

April 2012

Access to Information on Sporting Events: the Brazilian Approach

A unique atmosphere has arisen in Brazil over the past year in view of the passage of new laws that impact the sports world. The provisions in question were included in several normative acts issued by the Government, such as those found in Law No. 9.615/98 (the so-called “Pelé Law”¹).

Following the international regime that regulates professional football (FIFA Regulations on the Status and Transfer of Players), Law No. 12.395 of March 16, 2011 introduced new concepts to the legal framework governing football in Brazil. Two changes of major importance relates to rules on transfer of football players and transactions involving economic rights of these athletes.

In addition, this same act brought significant changes to the “right to access information on sporting events”, also known as the “right to free short coverage of sporting events” or simply as “fair use in sports”.

Before analyzing these changes, a comment about the *sui generis* treatment that is given by the Brazilian legislation to this subject is necessary.

Media access to information about sporting events is based upon the general principal of “access to information”, which is in most countries a constitutional right. It is exactly the same in Brazil (Article 5, XIV, Brazilian Federal Constitution). The way Brazil differs from other countries is that there is a special rule other than the constitutional one which addresses this principle in the context of sporting events, which seems to be a unique situation².

In most countries, this general principle is applied by courts primarily through a balancing of three fundamental rights: the right of information about issues of public interest, the right to privacy and the right of property.

With respect to sporting events, the “conflict” established is between the right to information about issues of public interest on the one hand, and the property rights of the entities that promote sporting events and the third parties that acquire the rights to broadcast such events on the other.

There are important aspects to be considered in the aforementioned analysis. One is to identify what is encompassed within the concept of “issues of public interest” and to establish its limits. This includes differentiating it from what could be considered “of interest to the public”.

No one would question whether an Olympic event or any World Cup match is considered “of interest to the public”. However, in this case, what should be considered “of public interest” is much narrower than that to which the public would like to have free access.

Some jurisdictions apply the concept of what is “newsworthy” combined with other parameters to establish the boundaries of what is deemed to be reasonable and acceptable uses by the media of these valuable assets (images of sporting events) in the interest of the right to information. The parameters commonly adopted are the portion of the event shown and the purposes of use, including an analysis of whether there is a commercial goal to its usage.

In Brazil, the right of access to information relating to sporting events was first addressed in the Brazilian Copyright law, which obviously was not the most adequate place for it, specially if we consider the fact that in Brazil sporting events are not deemed to be audiovisual works protected by copyright law.

In 1998 this subject was included in Pelé Law (Article 42). While such disposition was in force (until March, 2011) few lawsuits were brought to Brazilian courts to discuss the boundaries of this right. Careful analysis of those decisions reveals a bias in favor of the rights to information.

São Paulo

Av. Brig. Faria Lima, 2601
12th floor - 01452-924
São Paulo, SP - Brazil
Phone. +55 11 3555 5000

Rio de Janeiro

Praia de Botafogo, 440
15th floor - 22250-908
Rio de Janeiro, RJ - Brazil
Phone. + 55 21 3503 2000

Brasília

SCN - Quadra 4 - Bloco B
6th floor - 70714-900
Brasília, DF - Brazil
Phone. + 55 61 2109 6070

contato@levysalomao.com.br

April 2012

In 2011, Law No. 12.395/11, among other important changes already mentioned, amended Article 42 of the Pelé Law to allow the access of non-rights holders to excerpts of sporting events for journalistic, *sports* and educational purposes. This amendment prohibits the use of images exceeding 3% of the total time of the event. The 2011 Act also established that non-rights holders may capture images in places specifically reserved for such purposes in stadiums and arenas. If this is not feasible, third parties may receive images from the local rights holder of such media, but they may not use such images in connection with any form of sponsorship, advertising or commercial promotion.

The new Law broadens the circumstances under which such images may be used by third parties other than the rights holder. However, it also limits the access to the sporting venues where such events take place and explicitly prohibits free riding by commercial partners not entitled to associate their marks or products with such events.

It would appear that the aforementioned changes seek to promote a better regulatory framework for the sporting events to be held in Brazil in 2013/2014 (the FIFA Confederations Cup and World Cup) and in 2016 (the Summer Olympic Games). Nevertheless, they also create a concern by adding a new situation that is considered "fair use" - the "sporting" purpose.

The concept of "sporting purpose" is so broad as to be nearly meaningless; it will allow for differing interpretations of this provision of the Law, which will bring uncertainty and, as a consequence in the long term, may lower the value of the transmission rights of such events in all media. For instance, based upon this disposition, would a court rule that the images could be used in a sports interview program or even that the best content of each match could be made available on a website?

If the answer is in the affirmative, it may harm and undervalue rights sold with exclusivity to a rights holder.

It should be noted that Bill of Law no. 2330/11 recently approved in the Brazilian House of Representatives, which shall regulate legal issues arising in connection with the World Cup (the "General Law for the World Cup"), deals with this issue in a different way than Pelé Law. It establishes that FIFA, as the exclusive owner of all rights deriving from this sporting event, is the only party entitled to "exploit, negotiate, authorize and prohibit" the capture, transmission or exhibition of images, sounds and other forms of expression of the events, as well as issue credentials to journalists for their free access to the sporting venues and other official sites during the Confederations Cup and the World Cup.

Regardless these exclusive rights, the Bill that is still at the Congress to be approved by the Senate states that FIFA should provide images of the most important events (matches, opening and closing ceremonies and preliminary and final draws) to media companies that should observe several conditions to use such images.

FIFA would make such content available to the media within two hours after the end of the respective event, in a compact version of at least 6 minutes from which the media company would select 30 (thirty) seconds or, in the case of a match, 3% (three per cent) of its total duration. To be entitled to receive said compact versions, the media company should communicate FIFA with 72 hours in advance. Yet, the images or sounds selected should be used solely in news programs to be transmitted inside Brazilian territory and should not aim any form of sponsorship, promotion, advertising or marketing activity.

It is clear that if the Bill as currently drafted is passed into law, the images of matches and other events occurring during the 2013 Confederations Cup and the 2016 World Cup may not be transmitted by persons other than the rights holder and the media companies, in the context of news programs.

Finally, it is worthwhile mentioning that no similar bill has been put forward with regard to the

São Paulo

Av. Brig. Faria Lima, 2601
12th floor - 01452-924
São Paulo, SP - Brazil
Phone. +55 11 3555 5000

Rio de Janeiro

Praia de Botafogo, 440
15th floor - 22250-908
Rio de Janeiro, RJ - Brazil
Phone. + 55 21 3503 2000

Brasília

SCN - Quadra 4 - Bloco B
6th floor - 70714-900
Brasília, DF - Brazil
Phone. + 55 61 2109 6070

contato@levysalomao.com.br

April 2012

Summer Olympic Games which will remain subject to Article 42 of Pelé Law.

There is as yet no guidance as to how Brazilian courts will interpret these new provisions. It is our hope that they will be able to fully appreciate and take into account the disparate interests of the many parts affected by these complex set of rules not favoring third parties who seek to benefit from rights that they have paid nothing in return for.

Simone Lahorgue Nunes
slahorgue@levysalomao.com.br

-
1. This Law has been named the "Pelé Law" in homage to the famous Brazilian football player with the same name.
 2. A similar situation is found in Germany in the form of the "Interstate Broadcasting Treaty" (item 5, "short reports") of 1994 as amended.

São Paulo

Av. Brig. Faria Lima, 2601
12th floor - 01452-924
São Paulo, SP - Brazil
Phone. +55 11 3555 5000

Rio de Janeiro

Praia de Botafogo, 440
15th floor - 22250-908
Rio de Janeiro, RJ - Brazil
Phone. + 55 21 3503 2000

Brasília

SCN - Quadra 4 - Bloco B
6th floor - 70714-900
Brasília, DF - Brazil
Phone. + 55 61 2109 6070

contato@levysalomao.com.br