Association des Télévisions Commerciales européennes
Association of Commercial Television in Europe

Issue Paper 2: Rights to Information and Short Extracts

Question 1: Events of Major Importance

As we have commented before, the introduction of a list of protected sports events is an intervention in the market which will by definition discriminate between operators. So, some broadcasters will gain from such an intervention and others will suffer. It has therefore always been the policy of the ACT to refer the EU Commission to submissions made by our individual member companies on the detail of this provision. In general terms, we can see little added value in the suggestion that Member States should be obliged to have such a list. This would appear to be an unnecessary restriction of Member States' ability to regulate their own broadcasting markets as they see fit. The example of Denmark, which chose first to introduce a list of protected events and then to rescind it, would not be possible if there were an obligation to maintain a list.

Question 2: The Right to Information: General Remarks

The Issue Paper does not point out that short reporting rights are an exception to copyright and as such should be construed carefully. For an example of the need for caution in this area, we refer to the recent court ruling in Austria relating to matches in the T-Mobile Bundesliga. This ruling differentiated between a news programme – which could legitimately use short reporting rights – and a sports magazine show, where the defendants in this case, ORF, had sought to use a series of clips of different matches obtained under short reporting rules from the rightsholder, Premiere. The highest Austrian court ruled that "the right to short reporting should secure the public's right to information, rather than furthering the commercial interests of the secondary provider such as the interest in winning and retaining viewers"[1].

We urge the European Commission to follow the logic of the Austrian court and protect broadcasters' investment of in expensive sports rights. The importance of such exclusive content in building the sort of Information Society envisaged by the EU in its recent i2010 Communication should be obvious.

Right to Information: Comments on the Issue Paper

This subject has of course been discussed at length, both at EU and at Council of Europe level. Unlike the other points raised in the EU Issue Papers, this is a subject which is not central to the future shape of the EU industry. Indeed it is striking that this issue has no resonance, and is never discussed, outside these European regulatory circles.

[1] Unofficial translation of extract from judgment quoted in Der Standard, 12 August 2005

The Commission Issue Paper comments that the lack of a transfrontier regime on short reporting is a problem "since many EU broadcasters do not have sufficient technical means or financial resources to bear the cost of […] exclusive broadcasting rights". However, nothing hinders such broadcasters from acquiring non exclusive deferred rights or highlights rights. Indeed, this would appear to be the logical consequence of DG Competition's interventions in the sports rights market in recent years.

Although the ACT and our member companies have heard this argument several times at the numerous hearings on this matter at both EU and Council of Europe level in recent years, we do not recall ever hearing this argument advanced by a European broadcaster. Indeed, there are many companies within the ACT who could be classified as "smaller" operators, and certainly cannot afford the sums paid by their publicly-funded competitors for rights. We have discussed this with smaller operators in a number of markets both from the EU 15 and the EU 10, and no company has ever reported that this is an issue for them. Although we specifically asked for examples to be provided at the most recent Council of Europe hearing, and were promised that these would be forthcoming, as yet nothing has been received.

Leaving aside for the moment our significant concerns of proportionality and competence, in the event that smaller operators – including smaller ACT members - were indeed encountering problems which could be solved by introducing new rules at EU level, we would logically reconsider our opposition to such a move. But the EU needs first-hand, documented evidence of the extent of the problem, which can be discussed with all interested parties, rather than relying on the anecdotal examples with which we are all now familiar.

Extension of current arrangements: including non-broadcasters

The justification for an intervention in the rightsholders' copyright ownership – of ensuring the public's right to information according to the European Convention on Human Rights - is fulfilled by the current systems under which footage is exchanged on a non-profit basis between broadcasters. Giving third party commercial actors such as news agencies a right of free access may artificially help sustain the business model of selling footage to broadcasters, but can hardly be seen as adding to the information already freely available to those same broadcasters.

There are significant operational advantages in restricting the exchange of short reporting extracts to broadcasters. This is because there is a mutual interest among those broadcasters in preserving the value of exclusive sports rights. In almost all European markets, each broadcaster will have some exclusive sports rights and therefore will have a commercial interest in protecting exclusivity. And exclusion from national short reporting arrangements is an effective potential sanction for non-respect of the rules (e.g., length of extract, acknowledgement of source, use in news bulletins only)

Extension of national arrangements to non-broadcasters such as news agencies, who will not own exclusive sports rights, weakens the mutual recognition of broadcasters' exclusivity which underpins current arrangements. The current system, whereby broadcasters deal direct with their fellow broadcasters, is much simpler than involving third parties acting as agents for broadcasters. The risk of short extracts being repackaged is also, we would argue, heightened by

including within short reporting arrangements businesses such as news agencies whose core business is repackaging of content.

Extension of Current Arrangements: Non-national Broadcasters

The implementation at national level of Article 9 of the European Convention on Transfrontier Television together with the recommendation of the Council of Europe from 11 April 1991 includes a European dimension in some cases (Germany and Austria for instance address European broadcasters as beneficiaries of the right)

We are unsure that requiring Member States to introduce non-discriminatory provisions to their local arrangements for news access would be proportionate or worthwhile. For all the rhetoric about "the right to information", this is really a discussion about football. And those football competitions which are of genuinely pan-European interest such as the UEFA Champions League or the FIFA World Cup will already cater for news access. This can be done either directly from the rightsholder, via the EBU Eurovision network if the EBU has collectively purchased the broadcasting rights, or via a local news access arrangement.

So for Member States to extend local arrangements to all EU operators would not help, say, a Cypriot broadcaster to get access to a UEFA Champions League semi-final between Barcelona and Lyon, as this is already guaranteed. It would allow the Cypriot broadcaster access to, e.g., a French league game between Lyon and Paris St Germain. But is this game really of genuine public interest in Cyprus? We believe that this is stretching the "right of information" too far.

Even if these issues of principle can be resolved, there are still serious questions about how this system would work. National regimes on short reporting always have a series of safeguards to protect the interests of the primary rightsholder: limits on duration of the extract, on the length of time for which it can be used, requirement to include the logo of the primary rightsholder, etc. The holder of the French rights to Lyon v Paris St Germain can easily monitor how the extracts are used by its local competitors and has simple recourse to the local NRA and the courts if its interests are not respected. This is of great practical importance, as shown by recent French and Austrian cases. If the French short reporting regime were extended to other Member States' broadcasters, how would the primary rightsholders' interests be protected? Obviously our comments about the risk of extending this scheme to non-broadcasters also apply to non-national third party agents.

The second option proposed by the Issue Paper is that the directive should specify the events to be covered, beneficiaries of the right and the duration and destination of the extracts. Given that we can not identify any real – as opposed to anecdotal - obstacles to the internal market, we believe this approach is also disproportionate. For reasons explained above we believe that the decision to introduce a right of short reporting should remain at national level, and we suspect that the majority of events which are of genuinely pan-European interest are probably already covered.

Association of Commercial Television
Brussels
2 September 2005