

Update: sports law

Chris Walsh and Adam Leadercramer consider the latest developments on the 'listed events' review, preventing ambush marketing of the 2010 FIFA World Cup and the fit and proper person test

A MILESTONE IN the highly contentious 'listed events' review was reached on 19 March 2010. This was the extended deadline for the completion of the statutory consultation period announced by the Department for Culture, Media and Sport (DCMS) following the publication of the controversial Davies review panel recommendations in November 2009.

The Broadcasting Act 1981 provided the first statutory basis in the UK for the drawing up of a list of protected sporting events. The legislation, and the list, have been amended a number of times since 1981 and the current position is outlined in the Communications Act 2003 (section 299) which gives the secretary of state for culture, media and sport the power to maintain a list of sporting and other events of national interest. It also charges Ofcom with the task of administering the law relating to these events and providing guidance to broadcasters (which it does through its Code on Sports and other Listed and Designated Events). EC legislation has also confirmed the right for each EU member state to establish its own list of events (article 3J of the Audiovisual Media Services Directive) and created a mutual recognition system enabling each member state to enforce its list in each of the other member states.

The Communications Act 2003 currently divides up listed events into two categories: 'Group A' and 'Group B'. For events in Group A, full live coverage must be offered on channels that must be received by at least "95 per cent of the population of the United Kingdom" (schedule 1 of the Schedule to the Television Broadcasting Regulations 2000) – in effect BBC1, BBC2, ITV, Channel 4 and Channel 5 – and cannot be offered on an exclusive basis, while Group B events may be covered live on pay TV provided that highlights coverage is offered to the free-to-air broadcasters.

In December 2008, Andy Burnham (the then secretary of state) heeded calls that the current list of events, which was compiled as far back as 1998, needed to be updated. He therefore announced an independent review of the list to be carried out by a panel chaired by David Davies. On 13 November 2009, the review panel published its recommendations – namely a single list of protected live events including the entire FIFA World Cup and Rugby Union World Cup tournaments and all home Ashes Test matches.

The panel's recommendations immediately came under stinging attack from broadcasters and affected rights holders. The England and Wales Cricket Board (ECB) was particularly vocal in its condemnation of the recommendations given the significant adverse impact of a listed Ashes Series on its core TV revenues (and specifically its £220m BSKyB deal) and the hugely damaging knock-on effects that would be caused to its activities.

ECB Chairman, Giles Clarke, was scathing: "This report will have a disastrous impact on grassroots funding for every sport... listing will have a significant impact on funding at all levels. It will be absolutely devastating."

The ECB and other affected rights holders and broadcasters have now compiled their responses to the Davies review recommendations and submitted them to the DCMS in accordance with the 19 March deadline.

Whatever your view on this divisive issue, the UK government's decision is awaited with much interest. It is due before the forthcoming general election, and therefore all is likely to be revealed in May.

Ambush marketing

With the 2010 FIFA World Cup tournament in South Africa just around the corner, part of the organisers' attention will be focused on preventing ambush marketing campaigns capitalising on the event.



Ambush marketing is generally described as any unauthorised association by a company with an event, team or individual without paying any fee in respect of that association. Notable examples of ambush marketing at a global sporting event include:

- Linford Christie appearing at a press conference at the 1996 Olympics wearing Puma-branded contact lenses, despite Reebok being an official partner of the Games.
- The 'Leeuwenhosen incident' at the 2006 FIFA World Cup, where Bavaria Brewery provided Dutch fans with branded leeuwenhosen which they were required to remove before entering the stadium because of Budweiser's official sponsorship of the event.

In recent years, it has been a prerequisite of bids for major sporting events that the host country has in place robust anti-ambush marketing legislation. This was because of concerns from event organisers and other rights holders that existing legal protections (conferred predominantly by intellectual property law) were inadequate in countering



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increasingly innovative ambush marketing techniques.

In the case of South Africa, this has led to the enactment of the 2010 FIFA World Cup Special Measures Act, pursuant to which ‘exclusion zones’ are created around stadiums to prevent ambush marketers from operating, and the use of section 15A of the Merchandise Marks Act 1941 to allow the World Cup to be declared a ‘protected event’ so that companies are prevented from associating themselves (through the use of their own trademarks or otherwise) with the tournament “in a manner which is intended to derive special promotional benefit”.

In the recent Metcash Trading case, the South African courts have shown that they are determined to interpret the scope of section 15A widely. In that case, FIFA launched proceedings against a lollipop manufacturer that refused to stop selling a lollipop branded ‘2010 POPS’ with images of footballs combined with the South African flag on the accompanying packaging. The basis of FIFA’s case was that these images, together with the product name, took advantage of the publicity surrounding the World Cup and therefore constituted ambush marketing under the

Merchandise Marks Act. The court agreed with FIFA and held that this branding meant that Metcash was competing unlawfully and granted FIFA an injunction and its costs.

Clearly, ambush marketers looking to exploit the goodwill in the 2010 World Cup will need to be wary of the stringent laws in place in South Africa, and FIFA’s willingness to protect the value that its official sponsors will derive from the event. Moreover, ‘legitimate’ companies not actively seeking to ambush the event will nevertheless need to be wary that they do not innocently breach these wide-ranging provisions.

Fit and proper person test

The fit and proper person test (FPPT) is the mechanism by which the FA Premier League (FAPL) and Football League (FL) determine whether an individual is a suitable person to be a director or owner of a football club.

The FPPT has received much publicity in recent months in light of various club takeovers, and the recent financial problems at Portsmouth FC have put the effectiveness (or otherwise) of the FPPT into sharp focus.

The FPPT was first introduced by the FAPL in August 2004, and it required that

individuals who had been guilty of certain offences (e.g. disqualified as directors) or who had been involved with insolvent companies should not be able to run a football club.

Given the increasing sums of money now required to operate a football club, the reliance on owners to provide that funding and the international nature of football club ownership, the scope and form of the FPPT was bolstered for the 2009/10 FAPL season (with broadly analogous changes made to the FLFPPT).

A club director or owner (i.e. owning greater than 30 per cent of the shares in the club) will now also fail the FPPT if he or she:

- has spent more than 12 months in prison;
- has been convicted of any dishonesty offence;
- is prohibited from entering the UK; or
- is found guilty of ticket touting.

Sanctions for failing the FPPT include the resignation of the club director in question and the sale of the shareholding held by the relevant owner.

As of the 2009/10 season, any potential Premier League club buyer must notify the FAPL in advance of any takeover to obtain FPPT clearance, and clubs are now required to publish the identity of all individuals and companies who own more than 9.9 per cent of the club’s shares.

However, the multiple ownership changes at Portsmouth FC, where four takeovers have taken place within the 2009/10 season alone – but we understand that the relevant individuals did pass the FPPT – have led to widespread calls for the ambit of the FPPT to be further extended.

One possibility is for any prospective new owner to be required to provide ‘proof of funding’ before he or she is able to obtain an ownership interest in a club. Some argue that this would make the FPPT more restrictive than the prohibitions on directors/owners under general UK company law, and could therefore be subject to legal challenge as well as pointing to difficulties in independently assessing the existence of the requisite level of funding.

Others believe that the current financial crisis in football – as highlighted by the widely publicised financial problems of Portsmouth FC, Crystal Palace FC and Notts County FC – makes it a ‘special’ case that requires bespoke and appropriately restrictive regulation.

Chris Walsh is a partner and Adam Leadercramer a senior assistant solicitor at *onside law*, a niche firm specialising in sports law: www.onsidelaw.co.uk