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Broadcasting the 2006 World Cup: The Right of Arab Fans versus ART Exclusivity

Cover Page Footnote

Daniel Gervais

Broadcasting the 2006 World Cup: The Right of Arab Fans versus ART Exclusivity

Bashar H. Malkawi*

I. INTRODUCTION

The World Cup is the world's largest sporting event. Organized by the Federation Internationale de Football Association (FIFA),¹ the 2006 World Cup, held in Germany, was televised in approximately 189 countries to nearly 5 billion people.² In Arab countries, the 2006 World Cup may be remembered more for its off-field legal battles than its on-field action.

The 2006 World Cup found itself at the center of Arab countries' attention. In the past fans enjoyed free access to the televised World Cup on public channels that maintain public

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¹ In 1904, the national soccer associations of France, Belgium, Denmark, the Netherlands, Spain, Sweden, and Switzerland established FIFA to promote the game of Association Football (soccer), to foster friendly relations among the National Associations, Confederations, and their officials and players by promoting the organization of soccer at all levels, and to control every type of soccer by taking steps as shall be deemed necessary or advisable. Since its establishment, FIFA has grown from seven members to 177 members into one of the most prestigious sports organizations in the world. See generally FIFA.com, History of FIFA, <http://www.fifa.com/en/history/history/0,1283,4,00.html> (last visited Jan. 9, 2007).

² See *The Odd Man Out*, ECONOMIST, June 10, 2006.

service obligations.³ However, Arab Radio & Television (ART), a commercial broadcaster, bought the telecast rights to the World Cup matches in Arab countries. As a result of this deal, fans in Arab countries were not able to conveniently watch the World Cup broadcast. Further, the legal significance of the ART exclusive rights deal is not yet fully appreciated in Arab countries.

Part I of this article will first provide background on the ART deal in its relation to the World Cup. Part II will discuss the economics of exclusivity, and the likely social effects on Arab fans. Because broadcasting is related to copyright law, Part III of this article will provide an overview of the attempts made by Arab countries to improve copyright protection. Additionally, this section will discuss how ART's exclusive rights will be analyzed under the existing copyright laws of Arab countries. Part IV will investigate the antitrust implications of ART's exclusive rights. Finally, Part V will provide some solutions to the issue of ART's exclusivity that attempt to balance the right of Arab fans and the development of a diverse broadcasting industry in Arab countries. This article concludes that given current trends regarding World Cup broadcasting in Arab countries, legislative or regulatory action should be taken to guarantee that World Cup matches are available to all Arab fans regardless of their ability to gain access to or afford pay television. In sum, Arab fans should come first.

I. BACKGROUND

In-home television viewing is the most popular activity for male and female Arabs.⁴ Radio and television have made soccer the most popular game in Arab countries. Television brought the

³ See Bernd Holznel, *The Mission of Public Service Broadcasters*, 5 INT'L J. COMM. L. & POL'Y 1 (2000), for a discussion of public service broadcasters implementing their cultural mission and guiding role.

⁴ See generally *The World through Their Eyes—Arab Satellite Television*, ECONOMIST, Feb. 26, 2005. Across the Arab world, the impact of the satellite dish has been profound. *Id.* Al-Jazeera, by far the best known among some 150 Arab satellite channels, boasts 40 million to 50 million regular followers. *Id.* The entertainment channel MBC has even more. *Id.* When their smaller rival, Beirut-based Future TV ran a song contest last summer, 15 million viewers voted on the outcome—more Arabs than have ever cast ballots in a free election. *Id.*

game into the hearts and homes of millions of citizens across the Arab region, enhancing its appeal several-fold. People who had no interest in the game earlier have now become hardcore fans. All this is a result of the radio and television broadcasts.

There is also a social purpose for the World Cup. In essence, this is best expressed by the way it inspires young people to take up soccer, to develop their personalities, to face the challenges of life, and to experience the joys and good fellowship that should be at the heart of soccer.⁵ Televised sports in Arab countries may be explained as a form of social cohesion, a cultural festival that had the effect of developing harmony, which large quantities of people share. Televised sports still provide an overarching framework that suggests stability and some degree of unity in shared national values.

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. FIFA usually admits only one host broadcaster (i.e., the broadcaster in the country where the World Cup takes place) to produce the television signal.⁶ In this manner, FIFA controls the broadcasting of the World Cup and guarantees exclusivity. The host broadcaster then must secure broadcast rights from FIFA to televise the World Cup within its own national territory.⁷ Other broadcasters typically try to secure similar rights to broadcast the World Cup within their respective national territories. They do so from the host broadcaster, either in the form of a license to exploit the material produced by the host broadcaster or an assignment of all rights.

ART had a number of investment opportunities available to it. The first and most common investment approach was to acquire an

⁵ See STEPHEN DOBSON & JOHN GODDARD, *THE ECONOMICS OF FOOTBALL* 318 (Cambridge University Press 2001).

⁶ It is up to the event organizer whether or not to grant satellite broadcasting rights to a given broadcaster, in full knowledge of the economic impact that this may have on possible exploitation of terrestrial broadcasting rights by other broadcasters in countries situated in the footprint of the satellite.

⁷ See Coopers & Lybrand, *The Impact of European Union Activities on Sport*, 17 *LOJ. L.A. INT'L & COMP. L. REV.* 245, 285 (1995).

interest in the World Cup through broadcast rights. Accordingly, ART, a pay television distributor, was granted, by the host broadcaster (a German production company), the exclusive right to live coverage of the World Cup matches in the Middle East. The price for television rights to the World Cup was high.⁸ The broadcast fees may skyrocket in the future.

As part of the deal, ART and its sponsors will air their commercials during pre-game, half-time, and post-game segments; and, ART will have its logo superimposed on the screen during the telecasts. National broadcasters in Arab countries were only permitted to broadcast twenty-minute highlight programs for soccer matches and were required to delay any other coverage for several hours after the conclusion of a soccer match.⁹ However, the highlights or short reporting would do little to satisfy most soccer fans in Arab countries that wish to experience the entire event. There is a difference between live and recorded coverage, and between full coverage and excerpts. Arab fans have reportedly been infuriated by ART's deal.¹⁰

II. THE EFFECTS OF EXCLUSIVITY

Compared with the United States and the European Union, pay television was only recently introduced in Arab countries.¹¹ In the past, once a broadcast was made, there was a free exchange of sound and television broadcasts throughout Arab countries. Those policies sought to increase the diversity of programming.

⁸ The ART network paid \$100 million for the right to broadcast the World Cup in 2006, 2010 and 2014. Telephone Interview with Khaled Slaubi, Senior Marketing Manager, ART, in Jordan's Media City (Aug. 5, 2006).

⁹ Broadcasts of the highlight programs occur on tape delay at 11:30 p.m. *Id.*

¹⁰ Iraq's public broadcaster has no retransmission rights for the matches and the cost of subscriptions to satellite broadcasters are the beyond the means of many. *See* Khalil Jalil, *ART Spoils World Cup Celebrations in Iraq*, MIDDLE EAST ONLINE, June 6, 2006, <http://www.middle-east-online.com/english/?id=16651>.

¹¹ Pay television includes over-the-air or satellite subscription television and cable subscription television, both pay-per-view and premium channels. *See* Carles Llorens-Maluquer, *European Responses to Bottlenecks in Digital Pay-TV: Impacts on Pluralism and Competition Policy*, 16 CARDOZO ARTS & ENT. L.J. 557, 559 (1998).

There are many social equity issues with regard to the broadcast of the 2006 World Cup in Arab countries. The 2006 World Cup broadcasts, therefore, had more than economic concerns with the broadcast production.

A. *Economics of Exclusivity*

In the past, FIFA concerned itself mainly with ensuring coverage to attract sponsorship and promoting the popularity of soccer. However, exclusive broadcasting had economic advantages to the organizer of the World Cup, FIFA. In recent years, FIFA has come to resemble a commercial organization. It is part of a process of sport commodification in which sponsorship advertising and media coverage dominate. FIFA should be able to resist offers of higher money.¹² Wide access should be the goal of FIFA. FIFA should follow the examples of other sport bodies such as the International Olympic Committee, which accepted substantially less money for wider access.¹³

Exclusivity of broadcasting also gave economic advantages to the purchaser of the rights, ART, and the host broadcaster, the German production company. In contrast to free-to-air television, pay television earns revenue primarily through the sale of subscriptions and particular features.¹⁴ This revenue is supplemented with some advertising.

¹² See James A. R. Nafziger, *International Sports Law: A Replay of Characteristics and Trends*, 86 AM. J. INT'L L. 489, 499 (1992) (discussing the lack of ability on the part sports bodies to resist commercial pressures); see also Lindsay J. Rosenthal, *From Regulating Organization to Multi-Billion Dollar Business: The NCAA is Commercializing the Amateur Competition it has Taken Almost a Century to Create*, 13 SETON HALL J. SPORTS L. 321, 329 (2003).

¹³ In 1995, the International Olympic Committee granted the broadcast rights to the 2000, 2004 and 2008 Olympic Games to the European Broadcasting Union, a union of predominantly public free-to-air broadcasters, over a much higher offer from Sky Sports. See Scott Bouvier, *The Broadcasting Bill and Comparative Media Law*, 5 CARDOZO J. INT'L & COMP. L. 507, 532 n.91 (1997).

¹⁴ With private free-to-air television, the owner earns revenue primarily through the sale of advertising. Public free-to-air television is usually funded by the Government but may also accept funding by advertising. See Garrett Levin, *Buggy Whips and Broadcast Flags: The Need for a New Politics of Expression*, 2005 DUKE L. & TECH. REV. 24 (2005).

Exclusive broadcasting can be disadvantageous in Arab countries for several reasons. First, the pay television market in Arab countries is immature. The Arab market lacks a greater degree of non-exclusivity in the sale of broadcasting rights. In other words, there is limited competition between pay televisions in Arab countries. On the other hand, the U.S. has more flexibility so that, for example, ESPN and FOX all cover parts of the professional baseball season.¹⁵ Second, shifting broadcasting of the World Cup from Arab public free-to-air television to pay television will substantially affect public free-to-air television viability or, at the very least, program quality. Third, due to high subscription fees, pay television in Arab countries would not be able to gain a critical mass to fulfill their objectives for more diverse and innovative programming.

B. *Social Consequences of Exclusivity*

The ART exclusive broadcasting arrangement was disadvantageous to Arab viewers, particularly where rights are acquired by ART, a satellite-TV company whose signal is receivable by only a small proportion of viewers who paid a hefty fee to receive that signal or use special equipment.¹⁶ Many viewers were very upset because the World Cup coverage was shifted exclusively to pay television. For example, opinion polls found that eight out of ten people in Jordan believed that the World Cup matches should be available to the widest audience.¹⁷

¹⁵ See Jeff Friedman, *The Impact of Major League Baseball's Local Television Contracts*, 10 SPORTS LAW. J. 1, 12–13 (2003). In the U.S., the word “soccer” is used to refer to “football” as known in the rest of the world. The word “football” in the U.S. means American football. Soccer still remains a distant also-ran behind American sports such as baseball, basketball, hockey and American football. In 2002 only 3.9 million Americans watched the World Cup final, compared with 95 million who watched the Super Bowl. America’s coolness towards soccer is another example of American exceptionalism. See ANDREI S. MARKOVITS & STEVEN L. HELLERMAN, *OFFSIDE: SOCCER AND AMERICAN EXCEPTIONALISM* 55 (Princeton University Press, California 2001). As this article is for a U.S. journal, I use the term “soccer.”

¹⁶ See Mohammad Ghazal, *Football Fans Cannot Afford Prohibitive Premium Channel Prices*, JORDAN TIMES, June 14, 2006 (an annual subscription to the ART network is JD235 (\$331); the minimum wage in Jordan is set at JD115, the equivalent of \$162).

¹⁷ See Zuhair Al-Shaqairy, *Exclusivity of Broadcasting Dispossesses the World Cup Shine*, AL-RAI NEWSPAPER, July 15, 2006, at 31.

Many Arab soccer fans across countries like Jordan, Kuwait, Egypt, Tunisia, and Morocco believe that they have a right to watch the World Cup for “free” on television.¹⁸ Arab viewers should be entitled to watch the World Cup matches live. Indeed, the entitlement to watch live matches should be a fundamental right. However, no Arab country has gone so far as to grant viewers an enforceable right to hear or watch a particular soccer program. Nonetheless, consumers in Arab countries may raise claims based on such rights. Many constitutions in Arab countries include freedom of speech or opinion that can guarantee the rights of viewers to view World Cup matches.¹⁹

ART may increase the amount of soccer and other sports available on television, including sports not previously broadcasted.²⁰ In this way, ART will delight those viewers in Arab countries who can afford access to its network. However, ART also will bring a countervailing audience disempowerment when the universal free service of soccer television becomes the preserve of the affluent few. In other words, the socially disadvantaged are excluded from the World Cup spectacle by their lack of command of the necessary income for the installation and maintenance of the ART system. The three million ART subscribers are thus able to preempt the other 296 million television homes in Arab countries. Therefore, an image of “inequity” emerges in the Arab society.

¹⁸ See John Mathews, *Rip-off blocks kick-off . . . stingy purse begs a tin cup; 11m too high*, ARAB TIMES, June 15, 2006, available at <http://www.arabtimesonline.com/arabtimes/kuwait/Viewdet.asp?ID=8194&cat=a> (soccer fans in many Arab countries are disappointed that they cannot watch the World Cup, an event that happens every four years).

¹⁹ See THE CONSTITUTION OF THE HASHEMITE KINGDOM OF JORDAN, ch. 2, art. 15.1 (1952), TUNISIA CONSTITUTION, art. 8.1 (1959 as amended on July 12, 1988), BAHRAIN CONSTITUTION, art. 23 (2002), and QATAR CONSTITUTION, art. 47 (2003). See also Jim Phipps et al., *Middle Eastern Law*, 40.2 INT’L LAW. 597, 605 (2006) (discussing the Iraqi constitution and its protection of freedom of opinion).

²⁰ This rhetoric is usually used by pay televisions. See Michael Shapiro, *International Media Law in the 90s and Beyond: Expanding into the International Marketplace*, 17 WHITTIER L. REV. 307, 309–10 (1995).

Arab countries suffer from many economic problems such as poverty and unemployment.²¹ The World Cup was a golden opportunity for Arab audiences to set aside their daily problems, even for a while. However, ART's exclusive broadcasting added to their misery.

There have been serious public relations consequences for ART. It has been portrayed as a grasping gold-digger with little regard for those unable or unwilling to purchase highly expensive satellite receivers and smart cards. In sum, ART is a business organization whose only intention is to make as large a profit as can be made by telecasting the World Cup matches exclusively, resulting in a loss of welfare to Arab societies.

In addition to the goal of accumulating profits, ART should have considered equity grounds. The right to access the World Cup matches, particularly by those with restricted incomes, must be protected. The Arab general public should not be disadvantaged by the loss of access to the World Cup matches, which are recognized to play a significant part in their lives.

III. THE ROLE OF COPYRIGHT LAW

In the past, Arab countries lacked or had ineffective intellectual property laws.²² Intellectual Property was not nearly as important in the Arab society as it is today. Arab copyright laws were not harmonized with world standards until the Berne and the Rome Conventions.²³ Moreover, as Arab countries acceded to the World Trade Organization (WTO), they had to enact copyright laws

²¹ See John H. Donboli & Farnaz Kashafi, *Doing Business in the Middle East: A Primer for U.S. Companies*, 38 CORNELL INT'L L.J. 413, 445-48 (2005) (unemployment level reached 15%).

²² See Amir H. Khoury, *The Development of Modern Trademark Legislation and Protection in Arab Countries of the Middle East*, 16 TRANSNAT'L LAW. 249, 2251-52 (2003) (analyzing the trademark laws of Syria, Saudi Arabia, Jordan, and Egypt).

²³ See Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, last revised, Paris, July 24, 1971, S. TREATY DOC. NO. 99-27, 828 U.N.T.S. 221 (Berne Convention), available at http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html; International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Oct. 26, 1961, 496 U.N.T.S. 44 (Rome Convention), available at http://www.wipo.int/treaties/en/ip/rome/trtdocs_wo024.html.

which comply with the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs).²⁴

The TRIPs Agreement was a major step toward establishing a more effective system of intellectual property disciplines and procedures.²⁵ The TRIPs Agreement addresses trademarks, industrial designs, patents, and protection of undisclosed information.²⁶ The TRIPs Agreement also contains copyright provisions, which provide various neighboring rights to broadcasting organizations. Broadcasting organizations are “accorded the right to prohibit unauthorized fixations, reproductions of fixations, ‘and the rebroadcasting by wireless means of broadcasts, as well as the communication to the public of television broadcasts of the same.’”²⁷ As technology advances, the TRIPs Agreement could be extended to cover broadcasting via alternative media such as mobile phones.²⁸

World Cup matches themselves are not works of authorship that can be copyright-protected under the copyright laws of Arab countries. The nonexclusive list of categories of works eligible for copyright protection does not include any category that includes World Cup matches.²⁹ However, while the matches themselves are

²⁴ See Gary G. Yerkey, *U.S., Jordan Hold Talks in Effort to Avoid Sanctions Over IP Protection*, 15 INT’L TRADE REP. 661 (Apr. 15, 1998) (describing discussions of whether Jordan should be targeted with trade sanctions under the Special 301 provision of the 1988 Omnibus Trade and Competitiveness Act for failing to protect U.S. patents, copyrights, and trademarks); Gary G. Yerkey & Daniel Pruzin, *U.S. Wants more Progress on IPR before Allowing Jordan to Join WTO*, 16 INT’L TRADE REP. 866 (May 19, 1999). See also Gary G. Yerkey, *United States Close to Sealing Tariff Deal with Saudi Arabia in WTO Accession Talks*, 22 INT’L TRADE REP. 709 (Apr. 28, 2005) (discussing issues, notably in the areas of services and intellectual property protection, to be resolved before Saudi accession to the WTO).

²⁵ See David Nimmer, *GATT’s Entertainment: Before and After NAFTA*, 15 LOY. L.A. ENT. L. REV. 133, 142 (1995).

²⁶ *Id.*

²⁷ *Id.* at 150.

²⁸ See Matthew D. Asbell, *Progress on the WIPO Broadcasting and Webcasting Treaty*, 24 CARDOZO ARTS & ENT. L.J. 349, 351 (2006) (broadcasting is broader today than before as signals can be uploaded or otherwise redistributed most often via the internet).

²⁹ See, e.g., Jordan Provisional Copyright Law No. 52, art. 3 (2001), Official Gazette No. 4508 (Oct. 1, 2001), available at http://www.wipo.int/clea/docs_new/pdf/en/jo/jo004en.pdf.

not copyrightable, copyright laws in Arab countries consider the actual television broadcasts of the World Cup matches copyrightable works of authorship.³⁰ Thus, any effort by ART to claim exclusive intellectual property rights for the World Cup must be based on the television broadcasts of the matches.

Television networks and other broadcasters in the past did not have standing under past Arab copyright laws. TRIPs required Arab countries to enact copyright laws that comport with the TRIPs Agreement. Now, broadcasters will have more legal certainty when they acquire rights to a satellite broadcast. Under the new copyright regime in Arab countries, broadcasting organizations have a non-waivable right to prohibit rebroadcasting by wireless means and the communication of the broadcast to the public through public television.³¹ Thus, copyright laws in Arab countries extend protection to the communication of materials by satellite and cable.

It should be noted that copyright laws in Arab countries permit a defense of fair dealing for the purpose of reporting current events or news.³² In the case involving World Cup broadcasts, ART permitted Arab public television stations to broadcast a twenty-minute segment of highlights from the soccer matches. Thus, ART can sue the Arab public television stations for breach of copyright in the ART's World Cup transmissions if the stations showed more than twenty minutes of a match during their sports news programs. However, Arab national television stations can rely on the fair dealing defense, which exists to balance exclusive rights in

³⁰ See *id.* art. 23; Copyright Law, Royal Decree No: M/41, art. 9.1, 2nd Rajab 1424 H (Aug. 30, 2003) (Saudi Arabia), available at <http://www.sagia.gov.sa/Downloads/Copyright%20Law.pdf>; Arab Republic of Syria Law No. 12/2001, art. 13 (Feb. 27, 2001), available at http://portal.unesco.org/culture/admin/file_download.php/sy_copyright_2001_en.pdf?URL_ID=30397&filename=11424371293sy_copyright_2001_en.pdf&filetype=application%2Fpdf&filesize=68822&name=sy_copyright_2001_en.pdf&location=user-S/ (also available at http://www.internet-law.ru/law/int/nation_unesco/syrian/syrian.pdf); Federal Law No. (7) of 2002 Concerning Copyrights and Neighboring Rights, art. 19 (2002) (UAE), available at http://www.wipo.int/clea/docs_new/pdf/en/ae/ae001en.pdf.

³¹ See Jordan Provisional Copyright Law no. 52, *supra* note 29.

³² See *id.*, art. 17; see also Federal Law No. (7) of 2002 Concerning Copyrights and Neighboring Rights, *supra* note 30, art. 3.

copyright and the interest of the public in comprehensive information.

To mitigate the monopolistic broadcasting of World Cup matches, a compulsory licensing scheme should be considered.³³ However, only two compulsory licensing provisions currently exist in the copyright laws of Arab countries. These two provisions include translation of foreign works and publication of certain works.³⁴ Arab countries should modify their copyright laws to include a compulsory license law for the public showing of World Cup telecasts. A compulsory license law would compel ART to license its broadcasting at a rate that is reasonable as determined by governments.

World Cup broadcasts in Arab countries were encrypted to prevent ART rights overspill, reception of the broadcast outside those intended subscribers and without a copyright license for the unintended viewers. Since many viewers in Arab countries were at a disadvantage, they attempted to violate copyright protection by intercepting and decoding channels' signals in order to watch the World Cup.³⁵ Certainly, ART's exclusivity and its high fees will not help promote a culture of respect for copyright protection in Arab countries.³⁶ Therefore, because ART's exclusivity was based

³³ The participants in TRIPs collectively agree that some licensing practices or conditions pertaining to intellectual property rights which may restrain competition may have adverse effects. Accordingly, members may adopt appropriate measures, consistent with the other provisions of TRIPs to prevent or control such anti-competitive practices. See Uruguay Round of Trade Negotiations, Marrakesh, Uru., Apr. 15, 1994, *The Final Act of the 1986-1994 Uruguay Round of Trade Negotiations, Agreement on Trade-Related Aspects of Intellectual Property Rights*, art. 40.1, 8.2.

³⁴ See Jordan Provisional Copyright Law, *supra* note 29, art. 11. See also United Arab Emirates Federal Law, *supra* note 30, art. 21.

³⁵ For example, the UAE was bombarded by black market TV smart cards and satellite receiver boxes as viewers looked for ways to avoid paying for expensive ART subscriptions. The smart cards gave access to all 18 ART channels, including eight set aside for the World Cup. The smart cards cost dhs550 (\$149). See *The World Cup for DHS 550*, <http://www.7days.ae/2006/06/04/the-world-cup-for-dhs-500.html> (last visited Feb. 12, 2007).

³⁶ See John Carroll, *Intellectual Property Rights in the Middle East: A Cultural Perspective*, 11 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 555, 558, 574 (2001) (arguing that there are political and cultural factors that hamper effective enforcement of intellectual property laws in the Middle East and that there is a sentiment for many Middle Easterners that religiously based laws are necessary barracks against

on paid access for those who can afford it, there are repercussions on the broader picture of intellectual property protection and enforcement in Arab countries.

IV. ANTITRUST ASPECTS OF ART TELEVISIONING THE WORLD CUP

The TRIPs Agreement reserves the rights of countries to adopt and enforce antitrust law. TRIPs recognizes that intellectual property, and particularly intellectual property licensing, can be used in abusive ways, and some of those ways may harm competition.³⁷ Accordingly, Arab countries are allowed to adopt antitrust laws to prevent harm to themselves in their internal markets.

Antitrust law is concerned with protecting against economic oppression and unfairness.³⁸ ART has made antitrust issues more important in Arab countries. The dispositive question is whether giving ART exclusive right to televise the World Cup comes under antitrust law. There is no formal antitrust ruling in Arab countries on the issue yet as no legal challenge has been mounted against ART telecast rights. However, ART's exclusivity is not natural and in itself infringes antitrust law due to its long period and other excessive effects.

The effect of ART's exclusivity and whether it is contrary to antitrust law depends on a number of factors. These factors may include: the duration of the exclusivity agreement, the importance of the World Cup in relative and absolute terms, how many Arab viewers want to watch the World Cup, whether any other soccer events are substitutable, how important the World Cup is to advertisers, and whether ART has acquired exclusive rights to

Westernization and the domination of Western culture). Middle Easterners believe that violating intellectual property rights is the way to get revenge on the West for colonialism. *Id.*

³⁷ The TRIPs Agreement provides that nothing shall prevent members from specifying prohibited practices that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market. *See* Agreement on Trade-Related Aspects of Intellectual Property Rights, *supra* note 33, art. 40.3.

³⁸ *See generally* William H. Page, *Ideological Conflict and the Origins of Antitrust Policy*, 66 TUL. L. REV. 1 (1991) (examination of the competing views of antitrust law).

broadcast many other important soccer events.³⁹ Another antitrust issue is sublicensing by ART who had exclusive rights to broadcast the World Cup in Arab countries. ART refused sublicensing to Arab public television stations. ART demanded royalties that were too high and that discriminated between Arab public television stations—acts that would be contrary to antitrust law.⁴⁰ However, whether abuse happened is a question of fact for Arab national courts to decide.

ART's antitrust problems arise when it is the dominant company in the country. Unlike in the United States, antitrust laws in Arab countries prohibit exploitative abuses of dominant market power.⁴¹ Moreover, Arab antitrust laws do not create an exemption for pay television broadcasts of soccer events.⁴² After acquiring broadcasting rights, ART acquired content, thus strengthening its market position. Concentration of broadcasting rights in ART's hands eliminated price competition between TV channels, enabling ART to set prices at levels higher than would be possible in a competitive market. ART's pricing for World Cup broadcasts shows its unreasonableness and was a clear attempt to take advantage of its market power.

³⁹ ART signed a multi-year contract for exclusive broadcasting rights of the World Cup games in 2010 and 2014, English Football League, and European Champions League, Saudi League, and Arab Champions League. Interview with Khaled Slaubi, *supra* note 8.

⁴⁰ Morocco's national TV public stations "[did] not have enough money to pay the required US \$13 million in broadcast fees to ART." *Fears over TV Blackout*, BBC SPORT, June 7, 2006, available at http://news.bbc.co.uk/sport2/hi/football/world_cup_2006/5055078.stm. Algeria's state-run television made several financial offers to ART, to no avail. *Id.* ART "demanded that Egypt pay up to \$5.2 million to relay the matches, a figure considered exorbitant." *Egyptians await World Cup fate*, BBC SPORT, Jun. 8, 2006, available at <http://news.bbc.co.uk/sport2/hi/football/africa/5060570.stm>.

⁴¹ See, e.g., 15 U.S.C. §§ 1–2, 37 (2000); see Mohamed El Hedi Lahouel, *Competition Laws in MENA: An Assessment of the Status Quo and the Relevance of a WTO Agreement* 5 (Econ. Research Forum, Paper No. 2011, 2000), available at <http://www.erf.org/eg/middle.php?file=paperresult&id=152>.

⁴² See, e.g., The Competition Law, No. 33 art. 7 (2004) (Jordan) (creating exemptions for "exceptional circumstances, emergency situations or natural disasters"), available at <http://www.mit.gov.jo/Default.aspx?tabid=428>.

ART's high fees could be proof of illegality and abuse.⁴³ Arab antitrust laws expressly prohibit this practice.⁴⁴ Conclusions of excessive prices involving ART may be reached on the basis of several criteria, which are relevant to the facts of the case.⁴⁵ ART's fees were closer to a monopolist's fees rather than marginal cost.⁴⁶ ART's fees were due in part to restrictive agreements, not because ART was able to offer the best products or services.

ART's fees could have been more likely to be reasonable and lawful if they were discussed and genuinely negotiated with each of the Arab public television stations that would pay or bear the cost of the fees. However, ART imposed its broadcasting fees on Arab public televisions without discussion.⁴⁷ ART fees were unlikely to be lawful because they imposed single rates on everybody, rather than a series of rates adjusted to the circumstances of Arab countries.

Some clubs and restaurants in countries, such as Jordan, opted to broadcast the World Cup live on one of many European channels broadcasting the event. ART went out of its way to threaten those clubs and restaurants. The reduction in the number of channels that broadcast the World Cup in Arab countries protects ART's grant of exclusivity in the local markets, and enhances the value of the ART television contract by protecting the exclusivity of this contract from dilution caused by the importation of soccer matches from other foreign channels. ART does not have the right to do so. The antitrust laws of Arab countries

⁴³ ART's hefty fees could be attributed to high operating expenses, possibly due to lack of competition.

⁴⁴ For example, the Kuwaiti antitrust law prohibits abusive use of a dominant position through excessive prices. Lahouel, *supra* note 41, at 6 n.2; *see also* BAHAA ALI EL-DEAN, PRIVATISATION AND THE CREATION OF A MARKET-BASED LEGAL SYSTEM: THE CASE OF EGYPT 167 (Brill Academic Publishers 2002) (Egyptian competition law forbids exploitative behavior such as charging monopoly prices).

⁴⁵ Excessive prices are essentially prices which have no reasonable relationship to production costs. *See* Case C-242/95, GT-Link A/S v. De Danske Statsbaner (DSB), 1997 E.C.R. I-04449.

⁴⁶ Monopoly fee is the price at which the balancing of lower output and higher price maximizes profits. Marginal cost is the extra or additional cost of producing another unit of output. *See* COLANDER, MACROECONOMICS 6-7, 35 (McGraw-Hill 2005).

⁴⁷ *See generally Fears over TV Blackout, supra* note 40.

prohibit unreasonable ART behavior that restricts or distorts the market.⁴⁸

In sum, ART has done more than exercise an inherent broadcasting right. ART, when exploiting its intellectual property right, exceeded the limits of its legal content. ART abused a dominant position by obtaining or exercising intellectual property rights. ART's exclusive rights and practices are incompatible with the antitrust laws in Arab countries. ART's fees were unfairly onerous and anticompetitive. Sublicensing might have reduced the anticompetitive effects of ART's exclusivity significantly. Overriding reasons relating to the public interest including consumer protection should have directed ART to charge broadcasting fees on a fair and reasonable basis.⁴⁹ It is not desirable that ART would benefit from keeping a monopoly of broadcasting live World Cup matches nor should ART be free to refuse sublicensing to other Arab public televisions. The public interest must be fully protected by making the widest number of World Cup matches available to Arab viewers.

V. POSSIBLE SOLUTIONS

The current deregulatory trend in Arab countries means that growing pay television stations need sports programming.⁵⁰ Pay television has just begun to proliferate and consume any sporting events it could get its hands on. By the end of this decade, almost all sports such as basketball, soccer, and handball could be available exclusively on pay television in Arab countries.

Given that the World Cup is of fundamental importance to free-to-air viewers in Arab countries and that a substantial number

⁴⁸ See Jordan Provisional Anti-Trust Law, *supra* note 42.

⁴⁹ See U.N. Econ. & Soc. Comm. for Western Asia [ESCWA], *1998-1999 Report*, 51, E/ESCWA/ED/1999/24 (July 2000) (company practices must be advantageous to the consumer, resulting in abundance, diversity, quality and low prices).

⁵⁰ See Abdellatif Aloofy, *What Makes Arabian Gulf Satellite TV Programs? A Comparative Analysis of the Volume, Origin, and Type of Program*, in *THE INFORMATION REVOLUTION AND THE ARAB WORLD: ITS IMPACT ON STATE AND SOCIETY* 36 (The Emirates Center for Strategic Studies and Research 1998) (studying the implications for national development of global telecommunications trends and spread of direct-broadcast satellite television services in Arab countries).

of Arab viewers cannot access or afford ART's fees, the measures appear necessary. The form and extent of these measures can vary. However, the goal of these measures is to ensure that the free broadcast television system is preserved.

For the sake of the public interest, Arab countries could mandate the television coverage of key soccer events, including the World Cup. To cover the costs of these free telecasts, Arab broadcasters could receive a government grant and the right to sell advertising.

In order to limit exclusivity, Arab countries could enact laws that restrict pay television licensees from acquiring the right to televise certain listed soccer events, unless a national free-to-air broadcaster also has the right to televise the event on its broadcasting service. The governments of Arab countries could list soccer events, which televising should, in its opinion, be available free to the general public. However, there must be conditions for listing any soccer event. For example, the list should include soccer events of national significance to Arab viewers that have usually been televised by national television broadcasters. The list should not operate retrospectively and should only restrict the future acquisition rights to those soccer events by pay television. Moreover, the governments must take into account complex issues of social equity, broadcasting development, and competition policy.

Arab countries could ascribe to every important soccer event both public and pay television coverage rights. In other words, public television and pay television could hold both sets of coverage rights, but pay television rights should not be exclusive to those of public television. Therefore, all important soccer events would have the potential to be carried on public television or pay television or both. Public television and commercial television channels such as ART could agree on a list of soccer events that ART would not broadcast exclusively. These soccer events could include the World Cup, Arab Champions League, and European Champions League. These soccer events should not be purchased on an exclusive basis by pay television.

Laws in Arab countries should require pay television such as ART to reserve a percentage of the World Cup matches for free broadcast. ART could have agreed on broadcasts of designated World Cup matches to the general public. For example, the semi-finals and the final match are the most popular matches. These matches, which have always been available on over-the-air broadcast television without charge, should be viewed freely in Arab countries. The broadcasting of these matches should not prohibit ART from offering sophisticated, value-added, advance-paid broadcasts of the other matches.

If any of the previous measures is adopted by Arab countries, they could prevent private broadcasters from investing in televising a soccer event because they will consider Arab public television stations as “free riders.” The inability to televise major soccer events may hinder the emergence of new private broadcasters that could have contributed to the diversity and quality of content available to Arab viewers. Therefore, Arab public television stations could extract cheap rights from ART, instead of paying full price, by entering into mutual agreements. This solution would encourage Arab national television to contract with ART and individuals to buy legal smart cards at a reasonable price without having to pay a large sum.

Arab countries should take measures to protect the right to information and ensure public access to public television coverage of soccer events of major societal importance. However, at this stage, no proposed laws or regulations in Arab countries have been drafted to address the issue of exclusive broadcasting based on ART’s case.⁵¹ Arab countries should legislate to limit exclusivity of broadcasting for policy reasons of equity. In addition, it is important for Arab countries to legislate in order to remedy the current legal uncertainty, avoid market distortions, and reconcile free circulation of television to protect the legitimate general

⁵¹ The U.S. and Australia do not have laws that restrain sports telecast on cable television. Rather, the U.S. and Australia rely on regulatory monitoring such as the U.S. Federal Communications Commission (FCC) monitoring. *See* IN RE IMPLEMENTATION OF SECTION 26 OF THE CABLE TV CONSUMER PROT. AND COMPETITION ACT OF 1992, 9 F.C.C.R. 3440, 3474 (1994) (The FCC stated that it would continue to monitor the availability of sports.).

interest and broadcaster's right of exclusive broadcasting rights that it has purchased to important soccer events.

VI. CONCLUSIONS

Until recently, television, which originated as state-owned monopoly services, had been regarded less often as a business in Arab countries. Television is seen as a public service and means of entertainment, but not as a business like any other business. Increasingly, however, contracts between Arab commercial broadcasters such as ART and organizers of soccer events such as FIFA, involving large sums of money, mean that important soccer events such as the World Cup will be encoded broadcasts. Only subscribers who have signed contracts with ART can unscramble the encoded broadcast to view World Cup games live.

ART emerged to capitalize on the rising popularity of the World Cup in Arab countries. Furthermore, ART cares less about the World Cup than the revenue generated from such an event. ART's exclusive right to broadcast live the 2006 World Cup matches raised many legal and social issues, the implications of which are not yet fully understood in Arab countries. The broadcasting right given to ART was more analogous to a grant of monopoly than to recognition of copyright status. Moreover, ART's exclusive right extended and strengthened its dominant position and seemed contrary to antitrust laws in Arab countries. ART created power to shut competitors out of the television market and to force the public to pay high fees to subscribe.

Broadcasting World Cup matches exclusively on commercial channels, as in the case of ART, is a real problem because of concerns for low-income, die-hard Arab fans at home. The World Cup is a tradition that has always been available to all Arab viewers. Hence, access to it should not be determined by an income test. In Arab countries where the rich get the best services and increasingly better information and the poor get increasingly marginalized, the enjoyment of the World Cup may become one of the distinguishing features of the "haves" and the "have-nots."

In reaction to such legal and social concerns raised by ART exclusivity, Arab countries will have to take measures to ensure that major soccer events will be broadcast free-on-air, that is, they will not be encrypted. This is to ensure that the public need not subscribe to a particular channel to see an important soccer event of national or international interest. The measures could include reserving a percentage of the World Cup matches for free broadcast or adopting laws that list important soccer events that cannot be made the subject of exclusive rights on commercial channels. However, Arab countries should clearly adopt such measures to limit exclusivity of broadcasting with more thought to Arab viewers and at the same time should not stifle the future development of broadcasting soccer matches.

Commercial channels obtaining the exclusive right to broadcast soccer matches are inevitable throughout Arab countries. It therefore seems certain that the legal and social issues outlined in the ART case will no doubt arise again in other cases. It follows that it would be wise to set up effective regulatory compliance committees in Arab countries to monitor the television market. Moreover, competition commissions in Arab countries should look at commercial channels' practices in televising soccer events, especially exclusionary or exploitative practices. No doubt there are also potential plaintiffs, such as consumer societies in Arab countries, who may file complaints. One factor that could also keep ART and the like at bay is the pressure from Arab fans and members of parliaments.