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France
Rights over sporting events and online betting: new rules in France

On May 12 2010, around one month before the opening of the FIFA World Cup in South Africa, the Law on Online Betting and Gambling (2010-476) was promulgated. This law has one main objective: the liberalisation of online betting and gambling in France. In 2006 the European Commission ruled that the French state monopoly on betting and gambling was incompatible with Article 49 of the EC Treaty, which guarantees the free movement of services. Since this monopoly was not justified by public policy or law and order considerations, the French government was obliged to deregulate the market. After several years of discussion, three categories of online gambling have been opened up to competition in France: horseracing betting, sports betting and gambling. Each of these activities is subject to accreditation by the newly created Online Gaming Regulation Authority (*Autorité de Régulation des Jeux En Ligne* (ARJEL)), which imposes strict criteria on online bookmakers.

In addition to liberalising the sector, the legislature has decided to go further and address the problems that had been raised in connection with and regarding the rights of competition organisers, sports associations and sports clubs in relation to betting activity.

This has been a recurring issue in recent years, especially since the European Commission made it clear that France had to end the state monopoly on online betting. The rapid growth of online betting, added to the significant profits made by this industry over the last five years, has drawn attention away from the main players in major sporting events – the organisers and the entities which take part in these events. As a consequence, these entities have been trying to obtain a fair return on the profits and have been searching for the legal grounds on which to obtain such payments from online bookmakers. One such ground is intellectual property, and particularly trademark law, as most of the sports entities, organisers, associations and clubs own the rights to their name and symbols and have registered them as trademarks, including in Class 41 (for gaming and gambling services). Therefore, one of the main issues which has been raised before the French courts is whether an online betting operator can use the names and signs of sports clubs and sporting events in the course of its betting activities, especially when such signs have been registered as trademarks.

This issue has been the source of some relatively erratic case law from the French courts. Indeed, in *Unibet International Ltd v Federation Française de Tennis* (October 14 2009) the French Tennis Association, organiser of the French Open, brought a claim against online bookmaking company Unibet for trademark infringement of its French and Community ROLAND GARROS trademarks. The Paris Court of Appeal rejected Unibet's argument that this use was not use of the signs as trademarks. The appeal judges also refused to consider that use as a trademark would fall under the necessary reference exemption of Article L713-6 of the IP Code. Therefore, Unibet was held to have infringed the trademarks of the French Tennis Association, thereby giving sporting event organisers strong rights over their names and trademarks.

However, the same Paris Court of Appeal issued a different ruling in a similar case, except that in that case, the trademark owner was not a competition organiser, but rather a football club organised as a corporation. In *Juventus FC SpA v Unibet* (December 11 2009) Italian football club Juventus FC brought a claim against two online bookmakers for the unauthorised use of its trademark JUVENTUS in their activities. The appeal judges considered that the use of the word 'Juventus' by bookmakers was not use as a trademark, but was merely intended to identify the football team in order to enable users to bet on this team, since no other term could have done this. Therefore, the court found there to be no trademark infringement. This ruling was later confirmed by the same Paris Court of Appeal in *Paris-Saint-Germain Football v Internet Opportunity Entertainment Ltd* (April 2 2010), in which the court considered that the names 'PSG', 'Paris Saint-Germain'

and 'Paris SG' were merely used to identify a football team in order to enable users to bet on a team and not to identify a betting service. Therefore, the use of these names was not considered to be use as a trademark. The judges added that in the absence of any specific provision prohibiting the use of the club's names to identify games, the football club could not prevent such use.

In addition, it was previously held by the Paris Tribunal of First Instance (July 8 2005) in *Real Madrid Football Club v Hilton Group PLC* that a football team could not object to use of the names and image of its famous players on betting websites, since this use was not to promote bets but merely to present the game on which bets were organised.

This brief summary of the recent case law regarding the use of the names of sporting events and sports clubs by bookmakers shows that the consideration of whether the use of the name of a sports entity constitutes trademark infringement has given rise to divergent interpretations and solutions. This situation leads to legal uncertainty and deprives sports clubs and associations of significant income, since the most recent case law means that they cannot license their names, logos or images for betting services.

The French government considered this situation to be unsatisfactory and decided to address the problem specifically through Article 63 of the Law on Online Betting and Gambling. Therefore, two changes were made to the Sports Code regarding the rights of sporting event organisers and sports clubs or associations.

First, the new law modifies the articles of the Sports Code that deal with the rights of sporting event organisers in regard to such events. Law 92-652 (July 13 1992), following case law precedent, provides that "the right to exploit a sporting event belongs to the organiser of this event". This right has now been codified in Article L333-1 of the Sports Code, which provides that "[t]he sports associations and the organisers of sports events... are the owners of the exploitation rights of the sports events or competitions which they organise".

According to this article, there are two types of right holder in regard to sporting events: the sports federation and private organisers. Sports federations are usually the organisers of most major sporting events because, under French law, sports competitions that award local, national or international titles can be organised only by federations acting under a public service delegation. Private organisers are those which organise events other than national competitions with the agreement of the association concerned (eg, athletics meetings, the *Tour de France*).

Surprisingly, the French legislature did not precisely define the nature or scope of this exploitation right over a sporting events, leaving this task to the courts in several decisions. Therefore, the organiser's exclusive right over the sporting event is said to include all patrimonial exploitations of such event, particularly audiovisual, marketing, publicity and merchandising rights and ticketing.

In *Unibet International Ltd v Federation Française de Tennis* the Paris Court of Appeal considered that in the absence of any clarification or distinction under the law regarding the nature of the exploitation of sporting events or competitions, any form of economic activity which could not exist without the event must be regarded as exploitation under Article L333-1 of the Sports Code, thus including betting activities.

The legislature confirmed this case law through two amendments to the Sports Code, which introduced Articles L333-1-1 and L333-1-2. These articles confirm that the exclusive right of organisers over the exploitation of events includes the right to consent to the organisation of bets on such events or competitions which they organise. However, event organisers can license this right only to operators which are accredited by ARJEL. This has two main consequences:

- The organisers of sporting events may take payment from online bookmakers for online betting on their events.
- Organisers have the capacity to control the conditions under which betting can be carried out and thereby avoid cases of fraud.

However, in order to encourage competition between online bookmakers, the rights owner may not grant an exclusive licence to one bookmaker or act in a manner that would result in preferential treatment in favour of one or more bookmakers.

The Law on Online Betting and Gambling also modified the rights of sports companies or associations that own the clubs which take part in these competitions. A new Article L333-1-3 was introduced, according to which, subject to respecting the rights of competition organisers, sports companies and associations may grant the operators of online betting licences over the intangible assets that they hold.

There is still considerable uncertainty as to the exact meaning and scope of this new article. It is unclear what the term 'intangible assets' covers, and the article itself refers to a decree which has yet to be published to define such intangible assets.

It is therefore difficult to know whether the new article gives sports clubs and associations the specific

right to control the exploitation of their names, trademarks and image rights. It is especially difficult to know whether this new provision will affect the case law on the use of sports clubs' trademarks by online bookmakers, such as was set out in *Juventus FC SpA v Unibet and Paris-Saint-Germain Football v Internet Opportunity Entertainment Ltd*.

The difficulty arises not only from the lack of a definition of 'intangible assets', but also from the way in which the statutory right is expressed by the provision. The law does not prohibit bookmakers from using the names or signs of sports clubs or associations, but rather merely allows these entities to grant licences to online bookmakers over their intangible assets. This does not necessarily mean that bookmakers will not be allowed to continue to use sports clubs' names when this use is not considered by the courts to constitute use as a trademark. Indeed, this may mean merely that sports clubs or associations which were already considered to be the owners of their intangible assets may license further content to online bookmakers, especially in cases where the use of the name or sign of a sports club may be considered use of a trademark. However, this latter interpretation of the new statutory right would mean that Article L333-1-3 is little changed from the previous state of the law because sports clubs and associations were previously entitled to do so under trademark law. At best, the law reasserts the exclusive ownership of the sports clubs of such intangible assets.

As a result, the Law on Online Betting and Gambling creates uncertainty as regards the rights of sports clubs and, more specifically, the scope of the rights and the interaction of such rights with trademark law. Unless the expected decree provides a clear interpretation of this matter, many disputes may arise as a result of the provision.

By confirming the French case law as to the rights of sporting events organisers, the new Law on Online Betting and Gambling sets a strong precedent in Europe and opens the door for online bookmakers to make financial contributions to such organisers. It is likely that this evolution in French law and the recognition of sports organisers' rights in France will be followed by other countries under pressure from major sports organisers, particularly the national football leagues. European Commissioner for the Internal Market and Services Michel Barnier recently welcomed the French amendments in relation to the rights of sports organisers and the fair financial return, and held them up as an example of the potential harmonisation of the law on this subject. The Internal Market and Services Directorate General is preparing a consultation for all involved parties and the publication of a green book is expected before the end of 2010.

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