

# THE PROTECTION OF EXCLUSIVE TELEVISION RIGHTS TO SPORTING EVENTS HELD IN PUBLIC VENUES: AN OVERVIEW OF THE LAW IN AUSTRALIA AND CANADA

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[This article considers whether, under Australian and Canadian law, 'television rights' exist in sporting events held in public venues. Legal mechanisms that traditionally regulate intangible interests are considered. The survey discloses that promoters of public venue sports, by contrast to promoters of stadium sports, have few means by which to protect the inherent news and entertainment value in their organized spectacles. The applicable legal principles, however, were articulated before television revenues became fundamental to contemporary sports. It is argued, therefore, that legislators ought to consider formally recognizing broadcast, retransmission and fixation rights, akin to copyright protection, in sporting events. It is further suggested that legal uncertainty on this question may be detrimental to Australian and Canadian bids to host prestigious international competitions.]

## INTRODUCTION

The first international marathon footrace was held in 1896 at the revival of the Olympic Games in Athens. The event, traditionally the final event at the Games, commemorates the legendary feat of a Greek soldier who, in 490 B.C., is purported to have run a distance of 40 kilometres from Marathon to Athens to bring news of the Athenian victory over the Persians. In 1996, the centennial Olympic marathon will be held in Atlanta. If the International Olympic Committee ('IOC') had adjudicated otherwise, the event may have been held in Australia or in Canada.<sup>1</sup> The potential television broadcast revenues from the Atlanta venue, estimated at \$US 1.4 billion, constituted a significant factor in the IOC's decision.<sup>2</sup>

The second most prestigious marathon has been held annually in Boston since 1897. In 1990, the Boston Athletic Association ('BAA') sought to prevent the unauthorized telecast of the 94th edition of the race. Despite the existence of a prior exclusive television license, the BAA failed to obtain an injunction. On 12 February 1991, the United States Court of Appeal for the First Circuit affirmed the ruling.<sup>3</sup> In view of the importance of television revenues to contemporary national and international sporting events, *WCVB TV v. Boston Athletic Association* invites jurists throughout the world to re-examine certain fundamental issues relating to the telecast of sporting competitions.

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<sup>1</sup> The members of the IOC met in Tokyo on 18 September 1990 to decide the venue of the 1996 Games. Athens was the first runner-up. Toronto and Melbourne were respectively the second and third runners-up.

<sup>2</sup> *New York Times* (New York), 19 September 1990.

<sup>3</sup> 926 F. (2d) 42 (1991); 18 Media Law Reporter 1710; 17 United States Patent Quarterly (2d) 1689.

To what extent will the law protect the commercial interests of promoters of sporting events held in public venues in their attempts to manage efficiently the television broadcast rights associated with those events? The issue is of primary interest to sports law. But, it also concerns any popular public spectacle or newsworthy event which others, for motives of gain or public interest, may seek to disseminate more widely or in a manner that is contrary to the desires of the organizers. The identification of what exactly constitutes so-called 'television rights' in sporting events, whether those rights can be owned and by whom, are pertinent questions for broadcasters, promoters and athletes. They are also questions of relevance to dealings among various local and international sports bodies, including clubs, leagues and federations. For instance, in view of the importance of television revenues to the staging of the Olympic Games, the IOC in its selection process ought to consider, if it does not already, the domestic law of potential host countries in this regard. Apart from being of immediate applicability to the area of televised sports, this subject also raises broader legal and public policy issues that are fundamental to the manner in which legal systems protect intangible interests.

For most of the 1980s, the local affiliates of the three national, conventional television networks in the United States had aired simultaneously the complete Boston marathon. The rights were purchased on a non-exclusive basis. In 1990, WNEV-TV, the CBS (Columbia Broadcasting System) affiliate, decided not to cover the event. The BAA offered to grant exclusive rights for the first time. WBZ-TV, the NBC (National Broadcasting Company) affiliate, won the rights with a a \$US 40 000 bid. The unsuccessful American Broadcasting Company affiliate, WCVB-TV, challenged the arrangement in the Massachusetts District Court.<sup>4</sup> WCVB-TV declared its intention to broadcast the 1990 race despite WBZ-TV's exclusive rights. The parties to the broadcast agreement, defendants in the suit, applied for an interlocutory order to enjoin the intended WCVB-TV broadcast. WCVB-TV retorted that the race was a public news event since it was held on public streets and no admission fee was charged.

Federal judge David Nelson ruled that WCVB-TV could air the entire marathon even though WBZ-TV had already purchased the exclusive television rights. Immediately prior to the race, the appellate jurisdiction declined to issue an injunction pending the appeal. The running of the Boston marathon on 16 April 1990 was covered by both WCVB-TV and WBZ-TV.<sup>5</sup> The judge at first instance is reported to have ruled that any Boston station could cover the race from wire-to-wire, use the logos and titles of the Boston marathon and sell insertion advertising. He said, according to unofficial sources, that the BAA did not own the race as it unfolded on the streets.<sup>6</sup> The Court of Appeal affirmed the

<sup>4</sup> Civil action no. 90-10873-N, consolidated with 90-10879-N, in the United States District Court for the District of Massachusetts.

<sup>5</sup> Marathon enthusiasts will recall that Olympic and European champion, Gelindo Bordin of Italy, won the men's competition in 2 hr, 08 min, 09 sec; the Olympic champion Rosa Mota of Portugal won the women's event in 2 hr, 25 min, 24 sec.

<sup>6</sup> Huff, R., 'Marathon Suit May Threaten Rights to Events Held in Public', *Variety* (New York), 18 April 1990.

decision which has since become final.<sup>7</sup> The ruling was considered significant by those involved in the area.<sup>8</sup> The news director at WBZ-TV, perhaps overstating the importance of the case, predicted that the ruling could 'send a shockwave through the sports industry.'<sup>9</sup> Transcending rhetorical hyperbole, this area nevertheless merits attention by reason of the implications on commercial practices relating to the telecast of sports in Australia and Canada.

In matters of popular culture and entertainment, the United States serves as a useful reference point for other industrialized countries. The subject of broadcast rights in sporting events, particularly simultaneous telecasts, has received a considerable amount of attention in the United States both in the case law<sup>10</sup> and in the legal literature.<sup>11</sup> By contrast, no reported Canadian decision has ever

<sup>7</sup> A news release on 4 May 1991 stated that the case was settled along the following terms:

The parties are very pleased to announce that they have reached a settlement that preserves the rights of the BAA and the local television stations. Under the settlement, the parties will co-operate in the production of live, wire-to-wire basic coverage of the Marathon under a business arrangement upon which all parties have agreed. The local participants will continue to have local broadcast rights, and the BAA will continue to have exclusive national and international rights in the Marathon coverage.

<sup>8</sup> Huff, *op. cit.* n. 6.

<sup>9</sup> *Ibid.*

<sup>10</sup> *E.g.* *Rudolph Mayer Pictures Inc. v. Pathé News Inc.* 235 App. Div. 774, 255 N.Y. Supp. 1016 (1932); *National Exhibition v. Teleflash* 24 F. Supp. 488 (1936); *Twentieth Century Sporting Club v. Transradio Press Service Inc.* 165 Misc. 71, 300 N.Y. Supp. 159 (1937); *Pittsburgh Athletic Co. v. KQV Broadcasting Co.* 24 F. Supp. 490 (1938); *Madison Square Garden Corp. v. Universal Pictures Co.* 255 App. Div. 459, 7 N.Y.S. (2d) 845 (1938); *Johnson-Kennedy Radio Corp. v. Chicago Bears Football Club Inc.* 97 F. (2d) 223 (1938); *South West Broadcasting Co. v. Oil Centre Broadcasting* 210 S.W. (2d) 230 (1948); *Gauthier v. Pro-Football Inc.* 304 N.Y. 354, 107 N.E. (2d) 485 (1952); *United States v. National Football League* 116 F. Supp. 319 (1953); *Loeb v. Turner* 257 S.W. (2d) 800 (1953); *National Exhibition v. Fass* 133 N.Y.S. (2d) 379, 136 N.Y.S. (2d) 358 (1954), 143 N.Y.S. (2d) 767 (1955); *Ettore v. Philco Television Broadcasting* 229 F. (2d) 481 (1956), *certiorari* denied 351 U.S. 926 (1956); *Zacchini v. Scripps-Howard Broadcasting Co.* 433 U.S. 562 (1977); *Post Newsweek Stations-Connecticut Publishing Ins. Inc. v. Travellers Ins. Co.* 510 F. Supp. 81 (1981); *Eastern Microwave Inc. v. Double Day Sports Inc.* 691 F. (2d) 125 (1982), *certiorari* denied 459 U.S. 1226; *WTWV Inc. v. National Football League* 678 F. (2d) 142 (1982); *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma* 468 U.S. 85 (1984); *Baltimore Orioles Inc. v. Major League Baseball Players Association* 805 F. (2d) 663 (1986), *certiorari* denied 480 U.S. 941 (1987).

<sup>11</sup> *E.g.* Comment, 'Unfair Competition and Exclusive Broadcasts of Sporting Events' (1938) 48 *Yale Law Journal* 288; Campbell, J., 'Recent Decisions: Property Rights in Broadcast' (1939) 27 *Georgetown Law Journal* 381; 'Recent Cases' (1939) 37 *Michigan Law Review* 988; 'Recent Decisions' (1939) 23 *Minnesota Law Review* 395; 'Recent Cases' (1938) 51 *Harvard Law Review* 755; 'Recent Cases' (1938) 5 *University of Chicago Law Review* 320; Solinger, D., 'Unauthorized uses of Television Broadcasts' (1948) 48 *Columbia Law Review* 848; Note, 'Property Rights in a Sport Telecast' (1949) 35 *Virginia Law Review* 246; Warner, H., 'Unfair Competition and Protection of Radio and Television Programs' (1950) 50 *Washington University Law Quarterly* 297-323, 498-535; LeMense, R. and Pollard, W., 'The Case for Unfair Competition' (1954) 29 *Notre Dame Lawyer* 456; Hoffman, S. L., 'Pooling of Local Broadcasting Income in the American Baseball League' (1981) 32 *Syracuse Law Review* 841; Kritzer, P., 'Copyright Protection for Sports Telecasts and the Public Right of Access' (1971) 15 *Idea* 385; Torrens, T., 'Professional Football Telecasts and the Blackout Privilege' (1972) 57 *Cornell Law Review* 297; Ciaglo, C., 'Copyright Protection for Live Sports Telecasts' (1977) 29 *Baylor Law Review* 101; Yeldell, E., 'Copyright Protection for Live Sports Broadcasts: New Statutory Weapons with Constitutional Problems' (1979) 31 *Federal Communication Law Journal* 277; Quinn, J. and Warren, I., 'Professional Team Sports New Legal Arena: Television and the Player's Right of Publicity' (1983) 16 *Indiana Law Review* 487; Garrett, R. and Hochberg, P., 'Sports Broadcasting and the Law' (1984) 59 *Indiana Law Journal* 155; Shipley, D. E., 'Three Strikes and They're Out at the Old Ball Game: Preemption of Performers' Rights of Publicity Under the Copyright Act of 1976' (1988) 20 *Arizona State Law Journal* 369; Fine, L., 'Right of Publicity and Copyright Preemption after *Baltimore Orioles*' (1988) 40 *Rutgers Law Review* 971; Saxer, S., '*Baltimore Orioles Inc. v. Major League Baseball Players Association*: The Right of Publicity in Game Performances and Federal Copyright Preemption' (1989) 36 *U.C.L.A. Law Review* 861; Cyrlin, A., 'Trademark Protection of Public Spectacles: Boston Athletic Changes the Rules' (1990) 10 *Loyola Entertainment Law Journal* 335.

considered exclusive ownership of sporting events and only two decisions have considered the question of rights in the telecasts of those events.<sup>12</sup> Australian authorities are also rare.<sup>13</sup> The relative dearth of Australian authorities results from an early and authoritative judicial pronouncement, in *Victoria Park Racing and Recreation Grounds Company Limited v. Taylor and Others*,<sup>14</sup> which held against the existence of protectable radio broadcast rights in sporting events. The decision of the Australian High Court is of persuasive authority in Canada.<sup>15</sup> *Victoria Park Racing* pre-dates the introduction of commercial television in Australia and Canada, as well as the prevalence of television sports as entertainment programming. As a consequence, a crucial area of sports law in those jurisdictions remains largely unexplored in the contemporary context. In light of the *Boston Marathon* decision, revisiting *Victoria Park Racing* is a timely exercise.

This paper shall canvass certain issues concerning telecasts of public venue sporting events, particularly by examining whether rights vest either in the event or in the discrete components of the sporting spectacle. Canadian law does not provide a definitive statement on the subject and thus is characterized by a continuing uncertainty. In Australia, however, courts have steadfastly refused, for over 50 years, to recognize that rights vest in sporting events *per se*. On the other hand, Australian and Canadian copyright laws protect recorded television broadcasts of athletic competitions. Nevertheless, in both jurisdictions, unauthorized television recordings, broadcasts and rediffusions of a sporting event may occur if the telecast originates independently from the protected broadcast or recording. This can readily occur if the event is held in a public venue. The nature of public venue sporting contests prevents the promoter from managing efficiently the collateral television rights. Yet, in both countries, putative 'television rights' in events, as distinct from the rights to the broadcasts and the recordings, are purchased and sold as a matter of course.<sup>16</sup> This follows the generally accepted view in the United States, at least prior to the *Boston Marathon* case, that promoters of sporting contests have clearly defined rights in those events.<sup>17</sup> In both Canada and Australia, a warning of *caveat venditor* and *caveat emptor* ought to be heeded by those negotiating purported 'television

<sup>12</sup> *Canadian Admiral Corp. Ltd v. Rediffusion Inc.* (1954) 20 Canadian Patent Reporter 75 (Exchequer Court of Canada); *Titan Sports Inc. v. Mansion House (Toronto) Ltd* (1989) 26 Canadian Intellectual Property Reports 105 (Federal Court Trial Division); Barnes, J., *Sports and the Law in Canada* (2nd ed. 1988) 136-7.

<sup>13</sup> *Victoria Park Racing and Recreation Grounds Co. Ltd v. Taylor and Others* (1937) 58 C.L.R. 479; *Re South Queensland Broadcasting Pty Ltd* (1977) A.T.P.R., 103,547; *Re Universal Telecasters Queensland Ltd* (1977) A.T.P.R., Commission Decisions Authorizations and Notifications, 16, 757; *Re Brisbane TV Ltd* (1977) A.T.P.R., Commission Decisions, Authorizations and Notifications, 16,766; *Re Amalgamated Services Pty Ltd and the New South Wales Rugby Football League* (1980) A.T.P.R., Commission Decisions, Authorizations and Notifications, 17,076; *Re Australian Cricket Board, PBL Marketing Pty Ltd, World Series Cricket Pty Ltd and Publishing and Broadcasting Ltd* (1980) A.T.P.R., Commission Decisions, Authorizations and Notifications, 17,065; *Australian Broadcasting Commission v. Parish et al.* (1980) 40 F.L.R. 311.

<sup>14</sup> (1937) 58 C.L.R. 479.

<sup>15</sup> Fox, H. G., *The Canadian Law of Copyright and Industrial Designs* (2nd ed. 1967) 102, 139.

<sup>16</sup> E.g. *CHML/CKDS v. Telemedia Communications Inc.* (1988) 20 Canadian Intellectual Property Reports 22 (Ontario High Court); cf. *Re Universal Telecasters Queensland Ltd*, *supra* n. 13; *British Broadcasting Corp. v. British Satellite Broadcasting Ltd* [1991] 3 All E.R. 833 (Chancery), 839.

<sup>17</sup> Garrett and Hochberg, *op. cit.* n. 11, 156.

rights' in events, particularly sporting events held in public venues. Expectations of exclusivity may be seriously frustrated.

Practical considerations dictate to sports promoters clear motivations to control so-called 'television rights'. The organizers of sporting events hope to benefit from direct economic returns from the sale of those hypothetical rights. Moreover, by possessing rights which are opposable against third parties, promoters could ensure an orderly exploitation of the market place having regard to chronological and territorial dismemberment of those rights.<sup>18</sup> A promoter may even be able to manage the manner and content of the televised presentation as a condition of transfer.<sup>19</sup> What may be called 'television rights', for the purposes of this study, is not limited to the rights *per se* but would include modalities with respect to exclusivity, territory and duration. By definition, 'television rights' to sporting events, if they exist in any meaningful way, ought to include the broadcast, retransmission and fixation rights, as those terms are normally understood in the copyright context. They are, therefore, not only the right to permit the broadcast of an event on over-the-air television, but also extend to non-conventional television, including cable, pay and satellite television. The rights, if they exist, ought to extend to the filming or recording of the event on an audio-visual support, as well as the publication and public performance rights in the resulting audio-visual device. If those rights exist, then one must assume that they are infringed by any person 'taking' a substantial portion of the event. However, a substantial television coverage of a sporting event might not be quantitatively significant. A short journalistic treatment of the essential moment of a competition could undermine the promoter's economic interest in controlling how, by whom, and when, the result becomes public.<sup>20</sup> For instance, the intention to telecast, without permission, the key final moments of a two hour footrace would harm the promoter and the 'official' broadcaster, especially if they had contemplated a delayed broadcast.

The first part of this paper defines the exact nature of the sporting events with which this study is concerned by placing public venue sports in juxtaposition with more prevalent 'stadium' sports. The second part reviews the initial judicial and legislative responses to claims of rights in the new phenomena of radio and television sports. In general, only two analytical models emerge. The first, which may be termed the traditional Anglo-American model, denies the existence of proprietary rights in a sporting event *per se*. Under that analytical approach, sporting events do not receive protection unless they are comprised of discrete elements which are subsumed into the orthodox and recognized legal categories

<sup>18</sup> See generally Leibowitz, D., 'The Sequential Distribution of Television Programming in a Dynamic Market Place' [1985] 11 *European Intellectual Property Review* 310.

<sup>19</sup> E.g. the regulation of excessive nationalism: Rosellini, L., 'The Distorting Lens of Politics' 104 *United States News and World Report*, 29 February 1988, 64; Briggs, A., *Sound and Vision: The History of Broadcasting in the United Kingdom* (1979) vol. III 847 ff., McFarlane, P., 'New Zealand TV too Parochial on World Cup Semi-Final', *Age, Green Guide Supplement* (Melbourne), 26 March 1992.

<sup>20</sup> *British Broadcasting Corp. v. British Satellite Broadcasting Ltd*, *supra* n. 16, 844; cf. *Antenne 2 v. TF 1, Cour d'appel de Paris (1er Chambre)*, 15 June 1989, (1990) 143 *Revue Internationale du droit d'auteur* 321, 324; *Iowa State University Research Foundation Inc. v. American Broadcasting Companies Inc.* 621 F. (2d) 57 (1980), 59.

of tort, copyright, trade-mark, patent, breach of trust, or any other clearly identifiable and compartmentalized subject matter of intellectual property. The second analytical model views the protection of intangible interests in a more flexible, unified and global approach, or what may be called an open textured approach. It is in this second category that one may include the broader doctrine of unfair competition developed in the United States. The third part of this study examines the alternative methods available to sports promoters to ensure the exclusivity of television rights in public venue sports. The final part canvasses the possibility of legislative intervention to better respond to the realities of contemporary sports on television.

### *TELEVISION RIGHTS AND STADIUM SPORTS*

Professional and amateur sports are often associated in the public mind with games, competitions or contests played in gymnasiums, stadiums, arenas, privately owned playing fields and other enclosed or private venues. Yet, many important world-class events are held in public places. The *Tour de France* cycling race, the America's Cup sailing challenge, the Bells Beach Surfing Classic and the Monaco *Grand Prix* auto race are examples of a very different category of prestigious sporting events. The Olympic Games comprise several similar events, including the marathon, cycling, windsurfing and sailing. Triathlons and formation sky diving also come to mind. The litigation associated with the 1990 Boston Marathon merely illustrates a common yet neglected category of open and accessible venues required to stage certain contests.

Sporting events may be placed on a continuum based on the promoter's ability to control at least in practice, if not in law, access to the site by members of the public and the press, including the electronic media. The availability of physical barriers between the sporting event and the electronic spectator, has been described as a mode of 'self-defence'.<sup>21</sup> At one end of the spectrum, one may find indoor sports. In that case, occupiers can physically control observation of the event. Outdoor sports held in enclosures, such as stadiums, also fall within the category of sports to which access may be physically controlled. However, unlike indoor sports, it is possible for spectators or the television lens to look into the venue either from the air above or from a nearby height. Games played on open private spaces, for instance a golf course or a ski hill, are slightly more exposed to off-site piracy. At the other extreme of the spectrum are sporting events held entirely in public places.

As a general proposition, promoters of sporting events held indoors or in partially enclosed areas are unlikely to face the invasion of the unwanted eye of the electronic spectator. The reasons are both practical and legal. Physical barriers will go a long way to prevent an unauthorized television recording and broadcast. Even if television cameras can capture an outdoor sports ground from an adjacent location, an attractive and quality sports programme is unlikely to result. Close-ups of competitors have become too important to contemporary sportscasting for audiences to settle for a significantly inferior long distance

<sup>21</sup> *Victoria Park Racing*, *supra* n. 13, 500.

vantage point. In law, promoters principally benefit from contractual weapons. In addition, delictual and legislative safeguards provide useful extra-contractual armaments.

Legal principles concerning control of television rights in 'stadium' sports may be drawn from the trite rules of the general private law. Whilst the relationship between the sports promoter and a spectator injured as a result of a sporting contest has generally been analysed in tort law, relief for damages has been considered, on some occasions, in terms of an existing contractual nexus.<sup>22</sup> When the issue is one of unauthorized telecasts, the relationship between the electronic spectator and the promoter may also be analysed in contract law.<sup>23</sup> Indeed, in *Sports and General Press Agency Ltd v. 'Our Dogs' Publishing Co. Ltd*, Lush J. stated that 'if those who promote shows and exhibitions wish to prevent the taking of photographs, they must make it a matter of contract.'<sup>24</sup> Members of the public, and broadcasters admitted to venues, may have their rights restricted by the conditions of entry.<sup>25</sup> An express clause written on a ticket or on a sign is incorporated into the terms and conditions of the contract provided there is sufficient notice to the spectator prior to the bargain being completed.<sup>26</sup> Communication of the relevant restriction by a public announcement inside the stadium or by a clause contained inside a printed programme would also be adequate provided there was evidence of the spectator's prior knowledge of the standard terms under which entry into the stadium is normally authorized.<sup>27</sup> By an express contractual arrangement, the promoter may thus prohibit television recordings, telecasts and other means of disseminating live or delayed accounts of the event.<sup>28</sup> Moreover, if the broadcaster enters surreptitiously for the purpose of broadcasting the event, knowing that the promoter would not permit it, then the broadcaster's servants and agents cannot rely on the existence of an entry licence to remain on the premises.<sup>29</sup>

A similar result is probably reached if the licence to enter does not cover the matter expressly. It is a matter of diverging views in Australian and Anglo-Canadian jurisprudence whether or not, under normal circumstances, the permission given for value to enter sports grounds is coupled with an interest, whether or not it is revocable at common law, and whether or not reimbursement of the

<sup>22</sup> *Hall v. Brooklands Auto-Racing Club* [1933] 1 K.B. 205; *Bolton v. Stone* [1951] A.C. 850; *Woodbridge v. Sumner* [1963] 2 K.B. 43; *Gervais v. Canadian Arena* [1936] 74 Cour Supérieure 389 (Québec Superior Court); *Payne v. Maple Leaf Gardens* [1949] 1 D.L.R. 369 (Ontario Court of Appeal); Siskin, G., 'Liability for Injuries to Spectators' (1968) 6 *Osgoode Hall Law Journal* 305; Dworkin, G., 'Injuries to Spectators in the Course of Sporting Activities' (1962) 25 *Modern Law Review* 738.

<sup>23</sup> *Cox v. Coulson* [1916] 2 K.B. 177, 181, 186-7, 189.

<sup>24</sup> [1917] 2 K.B. 125, 128.

<sup>25</sup> Skone James, E., *Copinger on Copyright* (12th ed. 1980) 232.

<sup>26</sup> *Henderson v. Stevenson* [1875] 2 Sc. & Div. 470; *White v. Blackmore* [1972] 2 Q.B. 651; *Olley v. Marlborough Court Ltd* [1949] 1 K.B. 532; *Wilson v. Blue Mountain Resorts* (1974) 4 Ontario Reports (2d) 713 (High Court of Justice), 718; *Heller v. Niagara Racing Association* (1925) 2 D.L.R. 286 (Ontario Court of Appeal); Ascensão, J., 'The Right over an Entertainment or Event' (1990) 24 *Copyright Bulletin* 3, 7.

<sup>27</sup> *McCutcheon v. David MacBrayne Ltd* [1964] 1 W.L.R. 125 (H.L.).

<sup>28</sup> *National Exhibition Co. v. Teleflash Inc.*, *supra* n.10, 489, 490; *cf. National Exhibition v. Fass*, *supra* n.10, 770; *Loeb v. Turner*, *supra* n.10, 802.

<sup>29</sup> *Said v. Butt* [1920] 3 K.B. 497, 502; *Adrian Messenger Services and Enterprises Ltd v. The Jockey Club Ltd* [1972] 2 Ontario Reports 369, 386 (High Court of Justice).

entrance fee is the only remedy available to a spectator unlawfully ejected.<sup>30</sup> Nevertheless, legal opinion is consistent that the patron is under the obligation to behave and comply with management rules.<sup>31</sup> The exact content of those rules will depend on the reasonable expectations of the parties.<sup>32</sup> Though expectations undoubtedly cover at least rules of civil behaviour, they could also arguably prevent the use of space beyond a single seat which would be required to support broadcast equipment.

The promoter of stadium sports may in addition have a recourse in tort against third parties involved in an unauthorized broadcast. In *Victoria Park Racing* McTiernan J. suggested that '[i]t was competent for the [promoter of the sporting event] to impose on the right it granted to any patron to enter the [venue] that he would not communicate to anyone outside the [venue] the knowledge about the racing which he got inside.'<sup>33</sup> Not only would it be a breach of contract for the patron to disclose the information, but it would also be tortious to induce the breach of that contract by disclosing the information for the purpose of broadcasting it.<sup>34</sup> The contractual nexus between the on-site spectator and the promoter ensures the respect of that contractual arrangement by a third party, as for instance a broadcaster, based upon a principle of non-interference with contractual relations.<sup>35</sup>

Australian statutory law also provides an important legislative right in favour of promoters of stadium sports. Section 115 of the Broadcasting and Television Act 1942 (Cth) provides as follows:

The [ABC] or the holder of a licence for commercial television station shall not televise, either directly, or by means of any recording, film or other material or device or otherwise, the whole or a part of a sporting event or other entertainment held in Australia, after the commencement of this section, in a place to which a charge is made for admission, if the images of the event or other entertainment originate from the use of equipment outside that place.

This section was introduced in 1956 with the advent of both television and the Melbourne Olympic Games.<sup>36</sup> The legislation, an obvious response to *Victoria Park Racing*, presumes the operation of common law rules otherwise available to occupiers of stadiums. The section has nevertheless obvious *lacunae*, particularly its failure to address events for which no admission fee is charged, unauthorized images taken from inside the stadium and public venue sports generally.

<sup>30</sup> *Wood v. Leadbitter* (1845) M. & W. 838; 153 E.R. 351; *Marrone v. Washington Jockey Club* 227 U.S. 633 (1913); *Hurst v. Picture Theatres Ltd* [1915] 1 K.B. 1; *Heller v. Niagara Racing Association*, *supra* n. 26; *Naylor v. Canterbury Park Racecourse Co. Ltd* (1935) 35 S.R. (N.S.W.) 281; *Cowell v. Rosehill Racecourse* (1937) 56 C.L.R. 605; *Wintergarden Theatre (London) Ltd v. Millenium Productions Ltd* (1948) A.C. 173; *Adrian Messenger Services and Enterprises Ltd v. The Jockey Club Ltd*; *supra* n. 29; *cf. Heatley v. Tasmanian Racing* (1977) 137 C.L.R. 487, 508; *Forbes v. N.S.W. Trotting Club* (1979) 143 C.L.R. 242, 271.

<sup>31</sup> *Clifford v. Brandon* (1809) 2 Camp. 358, 369; 170 E.R. 1183; *Lewis v. Arnold* (1830) 4 Car. & P. 354, 356; 172 E.R. 737; *Hurst v. Picture Theatres Ltd*, *supra* n. 30, 5, 20; *Cowell v. Rosehill Racecourse*, *supra* n. 30, 633; *Heller v. Niagara Racing Association*, *supra* n. 26, 287.

<sup>32</sup> *Cf. Civil Code of Lower Canada*, art. 1024.

<sup>33</sup> *Supra* n. 13, 526-7.

<sup>34</sup> *Victoria Park Racing*, *supra* n. 13, 526-7; *cf. National Exhibition Co. v. Teleflash Inc.*, *supra* n. 10, 489.

<sup>35</sup> *Garry v. Sheritt Gordon Mines Ltd* (1987) 45 D.L.R. (4th) 22 (Saskatchewan Court of Appeal); *Clairol Inc. of Canada v. Trudel* (1971) 2 Canadian Patent Reporter (2d) 224 (Québec Court of Appeal); *Davis v. Nyland* [1975] 10 S.A.S.R. 76.

<sup>36</sup> Broadcasting and Television Act 1956 (Cth) s. 49.



For promoters who, by the nature of the sport and by reason of the places where the sport may be played or performed, can exclude or regulate the access of members of the public and television cameras, the issue of ownership of sporting events is, *pro arguendo*, not pressing. On the other hand, at publicly held sporting events, the intrusion by the unauthorized television camera cannot be restricted due to the very nature of the sporting contest. The public's access to streets, highways and waterways cannot be prohibited or regulated by the promoter. Access to public venues is subject only to general rules of conduct applicable to those places, for instance the rules of navigation and highway codes. Although governments may indirectly regulate television access to public venue sports by *ad hoc* legislation, that possibility is beyond the immediate control of a promoter.<sup>37</sup>

This paper is thus principally concerned with public venue sports as opposed to traditional stadium sports. Little attention has been given to those sports in any jurisdiction. The expression 'public venue' indicates places on land, in the air or on water where sporting events may be held and where the access of the public to those places, or the public's ability to watch the sporting events held in those places, cannot be regulated by the promoter either in law, or by the use of either physical barriers or distance. This is not to say that television rights to stadium sports are entirely irrelevant to this inquiry. One must merely acknowledge that it is simpler for a promoter to regulate telecasts of stadium sports through traditional and well established legal principles. Therefore, it falls upon public venue sports, which do not have access to traditional legal mechanisms, to test the outer boundaries of domestic legal systems. An analysis outside the realm of high profile stadium sports directly focuses the attention on ownership of sports events as entertainment spectacles. However, at first glance, one would not expect that the 'television rights' that potentially vest in sporting events *per se* should be any different whether the competition is held inside or outside a private sporting facility.

The primary question is whether rights exist in sporting events held in public venues in the nature of a right *in rem* and, if indeed they do exist, to whom do they belong. Alternatively, if the rights do not exist, one may ask whether they ought to be recognized by Parliament. The dichotomy between judicial approaches taken in analysing what rights, if any, are to be granted to promoters of sporting events is well illustrated by two rulings decided earlier this century: first, the ruling of the High Court of Australia in *Victoria Park Racing*, which illustrates the orthodox approach; and second, the decision of the Supreme Court of the United States in *International News Services v. Associated Press*, which illustrates an open textured approach to the protection of intangible interests.<sup>38</sup> The approach adopted will determine whether or not parasitic conduct with respect to sporting events is also piratical.

<sup>37</sup> *E.g.* America's Cup Yacht Race (Special Arrangements) Act 1986 (W.A.); Kelly, G. M., *Sport and the Law: An Australian Perspective* (1987) 313-15; *cf.* Commonwealth Games Act 1982 (Qld); Australian Formula One Grand Prix Act 1984 (S.A.).

<sup>38</sup> 248 U.S. 215 (1918).

*THE ORTHODOX ANGLO-AMERICAN PROTECTION OF INTANGIBLE 'PROPERTY'*

(i) *The Position Under the General Law*

In *Victoria Park Racing*, the Australian High Court did not recognize a proprietary or quasi-proprietary right in sporting spectacles.<sup>39</sup> The ruling is consistent with the traditional position that an exclusive right to take photographs of a public spectacle is not a form of property known to the common law.<sup>40</sup> The plaintiff had applied to the equitable jurisdiction of the Supreme Court of New South Wales for a permanent injunction. The plaintiff's Sydney racecourse was surrounded by a fence ranging from two to three and a half metres in height. Therefore, under normal circumstances, one had to be inside the venue to observe the racing. The plaintiff did not permit any description or information concerning the races to be broadcast by radio. Taylor, who owned a residential property near the racecourse, permitted the erection of a high scaffolding tower on his front lawn. From the top of the tower, one Angles was able to see inside the racecourse. Equipped with field glasses, the sportscaster could see the information posted on notice boards inside the racecourse before and after the races. The boards provided the position of the horses on the track at the start of the race, as well as their eventual placing. This information was of interest and value to the spectators and to those who wished to bet on the races.<sup>41</sup> Angles's detailed and contemporaneous description of the races, as well as the result of each race, was broadcast to the public by radio.

The plaintiff realized that many people who would have attended the races, and would have paid for admission, were staying away and listening to their radios instead. The injunction sought to restrain Taylor from allowing the use of his land in this manner, Angles from describing the races and the Commonwealth Broadcasting Corporation from broadcasting the descriptions. Nicholas J. dismissed the suit at first instance.<sup>42</sup> The plaintiff appealed to the High Court.

Although the case was ostensibly argued on specific and identifiable legal issues, it raised the broader question of whether the law would assist the plaintiff in order to protect its economic and alleged proprietary interests in the sporting spectacle. Indeed, it was quite clear that the plaintiff had suffered a loss in its sporting business as a direct result of the actions of the defendants. For the majority of the Court, however, the law did not provide for a remedy.

The plaintiff's principal argument was that the defendants' conduct gave rise to recovery at common law for either nuisance or unnatural user.<sup>43</sup> There was a willingness, expressed by all members of the bench, to acknowledge that the

<sup>39</sup> Paton, G. W., 'Broadcasting and Piracy' (1938) 16 *Canadian Bar Review* 423.

<sup>40</sup> *Sports and General Press Agency, Ltd v. 'Our Dogs' Publishing Co. Ltd*, *supra* n. 24; cf. *Detroit Baseball Club v. Deppert* 61 Mich. 856 (1886).

<sup>41</sup> Off-track betting was illegal. The systematic broadcasting of races by the defendants made it almost impossible to police gaming legislation.

<sup>42</sup> *Victoria Park Racing and Recreation Grounds Company Limited v. Taylor* (1936) 37 S.R. (N.S.W.) 322.

<sup>43</sup> *Vaughan v. Menlove* (1837) 3 Bing. N.C. 468; 132 E.R. 490; *Rylands v. Fletcher* [1868] L.R. 3 H.L. 330.

category of torts was not closed, and that the law of tort ought to be approached with a certain degree of flexibility.<sup>44</sup> If a new method of interference with comfort of a person in the use of his land arose, the courts should be willing to recognize it. However, the plaintiff failed to establish that the defendants' competitive entertainment constituted interference with the use, comfort and enjoyment of the land, as opposed to an interference in the profitability of plaintiff's business. The land continued to be suitable as a racecourse, although somewhat less profitable. The diversion of custom from a business carried upon land was recognized as a legitimate head of damages but it did not constitute, in itself, the cause of action.<sup>45</sup>

A claim based on statutory copyright was also advanced by the plaintiff. There was no claim of copyright with respect to the spectacle *per se*. The claim was with respect to a notice board and a racebook used in association with the races. Latham C. J. and Dixon J. were willing to acknowledge that copyright could subsist in a racebook.<sup>46</sup> However, the plaintiff had failed to establish its ownership in a literary work authored by a third party by at least proving that the author was the plaintiff's employee.<sup>47</sup> There was, moreover, considerable doubt whether the mere use of information in the racebook to enable a description of the races constituted an infringement of a work. It would have been necessary to demonstrate that the use of the content amounted to performance of a substantial part of the work. With respect to the notice board, the plaintiff unsuccessfully contended that the names and numbers of the starting, the scratched and the winning horses constituted an original literary work in which copyright subsisted since there was no originality in the expression of thought.<sup>48</sup>

The approach adopted by the majority illustrates the traditional approach taken by courts in testing the outer fringes of the law and its willingness to recognize property and economic rights not only in sport spectacles but in all intangible interests. Chief Justice Latham wrote:

It has been argued that by the expenditure of money the plaintiff has created a spectacle and that it therefore has what is described as a quasi-property in the spectacle which the law will protect. The vagueness of this proposition is apparent on its face. What it really means is that there is some principle (apart from contract or confidential relationship) which prevents people in some circumstances from opening their eyes and seeing something and describing what they see. The court has not been referred to any authority in English law which supports the general contention that if a person chooses to organize an entertainment or to do anything else which other persons are able to see he has a right to obtain from a court an order that they shall not describe to anybody what they see . . . the mere fact that damage results to the plaintiff from such a description cannot be relied upon as a cause of action. . . . A 'spectacle' cannot be 'owned' in any ordinary sense of the word.<sup>49</sup>

Mr Justice Dixon clearly stated what he considered to be the orthodox approach in the field of protection of intangible property. The courts, in his opinion, must find the correct compartment in which to classify the right in order to justify the requested remedy:

If English law had followed the course of development that has recently taken place in the United States, the 'broadcast rights' in respect of the races might have been protected as part of the quasi-

<sup>44</sup> *Victoria Park Racing*, *supra* n. 13, 493, 501, 506, 515, 524.

<sup>45</sup> *Ibid.* 507.

<sup>46</sup> *Ibid.* 497, 510.

<sup>47</sup> Copyright Act 1912 (Cth) s. 5(2).

<sup>48</sup> *Victoria Park Racing*, *supra* n. 13, 497, 498.

<sup>49</sup> *Ibid.* 496-7.

property created by the enterprise, organization and labour of the plaintiff in establishing and equipping a racecourse and doing all that is necessary to conduct race meetings. But courts of equity have not in British jurisdictions thrown the protection of an injunction around all the intangible elements of value, that is, value in exchange, which may flow from the exercise by an individual of his powers or resources whether in the organization of a business or undertaking or the use of ingenuity, knowledge, skill or labour. This is sufficiently evidenced by the history of the law of copyright and by the fact that *the exclusive right to invention, trade marks, designs, trade names and reputation are dealt with in English law as special heads of protected interests and not under a wide generalization.*<sup>50</sup>

Dixon J. then considered the decision of the United States Supreme Court in *International News Service v. Associated Press* and, in particular, the dissenting judgment of Mr Justice Brandeis, whose reasons, in his opinion, 'substantially represented the English view':

His [*i.e.* Brandeis J.'s] judgment appears to me to contain an adequate answer both upon principle and authority to the suggestion that the defendants are misappropriating or abstracting something which the plaintiff has created and alone is entitled to turn to value . . . it is not because the individual has by his efforts put himself in a position to obtain value for what he can give that his right to give it becomes protected by law and so assumes the exclusiveness of property, but because the intangible or incorporeal right he claims falls within a recognized category to which legal or equitable protection attaches . . . in my opinion, the right to exclude the defendants from broadcasting a description of the occurrences they can see upon the plaintiff's land is not given by law. It is *not an interest falling within any category* which is protected at law or in equity.<sup>51</sup>

The case of *Victoria Park Racing* continues to represent the analytical approach adopted in Australian law with respect to intangible property.<sup>52</sup>

By contrast Evatt and Rich JJ., in their dissenting judgments, considered the plaintiff's loss as a sufficient justification for equity to attempt to find a remedy. The duty of the court, in their view, was to show remedial flexibility beyond the clearly identifiable categories of protected legal interests in order to find an objectively fair solution. Evatt J. wrote:

The fact that there is no previous English decision which is comparable to the present does not tell against the plaintiff because not only is simultaneous broadcasting or television quite new, but, so far as I know, no one has, as yet, constructed high grandstands outside recognized sports grounds for the purpose of viewing the sports and of enriching themselves at the expense of the occupier.<sup>53</sup>

The minority, more mindful of the exercise of its equitable jurisdiction, would have protected the plaintiff's interests. By contrast, the majority, perhaps less offended by the conduct of the defendants, did not concentrate as much on the unfair 'taking' by the defendants as on the absence of a clearly identifiable 'property' right. The Privy Council refused to grant special leave to appeal.<sup>54</sup> Rich J. correctly foreshadowed the importance of the issues raised, in the technological context of the 1930s, when he wrote that 'the prospects of television make our present decision a very important one.'<sup>55</sup>

In the wake of *Victoria Park Racing*, the legal position of a promoter of a sporting event held in a public venue in Australia further deteriorates. The principle thrust of the discarded arguments revolved around the rights and obligations of owners of adjoining land. If the event is held in a public venue, then the promoter

<sup>50</sup> *Ibid.* 508-9 (emphasis added).

<sup>51</sup> *Ibid.* 509-10 (emphasis added).

<sup>52</sup> *Moorgate Tobacco Co. Ltd v. Philip Morris Ltd* (1984) 156 C.L.R. 414, 440 ff.

<sup>53</sup> *Victoria Park Racing*, *supra* n. 13, 519.

<sup>54</sup> *The Times* (London), 21 January 1938.

<sup>55</sup> *Victoria Park Racing*, *supra* n. 13, 505.

is bereft of any proprietary claims against the world at large, except arguments based on an infringement of copyright, trade-mark right, or the breach of any other 'special head of protected interests' by the unauthorized broadcaster. Success on those grounds is dubious.<sup>56</sup>

(ii) *Anglo-Australian Copyright Reform*

Within a few years from the introduction of television in the United Kingdom, moves were afoot to seek copyright protection for televised sporting events. A call for copyright law reform was merely an acknowledgement that, under the British system of law, the orthodox analytical approach to intangible property required a recognized special head of protected interest. Two copyright solutions were advanced.

As early as 1944, a group of sports promoters founded the Association for the Protection of Copyright in Sports ('APCS'). The Association was a loose affiliation of various British sporting interests: tennis, swimming, rugby football, horse and dog racing, golf and auto racing. The APCS 'sought to have the promoter of any sporting event placed in the same legal position as the author of a book, so that a promoter could make what arrangements he thought proper in connection with television or its rediffusion of any event.'<sup>57</sup> It sought a copyright protection in sporting events *per se* in order to control both simultaneous recording and subsequent reproductions from the recordings. The securing of those objects would have required the substantial rethinking of the theoretical underpinnings of the British Copyright Act 1911 (U.K.) which only protected literary, dramatic, musical and artistic works. The APCS's submission to the 1949 Beveridge Committee into broadcasting stated that:

The promoters of sporting events were unwilling to allow their events to be televised unless and until they could be assured of adequate legal protection against their exhibition without authorization to any kind of public audience, so that adequate payment could be obtained from all concerned.<sup>58</sup>

The Beveridge Committee appears to have been concerned with the scope of the right claimed which may have extended to pictorial representations in newspapers. The BBC (British Broadcasting Corporation) was opposed to promoters' attempts to obtain their own copyright. It had never acknowledged that promoters of sports events had any rights in those events. In fact, the BBC systematically described the payments made to promoters as 'facilities fees' related to right of entry to venues, and not as fees for the right to broadcast the event.<sup>59</sup>

Similarly, the BBC also advocated a copyright response to the new phenomenon of televised sports. Legislative recognition of copyright in live television broadcasts was proposed. The position of the BBC is reported in the following terms:

The problem of controlling the unauthorized rediffusion of sound and television broadcasts of sporting events, has also arisen in America, and the courts have granted injunctions to restrain rediffusion in cinemas and other places where a charge is made for admission, on the grounds that such rediffusion would be a reaping of the benefits of the labour and efforts of another, and thus

<sup>56</sup> This point shall be discussed below.

<sup>57</sup> Briggs, *op. cit.* n. 19, 871.

<sup>58</sup> Eddy, J. P., *The Law of Copyright* (1957) 115.

<sup>59</sup> Briggs, *op. cit.* n. 19, 840.

would constitute unfair competition. The doctrine of unfair competition is confined to American jurisprudence, and no similar cause of action is recognized by the English courts.<sup>60</sup>

Under the Copyright Act 1911 (U.K.) copyright did not vest in live, unrecorded television broadcasts of sporting events.<sup>61</sup> The BBC considered that it was 'anomalous and inequitable' that the BBC should not have similar rights to the protection given to performers against the sale or public performance of records of their dramatic and musical performances made without their consent under the Dramatic and Musical Performers' Protection Act 1925 (U.K.). It claimed a right similar to the right of makers of films and manufacturers of sound recordings. The BBC argued that sound or television programmes on which creative effort had been expended, and considerable expense incurred, should not be freely available to third parties. The expansion of copyright law to protect neighbouring rights was arguably justified by the invention of previously unknown means of communication.

The efforts of the APCS were unsuccessful. The 1952 Gregory Report<sup>62</sup> which led to the revised Copyright Act 1956 (U.K.) recommended that the BBC should receive copyright protection in its broadcasts, including its sports broadcasts, in the form of a performing right and a reproduction right.<sup>63</sup> The Gregory Committee refused to recommend what would have been a drastic change, *i.e.* that the concept of copyright, in the sense of a right to prevent or control the copying or recording of a spectacle or performance, be extended in the way suggested by the promoters.<sup>64</sup> There was concern that the recognition of rights in sporting events was a slippery slope that might cast an ambit of protection to other spectacles. Moreover, the wide variety of sports made it likely that the management of the rights would have to proceed through a multiplicity of collecting societies which, in itself, was not desirable. Finally, the Committee was of the view that the real threat of piratical acts, particularly the unauthorized and unremunerated public performance of televised sporting events in hotels, bars and cinemas, could be protected by appropriate contractual terms between the promoter and the broadcaster. Agreements could regulate the manner in which the BBC's material was publicly performed or publicly used. The control of the sports promoter would thus arise indirectly through the right newly granted in favour of broadcasters.<sup>65</sup> This solution proceeded on the assumption that sports promoters could invariably prevent an unauthorized broadcaster's access to the event through the use of traditional legal principles under which entry to places of entertainment could be controlled. This left a considerable and inadvertent gap of protection for contests held in public venues.

The BBC eventually realized that excessive broadcasting of sports was contrary to its long term interests. The telecasts of sporting events affected the viability of certain sports as a result of the decreased attendance. There was, moreover,

<sup>60</sup> Eddy, *op. cit.* n.58, 115, from an extract of a memorandum to the 1949 Broadcasting Committee.

<sup>61</sup> *Canadian Admiral Corp. Ltd v. Rediffusion Inc.*, *supra* n. 12; *cf.* Solinger, *op. cit.* n. 11, 858.

<sup>62</sup> United Kingdom, *Report of the Copyright Committee*, 1952 (the 'Gregory Report').

<sup>63</sup> Copyright Act 1956 (U.K.) s. 14.

<sup>64</sup> Gregory Report, 42.

<sup>65</sup> *Ibid.* 58-60.

upwards pressure on fees paid as a result of the advent of competitive commercial television in Britain in the late 1950s. Both these factors contributed to the waning of the activities of the APCS.<sup>66</sup> It is ironic that, arising as it did from the concerns of promoters with respect to copyright in sporting events, British copyright law eventually protected the interests of the broadcaster rather than the promoter. One author stated this quirk of legislative history in the following terms

The eccentricity of the British law of unfair competition is such that in the same situation this day the defendant broadcaster [in *Victoria Park Racing*] would have a copyright in his broadcast protecting him from unfair competition, while the victimized plaintiff could only lament that Parliament had not granted copyright in a sports spectacle.<sup>67</sup>

In 1959, the Spicer Committee's report on Australian copyright reform noted the strong representations that had been made to the Gregory Committee for the protection of spectacles and performances.<sup>68</sup> Nevertheless, an approach similar to the British copyright legislation was adopted in Australia in 1968.

The approach taken to the new sound and television broadcast technology in Australia was to divide the subject matter of copyright into two categories: the first category comprises the traditional forms of intellectual property such as literary, artistic, musical and dramatic works; the second category comprises intellectual creations arising from technology such as films, sound recordings and broadcasts.<sup>69</sup> The inclusion of the second category of rights in the copyright statute is simply that Anglo-Australian law has no law of unfair competition other than actions for passing off of title.<sup>70</sup>

#### *THE OPEN TEXTURED PROTECTION OF INTANGIBLE INTERESTS: UNFAIR COMPETITION*

##### (i) *The American Doctrine of Unfair Competition*

The majority of the High Court in *Victoria Park Racing* rejected the position that had been adopted in the United States in *International News Service v. Associated Press*, and which was later applied by the courts of that country to the radio sports broadcasting cases which arose in the 1920s and 1930s. Associated Press ('AP') was a co-operative organization for the gathering of news of current events. By the terms of membership, AP regulated the use that could be made of the news items. International News Service ('INS'), a competing news service, extracted news information from bulletin boards and early editions of AP newspapers on the east coast of United States, rewrote the stories and transmitted the items by telegraphy to its newspapers on the west coast. It was alleged that INS was 'taking' or misappropriating the novelty and freshness of news intelligence which was essential to the competitive trade of newspaper publishing. AP

<sup>66</sup> Briggs, *op. cit.* n. 19, 879-80.

<sup>67</sup> Filipiuk, W., 'The Canadian Admiral Case: Canada's Law of Unfair Competition' (1958) 16 *University of Toronto Faculty of Law Review* 113.

<sup>68</sup> Australia, *Report of the Committee Appointed by the Attorney General of the Commonwealth*, 1959, 54 (the 'Spicer Report').

<sup>69</sup> Cornish, W. R., *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (2nd ed. 1989) 265; and see generally Copyright, Designs and Patents Act 1988 (U.K.).

<sup>70</sup> Filipiuk, *op. cit.* n. 67, 109.

sought and obtained an injunction. On a writ of *certiorari*, the United States Supreme Court affirmed the decision.

The plaintiff's action was not framed in terms of infringement of statutory copyright. The large number of daily dispatches made it impracticable to comply with registration requirements under the applicable United States copyright legislation. In any event, copyright is restricted to the particular form, collocation of words or expression chosen to communicate the news and not the substance of the information. It was acknowledged that one who first reports an historic event could not claim in copyright the exclusive right for any period to spread the knowledge of it.

Pitney J., in delivering the majority opinion, stated that redress for the plaintiff turned upon the question of unfair competition in business. The plaintiff could not assert a general right of property as against the world, analogous to the common law right in an unpublished work, since news of current events are regarded as common property.<sup>71</sup> But, competitors engaged in the same legitimate field of business were under a duty to conduct their own business so as not unnecessarily or unfairly to injure that of the other. It is from that relationship, as between competitors, that property rights or 'quasi-proprietary interests' arise. The relative proprietary interest sustained the jurisdiction of equity. News for both newsgatherers was their stock in trade and was collected at the cost of enterprise, organization, skill, labour, and money. A competitor could not endeavour 'to reap where it has not sown.'<sup>72</sup> AP's right against INS existed for a reasonable period of time thus entitling AP to postpone its competitors 'from reaping the fruits' of AP's efforts. The Supreme Court held that INS's actions were in violation of the principle underlying the maxim *sic utere tuo ut alienum non laedas*.<sup>73</sup>

## (ii) *Extension of the Doctrine to Sports Broadcasts*

A promoter's ability to manage the television rights to an event upon unfair competition analysis is predicated upon the existence of competing businesses.<sup>74</sup> In this respect, two separate categories of competitors in the area of television sports may be considered: first, rival television broadcasters of sporting events; and second, the broadcaster *vis-à-vis* the promoter. In the former case, the proposition that they are competitors is not problematic. Television broadcasters compete, to one degree or another, for programming, ratings, market penetration, sponsorship and insertion advertising. The unauthorized 'taking' of sports telecasts is, however, largely if not exhaustively regulated by statutory copyright law in the United States.<sup>75</sup> In the latter case, however, the situation is less apparent.

<sup>71</sup> *Associated Press*, *supra* n. 38, 235.

<sup>72</sup> *Ibid.* 239-40.

<sup>73</sup> Use your own property in such a manner as not to injure that of another.

<sup>74</sup> *Associated Press*, *supra* n. 38, 235.

<sup>75</sup> U.S.C., ch. 17, ss 101, 102; *National Football League v. McBee & Bruno's Inc.* 792 F. (2d) 726 (1986), 731-2; *National Association of Broadcasters v. Copyright Royalty Tribunal* 675 F. (2d) 367 (1982).



At one level, the business of broadcasting involves the diffusion of content in order to inform and entertain the viewing audience. The commercial broadcaster can convert viewership into revenues through the sale of insertion advertising. On the other hand, the sports promoter is involved in the business of organizing sporting contests that attract revenues from a public following. This occurs directly through paid admission, or indirectly through sponsorship and by merchandising 'official' products. At a higher level of abstraction, however, the classification of sports and television as competing activities is commensurate with the respective reality of those businesses in the 1990s in both the North American and Australian contexts. Although it may have been asserted at one time that sport was not a business, the commercial activity surrounding sports, including high level international sport, makes that position no longer tenable.<sup>76</sup> Both contemporary sports and television are engaged in entertainment businesses.<sup>77</sup> Each is creating an entertainment product which must be communicated to the sporting public. The desire of the public to observe a sporting competition, directly or through the medium of television, becomes a commodity that may attract financial reward. In addition, as between the promoter and the telecaster, the relationship in the entertainment market is competitive since the financial pool is finite.

Viewed in the context of current industry practices, sports events *per se* and television broadcasts of sports events each meet the three criteria identified by the United States Supreme Court: first, they both require elaborate organization and a large expenditure of money, skill and effort; second, they both have exchange value in the hands of each party respectively; and third, they both have exchange value to the other party who can misappropriate it.<sup>78</sup> The misappropriator's parasitical activity is to feed upon the popularity and goodwill of the sporting event in its live or televised forms. As between the promoter and the broadcaster, the sporting contest may thus be regarded as quasi-property, irrespective of the rights of either of them as against the public.

It was successfully contended by promoters of sporting events in the United States that the unauthorized broadcast of a sporting event amounts to a misappropriation of the novelty and freshness of the sporting event or the results of the event in the competitive trade of either sports news or sports entertainment.<sup>79</sup> The unauthorized broadcast of a sporting event, applying *Associated Press*, would

<sup>76</sup> *Eastham v. Newcastle United Football Club Ltd* [1964] Ch. 413; *Buckley v. Tutty* [1971] 125 C.L.R. 353; *Hall v. Victorian Football League* [1982] V.R. 64; *Elford v. Buckley* [1969] 2 N.S.W.R. 171.

<sup>77</sup> *Post Newsweek Stations—Connecticut Publishing Ins. Inc. v. Travellers' Ins. Co.*, *supra* n. 10, 86; *National Exhibition v. Fass* 143 N.Y.S. (2d) 767 (1955), 770; *R. v. Federal Court of Australia*; *ex parte Western Australian Football League* (1979) 143 C.L.R. 190, 211.

<sup>78</sup> *Associated Press*, *supra* n. 38, 238.

<sup>79</sup> *Rudolph Mayer Pictures Inc. v. Pathé News Inc.*, *supra* n. 10; *Twentieth Century Sporting Club v. Transradio Press Service Inc.*, *supra* n. 10; *Madison Square Garden Corp. v. Universal Pictures Co.*, *supra* n. 10; *Johnson—Kennedy Radio Corp. v. Chicago Bears Football Club Inc.*, *supra* n. 10; *Mutual Broadcasting Systems v. Muzak* 177 Misc. 489, 30 N.Y.S. (2d) 419 (1941); *South West Broadcasting Co. v. Oil Centre Broadcasting*, *supra* n. 10; *Metropolitan Opera Association v. Wagner—Nichols Records Corp.* 101 N.Y.S. (2d) 483 (1950), 107 N.Y.S. (2d) 795 (1951); *National Exhibition v. Fass*, *supra* n. 10; *contra National Exhibition v. Teleflash*, *supra* n. 10; *Loeb v. Turner*, *supra* n. 10.

amount to a misappropriation of the result of the contest, the manner in which it was achieved and the promoter's right to control the dissemination of that news. For instance, in *Pittsburgh Athletic Co. v. KQV Broadcasting Co.*<sup>80</sup> an enterprising Pittsburgh radio station, without the consent of the club, was broadcasting play-by-play descriptions of baseball games obtained from persons positioned outside the stadium. This conduct interfered directly with the exclusive rights that had been granted to another broadcaster. The baseball club was successful in restraining those activities in equity based on unfair competition, unjust enrichment, interference with contractual relations and quasi-property rights in news, reports, descriptions or accounts of the games played in National League parks:

It is perfectly clear that the exclusive right to broadcast play-by-play descriptions of the games played by the 'Pirates' at their home field rests in the plaintiffs. . . . That is a property right of the plaintiffs with which the defendant is interfering when it broadcasts the play-by-play description of the games obtained by the observers on the outside of the enclosure. The plaintiffs and the defendant are using baseball news as . . . material for profit. By reason of its creation of the game, its control of the park, and its restriction of the dissemination of news therefrom, [the club] has a property right in such news, and the right to control the use thereof for a reasonable time following the games.<sup>81</sup>

Promoters of stadium sports may therefore assert a quasi-property right which may be used in equity to prevent unauthorized telecasts of the contest.<sup>82</sup>

Despite the broad language used in the case law, there may be doubts whether the same principles would apply to sporting events held in public venues. It has been suggested that the promoter's rights arise in part from the promoter's 'control of the park'.<sup>83</sup> The promoters in the American case law had at least attempted, to one degree or another, to limit access to the venue. By holding the competition in a public venue, the promoter may invariably be construed as having dedicated the news and entertainment value of the event to the world at large, including to competitors. Moreover, a successful plaintiff under an unfair competition analysis would have to establish the existence of a right to damages. It has been suggested that 'when an event is on public property, such as a boat race or a parade where there is no payment to the promoter from the general public, there is probably no damage to the promoter.'<sup>84</sup> The claim would therefore fail. On the other hand, one may reasonably assert that in certain circumstances other indirect and quantitative financial benefits may be lost by the promoter. For instance, the unauthorized telecast of a public venue event might, on evidence, be linked to a decreased attendance at the live venue whether or not an authorized broadcast was also contemplated. That fact alone may interfere with the promoter's ability to attract on-site sponsorship, and may significantly reduce the sale of 'official' merchandising items at the event. In *Production Contractors Inc. v. WGN Continental Broadcasting Co.*, the Court expressed the view in *obiter dictum* that the organizers of a parade held in the public streets of Chicago might have a valid cause of action in Illinois to prevent an unauthorized

<sup>80</sup> 24 F. Supp. 490 (1938); cf. *Zacchini v. Scripps-Broadcasting Co.*, *supra* n. 10, 575.

<sup>81</sup> *Pittsburgh Athletic Co. v. KQV Broadcasting Co.*, *supra* n. 10, 492.

<sup>82</sup> Solinger, *op. cit.* n. 11, 866.

<sup>83</sup> *Rudolph Mayer Pictures v. Pathé News Service Inc.*, *supra* n. 10; *Twentieth Century Sporting Club v. Transradio Press Service Inc.*, *supra* n. 10, 162; cf. *Loeb v. Turner*, *supra* n. 10, 802.

<sup>84</sup> Solinger, *op. cit.* n. 11, 863-4; Wagner, *op. cit.* n. 11, 321-3.

telecast under unfair competition.<sup>85</sup> In that case, the damages were linked to the liquidated liability to be incurred by the promoter under the agreement with the authorized broadcaster if the telecast failed to attract a predetermined share of the potential television market.<sup>86</sup> The unauthorized broadcast would have fragmented the television audience. The Federal Court dismissed the common law claims of unfair competition for lack of pendent jurisdiction. Nevertheless, the case illustrates that damages may conceivably arise from the unauthorized broadcast of non-stadium events. But, whatever the value of an unfair competition analysis to telecasts of public venue sporting events in the United States, a similar result is not readily applicable in Australia and Canada.

### (iii) *Unfair Competition in Australia*

Pursuant to *Victoria Park Racing*, there is no protectable interest in sporting events *per se* that courts of law or equity will recognize in Australia. Courts in that jurisdiction have flirted with the idea of recognizing a tort of misappropriation or unfair competition in order to take into account new technical means of mass communications.<sup>87</sup> But the High Court has reaffirmed its rejection of both *Associated Press* and the analytical approach suggested by that case.<sup>88</sup> The rejection of the expanded unfair competition doctrine and the recognition of quasi-property rights beyond the 'special heads of protected interests' is so firmly embedded in Australian jurisprudence that nothing short of legislation would reverse those judicial pronouncements. As a consequence, the promoter of a public venue sporting event must rely on indirect means of protecting exclusive television rights. Those indirect weapons must find their footing in clearly identified compartments of legal protection.

### (iv) *Unfair Competition in Canada*

In Canada, the status of the doctrine of unfair competition is not as apparent. Indeed, soon after the decision in *Canadian Admiral Corp. Ltd v. Rediffusion Inc.*,<sup>89</sup> it was suggested by legal scholars that the facts of that case could be subject to unfair competition analysis.<sup>90</sup> Canadian Admiral was the manufacturer of television sets. In order to advertise its wares, it had agreed to sponsor the telecast of the 1952 autumn season of the erstwhile Montreal Alouettes. Two categories of telecasts were contemplated: six live, unrecorded broadcasts from

<sup>85</sup> 622 F. Supp. 1500 (1985), 1505.

<sup>86</sup> *Ibid.* 1502.

<sup>87</sup> *E.g. Willard King Organization Pty Ltd v. United Telecasters Sydney Ltd* [1981] 2 N.S.W.L.R. 547, 552; *Hexagon Pty Ltd v. Australian Broadcasting Commission* (1975) 7 A.L.R. 233 (Supreme Court of New South Wales), 252; *cf. Cadbury Schweppes Pty Ltd v. Pub Squash Co. Pty Ltd* [1980] 2 N.S.W.L.R. 851, 859; Ricketson, S., 'Reaping Without Sowing: Unfair Competition and Intellectual Property Rights in Anglo-Australian Law' (1984) 7 *University of New South Wales Law Journal* 1.

<sup>88</sup> *Moorgate Tobacco Co. Ltd v. Philip Morris Ltd*, *supra* n. 52, 440 ff.; Blakeney, M., 'The Demise of Unfair Competition in Australia: *Moorgate Tobacco Co. Ltd v. Philip Morris Ltd* (No. 2)' (1985) 59 *Australian Law Journal* 366.

<sup>89</sup> (1954) 20 *Canadian Patent Reporter* 75 (Exchequer Court of Canada).

<sup>90</sup> Filipiuk, *op. cit.* n. 67, 109; 'Note' (1955) 68 *Harvard Law Review* 712, 714.

football games played in Montreal, and six delayed broadcasts of games played outside Montreal originating from cinematographic films made at the games. The contractual arrangements were such that if rights existed either in the telecasts or in the films they were vested in the sponsor. Rediffusion operated a cable distribution system. The defendant took both the live telecasts and the delayed telecasts of the games off the air and rediffused the signal by coaxial cable. The plaintiff commenced proceedings seeking damages and an injunction. At trial, the plaintiff unexplainedly abandoned an allegation based on the Unfair Competition Act (Canada).<sup>91</sup> The action proceeded exclusively, and largely unsuccessfully, on copyright issues. It was suggested that the principles of *Associated Press* were entirely applicable in view of the misappropriation of the popularity of the sporting contest by the defendant.<sup>92</sup> The hypothesis, advanced at the dawn of television in Canada, has yet to be tested conclusively by Canadian courts. The use of the laws of unfair competition to regulate the various interests surrounding the telecast of sporting events is unsatisfactory both in theory and in practice.

As a legal theory, unfair competition is perceived by many as unsound. Outside the United States, the law of unfair competition has had a chequered past:

The common law of the British commonwealth has notoriously been reluctant to launch out on the sea of 'unfair trading' or 'unlawful competition', beyond the safe harbours of passing off, injurious falsehood and breach of confidence.<sup>93</sup>

The law of unfair competition cannot be imported into Canada without taking into account the substantial number of critics and detractors in the United States, not the least of which was Brandeis J.'s detailed and well argued dissent in *Associated Press*. For instance, in *RCA Manufacturing v. Whiteman*, the Court of Appeal stated that the *Associated Press* decision had no application outside the exact facts there presented.<sup>94</sup> Moreover, a 1938 ruling by the United States Supreme Court severely balkanized jurisprudential developments towards a unified federal common law of unfair competition since federal judges, in cases based on diversity jurisdiction, were constitutionally mandated to apply State general law. Some State courts have held that *Associated Press* is not the law in their State.<sup>95</sup>

An additional hurdle to the adoption in Canadian jurisprudence of a wider concept of unfair competition is s. 63 of the Copyright Act (Canada) which states:

No person is entitled to copyright or any similar right in any literary, dramatic, musical or artistic work otherwise than under and in accordance with this Act, or any other statutory enactment for the time being in force, but nothing in this section shall be construed as abrogating any right or jurisdiction to restrain a breach of trust or confidence. [Emphasis added]

<sup>91</sup> *Canadian Admiral*, *supra* n. 12, 77; S.C. 1932, ch. 38.

<sup>92</sup> 'Note' (1955) 68 *Harvard Law Review* 712, 713.

<sup>93</sup> Cornish, W. R., 'Unfair Competition under Common Law and Statute' (1985) 10 *Adelaide Law Review* 32, 32.

<sup>94</sup> 114 F. (2d) 86 (1940), 90; see generally Baird, D., 'Common Law Intellectual Property and the Legacy of *International News Services v. Associated Press*' (1983) 50 *University of Chicago Law Review* 411.

<sup>95</sup> Solinger, *op. cit.* n. 11, 868; Knight, V., 'Unfair Competition: A Comparative Study of its Role in Common and Civil Law Systems' (1978) 53 *Tulane Law Review* 164, 165 (n. 38 and cases cited).

An expansion of intangible property rights under the general law may be proscribed by a presumably *intra vires* federal intellectual property statute which purports to occupy the field fully.<sup>96</sup> In view of the position of the Association for the Protection of Copyright in Sports, it is not unreasonable to assert that quasi-proprietary rights in sporting contests constitute a 'similar right' to copyright.<sup>97</sup> Unfortunately, s. 63 has not received authoritative judicial attention.

Due to constitutional developments since *Canadian Admiral*, the application of an unfair competition doctrine would now be applied under the laws of the provinces.<sup>98</sup> In the absence of valid federal legislation, litigation would be initiated in provincial courts under applicable statutory provincial law concerning 'property and civil rights in the province' or, in the absence of a statute, under the general law.<sup>99</sup> Québec's civil law, particularly Article 1053 of the Civil Code of Lower Canada, would be applicable in matters arising in Québec.<sup>100</sup> This would be the case if the facts underlying *Canadian Admiral* were to arise today.<sup>101</sup> The question of the status of the doctrine of unfair competition in the common law provinces remains unanswered. In 1989, the British Columbia Court of Appeal in *Westfair Foods Ltd v. Jim Pattison Industries Ltd* refused to decide whether or not the tort of misappropriation of quasi-property rights formed part of the general law of Canada.<sup>102</sup>

The question of misappropriation of sports events, and their unauthorized broadcast and rediffusion remains, as a matter of law, entirely open in Canada. It is possible that a Canadian court would act more 'boldly in its interpretive function'<sup>103</sup> than courts have in the past. A substantial body of American law in *pari materia* exists. Nevertheless, whilst speculations as to the existence in Canada of a remedy for sports promoters founded on unfair competition may be intriguing, in practice, this ambiguity is equivalent to the non-existence of a right. In order to establish stable commercial relations, the underlying legal theory to contractual arrangements concerning television rights must be relatively apparent. Canadian promoters of public venue sporting contests are thus on an equal footing with their Australian counterparts. Both must rely on indirect protection of their commercial interests by identifying discrete elements of the sporting spectacle to which courts will be less reluctant to attach *in rem* rights.

<sup>96</sup> *E.g. Kewanee Oil Co. v. Bicron* 416 U.S. 470 (1974); *Goldstein v. California* 412 U.S. 546 (1973); *Compco Corp. v. Day Brite Lighting* 376 U.S. 324 (1964); *Sears Roebuck and Co. v. Stiffel Co.* 376 U.S. 225 (1964); *Holland Nautical v. Racal Decca* [1987] *European Intellectual Property Review* D-50 (Supreme Court of the Netherlands).

<sup>97</sup> *Cf. Canadian Admiral*, *supra* n. 12, 82.

<sup>98</sup> *MacDonald v. Vapour* [1977] 2 Supreme Court Reports 134, 149; *cf. A.G. (Ontario) v. A.G. (Canada)* [1937] A.C. 405, 417.

<sup>99</sup> Constitution Act 1867 s. 92(14).

<sup>100</sup> *MacDonald v. Vapour*, *supra* n. 98, 150; generally Knight, *op. cit.* n. 95; Gauthier, P.-Y., 'Note sur la décision de la cour d'appel de Paris (1er Chambre) du 15 juin 1989' (1990) 143 *Revue Internationale du droit d'auteur* 325, 328; *Vidéotron Ltée v. Industries Microlec Electroniques* [1988] *Recueil de Jurisprudence du Québec* 546 (Québec Superior Court); *cf. Home Box Office v. Advanced Consumer Technology*, 549 F. Supp. 14 (1981).

<sup>101</sup> *Cf. 'Note'* (1955) 68 *Harvard Law Review* 712, 713.

<sup>102</sup> (1989) 59 D.L.R. (4th) 46 (British Columbia Supreme Court), 65; 68 D.L.R. (4th) 481, 488 (British Columbia Court of Appeal).

<sup>103</sup> Filipiuk, *op. cit.* n. 67, 115.

*INDIRECT PROTECTION OF TELEVISION RIGHTS: THE CONTEMPORARY POSITION*

(i) *General*

The *Boston Marathon* case illustrates the accepted strategy that must be adopted by sports promoters if the applicable domestic legal system does not clearly recognize *in rem* rights in sporting events *per se*. The decision of the Court of Appeal makes no express mention of a claim based on unfair competition or misappropriation. The general law of Massachusetts appears to disapprove of *Associated Press* and, presumably, its extension to the context of televised sports.<sup>104</sup> Nevertheless, the language of the ruling clearly suggests that the doctrine of unfair competition constituted an unarticulated preoccupation. The opinion of Chief Justice Breyer, with which Aldrich and Coffin JJ. concurred, evokes language reminiscent of Brandeis J.'s dissent in *Associated Press*. The Court of Appeal embraced a compartmentalized and non-unified vision of intangible interests:

As a general matter, the law *sometimes* protects investors from the free riding of others; and *sometimes* it does not. The law, for example, gives inventors a property right in certain inventions for a limited period of time . . . , it provides copyright protection for authors . . . , it offers certain protections to trade secrets . . . . But, the man who clears a swamp, the developer of a neighbourhood, the academic scientist, the school teacher, and millions of others, each day create 'value' (over and above what they are paid) that the law permits others to receive without charge. Just how, when and where the law should protect investments in 'intangible' benefits or goods is a matter that legislators typically debate, embodying the results in specific statutes, or that common law courts, carefully weighing relevant competing interests, gradually work out over time.<sup>105</sup>

The Court of Appeal's position is a rejection of the approach taken in *Associated Press* and the movement towards a notion of unfair competition which brings conceptual unity to all forms of intangible interests. As unfair competition was not directly at issue, one cannot conclude that the American sports broadcasting cases, such as *Pittsburgh Athletic*, have been put into question. At the very most, the ruling of the Court of Appeal raises the spectre that public venue sports must be distinguished, on the facts, from the earlier unfair competition decisions relating to stadium sports in States that continue to embrace the doctrine articulated in *Associated Press*.

The case was argued in trademark law even though, in essence, the defendant was poaching the event. The BAA had registered the words 'BOSTON MARATHON' as a mark in connection with the race. The trademark issue concerned 'customer confusion'. The relevant federal legislation prohibited the unauthorized use of marks 'only where doing so creates a "likelihood of confusion" about who produces the goods or provides the service.'<sup>106</sup> The alleged confusion was not occurring between producers or suppliers of similar products. WCVB-TV was not presenting its own annual marathon which might be confused with BAA's.

<sup>104</sup> *Triangle Publications Inc. v. New England Newspaper Publishing Co.* 46 F. Supp. 198 (1942), 203; *Coca-Cola v. Snow Crest Beverages* 64 F. Supp. 980 (1946), 985; cf. *New England Telephone & Telegraph Co. v. National Merchandising Corp.* 141 N.E. (2d) 702 (1957), 708; *Donovan v. Wilson Sporting Goods Co.* 285 F. (2d) 714 (1961), 717.

<sup>105</sup> *WCVB-TV v. Boston Athletic Association* 926 F. (2d) 42 (1991), 45.

<sup>106</sup> *Ibid.* 44.

It was argued that WCVB-TV's unauthorized broadcast constituted an infringement because it amounted to unauthorized use of the words 'BOSTON MARATHON' on the television screen which might lead the public to believe wrongly that the broadcast was 'official', *i.e.* that it had received the imprimatur or official endorsement of the BAA.

The extension in that context of the trademark notion of 'confusion' was not novel.<sup>107</sup> In *University of Georgia Athletic Association v. Laite*, a wholesaler was enjoined from marketing and distributing beer cans portraying an English bulldog, the symbol used by the plaintiff's athletic teams.<sup>108</sup> The BAA had itself been successful in the earlier decision of *Boston Athletic Association v. Sullivan* to prevent the sale of unlicensed 'BOSTON MARATHON' T-shirts during the race.<sup>109</sup> The latter decision had been interpreted as creating a broad interest in the event itself and '[t]aken literally the . . . decision seems to have created a new property right in the promotion of well known events.'<sup>110</sup> *Sullivan's* case fell in line with a series of decisions, particularly *Boston Professional Hockey Association v. Dallas Cap & Emblem Mfg*, from which American courts have since retreated.<sup>111</sup> Under that series of trademark cases, the courts had required no more than mere identification of the plaintiff's mark by the public.<sup>112</sup>

The Court of Appeal in *WCVB-TV v. Boston Athletic Association* has returned to the traditional trademark test by requiring proof of confusion. It explicitly dispelled any suggestion found in *Sullivan* that the court in that case had intervened principally because the defendant was attempting to reap where he had not sown.<sup>113</sup> Thus, the only 'property right' arising from statutory trademark protection is the right to prevent confusion.<sup>114</sup> On the record, the Court of Appeal was unable to find persuasive evidence of any intent on the part of WCVB-TV to use the mark to suggest official sponsorship.<sup>115</sup> Indeed, WCVB-TV had offered to broadcast disclaimers periodically in order to prevent any confusion in the mind of the public as to its potential 'special broadcasting status'. Breyer C.J. stated that 'one would ordinarily believe that television viewers . . . wish to see the event and do not particularly care about the relation of station to event-promoter.'<sup>116</sup> Confusion cannot easily be established if the sporting audience is indifferent to the question. Moreover, there was no evidence that WCVB-TV would somehow profit from public confusion. The lack of intention and the absence of a causal link between the public confusion and profits, made the *Sullivan* case distinguishable. Finally, the use of the mark 'BOSTON MARATHON' amounted to a 'fair use' because 'common sense' suggested that

<sup>107</sup> *Cf. Production Contractors Inc. v. WGN Continental Broadcasting Co.*, *supra* n. 85, 1504-5.

<sup>108</sup> 756 F. (2d) 1535 (1985).

<sup>109</sup> 867 F. (2d) 22 (1989).

<sup>110</sup> Cyrlin, *op. cit.* n. 11, 348.

<sup>111</sup> 510 F. (2d) 1004, *certiorari* denied 423 U.S. 868 (1975).

<sup>112</sup> Cyrlin, *op. cit.* n. 11, 339, 349-50.

<sup>113</sup> *WCVB-TV v. Boston Athletic Association*, *supra* n. 105, 45; *Boston Athletic Association v. Sullivan*, *supra* n. 109, 33.

<sup>114</sup> *Ibid.* n. 45.

<sup>115</sup> *Ibid.* 46; *cf. Amateur Sports Act 1978* (U.S.), s. 110; U.S.C.A., ch. 36, s. 380; *San Francisco Arts & Athletics v. United States Olympic Committee* 483 U.S. 522 (1987), 530.

<sup>116</sup> *WCVB-TV v. Boston Athletic Association*, *supra* n. 105, 46.

it did not amount to a 'use' in a trademark sense, that is, as an indication of origin.<sup>117</sup> The Court of Appeal also rejected that payments made by WCVB-TV to the BAA prior to the 1990 race to obtain non-exclusive broadcast licences estopped WCVB-TV's arguments.<sup>118</sup>

As in the case of *Victoria Park Racing*, by reason of the compartmentalized approach generally taken by courts under traditional Anglo-American analysis, the BAA was using breaches of recognized property rights to protect indirectly commercial interests in the event *per se*. In view of the status of the doctrine of unfair competition in Australia and Canada, sports promoters would be similarly well advised to seek clear 'special heads of protected interests' to assert accessory proprietary rights in sporting events. The following analysis of potential alternate mechanisms of protection reveals, however, a patchwork of unsatisfactory solutions. The promoter of a public venue sport wishing to restrict unauthorized telecasting in the jurisdictions under study is unlikely to achieve any greater success than the Boston Athletic Association.

### (ii) *Copyright in Telecast of Live Events*

Whilst Australia and Canada are not signatories to the 1961 International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations ('the Rome Convention'), both jurisdictions provide a certain degree of copyright protection to live telecasts and recordings, including those made of sporting contests.<sup>119</sup> As suggested in the 'Gregory Report', this constitutes an indirect safeguard against piracy of sporting spectacles.

In Australia, since 1 May 1969, the Australian Broadcasting Corporation, the Special Broadcasting Service and other licence holders under the Broadcasting and Television Act 1942 (Cth), own copyright, for a period of 50 years, in the television broadcasts made from Australia.<sup>120</sup> This is the implementation of the Spicer Committee recommendation. The owner of the copyright has the exclusive right to make a film or video of the broadcast or to re-broadcast it.<sup>121</sup> If a recording of the broadcast is made, the owner also enjoys, in respect of that audio-visual work, the exclusive right to make a copy, to broadcast it and to cause it to be retransmitted by cable.<sup>122</sup> Subject to fair dealing defences, notably for the purpose of reporting news, failure to respect the exclusive rights of telecasters would constitute an infringement.<sup>123</sup>

Copyright analysis in Canada must proceed under a statute which, for the most part, was drafted before the television age. In general, that analysis reflects the state of the law with respect to live television broadcasts of sporting events as it

<sup>117</sup> *Ibid.*

<sup>118</sup> *Ibid.* 47.

<sup>119</sup> The Convention was made at Rome, 26 October 1961; 496 United Nations Treaty Series 73; [1991] 27 *Copyright* 9; cf. Australia, *Parliamentary Debates*, House of Representatives, 3 November 1988, 2393.

<sup>120</sup> Copyright Act 1968 (Cth) ss 2, 91, 95, 98.

<sup>121</sup> *Ibid.* s. 8.

<sup>122</sup> *Ibid.* s. 86; Broadcasting and Television Act 1942 (Cth) s. 117A.

<sup>123</sup> Copyright Act 1968 (Cth) ss 100A, 101, 102, 103B; cf. *British Broadcasting Corp. v. British Satellite Broadcasting Ltd*, *supra* n. 16.



stood in the United Kingdom and Australia prior to the implementation of the recommendations of the Gregory and Spicer Committees. *Canadian Admiral Corporation v. Rediffusion* investigated whether copyright protection vested in both live and recorded television broadcasts of sports events. The case in no way clarifies the rights, if any, that a promoter can claim in the event *per se*.<sup>124</sup> Indeed, no comment was made that the Montreal Football Club purported to sell exclusive rights to televise the event to Canadian Admiral.<sup>125</sup> It was held that copyright protection for sports telecasts depended on the contemporaneous recording of the broadcast on an audio-visual support.

The telecasts of the 'home' games made directly to air were held not to attract copyright protection. In order for copyright to subsist, a 'work' must be expressed, to some extent at least, in a material form capable of identification, and it must have a more or less permanent endurance. The fleeting images on the television screen did not possess the required permanency. Furthermore, the process by which telecasting produces ephemeral images on the screen where they are 'projected' was held not to be analogous to either photography or cinematography.<sup>126</sup> On the other hand, the films of the 'away' games were entitled to copyright protection as a series of photographs. The recording of the matches on an audio-visual support, in this instance celluloid, provided the material form that was lacking for the live broadcast. It is to be noted that whilst copyright vests in an audio-visual production that does not otherwise qualify as a dramatic work only 'in so far as it consists of a series of *original* photographs', the result in *Canadian Admiral* implies that the level of originality required of the images of sports telecasts is either minimal or non-existent.<sup>127</sup> The Canadian legislation thus prohibited both the rebroadcast of the telecast by electromagnetic or Hertzian waves through the ether, and the performance of the telecasts in public, such as on television screens found in bars and other places of entertainment.<sup>128</sup> However, under the Canadian copyright statute as it existed prior to 1988, the copyright was held not to be infringed by the performance of the work by rediffusion on cable in the homes and apartments of subscribers to the defendant's service.<sup>129</sup> That anachronistic anomaly has since been corrected by legislation.<sup>130</sup>

Unlike in Australia, live broadcasts of sporting events, in the absence of a contemporaneous audio-visual recording, receive no copyright protection in Canada whether the event is a stadium or a public venue sport. Of course, live

<sup>124</sup> *Canadian Admiral Corp. Ltd v. Rediffusion Inc.* (1954) 20 Canadian Patent Reporter 75 (Exchequer Court of Canada), 102-3.

<sup>125</sup> *Ibid.* 77.

<sup>126</sup> *Ibid.* 88-9.

<sup>127</sup> Perry, R.-M., 'Copyright in Motion Pictures and Other Mechanical Contrivances' (1972) 5 Canadian Patent Reporter (2d) 256, 262; see generally Lupton, K., 'Photographs and the Concept of Originality in Copyright Law' [1988] 9 *European Intellectual Property Review* 257; *Bauman v. Fussell* [1978] Reports of Patent Cases 485 (Court of Appeal); Shipley, *op. cit.* n. 11, 390.

<sup>128</sup> *Canadian Admiral Corp. Ltd v. Rediffusion Inc.*, *supra* n. 124, 102-3.

<sup>129</sup> *Fortnighly Corp. v. United Artists Television Inc.* 392 U.S. 390 (1967); 393 U.S. 902 (1968); *Teleprompter Corp. v. CBS Inc.* 415 U.S. 394 (1974).

<sup>130</sup> United States Free Trade Agreement Implementation Act 1988 (Canada), ch. 65; see generally Gendreau, Y., *The Retransmission Right: Copyright and the Rediffusion of Works by Cable* (1990); cf. Garrett, *op. cit.* n. 11, 162; Yeldell, *op. cit.* n. 11, 278 ff.; Ciaglo, *op. cit.* n. 11, 112 ff.

telecasts are no longer of great consequence as most sporting events are, as a matter of legal obligation, videotaped.<sup>131</sup> This provides the requisite material form. Broadcasters may thus regulate unauthorized rebroadcasts and cable retransmission of their sports programmes. The Federal Court of Canada in *Titan Sports Inc. v. Mansion House (Toronto) Ltd* has even gone so far as to recognize that the telecast of a sporting event to be made and recorded simultaneously, at some future time, may attract sufficient prospective copyright protection to some as yet non-existent audio-visual work to justify an *ex parte* interlocutory injunction prior to broadcast.<sup>132</sup>

Despite the broadcaster's favourable copyright position, the rights granted under Australian or Canadian law are in the nature of reproduction rights to prevent copying. They do not amount to a monopoly over the sporting event. As a consequence, it would not constitute an infringement to record and broadcast an independent representation of the sporting contest. The enjoyment of the exclusive rights to record, reproduce and broadcast a sporting contest is predicated upon the assumption that the beneficiary of the copyright also enjoys exclusive rights of access to the event. The legislative schemes provided under Australian and Canadian copyright legislation are thus inadequate for public venue sports.

### (iii) *Copyright in Elements of Sporting Events*

In *Victoria Park Racing* the plaintiff attempted indirectly to protect the economic value of the sporting contest by alleging that the defendants' actions constituted an infringement of copyright in the racebook and the score-boards. Although the plaintiff was unsuccessful on the facts of that case, the principle of the underlying tactics adopted by the plaintiff-promoter were and continue to be sound.

Whilst the unauthorized recording and broadcast of a protected work, such as a play, made directly and independently would not amount to an infringement of copyright in an authorized broadcast and recording, it nevertheless would constitute an infringement of the underlying work. In the same way, the telecast and recording of sporting events must not amount to a reproduction, filming or telecast of any protected work or subject matter that is accessory to the sporting contest.<sup>133</sup> In general, a claim cannot be sustained with respect to the sporting event *per se*, as it could, for example, with respect to a play. A sporting event is not normally an artistic, musical, dramatic or literary work.<sup>134</sup> An exception may exist with respect to 'choreographed' sports. Figure skating, gymnastic, synchronized swimming, acrobatic skiing or rhythmic gymnastic routines are arguably choreographic works provided they are given a material form, and are thus protected dramatic works.<sup>135</sup> In the extreme, pre-established but ephemeral plays

<sup>131</sup> Copyright Act (Canada), R.S.C. 1985, ch. C-42, s. 3(1.1) and Television Broadcasting Regulations 1987 (Canada) s. 10(5).

<sup>132</sup> (1989) 26 Canadian Intellectual Property Reports 105 (Federal Court Trial Division).

<sup>133</sup> Copyright Act 1968 (Cth) ss 21(1), 31, 36, 42; Copyright Act (Canada) s. 3(1)(e)-(f).

<sup>134</sup> Skone James, *op. cit.* n. 25, 357-8; Fox, *op. cit.* n. 15, 139; Shipley, *op. cit.* n. 11, 384-8.

<sup>135</sup> Copyright Act 1968 (Cth) s. 10 ('dramatic work'); Copyright Act (Canada) s. 2 ('choreographic work' and 'dramatic work'); Wood, S., 'Two Left Feet: Government's Tango with Copyright and Choreography' (1991) 6 *Intellectual Property Journal* 291, 306-8.

in certain sports, such as football or baseball, may also meet the definition of protected works.<sup>136</sup>

Although marathons and cycling races are not the proper subject matter of copyright, the staging of sporting events generally involves accessory non-athletic entertainment components such as logos, theme songs, the name of the event,<sup>137</sup> uniforms<sup>138</sup> and other elements in which copyright may subsist in certain circumstances. For instance, in *Titan Sports* the plaintiffs claimed *inter alia* that the pirate public performance of the televised sporting contest would involve an infringement of the musical work associated with the wrestling matches. Though the spectacle of a public parade itself is not a protected work, it has been acknowledged that the unauthorized filming and public performance of a parade, either on television or in a cinema, may constitute an infringement of accessory musical copyright in the music played by the participants and the artistic copyright in the floats.<sup>139</sup> Therefore, to the extent that the promoter can assert ownership to component works, and can make it physically impossible to broadcast the event without a reproduction of a substantial part of those works, the promoter benefits from an indirect mechanism to manage the television rights in the event.

The rights arising from copyright protection in component works are not indefeasible. First, the promoter must assert a clear right of ownership to the relevant works either as an assignee or as a first owner of copyright.<sup>140</sup> Second, the reproduction of the work would have to be a substantial part of the work.<sup>141</sup> Third, the right would be subject to fair dealing exceptions, particularly as those exceptions relate to news gathering and reporting activities.<sup>142</sup>

By way of example, it may be considered whether, by prominently exposing a logo along a public venue, a promoter has an indirect mechanism to prohibit the unauthorized broadcast, retransmission and audio-visual recording of the event. In that context, it should be recalled that in Australia, under the Olympic Insignia Protection Act 1987 (Cth), unlike in the United States<sup>143</sup> and in Canada,<sup>144</sup> the Olympic symbol is given design and copyright protection rather than trademark protection.<sup>145</sup> Plainly, the doing of those acts in relation to protected artistic

<sup>136</sup> *Baltimore Orioles v. Major League Baseball Players Association*, *supra* n. 10, 669; Sayers, *op. cit.* n. 11, 869; *cf.* *NOS v. KNVB* [1988] 3 *European Intellectual Property Review* D-60 (Supreme Court of the Netherlands).

<sup>137</sup> *British Columbia v. Mihaljevic* (1989) 25 *Canadian Intellectual Property Reports* 298 (British Columbia Supreme Court); *King Feature Syndicate Inc., The Hearst Corp. & Harman Watch Co. v. Lechter* [1950] *Canadian Exchequer Court Reports* 297; *Exxon Corporation v. Exxon Insurance Consultants International* [1982] *Reports of Patent Cases* 69 (Court of Appeal); *Francis Day and Hunter v. Twentieth Century Fox Corporation Ltd* [1940] A.C. 112; *Green v. Broadcasting Corporation of New Zealand* [1988] 16 I.P.R. 1 (New Zealand Court of Appeal); (1989) 16 I.P.R. 24 (Privy Council); and Stim, R., 'E.T. Phone Home: The Protection of Literary Phrases' (1989) 7 *University of Miami Entertainment & Sports Law Review* 65.

<sup>138</sup> *Radley Gowns Ltd v. Costas Spyrou* [1975] *Fleet Street Reports* 455.

<sup>139</sup> *Hawkes & Son (London) Ltd v. Paramount Film Service Ltd* [1934] 1 Ch. 593; *Production Contractors Inc. v. WGN Continental Broadcasting Co.*, *supra* n. 85, 1503.

<sup>140</sup> Copyright Act 1968 (Cth) ss 35, 196; Copyright Act (Canada) s. 13.

<sup>141</sup> *Hawkes & Son (London) Ltd v. Paramount Film Service Ltd*, *supra* n. 139.

<sup>142</sup> Copyright Act 1968 (Cth) ss 42(1)(b), 103B, 248A (1)(f)(i).

<sup>143</sup> Amateur Sports Act 1978 (U.S.A.) s. 110.

<sup>144</sup> Trade Marks Act (Canada), R.S.C. 1985, ch. T-13, s. 9(1)(n)(iii).

<sup>145</sup> *Cf.* Olympic Insignia Protection Act 1987 (Cth) s. 19.

works in Australia and Canada amounts *prima facie* to an unlawful interference with the copyright owner's exclusive rights.<sup>146</sup> The copyright legislation in both jurisdictions confirms that, as a general rule, the telecast of images of an artistic work situated temporarily in a public place constitutes an act of infringement.<sup>147</sup> The reproduction in Australia of a substantial part of the Olympic symbols would *prima facie* constitute an infringement of artistic copyright even in the absence of confusion or misrepresentation of origin.<sup>148</sup> But, in Australia, unlike in Canada, the copyright owner's exclusive rights are significantly curtailed. First, a fair dealing relating to the giving of information, including the reporting of news, by means of broadcasting, would not constitute an infringement.<sup>149</sup> A broadcaster could thus report on a public venue sporting event as part of its news without infringing artistic copyright. The contemplated fair dealing only relates to news and not entertainment programming. In Canada, the fair dealing defence only applies to newspaper accounts.<sup>150</sup> A second curtailment arises under s. 67 of the Copyright Act 1968 (Cth). No similar provision operates in Canada. Copyright in an artistic work, including the Olympic logo, is not infringed in Australia if the artistic work is included in a film or a telecast. The s. 67 exception operates if the inclusion of the artistic work is merely incidental to the principal matter of the film or telecast.<sup>151</sup> It can be strongly contended by Australian broadcasters that the telecast of artistic works associated with a public venue competition is merely incidental since the event is the principal subject matter.

#### (iv) *Trademark, Passing Off and Trade Reputation*

Trademarks and trade reputation constitute an important intellectual property element associated with contemporary sporting contests. Recent applications of the common law tort of passing off in Australia, and its partial statutory restatement in s. 52 Trade Practices Act 1974 (Cth),<sup>152</sup> illustrates a degree of judicial flexibility when courts are faced with new technologies in mass communications, and new methods of advertising and marketing.<sup>153</sup> On analysis, however, the rules applicable in this area provide an unsuitable mechanism for sports promoters. The conceptual framework of passing off is substantially different from misappropriation. Misappropriation, as illustrated in *Associated*

<sup>146</sup> Copyright Act 1968 (Cth) ss 31(1)(b)(iii)-(iv), 36; Copyright Act (Canada) ss 2 ('telecommunications'), 3(1)(d)-(f), 27(1); *Warner Bros-Seven Arts Inc. v. CESM-TV Ltd* (1971) 65 Canadian Patent Reporter 215 (Exchequer Court of Canada); *Bishop v. Télé-Métropole Inc.* [1990] 2 Supreme Court Reports 467.

<sup>147</sup> Copyright Act (Canada) s. 27(2)(c); Copyright Act 1968 (Cth) s. 65. In Canada, a simultaneous recording would have to be made: see above discussion under heading 'Copyright in Telecasts of Live Events'.

<sup>148</sup> *Cf. San Francisco Arts and Athletics Inc. v. United States Olympic Committee*, *supra* n. 115, 530-1.

<sup>149</sup> Olympic Insignia Protection Act 1987 (Cth) s. 5(2)(b)(ii); Copyright Act 1968 (Cth) s. 42(1)(b).

<sup>150</sup> Copyright Act (Canada) s. 27(2)(a).

<sup>151</sup> *Cf. Broadcasting and Television Act 1942* (Cth) s. 100(10).

<sup>152</sup> Blakeney, M., 'Old Wine in New Bottles: Influence of the Common Law on the Interpretation of Section 52 of the Trade Practices Act' (1984) 58 *Australian Law Journal* 316.

<sup>153</sup> *E.g.* cases at n. 87 and *Henderson v. Radio Corp. Pty Ltd* [1960] S.R. (N.S.W.) 576; *Children's Television Workshop Inc. v. Woolworth's (N.S.W.) Ltd* [1981] 1 N.S.W.L.R. 273; *South Australian Telecasters Ltd v. Southern Television Corporation Ltd* [1970] S.A.S.R. 207.

*Press*, revolves around an unauthorized 'taking' of property or quasi-property. Passing off, by contrast, requires more than mere taking of trade reputation. It requires an element of misrepresentation, generally in the form of a deception or confusion of the public with respect to the origin of the goods or services, or with respect to the existence of an official endorsement.

The plaintiffs in the *Boston Marathon* case alleged unsuccessfully that the unauthorized broadcast amounted to a misrepresentation to the public that the telecast was somehow official. Theoretically, a claim may be made in Australia and Canada that the unauthorized use of an intangible component of a sporting event constitutes a similarly misleading and deceptive conduct.<sup>154</sup> It is difficult to conceive, however, any compelling reasons why an Australian or a Canadian court, though not bound by *WCVB-TV v. Boston Athletic Association* in any formal sense, would come to a conclusion that differed from the views expressed by the United States Court of Appeal. In any event, a properly worded disclaimer, telecast periodically, may neutralize any public misconception.<sup>155</sup>

Indirect protection arising from registered trademarks in Canada and Australia may be subsumed under a similar analysis. The registration of trademarks in relation to entertainment spectacles, radio and television programs, sports clothing, sports teams and sports venues has become widespread.<sup>156</sup> However, statutory trademark protection is not infringed unless the acts are likely to deceive the public as to the origin of the goods and services.<sup>157</sup> Moreover, the promoter would have to establish that the use made by the broadcaster constituted 'use' in the trademark sense. Registered trademarks exist to indicate the origin of the goods or services.<sup>158</sup> The mere incidental depiction of a mark at a public venue event would not amount to trademark use.

#### (v) *Right of Publicity*

The sports promoter's quest for an indirect mechanism to ensure exclusivity of television rights to public venue sports may eventually find support in the area of so-called 'rights of publicity'. This area is well developed in the United States in

<sup>154</sup> *World Series Cricket Pty Ltd v. Parish* (1977) A.T.P.R. 17, 417 (Federal Court); (1977) A.T.P.R. 17, 422 (Full Federal Court).

<sup>155</sup> *INXS v. South Sea Bubble Co. Pty Ltd* (1986) Australian Intellectual Property Cases 90-285 (Federal Court), 36,670; cf. *B.A.A. v. Sullivan*, *supra* n. 109, 34-5; *CBS Records Australia Ltd v. Telmak Teleproducts (Australia) Pty Ltd* (1987) 72 A.L.R. 270 (Federal Court).

<sup>156</sup> *Glen-Warren Productions Ltd v. Ross Programs Inc.* (1989) 23 Canadian Intellectual Property Reports 246 (Trade Mark Opposition Board); *CJMF-FM Ltée v. Radio-Mutuel Inc.* (1989) 24 Canadian Intellectual Property Reports 98 (Federal Court); *CBC v. Colonial Broadcasting System Ltd* (1986) 12 Canadian Intellectual Property Reports 279 (Trade Mark Opposition Board); *Monsport Inc. v. Vêtements de Sport Bonnie (1978) Ltée* (1988) 21 Canadian Intellectual Property Reports 207 (Federal Court Trial Division); *Sports Experts Inc. v. Les Boutiques Boom Sports Inc.* (1987) 13 Canadian Intellectual Property Reports 61 (Québec Superior Court); *Leaf Confections Ltd v. Maple Leaf Gardens Ltd* (1986) 10 Canadian Intellectual Property Reports 267 (Federal Court Trial Division); *Detroit Lions Inc. v. B.C. Lions Football Club* (1987) 14 Canadian Intellectual Property Reports 53 (Trade Mark Opposition Board); *Stadium Corporation of Ontario Ltd v. Wagon Wheel Concessions Ltd* (1989) 24 Canadian Intellectual Property Reports 24 (Federal Court Trial Division).

<sup>157</sup> *Mark Foy's Ltd v. Davies Coop & Co. Ltd* (1956) 95 C.L.R. 190, 204-5; *The Shell Co. of Australia v. Esso Standard Oil (Australia) Ltd* (1963) 109 C.L.R. 407, 422-4.

<sup>158</sup> Trade Marks Act 1955 (Cth) ss 6(1), 62, 64(1); Trade Marks Act (Canada) ss 2 ('use' and 'trademark'), 4, 19, 20.

the field of sports celebrities.<sup>159</sup> Similarly, Canadian courts, particularly Ontario courts, have recognized an athlete's right to the commercial exploitation of his or her image as a sports personality.<sup>160</sup> The emergence of a right of publicity is significant in two respects. First, the recognition of property rights under the general law outside the traditional compartments of intellectual property indicates a judicial willingness to adopt an open textured analytical model akin to the unfair competition doctrine in *Associated Press*. On analysis, the recognition of a tort of misappropriation of personality reveals a conceptual basis that is founded both on a privacy interest and a proprietary interest.<sup>161</sup> In some respects, intangible television rights in sporting events are merely a variation of the intangible rights claimed by athletes in their photographic images. Second, if the recognition of an athlete's publicity rights operates as more than a defence against unlawful misrepresentation, but amounts rather to the acknowledgement of a positive property or quasi-property right, then that right is infringed by mere 'taking' or misappropriation even in the absence of a misrepresentation in the passing off sense.

Judicial recognition of property rights in an athlete's image is a tacit rejection of Horridge J.'s *dicta* in *Sports and General Press Agency v. 'Our Dogs' Publishing* that 'no one possesses a right of preventing another person photographing him any more than he has a right of preventing another person giving a description of him.'<sup>162</sup> The plaintiff had unsuccessfully claimed to be the exclusive licensee of the rights to take photographs at a dog show. The *Our Dogs dicta* is in clear contradiction with an emerging right of publicity. Subsequent legal development with respect to the right of publicity of athletes may thus have undermined the foundations of the majority decision in *Victoria Park Racing* as well as the dissenting view of Brandeis J. in *Associated Press*. Indeed, *Our Dogs* may fairly be described as the authoritative substratum for the orthodox Anglo-American analytical model.<sup>163</sup> In an attempt to reconcile *Our Dogs* and *Victoria*

<sup>159</sup> *Haelan Laboratories Inc. v. Topps Chewing Gum Inc.* 202 F. (2d) 866 (1953), *certiorari* denied 346 U.S. 816 (1953); *Ali v. Playgirl Inc.* 447 F. Supp. 723 (1978); *Ettore v. Philco Television Broadcasting Corporation* 229 F. (2d) 481 (1956), *certiorari* denied 351 U.S. 926 (1956); *contra Namath v. Sports Illustrated* 371 N.Y.S. (2d) 10 (1975); *Gauthier v. Pro-Football Inc.* 304 N.Y. 354, 107 N.E. (2d) 485 (1952); Shipley, *op. cit.* n. 11, 396-402; Quinn & Warren, *op. cit.* n. 11, 493-6; Chaves, A., 'Arena Rights: Legislative Problems Concerning Broadcasting of Large Shows (Sports or Other)' (1987) 23 *Copyright* 310, 318; Briggs, *op. cit.* n. 19, 880; Dabscheck, B., "'Defensive Manchester": A History of the Professional Footballers Association', in Cashman, R. and McKernan, M. (eds), *Sport in History: The Making of Modern Sporting History* (1979) 237, 255; Buchanan, C. L., 'The Need for a Right of Publicity' [1988] *European Intellectual Property Review* 227; *Tokyo Yomiuri Giants and Sadaharu Ou v. Wako Ltd* [1979] *European Intellectual Property Review* D-139 (Tokyo District Court).

<sup>160</sup> *Krouse v. Chrysler* (1973) 1 Ontario Reports (2d) 225 (Ontario Court of Appeal); *Athans v. Canadian Adventure Camps Ltd* [1977] 80 D.L.R. (3d) 583 (Ontario High Court); see generally Potvin, L., *La Personne et la Protection de son Image* (1990); Mazeaud & Mazeaud, *Leçon de droit civil, Les personnes — La personnalité* (6th ed. 1981) 725; cf. *Gretzky v. Fortin* (1989) 24 Canadian Intellectual Property Reports 136 (Trade Mark Opposition Board).

<sup>161</sup> Howell, R., 'The Common Law Appropriation of Personality Tort' (1986) 2 *Intellectual Property Journal* 149, 159.

<sup>162</sup> [1916] 2 K.B. 881, 884.

<sup>163</sup> *International News Service v. Associated Press* 248 U.S. 215 (1918), 255; *Victoria Park Racing and Recreation Grounds Company Limited v. Taylor and Others* (1937) 58 C.L.R. 479, 509, 517, 527; *Canadian Admiral Corp. Ltd v. Rediffusion Inc.*, *supra* n. 124, 83; and Fox, *op. cit.* n. 15, 139.

*Park Racing* with the subsequent right of publicity case law, it would be an invidious distinction to suggest that the former cases related to the performances of animals rather than human athletes. Both *Our Dogs* and *Victoria Park Racing* were unquestionably decided on broad principle, *i.e.* that there is, under the common law, no photographic or broadcast fixation rights inherent in entertainments and spectacles.

The logical extension of the right of publicity is that the athletes may also control the telecast of their sporting performances.<sup>164</sup> As a consequence, an athlete's proprietary right of publicity may be assigned to the promoter of a sporting event held in a public venue. This would thus provide a circuitous means to regulate or prohibit an unauthorized telecast.<sup>165</sup> Although such a possibility is analytically attractive, in the absence of judicial authority it remains speculative in both Australia and Canada.<sup>166</sup> Further, it should be noted that, at this point, an athlete's right to prohibit unauthorized commercial use of his or her image in Australia is strictly limited to a passing off analysis. There must be a misrepresentation of an endorsement.<sup>167</sup> The conceptual framework falls short of the recognition of an assignable proprietary interest in the nature of a right of publicity. But, even if judges in Australia eventually wish to recognize a proprietary right of publicity, the performers' protection under Part XIA of the Copyright Act 1968 (Cth) may operate as a statutory pre-emption of the general law.<sup>168</sup>

The recent amendments to the copyright legislation will enable Australia to meet the minimum requirements of the Rome Convention with respect to the protection of performers' rights.<sup>169</sup> Under the scheme, performers are granted a non-proprietary and non-assignable civil right of action to prevent unauthorized uses of their performances, and particularly to prevent unauthorized audio-visual fixations of those live performances.<sup>170</sup> The ambit of protection covers public performances and spectacles including 'a circus act or variety act *or any similar presentation or show*.'<sup>171</sup> The Australian definition of protected performances was thus extended to variety artists, including jugglers and acrobats, and others who do not normally perform 'literary or artistic works' within the meaning of the Berne Convention for the Protection of Literary and Artistic Works. Despite

<sup>164</sup> *Ettore v. Philco Television Broadcasting* 229 F. (2d) 481 (1956), *certiorari* denied 351 U.S. 926 (1956); *Baltimore Orioles Inc. v. Major League Baseball Players Association* 805 F. (2d) 663 (1986), *certiorari* denied 480 U.S. 941 (1987); see generally Saxer, *op. cit.* n. 11; and Shipley, *op. cit.* n. 11.

<sup>165</sup> Howell, *op. cit.* n. 161, 192 ff.

<sup>166</sup> See generally Howell, R., 'Personality Rights: A Canadian Perspective: Some Comparisons with Australia' (1990) 1 *Australian Intellectual Property Journal* 212.

<sup>167</sup> *Honey v. Australian Airlines Ltd* (1990) 18 I.P.R. 185 (Full Court of the Federal Court); *cf. Wickham v. Associated Pool Builders Pty Ltd* (1988) 12 I.P.R. 567 (Federal Court); Simpson, S., 'The Price of Fame Revisited' (1989) 63 *Australian Law Journal* 281; Ricketson, S., 'Character Merchandising in Australia: Its Benefits and Burdens' (1990) 1 *Australian Intellectual Property Journal* 191.

<sup>168</sup> Copyright Amendment Act 1989 (Cth) s. 28.

<sup>169</sup> Australia, *Parliamentary Debates*, House of Representatives, 3 November 1988, 2393.

<sup>170</sup> Copyright Act 1968 (Cth) ss 248J, 248N.

<sup>171</sup> Copyright Act 1968 (Cth) s. 248A (emphasis added); Australia, Copyright Law Review Committee, *Report on the Protection of Performers*, 1987 ('C.L.R.C. Report'), 2; International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, made at Rome, 26 October 1961; 496 United Nations Treaty Series 73, art. 9.

the use of the word 'artist' at Article 9 of the Rome Convention, the view was expressed that the Convention could include 'some sportsmen'.<sup>172</sup> For this reason, the performance of a sporting activity was expressly excluded from the scope of protection granted to performers in Australia.<sup>173</sup> The exception is intended to embrace the idea of a sporting activity being available for spectators or audiences to enjoy.<sup>174</sup> In those circumstances, it is unlikely that an Australian court would recognize a similar right to control the use of an athlete's televised performance under the general law.

### PROPOSED LEGISLATIVE SOLUTION

Earlier in the history of television, promoters would have been satisfied with greater exposure for their sports.<sup>175</sup> This is no longer the case. The popularity of a sport has become a valuable commodity.<sup>176</sup> Co-extensive, non-exclusive telecasts are commercially unfeasible in Australia and Canada due to the potential dilution of an already small television audience.<sup>177</sup> The assured conversion of a sporting spectacle into value is therefore predicated on the promoter's ability to provide *exclusive* telecast rights to broadcasters. Unlike the promoter of a stadium sport, the promoter of a public venue sport is left with few, if any, self-defence mechanisms to achieve that result.

The absence of a coherent regime of protection for sporting events presents jurists with an intriguing enigma. It is common knowledge that there is a keen competition to acquire exclusive television rights to certain events and that significant amounts are paid to obtain grants of those rights. Considerable time, money, skill and labour are invested not only in the presentation of sporting contests, but also by broadcasters in reliance of *de facto*, if not *de jure*, 'acquisition' of exclusive rights. Some authors have suggested that the right of promoters to their events, a new *de facto* intangible right, arises from custom and usage.<sup>178</sup> Yet, the value attributed to a sporting competition by the entertainment market place is not reflected by any measure of legal protection. The 'rights' are unopposable against third parties.

Although a promoter's position would improve significantly if 'television rights' to the sporting event could be asserted in law, it would be an exaggeration to suggest that, given the choice, it would be in a broadcaster's interest to proceed with a telecast without the promoter's authority. Even if a promoter does not have property rights in a sporting event, a broadcaster will benefit from making an arrangement with the promoter. First, a broadcaster is likely to seek a number of accessory contractual rights: access to the sporting body's expertise; disclosure of information not generally available concerning routes and schedul-

<sup>172</sup> C.L.R.C. Report, *supra* n. 171, 8.

<sup>173</sup> Copyright Act 1968 (Cth) s. 248A(2).

<sup>174</sup> Australia, *Parliamentary Debates*, Senate, 12 April 1989, 1469; and 4 May 1989, 1837-9.

<sup>175</sup> Briggs, *op. cit.* n. 19, 840.

<sup>176</sup> Hay, D., 'Future Choice: Pay TV v. The Big Three', *Age, Green Guide Supplement* (Melbourne), 2 May 1991.

<sup>177</sup> *Re Amalgamated Services Pty Ltd and the New South Wales Rugby Football League* (1980) A.T.P.R. 17,087.

<sup>178</sup> Ascensão, *op. cit.* n. 26, 15; Garrett, *op. cit.* n. 11, 156.



ing; an input into scheduling choices; use of the promoter's sponsors as television advertisers; access to promotional material and accessory intellectual property rights; collaboration from athletes and officials; and camera positioning preferences, including the permission to place a camera on official vehicles or a broadcast 'booth' near the finish line. Without the expressed consent of the promoter, a rival broadcaster will be disadvantaged in its infrastructure. Second, a broadcaster's reputation may suffer from a public perception that its 'technically legal' activities are nevertheless parasitic in nature. Third, it is generally not in a broadcaster's long term business interests to alienate sporting interests with whom commercial dealings are likely to arise in the future. Although cooperative efforts are advantageous and are likely to continue to exist, the issue of an unauthorized telecast by a rival broadcaster remains unresolved. The *Boston Marathon* case is a striking example of an unauthorized broadcast despite the existence of a prior contractual arrangement due to a highly competitive television market.

Over the years, attempts to expand the scope of protection granted to intangible interests, including whether sporting events ought to be protected from unauthorized exploitation, have been advanced under various legal theories including unfair competition, misappropriation, natural justice, abuse of rights, rights of publicity and unjust enrichment. Ultimately, there is little to be gained by scholarly investigation into which conceptual framework constitutes the best theoretical rationale to support the promoter's claim. The recognized and orthodox analytical approach adopted by courts in jurisdictions following the British public law tradition is to defer to Parliament to set the course of public policy.<sup>179</sup> It is up to legislators to 'weigh relevant competing interests.'<sup>180</sup>

Whether or not Parliament ought to recognize existing commercial practices and the economic interests of sports promoters by the adoption of legislation which would define television rights in all sporting contests and would regulate their exploitation is an inherently political question. As occasional beneficiaries of exclusive rights, all broadcasters have a stake in the protection of that category of intangible 'rights'. But, from a public policy perspective, it may be acceptable to deny protection to sports events. The debate has not yet taken place. Evidence suggests, however, that the lack of protection for public venue sports is inadvertent. For instance, the initial judicial philosophy underlying *Victoria Park Racing* has been reversed by legislation in Australia.<sup>181</sup> Moreover, despite the inadequacy of the recommended mechanism, the underlying rationale of the Gregory and Spicer Reports acknowledge the need to protect the interests of sports promoters. Governments themselves have admitted the importance of intangible property with respect to hosting prestigious international events such as the Olympic Games. Thirty-two countries have become signatories to the Nairobi Treaty on the Protection of the Olympic Symbol.<sup>182</sup> Consonant with international movements, though not signatories to the Nairobi Treaty, both

<sup>179</sup> *Associated Press* 248 U.S. 215 (1918), 262, 263, 267.

<sup>180</sup> *WCVB-TV v. Boston Athletic Association* 926 F. (2d) 42 (1991), 44, 45.

<sup>181</sup> Broadcasting and Television Act 1942 (Cth) s. 115.

<sup>182</sup> (1981) 17 *Copyright* 305; (1991) 27 *Copyright* 11.

Australia and Canada have taken steps to protect the Olympic symbols and insignia.<sup>183</sup> That action recognizes the substantial revenues that may be raised through licensing and sponsorship. Examined together, these facts reveal a growing governmental awareness of the financial importance of intangible interests to contemporary sports.<sup>184</sup>

The most compelling argument favouring the legislative recognition of television rights in sporting events lies in the paradoxical conduct of governments in their attempts to attract certain sporting events, including the Olympic Games. On the one hand, substantial public funds are channelled into lobbying efforts.<sup>185</sup> These are justified by the potential economic benefits which would result from selection of a given country as the venue.<sup>186</sup> Yet, despite the acknowledged fact that secure television revenues have become crucial to the hosting of international events, unambiguous legal protection is not coherently and directly given, particularly for those events held in public venues. At present, nothing guarantees that a prestigious international marathon, held in either Australia or Canada, would not be subject to an unauthorized telecast. That potential behaviour, though undeniably parasitic and arguably unfair, would be lawful. Commercially, it would jeopardize secure television revenues.

Legislative recognition of rights in sporting events would not be without controversy. First, legislators would have to decide who would benefit from newly created property interests. Second, fetters on the free circulation and gathering of sports news will also have to be analysed against the standards of permissible governmental intervention.<sup>187</sup> The rights of access of journalists, based on constitutional or quasi-constitutional principles, may severely restrict the contemplated statutory intervention. For instance, one may ask to what extent, if any, governments can validly regulate the exercise of press rights in

<sup>183</sup> Olympic Insignia Protection Act 1987 (Cth); Trade-Marks Act (Canada) s. 9(1)(n)(iii); *Canadian Olympic Association v. Allied Corp.* (1990) 26 Canadian Intellectual Property Reports 157 (Federal Court of Appeal); *C.O.A. v. Gym & Tonic Ltd* (1988) 19 Canadian Intellectual Property Reports 127 (Federal Court Trial Division); *C.O.A. v. Konica Canada Inc.* (1987) 18 Canadian Intellectual Property Reports 223 (Federal Court Trial Division); *C.O.A. v. Olympic Life Publishing Ltd* (1987) 17 Canadian Intellectual Property Reports 191 (Trade Mark Opposition Board); *C.O.A. v. Olympus Optical Co.* (1987) 14 Canadian Intellectual Property Reports 259 (Trade Mark Opposition Board); *C.O.A. v. Methodes Sportives Gaetan Menard Inc.* (1987) 14 Canadian Intellectual Property Reports 308 (Trade Mark Opposition Board); *C.O.A. v. Universal Olympic Fitness Centre Ltd* (1987) 11 Canadian Intellectual Property Reports 60 (Trade Mark Opposition Board); *C.O.A. v. Pace Setter Swim & Gym Wear Inc.* (1986) 7 Canadian Intellectual Property Reports 134 (Trade Mark Opposition Board); *C.O.A. v. Mufty Bears Ltd* (1986) 7 Canadian Intellectual Property Reports 272 (Trade Mark Opposition Board).

<sup>184</sup> *E.g.* Australian Formula One Grand Prix (Amendment) Act 1985 (S.A.); Australian Formula One Grand Prix (Amendment) Act 1986 (S.A.).

<sup>185</sup> Nicklin, L., 'Melbourne's Olympic Dream: A Run for Your Money', *Bulletin* (Sydney), 7 August 1990, 31 (Melbourne's 1996 bid cost \$AU 20 million); Groodbody, J., 'A City Clinging Defiantly to Its Olympic Dream', *The Times* (London), 6 September 1990 (Manchester's 1996 bid cost £3 million); News Item, *Ottawa Citizen* (Ottawa), 11 July 1990 (Toronto's 1996 bid cost \$CAN 14 million).

<sup>186</sup> *E.g.* Brain, P. and Manlakos, J., 'Melbourne Olympics: an Economic Evaluation' (1991) *National Economic Review* 14.

<sup>187</sup> Canadian Charter of Rights and Freedoms s. 2(b); Canadian Bill of Rights, S.C. 1960, ch. 40, ss 1(d), 1(f); *cf.* Yeldell, *op. cit.* n. 11, 293 ff.; *Red Lion Broadcasting Co. v. Federal Communications Commission* 395 U.S. 367 (1969).

government owned public places.<sup>188</sup> Third, it may also be of concern that the recognition of property rights may restrict the ability of rival broadcasters to have access to sports programming as well as news footage. Experience demonstrates, however, that legislation in the past has been able to strike a balance between the interests of providers and the disseminators of sporting news.<sup>189</sup>

Only one country has gone forward with unique legislation directly attributing neighbouring rights to sporting competitions. Since 1973, Brazil's copyright legislation grants sports organizations the right to authorize or prohibit the fixation, broadcast or retransmission of public sporting events for which a fee is charged for admittance.<sup>190</sup> Coaches and participants, subject to an agreement to the contrary, share in ten *per cent* of the royalties. The right exists even in the absence of a fixation in a material form. A maximum of three minutes from a sporting event may be used for news and information. The term of protection is for 60 years from the holding of the event.<sup>191</sup> The legislation thereby provides funding to develop sports infrastructures. Whilst the legislation does not apply to sporting events held outside stadiums or to events held inside stadiums where no fee is charged, it is nevertheless of interest in view of its pioneering nature.

## CONCLUSION

Sport has been closely intertwined with the development and implantation of broadcasting. At first, television's attitude towards sports as programming content was purely parasitic.<sup>192</sup> Historically, a pattern emerged demonstrating a use of sports programming, perhaps unwittingly, in order to foster an irreversible taste for the new technologies of radio and television.<sup>193</sup> As television was introduced in Canada and Australia, the pattern was perpetuated.<sup>194</sup> Today, the relationship between television services and sports is more accurately described as symbiotic. Television re-formulates sporting events into a popular and

<sup>188</sup> *Canadian Newspaper Co. Ltd v. City of Victoria* (1989) 63 D.L.R. (4th) 1 (British Columbia Court of Appeal); *Canadian Newspaper Co. v. City of Montreal (ville)* [1988] Recueil Juridique de Québec (Québec Superior Court) 482; *contra Re Canadian Newspaper Co. and Director of Public Road and Traffic Services of the City of Québec* [1987] Recueil de Jurisprudence du Québec 1078, 36 D.L.R. (4th) 641 (Québec Superior Court); *City of Lakewood v. Plain Dealer Pub. Co.* 100 L. Ed. (2d) 771 (1988); *Post Newsweek Stations-Connecticut Publishing Ins. Inc. v. Travellers Ins. Co.* 510 F. Supp. 81 (1981); *International Society for Krishna Consciousness Inc. v. New Jersey Sports and Exposition Authority* 691 F. (2d) 155 (1982).

<sup>189</sup> Kelly, *op. cit.* n. 37, 304-13; Fox, *op. cit.* n. 15, 102-3; *Walter v. Steinkopff* [1892] 3 Ch. 489; *John Fairfax & Sons Pty Ltd v. Australian Consolidated Press* (1960) S.R. (N.S.W.) 413; Berne Convention for the Protection of Literary and Artistic Works, revised at Paris, 24 July 1971; (1978) *Australia Treaty Series* No. 5 arts 2bis(2), 10(1), 10bis; Nairobi Treaty on the Protection of the Olympic Symbol (1981) 17 *Copyright* 305 art. 2(4); *San Francisco Arts and Athletics Inc. v. United States Olympic Committee*, *supra* n. 115, 532-42.

<sup>190</sup> Law on the Rights of Authors and Other Provisions (1974) 10 *Copyright* 181, ss 100, 101; Chaves, *op. cit.* n. 159, 311 ff.; Ascensão, *op. cit.* n. 26, 4 ff.

<sup>191</sup> *Cf.* Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, *op. cit.* n. 171, art. 14.

<sup>192</sup> Williams, R., *Television: Technology and Cultural Form* (1974) 25.

<sup>193</sup> Barnouw, E., *A Tower in Babel: A History of Broadcasting in the United States, vol. 1, to 1933* (1966) 81; Barnouw, E., *The Golden Web: A History of Broadcasting in the United States, vol. II, 1933 to 1953* (1968) 244.

<sup>194</sup> *Canadian Admiral Corporation Ltd v. Rediffusion Inc.*, *supra* n. 124; Inglis, K. S., *This is the ABC: The Australian Broadcasting Commission 1932-1983* (1983) 202.

entertaining package.<sup>195</sup> As a result, sport constitutes an important part of total television programming and, more importantly, represents a significant portion of viewers' programming choices.<sup>196</sup> By the same token, sports promoters are staging entertainment spectacles that benefit from television exposure. Indeed, sport's reliance on television is illustrated by the willingness of promoters to modify the sporting contest in order to satisfy the requirements of television entertainment.

Though some social scientists criticize television's impact on sports, it has become inescapable over the latter half of this century that professional sports, and to some extent amateur sports, have progressively ceased to be mere pastimes and amusements.<sup>197</sup> Baron de Coubertin's nineteenth century sporting ideals are as remote from contemporary sports as the fatal final run of an erstwhile Greek messenger was from the birth of the modern Olympic movement. Sport has become a complex commercial area of activity which competes with other popular entertainment industries. As with all entertainment activities, sports entertainment involves, to some degree, the protection of the economic interests concerning the dissemination of the event to the sporting public. Sport partakes in the dialectic struggle between 'taking' and 'protecting' which is the common thread among all entertainment industries. Those engaging in transactions with respect to sporting contests must, therefore, avail themselves of the legal safeguards against the unauthorized 'taking' of the commercial worth of those events.

This study has demonstrated that, from the perspectives of the authorized broadcaster and the sports promoter, Australian and Canadian law does not provide a coherent regime of protection with respect to television rights. Available mechanisms of protection are limited and inescapably oblique. Yet, legal uncertainty as to what exact subject matter is being purchased and sold, and to what extent, if at all, third parties may be prevented from engaging in piratical activities, is both detrimental and a disincentive to commercial and sporting activity. Indeed, such uncertainties appear to be particularly relevant with respect to the international competitive bidding surrounding the selection of sporting venues.

At a higher level, the case of televised sports discloses a disquieting facet of the methodology by which legal systems protect new intangible interests. A recurring theme throughout this century in the field of intellectual property has been the law's ability to respond to threatened piratical behaviour in relation to emerging technological developments. Legislative protection granted in the form of copyright or neighbouring rights in radio and television broadcasts, satellite and cable retransmissions, musical recordings, computer softwares and integrated circuits are specific illustrations of a broader debate. The regulation of

<sup>195</sup> See generally Goldlust, J., *Playing for Keeps: Sport, the Media and Society* (1987).

<sup>196</sup> Canada, *The Report of the Task Force on Broadcasting Policy* (1986) 84-97; Australia, *Review of National Broadcasting Policy* (1988) 15.

<sup>197</sup> E.g. Goldlust, J., *Playing for Keeps: Sport, the Media and Society* (1987); Klatell, D. and Marcus, N., *Sports for Sale: Television, Money and the Fans* (1988); McFarlane, P., 'The lure of the mega-dollar will Poison TV Sport', *Age, Green Guide Supplement* (Melbourne), 4 May 1991; Simpson, V. and Jennings, A., 'Good Sports Come Last in the TV Olympics', *Age* (Melbourne), 28 March 1992.

unauthorized telecasts of public venue sports is a variation on the theme. The central public policy rationale for protecting intellectual property is that legislative protection provides an incentive to creators, inventors and others to make investments of time, effort, energy, and expense required to produce performances which are appealing to the public. Simultaneously, unjust enrichment is prevented. The same motive would be applicable to promoters of sporting and other spectacles. Yet, this has not occurred. A preliminary analysis of whether or not sports and other public spectacles ought to receive neighbouring rights protection occurred over 30 years ago, well before the full impact of an ongoing audio-visual revolution was revealed. The current law of televised sports in its contemporary context leaves jurists puzzling why legislators have left unregulated a commercially important aspect of the entertainment industries whilst, over the same period, they have eventually and progressively protected the rights of performers, film makers, producers of recorded music and broadcasters. There is perhaps an unarticulated bias implicit in parliamentary inaction which regards sports as a somewhat less meritorious entertainment than other forms of popular culture. On the other hand, the absence of protection is probably a symptom of the orthodox analytical model's chronic inability to respond expeditiously to a constantly evolving communications landscape. The judicial branch defers to a legislative branch which, in turn, is preoccupied with more pressing matters. In view of this judicial conservatism and legislative indifference, the full risk of the inherent obsolescence of that branch of the law which exists to protect intangible interests is regrettably borne by very few in society.