

Sport and Intellectual Property

Prof. Jacques de Werra, LGDJ, Bruylant and Schulthess, 2010, p. 124 (French and English). ISBN: 978-3725560059

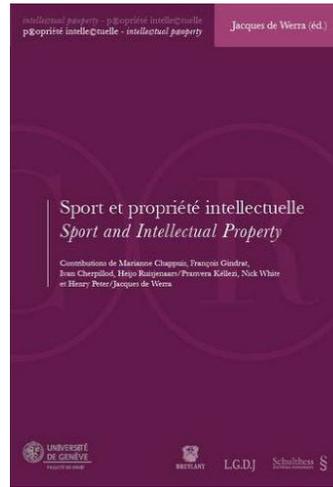
This volume edited by Prof. De Werra is the first opus of a series dedicated to IP: every year, a new volume will propose to a large public the acts of a conference organized by the University of Geneva.

Relationships between Sports and Intellectual Property are ancient, closer than expected, complex, and are developing fast since professionalization has overrun this area of human activity. In the past, sports authorities were very cautious about IP questions, and saw IP rights as the Trojan horse of commerciality and money in an area dedicated to gratuity and aristocratic ideal. For an example, the Nairobi Agreement on the protection of the Olympic symbols (1981) may be seen, at the time it was adopted, as a tool against commercial exploitation of the image of the Olympic games.

As times have changed, the paradigm of sports have too: to a large extent, sports are becoming an economical activity, or, to be more precise, sports are becoming as much the subject of an economical exploitation as any other subject. Thus, it is not surprising that IP rights now play an important role in developing such activity.

The six contributions gathered in this book cover most of the field where IP and sports meet, offered by specialists –mostly practitioners of these topics. In fact, who better than a Swiss academic could organize a conference and a publication, when most of the European and International Sports organizations are hosted in Switzerland ?

Mrs. Chappuis, in-house lawyer to the International Olympic Committee (IOC), explains which are the “Olympic properties” and how they are protected. The IOC is the owner of all rights in and to the Olympic Games and Olympic properties described in Article 7 of the Olympic Charter, which rights have the Olympic Movement the potential to generate revenues for such purposes. “It is in the best interests of the Olympic Movement and its constituents which benefit from such revenues that all



such rights and Olympic properties be afforded the greatest possible protection by all concerned, and that the use thereof be approved by the IOC. The Olympic Games are the exclusive property of the IOC which owns all rights and data relating thereto, in particular, and without limitation, all rights relating to their organisation, exploitation, broadcasting,

recording, representation, reproduction, access, and dissemination in any form and by any means or mechanism whatsoever, whether now existing or developed in the future.” The IOC determines the conditions of access to and the conditions of any use of data relating to the Olympic Games and to the competitions and sports performances of the Olympic Games. The Olympic symbol, flag, motto, anthem, identifications, as defined in Rules 8–14 of the Charter, may be collectively or individually referred to as “Olympic properties.” All rights to any and all Olympic properties, as well as all rights to the use thereof, belong exclusively to the IOC, including 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.

Nevertheless this protection granted to the IOC by national laws and the Nairobi Agreement is insufficient to fight some commercial behaviors such as the “ambush marketing.” Prof. Yves Cherpillod’s contribution (University of Lausanne) deals precisely with the ambush marketing. The Macmillan English Dictionary defines “ambush marketing” as a marketing strategy in which a competing brand connects itself with a major sporting event without paying sponsorship fee. Prof. Cherpillod describes the numerous and creative ways to practice ambush marketing (I do not want to expose here all of them so as not to give bad examples in a review dedicated to IP official licensing...) and points that most of them are lawful. Trade mark and copyright laws are often insufficient to stop advertising campaigns based on these practices; unfair competition is more accurate, but the efficiency of this tool varies from one country to another. The remedy may be to rely on special provisions in national or international laws: the author gives the example of Article L 333-1 French Sport Code which recognises to sport organisations which create a sporting event, an exclusivity on the commercial exploitation of this event, not only on the images of it but,

more largely, for all valuable aspects of it. A new kind of IP rights: new opportunities to apply licensing principles.

Mr. François Gindrat, in-house lawyer to UEFA (Union of European Football Associations) presents the protection of trade marks related to sport events and sport institutions. He takes example from UEFA's experience, but all major event's trade marks owners, such as "Tour de France," face the same problem: sharing Prof. Cherpillod's conclusions, Mr. Gindrat pleads for special provisions in national laws or international law to protect the name of the major sport competition (for example, the Portuguese law protects UEFA's name) or to enlarge Article 6 of the Paris Convention in order to include such names.

Heijo Ruijsenaars and Pranvera Kellezi, legal advisers at the European Broadcasting Union (EBU), provide a brief overview of the media, IP rights and competition law aspects of exclusive broadcasting rights for sport events and their limits. This rich contribution takes into account the "White paper on Sport" release by the EC Commission in 2007. The two authors present the main case laws in Europe on this topic and address more precisely the question of the limitations under competition law (do joint selling or joint acquisition of broadcasting sports rights restrict competition; how to analyze exclusive vertical agreements). In conclusion, limitation of the exclusivity

scope appears to be a remedy for restrictions of the competition event if it contradicts to some extent the industrial policy of the media groups and sport organisations.

The two last contributions deal with other IP rights aspects in sports: Nick White, solicitor in London with sports image rights; Henry Peter and Jacques de Werra, with the place of trade secrets in high sports. Mr. White presents a concise overview which explores the means to protect image rights in the UK, Germany, China and the U.S. He also presents image rights case studies. The closing contribution of Prof. De Werra and Peter gives a very interesting analysis of the scope of the protection against misappropriation of the trade secrets in the field of professional sports made in the light of recent disputes. They conclude that sports sanctioning bodies apply essentially the same standards of protection of trade secrets as the others as the ones resulting from general IP regulations, most specifically from Article 39 TRIPS.

We leave the final word to the editor of this book: "If intellectual property has something to learn from the sports industry, it can conversely be considered that the sports industry may have something to gain from the assimilation of the key values of IP law." We are now convinced. ■

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