

Kluwer Copyright Blog

Copyright law and football matches: impossible to match? (Part I)

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This post is based on the chapter “Audiovisual Coverage of Sports Events and Copyright Law: Originality in the Details?” in Natalie Helberger, Joost Poort, Martin Senftleben, Mireille van Eechoud, Stef van Gompel (eds.). Intellectual Property and Sports: Essays in Honour of P. Bernt Hugenholtz, Kluwer Law International, 2021.



The economic value of football broadcasting has reached impressive levels that appeared unthinkable decades ago. While the COVID-19 pandemic has affected the revenues of European football clubs (see [30th Annual Review of Football Finance](#) from Deloitte’s Sports Business Group), audiovisual rights still have a crucial role in securing the financing of sports events in the European Union.

At the same time, a global paradigm of online piracy enabling the retransmission of sports events on a worldwide basis has dynamically emerged. In this context, an important question is whether the classic copyright and related rights protection offers a solid legal basis for combatting online piracy, specifically regarding the broadcasting of live sports events, or whether the sports industry should be granted additional exclusivity through the establishment at EU level of specific protection, as is the case in certain Member States (currently Bulgaria, France, Greece, Hungary, Italy, Romania, Slovakia and Spain provide specific audiovisual rights, see: European Audiovisual Observatory, [Mapping report on national remedies against online piracy of sports content](#), 17 December 2021).

This post is divided in two parts. In the first part, the application of the EU concept of work in football matches is discussed (Part I). The second part explores the possible sources of originality in the filming and broadcasting of the match (Part II).

Football matches, creative but not original?

For football fans, football derives from a mysterious combination of preparation, skill, ingeniousness and hazard. Even if technical rules and time limits must be followed, moments or scenes of creativity are present. Who could deny that Diego Maradona's Marseille Roulette or Cristiano Ronaldo's legendary chop are not pieces of artistry? Or that Zinedine Zidane's Panenka penalty in the 2006 World Cup final does not bear a personal creative stamp? But, could they be considered as works in the sense of European copyright law?

In *Levola* (C-310/17), the CJEU constructed a two-fold analysis of the EU autonomous concept of work which consists of two elements: "originality" and "expression" (paras. 36, 37). Additionally, in a series of cases (*Painer* C-145/10, *Bezpenostní softwarová asociace* C-393/09, *Football Dataco* C-604/10, *Flos*, C-168/09 *Cofemel* C-683/17, and *Brompton* C-833/18) the CJEU affirmed that the concept of free and creative choices is at the heart of the EU originality concept.

The concept of "choices" is paradoxically both simple and difficult to define. Insignificant or obvious choices shall not be considered. Choices which are dictated by functionality cannot count as free choices. Choices shall point to the expression of the work. At the same time, the concept of choice appears to inherently hide an exclusion: arbitrary, random selections shall not be taken into consideration, since in that case the expression of the work is not the result of choices.

Nonetheless, the most important question from a copyright law perspective is whether the game as a whole could be protected as a work. The principle of non-protection of football matches by copyright law has been recognized in European copyright law. First, in *Football Dataco* (C-604/10) the CJEU denied the granting of copyright protection on the basis of skill, by declaring that skill does not amount to originality. The protection of football matches as intellectual creations was directly brought before the CJEU in the *Football Association Premier League* case (C-403/08 and C-429/08). The CJEU concluded that sports events as such do not qualify as protected subject matter under EU copyright law. As the Court stated, football games cannot be classified as works which are the author's own intellectual creation, since they are subject to rules of the game which leave no room for creative expressive freedom (par. 98).

The role of unpredictability

The CJEU justifies the exclusion of football matches from copyright protection on the grounds that there is no room for creative expressive freedom. Here, however, some clarification is necessary. Athletes express their individuality in many ways. Each game is unique, and it is characterised by individual, personal choices. Footballers can dribble, pass, run, shoot whenever they wish and in any manner they wish, assuming of course that they follow the rule of the game.

What is really missing, however, is the conscious placing of the athletes in a creative process, the outcome of which is commonly aimed and controlled by the players of both teams. Certainly, improvisation does not preclude copyright protection. For instance, an improvised play could still be protected. However, the footballer's moves are not only mainly unpredictable, but most importantly they have not been collectively aimed. Footballers are not motivated by a common collective will which points to a specific conception or expression of the game. The players of the opponent teams are competitors and not collaborators.

Therefore, football matches as unprocessed events cannot be protected as works. Moreover, single moves and the performing by the athletes of specific arrangements coordinated by the trainer could be seen either as mere expressions of skill or as methods, systems or ideas, which are unlikely to

meet the “expression” criterion, which was expressly established as an individual component of the EU concept of a work in the Levola decision.

However, there is room left for copyright protection for the filming and broadcasting of football matches, which may entail additional levels where creativity might be expressed. In the second part of this blogpost, an analysis of the possible sources of originality in the filming and the broadcasting of sports events will be made.

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