

Response to Call for Evidence for Gowers Review of Intellectual Property

This response is presented by Active Rights Management Ltd (ARM) on its own behalf and that of its sister company Projector Netresult Ltd (NetResult).

Both companies are deeply involved with the commercial aspects of the sports marketplace. ARM deals with commercial strategies for sports where it has worked with the International Olympic Committee, UK Football, International Rugby Board, British Horseracing Board, Ascot and many others. Much of its work is based on digital rights and new business models for sport including data, betting, messaging and sport-to-consumer services.

NetResult is a world leader in the monitoring and policing of sports content on the internet and its clients include major rights holders in football, cricket, motor sport, tennis, golf as well as TV broadcasters. NetResult's internet friendly as opposed formal legal approach to resolving IP infringements has proved to be the quickest and most successful method in most cases. This is especially important for sport as the infringers are likely to be fans and this relationship is important to sport. The timeliness of the service is also important as the value in sports broadcast is almost exclusively in the live rights so for a cricket match spanning 5 days a formal legal approach would not normally see the infringement resolved before the end of the event whereas over 90% of NetResult's actions result in removal of the infringement within this period. NetResult has observed over recent months a significant increase in deliberate online commercial piracy of sports audio visual content. These pirates are well organised and funded and are prepared to resort to very underhand methods to evade or deter efforts to stop such piracy.

Below we have provided our evidence related to a number of the questions raised.

How IP is awarded?

Sports' core product is producing trusted, competitive sporting events in which athletes or teams can compete. Sports provide a structure for these events which is based on rules which have been adapted after careful consideration over a number of years in order to maintain the competitiveness of the events. The sport relies, in most cases, on the experience and expertise of its officials to make decisions regarding those events such as who is eligible to play, disciplinary decisions and player rankings etc. Looking at how the US has supported the extension of patents to cover business processes, it is possible that if today a totally new sport with new rules was created that it might successfully be able to gain IP protection as such a business process.

In ARM's work with sports rights holders, we look to the five representations of the sports performance as being the key materials from which sport can both seek to derive revenues to support the sport either directly or indirectly and can use to further promote the sport to its target audiences. These forms of representations are:

- audio;
- audiovisual;
- still photos;
- text; and
- data.

The awarding of IP rights for the first four, especially the first three, have been traditionally well understood in principle by sport, but the situation for data is extremely unclear. Data is an extremely important part of sport and would include details on fixtures, competitors, results as well as detailed live performance information. The recent judgments given in the BHB and Football Data cases prove how expensive and difficult it is for sports rights holders to prove data rights in the current European IP framework. Clearly sport creates much of this data itself and in most other cases is the only party able to grant a third party the rights to capture other data and to award the “official” status for this data. It is this official status which delivers the value in sports data. Anybody can generate their own fixture list but only the League itself can generate the official (and therefore actual) fixture list.

In the online and digital world data can be converted into any of the other forms of representations of the sports performance. Data should be given clear IP protection where it is the direct product of the efforts of the sport. By efforts, we would include the creation and operation of a detailed set of sporting rules for the operation of the sport as well as any intellectual effort in, for instance, determining the ranking/seeding of a player where this relies on an individual’s experienced view. There is a clear commercial value that traditional and new media publishers derive from the use of this data. Also without IP protection sport has little control over how it is used.

The data rights situation as a result of the recent cases is now so unclear and the costs would be so prohibitively high to establish data rights within the interpretation of the ECJ judgment, that very few sports organisations outside of the very biggest leagues and events could ever begin to contemplate relying on these rights as part of a commercial programme for the sport.

Copyright in photos taken by unmanned, motion-sensing, still photo cameras at sports events is automatic. Yet the fixture list, which is dependent on years of promotion and relegation, complex consultative processes with other event owners and the skill and experience of the event organisers to produce a coherent fixture list, is left with little or no protection. This seems to be quite bizarre.

The only way for an event owner to try to control what happens to photos taken by mobile phones at the event is to impose ticket conditions forbidding the taking of photos or insisting that copyright is assigned back to the event owner, as there is currently no inherent copyright or other right in the sports performance. Many events take place in open venues e.g. London Marathon so these measures are not always available. While in our view sports would see no issue with such photos being used for private personal use, commercial use would be seen as damaging.

There have recently been press reports about potential initiatives involving mobile operators and TV companies designed to encourage the public to record video and send it to TV stations on the basis of “news”. It is impossible for sports event owners to effectively police the audience during an event to prevent such filming and distribution of content. While such a recording of an opera etc would need to deal with performing rights etc sports events would be left vulnerable.

How IP is used?

Sports events generate a number of commercial opportunities for the most successful sports and or events. Few sports would meet the normal criteria of profitable businesses albeit that they general significant revenues from the products that they produce. These revenues are used to continue the development of the sport, expanding its popularity and providing a fair return for the participants of the sport.

Outside of tickets, almost all of commercial sports revenues are generated based around IP rights. Sponsorship and television rights are the two biggest. Sponsorship values are linked primarily to the brand values represented through the logos of the sport and or event and the exposure of the sport which obviously includes the television coverage as the most important element. The television rights licensing model for events has traditionally worked on a territorial basis with particular markets e.g. the home market for a domestic event generating a large part of the income. Increasingly, as online opportunities develop, sport has looked to becoming its own publisher/broadcaster. There a successful commercial models involving data and photos as well as other forms of coverage.

Press coverage has always been encouraged by sport as a way of very cost effectively promoting the sport and or event. Such coverage forms a large part of the content of most newspapers. These newspapers and now their online versions together with a whole range of new purely online publications seek to use sports' content to attract customers/visitors in order to secure their own commercial model. These operators in most cases are using information and data about the events, but increasingly are seeking to supplement this with audio and or audiovisual materials related to the events.

It is likely that the archive value of audiovisual coverage and also historic results and other data will increasingly form part of the content used to generate revenues for the sport from online areas. Sport therefore does have a real interest in the term of any IP rights.

Sport frequently encounters issues with domain name registrations. While the largest sports will have significant in-house trademark resources, for smaller sports and events the requirement to purchase a number of domain names in order to provide protection for the official website, poses a real financial and administrative burden, especially for those who have not trademarked their sport or event name.

How IP is challenged and enforced

As mentioned above, sport derives a great deal of value from its live audiovisual content, distributed mainly through broadcasters but also recently over the internet. This content has long been protected by copyright laws and continues to be regardless of the method of distribution (TV, broadband, mobile etc.).

Advances in technology, including increased broadband penetration and the development of peer-to-peer software have meant that live audiovisual content can now be streamed on the internet to an ever increasing number of users worldwide. While advances in technology mean that sport will be able to access the internet market, these advances have also created significant new opportunities for piracy.

Pirates are now able to take the decoded TV signal or broadband signal and distribute live streams of live sporting events to thousands of users worldwide. The technology is cheap and easily accessible and has led to a growth industry in internet piracy of sporting events. Many sites charge for their illegal streams and many provide the streams for free often using advertising type models.

This activity infringes the rights owner's copyright, but it is very difficult to effectively enforce through traditional channels (courts, tribunals, ADR etc.) because of the timeliness of the damage. The greatest value derived from sport's audiovisual content is the value derived from its *live* broadcast. As a result, awards from courts/tribunals well after the live event is over, is of little consolation to sports and their broadcasters who pay a premium for exclusive rights to show live sports events in a particular territory.

Some territories such as the United States, have enacted laws that particularly address the misuse of issue of filesharing technologies in order to protect IP. These allow quicker action by ISPs and other service providers enabling piracy, however even under these laws, there needs to be still more clarification on such issues as ISP liability for streaming where there are only transient copies that pass through their servers.

While NetResult's internet friendly methods have proven very effective, there are many impediments to effectively enforcing live sports content and those impediments in turn will negatively affect sport's ability to derive fair value for its IP.

SPECIFIC ISSUES

Copyright exceptions – fair use/fair dealing

By its very nature, sport actively seeks out exposure for its events. Each sport is to a high degree in competition with other sports for participants, fans, TV coverage, press coverage and sponsors. The current copyright exceptions with respect to fair use and fair dealing provide sport with a number of challenges in the digital age. The internet allows each sport to become for the first time its own publisher of news and information about its events. While sport would fully acknowledge that other publications would wish to cover their events it is the extent of the coverage that these sites can use free of charge that restricts the ability of the official sites to generate revenues which are used to support the events. Using the example of newspapers and goal flash alerts sent by SMS, it is a matter of some debate as to whether this could be described as editorial. It clearly has a direct commercial value to the publisher. For events with little television revenue, the revenues generated from the official website and mobile services are now a very significant part of their ability to invest in their sport.

The copyright exceptions, in our view, need to be reconsidered carefully in light of the increasing range of business models now available to generate income from content. For instance, the exception that allows UK licensed betting officers to broadcast free –to-air programmes without the need to pay purely because they do no charge for admission to their premises or charge increased prices for food and drink would seem to be too restrictive. These bookmakers use this content to both attract customers into their premises and specifically to encourage betting on the events shown live on these free-to-air channels.

NetResult has some considerable success in generating an informal “fair use” policy with respect to the use of its clients' logos on third party websites. A number of operators choose to use such logos as link buttons, wallpaper, in heading panels or repeatedly on the sites. NetResult works to encourage such sites to restrict the “fair use” of these logos to once in the body of articles on the web page and for this to be either a simple picture file or a hot link to the official event site. This “convincing” effort is quite time consuming and improved clarity on what is and what is not allowed would be helpful.

The press lobby for increased free news access rights to audio visual coverage of sports events to enable them to compete with television companies is potential issue for sports. The news element of a match is often the key sporting moment of the game. It is doubtful that film companies would accept that the showing of the final climax moments of the latest blockbuster film would be fair dealing.

Copyright – digital rights management

The use of DRM technologies by sport in order to protect its content is still very limited. In a number of cases the media partners of the sport may employ their own DRM technologies. It is a real concern for sport that these technologies have a high degree of interoperability as most sports have multiple media partners in different territories. The use of such technologies, especially to the extent they successfully replicate the existing territorial commercial model of sport, would be a clear encouragement to sport to make more content available online.

Legal sanctions on infringements

Whether there are inconsistencies with regard to legal sanctions on IP infringements is likely a question best answered by the legal profession, however from a practical standpoint, the sports we represent face difficulty in protecting their online rights for a number of reasons.

As it stands now, sport faces considerable difficulty securing compliance from pirates who are making money from providing pirated streams of sports content. Recently we have seen a significant increase in the number of ‘professional’ pirate sites offering high quality live streams on a pay-per-view basis to an increasing number of viewers. These pirates are using several different payment systems including credit cards and PayPal and are advertising their services through services like Google ads etc.

Some of the sites are making considerable sums of money from their piracy businesses and will go to great lengths to protect their revenue streams. Recently the pirates behind one UK based streaming site went to the extent of forging a letter from a rights holder claiming to give them legitimate rights to the content, setting up a false telephone number claiming to be NetResult, registering a domain name similar to NetResult’s and sending spam emails from that account to thousands of email accounts in the UK, New Zealand and Australia, claiming that NetResult was threatening imminent legal action against each of these users. All of these actions were taken to deter NetResult and its clients from protecting sport’s legitimate IP rights.

These actions demonstrate the extent to which pirates are willing to go to protect their illegally gotten revenues from online piracy of live sports events. Online piracy is growing in both numbers and sophistication and the traditional IP legislation is ill-equipped to deal with the nature of online piracy, which is dynamic and knows no territorial boundaries. As a result, sports and other rights holders are increasingly vulnerable to piracy and face greater difficulties in securing effective enforcement of their valuable rights.

Coherent between competition policy and IP policy

Most sports operate with a very lean management structure. This does not, in most cases, extend to anywhere near the level of legal and management resource that one would traditionally associate with a business so heavily reliant on IP rights to generate its revenues. This has caused and will continue to cause sport significant problems until a clearer set of precedents and or clarification on policies for both IP and competition law are established. For sport the “cost of putting on the show” is what sport seeks to cover by generating revenues linked to the IP and access rights to these events. The recent BHB v. ATHERACES case is a significant concern if this is interpreted to mean that sport can only recover the direct costs associated with generating the particular content.

Once clarity for sport is available, then we would not expect sport to have any concerns with competition law being used to give the market comfort that excessive pricing or unjustified restrictions on the availability of content could be used by sport.

Other issues

Sport as an industry sector is subject to a great many special provisions; an example of this would be the Listed Events provision. This denies the owners of such events the ability to seek the highest price for the broadcast of the event and is justified by the desire to protect the availability of these events to the widest possible audience. We would argue that there is merit in considering as part of your review whether there shouldn't be a special sports right that could be used by a legitimate sport or event to ensure that they are able to derive fair value from all those who are deriving commercial value from the sports event. This would include bookmakers, SMS service providers, etc. This would, most likely, best be based around the core official data produced by the sport or by giving a sport performance right which would cover the 5 forms of representation set out earlier. It would ensure that sport received proper protection for its intellectual efforts.

The Patent Office web page <http://www.intellectual-property.gov.uk/faq/copyright/what.htm> would seem to us to quite fairly deal with the fundamental purpose of copyright and we see no reason why all of the representations of the sports performance should not be treated in the way set out therein. Currently the protection afforded to the sports intellectual efforts falls far short of what is required and indeed is fair. In the digital age it is increasingly important for the well being of sport that there is clear coherent IP framework that supports the legitimate right of sports rights owners to be able to generate fair revenues to cover the costs of their events and to invest in the future of their sports from those who derive commercial value from those events.