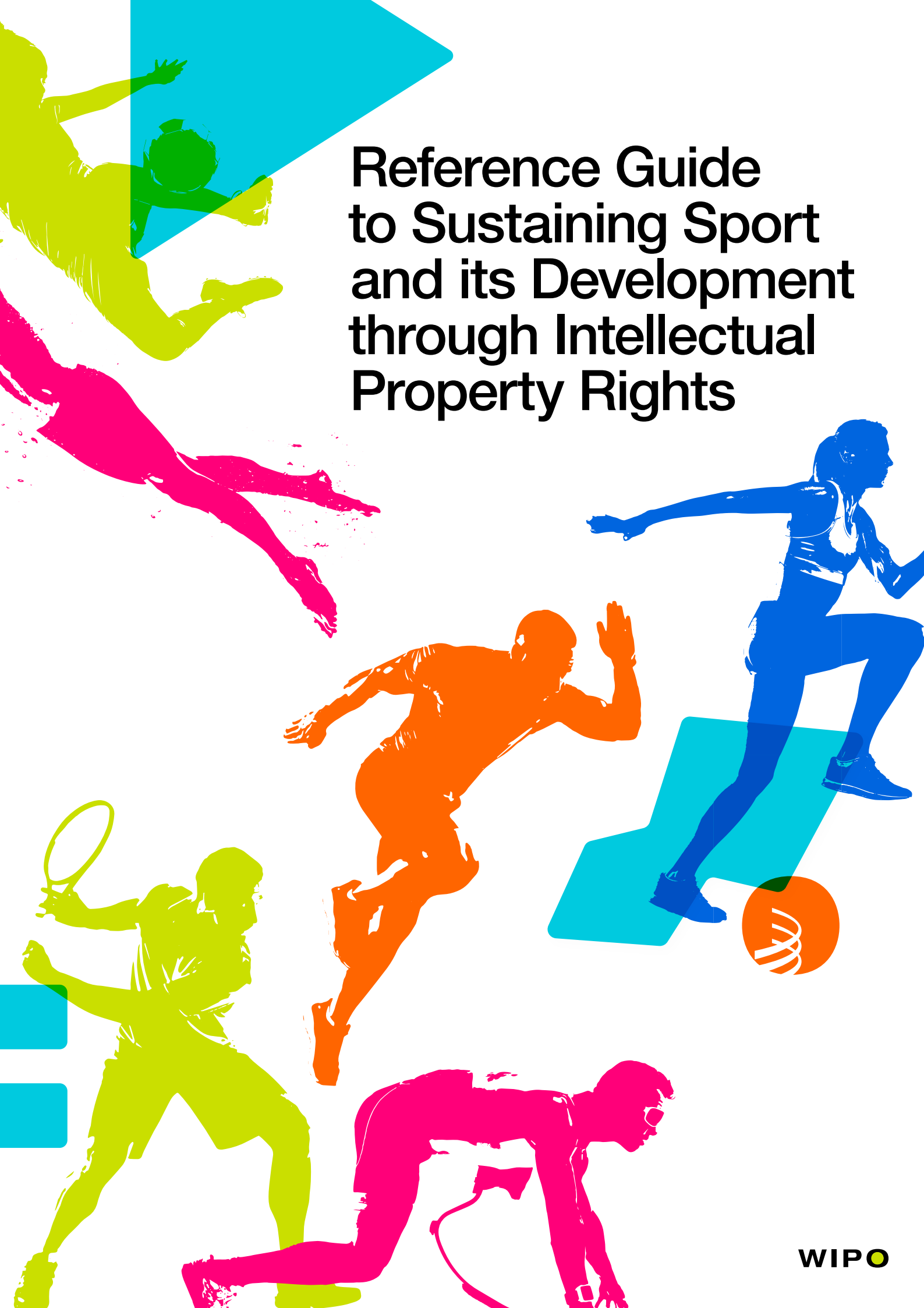


Reference Guide to Sustaining Sport and its Development through Intellectual Property Rights



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Jacques de Werra**

* This report is dedicated to the memory of Mrs Carole Croella who was the person in charge of the supervision of this report at WIPO and who was tragically killed in a car accident in August 2020.

** Professor of contract law and intellectual property law at the Faculty of Law of the University of Geneva; Director of the Digital Law Center (www.digitallawcenter.ch); Vice-Chairman of the board of the International Academy of Sport Science and Technology (www.aists.org).

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1. Introduction

As expressed by Daren Tang, the Director General of the World Intellectual Property Organization (WIPO), “The use of intellectual property rights has enabled the development of sports into the global \$350 billion industry that we know today.¹ From the Olympics to the World Cup, sports is fundamental to our identity and a truly universal language that brings people together. IP rights have always played an important role in the development of sports and will continue to do so with the emergence of new areas such as eSports, which has grown rapidly to reach a global audience of nearly 500 million.² As the industry continues to innovate, a better understanding of IP will help to bring sports to every corner of the world, support sportspersons in earning a living and bring the full benefit of sports to all countries.” The **sports industry is an important sector in many national and regional economies**, and can play an important role in the growth and development strategies of national and regional economies.³

The **organization of major sports events in particular can have a major economic impact on the countries hosting these events.**⁴ In addition, the development of sport is an essential component of the United Nations’ Sustainable Development Goals, given that “sport is an important enabler of sustainable development”,⁵ and “the growing contribution of sport to the realization of development and peace in its promotion of tolerance and respect and the contributions it makes to the empowerment of women and

¹ See: The Business Research Company. *Sports Global Market Report 2022, By Type, Revenue Source, Ownership*. Feb. 2022. Web. <<https://www.prnewswire.com/news-releases/sports-global-market-report-2022-301500432.html>>.

² See: Tristão, Hugo. “The Esports Audience Will Pass Half a Billion in 2022 as Revenues, Engagement, & New Segments Flourish.” *newzoo.com*, 19 Apr., 2022. Web. <<https://newzoo.com/insights/articles/the-esports-audience-will-pass-half-a-billion-in-2022-as-revenue-engagement-esport-industry-growth#:~:text=The%20global%20esports%20audience%20will,for%20the%20remaining%2071%20million>>

³ See: SportsEconAustria (SpEA, Project lead), *et al.* “Study on the contribution of sport to economic growth and employment in the EU.” *ec.europa.eu*. European Commission, Nov. 2012. Web. <<https://ec.europa.eu/assets/eac/sport/library/studies/study-contribution-sports-economic-growth-final-rpt.pdf>>: “Policy Implication 1: Sport is an important economic sector: The study shows that sport is an important economic sector in the EU, with a share in the national economies which is comparable to agriculture, forestry and fishing combined. Moreover, its share is expected to rise in the future.

Policy Implication 2: Sport represents a labour-intensive growth industry: Sport is a relatively labour-intensive industry. This means that the expected growth in the sport industry is likely to lead to additional employment, with sport’s share of total employment being higher than its share of value added. The sport sector can thus contribute to fulfilling the Europe 2020 goals”; it is obviously important to define the scope of the sports industry that shall be taken into account (which is discussed and defined in this Study); for an update, see: “Study on the economic impact of sport through sport satellite accounts.” *euoffice.euolympic.org*. European Commission, May 2018. Web. <<https://www.euoffice.euolympic.org/blog/new-study-economic-impact-sport-released-european-commission>>.

⁴ See the collection of essays published in: Maennig, Wolfgang and Zimbalist, Andrew, eds. *International Handbook on the Economics of Mega Sporting Events*. Cheltenham: Edward Elgar Publishing, 2012; see also: “The economic impact of major sports events - Analysis of Hong Kong’s 2017 major sports event calendar and outlook for the future” *assets.kpmg*. KPMG, 2018. Web. <<https://assets.kpmg/content/dam/kpmg/cn/pdf/en/2018/09/the-economic-impact-of-major-sports-events.pdf>>. It should be noted that the factors and criteria of impact can be of relevance for measuring the long-term benefits of sports events, such as the legacy. With respect to the Olympic legacy, for example, see: International Olympic Committee (IOC). “Olympic Legacy.” *olympic.org*. IOC. Web. <<https://www.olympic.org/olympic-legacy>>. For the suggestion that adequate factors be taken into account in economic impact studies, see also: Jeanrenaud, Claude. “Sports Events: Uses and Abuses of Economic Impact Studies.” *Finance & Bien Commun* 1: 26 (2007): pp. 99-104. Web. <<https://www.cairn.info/revue-finance-et-bien-commun-2007-1-page-99.htm#>>.

⁵ General Assembly. “Resolution adopted by the General Assembly on 16 December, 2016. 71/160. Sport as a means to promote education, health, development and peace.” (doc. A/RES/71/160, p. 4) *undocs.org*. United Nations, 19 Jan. 2017. Web. <<https://undocs.org/A/RES/71/160>>; see also: General Assembly. “Strengthening the global framework for leveraging sport for development and peace. Report of the Secretary-General.” (doc. A/73/325) *undocs.org*. United Nations, 14 Aug. 2018. Web. <<https://undocs.org/A/73/325>>.

of young people, individuals and communities as well as to health, education and social inclusion objective”.⁶ This requires the setting up of cooperation and partnerships between the relevant stakeholders, including international sports organizations, and WIPO engages very actively in the presentation and discussion of the application of intellectual property (IP) in the sports industry.⁷

The goal of this publication is to serve as a **reference tool that shall help to guide the development of national strategies in order to sustain sport and its development through IP rights**. Certain countries have **included IP as part of their national sports strategy** (which is, by way of illustration, the case of Jamaica⁸), or have duly acknowledged the importance of IP for the sports industry (as reflected, for instance, in a recent article about Singapore⁹).

This guide will consequently explore and present how the protection of IP rights applies and how it can be used in the sports industry. It analyzes how IP rights can help to foster the social and economic development of sports activities and the organization of sports events at the national or regional level.

This guide does not focus on any specific sport, it being noted that the relevance of IP rights may vary quite significantly depending on the type of sport and on its other features (e.g. individual vs. collective sport, etc.). Like many other sectors and industries, the sports industry faces challenges raised by the **digital environment** (as evidenced – among other factors – by the most significant development of eSport) which may have significant IP implications.¹⁰ Some of these implications will be discussed in this guide (in terms of digital piracy of sports broadcasts, see below (2) (d) (ii), and of digital ambush marketing, see below (2) (f)).

This guide is based on a **broad definition of IP rights** that shall cover the various categories of legal rights (even the rights that do not create property rights) that protect

⁶ *Ibid.*

⁷ For the interactions between the International Olympic Committee (IOC) and the United Nations, see: IOC. “Cooperation with the UN.” *olympic.org*. IOC. Web. <<https://www.olympic.org/cooperation-with-the-un>>; for WIPO activities on IP and Sport, see: WIPO. “Sport and Intellectual Property.” *wipo.int*. WIPO. Web. <<https://www.wipo.int/ip-sport/en/>>.

⁸ See: “White Paper on the National Sport Policy (Ministry Paper No. 29/13).” Office of the Prime Minister, Mar. 2013: para. 10.4.3 p. 16. Web. <<https://jis.gov.jm/media/National-Sports-Policy-March-25-2013-FINAL-6.pdf>>. (“The development of the economic potential of sport will depend on the steadfast protection of intellectual property rights as a fundamental resource. While Jamaica currently has a basic legal framework for the protection of intellectual property rights [...] the long-term development of sport will require the strengthening of its institutional capacity”); for another perspective from Jamaica, see also: Beckford, Carole. “Intellectual property, sports and tourism: a perfect match.” *wipo.int*. WIPO Magazine, Apr. 2019. Web. <https://www.wipo.int/wipo_magazine/en/2019/02/article_0005.html>.

⁹ See: Lai, Stanley. “Game on: It’s time to mind intellectual property rights in sport.” *The Business Times* (Singapore), Apr. 26, 2019. Web. <<https://www.businesstimes.com.sg/opinion/game-on-its-time-to-mind-intellectual-property-rights-in-sport>>.

¹⁰ See the interesting report: “Sports industry: time to refocus? - PwC’s Sports Survey 2019.” *pwc.ch*. PwC, 2019. Web. <<https://www.pwc.ch/en/publications/2019/PwC-Sports-Survey-2019-web.pdf>>. It is obvious that the sports industry must adapt to the digital environment and that IP rights are relevant (and affected by this context); this report does not address all digital IP issues that can arise for the sports industry and does not discuss the IP challenges that eSport raises; on this issue, see e.g.: Tan, David N. “Owning the World’s Biggest eSport: Intellectual Property and Dota.” *Harvard Journal of Law and Technology*. 31: 2 (2018): 965-989. Web. <<https://jolt.law.harvard.edu/assets/articlePDFs/v31/Owning-the-Worlds-Biggest-eSport-David-Tan.pdf>>; and: IP Sentinel - European IP Helpdesk Blog. “IP and eSports”. *iprhelpdesk.eu*. European IP Helpdesk. Web. <<http://www.iprhelpdesk.eu/blog/ip-and-esports>>.

intangible assets against their unauthorized use by third parties. Intangible assets include assets that are not protected by the traditional categories of IP rights, but by other legal rights. This is the case of the right of personality/right of privacy/right of publicity, which is a category of rights that do not belong to IP rights in a narrow sense but which plays a very significant role in the sports industry.¹¹

This guide is structured in three parts. It will start by presenting three important features of the sports industry that have an impact from the standpoint of IP rights (see below (2)).

The guide will then present and discuss a selection of the most relevant IP issues that can arise in the sports industry, which cover practically all the main categories of IP rights and which confirm the key importance of IP rights for the sports industry (see below (3)). The guide will then present specific policy measures that countries can consider for the development of their sports industry by relying on IP rights (see below (4)).

2. Important Features of the Sports Industry

It is necessary to present three important features of the sports industry that have an impact from the standpoint of IP rights. These features are as follows: the sports industry relies and depends on the efficient protection of IP rights (see below (a)); the sports industry is a multi-level and multi-stakeholder industry (see below (b)); and the sports industry is governed by a variety of legal rules that comprise sports-specific rules and general legal rules (see below (c)).

(a) The sports industry relies and depends on the efficient protection of IP rights

The sports industry is an industry that relies and depends on the efficient protection of IP rights.¹² The reason is that the sports industry derives an important part of its revenues from legal control over IP rights relating to sports events or sports institutions, which make it possible to commercialize them in a manner fruitful to third parties (e.g. broadcasters by the granting of exclusive broadcasting rights for sports events, or official sponsors of sports events or sports teams, at all geographic levels (including at the global

¹¹ See: Blackshaw, Ian S. *International Sports Law: An Introductory Guide*. The Hague: Asser Press, 2017. Print. This source includes image rights in IP rights. See also: Anthamatten-Büchi, Sylvia; Staub, Roger; Vasella, David. "Sport & Immaterialgüterrecht" in *Sportrecht*. Bern: Stämpfli, 2018, 2: 217. This source also adopts a broad definition of IP rights as covering personality rights; by way of illustration, the Brazilian Pelé law provides for the protection of the image rights of athletes (Art. 87-A), see Web. <<https://wipolex.wipo.int/en/legislation/details/16222>>.

¹² See: Global Innovation Policy Center (GIPC). "Leveraging Intellectual Property in the Global Sports Economy – Sports as a Tool for Progress and Development" *theglobalipcenter.com*. GIPC, 2018 ("GIPC Report"). Web. <https://www.theglobalipcenter.com/wp-content/uploads/2018/06/023441_GIPC_Sports_Econ_Insides_03.pdf>. The "key finding 1" of the GIPC Report is that "[t]he modern sports industry depends on and cannot exist without IP rights".

level, which is done for example in the International Olympic Committee's Olympic Partner (TOP) program for sponsors¹³).¹⁴

The efficient protection of IP rights is essential to the economic and social success and sustainability of sports institutions and sports events.¹⁵ This protection of IP rights can benefit all stakeholders in the sports industry, including individual athletes, teams and sports federations, which can derive revenues from the commercial exploitation of their IP rights.

Even though copyright and trademarks are traditionally considered the most important categories of IP rights for the sport industry, a much broader and diverse variety of IP rights is of key relevance for the sports industry and should be used in order for countries to "build a modern, successful sports economy".¹⁶

(b) The sports industry is a multi-level and multi-stakeholder industry

The sports industry is generally characterized by its multi-level structure. This results from the **pyramidal governance of many sports**, which comprises global governance bodies (e.g. the international federation in charge of a specific category of sport) and local (regional and national) governance bodies (e.g. the regional or national federation of that category of sport).¹⁷

These bodies can have (concerted) parallel activities and missions. This can have an impact on the mechanisms by which the relevant sports institutions can obtain third party funding from corporate sponsors and on the allocation of the IP rights and the revenues deriving from the monetization of these rights.¹⁸

¹³ See Blackshaw (note 10), p. 32 ("[...] without IPRs, it would be very difficult to market sports events, sports persons and sports teams, because sports bodies and individuals would have nothing to commercialise or sell").

¹⁴ See, by way of illustration, the 2018 Annual Report of the IOC, p. 14 (indicating that 91% of the funding of the IOC comes from broadcasting rights (73%) and from the TOP program marketing rights (18%)). IOC. "IOC Annual Report 2018: Credibility, Sustainability, Youth." *olympic.org*. IOC, 2018. Web. <<https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/Documents/IOC-Annual-Report/IOC-ANNUAL-REPORT-2018.pdf>>.

¹⁵ GIPC Report (note 11), p. 8 (noting that "[f]rom world championships to regional, national or even local sporting events, IP rights play a key role in the success and long-term viability of the sports sector" and that "[s]ports is an intangible asset and IP rights provide the legal protection to build economic value and stimulate interest and vitality in sports").

¹⁶ GIPC Report (note 11), on p. 5 and p. 38 (finding as "key finding 2" that a "modern sports industry requires a broad menu of IP rights to thrive").

¹⁷ See Blackshaw (note 10), p. 21 *et seq.*; there can be local differences in the organization and governance of certain sports, specifically a difference between the US and the European models, whereby the European model of sports organization is generally considered to be open and pyramidal, see Blackshaw (note 10), pp. 5-8; on the US model, see e.g. Carfagna Peter A., *Sports and the Law, Examining the Legal Evolution of America's Three "Major Leagues"*, St. Paul: West Academic Publishing (3rd ed), 2017. Print.

¹⁸ By way of illustration with reference to the structure of sponsorship within the Olympic Movement, the IOC manages the TOP sponsor marketing program (note 12), which has a global reach and has a limited number of sponsors. In addition, the Organising Committees of the Olympic Games (OCOGs) "manage their own complementary commercial programmes to support the staging of the Games", for which "[c]ontracts are negotiated directly by the OCOG and are generally limited to the four-year Games period", whereby the "OCOG marketing programmes incorporate: Olympic Games sponsorship and suppliership programmes (non-competing product categories to the TOP Partners), Olympic Games ticketing programmes [and] Olympic Games licensing programmes"; National Olympic Committees (NOCs) further "manage local sponsorship programmes in non-competing categories to the TOP Partners that also support sports development activities and the respective Olympic teams. These sponsorship programmes grant Olympic marketing rights within the NOC country or

The sports industry is also a **multi-stakeholder industry** characterized by a high number and very diverse variety of public and private stakeholders, which play a significant role in the proper functioning and development of the sport concerned.¹⁹

Athletes and sports teams are obviously the most important category of stakeholders in the sports industry. There would be no sports industry without them. Their role is quite important from an IP perspective because they own IP rights and can be directly involved in IP issues (as reflected in the important discussion about the ability of athletes to be active on social media in the context of mega sports events with respect to the issue of “digital ambush marketing”, see below (2) (f)).

National, regional and international sports federations and other sports governance bodies have a critical mission in the sports industry, because they can control some of the IP rights derived from sports events and because they can issue sports regulations that can be relevant to IP. National, regional and international governmental agencies dealing with sports (such as national ministries in charge of sports) can similarly play a significant role in the promotion and implementation of sport development activities.

The **private sector** is of key importance in the sports industry because it performs various activities that are essential to the industry. These activities include the organization of sports events (for example, individual sports competitions, such as tennis competitions), the broadcasting of sports events, the management of rights related to sports events and athletes (sports agencies²⁰), the manufacture and commercialization of sporting goods, the operation of sports clubs and sports venues, and the sponsoring of sports events and other sports institutions (including individual athletes, teams, competitions, sports venues (on the basis of so-called “naming rights”)).

Even though these stakeholders have very diverse activities and interests, what they do have in common is that they all rely, in a way or another, on the protection of intangible assets and on IP rights for their activities. This is particularly true in the case of athletes and teams who can derive (sometimes significant) revenues from personal and institutional sponsorship agreements.

territory only. Olympic marketing programmes managed by the NOCs include: National Olympic sponsorship and suppliership programmes that operate within the home country of the NOC, National Olympic licensing programmes”.

¹⁹ See: WIPO, “Intellectual Property and Sports: Tracing the Connections.” *wipo.int*. WIPO. Web. <https://www.wipo.int/ip-outreach/en/ipday/2019/ip_sports.html>. This lists the organizers of sports events, sports federations, athletes, teams, trainers, manufacturers of sports equipment, broadcasters and other media platform, corporate sponsors and sports fans; the goal of this report is not to describe precisely the respective activities and missions of all stakeholders in the sports industry, but to present them to the extent that they are relevant in light of the focus on IP rights.

²⁰ See: Belzer, Jason. “The World’s Most Valuable Sports Agencies 2019: CAA Expands Its Business, And Its Lead.” *forbes.com*. Forbes Magazine, 21 Oct., 2019. Web. <<https://www.forbes.com/sites/jasonbelzer/2019/10/21/most-valuable-sports-agencies-caa/#54c948c83011>>.

(c) The sports industry is governed by a variety of legal rules combining sports-specific rules and general legal rules

The pyramidal structure of governance that prevails in the sport industry (see (b) above) takes the form of a **top down regulatory system** with respect to the sporting rules that govern a given sport (or group of sports). This pyramidal structure means that there is a system of hierarchy of norms at the top of which we find the global rules established at the international level (e.g. by an international sports federation), which generally prevail over the rules adopted at the regional or national level (e.g. by a national sporting federation) in a system based on the consent/contractual agreement of all the participants.²¹

These institutional sports-related rules generally provide for specific rules that apply to certain “**mega sports events**”²² that the countries and cities that plan to host these mega sports events are invited to implement. These regulations may contain IP provisions that can specify how general IP principles shall apply in the specific context at issue.

This is, for example, what applies to the organization of Olympic Games. The modalities of organization of Olympic Games are carefully defined in a voluminous set of contractual documents, which generally include one framework contractual document (see, for example, the “Host City Contract (HCC) – Principles” for the organization of the XXV Olympic Winter Games 2026 in Italy²³) and many more detailed contractual documents (including the Host City Contract (HCC) – Operational Requirements).²⁴ In particular, these documents define the steps and actions that must be taken by the organizers in order to protect the IP rights relating to the event. These measures generally cover the various types of IP rights, including trademarks and copyrights and protection against ambush marketing (to be referred to below in the chapter on ambush marketing, see below (2) (f) and the excerpt of the chapter on “Rights Protection” in the final chapter of this guide).

The progressive development of sports-specific rules has led to the creation of a set of transnational sports law rules (which are known as building a “**lex sportiva**”),²⁵ in which

²¹ There is a discussion as to whether this consent-based/contract-based system is adequate in terms of the legitimacy of international sports governance. See: Freeburn, Lloyd. *Regulating International Sports - Power, Authority and Legitimacy*. Leiden: Brill Nijhoff, 2018; the models of governance of sports may vary from one country/region to the other and may take different forms, whereby the US model of sports governance is quite unique, see Harris, Spencer J./Jedlicka R., Scott, “The Governance of Sport in the USA”, in *Sport Business in the U.S.: Contemporary Perspectives*, New York: Routledge, 2020.

²² Such as the rules that apply for each edition of the Olympic Games or to other international sports events.

²³ IOC. “Host City Contract: Principles – XXV Olympic Winter Games 2026.” *olympic.org*. IOC, 2018. Web. <<https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/Documents/Host-City-Elections/XXV-OWG-2026/Host-City-Contract-2026-Principles.pdf>>.

²⁴ See, for example: IOC. “Host City Contract: Operational Requirements – June 2018.” *olympic.org*. IOC, Jun. 2018. Web. <<https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/Games/Host-City-Contract/HCC-Operational-Requirements.pdf>>. This is a 292-page document.

²⁵ For a recent analysis, see: Duval, Antoine. “What Lex Sportiva Tells You about Transnational Law” in *The Many Lives of Transnational Law: Critical Engagements with Jessup’s Bold Proposal* (Zumbansen, Peer, ed.). Cambridge: University Press, 2020:

Switzerland and Swiss law play a central role. This is particularly owing to the location of the headquarters of the Court of Arbitration for Sport (CAS) in Lausanne,²⁶ to the incorporation of many leading global sports bodies under Swiss law and to the submission of many international sports contracts to Swiss law so that the global governance of sport is largely governed by Swiss law.²⁷ The rules of global sports governing bodies generally provide that disputes be submitted to arbitration before the CAS.²⁸ By way of illustration, the Host City Contract for the 2026 Winter Olympic Games provides for the application of Swiss law and for the jurisdiction of the CAS.²⁹

These different sets of sports-related rules and sports-related dispute resolution mechanisms do not apply in a legal vacuum. Rather, these rules **apply jointly and in co-existence with the general legal rules and principles** of the relevant jurisdiction(s), which also fully apply to the sport industry.³⁰ The result of this is a **regulatory ecosystem that combines specific sports regulations and general legal rules**.

The protection of IP rights in the sports industry reflects this multiplicity of sources and the pyramidal structure of sports regulation. The protection of IP rights results, in particular, from sports-specific regulatory sources: international sports bodies have issued such sources dedicated to the protection of sports-related IP rights (connected to their activities, such as the Olympic Games).

p. 275 *et seq.* (tracing back the creation of this terminology to: Summerer, Thomas. *Internationales Sportrecht vor dem staatlichen Richter in der Bundesrepublik Deutschland, Schweiz, USA und England*. Munich: VVF, 1990, p. 95). The concept and the contours of the “lex sportiva” are not unified and some consider the “lex sportiva” to essentially focus on the judge-made rules and principles resulting from the Court of Arbitration for Sport; see: Casini, Lorenzo. “The Making of a Lex Sportiva by the Court of Arbitration for Sport.” *German Law Journal*. 12: 5 (2011): pp. 1317-1340. Print.

²⁶ See: Rigozzi, Antonio. “L’importance du droit suisse de l’arbitrage dans la résolution des litiges sportifs internationaux.” *Revue de droit suisse*. 132.1.3 (2013): pp. 301-325.

²⁷ See: Besson, Sébastien. “Gouvernance des organisations sportives : importance du droit suisse, enjeux et perspectives.” *Revue de droit suisse*. 132.1.3 (2013): pp. 283-300; Zagklis, Andreas. “The relevance of Swiss law in sport corporate governance: a view from abroad.” *Revue de droit suisse*. 132.1.3 (2013): pp. 327-339; this has an impact on doping rules, see: Morgan, Mike. “The relevance of Swiss law in doping disputes, in particular from the perspective of personality rights: a view from abroad.” *Revue de droit suisse*. 132.1.3 (2013): pp. 341-351.

²⁸ See, for example, art. 61 of the Olympic Charter:

“1. The decisions of the IOC are final. Any dispute relating to their application or interpretation may be resolved solely by the IOC Executive Board and, in certain cases, by arbitration before the Court of Arbitration for Sport (CAS).
2. Any dispute arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively to the Court of Arbitration for Sport, in accordance with the Code of Sports-Related Arbitration”; IOC. “Olympic Charter.” *olympic.org*. IOC, Aug. 2021. Web. <<https://stillmed.olympics.com/media/Document%20Library/OlympicOrg/General/EN-Olympic-Charter.pdf>>. For an analysis of the case law of the CAS, see: Lindholm, Johan. *The Court of Arbitration for Sport and Its Jurisprudence - An Empirical Inquiry into Lex Sportiva*. The Hague: Asser Press, 2019.

²⁹ See “Host City Contract: Principles – XXV Olympic Winter Games 2026.” (note 22), para. 51.1 and 51.2.

³⁰ See Blackshaw (note 10), p. 22; this raises the issue of the relationships between these sets of rules; see the pioneering work of Gérald Simon: Simon, Gérald. *Puissance sportive et ordre juridique étatique: Contribution à l’étude des relations entre la puissance publique et les institutions privées*. Paris: Librairie générale de droit et de jurisprudence, 1990; see: Cisneros, Ben. “Challenging the call: Should sports governing bodies be subject to judicial review?” *International Sports Law Journal*. 20 (2020). Web. <<https://doi.org/10.1007/s40318-020-00165-9>>; Baddeley, Margareta. “The extraordinary autonomy of sports bodies under Swiss law: lessons to be drawn.” *International Sports Law Journal*. 20 (2020). Web. <<https://doi.org/10.1007/s40318-019-00163-6>>.

By way of illustration, the Olympic Charter provides for the protection of the so-called “**Olympic properties**”³¹ and allocates the rights over them to the IOC.³² In addition to this sport-specific source of protection, the protection of IP rights in the sports industry further results from the general (i.e. non-sports specific) IP laws and regulations that apply at the international, regional and national levels.

Beyond IP laws, other areas of the law have a significant impact on the sports industry. One of them is contract law because the **commercialization of sports-related IP rights is based on contracts**. Contract law consequently has a key relevance to the sports industry and can appear in very diverse types of transactions, including agreements on broadcasting rights, license agreements, sponsorship agreements, merchandising agreements (on the importance of transactions over sports-related IP rights, see below (2) (j)). A sound and robust contract law system is consequently a fundamental enabling factor for the development and sustainability of the sports industry.³³ **Competition law** is another very important area of the law that has a major impact on the sports industry. Competition law has indeed significantly contributed to shaping the sports industry ecosystem and will certainly continue to do so in the future.³⁴ This is particularly true with respect to the broadcasting of sports events (see below (2) (d)(ii)).

³¹ On the “Olympic properties”, see: Wüthrich, Marianne. “Protecting the Olympic Properties.” *wipo.int*. WIPO Magazine, Aug. 2016. Web. <https://www.wipo.int/wipo_magazine/en/2016/04/article_0004.html>; Chappuis, Marianne. “The Olympic Properties.” *wipo.int*. WIPO Magazine, Jun. 2012. Web. <https://www.wipo.int/wipo_magazine/en/2012/03/article_0003.html>; Chappuis, Marianne. “La protection des propriétés olympiques” in *Sport et propriété intellectuelle/Sport and intellectual property* (de Werra, Jacques ed.), Geneva: Schulthess, 2010 (vol. 1 of the University of Geneva School of Law IP book series propriété intellectuelle/intellectual property), p. 1. Web. <<https://archive-ouverte.unige.ch/unige:5076>>.

³² See Rule 7, para. 4 of the Olympic Charter (note 27): “The Olympic symbol, flag, motto, anthem, identifications (including but not limited to “Olympic Games” and “Games of the Olympiad”), designations, emblems, flame and torches, as defined in Rules 8-14 below, and any other musical works, audio-visual works or other creative works or artefacts commissioned in connection with the Olympic Games by the IOC, the NOCs and/or the OCOGs, may, for convenience, be collectively or individually referred to as “Olympic properties”. All rights to the Olympic properties, as well as all rights to the use thereof, belong exclusively to the IOC, including but not limited to the use for any profit-making, commercial or advertising purposes. The IOC may license all or part of its rights on terms and conditions set forth by the IOC Executive Board”.

³³ See: Townley, Stephen. “Intellectual property and the specificity of sports.” *wipo.int*. WIPO Magazine, Apr. 2019. Web. <https://www.wipo.int/wipo_magazine/en/2019/02/article_0008.html>. (“The current sports industry approach to monetizing its assets relies on an amalgam of contract rights, IP rights, and a basket of analogous and neighboring rights that are often specific to an event or jurisdiction”).

³⁴ In view of their complexity, the competition law issues arising in the sports industry will not be discussed in this report, which focuses on IP rights, it being noted that competition law may significantly limit and affect the exploitation mechanisms of IP rights in the sports industry; see e.g.: Celli, Alessandro L. and Brogini, Romina. “Die kartellrechtliche Prüfung von Sportregeln : eine Auslegeordnung der aktuellen Praxis in der Schweiz und der EU” in *Sportrecht*. Bern: Stämpfli, 2018: 2, pp. 171-216; Ruijsenaars, Heijo and Këllezi, Pranvera. “Exclusive broadcasting rights for sports events and their limits” in *Sport et propriété intellectuelle/Sport and intellectual property* (de Werra, Jacques ed.), Geneva: Schulthess, 2010 (vol. 1 of the University of Geneva School of Law IP book series propriété intellectuelle/intellectual property), p. 49. Web. <<https://archive-ouverte.unige.ch/unige:5076>>; Parrish, Richard. *Sports law and policy in the European Union*. Manchester: University Press, 2003, p. 109 *et seq.* (Chapter 5: Sport and EU Competition Law). Various other very diverse areas of law are of great importance in the sports industry, including human rights (see e.g. the Center for Sport and Human Rights, <<https://www.sporhumanrights.org/>>) and tax law (see e.g. “Info Journal - Global Sports Law and Taxation Reports.” *sportsandtaxation.com*. Web. <<https://www.sportsandtaxation.com/journal/>>.)

(d) Key takeaways

This analysis leads to the following key takeaways:

1. **The sports industry relies and depends on the efficient protection of IP rights**

The sports industry derives a very important part of its funding from the commercial exploitation of IP rights by their owners. This exploitation can particularly benefit individual athletes (who can monetize their image rights in endorsement agreements), organizers of sports events (who can monetize the commercial exploitation of these events) and sports-related governance bodies.

2. **The sports industry is a multi-level and multi-stakeholder industry**

The sports industry is a **multi-level industry** because of the pyramidal governance of many sports that comprises global governance bodies (e.g. the international federation in charge of a specific category of sport) and local (regional and national) governance bodies (e.g. the regional or national federation of that category of sport). Specific rules applicable to the organization of “mega sports events” are issued by the governing bodies of the sports concerned. This is, in particular, the case for the organization of Olympic Games, which are governed by very detailed rules that apply to the host city/host country.

The sports industry is also a **multi-stakeholder industry** characterized by the high number and very diverse variety of public and private stakeholders, which play a significant role in the proper functioning and development of the sport concerned. These stakeholders include athletes and teams, national, regional and international sports federations and governmental bodies (including ministries of sport) and the private sector. All of them can significantly benefit from an efficient system of protection of IP rights.

3. **The sports industry is governed by a variety of legal rules combining sports-specific rules and general legal rules**

The **pyramidal structure of governance** of the sport industry takes the form of a **top down regulatory system**. This means that there is a hierarchy of norms at the top of which we find the global rules established at the international level (e.g. by an international sports federation) that generally prevail over the rules adopted at the regional or national level (e.g. by a national sport federation) in a system based on the consent/contractual agreement of all the participants. These institutional sports-related rules generally provide for specific rules that apply to

certain “mega sports events”. All these specific legal rules and principles of the sports industry together build the “lex sportiva”. Swiss law plays a significant role in the lex sportiva and in the global governance of the sports industry, in particular because of the seat of many international sports governance bodies including the **International Olympic Committee** and because of the seat of the **Court of Arbitration for Sport**).

In addition to these sports-specific legal rules, **general legal rules and principles also apply to the sports industry**, such as IP laws, contract law and other areas of law (including competition law).

3. Selected IP Issues for Sustaining Sport and its Development through Intellectual Property Rights

This chapter offers an overview of the substantive IP law topics that are of particular relevance in the sports industry and that relate to all the main categories of IP rights. These topics are:

- (a) Protection of the Olympic properties and the Olympic symbol
- (b) Trademark law
- (c) Design law
- (d) Copyrights and neighboring rights
- (e) Image rights
- (f) Protection against unfair competition: ambush marketing
- (g) Protection against unfair competition: trade secrets
- (h) Utility patents

The guide will then turn to two important transversal issues, which are the **enforcement of IP rights and dispute resolution mechanisms** (see below (i)) and **contractual transactions over sports-related IP rights** (see below (j)).

(a) Protection of the Olympic properties and the Olympic symbol

The Olympic Charter provides for specific protection of the “Olympic properties”.³⁵ The Olympic symbol further benefits from the **Nairobi Treaty on the Protection of the Olympic Symbol**, dated September 26, 1981, which provides for specific protection of the

³⁵ See above text in notes 30-31.

Olympic symbol³⁶ as the State parties (subject to certain limits and exceptions) are requested “to refuse or to invalidate the registration as a mark and to prohibit by appropriate measures the use, as a mark or other sign, for commercial purposes, of any sign consisting of or containing the Olympic symbol, as defined in the Charter of the International Olympic Committee, except with the authorization of the International Olympic Committee” (art. 1). The IOC also benefits from a specific protection against the use without authorization of the Olympic term in domain names³⁷. In addition to these international sources of protection, the Olympic signs can benefit from specific protection at the national level.³⁸ The scope of protection granted to the Olympic signs may lead to litigation before national courts.³⁹

What is the Olympic symbol protected under the Nairobi Treaty?

The Annex to the Nairobi Treaty defines the “Olympic symbol” as follows: “the Olympic symbol consists of five interlaced rings: blue, yellow, black, green and red, arranged in that order from left to right. It consists of the Olympic rings alone, whether delineated in a single color or in different colors”.

(b) Trademark law

The conditions of registration and of protection of sports-related trademarks are governed by the standard trademark law principles that apply in the relevant jurisdiction

³⁶ See: WIPO. “Nairobi Treaty on the Protection of the Olympic Symbol.” *wipo.int*. WIPO. Web. <<https://www.wipo.int/treaties/en/ip/nairobi/>>; 52 countries are presently parties to the Nairobi treaty (see: WIPO Lex. “WIPO-Administered Treaties - Contracting Parties: Nairobi Treaty (Total Contracting Parties: 52).” *wipo.int*. WIPO. Web. <http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=22>.); the Annex to the Nairobi treaty defines the “Olympic symbol” as follows: “the Olympic symbol consists of five interlaced rings: blue, yellow, black, green and red, arranged in that order from left to right. It consists of the Olympic rings alone, whether delineated in a single color or in different colors”.

³⁷ See: ICANN. “Implementation of the Consensus Policy for Protection of Certain Specific IGO and INGO Identifiers for All gTLDs.” *icann.org*. ICANN. Web <<https://www.icann.org/en/announcements/details/implementation-of-the-consensus-policy-for-protection-of-certain-specific-igo-and-ingo-identifiers-for-all-gtlds-16-1-2018-en>>.

³⁸ See e.g. the Chinese Regulations on the Protection of Olympic Symbols released by the State Council on February 4, 2002 (which entered into force on April 1, 2002), (<http://ipr.mofcom.gov.cn/zhuanti/jkblh/iplaws/trademark/alkp.pdf>) and the German law: § 3 Abs. 2 Gesetz zum Schutz des olympischen Emblems und der olympischen Bezeichnungen (OlympSchG).

³⁹ See the very long dispute about the “Olymprix” advertising campaign launched by a supermarket chain in France (Les Echos. “Protection : le parcours d'obstacles d'une marque notoire.” *lesechos.fr*. Les Echos, Dec. 1, 2014. Web.

<<https://www.lesechos.fr/2004/12/protection-le-parcours-dobstacles-dune-marque-notoire-654320>>); see judgment of the Bundesgerichtshof (BGH) of March 7, 2019 - I ZR 225/17 (“die Verwendung der Bezeichnungen “olympiaverdächtig” und “olympiareif” im geschäftlichen Verkehr für die Bewerbung von Sporttextilien als solche verstößt nicht gegen das Olympiaschutzgesetz”), (BGH - Mitteilung der Pressestelle. “Bundesgerichtshof zur Werbung für Sportbekleidung als “olympiaverdächtig.”. *juris.bundesgerichtshof.de*. BGH, Mar. 7, 2019. Web. <<http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=Aktuell&nr=93225&linked=pm>>); judgment of the Oberlandesgericht of Munich of 7 December 2017; ref. 29U 2233/17, CausaSport 2018, 47 (Keine Verwechslungsgefahr und kein unlauterer Nutzen bei “Bauernhofolympiade”) no infringement in this case, it being noted that the term “Olympiad” is defined in the Olympic Charter (see note 27) as “a period of four consecutive calendar years, beginning on 1 January of the first year and ending on 31 December of the fourth year” (By-law 1 to Rule 6/8); see also the judgment of the Oberlandesgericht of Stuttgart of 8 February 2018; Az. 2 U 109/17 (Anspielung auf olympische Ringe in Grillwerbung zulässig, CaS 2018, 50) concernant Lidl (chain of supermarket); BGH, GRUR 2014, 1215 Tz. 43 – Olympia-Rabatt zu § 3 Abs. 2 Nr. 2 OlympSchG.

in light of the international substantive and procedural principles governing trademark law (specifically the WIPO trademark-related agreements and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) – if applicable in the country concerned). The sports industry can rely on international and regional IP protection systems in order to protect its trademarks in multiple jurisdictions, and can specifically rely on the WIPO international trademark registration system - the Madrid System⁴⁰ - in the countries covered by it.⁴¹

We shall first discuss the conditions for the registration of trademarks (see below (i)), before addressing the scope of their protection (see below (ii)).

(i) Conditions of registration

Trademark protection is very important for all stakeholders in the sports industry. This is particularly the case for athletes, sports clubs and leagues, international or national sports federations, and manufacturers of sporting goods, which may all generate important revenues derived from merchandising activities. The sporting goods industry (like other consumer goods industries), in particular, depends on a strong trademark protection in order to fight efficiently against online and offline counterfeiting activities.⁴²

All types of trademarks can have great relevance to the sports industry, including traditional trademarks (word trademarks, word and design trademarks, and design trademarks, which can be of particular importance for the mascots of sports events, the signatures of athletes, the logos of sports clubs, etc.) and non-traditional trademarks (such as 3D trademarks or position trademarks - which are trademarks relating to the position of graphical features on a given product⁴³).

A trademark is defined as “[a]ny sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings, shall be capable of constituting a trademark” (art. 15 para. 1 TRIPS Agreement). This means that (as for other types of trademarks) non-distinctive signs are not protectable, which may lead to challenges for certain trademarks in the sports industry.⁴⁴

⁴⁰ WIPO. <<https://www.wipo.int/madrid/en/>>.

⁴¹ WIPO. “The International Trademark System and Sports.” *wipo.int*. WIPO. Web. <https://www.wipo.int/ip-outreach/en/ipday/2019/madrid_trademarks_sports.html>.

⁴² See: Schaefer, Jochen M. “Clubbing together to tackle the illegal trade in sporting goods.” *wipo.int*. WIPO Magazine, Nov. 2016. Web. <https://www.wipo.int/wipo_magazine/en/2016/si/article_0008.html>.

⁴³ See e.g. the judgment of the Court of Justice of the European Union of June 6, 2019, C-223/18 P, Deichmann vs EUIPO (position trademarks on sports shoes) and the continuing battle about the trademark protection of the three stripes of adidas®, see e.g.: Reuters Staff. “Adidas loses EU bid to extend three-stripe trademark.” *reuters.com*. Reuters, Jun. 19, 2019. Web. <[⁴⁴ For an example in the sports industry, see the refusal of trademark registration of a slogan \(verbal sign “SPÜRBAR ANDERS”, which can be roughly translated as “perceptibly different”\) for which a German soccer club \(Köln\) had applied for protection, see judgment of the General Court of the European Union of October 4, 2017; case T-126/16, para. 58: “c’est à bon droit que la chambre de recours a considéré que, eu égard à son caractère évident et banal, la marque demandée composée de la combinaison des termes « spurbar » et « anders » suivis par un point n’était pas apte à exercer la fonction d’indication d’origine](https://www.reuters.com/article/us-eu-court-adidas/adidas-loses-eu-bid-to-extend-three-stripe-trademark-idUSKCN1TK0P7>”; and judgment of the General Court of the EU, Case T-629/16, Shoe Branding Europe BVBA v EUIPO (intervener: adidas AG).</p></div><div data-bbox=)

Examples of trademarks registered by athletes:

- International (word) trademark for “**ROGER FEDERER**” owned by Roger Federer(international trademark 804031:
<https://www3.wipo.int/branddb/en/showData.jsp?ID=MAD.0804031>)
- National (figurative) trademark owned by Usain Bolt
(US trademark Reg No. 4177904
<https://www3.wipo.int/branddb/en/showData.jsp?ID=USTM.85313171>)



Examples of event trademarks:

- Word and design trademark owned by FIFA

(international trademark 1522880
<https://www3.wipo.int/branddb/en/showData.jsp?ID=MAD.1522880>)



**FIFA WORLD CUP
Qatar 2022**

- International (word) trademark owned by the International Olympic Committee for “**LONDON 2012**”
(international trademark 910300
<https://www3.wipo.int/branddb/en/showData.jsp?ID=MAD.0910300>)

au-delà du fait de porter un message promotionnel. Ainsi, c’est sans commettre d’erreur que la chambre de recours a constaté que la marque demandée constituait un message promotionnel dépourvu du caractère distinctif”.

Specific issues may arise with respect to so-called “**event trademarks**”, which are trademarks referring to specific sports events (such as Olympic Games, world championships, etc.). These trademarks may indeed be considered as being intrinsically non-distinctive (i.e. lack of intrinsic distinctiveness). They can still be valid if it can be established that the terms used in the event trademarks can be considered to have acquired secondary meaning through their use (i.e. acquired distinctiveness through use) and thus that they do identify the sport event at issue for the relevant consumers. The period of use can be extremely short or even immediate for major periodic sports events that are well known to the consumers, such as the Olympic Games.⁴⁵ This particularly applies to word trademarks consisting of the location and of the year of the sport event in question⁴⁶ or consisting of the name of the event and of the relevant year.⁴⁷

The registration of sports-related trademarks is governed by the same legal principles and is subject to the same general limits as non-sports related trademarks. Sports-related trademarks must comply with the general conditions of protection of the country in which registration is sought.⁴⁸ Sports-related trademarks referring to a geographic place should

⁴⁵ EUIPO, Guidelines for Examination of European Union Trade Marks, Part B, Examination, Section 4, Absolute Grounds for Refusal, Chapter 14, Acquired Distinctiveness through use (Article 7(3) EUTMR), Sec. 8.6 (Length of use), <<https://guidelines.euipo.europa.eu/binary/1922895/2000140000>> (“[...] it is in the nature of certain major sporting, musical or cultural events that they take place at regular intervals and are known to have extremely wide appeal. These major events are anticipated by millions, and the knowledge that the event is due on a particular date precedes the formal announcement of where it will take place. This circumstance creates intense interest in the nominated location of such events and in the announcement thereof (‘city/country+year’ marks). It is therefore reasonable to suppose that the moment a particular event, tournament or games is announced as having been allocated to a particular city or country, it is likely to become known instantly to practically all relevant consumers with an interest in the sector concerned or to professionals in the sector. This may thereby give rise to the possibility of very rapid acquired distinctiveness of a mark concerning a forthcoming event, in particular where the sign reproduces the structure of previously used trade marks with the result that the public immediately perceives the new event as a sequel to a series of well-established events”); for a discussion, see: Rigamonti, Cyrill P. “Eventmarken und Markenrecht” in *Wirtschaftsrecht in Theorie und Praxis: Festschrift für Roland Büren* (Kunz, Peter V., et al. eds), Basel: Helbing Lichtenhahn Verlag, 2009, p. 343; Anthamatten-Büchi, et al. (note 10), p. 243 et seq.; the Swiss Federal Supreme Court held in a decision of April 6, 2022 (case 4A_518/2021 und 4A_526/2021) that the word trademarks “PUMA WORLD CUP QATAR 2022” and “PUMA WORLD CUP 2022” registered by Puma were invalid because they are misleading under Art. 2 lit. c of the Swiss Trademark Act (STA) and that the trademarks “QATAR 2022” or “WORLD CUP 2022” (word and design trademarks) registered by FIFA are not valid under Art. 2 lit. a STA because of a lack of distinctiveness.

⁴⁶ See e.g. the Swiss trademark registered by FIFA on the terms “WORLD CUP 2022” (No 631'169) for various goods and services; for a discussion of the trademark challenged raised by this type of trademarks, see Anthamatten-Büchi, et al. (note 10), p. 242 et seq.

⁴⁷ See the judgments rendered in Germany about the trademarks “Fussball WM 2006” and “WM 2006”, BGH, ref. I ZB 96/05 et 97/05, GRUR Int 2007, 76.; see also the disputes between FIFA and Ferrero about the use of terms referring to the soccer World Cup of 2010, see: Clark, Birgit. “World Cup trade mark dispute: 1-0 says the German Federal Supreme Court.” *jiplp.blogspot.com*. Journal of Intellectual Property Law and Practice, Jan. 8, 2010. Web.

<<http://jiplp.blogspot.com/2010/01/world-cup-trade-mark-dispute-1-0-says.html>>; on the trademarks registered by the Union of European Football Associations (UEFA) for events, see: Gindrat, François. “La protection des marques d’institutions sportives et d’événements sportifs: l’exemple de l’UEFA” in *Sport et propriété intellectuelle/Sport and intellectual property* (de Werra, Jacques ed.), Geneva: Schulthess, 2010 (vol. 1 of the University of Geneva School of Law IP book series propriété intellectuelle/intellectual property). Web. <<https://archive-ouverte.unige.ch/unige:5076>>.

⁴⁸ See the US case relating to the registrability of the “Redskin” trademark (designating the Redskin football team in Washington DC), which was challenged as being disparaging to Native-Americans; see *Pro-Football, Inc. v. Blackhorse*, 709 F. App'x. 182, 183–84 (4th Cir. 2018) (vacating the district court’s order that held that the trademark was not valid because of disparagement and remanding for further proceedings consistent with another case decided by the US Supreme Court, *Matal v. Tam*, 137 S. Ct. 1744, 1751 (2017) (holding that the Lanham Act’s “disparagement” clause violates the Free Speech Clause of the First Amendment)); for a discussion, see: Song, Doori. “Blackhorse’s Last Stand?: The First Amendment Battle Against The Washington “Redskins” Trademark After *Matal v. Tam*.” *Wake Forest Journal of Business and Intellectual Property* 19:2 (2019), pp. 173–202. Web. <<http://ipjournal.law.wfu.edu/files/2009/09/Song.pdf>>; the team has decided to change its name, see Washington’s NFL team to retire Redskins name, following sponsor pressure and calls for change, see: Carpenter, Les. “Washington’s NFL team to retire Redskins name, following sponsor pressure and calls for change.” *washingtonpost.com*.

not, as a matter of principle, be considered as being misleading with respect to the geographic origin of the goods that are commercialized under the relevant trademark. For instance, sportswear products bearing a sports-related trademark of a national team shall not be expected to be manufactured in this country).⁴⁹

Many individual athletes have registered trademarks corresponding to their names, nicknames, initials, portraits, signatures or other distinctive features that are associated with them.⁵⁰ These signs can constitute valid trademarks,⁵¹ but may not necessarily protect them against all uses of their characteristics by third parties, specifically if the third parties use them in creative activities/artistic works.⁵² When trademarks incorporate athletes' names and/or other personal features (such as initials) and are used in the course of endorsement agreements in connection with goods and/or services, the parties are well advised to clarify in advance what shall happen to the trademarks in case of the termination of the endorsement agreement.⁵³ This shows **the importance of contracts and contract law in the commercialization of athletes' IP rights** (see (j) below).

(ii) Scope of protection

The scope of protection of sports-related trademarks is governed by the **general rules of trademark law that are applicable in the relevant country**. Because of their brand value and attractiveness, many sports-related trademarks (specifically trademarks affixed on sporting goods) suffer from massive counterfeiting activities and from the commercialization of fake sporting goods and fake sportswear items.⁵⁴ The financial

Washington Post, Jul. 13, 2020. Web. <<https://www.washingtonpost.com/sports/2020/07/13/redskins-change-name-announcement/>>.

⁴⁹ See Markenrechtlicher Schutz für den Deutschen Fussball-Bund (DFB), CaS 2017, 346 – judgment of the Swiss Federal Administrative Court of August 30, 2017 (ref. B-1428/2016) about the protection/extension in Switzerland of international trademark 1197623 (“DEUTSCHER FUSSBALL-BUND”).

⁵⁰ See: Roberts, Alexandra J. “Athlete Trademarks: Names, Nicknames, and Catchphrases” in *The Oxford Handbook of American Sports Law* (McCann, Michael A. ed), Oxford: University Press, 2018, p. 471. Print; see also e.g.: Huffington Post UK. “Gareth Bale Heart Celebration Approved By Intellectual Property Office.” *Huffingtonpost.co.uk*. Huffington Post, Aug. 9, 2013. Web. <http://www.huffingtonpost.co.uk/2013/08/09/gareth-bale-heart-celebration_n_3732430.html>.

⁵¹ See Art. 15, para. 1 of the TRIPS Agreement providing that “[a]ny sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings, shall be capable of constituting a trademark. Such signs, in particular words including personal names, letters, numerals, figurative elements and combinations of colours as well as any combination of such signs, shall be eligible for registration as trademarks”; for a discussion of this, see Anthamatten-Büchi, *et al.* (note 10), p. 219 *et seq.*

⁵² No protection of Tiger Woods under trademark law and publicity rights against the use of his image in a painting entitled “the Masters of Augusta”; see *ETW Corp. v. Jireh Pub., Inc.*, 99 F. Supp. 2d 829 (N.D. Ohio 2000), affirmed by *ETW Corp. v. Jireh Publ., Inc.*, 332 F.3d 915 (6th Cir. 2003) (holding “that, as a general rule, a person’s image or likeness cannot function as a trademark”).

⁵³ See the highly mediatized discussion relating to the “RF” logo (corresponding to the initials of Roger Federer) which was registered by Nike in the context of an endorsement agreement and which was recently assigned to Roger Federer, see: Novagraaf. “Roger Federer in battle with Nike over ‘RF’ trademark.” *novagraaf.com*. Novagraaf, Jul. 10, 2018. Web. <<https://www.novagraaf.com/en/insights/roger-federer-battle-nike-over-rf-trademark>>; see also: Wimbledon News. “Roger Federer: First Round.” *wimbledon.com*. Wimbledon, Jul. 2, 2018. Web. <http://www.wimbledon.com/en_GB/news/articles/2018-07-02/2018-07-02_roger_federer_first_round.html>; and: Bassam, Tom. “USPTO filing reveals ownership by tennis icon’s Tenro holding company.” *sportspromedia.com*. Sports Pro Media, Mar. 12, 2020. Web. <<https://www.sportspromedia.com/news/roger-federer-rf-logo-us-trademark-tenro-nike-uniqlo>>.

⁵⁴ See GIPC Report (note 11), p. 6 and 39 (key finding 3 holding that “[p]hysical counterfeiting poses a real threat to the sports industry”); see also: Office for Harmonization in the Internal Market. “The Economic Cost of IPR Infringement in

losses that are caused by these counterfeiting activities are staggering at the global level.⁵⁵

Non-authorized activities relating to sports-related trademarks can take various forms.

Trademark infringement resulting from the sale of unofficial merchandising products of a soccer club

In a mediatized dispute between the UK soccer club Arsenal and a seller of non-official Arsenal sportswear products (Matthew Reed),⁵⁶ the Court of Justice of the European Union⁵⁷ decided that the unauthorized third party seller of unofficial goods using the identical trademark on identical goods (i.e. sportswear products) was infringing on the soccer club's trademark by holding that "[i]n a situation [...] where a third party uses in the course of trade a sign which is identical to a validly registered trade mark on goods which are identical to those for which it is registered, the trade mark proprietor of the mark is entitled, in circumstances such as those in the present case, to rely on Article 5(1)(a) of that directive to prevent that use. It is immaterial that, in the context of that use, the sign is perceived as a badge of support for or loyalty or affiliation to the trade mark proprietor". In this case, the disclaimer that was put by Mr. Matthew Reed on a sign on the stall where he was selling the non-official products had no legal effect. The disclaimer had the following wording: "The word or logo(s) on the goods offered for sale are used solely to adorn the product and does not imply or indicate any affiliation or relationship with the manufacturers or distributors of any other product, only goods with official Arsenal merchandise tags are official Arsenal merchandise".⁵⁸

Sports Goods." *euiipo.europa.eu*. European Union Intellectual Property Office, 2015. Web. <https://www.euiipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/resources/research-and-studies/ip_infringement/study3/sports_reports_en.pdf>; this report does not include "sports apparel (such as football jerseys or baseball caps) that can also be worn as normal clothing" which is included in a separate report on the clothing, footwear and accessories sector, see: Office for Harmonization in the Internal Market. "The Economic Cost of IPR Infringement in the Clothing, Footwear and Accessories Sector." *euiipo.europa.eu*. European Union Intellectual Property Office, 2015. Web. <https://www.euiipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/resources/research-and-studies/ip_infringement/study2/the_economic_cost_of_IPR_infringement_in_the_clothing_footwear_and_accessories_sector_en.pdf>.

⁵⁵ See GIPC Report (note 11), pp. 27-28, estimating that "the direct impact of counterfeiting on the global sporting goods market is estimated at \$23.05 billion, with the total impact (direct and indirect) amounting to as much as \$40.07 billion. Similarly, the direct impact of counterfeiting on the global sportswear market is estimated at \$26.77 billion, with the total impact (direct and indirect) amounting to as much as \$44.16 billion"; counterfeiting activities further cause major losses in government revenues (lost taxes).

⁵⁶ See: Rozenberg, Joshua and Martin, Nicole. "Euro win for Arsenal in battle with trader." *telegraph.co.uk*. The Telegraph, Nov. 13, 2002. Web. <<https://www.telegraph.co.uk/news/uknews/1412978/Euro-win-for-Arsenal-in-battle-with-trader.html>>.

⁵⁷ Judgment of the Court of Justice of the European Union (CJEU) of Nov. 12, 2002 (case C-206/01).

⁵⁸ Para. 17.

The scope of trademark protection in the sports industry was also tested on the use made by a marketing agency offering hospitality packages using the trademark of a competing (soccer) team.⁵⁹ It is important, in any event, that sports-related trademarks be efficiently protected and enforced against third parties. The basketball legend Michael Jordan has won trademark disputes in China against a company that had registered trademarks corresponding to his Chinese name and to the pinyin transliteration of his name.⁶⁰ The star soccer player Lionel Messi has recently won a trademark dispute before the Court of Justice of the European Union (CJEU) and was consequently authorized to register a trademark reflecting his name “messi”, which did not create a risk of confusion with the pre-existing trademark “massi” because of the reputation of Lionel Messi, which constituted a relevant factor for the purposes of establishing a conceptual difference between the terms “messi” and “massi”.⁶¹

Branding is key for all stakeholders in the sports industry (including athletes, teams, sports leagues, sports goods manufacturers and organizers of sports events). Trademark law is consequently an essential component of an IP protection strategy and sports-related trademarks must be protected and enforced efficiently.

(c) Design law

Design law is an important tool of protection in the sports industry and can be an important tool for protecting the look of major sports events (specifically for the Olympic Games).⁶² Designs can protect the aesthetic (2D or 3D) shape of products, knowing that the shape plays a key role in “making a product attractive and desirable”.⁶³

⁵⁹ See *CausaSport* 2019, 441, decision of the Austrian Supreme court of May 28, 2019 (ref. 4Ob77/19f) (Dornenvolle Verwendung einer Fussball-Wort-Bild-Marke); for a comment, see: CMS. “Spielregeln für die Verwendung fremder Marken in der Werbung.” *cms.law*. CMS, Sep. 16, 2019. Web.

<<https://cms.law/de/aut/news-information/spielregeln-f%C3%BCr-die-verwendung-fremder-marken-in-der-werbung>>.

⁶⁰ The defendant - a Chinese company (Qiaodan Sports) - had registered a series of trademarks related to Michael Jordan, including “乔丹” (the Chinese name of Michael Jordan) and “Qiaodan” (the pinyin transliteration of “乔丹”); see: Li, Rosita. “Basketball legend Michael Jordan wins another trademark case in China.” *ellalan.com*. Ellalan, Apr. 28, 2020. Web.

<<https://www.lexology.com/library/detail.aspx?g=73a4996e-2bb1-4d39-a676-f4aee0271932>>; see also: Wininger, Aaron. “Michael Jordan Prevails in Eight-Year Trademark Battle at China’s Supreme People’s Court.” *natlawreview.com*. National Law Review, Apr. 9, 2020. Web. <<https://www.natlawreview.com/article/michael-jordan-prevails-eight-year-trademark-battle-china-s-supreme-people-s-court>>; for an analysis, see: Young, Laura Wen-yu. “Understanding Michael Jordan v. Qiaodan: Historical Anomaly or Systemic Failure to Protect Chinese Consumers?” *The Trademark Reporter* 106: 883 (2016).

⁶¹ Judgment in Joined Cases C-449/18 P *EU IPO v Messi Cuccittini* and C-474/18 P *J.M.-E.V.e hijos v Messi Cuccittini* of September 17, 2020.

⁶² See GIPC Report (note 11), pp. 15-16; see: WIPO. “Sport and Design.” *wipo.int*. WIPO. Web. <<https://www.wipo.int/ip-sport/en/design.html>>.

⁶³ See GIPC Report (note 11), p. 15.

The protection offered by design law can constitute a highly valuable component of an IP strategy for innovative companies doing business in the sports industry.⁶⁴

In this respect, design law can offer relevant advantages in comparison to other categories of IP rights.⁶⁵ Designs can be of particular relevance for organizers of sports events that can benefit from registering the 2D or 3D shapes of certain products associated with their events, such as mascots, cups and sport trophies.⁶⁶ Design protection can also be used in order to register specific fonts associated with a given sports event.⁶⁷

The sports industry can develop international IP protection strategies to protect its designs on the basis of the international framework protection, and specifically the WIPO international design protection system - the Hague System⁶⁸ - in the countries covered by it).⁶⁹

Design law is an important source of IP protection in the sports industry that can protect innovative 2D or 3D shapes of sports-related products. The protection of designs at the international level can benefit from the WIPO international protection Hague System.

(d) Copyrights and neighboring rights

Given that the sports industry is an image industry that is built on moving (and still) images of athletes and teams competing in sports games and events, **copyright law and other sources of legal protection of the visual content of sports events are critical sources of IP protection in the sports industry.**

In spite of the importance of the protection of the content of sports events (which is not disputed), the modalities of legal protection by copyright law and by neighboring rights (which are rights that are similar to copyright law) are not always simple also because of a lack of harmonization of the conditions of protection at the international level.⁷⁰ The analysis will be made here by focusing on the following issues:

⁶⁴ See the interesting example of the innovative “RoundTail” bikes; WIPO. “Reinventing the Frame, Challenging the Status Quo.” *wipo.int*. WIPO. Web. <<https://www.wipo.int/ipadvantage/en/details.jsp?id=3110>> (as presented in the GIPC Report (note 11), p. 16).

⁶⁵ In comparison to trademarks, designs are not subject to an obligation of use and their protection is not limited with respect to the claimed goods and/or services; see Anthamatten-Büchi, *et al.* (note 10), 248.

⁶⁶ See Anthamatten-Büchi, *et al.* (note 10), pp. 249-250 (and the examples of designs registered by FIFA and UEFA).

⁶⁷ See Anthamatten-Büchi, *et al.* (note 10), p. 250 (showing the example of the specific fonts used for the soccer world cup 2014).

⁶⁸ WIPO. “Hague – The International Design System.” *wipo.int*. WIPO. Web. <<https://www.wipo.int/hague/en/>>.

⁶⁹ See WIPO, “Sport and Design” (note 61).

⁷⁰ See Townley (note 32) (“Sports are a global industry but relies on fragmented IP [...] The global nature of the industry and major sports events creates complicated issues, not least because there is no single approach to the way in which content is covered by the IP laws of different countries and associated rights are protected”).

- (i) Protection of the sports performance and of the recording of the sports performance by copyright;
- (ii) Protection of broadcasters;
- (iii) Protection of organizers of sports events; and
- (iv) Protection of databases relating to sports events.

(i) Protection of sports performances and of the recording of sports performances by copyright

A first question is to assess whether the athlete who plays or performs a sports activity (such as a soccer player playing a game) and who creates and performs specific sports moves can benefit from the protection granted by copyright law.⁷¹ The question is **whether an athlete can be considered the author of a work** that might be protected by copyright law. There is no uniform answer to this question, which depends on the local laws that apply.⁷² Certain categories of sports activities may qualify for protection under copyright law. Planned and artistic sports performances such as artistic ice skating/synchronized swimming may be protectable under copyright law or neighboring rights (as a performance).⁷³ It is generally admitted that athletes participating in sports events cannot exercise individually their image rights in order to control the commercial exploitation of the sports events in which they participate.⁷⁴ This approach can be linked to the need to ensure solidarity between the participants in the sports event (which is at the core of the Olympic solidarity program). This can materialize in the grant of financial support to athletes/participants who have fewer funding opportunities (i.e. Olympic solidarity scholarships).⁷⁵

⁷¹ See: Mezei, Péter. “Copyright Protection of Sport Moves” in *Non-Conventional Copyright* (Bonadio, Enrico and Lucchi, Nicola, eds.). Cheltenham: Edward Elgar Publishing, 2018, pp. 271-297. Web. <<https://ssrn.com/abstract=2925195>> (concluding by stating that “overprotection of sport moves would appear to be detrimental to the normal functioning of amateur and professional sports”).

⁷² See judgment of the CJEU, *FA Premier League Ltd and Others v QC Leisure and Others*, and *Karen Murphy v Media Protection Services Ltd*, Oct. 4, 2011, C-403/08 and C-429/08, § 98 (holding that “[...] sporting events cannot be regarded as intellectual creations classifiable as works within the meaning of the Copyright Directive. That applies in particular to football matches, which are subject to rules of the game, leaving no room for creative freedom for the purposes of copyright”. However, the CJEU held in that case that “it is permissible for a Member State to protect sporting events, where appropriate by virtue of protection of intellectual property, by putting in place specific national legislation, or by recognising, in compliance with European Union law, protection conferred upon those events by agreements concluded between the persons having the right to make the audiovisual content of the events available to the public and the persons who wish to broadcast that content to the public of their choice” (CJEU, C-403/08 and C-429/08, § 102).

⁷³ See: Asser Institute. *Study on sports organizers’ rights in the European Union: Final Report*. Luxembourg: Publications Office of the European Union, 2014 (“Asser Study”). Web. <https://www.asser.nl/media/2624/final-report_sor-2014.pdf/>.

⁷⁴ Asser Study (note 72), p. 2 (“As recent case law in Germany and the Netherlands suggests, players or athletes can, however, not invoke their image rights to prohibit, or require remuneration for, audiovisual coverage of sports events in which they participate”) and p. 60 (“[...] even in countries where such rights are expressly recognised, image rights do not seem to protect athletes against unauthorized recordings or broadcasts of the sports events in which they participate”); on sports image rights, see below (e).

⁷⁵ International Olympic Committee. Web. <<https://olympics.com/ioc/olympic-solidarity>>.

The next question is whether certain other activities relating to the sports events that do not consist of the performance of the sports activities itself, and specifically the activities that relate to the filming, recording and communication (broadcasting) of the sports events, might be protected.

Provided that it is sufficiently creative, the filming **of a sports event can constitute a copyrighted work**.⁷⁶ It can also be protected by neighboring rights granted to film producers under relevant legislations.⁷⁷ The protection granted to film producers on the basis of a neighboring right does not depend on the artistic creativity of the activity performed by the film producer (who becomes the owner of this neighboring right). The neighboring right is rather granted as a result of the financial risk that the film producer takes in financing the production of the film.⁷⁸ The existence, as well as the source, of legal protection of the activity of filming a sports event are not harmonized at the international level and are not fully clarified under certain local legal regimes.⁷⁹

The legal uncertainty regarding the protectability of the performance of sports activities itself, and of the filming of sports events under copyright law or under neighboring rights, makes it **very important to have adequate legal protection of the broadcasting of sports events** (see immediately below).⁸⁰

(ii) Protection of broadcasters

Broadcasters (and broadcasting organizations) can also benefit from the protection of neighboring rights for their activity.⁸¹ This legal protection **covers the broadcasting signal and is independent from the protection of the content that is broadcast**.⁸² The grant of exclusive broadcasting rights for sports events raises legal issues that go beyond IP law (including competition law and media law).⁸³

⁷⁶ See the decision of the Austrian Supreme Court (Oberster Gerichtshof) of July 2, 2020 (ref. 4 Ob 86/20f), GRUR Int. 2021, 497; Asser Study (note 72), p. 51 (“The audiovisual recording of football games, as usually broadcast on TV, will normally amount to a work of authorship protected by copyright law, usually as a film or cinematographic work”); for a US perspective, see e.g. *Baltimore Orioles, Inc., et al., v. Major League Baseball Players Association*, 805 F.2d 663 (1986): “The many decisions that must be made during the broadcast of a baseball game concerning camera angles, types of shots, the use of instant replays and split screens, and shot selection similarly supply the creativity required for the copyrightability of the telecasts”; see also *National Basketball Association v. Motorola*, 105 F.3d 841 (2d Cir. 1997).

⁷⁷ Asser Study (note 72), pp. 53-54; see e.g. Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version); national laws may provide for specific protection for “audiovisual sports rights”, which is the case under Italian copyright law; for a discussion, see Asser Study (note 72), pp. 54-56.

⁷⁸ See e.g. Recital 5 of the Directive 2006/115/EC (note 76) (holding that “the investments required particularly for the production of phonograms and films are especially high and risky. The possibility of securing that income and recouping that investment can be effectively guaranteed only through adequate legal protection of the rightholders concerned”).

⁷⁹ This seems to be the case in China, see GIPC Report (note 11), pp. 29-32; see also: Yan, Bo. “Beyond the signal: a view from China on the copyright protection of live sports programming.” *wipo.int*. WIPO Magazine, Apr. 2019. Web. <https://www.wipo.int/wipo_magazine/en/2019/02/article_0002.html>.

⁸⁰ See: European Broadcasting Union (EBU). “Legal & Policy Focus - Broadcasters’ Rights: Towards a New WIPO Treaty.” *ebu.ch*. EBU, 2019 (“EBU Policy Paper”). Web. <<https://www.ebu.ch/publications/position-papers/2019/legal-policy-focus-broadcasters-rights-towards-a-new-wipo-treaty>>.

⁸¹ Asser Study (note 72), p. 56 *et seq.*

⁸² Asser Study (note 72), p. 57 (“the signal is protected as such, even if the underlying transmitted material is neither a work of authorship protected by copyright nor other material protected by neighbouring rights”).

⁸³ See e.g. Ruijsenaars and Këllezli (note 33).

At the international level, the protection of broadcasting organizations principally results from the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (1961),⁸⁴ which provides for the granting of minimal exclusive rights for the benefit of broadcasting organizations for a term of at least twenty years with respect to the communication to the public through reproduction, “fixation” (recording), and rebroadcasting.⁸⁵ The Rome Convention (and the other existing international instruments) are, however, not sufficient to efficiently protect broadcasters against digital threats⁸⁶ and against the unauthorized live streaming of sports events.⁸⁷ The conclusion of a new treaty on broadcasters’ rights is under discussion at WIPO.⁸⁸ This is called for by broadcasting organizations⁸⁹ in order to improve the level of protection in various respects,⁹⁰ which has been discussed for some time.⁹¹

The commercial value of broadcasting sports events (similarly to news events) lies in the control over *live* broadcasting because sports fans want to watch sports events live and are willing to pay to do so. The efficient fight against the piracy of live sports events means that the availability of quick injunctive relief against infringers is practically more important than the subsequent granting of damages.⁹² **Major challenges arise in the digital environment because of the pervasive online piracy of sports broadcasting.**⁹³

⁸⁴ See Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations; the Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite of 1974 (1974 Brussels Convention) offers another source of protection, which is, however, limited to signals transmitted by satellite.

⁸⁵ Article 13 - Minimum Rights for Broadcasting Organizations provides that “[b]roadcasting organisations shall enjoy the right to authorize or prohibit:

- (a) the rebroadcasting of their broadcasts;
- (b) the fixation of their broadcasts;
- (c) the reproduction:
 - (i) of fixations, made without their consent, of their broadcasts;
 - (ii) of fixations, made in accordance with the provisions of Article 15, of their broadcasts, if the reproduction is made for purposes different from those referred to in those provisions;
- (d) the communication to the public of their television broadcasts if such communication is made in places accessible to the public against payment of an entrance fee; it shall be a matter for the domestic law of the State where protection of this right is claimed to determine the conditions under which it may be exercised”.

⁸⁶ See the EBU Policy Paper (note 79), p. 6 (“The Rome Convention of 1961 offers inadequate protection of broadcasters’ signals today. New transmission technologies come with new costs and new risks for broadcasters as they increase the scope for international signal theft, including new means to easily copy and redistribute digital broadcasts”) and pp. 17-21 (dedicating a chapter on the “SHORTCOMINGS OF EXISTING INTERNATIONAL INSTRUMENTS”).

⁸⁷ For a perspective from Australia, see: Kariyawasam, Kanchana and Tsai, Matthew. “Copyright and Live Streaming of Sports Broadcasting.” *International Review of Law, Computers and Technology* 31.3 (2017). Web. <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3110364>.

⁸⁸ See: Knowledge Ecology International. “Timeline of WIPO negotiations on a Treaty for the Protection of Broadcasting Organizations.” *keionline.org*. Knowledge Ecology International. Web. <<https://www.keionline.org/wipo/sccr/timeline-broadcasting>>.

⁸⁹ See EBU Policy Paper (note 79).

⁹⁰ See EBU Policy Paper (note 79), pp/ 22-25.

⁹¹ For a summarized presentation of some of the issues at stake, see: WIPO. “Protection of Broadcasting Organizations – Background Brief.” *wipo.int*. WIPO. Web. <<https://www.wipo.int/pressroom/en/briefs/broadcasting.html>>.

⁹² EBU Policy Paper (note 79), p. 26 (“Adequate protection implies effective judicial remedies. Especially in sports and news programming, where the real value lies in the exclusive first transmission, it is vital for a broadcaster to be able to obtain an injunction immediately”) and p. 13 (“In the field of broadcasting, rapidly obtaining injunctive relief against unauthorized use of the signal is often more important than obtaining compensation for damages later. For sports or news programming, the real value lies in the exclusive first transmission and in such cases the only effective defence is a preliminary court order preventing unauthorized use of the signal as soon as possible”).

⁹³ GIPC Report (note 11), p. 6 and 39 (key finding 4: “Online piracy of sports broadcasting is mushrooming, but governments struggle to keep up with the threat”).

Like many other IP owners in many different industries, the sports industry can be severely impacted by the infringing goods and infringing content that can be offered and be made available on Internet platforms/by Internet intermediaries (including on social media platforms). Internet platforms and other Internet intermediaries consequently have a very important (gatekeeping) mission in the fight against online IP infringements activities affecting the sports industry.

The control over broadcasting rights and other (new) digital media rights, such as streaming, are essential for the financing and thus for the viability of mega sports events.⁹⁴

National laws may be adopted in order to improve the protection of broadcasters against unauthorized online access to protected sports events. This is what was confirmed by the CJEU in its judgment of March 26, 2015 in the case C-279/13 *C More Entertainment AB v Linus Sandberg*, in which the defendant provided links on an Internet site by means of which Internet users could gain access to the live broadcast of ice hockey games available on the claimant's access-protected site without having to pay the access fee asked by the claimant. The CJEU held in this case that EU law did not preclude "national legislation extending the exclusive right of the broadcasting organisations referred to in Article 3(2)(d) as regards acts of communication to the public which broadcasts of sporting fixtures made live on internet, such as those at issue in the main proceedings, may constitute, provided that such an extension does not undermine the protection of copyright".

Sports regulations may provide for the granting of an exclusive right of control over the broadcasting and other media rights relating to the relevant sports events for the benefit of the relevant sports governance body.⁹⁵

The exclusive right of control over broadcasting rights can be limited in certain circumstances on the basis of mandatory audiovisual regulations pursuant to which the broadcasting of certain major sports events of public relevance shall be made accessible on free television, as well as in short sports news reports.⁹⁶

⁹⁴ Blackshaw (note 10), p. 64; by way of illustration, the IOC derives 73% of its revenues from broadcasting rights (see: IOC. "Funding." *olympic.org*. IOC. Web. <<https://www.olympic.org/funding>>).

⁹⁵ See Article 7(2) of the Olympic Charter (note 27): "The Olympic Games are the exclusive property of the IOC which owns all rights relating thereto, in particular, and without limitation, all rights relating to (i) the organisation, exploitation and marketing of the Olympic Games, (ii) authorising the capture of still and moving images of the Olympic Games for use by the media, (iii) registration of audio-visual recordings of the Olympic Games, and (iv) the broadcasting, transmission, retransmission, reproduction, display, dissemination, making available or otherwise communicating to the public, by any means now known or to be developed in the future, works or signals embodying audio-visual registrations or recordings of the Olympic Games"; this can also result from specific local regulations, such as in the USA, the Sports Broadcasting Act of 1961, which regulates and protects the sale and distribution of sports media rights.

⁹⁶ The obligation to give access to the broadcast of sports events is provided for in many national regulations and its scope can sometimes lead to litigation, see e.g. the Indian case (Case number C.A. No.-010732-010733/2017) decided by the Indian Supreme Court (available online at: https://main.sci.gov.in/supremecourt/2015/4418/4418_2015_Judgement_22-Aug-2017.pdf) relating to the interpretation of the Indian Sports Act, 2007 (which provides access to the largest number of listeners and viewers, on a free to air basis, of sporting events of national importance through the mandatory sharing of sports broadcasting signals with Prasar Bharati and for matters connected therewith or incidental thereto and which held that the

Beyond the legal protection by IP rights of the sports performance, the recording of the sports events and the broadcasting of the sports events, there can also be legal protection relating to the organization of the sports events that can take the form of exclusive rights granted to the organizers and that shall now be analyzed.

The protection of broadcasters and broadcast signals and the protection against unauthorized access to live sports events, which is a major risk in the digital environment, are very important for the sports industry.

(iii) Protection of organizers of sports events

The granting of exclusive exploitation rights over sports events to organizers of sports events is not uniformly regulated at the international level and can consequently diverge between legal systems (it being noted that some countries provide for a specific statutory right).⁹⁷ This right of organizers of sports events is generally justified by reference to the so-called “house right” (“Hausrecht” according to the German terminology). This right is the **factual right of control of access of the organizers of sports events over the venues in which the sports events are organized** (because they have “the keys of the door”).⁹⁸ This right of control makes it possible for them to condition the access of

mandatory sharing obligation is only for terrestrial transmission and does not apply to resharing with other cable operators). The reuse of sports broadcasts for news reporting can also be regulated and lead to litigation under copyright law; see, for example, the Indian case of *New Delhi Television Ltd. (Appellant) v. ICC Development (International) Ltd. & Another (Respondent)* [(FAO) OS 460/2012] (see: Kumar Guha, Shouvik. “Delhi High Court seeks to break the Myth of ‘Breaking Sports News’: New Delhi Television Ltd. v. ICC Development (Intl) Ltd.” *spicyip.com*. SpicyIP, Oct. 11 2012. Web. <<https://spicyip.com/2012/10/delhi-high-court-seeks-to-break-myth-of.html>>); from a European perspective, see art. 14 and 15 of Directive 2010/13/EU of the European Parliament and of the Council of March 10, 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), which have not been amended by Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities.

⁹⁷ See Art. L333-1 of the French Sports Code (code du sport): (available at <<https://www.legifrance.gouv.fr/affichCode.do?idArticle=LEGIARTI000006547748&idSectionTA=LEGISCTA000006167058&cidTexte=LEGITEXT000006071318>>)

“Les fédérations sportives, ainsi que les organisateurs de manifestations sportives mentionnés à https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000025276085/ sont propriétaires du droit d'exploitation des manifestations ou compétitions sportives qu'ils organisent.

Toute fédération sportive peut céder aux sociétés sportives, à titre gratuit, la propriété de tout ou partie des droits d'exploitation audiovisuelle des compétitions ou manifestations sportives organisées chaque saison sportive par la ligue professionnelle qu'elle a créée, dès lors que ces sociétés participent à ces compétitions ou manifestations sportives. La cession bénéficie alors à chacune de ces sociétés”.

In support of this approach and pleading for the creation of sui generis right of sports organizers, see: Brost, Stefan. *Ein Leistungsschutzrecht sui generis für Sportveranstalter, Grundrechtliche Handlungsverpflichtungen und Gestaltungsoptionen des Gesetzgebers*. Cologne: Kölner Studien zum Sportrecht, 2017. Print; and the book review by Rafael Brägger, CaS, 2018, p. 434; several national sports regulations in Europe provide for the creation of similar rights - see Asser Study (note 72), p. 38 *et seq.*

⁹⁸ Blackshaw (note 10), p. 69 (“the broadcasting rights are controlled by the party holding ‘the keys of the door’”); see also: Katsarova, Ivana. “Audiovisual rights in sports events An EU perspective.” *europarl.europa.eu*. European Parliamentary Research Service, Mar. 2017. Web. <[https://www.europarl.europa.eu/RegData/etudes/BRIE/2017/599320/EPRS_BRI\(2017\)599320_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2017/599320/EPRS_BRI(2017)599320_EN.pdf)>, p. 2 (“Most sports events take place in specific venues over which the sports organisers have either ownership or exclusive-use rights. This type of exclusivity comes with the power to exclude unauthorized individuals or media from the venue. Entry is usually subject to specific contractual conditions and serves as an important legal instrument of protection for sports organisers. While the

the sports venues to (contractual) conditions for the commercial exploitation/broadcast of the sports events. The “house right” can be enforced by a mechanism of accreditation that can define the conditions relating to the broadcasting of sports games for news reporting.⁹⁹

As expressed in the Asser Study, “[...] the combination of house right, media contract(s), and intellectual property protection of the audiovisual recording and broadcast effectively allows the sports event organisers to enjoy complete ownership and/or control over the audiovisual rights in the sports events”.¹⁰⁰

Organizers of sports events have the right to control the commercial exploitation of the sports events that they organize.

(iv) Protection of databases relating to sports events

Independent of the protection by IP rights of certain activities relating to the sports events (described above), a major and growing issue arising in the sports industry relates to the protection by copyright law or by other legal sources of data relating to sports events.

The **sports industry is a data industry** and data (specifically statistical data about athletes and teams) can have a very high commercial value and can grant a competitive advantage if they are kept secret. Sports institutions can voluntarily give access to such data and grant licenses to use their data by contract (as is done by the IOC with the Olympic Data Feed system).¹⁰¹

In the absence of voluntary measures, the issue of the legal protection of sports-related data on the basis of trade secrets arises and will be analyzed separately (see (g) below). The legal status of sports data not only raises various IP issues but further raises questions that go beyond IP law and particularly relate to the legal protection of personal data (in the frequent cases where personal data about athletes are collected and processed).¹⁰²

scheme has not been explicitly recognised by the courts in all EU Member States, it most likely exists and is enforceable everywhere in the EU”); see also Anthamaten-Büchi, *et al.* (note 10), p. 252; the legal protection of such a right of control is not unanimously accepted across jurisdictions; for an overview, see Blackshaw (note 10), pp. 67-71; for Australia, see *Victoria Park Racing and Recreation Grounds Company Ltd v Taylor and others*, [1937] 58 CLR 479, HC of Australia; for the USA, see *Pittsburgh Athletic Co et al. v KQV Broadcasting Co.* [1937] 24 F. Supp. 490.

⁹⁹ Beschränkung der Online-Berichterstattung über Amateurfussballspiele rechtmässig, CaS 2018, 283 – judgment of the Oberlandesgericht of Munich of June 7, 2018; 29 U 2490/17; see also Bayerischer Fussball-Verband: Zulässige Regelung zur Ausübung des Hausrechts, CaS 2017, 130 – judgment of the Oberlandesgericht of Munich of March 23, 2017, Kartellsenat; U 3702/16 Kart; see commentary on this case: Fabian Reinholz: Münchner “Bewegtbilderurteil”: Kein Fall “Hartplatzhelden II”, CaS 2017, 138.

¹⁰⁰ Asser Study (note 72), p 2.

¹⁰¹ IOC. Web. <<https://odf.olympictech.org/>>.

¹⁰² See: Phelops, Warren and Gilchrist, Andrew. “The Legal Implications for Big Data, Sports Analytics and Plater Metrics

This section will, however, focus on the narrower issue, which is whether data associated with sports events (specifically fixture lists) that do not constitute confidential information and thus are not protectable by trade secrets can benefit from copyright protection and/or from another source of legal protection.¹⁰³ As a matter of principle, in the absence of sufficient intrinsic creativity of data relating to sports events (including data about scores and fixture lists), no copyright protection is available.¹⁰⁴ Some legal systems may grant legal protection against the unauthorized re-use of raw data based on the commercial value of such data (by reference to the so-called “hot news doctrine”).¹⁰⁵

The issue of the protectability of fixture lists particularly arises in disputes with sports betting companies that reuse databases of fixtures lists elaborated by sports institutions (such as soccer leagues) without paying them any fees for such use. It can be noted that certain statutory rules provide for a right of control over betting activities relating to sports events in favor of the relevant sports bodies.¹⁰⁶

The protection of sports-related data by copyright law was at issue in the dispute between Football Dataco Ltd (which is a UK company that has the mission to protect, market and commercialize the rights to official match-related data of the professional football leagues in England and Scotland) and Brittens Pools (which had used the data without authorization). The dispute was litigated in the UK and led to the conclusion that compilations of data can be protected by copyright law only if they reflect a sufficient

under the GDPR.” *lawinsport.com*. LawInSport, Aug. 15, 2017. Web. <<https://www.lawinsport.com/topics/item/the-legal-implications-for-big-data-sports-analytics-and-player-metrics-under-the-gdpr>>; see also: Hessler, Björn. “Personal real-time sports performance information” in *Jusletter* Feb. 17, 2020. Web.

<https://jusletter.weblaw.ch/fr/juslissues/2020/1011/personal-real-time-s_446d682198.html__ONCE&login=false>. In spite of its key importance, the application of personal data protection in the sports industry is beyond the scope of this report; the impact of data-driven technologies (specifically of artificial intelligence-powered technologies) on the sports industry raises interesting issues that cannot, however, be discussed in this report; see Roy, Bajayanta. “AI Augmented Sports Revolution.” *towardsdatascience.com*. Towards Data Science, Nov. 8, 2019. Web. <<https://towardsdatascience.com/ai-augmented-sports-revolution-5c0727ba7004>>.

¹⁰³ For a discussion, see: Frodl, Christian. “Commercialisation of Sports Data: Rights of Event Owners over Information and Statistics Generated About Their Sports Events.” *Marquette Sports Law Review* 26.1 (2015). Web. <<https://scholarship.law.marquette.edu/sportslaw/vol26/iss1/5/>>.

¹⁰⁴ See the interesting Indian judgment in the case of *Akuate Internet Services Pvt. Ltd & Another v Star India Pvt. Ltd & Another* rendered by a Division Bench of the Delhi High Court on August, 30 2013 (Sinha, Anubha. “Delhi HC rejects the “Hot News” Doctrine: A Summary.” *spicyip.com*. SpicyIP, Sep. 4, 2013. Web. <<https://spicyip.com/2013/09/delhi-hc-rejects-hot-news-doctrine.html>>). which held that no copyright protection can be granted under Indian copyright law on data relating to cricket games (that were shared by SMS, where the data consisted of live score cards, match updates and score alerts); see also the US case *National Basketball Association v. Motorola*, 105 F.3d 841, at (2d Cir. 1997).

¹⁰⁵ See *National Basketball Association v. Motorola*, 105 F.3d 841 (2d Cir. 1997) and the judgment of the US Supreme Court in the case *International News Service v. Associated Press*, 248 U.S. 215 (1918); the application of the hot news doctrine was discussed and was ultimately rejected in the Indian case of *Akuate Internet Services Pvt. Ltd & Another v Star India Pvt. Ltd & Another*.

¹⁰⁶ See Art. L333-1-1 of the French Sports Code (note 96):

“Le droit d’exploitation défini au premier alinéa de l’article L. 333-1 inclut le droit de consentir à l’organisation de paris sur les manifestations ou compétitions sportives” (see also arts. L- L333-1-2 to L333-1-4); the issue of sports betting will not be further addressed in this report given that it does not relate to IP law as such; for a European perspective, see Asser Study (note 72), p. 130 *et seq*; a recent high-profile dispute has been brought before the courts in the UK between two competing sports betting companies in which a breach of (EU) competition law was alleged in connection with the allegedly abusive exclusive control over soccer-related sport data, see: Hancock, Alice. “Sports data group launches legal action against rival - Sportradar claims BetGenius has an unlawful monopoly over Premier League statistics.” *ft.com*. Financial Times, Mar. 5 2020. Web. <<https://www.ft.com/content/2a21e1c2-5ec5-11ea-b0ab-339c2307bcd4>>.

degree of originality (which goes beyond the mere investment and time and efforts for the compilation of data).¹⁰⁷

Even if the unauthorized reuse of certain sports-related data by third parties cannot be prevented on the basis of copyright law, other IP rights may come into consideration (in addition to potential contractual protection mechanisms).¹⁰⁸ The legal protection of databases can offer a certain protection against the reuse of sports-related data by unauthorized third parties. Such protection can particularly result from a dedicated statutory regime of protection such as the one that exists in the European Union.¹⁰⁹ It can also result from general legal rules (specifically unfair competition laws). This is what was at issue in the dispute between Football Dataco Ltd and Sportradar GmbH, Sportradar AG, in which the “Football Live” data were reused, i.e. data about the “goals and when they were scored, the goal scorers, yellow and red cards and who and when they got them, penalties and when they were awarded, and substitutions (who was substituted, when and by whom)”.

In general terms, protection shall be available if a third party benefits freely (and unduly) from the work and investment made by a third party in collecting and compiling the data (unfair “free riding”).¹¹⁰

¹⁰⁷ The High Court of Justice in a judgment of April 23, 2010, (2010) EWHC 841 (Ch) admitted the protection by copyright of fixture lists (para. 42: “I conclude that the process of preparing the Fixture Lists, whether in England or in Scotland remains one which involves very significant labour and skill in satisfying the multitude of often competing requirements of those involved” and para. 43 “This work is not mere “sweat of the brow”, by which I mean the application of rigid criteria to the processing of data. It is quite unlike the compiling of a telephone directory, in that at each stage there is scope for the application of judgment and skill. Unlike a “sweat of the brow” compilation, there are some solutions which will simply not work, and others which will be better. [...] The quality of the solution depends in part on the skill of those involved”); the dispute was then submitted to the Court of Appeal, which issued a judgment on December 9, 2010 [2010] EWCA Civ 1380 and was subsequently submitted to the CJEU which held in *Football Dataco Ltd v Britten Pools* by judgment of March 1, 2012 (C-604/10) that “Article 3(1) of Directive 96/9/EC [...] must be interpreted as meaning that a ‘database’ [...] is protected by the copyright laid down by that directive provided that the selection or arrangement of the data which it contains amounts to an original expression of the creative freedom of its author [...]” “[...] As a consequence:

- the intellectual effort and skill of creating that data are not relevant in order to assess the eligibility of that database for protection by that right;
- it is irrelevant, for that purpose, whether or not the selection or arrangement of that data includes the addition of important significance to that data, and
- the significant labour and skill required for setting up that database cannot as such justify such a protection if they do not express any originality in the selection or arrangement of the data which that database contains”.

¹⁰⁸ The protection of trade secrets may be relevant in this context, see (g) below.

¹⁰⁹ Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases; for a discussion under EU law, see Asser Study (note 72), 124 *et seq.*

¹¹⁰ See judgment of the Court of Appeal, March 29, 2011 [2011] EWCA Civ 330 *Football Dataco Ltd v Sportradar GmbH, Sportradar AG*; judgment of the CJEU of October 18, 2012 (C-173/11); judgment of the England and Wales Court of Appeal (Civil Division), *Football Dataco Ltd & Ors v Stan James Plc & Ors* [2013] EWCA Civ 27 (6 February 2013) which held (para. 69) that “[t]he considerable investment which goes into FootballLive (of the order of £600,000 per annum) clearly justifies Floyd J’s decision that FootballLive is a protected database” and (para. 88) “Sportradar’s business model in part relies on extraction for nothing of data from Football Live (and possibly other databases too) and selling it on as part of its own wider package. It could provide a lesser package by avoiding this extraction. But then it would not be comprehensive. I see no reason why it should not pay for the comprehensive coverage which, by extraction, it is able to sell on”; the conditions of protection of sports-related data and databases remain delicate, as confirmed by the number of cases that were submitted to the CJEU in order to clarify the scope of protection of the sui generis rights under the Directive, see *Fixtures Marketing Ltd v Oy Veikus AB* C-46/02; *Fixtures Marketing Ltd v Svenska Spel AB* C-338/02 and *Fixtures Marketing Ltd v Organismos Prognostikon Agonon Podosfairou* C-444/02.

The sports industry is a data industry that can derive revenues from the use of the data that it collects: efficient tools of legal protection should be available in order to protect against the unauthorized reuse of sports-related data.

(e) Image rights

The image of individuals (and specifically of athletes) can be legally protected by so-called “image rights” and these rights play a very important role in the sports industry,¹¹¹ it being noted that the source, the legal nature and the scope of protection of image rights can differ depending on the legal system concerned (a certain protection can already result from contractual mechanisms).¹¹² This right is sometimes referred to as the **right of publicity** in certain legal systems (such as the United States of America).¹¹³

Prominent athletes can derive very significant revenues by commercializing their image rights.¹¹⁴ They frequently do so by transferring their rights to a separate legal entity that they control and that exploits these rights by granting licenses of use to third

¹¹¹ Blackshaw (note 10), p. 43; White, Nick. “Sports image rights” in *Sport et propriété intellectuelle/Sport and intellectual property* (de Werra, Jacques ed.), Geneva: Schulthess, 2010 (vol. 1 of the University of Geneva School of Law IP book series propriété intellectuelle/intellectual property). Web. <<https://archive-ouverte.unige.ch/unige:5076>>; see also: Blackshaw, Ian. “Understanding Sports Image Rights.” *wipo.int*. WIPO. Web. <https://www.wipo.int/ip-outreach/en/ipday/2019/understanding_sports_image_rights.html>. Image rights are also relevant for teams, which can raise complex legal issues; see e.g. no protection of the picture of six players of the national Belgium soccer team on a book cover because of the right to use the image of public personalities in certain circumstances; see: Van Nevel, Sarah. “No protection of image rights afforded to the Belgian national football team.” *Journal of Intellectual Property Law & Practice*, Volume 9, Issue 9, September 2014, 713–715, <<https://doi.org/10.1093/jiplp/jpu109>>; and the decisions of the President of the Brussels Court of First Instance (expedited proceedings) of September 26, 2013 (13/1268/C) and of the Brussels Court of Appeal (expedited proceedings) of November 12, 2013 (2013/KR/234); the protection of image rights can extend to “look-alikes” under certain circumstances; this is what the Dutch Supreme Court decided in a case (judgment of 22 April 2022, case ECLI:NL:HR:2022:621 (Verstappen/PICNIC)) about an advertising campaign featuring a look alike of the Formula 1 driver and 2021 Formula One World Champion Max Verstappen, see: AKD. “Supreme Court on Max Verstappen's portrait rights”. Web. <<https://www.akd.eu/insights/supreme-court-on-max-verstappen-s-portrait-rights>>.

¹¹² The celebrity status of athletes does not necessarily mean that the athletes can prevent the use of their name by third parties when these third parties have legitimate reasons for such use; this is what was decided by the Delhi High Court in the case of Mr. Gautam Gambhir vs D.A.P & Co. & Anr. in its judgment of December 13, 2017 (available at: <<https://indiankanoon.org/doc/106318101/>>) relating to the use of the name of a famous cricket player in connection with restaurants exploited by a person who had exactly the same name (“this Court finds no sound reasons to grant the restraint order. Celebrity status of the plaintiff is not disputed. However, there is no material on record to infer if any time in running the said restaurants with the tagline 'by Gautam Gambhir', the defendant ever represented to the public at large in any manner that the said restaurants were owned by the plaintiff or he was associated with them in any manner”); see Blackshaw (note 10) discussing the differences between the more protective civil law approach and the less protective (UK) common law approach, p. 51 *et seq.*; see also, however, the Rhianna vs Topshop T-shirt dispute before the UK courts: *Robyn Rihanna Fenty and others v Arcadia Group Brands Limited (t/a Topshop) and others* [2013] EWHC 2310 (Ch), confirmed by [2015] EWCA Civ 3.

¹¹³ See e.g.: Lee Stapleton, Laura and McMurphy, Matt. “The Professional Athlete's Right of Publicity.” *Marquette Sports Law Review* 10.1 (1999). Web. <<http://scholarship.law.marquette.edu/sportslaw/vol10/iss1/4>>; McCarthy, J. Thomas and Anderson, Paul M. “Protection of the Athlete's Identity: The Right of Publicity, Endorsements and Domain Names.” *Marquette Sports Law Review*. 11.2 (2001). Web. <<http://scholarship.law.marquette.edu/sportslaw/vol11/iss2/6>>.

¹¹⁴ Blackshaw (note 10), pp. 45-46.

parties.¹¹⁵ The nature of the contractual transfer of image rights to a third party may differ between legal systems, whereby some systems may consider (this may particularly be the case from a civil law perspective) that image rights (like other personality rights) are not assignable.¹¹⁶

In terms of terminology, **the reference to “image rights” is too restrictive** to the extent that athletes should benefit from the protection of all their identifying features beyond their images (including names, initials, signatures, body features, achievements, etc.). Some of these features can be protected by other types of IP rights (specifically trademarks¹¹⁷ or copyrights for sufficiently creative photographs or paintings of the athlete).¹¹⁸

Certain governments have taken steps to grant a specific statutory basis for the commercial protection of image rights. This is what the Channel Island of Guernsey, which is a British Crown Dependency located in the English Channel, has done by introducing, on 3 December, 2012, a new Statutory Image Right under the provisions of the Image Rights (Bailiwick of Guernsey) Ordinance of 2012.¹¹⁹ These statutory rights are protected in the relevant jurisdiction but have no impact in other countries.

¹¹⁵ See the case in which the claimant ETW Corp. is a company to which the celebrated golf player Tiger Woods (for Ethan Tiger Woods) assigned the exclusive right to exploit his name, image, likeness and signature, and all other publicity rights; ETW owns a United States trademark registration for the mark "TIGER WOODS" (Registration No. 2,194,381) for use in connection with "art prints, calendars, mounted photographs, notebooks, pencils, pens, posters, trading cards, and unmounted photographs, see *ETW Corp. v. Jireh Pub., Inc.*, 99 F. Supp. 2d 829 (N.D. Ohio 2000), affirmed by *ETW Corp. v. Jireh Publishing, Inc.*, 332 F.3d 915 (6th Cir. 2003).

¹¹⁶ On this issue and on the more general issue of the contractual management of sports image rights, see: de Werra, Jacques. "La gestion contractuelle du droit à l'image des sportifs" in *Citius, altius, fortius. Mélanges en l'honneur de Denis Oswald* (Rigozzi, Antonio; Sprumont, Dominique; Hafner, Yann eds), Basel: Helbing & Lichtenhahn, 2012. Web. <<https://archive-ouverte.unige.ch/unige:24390>>.

¹¹⁷ See (b) (i) above.

¹¹⁸ Athletes may benefit from legal protection if some of their personal features are used, even if their name is not used, see *Keller v. Elec. Arts* (In re NCAA Student-Athlete Name & Likeness Licensing Litig.), 724 F.3d 1268 (9th Cir. 2013).

¹¹⁹ Guernsey Legal Resources. "Image Rights (Bailiwick of Guernsey) Ordinance, 2012 (Consolidated text)." *guernseylegalresources.gg*. Guernsey Legal Resources. Web. <<http://www.guernseylegalresources.gg/article/106028/Image-Rights-Bailiwick-of-Guernsey-Ordinance-2012-Consolidated-text>>.

Example of national regulation of image rights:

The Statutory Image Right under the provisions of the Image Rights (Bailiwick of Guernsey) Ordinance of 2012

Pursuant to this regulation, the “image” on which exclusive property rights are granted is defined as “(a) the name of a personage or any other name by which a personage is known, (b) the voice, signature, likeness, appearance, silhouette, feature, face, expressions (verbal or facial), gestures, mannerisms, and any other distinctive characteristic or personal attribute of a personage, or (c) any photograph, illustration, image, picture, moving image or electronic or other representation ("picture") of a personage and of no other person, except to the extent that the other person is not identified or singled out in or in connection with the use of the picture”.

The **commercialization of athletes’ image rights can result from endorsement agreements**, on the basis of which athletes (or the companies that they have set up to manage their image rights) agree (against remuneration) to associate their image with the products and/or services of companies (corporate sponsors) and to provide certain services, such as appearing at certain corporate events organized by these companies, and acting as “influencers” on social media platforms for the companies that financially support them. Endorsement agreements that can offer an important source of revenues for athletes are generally quite sophisticated contracts.¹²⁰

These agreements generally define broadly the image rights, such as:

*“Image Rights means the right for any commercial or promotional purpose to use the Player's name, nickname, slogan and signatures developed from time to time, image, likeness, voice, logos, get-ups, initials, team or squad number (as may be allocated to the Player from time to time), reputation, video or film portrayal, biographical information, graphical representation, electronic, animated or computer-generated representation and/or any other representation and/or right of association and/or any other right or quasi-right anywhere in the World of the Player in relation to his name, reputation, image, promotional services, and/or his performances together with the right to apply for registration of any such rights”.*¹²¹

¹²⁰ For a discussion of image rights agreements and sponsorship agreements, see: Blackshaw, Ian S. *Sports Marketing Agreements: Legal, Fiscal and Practical Aspects*. The Hague: Asser Press, 2012; p. 253 (chapter on Sports Image Rights and Endorsement Agreements), with a template of “Agreement for the Use and Exploitation of a Player’s Image” on p. 271.

¹²¹ See *Proactive Sports Management Ltd. v 1) Wayne Rooney, 2) Coleen Rooney (formerly McLoughlin), 3) Stoneygate 48 Limited, 4) Speed 9849 Limited*, [2010] EWHC 1807, para. 187, whereby the agreement was entered into between Wayne Rooney (WR, who is a UK soccer player) and Stoneygate and “provided for the assignment of certain rights by WR to Stoneygate on a

The commercial use of an athlete's image can take multiple forms. One important use is in sports videogames, in which athletes' images and personal features are frequently reused. The conditions of such use have been regularly litigated on various legal grounds: one issue is whether videogame producers can use the athlete's image by relying on freedom of expression arguments.¹²² Another issue is whether videogame producers have obtained the authorization to use the image rights from the athletes and not from third parties. In a German court case, EA Sports (a leading videogame company) created a videogame that featured a large number of soccer players from across the world, one of whom was the German goalkeeper Oliver Kahn. EA had taken a license for image rights indirectly via FIFPro (Fédération Internationale des Associations de Footballeurs Professionnels), which is the international soccer players union, www.fifpro.org) and consequently assumed that it had the required permission to use these rights. Oliver Kahn, however, brought legal proceedings against EA Sports and was successful in his claim because he had not granted a license for his image rights.¹²³

On the basis of their image rights, athletes can prevent the unauthorized commercial use of their image or other personal features in various circumstances.¹²⁴ The scope and enforceability of this right depends on local laws, which can offer extensive

perpetual, exclusive, worldwide basis, in consideration of the allocation to him of the entirety of the issued share capital in Stoneygate" (para. 187); see also Blackshaw (note 10), p. 47, citing a 'grant of rights' clause in a sports image licensing agreement defining the image rights in rather broad terms as follows: "Access to the services of the personality for the purpose of filming, television (both live and recorded), broadcasting (both live and recorded), audio recording; motion pictures, video and electronic pictures (including but not limited to the production of computer-generated images; still photographs; personal appearances; product endorsement and advertising in all media; as well as the right to use the personality's name, likeness, autograph, story and accomplishments (including copyright and other intellectual property rights), for promotional or commercial purposes including, but without limitation, the personality's actual or simulated likeness, voice, photograph, performances, personal characteristics and other personal identification".

¹²² See: Mtima, Lateef. "Publicity Rights and the First Amendment: Balancing Athletes and Other Celebrity Interests." *iipsj.org*. Howard University School of Law, Institute for Intellectual Property and Social Justice, 2016. Web. <<https://iipsj.org/wp-content/uploads/2019/06/publicity-rights.pdf>>; Rice, R. Garrett. "Groove Is in the Hart: A Workable Solution for Applying the Right of Publicity to Video Games." *Washington and Lee Law Review* 72.1 (2015); see the US leading cases: *Hart v. Electronic Arts, Inc.*, 717 F.3d 141 (3d Cir. 2013); *Keller v. Elec. Arts* (In re NCAA Student-Athlete Name & Likeness Licensing Litig.), 724 F.3d 1268, 1276 (9th Cir. 2013).

¹²³ *Oliver Kahn v Electronic Arts* (OLG Hamburg, Sport und Recht 2004, 210); this is still a debated issue, as evidenced by recent disputes, see e.g. Paula Westenberger, "Case Comment: the unauthorized use of the image of a football player in videogames as a violation of image rights in Brazil," *Interactive Entertainment Law Review*, volume 1, issue 2, pages 119-122, Dec 2018, available at <<https://doi.org/10.4337/ielr.2018.02.05>>; see also the on-going dispute (known as "Project Red Card") relating to the claim raised by hundreds of soccer players who allege that their personal data has been used without their authorization), see <<https://www.sportspromedia.com/news/project-red-card-soccer-data-gdpr-lawsuit-ea-sports-sla/>>.

¹²⁴ The limits of the right of control are not always obvious; see the recent case initiated by Michael Jordan and his image rights company in order to preclude Michael Jordan's image use on sports trading cards; see: Herzfeld, Oliver. "Michael Jordan Background Images Spark Lawsuit." *Forbes.com*. Forbes Magazine, Feb. 24 2020. Web. <<https://www.forbes.com/sites/oliverherzfeld/2020/02/24/michael-jordan-background-images-spark-lawsuit/?sh=1fb0290d78f1>>; see the complaint, available at: <<http://ipcasefilings.com/wp-content/uploads/2020/02/Panini-America.pdf>>; see also the judgment of the Oberlandesgerichts Frankfurt am Main of August 7, 2018 (ref. 11 U 156/16), Zulässige Abbildung eines Fußballspielers auf Sammelkarte, CaS 2018, 275; see: Causa Sport News. "Die Angst des Tormanns vor Persönlichkeitsrechtsverletzungen." *causasportnews.com*. Causa Sport News, Aug. 10, 2018. Web. <<https://causasportnews.com/2018/08/10/die-angst-des-tormanns-vor-persoendlichkeitsrechtsver%e2%80%8eletzungen/>>; Golz, Robert. "Richtig im Ergebnis, heterogen in der Begründung. Anmerkungen zum Urteil des Oberlandesgerichts Frankfurt am Main vom 7. August 2018." *CausaSport* 3 (2018). Print.

protection¹²⁵ and can lead to significant damages in case of infringement of the athlete's image rights.¹²⁶

The value of endorsement agreements depends on the successful transfer of the positive goodwill and image of the athlete to the sponsoring company that can benefit from this transfer of positive image for the reputation of its own products and services. Risks may, however, arise for the sponsors when athletes do not provide positive images anymore because of their conduct. This may particularly occur because of the conduct of the athletes in a sports-related context (such as doping¹²⁷), as well as in a non-sports related context.¹²⁸ In view of this risk, endorsement agreements frequently contain so-called "morality clauses" (or "morals clauses") by which corporate sponsors can immediately terminate the agreement in the occurrence of events affecting the morality of the sponsored athletes that may also damage their reputation.¹²⁹

(f) Protection against unfair competition: ambush marketing

The organization of major sports events is very resource intensive. These events can be organized thanks to the financial revenues that organizers can generate from different external sources. One important source of revenue results from **sponsorship**

¹²⁵ For a recent illustration, see the recent decision of the Milan court (Tribunale di Milano, judgment n. 11374/2019 of December 9, 2019), in which the former soccer star Diego Maradona obtained damages for the unauthorized use of his name on a jersey shown in a Dolce & Gabbana fashion show; see: Rosati, Eleonora. "Maradona successfully sues Dolce & Gabbana over unauthorized use of his name on a jersey." *ipkitten.blogspot.com*. IPKat, Dec. 18, 2019. Web. <<http://ipkitten.blogspot.com/2019/12/maradona-successfully-sues-dolce-over.html>>.

¹²⁶ See *Michael Jordan and Jump 23, Inc. v. Dominick's Finer Foods, LLC*, 115 F.Supp.3d 950 (N.D. Ill. 2015); the case concerned the unauthorized use of Michael Jordan's name and his iconic number "23" in a full-page ad for a food chain (Dominick's Finer Foods LLC) in a commemorative issue of Sports Illustrated magazine celebrating Michael Jordan's career. The ad featured the tagline "You are a cut above" with a coupon for \$2.00 off Rancher's Reserve tender angus steak; an Illinois jury awarded Michael Jordan \$8.9 million in damages; see: Winston & Strawn LLP. "Jury Awards Michael Jordan \$8.9 million for Right of Publicity Violation." *winston.com*. Winston & Strawn LLP, Sep. 2, 2015. Web. <<https://www.winston.com/en/advertising-marketing-privacy-law-news/jury-awards-michael-jordan-8-9-million-for-right-of-publicity.html>>; another comparable dispute involving Michael Jordan led to a settlement between the parties, see: AP News. "Michael Jordan, Jewel-Osco reach settlement over use of name." *apnews.com*. The Associated Press, Nov. 23, 2015. Web. <<https://apnews.com/6f2c975acf3644199882d28f17e1c7f3/michael-jordan-jewel-osco-reach-settlement-over-use-name>>.

¹²⁷ On the doping scandal affecting the cyclist Lance Armstrong, see: Rotunno, Tom. "Armstrong Loses Eight Sponsors in a Day." *cnc.com*. CNBC, Oct. 18, 2012. Web. <<https://www.cnc.com/id/49462583>>; see also: White, Martha C. "Lance Armstrong doping scandal hurts cyclist's endorsement career." *nbcnews.com*. NBC, Aug. 24, 2012. Web. <<https://www.nbcnews.com/business/business-news/lance-armstrong-doping-scandal-hurts-cyclists-endorsement-career-f963406>>.

¹²⁸ On the sex scandal affecting the golf legend Tiger Woods, see: Reuters Staff. "Tiger Woods scandal cost shareholders up to \$12 billion." *reuters.com*. Reuters, Dec. 29, 2009. Web. <<https://www.reuters.com/article/us-golf-woods-shareholders/tiger-woods-scandal-cost-shareholders-up-to-12-billion-idUSTRE5BS38I20091229>>.

¹²⁹ See the moral clause cited by Blackshaw (note 10), p. 59: "The Sports Personality shall, at all times, during the term of this Agreement act and conduct himself/herself in accordance with the highest standards of disciplined and professional sporting and personal behaviour and shall not do or say anything or authorize there to be done or said anything which, in the reasonable opinion of the Licensor, is or could be detrimental, whether directly or by association, to the reputation, image or goodwill of the Company or any of its associated companies. The Sports Personality shall not, during the term of this Agreement, act or conduct himself/herself in a manner that, in the reasonable opinion of the Company, offends against decency, morality or professionalism or causes the Company, or any of its associated companies, to be held in public ridicule, disrepute or contempt, nor shall the Sports Personality be involved in any public scandal"; in the absence of such clause, it should be assessed under the law governing the endorsement agreement whether the agreement can be terminated which can be admitted under certain legal systems (including under Swiss law) if there is a just cause for termination. A just cause of termination exists when it cannot reasonably be expected from the party terminating the agreement to continue to be bound by the agreement; the consequences of the termination of the endorsement agreement will depend on the contract (particularly with respect to the possibility to obtain the reimbursement of the payments already made to the sponsored entity, for an example, see e.g. *Team Gordon, Inc. v. Fruit of the Loom, Inc.*, No. 3:06-cv-201, 2009 WL 426555 (W.D.N.C. Feb. 19, 2009).

agreements by which corporate sponsors agree to provide funding for which they receive the right to be officially associated with the sports event (as official sponsors), which is of value to them for the marketing of their products or services¹³⁰.

One essential component of the entire sponsorship ecosystem is **the exclusivity granted to the sponsors in a specific sector** (the exclusivity is generally granted for a category of products or services that must be precisely defined).¹³¹ Sponsors agree to pay sometimes massive sums of money only to the extent that they can obtain a certain exclusivity of association with the relevant sports event (e.g. the Olympic games). Sports organizers must consequently take all necessary steps in order to ensure that their sponsors can benefit from this exclusivity and that no third parties shall unduly take advantage of the goodwill and positive image of the sports event.

Protection against ambush marketing by cities/countries hosting major sports events

Protection against ambush marketing is an essential component of the IP protection strategy that must be adopted by cities/countries hosting major sports events. This issue is carefully addressed in the host city contractual documents. This can be illustrated by reference to the clauses relating to the protection against ambush marketing contained in the Host City Contract – Operational Requirements for the XXV Winter Olympic Games 2026

(<https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/Games/Host-City-Contract/HCC-Operational-Requirements.pdf>)

Chapter 29 of the HCC Operational Requirements (“Rights Protection”) provides the following with respect to ambush marketing:

“In order to deliver an appropriate and effective programme for Rights Protection in line with the introduction above and in accordance with the HCC - Principles, the following shall be implemented by the OCOG [Organising Committee for the Olympic and Paralympic Games] within the milestones and other timelines set out in the Games Delivery Plan (GDP):

[...]

¹³⁰ See: Johnson, Phillip. *Ambush Marketing and Brand Protection: Law and Practice*. 3rd ed. Oxford: University Press, 2021, para. 1.07; this report cannot discuss all the unfair competition & consumer protection issues that may arise in the sport industry such as those connected to the unauthorized resale of tickets (“ticket touting”).

¹³¹ See: Cobbs, John. “Legal Battles for Sponsorship Exclusivity: The Cases of the World Cup and NASCAR.” *Sport Management Review* 14 (2011): pp. 287-296. Print.

Rights protection programme

RPP 04 - Legal protection

• *In compliance with guarantees requested during the Candidature process and in coordination with the Host Country Authorities, ensure, where appropriate in collaboration with competent Host Country Authorities, the following:*

– *all Olympic Properties, (in particular the Olympic symbol, the terms “Olympic” and “Olympiad”, the Olympic motto) benefit from adequate and continuing legal protection in the Host Country in the name of the IOC and/or the OCOG as appropriate;*

– *the IOC’s exclusive rights and interests in relation to the Games (as defined in the HCC - Principles) are acknowledged and protected in the Host Country through appropriate legislation and other administrative measures, addressing in particular:*

o protections against ambush marketing (namely, preventing or minimising any direct and/or indirect unauthorised association with, exploitation or promotion of, the Olympic Properties and/or the Games; [...]

RPP 07 - Development of the rights protection programme

• *Submit a detailed rights protection programme to the IOC including:*

– *an anti-ambush prevention plan including proposed measures for education, public relations and communications activities internally within the OCOG and externally towards the IFs, all relevant Host Country Authorities, trade organisations, the general public, media entities and other key stakeholders;*

– *monitoring and action plan on ambush marketing, intellectual property infringements, ticket touting and counterfeit issues in the Host Country;*

[...].

RPP 08 - Coordination with Host Country Authorities

• *Develop relationships (with the appointment of points of contact) and strategies with the competent Host Country Authorities, as well as Marketing Partners and RHBs, to efficiently combat ambush marketing, intellectual property infringements, ticket touting, counterfeit activities and unauthorized Games Broadcast, Coverage and Exhibition. [...].*

RPP 09 - “No-marketing rights” clauses

• *Ensure that contracts for Games-related activities include appropriate “No Marketing Rights” clauses to restrict third parties (who have not acquired the marketing rights from the OCOG or the IOC) from associating themselves, or their goods and services, with the Games or publishing or issuing any statement (factual or otherwise) about their connection with the Games.*

RPP 10 - Monitoring and enforcement

• *Protect the Olympic Properties and the rights of Marketing Partners and RHBs in the Host Country by monitoring, preventing and/or terminating intellectual property infringements and ambush marketing activities including, where appropriate, by undertaking public relations campaigns and taking legal recourse in a timely manner. [...]*

The commercial communication strategies of non-official sponsors that aim to benefit from the sports event can be very detrimental to the official sponsors and to the organizers of the sports events, and can constitute **illegal “ambush marketing”**.¹³²

Even though there is no unique and official definition of “ambush marketing”,¹³³ it can generally be conceived as follows (in the words of Michael Payne, who was IOC’s first ever Marketing and Broadcast Rights Director¹³⁴): “The term parasite or ambush marketing refers to any communication or activity that implies, or from which one could reasonably infer, that an organization is associated with an event, when in fact it is not”.¹³⁵ For the IOC (it being noted that the Olympic Games are a very frequent target of ambush marketing activities¹³⁶), ambush marketing means the “Direct and/or indirect unauthorised association with, exploitation or promotion of, the Olympic properties and/or the [Olympic] Games”.¹³⁷

¹³² Ambush marketing is a legal phenomenon that cannot be detailed in full here; on this issue, see: Park, Kathryn. “Ambush marketing: when sponsors cry “foul”.” *wipo.int*. WIPO Magazine, Apr. 2019. Web. <https://www.wipo.int/wipo_magazine/en/2019/02/article_0004.html>; see the national reports and the international report (drafted by Pierre Kobel) of the study conducted under the aegis of the International League of Competition Law (LIDC); Kobel, Pierre. “Ambush Marketing: too smart to be good? Should certain ambush marketing practices be declared illegal and if yes, which ones and under what conditions?” *ligue.org*. LIDC, Sep. 2007. Web. <<http://www.ligue.org/index.php?page=catania-september-2007>>; see also: Dean, Owen. “Defending its turf: FIFA combats ambush marketing.” *wipo.int*. WIPO Magazine, Jul. 2009. Web. <https://www.wipo.int/wipo_magazine/en/2009/04/article_0003.html>.

¹³³ For a discussion, see Johnson (note 129), 1.15 – 1.20.

¹³⁴ See: Payne, Michael R. “Profile.” *michaelpayne.com*. Web. <<https://www.michaelpayne.com/about>>.

¹³⁵ Payne, Michael. “Ambush Marketing: The Undeserved Advantage.” *Psychology & Marketing* 15.4 (1998): pp. 323-331, at p. 324. Web. <<https://blogs.lt.vt.edu/cads19932/files/2015/02/Ambush-Marketing-The-Undeserved-Advantage.pdf>>.

¹³⁶ See: Nakamura, Bryce M. “Is Olympic Ambush Marketing Here to Stay?” *Arizona Journal of International and Comparative Law* 35.3 (2018): pp. 499-529. Web. <http://arizonajournal.org/wp-content/uploads/2019/04/04_Nakamura.pdf>.

¹³⁷ See: IOC. “IOC Marketing: Media Guide – Olympic Winter Games PyeongChang 2018.” *olympic.org*. IOC. Web. <<https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/Games/Winter-Games/Games-PyeongChang-2018-Winter-Olympic-Games/IOC-Marketing/Media-Guide.pdf>>, p. 56.

IP law can protect against ambush marketing activities in different manners depending on the type and nature of the ambush marketing activities. If the ambush marketer reuses protected IP rights of the sports event (trademarks, copyright protected content, etc.) – which is called *direct* ambush marketing,¹³⁸ the organizers (and/or the other IP owners) can enforce their rights against such unauthorized use without excessive difficulties. It is, however, more challenging from a legal standpoint to get protection against so-called *indirect* ambush marketing campaigns in which “the ambush marketer capitalizes on the event without misuse of the event’s trademarks or without making a direct false claim of affiliation with the event”. These are consequently “more difficult cases”.¹³⁹

There are almost unlimited ways to engage in indirect ambush marketing activities. By way of illustration, the sports brand Nike launched an advertising campaign during the London 2012 Olympic Games under the slogan “Find Your Greatness” that featured regular individuals doing all manner of sports, filmed in locations called London, other than London, England, such as London, Nigeria.¹⁴⁰

The key legal challenge of ambush marketing is to assess when and on the basis of which criteria ambush marketing campaigns shall be considered illegal. General legal standards of unfairness, parasitism and free riding resulting from the general laws against unfair competition may provide some support in this respect. The application of general unfair competition laws may, however, not be sufficient to fight efficiently against ambush marketing activities.¹⁴¹

On this basis, countries hosting major sports events have frequently adopted **specific regulations protecting against unauthorized *association* with a sports event**. This is what was done for the 2012 London Olympic Games, which led to the adoption of the London Olympics Association Right on the basis of the London Olympic Games and Paralympic Games Act 2006, schedule 4.¹⁴² This is also what was done by Brazil in

¹³⁸ See Park (note 131) noting that “easy cases to spot are direct ambushes – ones in which the actual trademarks of the event organizer are used to create the false impression that they are associated with an event; for example, if the use is of the distinctive symbol comprising five interlocking rings of the International Olympic Committee”.

¹³⁹ See Park (note 131) “The more difficult cases are indirect ambushes, ones in which the ambush marketer capitalizes on the event without misuse of the event’s trademarks or without making a direct false claim of affiliation with the event. A myriad of approaches can accomplish this, from buying advertising space near the event, branding transportation to the venue, featuring individuals participating in the event, and using a color scheme and words that imply the event, to name a few”.

¹⁴⁰ See Park (note 131).

¹⁴¹ See: Ericsson, Seth. “Ambush Marketing: Examining the Development of an Event Organizer Right of Association” in *Intellectual Property, Unfair Competition and Publicity: Convergences and Development* (Lee, Nari, et al., eds), Cheltenham: Edward Elgar Publishing, 2014; see: Cherpillod, Ivan. “La protection contre le marketing sauvage (ambush marketing)” in *Sport et propriété intellectuelle/Sport and intellectual property* (de Werra, Jacques ed.), Geneva: Schulthess, 2010 (vol. 1 of the University of Geneva School of Law IP book series propriété intellectuelle/intellectual property). Web. <<https://archive-ouverte.unige.ch/unige:5076>>; see also the Powerpoint presentation: King, Darren. “IP Challenges and Opportunities for Governments in the Organisation and Exploitation of Major Sporting Events and Local Competitions.” *wipo.int*. WIPO, Nov. 25, 2014. Web. <https://www.wipo.int/edocs/mdocs/mdocs/en/wipo_reg_ip_sport_sin_14/wipo_reg_ip_sport_sin_14_t_4a.pdf>.

¹⁴² London Olympic Games and Paralympic Games Act 2006, Chapter 12. Web. <http://www.legislation.gov.uk/ukpga/2006/12/pdfs/ukpga_20060012_en.pdf>; Schedule 4 ceased to have effect (31.12.2012) by virtue of the London Olympic Games and Paralympic Games Act 2006 (c. 12), s. 40(8) (see: London Olympic

preparation to host the Olympic Games (Rio 2016) and the FIFA World Cup in 2014,¹⁴³ and in South Africa for the 2010 Football World Cup.¹⁴⁴

**Example of a national regulation protecting
specifically against ambush marketing:**

**The London Olympics Association Right
adopted for the London Olympic Games 2012**

The London Olympics Association Right confers “exclusive rights in relation to the use of any representation (of any kind) in a manner likely to suggest to the public that there is an association between the London Olympics and (a) goods or services, or (b) a person who provides goods or services”.¹⁴⁵

It defines the concept of association as follows: “(a) the concept of an association between a person, goods or a service and the London Olympics includes, in particular (i) any kind of contractual relationship, (ii) any kind of commercial relationship, (iii) any kind of corporate or structural connection, and (iv) the provision by a person of financial or other support for or in connection with the London Olympics, [...]”.¹⁴⁶

It further provides that: “(b) a person does not suggest an association between a person, goods or a service and the London Olympics only by making a statement which (i) accords with honest practices in industrial or commercial matters, and (ii) does not make promotional or other commercial use of a representation relating to the London Olympics by incorporating it in a context to which the London Olympics are substantively irrelevant”.¹⁴⁷

Games and Paralympic Games Act 2006, Schedule 4. Web. <<http://www.legislation.gov.uk/ukpga/2006/12/schedule/4>>; specific guidelines are issued for each edition of the Olympic Games, see e.g. for the Tokyo 2020 Olympic Games (which have been postponed to 2021 because of the COVID-19 pandemic. See: Tokyo Organising Committee of the Olympic and Paralympic Games. “Protection of Intellectual Properties.” *tokyo2020.org*. Tokyo 2020. Web. <<https://tokyo2020.org/en/utilities/copyright>>); see also the Amendment made to Chinese Law where ambush marketing was added to the unfair competition law in Article 6 of the [Law of the People's Republic of China Against Unfair Competition](#) (as amended up to the Decision on Revising the Construction Law of the People's Republic of China and Other Seven Laws at the 10th Meeting of the Standing Committee of the Thirteenth National People's Congress on April 23, 2019).

¹⁴³ The Brazilian Parliament enacted the Brazilian Olympic Act (Law 12,035/2009) and the so-called World Cup Law (Law 12,663/2012) in 2012, see: Ferraz Vazquez, Rafael. “Sport and broadcasting rights: adding value.” *wipo.int*. WIPO Magazine, Apr. 2013. Web. <https://www.wipo.int/wipo_magazine/en/2013/02/article_0005.html>. (“These laws, similar to those adopted by other host nations in the past, are designed to combat ambush marketing, regulate advertising in and around official sporting venues and clamp down on digital piracy. The Brazilian World Cup Law goes much further in protecting the interests of right owners than Brazil’s pre-existing legislation in this area, the so-called Pele Law (Law 9,615/98). For example, the World Cup Law prohibits anyone but the official broadcaster from capturing and broadcasting images of events. However, it does permit use for non-commercial purposes, although this is limited to up to 3 percent of a match, or 30 seconds of a ceremony”).

¹⁴⁴ Protection against ambush marketing by intrusion is provided for in Section 15A of the South African Merchandise Marks Act pursuant to which the Minister of Trade and Industry can designate an event as a ‘protected event’. This is what was done for the FIFA 2010 World Cup (GG28877/25-5-2006); see: Dean, Owen. “Defending its turf: FIFA combats ambush marketing”. WIPO Magazine, *wipo.int*. July 2009 <https://www.wipo.int/wipo_magazine/en/2009/04/article_0003.html>.

¹⁴⁵ Schedule 4, 1 (1).

¹⁴⁶ Schedule 4, 1 (2)(a).

¹⁴⁷ Schedule 4, 1 (2)(b).

Section 7 of the London Olympics Association Right provides that “[t]he London Olympics association right is not infringed by—(a) the use by a person of his own name or address, (b) the use of indications concerning the kind, quality, quantity, intended purpose, value, geographical origin, time of production of goods or of rendering of services, or other characteristics of goods or services, (c) the use of a representation which is necessary to indicate the intended purpose of a product or service; provided, in each case, that the use is in accordance with honest practices in industrial or commercial matters”.¹⁴⁸

Based on these provisions, there is no violation of the London Olympics Association Right with respect to statements or representations that are in accordance “with honest practices in industrial or commercial matters”. It is worth noting that this terminology and the legal standard clearly refer to the general standard of unfair competition law, which similarly defines the (un)fairness of a conduct in reference to “honest practices in industrial or commercial matters”, as reflected in Article 10bis, paragraph 2 of the Paris Convention, which provides that “[a]ny act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition”.¹⁴⁹

Official sponsors of sports events must carefully anticipate the risks of ambush marketing activities and should address this issue with the organizers of the sponsored sports event in the preparation of the event.¹⁵⁰

¹⁴⁸ Schedule 4, 7.

¹⁴⁹ Paris Convention for the Protection of Industrial Property.

¹⁵⁰ See Park (note 131), exposing the measures that can be taken in order to mitigate and control the risk of ambush marketing: “Determining in advance what steps will be taken can improve the relationship between the parties during the critical time a sponsor is demanding action. Such steps can include:

1. Pre-event publicity by the organizer stating that ambush marketing will not be tolerated; proactive sweeps of media and the physical venue, up to and during the event, for potential infringements of the sponsor’s rights; designated personnel, including security and legal counsel, to address ambushes and the preparation of draft court papers.
2. Identification of competitors that the sponsor knows are likely to ambush an event. Often, a sponsor will have examples of past occurrences and even press clippings that show the ambusher was reported mistakenly as an official sponsor. Such documentation should be shared with the event organizer to support requests that the organizer issues advance warnings and prepares for immediate enforcement activity against the competitor as required.
3. Requiring the event organizer to establish clean zones around the arena or concert hall, working with the local municipality to establish a perimeter within which non-sponsor advertising is not permitted. This is often something the event organizer will have done, but nonetheless the guarantee of a clean zone should be specifically included in the agreement. A wily competitor could host a party near or on the day of the event in a building that falls within the clean zone, featuring invited guests and celebrities associated with the event, to build a subtle association with the event. A clear obligation to provide a clean zone will help the sponsor in that circumstance.
4. The sponsorship agreement should specifically impose obligations on the event organizer to ensure the organizer will have:
 - adequate language on the back of tickets stating that certain actions will be grounds for ejection from the event and that tickets may not be used in promotional activities;
 - rules for individual athletes or performers on how and when non-sponsor brands can be used within the venue; and
 - terms in supply agreements with suppliers which haven’t also obtained a sponsorship, that expressly prohibit promotional activities or advertising in conjunction with the mere fact of supplying the event.

Focusing on the product category and making sure it is comprehensive and anticipates future product developments in the category, if possible. Broad category definitions may make it easier to convince the organizer to take action, even against other sponsors, where there is some question about where the product of the ambusher falls. In an early ambush case, Mastercard, the official sponsor of the 1992 World Cup for “all card-based payment systems and account access devices,” successfully enjoined Sprint, which was marketing pre-paid telephone calls with the event logo. However, category specificity is an issue that continues to lurk, particularly in categories where technology and social media have created new products and services”.

The protection against ambush marketing is fact-sensitive. It requires finding the balance between conflicting rights and interests (including freedom to do business and freedom of expression) and some have expressed the concern that the legal protection against ambush marketing might be too broad.¹⁵¹ It should, however, be noted that statutory provisions and the relevant guidelines can significantly help to reduce the uncertainty by defining the circumstances in which there shall be no violation of the right of association with the relevant sports event and thus no illegal ambush marketing activity (as done in Section 7 relating to the London Olympics Association Right).

Example of a (fictional) indirect ambush marketing campaign:

The illustration below is a fictional example that was given by the organizers of the 2012 London Olympic Games in order to illustrate the case of an advertising campaign that would violate the right of association granted under the London Olympics Association Right and would thus constitute an illegal ambush marketing activity (the picture and text below contain several clear references to the 2012 London Olympic Games and thus violate the right of association):



Source (courtesy of the IOC): Sole Supplier guidelines – Brand Protection for the London 2012 Olympic Games (November 2010), available at: <https://library.olympic.org/Default/doc/SYRACUSE/65627/sole-supplier-guidelines-brand-protection-the-london-organising-committee-of-the-olympic-games-and-p> (p. 22 of the pdf document)

¹⁵¹ See: Louw, Andre M. *Ambush Marketing & the Mega-Event Monopoly: How Laws are Abused to Protect Commercial Rights to Major Sporting Events*. Cham: Springer, 2012.

The sports industry, like most other industries, is evolving in a fast-moving digital ecosystem. This can raise digital challenges that can take the form of what could be called “digital ambush marketing”, by which companies may want to take advantage of a sports event in the digital sphere without being officially associated with it. International sports organizations and organizers of major sports events consequently need to adapt to this dynamic environment, which they can do by issuing social media guidelines and policies.¹⁵²

In terms of digital ambush marketing, one issue relates to the **ability of athletes participating in a major sports event (specifically in Olympic Games) to communicate and to promote their personal sponsors on social media** (even if their personal sponsors are not official sponsors/partners of the Olympic Games). These circumstances are fundamentally different from the classical case of ambush marketing, which consists of activities of third parties that do not have any official status in the relevant sports events (i.e. by companies that are not official sponsors of the sports events).

This issue was debated in the context of the so-called “**Rule 40**” (which is more exactly By-law 3 to Rule 40) of the Olympic Charter, which was recently amended by the IOC¹⁵³ (as a result of various circumstances including antitrust proceedings in Germany).¹⁵⁴ The former version of Rule 40 provided that “[e]xcept as permitted by the IOC Executive Board, no competitor, team official or other team personnel who participates in the Olympic Games may allow his person, name, picture or sports performances to be used for advertising purposes during the Olympic Games”. The new version of By-law 3 to Rule 40 has liberalized the system and now provides (in the version of the Olympic Charter adopted on June 26, 2019) that “[c]ompetitors, team officials and other team personnel who participate in the Olympic Games may allow their person, name, picture or sports performances to be used for advertising purposes during the Olympic Games in accordance with the principles determined by the IOC Executive Board”.¹⁵⁵ The IOC has issued documents for the relevant editions of the Olympic Games. The last ones relate to

¹⁵² See e.g.: IOC. “2022: Beijing 2022 Olympic Winter Games.” *olympic.org*. IOC. Web.

<<https://olympics.com/ioc/documents/olympic-games/beijing-2022-olympic-winter-games>> under the tab “IOC Digital and Social Media Guidelines”.

¹⁵³ Rule 40 of the Olympic Charter (note 27) provides that “To participate in the Olympic Games, a competitor, team official or other team personnel must respect and comply with the Olympic Charter and World Anti-Doping Code, including the conditions of participation established by the IOC, as well as with the rules of the relevant IF as approved by the IOC, and the competitor, team official or other team personnel must be entered by his NOC”.

¹⁵⁴ For a discussion, see: de Werra, Jacques. “Athletes & Social Media: What constitutes Ambush Marketing in the Digital Age? The Case of Rule 40 of the Olympic Charter” in *Vers les sommets du droit: liber amicorum pour Henry Peter* (Trigo Trindade, Rita, et al. eds), Geneva/Zurich: Schulthess, 2019, p. 1 (presenting the system existing before the amendment of By-law 3 to Rule 40).

¹⁵⁵ See: IOC. “Commercial Opportunities for Participants During the Olympic Games Tokyo 2020 Presented.” *olympic.org*. IOC, Jun. 26, 2019. Web. <<https://www.olympic.org/news/commercial-opportunities-for-participants-during-the-olympic-games-tokyo-2020-presented>>.

the 2022 Olympic Winter Games in Beijing¹⁵⁶, it being noted that these documents may still evolve in the future.¹⁵⁷

In any event, the discussion about Rule 40¹⁵⁸ shows the need to address adequately the issue of digital ambush marketing activities and to find an equitable balance between the legitimate protection of the organizers of sports events and of their corporate sponsors, and the protection of the interests of the athletes.

Ambush marketing activities that consist of creating the false impression that a company is officially associated with a sports event (as a sponsor of the event) must be prevented in order to ensure the financial sustainability of the sports event and the protection of the official sponsors of the sports event. The protection frequently takes the form of specific regulations that are adopted for the preparation of a country/city to host major sports events (such as the Olympic Games).

(g) Protection against unfair competition: protection of trade secrets

Trade secrets can be critical in the sports industry to the extent that they can significantly contribute to giving a competitive advantage to teams and athletes.¹⁵⁹ The sporting goods industry, which is an innovation-driven industry, also relies heavily on confidential information and trade secrets in order to develop and commercialize its products.¹⁶⁰ On this basis, a robust protection of trade secrets is very important for the sports industry. This protection should be implemented in the local IP laws in light of the existing international regulatory framework (Art. 39 TRIPS Agreement).

¹⁵⁶ IOC. “Commercial opportunities for Participants during the Olympic Winter Games Beijing 2022.” *cloudfront.net*. IOC. Web. <https://olympics.com/athlete365?attachment_id=23336>; see also IOC. “Rule 40 Illustrative Guidance for Beijing 2022”. *olympic.org*. IOC. Web. <https://olympics.com/athlete365?attachment_id=35404>.

¹⁵⁷ See: Athlete 365. “Rule 40.” *olympic.org*. IOC. Web. <<https://olympics.com/athlete365/what-we-do/finance/rule-40/>>.

¹⁵⁸ This was discussed in the past, see e.g.: Sparks, Will and Pennington, Gabriel. “Questions Raised Over Marketing Restrictions on Olympic Athletes.” *sports.legal*. Squire Patton Boggs Sports & Entertainment Group, Dec. 9, 2019. Web. <<https://www.sports.legal/2019/12/questions-raised-over-marketing-restrictions-on-olympic-athletes/>> (indicating that the EU might initiate proceedings to protect the interests of athletes).

¹⁵⁹ GIPC Report (note 11), p. 18 (noting that “[t]eams gather proprietary information in the form of statistical analysis, scouting reports, dietary regimens, physiological metrics, and psychological assessment techniques—all to gain potential competitive advantage over their rivals”); see also: McQuade, James and Disotell, Michael. “Win At All Costs?: A Glimpse Into Trade Secrets In The Sports And Entertainment Industry.” *orrick.com*. Trade Secrets Watch, Oct. 30, 2015. Web. <<http://blogs.orrlick.com/trade-secrets-watch/2015/10/30/win-at-all-costs-a-glimpse-into-trade-secrets-in-the-sports-and-entertainment-industry>>; see also: Ford, Roger Allan. “Trade Secrets and Information Security in the Age of Sports Analytics” in *The Oxford Handbook of American Sports Law* (McCann, Michael A. ed), Oxford: University Press, 2018.

¹⁶⁰ GIPC Report (note 11), p. 18.

High profile disputes that broke out in innovation-intensive sport competitions (i.e. Formula One racing and the America's Cup sailing competitions) have confirmed the key importance of an efficient protection of trade secrets.¹⁶¹

One important element to consider is ensuring that the sports regulations themselves (in addition to the local IP laws) do provide for an adequate protection of trade secrets that shall be aligned with the general principles of legal protection of trade secrets under general international IP instruments (art. 39 TRIPS Agreement). By way of illustration, one can refer to the interesting decision of the World Motor Sport Council (WMSC) of September 13, 2007 (in the highly mediatized Ferrari/McLaren corporate espionage case), which held that “[t]he WMSC has full jurisdiction to apply Article 151(c) [Art. 151(c) of the International Sporting Code which prohibits “any fraudulent conduct or any act prejudicial to the interests of any competition or to the interests of motor sport generally”¹⁶² and stresses that it is “not necessary for it to demonstrate that any confidential Ferrari information was directly copied by McLaren or put to direct use in the McLaren car to justify a finding that Article 151(c) was breached and/or that a penalty is merited. Nor does the WMSC need to show that any information improperly held led to any specifically identified sporting advantage, or indeed any advantage at all. Rather, the WMSC is entitled to treat possession of another team's information as an offence meriting a penalty on its own if it so chooses”.¹⁶³ The trade secret misappropriation disputes that arose in the sports industry further evidence the need to find an adequate balance between the protection of corporate trade secrets and the ability of skilled employees to change job and thus to move to another team and use their personal skills in their new job (in Formula One and America's Cup races).¹⁶⁴

The fundamental importance of data is obvious in today's data-driven economy. The sports industry, which is a data-driven industry, benefits from a maximized use of sports

¹⁶¹ For a discussion, see: de Werra, Jacques. “How to Protect Trade Secrets in High-Tech Sports? An Intellectual Property Analysis Based on the Experiences at the America's Cup and in the Formula One Championship.” *European Intellectual Property Review* 32.4 (2010). Web. <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2149767>; see also: Peter, Henry and de Werra, Jacques. “How to Protect Trade Secrets in High Tech Sports? A Legal Analysis in the light of America's Cup and Formula One Experiences” in *Sport et propriété intellectuelle/Sport and intellectual property* (de Werra, Jacques ed.), Geneva: Schulthess, 2010 (vol. 1 of the University of Geneva School of Law IP book series propriété intellectuelle/intellectual property), p. 79 et seq. Web. <<https://archive-ouverte.unige.ch/unige:5076>>.

¹⁶² This provision is now reflected in Art. 12.1.1.c of the 2020 FIA International Sporting Code (“Any fraudulent conduct or any act prejudicial to the interests of any Competition or to the interests of motor sport generally”), available at: <https://www.fia.com/sites/default/files/2020_international_sporting_code_fr-en_clean.v2_2.pdf>

¹⁶³ FIA. “World Motor Sport Council – Decision – Re: Article 151(c) International Sporting Code – Vodafone McLaren Mercedes - 13 September 2007.” Para. 8.5; <http://web.archive.org/web/20071022060508/http://www.fia.com/resources/documents/17844641__WMSC_Decision_13_0907.pdf>.

¹⁶⁴ See the Decision of the America's Cup Arbitration Board of December 21, 2002 (ACAP 02/11 and 02/12, § 20: “[...] it is inevitable that competition for the services of top designers in particular areas of yacht design will exist and will result in those services going to the highest bidder. [...] To interpret the Protocol in a way that would prevent the successful bidder exploiting the knowledge in the mind of such a designer would be both unrealistic and quite impractical”, the decision is reproduced (in excerpts) in the book: Faire, John *et al.* (eds.). *Arbitration in the America's Cup: the XXXI America's Cup arbitration panel and its decisions*. The Hague: Kluwer Law International, 2003, p. 222. Web. <<https://archive-ouverte.unige.ch/unige:24811>>.

data statistics,¹⁶⁵ data mining and predictive analytics.¹⁶⁶ Data analytics raises not only IP issues (from the perspective of the protection of trade secrets) but also legal issues beyond IP law that particularly relate to the protection of personal data in cases where personal data about athletes are collected and processed.¹⁶⁷ In any event, it is clear that sports-related data will grow in importance in the future and that, as a matter of principle, such data can be protectable as trade secrets (provided that the conditions of protection are duly met). The digital environment and technological progress require constant reassessment of what “reasonable measures” must be taken in order to protect the trade secrets and to deserve legal protection.¹⁶⁸

The sports industry is a data-driven industry that benefits from a maximized use of sports data statistics, data mining and predictive analytic technologies. Such data can be protected as trade secrets under the general conditions of protection applicable to “undisclosed information” (under the relevant international IP instruments, specifically art. 39 TRIPS Agreement).

(h) Utility patents

The sports industry is an innovation-driven industry. In many professional sports, competing teams and athletes rely extensively on technological developments in order to improve their performance.¹⁶⁹ The sports goods industry similarly invests heavily in technological innovation.¹⁷⁰ This means that the **patent system is essential for supporting the development of the sports industry**. The international patent protection system (specifically the Patent Cooperation Treaty) is of key value in this context. One famous sports-related technology innovation was the Nike® shoe sole that was developed by a running coach and one of his students who would become the future founder of Nike at the University of Oregon.¹⁷¹

¹⁶⁵ Sports data analytics is an important activity, see e.g.: MIT Sloan Management Review. “Sports Analytics.” *sloanreview.mit.edu*. MIT. Web. <<https://sloanreview.mit.edu/tag/sports-analytics/>>.

¹⁶⁶ See GIPC Report (note 11), p. 19.

¹⁶⁷ See note 101 above.

¹⁶⁸ Other sources of protection beyond the protection of trade secrets may also come into consideration depending on the local laws, see e.g. for a US perspective: Trost, Brette. “Using the Economic Espionage Act to Protect Trade Secrets in Baseball.” *New York University Journal of Intellectual Property and Entertainment Law* 8.1 (2019). Web. <<https://jipel.law.nyu.edu/vol-8-no-1-4-trost/>>.

¹⁶⁹ See: WIPO. “Sport and Technology.” *wipo.int*. WIPO. Web. <<https://www.wipo.int/ip-sport/en/technology.html>>; see also: WIPO. “The WIPO Patent Cooperation Treaty and Sport-related Inventions.” *wipo.int*. WIPO. Web. <https://www.wipo.int/ip-outreach/en/ipday/2019/pct_patents_sports.html>.

¹⁷⁰ See GIPC Report (note 11), pp. 10-11.

¹⁷¹ See GIPC Report (note 11), p. 11 (“Up until the 1960s, running shoes featured flat soles. The University of Oregon’s running coach Bill Bowerman took on the task to improve traction and shock absorption in training shoes. He experimented by using his wife’s waffle maker to mold rubber spikes on the soles, and created a superior running shoe he named the Waffle Trainer. The design revolutionized the sneaker industry. Bowerman and one of his students, Phil Knight, founded Blue Ribbon Sports, which eventually became Nike. Today, Nike has obtained thousands of patents worldwide and now has a patent portfolio that rivals that of many leading companies in the pharmaceutical, automotive, and defense sectors, all traditionally

(i) Enforcement and dispute resolution mechanisms

The efficient enforcement of IP rights is critical in the sports industry, which is confronted by massive counterfeiting activities in the physical as well as the digital space. This requires that remedies be available to the rights owners, as provided under international conventions (specifically under the TRIPS Agreement).

One particular area of concern relates to the “signal piracy” of live sports events against which quick and effective legal remedies should also be made available (knowing that the value of live sports rights precisely lies in the ability to control the exclusive live transmission of the sports event).¹⁷² Remedies should also be available against digital intermediaries that facilitate online infringement activities (this is a challenge that is not limited to the sports industry), whereby social media platforms and other internet intermediaries can play a key role in contributing to the fight against online piracy (including by implementing quick and effective mechanisms for taking down illegal content, as provided for by regulations, such as the notice and take down system provided by the US Digital Millennium Copyright Act).

Because of its structure and its centralized regulatory ecosystem, the sports industry can also rely on the setting up of dedicated dispute resolution mechanisms that could come into to play to enforce certain IP rights and to solve certain types of IP-related disputes. This might particularly be the case for ambush marketing that would result from activities of athletes,¹⁷³ because athletes are generally bound by sports regulations that might provide for specific dispute resolution systems (including for ambush marketing disputes). One can note in this respect that certain high profile IP disputes have been submitted to sports dispute resolution bodies and have led to sports sanctions against the infringing teams.¹⁷⁴

It is important that sports governance bodies and other relevant institutions shall (continue to) develop alternative dispute resolution systems that could efficiently solve certain types of IP-related disputes arising in the sports ecosystem. This may be accomplished on the basis of the existing alternative dispute resolution tools that are made available to the sports industry (specifically the Court of Arbitration for Sport¹⁷⁵ and also the WIPO Arbitration and Mediation Center, which has developed specific

research and development- and technology-intensive industries”; see also: Moreira, Vitor Sérgio. “The Role of Patents in Sports.” *inventa.com*. Inventa International, Jun. 19, 2019. Web. <<https://www.inventa.com/en/news/article/415/the-role-of-patents-in-sports>>.

¹⁷² Digital piracy has been a major concern for the sports industry and remains one as technology continues to develop. See, specifically the Chapter 4 Case Study: The Sports Rights Owners Sector, of the following report: Organisation for Economic Cooperation and Development (OECD). *Piracy of Digital Content*. Paris: OECD, 2009. Web. <<https://www.oecd.org/sti/ind/piracyofdigitalcontent.htm>>.

¹⁷³ See the discussion about Rule 40 above text at notes 152–157 above.

¹⁷⁴ See above (note 160) the trade secret misappropriation cases in the Formula One and in the America’s Cup.

¹⁷⁵ This plays an essential role in solving sports-related disputes, see notes 25 and 27 above.

activities for the sports industry¹⁷⁶). Contracts relating to sports-IP rights could thus provide for Alternative Dispute Resolution (ADR)/arbitration clauses submitting the disputes that may arise between the parties to the selected ADR/arbitration mechanism. The submission to these dispute resolution mechanisms generally presupposes the agreement of the parties in dispute to submit to such mechanisms (because they are voluntary dispute resolution mechanisms). This may be lacking in certain IP disputes. This is generally the case of IP infringement proceedings initiated against counterfeiting activities that must consequently be submitted to national courts. The submission to national courts may also be justified in certain circumstances, particularly when dealing with IP disputes for which a certain expertise of the court is needed (in which case specialized IP courts can be of value).

**Examples of standard arbitration/ADR clauses
that can be selected to solve sports-related disputes:**

Even if arbitration proceedings can be tailored by the parties in order to meet their specific needs so that the parties remain free to decide individually on the content of their arbitration/ADR clauses, it is generally recommended that the standard arbitration and ADR clauses provided by experienced arbitration/ADR institutions are used.

The WIPO Arbitration and Mediation Center has developed different standard arbitration and other ADR clauses (including combined mediation and arbitration clauses) that can be found and generated on its website (<https://www.wipo.int/amc-apps/clause-generator/>):

The standard WIPO arbitration clause provides as follows (<https://www.wipo.int/amc/en/clauses/arbitration/>):

“Any dispute, controversy or claim arising under, out of or relating to this contract and any subsequent amendments of this contract, including, without limitation, its formation, validity, binding effect, interpretation, performance, breach or termination, as well as non-contractual claims, shall be referred to and finally determined by arbitration in accordance with the WIPO Arbitration Rules. The arbitral tribunal shall consist of [a sole arbitrator] [three arbitrators]. The place of arbitration shall be [specify place]. The language to be used in the arbitral proceedings shall be [specify language]. The dispute, controversy or claim shall be decided in accordance with the law of [specify jurisdiction].”

¹⁷⁶ WIPO. “WIPO Alternative Dispute Resolution (ADR) for Sports.” *wipo.int*. WIPO. Web. <<https://www.wipo.int/amc/en/center/specific-sectors/sports/>>.

The CAS provides a standard arbitration clause that can be inserted in a contract as follows (<https://www.tas-cas.org/en/arbitration/standard-clauses.html>):

"Any dispute arising from or related to the present contract will be submitted exclusively to the Court of Arbitration for Sport in Lausanne, Switzerland, and resolved definitively in accordance with the Code of sports-related arbitration."

Optional explanatory phrases

"The Panel will consist of one [or three] arbitrator(s)."

"The language of the arbitration will be..."

The relevant sports bodies can **issue valuable guidelines in anticipation of potential disputes in the context of major sports events in order to clarify, to the best extent possible, the conditions of application of an upcoming regulation so that it may avoid or reduce the risk of litigation.** This is done with respect to the protection of trademarks and the protection against ambush marketing before the Olympic Games¹⁷⁷ and other major sports events.¹⁷⁸

This does not mean that all IP sports-related disputes may necessarily be submitted to alternative dispute resolution bodies and totally removed from the jurisdiction of state courts. State courts may indeed keep jurisdictional powers to decide on certain aspects or on certain types of sports-related disputes (including – obviously – criminal law disputes and also – potentially – employment law disputes¹⁷⁹).

(j) Contractual transactions over sports-related IP rights

As expressed in the GIPC Report,¹⁸⁰ **"IP has become the de facto currency in sports-related business transactions"**. This confirms the importance of IP-related contractual transactions in the sports industry. All of the stakeholders in the sports industry should be in a position to rely on a secure and robust framework that shall support their sports-related IP transactions. Sports-related IP transactions can take very diverse forms and

¹⁷⁷ See e.g. IOC Marketing: Media Guide – Olympic Winter Games PyeongChang 2018, (note 136).

¹⁷⁸ See e.g.: FIFA. "Media and Marketing Regulations for the Final Competition of the 2018 FIFA World Cup Russia™." *resources.fifa.com*. FIFA. Web. <<https://resources.fifa.com/image/upload/media-and-marketing-regulations-for-the-2018-fifa-world-cup-2922838.pdf?cloudid=dbibgs0syrpkdbzbgbxr>>.

¹⁷⁹ This may mean that parallel proceedings may need to be initiated before different dispute resolution bodies; for a discussion of a decision of the Swiss Federal Supreme Court about a dispute which arose between a professional cyclist and its team which resulted from two parallel contracts, one a contract of employment, and one an image rights agreement, see: de Werra, Jacques. "Commentaire de l'arrêt A4_94/2011: Résiliation pour justes motifs de contrats liant un cycliste à son équipe : questions contractuelles et de règlement des litiges." Web. <https://archive-ouverte.unige.ch/documents/advanced_search?field1=journal.marc&value1=Commentaire+de+Jurisprudence+Num%C3%A9rique+-+CJN> (2011). Web. <<https://archive-ouverte.unige.ch/unige:33032>>.

¹⁸⁰ GIPC Report (note 11), p. 23.

can apply to all the different categories of IP rights. By way of illustration, trademarks owned by an athlete or a sports club can be licensed out to a third-party company as part of a merchandising agreement. Protected audiovisual sports-related content can be made available for online communication through various channels on the basis of sports media rights agreements. Sports-related IP transactions can also take the form of so-called “naming rights” agreements, which can be voluminous and long-term transactions by which corporate sponsors obtain the right to associate their corporate brand and trademark with a major sports facility that is used for sports events (frequently a sports stadium).¹⁸¹

The success of all these IP-related contractual transactions presupposes that the contracting parties are sufficiently familiar with the specificities of such IP transactions, particularly in case of international IP transactions, such as the licensing of image rights, or corporate sponsorship agreements.

The essential elements of merchandising agreements:

Merchandising agreements provide for an owner of IP rights and, specifically, of trademarks (for instance, an athlete, a sports team or a national sports federation) to give to a third party the right to manufacture products bearing its IP rights on the basis of a license of IP rights. As reflected in a WIPO document, “Merchandising is also an invaluable **marketing tool**, as it increases the merchandiser’s brand exposure, enhances the brand’s image, and leads it to new markets. For sport teams, for example, merchandising helps foster a sense of belonging amongst their fans, who feel proud to wear their team’s merchandised goods, such as t-shirts and caps”.¹⁸²

Merchandising agreements should generally include at least the following elements (based on the WIPO document):

- “a detailed description of the specific *IP rights* and other elements which the licensee is authorized to merchandise;

¹⁸¹ This shows the importance of trademark law for these corporate sponsors; naming rights transactions may lead to intricate disputes, see e.g.: Muresan, Remus. “Deutschland: Modeunternehmen unterliegt im Streit um “Esprit-Arena””, CaS, 2014, p. 175 presenting the judgment rendered by the Landesgericht Düsseldorf of March 7, 2014 (ref. 36 O 57/13); for a discussion of naming rights, see: Carfagna Peter A., *Negotiating and Drafting Sports Venue Agreements*, St. Paul: West Academic Publishing (2nd ed), 2016. Print (chapter 3: naming rights agreements); Morand, Anne-Sophie. “Chancen und Risiken im Sportsponsoring - der Wert eines Sponsoringengagements : insbesondere am Beispiel der Nutzung von Namensrechten an Sportstadien” in *Werte im Recht - Das Recht als Wert*. Zurich: Schulthess, 2018, p. 216; Voigt, Christian M. ““What’s Really in the Package of a Naming Rights Deal?” Service Mark Rights and the Naming Rights of Professional Sports Stadiums.” *Journal of Intellectual Property Law* 11.2 (2004), p. 327. Web. <<https://digitalcommons.law.uga.edu/jipl/vol11/iss2/4>>; see also: Insurance Journal. “University of Louisville Settles Naming Rights Dispute with Papa John’s for \$9.5M.” *insurancejournal.com*. Insurance Journal, Oct. 28, 2019. Web. <<https://www.insurancejournal.com/news/southeast/2019/10/28/546692.htm>>

¹⁸² WIPO, “Savvy Marketing: Merchandising of Intellectual Property Rights.” *wipo.int*. WIPO Magazine, May-June 2004, p. 2-5. Web. .<https://www.wipo.int/export/sites/www/wipo_magazine/en/pdf/2004/wipo_pub_121_2004_05_06.pdf>

- the specific types of *products/services* the licensed IP rights will be used for, and the information on whether the agreement extends to the manufacture and/or distribution and sale of those products and to the corresponding packaging and advertising materials;
- the *countries* in which the products or services will be sold or provided;
- the indication of the *period* during which the agreement applies, and the information on whether the agreement can be prolonged after that period or, on the contrary, terminated before that period under certain conditions (such as failure to manufacture and/or distribute, defaults in payments and, in general, any breach of the conditions of the agreement), including the consequences of such early termination;
- a requirement for the licensee to keep the licensor informed of any third party *infringements* of the IP rights of which he/she becomes aware;
- an *indemnification* clause which states that the licensee will protect the licensor from any lawsuits that might arise from the merchandising activities;
- the financial terms (advance payment against future royalties, royalty percentage, basis of calculation of the royalty amount, etc);
- the indication that the license is exclusive or non-exclusive;
- the indication whether or not the licensee may grant sub-licenses;
- the indication that the licensee should obtain the licensor's prior approval with respect to the manner in which the IP is used on or in connection with the products or services".

Disputes may arise between sophisticated parties to international sports-related contracts that show the need for developing and ensuring a sufficient understanding of the specificities of these contracts.¹⁸³ This is particularly important because an international

¹⁸³ See e.g. the high-profile dispute between FIFA and Mastercard relating to the non-renewal of a long-term sponsorship agreement that led to litigation in New York (*Mastercard International Inc. v. FIFA*, 239 Fed. Appx. 625 (2nd Cir. 2007)), to arbitration in Switzerland and to a settlement by which FIFA ultimately paid 90 million USD to Mastercard; see: Graybow, Martha. "MasterCard, FIFA settle World Cup sponsor fight." *reuters.com*. Reuters, Jun. 21, 2007. Web. <<https://www.reuters.com/article/us-mastercard-fifa-idUSN2136013820070621>>; see also the recent dispute between New Balance and Liverpool: Mizner, Andrew. "New Balance loses Liverpool shirt deal over social media reach." *iclg.com*. ICLG, Nov. 6, 2019. Web. <<https://iclg.com/cdr/litigation/10397-new-balance-loses-liverpool-shirt-deal-over-social-media-reach>>; Nolan, Tomás. "What It Takes To Sponsor Liverpool Football Club (Why New Balance Failed To Match Nike's Offer)."

contract relating to a local sports event (in which one of the parties is a foreign company) may not necessarily be governed by the local law of the country where the sports event is organized, given that international business contracts can, as a matter of principle, be governed by the contract law that the parties choose (in so-called choice of law clauses).

The parties and specifically the users/licensees of IP rights (particularly of athletes' image rights) **should carefully negotiate and review their contract** and ensure that they have cleared the rights and obtained the required licenses from all legitimate rightsholders. There are situations in which the licensee obtains only a license to use an athlete's image from a sport governing body and not from the athlete himself (or herself).¹⁸⁴

In view of the **key importance of exclusivity in many sports-related commercial transactions** (specifically with respect to athletes' endorsement agreements), the parties should meticulously clarify that there shall be no conflict between the different categories of sponsors of an athlete (e.g. personal sponsors and team sponsors). Due attention should also be paid to the different "layers" of endorsement and sponsoring agreements that should ideally coexist in a non-conflicting manner (e.g. coexistence between the personal sponsor of an athlete and the institutional sponsor of the sport event to which the athlete participates).¹⁸⁵ Sports-related transactions should also provide for accessible and adequate alternative dispute resolution mechanisms that shall make it possible for disputes arising between the parties to be solved quickly, cheaply and efficiently by using dedicated ADR mechanisms to the extent that this shall be useful (particularly with respect to athletes).

4. Policy measures that can be adopted by countries for the development of sports by relying on IP rights

(a) General considerations

Every country should be in a position to benefit from the development of sports activities and from the organization of sports events in their territory, and they should have the opportunity to rely on IP rights in order to reap the social and economic benefits of sports.

This guide has established that there is a **very broad diversity of IP rights and of IP issues that can arise in the sports industry**. These IP issues cover virtually all categories of IP rights (trademarks, copyrights, designs, patents, and unfair competition laws (with respect to the protection of trade secrets and to ambush marketing) and relate

lawinsport.com. LawInSport, Nov. 26, 2019. Web. <<https://www.lawinsport.com/topics/item/what-it-takes-to-sponsor-liverpool-football-club-why-new-balance-failed-to-match-nike-s-offer>>.

¹⁸⁴ See note 122 above (German litigation about the unauthorized use of the image rights of the soccer player Oliver Kahn in a soccer videogame).

¹⁸⁵ Difficulties may arise in a situation in which an athlete with a personal sponsor joins a team that would be sponsored by a competitor of the personal sponsor of the athlete; this is in essence what happened in the dispute that led to an arbitral award of the CAS ref. 91/45 (1992), published in: Reeb, Matthieu (ed.), *Recueil des sentences du TAS/Digest of CAS Awards 1986-1998*. Amsterdam: Kluwer, 2001, p. 19.

to various legal facets of the protection of IP rights (including the conditions of protection, the enforcement of IP rights and the contractual exploitation of IP rights).

Countries should benefit from an IP framework that offers them a trustworthy legal environment in the interest of all stakeholders of the sports industry ecosystem, starting with the athletes, and including the teams, the sports clubs, associations, federations and other stakeholders (including the sponsors of athletes and sports events, the organizers and broadcasters of sports events). **IP rights can support the countries by offering them a legal tool that shall make it possible to protect and monetize the intangible assets that result from sports activities**, such as the image of athletes (on the basis of sports image rights), the trademark/brand of sports athletes, teams and other sports entities (e.g. on the basis of merchandising agreements for the manufacture of sport-related products) and, of course, the sports events themselves (by the granting of broadcasting rights).

The supporting legal IP framework should facilitate and promote the development and active engagement of sports fans and the development of the practice of sports. Fostering sports fan engagement and fan trust (including in the digital environment) can translate into increased visibility of the sports events, which in turn may generate additional revenues for the relevant stakeholders in the sports industry, which could thus be reinvested in the further development of sports. Fan trust can particularly be established and increased by the commercialization of top quality merchandising goods (on the basis of merchandising agreements under which the quality of the goods shall be ensured) and by digital interactions with fans, which can be supported by digital tools that can stimulate and foster online fan engagement.

Additional revenues may also result from the development of the practice of sports in the public (which would then acquire sports equipment and products). From this perspective, the objective is to create a legal IP framework that shall support public and private investments in the organization of sports events and of sports activities. This requires that the investors investing in the organization of sports events and sports activities get a social and economic return on their investments.

Countries should thus create a **regulatory level playing field**, which shall support not only the creation of sports-related IP rights but also the commercial exploitation of these rights in a balanced and sustainable way and their efficient enforcement by all available means. Countries can include IP strategies as a component of their national sport strategy. This is, for example, what Jamaica has done.¹⁸⁶

¹⁸⁶ See the White Paper on the National Sport Policy (note 7).

(b) Obligations of host cities and host countries of major sports events to adopt an adequate ecosystem of protection of IP rights

Countries and cities considering to bid for the organization of major sports events should pay very careful attention to the requirements relating to the protection of IP rights that apply specifically to **host countries and cities bidding for the organization of major sports events** (such as the Olympic Games) and to the ways that they can implement them. As seen above (see above (1) (c)), the hosting of sports events presupposes that the host country/host city shall adopt an adequate ecosystem of protection and enforcement of IP rights that shall include adequate regulatory instruments, awareness-raising, education and training activities and the availability of efficient IP enforcement mechanisms. This can be illustrated (by way of example) by examining the obligations of host cities for organizing Olympic Games, as reflected in the host city contractual documents.

The obligations of host cities and host countries for organizing major sports events – The example of the host city contractual documents for the organization of the XXV Olympic Winter Games 2026 in Italy

The Host City contractual documents provide for various obligations relating to the protection of IP rights for the host city according to which it must secure legal IP protection for all the IP rights that are required for the organization of the Olympic Games:

This is reflected in Chapter 29 of the HCC Operational Requirements (“Rights Protection”) as follows:

“In order to deliver an appropriate and effective programme for Rights Protection in line with the introduction above and in accordance with the HCC - Principles, the following shall be implemented by the OCOG [Organising Committee for the Olympic and Paralympic Games] within the milestones and other timelines set out in the Games Delivery Plan (GDP):

[...]

“RPP 04 - Legal protection

• In compliance with guarantees requested during the Candidature process and in coordination with the Host Country Authorities, ensure, where appropriate in collaboration with competent Host Country Authorities, the following:

– all Olympic Properties, (in particular the Olympic symbol, the terms “Olympic” and “Olympiad”, the Olympic motto) benefit from adequate and continuing legal protection in the Host Country in the name of the IOC and/or the OCOG as appropriate;

– the IOC’s exclusive rights and interests in relation to the Games (as defined in the HCC - Principles) are acknowledged and protected in the Host Country through appropriate legislation and other administrative measures, addressing in particular:

o protections against ambush marketing (namely, preventing or minimising any direct and/or indirect unauthorised association with, exploitation or promotion of, the Olympic Properties and/or the Games; measures to control unauthorised street trading within the vicinity of Games venues (from two weeks before the Opening Ceremony until the Closing Ceremony);

o measures to prevent and sanction unauthorised ticket resale;

o measures to prevent manufacture and sale of counterfeit merchandise in relation to the Games;

o measures to secure control of relevant public and private advertising spaces (e.g. billboards, advertising on public transport, airspace, etc.) in the Host City and other venue cities;

o measures to control unauthorised live sites, public viewing events or similar concepts;

and

o protections against unauthorised Games Broadcast, Coverage and Exhibition; and

– procedures and remedies allow, or will allow, for disputes related to the above-mentioned matters to be resolved in a timely manner, in particular by means of an expedited process (such as but not limited to the possibility of interim injunction proceedings) when such disputes arise in the lead up to and during the period of the Games”.

The Host City contractual documents further require the development of a “rights protection programme” as follows:

“RPP 07 - Development of the rights protection programme

• *Submit a detailed rights protection programme to the IOC including:*

– *an anti-ambush prevention plan including proposed measures for education, public relations and communications activities internally within the OCOG and externally towards the IFs, all*

relevant Host Country Authorities, trade organisations, the general public, media entities and other key stakeholders;

– monitoring and action plan on ambush marketing, intellectual property infringements, ticket touting and counterfeit issues in the Host Country;

– management of displays, advertising and clean sites in connection to the Games; and – on-line/digital piracy prevention plan detailing the applicable legal framework, as well as the judicial or administrative mechanisms to be implemented in the Host Country during the Games, to prevent and stop unauthorised Games Broadcast, Coverage and Exhibition.

• Appoint qualified legal staff who will be dedicated to the adequate implementation of the rights protection programme”.

(c) Specific policy measures

Even if the local adoption of certain measures of protection of IP rights is not requested for hosting a major sports event (see above (b)), it is recommended that countries consider the adoption of three measures in order to develop their sports industry by relying on IP rights.

Given the large diversity of the respective sports landscapes of the countries and in view of the need to adapt the IP strategy to the local needs and features of the local sports market, it is important that countries map their national sports industry and conceive their general national sports development strategy before they create and implement their IP-supported sports development strategy. This should be done with the cooperation and support of relevant stakeholders and, specifically, the national IP offices and the relevant national sports governing bodies (in the government and in the sports federations).

The three measures that can be adopted by countries are as follows:

(i) Countries should ensure that the local legal systems offer an adequate basis for supporting the creation, management and enforcement of sports-related IP rights

The implementation of this measure should not be limited to the substantive conditions of protection of sports-related IP rights, but shall also cover the procedural aspects in terms of enforcement and dispute resolution mechanisms. One aspect of this is to ensure that remedies and specifically temporary injunctions shall be quickly available from the local courts given that sports events generally take place during a short window of time.

It is essential that court remedies shall be granted during that short window (and not after the event is over). Furthermore, it should not be limited to the statutory laws of the relevant countries, but should also cover the IP provisions adopted and implemented by the relevant sports bodies, given that the sports industry is characterized by the existence of its own body of regulations that may also have an impact on sports-related IP rights. It must, however, be duly noted that certain legal issues will not depend on local laws, particularly because international IP transactions/IP contracts will not necessarily be governed by local laws (international IP contracts can be governed by foreign law). In addition, certain elements of the sports regulatory ecosystem are defined at the international level (not only by international IP conventions, but also by global sports regulations) and may thus not leave much flexibility in terms of local implementation (e.g. states/cities hosting international sporting events have to abide by the rules defined by the relevant sports governance body which may also cover IP rights). It is essential that countries become familiar with the international sports regulatory ecosystem and be in a position to understand its application in their local environment.

(ii) Countries should engage in capacity-building activities with the objective of increasing awareness, as well as the personal and institutional skills and knowledge, of the creation, management and enforcement of sports-related IP rights

Capacity-building activities should be adapted to the interests and specificities of the local market and of the local sports industry in terms of substantive issues (i.e. identification of the relevant IP rights and of the other legal areas of relevance, specifically contract law, dispute resolution e.g. sports arbitration), as well as in terms of target audience: one important target would be to empower countries and local organizers of sports events to leverage their IP assets in order to maximize the economic and social benefits of the organization of sports events in those countries.¹⁸⁷

This could particularly include capacity-building activities about the legal and business aspects of sports sponsoring (specifically from an IP perspective).

(iii) Countries should develop standard reference tools and documents that shall assist the stakeholders in the sports industry in the creation, management and enforcement of their sports-related IP rights

The development of standard reference tools and documents could lead to the creation of various types of documentation (including on-line resources and tutorials) and may take various forms (including checklists, template agreements, case studies, etc.). This could support the capacity-building activities (see (ii) above).

¹⁸⁷ See: WIPO. "IP and Sports – Background Brief." *wipo.int*. WIPO. Web. <https://www.wipo.int/pressroom/en/briefs/ip_sports.html>.

(d) Conclusion

Sports-related IP rights “offer significant opportunities to foster the social, economic and cultural development of all nations”.¹⁸⁸ Countries should be in a position to seize these opportunities with the support of all the relevant stakeholders. WIPO can have a driving role in the conception and implementation of the measures that shall support the development of the sports industry at the country level based on an efficient strategy of protection of IP rights. This particularly applies to the measures identified above in view of WIPO’s expertise and activities in the area of sport and IP.¹⁸⁹ These activities should ideally be led in partnership and cooperation with all relevant stakeholders in the sports industry (specifically the global sports governing bodies).

The IP system should be put to use in order to contribute in the most efficient way to the sustainable social and economic development of sports around the world.

¹⁸⁸ *Ibid.*

¹⁸⁹ See: WIPO “Intellectual Property and Sports: Tracing the Connections.” *wipo.int*. WIPO. Web. <https://www.wipo.int/ip-outreach/en/ipday/2019/ip_sports.html> (see the last chapter: “IP and sports: What WIPO is doing”).



World Intellectual Property Organization
34, chemin des Colombettes
P.O. Box 18
CH-1211 Geneva 20
Switzerland

Tel: +41 22 338 91 11
Fax: +41 22 733 54 28

For contact details of WIPO's
External Offices visit:
www.wipo.int/about-wipo/en/offices

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