

# Commercialisation of Sports Data: Rights of Event Owners over Information and Statistics Generated About Their Sports Events

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# COMMERCIALISATION OF SPORTS DATA: RIGHTS OF EVENT OWNERS OVER INFORMATION AND STATISTICS GENERATED ABOUT THEIR SPORTS EVENTS

CHRISTIAN FRODL\*

## I. INTRODUCTION<sup>1</sup>

Sports data has become an important factor in professional sports worldwide. Since the publication of Michael Lewis's nonfiction book *Moneyball*<sup>2</sup>—about the Oakland Athletics' approach to assembling a competitive baseball team based on empirical analyses of players—the fundamental importance and influence of statistics on professional sports has become mainstream knowledge. Data on match events and player performance is gathered and analysed in professional sports leagues around the globe.<sup>3</sup> Sports governing bodies have, in more recent years, sought to commercially exploit data collected in their respective sports. Centralized collection and effective marketing of sports data to betting or media organisations have emerged as integral parts of the business of sport. Major sport event owners, as well as federations, sports leagues, and clubs, have partnered with global brands such as International Business Machines (IBM) and Systems, Applications, and Products (SAP) to develop software solutions to facilitate the viable collection, management, and dissemination of sports data.<sup>4</sup>

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1. All translations in the text and footnotes are the Author's own. The Author's native language is German, so some words throughout the Article are in European form.

2. See generally MICHAEL LEWIS, *MONEYBALL: THE ART OF WINNING AN UNFAIR GAME* (2003).

3. See, e.g., *About STATS*, STATS, <http://www.stats.com/about/> (last visited Dec. 14, 2015); *About*, PROZONE SPORTS, <http://prozonesports.stats.com/about/> (last visited Dec. 14, 2015).

4. See News Release, Int'l Bus. Machs. Corp., *IBM Rallies Tennis Fans with Innovative Technology at the Australian Open 2014* (Jan. 20, 2014), <http://www-03.ibm.com/press/us/en/pressrelease/42981.wss>; Super User, *SAP Kicks Off New Partnership with the German Football Association*

Notwithstanding the foregoing, the law regarding the ownership of sports data is still unsettled. A comparative analysis of the legal situations in Australia, the United States, and Europe reveals that sports data is subject to copyright only in certain situations. Event owners, therefore, must rely on other proprietary rights and supplementary contractual measures to establish their rights over event-related facts and information.

Betting, media, and sports data organisations frequently refute the notion that event owners retain an exclusive right to collect and exploit sports data related to their events, often citing certain constitutional rights, such as freedom of information and freedom of the press. Alternatively, such organisations simply operate their businesses within jurisdictions where event owners will find it difficult or impossible to enforce any rights of ownership they may possess. From an event owner's perspective, the current state of the law regarding ownership of sports data is uncertain and does not adequately restrain the unlicensed collection and use of sports data.

This Article first provides a definition of sports data and a description of the sports data industry (Part II) before analysing the legal framework with regard to the legal protection of sports data in Australia, the United States, and Europe (Part III). This comparative analysis will illustrate that the obstacles confronting event owners as they attempt to protect their commercial interest in their event-related data are common in all jurisdictions. Hence, there is a need for specific legislation to ensure appropriate protection of their investments and adequate financial participation in the revenue streams generated from the exploitation of event-related data by the sports data industry (Part IV).

## II. THE FACTUAL BACKGROUND: SPORTS DATA, ITS GENERATION, AND UTILIZATION

### A. *What Is Sports Data?*

Sports data can be defined as all facts and information in relation to a sports event or sporting competition.<sup>5</sup> According to its generation, content, and

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(DFB), SAP GLOBAL SPONSORSHIPS (June 14, 2013), <http://old.sapsponsorships.com/press-coverage/arenas/item/402-sap-kicks-off-new-partnership-with-the-german-football-association-dfb>; *FCB and SAP Launch Partnership*, FC BAYERN MÜNCHEN AG (Aug. 19, 2014), <http://www.fcbayern.de/en/news/news/2014/fcb-and-sap-new-partnership-190814.php>.

5. See Christoph Röhl, *Schutzrechte an Sportdaten – am Beispiel von Regelwerken, Spielplänen und Tabellen* [*Proprietary Rights Towards Sports Data – Illustrated by Way of Example to the Rules of the Game, Fixture Lists, and Tables*], in FACETTEN DES SPORTRECHTS: REFERATE DER ACHTEN UND NEUNTEN INTERUNIVERSITÄREN TAGUNG SPORTRECHT [FACETS OF SPORTS LAW] 27, 32 (von Klaus Vieweg ed., 2009) (Ger.).

refinement level, sports data can be divided into the following categories: fixtures; event data and performance data; and raw data and refined data.

### 1. Fixtures

Perhaps the most fundamental examples of sporting data are the fixture lists drawn up by the respective sports bodies, be it for a league competition, a tennis tournament, or a horse race. Scheduling the single matches, match days, and kick-off times or laying down the starting grids, these fixtures are the bases for staging an event and the initial points for all facts and information generated about an event. This set of data is distinct from other sports data in one important respect: fixtures are created by a governing sports body as the core element of its organisational tasks. The creation of fixture lists comprises a comprehensive procedure consisting of several stages and taking into account multiple factors, such as the:

- start and end of a season;
- number of matches that must be played;
- dates reserved to other national, European, or international competitions;
- home-away sequence;
- competitive balance of the competition;
- requests by a club to play its fixture against another club at home or away on a particular date; and
- possible conflicts with other events and interests of other stakeholders, for example, the capacities of the federal or state police.<sup>6</sup>

For this purpose, event owners have developed special databases and computer software where the above criteria are entered to calculate the match schedule and, finally, produce a readable version of the fixture list. This fixture list is then reviewed, first internally and then by other relevant stakeholders,

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6. See Case C-604/10, *Football DataCo Ltd. v. Yahoo! UK Ltd.*, 2012 E.C.R. 115, 13 (regarding the English Premier League); Röhl, *supra* note 5, at 41; Gregor Lentze, *DFL's Licensing System for Fixture Lists: Analysis*, 9 *WORLD SPORTS L. REP.* 3, 4 (2011) (regarding the German Bundesliga); see also *Der Spielplan: Ein Meisterwerk von Mensch und Computer [The Fixture List – A Masterpiece of Human Beings and Machines]*, Bundesliga (June 19, 2013), [http://www.bundesliga.de/de/liga/news/der-spielplan-ein-meisterwerk-von-mensch-und-computer\\_0000257823.jsp](http://www.bundesliga.de/de/liga/news/der-spielplan-ein-meisterwerk-von-mensch-und-computer_0000257823.jsp).

such as law enforcement organisations.<sup>7</sup> The manual review, on one hand, allows for corrections to the computer-calculated fixtures, which might be necessary.<sup>8</sup> In addition, the rather schematic software-based process may be adapted with regard to individual aspects, like competitive balance, to ensure fair and thrilling competition over an entire season.<sup>9</sup>

## 2. Event Data and Performance Data

Another category of sports data is the vast array of data accumulated during the conduct of a sporting contest or competition. Such data is commonly subdivided into two categories: event data and performance data. Event data relates to all facts and information collected regarding:

- the external circumstances and conditions of an event, such as the weather, temperature, and attendance; and
- the single events occurring on the playing field or court (i.e., goals, fouls, assists, unforced errors, etc.).

Performance data measures the tactical and physical performance of athletes during a game, such as their movement, overall distance covered, or maximum speed for a single sprint.<sup>10</sup>

Event data and performance data are distinguishable by the manner in which the data is collected. Event data is assembled by manual research and observation of the game, either inside the stadium or from a televised recording of the sporting competition. Trained operators collect relevant information related to a sporting contest and enter it into a central database for further analysis. The database cumulates and aggregates the raw event data into statistics on players, teams, and the overall competitions (e.g., league tables and foul statistics).<sup>11</sup> More comprehensive products created from event data are player ratings or historical comparisons that, in addition to the database calculations, require an editorial processing of the event data.<sup>12</sup>

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7. See *Football DataCo*, 2012 E.C.R at 18.

8. *Id.*

9. See Röhl, *supra* note 5; *Der Spielplan: Ein Meisterwerk von Mensch und Computer*, *supra* note 6.

10. See, e.g., *Products*, IMPIRE AG, <http://www.bundesliga-datenbank.de/en/products> (last visited Dec. 14, 2015).

11. *Id.*

12. See, e.g., *Premier League Appoints Opta as New Data Partner*, BARCLAYS PREMIER LEAGUE

Performance data is also generated through camera-based systems, which track players and the ball after a pitch or on the court. Each player and the ball are assigned X- and Y-coordinates that the camera system captures over the match time. The raw X- and Y-coordinates are then entered into high-tech software to compute into statistics and graphics on positions, movement, and speed. An alternative to camera-based tracking systems is a sensor-based system, like Adidas miCoach, which is used by Major League Soccer (MLS).<sup>13</sup> These systems involve small data cells that fit into a player's base-layer clothing.<sup>14</sup> "Connected by a series of electrodes and sensors woven into the fabric of the base layer, the cell wirelessly transmits . . . [performance] data . . . from each player to a central computer," which then displays the data in a software application.<sup>15</sup> Examples for end products created by using performance data include heat maps showing the movements of a single player or comparisons on ball possessions during a match.<sup>16</sup>

### 3. Raw Data and Refined Data

A further distinction can be made between raw data and refined sports data. Raw data refers to the single event data or performance data collected on a match or an athlete (e.g., a yellow card or a goal in soccer). Refined data relates to aggregated and cumulated information in the form of statistics (e.g., the match-day results, the league ladder, or statistics on overall passes in a soccer match or on unforced errors in a tennis match).

Distinguishing between these two categories is also legally relevant. Each refinement step may create new proprietary rights, particularly if a statistic is visualized in graphics or otherwise illustrated. Ownership of sports data may, therefore, change depending on the level of refinement of the raw data and the manner of display.

#### *B. Generation of Sports Data—The Market Players*

There are three main players in the sports data market who collect and

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(Mar. 4, 2013), <http://www.premierleague.com/en-gb/news/news/2012-13/mar/premier-league-apoints-opta-as-new-data-partner.html>.

13. See *MLS, Adidas to Launch First "Smart Soccer League" in 2013*, MLSsoccer (July 19, 2012), <http://www.mlssoccer.com/news/article/2012/07/19/mls-adidas-launch-first-smart-soccer-league-2013>.

14. *Id.*

15. *Id.*

16. See, e.g., *Products & Services*, TRACAB, <http://tracab.hegogroup.com/products.aspx> (last visited Nov. 28, 2015).

utilize event and performance data: private companies, event owners, and clubs. Private companies first recognized the commercial potential of sports data. Some of these companies commenced trading in the sports data market as early as the 1980s. In the last decade, event owners themselves have entered the sports data market and started to collect data, including commissioning third parties with the collection of data. Finally, the clubs participating in professional sports leagues generate sports data to analyse player and team performance.

### 1. Private Companies Specialized in the Collection and Distribution of Sports Data

Private companies involved in the sports and media business first recognized the commercial value of accumulated sports data. In the United States, STATS LLC (STATS) was founded in 1981 out of Project Scoresheet, a non-profit network created by Bill James to collect baseball statistics.<sup>17</sup> In the following years, STATS developed a reporter network for Major League Baseball (MLB) and introduced the baseball scorecard, a tool for assembling baseball statistics.<sup>18</sup> By 1990, STATS also started operations for the National Football League (NFL).<sup>19</sup> It also joined forces with Associated Press in 2005 and continues to evolve to maintain its status as one of the leading companies in the sports data industry.<sup>20</sup>

Other companies in the market have undergone a similar evolution. In Germany, IMPIRE AG (IMPIRE) was founded in 1988 with a focus on creating a database for supplying broadcast right holders with sports data related to Bundesliga matches.<sup>21</sup> IMPIRE expanded its operations significantly since then and today services a broad range of national and international leagues, clubs, and media companies with event and performance data of soccer matches.<sup>22</sup> In 2014, deltatre, the Italian market leader in digital sports media services, acquired IMPIRE, thus forming a company that provides sports data services for various

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17. See Ben McGrath, *The Professor of Baseball: Can the Master of Statistics Help the Red Sox Beat the Yankees?*, NEW YORKER (July 14, 2003), <http://www.newyorker.com/magazine/2003/07/14/the-professor-of-baseball>; STATS LLC, FACEBOOK, <https://www.facebook.com/STATSllc/info?tab=milestone> (last visited Dec. 14, 2015).

18. STATS LLC, *supra* note 17.

19. *Id.*

20. *Id.*

21. Deltatre AG, IMPIRE AG, <http://www.bundesliga-datenbank.de/en/19/> (last visited Dec. 14, 2015).

22. *Id.*

stakeholders in European sports.<sup>23</sup>

This combination of a company with an intimate knowledge of sports and sports data and a leading firm within the mainstream media industry mirrors the overall trend in the sports data market. In the United Kingdom, PERFORM Group, a media powerhouse listed on the London Stock Exchange, recently acquired Opta and is now responsible for data collection regarding the top three soccer leagues in Europe.<sup>24</sup> Bloomberg Sports LLC's establishment of its own sports data subsidiary is a further indication of the value that major media organisations accord to the collection and dissemination of sports data.<sup>25</sup>

The previous years have also led to further market concentration through mergers of sports data collection specialists. Prozone Sports Ltd., a Leeds-based company specializing in performance data analysis, merged with Sports Universal Process, the owner of the French market leader Mastercoach Amisco, in 2011 to form a "global industry leader in sports data and performance analytics."<sup>26</sup> Sportradar, which focuses on sports data collection for betting purposes, recently acquired SportsData, a live sports data provider specializing in United States sports, to enhance its global offering.<sup>27</sup>

In addition to these established companies, smaller independent firms operate in the market and offer sports data-related products. They commonly collect sports data by observing televised sports events and often distribute the sports data with broadcasting footage, which visualizes the information and statistics. These companies frequently operate without a license from event owners and are often based in foreign jurisdictions where enforcement of the event owners' rights is almost impossible. Some also try to collect sports data physically inside a venue, thereby breaching an event owner's ticketing terms and conditions.<sup>28</sup> This grey market significantly jeopardises the commercial

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23. *Deltatre Acquires German Company IMPIRE AG*, DELTATRE (Feb. 5, 2014), <http://www.deltatre.com/2014/02/deltatre-acquires-german-company-impire-ag>.

24. *Opta Acquired by PERFORM Group*, OPTA (July 10, 2013), <http://www.optasports.com/news-area/news-opta-acquired-by-perform-group.aspx>.

25. See *STATS INSIGHTS*, <http://www.stats.com/insights/> (last visited Dec. 14, 2015); *STATS LLC, BUSINESSWEEK*, <http://www.bloomberg.com/research/stocks/private/snapshot.asp?privcapId=739452> (last visited Dec. 14, 2015).

26. *PROZONE & AMISCO Join Forces to Advance Sports Performance Analysis*, F.C. BUS. (June 21, 2011), [fcbusiness.co.uk/news/article/newsitem=1259/title=prozone++amisco+join+forces+to+advance+sports+performance+analysis](http://fcbusiness.co.uk/news/article/newsitem=1259/title=prozone++amisco+join+forces+to+advance+sports+performance+analysis).

27. See Press Release, SportsData, SportsData Acquired by International Data Company Sportradar (Dec. 2, 2013), <http://www.sportradar.us/2013/12/02/sportsdata-acquired-international-data-company-sportradar/>.

28. See, e.g., Alistair Osborne, *Tennis Arrest at Company Set up by Former Betfair Staff*,



value of event-related data for event owners.

## 2. Collection and Distribution of Sports Data by Sports Bodies

While private enterprises recognized early on the value of a systematic collection and commercialisation of sports data, most sports bodies did not actively participate in the market for a long time. This trend changed because the strategic and commercial value of sport data has been fully recognized.

In recent years, many professional sport leagues set up their own databases into which they transfer, store, and distribute sports data from their competitions. In 2001, the Premier League founded Football DataCo Ltd., which acts on behalf of the professional football leagues in the United Kingdom to protect, market, and commercialise the sports data related to the leagues' matches.<sup>29</sup> Liga de Fútbol Profesional followed a similar scheme when partnering with the broadcasting company Media Pro and commissioning Opta and TRACAB with the collection of match data for all matches of the first and second Spanish division.<sup>30</sup> The Bundesliga tendered the contract for sports data collection for all matches in 2013.<sup>31</sup> At the same time, it invested in creating its own database for the storage and distribution of event and performance data and established a licensing scheme for the marketing of this data by third companies.<sup>32</sup>

Other professional sports bodies have not fallen behind in their development. The National Basketball Association (NBA) announced an agreement with STATS in 2013 to install player-tracking systems at all NBA games.<sup>33</sup> The National Rugby League engaged with Prozone Sports for a

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TELEGRAPH (Jan. 21, 2014), <http://www.telegraph.co.uk/finance/newsbysector/retailandconsumer/leisure/10588270/Tennis-arrest-at-company-set-up-by-former-Betfair-staff.html>. Charges, however, were dropped later "based on the circumstances of this case." Rachel Baxendale, 'Courtsiding' Tennis Betting Charge Dropped Against British Man, AUSTRALIAN (Mar. 6, 2014), <http://www.theaustralian.com.au/sport/tennis/courtsiding-tennis-betting-charge-dropped-against-british-man/story-fnbe6xeb-1226846823981>.

29. *Welcome to Football DataCo*, FOOTBALL DATACO, <http://www.football-dataco.com/index.html> (last visited Dec. 14, 2015).

30. *See Partnerships*, OPTAPRO, <http://www.optasportspro.com/about/partnerships.aspx> (last visited Nov. 28, 2015).

31. *League Notes: DFL Awards Match Data Collection Contract to Opta and Hego Trac*, SPORTSBUSINESS DAILY GLOBAL (Jan. 8, 2013), <http://www.sportsbusinessdaily.com/Global/Issues/2013/01/08/Leagues-and-Governing-Bodies/Notes.aspx>.

32. *Id. See, e.g., Statistics*, BUNDESLIGA, <http://www.bundesliga.com/en/stats/> (last visited Dec. 14, 2015).

33. Ira Boudway, *The NBA Will Now Track Every Player's Movements*, BUSINESSWEEK (Sept. 6, 2013), <http://www.bloomberg.com/bw/articles/2013-09-06/the-nba-will-now-track-every-players-movements>.

collection and analysis of performance data.<sup>34</sup> In professional tennis, the Australian Open partnered with IBM and set up a “real-time analytics and immediate video replay technology,” which involves “processing the data emerging from several matches across the grand slam [tournament], [and] computing every fault, forced error and break point.”<sup>35</sup> Such data is made available to accredited journalists and fans via mobile applications.<sup>36</sup> Today, many leagues and other sports bodies act in the sports data market themselves and thereby compete with the established private companies. This leads to the legal question: to what extent the former may exclude the latter from data collection and distribution in relation to their events?

### 3. Clubs

Finally, the clubs participating in the professional leagues generate match data themselves to analyse player and team performance. Usually, the clubs will commission the match data collection to one of the private sports data collection companies.<sup>37</sup> Thus, clubs are a determining factor for the overall industry. On the one hand, clubs influence the industry standards for the data quality with the data demands for comprehensive and precise statistics and applications. On the other hand, clubs act as both buyers and sellers of sports data in the market and are strategically and economically important players in the industry.

#### *C. Utilization of Sports Data*

Sports data is utilized in four main purposes: analysis of athlete and team performance, creation of bets, media and gaming industry, and sponsorships.

##### 1. Performance Analysis of Players and Teams

As described above, the analysis of team and player performance was the starting point for the utilization of data in the sports industry. Initially limited to rather general statistics on the game, today, detailed data on players and teams

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34. *NRL Partnering with Prozone Sports*, NRL, <http://www.nrl.com/nrl-partnering-with-prozone-sports/tabid/10874/newsid/75763/default.aspx> (last visited Dec. 14, 2015).

35. Harrison Polites, *How the Australian Open Turns Match Data into Dollars*, BUS. SPECTATOR (Jan. 17, 2004), <http://www.businessspectator.com.au/article/2014/1/17/technology/how-australian-open-turns-match-data-dollars>.

36. *See id.*; News Release, Int’l Bus. Machs. Corp., *supra* note 4.

37. *See, e.g., Opta Clients*, OPTA, <http://www.optasports.com/who-we-work-with.aspx> (last visited Dec. 14, 2015); *About*, *supra* note 3.

is available, including information on tactical and physical performances. This comprehensive set of sports data is used by virtually every club in the top professional leagues and most international federations to further enhance athletes' performance and, thus, the sporting success. The customer lists of sports data providers include not only an extensive list of all prominent soccer clubs but also include international federations of all major sports.<sup>38</sup>

## 2. Betting Industry

The betting industry has utilized sports data for a long time. Because no bet can be created without having teams, players, or starting grids available, fixture lists are essential for the betting companies and bookmakers' businesses. Today, various forms of live betting on almost every single event within a game are also available. Online betting companies, such as Bwin and Betfair, and independent bookmakers, therefore, are main customers of sports data firms, like Sportradar and Running Ball, which have specialized in the collection and distribution of live sports betting data.<sup>39</sup> The betting industry, hence, is an important revenue generator, both for sports data companies and event owners. At the same time, however, the use of fixture lists and other event data by betting companies raises a legal question: to what extent the consent of an event owner is required for such utilization? Not surprisingly, the industry gave rise to many of the leading cases concerning property rights regarding sports data.

## 3. Media and Gaming Industries

Furthermore, sports data is increasingly exploited in the media and gaming industries. Whereas line-ups, results, and league tables have been used in print media and broadcasts for decades, technical developments in the digital era allow for far more comprehensive live applications. Sport broadcasters worldwide make use of these opportunities and improve their products with heat maps and other real-time graphics, which visualize statistics on the screen.<sup>40</sup> Besides, sports data is essential for the creation of fantasy leagues and other electronic games, which are based on real-life data on players and teams. Examples of the gaming industry's use of sports data include FIFA 14, a soccer

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38. See, e.g., *About*, *supra* note 3; *Clients*, DELTATRE, <http://www.deltatre.com/clients> (last visited Dec. 14, 2015); *Opta Clients*, *supra* note 37.

39. See *Group Set-Up*, SPORTRADAR, <https://www.sportradar.com/about-us/group-set-up/> (last visited Nov. 28, 2015); see also *RUNNINGBALL GLOBAL SPORTS DATA*, <http://www.rball.com> (last visited Dec. 14, 2015).

40. See, e.g., *On-Screen*, OPTA, <http://www.optasports.com/services/broadcast/data-graphics/on-screen.aspx> (last visited Dec. 14, 2015).

manager game published by Electronic Arts;<sup>41</sup> fantasy sports leagues marketed by leagues, newspapers, and sports magazines;<sup>42</sup> and trading cards and stickers offered by companies like Topps.<sup>43</sup> The sale and purchase of sports data by media and gaming companies have become important factors in the sports data industry.

#### 4. Sponsorships

Finally, sports data becomes increasingly more relevant in the context of sponsorships. The best known example is the Castrol Index, a player grading system based on match data, which is part of the sponsorship agreement between Castrol and FIFA.<sup>44</sup> Another approach to commercialise sports data in sponsorships is by granting rights to a data collection partner to trade under the designation of an “official data supplier.”<sup>45</sup> Such an agreement combines the commissioning of data supply services with sponsorship elements. However, sports data still plays an ancillary role in sponsorship agreements; event owners and the commercialisation of sports data in the sponsorship segment is still developing.

### III. RIGHTS OVER SPORTS DATA—THE LEGAL FRAMEWORK IN AUSTRALIA, THE UNITED STATES, AND EUROPE

Despite the expanded utilization and commercialisation of sports data in the last decade, the legal status regarding the collection and ownership of sports data is still unclear. As a comparative analysis of the legal situation in Australia, the United States, and Europe shows, event owners face similar legal obstacles regarding the protection of fixture lists, racing fields, and other event-related facts and information.

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41. See, e.g., *FIFA 14*, EA SPORTS, <http://www.easports.com/fifa/fifa-14> (last visited Dec. 14, 2015).

42. See, e.g., *Fantasy Football*, NFL, <http://www.nfl.com/fantasyfootball> (last visited Dec. 14, 2015); TELEGRAPH FANTASY FOOTBALL, <https://fantasyfootball.telegraph.co.uk> (last visited Dec. 14, 2015).

43. See *Trading Cards*, TOPPS, <http://www.topps.com/collectibles/trading-cards/all-trading-cards.html> (last visited Dec. 14, 2015).

44. See *The Castrol Index: Analysing Peak Performance*, FIFA (May 22, 2014), <http://www.fifa.com/worldcup/news/y=2014/m=5/news=the-castrol-index-analysing-peak-performance-2341561.html>.

45. See, e.g., *PA Named Official Data Supplier for the Football Conference*, PRESS ASS'N, <https://www.pressassociation.com/Aboutus/PressOffice/2014-01-20/PA-named-official-data-supplier-for-the-Football-Conference> (last visited Dec. 14, 2015).

### A. Australia

The legal protection of sports data in Australia is heterogeneous. With regard to the betting industry, the commercial interests of event owners are protected by state laws, which allow event owners to negotiate a contractual agreement with betting and wagering operators as a condition to using racing lists and other event-related information for betting purposes. Where no specific legislation exists, event owners must rely on established proprietary rights for safeguarding the exploitation of event-related data.

#### 1. State Legislation Regarding the Use of Sports Data for Betting Purposes

All states and territories of the Commonwealth of Australia enacted legislation that governs betting on racing competitions and sports events in general. These regulatory regimes require betting and wagering operators to receive approval of, or enter into an agreement with, sports governing bodies for the use of race fields and other information relating to their sports events.<sup>46</sup> The primary legislative aim of these statutory provisions is to foster the integrity of the industry by disclosing the companies that are involved in sports betting, sharing information regarding the types of bets offered, and placing restrictions on the contingencies, which may be used for creating sports bets.<sup>47</sup> At the same time, however, sports bodies are put into the position to negotiate contractual agreements with sports betting providers and, thus, benefit from the revenue streams of the gambling industry.<sup>48</sup>

In Victoria, for example, the Gambling Regulation Act of 2003 provides that a sports event must be approved by the Victorian Commission for Gambling and Liquor Regulations as a condition to offer bets on such events.<sup>49</sup> Sporting organisations must apply to the Commission for Gambling and Liquor Regulations for approval as the sports controlling body for betting purposes.<sup>50</sup> Once this approval is obtained, the sports controlling body is entitled to

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46. See, e.g., *Racing Act 1999* (ACT) pt 5B div 5B.1; *Racing Administration Act 1998* (NSW) s 33 (Austl.); *Gambling Regulation Act 2003* (Vic) ss 2.5.19, 4.5.1 (Austl.); *Betting Control Act 1954* (WA) s 27D.

47. See, e.g., *Sports Betting*, VCGLR, <http://www.vcglr.vic.gov.au/home/gambling/new+applicants/sports+betting> (last visited Dec. 14, 2015).

48. Ben Sellenger, *Chasing the Golden Goose: A Legal Approach to Sports Assessing Gambling Revenue*, 34 AUSTL. BUS. L. REV. 7, 7 (2006); see also DELOITTE, OPTIMAL PRODUCT FEE MODELS FOR AUSTRALIAN SPORTING BODIES 6 (2012), [http://australianwageringcouncil.com/assets/docs/Deloitte\\_-\\_Optimal\\_Product\\_Fees\\_Report.pdf](http://australianwageringcouncil.com/assets/docs/Deloitte_-_Optimal_Product_Fees_Report.pdf).

49. See *Gambling Regulation Act 2003*, s 4.5.1.

50. *Id.*

negotiate a contractual agreement with the sports betting provider, who is prohibited from offering bets on the sport event prior to the conclusion of such agreement.<sup>51</sup> If no agreement is reached, the Commission for Gambling and Liquor Regulations may determine the terms and conditions the sports betting provider may offer bets for the sports event in question.<sup>52</sup> Furthermore, the Commission for Gambling and Liquor Regulations “prohibit[s] particular contingencies considered inappropriate for betting purposes.”<sup>53</sup>

All major event owners in Victoria must obtain approval as the sports controlling body of their sport for betting purposes.<sup>54</sup> As a result, the event owners can restrict the use of racing fields, fixture lists, and other event-related information for betting purposes if the sport betting provider is not entering into an agreement. Cricket Australia, for example, approved various betting partners who accepted information sharing and other integrity requirements as well as a share of revenue generated from betting on cricket matches played under the auspices of Cricket Australia.<sup>55</sup>

In some states and territories, such as New South Wales, the gambling legislation also imposes a statutory fee for the use of racing field information.<sup>56</sup> Australian-licensed wagering operators must pay a fee to Racing New South Wales, the sports governing body, “equal to 1.5% of the wagering operator’s . . . turnover on [New South Wales] thoroughbred race meetings to the extent that turnover exceeds an ‘exempt turnover threshold’” of 5 million AUD in a year.<sup>57</sup>

The above-mentioned gambling laws answer the legal question as to who owns the exploitation right to event-related information in favour of the sport governing bodies. Most state legislation is, however, limited in its scope to racing and, in all states, only applies to the utilization of event-related information for betting purposes.

Other sports event-specific legislation under Australian law (e.g., the Major

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51. *Id.*

52. *Id.* at s 4.5.4(2).

53. *Sports Betting*, *supra* note 47; *see also Gambling Regulation Act 2003*, ss 4.5.1(3)(d), 4.5.4(2).

54. *See Sports Controlling Bodies*, VCGLR, <http://www.vcglr.vic.gov.au/home/gambling/new+applicants/sports+betting/sports+controlling+bodies> (last visited Feb. 24, 2015).

55. *See Approved Sports Betting Providers*, CRICKET AUSTL., <http://www.cricketaustralia.com.au/about/partners/betting> (last visited Dec. 14, 2015); *see also Sports Controlling Bodies*, *supra* note 54.

56. *See Racing Administration Act 1998* (NSW) s 33 (Austl.).

57. RACING N.S.W., RACE FIELDS LEGISLATION—AUSTRALIAN WAGERING OPERATORS 2 (2008), [http://www.racingnsw.com.au/site/\\_content/document/00000055-source.pdf](http://www.racingnsw.com.au/site/_content/document/00000055-source.pdf); *see also Racing Administration Act 1998*, s 33.

Events Act of 2009 (NSW) and the Major Sporting Events Act of 2009 (Vic)) provides event owners an exclusive right to broadcast or advertise an event but does not relate to the collection and utilization of sports data.<sup>58</sup> Outside the scope of the above-mentioned gambling laws, event owners must, consequently, refer to recognized proprietary rights under Australian law to establish their ownership or exclusive exploitation rights of sports data.

## 2. Legal Protection for Utilization of Sports Data Outside the Betting Industry

Since the High Court of Australia's decision in *Victoria Park Racing & Recreation Grounds Co v Taylor*,<sup>59</sup> it is a settled position under Australian law that the activities of a sport event are not legally protected. The facts underlying the court's decision involved the unauthorized broadcasting of a sports event.<sup>60</sup> The rationale of this decision, however, is analogous to the collection of sports data. As Chief Judge Latham stated,

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. . . . Further, as I have already said, the mere fact that damage results to a plaintiff from such a description cannot be relied upon as a cause of action.<sup>61</sup>

As a result, the right to exclude third parties from collecting and utilizing event-related data may only be established under general copyright laws or related proprietary rights.

### *a. Protection Under Copyright Laws*

In accordance with acknowledged international standards, the Copyright Act of 1968 (Cth) establishes the exclusive rights for a creator to reproduce, publish, publicly communicate, or make adaptations to literary, dramatic,

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58. See generally *Major Events Act 2009* (NSW) (Austl.); *Major Sporting Events Act 2009* (Vic) (Austl.).

59. (1937) 58 CLR 479, 496 (Austl.).

60. *Id.* at 480–81.

61. *Id.* at 496.

musical, or artistic works.<sup>62</sup> For copyright protection, a work must be original (i.e., represent the independent application of knowledge, judgment, skill, or labour) and exist in a material form.<sup>63</sup>

To meet the originality standard, a work does not necessarily need to be innovative. Rather, Australian copyright law follows “a ‘sweat of the brow’ approach” and also rewards quantity of effort, provided that the work represents the independent application of knowledge, judgment, skill, or labour and is original in the form it is expressed.<sup>64</sup> Accordingly, section 10 of the Copyright Act expressly includes compilations in its definition of a literary work.<sup>65</sup>

In *Desktop Marketing Systems Proprietary Ltd v Telstra Corp*,<sup>66</sup> the Federal Court of Australia found that the White and Yellow Pages were original works where copyright subsisted, given the labour and expense involved in compiling these telephone directories.<sup>67</sup> This assessment, however, was questioned in the 2009 High Court decision of *IceTV Proprietary Ltd v Nine Network Australia Proprietary Ltd*.<sup>68</sup> The court emphasized that “[c]opyright does not protect [mere] facts or information” but only “the particular form of expression of [such] information, namely the words, figures and symbols in which [it is] expressed, and the selection and arrangement of that information.”<sup>69</sup> In an obiter dictum, the court suggested that the substantial labour and incurred substantial expense in assembling information are not sufficient for copyright protection.<sup>70</sup> Rather, authors must establish that the intellectual and financial input was directed to the particular form of expression and to the originality of the compilation.<sup>71</sup>

In accordance with the court’s approach, the federal court, in a subsequent decision, denied copyright protection for two particular telephone directories because the authors did not establish “‘independent intellectual effort’ and / or the exercise of ‘sufficient effort of a literary nature’” in creation

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62. See *Copyright Act 1968* (Cth) s 31(1) (Austl.).

63. See Sellenger, *supra* note 48, at 19 (citing *Copyright Act 1968*, s 32(1)).

64. See *id.*

65. *Copyright Act 1968*, s 10(1).

66. See generally (2002) 119 FCR 491 (Austl.).

67. *Id.* at 497; see also Tanya Aplin, *When Are Compilations Original?*, 23 EUR. INTEL. PROP. REV. 543, 543 (2001).

68. See generally (2009) 239 CLR 458 (Austl.).

69. *Id.* at 472.

70. *Id.* at 480.

71. *Id.* at 472, 480; see also Laila Hamzi & Amelia Lynch, *Australian & European Approach to Fixture List Rights*, 10 WORLD SPORTS L. REP. 3, 3 (2011).



of the compilations.<sup>72</sup>

Following these decisions, satisfying the standards for copyright protection of sports data appears difficult. Because mere facts and information cannot be copyrighted, raw event data and performance data do not qualify for protection under copyright law. Also, the collation and structured assembling of such data generally will not suffice to attach a copyright, even if special skills and knowledge are required and substantial investments are incurred by an event owner in assembling the data. Copyright, however, may subsist in refinements of raw data if it can be established that independent intellectual effort or sufficient effort of a literary nature was required for its creation. In most cases, this will be true for sophisticated applications, which involve additional editorial or graphical work. Fixture lists and other basic statistics generally might fall short of the standard of originality where it cannot be established that independent intellectual effort to create the particular form of expression or its selection and arrangement was required.<sup>73</sup>

#### *b. Protection Under Other Property Laws*

Establishing protection of event-related data under other property laws is just as difficult. Contrary to other jurisdictions, unfair competition and unjust enrichment are not recognized as independent actions under Australian law.<sup>74</sup> As a result, the use of fixture lists and other sports data cannot be prohibited based on these legal defenses. In the absence of a general property right for sport events and given the financial investments and the business risks for event owners, the lack of defenses may be criticized for good reasons.<sup>75</sup> The current law, however, does not enable event owners to successfully claim any rights over sports data based on these legal institutions.

Furthermore, the tort of passing off, in most cases, is not applicable for event owners to argue for an exclusive exploitation right regarding event-related data. A passing off claim requires that the reputation and goodwill of a name or business are wrongfully used to represent that other goods or services have a particular association, quality, or endorsement, which subsequently deceives or

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72. *Telstra Corp Ltd v Phone Directories Co Pty Ltd* [2010] FCA 44 (8 February 2010) ¶ 344 (Austl.).

73. See Hamzi & Lynch, *supra* note 71.

74. See *Vict Park Racing & Recreation Grounds Co v Taylor* (1937) 58 CLR 479, 509 (Austl.); *Moorgate Tobacco Co Ltd v Philip Morris Ltd* (1984) 156 CLR 414, 445–46 (Austl.); Sellenger, *supra* note 48, at 11.

75. See Brian F. Fitzgerald & Leif Gamertsfelder, *A Conceptual Framework for Protecting the Value of Informational Products Through Unjust Enrichment Law*, 16 AUSTL. B. REV. 257, 257 (1998).

misleads ordinary consumers of these goods or services.<sup>76</sup> These conditions are rarely met in the context of sports data collection and utilization. The collection of sports data by private companies is based on their own skills and efforts and does not constitute a misrepresentation of the sports bodies' reputation or goodwill, even if the collation is carried out without any authorization of an event owner. The marketing of such raw or refined data will generally occur in the private companies' own trade name and without a specific reference to a sports body's business, other than the use of its name for identification of a particular sporting competition. As held by the court in *S & I Publishing Proprietary Ltd v Australian Surf Life Saver Proprietary Ltd*,<sup>77</sup> the descriptive use of a league or association's name does not constitute a misrepresentation.<sup>78</sup> Even if third parties use fixture lists or other basic statistics created by a sports body, it is doubtful whether such use will result in a wrongful representation regarding the quality or endorsement of such products and thereby deceive or confuse end customers, which in most cases includes commercial enterprises as well.<sup>79</sup> As a result, except in extraordinary circumstances, an event owner will not be able to establish a claim for passing off regarding the collection and utilization of event-related data by third parties.

*c. Incidental Intellectual Property Rights and Control of Physical Access to the Venue*

Event owners must resort to supplementary measures to safeguard the exploitation of their sports data. One approach is to rely on incidental intellectual property rights, which attach to the fixture lists and other sports data products (e.g., the league logo or the emblem of championship trophies protected by trademarks). Such incidental protection was successfully litigated in other contexts.<sup>80</sup> This incidental protection, however, can only become relevant when a sport governing body markets products created from event and performance data labelled with copyrighted symbols or trademarks are utilized by a third party for business purposes. Furthermore, the incidental intellectual property rights must not fall within the scope of the fair dealing exceptions

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76. See *Conagra Inc v McCain Foods (Aust) Proprietary Ltd* (1992) 33 FCR 302, 308–09 (Austl.); Sellenger, *supra* note 48, at 16.

77. See *generally* (1998) 88 FCR 354 (Austl.).

78. *Id.* at 363; see also Sellenger, *supra* note 48, at 13.

79. Sellenger, *supra* note 48, at 17.

80. See, e.g., Joined cases C-403 & C-429/08, *Football Ass'n Premier League Ltd. v. QC Leisure*, 2011 E.C.R. I-09083, ¶ 149; *Football Association Premier League Ltd. v. Panini UK Ltd.*, [2003] EWCA (Civ) 995 [27], [37], [2004] 1 WLR 1147 (Eng.).

established under the Copyright Act of 1968 (Cth).<sup>81</sup>

Regarding the initial collection of sports data, event owners may facilitate their exclusive exploitation rights by controlling physical access to the venue. As suggested in *Victoria Park Racing & Recreation Grounds*, event owners are free to restrict access to their events by physical means and corresponding contractual agreements.<sup>82</sup> The court also considered that the contractual restriction of the disclosure of information was legally valid to protect the commercial exploitation of an event.<sup>83</sup> Hence, by structuring the ticketing terms and conditions and media accreditations accordingly, collection of sports data inside a venue may be prohibited or permitted only after payment of a license fee. These supplementary measures, however, do not protect event owners against the collection of sports data outside a venue (i.e., by observing an event on television).

### B. United States

Similar to Australia, event owners in the United States have sought to establish protection of sports data under copyright laws and property laws, namely the torts of unfair competition and publicity. The limited success of such attempts may be exemplified by the following cases, which involve three major sports event owners: the NBA, MLB, and the Professional Golfers Association (PGA), the governing body of the United States professional golf tour.

#### 1. *National Basketball Association v. Motorola Inc.*

Regarding the copyright protection of sports data, the legal situation in the United States aligns with the above-described legal status in Australia. In *Feist Publications Inc. v. Rural Telephone Service Co.*,<sup>84</sup> the U.S. Supreme Court emphasized that United States law requires originality as a “prerequisite for copyright protection” and that facts are not protected under copyright laws.<sup>85</sup> Accordingly, the Court held that a compilation of facts is not copyrightable *per se*; rather, *the facts are* only protected if they “are selected, coordinated, or arranged *in such a way that* the resulting work as

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81. See *Copyright Act 1968* (Cth) ss 40–42 (Austl.). For a discussion on incidental use of trademarks and copyrighted symbols in the context of the sports industry, see *Panini*, [2003] EWCA (Civ) [27], [39].

82. *Vict Park Racing & Recreation Grounds Co Ltd v. Taylor* (1937) 58 CLR 479, 494 (Austl.).

83. *Id.* at 526–27.

84. See generally 499 U.S. 340 (1991).

85. *Id.* at 351, 356.

a whole constitutes an original work of authorship.”<sup>86</sup> Thus, the Court rejected the application of the “sweat of the brow” doctrine, concluding, as in Australia, that the mere assembly of raw event or performance data is not copyrightable.<sup>87</sup>

These principles were applied to the collection and commercialisation of sports data in *National Basketball Ass’n v. Motorola, Inc.*<sup>88</sup> The case concerned the collection of event data from NBA matches by the sports data provider STATS.<sup>89</sup> STATS observed the broadcast of NBA matches and transmitted the relevant events to a sports information service of the telecommunications provider Motorola.<sup>90</sup> The NBA, in the appeals proceedings, claimed that the collection and commercial distribution of match-related data infringed its copyright and broadcast of NBA games.<sup>91</sup>

The court of appeals, however, denied copyright protection for the NBA games themselves “because they do not constitute ‘original works of authorship’ under [United States copyright laws].”<sup>92</sup> Regarding the game broadcasts, the court found that Motorola and STATS did not infringe the NBA’s copyright because they did not retransmit the broadcast but only reproduced facts by observing it.<sup>93</sup> In accordance with the U.S. Supreme Court’s decision in *Feist Publications*, the court of appeals held that such facts were not copyrightable and that STATS and Motorola, therefore, did not infringe any protectable rights of the NBA.<sup>94</sup>

In addition to the copyright claim, the NBA asserted an action of unfair competition.<sup>95</sup> Contrary to the High Court of Australia, the United States Supreme Court previously recognized an independent action for unfair competition in *International News Service v. Associated Press*.<sup>96</sup> Subsequently,

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86. *Id.* at 356 (quoting 17 U.S.C. § 101 (1976)).

87. *Id.* at 357.

88. *See generally* 105 F.3d 841 (2d Cir. 1997).

89. *Id.* at 843–44.

90. *Id.* at 844.

91. *Id.*

92. *Id.* at 846.

93. *Id.* at 847.

94. *Id.*; *see also* Nat’l Football League (NFL) v. Governor of Del., 435 F. Supp. 1372, 1378 (D. Del. 1977); Wm. Tucker Griffith & Ekaterina Gordeeva, Note & Comment, *Beyond the Perfect Score: Protecting Routine-Oriented Athletic Performance with Copyright Law*, 30 CONN. L. REV. 675, 708 (1998); Claudia Werner, Case Note & Comment, *NBA v. Motorola & STATS, Inc.: Real-Time Basketball Scores – News or Property?*, 7 DEPAUL-LCA J. ART & ENT. L. 288, 303 (1997).

95. *Motorola*, 105 F.3d at 844.

96. 248 U.S. 215, 242 (1918).

in the proceedings, the NBA argued that the collection and distribution of the event data by STATS and Motorola constituted a misappropriation of time-sensitive information, which was generated at its expense; thus, the NBA argued the collection and distribution must be considered an illegal free riding of its services of staging and broadcasting professional basketball matches.<sup>97</sup> The court of appeals, however, did not concur with this argument for two reasons. First, the collection and retransmission of event data about the matches occurred at the expense of STATS and Motorola.<sup>98</sup> Second, the data collection and distribution was a different service than the game staging and broadcasting and, thus, did not constitute free riding of the NBA services.<sup>99</sup> As a result, the NBA could not prevent STATS and Motorola from collecting and commercially distributing NBA game data.<sup>100</sup>

2. *C.B.C. Distribution & Marketing, Inc. v. Major League Baseball Advanced Media, L.P.*

Another example that illustrates the difficulties faced by the sports leagues in establishing a proprietary right with regard to event-related data is the case of *C.B.C. Distribution & Marketing, Inc. v. Major League Baseball Advanced Media, L.P.*<sup>101</sup>

CBC markets, distributes and sells fantasy sports products, including fantasy baseball games [which are] accessible over the Internet. . . . In addition to fantasy sports games, CBC's website provides up-to-date information on each player to assist game participants in selecting players for and trading players on their fantasy teams. This information includes [baseball statistics] which [are] typically [available in the public domain,] such as players' batting averages, at bats, hits, runs, doubles, triples, [or] home runs . . . .<sup>102</sup>

In 2005, Major League Baseball Advanced Media (a subsidiary of MLB) refused to grant CBC a new license for its services because it decided to launch

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97. See *Motorola*, 105 F.3d at 847–48.

98. *Id.* at 854.

99. *Id.* at 853–54.

100. *Id.* at 854.

101. See generally 443 F. Supp. 2d 1077 (E.D. Mo. 2006).

102. *Id.* at 1080.

its own online fantasy game.<sup>103</sup> CBC filed a declaratory relief action, requesting summary judgment that its use of the players' names and the aforementioned baseball statistics did not violate the players' publicity rights or MLB's ownership of the statistics.<sup>104</sup> In its decision, the United States District Court of Missouri held that the mere use of player names and publicly known information constitutes neither an infringement of MLB's right of publicity nor of MLB's proprietary right.<sup>105</sup> Furthermore, the court expressly held that CBC was protected by the constitutional rights of free speech under the First Amendment.<sup>106</sup>

### 3. *Morris Communications Corp. v. PGA Tour, Inc.*

A positive outcome for event owners, however, was achieved in *Morris Communications Corp. v. PGA Tour, Inc.*<sup>107</sup> Here, the media company Morris Communications brought a claim against the PGA, arguing that the PGA monopolized the publication of golf scores in violation of section 2 of the Sherman Antitrust Act.<sup>108</sup> The PGA "developed a Real-Time Scoring System ('RTSS') that allow[ed]" for real-time online publication of golf tournament events.<sup>109</sup> Media companies received access to the system under certain conditions, such as a thirty-minute delay to the real-time event before publishing the scores.<sup>110</sup> Morris refused to adhere to such conditions and filed an antitrust claim against the allegedly anticompetitive conduct of the PGA.<sup>111</sup> The court of appeals, however, held that a company, even if it was a monopolist, which invested in the development of a copyrighted product, is not obliged to grant third parties access to its products or services.<sup>112</sup> Furthermore, the court found

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103. *Id.* at 1081.

104. *Id.* at 1081–82. See generally Joshua Waller, *The Right of Publicity: Preventing the Exploitation of a Celebrity's Identity or Promoting the Exploitation of the First Amendment?*, 9 UCLA ENT. L. REV. 59 (2001). With particular regard to the sports industry, see Beth A. Cianfrone & Thomas A. Baker III, *The Use of Student-Athlete Likenesses in Sport Video Games: An Application of the Right of Publicity*, 20 J. LEGAL ASPECTS SPORT 35, 60–61 (2010).

105. *C.B.C. Distribution & Mktg.*, 443 F. Supp. 2d at 1107.

106. *Id.*; see also David L. Pratt II, Note & Comment, *Fantasy Sports and the Right of Publicity: A Case for Viewing Dissemination of Player Statistics as Fair Use of the News*, 13 TEX. WESLEYAN L. REV. 215, 225 (2006).

107. See generally 364 F.3d 1288 (11th Cir. 2004).

108. *Id.* at 1290 (referencing 15 U.S.C. § 2 (1890)).

109. *Id.*

110. *Id.* at 1291.

111. *Id.* at 1292.

112. See *id.* at 1295.

the PGA had a legitimate business interest in protecting its exclusive rights in RTSS and, therefore, was allowed to prevent third parties from “free-riding” by licensing its product and its derivative only under certain conditions.<sup>113</sup>

In summary, based on the above-described jurisprudence, raw sports data is not copyrightable under United States laws, and event owners cannot prevent third parties from collecting event data from the live broadcast of their events. Furthermore, the use of athletes’ names and other publicly available information and statistics are not subject to a proprietary right of the sport governing bodies but can be commercially exploited by the media or gaming industry for their purposes. Generally, such conduct does not result in unfair competition because sport data providers and their customers collect and distribute the particular sports data at their own expense and offer products and services different to the staging or broadcasting of an event.

Event owners are, however, entitled to restrict access to their events and are not required to grant media companies or sports data providers unconditional access to information and statistics that they generate. Rather, if an event owner refines event-related data and produces a marketable end product, the product may be licensed subject to certain conditions such as a time delay of its publication.

### *C. Europe*

Under current European Union law and the legislation of the European Union member states, sports events do not qualify for protection under intellectual property laws. With a view to the matches of the Premier League, the Court of Justice of the European Union (CJEU) stated,

FAPL cannot claim copyright in the Premier League matches themselves, as they cannot be classified as works.

To be so classified, the subject-matter concerned would have to be original in the sense that it is its author’s own intellectual creation . . . .

However, sporting events cannot be regarded as intellectual creations classifiable as works within the meaning of the Copyright Directive. That applies in particular to football matches, which are subject to rules of the game, leaving no room for creative freedom for the purposes of copyright.

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113. *Id.* at 1298.

Accordingly, those events cannot be protected under copyright. It is, moreover, undisputed that European Union law does not protect them on any other basis in the field of intellectual property.<sup>114</sup>

Similar to the jurisdictions discussed above, event owners in Europe, therefore, must establish their ownership or exclusive exploitation rights on traditional property rights that are recognized under European Union and national laws. Regarding the protection of sports data, legislation and jurisprudence in the European Union are widely determined by Directive No. 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (Database Directive).<sup>115</sup> The Database Directive governs the legal protection of databases and gives the CJEU the chance to hand down a series of decisions on the legal protection of fixture lists and sports databases.<sup>116</sup> Following an overview of the interpretation of the Database Directive by the CJEU, this Article will look at the implementation of the European law in the United Kingdom, Germany, and France and the additional legal approaches that are applied in these jurisdictions regarding the protection of sports data.

### 1. European Union Law–Database Directive and CJEU Decisions

The Database Directive was enacted in 1996 with the aim of protecting the setup of databases and the corresponding financial investments, which, in the view of the European Commission, had not been protected sufficiently under the legislation of the European Union member states.<sup>117</sup> The Database Directive protects the collation, assembly, verification, and presentation of data within a database by establishing a *sui generis* database, irrespective of whether the database content qualifies for copyright protection or whether the database is innovative or not.<sup>118</sup> A database-maker is given the right to prevent any extraction or reutilization of the database contents and is, hence, entitled to

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114. Joined cases C-403 & 429/08, *Football Ass'n Premier League Ltd. v. QC Leisure*, 2011 E.C.R. I-09083, ¶¶ 96–99; *see also* ASSER INST., *STUDY ON SPORTS ORGANISERS' RIGHTS IN THE EUROPEAN UNION* 16, 29 (2014), [http://ec.europa.eu/sport/news/2014/docs/study-sor2014-final-report-gc-compatible\\_en.pdf](http://ec.europa.eu/sport/news/2014/docs/study-sor2014-final-report-gc-compatible_en.pdf).

115. *See generally* Council Directive 96/9, 1996 O.J. (L 077) 20 (EC) [*hereinafter* Database Directive].

116. *See id.* arts. 1(1), 16.

117. *Id.* at recital 1.

118. *Id.* art. 7(1).



exclusively exploit the database content by making it available to the public.<sup>119</sup>

Beginning in 2004, the CJEU decided various cases relating to the protection of fixture lists under the Database Directive. One of the first cases involved Fixtures Marketing Ltd., an enterprise commissioned with the international marketing of Premier League fixture lists, that claimed the unauthorized use of those fixtures by Finnish, Greek, and Swedish betting providers.<sup>120</sup> In its decisions, the CJEU found that the creation of the fixture lists was an inherent part of the organizational task of the Football Association Premier League.<sup>121</sup> The CJEU, therefore, concluded that the Premier League had not allocated separate resources or made specific investments for drawing up the fixtures, which would exceed its general expenditures for organizing the league.<sup>122</sup> Hence, according to the CJEU, it lacked a separate investment regarding creating a database as required by the Database Directive, and, thus, the court denied the existence of a *sui generis* database right in the fixtures.<sup>123</sup>

In *British Horseracing Board Ltd. v. William Hill Organization Ltd.*,<sup>124</sup> the CJEU reached a similar conclusion. This case concerned the use of racing lists processed in the database of the British Horseracing Board by the English book-making firm William Hill.<sup>125</sup> The CJEU found that the racing lists were essential for organizing the horse races staged under the auspices of the British Horse Racing Board.<sup>126</sup> Therefore, it concluded that the storage and utilization of those materials in the British Horseracing Board database did not require a separate investment independent from the resources, which were already spent for the creation of the racing lists.<sup>127</sup> Accordingly, the CJEU held that the racing lists did not represent a substantial part of the database and did not qualify for protection under article 7 of the Database Directive.<sup>128</sup>

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119. *Id.*

120. Case C-444/02, *Fixtures Mktg. Ltd. v. Organismos prognostikon agonon podosfairou AE (OPAP)*, 2004 E.C.R. I-10549, ¶ 2; Case C-46/02, *Fixtures Mktg. Ltd. v. Oy Veikkaus Ab*, 2004 E.C.R. I-10365, ¶ 2; Case C-338/02, *Fixtures Mktg. Ltd. v. Svenska Spel AB*, 2004 E.C.R. I-10497, ¶ 2.

121. *Organismos prognostikon*, 2004 E.C.R. I-10549, ¶ 52; *Oy Veikkaus Ab*, 2004 E.C.R. I-10365, ¶ 46; *Svenska Spel AB*, 2004 E.C.R. I-10497, ¶ 36.

122. *Organismos prognostikon*, 2004 E.C.R. I-10549, ¶ 51; *Oy Veikkaus Ab*, 2004 E.C.R. I-10365, ¶ 47; *Svenska Spel AB*, 2004 E.C.R. I-10497, ¶ 35.

123. *Organismos prognostikon*, 2004 E.C.R. I-10549, ¶ 51; *Oy Veikkaus Ab*, 2004 E.C.R. I-10365, ¶ 47; *Svenska Spel AB*, 2004 E.C.R. I-10497, ¶ 35.

124. *See generally* Case C-203/02, *British Horseracing Bd. Ltd. v. William Hill Org. Ltd.*, 2004 E.C.R. I-10415.

125. *Id.* ¶¶ 8, 10–11.

126. *Id.* ¶ 17.

127. *Id.* ¶ 80.

128. *Id.* ¶ 95; *see also* Rachel Boothroyd, *Databases: Database Protection: Solutions in the*

Following these decisions it appeared that fixture lists and other database-processed facts and information relating to sport events are not protected under the Database Directive at all, despite event owners' substantial investments in the setup of databases and corresponding software. In 2010, however, Football DataCo again tested the scope of the Database Directive when it brought two cases: (i) against the online platform Yahoo! and its data suppliers and (ii) against the sports data provider Sportradar for an unauthorized use of Premier League fixture lists and match results.

Contrary to the proceedings in the *Fixtures Marketing* cases, Football DataCo did not solely base its claim against Yahoo! on the *sui generis* database right. Rather, before the national courts, it additionally argued that the fixture lists used by Yahoo! were also protected as literary work under English copyright laws.<sup>129</sup> In accordance with the CJEU precedents, the High Court of Justice rejected protection of the fixture lists under article 7 of the Database Directive and the respective implementation legislation of the Copyright Designs and Patents Act of 1988 (U.K.).<sup>130</sup> The court, however, found that the creation of the fixture lists required substantial skill and knowledge, so the lists qualified as literary works under the Act.<sup>131</sup> In the appeal proceedings before the civil division, the High Court of Justice referred the case to the CJEU for a preliminary ruling as to whether such a copyright may exist under European law besides the *sui generis* right provided for in article 7 of the Database Directive.<sup>132</sup>

The CJEU, in its decision, held that article 7 of the Database Directive does not exclude the subsistence of general copyrights in databases.<sup>133</sup> Rather, pursuant to article 3 of the Database Directive, databases may qualify for copyright protection if they, by the selection or arrangement of their content, constitute an original expression of the creative freedom of its author.<sup>134</sup> The CJEU, however, emphasized in determining this question that neither the labour and skill required to set up the database nor the effort of creating the database

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*Post-William Hill Era*, 3 WORLD SPORTS L. REP. 6 (2005); Dominic Bray & Lucy Otterwell, *News Analysis: William Hill v. BHB: Database Right in Doubt*, 3 WORLD SPORTS L. REP. (2005); Stephen Sampson & Louisa Penny, *British Horseracing Board—An Examination of Recent Case Law Arising from the ECJ Database Decision*, 17 ENT. L. REV. 39, 41–42 (2006).

129. *Football DataCo Ltd. v. Britten's Pool Ltd.* [2010] EWHC (Ch) 841 [2] (Eng.).

130. *Id.* at [101].

131. *Id.* at [100].

132. *Id.* at [101]; see also Rachel Montagnon & Mark Shillito, *Requirements for Subsistence of Database Copyright and Other National Copyright in Databases Referred to the ECJ: Football DataCo Ltd v. Yahoo!*, 33 EUR. INTEL. PROP. REV. 324, 325 (2011).

133. Case C-604/10, *Football DataCo Ltd. v. Yahoo! UK Ltd.*, 2012 E.C.R. 115, 27.

134. *Id.* at 28–32.

content are relevant. Instead, the originality and creativity in the selection or arrangement of the data itself is decisive and may justify copyright protection for a database that expresses such characteristics.<sup>135</sup> The CJEU did not decide whether the Premier League fixture lists met this standard but referred the case back to the national court.<sup>136</sup> However, the CJEU noted that the procedures for creating the lists, as described by the court of appeal, did not suffice for copyright protection under article 3 of the Database Directive.<sup>137</sup>

*Football DataCo Ltd. v. Sportradar GmbH*<sup>138</sup> gave the CJEU the opportunity to further clarify the scope of the Database Directive regarding the reutilization of a sports database in the online environment. Football DataCo claimed that Sportradar, in its “Football Live” service, made available to the public contents of the Football DataCo database, containing the results and further information on the Premier League and other English and Scottish leagues.<sup>139</sup> The CJEU confirmed the assessment and found that Sportradar violated Football DataCo’s *sui generis* database right by publishing online the results and information of these soccer leagues to customers in the United Kingdom and Austria.<sup>140</sup> It must, however, be emphasized that protection of the Football DataCo database under the *sui generis* database right was undisputed in the national proceedings.<sup>141</sup> Contrary to its decisions in the *Fixtures Marketing* cases and in *British Horseracing Ltd. v. William Hill Organization Ltd.*, the CJEU did not consider whether the database content in question de facto qualified for protection under article 7 of the Database Directive but focused on the interpretation of the methods of reutilization.<sup>142</sup>

In summary, according to the jurisprudence of the CJEU, article 7 of the Database Directive does not protect database-processed sports data, particularly fixture lists, if the collation, storage, and processing of such data is covered by the resources and financial investments that are necessary for organizing the league. In other words, if no independent deployment of resources or financial investment is required for the collection, storage, processing, or reutilization of event-related data, a *sui generis* database right does not subsist in such data.

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135. *Id.* at 38.

136. *Id.* at 53.

137. *Id.* at 44.

138. See generally Case C-173/11, *Football DataCo Ltd. v. Sportradar GmbH*, 2012 E.C.R. 642.

139. *Id.* at 15.

140. *Id.* at 47; see also Rachel Montagnon & Joel Smith, *Suing Under Sui Generis Rights—Getting Closer to Off-Shore Servers*, 8 J. INTELL. PROP. L. & PRACT. 197, 199 (2013).

141. See *Football DataCo Ltd.*, 2012 E.C.R. at 19.

142. See generally *Football DataCo Ltd.*, 2012 E.C.R. 642.

Notwithstanding article 3 of the Database Directive, database-processed fixture lists and other sports data may be subject to copyrights as creative works under national legislation (under the so-called database right). When determining whether such database right exists in the processed data, solely the originality and creativity in the selection or arrangement of this data may be taken into consideration. Labour and skills for setting up the database, in contrast, cannot justify copyright protection of the processed data.

## 2. Legal Status Under the Legislation of European Union Member States

Regarding copyright protection, legislation in the United Kingdom, Germany, and France is widely determined by the Database Directive, which has been implemented by these European Union member states and the jurisprudence of the CJEU. Similar to Australia and the United States, supplementary protection through application of other quasi-proprietary rights may apply in certain cases. France also enacted a specific “event right” that protects sports federations and certain sport event owners in the commercial exploitation of an event.

### *a. United Kingdom*

All CJEU cases discussed above had their origin in the United Kingdom, and the CJEU’s decisions were adopted accordingly in the national proceedings. Following the CJEU’s decision in *Football DataCo Ltd. v. Yahoo! UK Ltd.*, Football DataCo conceded that it could not assert intellectual property rights in the Premier League fixture lists.<sup>143</sup> As a result, the High Court of Justice “issu[ed] a sealed Order declaring that fixture lists are not protected by database copyright or database rights in the [United Kingdom].”<sup>144</sup> This decision put an end to the “sweat of the brow” approach applied to fixture lists under English law according to what intellectual property protection in fixture lists could be obtained if substantial “labour, skill, judgment or ingenuity” were involved in its creation of the assembling of the data.<sup>145</sup>

While this decision dashed event owners’ hopes of establishing

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143. *Olswang Helps Yahoo UK Stan James to Win Football Fixtures Appeal*, OLSWANG LLP (Nov. 22, 2012), <http://www.olswang.com/news/2012/11/olswang-helps-uk-defendants-to-win-football-fixtures-appeal>.

144. *Id.*

145. *See* *Football League Ltd. v. Littlewoods Pools Ltd.* [1959] Ch 637 at 651 (Eng.); *see also* Nick Fitzpatrick & John Cloke, *Sporting Data: Rights in Sporting Data After Football DataCo v Stan James*, 8 WORLD SPORTS L. REP. (2010); Sellenger, *supra* note 48, at 21.

copyright protection of sports data as literary work,<sup>146</sup> the court of appeals' decision in *Football DataCo Ltd. v. Sportradar GmbH*<sup>147</sup> first recognized the protection of sports databases under article 7 of the Database Directive. The court found that the live collection of the results and further data relating to the professional leagues in the United Kingdom and the processing in Football DataCo's databases constituted a substantial investment by Football DataCo, which met the standards under European law for *sui generis* protection.<sup>148</sup> The court of appeals distinguished the case from *British Horseracing Board Ltd. v. William Hill Organisation Ltd.* where it confirmed the CJEU restrictive interpretation of the Database Directive<sup>149</sup> because the data reutilized by Sportradar was not inherently connected to the organization of the sporting competition but was separately collected by Football DataCo on the field.<sup>150</sup> The court precisely differentiated between sports data that is tied to the organization of the sporting competition, such as fixture lists, and sports data that is generated separately by observing the game.<sup>151</sup> Following this decision, sports bodies and sport event owners may successfully establish an infringement of their *sui generis* database right under United Kingdom copyright law, provided they can prove that the sports data contained in their databases is extracted and reutilized without their consent.

Because the decision is based on an application of article 7 of the Database Directive, its rationale can be extrapolated to other European Union member states. If this approach is litigated, however, sports database owners must prove that the particular data is de facto gathered from their databases—not collected independently by a third-party (e.g., by observing the broadcast of an event).<sup>152</sup> In this context, the above-mentioned supplementary protection measures, such as restrictions on data collection inside a venue, may become pertinent.<sup>153</sup> If implemented, the restrictions may enable event owners to successfully establish that the utilized data may only originate from their database or the data was gathered in breach of a contractual obligation.

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146. See Fitzpatrick & Cloke, *supra* note 145.

147. See generally *Football DataCo Ltd. v. Sportradar GmbH* [2013] EWCA (Civ) 27, [2013] Bus. L.R. 837 (Eng.).

148. *Id.* at [106].

149. See *id.* at [41] (referencing Case C-203/02, *British Horseracing Bd. Ltd. v. William Hill Org. Ltd.* 2004 E.C.R. I-10415 (Eng.)); see also Boothroyd, *supra* note 128; Bray & Otterwell, *supra* note 128.

150. See *British Horseracing Bd. Ltd.*, [2005] EWCA (Civ) 863 [64]–[66].

151. See *Football DataCo Ltd.*, 2013 F.S.R. [46–47].

152. See *id.* at [37]–[41].

153. See *supra* Section III.A.2.c.

*b. Germany*

Germany implemented the Database Directive in its national Copyright Act.<sup>154</sup> Databases may subsist in copyright protection as a “database work” under section 4 of the German Copyright Act and the *sui generis* database right in section 87a of the German Copyright Act.<sup>155</sup> While German courts have not applied these provisions in the sports industry context yet, academic articles have frequently discussed the copyright protection of fixture lists and other sports data.

Prior to the CJEU decision in *Football DataCo Ltd. v. Yahoo! UK Ltd.*, many authors argued for protection of fixture lists as database works, given the comprehensive process of their creation.<sup>156</sup> In accordance with these assessments, the Deutsche Fußball Liga (DFL) initially announced in 2011 it would enforce its rights in the Bundesliga fixture lists against any unauthorized use.<sup>157</sup> However, after the enactment of a new state treaty on gambling, the DFL dropped the approach.<sup>158</sup>

Notwithstanding the creative human input that is undisputedly required for creating fixtures,<sup>159</sup> in *Football DataCo Ltd. v. Yahoo! UK Ltd.*, the court expressly held that the process applied by the Premier League for creation of its fixtures did not meet the standards under article 3 of the Database Directive.<sup>160</sup> Because this interpretation of the European law also applies to the German implementation legislation, it appears unlikely that copyright protection of fixture lists will be successfully litigated.

The same is true for raw event and performance data. Similar to Australia and the United States, under German copyright law, mere facts are not copyrightable. Event owners, thus, cannot prevent the collection of sports data

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154. Gesetz über Urheberrecht und verwandte Schutzrechte [Urheberrechtsgesetz] [Copyright Act], Sept. 9, 1965, BUNDESGESETZBLATT [BGBl] I at 1273, § 1, no. 4 (Ger.).

155. *Id.*; § 6, no. 87a.

156. See generally Lentze, *supra* note 6; Röhl, *supra* note 5; Thomas Summerer & Holger Blask, *Rechte an Spielplänen und Tabellen von Profiligen am Beispiel der DFL* [Rights Towards Fixtures and Tables Illustrated by Way of Example to DFL], SPURT 50 (2005).

157. DFL DEUTSCHE FUßBALL LIGA GMBH 48 / 2011 / *Kommerzielle Nutzung von Spielplänen künftig nur mit Zustimmung der DFL möglich* [Commercialisation of Fixture Lists from Now on Requires Permission of DFL], PRESSEANZEIGER (June 22, 2011), <http://www.presseanzeiger.de/pm/DFL-Deutsche-Fussball-Liga-GmbH-48-2011-Kommerzielle-Nutzung-von-493756>.

158. *DFL Deutsche Fußball Liga GmbH: 70/2011: Bundesliga: Vorerst keine Geltendmachung des Spielplanschutzes bei neuem Glücksspielstaatsvertrag* [No Enforcement of Protection of Fixture Lists if New State Treaty on Gambling Is Enacted], PRESSEPORTAL (Dec. 16, 2011), <http://www.presseportal.de/pm/52476/2166941>.

159. See *supra* Section II.A.1.

160. Case C-604/10, *Football DataCo Ltd. v. Yahoo! UK Ltd.*, 2012 E.C.R. 115, 27.

from broadcasts—provided that no contractual restrictions for the commercial use of the broadcast exist.<sup>161</sup> In view of this legal situation, the DFL implemented a contractual provision that restricts its broadcasting partners from utilizing the footage of Bundesliga matches for data collection purposes.<sup>162</sup> Correspondingly, the broadcasting partners must mirror such prohibition in their contracts with end customers.<sup>163</sup> By this means, commercialisation of the copyrighted broadcast for purposes other than private consuming can be excluded, at least in situations where a contractual relation to the end customer exists.

Actions based on the tort of privacy, unjust enrichment, and unfair competition face similar legal obstacles in the jurisdictions analysed above. These legal institutions are established as statutory actions under German law. Their conditions essentially correspond to the legal status under common law and require a misappropriation of efforts, skills, knowledge, goodwill, or another quasi-proprietary right.<sup>164</sup> Event owners will, therefore, generally struggle to claim unfair competition or unjust enrichment regarding the independent collection of sports data by third parties, even if by observing the copyrighted broadcast of an event.

Establishing a privacy tort claim is just as difficult. The constitutional right of privacy protects names and other personal information, and this right can be claimed if personal information is used without authorization.<sup>165</sup> The application of the tort of privacy in the collection and exploitation of sports data will, in most cases, be unsuccessful however. On one hand, information on the height, age, and weight of players is generally available in the public domain. Additionally, if such data is used for information purposes only, sport data providers and media companies can argue for a free use exception under the constitutional rights of freedom of the press and freedom of information under article 5 of Grundgesetz für die Bundesrepublik Deutschland (Basic Law of the Federal Republic of Germany).<sup>166</sup> Only if names and other personal information

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161. See Jürgen Paepke & Holger Blask, *Ligaverband und DFL*, in HANDBUCH FUßBALL-RECHT: RECHTE - VERMARKTUNG - ORGANISATION 539, 565 (Martin Stopper & Gregor Lentze eds., 2012).

162. *Id.*

163. *Id.*

164. See Bürgerliches Gesetzbuch [Civil Code], Jan. 2, 2002, BGBl. I at 42, 2909, §§ 1, 12, 812, 823, (Ger.); Gesetz gegen den unlauteren Wettbewerb [Act Against Unfair Competition], Mar. 3, 2010, BGBl. I at 254, §§ 3, 4 (Ger.). With regard to the application of these actions to the protection of fixture lists, see Peter W. Heermann, *Schutz von Spielplänen im Licht einer Entscheidung des High Court of Justice* [Protection of Fixture Lists in Light of a Decision of the High Court of Justice], in 3 CAUSA SPORT 227, 231 (2010).

165. Paepke & Blask, *supra* note 161, at 547.

166. Grundgesetz für die Bundesrepublik Deutschland [Basic Law of the Federal Republic of

are exploited solely for commercial purposes, like in the gaming industry, may their unauthorized use be prohibited by the players or in their name by the governing sport body.<sup>167</sup>

Based on the decisions of the CJEU and the High Court of Justice, the DFL and other owners of sports databases under German law may claim a *sui generis* right under article 7 of the Database Directive, provided that the database owners can overcome procedural hurdle of proving an illegal extraction and reutilization of the database content.<sup>168</sup> Furthermore, supplementary protection can be achieved by restricting the physical access to an event. German courts have clarified that event owners, even if they own a monopoly, are not required to grant media companies free access to their events under the constitutional rights of freedom of the press and freedom of information.<sup>169</sup> As a result, event owners can safeguard their commercial interests in exploiting event-related data by structuring the media accreditations accordingly and establishing licensing schemes for sports data collection inside a venue.

### *c. France*

In contrast to the United Kingdom and Germany, sporting federations and certain sport event owners in France are in a more comfortable situation because they can rely on a specific event right.<sup>170</sup> Article L. 333-1 Code du sport (Sports Code) establishes that “sports federations, as well as the organisers of sports events . . . are the owners of the exploitation rights for the sports events or competitions which they organise.”<sup>171</sup>

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Germany], July 11, 2012, BGBL. I at 1478, art. 5 (Ger.).

167. For the successful action of DFL Deutsche Fußball Liga against the gaming publisher Konami, see Landgericht Frankfurt [District Court of Frankfurt], Dec. 12, 2008, SPORT UND RECHT [SPURT] 227 (Ger.).

168. See discussion *supra* Section III.C.2.a.

169. Bundesgerichtshof [BGH] [Federal Court of Justice] Nov. 8, 2005, 154, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 377, 2006 (Ger.).

170. Hungary and Poland, in 2009 and 2011, implemented a right in favour of event owners to consent to betting on sports events. These provisions have, however, not been enforced in practice yet and, thus, are not taken into consideration. See ASSER INST., *supra* note 114, at 145, 153.

171. ASSER INST., *supra* note 114, at 136; Accord Loi 2006-596 du 23 mai 2006 relative à la partie législative du code du sport [Ordinance No 2006-596 of May 23, 2006 on the Codification of Sports Texts and Laws], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], May 25, 2006, p. 7791. The original text of Article L. 333-1 of the Sports Code reads “Les fédérations sportives, ainsi que les organisateurs de manifestations sportives mentionnées à l’article L. 331-5, sont propriétaires du droit d’exploitation des manifestations ou compétitions sportives qu’ils organisent.” *Id.*



Based on this provision, in 2008, the Tribunal de Grande Instance de Paris held that the Ligue de Football Professionnel, the governing body for the French professional soccer league, has the exclusive right to license its fixture lists to betting companies.<sup>172</sup> This decision was eventually implemented in article L. 333-1-1, which now expressly provides that offering bets on sporting events requires a license or permission from a respective event owner.<sup>173</sup>

Sports betting providers, concerned by the mandatory licensing system, challenged the validity of article L. 333-1-1 in 2011. The Conseil d'État (French Administrative Court) found, however, that the commercialisation of sporting events is not a public right (*bien public*) but that the provision establishes an exclusive exploitation right for the governing sport bodies. The French Administrative Court justified this finding because of event owners' substantive financial investments in the development of their sport and the staging of the respective competitions.<sup>174</sup>

Consequently, the French sport governing bodies are not required to resort to copyright protection for the exploitation of their fixture lists but can rely on the statutory exploitation right granted under the French Sports Code. Moreover, they are not restricted in claiming other intellectual property rights regarding event-related data (e.g., they may also claim the *sui generis* databank right, provided the respective conditions for its application are met).<sup>175</sup>

#### IV. CONCLUSION

Despite the different legal regimes in Australia, the United States, and the European Union, event owners encounter similar legal obstacles in protecting the commercial exploitation of event-related data. None of these jurisdictions provide protection for mere facts and information. Thus, raw event and performance data is not copyrightable.

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172. Tribunaux de grande instance de Paris [TGI] [ordinary court of original jurisdiction] Paris, 1e civ., May 30, 2008, Bull. civ. I, No. 08/02005, confirmed by Cour d'appel [CA] [regional court of appeal] Paris, May 30, 2008, 08/19179.

173. See Loi 2010-476 du 12 mai 2010 relative à l'ouverture à la concurrence et à la régulation du secteur des jeux d'argent et de hasard en ligne [Law No 2010-476 of May 12, 2010 on the Opening of the Online Gambling and Betting Sector to Competition and Regulation], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], May 12, 2010, p. 8881. For a detailed description of the regulatory requirements regarding the marketing of betting licenses by sports event owners, see ASSER INST., *supra* note 114, at 138–41.

174. CE, Mar. 30, 2011, Rec. Lebon 342142; see also ASSER INST., *supra* note 114, at 39.

175. See generally Estelle Derclaye, *Recent French Decisions on Database Protection: Towards a More Consistent and Compliant Approach with the Court of Justice's Case Law?*, 3 EUR. J. L. & TECH. (2012), <http://ejlt.org/article/view/124/235>.

Copyright protection of refined sports data only exists when the requirements of originality and creativity under the respective copyright laws are met. Statistics, which reselect or rearrange the raw data, may subsist in copyright if the selection or arrangement expresses originality and creativity. Sports data products that involve editorial or graphical processing (i.e., comprise historical and background information, commentary, and illustration) are copyrightable as well.<sup>176</sup> Fixture lists and other basic statistics fail, however, to comply with the “creativity standard.”

In the United Kingdom, Germany, and France, sports databases are additionally protected under a *sui generis* database right implemented under the influence of European Union law. Such rights, however, may only be facilitated regarding sports data that is not inherently connected to the organization of the sporting competition but collected separately on the pitch. Provided they can prove an illegal extraction and reutilization of their database, sport event owners may take legal action against the use of event-related data on the basis of the *sui generis* right.

In the absence of a comprehensive protection of event-related data under copyright laws, event owners must resort to other property rights and supplementary contractual measures. Even in jurisdictions where unfair competition, unjust enrichment, or publicity and privacy rights are recognized as general torts, event owners will, in most cases, fail to establish an action against the collection and distribution of event-related data by third parties. This is because sports data collection requires independent skills and knowledge and can be distinguished from the staging and broadcasting of an event. Third parties, in most instances, also will market the data in their own name without any specific reference to an event owner’s business. Except in rare cases, event owners will, therefore, struggle to argue for an illegal misappropriation of their investments in an event or a misrepresentation of their name, products, and services.

Contractual measures, such as setting restrictions or conditions for the physical access to an event, only cover the in-venue collection of sports data. In particular, event owners cannot prevent sports data providers from collecting sports data from a broadcast of their events, even if a broadcast itself is copyrighted. A supplementary measure is to structure the broadcasting agreements accordingly: oblige the rights holders to implement a prohibition for data collection from their broadcast in the end consumer agreements. This is, however, only feasible when contractual agreements with the end consumer exist. Furthermore, it will not prevent the grey market from operating in a

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176. ASSER INST., *supra* note 114, at 126.

jurisdiction where enforcement of such contractual provisions is hard to achieve.

As a result, from the perspective of an event owner, the applicable laws and supplementary contractual measures leave unsatisfactory loopholes for unlicensed collection and commercialisation of sports data. To a certain extent, the free use of event-related information may be justified under constitutional rights, such as freedom of the press and freedom of information. In particular, by publishing fixture lists, squads, and match results, the media industry not only serves the legitimate interests of informing the public, it also contributes to the prominence of the league or tournament and, hence, is a valuable event-marketing feature. These arguments, however, do not justify “free riding” in the utilization of sports data by solely commercial businesses, particularly in the betting and gaming industries.

In some jurisdictions, these issues are addressed in legislation (e.g., in France, which has enacted a comprehensive statutory event right for sport federations and certain event owners). Event owners in most other jurisdictions, however, do not enjoy similar protection. Given the substantial human resources and the financial investments in staging an event and developing their sport,<sup>177</sup> the current protection for event owners regarding the exploitation of event-related data is insufficient.

To ensure adequate financial participation in the revenue streams of adjacent industries that rely on the utilization of event-related data, statutory protection for event-owners’ legitimate interests in exploiting an event and refinancing their investments are required.<sup>178</sup> The right to consent to betting in Australia and the sports event right in France illustrate the two alternatives in how such protection could be implemented.

However, a specific regulation for the use of fixture lists for betting purposes covers only one industry, while the commercial utilization of sports data in the media and gaming industries and for sporting purposes is outside the scope. The enactment of a general event right for sporting competitions, thus, would be the most suitable solution. It would not only address the legal inadequacies illustrated above regarding the protection of sports data but also include the exploitation of other event-related activities and assets. Considering that sports data products in the media, gaming, and betting industries are often

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177. See, e.g., SPORTSECONAUSTRIA, STUDY ON THE CONTRIBUTION OF SPORT TO ECONOMIC GROWTH AND EMPLOYMENT IN THE EU 1 (2012), <http://ec.europa.eu/sport/library/studies/study-contribution-sports-economic-growth-final-rpt.pdf>.

178. With a view to the exploitation of sports events in general, see generally Darren Bailey, *Sports’ Organisers Rights—Where Next?*, 21 SPORTS L. ADMIN. & PRACT. 4 (2014).

offered in combination with audiovisual material, player images, and other event-related values, a comprehensive event right would reflect the manifold forms exploitation of sports events in the commercial marketplace most appropriately.<sup>179</sup>

Lobbying for such right has, however, proven difficult in the past. In 2011 and again in 2013, the Parliament of the European Union in two resolutions argued for a general property right in favour of sport event organisers:

[The European Parliament] reaffirms its position that sports bets are a form of commercial use of sporting competitions; recommends . . . that sporting competitions should be protected from any unauthorised commercial use, notably by recognising the property rights of sports event organisers, not only in order to secure a fair financial return for the benefit of all levels of professional and amateur sport but also as a means of strengthening the fight against sports fraud, particularly match-fixing[.]<sup>180</sup>

So far, no legislative action has been taken in Europe though. Other examples of legislators' reluctance in addressing the issue from the national level are the ongoing political discussion on a general "neighbouring right" for sport events in Germany<sup>181</sup> and the non-consideration of the Australian government in establishing a *sui generis* right for databases.<sup>182</sup>

One reason for this reluctance might be the extraordinary media right revenues generated by the top sports events, which make other forms of commercial exploitation of an event appear marginal.<sup>183</sup> Furthermore, protection of event owners by traditional property rights and the control of physical access to a venue are often wrongly considered sufficient. A recent study on sports organisers' rights in the European Union, for example, concluded that

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179. *Id.*

180. Online Gambling in the Internal Market, EUR. PARL. DOC. (INI 2012/2322) 57 (2013); *see also* Online Gambling in the Internal Market, EUR. PARL. DOC. (INI 2011/2084) 40 (2011).

181. *See* Paepke & Blask, *supra* note 161, at 564.

182. *See* Fitzpatrick & Cloke, *supra* note 145.

183. For the importance of media right revenues for top sports events, *see, e.g.*, ASSER INST., *supra* note 114, at 65.

organisers of sports events seem to be fairly well protected as a matter of substantive law, against unauthorized acts of exploitation of live transmitted or recorded sports events on the basis of a combination of the “house right”, [sic] the law of contract, and original or derivative rights of intellectual property.<sup>184</sup>

Finally, the large amount of stakeholders with divergent interests involved in the sports industry make it difficult to agree on the appropriateness, form, and scope of a legal protection for sports events:

The universe of sports and media is a complex network of social and commercial relationships with a variety of stakeholders, each one of whom can claim rights or specific interests in the value chain of organizing and exploiting sports events, such as clubs, leagues, athletes, federations, fans, media content providers, sponsors, owners of sport facilities, sports betting operators and news media.<sup>185</sup>

Against this backdrop, it is highly uncertain whether appropriate legislation will be enacted in the near future. Thus, for the time being, event owners will have to cope with the existing legal framework regarding the protection and commercialisation of sports data.

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184. *Id.* at 178. *But see* Bailey, *supra* note 178, at 11.

185. ASSER INST., *supra* note 114, at 1.