva, 29 May 2007, [https://www.wipo.int/edocs/mdocs/copyright/en/sccr\\_s2/sccr\\_s2\\_2.pdf](https://www.wipo.int/edocs/mdocs/copyright/en/sccr_s2/sccr_s2_2.pdf).

6. See Sports Rights Owners Coalition: About, <https://www.sroc.info/about/>.

7. WIPO, *supra* note 5, at 6. Other issues that the SCOR actively engages with are the outlawing of ‘ambush marketing and ticket touting/scalping’ and the creation of ‘a regime for sports betting that enables sport to protect its integrity, and establishes a fair return to sports for the use of their events by betting operators’. These issues will not be further discussed in this chapter.

8. On the protection of sports as subject-matter of intellectual property, see amongst others, the contributions by Bently, Dusollier, Grosheide, Janssens and Synodinou in this volume.

of Performers, Producers of Phonograms and Broadcasting Organizations,<sup>9</sup> the protection of sports events was not yet an issue. However, in those days, there was also no genuine need for such protection, because the market for sports broadcasting was still in its infancy.<sup>10</sup> Indeed, as the *travaux préparatoires* of the Rome Convention reveal, sports organisations were not present at the diplomatic conference in Rome and the question of sports rights was not discussed,<sup>11</sup> other than whether sportspersons could benefit from the protection under the Convention if a Contracting State would extend this protection to ‘artists who do not perform literary or artistic works’, as permitted under Article 9.<sup>12</sup>

The need for protecting the coverage of (live) sports events by broadcasting rights increased with the economic importance that the broadcasting of major sports events gained in the television market in the last decades of the twentieth century.<sup>13</sup> On some occasions, this need for protection became so strong that a direct impact of sports on intellectual lawmaking initiatives in the field of intellectual property can be witnessed. A perfect example is the enactment of the Neighbouring Rights Act in the Netherlands in 1993. While the need for neighbouring rights protection had already been discussed for several years in Dutch academic literature, plans to adopt such rights never really stood a chance at the policy level. This was due, in part, to resistance from authors, who were afraid that if protection were granted to performers, they would have to share the copyright revenues pie with them. In addition, policymakers were afraid that the introduction of neighbouring rights would be too costly for public broadcasting organisations, as it would require them to also clear rights in performances and sound recordings included in their broadcasts.<sup>14</sup> Dutch policy discussions changed overnight, however, when the Netherlands announced a serious bid to organise the 1992 Summer Olympics. This made Dutch policymakers understand that broadcasters also have a genuine interest of their own in neighbouring rights protection. In 1986, the Minister of Justice and the Minister of Welfare, Health and Culture wrote: ‘[Neighbouring rights] protection of television broadcasts is vital in order to safeguard the potential financial benefits which the organising committee of the 1992 Olympic Games, which may be held in Amsterdam, may derive from the use of the relevant audiovisual recordings.’<sup>15</sup> Eventually the Dutch

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9. See the authentic text of the Rome Convention at <https://wipolex.wipo.int/en/text/289795>.

10. See H.A. Solberg, ‘The Economics of Television Sports Rights: Europe and the US – A Comparative Analysis’, 9(2) *Norsk medietidsskrift* (2002), 57–80, <https://doi.org/10.18261/ISSN0805-9535-2002-02-04>.

11. See Records of the Diplomatic Conference on the International Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Rome, 10 to 26 October 1961 (ILO, UNESCO & BIRPI, 1968).

12. *Ibid.* at 87 (point 165), Mr. García-Noblejas from Spain recalling ‘the importance of certain means of retransmitting sporting events, such as boxing, for instance’ while stating that a boxer would ‘not lay claim to the title of artiste, and no one would think of referring to him as such’.

13. Solberg, *supra* note 10.

14. G.J. Heevel, ‘Korte terugblik: WNR 1993 vanuit historisch perspectief’, 6 *AMI* (2018), 236–242, at 238.

15. *Kamerstukken II* 1985/86, 19435, no. 1, p. 7.

bid was unsuccessful,<sup>16</sup> but the adoption of neighbouring rights protection in the Netherlands was certainly triggered by the prospect of acquiring revenues from the global sale of rights to broadcast a major sports event such as the Olympic Games.<sup>17</sup>

Although this Dutch example may still be seen as an incident of the influence of sports on intellectual property lawmaking, in recent years, organisers of sports events have intervened more structurally in policy initiatives in this area. Since 2007, the SROC has an observer status in sessions of the WIPO Standing Committee on Copyright and Related Rights to monitor the development of the proposed WIPO Treaty on the Protection of Broadcasting Organizations. Greatly concerned by the fight against piracy of sports competitions,<sup>18</sup> SROC members believe ‘that the Treaty could play an important role in the global fight against piracy and they share the concerns of broadcasters over piracy of broadcasters’ signals and the inadequacy of the Rome Convention to deal with that form of piracy.’<sup>19</sup> In particular, the SROC calls upon WIPO Member States to adopt a Treaty which is technology-neutral in its application, enabling the combat of piracy of broadcasts of (live) sports events on any relevant technological platform. Furthermore, it believes that the benefits of the protection established by the WIPO Broadcasting Treaty should also be enjoyed by owners of the underlying sports rights, either by respecting the contractual arrangements entered into between sports rights holders and broadcasters, or ‘preferably by a direct recognition of our interests and rights therein’.<sup>20</sup>

But is strengthening broadcasters’ rights by adopting a Treaty to that effect really needed to protect against the piracy of live sports events? Bernt Hugenholtz thinks not. While recognising that ‘[i]llegal streaming of broadcast signals is a serious problem’, he argues that ‘broadcasters in most countries already enjoy solid legal protection against signal piracy and other unauthorised uses.’<sup>21</sup> This is the case even for live sports events that are broadcast in real time. He explains that in most countries of the civil law tradition, where fixation of a work is not a prerequisite for copyright, the ‘live coverage of a sporting event will qualify as a protected audiovisual work if it is the product of creative choices. For example, live coverage of a Champions League football match that involves, at the very least, multiple camera operators, several commentators and a director, will easily

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16. The 1992 Summer Olympics were held in Barcelona.

17. See e.g. D.J.G. Visser, ‘Van James Last tot Berdien Stenberg: tien jaar WNR in vogelvlucht’, 6 *AMI* (2003), 189–193, at 189; G.J. Heevel, ‘Beoogd en daadwerkelijk verkregen profijt van tien jaar WNR’, 6 *AMI* (2003), 194–202, at 196.

18. See *Background Report on Digital Piracy of Sporting Events* (Envisional, Cambridge & NetResult, London, 2008) <https://ininet.org/background-report-on-digital-piracy-of-sporting-events.html>; and *Update on Digital Piracy of Sporting Events*, report commissioned by the SROC (NetResult, London & Envisional, Cambridge, 2011) [https://www.wipo.int/export/sites/www/ip-sport/en/pdf/piracy\\_report\\_2011.pdf](https://www.wipo.int/export/sites/www/ip-sport/en/pdf/piracy_report_2011.pdf).

19. WIPO, *supra* note 5, at 6.

20. SROC Position on the WIPO Broadcasting Treaty, 10 April 2013, [https://www.sroc.info/wp-content/uploads/2018/04/SROC\\_Position\\_on\\_WIPO\\_Broadcasting\\_Treaty\\_-\\_Final.pdf](https://www.sroc.info/wp-content/uploads/2018/04/SROC_Position_on_WIPO_Broadcasting_Treaty_-_Final.pdf).

21. See Hugenholtz, *supra* note 2, 202.

pass this test.<sup>22</sup> But also in countries where copyright requires prior fixation of a work, such as the United States of America and the United Kingdom, broadcasters are not empty-handed, because they ‘may invoke copyright protection for ancillary content such as leaders, graphics, animations, replays and other (pre) recorded audiovisual content included in live sports broadcasts’.<sup>23</sup> Moreover, in many countries, broadcasters can ‘rely on the general law of unfair competition to support claims against signal pirates’, or perhaps fall back on ‘general criminal statutes or special laws on telecommunications secrecy or cybercrime’ that qualify theft of pre-broadcast signals as a criminal act.<sup>24</sup>

Accordingly, while there is need to tackle piracy and other illegal online transmissions of sports event broadcasts, this does not warrant the adoption of a Treaty with extended broadcasters’ rights.

### 3. ESTABLISHING A NEW RIGHT FOR SPORTS EVENT ORGANISERS

Other than strengthening broadcasters’ rights, sports organisers also want to have their own rights recognised.<sup>25</sup> This is an ambitious proposition, because at least in Europe the status of sports organisers’ rights has not been established.<sup>26</sup> In *Football Association Premier League and Others*, the Court of Justice of the European Union (CJEU) ruled that sports events cannot be protected under copyright, while acknowledging that EU law does not protect them on any other basis in the field of intellectual property.<sup>27</sup> Still, the CJEU confirmed that it is permissible for a Member State to protect sports events by its domestic legislation, including through intellectual property law, specific national legislation (such as the so-called ‘house right’ – an access right to a venue, on the basis of which unauthorised persons and media can be conditionally allowed or denied entry), or contractual arrangements between sports organisers and broadcasters.<sup>28</sup> For sports event organisers, such legal protection is important, since it enables them to grant licences to broadcast the sports events they organise. This represents an important source of income for sports event organisers.

For this reason, the legal protection of sports event organisers is also discussed at the EU policy level. In the legislative process leading to the adoption of the Directive on Copyright in the Digital Single Market, the JURI Committee of the European Parliament proposed a new Article 12a instructing the Member

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22. *Ibid.*, at 202.

23. *Ibid.*, at 202, with reference to CJEU, 4 October 2011, joined cases C-403/08 and C-429/08, ECLI:EU:C:2011:631, *Football Association Premier League and Others*, [2011] ECR I-9083, para. 149.

24. *Ibid.*, at 202.

25. See e.g. SROC Position Paper on the Asser Study on Sports Organisers’ Rights in the European Union, November 2013, [https://www.sroc.info/wp-content/uploads/2018/04/SROC\\_position\\_paper\\_on\\_Asser\\_Study\\_-\\_08\\_11\\_13.pdf](https://www.sroc.info/wp-content/uploads/2018/04/SROC_position_paper_on_Asser_Study_-_08_11_13.pdf), at 8.

26. See e.g. T. Margoni, ‘The protection of sports events in the EU: Property, intellectual property, unfair competition and special forms of protection’, 47 *IIC* (2016), 386–417.

27. CJEU, 4 October 2011, *supra* note 23, para. 99.

28. *Ibid.*, para. 102.

States to provide sports event organisers with the exclusive rights of fixation, reproduction and making available to the public.<sup>29</sup> While the European Parliament approved this amendment on 12 September 2018,<sup>30</sup> the provision did not find sufficient support in the ‘trilogue’ negotiations with the European Commission and the Council and was therefore abandoned. The Commission issued a statement, however, that in view of the importance of sports event organisations and their role in financing sport activities in the EU, it ‘will assess the challenges of sport event organisers in the digital environment, in particular issues related to the illegal online transmissions of sport broadcasts’.<sup>31</sup> This is in line with Article 165 of the Treaty on the Functioning of the European Union (TFEU), according to which the Union shall contribute to the promotion of European sporting issues.

More recently, on 19 May 2021, the European Parliament issued a Resolution with recommendations to the Commission on challenges of sports event organisers in the digital environment. Interestingly, this resolution sets out ‘that the creation in Union law of a new right for sports events organisers will not provide a solution as regards the challenges they face that arise from a lack of effective and timely enforcement of their existing rights’.<sup>32</sup> This echoes the findings of a new report of the JURI Committee of the European Parliament. In line with Hugenholtz’ position outlined above (section 2), which also clearly surfaces in a 2014 study that was conducted under his supervision,<sup>33</sup> this JURI report asserts that there is already a sufficient arsenal of rights protecting the broadcasting of live sports events.<sup>34</sup> The problem therefore is not that sports event organisers have no means to initiate legal action against the unauthorised transmission of live sports events. The real problem is that the economic value

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29. European Parliament, Committee on Legal Affairs (rapporteur: Axel Voss), Report on the proposal for a directive of the European Parliament and of the Council on copyright in the Digital Single Market (COM(2016)0593 – C8-0383/2016 – 2016/0280(COD)), A8-0245/2018, 29 June 2018. The proposal read: ‘Member States shall provide sport event organizers with the rights provided for in Article 2 and Article 3 (2) of Directive 2001/29/EC and Article 7 of Directive 2006/115/EC’.

30. Amendments adopted by the European Parliament on 12 September 2018 on the proposal for a directive of the European Parliament and of the Council on copyright in the Digital Single Market (COM(2016)0593 – C8-0383/2016 – 2016/0280(COD), P8\_TA(2018)0337, Amendment 76.

31. European Commission, ‘Statement on sport event organisers’, annexed to the European Parliament legislative resolution of 26 March 2019 on the proposal for a directive of the European Parliament and of the Council on copyright in the Digital Single Market, OJ C 108/231, 26 March 2021.

32. European Parliament resolution of 19 May 2021 with recommendations to the Commission on challenges of sports events organisers in the digital environment (2020/2073(INL)), P9\_TA(2021)0236, para. 24.

33. B. van Rompuy & T. Margoni (project leader: P.B. Hugenholtz), *Study on sports organisers’ rights in the European Union* (T.M.C. Asser Instituut (Asser International Sports Law Centre) & Institute for Information Law, University of Amsterdam, February 2014), 24–60.

34. European Parliament, Committee on Legal Affairs (rapporteur: Angel Dzhambazk), Report with recommendations to the Commission on challenges of sports events organisers in the digital environment (2020/2073(INL)), A9-0139/2021, 23 April 2021, at 16–17 (explanatory statement).

of many sports events, such as football matches, boxing or cycling races, lies in the ‘live’ broadcast and that it is difficult to instantly enforce rights against pirates of sports events that are broadcast live. As Angel Dzhabazk, the JURI rapporteur, observes:

Unlike other content, such as films, series or books (and possibly some sport events such as ice dance competitions based on choreography which is of interest and that still has value years after the event ends) the main harm is caused during the event and the window for relevant action against piracy is short and is, basically, the duration of the event. Given the specificity of ‘live’ sport event broadcast, the relevant remedy should be the immediate termination of the unauthorised broadcast, before it has lost its value.<sup>35</sup>

Rather than establishing a new right for sports event organisers, therefore, the European Parliament recommends strengthening enforcement measures to enable rightholders to more effectively tackle piracy of live sports event broadcasts. It specifically calls on the Commission to assess the impact and appropriateness of introducing injunction procedures aimed at allowing real-time disabling of access to, or removal of, illegal online live sports event content, based on the model of ‘live’ blocking orders and ‘dynamic injunctions’.<sup>36</sup> It also suggests involving ‘certified trusted flaggers’ in notice and action procedures by requiring content hosting platforms to immediately remove or disable access upon a notification of an illegal broadcast of a live sports event by a certified trusted flagger.<sup>37</sup>

Such measures may indeed be more effective to fight online piracy of live sports event broadcasts than the creation of a new intellectual property right. However, as the CULT Committee of the European Parliament also emphasises, this should be accompanied by adequate safeguards to prevent that such measures affect ‘press freedom, the news media’s ability to inform citizens or to access information, freedom of expression and consumer privacy online’.<sup>38</sup> For this reason, the Resolution underlines that it must be ensured that real-time blocking measures strictly target illegal content only and do not lead to the arbitrary, excessive and collateral blocking of legal content.<sup>39</sup> Moreover, the enforcement measures must be transparent, respect the ban on general monitoring, safeguard

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35. *Ibid.*, at 15–16.

36. European Parliament resolution of 19 May 2021, *supra* note 32, para. 20.

37. *Ibid.*, paras. 16–17.

38. European Parliament, Opinion of the Committee on Culture and Education (rapporteur: Tomasz Frankowski) for the Committee on Legal Affairs with recommendations to the Commission on challenges of sports events organisers in the digital environment (2020/2073(INL)), 28 January 2021, para. 13.

39. European Parliament resolution of 19 May 2021, *supra* note 32, para. 21, pointing to the case-law of the European Court of Human Rights (ECtHR) according to which the illegal nature of specific content does not justify the collateral blocking of legal content hosted by the same website or server (see e.g. ECtHR (Second Section) of 1 December 2015, *Cengiz and Others v. Turkey*, Appl. nos. 48226/10 and 14027/11, paras. 54–56; ECtHR (Third Section) of 23 June 2020, *OOO Flavius and Others v. Russia*, Appl. nos. 12468/15, 23489/15 and 19074/16, para. 38; and ECtHR (Third Section) of 23 June 2020, *Vladimir Kharitonov v. Russia*, Appl. no. 10795/14, para. 46).

the protection of fundamental rights and personal data, offer effective judicial remedies, and include adequate complaint and redress mechanisms in notice and action procedures.<sup>40</sup>

Providing customers with sufficient legal alternatives to access live sports event broadcasts may be more important, however, to effectively tackle online piracy.<sup>41</sup> In this light, the CULT Committee in its opinion calls on the Member States to support the broadcasting of major sport events such as the FIFA World Cup or the Olympic Games on free-to-air television ‘as a form of popular culture that plays an important part in the lives of citizens’.<sup>42</sup> But policymakers could do more to encourage sports event organisers to offer consumers affordable, convenient and diverse access to live broadcasts of sports events. As Quintais and Poort argue, they ‘ought to shift their focus from repressive approaches to tackle online infringement towards policies and measures that foster lawful remunerated access to copyright-protected content’.<sup>43</sup> In this respect, the European Parliament could have more strongly emphasised that sports event organisers also have a responsibility of their own to increase the availability of affordable legal content in a way that meets the demands of sports consumers.

#### 4. PRESERVING THE TERRITORIAL LICENSING MODEL OF (LIVE) SPORTS BROADCASTS

Sports event organisers have also been actively engaged in excluding (live) sports broadcasts from legislative actions at EU level aimed at removing national territorial barriers to the digital single market. In 2015, the SROC urged:

the European Commission to dismiss any overly far-reaching initiatives, which could negatively jeopardise the financing models of sports and the ability of sports bodies to fulfil their functions as sports events organisers and guardians of our sports. This is especially true of any potential general ban on territorial restrictions which SROC members believe would be extremely detrimental to European sports, to local broadcasting businesses and to the vast majority of European consumers.<sup>44</sup>

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40. *Ibid.*, paras. 13, 17 and 22.

41. J.P. Quintais and J. Poort, ‘The Decline of Online Piracy: How Markets – Not Enforcement – Drive Down Copyright Infringement’, 34(4) *American University International Law Review* (2019), 807–876. See also J. Poort and J. Weda, ‘Elvis Is Returning to the Building: Understanding a Decline in Unauthorized File Sharing’, 28(2) *Journal of Media Economics* (2015), 63–83, DOI: 10.1080/08997764.2015.1031904.

42. European Parliament, Opinion of the Committee on Culture and Education on challenges of sports events organisers in the digital environment (2020/2073(INL)), 28 January 2021, *supra* note 38, para. 15.

43. Quintais & Poort, *supra* note 41, 876. Insofar as piracy concerns the live event, which as such may fail to meet copyright’s originality test, this guideline applies by analogy.

44. SROC Paper on the territoriality, cross-border access to content and portability issues, 22 May 2015, [https://www.sroc.info/wp-content/uploads/2018/04/SROC\\_position\\_paper\\_on\\_territoriality.pdf](https://www.sroc.info/wp-content/uploads/2018/04/SROC_position_paper_on_territoriality.pdf), 7.



In this respect, sports event organisers successfully managed to exclude '[a]udio-visual services, including services the principle purpose of which is the provision of access to broadcasts of sports events and which are provided on the basis of exclusive territorial licenses' from the scope of EU Regulation 2018/302, which prohibits unjustified geoblocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment in cross-border transactions within the EU.<sup>45</sup> They further achieved that the country of origin rule in the 2019 Online Broadcasting Directive, which aims to facilitate licensing by establishing that rights for broadcasters' 'ancillary online services' (such as simulcasting and catch-up services) only need to be cleared in the broadcasters' country of establishment, does not apply to television broadcasts of sports events and works and other protected subject matter included in them.<sup>46</sup>

As a result, broadcasting rights for sports events can still be licensed on an exclusive territorial basis. Broadcasters wishing to make sports event broadcasts available over the internet therefore require licences from all relevant right holders in all countries where access to the broadcasts is provided or otherwise they must apply geoblocking technologies to prevent their online services being accessible across borders.<sup>47</sup> One exception applies, however, for the cross-border portability of online content services that are subscription-based. The 2017 EU Portability Regulation requires providers of such services to provide subscribers who are temporarily travelling within the EU continued access to the online content services to which they have subscribed in their country of residence. To prevent that providers of such online services have to clear rights for this type of use in all the EU Member States, the Regulation introduces the legal fiction that the provision of the service 'shall be deemed to occur solely in the subscriber's Member State of residence'.<sup>48</sup> These portability rules also apply to online content services offering access to sports events,<sup>49</sup> which the SROC did not oppose.<sup>50</sup>

But can exclusive territorial licensing of broadcasting rights for sports events be justified? On the one hand, there may be good reasons for sports event

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45. Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC, *OJ L* 60/1, 2 March 2018, recitals 6 and 8.

46. Directive (EU) 2019/789 of the European Parliament and of the Council of 17 April 2019 laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes, and amending Council Directive 93/83/EEC, *OJ L* 130/82, 17 May 2019, Art. 3(1).

47. See e.g. H. Ruijsenaars, 'De Richtlijn online omroepdiensten: een brug te kort', 1 *Auteursrecht* (2021), 10–19, at 17 et seq., calling the 'unnecessary restrictions of the country of origin rule' in the 2019 Online Broadcasting Directive a 'missed opportunity'.

48. Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market, *OJ L* 168/1, 30 June 2017, Art. 4.

49. *Ibid.*, recitals 1, 5 and 6.

50. SROC, *supra* note 44, 7.

organisers to sell rights to broadcast sports events on a territory-by-territory basis. Especially in Europe, most broadcasters operate nationally and there is not automatically a high demand to deliver sports content outside national broadcasting markets.<sup>51</sup> Moreover, the popularity of sports differs between Member States and sports consumers in different countries often have different cultural and linguistic preferences when watching sports competitions and events. It would be difficult to cater to all such domestic demands if sports were broadcast on a pan-European level.<sup>52</sup> Territorial licensing further enables sports event organisers to engage in price discrimination between Member States, according to the value that consumers in various countries attach to the relevant sports event and the average income in those countries.<sup>53</sup> Exclusive territorial licensing also ensures that broadcasters investing in rights to broadcast sports events can maximise the value proposition associated with the relevant sports in the home market, while allowing sports bodies to seek new platforms to monetise their competitions outside of the home market.<sup>54</sup>

On the other hand, territorial exclusivity of sports event broadcasting may also conflict with market forces, as it prevents sports consumption shifting towards platforms that operate on a pan-European level.<sup>55</sup> It may further be at odds with consumer expectations, especially since many EU citizens live in another EU Member State and territorial restrictions may bar them access to sports competitions in their home country.<sup>56</sup> Territorial exclusivity thus also enhances the risk that consumers will revert to online piracy to gain access to (live) sports event broadcasts.<sup>57</sup> Finally, exclusive territorial licensing runs foul of EU competition law, if it has the effect or object of preventing or restricting distribution or distorting competition on the market.<sup>58</sup> This is the case, for example, if an exclusive licence for a pay TV service for sports prevents or restricts ‘passive’ sales in non-licensed territories,<sup>59</sup> by obliging the pay TV operator not to supply decoding devices to users outside the licensed territory.<sup>60</sup>

The latter was the outcome of the CJEU’s *Premier League* decision of 2011, which forced the Premier League to renegotiate its licensing agreements with

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51. *Ibid.*, 4–5, explaining that in the past, attempts were made to sell the rights to broadcast the English Premier League on a pan-European basis, but this ‘did not attract a single bid’.

52. *Ibid.*, 4.

53. *Ibid.*, 2–3.

54. *Ibid.*, 3.

55. See, in relation to films, P.B. Hugenoltz and J. Poort, ‘Film Financing in the Digital Single Market: Challenges to Territoriality’, 51 *IIC* (2020), 167–186, at 170.

56. *Ibid.*, 170–171.

57. *Ibid.*, 170.

58. See European Court of Justice (ECJ), 6 October 1982, case 262/81, ECLI:EU:C:1982:334, *Coditel v. Ciné Vog Films (Coditel II)*, [1982] ECR 3381, paras. 14 to 16, stating that an exclusive territorial licence in respect of film distribution may be, but is not, in itself, anti-competitive.

59. Hugenoltz and Poort, *supra* note 55, 177–178.

60. CJEU, 4 October 2011, *supra* note 23, paras. 134–146.

all broadcasters in the EU.<sup>61</sup> The new licensing terms disallow licensees outside the UK and Ireland to offer an optional English language feed to its consumers. To respect the UK blackout rule that prohibits the broadcasting of live football matches on Saturday from 2.45pm to 5.15pm, they further disallow licensees outside the UK to transmit more than one live Premier League match on Saturday afternoon.<sup>62</sup> Van Rompuy therefore maintains that Premier League fans in Europe are worse off after the *Premier League* decision, since they have to accept ‘less live Premier League matches and no more English commentary’.<sup>63</sup> He further argues that a blackout rule, especially if it is contractually imposed on broadcasters in other countries, has clear anti-competitive effects that are not outweighed by any possible justification.<sup>64</sup>

If it can conclusively be established that there are legitimate reasons based on the special economic characteristics of the sports broadcasting industries to allow temporary territorial exclusivity of sports event broadcasting, then recourse can perhaps be sought in ‘block exemptions’ issued by the European Commission.<sup>65</sup> Such block exemptions provide generic exemptions to the EU competition law rules for specific economic sectors or particular types of business practices, which may permit temporary territorial exclusivity in certain well-defined cases. As Hugenholtz observes, such block exemptions could be supplemented or substituted by guidelines based on the general rule of non-discrimination in Article 18 TFEU, which ‘could take the shape of “black” and “grey” lists well known from the field of consumer law’ to define which specific types of geoblocking and geographical discrimination based on territorial licensing are prohibited or conditionally permitted.<sup>66</sup> Otherwise, exclusive territorial licensing might have a hard time passing the test of EU competition law.

## 5. CONCLUSION

As this chapter demonstrates, sports organisations, which have been united in the SROC for the past decade-and-a-half, have actively lobbied at the international and EU levels to protect the business model for broadcasting (live) sports events through intellectual property law. For this purpose, they have called for extended rights for broadcasting organisations, for the introduction of a new right for sports event organisers, and for preserving their exclusive territorial licensing business model.

Many scholars, including Bernt Hugenholtz, on the other hand, have warned against a needless expansion of intellectual property rights. They have expressed

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61. Ben van Rompuy, ‘Premier League fans in Europe worse off after Murphy judgment’, *Kluwer Competition Law Blog*, 6 May 2014, <http://competitionlawblog.kluwercompetitionlaw.com/2014/05/06/premier-league-fans-in-europe-worse-off-after-murphy-judgment>.

62. *Ibid.*

63. *Ibid.*

64. *Ibid.*

65. Hugenholtz and Poort, *supra* note 55, 180, in respect of exclusive territorial licensing for films.

66. Hugenholtz, *supra* note 3, 64–65.

concerns that an extended protection or a new intellectual property right may impede access to culture, restrict freedom of expression and impact consumer rights. As Hugenholtz asserts: ‘Obviously, granting IP rights for no good reason can have serious consequences, both for the economy and for society at large. The temporary monopoly that an IP right entails does not only create an obstacle to freedom of competition.’<sup>67</sup>

Lawmakers should therefore exercise caution when specific interest groups try to influence the policy debate for their own good. They must critically assess whether there is truly a need for an extended protection and whether this does not lead to overprotection, with all the associated risks and societal costs. Although this seems like stating the obvious, over the past decades, we have witnessed various proposals for extended intellectual property protection passing into law, despite fierce criticism from the academic community.<sup>68</sup> Irrespective of his obvious love for sports, I doubt whether the described attempts to strengthen the protection of live sports broadcasts can meet Bernt’s approval, given his consistent scholarly quest for a ‘balanced’ intellectual property framework.

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67. Hugenholtz, *supra* note 2, 201.

68. See e.g. S.J. van Gompel, ‘Copyright, Doctrine and Evidence-Based Reform’, 8 *JIPITEC* (2017), 304–310.