

British & Irish Lions

lionsrugby.com



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By post and by email

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Dear Mr Davies

FREE-TO-AIR EVENTS REVIEW

Thank you for inviting British Lions Limited to provide its views on whether the UK Government should impose any restrictions on the sale of broadcasting rights to the British Lions Tour to subscription-service broadcasters. We are due to meet with you in person on 14 May 2009 to discuss this issue. In advance of that meeting, and to ensure our time together can be spent most productively, I am pleased to provide the following summary of British Lions Limited's comments:

1. Overview

- 1.1 The British & Irish Lions are a representative team drawn from the four national rugby unions of England (the Rugby Football Union), Scotland (Scottish Rugby Union plc), Ireland (the Irish Rugby Football Union) and Wales (Welsh Rugby Union Limited) (together, '*the home Unions*'). The team tours every four years, to New Zealand, South Africa and Australia in turn. This year the British & Irish Lions will tour to South Africa; in 2013 they will go to Australia; and in 2017 they will go to New Zealand.
- 1.2 The home Unions originally organised the British & Irish Lions tours via a committee known as the Four Home Unions Tours Committee. In the professional era, however, they have formed British Lions Limited, a private limited company incorporated in Ireland, to organise the tours (including contracting with the various members of the tour party, as well as with the host Union) and to raise the money needed to finance the tours by exploiting the commercial value of the British & Irish Lions. The four home Unions are equal shareholders in British Lions Limited, liable equally for any losses it incurs and eligible equally for any surplus it generates.
- 1.3 British Lions Limited does not own the broadcasting rights to tour matches played by the British & Irish Lions. Instead, those rights are owned by the Union hosting the particular tour, i.e., the South

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African Rugby Union (in respect of tours to South Africa), the New Zealand Rugby Football Union (Incorporated) (in respect of tours to New Zealand), or the Australian Rugby Union Limited (in respect of tours to Australia). This is important, because any listing of Lions matches would effectively amount to interference by the UK Government with the proprietary rights of foreign entities to matches played wholly outside the UK.

1.4 However, any such listing would also directly prejudice British Lions Limited and the four home Unions. British Lions Limited has reached an agreement with those Unions (the ‘SANZAR Unions’) to assist in the sale of the UK broadcasting rights to future tours in return for a share in the revenues generated by the exploitation of those broadcasting rights. That is a vitally important agreement, because British Lions Limited needs that income to cover the substantial costs of sending a large squad of professional rugby players and their entourage on tour, and (hopefully) to generate a small surplus to be distributed to the four home Unions as an incentive to keep supporting Lions tours in the future and to use to cover their own substantial costs of governing and developing the game in their respective territories. If the Lions tours were not to cover their own costs, and indeed to provide a surplus to incentivize support by the four home Unions, then the very concept of the Lions tour in the modern professional era would come under threat. It is therefore no exaggeration to say that any material decrease in the income derived from the exploitation of the broadcasting rights to the Lions tours (such as would inevitably follow from removal of subscription-based broadcasters from the market for such rights) could threaten the viability of future Lions tours.

1.5 With that background in mind, we turn to the three specific questions you have posed in your consultation paper. Each of the SANZAR Unions has reviewed and endorses the comments that follow.

2. **There is no proper basis, in law or in policy, for the expropriation (without compensation) of the proprietary rights of the SANZAR Unions to sell the UK broadcasting rights to Lions tour matches to the purchaser(s) of their choice.**

2.1 The only ‘rights’ at issue here are the SANZAR Unions’ respective property rights in the broadcasting of Lions matches. Those rights should not be interfered with unless there is clear and compelling justification, which is wholly absent here. They should certainly not be interfered with unless proper compensation is provided, particularly when that interference prejudices a vital income stream that the SANZAR Unions depend upon to discharge their governance and developmental responsibilities as custodians of the sport in their respective territories, and which British Lions Limited depends upon to cover the substantial costs of the Lions tours and to generate a surplus for the use of the four home Unions. The public interest in access to premium sporting events is adequately protected by the UK competition rules, which ensure that sports broadcasting rights are exploited on a level playing-field, in a fair and transparent manner that achieves a fair market value and also encourages innovation and investment in a rapidly-changing sector. Listing events constrains that competition artificially, and so limits the price paid for the rights, without any provision for proper compensation to fill the ensuing funding gap. In addition, contrary to the fundamental principle that Government should leave the running of sport to those with the necessary experience and expertise, listing of events also supplants the judgment of the SANZAR Unions and British Lions Limited as to how best to discharge the twin responsibilities of promoting their sport to the public at large and generating as much revenue as possible to finance their governance and developmental roles. British Lions Limited and the SANZAR Unions therefore disagree with the very concept of listing of events as a matter of principle.

A. *The Unions’ proprietary rights should not be interfered with absent clear and compelling justification*

2.2 British & Irish Lions tours may involve players who compete for the national representative rugby teams of the four participating home Unions, but they are not a public asset, owned by ‘the nation.’ Rather, they are a privately owned organised event, the commercial rights to which are owned and controlled by the SANZAR Unions and British Lions Limited. And as discussed above, the broadcasting rights are owned by the SANZAR Unions alone.

2.3 British Lions Limited acknowledges the substantial public interest in the British & Irish Lions team, and further acknowledges the responsibility of its shareholders, the four home Unions, as custodians of the game in their respective territories, to promote rugby union generally. However, British Lions

Limited does not accept that there is, or that there should be, a legally enforceable ‘right’ for members of the UK public to watch the British & Irish Lions tour matches on ‘free-to-air’ (‘FTA’) television.¹ To the contrary, the key right here is the SANZAR Unions’ proprietary right to sell the broadcasting rights to such matches as they see fit. That right, like any other property right, is entitled to legal protection. See Article 1 of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms: ‘*Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one may be deprived of his possessions except in the public interest and subject to conditions provided by law. ...*’.

- 2.4 Clearly this right is not absolute: as Article 1 expressly states, it may be compromised ‘*in the public interest and subject to conditions provided by law.*’ But the point is that this is not a question of balancing the competing rights of the event organiser on the one hand and the public on the other hand. Rather, the starting-point of the analysis should be that the proprietary rights of the SANZAR Unions should not be interfered with unless justified by a clear and compelling public interest. If such compelling justification cannot be clearly demonstrated, then no interference with those rights is warranted. And even were such justification to be established (which is disputed), then the interference with the SANZAR Unions’ proprietary rights must be limited strictly to that which can be shown to be proportionate to the legitimate objectives identified, and must be subject to proper conditions as to transparency, compensation, etc.
- 2.5 These requirements must be all the more stringently applied where the matches in question are played wholly outside the UK, and the broadcasting rights in question are wholly owned by foreign entities.
- 2.6 These requirements are not and cannot be met in respect of the British & Irish Lions and therefore British & Irish Lions tour matches should not be listed. British Lions Limited does not dispute that the British & Irish Lions have a substantial and enthusiastic public following. (Indeed, British Lions Limited relies upon and is very grateful for the enthusiasm and dedication of supporters of the British & Irish Lions). But that is not the same as saying that there is a clear and compelling public interest in the British & Irish Lions tour matches being shown live on FTA television. Preservation of the status quo for its own sake, and for the sake of political expediency, are not sufficient justification for interfering with the proprietary rights of the SANZAR Unions.

B. The ‘public interest’ arguments in favour of listing of events are outmoded

- 2.7 Those in favour of the listed events system commonly assert that televised sport is a ‘*force for cohesion*’ in society. British Lions Limited does not dispute the unifying effect which sport can have within the United Kingdom. However, it does not believe that removing the listed events system would result in the departure of every listed event from FTA television to subscription-based television. Instead, the major effect would be a greater competition for rights and the award of contracts at a fair market price, whether to subscription services or FTA services (rather than at an artificially depressed price to a qualifying FTA broadcaster).
- 2.8 Further, even were some listed events to transfer to subscription services, British Lions Limited does not regard the fact that more homes have access to FTA television than to subscription-based television supports the argument that live coverage on FTA channels in some way promotes greater societal cohesion than subscription services.
- 2.8.1 First, live coverage on television is by no means the only available method for the public to follow sporting events. Television highlights programmes, radio broadcasts, news

¹ As your consultation paper itself notes, the provision of free access to sporting events by preventing the grant of exclusive broadcasting rights to those events to subscription platforms is not mandatory under either English or EC laws or regulations. Instead, it is permitted, but only where such restriction is compatible with EC law, i.e., only where it is demonstrably justified and proportionate to the achievement of a legitimate imperative. (Audiovisual Media Services Directive, 2007/0248, Article 3j). And even then, under the OFCOM Code (para 1.1.4), if a qualifying FTA broadcaster who is offered fair and reasonable terms for the acquisition of the rights does not accept those terms, that event will not be seen on FTA television.

access,² internet highlights or reports, and the print media, all serve to keep sports enthusiasts and the wider public informed of major sports events.

2.8.2 Secondly, those that wish to watch events on subscription services often do so with friends, either at a subscriber's home or in local pubs and clubs. In this regard, British Lions Limited notes with interest arrangements put in place by Sky Sports and the English Cricket Board to provide discounted subscriptions to local cricket clubs as an example of the kind of flexible solutions that are available to permit increased access to sporting events being broadcast live exclusively on subscription services.

2.8.3 Third, a phenomenon of the past decade has been the establishment of large outdoor screens (or fan festivals) to show live sporting events.

As a result, British Lions Limited believes that arguments that subscription services dramatically hinder the 'cohesive impact' of sporting events is grossly overstated.

2.9 Other underlying assumptions behind the concept of listed events are also no longer sound. For example, following the publication of the Advisory Group's 1998 Report, Lord Strathblane stated: '*if sports are shown on terrestrial television they will secure more sponsorship and bigger advertising deals, which are equally important in raising revenue.*'³ This simplistic, broad-brush approach glosses over the many nuances inherent in the successful commercialisation of a modern sports property. In fact, the exclusive screening of an event on subscription services does not necessarily reduce the attractiveness of the event to potential advertisers or sponsors. To the contrary, a number of factors are assessed by potential advertisers and sponsors, including the audience demographic of particular media outlets, and exposure gained through news, print and online coverage, particularly where there is an opportunity to be associated with success.⁴ And that success is more likely where greater broadcasting revenue, whether derived from subscription services or FTA services, can be reinvested in training and facilities. Furthermore, there is obviously no advertising around the BBC's coverage of events, while sponsors will know that the BBC Charter restricts their ability to promote their brands, goods and services via the BBC's coverage of the event, particularly when compared to the opportunities available on commercial platforms.

2.10 In addition, whatever public interest arguments may previously have been advanced in favour of a system of listed events, those arguments look increasingly anachronistic in a television age where multi-channel television is the norm, scheduling is being increasingly replaced by on-demand content and the concept of paying for premium content is increasingly accepted. New technology has emerged to challenge the dominance of the television as the primary form of content delivery in the United Kingdom. The rise of the internet, the proliferation of mobile phones, the possibility of transmission of video content by phone lines, delayed transmission services and personal video recorders, amongst other developments, all serve to increase options for broadcasters and viewers alike. The digital switchover, scheduled for 2012, will further increase the range of television channels available within every home in the United Kingdom. This expansion of choice in both content and means of delivery ensures that the relationship between viewer and broadcaster will alter fundamentally – a viewer will no longer be bound to consume whatever is scheduled but will select what he wishes to receive, when, and how. The concept of limiting the broadcasting of certain events to qualifying FTA platforms runs counter to the trend of viewer (rather than state) choosing content.

C. The competition rules already protect the public interest in free and fair competition in the market for the acquisition of broadcasting rights to sports events, striking a proper balance between the need to encourage investment and innovation and the need to ensure all broadcasters have a fair opportunity to acquire the rights. There is no justification for

² News access is protected under EC law pursuant to the Audiovisual Media Services Directive (2007/0248).

³ House of Lords debate 20 April 1998, Vol 588 cc 1011.

⁴ For example, Vodafone, the largest sponsor of English cricket, increased its annual payments on renewal of its sponsorship of the ECB in 2006, notwithstanding the fact that live coverage would be provided by Sky Sports rather than by Channel 4. (See Vodafone press release, dated 11 July 2005).

interfering with that balance to favour those FTA broadcasters that are not ready, willing or able to match the investments that subscription platforms are willing to make.

- 2.11 This Government has emphasised repeatedly that there is a clear and compelling public interest in free and fair competition in the markets for the acquisition of goods and services. That is reflected in the strong prohibitions on anti-competitive conduct set out in the Competition Act 1998 (which tracks the same prohibitions in the Treaty of Rome), and in the enforcement and sanctioning powers given to the competition regulators, the Office of Fair Trading and the Competition Commission and (at the EC level) the European Commission. And those regulators have repeatedly examined the market for sports broadcasting rights, with a view to ensuring that rights grants (including exclusive rights grants) do not operate to restrict competition in that market or to stifle innovation and investment.⁵ In so doing, they have recognised that grants of exclusive rights to premium sports events to any television platform need to be limited in scope and duration, to avoid excessive foreclosure of competition on the market for such rights. However, they have also recognised that prohibiting the grant of exclusive rights to subscription platforms completely is likely to prevent the emergence of new subscription platforms and so to undermine (not to promote) competition and innovation.⁶
- 2.12 British Lions Limited would endorse the view that, as in any other sphere of industry, competition in the market place serves to encourage innovation and the maintenance of high standards, which can only be in the public interest. Undoubtedly, the competition that Sky and now Setanta have introduced into the UK market for sports broadcasting rights has improved investment in production and therefore in the quality of the sports product by all sports broadcasters, including FTA broadcasters, for the benefit of all stakeholders, including in particular the viewing public.
- 2.13 In short, the competition rules already place sufficient limits on the nature and scope of exclusivity of rights to a premium sports event that may be granted to a subscription platform, striking a careful and considered balance between the need to promote investment and innovation and the need to ensure other platforms have a fair opportunity to obtain the rights. To interfere with that balance, artificially constraining the right of subscription platforms to bid on a level playing-field for exclusive rights to premium sports events, simply because FTA platforms may not be ready, willing or able to match the investments the subscription platforms are prepared to make in those events, is antithetical to proper competition policy, and not in the public interest.

D. The adverse impact that listing has on competition on the market for the acquisition of the UK broadcasting rights to British & Lions tour matches is another strong argument against listing.

- 2.14 In addition to the concerns expressed above about the adverse effects of restricting free competition on the market for UK sports broadcasting rights, there is also the fundamental concern that artificially constraining such competition will depress the value of those rights and so imperil a vital source of commercial income for affected sports bodies.
- 2.15 The emergence of subscription platforms such as Sky and (more recently) Setanta has galvanised the market for the acquisition of UK broadcasting rights to sports events, ensuring a steady and much-needed rise in rights fees since the early 1990s. However, a subscription platform must have exclusive rights to the event, for the simple reason that people will not pay to watch on one channel what they can view for free on another channel. Accordingly, any derogation from exclusivity can seriously compromise demand (and therefore competition) for the rights in question, if not destroy it altogether.
- 2.16 Currently, the British & Lions tour is not a listed event under the UK legislation, meaning that there is no restriction on the exploitation of those rights by their owners, the SANZAR Unions. So, for

⁵ See *passim* Chapter B2 (EC and UK Competition Rules and Sport), paras B2.249 et seq., in *Sport: Law & Practice*, Lewis & Taylor, eds. (2nd Edn., Tolley's, 2008).

⁶ See eg the decision of the Restrictive Practices Court in *Re Televising Premier League Football Matches*, [2000] EMLR 78, where the court upheld the Premier League's exclusive grant of broadcasting rights to Sky, on the basis that the acquisition of exclusive rights promoted competition between broadcasters (pages 216, 217), and indeed was necessary to enable a new entrant to differentiate its service and drive subscriptions (page 188).

example, the UK broadcasting rights to the 2009 British & Irish Lions tour to South Africa have been granted exclusively to Sky. It will broadcast all of the matches live (including not only the Test matches but also the midweek and other warm-up matches) and its investment in the highest production values will greatly enhance the quality of the product brought to the subscribers to its services. Meanwhile, non-subscribers will be able to get access to the tour matches through news access coverage on other platforms, as well as from saturation coverage on the Internet and in print media.

- 2.17 When the UK broadcasting rights to future British & Irish Lions tours come to market, every broadcaster (FTA or subscription-based) will have a free and fair opportunity to bid for and to acquire the rights. The SANZAR Unions and British Lions Limited understand the benefits of having the broadest possible exposure for the tour, and would be happy if the BBC or another FTA broadcaster was willing to pay a proper market value to acquire the rights. Furthermore, if there is indeed a public demand for FTA access to the rights, then it is only right that the public should pay for that access, either through the licence fee paid to the BBC, or through watching the advertisements that would finance a bid by ITV or another commercial platform. That public interest could never justify requiring the SANZAR Unions and British Lions Limited to bear the cost of such public access, by forcing them to accept an artificially depressed price for the rights due to the exclusion of the subscription-based platforms from the bidding.
- 2.18 Obviously if Sky and others were excluded outright from the bidding (List A), the impact on the price paid would be enormous – British Lions Limited would estimate it would depress the value of the rights by over £10 million. But there would also be a substantial adverse impact if Sky could only be offered limited exclusivity, with secondary coverage on FTA television (i.e., List B). If a fan can see the event on another channel for free, albeit after a short delay, then a significant part of the value of the rights is lost for Sky, with a direct consequential impact on its interest in the rights.
- 2.19 On the other hand, preserving the ability of the rights-owner to sell the broadcasting rights to a broadcaster of its choice, and so permitting free and fair competition on a level playing-field, has a positive impact on rights fees, ensuring that the true value of its investment in the event can be realised. While this means that, for example, the BBC may have to pay more to acquire the UK rights to the British & Irish Lions tour matches, that is a burden that it can bear much more easily than can the SANZAR Unions or British Lions Limited. And the public can hardly complain at this use of public funds, given the premise that a British & Irish Lions tour is a vital part of the national fabric to which everyone should have free access. In short, if the public wants FTA access to the British Lions Tour, then the public should absorb the cost, not the private organisations that stage and own the commercial rights to the event.

E. No proper compensation is provided for this expropriation of rights.

- 2.20 By the same token, if the UK Government is not willing to require the BBC to pay the market rate for the broadcasting rights to the British & Irish tour matches, but instead wishes to expropriate the SANZAR Unions' proprietary rights in the name of the public good, then the SANZAR Unions and British Lions Limited should be held harmless from the resulting prejudice, i.e., they should be fully compensated for the resulting loss in value of the rights.
- 2.21 An analogy might be drawn with compulsory purchase schemes, whereby landowners whose property is acquired in the furtherance of the public interest (eg, to permit the building of a new airport runway) are paid a fair market value for the property and (in appropriate circumstances) compensation to reflect the loss of amenity or disruption caused to the enjoyment of their property. Similarly, interference with the proprietary broadcasting rights of the SANZAR Unions is only justified if the Government ensures that adequate compensation is received.
- 2.22 The current legislation does not provide any such mechanism. Indeed, where it refers to the need for the rights to be acquired on 'fair and reasonable' terms, this is not to preserve value for the rights-owner but rather to drive down the price to what the FTA broadcasters are willing to pay. The need to compensate the rights-owner for the resulting loss of income is not even acknowledged, let alone addressed.

- 2.23 It is not justifiable for the Government to use legislation to strip away a sport's valuable commercial rights simply to satisfy a populist demand, particularly when the Government offers no compensation whatsoever to fill the substantial funding gap that may result.
- 2.24 Any encroachment upon the freedom of the SANZAR Unions to maximise the value of the UK broadcasting rights to future Lions tours could have disastrous implications for rugby union in general and for the future of the Lions tours in particular. The SANZAR Unions must secure sufficient revenue from the British Lions Tour to ensure that the costs of staging the tour are met and to finance their own developmental activities, including investing in their own national squads. If the broadcast income is reduced, without compensation to fill the gap, then less money will be available for those purposes, and (among other things) the SANZAR Unions may be unable to prevent their players moving to more lucrative Northern Hemisphere markets, to the detriment not only of the SANZAR national teams, but also (because of the lessening of opportunities for home-grown players) of the home Unions' national teams. Indeed, a point may be reached at which future tours are no longer financially viable either for the SANZAR Unions or for the four home Unions.
- 2.25 It is therefore essential to the future health of the global game of rugby union in general, and of the Lions tour concept in particular, that the UK broadcast rights to future British & Irish Lions tours remain free from any legislative restriction that depresses the value of those rights, or that full compensation be paid to cover the resulting funding gap.
- F. The SANZAR Unions and British Lions Limited are in the best position, when it comes to selling the UK broadcasting rights to Lions tours, to balance the various competing interests in order to determine what is in the best long-term interests of the sport as a whole. There is no proper justification for the Government to supplant them in that role.*
- 2.26 The UK Government has consistently taken the position that as a matter of principle '[t]he Government does not and should not run sport.'⁷ Instead, the Government has left that responsibility on the shoulders of the national governing bodies of sport in each home nation, including (in relation to rugby union) the four home Unions.
- 2.27 Thus, the Government relies upon the home Unions to organise, manage and regulate the entire conduct of rugby union in the UK, including governance of the sport on a democratic and inclusive basis, ensuring the safety of participants and spectators (e.g., equipment issues, on-field conduct), protection of the integrity of the sport (anti-corruption, anti-doping, etc), and promotion of the long-term development and growth in participation in the sport at both amateur and professional level. These are complex and burdensome tasks, of substantial 'public' interest, but the Government would not dream of intervening to regulate them, preferring instead to rely on the long experience and expertise of the self-regulating national governing bodies to determine what is in the best long-term interests of the sport as a whole.
- 2.28 The home Unions require substantial funds to carry out their roles as custodians of their sports, to cover their governance functions, to provide the first-class stadia and facilities required for their teams to play in (and for spectators to watch in safety), and to finance investment in the future development of the game. The Government provides some limited (mainly Lottery) funding of grass-roots rugby union, but otherwise leaves it to the home Unions to generate the funds they need in whichever way they can.⁸
- 2.29 Furthermore, while it is commonly accepted that English law provides less than adequate protection to sports event organisers looking to protect and exploit the commercial value of their events,⁹ to

⁷ Tony Blair, Prime Minister, *A Sporting Future for All – The Government's Plan for Sport* DCMS PP374 (March 2001).

⁸ And of course the UK Government provides no funding at all to the Irish Union, or to any of the SANZAR Unions.

⁹ Because of its refusal to recognise any proprietary rights *per se* in a sports event: see *Victoria Park Racing v. Taylor*, (1937) 58 CLR 479 (HCA). Hence, for example, the need for special legislation for the London 2012 Olympic Games, recognising a *sui generis* right of association with the Games, owned by the local organising committee and not to be exploited by any third party without the permission of that committee. See generally *Sport: Law & Practice*,

date the Government has not responded to requests to assist sports bodies in their efforts to improve that position.¹⁰ While that is of course its prerogative, it makes it all the more important that any proposal to strip away the value of a sports event organiser's commercial portfolio is approached with caution and not even contemplated unless the justification is overwhelming.

- 2.30 Broadcasting rights are one of the few elements of a sports event organiser's commercial portfolio that can be properly exploited for a reasonable commercial return. Indeed, it is hoped that the agreement reached between British Lions Limited and the SANZAR Unions to share in the exploitation of the broadcasting rights to future Lions tours will enable British Lions Limited to generate significant revenue to cover the substantial costs of such tours and to generate a surplus that will help incentivize the four home Unions to contribute their players, management and support to future tours. Without that income stream, the very viability of the Lions concept in the modern professional era will be in doubt.
- 2.31 British Lions Limited understands very well the tension between the need to promote the sport through its broad exposure on FTA television, and the need to generate maximum commercial revenues to fund costs and to finance the development programmes of the Unions. Finding the correct compromise between the various competing imperatives is by no means a simple analysis; on the contrary, it is a nuanced and finely balanced one.¹¹ And it is the firm and unequivocal opinion of British Lions Limited that it is the SANZAR Unions and British Lions Limited -- and not the UK Government -- that is best-placed to strike the right balance, particularly where the rights of foreign entities beyond the jurisdiction of the UK Government are concerned.
- 2.32 In part, this is just a reflection of the general principle that Government does not and should not run sport, but instead sensibly and properly leaves it to specialist and experienced sports governing bodies to judge what is in the best interests of their sports. (See para 2.26 above). In addition, however, in the complex and fast-developing world of sport, broadcasting and new media, central regulation is too cumbersome and slow to react to emerging trends and new industry practices. In the ten years since the listing of events was last reviewed by Government, there have been substantial developments in technology in this market-place. (See para 2.10 above). And the explosion of interest in any given sport generated by success (for example, rugby union following England's victory in the 2003 World Cup, or cricket following the 2005 Ashes), new events (for example Twenty20 in cricket), new broadcasters or new media can be similarly unpredictable and fast-moving. The rights-owners and their commercial partners are ready, willing and able to adapt to those developments in a way that an ad hoc Free-To-Air Review Panel is simply unable to do.
- 2.33 At the same time, British Lions Limited will insist that each of the tour's licensed broadcasters exploits its rights on every available medium, including the Internet, and that they grant 'news access' to highlights of the British & Irish Lions tour matches to their competitors, so as to ensure broad exposure and access to the tour for the public.
- 2.34 Of course, it follows from the above remarks that British Lions Limited and the SANZAR Unions believe they should remain free to decide in the future whether an exclusive live deal with a subscription broadcaster or a FTA broadcaster is the best option for the UK territory. Certainly the steadily-increasing number of subscribers to pay-television platforms such as Sky is a trend that has to be taken into account. The crucial point, however, is that the judgment of what is most appropriate is one that is properly made by the rights-owner in light of its experience and expertise, not by Government.

Lewis & Taylor, eds. (2nd Edn, Tolley's, 2008), chapters G1 (Proprietary Rights in Sports Events) and H2 (Tackling Ambush Marketing of the Olympic Games and Paralympic Games – London 2012: A Case Study).

¹⁰ For example, the Government has rebuffed requests to extend to other sporting events the special legislative protection afforded to the IOC against ambush marketing and ticket touting at London 2012. Similarly, to date it has not supported requests to recognise a sports betting right to fill the gap left by the ECJ's refusal to recognise database rights in event data.

¹¹ For example, broadcasting rights agreements are not negotiated in a vacuum, but rather play a central role in the design and implementation of a coherent commercial programme across the event, involving the making of news access arrangements and the granting of mobile, Internet and other new media rights packages, as well as a package of sponsorship and supplier deals that have a symbiotic relationship with the media rights profile of the event.

3. **If events are to be listed, what criteria should be used to select them for listing?**

- 3.1 For the reasons set out above, there is no justification for the Government to supplant the analysis of the SANZAR Unions and British Lions Limited as to what broadcasting deal is in the best interests of the sport, still less to strip away their proprietary rights without proper compensation. Instead, as a matter of principle British & Irish Lions tours should remain ‘unlisted’.
- 3.2 Without prejudice to that argument, if the concept of listing is to be maintained, then in order to provide certainty and transparency, and to ensure satisfaction of the requirement of a clear and compelling justification for legislative intervention, as well as to ensure that the resulting expropriation of assets is strictly limited to what is absolutely necessary and proportionate, the criteria should be narrowed and made far more specific and measurable than at present.
- 3.3 At present, the key criteria are that *‘the event has a special national resonance, not simply a significance to those who ordinarily follow the sport concerned; it is an event which serves to unite the nation; a shared point on the national calendar.’* These factors are obviously completely subjective and therefore inherently open to inconsistent application. For example, there was relatively little public outcry over the ECB’s grant to Sky of exclusive rights to England’s home Test matches until success in the Ashes series against Australia gripped the public’s attention in 2005. In other words, the popularity of a particular sporting event depends on the vagaries of popular sentiment, and in particular on the success of the national team in that event. As such, it is a movable feast, and therefore references to ‘national resonance’ and ‘shared points on the national calendar’ do little to distinguish between events that should be listed and those that should not. It is simply not good enough to say *‘the sense of community through televis[ing of sports events] ... is an elusive thing but we know it when we feel it.’*¹²
- 3.4 In that analysis, clearly the impact of falling broadcasting revenues on the ability of sports governing bodies to run their sports must be given central importance. Under the current legislation, the Secretary of State is to have regard to *‘the impact of reducing the income or potential income of the sport, and the consequences of that reduction for its investment in increasing participation and/or improving levels of performance and/or in creating safe facilities.’* British Lions Limited agrees with the inclusion of this factor, but believes it should be given priority, and no event should be listed unless it can be shown, by means of a detailed and costed study, that such listing will not have a material adverse impact on the ability of the sports body in question to carry out its governance and regulatory functions as custodian of that sport. That analysis must be all the more carefully pursued where the sports bodies in question are based overseas.
- 3.5 In addition, the focus on premium sports events in the listed events system needs to be reconsidered. The public interest might equally be said to be in the support of a wide variety of sports at different levels to encourage participation and to nourish the development of athletes in a variety of disciplines. It also appears to be grossly unfair that those subscription broadcasters who do invest in screening the lower levels of particular sports throughout the year should be precluded from bidding for or securing the premium events in those sports.

4. **If events are to be listed, how should the British & Irish Lions tour be treated?**

- 4.1 If the concept of listing is to be maintained, there is absolutely no justification for putting the British Lions Tour on either List A or List B, particularly given the clear adverse impact that such a move would have on the value of the rights to the British & Irish Lions tour, and therefore on the commercial income that the participating Unions can expect to receive, and on which they rely so much. In terms of the current criteria, while the British & Irish Lions Tour attracts a strong loyalty within the tribal rugby community, it cannot be said to be an *“event which serves to unite the nation”*.
- 4.2 British Lions Limited is not aware of any public outcry about the fact that Sky has held the exclusive right to broadcast coverage of recent Lions tours in the UK. It notes that in 2001 one MP twice suggested that this was contrary to the public interest, but no support for that suggestion was forthcoming. The public accepts that Sky has an important role to play in the UK sports

¹² Speech by Andy Burnham MP, DCMS Minister, 26 September 2008.

broadcasting market, and that the SANZAR Unions and British Lions Limited have a right and responsibility to exploit the commercial rights to Lions tours as they think fit.

4.3 For all of the reasons set out above, British Lions Limited and the SANZAR Unions have the same view.

We look forward to discussing these issues with you at our meeting on 14 May 2009.

Yours sincerely,

John Feehan
CEO
British Lions Limited

cc: Mr John O'Neill – CEO, Australian Rugby Union
Mr Steve Tew – CEO, New Zealand Rugby Union
Mr Andy Marinos – Acting Managing Director, SA Rugby (Pty) Ltd.