

**Jamaica Intellectual Property Office**

**IP WEEK SEMINAR**

**JAMPRO Conference Room**

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**“BROADCAST RIGHTS: BALANCING THE COMMERCIAL AND PUBLIC INTERESTS”**

**Presentation by Cordel Green, Executive Director, Broadcasting Commission of Jamaica**

**SPEAKING NOTES**

This presentation will cover:

- How broadcasting rights underpin the relationship between sports, TV and other media
- Broadcast Rights: Balancing the Commercial and the Public Interests

Sports programming and broadcasts are among the most watched programmes and widely consumed content in the world. It follows that sports provide an excellent opportunity for advertisers and sponsors to connect with fans (consumers & potential customers), and most importantly, help media companies to secure major advertising, sponsorships or pay to view subscriptions.

Not surprisingly, broadcast rights have grown in importance as a source of income and revenue for sports associations, leagues and teams. Media and technology companies pay billions of dollars for the rights to provide or transmit coverage of top sporting events across multiple platforms.

Broadcast rights have therefore played a significant role in the exponential growth of the business of sports. A case in point is that this year, a 30-second advertisement during the Super Bowl, aired exclusively on CBS, went for US\$5.25 million. For perspective, that's approximately US\$175,000 per second.

In 2014, NBC Universal paid the International Olympic Committee (IOC) US\$7.75 billion for the exclusive broadcast rights (in the US) to the six Summer & Winter Olympic Games from 2022 to 2032. ESPN and TNT currently pay the National Basketball Association (NBA) US\$2.7 billion each year for the rights to broadcast NBA games. Amazon, successfully outbid Twitter and YouTube, and pays the National Football League (NFL) US\$65 million per year to stream "Thursday Night" football games.

Exclusive arrangements can be based on different business models. The media company can agree to pay a fixed up-front licence fee to the sports entity. This is an inherently risky proposition as there is no guarantee that audience and advertising and sponsorship revenue will materialise as planned.

There is also a revenue-sharing model where the sports entity and media company share the revenues from advertising and sponsorship. In some cases, the sports entity purchases the air time and keeps all the advertising revenue which it generates.

The commercial interests and the copyright interests in sports are inextricably bound. Media companies pay enormous sums for broadcast rights and, naturally, expect those rights to be protected. I cite as an example, the case of *TVJ v CVM*.

TVJ took CVM to court in 2015 over the use of footage from the World Championships, held in Beijing, China. TVJ had exclusive rights to broadcast the championships and contended that CVM breached its broadcast licence. It also argued that it suffered losses as a result of the airing of content by CVM. The Supreme Court awarded damages against CVM in the sum of US\$125,975 for breaching TVJ's rights.

Mr. Justice Sykes found that CVM's use of footage during the programme 'Return to the Nest' was in breach of TVJ's exclusive licence. Footage posted on CVM's social media pages were also found in violation and not

protected by the fair use provision of the Copyright Act.

Justice Sykes said " The use of the clips was not for the purpose of fair dealing for reporting a current event...It does not matter that CVM did not get the material from TVJ's feed, once it used material covered by TVJ's licence and the fair dealing defence does not apply then CVM was in breach of TVJ's rights."

The point of departure for that judgement, at core, is that copyright is about owning what you create, and an entitlement to returns from investing in something (Juden, 2010, 99). That hypothesis has held sway for over 150 years, predicated on the need for innovators to exercise rights over their creations, as an incentive to continue to create.

But this can foster confusion and resentment by consumers. Many Jamaicans continue to be angered by the blocking of sports events when exclusive rights are acquired by a local television station or a local cable channel. They also see no logic in blocking content that can be easily accessed via unregulated, internet-based, substitutes.

The situation is complicated by what is sometimes described as "free culture" (Lessig, 2005). One of its proponents, Lessig, posits that the notion of "free culture" seeks to guard against the perverted effects of extreme proprietorship and adjust copyright laws to the technologies of the times. He submits that Free culture is not anti-proprietary nor does it promote a culture in which creatives are not paid (ibid). Rather, it calls for a re-thinking of copyright, perhaps to "assert public use and then allow a few commercial exemptions" rather than "assert private ownership and then allow a few exceptions" (Howkins, 2010, pp.176-177). It is argued that this new approach is required to balance incentivizing creativity and exclusivity, on the one hand, and ensuring equity in the dispersion of creative enterprise, on the other.

### **Special legislative provisions**

Some countries have responded to these concerns by instituting special legislative provisions to govern the acquisition of exclusive rights to sporting events which have a very high public interest.

In Australia, for example, there is a so-called 'Anti-Siphoning Scheme' under which the Minister of Communications establishes a list of premium content, and stipulates that only terrestrial/ free television broadcasters are eligible to acquire the exclusive broadcast rights for any of the programmes on the list. Similar arrangements exist in the United Kingdom, Singapore, Belgium, Austria, France, Finland and Germany.

In the case of Jamaica and the wider Caribbean, the opportunity to see our children, sportsmen and women compete at Girls and Boys Champs, Dacosta Cup, the Olympics, World Championships, cricket, netball, football, swimming etc., is a source for building national pride and serves as a unifying force that lends support to social cohesion.

### **High public interest**

An argument could therefore be made for privileging a select list of sports events and requiring that the licensing arrangements must guarantee the widest distribution or opportunity for access. For example, to require that a broadcaster which has secured exclusive rights to a sporting event which has very high public interest or cultural relevance, must have the capacity to adequately broadcast that content to a specified percentage of the population (usually 95%).

Speaking personally, I favour the argument. However, any such regime would need to be considered and crafted very carefully because broadcasting also comes with the social obligation to ensure that rights holders can monetize their rights.

The current state of affairs in Jamaica is this: if a copyright holder makes a complaint to the Broadcasting Commission that its copyright in a sporting event is being or has been breached, we are duty bound to investigate and take such measures as are appropriate and reasonable to prevent the continuation of a breach or future infringement.

Our powers are to recommend the suspension of licences, recommend the non-renewal of licences, direct that programmes or channels be blocked or removed, or require other remedial measures such as the airing of public apologies.

## **Review the licensing regime**

We support a review of the licensing regime to deal with high public value content and the introduction of financial sanctions to encourage compliance with the copyright law. In relation to compliance, we long ago recommended to government that financial sanctions of up to a million dollars be imposed for breach of copyright.

We have also recommended that the definition of broadcasting be modernised so that we can deal with content, including copyright violations, regardless of the platform which is used for delivery or the device which is used for reception.

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