

Sunrise Seminar II

Emily C. & John E. Hansen Intellectual Property Institute

**TWENTY-SEVENTH ANNUAL CONFERENCE
INTERNATIONAL INTELLECTUAL PROPERTY
LAW & POLICY**

*Fordham University School of Law
Skadden Conference Center, Moot Court Room 1-01
150 West 62nd Street
New York, New York
Friday, April 26, 2019 – 7:30 a.m.*

**SUNRISE SEMINAR II:
*Live Streaming Piracy***

Moderator:

Michele Woods

World Intellectual Property Organization (WIPO), Geneva

Speakers:

Marie Sellier

Vivendi SA, Paris

Michael J. Mellis

*Major League Baseball, New York
Internet Piracy of Live Sports Telecasts*

Panelists:

He Jing

AnJie Law Firm, Beijing

Trevor Cook

WilmerHale, New York

Fiona Phillips

Fiona Phillips Law, Sydney

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MS. WOODS: Good morning, everyone. Welcome to Sunrise Session II on Live Streaming Piracy.

Before we get into the topic, I want to wish everyone Happy World IP Day. As I'm sure most of you know, the theme this year is "Reach for Gold: IP and Sports."

This topic is very relevant to our subject today, live streaming, especially live streaming piracy, because one of the problems that has been identified is that sports events are often streamed illegally, so this is something that we can look at as part of our theme today. Of course, that piracy undercuts the financing model for broadcast television and Internet distribution rights that helps bring events like the World Cup and the Olympics to billions of viewers.

At its simplest, all you need to stream live is a smartphone, an app, and a platform. The distribution platforms are the same ubiquitous social media platforms that many of us use — Periscope, Facebook Live, Twitter, YouTube.

Before we get into the piracy topic, it is important to note that there is a huge industry built around live streaming, for example with respect to video games. The most recent figure I could find that looked reliable for live streaming of video games, particularly on Twitch, was \$30 billion in 2016, clearly a huge market. Tournaments are run using live streaming and interactive viewer participation.

Then there is the phenomenon of the social media influencers, many of whom use live streaming throughout the day for product placement and as a marketing tool to encourage others to do the same, and they have large followings.

Others use live streaming, not for marketing efforts, but just to express themselves, to make a record of their lives. Live streaming is something that all of us could easily do if we chose to. I was thinking about saying we should all live stream this session as an exercise, but I figured it's too early in the morning to get into that activity.

PARTICIPANT: We are doing it over here.

MS. WOODS: Great. You can demonstrate.

One of the reasons I suggested that we look at this topic is because at WIPO¹ we have been hearing from some developing country governments asking if they should update their intellectual property laws to address the topic of live streaming, including the piracy issue that has been identified in some cases. One of the areas we would like to focus on today is whether we have adequate intellectual property tools to both support the creative industries that have developed around live streaming and at the same time combat what has become very serious piracy.

We have two distinguished speakers and, per the usual Fordham format, we will have a discussion period after each of their interventions. Our three panelists will be giving us perspectives from several different regions.

I am going to turn to Marie Sellier, from Vivendi in Paris, to give the first presentation, after which we will have five minutes for discussion.

MS. SELLIER: Thank you so much for waking up.

¹ World Intellectual Property Organization.

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I want to first, as Michele said, explain why live streaming has emerged as more than hype — it is going to stay, and it is going to be an increasingly very important phenomenon.

Because the streaming is live, it requires people to be actually doing the same thing at the same time and not changing the content that is being broadcast. That is very important.

The reason live streaming has become so popular is because of the huge phenomenon of the adaption of smartphones and all connected devices to allow you to basically watch any type of media on any type of screen. You can see in green how popular it has become.

And it is still developing. If you look at the projection on the left side from Cisco, by 2022 Internet video is going to be extremely massive, and a big part of it is going to be live streaming.

The growth of live streaming is also being driven by the fact that there are more offers, that the landscape of over-the-top (OTT) offers is growing, so you can have any type of offers on different connected devices. It can be smartphones; it can be Internet Protocol television (IPTV) boxes; it can be smart TVs; game consoles. All of this is being driven by the fact that more and more people have access to these offers. For example, in the United States almost 60 percent of people subscribe to an OTT offer.

I also want to show you that it is not limited to a type of content, but it is really spreading to any kind of content. If you have teenagers, they probably spend a lot of time on Twitch watching other people playing *Fortnite* online, for example, and broadcasting it on the Twitch platform. It is extremely popular. Not just movies and other types of content are included but also music.

We see that in France that illegal live streaming has increased a lot over the last two years. We notice a big change in the figures. In October 2017 there were 1.7 million users at least once a month in the illegal live streaming sites, and one year later it is 2.2 million, an increase of almost 30 percent. In February 2018, there were an average of 365 illicit streams, and in February 2019 there were more than 448 illicit flows, so really, it's becoming massive.

The reason why it is becoming more and more important is that there are multiple options to access illicit streams, and these options are becoming more numerous. You can go to the Internet; you can have streams coming through streaming link sites; you can have it bundled in IPTV boxes.

I will focus a little bit more on the Kodi boxes, which some of you may have heard of. Basically, it is not really a set-top-box but a device that allows you to access pirate apps, and it will aggregate content to you and allow you to stream every type of content. It works like a platform, so it is not limited to content that would be preloaded. This is really important. It can give you access to multiple sources of illicit content. When you look at the figures — I don't have the demographics here — it is very popular with eighteen-to-twenty-five-year-olds.

I am not going to focus more on these blocking options because they were discussed a lot yesterday in different panels.

I wanted to emphasize that the framework should probably move from the site-blocking approach, which was historically a “static” approach, to live blocking,

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meaning it has to in real time. Because it is sometimes in a specific timeframe or at a specific point of time, you don't necessarily need to block it for longer than, for example, the broadcast time of a game. Also, it has to be live in the sense that injunctions that could be addressed to intermediaries have to be dynamic because the sources of illicit streams are constantly changing location. Really the message is to try to make the framework more flexible to include both site blocking but also these new forms of piracy.

Of course, it's very difficult to have a "one size fits all" approach. What we see in Europe is that there are many different cultures and different approaches that emerge.

In the United Kingdom, which is often considered the most advanced country, there is this Internet Protocol blocking mechanism that was discussed yesterday in detail. It's something that we look at from France and think it's very interesting.

Unfortunately, in countries like France it is not allowed, so we cannot ask a judge to order preventing measures in those cases because it would not fit with the principles of the law.

There are some interesting approaches that have been announced that could be adopted in 2020.

Aurore Bergé, a French Member of the EU Parliament, has proposed that there could be a specific mechanism for temporary blocking that would include the support of a regulatory body such as the HADOPI.² It's still an ongoing reflection.

That is one option, but there could be other options that will be discussed. I am just quoting this one because I think it is interesting that the French legislators are becoming more aware of this.

MS. WOODS: Thank you so much.

Now, following our usual practice, we will have a five-minute discussion period. First, I will turn to our three panelists and see if any of the panelists has a comment or a question.

MS. PHILLIPS: I wanted to respond to the importance of having dynamic web-blocking orders when you are dealing with live streaming. Yesterday in the plenary session there was a comment about Australia not facilitating dynamic orders.

Australia has had site-blocking legislation since 2015³ that has been used to deal with a lot of enforcement issues, including blocking domains that facilitate set-top boxes as well as KickassTorrents and other pirate sites.

Following the introduction of the 2015 legislation and the government review, it is actually now emphasized that the Federal Court in Australia has the power to grant dynamic orders. It is clear that is an option. I think that is interesting.

The other thing is the court's site-blocking power has now extended to specifically cover online search, which I think could be relevant in the kind of dynamic environment we see for live streaming.

One of the things that I have observed over the last few years in live streaming is previously the emphasis was very much focused on the uploader, the person who was doing the streaming. For example, in Australia a few years ago there was a guy who was

² Haute Autorité pour la diffusion des œuvres et la protection des droits sur internet est une autorité publique indépendante ("Supreme Authority for the Distribution and Protection of Intellectual Property on the Internet").

³ Copyright Amendment (Online Infringement) Act 2015, C2015A00080 (Austl.).

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outraged that a big boxing match was only available on pay-per-view, so he thought it would be a good idea to sit there with his phone and stream it live on Facebook. The response, rather than addressing Facebook, was directed at the guy doing the streaming. The pay-TV station immediately telephoned him and said, “Stop doing that.” That’s a very basic kind of analog response when you see that one of your subscribers is live streaming: you ring them up and tell them to stop. In this instance, the guy was fairly abusive in his response, so they just switched his subscription off.

But there was very little public discussion about Facebook’s role. Of course, all the copyright lawyers were talking about Facebook’s responsibility. But really the focus was very much on the person doing the streaming, and I think, consistent with the change we’ve seen around the world, now there is a bigger focus on the platforms.

I suppose, coming from Australasia, that really reached a high-water mark a month ago with the Christchurch massacre, which was actually live streamed on Facebook. In fact, not only did the New Zealand Prime Minister make some fairly damning statements about Facebook in Parliament, but the New Zealand government rushed through legislation to deal with those situations in terms of the criminal law. I think that is an example of the shift.

MS. WOODS: Interesting.

Trevor?

MR. COOK: I was interested in the examples you gave of the problem you have with injunctions in France. As you say, there is tremendous flexibility in how one can structure these injunctions against service providers. To give you the English point of view on blocking orders, let me quote the Mr. Justice Arnold’s decision in the 2017 *FA Premier League*⁴ case. He really goes through all of these issues and also tells you something — although some of the technology and so on and so forth is confidential — about the nature of the technology and the interaction between injunctions and the technology. Just to read from one paragraph of his decision:

“The video monitoring technologies used by [FA Premier League] now permit the identification of infringing streams with a very high level of accuracy in close to real-time during Premier League matches. The servers from which such streams emanate can be notified to the Defendants nearly instantaneously” — and so then the injunction has effect on those.

“Advances in certain of the Defendants’ blocking systems will allow them to block and unblock IP addresses during the course of Premier League matches, in some cases automatically. If this process is automated, or if manual supervision can be provided at the relevant times, that would mean that blocking can be responsive to changes in the IP addresses being utilized by the operators of streaming services at the times when blocking is most needed to protect the rights in question. It would also mean that blocking need not occur outside of match times.” Indeed, these orders are very much framed that they only apply during the match times and that they are dynamic during the match times.

⁴ The Football Association Premier League Ltd. v. British Telecommunications PLC & others [2017] EWHC 480 (Ch) (UK).

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There were some subsequent cases in the boxing area when, because of the nature of the match times, there were some differences in relation to those blocking orders. But that is something that can be done in the United Kingdom and, I suppose, in other common law countries.

MS. PHILLIPS: Our regime is very much modeled on the system in the United Kingdom.

MR. COOK: Right. But it is very interesting that within Europe, despite having, for example, this mandatory provision in Article 8(3) of the Information Society Directive⁵ about having blocking orders of one sort or another, we run up against our own differences in civil procedural law as to what you can actually do with an injunction and how you can frame an injunction.

MS. WOODS: That is one of the points that comes up frequently when WIPO is asked by Member States what they should put in their laws and how they should then implement the laws in practical terms.

We will now go to our next speaker, Mike Mellis from Major League Baseball (MLB) — for full disclosure, a former client of mine — to tell us about his and Major League Baseball's experiences with this topic.

MR. MELLIS: Good morning, everyone, and thank you for inviting me. Thank you to Professor Hansen and thank you to Michele for inviting me to speak about this topic, which is one that we have been working on for many years, as Michele mentioned.

This image is from an article called “Inside the Complex World of Illegal Sports Streaming” that appeared in March on Yahoo! Sports. I like the image. I didn't give it a credit; I should have. I like the image because I think it is as easy a way as I could give you to not only explain how all of this works from a practical standpoint but also the nature of the challenge that this particular type of piracy presents.

Really the pirate is the bad actor on the left. Somehow, one way or another, the pirate gets a live stream of any television network programming — not necessarily a Major League Baseball game, but any program — puts it on a server, transmits it to a hosting site, and then the illegal stream is posted in multiple places typically, not just one.

On the right-hand side you see the image of a linking site. That is usually a message board. Most commonly now in the United States Reddit seems to be the place that most people go.

There are chat rooms with posts saying, “Where can I get pirated free MLB streams? Where can I get pirated National Football League (NFL) streams and Ultimate Fighting Championship (UFC),” and so on. Those posts are generally (depending on the facts) protected under U.S. law by the Communications Decency Act⁶, so there is little that can be done from a legal perspective about that. They give people kind of a menu or a list about where to go to watch it, and it all unites with the illegal stream.

This is an example of one service that is up and running right now, gearstvhd.com. I took these screenshots the other day. This is the way that presents it to users. I clicked on the “USA channels” toggle, and you can see all the networks that they

⁵ 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.

⁶ 47 U.S.C. § 230 (2018).

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claim to offer. Whether they do or not is an entirely different matter, whether it is good quality or not is an entirely different matter, but this is what they claim to do. You can see they also have a U.K. toggle and a Canada toggle. They probably have different language versions for different parts of the world and so on.

This is just one example of the type of thing that we see now and that we have seen for many years. Actually, we started to see this in about 2006, so it is by no means new. What has changed is the nature of the technology that enables it.

I think this is a very important point. On the right side of the slide is the pirate service's price. You have to pay for it — not in all cases; there are free streams —, but here they are asking for a credit card, \$9.95 a month.

One very important part of the issue from the consumer protection perspective is that, obviously, this is a rogue site. Anyone who gives his or her credit card information, personal information, is making a big mistake. It is probably a repository for a lot of bad things to happen in terms of downstream fraud.

Also, many of these sites have ways to get malware into your computer and blow it up. We have had a dedicated team of monitors since 2006. We use different computers because malware gets dropped into them so frequently.

From a rightsholders' perspective, although we do not want to see any fan or anybody victimized by this, the more consumers come to realize that these are very bad decisions to make as opposed to the legal and much better alternatives, that is one data point to think about.

That brings me to the next thing that I wanted to say. For many years, my job has been to think about: *What's our strategy? What do we do about this?* We have thousands of illegal streams that we see per year, and we have seen for many years. We have a dedicated team that monitors and collects information.

We monitor. We do cease-and-desist correspondence. We do thousands of takedowns a year on services like Facebook. We use private network policies — Facebook is an example of that — or the Digital Millennium Copyright Act (DMCA)⁷. We infrequently get involved in litigation, but we have. We report systematic or persistent patterns to law enforcement.

We have teamed with the other leagues. We started with the National Basketball Association (NBA) in 2007 — two of us, specifically me and a colleague of mine from the NBA — to answer the question “What are we going to do about this problem?”

We started a group the Coalition Against Online Video Piracy. It is still very active. We meet four times a year. It is now a worldwide group of major sports leagues, rightsholders, and some trade organizations. It's a think tank. It doesn't take a position on any particular legislation.

It is there to share best practices and trade information. For example, “What's going on in the United Kingdom?” — our Premier League representative will tell us. “What's going on here?” — The NBA has some copyright litigation going on in China, in which my colleague seated next to me is representing the NBA. We receive information like that. That is an important and very valuable way that we all can make better decisions about how to deal with this.

⁷ 17 U.S.C. § 512 (2006).

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It is an international problem, and it always has been, and it always will be. I think of it in terms of the principle of the lowest common denominator across many nations: If the pirate is in Russia and if the hosting site is in Switzerland and if the illegal stream is being watched by someone in Canada, as general counsel to Major League Baseball what should I do about it? What practical tools do I have? What remedies do I have? Should I go out and authorize from my budget litigation in many, many countries to stop streams that we find over time? What can you do in practical terms? If you were in my shoes, what would you do when you see these patterns going on thousands of times every season? That is the challenge.

One of the things that we did — with the conviction that this is an international problem very early on when we started to see it in 2005–2006 — was to try to educate government. Our Coalition is one way that we do that.

Another way is to have a long-term dialogue with government stakeholders, and we do. In 2009 the House Judiciary Committee in the United States held a hearing on the very topic. I testified for Major League Baseball: “...the piracy is a global phenomenon, often involving sites and services that operate entirely offshore, outside the effective reach of our courts. Pirates take advantage of the borderless Internet and readily available technologies to distribute streams worldwide.”⁸

Someone from the Entertainment and Sports Programming Network (ESPN) was there, and the person who owned the Ultimate Fighting Championship at the time, and we all talked about our perspectives. I think it was the first time that Congress and the Judiciary Committee, which controls the copyright law, received any presentation. We work closely with the U.S. Trade Representative’s Office, and every year for eleven years now the Trade Representative has identified our problem as one that needs to be addressed in bilateral trade agreements; and also identifies the most problematic countries that we find, which vary from year to year.

On this slide is a list of the most problematic countries for all the U.S. sports leagues taken together from their data.

MS. WOODS: With that list in front of us, perhaps we can open up the five minutes of discussion. I see a hand over here. Please identify yourself and give your affiliation.

QUESTION: [Heather Jensen from ITHAKA]: But I also formerly represented Major League Baseball.

It’s understood that you should be combating piracy and taking all these measures. But hand in hand with that is the ubiquity of this problem starting to challenge thinking on business models and in what ways, if at all, might this revolutionize the way in which sports is being legally distributed? In what ways do you make legal methods of accessing this content more attractive?

MR. MELLIS: That’s a great question. I will speak from my experience at Major League Baseball. The answer is No. The reason is that we were very early in streaming our games. We started to stream our games live in 2003. We were one of the original iPhone apps. We had one of the original over-the-top services, MLB.tv, launched in 2003,

⁸ *Piracy of Live Sports Broadcasting Over the Internet: Hearing Before the H. Comm. on the Judiciary*, 111th Cong. 111-94 (2009) (statement of Michael J. Mellis, Senior Vice President and General Counsel, MLB Advanced Media, L.P.).

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before there was even the phrase “over-the-top.” So, we have always been active in getting our telecasts out there in new media.

I think that technology has kind of caught up with where we are. When you think of something like YouTube TV and all the virtual multichannel video programming distributors that are out there now in the United States — DirecTV Now, Sling — our games are all widely distributed on those platforms. That is definitely part of our business model. It is not driven by piracy, but it certainly has that positive effect.

The second thing that I think keys into this is that when you think of those services — and also the Apple Internet Operating System (IOS) system and the App Store — those products are so much better than what I showed you on Gearstvhd.com — so much cheaper really, the quality is better, and obviously they are safe — that I think consumers do have better alternatives than going to a pirated source. That is one of the reasons why I think over time, as the technology gets better, if we keep our games widely distributed, which we do, that is to our advantage.

MR. HE: In China the model is that all the major sports leagues make the streaming widely available. They give licenses to some of the largest streaming sites. There are two kinds of channels: one is ad-free, and you pay for that; the other one is free, but you have to watch advertisements. Also, State-owned television has its own streaming sites.

MS. WOODS: Thank you for adding that perspective. I was going to ask if this is available internationally.

I see we have two questions. Stan, please go ahead.

QUESTION [Stanford McCoy, Motion Picture Association EMEA, Brussels]: Thanks for calling attention to this, Mike. I was at the Office of the U.S. Trade Representative eleven years ago when you came in for the first time and started calling our attention to this problem, so I know exactly how long you have been working on this.

It is an increasing area of focus for the MPA and for the wider coalition that we are a member of, along with Canal+ and many others, the Alliance for Creativity and Entertainment.

I see that you’ve got beoutQ Sports on the slide next to Saudi Arabia. Could you tell us more about that?

MR. MELLIS: Sure. This has been widely written about. I think it is unique. I don’t think we’ve ever seen anything quite like this before. beoutQ is a pirate service in Saudi Arabia. There is a very large sports rightsholder based in Qatar called beIN Sports, which is our rightsholder in certain countries in Europe, but their mainstay is professional soccer rights in Europe, Asia, and the Middle East. The pirate service beoutQ runs all the beIN Sports channels 24/7 and has built its own network off of them, beoutQ Sports. They say it is gated within Saudi Arabia and you cannot get to it from outside Saudi Arabia. I don’t know if that is true or not.

There is a lot of litigation going on between beIN Sports and beoutQ Sports, and it has now reflected up to the point where Qatar has started a WTO proceeding against the Kingdom of Saudi Arabia over this issue. Whether or not there is any connection between the service and the government in Saudi Arabia — there have been accusations about that — I have no idea, but that is one thing that some people think might be going on.

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In any event, that is an example of a very open and systematic network television appropriation going there.

QUESTION [Charlotte Lund Thomsen, International Video Federation]: Thank you. I normally advise film producers, so apologies if I'm a bit out of my comfort zone. I want to add a Danish perspective to two points that Marie raised.

One is the importance of the order being dynamic. We just had a blocking decision in Denmark last week against nine sites illegally showing La Liga (Spanish football) using Article 8(3) of the Copyright Directive⁹ as implemented in Denmark. That goes to the dynamic nature of the blocking order.

My second point goes to Marie's remark about the importance of ISP cooperation. We have a Memorandum of Understanding with ISPs and telecoms in Denmark that enables us to go to court and get one injunction that then is automatically applied by all ISPs and telecoms operating in Denmark. That is very efficient from our perspective. It is also considered efficient by the ISPs and telecoms because they do not need to go to court and defend themselves, knowing very well that the blocking injunction will be extended to cover them as well.

That is the Danish perspective.

MS. WOODS: Thank you, Charlotte.

We have about half an hour for general discussion. I would first like to turn to our panelists. Jing, you had mentioned in our correspondence an interesting point about the impact of what you characterized as "European copyright thinking" in China. Could you expand on that?

MR. HE: In China the protection of live streaming of sports broadcasts has been a very big issue for the last five years, even longer than that.

First of all, it is really amazing that major sports leagues, like the NBA or Major League Baseball or even the NFL, have done lots and lots of takedowns, but they rely on very borderline legal issues.

The first important legal issue is whether or not what we call a "sports telecast" is copyrightable. This has become a big issue in China. When we look at European practice, it is very interesting that many judges and scholars have quite different views.

The majority of scholars think: "Of course it's copyrightable; looking at how much effort and creativity there is, it should be."

There are some Chinese judges, and even some scholars, who use the European model to say: "China is a continental model. We require a higher level of originality. Don't look at the U.S. 1976 Copyright Act;¹⁰ the Americans have a very low originality threshold.

In China we follow the European model. We have a higher threshold. When we look at the European law, at the German law and the French law, we cannot find any cases where courts have said that telecasts meet the originality threshold. People somehow are really relying on some other rights that are protected. That is the argument.

⁹ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, O.J. 2001 (L 167) 10.

¹⁰ Copyright Act of 1976, 17 U.S.C. §§ 101-1401 (2018).

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So far, we have not won that argument in the courts, but I think we are very close to winning the game, perhaps in time for next year's conference.

The second important legal issue is: What kind of rights are we talking about? When discussing copyrightability, the question is really: can we have control over the interactive streaming or noninteractive streaming? We would say live streaming is noninteractive.

In China only copyrighted works — not a recorded work, not neighboring rights, only copyrighted works — enjoy rights arguably over the noninteractive streaming. We have a catch-all provision for recorded works with neighboring rights (again the European concept) under which noninteractive streaming is not entitled to copyright protection. That is why the sports leagues were desperately trying to qualify sports telecasts as copyright-protected works.

This is what we have been litigating for years. We want to win this, and we hope that the law is going to change. The Chinese Copyright Law¹¹ has not been substantially amended for more than ten years. It is way too outdated. Some things have to be changed.

Right now, China wants to incorporate the protection of audiovisual works. That concept is not now in the Copyright Law. We are actually trying to define what are "cinematographic works." We are finding that very difficult.

MS. WOODS: Thank you so much.

Before going back to the audience, I would like to ask Trevor to chime in with the European perspective. In our exchanges before the conference, you had suggested that, at least in Europe, even if the underlying sports telecast is not in fact copyrightable in many jurisdictions, there are adequate tools available to address these issues.

MR. COOK: The English decisions list the nature of the copyright works which were involved, and in fact there are always temporary recordings involved.

If you look at the original *FA Premier League* case,¹² the copyrighted works were "the films comprising the Action Replay Films included in the Clean Live Feed (and hence the Recorded World Feed), the films comprising the Recorded World Feed," and then also "the artistic works comprising the Premier League and Barclays logos which are incorporated in the Recorded World Feed; the artistic works comprising two sets of on-screen graphics (referred to as the 'AEL Onscreen Graphics' and the 'IMG Onscreen Graphics') which are incorporated in the Recorded World Feed," and things like that. So all the other stuff that was added in provides copyrighted works.

But it was established in CJEU decision in *FA Premier League v. Murphy*¹³ that there is no copyright, in the Berne Convention sense of copyright, in an actual sports match itself.

MS. WOODS: In the live match.

¹¹ Copyright Law of the People's Republic of China (as amended up to the Decision of February 26, 2010, by the Standing Committee of the National People's Congress on Amending the Copyright Law of the People's Republic of China), English version available at <http://www.wipo.int/wipolex/en/details.jsp?id=6062>.

¹² *The Football Association Premier League Ltd v. QC Leisure & Ors.* [2008] EWHC 44 (Ch) (UK).

¹³ *Case C-403/08, Football Ass'n Premier League Ltd & Others v QC Leisure & Others*, <http://curia.europa.eu>.

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MR. COOK: In the live match, indeed. So, you have all these temporary recordings to establish a film copyright or cinematographic copyright, at least to start with.

In fact, the nature of the rights has never been a problem really in any of these blocking cases, although, interestingly, in one of the more recent decisions in relation to boxing matches, somebody tried to grant an exclusive license of the Article 8(3) right to the person who brought the action, and the judge (again Richard Arnold) said, "No, that's not good enough" and there had to be a straight assignment of that right. The nature of the rights has not otherwise been a problem from that point of view.

Just to chip in on some other issues, I was very interested to hear about the experience in Denmark, which at least shows that the United Kingdom is not alone in this. But I was fascinated to see that the Netherlands is another EU Member State that is up there on Mike's last slide as having a major problem in this area. I don't know if there is anyone in the audience who can provide a perspective as to why enforcement seems to be difficult in the Netherlands.

MS. WOODS: It looks like we have several people volunteering to respond on that point.

QUESTION [Tim Kuik, Stichting BREIN, Amsterdam]: I lead the BREIN foundation, the anti-piracy coalition in the Netherlands in which virtually everybody involved with business software and sports participates. You can have my business card later if you are interested in more information.

It was mentioned that ISP cooperation is very important. At the moment what we see is that the ISPs are still putting everything they have into thwarting the blocking order in the Netherlands. We have one case pending. We started it at the same time as my Danish colleagues here started their case, and now, a fat ten years later, we have had a preliminary blocking order for about a year. Yet, still, in the proceeding on the merits the ISPs are trying to be the first in Europe to stop blocking altogether and are hanging in there. We are also pulling out all stops to win it.

At the same time, we have appealed to the Dutch government, and the Minister has now brought together all parties, the ISPs and the rightsholders, and we are having talks about what should happen once we win the blocking case.

This case went through all the stages up to the Court of Justice.¹⁴ The Pirate Bay and its users were deemed to have infringed. It went back to the Dutch Supreme Court, which only deals with matters of law, so for the factual weighing of the various fundamental rights it was referred back to the Appeal Court in Amsterdam. The hearing has been postponed again. We will now be pleading the case on May 21st. The court will set the date for the next hearing. We hope that we will have this before the year ends, and of course we have a number of sites already lined up where we are going to claim blocking for those sites. They are the usual suspects.

Now we have the preliminary blocking going on and we see that the ISPs can block very quickly. They do it for us in a matter of hours, but really, they could do it in a matter of minutes. This is, of course, where sports comes in. You have to block it very

¹⁴ Case C-610/15, Stichting Brein v Ziggo BV & XS4All Internet BV, <http://curia.europa.eu>.

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quickly, during the actual broadcast. Obviously, that is possible. We have seen it done elsewhere in Europe.

In addition to blocking the streams, it is important to go after the places where the server parks are that are actually facilitating this because there are sources behind just selling the streams themselves.

We know that there are a number of hosting providers in the Netherlands who are, in my opinion, willfully blind and are hosting these kinds of services. One of them is WorldStream, which hosts the whole infrastructure that streams virtually all the illegal sportscasts into Italy.

There are also other servers or hosting providers which now are officially in the Seychelles, which of course is known for its excellent Internet infrastructure, and maybe climate change will do something to help that situation. But, in essence, those servers are based in the Netherlands. Quasi Networks — formerly known as Ecatel, now known as Novogara— hosts these services, lots of illegal services for sports, but also in other arenas.

We need to put pressure on the Dutch government to actually put some weight behind criminal enforcement because what we have in Holland is only civil enforcement. The criminal investigative agencies and the public prosecution service virtually do nothing about these matters.

There is cooperation within Europe coordinated by Europol¹⁵ throughout Europe. There have been very successful actions. Thirty countries are participating. Europol is based in the Netherlands, in The Hague. Which country does not participate? The Netherlands.

It is really quite a bad situation and we could use some international pressure to help this problem get the attention it deserves.

MS. WOODS: Thank you very much for that perspective.

Let's go over here.

PARTICIPANT [Mihály Ficsor, Hungarian Copyright Council]: I am Mihály Ficsor, a member of the Hungarian Copyright Council. For seven years in WIPO I was who is now Michele Woods. After that, I became for seven years who is now Sylvie Forbin.

I am also a player in the Icarus Football Club in Budapest. I will arrive at Budapest at 8:30 on Sunday and by 10:00 I will be on the pitch playing football.

Maybe that is the reason why the European Commission, the Fédération Internationale de Football Association (FIFA), and the Union of European Football Associations (UEFA) asked me to organize a workshop in Moscow in 2018 to prepare the organizers for intellectual property challenges associated with the World Cup that took place last year in Russia.

Of course, the representatives of FIFA, UEFA, the Premier League, Real Madrid, etc. all asked for two things: a WIPO Broadcasters' Treaty and a dynamic injunction against live streaming. Everybody agreed that the situation is not clear. In the United States copyright covers these kinds of events, but it does not in Europe.

¹⁵ The European Union Agency for Law Enforcement Cooperation.

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In my view, the dominant European legal practice according to which television transmissions of sport events cannot enjoy copyright protection is wrong. When once upon a time there was only one camera and one running commentator, it was true that sports transmissions were not original, but if you look at a presentation of El Clásico¹⁶ now, it cannot be said that there is no element of originality in such a program.

The problem we are faced with at WIPO in the preparation of the Broadcasters' Treaty is that in the common law tradition countries there is copyright protection while in Europe there is only protection for broadcasters' rights, which is very generous; even the "making available to the public right" is granted.

In the case of sport events, live transmissions represent real value, the protection of which requires international harmonization as a basis for the general applicability of the dynamic injunctions invented by Mr. Justice Arnold. As a footnote, if Brexit takes place, the biggest loss for EU intellectual property law will be that Justice Arnold will no longer work in an EU Member State.

It is really important that the sport organizations be more actively present with their demands for a Broadcasters Treaty at WIPO, as they were in Moscow.

I repeat again what I pointed out at a WIPO seminar in Lima. Protecting broadcasters' rights would not benefit only the big clubs of rich countries, about which impressive figures were offered in Moscow — e.g., in the previous year revenue from television transmissions of the U.K. Premier League clubs was 2 billion forints; for Real Madrid, the revenues from broadcasting rights were bigger than from merchandising rights; for FIFA matches broadcasting is also the biggest source of income — but also it would be very attractive for developing countries to have appropriate protection for sport events transmissions. While developing countries are not very active in the motion picture industry, they are very active in football, cricket, baseball, and so on.

I think that the umbrella solution in Article 14 (3) of the TRIPs Agreement¹⁷ should be the basis also in WIPO. You know the text:

Broadcasting organizations shall have the right to prohibit the following acts when undertaken without their authorization: the fixation, the reproduction of fixations, and the rebroadcasting by wireless means of broadcasts, as well as the communication to the public of television broadcasts of the same. Where Members do not grant such rights to broadcasting organizations, they shall provide owners of copyright in the subject matter of broadcasts with the possibility of preventing the above acts, subject to the provisions of the Berne Convention (1971).

¹⁶ El Clásico is the name given to any game between bitter rivals Real Madrid and Barcelona. It is a Spanish term which translates to 'The Classic' in English and is known in Catalan as El Clásic (June. 4, 2020, 12:04 AM), *See* <https://www.goal.com/en-us/news/what-is-el-clasico-real-madrid-vs-barcelona-nickname/g5r0hzo0qgnalpddwvqb6498ie>.

¹⁷ Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994).

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A beautiful list of rights! Applause! Although those rights are not broader than the rights under the Rome Convention¹⁸, along with the enforcement measures and the WTO dispute settlement mechanism, their value still has increased.

However, the second sentence begins in such a surprising way: “Where Members do not grant such rights...” One could then ask: “What kind of obligation is it then?” But the text continues to turn into an umbrella solution: Members “shall provide owners of copyright in the subject matter of broadcasts.”

I think that this may be the solution also for a Broadcasters’ Treaty at a more appropriate level of protection. In a new umbrella solution, the acts to be covered by protection should be duly identified, and it may be left to the Contracting Parties how those acts are protected, whether by related rights or by copyright.

The other open issue is the right of making available. I don’t think the right of making available will go through, but a catch-up right must go through because I think a catch-up period is still part of the content priority; it is still part of the exploitation of the exclusivity of the program.

How long should the catch-up period be? That is the question. Somebody told me ten days. I think that is too short. The exception for ephemeral recording under Article 11bis(3) is based on the same idea: broadcasters may retain a copy not only just for the broadcast time but for a period after that, and it is only after a couple of months that they have to delete it or pass it over to some official archive.

MS. WOODS: Thank you very much.

Now over to Marco, and then we’ll come back to our panel.

QUESTION [Marco Giorello, European Commission, Brussels]: Thank you. I have a comment and a question that I feel is very much linked to this discussion.

In the last months of the negotiations of the Digital Single Market (DSM) Copyright Directive we had detailed discussions about sports organizers because the European Parliament proposed an amendment to our Commission proposal aimed at introducing a self-standing neighboring right to protect sports events, that would change the *Premier League* judgment in a way that said such sports events are not covered by copyright. This is a proposal which failed to find sufficient consensus. It was not endorsed.

But the discussion is still open in Europe. It is not so much about whether the broadcasters should be protected; of course, broadcasters enjoy a specific neighboring right under European law, as you know. I think it is not even a question of looking from our perspective at whether the broadcast is original or not; broadcasters have the right, so no enforcement actions can be brought on this basis.

But the question that we had, and that probably we will have to discuss more, is whether sport organizers as such should be granted a new neighboring right. As you can imagine, this would involve creating a completely new category of rightsholders, which is not easy and not something that can be done very quickly. I wanted to bring this perspective into the discussion.

¹⁸ International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Oct. 26, 1961, 496 U.N.T.S. 43.

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My question is to the Americans in the room, mainly to understand how it works, what kind of protection sport organizers enjoy, and on what legal instruments you base your enforcement actions. Are they considered rightsholders in your own basic position or do you rely on parts of the European approach to copyright in the transmission or the rights of the broadcasters?

MS. WOODS: Mike, do you want to respond to that?

MR. MELLIS: Sure. Is your question about how it works in the United States?

QUESTIONER [Mr. Giorello]: Yes, from the legal perspective.

MR. MELLIS: From the legal perspective there really has been no issue since the 1976 Copyright Act. The leagues lobbied for this in 1976, as I understand it. In the legislative history it is clear that live sports broadcasts, as long as they are simultaneously fixed and as long as they have the requisite amount of creativity, are protected by copyright in the same way as, let's say, a photograph is, with a low standard.

That was then and this is now, as this gentleman said. Anybody who goes into a broadcasting truck and watches how any modern professional sport is telecast would come out and say, "There's a lot of creativity going on in this."

For example, let's take the Yankees here in New York with the YES Network. They have six or seven cameras going, and there are producers and directors making decisions. It is not the act of a robot. There is a lot of creativity that goes on. And that's just part of it. There is the overlay of statistics; when to do that, when not; graphics — it goes on and on.

So, the notion that, even standing alone, there is not enough creative content in the way that these are produced is anachronistic. We do not experience that debate here in the United States, but I am familiar with it in Europe.

I think there are other areas where there is debate about the Copyright Act. For example, the gentleman from the Netherlands was talking about how important it is for law enforcement to take on criminal copyright cases. In the United States, there is a peculiar wrinkle in our copyright law that if live streaming is a criminal act, it is only punishable as a misdemeanor, not a felony, as compared to criminal distribution or copying. That is not the case in many other places.

There was a bipartisan bill in 2012 that came out of the Senate to reclassify live streaming as a felony rather than a misdemeanor. It got through the Senate Judiciary Committee, but it stopped along with the failure of the Stop Online Piracy Act (SOPA)¹⁹ and the PROTECT IP Act (PIPA)²⁰ in the United States. For years afterward the Copyright Office has supported it, but it just has never come back as an issue for Congress to deal with.

MS. WOODS: We heard Karyn Temple say yesterday that she thinks this is a new era for copyright legislation in the United States, so perhaps that will be one of the topics raised.

I would like to turn to our panelists and see if they have any reactions or comments based on the discussion we've had thus far.

¹⁹ Stop Online Piracy Act, H.R. 3261, 112th Cong. (2011).

²⁰ Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act of 2011, S. 968, 112th Cong. (2011).

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MR. HE: Just a very quick comment on what Michael said about originality. Over the years we have brought lots of judges to watch live satellite broadcasts because we thought it was quite straightforward.

But, no. Some of the judges, after they saw it, came back and wrote an opinion saying: “Well, we understand what you are saying. They have multiple cameras and there is selection. But the director has a manual so there are limited choices. It doesn’t really require that much creativity.” We were very disappointed. However, fortunately, we think that the Court of Appeals judges are now probably more open-minded about this.

I just want to say that it is not so straightforward that people will automatically think, “Yes, this will be creative.” That may be due to a different cultural context. Maybe it depends on how much this judge really knows about sports.

MS. WOODS: Fiona?

MS. PHILLIPS: I will offer a perspective from Australia. Quite apart from the commercial model, sport is an extremely important part of the Australian cultural identity, and the Australian government spends a lot more money on sport than on any other kind of cultural pursuit.

In fact, some of our seminal copyright cases — we are not a very litigious society — do concern sport. It is interesting to listen to the discussion here. Our protection of sporting events actually exceeds what Europe and the United States have. For example, commercial-scale communication, which includes live streaming, is an indictable offense in Australia; you can go to prison for a long time.

One of the earliest authorities from our High Court was a case in 1937²¹. Some enterprising guy erected a platform next to a horseracing track and he charged admission for people to watch the horserace from his backyard, even though the High Court said in that instance that there was no copyright in a spectacle.

As Trevor said, in Australia we have no issue, because of the broadcast and because there is usually some kind of record, with protecting sporting events. This is one area where I think if it was felt that there was a lack in protection, the Australian government would be very, very quick to act because sport is so important in terms of our cultural identity.

MR. COOK: I found the intervention by Marco Giorello from the European Commission interesting. I was surprised to hear that there was pressure for a neighboring right for broadcasters because when you look at the case law in Europe, this is not really a problem in practice.

The problem that we have seen in Europe is actually one at the other end, at the enforcement end, on the scope of the injunctions. The civil law generally has not been harmonized, or the question of remedies has not been sufficiently harmonized perhaps, at the EU level, and we still have our very own national legal traditions of how injunctions are structured. Of course, also in Europe there is the issue of the extent to which the European Union can get involved in issues of criminal penalties and things like that, and that is presumably a whole other delicate area for the Commission.

²¹ Victoria Park Racing & Recreation Grounds Co Ltd v. Taylor (1937) 58 CLR 479 (Austl.).

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I find it interesting that there seems to be pressure at the protection end but actually the problem really seems to me to be at the enforcement end.

MR. HE: May I add one more point?

MS. WOODS: Yes, please.

MR. HE: I want to add a point in relation to the discussion about the legal tradition and the industry interest. In China, yes, what was frustrating was that protection for sports telecasting was denied, but it is very interesting that the live streaming of e-gaming somehow got protection in some local courts.

This is an illustration of the intertwining issues between the legal tradition and the industry interest. In some Chinese cities e-gaming is a very big business, so somehow the local courts are really motivated to protect it, even though, if you look at it from the European legal tradition or Chinese thinking, it is very hard to justify e-gaming qualifying as a cinematographic work. However, the court decided that these are cinematographic works and their live streaming should be protected under the Copyright Law and the Unfair Competition law. So, they actually broke through the legal constraints and protected it.

That is not happening in sports broadcasting, but we think it is coming. That's why we think the judges are struggling right now. They ask, "Should we stick to this technical analysis or should we follow the industry demands for protection?"

If lots of Chinese judges change their mood, or the legislature changes the mood, maybe we are going to see a big shift, considering how big our streaming industry is and how important sport content or e-gaming content becomes in China.

MS. WOODS: Thank you.

I saw Carlo's hand up over there.

QUESTION [Carlo Lavizzari, Lenz Caemmerer, Basel]: On Switzerland, I just want to say that global warming will not solve its problem as fast as in the Netherlands.

Switzerland is becoming an island of pirates. Data is the new money really. There are lots of server farms in Switzerland. And, with the DSM, Switzerland will become even more isolated.

There was a recent judgment saying blocking is not an option in Switzerland, although that case only concerned access providers and not hosters or server farms.

I just wonder if copyright is always the right tool, though. Is it not a question of cybercrime, criminality, and unlawful competition? That would also do away with the difficult rights chain that could still be difficult in many jurisdictions, even once there is an object of protection. Do you have any experience with using other types of computer fraud-type laws?

MS. WOODS: Let's get one more question or comment and then we can get a response to Carlo's question.

QUESTION [Jan Bernd Nordemann, Boehmert & Boehmert, Berlin]: We are also working in Germany for a major sports league. Our approach is always that in addition to website blocking, which is a very important tool in the area, you need to apply a bundle of other measures.

I want to ask you what you think are other important measures, especially in countries where you do not have website blocking available? For example, website blocking is not available in the United States. I think the upstream providers are one of

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the key players because the closer the live stream is to the viewer, the better it will be; so if you push them further away from the viewer, that will make the quality poorer.

Also, follow the money. Are you going after advertisers on rogue sites? That has been very successful in at least getting the advertisers away from the rogue sites.

I would like to hear a bit about the strategy you are following besides website blocking.

MS. WOODS: I think those two questions go together. Do any of the speakers or panelists wish to respond?

Mihály, do you want to comment on this?

PARTICIPANT [Dr. Ficsor]: Not on this, but I would like to refer to the fact that, if I remember correctly, one or two years ago at this conference Jamie Love said that if we have such a big problem with sport events, let's have a sport events treaty. I am not in favor of that.

Nevertheless, sport organizers may be very helpful in promoting the WIPO Broadcasters' Treaty. I heard a rumor that the change in India's position — they were very much against even simulcasting rights — was due to the influence of the cricket lobby in India. It is very interesting that when I was collecting the beautiful court decisions concerning dynamic injunctions, I found a Texas Federal Court case²² where a dynamic injunction was issued for an Indian cricket tournament for the period of the tournament. That is very helpful. I told the Indians to please come to the Diplomatic Conference on the Broadcasters' Treaty.

MS. WOODS: Thank you very much.

Is there any response to the specific question we had on competition law and the other measures? Mike, I know you want to say something.

MR. MELLIS: To answer that question, we have done many different things and we use many different statutes. It is a multi-pronged approach. We are looking for a practical result, and so we have done different things. So, your point is very well taken and I agree with it.

MR. HE: The only thing I want to add is that in China people do use the technological protection measures (TPMs). Actually, the court requires us to use a TPM as a basis for a legal claim against aggregators.

MS. PHILLIPS: I want to make a comment not dealing with the infringement side but maybe influencing the need for an infringement action. In Australia we have what is called "anti-siphoning" legislation, so important sporting matches have to be broadcast on free-to-air in Australia. Sport events that are important to us — like the Melbourne Cup, the Australian Rules Football Grand Final — have to be on free-to-air TV so that everybody can watch. That obviously doesn't deal with the international issues.

MS. WOODS: That is an interesting solution, and we could probably have another panel on this subject, but I think we will need to wrap up here.

I would like to thank our speakers, our panelists, and the audience members for an excellent discussion and some new thoughts on how the question of live streaming and piracy could be addressed. Thank you.

²² Times Content Ltd. v. DOE 1, No. H-17-1287 (S.D.Tex. May 5, 2017).