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THE NETWORK CENTRE

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Dear [REDACTED]

CONSULTATION ON EVENTS LISTED UNDER PART IV OF THE
BROADCASTING ACT 1996

I refer to the letter from the Secretary of State to me of 10 July 1997.


I enclose the response of the Independent Television Association Limited to the consultation document, which I hope will be of assistance to the Secretary of State in his review of the list of Protected Events.

We shall be pleased to offer any further assistance the Secretary of State may require and meet with representatives of the Department should they so wish.

Yours sincerely,

Leslie Hill
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**CONSULTATION ON EVENTS LISTED UNDER PART IV OF
THE BROADCASTING ACT 1996**

1. **Response by the Independent Television Association Limited**

In responding to the Secretary of State's letter of consultation, we examine in this paper whether it is possible to produce a set of criteria which cover the eight events which are already listed as protected events, but are not drawn so widely as to produce a long list of less appropriate events.

We maintain the position which we expressed at the time of the last consultation process, to the effect that any argument to extend the list made by broadcasters will inevitably contain an element of "special pleading" from those who fear that they may lose valuable sporting contracts. We believe that it is important not to attempt to influence the criteria so as to produce the circumstances in which events that favour one broadcaster over another are listed.

The questions posed for consideration were as follows:

2. **Should there be a stated list of criteria to inform the listing process?**

Although there are advantages in having a list of stated criteria to inform the listing process, there are also significant disadvantages.

The debate as to which sporting events deserve protection by listing is one which tends to be influenced by the prevailing attitudes of the time. We submit that Parliament should retain the freedom to consider listing on its merits at any particular time rather than be obliged to consider the issue in the context of criteria which may have been agreed by a previous Parliament. There is a danger that set criteria will lead to inflexibility thereby curbing Parliament's freedom to take appropriate action.

Unless the criteria are genuinely objective there is a danger that they will be such as to favour those events which broadcasters would like to see protected at a particular time.

The popularity of individual sporting events varies over time as tastes change. The Ryder Cup and the European Football Championships have experienced an upsurge in popularity over the last ten to fifteen years, coinciding with the success of the National teams in the respective competitions. On the other hand, the Commonwealth Games and the World Athletics Championships have become less popular over the same period. Any criteria would have to be adequate to ensure that such events can objectively be assessed by the Secretary of State in deciding whether they should at any time be listed for protection. Presumably neither the Secretary of State nor Parliament would wish to find that the criteria were such that events could not be listed as they became more popular, whilst less popular events remained protected.

Additionally, new events are being created all the time. Future major events may be created over time through investment by a pay TV broadcaster. The Rugby League

World Cup Championship, recently broadcast in the UK by Sky, is an example. Surely it would be inappropriate to list such an event in circumstances where its very popularity arises from the effort and investment of a pay TV broadcaster?

3. **What should the criteria be**

The Secretary of State has suggested criteria, the fulfilment of at least one of which would render a sporting event appropriate to be considered for listing.

ITVA would submit that each of the criteria proposed in this paragraph is vulnerable to an unacceptable level of subjectivity, pursuant to which one broadcaster might argue that their favoured events would meet the criteria, whilst another broadcaster would make the same argument in respect of different events. Any criteria which are capable of a subjective interpretation are not likely to be helpful.

We do not believe that it is possible objectively to determine whether an event and its outcome has a "special national resonance". Events such as The Derby or Cricket Test Matches only have a special national resonance for some sections of the public. Does the outcome of the Derby have more of a special national resonance than, for example, The Oaks, or the 2000 Guineas, or any of the other "classic" horse races?

The question whether an event is of such pre-eminence and popularity as to give it a "particular potential for encouraging participation" is subject to even greater differences of interpretation. The FA Cup Final may be no more likely to encourage participation in the game of football than any other live and high profile football match, such as a match within the UEFA Champions League, or indeed a match in one of the earlier rounds of the FA Cup.

It would be difficult to agree which sporting events served to "unite the nation". Furthermore, the inclusion of the involvement of "the national team in the sport" as a criteria means that the Secretary of State might be invited to consider listing World Cup or European Football Championship qualifying matches, or the World Championships of any one of a large number of sports, including Athletics, Swimming and other high profile Olympic sports. This would lead to an inordinately large list of protected events.

We offer the following comments on the remaining suggested criteria:-

4. **"It is likely to command a large television audience"**

Size of television audience is not an important criterion. Test Match Cricket does not attract large audiences compared with the FA Cup Final or the World Cup Finals, or many other events which are not presently protected. Such Test Matches take place during the day, when television audiences tend to be smaller than during peakttime. The words "large television audience" would need some explanatory definitions if this were to be a criterion.

Should an event be deemed to have a large television audience if it passes a certain

minimum level of viewers? Where would that level be set? If a minimum audience level is set, will an allowance be given for the fact that certain events take place during times when total television viewing is lower? All of these are questions which would have to be answered. It is too simplistic to suggest that size of television audience alone should be a significant factor. There are clearly practical difficulties in determining what is a large television audience.

Furthermore, there are many events which attract very large audiences which it might be argued should not be listed. For example:-

- UEFA Champions League Matches (Average in 1996/97 - 9.9 million)
- Live FA Cup Matches (Average over 1996/97 - 8.5 million)
- Formula One Grand Prix (Average 1997 - 5.1 million)
- Coca Cola Cup Final (8.4 million in 1996)

These are clearly popular events, but popularity when broadcast in peaktime does not necessarily mean that they are events which are part of the national culture and deserve to be protected. Any argument for their listing would be influenced, we suggest, by a subjective desire on the part of broadcasters to retain contracts for their most popular events. ITVA does not believe that subjectivity or special pleading should form part of the process of deciding which events should be protected.

Indeed, there are many sporting events which attract very large audiences, which are not listed, although they are part of competitions where sport events are listed. World Cup qualifying matches featuring national teams are not listed, whilst the Finals, in which no national team may participate, are protected as a listed event. The Wimbledon Finals weekend is listed, yet live matches featuring British players during the competition are not, even though such matches may attract a much larger audience than the Final.

So if size of audience were the determining criterion, the list of Protected Events might have to be extended significantly, whilst some events which presently enjoy protection might lose their listed status. Other events in respect of which there has been public concern, such as the Open Golf Championship and the Ryder Cup, might also fail the "large audience" test.

5. **"It is a regular, readily defined event of limited duration"**

We would be concerned at how one might define "limited duration", in light of the fact that the Olympic Games and the Football World Cup Finals are listed events. These are both events of some length; two weeks in the case of the Olympic Games and four weeks in the case of the World Cup Finals.

6. **"It has a history of being broadcast live on free to air services"**

This is a difficult criterion to apply. For how long must an event have been broadcast on a free to air service for it to be said that it has a "history" of being so broadcast? The Rugby Union World Cup has been on free television for its three tournaments only. Would this be sufficient?

Such a criterion would automatically exclude new events, which otherwise the Secretary of State might wish to consider listing. An example might be a European Football super league developing out of the present UEFA Champions League.

Taking this suggested criterion together with the previous one, it appears that the Secretary of State could be denied the important discretion to list one-off events which he might otherwise wish to protect. Examples might be a British Finalist in a Grand Slam Tennis Final, or a play off Match featuring a British team to decide qualification for the Football World Cup Finals. On either of these two criteria, such events would fail to be listed.

Regardless as to whether such events should be listed, the Secretary of State might find himself with limited room for manoeuvre, if it was felt that an event was of such importance that he would want to act.

7. **"The impact of listing in reducing the income or potential income of the sport, and the consequences of that reduction for its investment in increasing participation and/or improving levels of performance and/or in creating safe facilities"**

This is one of the most significant factors to be examined in deciding whether to list a particular sports event.

There is no doubt that listing does affect the potential income of a sport, since it effectively obliges the rights owner to sell the rights to one particular category of broadcaster, (although this may not always be the case). This will normally shift the negotiating advantage significantly from seller to buyer. As a result, income is lost which may well have a profound effect on the amount of money the rights owner can reinvest, raising the possibility of considerable long term detrimental consequences for the sport concerned.

The effect is particularly pronounced when the event which has been listed is in reality a suitable purchase for only one of the terrestrial broadcasters. Some of the listed events have hitherto been more attractive to the BBC rather than to the commercial broadcasters, because of the availability of the BBC's second free to air channel, allowing the Corporation to cover events which require many hours of schedule time. Such events include Cricket Test Matches, and the Wimbledon Championships. The position is somewhat similar for Golf events such as the Ryder Cup and The Open Championship, which some have argued should be listed. It is impossible to see how ITV or Channel 4 could schedule a five day Test Match or four day golf event without being in breach of their licence obligations to broadcast news and children's programmes etc. Thus the potential income for the rights owners to such events could be severely limited, because the effect of listing would be to oblige

them to sell live rights to just one broadcaster. This situation may eventually change once DTT is established and ITV and Channel 4 have extra channels available.

There is little doubt that most sports would benefit from a healthy competitive market for television rights, since they have a need to invest in facilities, infrastructure and/or the grass roots development of the game. Cricket and Rugby Union are sports which appear to be in that position. Anything which limits the market place in the exploitation of television rights risks being detrimental to the sport concerned.

It is interesting that the rightsholders of major cricket, rugby union and football have voluntarily "unbundled" their rights, selling to both pay television and free to air, thus maximising income and retaining the widest possible exposure for their event.

8. **"The likely impact of listing on the broadcasting market, including future investment in sports broadcasting, the level of competition and the position of public service broadcasters"**

The listing of sports events could have a detrimental effect on competition.

We referred above to the advantages enjoyed by the BBC, with two channels, in negotiating with the rightsholders for events of long duration. The launch of digital terrestrial channels may eventually allow ITV (and Channel 4) to overcome some of their problems of limited capacity, and ITV intends to use its digital frequencies to offer enhanced coverage of some sports events which ITV already covers. So ITV (or Channel 4) might, in the medium term, be in a position to offer coverage of longer events such as cricket or golf, offering in depth coverage on digital channels with highlights on analogue. But, the listing of these events would make this impossible because coverage and penetration of the DTT services will be limited.

We believe then that the impact on public service broadcasters will vary, to the competitive advantage of the BBC and the detriment of ITV and Channel 4.

9. **"Whether there are arrangements to ensure that highlights of the event are available to all viewers"**

From a practical point of view, technical arrangements can always be made for a broadcaster to have highlights of an event. All that they need to do is reach an arrangement for the technical access to the host broadcasters' signal so that it may be transmitted to the transmission centre of the highlights broadcaster. This is a common and straightforward arrangement.

What is required is that there should be legal and contractual arrangements to allow highlights of the event to be available to all viewers. Rightsholders for sports with sufficient mass appeal are already doing this, particularly those who are parties to the

Voluntary Code of Conduct for Broadcasting of Sports Events. The Cricket, Rugby Union and Football authorities have all sold rights to both terrestrial and non terrestrial broadcasters, combining the width of coverage offered by a specialist sports

channel with the mass availability of terrestrial television. We believe that such an arrangement can and should be achieved by broadcasters by negotiation without interference in the market place which would result from legislation.

However, it is desirable that rights owners should maintain the widest possible television access to an event by reaching a direct agreement with a terrestrial broadcaster rather than placing the cable/satellite broadcasters in the position of "gatekeeper", so that the terrestrial broadcaster has to acquire the rights (rather than just the physical access) from the cable/satellite broadcaster. Such gatekeeper arrangements leave room for abuse. There may be competition issues which require that there should be measures to ensure that rights owners reach direct agreements with terrestrial broadcasters. A question may be raised as to whether the pay TV broadcaster is able to abuse a dominant position in selling rights to a "rival" broadcaster and, as such, be in breach of Article 86 of the Treaty of Rome. However, legislation concerning listed events would not be an appropriate area to provide for such measures.

10. Conclusion

For the reasons set out, we believe that it is not possible to come up with a meaningful, useful genuinely objective set of criteria which are sufficiently flexible to cover those events which have already been listed, yet sufficiently certain as to offer objective assistance to Parliament and the Secretary of State in deciding what events in the future ought to be listed.

We do not agree that a list of criteria would necessarily help to ensure that events are listed only where there is a strong case for doing so. We share the point of view expressed in the consultation document, that the particular significance of individual events is difficult to encapsulate in a set of general principles. If, as the consultation paper suggests, there is to be further consultation regarding the listing of specific events, we would question what particular assistance a list of criteria would offer to any subsequent consultation process. The Secretary of State should retain the discretion to consider events for listing as and when he considers it prudent to do so. In offering such events for listing, any subsequent consultation would be able to take place by way of an analysis of the particular merits and demerits of the event being proposed for listing.

It is ITVA's argument that the attempt to inform the debate by means of criteria has been a useful exercise. However, we have sought to demonstrate that any attempt to introduce criteria would introduce an unacceptable level of subjectivity into the decision making process. We do not believe that it is possible to come up with genuinely objective criteria, which are such as to avoid differences of interpretation by different parties. For that reason, we would not support the approach proposed in the consultation paper. The inherent discretion of the Secretary of State to make proposals to Parliament for the listing of events should be maintained in the same manner as provided by existing legislation.