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**GROUP OF SPECIALISTS ON THE DEMOCRATIC AND SOCIAL
IMPLICATIONS OF DIGITAL BROADCASTING**

(MM-S-DB)

**Comments on the draft Recommendation on the right of the public to information on
major events where exclusive rights have been acquired
and on the draft Explanatory Memorandum thereto**

**Secretariat memorandum
prepared by the
Directorate General of Human Rights**

Introduction

This document reproduces the comments on the draft Recommendation on the right of the public to information on major events where exclusive rights have been acquired and on the draft Explanatory Memorandum thereto.

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ARMENIA

1. Section on *Definitions*:

In the definition of “major event”, insert “to cover the event” after “exclusive rights”.

2. Section on *Principles*:

Combine paragraphs 2 and 3 of the second principle, since they concern the same topic.

As regards the right of television broadcasters to report on a major event at transnational level, it should be noted that the Republic of Armenia has not ratified the European Convention on Transfrontier Television.

DANEMARK

The draft Recommendation

Preamble

Paragraph 6: We suggest that the word “rights” is inserted in the second line of the paragraph such that it reads: “Aware of the fact that the right of the public to information on major events must be reconciled with the property **rights** or other rights of events organisers, of the owners of the premises where the events take place, as well as of authors and other rights holders to such events, bearing in mind the limitations which may be placed on these rights under the relevant international instruments;”

Paragraph 8: We suggest the following wording of the paragraph: “Noting that, since the adoption of the above Recommendation, a number of developments have taken place making it necessary to take account, over and above television, of the other media **such as the written** press, radio, ~~as well as~~ news agencies and new information services on electronic communication networks, in order to guarantee the public's right of access to information”.

Definitions

“Primary rights holder”

As no distinction between a primary rights holder and a secondary rights holder is made in the text of the draft recommendation we do not see any reason for maintaining the concept of a “primary rights holder”. In the text of the Recommendation “primary rights holder” is only used in principle 1 on the general conditions for the exercise of the public’s right to information. We therefore suggest to use the general concept of a “rights holder” such that “primary rights holder” is replaced by “rights holder”. Furthermore, we suggest that the definition of the “rights holder” is identical to the one used in defining “primary rights holder”, i.e. “Rights holder” means any person who is able to exercise exclusive rights which might prevent news reporting on a major event.

“Exclusive rights”

We find that the present definition of exclusive rights is not entirely logical. By including “rights held by the primary rights holder” (or as suggested just rights holder) in the present definition we do not actually define exclusive rights, but generally refer to all exclusive rights which might prevent news reporting on a major event (cf. the definition of “rights holder”). In reality such exclusive rights may be rights held by the organiser of the event and/or by the owner of the premises where the event is taking place as well as rights acquired contractually by a news service provider. We therefore suggest rephrasing the definition of exclusive rights as follows:

“Exclusive rights” means the rights held by **the organiser of a major event and/or by the owner of the premises where the event is taking place, as well as by authors and other rights holders** or rights acquired contractually by a news service provider from these rights holders with a view to the exclusive coverage of the event for a given geographical zone.

“Major event”

The word “primary” should be omitted from the definition of major event such that the paragraph reads as follows: “Major event” means any event in which a rights holder holds exclusive rights and which is reasonably considered by one or more providers of news services as being of high interest for its (their) public.

“Audiovisual short report”

Finally, we propose to omit the definition of an “audiovisual short report” as the term is no longer used in any of the principles of the draft Recommendation.

Principles

Principle 2, Paragraph 3: In the fourth line of paragraph 3 the word “and” should be inserted following the word “allowed”: “...provided that sufficient access is allowed, **and** where necessary using pooling arrangements.”

Principle 5, Paragraph 8: It could be considered to specify in line 4 that “these services” are “information society news services” in order to avoid any confusion.

The draft Explanatory Memorandum

Paragraph 4: We suggest replacing the words “competition over” in the second line of the paragraph by the words “commercialisation of”.

Paragraph 14: We suggest replacing the words “through competition law” in the fourth line of the paragraph by the words “through other means” as problems in the area may be solved not only through competition law.

Paragraph 19 a): We suggest the following wording of the two first lines of the paragraph: “An organised major event is any major sporting, cultural, social **or** political event, which occurs as a result of...”

Paragraph 22: The paragraph should be rephrased in accordance with the definition of “exclusive rights” proposed above.

Paragraph 24: As proposed above we suggest using the concept of “rights holder” instead of “primary rights holder”.

Paragraphs 25 and 26: As proposed above we suggest omitting the definition of an audiovisual short report.

Paragraph 28: As proposed above we suggest using the concept of a “rights holder” instead of “primary rights holder” and we therefore suggest the following wording of paragraph 28:

“The exercise of exclusive rights by the **rights holder** should be the subject of restrictions, so that other news service providers may provide the public with information about a major event. This does not mean the **rights holder** foregoing his property right, but...”

Paragraph 29: It could be considered to state in paragraph 29 that it is at the member states’ discretion to decide whether radio news reports should be deferred or live.

Paragraph 34: The full title of Recommendation No. R (91) 5 should be stated.

Paragraph 38: The term “primary rights holders” in line 3 should be replaced by “rights holders”. With regard to the reference to the conditions of use of short reports mentioned in principle 3 of Recommendation No. R (91) 5 it could be considered to specify what these conditions are.

Paragraph 39: For the sake of clarity we suggest to replace the words “these services” in line 7 by “these information society news services”.

Paragraph 40: In line 5 we suggest to replace the word “Furthermore” by “Therefore”.

Paragraph 41: We suggest the following changes in the wording of paragraph 41:

“It should be noted that, unlike news services covered by the principles **3 and 4** above, Principle 5 does not provide any possibility for Information Society news services to report on a major event by means of moving images. The drafters of the Recommendation noted that this type of report could raise many difficulties, notably for preserving the legitimate rights of **right holders** facing risks of abuse, for example, by means of reproduction and easy use of materials placed on **the** Internet. Facing these dangers, which would be difficult to avoid, the drafters considered it preferable not to extend the short reports system to Information Society services. Furthermore, they noted that the development of some of these services, such as “webcasting”, were still at a **too** preliminary stage to be treated in this Recommendation in an appropriate manner.”

NETHERLANDS

We wonder if in the current draft (Principle 2), it is clear enough on what the standards are for live reporting on radio.

In the Explanatory Memorandum of the 1991 Recommendation, a maximum duration of a short report for television (90 seconds) was given (Principle 2.2. point 38). We do not see this in the draft Explanatory Memorandum to the new Recommendation and believe that it should be added, at least where television is concerned.

In the draft Explanatory Memorandum, paragraph 41, it is mentioned that Principle 5 does not offer the possibility to Information Society News Service Providers to report on a major event by means of moving images. We are uncertain whether this is clear in the draft Recommendation itself (Principle 5). In general, we believe that Principle 5 needs more reflection and elaboration.

Perhaps the specific standards concerning the restriction to the right of Information Society Service Providers to report on major events could be specified more clearly in the draft Explanatory Memorandum.

PORTUGAL

Suggestions concerning Principle 5

With regard to Principle 5 in the draft Recommendation, we do not really see any justification for not according Information Society news services the right to disseminate moving images when reporting on major events. Clearly, it would be reasonable to permit restrictions of this right, but it must nevertheless exist to enable the public to be properly informed.

At the same time, when only texts, still photographs or sound are disseminated, we fail to see the justification for restrictions “*to protect the legitimate interests of rights holders*” being proposed solely for Information Society news services.

The best solution might be to grant Information Society news services, like the print media and radio, the unrestricted right to disseminate texts, still photographs or sound and only provide for restrictions “*to protect the legitimate interests of rights holders*” when Information Society news services broadcast moving images, in which case the restrictions could be those set out in the final section of the current version of Principle 5.

We cannot therefore agree with paragraphs 40 and 41 of the draft Explanatory Memorandum. Insofar as moving images are not broadcast, the dissemination of live news reports about a major event poses no threat to rights holders, as it does not involve the de facto expropriation of the rights of the primary rights holders. Although it does inform the public, it does not “steal the show” or replace it. It provides a public service without causing any harm to the primary rights holders.

As for the prohibition of the broadcasting of moving images after the event, as opposed to the provisions for television service operators, the argument that webcasting is still at a too preliminary stage is an insufficient basis for simply denying online media the relevant right. They should be granted the right, but, in return, the definition of “Information Society news services” should be made much stricter so that the right was enjoyed solely by professional webcasters.

A better definition could, for instance, be as follows: “*Information Society news services’ means services providing news at a distance, by electronic means and at the individual request of the recipient, whether in return for payment or not, on a professional and*

continuous basis, in accordance with the rules and legal and ethical standards that govern the media in general, such as news delivered by online and mobile telephone services.”

TURKEY

In general, the draft Recommendation should be admitted by all to claim an equal and fair approach to all different news emitting media that include television, radio, written press, news agencies and new media. Considering the difficulty in drafting a Recommendation on such a very complicated issue due to the necessities to build up a fair and sensitive balance between the public's right to information on major events to which exclusive rights have been acquired and the rights of any organisation whose aim is to supply news to the public for commercial purposes, this draft Recommendation should be treated as an optimum point of benefit for all rights holders and parties concerned, although it may conceal some unforeseeable elements that hinder it to become a perfect one.

This Recommendation is based on and takes its power from the provisions of the basic international legal instruments at the European level, such as Article 10 of the European Convention on Human Rights and Article 9 of the European Convention on Transfrontier Television. In a transfrontier context, this draft Recommendation has a very strong base in the implementation of its principles all across Europe. However, it will be a little bit more difficult to say the same thing about its implementation in every member State of the Council of Europe in a national context since the relevant regulations, rules etc., introduced so far about the short reporting issue in each European country differ in accordance with their own legal system and administrative organisation.

For instance, the short reporting issue on football matches is still a question in Turkey in the national context. The commercial interests of primary right owners are protected severely by contractual agreements. Secondary broadcasters are to bear the expenses set by the primary right owners to broadcast their short reports on football matches on their TV channels. This situation falls completely contrary to Recommendation 91 (5), Principle 4 (1). As far as the access rights are concerned, it is impossible for the present regulations to allow secondary broadcasters and media individually to bring cameras and make audiovisual short reports in football stadiums during the matches. In the past, the Turkish Football Federation allowed secondary broadcasters into stadiums to make short reports during matches, but this situation caused many problems and the regulators witnessed that some of them had abused their rights of making short reports by showing matches in their TV channels for about 30 minutes, which didn't comply to the limitations on the duration of short reporting set by Rec. No 91 (5).

This draft Recommendation defines all the necessary principles about what the balance in general should be between the public's right to be informed on major events by means of short reporting via all media organs and the exclusive rights of the event organisers, owners of the premises and other right owners by considering the commercial and social aspects of providing short reporting to public. However, it does not define "how this objective shall be realised". The draft Recommendation leaves this goal to the achievement of each member States' regulatory approaches in accordance with their own legal system. At this very point, this draft Recommendation fulfils its purpose since it successfully brings the question of "how" as a second step to the attention of the member States.

SWITZERLAND

Draft Explanatory Memorandum

Paragraph 30. It would be advisable to use the term “differential treatment” rather than “discrimination”. Discrimination should not be allowed, but in some cases there may be differential treatment based on real, effective, tangible criteria (such as a given number of listeners or readers). In the event of discrimination, objective and practical reasons should not be put forward to justify differential treatment.

In paragraphs 3 and 12 of the French version we found some typing errors.

Draft Recommendation

Proposal by the legal department of the SRG SSR idée suisse (public service broadcasting company):

“On the whole, we support the draft text. Our only query is whether it is justified to include agencies under Principle 4, paragraph 7. In the area of sporting rights, agencies never work on a reciprocal basis (their purpose is to secure sales), so it does not make sense to include them. Given that Principle 3, paragraph 5 of the draft text would already give all broadcasters direct access to the host broadcaster, it does not seem advisable to include agencies in paragraph 7, since the aim is already fulfilled. The simplest solution would be to delete paragraph 7, or at least to exclude sporting rights from the text”.

“We are aware that the EBU, which is taking part in the discussions, argues in favour of the same position. We support the position of the EBU representatives in these discussions.”

AGENCE FRANCE-PRESSE (AFP) NEWS AGENCY

This draft Recommendation comes at a time when AFP and other international news agencies are encountering more and more obstacles regarding access to major events and the provision of real-time news services for their subscribers.

In recent years, there has been a particular increase in restrictions on freedom of information in the field of sports events.

For instance, the agent for the English and Scottish football leagues intends making the distribution of fixture schedules subject to the payment of subscription fees that bear no relation to the limited costs of producing the data in question. News professionals have always regarded the data as freely accessible, as they are necessary for organising coverage of the events concerned. Moreover, news agencies do not market them in any way.

More worrying still is the fact that, for the coming season, these leagues’ agent has decided to impose a two-hour embargo on the publication of photographs from the relevant matches and a total embargo on the results so that marketing of the photographs and data can be assigned to an exclusive partner. The two-hour embargo on photographs would prevent agencies from serving their daily newspaper clients in Asia. No such serious restrictions on freedom of information have ever been imposed before.

During the EURO 2004, UEFA also imposed numerous restrictions. Subscribing television broadcasters which did not hold the broadcasting rights were not able to broadcast short reports from the matches. Many other subscribing media did not have access to still photographs either. UEFA also placed restrictions on the number of photos that news agencies could supply to certain electronic media services, which bore no relation to the necessary protection of television broadcasters' rights.

Lastly, news agencies' subscribers in the media are increasingly being totally excluded from certain types of sports coverage, even though the services they offer are identical to authorised services that can be accessed in other ways. In particular, this is true of the mobile telephone services banned by the agent of the British leagues, the *Bundesliga* in Germany and UEFA during EURO 2004, even though the information to which they give access can be consulted in an identical configuration on websites.

As regards the text of the draft Recommendation, we should like to make the following points:

- Definitions

“Provider of news service”: as news agencies are “wholesalers” which provide other media outlets with information they use in producing their own news services, the definition should be amended as follows:

“Provider of news service” means any person who offers on a professional basis, **either directly or through subscribing media in the case of news agencies**, a news service to the public, in the form of texts, images and/or sounds, whether in return for remuneration or not.

- Principles

Principle 1 – General conditions for the exercise of the public's right to information

We would suggest a corresponding amendment to take account of the specific nature of news agencies. In our view, it is essential to stipulate that the public's right to information must be exercised without any delays other than the time required for the production and transmission of the relevant material:

1. Unless other contractual agreements between the parties concerned guarantee the public's right to information, the exercise of the exclusive rights of primary rights holders should be restricted in accordance with the terms set out below so that providers of news services may supply news on major events to the public **without delay, either directly or through subscribing media in the case of news agencies**.

Principle 2 - Written press and radio

Access to the relevant infrastructures should go hand in hand with free use of the data concerning the organisation of the events, including, in particular, schedules, with a view to the production of news reports.

Paragraph 4 could be reworded as follows:

4. No financial participation should be required from professionals from the written press and radio for access for news reporting purposes. At the same time, the event organiser or the owner of the premises should have the possibility to require them to pay possible additional expenses linked to the setting-up of infrastructures **and the production of data on the organisation of the events for free use**. These expenses should be clearly defined, correspond only to the cost of the service and exclude any form of profit for the organiser of the event.

Principle 4 – News agencies

News agencies must be able to supply all their subscribers with the news material they produce. We therefore do not believe that the restriction at the end of paragraph 6 is fair, as it implies that the written press and radio should be treated more favourably. Yet news agencies supply the same text and photo services to all of their subscribers, regardless of the medium, when such subscribers produce news services.

The paragraph should therefore be reworded as follows:

6. Where news agencies wish to report on a major event by means of texts, still photographs or sound, they should have access to the premises where this event is taking place **and be able to use data concerning the organisation of the event** along the same lines as the media from the written press and radio and have the right to disseminate the resulting content **for news purposes on a real-time basis**.

EUROPEAN NEWSPAPER PUBLISHERS' ASSOCIATION (ENPA)

EUROPEAN PUBLISHERS' COUNCIL (EPC)

NEWSPAPER PUBLISHERS' ASSOCIATION (NPA)

WORLD ASSOCIATION OF NEWSPAPERS (WAN)

We welcome the opportunity to comment on the subsequent revised Council of Europe draft Recommendation on 'short reporting'. As before, we write on behalf of the World Association of Newspapers (representing publishers and editors from 18,000 daily, Sunday and weekly newspapers throughout the World (including most member states of the Council of Europe), together with seven regional press associations, and 13 agencies), the European Newspaper Publishers Association (which represents some 3,200 daily, Sunday and weekly newspapers from 22 European countries), the European Publishers Council (representing a high level group of Chairmen and CEOs of major European media corporations actively in multi-media markets spanning newspapers, magazines and on-line publishers—many EPC members also have significant interests in commercial television and radio) and the Newspaper Publishers Association (representing the eight major British national newspaper publishers).

Our comments are driven by the recognised need by the Council of Europe to safeguard the public's right of access to information on major events where exclusive rights have been acquired. In making our submission, we do recognise the importance of rights holders to be able to exploit their property. However, we feel that the draft as currently worded inclines too greatly towards the rights holders and not sufficiently to the public's right of access to information.

Specific comments which we do wish to make are contained below for your consideration.

Principle 2

Paragraph 2: the wording ‘As a rule’ might imply exceptions to the rule and in such an event would conflict with the public’s right of access to information. Consequently, we propose the deletion of that wording and the inclusion of the word ‘always’ between ‘should’ and ‘have’ in the first line.

Paragraph 3: we support the inclusion of the reference to “sufficient access” in line 4 which provides helpful and important clarification.

Paragraph 4: we propose the inclusion of the word ‘justified’ after the word ‘defined’ in line 5. We appreciate that as drafted the wording is much improved, but feel that an expense can be defined whilst not being justified. Hence our proposal to clarify this.

Removed previous paragraph 6: We note with much concern the removal from the December 2003 draft of the previous paragraph 6 in Principle 2. This stated that ‘Professionals from the written press and radio sectors should be free to disseminate the content that they produce, in the form and the format which they have chosen and by using the technical means and distribution channels of their choice.’ In our submission to you dated 30 January 2004, we specifically mentioned this saying ‘We particularly welcome the wording of I.6 which goes right to the core of the Council’s objectives in relation to the public’s right to be informed.’ Our view is unchanged on this and we urge the Council to re-introduce that wording to form part of Principle 2. Whilst Principle 5 paragraph 8 might seem to cover this, we feel that this paragraph is insufficiently clear in making this point because of the removal of the reference to freedom of choice of format, technical means and distribution channels. This also links with our concern on Point 40 of the draft Explanatory Memorandum as outlined below by this letter. We believe that in the interest of improving clarity, the paragraph should be re-instated.

Principle 5

Paragraph 8: Whilst we accept that rights holders need to be able to exploit those rights, we feel that the wording on this paragraph is too open-ended. Publishers generally accept that their reports will not constitute broadcasting and inevitably will not be live whatever the delivery mechanism given the editorial treatment needed in publishing text and/or photographs. Consequently, we feel that the restrictions should be worded to reflect this and not go beyond, in ways which might be abused to prevent publishers seeking to provide the public with information. We would recommend that the issue of restrictions on use of material beyond a 24-hour period are re-addressed by the committee, at least as far as the press is concerned. Restricting use for the press in this way will have severe repercussions for existing press practice, e.g. accepted practices such as written on-line databases presented by the press, explaining for example what were the highlights of a sports match in 2002.

Draft Explanatory Memorandum

Point 7: we welcome the recognition and confirmation that the holding of exclusive rights should not affect the need for the press to be guaranteed the right to report on major events.

Point 11: We find the statement in the Preamble to the draft Explanatory Memorandum's Point 11, second sentence (News agencies are the primary source of information to the media.....' to be inaccurate. Perhaps there has been a linguistic error in drafting. We wish to clarify this sentence to read 'News agencies are a very important source of information of the media'. In explanation, newspapers at least would deem news agencies to be just one amongst a variety of important ways of obtaining information.

Point 18: whilst we support the defining by news service providers of what constitutes a 'major event', we were disappointed to see the use limited solely for news purposes. We would anticipate that the well-established practice of syndicating editorial would not be prevented by this paragraph (although by introducing new liabilities and the need for a new contractual chain of warranties and indemnities with licensees, it may render syndication activities impractical). Nevertheless, we believe that the proposed wording could lead to ambiguity about what constitutes 'news' and additionally threatens some traditional activity by publishers which might be seen by some as 'commercial' or 'entertainment' merely because, for example, it has a promotional effect for the publisher or is published in a light-hearted way. Publishers should be free to create their products according to an agenda set by their editors, not any external third party. As well as being consistent with the public's right to information and the principle of editorial freedom, the removal of this ambiguous restriction will allow publishers to continue with important and long established promotional practices based on highlighting their content and coverage to potential readers. Naturally, we appreciate that the right to exploit material could not be unlimited, but publishers are already restrained by the law (for example trademark law, some aspects of copyright law and—depending on territory—passing off, defamation law etc) in their ability to exploit this material commercially. Therefore we believe banning non-news use completely to be wrong and urge a reassessment of this.

Point 21: Although the reference in this point is to a 'news service', we suggest adding as a second sentence that 'Member States should acknowledge that 'news' as editorial almost always includes some element of entertainment and this particularly applies in the area of sport'.

Point 32: We believe that further discussions in the MM-S-DB Group should consider the implications for events where exclusive rights have not been granted but where an event taking place is controlled by the site owner (this has been addressed as an issue in the text by Point 32 of the draft Explanatory Memorandum and also applies in Principle 2, paragraph 3). The examples given are clearly newsworthy, non-organised current events, which could be of considerable public importance and public interest at the time and likely to continue to be so thereafter. Care should be taken to avoid justification of unnecessarily restrictive controls over media access and its coverage of a wide category of events. Even in the extreme examples of mine disasters or hijack this might not merely allow restrictions on media access to the actual mine shaft or the aircraft as suggested, but also to the wider surroundings and community involved. The MM-S-DB Group should ensure that the wording in both texts clearly allows for sufficient access to non-organised events to be guaranteed for all press in the interests of maintaining freedom of the press, not just to one news provider. We are concerned that providing access for such events to only one news provider could allow news management by the site owner or by the authorities and incur doubts on news objectivity, especially if the disaster happened under suspicious circumstances for example.

Point 40: the issue of content being delivered through the internet and mobile phone is a crucial development for publishers and should be accepted as a normal and logical extension

of press content delivery. As we said before, providing such publishing falls short of broadcasting and is not live (but can and should be near live) then it should be permitted and encouraged. By doing so, it meets the needs of rights holders who have the clear advantage of first use, whilst not denying newspapers their essential development in using available technology. The focus of the Recommendation should be on the nature of the product being provided, rather than the platform by which it is being delivered. Principle 5 should not confuse the differing qualities attributed to mediums of text and moving image. We consider that it should be clear that the commercial interest for protecting the exclusive right concerns the picture rather than the 'near live' text describing the event. We cannot agree with the statements made in the second sentence of the Point, beginning 'This would be the case, for example, ...' For the above reason and therefore we would ask for this entire sentence to be deleted. Making this distinction will constitute acting to protect the freedom of the press and ensuring the responsibility of the press to meet the public's right to information.

Summary

In summary, we do appreciate the very difficult work being done by those drafting the wording of this proposed Recommendation and the efforts being made to meet the interests of rights holders without damaging the public's right to information.

A lot of progress has been made to date, but we do urge a serious consideration of the detail of our submission above. We hope that it will help the Council of Europe arrive at a sensible and practical solution in the eventual resulting Recommendation.

REUTERS

Introduction

The barriers to news reporting of public events are increasing. For example, the international news agencies Reuters and Associated Press were unable to include any television news coverage of the Euro 2004 matches in their services to television broadcasters. Reuters received (sometimes desperate) letters from broadcasters, several in Eastern Europe, claiming that without short news highlights from news agencies they would be unable to include any news of Euro 2004 in their news programmes. We recall that smaller broadcasters are less likely to be able to afford to purchase exclusive entertainment rights to major public events. Their competitive position vis-à-vis their larger competitors will deteriorate further if they are also unable to compete in the provision of news programmes. Without access to news of major public events, the overall attractiveness of their news programmes will inevitably decline. The services of news agencies are the essential news raw materials that support a competitive news market place, and to deliver the objective of news pluralism in Europe.

Reuters and AP referred the Euro 2004 prohibition to both the domestic Portuguese competition authority and to DG Competition, but neither was able to resolve the issue. One recurrent problem is that the organisers of major public events tend not to finalise and confirm the position to news agencies until shortly before an event takes place. This tactic of delay makes it almost impossible for news agencies to obtain a remedy on competition law grounds within the short period available, since competition law processes take time to complete.

In the case of Euro 2004, Reuters and AP also took the prohibition to the Portuguese public authority responsible for protecting the rights of the press (AACS), which decided not to intervene. Although the AACS did not elaborate on the grounds for its decision not to intervene, in our preliminary contacts it seemed clear that the omission of any express reference to news agencies in the Portuguese law guaranteeing news access was at least one factor. This reinforces the justification for the Council of Europe's initiative to extend the scope to include news agencies.

This season, and for the first time, the English Premier League has refused to allow news agencies to include television news highlights in their services to broadcasters.

A growing problem is **delayed** news access. For example, at both the Sydney and Athens Olympics, the IOC has permitted news agencies to use television news highlights, but has imposed a fifteen-hour delay. This season, the English Premier League is attempting, for the first time, to impose a two-hour delay on the use of still news photos by newspapers and news agencies. Discussions on this issue continue.

Such delays can cause practical difficulties for the publishing deadlines of media. Moreover, it is obvious that reporting news events must be done swiftly. Sports events, even the most important ones, quickly cease to be news events.

Detailed points on the draft Recommendation

Recitals:

In view of the increasing imposition of time delays by events organisers, we recommend that the Recommendation include an express recognition that the reporting of current news events must be permitted to be carried out promptly. Perhaps this could be included as an additional recital. Alternatively or additionally, the Principles themselves could include provisions against delay.

Paragraph 5: News agencies are a species of media. Because of this, we would prefer the recital to read: *“Noting the crucial importance of the media, including news agencies, in informing society....”*

Paragraph 10: We fear that the proviso *“where necessary”* would be open to abuse, and could defeat the objectives of the Recommendation, particularly in the transfrontier context. In the case of Euro 2004, for example, it was clear that some of the most serious difficulties were being experienced not in the host nation Portugal, but in countries in Eastern Europe. It is likely that one member States' assessment of what is *“necessary”* may be entirely different to another's. In the context of major public events, where there is usually crossborder news interest, we believe that there are many uncertainties, as well as dangers, in allowing a *“where necessary”* discretion. Moreover, the *“competition law”* reason give in paragraph 14 of the draft Explanatory Memorandum may ignore the practical difficulties of applying competition law to events that take place over a short period, sometimes a single day. National competition law processes are still not especially well placed to resolve competition problems that (often) also impact news access in other countries. These difficulties are increased by the tendency of events organisers to delay communicating the decision to news agencies and other interested parties until shortly before an event takes place. This allows little time for the competition authorities to evaluate the position, both domestically and in other countries, and reach a decision before the event has taken place. Our empirical

experience in Portugal, where we sought assistance from both the national competition authority and DG Competition, reinforces our view that competition law has limitations as an instrument to protect newsgathering in this context. We therefore urge the removal of “*where necessary*”.

Definitions:

“**Provider of news service**”. Since the major clients of news agencies, as wholesalers of news, are other media, we would recommend the insertion of “*or to other providers of news services*” after “*to the public*” in line 2.

Principles:

Principle 1: We would suggest a similar insertion after “*to the public*” to reflect the role of news agencies as news wholesalers to other media.

Principle 2, Paragraph 2: We fear the implications of the opening “As a rule.” We do not believe this expression adds anything other than uncertainty, and would urge its removal.

We regret the removal of paragraph 6 of the previous draft, and ask for it to be reinstated or perhaps as an additional Recital. In our view, it expressed well some of the most important values underlying the Recommendation.

Principle 4, Paragraph 6, Line 4: We urge the deletion of “*for print or radio news purposes*” and its replacement by “*for news purposes.*” Reuters supplies its text and photos news services not just to the printed media and radio stations, but also to TV broadcasters. In our view, such broadcasters must not be constrained from using these services for legitimate news purposes. For example, we know of several broadcasters during Euro 2004 that, denied any supply of moving pictures news coverage because of the prohibition, had no alternative to using still news photographs supplied by Reuters in their news programmes. This was clearly a poor substitute for a television station, but at least provided these broadcasters with some limited means of illustrating their news coverage of a highly newsworthy European event. There seems to us to be no logic in preventing broadcasters from using our text and news photos services for any legitimate news purposes.

We would also request the addition of “and without delay” at the end of line 4, to address the growing imposition of delays in news reporting.

Principle 4, Paragraph 7, Line 1: We would request the deletion of “*an essential service*” What does it mean? Who would determine what it means? If it would be for the government or courts of the country where an event takes place to determine, how would the interests of television stations and their viewers located in other countries be taken into account? Reuters and AP are international, rather than domestic, news agencies. It is (very) often the case that the need for the news coverage from international news agencies is greatest **outside** the country in which an event takes place, since it will be more difficult and costly for media from other countries to report the event themselves. We recommend the deletion of “*provide an essential service*” and its replacement by “*provide their regular general news services*”. The expression “*essential service*” is often associated with public utility operations. Neither Reuters nor AP are public utilities.

As with Paragraph 6, we would request the addition of text to address the growing problem of delay.

BBC, ITV, CHANNEL 4, ITN, BSKYB, GMTV, CHANNEL 5, MUTV (the signatories to the UK Sports News Access Code of Practice)

Individual signatories may in the past have made individual submissions on the draft Recommendation - and they may do so in the future - but all are agreed that this joint submission will be a useful adjunct.

Background

It may be worth explaining how the Code came into being:

Article 5 (3) (c) of the Copyright Directive 2001/29/EC (“the Directive”) allows member states to provide that copyright material may be used without consent “in connection with the reporting of current events, to the extent justified by the informatory purpose and as long as the source, including the author's name, is indicated, unless this turns out to be impossible”.

An equivalent provision has been incorporated into UK law since 1988 under sections 30(2) and (3) of the Copyright Designs and Patents Act 1988 (“the Act”) which, with a recent change to section 30(3) as a result of the Directive, reads:

“(2) Fair dealing with a work (other than a photograph) for the purpose of reporting current events does not infringe any copyright in the work provided that (subject to subsection (3)) it is accompanied by a sufficient acknowledgement

(3) No acknowledgement is required in connection with the reporting of current events by means of a sound recording, film or broadcast where this would be impossible for reasons of practicality or otherwise.”

There is – understandably given the wide variety of circumstances in which the provision may come into play – no definition in the Act of what is “fair”. Therefore in 1991, a group of UK broadcasters drew up the Code in order to facilitate in practice the dissemination of news to the public, while balancing the interests of rightsholder and news broadcasters, and to provide a forum for the resolution of disputes and to review the provisions of the Code as a result of technological and other developments.

How the Code operates

The Code recognises that news providers obtain material for use in their reports by:

- 1 taking it off-air (the primary method addressed by the Code)
- 2 agreeing with the owner of the signal to have access to it (envisaged by the Code but left to the signatories to arrange between themselves)
- 3 physical access to venues (specifically excluded from the ambit of the Code because it deals with copyright, not property rights, and because the signatories do not control access to venues).

Signatories to the Code have off-air access to the host broadcaster's live feed of sporting events. The Code sets out in detail what broadcasters consider to be "fair dealing" for the purposes of reporting current events under section 30(2) of the Act. Clips of the event, of varying duration depending on the circumstances, can be used in news reports a certain number of times over a period of 24 hours without charge and without the need to obtain consent.

Over the 12 years of its existence, the Code has successfully achieved its objectives of facilitating the dissemination of news, while balancing the interests of rights holders and news providers. It is also recognised by sports bodies as representing a fair means of ensuring public access to information, and is normally specifically referred to in contracts between them and the signatories. Thus it has enhanced the effectiveness of the statutory provisions – and therefore reinforced the principles underlying them.

This has been achieved through industry co-operation, without the necessity either to require broadcasters to make their signal available (which would raise questions of liability for costs), or to impose obligations on those who control access to venues (with attendant issues relating to space, health and safety etc).

Comments on the draft Recommendation

The Code signatories support the principle of public right of access to information. However:

- there is no evidence that citizens of the UK are unable to see short extracts in their national news coverage of major events. To the extent that it does happen, an entire new Council of Europe Recommendation which goes to the root of broadcasters' contractual relations with sports bodies is a rather excessive remedy;
- the cure can be found more appropriately - bearing in mind the varying interests involved - and fairly, through the medium of copyright legislation.

If however a Recommendation is to be made, the signatories, while they note what is said in the draft Explanatory Memorandum, have concerns about the practical implications of (1) the breadth of the categories of "providers of news services", (2) the definition of "Information Society news services", and (3) the definition of "major event". The first two could lead to onerous and administratively complex access arrangements, while all three are potentially detrimental to primary rights-holders.

FA PREMIER LEAGUE LIMITED (FAPL) **FOOTBALL DATACO LIMITED (DataCo)**

FAPL was founded in 1992 to create, manage and improve the top football league competition in England. The FAPL is responsible for increasing interest in the competition, promoting accessibility to live games, enhancing the media exposure of the competition and generating increased revenue to enhance the competition and strengthen the long term future of the 20 member clubs who form the League each season. It aims to improve the experience of the league for all of its consumers, from the match attending supporters, through its neighbours and local communities, to the media and press, by bringing standards of customer

service which reflect best practice. Stadiums have had their facilities improved to make them ever more attractive to fans, as well as improving the facilities for the media.

FAPL was founded on a set of rules that enables it to grant packages of exclusive audio-visual and other broadcast rights centrally on behalf of its member clubs in order to optimise revenues for all of those clubs. The FAPL redistributes revenue on the basis of an agreed formula in order to:

- Promote greater equality of opportunity among the clubs; and
- Reward success on the pitch to stimulate sporting competition among the clubs.

In turn, the clubs invest their revenue in the pursuit of success on the pitch through the acquisition of players, grass roots programmes, for the development of young talent as well as in stadia development for the benefit of their fans. They also promote solidarity throughout the game by redistributing revenue to the grass roots of the game by way of the Football Foundation, the Youth Development Fund, and via a range of community, education and social inclusion initiatives, as well as by participating in the Football League Cup, and F.A. Cup and by making their players available to the National Team.

DataCo is a company formed in 2001 which has been granted licences to handle the collection, marketing and dissemination of digital and analogue data associated with the UK professional football leagues, namely the FAPL, the Football League, the Scottish Premier League and Scottish Football League. FAPL is one of the Shareholders of DataCo. The scope of DataCo's licence encompasses fixture lists, live match data, player data and still images. Data is marketed to business sectors such as the press, broadcasting, the betting industry, games, publishing, mobile networks and the Internet. The leagues have been exploiting data, particularly the fixtures lists, for many years. Since 2001, DataCo has made this data available on a "white label", open licence basis to third parties.

Introduction

We are pleased to observe that this version of the draft Recommendation has been amended to remove some of the provisions that FAPL and DataCo found to be the most problematic for us in previous versions. We particularly welcome the recognition of the principle that the written press should use their short reports in the written press, radio broadcasters should use their short reports by means of the radio and television broadcasters by means of television. These are important clarifications.

In relation to News Agencies, we welcome the fact that the draft has made certain changes. We are pleased with the clarification that News Agencies would be subject to similar specifications in terms of the use of text, still photographs or sound for print or radio news purposes. In addition, the clarification that their use of moving images for broadcasting purposes would be subject to the provisions of Recommendation No.R(91)5, provides similar control with regard to the protection of the primary rights holder.

Our principle concerns, nonetheless, still relate to the provisions regarding "Information Society News Services". Whilst it is indeed clarified that such services could not include moving images, we remain concerned that News Agencies, or indeed any other media source, could provide information or data to such services with few restrictions as to the use and dissemination of this content. The provisions which, it is noted, may be introduced in this context to protect the legitimate rights of rights holders, are imprecise and remain open to

interpretation. The abuse of reporting privileges for commercial purposes can still take place under the current wording of the draft Recommendation.

We would suggest that the draft Recommendation should concentrate upon appropriate models for written press, radio, television and new media, irrespective of whether the information is gathered directly, or via news agencies or Information Society News Services. We think that this would make the drafting clearer.

Main comments of FAPL and DataCo

Whilst we welcome some of the developments in this draft, there are five main areas where we wish to ask the Council of Europe to consider making further changes and amendments to reflect the outstanding concerns that we have with the draft Recommendation.

1. Definition of “Major Events”

We welcome the change to the draft Recommendation by means of the inclusion of a concept of reasonableness and the reference to events of high interest. However, the definition remains subjective and leaves it solely to news providers to determine “reasonably” whether an event is of high interest to the public. This is entirely subject to the discretion of the news provider, to suit their own commercial requirements at any particular time, contains no certainty and no clarification and, in our submission, is inappropriate for a policy instrument. We would disagree with the draft Explanatory Memorandum’s suggestion that the definition can be subjectively determined. We believe strongly that the definition of a Major Event should be set according to objectively measurable criteria, either by way of a fixed definition or by way of a statement of the defined characteristics of a Major Event that can be adapted to the requirements of each member State.

This leads to our second submission, which is that any resulting policy intervention in this area should only be appropriate for “Major Events” where they are clearly defined. While we are, of course, aware that the Convention on Transfrontier Television (the “Convention”) introduced the concept of ‘events of high interest to the public’ with regard to the right to short reporting in the broadcasting sphere, we would note that we are now in a new media environment in which news and media sources proliferate. We would suggest that any extension of this concept throughout the media should take guidance, rather, from the wording of Article 9bis of the Convention and Article 3a of the “Television without Frontiers” Directive which define Major Events as those events which are of major importance to society i.e. limited to events of major cultural or national importance in the member State in question. Taking guidance from the approach adopted by certain EU member States to date, these could include the Olympic Games, FIFA World Cups, European Football Championships and so on. We suggest that it would be inappropriate to leave the door open to the application of detailed legislative intervention of this nature to regular, weekly, year round, national events, of whatever scale, simply because the rights owner has granted some form of exclusive television broadcast rights.

2. Physical Access

The draft Recommendation still places too much emphasis on physical access to the stadium and undermines the needs of safety, security and, more importantly the desire to allow the largest number of spectators to attend the venue. The principle of “off-air” news access must have greater priority over physical access in the drafting of this Recommendation. Moreover,

once physical access is given, the copyright owner risks losing control of the material, heightening the potential for misuse and abuse of material collected, particularly with regard to Information Society News Services. The issues surrounding the different types of access that might be required for press, radio and television are complicated, and need to take account of space, security and safety. We would caution against the draft Recommendation granting a wide and general right of physical access. Physical access should only be considered in relation to non-TV platforms where it is not possible to obtain access to text or pictures from authorised persons on an open licence arrangement.

3. The Use of News Reports

Although this draft now constrains each sector of the media to the media in which they traditionally distribute, we are concerned that there are insufficient safeguards put in place to protect the interest of the primary rights holder with regard to Information Society News Services. The current text envisages that restrictions “may” be applied to use within a 24 hour period only, together with restrictions on the length of reports and whether they are live or not. We would wish to see the draft Recommendation go further and put in mechanisms to protect the interests of the primary rights holder to ensure that the value of its rights is not eroded. These might include protection of the first use by the primary rights holder, credits and an outer time limit on the usage.

Alternatively, the Council might look at an arrangement similar to a News Access Code and see how such a Code could apply to other platforms than television. If the principles behind such a Code are to be applied to other platforms, then the extent of the appropriate access would need to be adjusted to take account of the applicable commercial opportunities for those platforms. For example 30 seconds of News Access on television (where consumers are used to viewing whole live matches and extended highlights) is not equivalent to 30 seconds on the internet or on mobiles, where the commercial exploitation generally involves the viewing and downloading of short clips. There ought also to be a differentiation between general news content and personalised news content.

4. The Right to Information Crossing into Commercial Exploitation

Our concern here is to ensure that a clear line is drawn between the right to information and commercial exploitation. Through DataCo, and prior to DataCo being established, directly, the UK Leagues have had a long and satisfactory relationship with the press. The Leagues have always recognised the right of the media to report and comment on their tournaments and have never sought to impede or reduce the level of opinion based news reporting. We believe that it is firmly in the interests of fans and the wellbeing of the competition that this reporting should take place. There is an accepted practice to have opinion based news about football as part of a general news service. However, where tournament material has been used commercially, the Leagues have always sought, and the newspapers have agreed, a contribution to the finances of the competition that is generating this revenue. Examples would be the use of advertising supplements, the use of posters and use of promotional materials designed to enhance and promote the editorial services of a particular publication.

We wish to emphasise that FAPL and DataCo absolutely recognise the need for the widest ability to report editorially on league matches as is reasonably possible. Nonetheless, this draft Recommendation should not stray into a licence for commercial organisations to collect and recreate data, still images and news information to exploit on a commercial basis or to sub-licence to third parties without the consent of the rights owner and exclusive rights

holders. We must avoid the risk of providers of information services attempting to create revenue models that go beyond the traditional presentation and reporting of news. This draft Recommendation risks failing to distinguish between the legitimate reporting of news and the creation of commercial data or audio/audiovisual services which would allow the providers of information services to take commercial advantage of rights holders under the guise of news reporting. We would call for further clarification of and restrictions on the use that could be made of material disseminated in Information Society News Services.

5. **The Right to Information**

The draft Explanatory Memorandum makes clear that the draft Recommendation is based on a claim that the public's right to information is being denied. In reality, we would suggest that those commercial organisations who are primarily advocating the change are motivated by an intention to enshrine their commercial right to attend an event for the purpose of deriving commercial gain by undermining intellectual property rights under the guise of public interest.

We must stress that, in the UK, the public has the widest possible access to information about the FAPL competition from a plurality of sources, all of whom have editorial freedom in the way that they report. This access arises from the way that FAPL has sold its rights to pay TV and free TV, on a near live basis and by means of access to mobile and online clips as well as by measures taken in our member State. By virtue of the UK's Code of Practice for News Access to Sports Events, all matches that have received any primary broadcast will be available for a 24 hour period (and occasionally beyond) to all regularly scheduled news bulletins of non-licensed broadcasters by way of off-air news access. All of these news broadcasters can report the event with the benefit of access to pictures and with their own journalistic interpretation. The sales of our national live radio commentary rights, the sale of scoreflash rights, and the agreements between clubs and local radio, both BBC and commercial, together with access for clubs to provide commentaries online, means that radio listeners have the widest possible access to FAPL information. There is free and widespread access for national, regional and local newspapers to matches to produce match reports for use in such media.

The combination of the contractual and regulatory regime described above means that the public has the widest possible access to information of the FAPL competition. Should the Council of Europe still deem it necessary to introduce a further policy instrument in this area, we would be keen to ensure that such an instrument is limited to, and guarantees only, the objective sought: that is guaranteeing the public's rights to information on main events in cases where such a right is genuinely under threat.

FIFA

The Fédération Internationale de Football Association (FIFA) ("FIFA") is the worldwide governing body of Association Football, and is a not for profit organisation responsible for arranging a number of competitions, including the FIFA World Cup™, which are likely to be affected by the provisions of the draft Recommendation. Consequently, FIFA has a significant interest in the outcome of the consultation process and we respectfully reiterate our request that the Council of Europe ("the Council") takes FIFA's views fully into account.

FIFA has already made submissions in relation to the draft Recommendation, by way of letter dated 30 January 2004, and through the attendance of a FIFA representative at the public consultation in Strasbourg on 7 October 2003. FIFA reiterates the comments made in these earlier submissions, and we would like to take the opportunity to provide updated comments on these in light of the changes to the latest draft. As we believe our earlier comments remain valid, we have also attached FIFA's original letter for the Council's reference.

1. General Observations

We would like to repeat that FIFA supports the principle of the general right of the public to receive information about major events. It is for this reason that FIFA has instituted its own policies to ensure that information, news and images of our events are as widely available as possible, consistent with our commercial programme. Indeed, FIFA to a large degree depends on this broad dissemination of news, information and images to ensure the success and popularity of its events.

We note that the draft Recommendation is now somewhat different from its original form, having moved away from its original focus on ensuring that 'secondary' providers could gain access to content to ensure that the public is sufficiently informed about a major event, to a focus on the right *per se* of the public to receive information on major events.

FIFA is still interested to know why the Council views this draft Recommendation as necessary, given the existing legislation or Recommendations in place. FIFA is also unaware of any situations where the public's right to information has been jeopardised by the actions of a rights holder and/or their exclusive licensee. Certainly we can imagine situations where commercial organisations involved in the media industry are aggrieved that they are unable to transmit valuable content, however it is more difficult to contemplate a situation where the right of the public has been affected. We feel that it would greatly assist us if the Council could provide us with a description of the sort of situation it is attempting to remedy.

There is also a need to clarify what effect granting exclusivity in one form of media has when no such exclusivity is granted in relation to other media. The principles of the draft Recommendation apply only in the event that exclusivity has been granted to a Primary rights holder. However, to our knowledge, no contemporary events rights holder sells exclusive rights for all media to a single licensee. The reality is that various media are treated differently.

The fact that an exclusive rights holder has been appointed in one media (e.g. live television broadcast) but not in another (e.g. print media) should not mean that the provisions of the draft Recommendation apply to the other media, as there is no threat to the public's right to information. Indeed, it is arguable that the public may already be adequately informed via the non-exclusive media, even if other forms of media are granted exclusively, given that the public has a choice of media through which it may be informed. Consequently, FIFA believes that the Council should look very closely at this 'partial' exclusivity, and whether or not the public's right to information is jeopardised in such circumstances.

2. Specific Comments on the Wording of the draft Recommendation

We would like to again outline some specific concerns or comments we have identified with regard to the wording and structure used in the draft Recommendation.

Definitions:

- “Primary rights holder”:
 - Why is this limited only to “person[s]” (i.e. individuals) rather than entities?
 - The use of the word “might” is open to abuse. The exclusive rights holder “*must have the ability*” to prevent news reporting.
- “Major event”:
 - As described above, the fact that exclusivity has been granted in one media should not mean that the draft Recommendation applies to other media, as there is no threat to the public’s right to information. Therefore, the “providers of news services” should be in the media within which the exclusive rights have been granted to the Primary rights holder.
 - By defining a ‘major event’ as being an event to which exclusive rights have been granted, there is the possibility that an event may be a major event for the purposes of one media, but not a major event for others. Any other conclusion could lead to the abuse of the terms of the draft Recommendation by certain groups of media in the event that the public’s right to information is in reality not in jeopardy.

Principle 1

- We note that the rights contained in the draft Recommendation are now “subject to other contractual agreements between the parties concerned which would secure the public’s right to information”. We presume that this means that FIFA may create certain terms and conditions and these would prevail over the terms of the draft Recommendation, provided that the public’s right to information is not jeopardised? If this is the case, then FIFA believes this to be a sensible amendment. If this is not the case, we would greatly appreciate an explanation on how this wording works.

Principle 2 - Written Press and Radio:

- FIFA believes that this Principle should only apply, if at all, to situations where rights holders grant exclusive rights in relation to the written press and photographers. If no exclusivity has been granted in these areas then there is no threat to the public’s right to information.
- **Article 2:** Why have moving images and sound recordings been treated differently? All FIFA’s arrangements have combined radio and television rights, and largely treat them equally. This is standard industry practice. Consequently, FIFA cannot allow radio reporters to enter the stadium to make sound recordings, as this is a right that has been exclusively granted to a third party. Please note that this does not prevent radio reporters from viewing the matches from outside the stadia, and providing updates on this basis.
- **Article 3:** Notwithstanding the fact that we believe that it is unlikely that this Principle will apply to FIFA given our policy of not granting these rights on an exclusive basis, FIFA does not believe that it is always necessary to allow access to *all* members of the press *at any time* in order to satisfy the public’s right to information. FIFA believes that this right can be satisfied by allowing a reasonable and broad (if the circumstances allow it) selection of professional media to gain entry, but not always all.

As drafted, the only provisos to this right of access are on the basis of security and capacity concerns. However, whilst it is not our particular area of concern, we wonder how this Article will be applied when a non-organised ‘major event’ takes place on private property? We foresee that this is a circumstance where the existing wording of the draft Recommendation could produce some unforeseen results. For example, it is becoming customary for high profile individuals to sell the rights to their story exclusively to particular media organisations. Is it the intention of the draft Recommendation to prevent this? In such circumstances should all and any media be entitled to gain access to the premises where such an interview is being given? Could this not lead to an invasion of privacy?

Principle 4 - Press Agencies

- **Article 6:** FIFA believes that the term “news agencies” should be defined so as to differentiate them from the written press described in Principle 2.

- **Article 6:** FIFA believes that rights holders should be entitled to *reserve the right* to charge such news agencies a fee in relation to this commercial exploitation of the rights’ holder’s event. This is to prevent ideals such as “news access” or “the public’s right to information” from being used by news agencies as a way of acquiring commercially valuable rights for free, while other legitimate licensees must pay the right holder a fair license fee for the commercial rights they receive.

As above, FIFA cannot allow such news agencies to make radio recordings within its stadia.

- **Article 7:** If news agencies were to be treated as secondary broadcasters in the event that they provide short reports as an essential service to other TV broadcasters, we would again like to see the inclusion of a provision reserving the rights holder the right to charge such agencies a fee, as described above in relation to Article 6.

Principle 5 - Information Society News Services

- **Article 8:** If rights holders are entitled to stipulate their own restrictions to protect their commercial programme then this amendment is welcomed. In particular, we would expect this to allow FIFA to require certain embargos or conditions on the use of particular types of content.

-FIFA again has the same objections to sound recordings, as described above.

UEFA

Introduction

UEFA is the governing body for football in Europe and organises certain competitions such as the European Football Championships and the UEFA Champions League that may be affected by the content of this draft Recommendation. UEFA has submitted comments in relation to a previous draft prepared by the Council and has also participated in a hearing in Strasbourg to discuss this matter.

From the outset, UEFA has made it clear that it supports the dissemination of information to the public and supports the concept of *bona fide* news reporting. What we have emphasised,

however, is the need to strike the right balance between the legitimate interests of right-holders (such as UEFA) and the legitimate interest of the public in having access to the news.

Against this background, we find the current draft Recommendation unsatisfactory, in that it fails to strike the right balance, uses vague terminology, and does not, in our view, reflect existing principles of national or international copyright law. Indeed, it seems to us that the draft has been too heavily influenced and shaped by the apparent concerns and commercial interests of news agencies, and has not taken proper account of the property rights of entities that organise major events, such as UEFA.

We note that the draft Explanatory Memorandum refers (at paragraph 12) to Article 1 of the Protocol to the European Convention on Human Rights, which provides that "every natural or legal person is entitled to the peaceful enjoyment of his possessions". There is also an acknowledgement that the right of the public to information must be reconciled with the property rights of event organisers and in accordance with principles contained in relevant international instruments.

We believe the relevant instruments to consider here would most certainly include the EU Copyright Directive and the Berne Convention. Both contain similar provisions regarding exceptions to copyright infringement, stipulating that such exceptions can be permitted only: (1) in certain special cases; (2) which do not conflict with the normal exploitation of the copyright work; and (3) which do not unreasonably prejudice the legitimate interests of the right-holder. These are internationally accepted legal standards and we would suggest that whatever Recommendation the Council of Europe eventually produces should be fully consistent with these legal principles which should be mentioned in an introductory paragraph to the Recommendation.

Furthermore, given that news reporting exceptions are already recognised in both national and international copyright law, UEFA questions the need for further regulation of this matter by the Council of Europe. In this respect, we are still unaware of any convincing body of practical evidence demonstrating that existing legal instruments are not sufficient to protect the right of the public to information. It is possible that existing instruments may not be satisfactory for the commercial purposes of news agencies seeking to obtain reports to sell to "their clients" (draft Explanatory Memorandum, paragraph 38) however, this does not show that the public is being deprived of access to the "news". This is an important point for the Council of Europe to have in mind for the purposes of its work in this area: certain entities (in particular, news agencies) are seeking material of commercial value to sell to third parties. The "news" on the other hand, is not a commercial commodity to be bought and sold. For example, UEFA is not selling news reporting rights to anyone. We sell exclusive rights to our broadcast partners subject to the "news reporting" or "fair dealing" exceptions that already exist as a matter of law.

Specific comments on the draft Recommendation and draft Explanatory Memorandum

Definitions: "Primary rights holder"

This is defined as any "person who is able to exercise exclusive rights which might prevent news reporting on a major event". For the record, we are not aware of any situation in Europe where an exclusive rights holder actually can prevent news reporting on a major event. This is because copyright law (or constitutional law) recognises exceptions to property rights precisely to permit reporting of the news. Accordingly, it might be useful for the Council of

Europe to give some practical examples of situations where the primary rights holder has prevented news reporting, so we can understand exactly which situations the Recommendation is designed to address.

"Exclusive rights"

This is defined as "the rights held by the primary rights holder or acquired contractually by a provider of a news service". Again, for the sake of completeness, we would mention that UEFA does not enter into commercial contracts with providers of news services as we do not make money out of the "news".

"Major event"

This is defined as any event that a news service provider "reasonably considers" to be of "high interest" to its public. In this context, the public is not even the general public but includes "certain groups within it having particular interests" (draft Explanatory Memorandum, paragraph 16). Obviously, this definition is completely open-ended and gives carte-blanche to the news service provider. As the draft Explanatory Memorandum states (paragraph 18) a "major event" is not an objective concept: apparently it is anything the news service provider (subjectively) considers it to be. This is absolutely unacceptable. We would have thought a more objective standard would be appropriate to define "major event".

Remarkably, the draft Explanatory Memorandum suggests that the discretion afforded to news agencies in this respect (i.e. to define major events) is subject to a number of restrictions, the "most notable" of which is that "they should report only for news purposes". With respect, we would have thought that it goes without saying that a news service provider may only be reporting the news. What remains lacking in this draft Recommendation is a clear definition of what the "news" is.

"Audiovisual short report"

This is defined as a "brief" sequence of moving images, whether or not accompanied by sound, allowing the provider of a news service to have a "sufficient overview" of the "essential aspects" of an event. These terms are vague, imprecise, and likely to result in confusion. In our view, it should also be clearly stated that any audio-visual report should be strictly limited to the extent justified by the informatory purpose (as stipulated in the EU Copyright Directive).

Principle 1 – General Conditions for the exercise of the public's right to information

This Principle states that the exercise of exclusive rights by a primary rights holder should be subject to limitations, so the providers of news services can provide information to the public on a major event. However, as stated above, the exercise of exclusive rights is already subject to limits imposed by law and it is for the Council of Europe to explain why existing legal instruments are insufficient in this respect.

Furthermore, in a discussion of "General Conditions" it would be appropriate to stipulate that access to major events should be strictly limited to news reporting and may not, under any circumstances, provide news agencies or other third parties with free access to material which can then be exploited for commercial gain to the detriment of the property interests of right holders. Paragraph 28 of the draft Explanatory Memorandum also creates the confusing impression that exclusive rights are somehow granted to news service providers. This is not

the case: exclusive rights are typically sold to broadcasters subject to news access rights recognised under applicable law.

Principle 2 – Written press and radio

We would have thought that the safety of the public at a major event would have been of equal importance to the availability of information. Bearing in mind that at nearly every major event (and certainly at any major event organised by UEFA) there will be a veritable army of representatives from the press and media, it is not likely, in the real world, that the public will be deprived of information pertaining to that event. Safety concerns are, however, paramount for UEFA and we consider it crucial that the event organiser must retain an absolute right to refuse admission to venues on security grounds. Against this background, we think the wording of Principle 2 could be better balanced, to take account of both safety/security issues (including physical capacity constraints of the stadium) and freedom of information.

We also consider that a distinction should be made between the written press and radio for news reporting purposes. By their nature, press reports are contained either in the newspapers the following day or (less commonly) in the evening editions if the event takes place earlier in the day. For magazines, press coverage may be a week or even a month after the event.

By contrast, radio commentaries are often live and may have significant commercial value. That value should not be eroded by the exercise of news access rights by non-licensed radio stations during the event. In this respect, we think the news access regime applicable to radio should be closer to that envisaged for television, not for the written press. This is not to say that a radio station could not provide a factual report of an event (for example, information on the score in a football match while it is taking place or after the match). However, this is very different from allowing a radio station to transmit live reports or commentary from the location of the event, in such a way as to diminish the value of the exclusive rights of those stations that have bought them.

Consequently, we suggest that radio be separated from the written press for the purposes of this Recommendation and for it to be clarified that radio news reporting on a major event be part of a general news programme or bulletin and not live. This is also in line with the approach taken by national courts which have recognised that event organisers may grant exclusive radio rights for a fee and may limit access of other radio stations to the venue (Hamburg Court of Appeals, judgment in June 2003). Since the Council draft Recommendation specifically states that no fee is payable by journalists attending an event for the purposes of press reporting, it would be inconsistent with accepted legal principles if similar treatment was accorded to radio stations. For all these reasons, the approach as regards radio should be more similar to that taken for television and we suggest that the draft Recommendation be revised accordingly.

Principle 3 – Television

We note that, unlike Recommendation No. R (91) 5, this new draft Recommendation covers the right to report on major events both in the transfrontier and national contexts. As to this issue, we would simply re-iterate the point that existing legal instruments, such as the EU Copyright Directive implemented nationally in the member States of the EU, already permits the possibility of fair dealing defences to copyright infringement for legitimate news reporting. Again, therefore, we are not clear what this draft Recommendation would add or why it is needed.

Principle 4 – News Agencies

Whilst we recognise that news agencies may have an important role in disseminating information to the public we think it is inappropriate for them to be treated in the same way as press, radio, and television broadcasters for the purposes of this Recommendation. Unlike these other entities, news agencies do not inform the public directly but instead sell their reports to clients in Europe and throughout the world.

Since the news agencies profit from this activity it is only reasonable that they should have to pay for the material that they are selling. Of course, this becomes less of an issue if it is absolutely clear that access is strictly limited to the "news" (i.e. a report on the factual outcome of an event or a very short clip on television) and does not extend to material that has real commercial value. In this respect, UEFA welcomes the clarification at paragraph 38 of the draft Explanatory Memorandum that: "the possibility for news agencies to produce short reports and then broadcast them to their clients should be limited to avoid any abuse that could affect the legitimate interests of primary rights holders". We would suggest that this point be included in the text of the Recommendation itself, rather than in the draft Explanatory Memorandum.

Principle 5 – Information Society Service Providers

UEFA has consistently voiced its particular concern regarding the potential application of this draft Recommendation to new media service providers, including internet service providers and mobile phone operators. We believe that, if investment in these new media platforms is to be encouraged, it is essential that these platforms have some degree of exclusivity and that this exclusivity is not eroded by the exercise of "news reporting" rights.

In this respect, UEFA welcomes the clarification (Paragraph 41 of the draft Explanatory Memorandum) that Principle 5 does not provide any possibility for Information Society news service providers to report on a major event by means of moving images. This is a key point that should be reflected clearly in the Recommendation itself. At present, the prohibition on the use of moving images for the purposes of news reporting by such entities does not appear in Principle 5, which merely states that rights: "may be restricted to protect the legitimate interests of rights holders, notably in relation to the length of reports, live reports and the use of material beyond a 24-hour period."

Furthermore, we believe the draft Recommendation still fails to distinguish adequately between different media when defining what constitutes news reporting. For example, at present, it is envisaged that Information Society news service providers may report on a major event by means of texts, still photographs or sound, and may have access to the venue where the event takes place along the same lines as the press and radio. However, what may be regarded as reasonable news coverage in one medium, such as still photographs in a newspaper, can easily constitute the delivery of a commercial service in another medium, such as a still photograph on a mobile phone or on the internet. In order to take account of the distinctions, it is indispensable that tailored approaches must be taken depending on the distribution platform that the news is being disseminated on.

As regards mobile phones, the transmission of a still photograph of an interesting element of an event, such as a goal being scored in a football match, is entertainment rather than news. This common sense conclusion was endorsed by the Court in Italy when it was asked to

determine whether the sending of still images of *Serie A* games on a near-live basis by a mobile phone operator was permitted by news access rights guaranteed under the Italian constitution. Much of the argument centred on whether the images constituted entertainment or sports journalism. The court rejected the argument that the images amounted to "news" as the operator in question sold the images as a commercial service at €1 each, rather than in the context of a news service.

Accordingly, UEFA suggests that the Council revise the draft Recommendation to delete the possibility for mobile phone operators to transmit either still or moving images as part of a news reporting service. We believe the right of the public to receive information is more than adequately protected by the ability to receive a text report on a mobile phone (together with the plethora or other news dissemination possibilities offered by press, radio, television, internet etc.) and even this should be questioned if it is done with the purpose of obtaining commercial benefit.

With respect to internet service providers, UEFA is similarly of the opinion that a right of access to near-live images with or without texts or sound would jeopardise the legitimate interests of other rights holders and would be potentially damaging to investment and development of this particular distribution medium. In this respect, images and sound recordings are the sole manner in which rights may be exploited over the internet. To grant such rights to parties that have not paid for them on the basis of news access would substantially diminish the commercial interests of legitimate licensees. We would suggest that the right of an internet service provider to deliver text updates reporting on the facts of an event is sufficient to guarantee the right of the public to information. Consequently, the availability of images (whether moving or still) and sound should remain solely in the hands of right-holders that have invested in such rights and this should be set out in the Recommendation.

Final Remark

As stated previously, UEFA fully supports freedom on information. Nevertheless, we are also of the view that the existing national and international legal instruments are sufficient to guarantee the right of the public to information on major events and it remains unclear to us why an additional layer of regulation is needed. Certainly, if these matters are to be regulated this needs to be achieved in a balanced and precise way, in particular, as concerns the application of news access principles to new media platforms. Otherwise there is a risk that the ultimate development of these new services will be retarded both to the detriment of rights holders and to the detriment of the general public.