

ANNEX 4: OPINION FROM COUNSEL ON THE LEGALITY OF THE EXISTING LISTED EVENTS RULES

June 9, 2009

NOTE ON LEGAL ISSUES RAISED BY THE UK BROADCASTING REGULATIONS

This memorandum analyzes the legality of the UK's existing regulatory regime (the "Rules") governing the live broadcasting of the Olympic Games (the "Games") on free-to-air television. It concludes that the Rules violate EC law, with the result that, if challenged, a court would be required to declare the Rules unenforceable and to award damages as compensation for any loss flowing from their application.

**I. EXECUTIVE SUMMARY**

The Rules guarantee a right for free television broadcasters to broadcast all, or any portion of, live broadcasts of the Games alongside any other successful bidder for the same rights. Since 1992, only the BBC has obtained the right to broadcast live Games content on its free television channels, BBC1 and BBC2.

The Olympic Games take place every two years over 16 days, preceded by the opening ceremony. The hours of live Olympic Games content made available for broadcast have increased steadily with every edition of the Games, amounting to 5,000 hours covering 28 sports at the 2008 Beijing Olympic Games. 26 free-to-air channels broadcasting 12 hours a day for 16 days would be needed to broadcast all this available live Olympic Games content, which is the equivalent of 208 days of uninterrupted broadcast coverage.

Understandably, capacity constraints have meant that the BBC has always broadcast a fraction of all available live Games content on BBC1 and BBC2: 4.8% of the total 5,000 hours of live content at the 2008 Beijing Olympic Games. This still represents about 7.5 hours of live broadcasting each day during 16 days on each of BBC1 and BBC2.

The mismatch between, on the one hand, the total hours of live Olympic Games content guaranteed for the BBC and, on the other hand, the BBC's own capacity constraints that enable it to show only a small fraction of this total on BBC1 and BBC2 has important legal consequences, namely that the Rules and any European Commission decision endorsing them violate:

1. The Audiovisual Media Services Directive in combination with Article 49 of the EC Treaty, which mandates that national listing rules guarantee free-to-air channels no more live content than is strictly necessary to ensure that the UK public has access to live events of major importance for society;

2. The Audiovisual Media Services Directive in combination with Article 86(1) of the EC Treaty, which mandates that special rights granted by law to specific entities (in this case the guarantee for free-to-air broadcasters to show live Olympic Games content) in order to achieve a public interest objective not be broader than strictly necessary to achieve that specific public interest objective;
3. The IOC's right to the peaceful enjoyment of its possessions for no pressing social need under the European Convention on Human Rights ("ECHR").

## **II. THE CURRENT SITUATION**

### **A. LEGAL FRAMEWORK FOR THE BROADCASTING OF LISTED EVENTS**

Article 3j(1) of the Audiovisual Media Services Directive<sup>1</sup> permits Member States to adopt national legislation listing certain events that must be available for viewing by a substantial proportion of the public on free television.<sup>2</sup> This aims to ensure the viewing public "continue to have access to major (sports) events live on in-the-clear television."<sup>3</sup> Article 3j(1) provides expressly that these national measures must comply with Community law.

Article 3j(2) of the Audiovisual Media Services Directive requires EC Member States to notify immediately any listing rules to the EC Commission, which must decide within three months whether they are compatible with the EC Treaty. Under Article 3(j)(3), EC Member States must ensure that broadcasters under their jurisdiction, which have purchased exclusive rights to an event, do not broadcast live content of that event into another EC Member State in such a way that a substantial proportion of the public in the receiving EC Member State is deprived of the possibility of having live access to that event, if that event is listed in the receiving EC Member State.<sup>4</sup>

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<sup>1</sup> Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 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 (OJ 2007 L 332/27). Article 3j corresponds to Article 3a of Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 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 (OJ 1997 L 202/60).

<sup>2</sup> Free television is defined as "broadcasting on a channel, either public or commercial, of programmes which are accessible to the public without payment in addition to the modes of funding of broadcasting that are widely prevailing in each Member State (such as licence fee and/or basic tier subscription fee to a cable network)"(recital 22 of Directive 97/36 amending Directive 89/552 (OJ 1997 L 202/60).

<sup>3</sup> See "Television without frontiers and major (sports) events: Commission Communication", February 5, 1997, page 1.

<sup>4</sup> See Case C-125/06 P *Commission v. Infront*, judgment of March 13, 2008, for a full explanation of these rules.

In the United Kingdom, the Rules<sup>5</sup> distinguish between qualifying and non-qualifying broadcasters. Only those broadcasters whose signal reaches 95% of the British population and that provide their signals without any consideration for reception of the service are qualifying broadcasters. The Rules stipulate that the only broadcasters that meet these criteria are BBC1, BBC2, ITV, Channel 4, and Five.

Under the Rules, qualifying broadcasters have a guaranteed right (the “Special Right”) to broadcast live the whole or any part of the Games alongside any non-qualifying broadcasters that have successfully bid for the right to broadcast the Games live.<sup>6</sup> Ofcom may permit a non-qualifying broadcaster to acquire exclusive rights to broadcast the Games live, but only if qualifying broadcasters have declined a genuine opportunity to acquire the rights on fair, reasonable, and non-discriminatory terms.<sup>7</sup>

## **B. DE FACTO SITUATION UNDER THE UK REGULATIONS**

The Olympic Games take place every two years over 16 days, preceded by the opening ceremony. The hours of live Olympic Games content made available for broadcast have increased steadily with every edition of the Games, amounting to 5,000 hours covering 28 sports at the 2008 Beijing Olympic Games (1,000 hours and all 7 sports at the upcoming Vancouver 2010 Olympic Winter Games). This trend is expected to continue with the London 2012 Olympic Games, when the IOC expects to produce full live coverage of every event.

The current listed events rules designate the Olympic Games as a single event of significant importance. Rights-holding qualifying free-to-air television broadcasters thus have a guaranteed right to broadcast all or any part of the 5,000+ hours of live Olympic Games content alongside any other successful bidder for the same rights.

The Europe territory Olympic broadcast rights-holder from 1964 through the London 2012 Olympic Games has been the European Broadcast Union, of which the UK members are the BBC and ITV. Since 1992, only the BBC has broadcast the Olympic Games on BBC1 and BBC2 (ITV’s last Olympic broadcast participation was in Seoul 1988).

BBC1 and BBC2, however, cannot broadcast 5,000+ hours of live Olympic Games content over 16 days: at least 26 free-to-air channels broadcasting 12 hours a day for 16 days

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<sup>5</sup> The Broadcasting Act 1996, available online: [http://www.opsi.gov.uk/acts/acts1996/ukpga\\_19960055\\_en\\_1](http://www.opsi.gov.uk/acts/acts1996/ukpga_19960055_en_1); The Television Broadcasting Regulations 2000 Available online: <http://www.opsi.gov.uk/si/si2000/20000054.htm>; and The Code on Sports and Other Listed and Designated Events, available online: [http://www.ofcom.org.uk/tv/ifi/codes/code\\_sprt\\_lstd\\_evt/ofcom\\_code\\_on\\_sport.pdf](http://www.ofcom.org.uk/tv/ifi/codes/code_sprt_lstd_evt/ofcom_code_on_sport.pdf) (“Code”, and collectively, the “Rules”). The rules are administered by the Office of Communications (“Ofcom”), the regulator and competition authority for the communication industries in the United Kingdom.

<sup>6</sup> See s. 101.

<sup>7</sup> This situation does not appear to have arisen in practice, perhaps because of the difficulty of determining what constitute “fair and reasonable” terms.

would be needed for that, which is the equivalent of 208 days of uninterrupted broadcast coverage. In addition, since the BBC cannot use BBC1 and BBC2 to broadcast only live Olympic Games content over 16 days, the actual live Olympic Games content broadcast on these two channels has always been a fraction of the total available live content at any Olympic Games. For example, at the 2008 Beijing Olympic Games, the BBC aired a mere 4.8% (240 hours) of that content over BBC1 and BBC2. The principle applies similarly to the Olympic Winter Games -- for Torino 2006, the BBC showed 104 hours on BBC1 and BBC2, 10.4% of the total available output. Annex A illustrates the fact that this has been a constant feature over the last two decades.

Whilst the BBC has made provision to air further coverage behind the red button and through broadband, the practical effect of the current listed events rules has been that over 95% of all available live Olympic Games content has hitherto failed to reach the UK viewing public via BBC1 and BBC2.

In practice, non-qualifying broadcasters have not submitted bids for the right to broadcast live Games content because of the diminished value of broadcasting events live that may also be simultaneously broadcast live by the BBC.<sup>8</sup>

### **III. ILLEGALITY OF THE RULES**

#### **A. THE RULES ARE INCOMPATIBLE WITH ARTICLE 49 OF THE EC TREATY, ARTICLE 3(J) OF THE AUDIOVISUAL MEDIA SERVICES DIRECTIVE, AND WITH THE PRINCIPLE OF PROPORTIONALITY AND THE RIGHT TO PROPERTY**

The Audiovisual Media Services Directive harmonizes national laws governing television broadcasting activities in the EU in order to eliminate barriers to the free provision of broadcast services across borders within the EU.<sup>9</sup> In doing so, the Directive implements the principle of Article 49 of the EC Treaty, which prohibits national restrictions on the freedom to provide cross-border services within the EU.

Article 3j(1) of the Audiovisual Media Services Directive derogates from the overall harmonization of national rules by permitting Member States to adopt divergent national legislation concerning listed events. However, Member States do not have an unfettered discretion to adopt national legislation in this area. Article 3(j)(1) provides that national legislation must comply with EC law. Article 3j(2) provides that national legislation must

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<sup>8</sup> Indeed, Ofcom frequently authorizes qualifying broadcasters to broadcast listed sports events in the absence of non-qualifying broadcasters having tendered for the rights. For example, see “Ofcom gives consent to BBC and ITV for Euro 2008 Coverage”, June 2, 2008: [http://www.ofcom.org.uk/tv/ifi/codes/code\\_sprt\\_lstd\\_evts/approved/consentbbc/](http://www.ofcom.org.uk/tv/ifi/codes/code_sprt_lstd_evts/approved/consentbbc/); “BBC Requests Ofcom Consent for Commonwealth Games Broadcast”, February 3, 2006: <http://www.ofcom.org.uk/consult/condocs/bbccgames/>; “BBC Requests Ofcom Consent for Wimbledon Broadcast”, May 4, 2005: <http://www.ofcom.org.uk/consult/condocs/wimbledon/>; “BBC Requests Ofcom Consent for Grand National Broadcast”, March 5, 2003: <http://www.ofcom.org.uk/consult/condocs/146413/>.

<sup>9</sup> Joined Cases C-34/95, C-35/95, and C-36/95 *De Agostini*.

immediately be notified to the Commission, and the Commission must verify its compatibility with EC law within three months.<sup>10</sup> The Commission's verification and decision must be published in the Official Journal of the European Community.

As reflected in the Commission's published decisions, the Commission's principal task is to ensure that national legislation complies with the fundamental EC law principle of proportionality.<sup>11</sup> This reflects the basic legal principle that any national legislation adopted by an EC Member State must be strictly tailored to achieve the intended public interest objective,<sup>12</sup> here to ensure that the public has free access to live television coverage of sports events of major importance to society.

National rules that are not strictly tailored to this objective are disproportionate, and thereby violate Article 49 of the EC Treaty, Article 3j of the Audiovisual Media Services Directive, and the fundamental principle of proportionality. They also violate the fundamental right to property, since restrictions to the right to property (in this case, the IOC's right to dispose of its rights freely) are authorized under EC law only if they are indispensable for and proportionate to the achievement of a legitimate objective.<sup>13</sup>

The mismatch between, on the one hand, the total hours of live Olympic Games guaranteed by the Rules for the BBC and, on the other hand, the BBC's own capacity constraints that enable it to show only a small fraction of this total on BBC1 and BBC2 mean that the Rules are clearly disproportionate.

## **B. THE RULES ARE INCOMPATIBLE WITH ARTICLE 86 OF THE EC TREATY**

The European Court of Justice has held that national legislation granting special rights to a company are incompatible with Article 86(1) unless the rights are indispensable to enable

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<sup>10</sup> For a description of the potential effects of national legislation on the freedom to provide cross-border broadcasting services, see Case C-125/06P *Commission v. Infront*.

<sup>11</sup> See, for example, the Commission's decision of October 16, 2007, concerning the Rules, which states in the second preamble that "[t]he Commission verified, within three months from this notification, that these measures are compatible with Community law, in particular as regards the proportionality of the measures and the transparency of the national consultation procedure." OJ 2007 L 295/12.

<sup>12</sup> As the European Court of Justice has stated repeatedly, "[T]he Court has consistently held that the principle of proportionality is one of the general principles of Community law. By virtue of that principle, the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and in the disadvantages caused must not be disproportionate to the aims pursued." See *R. v. Minister for Agriculture, Fisheries and Food*, [1990] ECR 4023, at paragraph 13. See also "Communication From Mr. Oreja to the Commission", *Exclusive Rights for TV Broadcasting of Major (Sports) Events*, page 2: "However, certain restrictions may be justified for overriding reasons of public interest as long as the measures are proportionate to the objective pursued and non-discriminatory."

<sup>13</sup> Case 44/79 *Hauer*.

the company to provide a public interest service.<sup>14</sup> As just explained, even assuming that the public interest is served by ensuring the UK public's access to Olympic content on free television, the scope of the Special Rights, extending over the entire live broadcasting content relating to the Olympic Games, is clearly not indispensable for the achievement of this public interest objective because the BBC has used its Special Rights to broadcast live Olympic Games content on BBC1 and BBC2 only to a very limited extent. The Rules thus violate Article 86(1) of the EC Treaty.

In another strand of case law, the European Court of Justice has ruled that the grant of special rights to a company violates Article 86(1) if it inevitably brings about an abuse. For example, the European Court of Justice has held that a decisive feature is that the beneficiary of the Special Rights is "manifestly not in a position to satisfy demand" prevailing on the market for activities of the kind covered by the rights.<sup>15</sup>

In this case, the decisive feature is that the BBC, whose Special Rights extend to showing all live Olympic Games content on free television, fails to broadcast over 90% of this content on free television. The issue of unused Olympic content was a principal concern of the Commission when authorizing the operation of the EBU as a collective purchasing entity of broadcasting rights to major sports events.<sup>16</sup> In particular, the Commission authorized the EBU to operate as an entity only after it adopted a sub-licensing mechanism enabling non-EBU members to exploit any content that the EBU planned not to broadcast. The European Court of First Instance annulled the Commission's decision because it concluded that the mechanism approved by the Commission did not guarantee third party use of unused content in all circumstances.<sup>17</sup>

### C. THE RULES BREACH PROTOCOL 1 OF THE ECHR

In effect, the Special Rights *de facto* protect the BBC from all competition for the right to broadcast the Games, which permit it to submit tenders for the broadcast rights lower than what it would otherwise submit were it exposed to competition. This aspect of the Special Right breaches the IOC's right to the peaceful enjoyment of its possessions for no pressing social need under the ECHR.<sup>18</sup>

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<sup>14</sup> Case C-320/91 *Paul Corbeau*. The EC Treaty does not define the term "special rights". The Commission has defined them, for example in connection with legislation in the telecommunications sector as rights that are granted by a Member State to a limited number of undertakings through any legislative, regulatory or administrative instrument with respect to a given geographical area.

<sup>15</sup> See Case C-41/90 *Höfner and Elser v. Macrotron*,

<sup>16</sup> Case IV/32.150 – Eurovision (OJ 2000 L 151/18).

<sup>17</sup> Joined Cases T-185/00, T-216/00, T-299/00 and T-300/00 *M6 v. Commission*.

<sup>18</sup> Prot. 1, Art. 1 of the ECHR.

**ANNEX A: BBC Olympic Games Broadcast Hours**

Olympic Games	Summer Olympics					Winter Olympics		
	Barcelona 1992	Atlanta 1996	Sydney 2000	Athens 2004	Beijing 2008	Nagano 1998	Salt Lake City 2002	Torino 2006
<b>BBC1 and BBC2 Coverage</b>	291	297	318	247	240	101	91	104
<b>Total Host Broadcast Hours Produced</b>	2800	3000	3500	3800	5000	600	900	1000
<b>Percentage of Olympic Coverage Broadcast on BBC1 and BBC2</b>	<u>10.4%</u>	<u>9.9%</u>	<u>9.1%</u>	<u>6.5%</u>	<u>4.9%</u>	<u>16.8%</u>	<u>10.1%</u>	<u>10.4%</u>
<b>Red Button Coverage</b>	N/A	N/A	N/A	1094	2450	N/A	N/A	661
<b>Percentage of Olympic Coverage Broadcast on Red Button Channels</b>	N/A	N/A	N/A	28.8%	49%	N/A	N/A	66.1%
<b>Total Percentage of Olympic Coverage Broadcast in UK</b>	10.4%	9.9%	9.1%	35.3%	53.9%	16.8%	10.1%	76.5%
<b>Number of Hours Not Broadcast on any BBC Platform</b>	2509	2753	3182	2409	2340	499	809	235