

FROM LUXEMBOURG TO BEIJING: “LIVE SPORTS COVERAGE” UNDER TURBULENCE

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A. Introduction

Live or deferred, sports telecast simpliciter is undeniably big bucks. Rights to all sports taken together are a multi-billion dollar business. Understandably, organisers protect to the maximum their investment as these events require patience, resources and money. The legal documents protecting such sporting rights are extensive in length. Contractual laws aside, various other sources of laws are available for this purpose.ⁱ Besides the legal framework, physical measures such as fingerprinting technologies or web-crawling techniques are also put into place.

Beginning in Venice in the 15th century, through to the 1710 Statute of Anne in the UK, modern copyright laws have made in-roads in wide ranging spheres where no other fields of law could afford appropriate safeguard. Copyright protects the creation of the mind and shields the expression of an idea within a legal cocoon. The crucial international instrument for copyright is still the Berne Convention (BC), instigated by French author Victor Hugo. Following the meeting of the *Association Littéraire et Artistique Internationale* (ALAI) in Rome calling for an international mutual cooperation, the Berne Convention came to fruition in 1886, to which the UK and China are both party to. The WIPO Copyright Treaty (WCT) 1996 is an improvement on the BC for the internet/digital age.

B. Protection of live sports

Article 2 of the Berne Convention protects: “Literary and artistic works” – *which include ... dramatic...; choreographic works ... cinematographic works to which are assimilated works expressed by a process analogous to cinematography... photographic works to which are assimilated works expressed by a process analogous to photography...*” (Emphasis mine)

The 1961 Rome Convention was a milestone for broadcasters. This treaty protects the “broadcasts” (also called the related or neighbouring rights) of broadcasting organisations. China is not yet a party to this convention.

One of the debatable issue disquieting both organisers and broadcasters is the classification of live sports under the BC. Can live sports as being played have enough creativity to amount to one of the works underlined above? A game although it is original while in progress, is not reproducible. The players cannot execute the same actions repeatedly in the same manner and with the same creativity/skill. Hence, the issue of protection for sports under copyright laws is on balance.

This is different for instance to a choreographed sportⁱⁱ. Such acts are rehearsed prior to them being performed and hence can be replicated time and again. Another choreographer can copy such acts and to some extent protection can be available. An artistic work can be described as any literary or artistic intellectual creation that has an individual character, regardless of its value or use, which may or may not have a material embodiment. Another core difference is that a performer as defined under the Rome Treaty does not include a sportsperson.

The ‘*broadcast*’ of live sports as such is protected under the Rome Convention as broadcasts. The Asser Report states: “Similarly any unauthorised use of television broadcast whether on another TV

channel or on the Internet is to be considered an infringement of the neighbouring right..." The sportsmen may also have protection for their image, but whether the playing of a soccer game in itself for instance, attracts copyright protection is another ball game altogether!

Is there copyright protection for live sports?

The Intermediate People's Court of Beijing upheld the lower court's decision in favour of copyright protection for live sports events in the case of *Sina vs. iFeng*ⁱⁱⁱ. The reasoning of this case is a legal innovation in the APAC region at least^{iv}. It is not a Supreme Court decision and the ruling of the highest court is eagerly awaited (the Defendant having appealed). The judgment in *Sina* is being heralded as the victory of sports organisers and its ambit can be wide ranging.

i. Facts of Sina vs. iFeng

Briefly, the facts were that *Sina* (an internet-based information service company) found that the defendant (*Beijing Tianying Jiuzhou Network Technology Co. Ltd – iFeng*) was advertising two prominent games of soccer on its website to which *Sina* had the exclusive rights. The case proceeded as a breach under copyright laws. *Sina* claimed that *iFeng* was infringing the broadcast of the TV signals of live games to the public through the use of an information network synchronisation system in the sporting event program. The defendant's main argument was that soccer games are not subject matter of copyright law. The court found as a matter of fact that *Sina* had exclusive rights to broadcast the CSL games on its websites and other platforms, including but not limited to live broadcast, recorded broadcast, broadcast on demand and postponed broadcast.

The court ruled that pictures of the CSL games are protected under Chinese Copyright Law, which passed the two pronged acid-test. The interesting question was the meaning or scope of originality in a live sports game. The court held that there is originality and that pictures *generated through recording of sporting events, meet the requirement of originality under Chinese copyright law, and shall be regarded as work.*"

ii. Facts of Football Association Premier League vs. Others (Joined cases C- 403/08 & C - 429/08) (Known as the Murphy case)

In 2011, the Grand Chamber of the European Court of Justice (ECJ) had the chance to answer the same question – whether there is copyright in live sports events? The ruling of the ECJ is unanimous on this score that there is no copyright in sports events per se.

The UK Football Association Premier League (FAPL) runs the English Premier League. FAPL's activities include the filming of the matches and making the audio-visual content of these games available to the public by means of TV broadcasts. FAPL licenses these rights on a national basis to individual broadcasters that have the right for those matches. FAPL claimed that the Defendants' activities were harmful to its interests as they undermine the exclusivity of the rights granted by a licence in a given territory. The ECJ held that FAPL cannot claim copyright in the Premier League matches themselves, as they cannot be categorised as works.

C. Analysis and scope of judgments on definition of works

The difference in approach is clear, explicit and unambiguous. The Chinese jurisprudence is far reaching and wider in its scope and ambit.

a. Difference - Definition of originality

The *Sina* judgment held that “*the originality is reflected in the fact that through different selection and production, different pictures will be created*”. The Court’s statement is that: ‘*Originality is the key for the court to decide whether pictures of the CSL games constitute work*’. The court in Luxembourg held on the other hand that “*to be so classified [sic] the subject matter concerned would have to be original in the sense that it is the author’s own intellectual creation...However sporting events cannot be regarded as intellectual creations classifiable as works... That applies in particular to football matches, which are subject to rules of the game, leaving no room for creative freedom for the purposes of copyright*”. The Luxembourg judgment further states that “*FAPL cannot claim copyright in the Premier League matches themselves, as they cannot be classified as works*”.

b. Assimilation of photographic images to works

The *Sina* judgment held “*through selection and arrangement of the recording cameras for sporting events, new pictures are created...Pictures generated through recording of sporting events, meet the requirement of originality under Chinese copyright law, and shall be regarded as work*” Under the Berne Treaty, “*photographic works to which are assimilated works expressed by a process analogous to photography*” is to be considered work. It is submitted that the *Sina* judgment concluded the technical process through which live sports are assimilated by a process of photography is therefore ‘work’.

However, one would be excused for thinking that the ECJ judgment is fundamentally different as it held that “*Sporting events, as such, have a unique and, to that extent, original character which can transform them into subject-matter that is worthy of protection comparable to the protection of works, and that protection can be granted where appropriate...*”

D. Conclusion

The Beijing judgment, it is averred, is enlarging the category of copyright works. This plausibility may be due to the underlying absence of China’s accession to the Rome Convention, thereby assimilating sports events as a broadcast (related rights). However, related rights do not require originality, an element which is the rationale in *Sina*. Critics have argued that in fact the Beijing judgment is protecting the programme event and not the live sports per se. Considering the number of times the Beijing court used the word “picture” (*supra.*) to aggregate it to protection of “works”; there is credibility in this argument.

The Chinese judgment is avant-gardist, liberal and ground-breaking compared to the conservatism of the ECJ. The reasoning of the Beijing Court is at least bold and states in no equivocal terms what the Luxembourg court struggles to hold – live sports can be protected under copyright laws. Moreover, with the progression of technology in the broadcasting sector, from 3D through the Ultra-High-Definition Television (UHDTV-4K) to Super High-Vision (SHV-8K) and multimedia inputs, the reasoning of the Beijing Court is more in line with the reasoning of some commentators who advocate for copyright protection in the intelligent use and original positioning of recording cameras to provide

creative images. It may also be a positive response to online digital piracy of sports in China^v which is, according to figures published by Go-Golf, the top country with 91% online piracy.

Nonetheless, the judgment in the Beijing Court raised a number of fundamental issues:

- a) CSL covers Chinese league games and whether the Chinese Court will be as accommodating to foreign games and afford similar protection in applying the national treatment principle is yet to be seen.
- b) Is the court protecting the sports programme or the sports event?
- c) How far is the judgment useful for games not recorded on intelligent positioning of cameras?
- d) How far can the individual components of the sporting event be subject to copyright? Can an individual player protest if other competitors begin to imitate his actions?^{vi}
- e) Where does the liability stop if sporting events become copyrightable?
- f) What are the economic consequences of giving protection to live sports coverage for the APAC region compared to Europe?

On the other hand, is the European Court in the Murphy case advocating a *sui generis* category of protection for live sports similar to the *sui generis* EU Database right? By restricting FAPL's claim to anthems and logos, has the ECJ not imposed a disproportionate burden of proof on potential claimant? How far is the single digital market following the Murphy case and will this be the solution to solving the problem of live sports protection in Europe? Or the WIPO Broadcasters' Treaty is the solution for such situations?

The Beijing Intermediate IP Court has in the meantime put the cat among the pigeons!

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ⁱ Study on Sports organisers' rights in the EU, Final Report, Feb 2014 (Asser Institute); see also T. Magoni: The Protection of Sports Event in the EU

ⁱⁱ Sporting events as dramatic works in the UK copyright system, Viola Elam, LLB, University of Florence School of Law, Florence, Italy

ⁱⁱⁱ (2014) Beijing Chaoyang District People's Civil (IP) First Instance Record No. 40334

^{iv} U.S. case of *Baltimore Orioles, Inc vs. Major League Baseball Players Association*, 805 F.2d 663 (7th Cir 1986), the court ruled that a baseball game is copyrightable. Reversed in the Supreme Court, 480 U.S. 941 (1987)

^v New Challenges of Chinese Copyright Law in the Digital Age: A Comparative Copyright Analysis by Seagull Haiyan Song

^{vi} See Paul C Weller, Levelling the Playing Field: How the Law can make Sports Better for Fans