The role of the media

1. Foster greater transparency in the coverage of sport corruption. A particular responsibility lies with the international media organisations, including those which support the 2003 Charter on Media Transparency, to raise issues of transparency and accountability in sport management in national and international sports organisations.
2. Media organisations and institutions must adopt policies that ensure coverage of social issues in sport as a way to monitor corruption in sports organisations.
3. Encourage journalists to investigate allegations of corruption in national and international sport associations.
4. Educate journalists in sport corruption and its consequences

Conclusion

Corruption in sport should be addressed quickly, tackled heavily and punished severely. Sports bodies in Britain, such as the Jockey Club and the Football Association, have recently had to face a number of unwelcome and fraud-based allegations, and they have done reasonably well as supported by the UK Sports Minister. Corruption in sport is not, of course, confined to Britain. For instance, Italy's victory in the FIFA World Cup of 2006 did little to hide the extent of the problems faced by domestic football in that country. The time to address corruption in European sport is now. The only four horseman that should "ride alongside sport" are not violence, racism, drugs and corruption but integrity, fairness, transparency and trustworthiness. In order to ensure this, it is hoped that the Play the Game initiative on anti-corruption standards in sport will be endorsed, even adopted, at a higher level. It would be most apt if the Polish Ministry for Sport - which has, in the guise of this conference, shown its commitment to good governance in sport - would raise and promote a similar programme at future council meetings of EU Ministers for Sport.

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Effects of the EU Anti-Doping Laws and Politics for the International and Domestic Sports Law in Member States*

by **Magdalena Kedzior****

Introduction

It is generally believed that the greater the role of economic factors in sport, the greater the impact of law in sport.[1] This is also true of Community law.[2] In her speech delivered on 28 November 2003, *Viviane Reding,* then the EU commissioner for sports matters, announced that the elimination of doping in sport is to become one of the priorities in the Community's policy.[3] Such a declaration raises the question of the legal grounds that might lie at the EU anti-doping policy, or of the extent to which Community law might influence the anti-doping laws and regulations adopted by international sports federations, or of the relationship between WADA (*World Anti-Doping-Agency*) and EU policy, regarding the fight against doping going on today.

Legal sanctioning of doping at the international level - historical background

The battle against doping in sport that had been fought until late 1990s under the auspices of the International Olympic Committee was not successful. Poor international collaboration rendered the unification of procedures or jurisdiction impossible.[4] Despite the existence of an international legal document that addressed the problems of doping in sport, which took the form of the Anti-doping Convention of the Council of Europe No 135 issued on 16 November 1989 and ratified by the government of Poland on 1 November 1990[5], it soon turned out that it was not an instrument capable of resolving the technical complexities (or technical problems) encountered in the fight against doping in sport.[6] The unquestionable advantage of having the Convention, however, is the fact that it triggered off mechanisms that broadened awareness of, and interest in the problem of doping in sport.[7]

The impulse that had significantly accelerated the efforts to develop effective ways of eliminating doping worldwide - and therefore also within the Community - were the doping scandals that came to light during the *Tour de France* race in 1998, when substances known for their doping characteristics were found in the samples taken from the *Festina* team. It was then that both the Council of Europe and the European Union resolved to take measures that would decidedly fight doping in sport.

At the Vienna summit in December 1998, the Council of Europe expressed its concern about the growing number and scale of doping scandals in sport. Those concerns were later reflected in the so called Community Plan to Combat Doping in Sport. That document had laid the grounds for a large-scale information and education campaign. The Council underlined the necessity of joint action at the Community level and obliged the European Commission to investigate the existing anti-doping laws in member states.[8] Further, basing on the opinion of the European Group of Ethics[9], the European Committee announced mobilisation of all Community instruments that might contribute to the elimination of doping in sport. At the same time it was agreed that

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1 For more on the increasing role of the legal factor in sport see in Verrechtlichung, B. Heß, Aktuelle Rechtsfragen des Sports, Heidelberg 1999, p. 10; M. Kedzior, Gerichtliche Überprüfung von Vereinsstrafen am Beispiel von Sportverbänden im deutschen und polnischen Rechtssystem, Hamburg 2005, p. 62.(in German)

2 A. Röthel; Kompetenzen der Europäischen Union zur Dopingbekämpfung, (in:) V. Röhricht, K. Vieweg, (ed.), Doping-Forum: aktuelle medizinische und rechtliche Aspekte, Stuttgart 2000, p.109.

3 www. europa.eu/rapid/pressReleasesAction.do?reference=IP/01/983.

4 The beginnings of the fight against doping internationally date back to 1967 when a list of prohibited substances, and later also methods, was adopted by the Medical Commission. The list is regularly revised and updated.

5 conventions.coe.int/Treaty/Commun/ListeTraites.asp

6 R. Wysoczanski, Implementation of the Council of Europe Anti-Doping Convention and the International Olympic Anti-doping Card in Polish sports rules and educational activity (in:) A. Szwarc (ed.) Legal Issues of Doping in Sport, Poznan 1992, p. 80.

7 The appendix contains a list of substances and methods regarded to be of a doping character. A protocol to the Conventioned signed in Warsaw on 12 September 2002 with effect on 1 April 2004 provides for mutual recognition of the anti-doping control tests results and permits anti-doping controls being performed by one state, signatory to the Convention, in another signatory state without prior notice.

the protection of sportsmen's rights was a higher goal of the world-wide anti-doping policy that should involve the harmonisation of doping rules and procedures, as well as disciplinary sanctions and the determination of a uniform list of illegal products and methods, giving priority to the health of the sportsmen through exercising anti-doping controls and checks also at times between competitions. The document failed, however, to specify on what legal grounds the European Union could base its intended action.

Legal grounds of the Community anti-doping policy

The EC founding Treaties and subsequent reforming treaties[10] do not contain any provision that would regulate *stricte* sports issues[11]. Consequently, the classification of sport, and therefore the anti-doping policy as an area of EU activity, is not at all clear.[12] Doping in sport is a multi-dimensional phenomenon and therefore the European Commission, in seeking to combat it, reaches for legal instruments which are also available in other policies. Depending on the needs and the intended goals, the Commissions may apply measures that already exist in health protection policy (Art. 152 TEU), cultural policy (Art. 151 TEU), consumer protection (Art. 153 TEU), education and youth policy (Art. 149 TEU), research (Art. 163 TEU), or workers' protection (Art. 137 TEU). It should be noted here that in all the above areas, the Community activities follow the subsidiarity principle, i.e. they are reduced to merely assisting, coordinating and complementing the efforts undertaken in individual member states.[13]

In a document on the European model of sport published in 1998[14], the European Commission pointed to the fact that sportsmen were *inter alia* bound by EU directives prohibiting the taking of pharmaceuticals to achieve purposes other than the intended ones.[15] Community law also prohibits advertising pharmaceuticals[16] or selling them without prescription[17]. Sportsmen are also bound by the provisions of the directive on the implementation of measures to improve the safety of workers and health protection at the place of work.[18] Doping may also be combated within the framework of the 3rd pillar of the EU - Police and Judicial Co-operation in Criminal Matters.[19]

Another issue that requires consideration here is the extent to which the anti-doping laws and regulations in member states may be the subject of harmonisation of legislation as provided in the Treaty.[20] Under Art. 94 TEU and Art. 95 TEU, the harmonisation of the legislation of member states shall only be for economic purposes resulting from the harmonisation of the common market. This, in turn, means that pursuant to Art. 94 and 95 TEU, harmonisation for economic purposes applies mainly to laws regulating the products of a doping character, and, *inter alia,* their importation or marketing. Other anti-doping regulations, such as *eg*. penalties for the use of doping products, are considered to fall outside the scope of the competences of the Community due to their *stricte* sports related nature, and their harmonisation in different member states is not deemed necessary.

Doping in the jurisprudence of the European Court of Justice

The starting point of every decision of the ECJ in sports matters is the continuous or unchanging statement that the Treaty provisions apply to a sporting activity insofar as that activity may also be treated as economic.[21] Consequently, the cases that had come before the ECJ until very recently, concerned different economic aspects of sporting activity, such as transfer rules (*Bosman*)[22], rules governing the composition of sporting teams (*Dona23, Bosman*), or rules on the dates of transfers (*Lethonen*).[24] Cases related to non-economic aspects have been exceptional and the decisions of the ECJ have not been unanimous.[25]

Consequently, the ECJ decision in *Meca Medina & Majcen v. Commission*26 may be treated as a certain breakthrough in the approach to sports jurisdiction in the Community. Here, the ECJ expressed an opinion on the legal character of doping sanctions and the extent of the applicability of Community law to the anti-doping rules and regulations of international sports organisations.[27] In *Meca Medina & Majcen v. Commission I* of 30 September 2004 the Court of First Instance although confirmed that the rules regulating the elimination of doping in sport are based exclusively on premises related to sport only, it also held that since those rules are not directed to achieve an economic purpose, they fall outside the scope of the Community competition law (Art. 81 TEU), or the provisions protecting freedom to provide services (Art. 49 and subsequent articles of TEU)[28]. In its final ruling of 18 July 2006 the ECJ held that "the very fact that a given provision is of a strictly sports nature, does not automatically result in excluding the person involved in the activity regulated by the provision in question, or the organ that issued that provision". The ECJ held that if a given sports activity falls within the scope of the Treaty provisions, the conditions under which this activity is performed must take notice of the requirements of Community law, and in particular those seeking to provide for free movement of people, freedom of establishment or free competition.[29] Consequently, the stance taken by the *Court of First Instance* has been qualified.

In *Meca-Medina & Majcen,* the ECJ took a general view that anti-doping provisions set out by sports organisations and the provisions of Community competition law belong to two different legal systems[30]. At the same time the Court held that in their essence the anti-

8 In consequence of the above decision, the European Commission initiated a number of projects conducted by research institutes in selected member states, one of them being "Legal comparison and the harmonisation of doping rules", No C116-15, carried out in the years 2000-2001by an international group consisting of scientists from the Asser Institut, Erlangen-Nürnberg, Max-Planck Institut, and Anglia Polytechnic-University, Chelmsford. The same project contained a report of the legal situation of anti-doping in sport in Poland. (see: M. K_dzior, Country Report: Poland - legal situation in 2001, available on CD-ROM).

9 Look for the position of the European Ethic Group on Ethical Aspects of Doping in Sport from 11 November 1999; www.ec.europe.eu/european_group_ethics/doc/avis14_en.pdf. The following are recommended: formation of specialist information units composed of medical doctors and psychologists to support sportsmen, adoption of a directive protecting young sportsmen, adoption of a separate directive protecting sportsmen as a professional group under particular risk , close collaboration of police forces and the administration of justice, inclusion of anti-doping clauses in contracts signed with sportsmen.

10 The draft of the Treaty establishing a Constitution for Europe includes some significant proposals towards regulating sports activities. Till date, the EU has issued the following documents: Appendix No 29 to the Treaty of Amsterdam of 1997, i.e. the Declaration on Sport and the Nice Declaration on the specific characteristics of sport (2000). Also see: Foks, Sport in the draft of the Treaty establishing a Constitution for Europe in "Sport Wyczynowy" 2004, No 7-8, p. 6.

11 K. Vieweg, The legal autonomy of sport organisations and the restrictions of European law, (w;) A. Gaiger, S. Gardener (ed.), Professional Sport in the European Union, Den Haag 2000, p. 90, com. J. Foks, National vs international law in sport - case Poland, "Sport Wyczynowy" 2006, No 1-2, p. 74.

12 M. Kedzior, op.cit., p. 60.

13 Das Europäische Sportmodell, Disskussionspapier der Generaldirektion X der Europäischen Kommission, SpuRt 2000, p. 62, com. A. Röthel, op. cit., p.109; com. Steiner, Doping aus verfassungsrechtlicher Sicht, (in:) V. Röhricht, K. Vieweg, (ed.), Doping-Forum: op. cit., p. 128.

14 www.europa.eu.int/comm/dg10/sport/publications.

15 EEC Directive 65/65/ amended by EEC Directive 89/341.

16 EEC Directive 84/450.

17 EEC Directive 75/319 amended bt EEC Directive 89/341.

18 EEC Directive 89/391.

19 Das Europäische Sportmodell, op. cit., p. 62.

20 A. Röthel, op. cit., p. 112.

21 Also see case 36/74 of 12 Dec.1974 Walrave & Koch (Rec. 1405 point 4), case 13/76 of 14 July 1976 Dona (Rec. 1333 point 12), case C-176/96 Lethonen of 13 April.2000, (Rec. 2681 point. 32).

22 Case C-415/93 of 15 Dec.1995, Rec. I 5078.

23 Case 13/76 of 14 July1976, Rec. 1333.

24 Case C-176/96 of 13 April, Rec. 2681.

25 W. Schroeder, Anmerkung zum EuG Urteil v. 30.9.2004 - RS. T-313/02, Meca Medina und Majcen / Kommission, SpuRt 2005, p. 23.

26 Judgement of the EC First Instance Court of 30 Sep..2004 regarding case T-313/02, Meca-Medina and Majcen / EC Commission (See. Orz. II-3291).

27 See M. Kedzior, op. cit., p. 120.

28 Judgement of the ECJ in case C-519/04 P, Meca-Medina and Majcen / EC Commisssion of 18 July 2006, nb. 9.

29 ECJ judgement in case C-519/04 P, op. cit., nb. 28.

30 The application of anti-monopoly law in sport has been considered by European legal scientists since the 70s of the 20th century. The legal grounds for that can be found in Article 81 of the TEU prohibiting concerted practices and Article 82 TEU on dominant position. The establishing of tolerance thresholds in regards of prohibited substances and their use may be viewed as concerted practices, while the abuse of a dominant position shall occur when a given sport organisation administers a disqualification that shell be too long. For more, see K. Vieweg, op.cit., p. 90.

doping provisions do not restrict or limit the freedom of movement of persons because as such they address only sports issues and have nothing to do with economic activity. However, the ECJ noted a possible correlation between the anti-doping provisions and Community anti-monopoly law. It held further, that anti-doping rules on a scale exceeding that absolutely necessary to ensure proper execution of sports competitions may contravene Community law by prohibiting free competition. In the reasons for its judgement the ECJ said that "the repressive character of anti-doping regulations and the weight of the applicable penalties in case those regulations are violated may negatively influence competition because if those penalties turned out unjustified, this could lead to the unjustified exclusion of a sportsman from sports competitions, thus distorting the conditions necessary for performing a certain activity".[31] The ECJ stated explicitly that a doping related disqualification that infringes the principle of proportionality, too severe a sanction or faulty differentiation of sanctionable doping instances from those that are not punishable ones, would amount to an infringement of Community competition law.[32]

This statement constitutes a certain novelty in the line taken by the ECJ in its anti-doping jurisprudence, despite the fact that the application of the principle of proportionality to adjudicate in matters where Community law is in conflict with the autonomy of the sports movement has already been proposed by sports law scholars.[33]

The principle of proportionality must also be observed when disqualification, which in fact restricts or limits the right to exercise a certain activity, is a result of disciplinary proceedings conducted in compliance with the requirements of the state of law. Such proceedings should first of all be based on clear anti-doping laws applied in a uniform manner with regard to all sportsmen, and coordinated at the national and international level.[34] Further, the principle of proportionality shall be respected only if the organs administering the sanction of disqualification are independent. Last but not least, the principle of proportionality requires that each time the gravity of the infringement of the law is weighed against the grounds justifying that infringement.[35]

Formal reasons precluded the ECJ from formulating an opinion regarding a claim that the anti-doping rules of international sports federations may infringe the Community provisions protecting the freedom to provide services (Art. 49 TEU and subsequent articles). It seems, however, that the ECJ deliberately refrained from expressing its opinion regarding that issue. The effects of the ECJ decision in *Meca-Medina & Majcen* that anti-doping provisions infringing the principle of proportionality are contrary to Art. 49 TEU might be of a similar weight for the sports world as the consequences of its decision in the *Bosman* case.

Relations between the EU and WADA

Great hopes are pinned on the Word Anti-Doping-Agency WADA constituted on 10 November 1999, whose main objective is a fight against illegal doping in sport. Alongside the representatives of the Olympic movement, the Council of Europe and government administrations, its membership includes representatives of the European Union[36] in the person of the president of the European Council and members of the European Commission.[37]

The idea was that WADA would be a fully independent, non-governmental institution. The way it is financed though, indicates strong influences of the International Olympic Committee (IOC). In its first two years, the only funds WADA obtained, which was US$ 18.3m, came exclusively from the IOC.[38] Since mid 2002, however, the IOC has been financing only half of WADA's expenses. The other half has come from the governments of member states. Its total budget in 2006 was US$ 20.3m. Membership fees from European states accounted for 47.5 %, in comparison with 0.5% from Africa, 20.46% from Asia, 29% from both Americas and 2.54% from Oceania.[39]

It must also be added that the Nice summit in 2000 envisaged a direct support of WADA from the EU budget. That decision of the European Commission was prompted by the provisions of Art. 152 of the TEU (health protection), demanding, at the same time, *inter alia*, a wider control of the expenses originating in WADA's budget. This hope, however, was not fulfilled for political and legal reasons. The EU demanded greater competences in deciding on matters concerning WADA, such as a detailed estimate of its costs planned for the budget years 2003-2006, and a transparent determination of the mechanisms by which the contributions and donations were paid[40]. Consequently, the EU has continued to be financially involved in WADA's activities through the so-called 'pilot projects' realised on a case by case basis. An example of such an involvement here is, *i.a.*, the financing by the EU of a project concerning the so-called "sportsman's passport". The total cost of that project is EUR 400,000, of which the EU financed EUR 300.000.[41]

The fact that WADA managed to adopt, at its summit in Copenhagen in 2003, the World Anti-Doping Code (WADC) that harmonised the procedures and sanctions for using doping in sport was certainly an indisputable success. However, as there were certain difficulties in the implementation of the code, the provisions of the WADC had been encapsulated in a so-called Anti-Doping Convention, subsequently adopted by UNESCO on 19 October 2005[42]. Currently the Convention is in the process of ratification. The Convention, being a source of international public law, may now constitute grounds for implementation in each member state of binding anti-doping norms.[43]

Doping in Polish legislation

The current anti-doping laws of Poland[44] are contained in the Act of qualified sport (Law on Professional Sport) of 29 July 2005[45], and more precisely, in chapter 6 (Art. 50-55). Polish anti-doping regulations seem to be largely in line with the provisions of the World Anti-Doping Convention, and undoubtedly the list of methods and substances (products) prohibited by Polish law as having a doping effect[46] is the same as that provided in the Convention.[47]

What needs to be amended though, are the provisions that are overtly contrary to those set out in the Convention, i.e. art. 53 clause 3 of the Act that states that a refusal of a sportsman to subject him/herself to an anti-doping check, or failure to turn up for such a check shall result in the loss of a licence to participate in competitions for a period of 6 to 24 months.[48] Another highly controversial regulation in the Polish act is the provision of Art. 55 which very generally stipulates that sportsmen, coaches, and other persons shall be held liable for the breach of disciplinary anti-doping rules issued by international sport organisations, but does not specify, which rules, or of which international organisations or federations, it refers to.

31 ECJ judgement in case C-519/04 P, op cit., nb. 47.
32 ECJ judgement in case C-519/04 P, op. cit., nb. 48.
33 R. Streinz, Die Rechtsprechung des EuGH nach dem Bosman-Urteil, (in:) P. J. Tettinger (ed.), Sport im Schnittfeld von europäischem Gemeinschaftsrecht und nationalem Recht, Stuttgart 2001, p. 52; K. Vieweg, op. cit., p. 104.; K. Vieweg, A. Röthel, Verbandsautonomie und Grundfreiheiten, ZHR 166 (2002), p. 26.
34 In Polish literature of sports law on legal aspects of disciplinary proceedings, see: S. Stachowiak, Disciplinary proceedings in sport, (in:) A. Szwarc (ed.), Disciplinary liability in sport, Poznan 2001, p.119; in foreign literature, see: J.W. Soek, Die prozessualen Garantien des Athleten in einem Dopingverfahren, in: V. Röhricht, K. Vieweg (ed.), and Doping-Forum: op. cit., p. 35 and others.
35 K. Vieweg, A. Röthel, op. cit., p. 26.
36 "Sport Wyczynowy" 2004, No 3-4, p. 106.
37 www. europa.eu/rapid/pressReleases_IP/01/983.
38 www.wada-ama.org/en/dynamic_259.
39 www.wada-ama.org/rtecontent/document/Funding_2006_en.pdf.
40 www.europa.eu/rapid/pressReleases_IP/01/1727.
41 www.europa.eu/rapid/pressReleases_IP/02/212.
42 A.Wach, World Anti-doping Code - legal aspects, "Sport Wyczynowy" 2003, No 7-8, p. 38.
43 A. Wach, op. cit., p. 43.
44 The first anti-doping rules in Poland of a legal binding force were contained in Article 18 of the Act on Physical Culture of 1984, Dz. U. No. 34 of 1984, item 181, subsequently extended and included in the Law on Physical Culture of 18 January 1996r.(Article 47 and others.), Dz. U. of 1996 No 25, item 113.
45 Dz.U. of 2005, No 155, item 1298.
46 Ordinance of the Minister of National Education and Sport of 13 August 2004 on pharmacological substances and methods regarded as of doping character and consequently prohibited, Dz.U. No 195, item 2005.
47 J. Foks, op. cit., p. 72.
48 Com. A. Wach, Comments and opinions on professional sport of 25 July 2005, "Sport Wyczynowy" 2005, No 9-10, p. 46.

Conclusions

Because of the commercialisation and professionalisation of sport, the significance of fighting illegal doping has grown in importance and has now become a wide-ranging anti-doping policy within European Union law, while the relations between the anti-doping regulations of international sports federations and the Community laws have become the subject of the jurisdiction of the European Court of Justice. The European Union is an active supporter of the various WADA's activities, including the organisational and the financial. The adoption of the World Anti-Doping Convention may be seen as a certain achievement, or an accomplishment, justifying the reasons why the EU decided to cooperate with WADA, since it clearly shows that the Convention meets the expectations advocated by the EU, that first of all, the health and rights of sportsmen should be protected.

In its most recent case law the European Court of Justice has demarcated the autonomy and the limits of the international sports movement to set out anti-doping regulations. That boundary was based on the proportionality principle. Consequently, where disciplinary sanctions for doping in sports infringe the principle of proportionality, the autonomy of the sports movement ends, and EU anti-monopoly law applies. Consequently, the task before international sports federations and sports associations in member states is to set out anti-doping regulations as will meet the Community standards.[49] One would also expect that in its jurisdiction in the future, the ECJ will specify the line adopted in *Meca-Medina and Majcen* and will eventually take a clear stance on deciding whether a disqualification resulting from the use of illegal doping shall amount to a breach justifying a denial of the freedom to provide services on the EU market.

In order to comply with Community law, the Polish legislator should respect (i.e. incorporate into Polish law) the provisions of the EU directives on the anti-doping policy, and the guidelines articulated by the ECJ. At the same time all other players who may also become the subject of anti-doping policies, such as entrepreneurs, employers and the like, must additionally abide by the applicable domestic norms resulting from the incorporation of the relevant Community instruments into the domestic laws. Hence the hope that the Polish Act on qualified sport and the provisions of the World Anti-Doping Convention, when ratified by Poland[50], shall together constitute a coherent anti-doping system of legal regulations. Once that is accomplished, the next challenge will be the dissemination of those provisions throughout the whole sporting community in Poland.

49 Com. R. Streinz, op. cit., p. 49.

50 As at 14 August 2006, the Convention had not been ratified by Poland yet. For those states that have ratified the Convention, see: //www.wada-ama.org.

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Conceptual Approaches to Protecting the Publicity Value of Athletes in Germany and the United States*

by **Saskia Lettmaier****

I. Introduction

In a media-driven economy, nothing, to paraphrase an old saying, sells like success -success in sports in particular. Performance on the pitch frequently spells prominence off it, and prominence, in its turn, opens up a host of marketing opportunities: commercial exploitation of an athlete's publicity value may take forms as varied as catering to a public interest in his person and lifestyle, enlisting his charismatic qualities for advertising purposes, or selling merchandise bearing his name or other distinguishing characteristics.[1] In fact, many top athletes today make more money "mining" their celebrity status than they do exploiting the primary sporting talent which first created it.[2]

From a legal perspective, this growing commercialisation of the athlete persona raises two thorny issues: firstly, how does or should the law conceptualise the object traded in and, secondly, what protection against third parties does or should it afford? In other words, is an athlete's publicity value an asset in the public domain, a part of the intellectual commons that is free to all comers, or is it the property of the athlete concerned and as such subject to his (exclusive or limited) control? The following article represents an effort to answer these questions by reviewing the conceptual approaches taken and the protective regimes afforded to an athlete's publicity value in Germany and the United States.

The article provides first a status report on the current state of German law, where the debate on protecting publicity values was recently given a new lease of life by a string of high-profile court decisions. While remaining wedded to a personality-rights-based analysis, the German courts have upped both the level of protection and the amount of compensation available to athletes whose "personas" are commercially appropriated without their consent (II.). The article next takes a comparative look at leading US-American jurisdictions that promote the commercialisation of identity by recognising an intellectual property right in persona known as a right of publicity (III.). The concluding sections attempt a synthesis of the foregoing analysis and offer reflections on the likely future development of German law: they argue that while the US-American concept of separate protective regimes for dignitary and economic concerns may serve as an aid to clear thinking, giving athletes a freely alienable property right in the commercial value of their own identities is not a path Germany should follow (IV., V.).

II. The German "kommerzielles Persönlichkeitsrecht" as a personality right in the commercial value of identity

In German law, a person's identifying characteristics are protected either by special statutory personality rights - § 12 of the German Civil Code (Bürgerliches Gesetzbuch - BGB) protects a person's name and §§ 22 *et seq.* of the Art Copyright Act (Kunsturhebergesetz -

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1 On the different varieties of commercial exploitation, see *van Caenegem*, Different Approaches to the Protection of Celebrities against Unauthorised Use of Their Image in Advertising in Australia, the United States and the Federal Republic of Germany, 12 E.I.P.R. (1990), pp. 452, 453; *Magold*, Personenmerchandising: Der Schutz der Persona im Recht der USA und Deutschlands (1994), pp. 14 *et seq.*

2 Lucrative endorsement contracts signed by Olympic (gold) medallists may serve as an example. Nor does an athlete's publicity value necessarily decrease as his sporting prowess wanes. The "value" of former German tennis champion *Boris Becker*, e.g., was recently assessed at 1.2 million Euros for a Germany-wide ad campaign. See the recent judgement by the Landgericht München I [LG] [county court], Urteil v. 22.02.2006, Az. 21 O 17367/03. Another illustration of the same principle is provided by the case of former England captain *David Beckham*. Despite the fact that Beckham failed to win any major titles in his three and a half seasons with Real Madrid, where fading skills and injuries had increasingly left him on the bench, Beckham recently was offered and accepted a five-year contract worth nearly 200 million Euros to play for the Major League