

---

---

WAKE FOREST JOURNAL OF BUSINESS  
AND INTELLECTUAL PROPERTY LAW

---

---

VOLUME 15

FALL 2014

NUMBER 1

---

---

**THE DIVISIBILITY DOCTRINE: IMPACT ON SPORTS  
BROADCASTING FOR THE FIFA WORLD CUP**

**Brittanie Browning<sup>†</sup>**

<b>I. INTRODUCTION .....</b>	<b>170</b>
<b>II. THE 1909 ACT: INDIVISIBILITY DOCTRINE.....</b>	<b>172</b>
<b>III. TREATMENT OF SPORTS BROADCASTS UNDER THE 1909 ACT .....</b>	<b>174</b>
<b>IV. CURRENT LAW: DIVISIBILITY DOCTRINE .....</b>	<b>176</b>
<b>V. TREATMENT OF SPORTS BROADCAST UNDER 1976 ACT.....</b>	<b>179</b>
<b>VI. COPYRIGHT OF SPORTS BROADCASTS IN THE EUROPEAN UNION AND THE UNITED KINGDOM .....</b>	<b>181</b>
<b>VII. BACKGROUND OF THE FIFA WORLD CUP BROADCAST IN THE UNITED STATES .....</b>	<b>188</b>
<b>VIII. APPLYING DIVISIBILITY TO THE AMERICAN BROADCAST OF THE WORLD CUP.....</b>	<b>192</b>
<b>IX. COMPARISON TO NBC'S OLYMPIC BIDDING POLICY .....</b>	<b>196</b>
<b>X. PREDICTIONS FOR THE FUTURE FIFA WORLD CUP BROADCASTS IN THE UNITED STATES .....</b>	<b>199</b>
<b>XI. CONCLUSION.....</b>	<b>202</b>

---

<sup>†</sup> J.D., May 2014, Georgia State University, College of Law. The author thanks her family for their continuous support as well as the staff members of the Wake Forest Journal of Business and Intellectual Property Law for their tireless efforts in editing her manuscript.

## I. INTRODUCTION

Copyright promotes creative arts for the public good by allowing authors exclusive rights to their works.<sup>1</sup> Copyright law requires audiovisual works to be fixed in a tangible medium and contain an original meaning created by the author.<sup>2</sup> Today, copyright protection begins at creation even without notice or registration.<sup>3</sup> Initially, copyright protection under American law was only granted<sup>4</sup> through the Progress Clause of the Constitution,<sup>5</sup> which allows Congress the power “[t]o promote the Progress of Science . . . by securing for limited Times to Authors . . . the exclusive Right to their respective Writings . . . .”<sup>6</sup> This provision has been interpreted to mean that artistic works promote the public good.<sup>7</sup> The Supreme Court expounded upon this principle in 1975, stating that: “[t]he immediate effect of our copyright law is to secure a fair return for an ‘author’s’ creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.”<sup>8</sup> The 1909 Copyright

---

<sup>1</sup> *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 575 (1994) (stating “copyright’s very purpose, ‘[t]o promote the Progress of Science and useful Arts . . . .’”).

<sup>2</sup> *See Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 355 (1991) (stating that “[t]he two fundamental criteria of copyright protection [are] originality and fixation in tangible form . . . .”).

<sup>3</sup> Xuan-Thao Nguyen, *Collateralizing Intellectual Property*, 42 GA. L. REV. 1, 7-8 (2007).

<sup>4</sup> *See Marshall Leaffer, American Copyright Law Since 1945 in A HISTORY OF THE BOOK IN AMERICA VOL. 5: THE ENDURING BOOK, PRINT CULTURE IN POSTWAR AMERICA* 151, 151 (David Paul Nord et. al, eds) (stating that “[t]he term ‘copyright’ originated in England with the Statute of Anne (1710), which protected against unauthorized reproduction of a work . . . . American copyright law grew from these English roots and from the patent and copyright clause of the U.S. Constitution”).

<sup>5</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>6</sup> *Id.*

<sup>7</sup> *See Mazer v. Stein*, 347 U.S. 201, 219 (1954) (stating that “[t]he economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in ‘Science and useful Arts.’”).

<sup>8</sup> *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (emphasis added). Ten years later in *Harper Row, Publishers v. Nation Enterprises*, the Supreme Court noted “that copyright’s idea/expression dichotomy ‘strikes a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author’s expression.’” 471 U.S. 539, 556 (1985).

Act<sup>9</sup> limited the fair return to the author as copyrights gain value through the multiple underlying exclusive rights in the work.<sup>10</sup>

Under the 1909 Act, copyright law was indivisible, meaning that all rights associated with a work had to be exclusively sold to one person.<sup>11</sup> Yet, this proved to go against the purpose of the “general public good” as emphasized by the Supreme Court.<sup>12</sup> Therefore, under the 1976 Copyright Act<sup>13</sup>, a copyright is divisible so that individual rights could be sold separately.<sup>14</sup> For example, the rights could be sold to separate media such as television versus Internet broadcast rights. This principle may assist in promoting the “general public good” but typically broadcasting rights are sought after in exclusivity.<sup>15</sup> This proposition will be explored through a case study of the Federation Internationale de Football Association (FIFA) World Cup television broadcast because the United States’ 2014 broadcast was split between two networks: ESPN and Univision, each of which has the exclusive rights to a specific-language broadcast, either English or Spanish.<sup>16</sup> The upcoming World Cup 2018 broadcasts will involve Fox and Telemundo<sup>17</sup>, which is a subsidiary of NBC.<sup>18</sup> Notably, NBC is a powerhouse for the Olympic Games and the exclusive broadcaster for

---

<sup>9</sup> 17 U.S.C. § 26 (repealed by Copyrights Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended scattered statutes in 17 U.S.C.)).

<sup>10</sup> *See generally id.*

<sup>11</sup> *New York Times Co. v. Tasini*, 553 U.S. 483, 494 (2001).

<sup>12</sup> *Id.* at 495 (describing the 1976 revision as an action to improve the “frequently unfair legal situation” of indivisibility).

<sup>13</sup> Copyrights Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended scattered statutes in 17 U.S.C.).

<sup>14</sup> *Id.* at 495-96.

<sup>15</sup> *See* Broadcasting Media Rights in Sport, WIPO, <http://www.wipo.int/ip-sport/en/broadcasting.html> (last visited Aug. 22, 2014).

<sup>16</sup> Chris Smith, *American World Cup Rights Fees Soar Along with Viewership*, FORBES.COM (June 9, 2014, 11:04 AM), <http://www.forbes.com/sites/chris-smith/2014/06/09/american-world-cup-rights-fees-soar-along-with-viewership> (ESPN has paid for English-language rights for the 2010 and 2014 tournaments); Anna Marie de la Fuente, *How to Watch the World Cup Online*, VARIETY.COM, <http://variety.com/2014/tv/news/how-to-watch-the-world-cup-online-1201218552> (last accessed September 6, 2014) (stating that for the 2014 games Univision held “exclusive Spanish-language broadcast rights to the World Cup”).

<sup>17</sup> Smith, *supra* note 17; *see also* de la Fuente, *supra* note 17.

<sup>18</sup> *See generally* Telemundo, NBCUNIVERSAL, <http://www.nbcuni.com/broadcast/telemundo> (last accessed September 6, 2014) (stating that Telemundo is a division of NBCUniversal Hispanic Enterprises, and discussing the stations owned by Telemundo).

the United States since 1988.<sup>19</sup> Now NBC has entered the competition, and it will be interesting to see how its policy of outbidding every competitor will play out in future FIFA World Cup bidding processes.

## II. THE 1909 ACT: INDIVISIBILITY DOCTRINE

Congress enacted the 1909 Copyright Act<sup>20</sup> but “[t]he rule of indivisibility is a development of case law.”<sup>21</sup> Under the indivisibility doctrine, the bundle of rights stemming from a copyright could only be exclusively owned. “[C]opyright is an indivisible thing, and cannot be split up and partially assigned either as to time, place, or particular rights or privileges, less than the sum of all the rights comprehended in the copyright.”<sup>22</sup> A copyright “could not be assigned (1) for less than its complete term, (2) for a territory less than the jurisdiction conferring the right, and (3) with respect to part rather than all the component rights of the copyright.”<sup>23</sup> Thus, a copyright could not be divided within the same area or for the same rights. Copyright was limited to either an assignment or a license:

The concept of indivisibility tends to force all sales or transfers of copyrights or rights in copyrights into one of two molds, (a) assignment, a complete transfer of all rights, or (b) license, a transfer of any portion of those rights. An assignment carries all rights; a license is really a contract not to sue the licensee, and the licensee cannot fully enforce his rights against third parties.<sup>24</sup>

These limitations on copyright make sense in the context of the technology available in 1909.

---

<sup>19</sup> See Stephen Wilson, *NBC Keeps U.S. Olympics Broadcast Rights Through 2032*, WASHINGTONTIMES.COM (May 7, 2014), <http://www.washingtontimes.com/news/2014/may/7/nbc-keeps-us-olympics-broadcast-rights-through-203/?page=all> (stating that NBC first broadcasted the Olympics in 1964; has broadcasted every Summer Olympics since 1988 and every Winter Olympics since 2002. NBC recently purchased the rights to cover all of the games through 2032).

<sup>20</sup> See H.R. 28192, 60th Cong. (1909).

<sup>21</sup> STAFF OF S. COMM. ON THE JUDICIARY, 86TH CONG., *STUD. ON COPYRIGHT LAW 11* (Comm. Print 1960) (Study prepared by Abraham L. Kaminstein).

<sup>22</sup> *Id.* at 13.

<sup>23</sup> *Id.* at 11.

<sup>24</sup> *Id.* at 1.

Originally, only a limited number of materials required a copyright, for example, music, art, and books.<sup>25</sup> In the late 1890s, film made its public debut in France with Georges Méliès and the Lumière brothers.<sup>26</sup> Quickly, film crossed the Atlantic Ocean and grew in popularity with the American people.<sup>27</sup> In 1909, the movie industry was still a very new medium, having existed for less than twenty years. With the advent of new technology, including film and eventually television, broadcast rights spawned from copyright and required new legislation to cover the evolving creation of new media.<sup>28</sup> Before drafting such legislation, the judiciary was left with the task of protecting copyright.<sup>29</sup> “Inartfully drafted and lacking important definitions—and enacted before the invention or widespread commercial use of the phonograph, motion pictures, radio and television . . . the 1909 Act was subjected to frequent ad hoc amendment and to unguided judicial interpretation.”<sup>30</sup> The courts were left to interpret the 1909 Copyright Act and its application to new technology and media.<sup>31</sup> In *United States v. Paramount Pictures, Inc.*, the Supreme Court noted: “[n]o film is sold to an exhibitor in the distribution of motion pictures. The right to exhibit under copyright is licensed.”<sup>32</sup> Thus, film and television were limited to licensing of a broadcast indivisibly.

---

<sup>25</sup> See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 256–57 (rev. ed. 1985) (stating that “[t]he first federal Copyright Act became law in 1790. An author might gain sole right and liberty of printing, reprinting, publishing and vending a map, chart, book or books . . . . By [1831] the act covered musical compositions, designs, engravings, and etchings, as well as maps, charts and books.” (internal quotations omitted)).

<sup>26</sup> Jean-Jacques Meusy, *How Cinema Became a Cultural Industry: The Big Boom in France Between 1905 and 1908*, 14 *FILM HISTORY* 418, 418–20 (2002), available at <http://www.jstor.org/stable/3815441>.

<sup>27</sup> See, e.g., David A. Cook, *History of the Motion Picture*, BRITANNICA ACADEMIC EDITION, available at <http://www.britannica.com/EBchecked/topic/394161/history-of-the-motion-picture> (last visited August 24, 2014) (stating in detail the growth the American film industry experienced in its early years).

<sup>28</sup> See, e.g., BRIAN WINSTON, *MEDIA TECHNOLOGY AND SOCIETY, A HISTORY: FROM THE TELEGRAPH TO THE INTERNET* 81 (1998) (explaining that “[l]egislation was hurriedly prepared and passed as the 1927 Radio Act. It created the Federal Radio Commission (FRC) as the licensing authority but for one year only. This was renewed in 1928 and became a permanent arrangement in 1929.”).

<sup>29</sup> ROBERT A. GORMAN, *COPYRIGHT LAW* 2 (2d ed. 2006).

<sup>30</sup> *Id.*

<sup>31</sup> See *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948) (interpreting the 1909 Copyright Act as it applies to film).

<sup>32</sup> *Id.* at 141.

Other problems arose under the 1909 Act; for example, with regards to indivisibility: “[i]ndivisibility’s main problem hinged on standing to sue for infringement, coupled with the distinction between an exclusive license and an assignment.”<sup>33</sup> In the end, the problems with the 1909 Act stemmed from the lack of clarity regarding which rights were created in the original copyright. For instance, one of the largest issues with problem with “indivisibility has been the determination of which rights could be split off from the bundle of rights and the ability of the grantor to convey title to one or more but not all the rights in the copyright.”<sup>34</sup> Courts were ill equipped to handle the drastic boom of technology and, in fact, yielded to Congress.<sup>35</sup> The Supreme Court noted they had to take the 1909 Act as they found it because altering the terms was left for Congress.<sup>36</sup> The value of these rights increased with the creation of new media, and this necessitated Congress’ intervention. For example, “the subsidiary rights may be much more valuable than what were formerly regarded as the basic rights. Motion picture rights in a book may be worth much more than the publishing rights . . . .”<sup>37</sup> Therefore, Congress enacted the 1976 Copyright Act to deal with the issues that arose as television and motion pictures became more popular and valuable.

### III. TREATMENT OF SPORTS BROADCASTS UNDER THE 1909 ACT

Prior to the 1976 Act, motion pictures and television programming were created and sold under the 1909 Act and the indivisibility doctrine.<sup>38</sup> Under the 1909 Copyright Act, copyright holders had a right to control public performances of the work; however, “cable operators’ secondary transmissions of broadcast programs were not regarded as additional performances of those programs under the 1909

---

<sup>33</sup> Jeffrey W. Natke, Comment, Collapsing Copyright Divisibility: A Proposal for Situational or Medium Specific Indivisibility, 2007 MICH. ST. L. REV. 483, 493 (2007).

<sup>34</sup> STAFF OF S. COMM. ON THE JUDICIARY, 86TH CONG., STUD. ON COPYRIGHT LAW 12 (Comm. Print 1960) (Study prepared by Abraham L. Kaminstein).

<sup>35</sup> See, e.g., *Fortnightly Corp. v. United Artists Television Inc.*, 392 U.S. 390 (declining the invitation to render a decision in the case with regard to the Copyright Act because “[t]hat job is for Congress. We take the Copyright Act of 1909 as we find it.” *Id.* at 401–02).

<sup>36</sup> *Id.* at 401–02.

<sup>37</sup> STAFF OF S. COMM. ON THE JUDICIARY, *supra* note 35.

<sup>38</sup> See *supra* part II.

Act . . . .”<sup>39</sup> Therefore, copyright authors were not making a profit on the secondary transmission because they sold the rights indivisibly, primarily as licenses. The courts therefore played a major role in determining a purchaser’s status by placing a label on the rights:

Indivisibility is a rule or theory relied upon by the court; it is usually applied when a court determines that a grant is not an assignment but a license. If the grant is an assignment, the assignee has full rights; if it is a license, then the doctrine of indivisibility may be used to bar the licensee from doing some of the things an assignee could do.<sup>40</sup>

Therefore, it is important for a broadcaster to acquire the proper form of ownership, because “[a]ssignments carry the right to transfer the copyright and to sue. Licenses are usually personal, contractual, rights and are strictly construed.”<sup>41</sup> Given the difference in rights and privileges, it is very important for the copyright holder to contract using licenses to preserve standing to sue and the right to transfer the copyright. Yet, “nothing prevents the titleholder from promising to treat the licensee’s privileges as irrevocable and exclusive.”<sup>42</sup> Copyright holders were able to work around the indivisibility doctrine, however. For example, the titleholder could elect to not exercise his rights in a particular area.<sup>43</sup> The discrepancy between a license and an assignment was clarified in the 1976 Act.

Prior to the 1976 Act clarification, sports broadcasters relied upon license agreements with the copyright holder. Copyright infringement pertains to the broadcaster who did not procure a valid license for the underlying work.<sup>44</sup> The distinction was drawn by the Supreme Court between the broadcaster and the at-home viewer.<sup>45</sup> In *Fortnightly Corp. v. United Artists Television, Inc.*, the Court noted: “Broadcasters perform. Viewers do not perform.”<sup>46</sup> A license is

---

<sup>39</sup> *Satellite Broad. Comm’n Ass’n v. FCC*, 275 F.3d 337, 345–46 (4th Cir. 2001).

<sup>40</sup> STAFF OF S. COMM. ON THE JUDICIARY, 86TH CONG., *STUD. ON COPYRIGHT LAW 12* (Comm. Print 1960) (Study prepared by Abraham L. Kaminstein).

<sup>41</sup> *Id.* at 13.

<sup>42</sup> Christopher M. Newman, *An Exclusive License Is Not an Assignment: Disentangling Divisibility and Transferability of Ownership in Copyright*, 74 *LA. L. REV.* 59, 80 (2013).

<sup>43</sup> *Id.*

<sup>44</sup> *See generally Fortnightly*, 392 U.S. 390 (1968).

<sup>45</sup> *Id.* at 397–98.

<sup>46</sup> *Id.* at 398.

required for broadcasters to show the underlying copyrighted work, such as a sporting event. Viewers, on the other hand, only passively observe the copyrighted work by utilizing their own equipment. Broadcasters work with the public to transmit the shows; “[t]he broadcaster selects and procures the program to be viewed. . . . He then converts the visible images and audible sounds of the program into electronic signals, and broadcasts the signals at radio frequency for public reception.”<sup>47</sup> Then, the viewers must provide their own equipment to receive the signal and watch the programming.<sup>48</sup> This interaction shows the “general public good” goal of copyright in broadcasting because the public benefits from enjoying and viewing the copyrighted work at home.

Even with evolving technology, however, the Court, as mentioned above, declined to interfere with the legislative process by creating a compromise for the changing technology by stating, “[t]hat job is for Congress. We take the Copyright Act of 1909 as we find it.”<sup>49</sup> Congress addressed sports broadcasts specifically with the Sports Broadcast Act of 1961. However, the Act only “immunizes from antitrust liability the pooled sale of telecasting rights by certain of the professional sports leagues.”<sup>50</sup> It does not address the right to divide copyright between media and languages. Also, it does not expressly state the ownership of copyright in sports broadcasting. Therefore, the copyright for sports is encompassed as an audiovisual work under the 1976 Copyright Act.

#### IV. CURRENT LAW: DIVISIBILITY DOCTRINE

The Copyright Act of 1976 allowed for the division of rights in a copyrighted work.<sup>51</sup> The doctrine of indivisibility is abrogated in Section 201(d)(2): “[c]opyright is made completely divisible.”<sup>52</sup> Essentially, “[d]ivisibility permits a copyright owner to split off some subset of exclusive rights to the work and assign it separately, thus relinquishing all authority over it and effectively creating an entirely separate object of ownership.”<sup>53</sup> The limitations of the rights are outlined in Section 106, which confers a bundle of rights to the owner.

---

<sup>47</sup> *Id.* at 397.

<sup>48</sup> *Id.* at 397–98.

<sup>49</sup> *Id.* at 401–02.

<sup>50</sup> Robert Alan, Garrett Philip, R. Hochberg, Sports Broadcasting and the Law, 59 *IND. L.J.* 155, 186 (1984).

<sup>51</sup> *See generally* 17 U.S.C. § 106 (2012).

<sup>52</sup> U.S. COPYRIGHT OFFICE, GENERAL GUIDE TO THE COPYRIGHT ACT OF 1976 A2:04 (1977), available at <http://www.copyright.gov/reports/guide-to-copyright.pdf>.

<sup>53</sup> Newman, *supra* note 43, at 61.



“Under the Copyright Act, these rights—to publish, copy, and distribute the author’s work—vest in the author of an original work from the time of its creation.”<sup>54</sup> The Supreme Court noted that the 1976 Act recast copyright as a discrete bundle of exclusive rights that can be transferred separately.<sup>55</sup> Therefore, the author can now sell individual rights for different pieces of the bundle of rights. The Copyright Act of 1976 covers exclusive rights and authorizes any of the following enumerated rights:

- (1) to reproduce the copyrighted work in copies or phonorecords; . . .
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of . . . motion pictures and other audiovisual works, to perform the copyrighted work publicly;
- (5) in the case of . . . individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
- (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.<sup>56</sup>

These enumerated rights are the scope of divisibility and can be sold separately.<sup>57</sup> Any of these rights can be divided between multiple copyright holders.<sup>58</sup>

Divisibility is encompassed in Section 201(d)(1) of the Copyright Act: “The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law . . . .”<sup>59</sup> Furthermore, “[a]ny of the exclusive rights comprised in a copyright . . . may be transferred . . . and owned separately. The owner of any particular exclusive right is entitled, to the extent of that right, to all of the protection and remedies accorded to the copyright owner by this title.”<sup>60</sup> So the copyright holder of an exclusive right has full use and

---

<sup>54</sup> Harper Row, 471 U.S. at 546–47.

<sup>55</sup> Tasini, 533 U.S. at 495–96.

<sup>56</sup> 17 U.S.C. § 106 (2012) (omitting the second enumerated right as it does not pertain to broadcasting).

<sup>57</sup> Tasini, 533 U.S. at 495–96.

<sup>58</sup> *Id.*

<sup>59</sup> 17 U.S.C. § 201(d)(1) (2012). *See also* Natke, *supra* note 34, at 496 (explaining that “[d]ivisibility allows for multiple owners of a single copyrighted work, each with a different slice of the copyright bundle of rights.”).

<sup>60</sup> 17 U.S.C. § 201(d)(2).

enjoyment of that right to the exclusion of all other people. The exclusive-rights holder can enforce his rights to the exclusion of all others. To achieve the divisibility of copyright, the copyright author can transfer a portion of his rights to a licensee or assignee. Section 101 defines a “transfer of copyright ownership” under the current Act as “an assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights comprised in a copyright, whether or not it is limited in time or place of effect, but not including a nonexclusive license.”<sup>61</sup> Based upon section 101, assignment and license are two of the possible ways to divide the copyright that remained from the 1909 Act. An exclusive license or an assignment must be in writing.<sup>62</sup> This writing requirement makes the terms and rights clearer for the copyright holder of his rights. “[T]he licensor remains the owner of the copyright, and the licensee is the owner only of the exclusive rights that are the subject of license . . . .”<sup>63</sup>

Although “license” is undefined in the Act, one definition of a “license” is “an interest, granted by a titleholder, that relieves the licensee of the duty to refrain from some action or actions that would otherwise violate the titleholder’s rights of noninterference.”<sup>64</sup> Therefore, the licensee will not be sued for copyright infringement for the scope of rights he purchased from the copyright holder. The licensee helps protect the copyright by enforcing his rights from infringement.<sup>65</sup>

Under section 204, a license is divisible, either nonexclusively or exclusively.<sup>66</sup> Nonexclusive licenses can be valid without writing, meaning it could be implied or oral.<sup>67</sup> Furthermore, “[a] nonexclusive license granted under § 205(e) is akin to an easement over land—it conveys irrevocable use-privileges that pertain to the underlying

---

<sup>61</sup> 17 U.S.C. § 101 (2012). *See also* David Nimmer, NIMMER ON COPYRIGHT § 10.02 [A] (2013).

<sup>62</sup> *Id.* at [B][2].

<sup>63</sup> *Id.* at [C][2]. *See also* Christopher M. Newman, A License Is Not a “Contract Not To Sue”: Disentangling Property and Contract in the Law of Copyright Licenses, 98 IOWA L. REV. 1101, 1151 (2013) (explaining that “[l]icenses are usually accompanied by terms reciting various duties of the licensee, some directly regulating his use of the licensed property, others requiring additional actions, such as the payment of royalties.”).

<sup>64</sup> Newman, *supra* note 43, at 79.

<sup>65</sup> *See* Donald M. Cameron, CAMERON’S PATENT AND TRADE SECRETS LAW 14 (2010), available at <http://www.jurisdiction.com/patweb13.pdf>.

<sup>66</sup> *See* 17 U.S.C. § 204(a) (2012); 17 U.S.C. § 205 (2012).

<sup>67</sup> Newman, *supra* note 64, at 1159 (noting that a “deed is not required to create a nonexclusive license . . .”).

property in rem, thus binding subsequent assignees.”<sup>68</sup> A nonexclusive license allows a copyright holder to sell the use to multiple licensees making the sale more lucrative for the copyright holder. On the other hand, exclusive licenses “are treated like assignments in that they constitute a conveyance of a property right that can be accomplished by gift no less than by sale.”<sup>69</sup>

Any of the exclusive rights comprised in a copyright, including any subdivision of any of the rights specified by section 106, may be transferred . . . and owned separately. The owner of any particular exclusive right is entitled, to the extent of that right, to all of the protection and remedies accorded to the copyright owner by this title.<sup>70</sup>

Furthermore, “[t]he exclusive license interests enabled by the 1976 Act constitute a form of ownership in that they vest exclusive licensees with certain enumerated independent powers of title that had been denied them under previous law.”<sup>71</sup> Broadcasters seek exclusive licenses to pull viewers to their channel and network to watch popular sporting events.<sup>72</sup> The goal of divisibility is to allow the copyright holder to profit from his creative work.<sup>73</sup> However, given this purpose, it also promotes the general public good by allowing more people the opportunity to enjoy the work.

#### V. TREATMENT OF SPORTS BROADCAST UNDER 1976 ACT

The 1976 Act allowed for division of the copyrights used during television broadcasts. “At the urging of the professional sports leagues, Congress extended federal copyright protection to live sports broadcasts, thereby vesting the owners of these telecasts with the exclusive right to ‘perform’ them ‘publicly.’”<sup>74</sup> Sports broadcasts must meet the requirements of a copyright in order to receive protection: an original work of authorship fixed in a tangible medium.<sup>75</sup> A sports broadcast “must be ‘fixed’ (*i.e.*, recorded)

---

<sup>68</sup> *Id.* at 1149. (Using the easement analogy, “unlike an easement, a nonexclusive license includes no rights of noninterference.”).

<sup>69</sup> Nimmer, *supra* note 62, at § 10.02(B)(5).

<sup>70</sup> 17 U.S.C. § 201(d)(2) (2012).

<sup>71</sup> Newman, *supra* note 43, at 61.

<sup>72</sup> WIPO, *supra* note 16.

<sup>73</sup> *See* Newman, *supra* note 43, at 82.

<sup>74</sup> Alan, Philip, Hochberg, *supra* note 51, at 161.

<sup>75</sup> Nat’l Basketball Ass’n v. Motorola, Inc., 105 F.3d 841, 847 (2d Cir. 1997).

simultaneously with its transmission.”<sup>76</sup> So the last two elements are met: fixation and in a tangible medium. The difficulty in initially receiving a copyright comes from the confusion about authorship. “Ownership in the copyright to sports broadcasts lacks clarity because the broadcaster produces and creates the broadcast and is therefore the ‘author’ of the copyrighted work, that being the broadcast of the game.”<sup>77</sup> Authorship comes from the selection of shots that make it to air:

Section 102(a)(6) of the new Copyright Act for the first time provided copyright protection for the event, so long as it was recorded on film or videotape (which by 1976 was becoming routine). Moreover, courts have also ruled that the special techniques of sports broadcasting—instant replays, split screen shots, and commentary by announcers--constitute “creativity” for authorship purposes.<sup>78</sup>

Sports are unique for copyright because the real “authors” are the athletes. “Sports events are not ‘authored’ in any common sense of the word . . . . Unlike movies, plays, television programs, or operas, athletic events are competitive and have no underlying script.”<sup>79</sup> In fact, many memorable sports moments are unplanned or result from “mistakes.” For example, a half court basket during a basketball game is not planned but a mixture of luck and practice. Yet, the sports broadcasts gain protection because the broadcast itself is a creative work, the editing and selection of clips for replays makes it qualify as an original work.<sup>80</sup> “Congress passed legislation expressly affording copyright protection to simultaneously-recorded broadcasts of live performances such as sports events.”<sup>81</sup> Therefore, sports broadcasts qualify for copyright protection because it is a creative work in a fixed, tangible medium.

Interestingly, given the difficulty of amending Copyright law in the United States, sports broadcasters seek exclusivity of content. It is common for multiple networks to split rights to a series of games, such

---

<sup>76</sup> Alan, Philip, Hochberg, *supra* note 51, at 161. *See also* 17 U.S.C. § 101 (2012).

<sup>77</sup> Richard T. Karcher, Broadcast Rights, Unjust Enrichment, and the Student-Athlete, 34 *CARDOZO L. REV.* 107, 116 (2012).

<sup>78</sup> J. Gordon Hylton, The Over-Protection of Intellectual Property Rights in Sport in the United States and Elsewhere, 21 *J. LEGAL ASPECTS SPORT* 43, 51-52 (2011).

<sup>79</sup> Nat’l Basketball Assoc., 105 F.3d at 846.

<sup>80</sup> *See* 17 U.S.C. § 101 (2012) (defining when a work is created).

<sup>81</sup> Nat’l Basketball Assoc., 105 F.3d at 845.

as the NCAA March Madness between Turner, including TBS, TNT, and truTV local channels, and CBS.<sup>82</sup> However, it is not common to share rights to the same event or game.<sup>83</sup> This difference will be explored in the following sections. Broadcasters purchase the copyright for events from the sport's governing body, such as the International Olympic Committee, which owns all rights to the Summer and Winter Olympic Games.<sup>84</sup> Exclusivity of a broadcast does not limit the rights to a singular event if those rights encompass different aspects, such as the medium like television or radio, or to a particular language. The value of copyright is the ability to divide the multiple copyrights in a work for its profitability for the author. Thus, the copyright of sports broadcasts can be split between media, such as radio and television, as well as between languages.

#### VI. COPYRIGHT OF SPORTS BROADCASTS IN THE EUROPEAN UNION AND THE UNITED KINGDOM

Sports television broadcasts are popular around the world and warrant a comparison to the United States Copyright Act. Overall, soccer (or "football," as it is called outside of the United States) is one of the most-watched sports in Europe.<sup>85</sup> Soccer was codified in England in 1863 and spread throughout Europe shortly thereafter.<sup>86</sup> In 1904, FIFA was founded to regulate the sport.<sup>87</sup> Today, Europe has four major country powerhouses based upon wins: England, Germany, Italy, and Spain.<sup>88</sup> The English Premier League ("EPL") Soccer team is the most lucrative because it generates the most revenue and global

---

<sup>82</sup> Michael Smith, News Ads Link Partners to NCAA, *SPORTS BUS. J.*, Mar. 17, 2014, at 5, 5, available at <http://www.sportsbusinessdaily.com/Journal/Issues/2014/03/17/Colleges/NCAA-ads.aspx>.

<sup>83</sup> See John Ourand, Christopher Botta, MLS's Big Play, *Sports Bus. J.*, May 12, 2014 at 1,1, available at [www.sportsbusinessdaily.com/Journal/Issues/2014/05/12/Media/MLS-TV.aspx](http://www.sportsbusinessdaily.com/Journal/Issues/2014/05/12/Media/MLS-TV.aspx) (providing an example where one network has the rights to Friday games, while another has the rights to Sunday games).

<sup>84</sup> INT'L OLYMPIC COMM., *OLYMPIC CHARTER 22* (2013), available at [http://www.olympic.org/documents/olympic\\_charter\\_en.pdf](http://www.olympic.org/documents/olympic_charter_en.pdf).

<sup>85</sup> *Top List of the World's Most Popular Sports*, TOPENDSPORTS, <http://www.topendsports.com/world/lists/popular-sport/fans.htm> (last accessed Sept. 6, 2014).

<sup>86</sup> Todd Henderson, NOTE, The English Premier League's Home Grown Player Rule Under the Law of the European Union, 37 *BROOK. J. INT'L L.* 259, 262 (2011).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 263.

television viewing.<sup>89</sup> The Union of European Football Associations “ranks the EPL as the strongest European domestic league based on its performance in inter-European Club Competitions.”<sup>90</sup> Due to the popularity of soccer and viewership ratings in Europe and particularly in England, an analysis of the copyright protection afforded to sports broadcast was warranted in comparison to the United States Copyright Act of 1976. The American copyright law only extended to works inside the United States and did not protect authors abroad.<sup>91</sup> Thus, the United States was prompted to join the Berne Convention in 1988,<sup>92</sup> which required more formalities but allowed for copyright divisibility.<sup>93</sup> Similar to the United States Copyright Act of 1976, copyright law under the Berne Convention operates with “separate and divisible copyrights . . . embodied in a single object.”<sup>94</sup> Given the popularity of sports broadcasting around the world, it was necessary for a formal body to protect those rights.

During the 2010 World Cup, Europe had over 16,000 hours of coverage, outpacing every other region in the world.<sup>95</sup> The United Kingdom aired 340 hours of coverage.<sup>96</sup> During peak coverage, the United Kingdom had over 16 million people watching the matches.<sup>97</sup> Soccer is one of the most-watched sports in Europe but the FIFA World Cup draws enormous viewership. The 2010 final match between Spain and the Netherlands pulled one billion viewers

---

<sup>89</sup> *Id.* at 264.

<sup>90</sup> *Id.*

<sup>91</sup> See Orrin G. Hatch, Better Late Than Never: Implementation of the 1886 Berne Convention, 22 CORNELL INT’L L.J. 171, 178 (1989).

<sup>92</sup> See Berne Convention Implementation Act of 1988, Pub. L. No. 100–568, 102 Stat. 2853 (codified as amended in scattered sections of 17 U.S.C.).

<sup>93</sup> Sheldon Mak Rose Anderson, COPING WITH THE BERNE CONVENTION 1 (1989), available at [http://www.usip.com/pdf/Article\\_Patents/BerneConvention.pdf](http://www.usip.com/pdf/Article_Patents/BerneConvention.pdf).

<sup>94</sup> WIPO Copyright Treaty, Dec. 20, 1996, 2186 U.N.T.S. 121, S. Treaty Doc. No. 105-17 (1997); 36 I.L.M. 65 (1997); see also, 3 CENTER FOR INTERNATIONAL LEGAL STUDIES, WORLD INTELLECTUAL PROPERTY RIGHTS AND REMEDIES: LAW WITH COMMENTARY § 67:5 (Dennis Campbell ed., 2014) (“For example, a film may carry multiple copyrights, in an original book, in the screenplay derived from the book, in the film, in the music of the score, and in the sound recording of the music. If the film is broadcast, a further broadcast copyright is added.”).

<sup>95</sup> KANTARSPORT, 2010 FIFA WORLD CUP SOUTH AFRICA: TELEVISION AUDIENCE REPORT, 21 (2010) available at <http://www.fifa.com/mm/document/affederation/tv/01/47/32/73/2010fifaworldcupsouthafricatvaudiencereport.pdf>.

<sup>96</sup> *Id.* at 38.

<sup>97</sup> *Id.* at 13.

globally.<sup>98</sup> Therefore, broadcasting copyright is paramount for sports to generate revenue for FIFA in Europe. In the European Union (“EU”), copyrights in broadcasting are protected by the World Intellectual Property Organization (“WIPO”) Copyright Treaty,<sup>99</sup> the Berne Convention,<sup>100</sup> and the Universal Copyright Convention (“UCC”).<sup>101</sup> The WIPO protects copyrights of authors by allowing

---

<sup>98</sup> FIFA: At Least 1 Billion Saw Cup Final, ESPN (July 11, 2011, 3:19 PM), [http://espn.go.com/sports/soccer/news/\\_id/6758280/least-1-billion-saw-part-2010-world-cup-final](http://espn.go.com/sports/soccer/news/_id/6758280/least-1-billion-saw-part-2010-world-cup-final).

<sup>99</sup> “Article 6. Right of Distribution (1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their works through sale or other transfer of ownership. (2) Nothing in this Treaty shall affect the freedom of Contracting Parties to determine the conditions, if any, under which the exhaustion of the right in paragraph (1) applies after the first sale or other transfer of ownership of the original or a copy of the work with the authorization of the author.” World Intellectual Property Organization Copyright Treaty art. 6, Dec. 20, 1996, S. Treaty Doc. No. 105-17, 2186 U.N.T.S. 38542, available at [http://www.wipo.int/treaties/en/text.jsp?file\\_id=295166#P62\\_6959](http://www.wipo.int/treaties/en/text.jsp?file_id=295166#P62_6959) (last visited Aug. 27, 2014).

<sup>100</sup> The Berne Convention was signed in 1886 between 10 countries and now has 77 signatories. 5-17 Melville B. Nimmer and David Nimmer, NIMMER ON COPYRIGHT § 17.01 (Matthew Bender, Rev. Ed.). The key provision for broadcasting is found in “Article 11bis, Broadcasting and Related Rights: 1. Broadcasting and other wireless communications, public communication of broadcast by wire or rebroadcast, public communication of broadcast by loudspeaker or analogous instruments; 2. Compulsory licenses; 3. Recording; ephemeral recordings (1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing: (i) the broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images; (ii) any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organization other than the original one; (iii) the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work. (2) It shall be a matter for legislation in the countries of the Union to determine the conditions under which the rights mentioned in the preceding paragraph may be exercised, but these conditions shall apply only in the countries where they have been prescribed. They shall not in any circumstances be prejudicial to the moral rights of the author, nor to his right to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority.” Berne Convention for the Protection of Literary and Artistic Works, September 9, 1886, as last revised at Paris on July 24, 1971, 1161 U.N.T.S. 30; Berne Convention for the Protection of Literary and Artistic Works art. 11bis, Sept. 9, 1886, S. Treaty Doc. No. 99-27, 828 U.N.T.S. 11850.

<sup>101</sup> The UCC was initially created in 1955, however, not every country agreed to the terms of the Berne Convention. “The UCC ensured that international protection was available to authors even in countries that would not become parties to the Berne Convention. Berne convention countries also became signatories of the UCC to ensure that the work of citizens in Berne Convention countries would be protected

*continued . . .*

“[t]erritoriality – the right of the rights holder to decide on the geographic scope of a licence [sic],”<sup>102</sup> which is similar to contractual freedom that allows for selling rights to profit the author. “The UCC requires member nations to conform their domestic copyright laws to the minimum standards contained in the Convention to insure that each country will provide the nationals of other member countries with certain uniform minimum copyright protections.”<sup>103</sup> The United States and the United Kingdom are signatories to the UCC as well as the Berne Convention, which has a higher minimum standard of protection for copyrights.<sup>104</sup> As the Berne Convention is not self-executing, each member state creates its own legislation to incorporate the terms for copyright protection.<sup>105</sup> The member-state legislation is exemplified by the copyright law in the United Kingdom, under which licensing is accomplished on a territorial basis.<sup>106</sup>

The United Kingdom signed the Berne Convention in 1886 and it was enforced in 1887.<sup>107</sup> The copyright protection was authorized through legislation. In the United Kingdom, copyright law is regulated by the Copyright, Design, and Patents Act of 1988 (“CDPA”).<sup>108</sup> The copyright can be assigned wholly or partially, even

---

in non-Berne Convention countries.” Fact Sheet P-14 The Universal Copyright Convention (UCC), UK COPYRIGHT SERVICE, (Jan. 27, 2007), [https://www.copyrightservice.co.uk/copyright/p14\\_universal\\_copyright\\_convention](https://www.copyrightservice.co.uk/copyright/p14_universal_copyright_convention).

<sup>102</sup> KEA, MULTI-TERRITORY LICENSING OF AUDIOVISUAL WORKS IN THE EUROPEAN UNION 7 (2010) *available at* <http://www.keanet.eu/docs/mtl%20-%20exec%20summ%20en.pdf>.

<sup>103</sup> Joseph Greenwald, Introduction to Universal Copyright Convention, revised July 24, 1971, 25 U.S.T. 1341, 943 U.N.T.S. 1344 *available at* 1989 W.L. 1633946, 1 (citing the terms of 1988 UCC).

<sup>104</sup> *Id.*

<sup>105</sup> Ruth Okediji, Toward an International Fair Use Doctrine, 39 COLUM. J. TRANSNAT’L L. 75, 144–45 (2000).

<sup>106</sup> Opinion of Advocate General Kokott, Joined Cases C-403/08 C-429/08, Football Ass’n Premier League Ltd. v. QC Leisure, and Karen Murphy v. Media, 2011 EUR-Lex CELEX LEXIS 608CC0403 (Feb. 3, 2011), *available at* <http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d2dc30d604a608f29c4245128e5cea295c2e8329.e34KaxiLc3qMb40Rch0SaxuOaxj0?text=docid=84316pageIndex=0doclang=ENmode=lstdir=occ=firstpart=1cid=368880> (last visited Aug. 27, 2014).

<sup>107</sup> Fact sheet P-08: The Berne Convention, UK COPYRIGHT SERVICE, [http://www.copyrightservice.co.uk/copyright/p08\\_berne\\_convention](http://www.copyrightservice.co.uk/copyright/p08_berne_convention) (last amended Dec. 6, 2011).

<sup>108</sup> Fact sheet P-01: UK Copyright Law, UK COPYRIGHT SERVICE, [http://www.copyrightservice.co.uk/copyright/p01\\_uk\\_copyright\\_law](http://www.copyrightservice.co.uk/copyright/p01_uk_copyright_law) (last amended Nov. 27, 2009).



in regards to future copyrights.<sup>109</sup> Copyright in a broadcast has a duration of fifty years from the end of the year it was first broadcast.<sup>110</sup> Under the CDPA, the United Kingdom dealt with the use of sports broadcasting during new programs in *BBC v. British Satellite Broadcasting Ltd.*<sup>111</sup> “[T]he [British Broadcasting Company (BBC)] owned the copyright in its broadcasts of matches in the international 1990 World Cup football tournament.”<sup>112</sup> The infringement occurred when FIFA World Cup footage was used by BBC’s competitors to highlight goals during the matches.<sup>113</sup> The United Kingdom’s High Court, the Chancery Division, held that it was “fair dealing”<sup>114</sup> because the secondary broadcasts were less than 30 seconds and gave credit to the BBC.<sup>115</sup> Therefore, viewers knew that the BBC would broadcast the entire match.<sup>116</sup>

Further copyright law comes directly from the EU, which promulgated the European Community Directive 2001/29, including in granting authors “the exclusive right to authorise [sic] or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part.”<sup>117</sup> Each member state had to incorporate the Directive into its copyright laws.<sup>118</sup> For example, the United Kingdom incorporated the Directive into the CDPA to protect

---

<sup>109</sup> Copyright, Designs and Patents Act, 1988, c. 48, § 91 (Eng.) (“[P]rospective owner [may purport] to assign the future copyright (wholly or partially) to another person . . . .”) (emphasis added).

<sup>110</sup> Copyright, Designs and Patents Act, § 14. *See generally* Fact sheet P-10: Copyright Duration, UK COPYRIGHT SERVICE, [http://www.copyrightservice.co.uk/copyright/p10\\_duration](http://www.copyrightservice.co.uk/copyright/p10_duration) (last amended July 5, 2004) (stating the duration of copyright in the United Kingdom).

<sup>111</sup> *BBC v. British Satellite Broad. Ltd.*, [1991] Ch. 141 (Eng.).

<sup>112</sup> *Id.* at 141–42.

<sup>113</sup> *Id.* at 142.

<sup>114</sup> *See generally* Sarah Sklar-Heyn, Battling Clearance Culture Shock: Comparing U.S. Fair Use and Canadian Fair Dealing in Advancing Freedom of Expression in Non-Fiction Film, 20 *CARDOZO J. INT’L COMP. L.* 233, 238-51 (2011) (describing the history of the development of both the “fair use” doctrine in American law and “fair dealing” in foreign law). “Fair dealing” is akin to the “fair use” defense under American copyright law.

<sup>115</sup> *British Satellite Broad. Ltd.* at 158-59.

<sup>116</sup> *Id.* at 146.

<sup>117</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society. 2001 O.J. (L 167) 10, 16, *available at* <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001L0029&qid=1408737169106&from=EN> (last visited Aug. 27, 2014).

<sup>118</sup> *Id.* at 6.

exclusive licensing of copyright, specifically including broadcasts.<sup>119</sup> The CDPA licensing rights for broadcasts requires notice to a licensing body including proper payments.<sup>120</sup> One key amendment from the Directive for the British copyright law was to allow performers exclusive rights “to control ‘on-demand’ transmissions of recordings of their performances . . . .”<sup>121</sup> This inclusion reflects the technological innovation and the law’s quick response to protect copyright holders.

The EU addressed sports broadcasting in 2011 when a case arose concerning the use of satellite broadcasts infringing on copyrights of British copyright holders. In *Football Association Premier League Ltd. v. QC Leisure*<sup>122</sup>, the issue of copyright infringement for sports broadcasting was discussed in relation to the CDPA and EU law.<sup>123</sup> To better understand this case, it is important to get a background on the licensing of soccer in England. “[T]he Football Association Premier League Ltd. (the FAPL), the top English football league’s organisation [sic] for marketing that league’s matches . . . grants its licensees the exclusive right to broadcast and economically exploit the matches within their broadcasting area . . . .”<sup>124</sup> The FAPL controls filming of the soccer matches and then licenses those rights to broadcasters, who purchase exclusive licenses for a territory. “The exclusive rights to broadcast live matches are divided territorially and are granted on the basis of three-year terms.”<sup>125</sup> In practice, licenses are primarily sold by territory meaning it is limited to one broadcaster for one country.<sup>126</sup> Thus, FAPL ensures the exclusivity of the

---

<sup>119</sup> Copyright, Designs and Patents Act, 1988, c. 48, § 1 (including the amendment from 2003).

<sup>120</sup> “Conditions for exercise of right: 1) A person who, on or after the date specified in a notice under section 135B(1)(b), includes in a broadcast . . . any sound recordings in circumstances in which this section applies, and who—(a) complies with any reasonable condition, notice of which has been given to him by the licensing body, as to inclusion in the broadcast . . . of those recordings, (b) provides that body with such information about their inclusion in the broadcast . . . as it may reasonably require, and (c) makes the payments to the licensing body that are required by this section, shall be in the same position as regards infringement of copyright as if he had at all material times been the holder of a licence [sic] granted by the owner of the copyright in question.” *Id.* at § 135C.

<sup>121</sup> FOUNDATION FOR INFORMATION POLICY RESEARCH, IMPLEMENTING THE EUROPEAN COPYRIGHT DIRECTIVE 1.5, *available at* [http://www.fipr.org/copyright/eucd\\_draftimpact.html](http://www.fipr.org/copyright/eucd_draftimpact.html) (last visited Aug. 22, 2014).

<sup>122</sup> *Football Association Premier League Ltd. v. QC Leisure* [2008] EWHC 1411 (Ch) (Eng.).

<sup>123</sup> *See* *Football Ass’n Premier League Ltd.*, *supra* note 107, at 9093.

<sup>124</sup> *Id.* at 9092.

<sup>125</sup> *Id.* at 9103.

<sup>126</sup> *Id.* at 9092.

broadcasting areas by preventing viewership outside the exclusive territory, which is a common practice in Europe. “In order to protect this territorial exclusivity, each broadcaster undertakes in its licence [sic] agreement with the FAPL to encrypt its satellite-delivered signal.”<sup>127</sup> So the broadcaster protects the signal to help maintain the value of its copyright and ensures that the viewer pays for the right to watch the broadcast.

In *Football Association Premier League Ltd. v. QC Leisure*, the value of that encrypted satellite signal was at issue when an English pub owner broadcast a soccer match using a decoder purchased from Greece.<sup>128</sup> The owner only paid for a domestic copyright, which meant the viewing could only be for personal use, not commercial.<sup>129</sup> Thus, the pub owner was fined for copyright infringement by publicly broadcasting the match in the pub.<sup>130</sup> However, the device that enabled the transmission via satellite was not illegal.<sup>131</sup> “The European Court of Justice ruled that subscribing to a foreign satellite broadcaster and using a foreign decoder card for private use was not illegal.”<sup>132</sup> The outcome of the case allowed for national licensing for independent members to continue in the EU.<sup>133</sup>

Furthermore, the European Court of Justice held “all the matches in the final stages of those two tournaments [FIFA and UEFA] actually attracted sufficient attention from the public to form part of an event of major importance”<sup>134</sup> because the matches are very popular. However, individual EU states can designate any match as being of “major importance.”<sup>135</sup> Based on this case, FIFA and UEFA, the two governing bodies of soccer associations in Europe, lost some of the value in their broadcasting rights because they can no longer limit final matches of the World Cup and European Championship to only paid television channels. Nonetheless, FIFA still makes millions of

---

<sup>127</sup> *Id.* at 9103.

<sup>128</sup> Mark Thompson, Europe Probes Studios’ Deals With Pay TV, CNN MONEY (Jan. 13, 2014, 9:21 AM), <http://money.cnn.com/2014/01/13/news/companies/europe-movies-probe/>.

<sup>129</sup> Football Ass’n Premier League Ltd., *supra* note 107, at 9111.

<sup>130</sup> Thompson, *supra* note 129.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> Jenine Hulsmann, Exclusive Territorial Licensing of Content Rights After the EU Premier League Judgments, 26 ANTITRUST 30, 36 (Summer 2012) *available at* [http://www.cliffordchance.com/content/dam/cliffordchance/PDFs/Antitrust\\_Article\\_on\\_Exclusive\\_Territorial\\_Licensing.pdf](http://www.cliffordchance.com/content/dam/cliffordchance/PDFs/Antitrust_Article_on_Exclusive_Territorial_Licensing.pdf).

<sup>134</sup> Arjun Kharpal, FIFA loses battle over soccer World Cup broadcasts, CNBC (July 18, 2013, 9:51 AM), <http://www.cnbc.com/id/100896248>.

<sup>135</sup> *Id.*

dollars from licensing rights from the World Cup;<sup>136</sup> however this case shows some of the limitations based upon the sport's popularity in European cultures. Access to the World Cup is of major importance to the European marketplace and justifies the outcome that everyone should have access to the final match.

## VII. BACKGROUND OF THE FIFA WORLD CUP BROADCAST IN THE UNITED STATES

The issues of copyright divisibility are particularly interesting in the context of FIFA soccer broadcasts in the United States, because they create a market that can be divided between networks. The pinnacle global event for soccer is the World Cup, which is held every four years.<sup>137</sup> It is an international competition where each country participating is represented by its best soccer players, many of whom are also professional soccer players.<sup>138</sup> FIFA organizes the World Cup and owns all the rights.<sup>139</sup> "Typically, to broadcast the World Cup, a three-way deal is arranged between the organizer, host broadcaster, and other broadcasters. FIFA initially owns the broadcasting rights to the World Cup."<sup>140</sup> In turn, FIFA sells those broadcast rights to companies to show the World Cup in their home countries.<sup>141</sup> FIFA "selects a production company as the 'host broadcaster' and then licenses the right to show World Cup games on television and radio to individual broadcasters in interested countries."<sup>142</sup> A bidding process determines which broadcaster will be authorized to show the matches in each country or region.<sup>143</sup> The bidding process allows FIFA to maintain control over the broadcast by limiting only authorized broadcasters into the arenas.<sup>144</sup>

---

<sup>136</sup> See Kelly Phillips Erb, *World Cup Mania: Figuring Out FIFA, Soccer & Tax*, FORBES.COM (June 14, 2014, 12:23PM), <http://www.forbes.com/sites/kellyphillipserb/2014/06/16/world-cup-mania-figuring-out-fifa-soccer-tax> (stating that that during the 2010 World Cup "branding alone generated USD \$37 million for FIFA.").

<sup>137</sup> FIFA World Cup, FIFA (Aug. 22, 2014, 2:15 PM) <http://www.fifa.com/aboutfifa/worldcup/>.

<sup>138</sup> *Id.*

<sup>139</sup> Hylton, *supra* note 79, at 58.

<sup>140</sup> Bashar H. Malkawi, Broadcasting the 2006 World Cup: The Right of Arab Fans versus ART Exclusivity, 17 FORDHAM INTELL. PROP. MEDIA ENT. L.J. 591, 593 (2007).

<sup>141</sup> *Id.*

<sup>142</sup> Hylton, *supra* note 79, at 58.

<sup>143</sup> See *id.* at 59.

<sup>144</sup> See *id.* at 61.

The 2014 World Cup in Brazil marked the 20<sup>th</sup> tournament.<sup>145</sup> Despite the overwhelming popularity of the tournament worldwide, it has yet to garner as many fans in the United States. “[D]espite the World Cup’s unparalleled popularity across the globe, American interest in, enthusiasm about, and coverage of the World Cup have lagged behind the rest of the world.”<sup>146</sup> Many theories offer a potential rationale for lack of popularity in the United States compared to the rest of the world.<sup>147</sup>

One theory is based on the limited focus of a nation to watch only a certain number of sports, which was popular at a time prior to television broadcasting of sports.<sup>148</sup> Thus, the popular sports were local teams that could be heard on the radio or seen in person. “Whichever sport entered a country’s sport space first and managed to do so in the key period between 1870 and 1930, the crucial decades of industrial proliferation and establishment of modern mass societies, continues to possess a major advantage to this day.”<sup>149</sup> Therefore, sports like baseball, basketball, and football are strongholds for the American people.<sup>150</sup> Further, this theory explains the reason that the United States hosting the 1994 World Cup did not generate more popularity with American viewers.<sup>151</sup> Soccer was not a popular

---

<sup>145</sup> See David R. Novak & Andrew C. Billings, *The Fervent, the Ambivalent, and the Great Gap Between: American Print-Media Coverage of the 2010 FIFA World Cup*, 5 INT’L J. OF SPORT COMM. 35, 44 (2012) (citations omitted).

<sup>146</sup> *Id.* at 36.

<sup>147</sup> *Id.* at 37.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* For example, applying this theory to the United States, baseball is the national pastime, even though today attendance is not as strong as it once was. Ed Sherman, *All-time low rating: Why World Series continues to decline; trails NBA Finals, NCAA tourney, BCS*, SHERMAN REPORT (Oct. 30, 2012), <http://www.shermanreport.com/why-world-series-matters-much/> (discussing sinking television ratings and attendance despite the perceived popularity of the sport). But football and basketball were being played during this “crucial time” in the United States, which are the three main popular sports on television today. Andy Benoit, *Football, Baseball and the Evolving Tastes of Fans*, N.Y. TIMES, Apr. 17, 2012 available at [http://fifthdown.blogs.nytimes.com/2012/04/17/football-baseball-and-the-evolving-tastes-of-fans/?\\_php=true\\_type=blogs\\_r=0](http://fifthdown.blogs.nytimes.com/2012/04/17/football-baseball-and-the-evolving-tastes-of-fans/?_php=true_type=blogs_r=0).

<sup>150</sup> Novak, *supra* note 146, at 37.

<sup>151</sup> See Jake Mann, *Will the World Cup Give U.S. Soccer a Permanent Boost?* THE MOTELY FOOL (June 12, 2014), <http://www.fool.com/investing/general/2014/06/12/will-the-world-cup-give-us-soccer-a-permanent-boos.aspx> (stating that “There has been little change in the number who consider themselves fans . . . over the past two decades. Some 28% identify themselves as fans today, compared with 31% on the eve of the 1994 World Cup” (internal quotations omitted)).

professional sport in the United States in the early 1900s<sup>152</sup> and even hosting the event did not cause a new wave of interest.

Another theory for the unpopularity of soccer is that the American broadcasters victimize the American soccer team.<sup>153</sup> For example, in the 2002 World Cup match between the United States and Brazil showed the Americans as completely outpaced by the Brazilians.<sup>154</sup> This notion of “us versus them” comes into play mainly for soccer in the United States because Europe offers powerhouse teams, leading broadcasters to portray American teams as David versus the European Goliath. Even though the United States versus China women’s final pulled 18 million viewers on ABC, those viewers did not tune in for other matches for the World Cup.<sup>155</sup> Given the victimization of American soccer, it is not surprising that the sport’s broadcast popularity did not grow despite the fact that American women’s team won the World Cup in 1999.<sup>156</sup>

Despite the lack of World Cup viewing, Americans play soccer in an increasing number. It is estimated that “in the United States, soccer is primarily a participation sport [with 31 million people playing]. Over 4 million youths play soccer, as well as over 700,000 high school athletes.”<sup>157</sup> Likely, the number of Americans watching the World Cup will increase as the general population gains a knowledge and passion for the sport. In spite of all the data stating that Americans are not watching the World Cup, there is conflicting data to show that is not true. The Nielsen Company has monitored the most-watched soccer matches.<sup>158</sup> Surprisingly, the most-watched match in the United States did not involve the American team, but instead was the final between Spain and the Netherlands in the 2010 World Cup.<sup>159</sup> The total viewership in the United States was 24.3 million during the ABC/Univision broadcast.<sup>160</sup> The second most-watched match for the 2010 World Cup was between the United States and Ghana with 19.4

---

<sup>152</sup> *Id.* at 38.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* (explaining that “Brazil is framed as the ‘champion/superstar’ team . . .”).

<sup>155</sup> 2010 World Cup Final Becomes Most Watched Soccer Game in U.S. TV History, NIELSEN (July 12, 2010), <http://www.nielsen.com/us/en/newswire/2010/2010-world-cup-final-becomes-most-watched-soccer-game-in-u-s-tv-history.html>.

<sup>156</sup> See Mann *supra* note 152 (stating that there has not been much of an increase in viewership in the past 10 years).

<sup>157</sup> Ken Belson, Soccer’s Growth in the U.S. Seems Steady, N.Y. TIMES, July 23, 2010, [http://www.nytimes.com/2010/07/24/sports/soccer/24soccer.html?\\_r=0](http://www.nytimes.com/2010/07/24/sports/soccer/24soccer.html?_r=0).

<sup>158</sup> See 2010 World Cup Final, *supra* note 156.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

million viewers.<sup>161</sup> Americans tend to “root for the flag more than for the game of soccer itself,” meaning that if the American team does well then Americans will tune into the match.<sup>162</sup>

Although American viewers are tuning into the World Cup, ranked as the 8<sup>th</sup> most viewing country in the world in 2006, the American broadcasters do not disclose the profits.<sup>163</sup> On the other hand, FIFA has readily disclosed its profits from the broadcast rights and sponsorship deals.<sup>164</sup> American broadcasters do not gain profits for FIFA as they would for other sports due to the fact that the model for recouping the cost of the rights’ fees is not the same for soccer.<sup>165</sup> Typically, broadcasters recoup their investment in a sporting event through advertisements, like the Super Bowl bringing in as much as \$3 million for a thirty second ad slot.<sup>166</sup> The high price for ads comes from a guaranteed audience during live sporting events. “The advertiser is rewarded with a guaranteed audience, while the broadcaster has a wonderful opportunity to increase revenues—provided the advertiser and broadcaster first gain the permission of the program’s rights holder.”<sup>167</sup> Live sports have a pull as they happen in real time and instant results make it necessary for a sports fan to watch the game while it is on currently airing on television.<sup>168</sup> Although this theory applies to the World Cup, soccer generally does not pull the same ad revenue. “One obstacle networks face in recouping their investment is that soccer is not the most ad-friendly of sports. The two 45-minute periods of each match go mostly uninterrupted, limiting natural ad breaks to immediately before and after the match and at halftime.”<sup>169</sup> Thus, soccer allows for minimal interruption for ads

---

<sup>161</sup> *Id.*

<sup>162</sup> Novak, *supra* note 146, at 48.

<sup>163</sup> FIFA World Cup TV Viewing Figures, FIFA, [http://www.fifa.com/mm/document/fifafacts/ffprojects/ip-401\\_05a\\_tvstats\\_9299.pdf](http://www.fifa.com/mm/document/fifafacts/ffprojects/ip-401_05a_tvstats_9299.pdf). No. 1 Sports Event, FIFA, [http://www.fifa.com/mm/document/fifafacts/ffprojects/ip-401\\_06e\\_tv\\_2658.pdf](http://www.fifa.com/mm/document/fifafacts/ffprojects/ip-401_06e_tv_2658.pdf). Sommer Saadi, World Cup TV: Many Viewers, No Profits, BLOOMBERG BUSINESSWEEK (July 15, 2010), [http://www.businessweek.com/technology/content/jul2010/tc20100714\\_994644.htm](http://www.businessweek.com/technology/content/jul2010/tc20100714_994644.htm).

<sup>164</sup> Saadi, *supra* note 164.

<sup>165</sup> *See id.*

<sup>166</sup> Ari J. Sliffman, Unconstitutional Hosting of the Super Bowl: Anti-Ambush Marketing Clean Zones’ Violation of the First Amendment, 22 Marq. Sports L. Rev. 257, 258 (2011).

<sup>167</sup> Askan Deutsch, Sports Broadcasting and Virtual Advertising: Defining the Limits of Copyright Law and the Law of Unfair Competition, 11 MARQ. SPORTS L. REV. 41, 46 (2000).

<sup>168</sup> *See, e.g.,* Chuck Klosterman, Space, Time and DVR Mechanics, GRANTLAND (June 10, 2011), <http://grantland.com/features/space-time-dvr-mechanics/>.

<sup>169</sup> Saadi, *supra* note 164.

compared to the formatting of other sports broadcasting that allows for multiple advertising breaks whenever there is a break in the game action.

Ultimately, FIFA profits most from the World Cup. “[FIFA] . . . took in \$1.9 billion from the sale of World Cup TV rights to rights-holders worldwide, from CBC in Canada to Sky Deutschland in Germany—a nearly 60 percent increase over the previous quadrennial tournament.”<sup>170</sup> Given that increase, the World Cup is highly lucrative. FIFA will continue to see profits for the rights, especially as the tournament gains popularity in regions that previously did not watch it. “FIFA earns about 90% of its revenue from broadcasting, sponsorship and marketing deals tied to the World Cup. The world body calculates it earned \$2.4 billion in broadcast sales worldwide just for the 2010 tournament.”<sup>171</sup> Further, FIFA sold the 2018-2022 rights in the Middle East, parts of Asia, and Latin American for \$1.7 billion, a 90% increase from the previous bidding session from 2010-2014.<sup>172</sup> Therefore, the real winner of the World Cup tournament broadcast is FIFA.

#### VIII. APPLYING DIVISIBILITY TO THE AMERICAN BROADCAST OF THE WORLD CUP

Viewership in the United States was nowhere near the millions of viewers in the United Kingdom, which had over 17 million viewers during peak coverage.<sup>173</sup> “In the USA, the tournament coverage reached 94.5 million viewers; well over 40% of the reach for the region. Audience reach in the USA saw a 19% rise versus the 2006 edition, the highest rise of any measured market.”<sup>174</sup> However, each match averaged about 8 million viewers to the English [language]

<sup>170</sup> *See id.*

<sup>171</sup> FIFA Confirms Fox, Telemundo Get U.S. World Cup Rights, USA TODAY, (last updated Oct. 22, 2011), <http://usatoday30.usatoday.com/sports/soccer/worldcup/story/2011-10-21/fox-telemundo-us-tv-rights-2018-2022-world-cup/50856226/1>.

<sup>172</sup> *Id.*

<sup>173</sup> KANTARSPORT, *supra* note 96, at 13. These numbers are strikingly disproportionate when seen against the total population in the U.S. and the U.K.. In 2010, the U.S. had 308,745,538 people and the U.K. had only 62.3 million people. U.S. Census Bureau, RESIDENT POPULATION DATA: POPULATION CHANGE (2010), <http://www.census.gov/2010census/data/apportionment-pop-text.php>; OFFICE FOR NATIONAL STATISTICS, NATIONAL POPULATION PROJECTIONS, 2010-BASED STATISTICAL BULLETIN (Oct. 26, 2011), [http://www.ons.gov.uk/ons/dcp171778\\_235886.pdf](http://www.ons.gov.uk/ons/dcp171778_235886.pdf).

<sup>174</sup> KANTARSPORT, *supra* note 96, at 39. However, it is important to note that these numbers were based on a minimum of watching only 20 minutes.



broadcast on ABC.<sup>175</sup> The final match pulled around 15 million viewers.<sup>176</sup> Compared to the United Kingdom broadcast, the American viewership was low because the United Kingdom averaged over 15 million viewers per preliminary match.<sup>177</sup>

Even with only 15 million viewers in the United States, the cost of the rights to the broadcast is soaring and profits have been minimal. The American broadcast has been dominated by ESPN, broadcasting the English-speaking matches, and Univision, who has held the rights for the Spanish-speaking broadcast since 1978.<sup>178</sup> During the 2010 South Africa broadcast, “Univision and ESPN said they were each close to selling out their commercial time.”<sup>179</sup> However, the networks are not likely to truly profit from the broadcasts based on the cost of the rights. The cost of the World Cup broadcast rights have skyrocketed over the past 10 years. ESPN paid \$100 million for “two World Cups and two Women’s World Cups through 2014—up from \$11 million in 1994 and \$22 million in 1998.”<sup>180</sup> The large increase is due in part to the fact that previously ESPN rented out airtime on ABC, ESPN, and ESPN2 to Major League Soccer, who paid \$40 million to FIFA.<sup>181</sup> “Broadcasters never make up the cost of the Cup. . . . But they buy the rights to build up their image, to become known as the soccer channel.”<sup>182</sup> As suggested, ESPN sought to become known as the soccer channel for English-speaking American viewers. Yet the amount paid by ESPN pales in comparison to Univision, who paid \$325 million for the Spanish-language rights, an increase from their prior bid of only \$125 million.<sup>183</sup> For the 2006 World Cup held in Germany, Univision “received about \$110 million in incremental World Cup-related revenue in 2006 . . . .”<sup>184</sup> Still, that revenue did not result in profits for Univision. The difference in price paid by Univision and ESPN is due to the popularity among Spanish speakers, who adamantly watch the World Cup.

---

<sup>175</sup> *Id.* at 40.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 37.

<sup>178</sup> Richard Sandomir, For ESPN and Univision, the U.S. Is a Soccer Country, N.Y. TIMES, June 7, 2010, at B11.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> Saadi, *supra* note 164. (quoting Ezechiel Abatan, a sports researcher for Sportcal).

<sup>183</sup> Sandomir, *supra* note 179.

<sup>184</sup> Paul J. Gough, Networks unlikely to profit from World Cup, REUTERS, May 7, 2010, <http://www.reuters.com/article/2010/05/07/us-soccer-idUSTRE6460V920100507>.

Bottom line, after investing millions acquiring the broadcast rights, the World Cup did not create record profits for the networks. “After production and marketing costs, however, that slight profit all but vanished, making it a break-even business. This year, the World Cup likely will bring in about \$100 million in incremental revenue . . . which would mean a loss when looking at direct Cup financials.”<sup>185</sup> As for ESPN, during the 2006 World Cup ESPN stated that it made a 30% jump in online advertising on ESPN.com.<sup>186</sup> This increase in online sales was seen despite mistakes with the broadcast, including hiring an announcer that was not knowledgeable about soccer.<sup>187</sup> This announcer was replaced with British announcers for the 2010 South Africa World Cup after an outpour from angry viewers.<sup>188</sup> Despite lackluster profits, it was a surprising turn of events in 2011 when Fox purchased the rights to the English-speaking broadcast and Telemundo purchased the Spanish-speaking rights in the United States.<sup>189</sup> Previously, Univision purchased both the television and the radio rights.<sup>190</sup> Now the unity of the broadcast is split between Telemundo, holding the television rights, and Futbol de Primera Radio, holding the radio rights.<sup>191</sup>

For the 2010 and 2014 broadcasts, ESPN and Univision paid a combined \$425 million for the World Cup.<sup>192</sup> This amount was drastically increased for the 2018 and 2022 broadcasts. Fox alone paid “\$450-500 [million] for the English-language rights to the next two events, scheduled for Russia and Qatar.”<sup>193</sup> As for the Spanish-language rights, “NBC-owned Telemundo has agreed to pay around

---

<sup>185</sup> *Id.*

<sup>186</sup> Richard Sandomir, *supra* note 179.

<sup>187</sup> *Id.* (discussing ESPN’s hiring of Dave O’Brien, a baseball announcer, to call soccer matches when he did not know the rules of soccer).

<sup>188</sup> *Id.*

<sup>189</sup> See Grant Wahl, Lots of Questions About Fox’s Surprising World Cup Coup, *SPORTS ILLUSTRATED*, Oct. 21, 2011, [http://sportsillustrated.cnn.com/2011/writers/grant\\_wahl/10/21/fox.world.cups/index.html#ixzz2wGTaH4wW](http://sportsillustrated.cnn.com/2011/writers/grant_wahl/10/21/fox.world.cups/index.html#ixzz2wGTaH4wW).

<sup>190</sup> See *id.*

<sup>191</sup> FIFA Confirms Fox, Telemundo Get U.S. World Cup Rights, *USA TODAY*, Oct. 22, 2011, <http://usatoday30.usatoday.com/sports/soccer/worldcup/story/2011-10-21/fox-telemundo-us-tv-rights-2018-2022-world-cup/50856226/1>. Analyzing the radio broadcast rights is beyond the scope of this paper which focuses on television broadcast rights.

<sup>192</sup> *Id.*

<sup>193</sup> John Ourand, Fox, Not ESPN, Expected to Be Awarded FIFA World Cup Rights for '18, '22, *SPORTSBUSINESS DAILY*, Oct. 21, 2011, <http://www.sportsbusinessdaily.com/Daily/Issues/2011/10/21/Media/Fox-World-Cup.aspx>. Fox, also, has the opportunity to show more matches with the creation of Fox Sports 1 and Fox Sports 2, which started in 2013.

\$600 [million] . . . .”<sup>194</sup> Following the loss, ESPN commented on its bidding policy, “We made a disciplined bid that would have been both valuable to FIFA and profitable for our company, while continuing to grow our unprecedented coverage of the World Cup and Women’s World Cup events. We were aggressive while remaining prudent from a business perspective.”<sup>195</sup> However, if NBC wants to dominate the FIFA World Cup broadcasts in the United States, its company policy will likely win the bid because the money paid for the broadcast of the World Cup does not match the amount spent for the Olympic broadcast. In 2011, NBC paid \$4.38 billion for the Olympics through the 2020 Summer Games in Tokyo.<sup>196</sup> Yet this year, NBC privately bid for the Olympic broadcast through 2032 for \$7.75 billion.<sup>197</sup> This transaction was done privately with the International Olympic Committee and it was not an open bidding process so NBC had no competition.<sup>198</sup> However, the World Cup broadcast reflects that multiple companies can broadcast the same tournament using different exclusive rights.

This division of the broadcasting rights to two distinct television companies illustrates the divisibility doctrine codified in the Copyright Act of 1976. Telemundo is a subsidiary of NBCUniversal,<sup>199</sup> which is an interesting development based on NBC’s control of the Olympic broadcasts in the United States. Previously, ABC controlled the broadcast by ESPN and Univision is a subsidiary of Univision Communications, Inc., which included the radio broadcasts.<sup>200</sup> Typically for sports tournaments, one network wants exclusive rights, like NBC broadcasting the Olympics. But the FIFA World Cup is different because NBC and Fox will co-exist by broadcasting the same matches but in different languages. Telemundo acquired the more lucrative Spanish-language broadcast rights for the United States. As an NBC subsidiary enters the FIFA bidding process, it is important to understand its company philosophy for bidding and playing to win.

---

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> Richard Sandomir, NBC Extends Olympic Deal Into Unknown, N.Y. TIMES, May 8, 2014, at A1, available at [http://www.nytimes.com/2014/05/08/sports/olympics/nbc-extends-olympic-tv-deal-through-2032.html?\\_r=0](http://www.nytimes.com/2014/05/08/sports/olympics/nbc-extends-olympic-tv-deal-through-2032.html?_r=0).

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> Telemundo, NBCUNIVERSAL, <http://www.nbcuni.com/broadcast/telemundo/> (last visited March 17, 2014).

<sup>200</sup> Saadi, *supra* note 164.

---

**IX. COMPARISON TO NBC'S OLYMPIC BIDDING POLICY**

The World Cup is easily comparable to the Summer Olympic Games due to the duration of the competition. The Olympics is around 17 days of competition with athletes from all over the world convening in one country.<sup>201</sup> The World Cup competition spans one month from June to July with a similar field of global athletes convening in one country.<sup>202</sup> Sports broadcasts pull in millions of viewers. The 2010 World Cup final match between Spain and the Netherlands is estimated to have been seen by 1 billion people around the world.<sup>203</sup> However, the 2008 Beijing Olympics opening ceremony was seen by more people and was the most-watched television event in the world.<sup>204</sup> But the Olympic viewership continued to increase with the 2012 London Games, marking the most-watched television sporting event in American history,<sup>205</sup> the FIFA World Cup in 2014 will be the test ground for increasing viewership in the United States. The London Games were seen by 3.6 billion people globally, a 0.5 billion viewer increase over the Beijing Games.<sup>206</sup>

The bidding process and territorial exclusivity is another key similarity between the Olympics and the World Cup. The International Olympic Committee accepts bids for one broadcaster to exclusively broadcast Olympic coverage for a country or region.<sup>207</sup> This exclusivity creates interesting situations that extend beyond borders. For example, Seoul Broadcasting System had the rights to broadcast the Olympic Games during the London 2012 Games for the entire Korean Peninsula, which included both South Korea and North

---

<sup>201</sup> How Many Days Do the Olympic Games Last?, OLYMPICS.MU, <http://www.olympics.mu/how-many-days-olympic-games-last.html> (last visited Aug. 22, 2014).

<sup>202</sup> FIFA: At least 1 billion saw Cup final, ESPN (July 11, 2011, 3:19 PM), [http://espn.go.com/sports/soccer/news/\\_/id/6758280/least-1-billion-saw-part-2010-world-cup-final](http://espn.go.com/sports/soccer/news/_/id/6758280/least-1-billion-saw-part-2010-world-cup-final).

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> Lisa de Moraes, NBC Proclaims London Olympics Most-Watched Television Event in U.S. History, WASHINGTON POST (Aug., 13 2012, 7:39 PM), [http://www.washingtonpost.com/blogs/tv-column/post/olympics-finale-most-watched-closing-ceremonies-for-non-us-summer-olympics-in-36-years/2012/08/13/86b7bcb2-e5a2-11e1-936a-b801f1abab19\\_blog.html](http://www.washingtonpost.com/blogs/tv-column/post/olympics-finale-most-watched-closing-ceremonies-for-non-us-summer-olympics-in-36-years/2012/08/13/86b7bcb2-e5a2-11e1-936a-b801f1abab19_blog.html).

<sup>206</sup> Sponsorship Intelligence, LONDON 2012 OLYMPIC GAMES GLOBAL BROADCAST REPORT 4 (Dec. 2012), [http://www.olympic.org/Documents/IOC\\_Marketing/Broadcasting/London\\_2012\\_Global\\_20Broadcast\\_Report.pdf](http://www.olympic.org/Documents/IOC_Marketing/Broadcasting/London_2012_Global_20Broadcast_Report.pdf).

<sup>207</sup> Broadcasting Media Rights in Sport, WORLD INTELLECTUAL PROP. ORG., <http://www.wipo.int/ip-sport/en/broadcasting.html> (last visited Aug. 22, 2014).

Korea.<sup>208</sup> The historical and current discord between the two countries makes it more interesting for the broadcast rights to only be sold to one broadcasting company in one country. However, North Korea could limit the amount shown to its citizens. For the London 2012 broadcast, North Korea allowed five hours of coverage per day but none was live.<sup>209</sup> An increase in North Korean coverage was attributed to their athletes winning gold medals.<sup>210</sup> This example shows that the organization body can control its broadcast rights exclusively. FIFA is no different than the International Olympic Committee when it comes to selling exclusive rights.

The FIFA World Cup broadcast in the United States has a new competitor, NBC. In order to adequately understand the bidding process and what is at stake for the future broadcasts, it is necessary to understand the strategy employed by NBC in other sports broadcasts. NBC has had control of the Olympic broadcasts in the United States since 1988.<sup>211</sup> The key to NBC's domination is based on their philosophy of outbidding everyone. Under the leadership of Chairman of NBC Universal Sports and Olympics Dick Ebersol, NBC won the rights multiple times because he had a surefire strategy of outbidding competitors by multiple millions of dollars.<sup>212</sup> For example, Chairman Ebersol outbid Fox by over \$700 million for the rights through 2012.<sup>213</sup> Moreover, NBC will preemptively bid to ensure no competition occurs to acquire the Olympics.<sup>214</sup> However, NBC has not always had competition for the broadcast bidding. "The American rights for the Athens 2004, Torino 2006, and Beijing 2008 broadcasts

---

<sup>208</sup> IOC Awards TV Rights for North and South Korea to SBS, INT'L OLYMPIC COMM. (Feb. 8, 2006), <http://www.olympic.org/content/news/media-resources/manual-news/1999-2009/2006/08/02/ioc-awards-tv-rights-for-north-and-south-korea-to-sbs/>.

<sup>209</sup> Evan Ramstad, North Korea Allows Broadcasts of Olympics, WALL ST. J., Aug. 3, 2012, <http://online.wsj.com/news/articles/SB10000872396390443687504577564873734096722>.

<sup>210</sup> *Id.*

<sup>211</sup> Nick Zaccardi, IOC Awards Olympic Broadcast Rights to NBC Through 2032, NBC OLYMPICTALK (May 7, 2014, 12:25 PM), <http://olympictalk.nbcsports.com/2014/05/07/olympics-nbc-broadcast-rights-2032/>.

<sup>212</sup> Howard Berkes, NBC's Olympic TV Dynasty Challenged In Rights Bidding, THE TWO-WAY: NPR (June 6, 2011, 3:30 PM ET), <http://www.npr.org/blogs/thetwo-way/2011/06/06/137009774/nbcs-olympic-tv-dynasty-challenged-in-rights-bidding>.

<sup>213</sup> *Id.*

<sup>214</sup> See Queenie Ng, United States and Canadian Olympic Television Coverage: A Tale of Two Monopolists. 8 SW. J.L. TRADE AM. 251, 256–58 (2001/2002). Ultimately, NBC won monopoly rights for six of the seven games, excluding the 1998 Nagano Winter Olympics. NBC invested \$3.6 billion for 2000 to 2008.

went to NBC in a process that involved no other bidders.”<sup>215</sup> The bidding processes have varied including blind bidding of sealed offers after the networks give presentations to the International Olympic Committee or open bidding like in the early 2000’s.<sup>216</sup>

The battle over the World Cup broadcast rights is not the first interaction between NBC, ESPN, and Fox. Various broadcasting companies sought to gain the rights and generate the profits associated with the most watched series in television history.<sup>217</sup> Interestingly, serious offers arose as Fox and ABC/ESPN challenged “NBC for its lock on the 10 most recent summer and winter games.”<sup>218</sup> Fox bid \$3.4 billion for the broadcasts of the Olympic Games from 2014 to 2020 including “\$1.5 billion for the 2014 and the 2016 Olympics.”<sup>219</sup> The second bid came from ESPN for \$1.4 billion for the 2014 and 2016 Olympic Games.<sup>220</sup> NBC already competes for sports viewers with ESPN. NBC Sports is in approximately 80 million homes, but that does not relate to the number of viewers.<sup>221</sup> ESPN is in 19 million more homes than NBC Sports.<sup>222</sup> “The real disparity is with fans who tune in. ESPN has averaged about 1.23 million viewers aged 18 to 49 for its prime-time programming [in 2012], according to Nielsen . . . ratings . . . NBC Sports Network’s audience: 142,000 viewers.”<sup>223</sup> Therefore, it was crucial for NBC to win the Olympic Game broadcast to try to draw more sports viewers. So it is clear that NBC wants to lock down major sporting events and privately acquired the rights to the Olympics through 2032 to avoid competition from Fox and ESPN.

Moreover, NBC can generate profits during the long duration of competition during its Olympic broadcasts, proving itself to be a

---

<sup>215</sup> Berkes, *supra* note 213.

<sup>216</sup> *See id.* The networks can bid for two or more Olympic Games; the IOC prefers inclusion of four games: two Winter Games and two Summer Games. If none of the bids are acceptable, the IOC can initiate another round of bidding. *See* OLYMPIC.ORG, ALL ABOUT THE BID PROCESS, <http://www.olympic.org/content/the-ioc/bidding-for-the-games/all-about-the-bid-process/> (last visited Aug. 30, 2014).

<sup>217</sup> Richard Sandomir, NBC wins U.S. Television Rights to Four More Olympics, N.Y. TIMES, June 7, 2011, at B13, *available at* [http://www.nytimes.com/2011/06/08/sports/nbc-wins-tv-rights-to-next-four-olympics.html?pagewanted=all\\_r=0](http://www.nytimes.com/2011/06/08/sports/nbc-wins-tv-rights-to-next-four-olympics.html?pagewanted=all_r=0).

<sup>218</sup> Berkes, *supra* note 213.

<sup>219</sup> Sandomir, *supra* note 218.

<sup>220</sup> *Id.*

<sup>221</sup> Alex Sherman, NBC Sports Network’s Olympic Ambitions, BUSINESSWEEK. (July 5, 2012), <http://www.businessweek.com/printer/articles/60448-nbc-sports-networks-olympic-ambitions>.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

powerhouse. NBC profits from the Olympic Games due to heavy pre-Games promotion and advertising sales.<sup>224</sup> Advertising has sold for approximately \$100,000 per spot with 11,000 television commercial spots available on NBC networks.<sup>225</sup> “The amount paid by individual marketers can vary considerably depending on how much ad time is purchased, the mix of premium and non-premium inventory, packaging of TV spots with online inventory, and other negotiable factors.”<sup>226</sup> Unlike other Olympic Winter broadcasts, Sochi was poised to sell out months in advance. As of November 2013, NBC had already sold 90% of its television advertising spots.<sup>227</sup> “Advertising sales have been so strong that Seth Winter, NBC Sports executive vice president of ad sales, said the company is positioned to sell out its first Olympics in more than a decade.”<sup>228</sup> Projections show that NBC is estimated to earn \$1 billion on these advertisements.<sup>229</sup> NBC attributes the success to social media, which pulled viewers to the primetime broadcasts.<sup>230</sup> Using Sochi as the microcosm, NBC can generate profits during lengthy sporting events and can use that knowledge to profit during Telemundo’s FIFA broadcasts.

#### X. PREDICTIONS FOR THE FUTURE FIFA WORLD CUP BROADCASTS IN THE UNITED STATES

Likely, the World Cup will gain popularity, meaning that the rights will increase in value and price for American broadcasters. Notably, the highest percentage of viewers in the US during the 2010 World Cup was the young adults aged 16-34.<sup>231</sup> This statistic is in line with

---

<sup>224</sup> Eric Chemi, NBC's Own Olympic Event: Selling 11,000 Ads in Two Weeks, *BUSINESSWEEK* (Feb. 7, 2014), <http://www.businessweek.com/printer/articles/182745-nbcs-own-olympic-event-selling-11-000-ads-in-two-weeks>.

<sup>225</sup> *Id.*

<sup>226</sup> Kantar Media Takes Historical Look At Winter Olympics Ad Spending 2014 Sochi Olympics Could Produce More Than 5,500 TV ad minutes, *KANTAR MEDIA* (Jan. 22, 2014, 3:04 PM), <http://kantarmedia.us/press/kantar-media-takes-historical-look-winter-olympics-ad-spending>.

<sup>227</sup> Tripp Mickle, NBC Bullish on Profitability of Sochi Olympics, *SPORTS BUS. J.*, Nov. 4, 2013, at 5, *available at* <http://www.sportsbusinessdaily.com/Journal/Issues/2013/11/04/Olympics/NBC-Sochi.aspx>.

<sup>228</sup> *Id.*

<sup>229</sup> Chemi, *supra* note 225.

<sup>230</sup> Meg James, Advertisers Make \$900-Million Bet on Olympic Winter Games, *L.A. TIMES*, Feb. 7, 2014, <http://articles.latimes.com/2014/feb/07/entertainment/la-et-ct-olympics-ads-20140206>.

<sup>231</sup> *KANTARSPORT*, *supra* note 96, at 23.

the growing popularity of the sport with many children and teens playing in local leagues. Therefore, viewership will increase in the coming years as the youth soccer players get older and become interested in the World Cup. Based upon other sporting events, the rights are more valuable to the broadcaster when they are exclusive because they will make the viewer connect the event with the network.<sup>232</sup> Based on NBC's bidding policy (outbid no matter the cost) NBC can likely win the World Cup if they want to acquire the English-language broadcast. Telemundo clearly beat out Univision, who had the rights since 1978.<sup>233</sup> NBC can use these tactics to fully own the broadcast rights to the World Cup with high bids like those seen by NBC for the Olympics (i.e., \$7.75 billion).<sup>234</sup> FIFA stands to profit from NBC's entrance into the World Cup broadcast. With the doctrine of divisibility, it logically follows the more valuable the event the more division of rights available to FIFA, who profits by allowing multiple parties to broadcast.

Copyright has a goal of promoting the creative works for the public good. Preventing exclusivity by one broadcaster allows the broadcasters to compete, which allows for competition and improvement in the broadcast to draw the viewers. The split of the rights between Telemundo and Fox will allow a wide audience to better access the matches because the carriers are cheaper for subscribers. The cost of sports channels has rapidly increased over the past two years and is projected to continue to increase for subscribers.<sup>235</sup> Additionally, the cost-prohibitive nature of sports broadcasting can lead to less Americans watching the World Cup. ESPN is a cable television channel, meaning it is quite expensive to get the channels showing the FIFA World Cup matches.<sup>236</sup> However,

---

<sup>232</sup> See Katrien Lefever, *NEW MEDIA AND SPORT INTERNATIONAL LEGAL ASPECTS* 10 (Springer 2012).

<sup>233</sup> Univision Wins Rights to 2010 and 2014 FIFA World Cup, UNIVISION COMM'N, INC., Nov. 2, 2005, <http://corporate.univision.com/category/press/press-releases/>.

<sup>234</sup> Stephen Wilson, NBC Extends Olympic Deal Through 2032 for \$7.75B, WASH. TIMES, May 7, 2014, at 1, available at <http://www.washingtontimes.com/news/2014/may/7/nbc-extends-olympic-deal-through-2032-for-775b/?page=all>.

<sup>235</sup> Derek Thompson, How Watching 'Unbundled' ESPN and AMC Could Cost More Than Your Whole Cable Bill, THE ATLANTIC, Jul. 18, 2013, <http://www.theatlantic.com/business/archive/2013/07/how-watching-unbundled-espn-and-amc-could-cost-more-than-your-whole-cable-bill/277916/>.

<sup>236</sup> Richard Sandomir, James Andrew Miller, Steve Eder, To Protect Its Empire, ESPN Stays on Offense, N.Y. TIMES, Aug. 26, 2013, at 4, available at [http://www.nytimes.com/2013/08/27/sports/ncaaf-football/to-defend-its-empire-espn-](http://www.nytimes.com/2013/08/27/sports/ncaaf-football/to-defend-its-empire-espn-continued...)

*continued . . .*



Fox Sports is a regional sports channel, meaning the cost to the consumer is less than ESPN.<sup>237</sup> During the 2018 World Cup broadcast, the American viewership should increase given the cost difference between subscriptions to Fox and ESPN. So far, Fox Sports 1 has begun to garner a sports-viewing audience. “Fox Sports 1 is in 87 million homes and has signed long-term carriage deals with Comcast, Time Warner Cable and ATT U-verse.”<sup>238</sup> The future is promising for Fox Sports 1 to compete for major sporting events including the World Cup. The creation of a new network for Fox will help build a soccer brand that could support that decision and help recoup the cost of the broadcast rights.

The FIFA World Cup bids only highlight the dispute in the sports broadcasting market in the United States. Although Fox Sports 1 has entered the sports broadcast landscape, the real competition is between NBC and ESPN competing for sports viewers and major championships. ESPN is a powerhouse for sports broadcasting and NBC is trying to make strides in the amount of viewers that ESPN can pull to its channels. If NBC gets the English-language broadcast, they have a proven track record of gaining profits with lengthy events like the Olympics, which lasts approximately seventeen days.<sup>239</sup> NBC can now use that knowledge with the World Cup broadcast on Telemundo,

---

stays-on-offensive.html?pagewanted=all (explaining that the price paid by the viewer is currently a “\$5.54 average monthly price for ESPN [which] is more than four times the fee for the next most expensive national network.”).

<sup>237</sup> Trefis Team, Can ESPN Keep Raising Prices With Competition Heating Up?, FORBES, Mar. 20, 2013, at 3, available at <http://www.forbes.com/sites/greatspeculations/2013/03/20/can-espn-keep-raising-prices-with-competition-heating-up/> (stating “Fox Sports is a regional sports network. Regional sports networks are involved in broadcasting college and professional sports of local teams on regional level . . .”). See also, Richard Sandomir and Amy Chozick, Seeing Riches in Sports TV, Fox Will Create New Network, N.Y. TIMES, Mar. 4, 2013, at 2, available at <http://www.nytimes.com/2013/03/05/sports/fox-planning-national-sports-network-it-hopes-can-challenge-espn.html?pagewanted=all> (stating “Fox Sports 1 will probably charge cable, satellite and telephone companies 75 cents to \$1 a subscriber.”).

<sup>238</sup> John Ourand, Fox Sports Execs Like Trends at FS1, SPORTS BUS. J., Mar. 3, 2014, at 1, available at <http://www.sportsbusinessdaily.com/Journal/Issues/2014/03/03/Media/Fox-Sports-1.aspx>.

<sup>239</sup> See David Schwendiman, The Bar, the Courts, Criminal Justice and the Olympics: Handling the Impact of the Olympic Games on the Courts, Law Practice and Criminal Justice in Utah, 14 No. 8 UTAH B.J. 8, 8 (2001) (explaining that for the Olympic athletes: “a workable balance will be found . . . for the seventeen days of the event.”).

a true test of broadcasting power over one month.<sup>240</sup> Given the length of the competition, NBC has experience garnering advertisers to recoup the broadcast fees and start gaining profits. If Telemundo profits during the upcoming FIFA World Cups, NBC is likely to enter the English-speaking broadcast bids which can yield record breaking bids. NBC has already acquired the Olympic broadcast rights through 2032 and can, therefore, focus solely on building its sports brand by seeking out other competitions in exclusivity. Ultimately, once NBC enters the bidding process, a monopoly will occur but it is not illegal to be the exclusive copyright holder.<sup>241</sup> This fact reflects how the divisibility doctrine benefits the copyright holder by allowing FIFA to profit from its copyright by charging more for different exclusive portions.

## XI. CONCLUSION

The divisibility doctrine has led to more competition in the sports broadcasting market. It allows more viewers an opportunity to see major sporting events. However, the sports landscape in the United States typically calls for exclusivity of events to create a brand for a particular sport or event. Thus, the FIFA World Cup broadcast in the United States is likely to go to one exclusive broadcaster for both the English- and Spanish-language broadcasts. Especially, if NBC is involved in the bidding process, the company policy of outbidding the competition will likely prove enough to win the World Cup. The first step has already occurred with Telemundo purchasing the highly sought after Spanish-language broadcast. The next logical step is for NBC to monopolize the World Cup with the English-language broadcast. Although the copyright divisibility has allowed for multiple broadcasters, sports networks still prefer to monopolize an event, and likely that will occur with the World Cup, like other sporting events, as it gains popularity with the American viewers.

---

<sup>240</sup> FIFA, Match Schedule, FIFA.COM (Jan. 13, 2001), [http://www.fifa.com/mm/document/tournament/competition/01/52/99/91/2014fwc\\_matcheschedule\\_wgroups\\_13012014\\_en\\_neutral.pdf](http://www.fifa.com/mm/document/tournament/competition/01/52/99/91/2014fwc_matcheschedule_wgroups_13012014_en_neutral.pdf).

<sup>241</sup> See Brian Danitz, Comment, Martignon and KISS Catalog: Can Live Performances Be Protected?, 15 FORDHAM INTELL. PROP. MEDIA ENT. L.J. 1143, 1196 (2005) (stating that copyright is not a true monopoly).