

Philip Zander

**Freedom of Expression and Events of Major Importance: An
Analysis of the Issues in *Union des associations européennes de
football (UEFA) v European Commission* in the context New
Zealand.**

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Abstract

This paper discusses the context of a Directive of the European Union which allowed for events of major importance to society to be listed and televised in a manner deemed appropriate by Member States. Union des associations européennes de football challenged the validity of the acceptance of the list of the United Kingdom by the European Commission in 2007. The challenge questioned whether the entirety of the European Championship finals could be included in the list given that this appeared to breach multiple rights and all the matches may not be of major importance.

The General Court of Europe and the Court of Justice of the European Union both found for the United Kingdom, highlighting that their powers were limited in respect of the current action. In doing so the courts left open the question of whether the designation properly balanced relevant rights. As every nation has a different context that may influence the balancing of these rights, any decision on the validity of the designation would have to consider large quantities of information. This paper aims to discuss the designation of the EURO championships in light of the circumstances of New Zealand.

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Subjects and Topics

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I Introduction

In 1997 a Directive of the European Union allowed Member States to control the broadcast of events that were classified as of major importance to society.¹ The rationale behind this directive was that the public interest in the event meant that if broadcast was not controlled a substantial proportion of the population would be denied the ability to view this event.² The directive, in its preamble, acknowledged that this would infringe upon certain rights of the rights holder but held that this public interest meant that this was a justifiable infringement.³ This public interest is effectively the rights of citizens of a Member State having the right to receive information, which is a fundamental element of the freedom of expression protected by the European Charter.⁴ The United Kingdom had a difficult road in getting its list of events accepted, having it overturned due to an incorrect acceptance procedure⁵ before being correctly accepted in 2007.⁶ This paper summarises the challenge of Union des associations européennes de football (UEFA) in *Union des associations européennes de football (UEFA) v European Commission* before summarising the decisions in the General Court of Europe (GCE)⁷ and the following appeal to the Court of Justice of the European Union (CJEU).⁸

The courts were limited in the scope of their analysis due to UEFA having challenged the validity of the acceptance of the list of the United Kingdom by the European commission.⁹ Due to this, the courts only checked the process the United Kingdom had taken and whether

¹ Directive 89/552/EEC as amended by Directive 97/36/EC [1997] OJ L 202/60-70 article 3a (1).

² Article 3a (1).

³ Article 3a (1).

⁴ T-55/08 *Union des associations européennes de football (UEFA) v European Commission* [2011] II-00271, at 44; C-201/11 *Union des associations européennes de football (UEFA) v European Commission* [2011] OJ C260, 7 September 2013 at 10-11.

⁵ The Director-General of the Directorate-General (DG) Education and Culture informed the United Kingdom, by letter of 28 July 2000, that the Commission would not raise objections to the United Kingdom measures, which would, accordingly, be published shortly thereafter in the Official Journal of the European Communities.

⁶ 2007/730/EC *Compatibility with Community law of measures taken by the United Kingdom pursuant to Article 3a (1) of Council Directive 89/552/EEC* OJ L295/12-27.

⁷ T-55/08 *Union des associations européennes de football (UEFA) v European Commission* [2011] II-00271,

⁸ C-201/11 *Union des associations européennes de football (UEFA) v European Commission* [2011] OJ C260, 7 September 2013.

⁹ Advocate General Jääskinen *Opinion on Cases: C-201/11 P, C-204/11 P and C-205/11 P Union des associations européennes de football (UEFA) v European Commission* (Court of Justice of the European Union, 2011, Luxembourg) at 14-22.

there were general breaches of community law.¹⁰ The opinion of Advocate General Jääskinen opened the door to more potential litigation in the future, stating that if UEFA challenged the law generally then there would be a wider scope for review.¹¹

This paper draws from this and discusses whether football matches such as these are defensible under freedom of expression theory. Highlighting the generally accepted justifications for free expression and discussing the characteristics of the football to see whether it fulfils any of the justifications. The paper then discusses the justification of personal growth in detail, discussing in detail the potential benefits of football and whether the negative implications will or should have any impact on an event being protected expression.

The paper then shifts the focus to the context of New Zealand, and discusses some context that may be present in New Zealand if legislation similar to this was to come into force. The paper discusses whether the listing of the entirety of the European Championship finals would be justifiable under a New Zealand Bill of Rights Analysis.¹² In order to discuss this the paper canvasses the potential for how information should be treated, the breadth of the right of freedom of expression in New Zealand and some differences which may alter the balancing of the rights when compared to the United Kingdom or other jurisdictions. The paper discusses whether there are any less infringing alternatives that could be present before contrasting the practical position legislation such as this would provide with the status quo, focussing on the Rugby World Cup 2011, an event that is estimated as comparable to the EURO finals to New Zealand.

II Directive and Case

In this section the paper aims to discuss both the Directive of the European Parliament and *Union des associations européennes de football (UEFA) v European Commission* that raised this particular issue.¹³ First it discusses the directive and the requirements present in the directive. The paper then looks briefly at the justifications that are said to underly the directive. After this the case is discussed and the issue central to this paper, freedom of expression, is drawn out.

¹⁰ See: T-55/08 *Union des associations européennes de football (UEFA) v European Commission*, above n7; C-201/11 *Union des associations européennes de football (UEFA) v European Commission*, above n8.

¹¹ Advocate General Jääskinen, above n9, at 71.

¹² *R v Hansen* [2007] NZSC 7.

¹³ T-55/08 *Union des associations européennes de football (UEFA) v European Commission*, above n7.

A Directive 89/552/EEC

In 1997 Directive 89/552/EEC as amended by directive 97/36/EC (the Directive) was issued from the European Parliament that enabled Member States to list events as of “major importance to society”.¹⁴ Under article 3a (1), events are of such importance that it would “deprive a substantial proportion of the public” the ability to view the event if it was not broadcast on free to air television in a way dictated by that Member State.¹⁵

As a directive of the European Union it did not aim to harmonise the law across all Member States.¹⁶ States may legitimately place differing importance on the same events, as such the lists had to meet procedural requirements only.¹⁷ The process taken needed a requisite level of clarity and transparency.¹⁸ An unavoidable consequence of this requirement was that the Directive gave “concrete expression [...] to restrict the fundamental freedoms established by primary Community law on the basis of overriding reasons in the public interest.”¹⁹ This is said to be justifiable in light of “public importance”, which includes the right to receive information.²⁰ Member States were given a margin of discretion in this area in order to balance the unique circumstances present in their State.²¹

B The Case

C-201/11 *Union des associations européennes de football (UEFA) v European Commission* (The Case),²² focussed on the designation by the United Kingdom in 2000 of the European Championship finals (EURO) and the World Cup Finals (World Cup) in their

¹⁴ Directive 89/552/EEC as amended by Directive 97/36/EC [1997] OJ L 202/60-70 article 3a (1).

¹⁵ At Article 3a (1).

¹⁶ T-55/08 *Union des associations européennes de football (UEFA) v European Commission*, above n7, at 1, 18; See also: Advocate General Jääskinen, above n9, at 14 citing: C-412/93 *Leclerc-Siplec* [1995] ECR I-179 at 28; Joined Cases C-34/95, C-35/95 and C-36/95 *De Agostini and TV-Shop* [1997] ECR I-3843, at 3; C-201/11 *Union des associations européennes de football (UEFA) v European Commission*, above n8, at 10.

¹⁷ T-55/08 *Union des associations européennes de football (UEFA) v European Commission*, above n7, at 1, 18.

¹⁸ At 51.

¹⁹ At 44.

²⁰ At 44; C-201/11 *Union des associations européennes de football (UEFA) v European Commission*, above n8 at 10-11.

²¹ T-55/08 *Union des associations européennes de football (UEFA) v European Commission*, above n7, at 87.

²² C-201/11 *Union des associations européennes de football (UEFA) v European Commission*, above n8, at 10.

entirety as events of “major importance”.²³ The United Kingdom’s list listed the entirety of the EURO finals as of major importance.²⁴ This differed from some other member states who only listed ‘gala’ type matches.²⁵ This list was correctly accepted in 2007 by the European Commission. The case stems from this acceptance.²⁶ The delay in correct acceptance stems from procedurally incorrect acceptance in 2000²⁷ which was successfully challenged in 2005.²⁸ UEFA issued proceedings challenging the validity of the acceptance by the European Commission of the United Kingdom’s list. As the European Commission had limited powers of review when analysing the lists of Member States, the Court was restricted in its functions. The Court was restricted to checking if the review had been carried out correctly.²⁹ This essentially asked if a “clear and transparent” procedure had been followed and whether it was generally defensible.³⁰ UEFA had appeared to want a closer analysis of the issues and as such most of their submissions were not discussed in the detail they may have hoped for.³¹ Both the GCE and the CJEU found for the United Kingdom.³² The CJEU clarified some requirements of the directive and altered some of the discussions of the GCE.³³ The report of Advocate General Jääskinen went into more detail on some surrounding issues such as Property Rights and whether or not, in the United Kingdom, these rights could be correctly classified as property.³⁴

²³ See: Broadcasting Act 1996 (UK) s98 as amended by the Television Broadcasting Regulations 2000 (UK); Broadcasting Act 1996 (UK) s101 as amended by the Television Broadcasting Regulations 2000 (UK); Code on Sports and Other Listed and Designated Events 2000 (UK) s13.

²⁴ Code on Sports and Other Listed and Designated Events 2000 (UK) s13.

²⁵ T-55/08 *Union des associations européennes de football (UEFA) v European Commission*, above n7, at 115.

²⁶ 2007/730/EC *Compatibility with Community law of measures taken by the United Kingdom pursuant to Article 3a (1) of Council Directive 89/552/EEC*, above n6.

²⁷ The Director-General of the Directorate-General (DG) Education and Culture informed the United Kingdom, by letter of 28 July 2000, that the Commission would not raise objections to the United Kingdom measures, which would, accordingly, be published shortly thereafter in the Official Journal of the European Communities.

²⁸ T-33/01 *Infront WM v Commission* [2005] ECR II-5897.

²⁹ Advocate General Jääskinen, above n9, at 14-22.

³⁰ C-201/11 *Union des associations européennes de football (UEFA) v European Commission*, above n8, at 17.

³¹ See Generally: Advocate General Jääskinen, above n9, at 66-71.

³² C-201/11 *Union des associations européennes de football (UEFA) v European Commission*, above n8; T-55/08 *Union des associations européennes de football (UEFA) v European Commission*, above n7.

³³ C-201/11 *Union des associations européennes de football (UEFA) v European Commission*, above n8 at 35-59.

³⁴ Advocate General Jääskinen, above n9, at 33-45.

C The Court of Justice of the European Union

The case itself was akin to judicial review in New Zealand. The discussion of the issues was limited in scope and focussed on:³⁵

- The event concerned has been added to the list provided for in Article 3a(1) of Directive 89/552 in accordance with a clear and transparent procedure in due and effective time;
- Such an event may validly be regarded as being of major importance;
- The designation of the event concerned as being of major importance is compatible with the general principles of European Union law, such as the principles of proportionality and non-discrimination, with the principles of the freedom to provide services and the freedom of establishment and with the rule of free competition.

1 Process and the Failure to State Sufficient Reasons

UEFA argued that the consultation process was not complete, the recommendations of professional bodies had been ignored and as such the decision was not valid.³⁶ This appeared to be an attempt to draw the court into analysing the merits of the decision.³⁷ Member States do not have to follow the recommendations of advisory boards when making a decision due to the broad discretion. The weighting of the evidence goes to the decision, not the process of that decision.³⁸ Reasons have to be provided in a manner that enables the affected party to understand the decision and “enable the Commission and the competent Courts to exercise their power of review”.³⁹ The reasons were stated, even if briefly, and UEFA had been included in the consultation process. UEFA was able to understand the decision.⁴⁰

³⁵ C-201/11 *Union des associations européennes de football (UEFA) v European Commission*, above n8, at 17.

³⁶ T-55/08 *Union des associations européennes de football (UEFA) v European Commission*, above n7, at 80-84.

³⁷ At 92, 96; C-201/11 *Union des associations européennes de football (UEFA) v European Commission*, above n8, at 24-26.

³⁸ T-55/08 *Union des associations européennes de football (UEFA) v European Commission*, above n7, at 92, 96.

³⁹ C-201/11 *Union des associations européennes de football (UEFA) v European Commission*, above n8, at 24-26.

⁴⁰ T-55/08 *Union des associations européennes de football (UEFA) v European Commission*, above n7, at 64.

2 *Errors of Law and Assessment*

They GCE held, in error, that the EURO could be considered as a whole due to being listed in the preamble as an event that was considered in this directive.⁴¹ The CJEU held that this was incorrect. The EURO is an event that, in principle, is divisible and not all events within may be capable of being of major importance.⁴² The GCE's statement that Member States are not required to state reasons why the EURO finals if classified as a single event, are of major importance is also incorrect.⁴³ If a Member State designates the entirety of the EURO as an event of major importance they are required to provide reasons why it is of major importance in the particular circumstances of that State.⁴⁴ This error by the GCE did not invalidate the decision. The information provided to the Commission and discussed by the GCE enabled a finding that the EURO finals as a whole were of special resonance and enabled the Commission to utilise its power of review.⁴⁵ Nothing was presented to suggest the power of review was not utilised in fact. There was also no manifest error in judgment present.⁴⁶

3 *Granting of Special Rights and the Treaty of Competition*

UEFA argued that by listing the events as of major importance they forced UEFA to sell non-exclusive rights and gave free-to-air broadcasters a privileged position.⁴⁷ The GCE held that no privileged position actually exists. No broadcaster, regardless of their categorisation, can obtain exclusive rights.⁴⁸ The treaty on competition in article 86(1) EC is not at issue as choosing to not bid for non-exclusive rights does not breach the treaty on competition.⁴⁹ The CJEU held that neither ground was called into question on appeal.⁵⁰

⁴¹ At 136.

⁴² C-201/11 *Union des associations européennes de football (UEFA) v European Commission*, above n8, at 37-39.

⁴³ At 42-45.

⁴⁴ At 42-45.

⁴⁵ At 47-51.

⁴⁶ At 47-51.

⁴⁷ T-55/08 *Union des associations européennes de football (UEFA) v European Commission*, above n7, at 164.

⁴⁸ At 169.

⁴⁹ At 171.

⁵⁰ C-201/11 *Union des associations européennes de football (UEFA) v European Commission*, above n8, at 74-81, 85.

4 *Breach of the Freedom to provide services*

UEFA argued that restrictions on the right to provide services must be “justified by overriding reasons in the public interest, they must be compatible with the objectives of the Treaty, apply without discrimination and be proportionate”.⁵¹ The GCE pointed out an error in the submission. The entirety of the EURO finals had been justifiably listed and there was no other proportionate way to achieve non-exclusive free to air broadcasting.⁵² What seemed intended from the plea was that the inclusion of the whole event was not a proportionate restriction on the right to provide services. As discussed in the CJEU the EURO finals could legitimately be included in their whole in the United Kingdom and were inherently a proportionate restriction.⁵³

5 *Property Rights*

UEFA argued that their property rights had been breached by this Directive as they are forced to sell to certain parties.⁵⁴ There was some argument that the rights in the United Kingdom were not property but bundles of contractual rights.⁵⁵ This contention was not accepted by the Courts. UEFA, as the organiser of the EURO, has certain rights in broadcast revenues that meet the requirements under article 17(1).⁵⁶ Although rights exist they are not absolute and contain exceptions.⁵⁷ Restrictions must be in the public interest, not disproportionate and not an intolerable interference.⁵⁸ The rights were affected but were validly restricted on multiple grounds as an event of major importance to society.⁵⁹ The restriction on the rights did not destroy their commercial value, UEFA can still sell the

⁵¹ T-55/08 *Union des associations européennes de football (UEFA) v European Commission*, above n7, at 142.

⁵² At 151-152.

⁵³ At 152; C-201/11 *Union des associations européennes de football (UEFA) v European Commission*, above n8, at 90-94.

⁵⁴ C-201/11 *Union des associations européennes de football (UEFA) v European Commission*, above n8, at 99.

⁵⁵ Advocate General Jääskinen, above n9, at 33-45.

⁵⁶ Charter of Fundamental Rights of the European Union [2012] OJ C326/391-207, Article 17.

⁵⁷ T-55/08 *Union des associations européennes de football (UEFA) v European Commission*, above n7, at 179-180.

⁵⁸ At 180.

⁵⁹ C-201/11 *Union des associations européennes de football (UEFA) v European Commission* [2011], above n8, at 102.

rights.⁶⁰ The infringement on property rights did not invalidate the designation of the event as of major importance.

6 *Proportionality and Equal Treatment*

The question of proportionality was quickly disposed of by the GCE, there was no breach of article 5 EC⁶¹ as the EURO was justified in being listed in its entirety, within the margin of discretion and proportionate to the objectives pursued.⁶² As discussed earlier, the designation is justifiable and this is the only manner in which the requirements of the Directive could be carried out.

UEFA further argued that the Commission had treated it unequally with events that are not included on the list, some of which have more resonance in the United Kingdom.⁶³ The GCE stressed that events must be looked at based on their own merits. It is inappropriate to treat similar situations differently and to treat different situations similarly.⁶⁴

7 *Conclusion on the Case*

Whilst UEFA lost on all grounds at all stages, the case, correctly, never looked at the merits of the designation. It did not question the balancing of the competing rights or interests in themselves. An interesting feature was that it appeared implicit in the judgments that UEFA may be able to challenge the validity of the designations through the Courts of the Member State and proceed to the CJEU.⁶⁵ If challenged in this manner the CJEU would have a wider ambit to discuss the issues.⁶⁶

Despite the decision of the GCE being vitiated by error it was not overturned as the decision was still justifiable on the correct analysis of the Directive's requirements.⁶⁷ The

⁶⁰ T-55/08 *Union des associations européennes de football (UEFA) v European Commission*, above n7, at 183.

⁶¹ Treaty of Lisbon [2007] OJ C306/01 article 3b.

⁶² T-55/08 *Union des associations européennes de football (UEFA) v European Commission*, above n7, at 185-189.

⁶³ At 191.

⁶⁴ At 193 citing C-422/02 P *Europe Chemi-Con (Deutschland) v Council* [2005] ECR I-791, at 33.

⁶⁵ Advocate General Jääskinen, above n9, at 70, 71.

⁶⁶ At 71.

⁶⁷ C-201/11 *Union des associations européennes de football (UEFA) v European Commission* [2011], above n8, at 96.

infringements on the rights withstood the limited powers of review that the Commission and the Courts were able to undertake.⁶⁸

The decision and discussion in the case raise a number of issues. Among these issues are whether events such as this are actually a protected form of expression and how to balance the competing myriad of rights including the right to receive information as against the rights to control information you possess.⁶⁹ The rest of this paper discusses the justifications for freedom of expression, the theory of football and attempts to balance those rights within the context of New Zealand.

III Freedom of Expression Justifications

Freedom of expression is a complex area of the law that is not adequately explained by any single theoretical foundation.⁷⁰ As such it requires an analysis of multiple justifications in order to grasp the underlying tenets that are essential to freedom of expression.⁷¹ McGrath J in *Brooker*, characterised freedom of expression as something that:⁷²

[...] protects human dignity and the right to think and reflect freely on one's circumstances and condition. It allows a person to speak not only for the sake of expression itself, but also to advocate change, attempting to persuade others in the hope of improving one's life and perhaps the wider social, political, and economic environment.

As such the importance of free expression to society cannot be taken for granted. In New Zealand freedom of expression is protected under s14 of the Bill of Rights Act 1990. Unlike other countries, our constitutional framework does not allow the judiciary to strike down legislation.⁷³ How New Zealand Courts deal with balancing rights is analysed later in this essay.

⁶⁸ C-201/11 *Union des associations européennes de football (UEFA) v European Commission* [2011], above n8.

⁶⁹ C-201/11 *Union des associations européennes de football (UEFA) v European Commission* [2011], above n8, at 10-21.

⁷⁰ Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A commentary*, (LexisNexis, Wellington, 2005) at 307-310.

⁷¹ Paul Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, Auckland, 2003) at 309-313.

⁷² *Brooker v Police* [2007] NZSC 30, McGrath J at [114] citing the Supreme Court of Canada in *Ching RWDSU, Local SS8 v Pepsi-Cola Canada Beverages (West) Ltd* [2002] 1 SCR 156 at [32].

⁷³ Bill of Rights Act 1990, s4.

There is general consensus that freedom of expression can be justified on multiple grounds.⁷⁴ This essay focuses on Robert Sharpe's three main theories, that expression:⁷⁵

- (1) is "essential to intelligent and democratic self-government";
- (2) Enhances "the search for truth" by protecting open exchange and "creating a competitive market-place of ideas"; and
- (3) Is "essential to personal growth and self-realization".

The analysis looks at the rationales in detail before applying it to the issue contained in the case, events of major importance, with specific reference to football.

A Democratic Self Governance

Democratic self-governance focuses on the idea that democratic governance requires free speech in order to properly perform.⁷⁶ The public needs to be informed in order to participate in political discussion, debate issues and elect officials to represent them, thus "the free flow of information informs political debate."⁷⁷ No restriction should be placed on information, the dissipation of that information and the ability of people to receive and have access to information.⁷⁸ The focus is on public issues, issues which affect society or groups in society.⁷⁹ Instances of information that informs democratic debate could be political theory, the performance of government officials and security breaches within government programmes. As people elect officials they need to be fully informed of all relevant activities so they can make decisions on who will represent them in the future.⁸⁰ It is difficult to associate the EURO finals with the function of governance or the free flow of democratic information. Sport may, in certain ways, be drawn into the political sphere and require debate that can be characterised as political. Issues surrounding tours of countries such as during the apartheid regime in South Africa may be protected under this justification. Whether or not the events of major importance, such as the EURO finals are on free to air television may also inform political debate and thus become a topic of democratic discussion if they are a policy of a political party. The issue in this case, whether

⁷⁴ See: Andrew Butler and Petra Butler, above n70, at 307-310; Paul Rishworth and others, above n71 at 309-313.

⁷⁵ Robert J Sharpe "Commercial Expression and the Charter" (1987) 37 U Toronto LJ 229, 232.

⁷⁶ Paul Rishworth and others, above n71, at 310.

⁷⁷ *R v Secretary of State for the Home Department, ex p Simms* [1999] 3 WLR 328,337.

⁷⁸ Andrew Butler and Petra Butler, above n70, at 308-309.

⁷⁹ At 304.

⁸⁰ At 308-309; Paul Rishworth and others, above n71 at 308.

or not the matches are available live on free to air television appears disconnected to the core rationales of this justification.⁸¹ The issue does not lend itself to democratic or political concern. Whether or not the matches are on television will not, by itself, affect the governance of a nation.

B Marketplace of Ideas

The marketplace of ideas is drawn from the works of John Milton and John Stuart Mill.⁸² The marketplace of ideas is most famously espoused through the dissent of Justice Oliver Wendell Holmes in *Abrams v United States*.⁸³ Holmes said:⁸⁴

If you have no doubt of your premises or your power and want a certain result with all your heat you naturally express your wishes in law and sweep away all opposition. ... But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that the truth is the only ground upon which their wishes safely be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.

Truth emerges from the competition of ideas.⁸⁵ This truth is not considered as an absolute truth, it is merely the truth or consensus of the day.⁸⁶ The marketplace of ideas is a process focused justification, it is not concerned with the finding of an actual truth.⁸⁷ Situations this justification deals with often render finding an actual truth an impossibility.⁸⁸ An underlying faith in the ability of people to determine the ‘truth’ for themselves propels this

⁸¹ Paul Rishworth and others, above n71, at 312.

⁸² Paul Rishworth and others, above n71, at 309.

⁸³ At 309; Andrew Butler and Petra Butler, above n70, at 307.

⁸⁴ *Abrams v United States* 205 US 616 (1919) at 630.

⁸⁵ Paul Rishworth and others, above n71, at 309.

⁸⁶ At 309.

⁸⁷ At 309.

⁸⁸ Eric Barendt *Freedom of Speech* (2nd ed, Oxford University Press, New York, 2005) at 399.

idea forward.⁸⁹ The marketplace works only if people have the ability to say what they wish and receive all the information required in order to find the ‘truth’.⁹⁰ As Butler and Butler highlight, the reliance on news media to spread information may have created an imperfect marketplace.⁹¹ The vested interests of media institutions which are often influential and not necessarily impartial may have impacted the effectiveness of the search for truth.⁹² Whether or not this has an impact on the marketplace is beyond the scope of this paper.

It is difficult to see how the search for truth can be used to defend showcasing football matches on free television. The marketplace is used to present information about topics that have no real answer and are guided by morality, personal experience, culture and ideology.⁹³ The information presented in a football game that is of vital importance lacks the basic necessity of opaqueness to inform any public debate. The most important information is the result, performance and key match facts. This information is all factual, the match has happened and who scored or created the goals is known. There can be no question over its truthfulness in this regard and cannot be understood by utilisation of this theory.

A deeper analysis of what is contained in a football match may offer more support for this theory. Football is a series of actions, the style of performance or lack thereof may be of importance to the nation. It can be argued that the style of the performance of the national team is representative of the culture of the nation. It is be arguable that the discussion of a football match may lead to a development in the national identity or a search for what the national identity may entail. For the purposes of this essay this idea is not followed in detail under the marketplace of ideas theory. Conceptually speaking it is still difficult to say that the match information and understanding of the match helps find the ‘truth’ of the performance of a nation. Many of the discussion here is also prevalent under Personal Growth and is discussed in more detail later in the paper.

C Personal Growth

The essential rationale behind personal growth is that the free movement of information and expression can help people “to be themselves”.⁹⁴ This can be seen as one of the widest

⁸⁹ Paul Rishworth and others, above n71, at 310.

⁹⁰ Paul Rishworth and others, above n71, at 309-310; Andrew Butler and Petra Butler, above n70, at 307-308.

⁹¹ Andrew Butler and Petra Butler, above n70, at 308.

⁹² At 308.

⁹³ Barendt, above n88 at 399.

⁹⁴ Andrew Butler and Petra Butler, above n70, at 309 citing *Curtis v Minister of Safety and Security*, 1996 (5) BCLR 609 (SACC).

justifications in that it can include anything that can help a person grow.⁹⁵ Growth is ambiguous. What one segment of society sees as growth may be labelled as a waste by another. The justification is theoretically wide enough to encompass anything, “regardless of its popularity, aesthetic or moral tastefulness or mainstream acceptance”.⁹⁶ It can include something that is a part of cultural or national identity and information which is essential to the understanding of that identity. This justification, according to Rishworth, “can accommodate many forms of expression beyond the deliberative”.⁹⁷

If football can be considered part of the national identity, it can be argued that personal growth of the nation requires the information to be presented in an adequate manner for the population to receive it. It was conceded in the case that matches which were classified as ‘gala’ matches or involving a team from a home nation were of such importance to the United Kingdom that they fulfilled the Directive and are justifiable.⁹⁸ The case attempted to say that ‘non-gala’ matches should not have been included as there was no public importance attached in the United Kingdom.⁹⁹ Both ‘gala’ and ‘non-gala’ matches will be discussed later in this essay.

It is important to note that human development and personal growth are generally derivative, the world is not often introduced to truly novel things. Watching nations play football at a high level gives the potential for the persons watching to grow in a variety of ways. This is discussed fully in the next section which analyses the issues of the case with regard to this justification.

IV Personal Growth

This section looks into the rationale of personal growth and self-realisation in more detail, with specific reference to football and the EURO finals. It discusses multiple aspects of growth that could flow from football.

The idea of personal growth, as mentioned above, is that a person or part of the population has the opportunity to grow from the information that has been disseminated.¹⁰⁰ This can be contrasted with something which is of pure entertainment value and doesn’t contribute to growth. In reality very little may be considered as pure entertainment as entertainment

⁹⁵ Paul Rishworth and others, above n71, at 311; Andrew Butler and Petra Butler, above n70, at 309.

⁹⁶ Andrew Butler and Petra Butler, above n70, at 309 citing *R v Sharpe* (2001) 194 DLR (4th) 1 (SCC), para 141 per L’Heureux-Dubé, Gonthier and Bastarache JJ.

⁹⁷ Paul Rishworth and others, above n71, at 311.

⁹⁸ C-201/11 *Union des associations européennes de football (UEFA) v European Commission* [2011], above n8, at 30-34.

⁹⁹ At 30-34.

¹⁰⁰ See: Paul Rishworth and others, above n71, at 311; Andrew Butler and Petra Butler, above n70, at 309.

often contains messages that allow for growth. In countries where something either is or is not protected expression, the issue of where to draw the line becomes important, otherwise almost all expression could be considered protected.¹⁰¹ In New Zealand we have wide ranging protection of expression but allow for specific intrusion.¹⁰² This makes the distinction between forms of expression a non-issue in New Zealand. In a practical sense the conclusion under both systems may be similar. At this point this essay asks whether football fits within the traditional justifications and is protected expression. As a conceptualisation, this section is asking how far along the continuum between personal growth and mere entertainment these football matches are.

A How do we judge personal growth?

Under this justification actual personal growth is not necessary but the question still remains of how we judge the ability to let people personally grow. Both the potential positive effects and some future or secondary effects will be measured against the known practical effects of football matches. The negative implications of football on society does not inherently remove the ability for the general population to grow. It is of importance that the law must not be detached from reality when conducting an analyses of these issues. How exactly personal growth is to be measured is a theoretical question best be left to policy makers. We can only analyse what the legal ramifications are and judge them against the deemed importance of a person with the viewpoints we share. Policy makers are in the best position to truly know and understand the potential for personal growth amongst the population as a whole. Because of these factors, the position policy makers find themselves in requires a margin of discretion.¹⁰³

B Cultural Identity and Sport

Sports are often part of the cultural identity of a nation. They embody national pride and are a source of hope for the poor and wealthy alike.¹⁰⁴ In Europe football is one of the more important sports, many competitions are played and followed with vigour from low league matches to the high glamour competitions such as the Champions League and Premier League. Despite nations being fiercely divided when supporting club football, national

¹⁰¹ See: Andrew Butler and Petra Butler, above n70, at 314-316, 323.

¹⁰² Andrew Butler and Petra Butler, above n70, at 310-324.

¹⁰³ C-201/11 *Union des associations européennes de football (UEFA) v European Commission* [2011], above n8, at 14, 24.

¹⁰⁴ Interview with Jérôme Valcke, Secretary General of FIFA (Vikas Shah, Thought Economics, 26 March 2011).

teams break down these barriers and are an embodiment of the nation. The national team often takes on certain characteristics of the member population's philosophy. The United Kingdom is an example of football stopping a nation, with forty percent of the population watching certain EURO finals matches live.¹⁰⁵ When something is intrinsically linked it is easy to see how important it may be to society. The question over whether it will actually enable personal growth is a different and more difficult question.

For personal growth to be possible the benefits of viewing these matches must enhance the viewer's perception of the culture, enable discourse that will lead to the identity reflecting that society in a closer manner, or alter perceptions or ideology held by that person in a positive manner. At first instance a sporting match is difficult to reconcile with the idea of enhancing personal growth through understanding of national culture. One view is that the matches are just a means of entertainment, they offer nothing more than a spectacle that draws time, money and attention away from things that truly matter in society. A more nuanced view, in the eyes of this author, is that the matches as a source of national pride bring the nation closer together and promote harmony. The discussion surrounding the match and the history of the place of sport in the nation could help a person understand the history of their nation and how that identity is embodied within a sport.

Downstream effects of sport are the removal of barriers that are evident in other areas of society. Rich and poor can view and enhance their understanding of the nation, build a cohesive culture together and have an equal footing in the identity that stems from these matches. This can be a social equaliser. The population is not divided along class or wealth lines and every person has an equal say in how the match develops a national identity. Youth watching the match will take from their own lives and experiences and bring those ideas into the future. This will be reflected in the future embodiment of the team and shows how historically the team represents the background of the population. Whether the match is played with flair or grit and determination, it is a representation of the past, present and future of the nation. The countering view is that the resources, both in time and monetary value are better spent in other areas. Whether this is true is not a discussion for this paper, the focus is on the activity and whether or not it leads to potential personal growth.¹⁰⁶ The focus is also not on what may encourage personal growth in a way that is the most efficient. Football can be seen as allowing the possibility of enhancing the culture and identity of a nation and as such could lead to personal growth amongst the people viewing the matches.

¹⁰⁵ Ofcom "The Communications Market 2013" (1 August 2013) Independent regulator and competition authority for the UK communications industries <www.ofcom.org.uk> at 154.

¹⁰⁶ Paul Rishworth and others, above n71, at 311.

Whether this happens in practice would be a difficult analytical challenge to measure with any accuracy, luckily that is not required for the purposes of this justification.¹⁰⁷

C Role Models and Identifying with players

Imitation theory is the idea that people in certain ways imitate activities that are present in their lives. During different stages of development, from childhood to adulthood, the responses to what is seen, heard or participated in differ.¹⁰⁸ The effects of imitation theory are generally more pronounced amongst the younger population.¹⁰⁹ A lot of the research in this area focusses on the prevalence of recurring violence amongst generations of families in poor areas.¹¹⁰ It is arguable that football, especially major international competitions such as the EURO finals can enhance personal growth amongst the younger population through role models.¹¹¹ This is through having role models readily accessible in areas of their life that they are interested in. Role models are a key component in the development of young people and can help guide older people too.¹¹² Football can help instil a sense of belonging within society which may not be otherwise felt amongst the poorer classes given the western phenomenon of increasing wage gaps and need for social help.¹¹³ Football is a game played by a diverse number of people which can help the younger and older to break down stereotypes that plague society. Ethnicity, religion and other ‘defining aspects’ of a person can be shown to be immaterial on a football pitch. Imitating the actions of their role models may create a more cohesive society which breaks down the barriers that are currently faced by minority groups.

The role model of a young person may also help that person achieve more in their daily life.¹¹⁴ The reality of being poor often means that there is little that can help people to ‘escape’ the reality of life in the area they live. This is a recurring theme amongst societies with gang problems in the United States and is prevalent worldwide.¹¹⁵ If a sports star can

¹⁰⁷ Paul Rishworth and others, above n71, at 311.

¹⁰⁸ Laura E Berk Child Development (9th ed, Pearson Education Ltd, New Jersey, 2012) at 237, 400-484.

¹⁰⁹ At 237, 400-484.

¹¹⁰ At 400-484; See Also: American Academy of Child & Adolescent Psychiatry “Facts for Families – No 99 Children and Role Models” (9 September 2011) American Academy of Child and Adolescent Psychiatry <www.aacp.org>; Stanton E Samenow “Role Models and Choices” (2 April 2013) Psychology Today <www.psychologytoday.com>.

¹¹¹ At 400-484.

¹¹² At 400-484.

¹¹³ Interview with Jérôme Valcke, above n104.

¹¹⁴ Berk, above n108, at 400-484.

¹¹⁵ At 400-484.

‘escape’ this life then it gives an alternative pathway that can be followed. This could reduce the prevalence of crime and gang culture in society. These are downstream effects however they cannot be understated. If watching football matches allow people to remove themselves from hardship and societally damaging lives, the positive potential is evident both personally and for society in general. Providing positive role models in areas of natural interest such as sports is tightly linked with personal growth. This may be only a factor in a person’s life and only affect a portion of the population but the potential exists and fulfils the justification.

D The importance of the national team playing

The national team playing in the match is important in many facets. Without it there is no embodiment of the national culture represented in the information being received. This is important to the above reason of cultural identity and understanding the nation’s history and guiding its future. Not having the national team playing is not necessarily defeating. Personal growth can be reached without the national team playing. The national identity is not only a representation of growth from within that society alone. Society is derivative in nature and as such the potential for growth within a nation can stem from studying the way others play. This is not as direct of a link as when the national team is playing. The information is not a representation of national culture but information that may help a person understand that culture in context. This would need to be considered for any proportionality analysis, the less direct the link means the interference with other rights are not as justifiable.

More growth is probable from watching the national team play another nation as the comparative style of playing and philosophy are directly compared to the identity of the national team. Thus the ability to grow is enhanced due to having a comparison presented in an understandable format. This makes the potential to grow more evident if the national team is playing in the match but does not limit the ability to grow to those matches alone. It is also plausible that watching matches without the national team has the potential to provide more growth. Having two different cultural embodiments on the pitch with different fans, different rituals and the potential for more minority representation may provide more information and more derivative growth potential. There is also a question on how much can be understood from the matches themselves without the fan-base having any understanding of the culture originally. When analysing other nations the base knowledge may not be present and this may limit how much growth is possible. The potential for growth would be more limited in scope across the population as the matches

are of less importance to society.¹¹⁶ If less people are viewing the information, the potential for growth amongst people in general is weakened. Due to the added difficulty in processing the information and the less importance in viewing the matches without the national team would have lesser importance to the population and as such less weight in a proportionality analysis.

Overall, whether or not the national team plays in any given fixture is not determinative on personal growth. The ability to grow exists in all matches regardless of the national team playing. As such it can be said that *prima-facie*, all international matches have the characteristic of protected speech but the strength of this justification is limited depending on certain factors. This is dealt with in the proportionality analysis later in this paper.

E Removal from free television

For personal growth the information must be prevalent to society in general, not just a proportion that can afford to access certain paid services. Certain countries choose to have a television licencing scheme in place for all households with a television or screen that can access public access channels. For the purposes of this essay these costs are not considered as they are essential to the functioning of television and unavoidable. The directive itself is explicit that these costs are not considered when discussing free to air or paid television providers.¹¹⁷ The removal of matches from free television would, in theory, limit the amount of people who would be able to access the matches. This would appear to disproportionately affect the poorer members of society and prevent their ability to grow. When discussing the potential for personal growth above, it is clear that anybody receiving the information has the potential to grow. If the matches are removed from the poor then it is arguable that it is being removed from the portion of the population that makes up a significant quantity of the culture and national identity. Whilst it is arguable and will be discussed later that the costs of BskyB are not prohibitive themselves, the removal from free television would prevent a large proportion of persons in the United Kingdom from access to this information and detrimentally effect their potential to grow.¹¹⁸ This will also be relevant to the proportionality assessment below.

It is important to note, and will be discussed later, that this has more potential harm than when the information has not always been available in this manner. This may not be as

¹¹⁶ Ofcom “The Communications Market 2013”, above n105.

¹¹⁷ Directive 89/552/EEC as amended by Directive 97/36/EC [1997] OJ L 202/60-70 article 3a (1).

¹¹⁸ See: Sky Television “Annual Review 2013” (August 2013) Sky Television <www.corporate.sky.com>; Office for National Statistics “Census 2011” (17 December 2012) Office for National Statistics <www.ons.gov.uk>.

strong of a contention in other societies where paying for access to information with a national team in it is the norm. In that instance the harm to the population who used to receive the information is not necessarily as relevant in a proportionality exercise and it may prove to strengthen the position of the rights holder.

F Conclusion on Personal Growth

The idea of personal growth appears stretched when moving into areas which can be considered as entertainment. What is apparent from the above analysis is that the potential to grow is present, even if only shown through theory. Regardless, the core rationales of freedom of expression appear to have an uneasy fit with entertainment. Whilst the expanse of what freedom of expression covers a broad category of information, the core tenets as they are understood are closer to democratic ideals or core fundamental rights.¹¹⁹ As such, encroachments upon ‘fringe’ rights may allow a larger margin of discretion than ‘core’ rights.¹²⁰ This is effectively deferring to the competency of Parliament in situations that affect citizens. The question on how much deference is to be given in any situation is a complex question that can only be answered with careful analysis.¹²¹ Despite the fact that it is not a situation central to the fundamental understanding of freedom of expression it deals with issues that are such as the right to receive information and the right to not disperse information.¹²² Any deference that is given to parliament should be careful to consider the factual situation in isolation and the factual situation in context otherwise important rights may be curtailed without proper analysis.

G Negative aspects

Football being broadcast on television has the potential to do good to society in ways that are often difficult to analyse and fully understand. Despite this football also causes negative reactions. These reactions have come in the form of violence amongst spectators, domestic violence, religious and racial incidents amongst others.¹²³ Whilst much of these negative reactions stem from other sources, such as alcoholism or a predisposition for violence, the role football plays in causing the increase or the enhancement of these reactions must be

¹¹⁹ Paul Rishworth and others, above n71, at 312.

¹²⁰ At 312.

¹²¹ At 312.

¹²² At 311-313; Andrew Butler and Petra Butler, above n70, at 319-321.

¹²³ Home Office “Statistics on football related arrests and football banning orders: Season 2012-2013” (October 2013) Home Office <www.gov.uk/government/organisations/home-office>.

examined in order to fully understand how this directive may impact society in the short and long term.

Televised sport has been linked to an increase in domestic violence both in New Zealand and the United Kingdom.¹²⁴ Whilst the event is not necessarily causative of the harm in itself it is one of the contributing factors to the increase in harm being caused. This danger cannot go unrecognised, with a 26 to 38 percent increase in domestic violence in the United Kingdom when the English national team plays the increase must concern policy makers.¹²⁵ Allowing the activity on free television may cause more harm to a group in society that is also, possibly, not benefitting directly from the potential good. It is difficult to gauge the exact female proportion in the United Kingdom that support football or deem it of importance, however attendance in 2006 in the premier league had increased to 18 per cent.¹²⁶ This is a minority of football fans and can be contrasted with the heightened rate of domestic violence experienced in the United Kingdom, predominantly towards women.¹²⁷

Historic evidence of the link between football and a number of crimes are regularly compiled in the United Kingdom.¹²⁸ They show a clear link between the spectacle, the consumption of alcohol and the damage to people and property.¹²⁹ These statistics focus on the damage at the stadiums which may be more acute due to over-representation of supporter groups.¹³⁰ What the statistics do not show is the damage to people watching from another location who may have similar passions, similar dispositions and less oversight from police or other authorities.¹³¹ Domestic violence during English matches at the 2010 World Cup showed an increase in violence regardless of the result, with 27.7 per cent for

¹²⁴ Simon Collins "Rise in Assaults during Rugby World Cup" (27 September 2012) New Zealand Herald <www.nzherald.co.nz>.

¹²⁵ Christopher Hooton "Domestic Violence Increases 25% During England World Cup Games" (19 June 2014) The Independent <www.independent.co.uk>; Sandra Laville "Police Fear Rise in Domestic Violence during World Cup" (8 June 2014) <www.theguardian.com>.

¹²⁶ Jonathon Thompson "Female Fans: A (more) beautiful game" (29 October 2006) The Independent <www.independent.co.uk>.

¹²⁷ Alan Travis "Domestic Violence experienced by 30% of the population research shows" (13 February 2014) The Guardian <www.theguardian.com>.

¹²⁸ Home Office "Statistics on football related arrests and football banning orders: Season 2012-2013", above n123.

¹²⁹ Home Office "Statistics on football related arrests and football banning orders: Season 2012-2013", above n123 at 6.

¹³⁰ Home Office "Statistics on football related arrests and football banning orders: Season 2012-2013", above n123 at 12.

¹³¹ Home Office "Statistics on football related arrests and football banning orders: Season 2012-2013", above n123.

a win and 31.5 per cent for a loss. Other research in the area showed a greater disparity between the two with a 38 per cent increase for a loss and 26 per cent for an English win.¹³² This phenomenon became of such concern that organisations launched campaigns during the recent 2014 World Cup to highlight the issues.¹³³ Given the prevalence of such impacts to members of society in vulnerable situations any legislative changes in New Zealand would need to consider whether wide access is the best way to provide net benefits to society or not. If society may have the ability to grow from the information, this must be weighed against the detriments it has to people already in difficult situations. Football, or any event of major importance may only be the spark in a combustible situation, but it performs a key role in detriment to parts of society.

Another concerning statistic found in the reports is the prevalence of racial slurs and the normalisation of anti-social behaviours.¹³⁴ As mentioned above, the prevalence of players from different backgrounds and with differing worldviews may reduce these incidents in the long-term. The opposite may also happen in that viewing such incidents may also normalise the behaviour or make it seem acceptable to people watching on television and stoke hatred. Racism in relation to football in the United Kingdom may not be racism in the same manner as Apartheid, but may lead to segments of society not participating in something that is culturally important to the people of the United Kingdom. Inclusion in society is not simply the opening of the door or the label of acceptability, it is the inclusion and acceptance into all facets of life. Placing extra weight on football may drive away certain segments of society which are not already immersed or face issues in being accepted into the football culture. Perhaps this is a false concern, but it is something to consider when policy is being formulated.

Despite these concerns and evidence of detriment to society, justification for freedom of expression is not based on no ancillary negative aspects arising.¹³⁵ If an activity fits within a justification then it fulfils the requirement of being “protected speech”.¹³⁶ These negative aspects should still be of concern when discussions surround whether activities which act as a catalyst should be broadcast on a free basis. This goes to proportionality more than any other area. Whilst these discussions are of importance to the general arguments

¹³² Sandra Laville “Police Fear Rise in Domestic Violence during World Cup” (8 June 2014) <www.theguardian.com>.

¹³³ Mark Duell “‘No one wanted England to win more than women’: How domestic violence rises by a third when England exit World Cup” (27 June 2014) The Daily Mail <www.dailymail.co.uk>.

¹³⁴ Home Office “Statistics on football related arrests and football banning orders: Season 2012-2013”, above n123.

¹³⁵ Paul Rishworth and others, above n71, at 308-313.

¹³⁶ Andrew Butler and Petra Butler, above n70, at 314-319.

surrounding the applicability of any legislative action based upon freedom of expression grounds they are not necessarily relational to the status of whether something is able to be protected under freedom of expression. The focus in freedom of expression is not whether this is within or excluded from protected expression but whether any infringements are justifiable given the ideas of balancing competing rights.¹³⁷

When discussing these issues stakeholder groups must be included so proportionality can be fully analysed. It may be best to make the events available but encourage or legislate for certain requirements during broadcasting aimed at negating these negative impacts. The platform given by football may be more effective in dealing with these situations and eliminating them from society. Allowing for counter measures may be more effective in dealing with these aspects than simply saying football on the balance does not create enough person growth.

The preferred approach, in the eyes of this author, is to disassociate that event from those negative aspects rather than to remove the event itself. By providing for messages to combat the negative effects we may see long-term reductions in anti-social behaviours. It is also arguable that the vast audience of these events, especially in the United Kingdom of the EURO finals will have enhanced positive messages and lead to downstream success in these difficult societal areas. Direct confrontation of issues may not be the most pleasant but it can lead to the most success.

V New Zealand Context

Nationals of each country place differing importance on different aspects of life.¹³⁸ This makes it is difficult to properly analyse a national situation from an external point of view. Understanding the prevailing conditions within a nation before undertaking any substantive analysis is important.

In New Zealand understanding the impact football has worldwide is difficult. It is difficult to comprehend football as the pride of the working man in England and difficult to understand the escape route from poverty it has provided and continues to provide worldwide.¹³⁹ It is also difficult, apart from reading selected events that are published how football has enabled humans to retain spirit in circumstances such as Apartheid.¹⁴⁰ In

¹³⁷ At 308-323.

¹³⁸ T-55/08 *Union des associations européennes de football (UEFA) v European Commission*, above n7, at 1, 18.

¹³⁹ See Generally: Interview with Jérôme Valcke, above n104.

¹⁴⁰ Chuck Korr and Marvin Close “More than Just a Game – Soccer vs Apartheid: The Most Important Soccer Story Ever Told” (Collins, United States, 2010).

Europe, football was also part of the famous Christmas truce of 1914.¹⁴¹ Given the historical impact of such events on society in Europe, it is hard for an outsider to truly gauge how important football is to society. This essay seeks to analyse the issues of the Directive in light of an upbringing in New Zealand with relevance to specific questions that may arise in the context of New Zealand. It is estimated that to New Zealanders, the importance of football is equivalent to that of rugby.

None of these theories enunciated above can adequately justify the importance of freedom of expression but they each offer something in determining how the right, under s14¹⁴² should be interpreted.¹⁴³ Expression has been held to be “as wide as human thought and imagination”.¹⁴⁴ This means that the categorisation of expression is not as important in New Zealand as it is elsewhere. We can find protected expression in areas that other nations may find complex, such as commercial expression.¹⁴⁵ When discussing the information above it was concluded that the EURO championship matches allow for personal growth and are justifiable.

Butler and Butler also argue that the term ‘information’ should not be restricted in order to avoid difficulty that has arisen in other jurisdictions.¹⁴⁶ This means that both factual information and personal opinions are within the ambit.¹⁴⁷ Factual information contributes to the marketplace of ideas or democracy indirectly by influencing how people think and discuss situations with the aid of that information.¹⁴⁸ It does not in itself give much personal growth. Not restricting factual information is in line with the wide ambit of freedom of expression in New Zealand.¹⁴⁹

The ability to seek information protects many ways in which a person may try to obtain information but does not mean that an individual has a right to be “given certain information or that the state has to make a certain medium available.”¹⁵⁰ This must be extended to including that something need not be required to be available on a certain subset of a medium. If the State is not required to make something available on television,

¹⁴¹ Alan Wakefield “Football and Feasts: First World War Christmas Truce” (29 November 2013) The Telegraph <www.telegraph.co.uk>.

¹⁴² Bill of Rights Act, 1990.

¹⁴³ Paul Rishworth and others, above n71, at 311.

¹⁴⁴ *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 at [15] per Tipping J.

¹⁴⁵ Andrew Butler and Petra Butler, above n70, at 314-319.

¹⁴⁶ At 318.

¹⁴⁷ At 318.

¹⁴⁸ At 317-318.

¹⁴⁹ See: *Moonen v Film and Literature Board of Review*, above n144, at [15] per Tipping J; Paul Rishworth and others, above n71, at 308-313.

¹⁵⁰ Andrew Butler and Petra Butler, above n70, at 320.

making it available on free television is also not a requirement. If information is owned by someone that is of importance to the public, the state must consider whether the information can be adequately portrayed in ways that do not infringe on that parties rights to agree to distribution deals amongst mediums.

The right to receive information prohibits the state from standing between a speaker and their audience.¹⁵¹ The State will be, in a manner, standing between the speaker and the audience, even if it is to compel expression, rather than to prevent it. This right does not extend to being given access to information and opinions and includes the right to not receive information.¹⁵² In essence, the State is forcing the information to be present to the public. Imparting information you hold is a choice that is to be made.¹⁵³ Legislation such as the directive is compelling an entity to provide information that it is, in theory, at its discretion to provide. The ability to impart information requires no administrative obstacles and protects the place and time where the information is imparted.¹⁵⁴ Legislative intervention would be to place obstacles in front of the rights holder and force them to impart the information at a certain place and time. Even if this is the only time that the information would have been presented.¹⁵⁵

These concerns are all freedom of expression arguments that support the rights holder. It is important to recognise not only these issues but to discuss them in context. Freedom of expression does not operate in a vacuum. Expression is interwoven with many other rights and must be examined holistically.¹⁵⁶ This creates a difficult balancing act for policy makers. In New Zealand, the balancing of the rights of UEFA to impart the information would have to be balanced against the rights of citizens to receive the information with regard to rights of competition, property and other factors. UEFA has the right, in theory, to choose how and when they disseminate the information as it is their property. When discussing if something is a justifiable incursion on a right the Majority test in *Hansen*¹⁵⁷ as enunciated by Tipping J is the most applicable law.¹⁵⁸

¹⁵¹ At 320.

¹⁵² At 320-321.

¹⁵³ See: At 321-322; Paul Rishworth and others, above n71, at 308-313.

¹⁵⁴ Andrew Butler and Petra Butler, above n70, at 321.

¹⁵⁵ Ofcom "The Communications Market 2013", above n105

¹⁵⁶ See generally: T-55/08 *Union des associations européennes de football (UEFA) v European Commission*, above n7, at 44.

¹⁵⁷ *R v Hansen*, above n12.

¹⁵⁸ Claudia Geiringer "The principle of legality and the Bill of Rights Act: A critical examination of *R v Hansen*" (2008) 6 NZJPI 59 at 68.

A The Public Sphere

New Zealand does not currently have legislation that forces events of major importance to be on free to air television. Events which could potentially be classified as of major importance, such as the America's Cup, Olympics, Bledisloe Cup and Rugby World Cup are not necessarily broadcast on free to air television. This creates a cultural difference in the way we perceive the activities and how to balance the positive results against the negative implications. If a society has had something presented in a way that is of cultural importance the way it has been presented can become a norm in itself. The removal of something in this manner, even if it is not fully removed will cause harm to certain portions of society. Whilst this harm may dissipate over time with the advancement of technology and the reduction of costs associated with the new service, harm is still caused. This is the situation that would have been faced in the United Kingdom. If the EURO championships had been removed, people who were exercising their right to receive those matches could no longer exercise those rights. This arguably causes more harm to society than if something was never available in a certain manner. This highlights a societal difference that exists between New Zealand and the United Kingdom and must be borne in mind. If a law is enacted to protect users from exercising rights that they currently are able to exercise then the balance falls more in the favour of that infringement being justifiable. In contrast, if rights have never been exercised and society accepts that certain fees are associated with receiving the information then an enactment which forced the rights holder to distribute to only free television stations would appear to be less justifiable.

B Government Funding

When considering how society perceives the importance of access to information consideration must also be given to whether the information they are receiving has been publicly or privately funded. The performance of a nation team is important to the cultural identity in many ways, but the closeness of the nation to that performance may be enhanced if public money was used to fund that performance. This importance may change depending on the proportion or importance of the public funding to that team. It may be diluted if funding is available to all. A significant question is whether this should impact any analysis on whether the information should be available on free to air television. In the opinion of the author it is not a decisive factor when weighing up competing rights or arguments. The fundamental underpinning in freedom of expression is the potential for gains to the public and the proportionality of any legislative actions.¹⁵⁹ Whilst funding may

¹⁵⁹ See: Andrew Butler and Petra Butler, above n70, at ch 6.

completely cover the fees of certain events, the public may deem those events of less importance than events which contain less or no funding. Logically speaking, events which are significantly funded by a Government will be of some importance to that country. Thus the funding may create a presumption of importance to the population and make the legislative intervention seem justifiable. Whilst this is not discussed in the case or the Directive it is relevant to the proportionality analysis and may lend support to one conclusion or another. Any such assumptions of importance would need to be backed by information which supported such a conclusion.

Discussions about whether or not the funding creates importance are only relevant if the funding is actually known to the public generally. The availability of financial statements that are readily accessible is a good way to measure public awareness. Despite the limitations to deeming knowledge through financial statements, it would be difficult for a Court or Parliament to gauge public knowledge in other manners. In New Zealand the Government provides funding to a number of different sporting entities. This funding differs depending on certain criteria and may in some situations be the bulk of the income received by an entity.¹⁶⁰ The importance of the funding is dependant, for instance Team New Zealand in the Americas Cup often receive government funding at the start which enables a challenge.¹⁶¹ Sponsors may invest more than the government in this situation but the feeling is that it is a publicly funded initiative.¹⁶² The presumption of importance must be measured against a variety of other factors. In New Zealand the New Zealand Rugby Union (NZRU) is partially funded by the government, however this makes up a small proportion of the total revenue of the NZRU.¹⁶³

VI New Zealand Bill of Rights analysis

This section applies the directive, as enacted in the United Kingdom with the circumstances as they are found in New Zealand. The prevailing test in New Zealand is the *Hansen* test as enunciated by Tipping J and is considered as the majority opinion on the matter.¹⁶⁴

¹⁶⁰ High Performance Sport New Zealand “Performance Enhancing Grants Programme Guideline” (20 December 2012) High Performance Sport New Zealand <www.hpsnz.org.nz/>.

¹⁶¹ One News “Team New Zealand confirms funding until end of year” (21 June 2014) Television New Zealand <www.tvnz.co.nz/>.

¹⁶² See: Eric Sorenson “The Cost to Compete in the 34th Americas Cup” (26 September 2013) ScuttleButt Sailing News <<http://www.sailingscuttlebutt.com/>>; Stuff “Team NZ gets \$36m taxpayer cash for Cup” (21 April 2011) Stuff News <www.stuff.co.nz/>.

¹⁶³ New Zealand Rugby Union “2013 Annual Report” (April 2014) New Zealand Rugby Union <www.nzru.co.nz/>.

¹⁶⁴ Geiringer, above n158, at 68.

A Hansen Test

*Hansen*¹⁶⁵ is a case in the Supreme Court of New Zealand which follows a ruling of the Supreme Court in *Moonen*.¹⁶⁶ The Majority adopted a different formulation when dealing with s14 in the New Zealand Bill of Rights Act.¹⁶⁷ The *Hansen* test per Tipping J requires you to:¹⁶⁸

- Step 1. Ascertain Parliament's intended meaning.
- Step 2. Ascertain whether that meaning is apparently inconsistent with a relevant right or freedom.
- Step 3. If apparent inconsistency is found at step 2, ascertain whether that inconsistency is nevertheless a justified limit in terms of s 5.
- Step 4. If the inconsistency is a justified limit, the apparent inconsistency at step 2 is legitimised and Parliament's intended meaning prevails.
- Step 5. If Parliament's intended meaning represents an unjustified limit under s 5, the court must examine the words in question again under s 6, to see if it is reasonably possible for a meaning consistent or less inconsistent with the relevant right or freedom to be found in them. If so, that meaning must be adopted.
- Step 6. If it is not reasonably possible to find a consistent or less inconsistent meaning, s 4 mandates that Parliament's intended meaning be adopted.

To clarify this test we must first, through principles of ordinary statutory interpretation, ascertain the meaning intended by Parliament.¹⁶⁹ With this ascertained meaning we see whether there is a prima facie breach of a right. If a prima facie breach is found you then check to see if this is justifiable in terms of s5.¹⁷⁰ If the breach is justifiable we do not continue with an analysis.¹⁷¹ If the breach is not justifiable we engage with s6, the interpretation section of the Bill of Rights Act. This means that the s6 interpretation is only engaged after we have had a 'preliminary' discussion on justifiability and we then discuss alternative meanings that could be preferred.¹⁷² What is required, in regards to a s6 analysis is that the meaning is "available on the language of the text being interpreted".¹⁷³ This may

¹⁶⁵ *R v Hansen*, above n12.

¹⁶⁶ *Moonen v Film and Literature Board of Review*, above n144.

¹⁶⁷ Geiringer, above n158, at 67-68.

¹⁶⁸ *R v Hansen*, above n12, per Tipping J at [92].

¹⁶⁹ Geiringer, above n158, at 68-73.

¹⁷⁰ Geiringer, above n158, at 68-73.

¹⁷¹ *R v Hansen*, above n12, at [92].

¹⁷² Geiringer, above n158, at 68.

¹⁷³ *R v Hansen*, above n 12, at [61] per Blanchard J, [237] per McGrath J.

be a linguistically strained meaning but it must be a tenable strained meaning.¹⁷⁴ This process was heavily criticised by the Chief Justice in *Hansen*. The Chief Justice argued:¹⁷⁵

that the majority's approach was inconsistent with the language of section 6 and the scheme and purpose of the Bill of Rights Act, and that it risks the erosion of fundamental rights.

Whether or not this interpretation does cause an erosion of rights is a question for the Supreme Court in the future. The concern of the Chief Justice does have validity and must be acknowledged before any analysis surrounding sections 4, 5 and 6 is undertaken.¹⁷⁶ Regardless of this criticism the approach in *Hansen* per Tipping J is the law in New Zealand and the Directive will be analysed utilising its framework.¹⁷⁷

1 Step One Ascertain Parliament's intended meaning

The directive is clear in what was intended, Member States in the European Union were to follow “clear and transparent processes” in order to determine events that are of “major importance to society”.¹⁷⁸ If these events were of major importance and would “deprive a substantial proportion of the public” of the ability to view them, the Member State was authorised to legislate so that the event was on television in a manner that was deemed appropriate.¹⁷⁹ It is clear from this, as enunciated by the CJEU and the Directive itself that the intended meaning was to breach multiple rights of commerce as well as the right of freedom of expression of the rights holder.¹⁸⁰ This was done in the “public interest” of that event being widely broadcast without extra costs.¹⁸¹ In New Zealand this is similar to the Directive being an empowering act which allow a regulatory body to list events that are of major importance through a clear and transparent process. The intended meaning is clear, with difficulties surrounding how major importance is to be determined.¹⁸² Events which are of major importance that are not being broadcast on a free basis will deprive a

¹⁷⁴ At [13] per Elias CJ.

¹⁷⁵ Geiringer, above n158, at 68; See Also: *R v Hansen*, above n12, at [6], [15]-[24] per Elias CJ.

¹⁷⁶ Bill of Rights Act 1990.

¹⁷⁷ *R v Hansen*, above n12, per Tipping J.

¹⁷⁸ Directive 89/552/EEC as amended by Directive 97/36/EC [1997] OJ L202/60-70 article 3a (1).

¹⁷⁹ Article 3a (1).

¹⁸⁰ See: Article 3a (1); C-201/11 *Union des associations européennes de football (UEFA) v European Commission*, above n8, at 10-21.

¹⁸¹ Directive 89/552/EEC as amended by Directive 97/36/EC [1997] OJ L202/60-70 article 3a (1).

¹⁸² Article 3a (1).

substantial proportion of the population the ability to view that event. They may be listed, following a clear and transparent process so that the public is not denied the ability to view these events. In this instance, the listing of the entirety of the EURO finals as an event which can be characterised as of major importance is what is at issue.

2 *Step Two Apparent Inconsistency*

At this stage we utilise a low threshold for inconsistency, merely checking that it prima-facie breaches a right protected in the Bill of Rights Act.¹⁸³ In this instance s14 would be engaged, freedom of expression.¹⁸⁴ It is clear from the Directive that it is impinging upon the rights holders ability to disseminate the information they hold.¹⁸⁵ Due to the wording of s14¹⁸⁶ the right in New Zealand is broad, it is “as wide as human thought and imagination”.¹⁸⁷ There is a breach despite the justification for the breach being the same right itself. This creates an odd situation that is addressed in step three where discussions surround justifiable limitations.

3 *Step Three Justifiable Under s5*

We need to discuss whether or not this interpretation, under ordinary statutory interpretation methods is justifiable under s5.¹⁸⁸ Section 5 states:¹⁸⁹

Subject to section 4, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

There is no real guidance in the statute beyond “demonstrably justifiable” and case law is required to help us understand what is meant.¹⁹⁰ *Hansen* is the leading decision that guides this area of the law, however the issue of justifiability is a fact based analysis due to the nature of the issues we are dealing with.¹⁹¹

¹⁸³ Geiringer, above n158, at 68-69.

¹⁸⁴ Bill of Rights Act 1990.

¹⁸⁵ Andrew Butler and Petra Butler, above n70, at 321-322.

¹⁸⁶ Bill of Rights Act 1990.

¹⁸⁷ *Moonen v Film and Literature Board of Review*, above n144, at [15] per Tipping J.

¹⁸⁸ Bill of Rights Act 1990.

¹⁸⁹ Bill of Rights Act 1990.

¹⁹⁰ Andrew Butler and Petra Butler, above n70, at 139-149.

¹⁹¹ *R v Hansen*, above n12.

The question on whether an event is or is not of major importance is key to our understanding of whether or not it is inherently justifiable to force rights holders to sell the rights to certain parties only. Another question that may be applicable to other events is whether it is justifiable to control broadcast procedures in certain ways. The second discussion is not a prevalent issue in the context of sporting events which is the focus of this paper. Having live coverage is important in sporting events due to the nature of the information conveyed and the impact of the result on the perceived value in watching.¹⁹² In some situations, delayed coverage is better for society in terms of the numbers it reaches. Forcing live coverage is often not an issue with broadcasters of sporting events.¹⁹³

The focus in the next section is on the process of how something could be classified as of major importance arguments of competing rights, the value of evidence and expert opinion and the discretion afforded to Parliament and regulatory bodies who may be tasked with these duties.

(a) Qualitative or Quantitative

For an act of Parliament to be justifiable, the right that has been infringed must be balanced against the importance of the objective. You must not “use a sledgehammer to crack a nut”.¹⁹⁴ In this case the justification for infringement and the right infringed are both freedom of expression.¹⁹⁵ This decision can incorporate a number of sometimes conflicting quantitative and qualitative assessment tools, the weight placed on these tools will need to be logical and understandable.

The questions over whether a quantitative or qualitative assessment is preferable depends on the schools of thought a person subscribes. Both have benefits and detriments and cover different areas. For instance, a qualitative analysis can accurately discuss whether an event is, based on pure viewing numbers of importance to society. It gives us a starting point for a discussion when we consider how important events are. If an event attracts, by far, the highest viewing ratings out of anything on television for the year then we could consider that it starts off as an event that is important. If another event attracts a minimal audience we could start with the assumption that the event in itself was of little importance to society. These are not necessarily corollaries and focuses on the numbers alone. A substantial proportion of society may still view an event if it is on paid television and render the figures moot. Empirical evidence such as viewing numbers may show the importance historically.

¹⁹² Ofcom “The Communications Market 2013”, above n105.

¹⁹³ Ofcom “The Communications Market 2013”, above n105.

¹⁹⁴ See generally: Rishworth and others, above n71, at 116-195.

¹⁹⁵ C-201/11 *Union des associations européennes de football (UEFA) v European Commission*, above n8, at 10-21.

Modern times may have negated or enhanced that importance. The numbers may not prove an importance today. More importantly to this numerical analysis is what qualifies as a substantial proportion of society. Whilst these numbers may back up what we define as a substantial proportion they are only useful in the context. The definition of substantial proportion may be set at a percentage value or a threshold, whilst others would prefer to identify certain characteristics and use judgment to come to a conclusion. What is clear from the Directive is that a substantial proportion of society must be vested in the event.¹⁹⁶ This does not require the importance to flow to all of society, or even a majority of society. When considering the analytics, it is clear that different events may require a different combination of quantitative and qualitative analysis. When a situation, such as football is dealing with abstract benefits to society, the abstract should invariably be the strongest part of the discussion of substantial proportion. To focus on the data alone would be to focus on the information that is quantifiable and often excludes the abstract benefits. In this case, discussion would have to surround the proportion of society that is culturally affected by certain football competitions such as the EURO finals. Viewing numbers are a useful backup but fail to fully reflect the cultural importance and how society may be deemed to grow from these matches.¹⁹⁷

It is at this junction that the evidence of experts would need to be considered. Experts could range from a number of fields with differing backgrounds. The evidence of the experts will also not be conclusive for the purposes of any analysis. Experts will help the decision makers analyse the situation from their own background. Inherent in these backgrounds is that there may be some bias, even if the analysis is objectively undertaken. If trust is placed in one expert alone then an element of unreasonableness may permeate the decision. For instance, experts who deal with domestic violence may have a natural and understandable inclination that the proliferation of these matches may detrimentally affect vulnerable portions of society without any tangible benefits. As discussed above these views are essential to the process but must be considered in context. Evidence from multiple experts should be considered in any decision in order for it to be robust and defensible.

All the evidence that can be presented within governmental parameters should be considered. Governance and timing issues will restrict the amount that can be analysed in full. This is where the requirement of a clear and transparent process must be followed closely. The weighting of the evidence requires logical process and must be understandable and able to be defended. The weighting is a complex issue for decision makers, however if a robust mixture of qualitative and quantitative analysis is not conducted then in the views

¹⁹⁶ Directive 89/552/EEC as amended by Directive 97/36/EC [1997] OJ L202/60-70 article 3a (1).

¹⁹⁷ T-55/08 *Union des associations européennes de football (UEFA) v European Commission*, above n7, at 128-141.

of this author any decision reached would *prima facie* breach the Bill of Rights Act. This breach is because the decision reached would not be able to be properly defended and as such be an unjustifiable limitation on either the freedom to receive information, or on the freedom to impart information. The process is essential to the justifiability of the decision. The process taken by the United Kingdom, on the surface, appears to be commendable. The United Kingdom required stakeholder consideration in any decision which may affect an entity.¹⁹⁸ The viewpoints of those opposed are brought directly to the fore, this may cause more evidence being submitted against a declaration of something as of major importance but does add robustness to a decision reached. As long as a decision maker considers multiple viewpoints including quantitative and qualitative analysis the decision will be defensible.

(b) Analysis

As discussed above, especially in relation to football, events of major importance can allow for personal growth. Much of this growth is theoretical growth and hard to quantify. Whilst the potential for growth does exist, it is the view of this author that the growth is not as powerful of an argument as other freedom of expression justifications. It is not a central tenet within the right of freedom of expression. The political or civil rights that are often defensible through freedom of expression are not at risk here. It is hard to rationalise the connection between fundamental freedoms and events of major importance in this manner generally.¹⁹⁹ This leads to a discussion surrounding whether there is actually a right to receive this information or merely the privilege of having this available. Is there a right to receive the information or a right to see the information? Should we be extending rationales that stem from the heart of civilised society to something that is placed very close to entertainment?

Events of major importance straddle a difficult area, they are on the border between the right to see against the privilege to see and also are in an awkward area of freedom of expression that is based on potential growth. The arguments in favour of allowing the public to view the matches are tenuous and rely on guesswork in an area where guessing infringes multiple other rights, even if not all these are protected under the Bill of Rights Act.

¹⁹⁸ See: Broadcasting Act 1996 (UK) s98 as amended by the Television Broadcasting Regulations 2000 (UK); Broadcasting Act 1996 (UK) s101 as amended by the Television Broadcasting Regulations 2000 (UK); Code on Sports and Other Listed and Designated Events 2000 (UK).

¹⁹⁹ See: Andrew Butler and Petra Butler, above n70, at 311-318.

The matches in the United Kingdom are only watched by a maximum of forty percent of the population,²⁰⁰ with numbers dropping to minimum of four thousand viewers for one match.²⁰¹ Even with the limitations of figures this highlights that as a whole not all matches can feasibly be considered as of major importance. Many matches are easily deemed of little importance to the population, they will have limited effect on the tournament and are watched less than entertainment programming.²⁰² Furthermore, the maximum population that watched the most popular match does not massively exceed the amount of people who own Sky television (BskyB) subscriptions. It can be argued that having the matches on free television may not deprive anyone who would have actually watched the matches the ability to watch these matches. This is not a perfect argument but reduces the effectiveness of the arguments in favour of the public's freedom to receive the information.

It must also be noted that the Bill of Rights Act only gives the population a right to receive the information.²⁰³ As explained above this does not give the population the right to receive the information in a certain medium.²⁰⁴ This begs the question over whether, in modern society the nature of the information in a football match could be adequately portrayed without being on television. The information could still be available over the internet and radio in a commentary style. In the opinion of the author this argument is untenable on the facts. The justification requires viewership of the matches in order to enable personal growth in the way the paper envisages. This is not to say this will happen in all situations, it will depend on the information being presented and whether the nature of that information requires viewership or not with regards to modern society. If this was to be restricted to merely a right to receive the information and not a right to see the information the ability for growth would be restricted in the western world where television is ubiquitous.

The possibility for growth is also limited due to the large proportion of people watching them being beyond the formative years and thus with limited influence under imitation theory.²⁰⁵ In general, the population is beyond the age that are mostly affected by imitation theory, thus the enhancement of certain growth will be limited due to ingrained ideologies. Imitation theory works best amongst younger members of society, who, although they may

²⁰⁰ Ofcom "The Communications Market 2013", above n105, at 154.

²⁰¹ T-55/08 *Union des associations européennes de football (UEFA) v European Commission*, above n7, at 112.

²⁰² Ofcom "The Communications Market 2013", above n105.

²⁰³ Andrew Butler and Petra Butler, above n70, at 320-321.

²⁰⁴ At 320-321.

²⁰⁵ Berk, above n108, at 400-484.

be present cannot be said to be actively watching the matches.²⁰⁶ This limits what potential for growth there may be.

Despite these negatives the potential for growth of the public is still present, albeit limited in scope compared with when it is analysed in a theoretical manner. The potential for a person to grow and the population in general could help alleviate racism, sexism and provide good role models. The public would also probably be stripped, in some manner, of the ability to watch the games if they were not broadcast on free television. Although the exact amount of limitation is questionable. Furthermore in New Zealand the infringement of property rights which are not already limited in this manner requires a higher threshold than in the United Kingdom. The discussion in the United Kingdom would place less importance on the property rights as for a long time they have been restricted and the legal challenge is to re-introduce the full bundle of rights.

The negative implications temper the freedom of expression argument as it allows for the potential of more violence through more widespread viewership. This does not necessarily mean it is contrary to the justification. Having more widespread viewership may offer a better platform to address those issues and even enhance the argument that this is justified. The matches themselves could enhance personal growth by containing advertisements or information that can tackle these societal issues. It is the view of the author that the combination of scope for actual or potential personal growth is not as strong as theory would suggest.

The combination of the viewership numbers and the limited applicability of growth lead the justification to have these on free television as low for the inclusion of all matches. On these two issues alone there is, arguably, enough to say that the Directive could be justifiable under New Zealand law. Some matches do appear to have a higher justifiability with some being very low, the inclusion of the entirety of the EURO finals does appear to still meet the justification threshold in this section. On the balance, the potential growth for society through this directive can be said to outweigh the right to withhold the information. The right to withhold, under freedom of expression, is breached here, although the breach is less important than other breaches due to the nature of the information. The information is commercial in nature and always intended to be sold, but only sold at a lower price. This brings in some economic issues that need to be discussed before any full conclusion can be reached.

²⁰⁶ At 400-484.

(c) Economic Issues

Many of the issues in the Directive arose around economic rights, such as fair competition, equal treatment and a breach of property rights.²⁰⁷ The issues of fair competition and equal treatment argued that the television market was giving a preferential position to free-television operators. This argument was ruled out by the CJEU.²⁰⁸ The issues may still arise depending on how the television market is characterised. In practice it must be noted that some benefits are conferred upon free-television providers from this directive that does cause paid television operators to be at a disadvantage. Paid television operators require exclusivity in order to provide programming and gain subscriptions. This directive effectively undermines their business model and has the practical effect of providing free television providers with a preferential position. Although this is an infringement on how a business may operate it is not decisive as regulation is accepted in business. The actual restriction is a business choice, not a legislative one. All businesses can still purchase the rights. This may appear to ignore the practical reality but is a weak argument in restricting the public's freedom to receive information.

The stronger argument within the economic field is not that the marketplace is distorted through effectively ruling out some competitors but that property rights are infringed by forcing a sale to a certain class of persons. The Directive forces property rights to be sold. Regardless of the fact these rights were created with the intention of sale for profit, this is an interference into property, which is considered of paramount importance to society.²⁰⁹ When discussing this it must be noted, that this is not land or chattels that are being discussed but a form of property best characterised as intellectual property. There was argument before the Court that it would not fit within the definition of property in the United Kingdom.²¹⁰ The Court disagreed with this finding that it fitted within the definition of Property within article 17(1).²¹¹ There is some strength in the force that these rights are better categorised as bundles of contractual rights rather than property. None of the Courts questioned this in great detail, whilst an arguable counter, it is probable that this will be classified as a form of property in New Zealand. Interference with property rights requires a strong justification. As property rights are said to be one of the reasons we entered into society, any justification must be strong enough to override this historic importance. As it

²⁰⁷ C-201/11 *Union des associations européennes de football (UEFA) v European Commission*, above n8, at 9.

²⁰⁸ C-201/11 *Union des associations européennes de football (UEFA) v European Commission*, above n8, at 77-80.

²⁰⁹ John Locke *Two Treatises of Government* (1690) sec 138 ch 9.

²¹⁰ Advocate General Jääskinen, above n9, at 33-45.

²¹¹ Charter of Fundamental Rights of the European Union [2012] OJ C326/391-207, Article 17.

stands, the infringement with these property rights would move this towards not being justifiable in the entirety. The final step in this process is to discuss whether the costs charged for BskyB would put this information out of the reach of a substantial proportion of the population.

(d) Costs associated with BskyB

The main argument in favour on having the information available on free to air is that without access, a substantial proportion of the population would be deprived of the ability to receive the information.²¹² This concern is about information being available regardless of the amount of discretionary income available to a person. It is logical that those most affected by not having the Directive would be poor and as such this can be a way of enabling personal growth in society. In a basic sense this is a strong justification, the importance of equal access to nationally important information is high. Despite this it is readily accepted in other important contexts, such as newspaper subscriptions, that access to information can cost, regardless of how important that information may be. We need to discuss whether the fees paid for BskyB are beyond what could be considered as reasonable in order to obtain the information in a certain medium. BskyB is utilised as it is the dominant paid television service in the United Kingdom and often holds sporting rights as they are central to its business model.²¹³

In the United Kingdom BskyB with a subscription to sporting channels costs £46.²¹⁴ Also in the United Kingdom a subscription to The Guardian newspaper in print and across all modern devices is £44.²¹⁵

In this manner it is difficult to perceive how the additional £2 required for a subscription to BskyB over an all-inclusive newspaper subscription can be deemed as excessive. It is difficult to see how this difference deprives a substantial proportion of the population the ability to access the information. As BskyB is already in half of the households in the United Kingdom, the access issue is further questionable.²¹⁶ How can something be said to deprive a substantial proportion when a maximum of half the population may be required to spend £2 per month. As the EURO Finals match received a maximum of forty percent of the United Kingdom television audience it is arguable that nobody would be deprived

²¹² Directive 89/552/EEC as amended by Directive 97/36/EC [1997] OJ L 202/60-70 article 3a (1).

²¹³ Sky Television “Annual Review 2013” (August 2013) Sky Television <www.corporate.sky.com>.

²¹⁴ Sky Television “Sky Shop” (20 July 2014) Sky Television <www.sky.com>.

²¹⁵ The Guardian “Subscribe” (20 July 2014) The Guardian <www.subscribe.theguardian.com>.

²¹⁶ See: Sky Television “Annual Review 2013” (August 2013) Sky Television <www.corporate.sky.com>; Office for National Statistics “Census 2011” (17 December 2012) Office for National Statistics <www.ons.gov.uk>.

of the ability to view the match, given how BskyB is built off of exclusive access to sporting events.²¹⁷

This is an attractive argument but without adequate figures it remains theoretical. The argument could also be flawed. Comparisons to newspaper services will not necessarily deprive the public of the news, but merely limit them to the free versions which may not provide them in as pleasant a format. If the EURO championships were on BskyB, half the population or more would be limited from accessing the matches in a manner that the others were able to. This is a restriction that could deprive a substantial proportion the population of the ability to obtain that information. This makes the cost comparison ineffectual, unlike newspaper subscriptions, the choice is to either pay or miss out entirely. As such any comparison is not on aesthetic appeal, but on necessity and changes the fundamental character of the information.

These flaws undermine the relative cost scenario and add weight that the fact that such an infringement is justifiable. However, when combining that the ability for growth is inherently theoretical and the negative impacts are tangible, it could be argued that these costs are in proportion to the importance, societally, of the rights in relation to football. The costs of BskyB does not strengthen or weaken any argument on the surface without more information being present, it just provides potential contrasting views that require consideration by a decision maker.

(e) Conclusion on s5

Overall the Directive, based purely on a freedom of expression footing is prima-facie justifiable under s5. As freedom of expression does not work in isolation, property rights and economic issues appear to support the conclusion that the inclusion of the whole of the EURO finals is not justifiable. This is because we start with a limited justification. In this instance there is a general feeling that the freedom to receive information is not a central tenet of freedom of expression. Personal growth is, in theory, encouraged this is tempered by the age of the audience and the viewership patterns of matches generally. Some matches are clearly more important than others, overall the EURO finals is only partially justifiable. If a closer connection was proved between the cultural importance of these events on television then this may warrant re-inspection. When holistically examined the balance is tilted in favour of the rights holder. It is difficult to say that this infringement is justifiable in the public interest. If the public is not that interested in the information and does not personally grow yet property rights are restricted arbitrarily this is unjustifiable. Assumptions are required in order to support either conclusion. If information arose that

²¹⁷ Ofcom “The Communications Market 2013”, above n105, at 154.

rejected the loss of money by the rights holder or proved that a significant proportion of those who wished to watch would be restricted if the rights were held by BskyB then this may require a re-evaluation. On the information present in the case, the entirety of the EURO finals are not justifiable under s5 of the Bill of Rights Act. This is due to the combination of low importance of some events, the infringement of property rights and associated economic loss and the arguable case that nobody will actually be deprived if the information is on BskyB.

4 Step Four

Step four is not required in this analysis, however the issue is finely balanced. Depending on the information presented and the weighting of that evidence then the infringement may be justified.

5 Step Five – Other Options

At this stage we must look for other options that may be available which may be more justifiable under s5.²¹⁸ It must be noted that we are looking for a method that is either more consistent or less inconsistent with the rights breached than the original method.²¹⁹

(a) Gala and National Team matches only

Many nations in Europe had listed ‘gala’ matches and matches with the national team within their list of major importance.²²⁰ ‘Gala’ matches are matches that contain teams that are historically of importance to the competition.²²¹ These will be matches not involving the home nation which may affect either the outcome of the tournament or are deemed as generally important matches. The restriction to ‘gala’ only matches has difficulties as sometimes ‘gala’ matches will still attract a lower viewing in comparison with some of the matches with home nations. However the importance of ‘gala’ matches have been reflected in the viewing numbers historically. This removes the issues faced with justifying the entirety of the EURO finals as of major importance as it only disrupts property rights and interferes with economic interests to the extent that the matches are actually important in themselves. This creates some compliance issues surrounding which provider will get

²¹⁸ Bill of Rights Act 1990.

²¹⁹ Geiringer, above n158, at 83.

²²⁰ T-55/08 *Union des associations européennes de football (UEFA) v European Commission*, above n7, at 115.

²²¹ At 113.

matches and creates uncertainty in the economic marketplace. Television providers will not know what they are hosting until potentially days before the match takes place. These compliance issues may suggest that the working is too difficult and the events need to be broadcast as a whole as delays in programming schedule affects advertisers and other stakeholders. These practical issues may be harder to overcome than as presently discussed and make this option illogical to put into place. That conclusion would appear unlikely as there was no argument on the practicality issue in the courts.²²² On the surface, this option still impedes property rights and economic interests but in a more limited way than the original option. It is more justifiable as the figures back up the importance to the population and match with the ability of personal growth in a better manner. This is not a perfect solution, but is less infringing and more justifiable than including all matches.

As this option is viable, then it is to be preferred over the option of the inclusion of the event as a whole. However the issues is finely balanced as to whether or not the issues is prima-facie justifiable under s5.²²³ A competent Court may accept that the decision maker was within its discretion to declare the event competent as a whole. If this occurred in New Zealand the applicability of the next steps would be on whether this was done through legislative purposes or under regulations from empowering legislation.

6 Step Six

This step is not required as, under the Directive, another option is present that is justifiable, however another option was present in New Zealand history which may house a solution to the issue which still protects the rights of the population whilst also protecting the economic, property and freedom of expression of the rights holders. This arose in the context of the 2011 Rugby World Cup.

VII Contrast with Rugby World Cup

Another option can be found in the solution to a situation surrounding television rights in New Zealand and the 2011 Rugby World Cup. Despite the Rugby World Cup being hosted in New Zealand no legislation was prevalent to force the rights holders into selling the rights on a non-exclusive basis.²²⁴ Despite no legislation being present multiple matches,

²²² T-55/08 *Union des associations européennes de football (UEFA) v European Commission*, above n7; C-201/11 *Union des associations européennes de football (UEFA) v European Commission*, above n8.

²²³ Bill of Rights Act 1990.

²²⁴ See: Three News “Key lets Maori TV have the World Cup” (14 October 2009) Three News <www.3news.co.nz>.

including some highly important ones, were aired on free-television channels.²²⁵ In order to avoid a messy bidding war between free-to-air channels for the rights the International Rugby Board were selling, the government intervened and launched a joint bid that would ensure citizens had access to the games on free television.²²⁶ This led to both Sky Television and free-television providers hosting all ‘gala’ matches with Sky also having the rights for some ‘non-gala’ matches often exclusively. This can be seen as a similar result to only allowing ‘gala’ and home nation matches on free to air television. However, unlike enacting legislation this option still enables the market to work in the manner prescribed by the rights holders, removing the interference with property rights and economic interests being detrimentally affected. Nominally, the same result has been achieved without legislation being required. The issue on this front is that it is highly dependent on the rights holder choosing to sell the rights in a manner which allows both free and paid television stations to compete. This may only last where this is deemed the best economic option and the money of paid television stations may eventually place us back into a difficult situation. Instead of dealing with an issue, this in effect leaves the status quo alone until a violation of the public’s freedom to receive information occurs. Whether public money should be utilised in this way is a policy question and does give free television providers, theoretically, a privileged position which raises other questions. This is the best option to protect rights out of all the options that are presented. However, if a justification exists for events that are actually of major importance, the other options are justifiable. This option achieves the same results for the public without hurting the rights holder’s property, freedom of expression or economic interests. Given the importance to the population, it is understandable if Parliament wishes to enact legislation to prevent a mishap in the future.

VIII Conclusion

This paper summarised the decisions of the GCE²²⁷ and the CJEU²²⁸ in finding that the legislation of the United Kingdom had followed a clear and transparent process and as such the acceptance of the legislation by the European Commission was valid. The CJEU corrected the GCE that the EURO finals were an event that is, in principle, divisible.²²⁹

²²⁵ Three News “Key lets Maori TV have the World Cup” (14 October 2009) Three News <www.3news.co.nz>.

²²⁶ Three News “Key lets Maori TV have the World Cup” (14 October 2009) Three News <www.3news.co.nz>.

²²⁷ T-55/08 *Union des associations européennes de football (UEFA) v European Commission*, above n7.

²²⁸ C-201/11 *Union des associations européennes de football (UEFA) v European Commission*, above n8.

²²⁹ At 37-39.

This correction did not alter the applicability of the decisions as the GCE had canvassed the issue in depth and had analyses which supported the listing of the entirety of the EURO finals as of major importance.²³⁰ In conducting this process the courts had limited powers of review and correctly decided that there was no manifest error in judgment and no breach of applicable community law in the designation of the United Kingdom.²³¹ The report of Advocate General Jääskinen opened the door to future potential litigation by clarifying that the limited powers of review would not exist if the legislation was challenged in the courts itself.²³²

As the directive is justifiable on the public interest of receiving information from events of major importance,²³³ the paper moved to analyse the nature of information in events of major importance and whether it fulfilled accepted theoretical freedom of expression justifications.²³⁴ Concluding that the information in the matches had the necessary requirements to fulfil the personal growth justification the paper discussed how personal growth could be achieved, noting that the potential benefits were numerous and could encourage immense personal growth in the community.

The paper then shifted to the context of New Zealand, discussing the potential for growth within a New Zealand Bill of Rights analysis.²³⁵ In deciding whether the entire EURO finals would be justifiable in New Zealand the paper highlighted that the information has not always been presented on free to air television. As such the arguments surrounding property rights gained more strength than in the context of the United Kingdom. Having information received in a certain manner historically can change the importance to the public of having the television market regulated. If the information has historically been on paid television changes the balancing of the rights. This difference, in New Zealand, shifted the balance of the justification in favour of UEFA, the rights holder. Overall, the inclusion of the entirety of the EURO finals, is unjustifiable although the point is finely balanced. It is conceded that due to the nature of the information is not a 'core' right under freedom of expression and a court may afford a wider margin of discretion than this paper

²³⁰ At 47-51.

²³¹ T-55/08 *Union des associations européennes de football (UEFA) v European Commission*, above n7; C-201/11 *Union des associations européennes de football (UEFA) v European Commission*, above n8.

²³² Advocate General Jääskinen, above n9, at 70, 71.

²³³ T-55/08 *Union des associations européennes de football (UEFA) v European Commission*, above n7, at 51.

²³⁴ Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A commentary*, (LexisNexis, Wellington, 2005) at 307-310; Paul Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, Auckland, 2003) at 309-313.

²³⁵ Geiringer, above n158, at 68; *R v Hansen*, above n12.

has allowed for.²³⁶ Lastly the paper questions the validity of such legislation overall, discussing how the Rugby World Cup 2011 achieved the same result in New Zealand without restricting property rights or impacting the market for rights. The decision on whether or not to legislate will rest with the Government of the time. If no legislation is enacted then the issue may merely be delayed into the future. Events of major importance are justifiable under freedom of expression, the strength of any relevant justification will depend on a number of factors that require a balanced quantitative and qualitative analysis. If this process is completed the courts will have a difficult time in deciding that such a designation is not legitimate. The ‘fringe’ nature of these rights should afford the decision makers a wider margin of discretion when compared to issues dealing with ‘core’ rights.²³⁷ Football, as such, can be protected information under freedom of expression.

²³⁶ Paul Rishworth and others, above n71, at 312.

²³⁷ T-55/08 *Union des associations européennes de football (UEFA) v European Commission*, above n7, at 87.

IX Appendix A

The provision of the Directive concerned, Article 3a (1) states:²³⁸

Each Member State may take measures in accordance with Community law to ensure that broadcasters under its jurisdiction do not broadcast on an exclusive basis events which are regarded by that Member State as being of major importance for society in such a way as to deprive a substantial proportion of the public in that Member State of the possibility of following such events via live coverage or deferred coverage on free television. If it does so, the Member State concerned shall draw up a list of designated events, national or non-national, which it considers to be of major importance for society. It shall do so in a clear and transparent manner in due and effective time. In so doing the Member State concerned shall also determine whether these events should be available via whole or partial live coverage, or where necessary or appropriate for objective reasons in the public interest, whole or partial deferred coverage.

²³⁸ Directive as amended by Article 3a (1).

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