

The Protection of Sports Events in the EU: Property, Intellectual Property, Unfair Competition and Special Forms of Protection

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Abstract This article analyses some of the legal tools available to organisers of sporting events under EU law and the law of EU Member States. The focus is on remedies based on property rights and contracts, as well as on intellectual property, unfair competition rules and so called “special” forms of protection. As it is well known, in fact, following the ECJ ruling in *Premier League v. QC Leisure*, sporting events *as such* do not qualify as works under EU copyright law. Nevertheless, the article shows that remedies based on both traditional and new forms of property, IP and cognate rights can still offer adequate protection to sports organisers. First, many sports events take place in dedicated venues on which sports organisers can claim exclusive use rights and thereupon develop conditional access agreements (i.e. “house right”). Second, the recording and broadcast of sporting events may give rise to a variety of intellectual property rights, especially in the field of copyright and related rights. Third, unfair competition rules, and in particular misappropriation doctrines, have been invoked to protect sporting activities from unauthorised copying. Fourth, special forms of protection have recently been devised at the national level in order to offer an additional layer of rights protecting sports organisers. The article argues that even in the absence of a dedicated EU harmonised right tailored to sports events, the current legal framework is well equipped to offer protection to the investments that the sport industry is making in this sector. The article also argues that national initiatives in the field have so far proven of little practical relevance and, as a matter of fact,

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have the potential to clash with the general EU legal framework. There is only one area that escapes this rule: a right to use sporting events data to organise betting activities, or in other words, a right to consent to bets. The article concludes that if such a right is to be recognised, it is not the field of intellectual property, nor even property in general, the most appropriate area of law at which to look.

Keywords *Premier League v. QC Leisure* · Intellectual property · Property rights · House right · Unfair competition · Misappropriation · Contracts · Sporting events · Right to consent to bets

1 Introduction

The object of this paper is to analyse the nature, ownership and scope of protection of the legal tools available for the protection of sports events in the EU. A specific right protecting sporting events is not generally available and recently the ECJ established that sports events as such are not copyrightable subject matter. On this basis, it could be argued that, absent an appropriate form of legal protection rewarding sports events organisers for their massive investments, the further development of sport could be impaired. Sport, as recognised by the same ECJ, represents a special sector not only in terms of the impact on the economy, but also in terms of the fundamental social and formative roles it plays in our society.¹

The ECJ decision that uncovered Pandora's box is *Premier League v. QC Leisure*, where the European Court of Justice held that sports events as such are not copyrightable subject matter due to the lack of free and creative choices. Following this decision, concern has been raised by the many stakeholders involved in the sport sector that the exclusivity underpinning their business model was undermined.² The field of sport is indeed a special one. Not many other sectors can be said to possess such a strong mix of economic and socio-cultural values. On the one hand, professional sports represent a large and fast-growing sector of the European economy – in particular due to the commercial significance of sports media rights. National and international sports organisations are leading economic agents: their decisions contribute not only to the regulation of professional sports, but also to the economic and commercial development of a specific sector, and in the case of major sporting events such as the Olympics also of a geographical area.³ On the other hand, sports can claim specific characteristics and an important societal function. Under this point of view, sports are widely regarded as playing a pivotal role as a “social cohesive”, a conveyor of

¹ See European Commission (2014); SportsEconAustria et al. (2012).

² See *ex pluris* the Sports Rights Owners Coalition (SROC) position at: http://sroc.info/files/9513/8667/7878/SROC_position_paper_on_Asser_Study_-_08_11_13.pdf.

³ See Van Rompuy and Margoni (2014), p. 14; Boyle (2015).

moral values particularly at the grass-roots and amateur level.⁴ This is reflected, for instance, in the fact that major sports events qualify in various EU Member States as “events of major importance” for society, subject to special media rules mitigating broadcasters’ exclusive rights in order to guarantee viewers’ access to these events via free-to-air television.

Another element of complexity in the sport sector is the plurality of stakeholders who can claim rights or specific interests in the various elements of the value chain constituting the organization of sport events. Clubs, leagues, federations, TV broadcasters, sponsors, owners of sport facilities, betting companies: all create a complex web of commercial relationships that need to be properly addressed with an efficient *ab origine* allocation of rights. A final element of intricacy can be identified in the national fragmentation of rules, remedies and markets within the EU: the exploitation of sports media rights is still chiefly territorial due to a number of cultural and linguistic reasons. This situation, especially in the past, has led to the creation at the MS level of dedicated remedies that may not be fit for the new internal digital market.⁵

By employing a European comparative methodology, this study looks at the EU legal framework as designed by the legislator and applied to the sport sector by the ECJ. Likewise, it looks at specific national interventions – where relevant – and in particular at their compliance with the current EU framework. The article demonstrates that even though sports events as such are not copyrightable there is a variety of remedies found in property law, IP and contracts that already offer a satisfactory level of protection to sports events, comparable to that of other subject matter. Moreover, the article argues that special forms of protection at the national level, when compatible with the EU legal framework, do not add much to the protection found in the aforementioned mix of tools. There is only one exception: a right to use the results of sporting events, or, in other words, a right to consent to bets. However, this type of protection is not traditionally contemplated by IP rights. If such a right is to be recognised, it is argued that the field of (intellectual) property is not the legal framework fit for this task.

In order to systematically cover the different rights available at the EU and domestic levels the article is structured as follows. Centrality is given to the concept of the sport event, the “protagonist” of this study. Accordingly, the analysis looks at the sport event as such (Sect. 1), and therein at the protection afforded by copyright (1.1), the so called “house right” (1.2) and neighbouring rights that might apply to the sport event as such (1.3). Section 2 looks at the protection afforded to the recording of the sport events by copyright (2.1) and neighbouring rights (2.2). Section 3 looks at the protection of the broadcast of sport events; Sect. 4 is dedicated to unfair competition and the extent to which this largely national based remedy can be used to protect sports events; Sect. 5 describes some of the most interesting examples of “special forms of protection” devised at the national level, in particular in France (5.1) and Italy (5.2). Section 6 presents the conclusions.

⁴ See Van Rompuy and Margoni (2014), p. 14.

⁵ This article does not look at competition law rules in the EU sport sector. For a detailed analysis, see in general Van Rompuy and Margoni (2014).

2 The Sport Event as Such

2.1 Copyright

The 2011 EU Court of Justice (ECJ) decision in *Premier League v. QC Leisure* stated that sports events as such (notably football matches) do not qualify as protected subject matter under EU copyright law.⁶ The Court explained that in order to be classified as a “work of authorship” the subject matter concerned would have to be original in the sense of the *author’s own intellectual creation*.⁷ However, sporting events cannot be regarded as intellectual creations within the meaning of the EU Information Society Directive.⁸ This applies in particular to football matches, which are subject to rules of the game which leave no room for creative expressive freedom.⁹ The Court went even further and stated that sports events are not protected by European Union law on any other basis in the field of intellectual property, excluding therefore neighbouring or related rights to copyright (including database *sui generis* rights) as well.¹⁰

Whereas the Court ruled out EU copyright protection for sports events as such, it nevertheless left the door open to national forms of protection in the field of IP. According to the Court, “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, by the various domestic legal orders”.¹¹ In other words, while clarifying that sports events are not covered by EU copyright law, the Court admits the possible existence of national schemes protecting sports events. It must be concluded that the only possible way for domestic legal orders to afford this type of protection is in the form of neighbouring rights or other similar forms of special protection. In fact, by reading the ECJ passage here under analysis in the light of the constant case law of the Court in the field of the originality standard harmonisation, it has to be inferred that only one standard of originality can exist, that of the author’s own intellectual creation. This new standard, which in the words of the Court is not met by sport events, corresponds to an intervention of maximum harmonisation as repeatedly confirmed by the same ECJ. Accordingly, there is no

⁶ See Joined Cases C 403/08 and 429/08 *Football Association Premier League Ltd and others v. QC Leisure and others* and *Karen Murphy v. Media Protection Services Ltd* (2011) ECR-I-9083.

⁷ *Id.*, 97. For a detailed analysis of the ECJ defined originality standard see Margoni (2015) and literature therein cited.

⁸ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society.

⁹ See Joined Cases C 403/08 and 429/08 *Football Association Premier League Ltd and others v. QC Leisure and others* and *Karen Murphy v. Media Protection Services Ltd* (2011) ECR-I-9083, 98. See for an insightful and provocative argument that a football performance can feature enough free and creative choices the intervention by Prof. Lionel Bently in the panel “Who owns the World Cup? The case for and against (intellectual) property rights in sports” held during IViR 25th Anniversary Conference and described (with links to the video) at <http://kluwercopyrightblog.com/2014/10/13/who-owns-the-world-cup-the-case-for-and-against-intellectual-property-rights-in-sports/>.

¹⁰ *Id.*, 99.

¹¹ *Id.*, 100.

room for any national form of copyright based on a threshold of originality other than that of the author's own intellectual creation – except perhaps in the field of registered designs which is of no relevance for present purposes.¹²

It can be further observed that the Court, following its line of jurisprudence inaugurated with the famous *Infopaq* decision,¹³ grounds its ruling denying copyrightability of sports events as such to the lack of free and creative choices and of the personal stamp of the author. In this regard two observations may be formulated. First, it could be speculated whether under certain specific circumstances some particular sports, such as gymnastics, figure skating, synchronized swimming, or other events that strictly follow a script, could be seen as artistic works subject to copyright protection by virtue of their similarities with, for example, choreographic or dramatic works. This is an eventuality that cannot be excluded a priori. However, it seems that even admitting its plausibility, the eventuality applies only to a handful of sports that border on the arts and that have limited commercial impact if compared with football or other mainstream sports. Furthermore, this reconstruction does not seem supported by the limited case law available.¹⁴

Second, the very argument that sports events lack free and creative choices could be challenged. As has been shown, the execution of specific moves or tricks can in some cases require a number of choices that are arguably not of pure technical nature, or in other words these moves represent something more than a skilful execution.¹⁵ Whether such choices possess free and creative elements, that is to say, whether the execution of a certain movement by an athlete is completely left to his or her discretion and ingenuity or, on the contrary, is severely limited and constrained by the rules of the game is an issue that cannot be easily addressed because the solution risks to verge largely on subjective judgement. Other types of considerations regarding (i) the nature of the activity (whether there is a “work” at all¹⁶); (ii) copyright law tradition and history (sports performances have never been contemplated by copyright law, even though their existence pre-dates that of copyright law itself); (iii) utilitarian arguments (sports have thrived regardless of the absence of copyright protection); and (iv) public policy considerations (were sports

¹² Bently (2012); Margoni (2016).

¹³ For a brief account of the originality case law of the ECJ see Margoni (2015) and literature therein cited.

¹⁴ See Dutch Supreme Court (Hoge Raad), 23 October 1987, NJ 1988, 310 (*KNVB v. NOS*); Stockholm Administrative Court of Appeal decisions of 3 December 2007, case 2896 and 2898; For a Canadian case stating that a sport game does not constitute a choreographic work, even though parts of the game were intended to follow a pre-determined plan see *FWS Joint Sports Claimants v. Copyright Board* (1991) 22 I.P.R. 429 (Fed. CA of Canada). *Contra* a French decision by the Paris Court of Appeal of September 2011 has recognized copyright in a sailing race; however, such decision seems so far isolated and harshly criticized by commentators on the basis that such event cannot be assimilated to choreographic or dramatic works; see Vivant and Bruguère (2012), p. 1059.

¹⁵ See *supra* note 9.

¹⁶ For the exclusion of sports events from the category of protected works (underling the *numerus clausus* principle) see Italian Supreme Court (Corte di Cassazione), 29 July 1963, No. 2118, in Foro it., 1963, I, 1632; For a detailed analysis of the *numerus clausus* of intellectual property rights with particular attention to the case of sports events, see Restà, p. 43, et seq.

movements copyrightable, should a goal scored using – without authorisation – a protected trick be annulled for copyright infringement?) weigh in favour of the denial of protection as copyright subject matter.

In conclusion, and with the possible limitation connected to exceptional situations where the sport performance is based on a script, sports events as such are not works of authorship under EU copyright law. As it will be seen below, this exclusion of protection is however delimited. On the one hand, it only refers to EU intellectual property rights (therefore admitting protection on other basis such as property rights, unfair competition or specific domestic legal tools), while on the other hand it only applies to sports events as such, admitting that works or other protected subject matter can in fact exist in relation to, e.g., the audiovisual recording or broadcast of said sports events.

2.2 Ownership, Exclusive Use Rights and “House Right”

Sports events are usually held in dedicated venues such as stadia, circuits and tracks. These are typical cases where access can be controlled thanks to the presence of perimeter walls, doors and gates, i.e. boundaries which not only serve the purpose of delimiting and containing the area where the sport event is played (e.g. a squash court, or a swimming pool), but also of physically regulating entrance into the venue. The material faculty to exclude access and the related legal power to regulate it are the crucial elements constituting the so-called “house right”. The “house right”, however, does not represent a strict dogmatic legal category with precisely defined boundaries. On the contrary, it constitutes a term that legal scholars and courts have often employed to refer to a common hermeneutic construction: the property based power to control admission (a *jus excludendi alios* from the sport event venue) and the contractual based faculty to establish entrance conditions.¹⁷

Advocate General (AG) Jääskinen offers a clear and succinct view on this hermeneutic construction in his 2013 opinion in *Fifa v. European Commission* when he states that contracts based on the power to control access to a specific venue (power usually based on property or an exclusive right to use) are usually stipulated to determine who can view, film or broadcast the event, and under which conditions. However, this determination is based on a contractual relationship not on a property right.¹⁸

Leaving aside for the moment considerations relating to special forms of protection as well as considerations relating to the ownership of copyright and

¹⁷ See e.g. Hilty and Henning-Bodewig (2006), p. 42 et seq. See also Paal (2014), p. 74 et seq. For case law see e.g. German Federal Supreme Court (Bundesgerichtshof), 8 November 2005, KZR 37/03 (“Hörfunkrechte”); Dutch Supreme Court, 23 October 1987, NJ 1988, 310 (*KNVB v. NOS*); and also Dutch Supreme Court, 23 May 2003, NJ 2003, 494 (*KNVB v. Feyenoord*); Danish Supreme Court U2004 2945 H and U 1982 179 H. Outside the EU see *Victoria Park Racing and Recreation Grounds Co. Ltd v. Taylor* (1937) 58 CLR 479, HC of A.; *Sports and General Press Agency Ltd v. ‘Our Dogs’ Publishing Ltd* [1917] 2 KB 125, CA.

¹⁸ See Opinion of Advocate General Jääskinen delivered on 12 December 2012 in Cases C-201/11 P, C-204/11 P and C-205/11 P *UEFA, FIFA v. European Commission*, 18 July 2013, 33–45. The opinion of the AG has been upheld by the ECJ, although the Court did not reproduce the detailed analysis on property rights developed by the AG.

neighbouring rights in the televised signals (for both see *infra*), the possibilities for sports organisers to protect their investments are based primarily on a combination between the exclusive right to use and regulate access into the sport venue and the network of contractual agreements based on that exclusivity. Commonly, in fact, organisers of sports events are either the owners or the exclusive users (at least for that event) of the sport facility.¹⁹ Therefore, the exclusive use right of sports organisers can be based either in the right of property of the stadium or derive from a contractual agreement between the owner of the stadium and the sport organiser. For present purposes, the origin of such exclusivity, whether property-based or contract-based, is irrelevant. The crucial aspect is that there is an exclusivity which is based on property rights and that this exclusivity can be contractually transferred.²⁰

Consequently, the owner/exclusive user of the stadium possesses the power to establish conditions of access, rules of behaviour in the venue, and prices that spectators, media, audiovisual companies and broadcasters have to accept in order to access the venue and perform their function.²¹ This is commonly done in the terms and conditions that spectators accept when purchasing a ticket and can be further consulted on the “house rules” that are sometimes publicly posted on the premises of the venue in order to inform attendees. Special agreements with audiovisual production and broadcasting companies are also concluded, setting out (*inter alia*) precise terms regarding the right of the media companies to report the event(s), payment structures and ownership in the broadcast signal (see below).²²

Terms and conditions of access attached to sport event tickets have nowadays developed into quite lengthy lists of contractual obligations, which can vary depending on the type of event and on its commercial relevance. By way of illustration, together with the prohibition to carry into the stadium items considered dangerous or otherwise inappropriate, the use of recording and broadcasting equipment, the unauthorized transmission and/or recording through mobile phones or other recording devices, and sometimes even flash photography are explicitly forbidden.²³

Yet, as recalled amongst others by AG Jääskinen, these rules are purely contractual. Therefore, in the case in which a spectator has, without authorization, succeeded in recording the match on a personal device such as a smartphone and has uploaded the video on an online platform, a third party acting in good faith (such as the online platform) will not be bound by that contractual agreement. It follows that the platform operator, as well as any other third party, cannot be forced merely on this contractual basis to take down the content from the platform. Whereas it has been argued that amateur recordings do not really pose serious commercial threats

¹⁹ See Lawrence and Taylor (2008), p 1077.

²⁰ *Id.*, p. 1119.

²¹ See Gardiner et al. (2012), p. 246; Lawrence and Taylor (2008), pp. 1077 and 1092–1094.

²² *Id.*

²³ See Gardiner et al. (2012), p. 318 offering different examples of terms and conditions of tickets used during the Olympic Games. Literature is rich of similar examples, see *inter alia* Andriychuk (2009), p. 137; Lawrence and Taylor (2008), p. 1077.

to sports organisers²⁴ (and in any case they still represent a breach of contract²⁵), the gap in the “house right” based legal protection of sports organisers is in the absence of third-party effects.²⁶

Case law from national courts in EU Member States confirms the depicted landscape and, in some cases, elaborates further the concept of “house right”. For example, the Supreme Court of the Netherlands ruled that the Dutch Football Association (KNVB), or the clubs, were entitled to prohibit or require remuneration for radio broadcasts on the basis of a “house right”, i.e. the right to control access to the stadium and make access conditional upon a prohibition to broadcast matches. Accordingly, whoever engages in radio broadcasting of a match “in a stadium or on a terrain where KNVB and its clubs organize football matches [...] knowing that the owner or user of the stadium or terrain has not consented to the broadcast, acts unlawfully against the owner or user”.²⁷ However, “merely informing the public” or “reporting on a match after it is over” is not unlawful.²⁸ In a subsequent decision the of The Hague Court of Appeal clarified that as a consequence of the Supreme Court’s recognition of a “house right”, the latter belongs solely to the club controlling the venue and not (jointly) to the Football Federation. The club could therefore exclusively exercise or market the rights to televise its home matches.²⁹ The court of appeal’s decision was subsequently upheld by the Supreme Court.³⁰

Similarly, according to the case law of the German Federal Supreme Court (Bundesgerichtshof), “house rights” may be invoked by sports organisers to protect their events against certain unauthorized uses. In the landmark *Hörfunkrechte* case the Court held that professional football clubs (which are the owners or users of the stadium) have the right to prohibit audio recordings, filming or photographing of their games from within the stadium based on their house rules. If attendees do not respect these rules they can be removed from the stadium or forbidden entry.³¹

Likewise, the Austrian Supreme Court has also formally recognised “house right” claims on the basis of property law as regulated in the Austrian Civil Code.³² The Court, in particular, clarified that tenants are entitled to invoke the “house

²⁴ See e.g. Submissions of SROC, FA and Bundesliga to “Consultation on the Green Paper “Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values”, available at <http://ec.europa.eu/digital-agenda/en/news/consultation-green-paper-preparing-fully-converged-audiovisual-world-growth-creation-and-values> (doc. 07. Sport Related Entities).

²⁵ See Van Rompuy and Margoni (2014), p. 27 and fn 30.

²⁶ These types of considerations lead some renown doctrine to be skeptical towards the category; See Hilty and Henning-Bodewig (2006), p. 42.

²⁷ See Dutch Supreme Court, 23 October 1987, NJ 1988, 310 (*KNVB v. NOS*). See also Dutch Supreme Court, 23 May 2003, NJ 2003, 494 (*KNVB v. Feyenoord*).

²⁸ *Id.*

²⁹ See The Hague Court of Appeal, 31 May 2001 (*KNVB v. Feyenoord*).

³⁰ See Dutch Supreme Court, 23 May 2003, NJ 2003, 494 (*KNVB v. Feyenoord*).

³¹ German Federal Supreme Court, 8 November 2005, KZR 37/03 (“*Hörfunkrechte*”). See also Danish Supreme Court U2004 2945 H and U 1982 179 H. Outside the EU see *Victoria Park Racing and Recreation Grounds Co. Ltd v. Taylor* (1937) 58 CLR 479, HC of A.; *Sports and General Press Agency Ltd v. ‘Our Dogs’ Publishing Ltd* [1917] 2 KB 125, CA.

³² See Arts. 339, 344, 354, 362 and following of Austrian Civil Code (*Allgemeines Bürgerliches Gesetzbuch*, ABGB).

right” just like proprietors are, because for the duration of the tenancy contract the tenant solely decides who is granted access and who is not.³³

2.3 Neighbouring Rights: The Organisation of Shows and Spectacles

As seen above, a sport event as such does not enjoy legal protection on the basis of copyright and neighbouring rights under EU law. This is *inter alia* confirmed by the findings of the ECJ in the *Premier League v. QC Leisure* case, where the Court clearly states that “it is, moreover, undisputed that European Union law does not protect them [sports events] on any other basis in the field of intellectual property”, which includes, but is not limited to, neighbouring rights.³⁴

Neighbouring rights are a heterogeneous category, and the rights included under this label usually protect quite different activities, in different ways, and in situations that can vary from one jurisdiction to another. At the EU level there are four neighbouring rights that are made mandatory for all Member States. Three of these are also recognised at the international level: performers’ performances, sound recordings, and broadcasts of broadcasting organizations. Another one is unique to the EU legal landscape and is the film producer’s right to the first fixation of a film.³⁵

With regard to the sports events as such, the only neighbouring right that might be of some relevance is the right of performers (broadcast and film producers’ rights will be analysed in the relevant sections *infra*). Performers are defined as “actors, singers, musician, dancers, and other persons who act, sing, deliver, declaim, play in, or otherwise perform *literary or artistic works*”.³⁶ In other words, performers can enjoy the related right only to the extent to which they are performing or executing a work of authorship, i.e. a work that is, or has been, protected by copyright.³⁷ Since sports events *as such* do not qualify as works of authorship, athletes’ executions and performances cannot be protected by performers’ rights. The only plausible exception to this rule relates to sports events that follow a predefined creative script as is perhaps the case for figure skating, some gymnastics

³³ See Austrian Supreme Court, 23 March 1976, 4 Ob 313/76; 22 March 1994, 4 Ob 26/94 and 29 January 2002, 4 Ob 266/01y.

³⁴ See Joined Cases C 403/08 and 429/08 *Football Association Premier League Ltd and others v. QC Leisure and others* and *Karen Murphy v. Media Protection Services Ltd* (2011) ECR-I-9083, 99.

³⁵ Performer’s performances, sound recordings and broadcasts of broadcasting organizations are the “traditional” neighbouring rights present in the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations signed in Rome the 26 October 1961 [Rome Convention]. More recently, phonogram producers and performers protection has been “updated” by the WIPO Performances and Phonograms Treaty (WPPT) adopted in Geneva on December 20, 1996. In the EU, these and other neighbouring rights have been introduced mainly by Directive 92/100/EEC on rental right and lending right and on certain rights related to copyright in the field of intellectual property; Directive 93/83/EEC on the coordination of certain rules concerning copyright and related right to copyright applicable to satellite broadcasting and cable retransmission; Directive 93/98/EEC harmonizing the term of protection of copyright and certain related rights; and 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society.

³⁶ See Rome Convention Art. 3(a); see also the almost identical definition of Art. 2(a) of the WPPT.

³⁷ See Goldstein and Hugenholtz (2010), p. 234.

and similar script-based sports. No case law on this hypothetical issue has been found.

At the Member States' level, a similar conclusion (i.e. exclusion of protection due to the absence of a protected work) can be reached in respect of the German neighbouring right protecting organisers of commercial performances (*Schutz des Veranstalters*) regulated by Art. 81 of the German Copyright Act.³⁸ This neighbouring right, in fact, also requires the performance of a *work* protected by copyright in order to come into existence.³⁹ As seen above, sports events as such are not protected by copyright and therefore the protection offered by Art. 81 Copyright Act is not available to organisers of sports events.⁴⁰

Interestingly, the opposite conclusion has been reached by Portuguese scholars and courts in respect of a right similar to the German event organisers' right: the *direito ao espectáculo*.⁴¹ Article 117 of the Portuguese Copyright Act provides that the organiser of a show (spectacle) in which a work is performed has the right to authorize any broadcasting, recording or reproduction of the performed work.⁴² The constitutive elements of the right (the performance of a work) should suggest that, similarly to the German rule, sports events do not benefit from this type of protection because there is no "work". It has been argued, however, that Art. 117 reflects a right of customary nature generally conferred to the organisers of shows as a reward for their investment and the risks they carry, and that from an economic point of view there should be no discrimination between the organization of a concert and that of a sports event given that the type of risk and investment are comparable.⁴³ This interpretation has been supported by the legislature, which in different provisions has confirmed – albeit without offering detailed regulation – the existence of a "spectacle right" which finds application in the case of sports events.⁴⁴

³⁸ See Art. 81 Copyright Act (Gesetz über Urheberrecht und verwandte Schutzrechte) of 1965, as amended.

³⁹ See Hilty and Henning-Bodewig (2006), p. 40 and literature therein cited. See also German Federal Supreme Court, I ZR 60/09 of 28 October 2010 (*Hartplatzhelden.de*); Hamburg Court of Appeal, 11 October 2006, 5 U 112/6.

⁴⁰ *Id.*

⁴¹ The authoritative reference is to the work of Oliveira Ascensão, in particular Oliveira Ascensão (2008), p. 590 and the references therein cited. See also Menezes Leitão (2011), 270.

⁴² See Código do Direito de Autor e dos Direitos Conexos, of 1985, as amended.

⁴³ See Oliveira Ascensão (2008), p. 590, and the references therein cited. See also Menezes Leitão (2011), p. 270. For a decision supporting the existence of an absolute right comparable to copyright and vesting in the sport organiser in virtue of its investment see the ordinance of *Pretore Roma* of 18 September 1987, in Dir. Inf. 1988, 132, and the following comment by Morese; *contra* excluding more in general the copyrightability of sports events recordings Sammarco (2006); for a general criticism to judicial decisions recognising protection to new immaterial goods in spite of the principle of *numerus clausus*, see Auteri (2003); Resta (2010).

⁴⁴ The right first appeared in 1985 in Art. 117 of the Copyright Act. The *direito ao espectáculo* finds explicit recognition in the field of sport in Art. 19 of the law 1/90 of 1990 on the "Basis of the Sport System". For an account of the evolution of the right including the numerous amendments, see Menezes Leitão (2011), p. 270.

Following a wave of legislative reforms and amendments,⁴⁵ the continuation of the right has been challenged by the 2007 reform of the Regulation of Physical Activities and Sports, which removed any explicit reference to a “spectacle right” in the field of sports.⁴⁶ Part of the doctrine argues that, although an explicit reference to the right is absent in the new law, the right still survives in what is now Art. 49 No. 2, which confers on the owner of the show the right to limit access to shows for which a fee is required.⁴⁷

In 2009, the Portuguese Supreme Court did confirm the existence of the right in the specific case of football games; however, the Court, *ratione temporis*, applied the old 1990 law, and made reference to the fact that Art. 19 of the old law specifically mentioned that right.⁴⁸ Nevertheless, the Supreme Court (and the court of appeal) seemed to use Art. 19’s explicit reference as an argument to confirm the existence of the right rather than as its legal basis. In the reasoning of the court, the legal basis of this right is to be found in the reported doctrine that confers it a customary nature.⁴⁹

In conclusion, athletes competing in a race or players on a team are not “performers” in the sense of international, national and EU copyright law, as the activities they perform are not literary or artistic works. The same argument excludes the applicability to sports events of the special neighbouring right for event organisers regulated by Art. 81 German Copyright Act. While Portugal afforded, at least until 2007, a form of protection for organisers of sports events, views on the current status of this right diverge.

3 The Recording of Sports Events

3.1 Copyright: Cinematographic Works

While sports events as such do not attract copyright or neighbouring rights protection under EU law or the law of the Member States, this by no means implies that copyright and related rights play no role in protecting the commercial interests of sports organisers.

The audiovisual recording of sports events, as commonly broadcast on TV, could amount to a work of authorship protected by copyright law as a cinematographic

⁴⁵ See Art. 19.2 of “Lei n. 1/90”, of 13 January 1990; repealed by “Lei n. 30/2004 of 21 July 2004” (Art. 84); repealed by “Lei 5/2007 of 16 January 2007” (Art. 49); see Menezes Leitão (2001), p. 270; Oliveira Ascensão (2000), V. 71–78.

⁴⁶ See Law No 5/2007 of 16 January (Lei de Bases da Actividade Física e do Desporto).

⁴⁷ See Art. 49 Law No 5/2007 of 16 January (Lei de Bases da Actividade Física e do Desporto); See Menezes Leitão (2011), p. 272.

⁴⁸ See Portuguese Supreme Court (Supremo Tribunal de Justiça), No. 4986/06.3TVLSB.S1, of 21 May 2009, confirming in this regard the finding of the Lisbon Court of Appeal (Tribunal da Relação de Lisboa) No. 3599/2008-6, of 17 December 2008.

⁴⁹ See Portuguese Supreme Court, No. 4986/06.3TVLSB.S1, of 21 May 2009 (“Para compreender o objecto do contrato em causa, achamos oportuno lembrar os ensinamentos de Oliveira Ascensão”); Oliveira Ascensão (2008); Menezes Leitão (2011).

work.⁵⁰ Cinematographic works are protected by copyright when they are original in the sense of the author's own intellectual creation. Accordingly, not all audiovisual recordings of a non-copyrightable subject matter such as sports events can be considered copyrightable. In fact, only those audiovisual recordings that contain free and creative choices and the personal stamp of an author can qualify for protection as cinematographic works.⁵¹ In many instances, the audiovisual recording of major sports events are capable of achieving the fairly modest levels of originality required to qualify for copyright protection.

To this effect, the elements that brought the ECJ to a finding of a copyrightable recording in an equally non-copyrightable subject matter may be used for guidance. In *Painer*, although deciding on the originality of a portrait photograph and therefore not in a moving but in a still image, the ECJ stated that the author (the photographer in the case, but arguably also a director) can make "free and creative choices in several ways and at various points in its production".⁵² In particular these choices can be made in three phases: In the preparation phase, the photographer can choose the background, the subject's pose and the lighting.⁵³ By way of comparison, the director of the audiovisual recording of a sporting event can probably influence aspects connected to the background and the lighting in order to improve the quality of the recording. Usually, sports organisers and audiovisual companies conclude detailed agreements that cover many technical aspects connected with the quality standards of the resulting footage. Similarly, the engaging postures that players take before the match may certainly be the result of the input of the audiovisual recording director rather than constituting the – dubious – aesthetic judgement of the players or of their public image consultants. Nevertheless, these aspects are related to a phase that precedes the sporting event as such and probably do not play as an important role in terms of free and creative choices as they do in photographs.

The second phase identified by the ECJ in *Painer* is "when taking a portrait photograph". In this phase the photographer can choose the framing, the angle of view and the atmosphere created.⁵⁴ In the case of the audiovisual recording of a sport event, the director can certainly influence the framing and the angle of view of the cameras.

⁵⁰ In the current version of the Berne Convention cinematographic works are present in Art. 2 as a protected subject matter and are further regulated in Arts. 4, 7, 14, 14^{bis} and 15. See generally Bently and Sherman (2009), p. 84 and fn 159; Kamina (2002). For case law see e.g. Case C 403/08 *Football Association Premier League Ltd et al. v. QC Leisure et al.* (ECJ), of 4 October 2011, at 149–152 ("... it is common ground that FAPL can assert copyright in various works contained in the broadcasts... in particular, the opening video sequence, *pre-recorded films showing highlights of recent Premier League matches*, ..." [emphasis added]; See also Paris District Court (Tribunal de Grand Instance de Paris), *S.A. Television Française 1 v. YouTube LLC*, of 29 May 2012, RG: 10/11205.

⁵¹ After the landmark *Infopaq* decision the threshold of "the author's own intellectual creation" which thus far only found statutory recognition with regard to computer programs, photographs and databases has been expanded to all copyright subject matter covered by the InfoSoc Directive (although the issue of cumulatibility with design rights remains an open issue); see Case C 5/08, of 16 July 2009 *Infopaq International A/S v. Danske Dagblades Forening* [*Infopaq*]; Bently and Sherman (2009), Margoni (2015).

⁵² See Case C145/10 *Eva-Maria Painer v. Standard VerlagsGmbH et al.*, 1 December 2011 (*Painer*), p. 90.

⁵³ *Id.*, p. 91.

⁵⁴ *Id.*

Actually, the director will probably influence framing and angle at the outset when deciding where to place the cameras (although the positions of the cameras for premium sporting events may be object of a specific negotiation between the sport organiser and the production company and therefore their specific location could not represent the free and creative choice of the director) and by instructing the camera operators during the match to focus on a specific side of the pitch or moment of the game that not necessarily corresponds to “follow the ball”. The audiovisual recordings of major sport matches and competitions ordinarily feature a large number of cameras placed in different sections of the field in order to capture not only the most important aspects of the event, but also the smallest details. Cameras, more recently, have been located on devices such as small helicopters or flying drones or, in the case of F1 or other motor races, on the very same competing cars and are usually directed, coordinated and selected by the audiovisual production unit.

The third phase identified in *Painer* is “when selecting the snapshot”. In this phase the photographer may choose from a variety of developing techniques the one he wishes to adopt or, where appropriate, use computer software.⁵⁵ This phase is probably where the creativity of the director of the audiovisual production can be expressed at best. In this case the director can choose which feed of images will form the audiovisual recording and for major sports events we have seen that the choice is considerable since the incoming feed corresponds to many different recording devices placed in different areas. The added content that is usually part of the televised audiovisual work, such as commentary, computer software animations indicating whether a football player was actually off-side, or the telemetry recordings of racing cars, are blended with the various cameras’ recordings. The resulting audiovisual recording is the selection and combination of all these elements through the filter of the director.⁵⁶ By making those various choices the director of the audiovisual recording is arguably capable of stamping the work created with his personal touch.⁵⁷

In *Painer* the Court concluded that the freedom available to the author to exercise his creative abilities will not necessarily be minor or even non-existent just because the subject matter is a portrait photographs, i.e. to say a “realistic image”.⁵⁸ Likewise, in the case of the audiovisual recording of a sporting event (i.e. a non-copyrightable subject matter) originality cannot be denied on the sole basis of it being a “realistic sequence of images”.⁵⁹ Copyrightability has to be verified in the

⁵⁵ *Id.*

⁵⁶ See e.g. Case C 403/08 *Football Association Premier League Ltd et al. v. QC Leisure et al.* (ECJ), of 4 October 2011, at 148–149; See however, the Swedish Court of Appeal decision that the audiovisual recording of an ice hockey game (with added commentary) could not be considered an original work of authorship; See Southern Norrland Court of Appeal of 20 June 2011, No. B 1309-10.

⁵⁷ See *supra* note 52, *Painer*, p. 92.

⁵⁸ See *supra* note 52, *Painer*, p. 93. To be noted that the relevant question in this case (referred question four) asked whether “portrait photos are afforded ‘weaker’ copyright protection or no copyright protection at all against adaptations because, in view of their ‘realistic image’, the degree of formative freedom is too minor”, see AG Trstenjak Opinion delivered on 12 April 2011 in Case C-145/10 (*Painer*).

⁵⁹ As a matter of fact, the ECJ seems to suggest that free and creative choices and personal stamp are the *only* factors to consider in a finding of originality. A strict reading of this requirement brought some commentators to wonder whether any other condition, such as for example a closed list of copyrightable subject matter as provided e.g. in the UK, is still compliant with EU law; See Cornish et al. (2013), 11-04 fn 12.

light of the presence of the author's free and creative choices and his personal stamp, on the basis of the conditions set out by the constant ECJ case law and in particular in *Painer* given the similarity of the facts of the case. Nevertheless, the presence of the free and creative choices and of the personal touch of the author has to be verified on a case-by-case basis: while major sports audiovisual productions are characterised by the above-described richness of cameras, animations, commentaries and original selection, many other recordings of sports events can easily lack said free and creative choices. In particular, one camera or a few cameras merely recording all that is happening before their lenses will not create a copyrightable subject matter. Nevertheless, even in this case the EU legal system is equipped with a dedicated remedy (the producer's first fixation of a film, see *infra*).

Cinematographic works are usually complex works where intellectual creative contributions come from a plurality of providers, such as the script author, the author of the cinematographic adaptation, the director of the film, the artistic director, the author of the soundtrack and the producer.⁶⁰ However, the principal director of a cinematographic or audiovisual work shall be considered its author, or one of its authors, in all EU Member States.⁶¹ The latter are, in fact, free to recognize authorship also to other subjects, who will be considered co-authors of the principal director. In the EU, these subjects usually include the author of the screenplay, the author of the dialogue, and the composer of music specifically created for use in the cinematographic or audiovisual work.⁶² The list is merely illustrative, as it is left to Member States to determine for each domestic legal order the principal director's co-authors, if any.⁶³

According to national law, and in contractual practice, the main economic rights in an audiovisual work are commonly vested in the film producer. Consequently, insofar as sports organisers, clubs, or federations act as producers of the audiovisual coverage of the games, the copyright in the audiovisual work will vest in them. Alternatively, if the audiovisual coverage is commissioned to an outside producer or broadcaster, the copyright can, and in practice often will be, assigned or licensed back to the club(s) or to the organiser of the sport event or competition on the basis of specific contractual agreements (however, some domestic legal orders have legislated in this field, see *infra*).

In some jurisdictions (e.g. the UK and Ireland), works in general, therefore including cinematographic works, have to be fixed in a tangible (material) form for copyright protection to arise.⁶⁴ Under the 1988 UK Copyright Act

⁶⁰ See Perry and Margoni (2012), p. 22.

⁶¹ See Art. 2(1) of Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights (codified version) [Term Directive], repealing Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights.

⁶² See Art. 2(2) Term Directive.

⁶³ *Id.*

⁶⁴ Sec. 5B Copyright, Designs and Patents Act 1988 [UK], defines films as "a recording on any medium ...". Similarly Sec. 2(1) Copyright and Related Rights Act, 2000 [Ireland] requires that the film be fixed on any medium. However, a film, as the work suggests, is usually recorded on a support, tape, film, disk, etc.

(CDPA⁶⁵), films are defined as a *recording* on any medium from which a moving image may be produced by any means.⁶⁶ Absent fixation there will be simply no film, but not necessarily no copyright. A televised live transmission will be likely protected as a broadcast (see below).⁶⁷ Additionally, in the UK there is no explicit requirement for films to be original in order to be protected by copyright, an aspect that makes it even simpler for recordings of sports events to qualify for protection.⁶⁸ However, under certain circumstances a film in the UK can also be protected as a dramatic work, as clarified by the Court of Appeal in the *Norowzian* case (see however below for considerations regarding EU law compliance of this solution).⁶⁹

In conclusion, although the audiovisual recording of a major sports event is capable of reaching the required level of originality and enjoy copyright protection, it is possible that other audiovisual recordings, usually associated with minor sports events, are not sufficiently creative and therefore are not protected by copyright. A possible example could be identified in the case of audiovisual productions where, for instance, there is only one or a few cameras, perhaps even fixed, that record everything that is happening in front of the lenses. Provided that this latter case represents a situation in which the free and creative choices and the personal stamp of the author are absent, the resulting product cannot be considered as a cinematographic or audiovisual work. Nonetheless, even in this case the producer can rely on a specific form of protection which is granted to the first fixation of a film on the basis of a specific EU neighbouring right.

3.2 Neighbouring Rights: Film Producers' First Fixation of a Film

The EU Rental Right Directive requires Member States to offer a special form of protection to the producers of the first fixation of films.⁷⁰ The Directive defines films in Art. 2(1c) as cinematographic or audiovisual works or moving images, whether or not accompanied by sound. Similarly to the case of other neighbouring rights, and

⁶⁵ Copyright, Designs and Patent Act 1988.

⁶⁶ See Sec. 5B(1) CDPA.

⁶⁷ See Joined Cases C 403/08 and 429/08 *Football Association Premier League Ltd and others v. QC Leisure and others* and *Karen Murphy v. Media Protection Services Ltd* (2011) ECR-I-9083, para. 150 (“broadcasters ... can invoke the right of fixation of their broadcasts which is provided for in Article 7(2) of the Related Rights Directive, the right of communication of their broadcasts to the public which is laid down in Article 8(3) of that directive, or the right to reproduce fixations of their broadcasts which is confirmed by Article 2(e) of the Copyright Directive”).

⁶⁸ If the film qualifies as a “cinematographic work” under the Berne Convention then it can be protected as a dramatic work under the UK copyright law; see *Norowzian v. Arks* (No. 2) [2000] EMLR 67; See in general Kamina (2002), at 35 et seq.

⁶⁹ See *Norowzian v. Arks* (No. 2) [2000] EMLR 67, recognizing that a film can also be a dramatic work when it is a “work of action”; Arnold (2001/2002), pp. 51–60.

⁷⁰ See Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version) repealing Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property.

unlike copyright, originality is not required to trigger the neighbouring right. If there is originality, the film will be protected by a copyright (in the cinematographic work) and by a neighbouring right (in the fixation of the film).⁷¹ The latter operates independently from any copyright in the cinematographic or audiovisual work. The goal of this form of protection is to reward the producer of the film for accepting the financial risk and organizational responsibilities connected to the realization of the film.⁷² This is confirmed by Recital 5 of the Rental Directive, which clarifies that the investments required for the production of films are especially high and risky, and that the possibility of recouping that investment can be effectively guaranteed only through adequate legal protection of the right-holders concerned.⁷³

The film producer's neighbouring right includes the exclusive right to authorize or prohibit direct or indirect, temporary or permanent reproductions by any means and in any form, in whole or in part in respect of the original and copies of the films.⁷⁴ It also provides for the exclusive right to authorize or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them – in other words, *on demand* – of original and copies of their films.⁷⁵ However, the right does not include, at least at the EU level, the broader right of communication to the public.⁷⁶ Producers of first fixations of films also enjoy the exclusive right to distribute (make available to the public in tangible copies), by sale or otherwise, in respect of the original or copies of their films.⁷⁷ This neighbouring right lasts 50 years from the date of first lawful publication. If the film has not been lawfully made available to the public or published the 50-year term will accrue from the date of fixation.⁷⁸

As seen, the UK is somehow an exception to the dual protection of audiovisual products in the EU – copyright in the cinematographic work and neighbouring right rewarding the producer's investment. UK law recognizes only a single right: copyright in the film.⁷⁹ According to some authors this approach fails to properly implement EU law.⁸⁰ However, under certain circumstances a film in the UK can also be protected as a dramatic work, as clarified by the Court of Appeal in the *Norowzian* case.⁸¹ It must be noted, however, that even if under certain conditions a

⁷¹ But see above the analysis of the UK for the case of films.

⁷² See Goldstein and Hugenholtz (2010), p. 232; See German Federal Supreme Court, 22 October 1992, Case 1 ZR (300191), in 25 IIC pp. 287, 288 (1994).

⁷³ See Recital 5 Rental Directive.

⁷⁴ See Art. 2(d) InfoSoc Directive which now governs horizontally the right of reproduction in EU copyright law. Article 7 of the previous version of the Rental Directive has been repealed in virtue of Art. 11(1)(a) of the InfoSoc Directive.

⁷⁵ See Art. 3(2)(c) InfoSoc Directive.

⁷⁶ See Art. 3(2) InfoSoc Directive.

⁷⁷ See Art. 9(1)(c) Rental Directive.

⁷⁸ See Art. 3(3) Term Directive, which however uses an incomprehensible way to express this.

⁷⁹ But under some circumstances the film could be considered also a dramatic work, restoring, somehow, the EU duality; see Kamina (2002), p. 137.

⁸⁰ See Kamina (1998), p. 109–114.

⁸¹ See *Norowzian v. Arks* (No. 2) [2000] EMLR 67, recognizing that a film can also be a dramatic work when it is a “work of action”.

duality of protection is possible in the aftermath of the *Norowzian* case, it is not of the kind contemplated by EU law. If a film is *also* a dramatic work, it will benefit from two forms of copyright protection under UK law, not from a copyright and a neighbouring right. This can be inferred, *inter alia*, from Art. 13B CDPA, which states that the copyright in a film expires 70 years pma.⁸²

4 The Broadcast of Sports Events

Broadcasting organizations enjoy protection for the transmission for public reception of their broadcast signals. This protection extends to the right to prohibit the fixation, the reproduction of fixations and the rebroadcasting by wireless means of broadcast, as well as the communication to the public of television broadcast.⁸³ These broadcast signals, which usually contain cinematographic or audiovisual works or moving images, are protected by a neighbouring right (or copyright in the UK⁸⁴) that operates independently from, and regardless of, any copyright in the content of the signal.⁸⁵ In other words, the neighbouring right exists even in the absence of any copyright in the content carried by the signal. This is an important aspect: the signal is protected as such, even if the underlying transmitted material is neither a work of authorship protected by copyright nor other subject matter protected by neighbouring rights.⁸⁶ This means that even if a court were to find that a televised football game is not protected as a work of authorship, nor by the producer's neighbouring right on first fixations (something not possible in the EU), its broadcast still qualifies as protected subject matter.

The Rome Convention, on which the European *acquis* for related rights is largely built, defines “broadcasting” as the transmission by wireless means for public reception of sounds or of images and sounds”.⁸⁷ This right, in other words, affords protection to broadcasters’ technical contributions to the assembly, production and

⁸² See Art. 13D Copyright, Designs and Patents Act 1988.

⁸³ The relevant EU directives in this field are the Rental Directive (particularly Arts. 7–9), the Satellite Directive, and the InfoSoc Directive (see Arts. 2(e) and 3(2)). At the international level see Art. 14(3) TRIPS Agreement. In substantially similar terms see Art. 13 Rome Convention. See also the Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite, done at Brussels on 21 May 1974; For an account of different Member States approaches towards the redistribution and rebroadcast of copyright works (although analyzing the specific field of the “clouds”) see Ficsor (2012).

⁸⁴ See Sec. 6 CDPA. Systematically, however, it can be considered a related right as suggested by the duration of protection which is limited to 50 years from when the broadcast was made as stated by Section 14 CDPA.

⁸⁵ See Bently and Sherman (2009), p. 86.

⁸⁶ See Case C 403/08 *Football Association Premier League Ltd et al. v. QC Leisure et al.*, of 4 October 2011, 150.

⁸⁷ See Rome Convention Art. 3(f). Similarly, Art. 2(f) WPPT that defines broadcasting as “the transmission by wireless means for public reception of sounds or of images and sounds or of the representations thereof; such transmission by satellite is also ‘broadcasting’; transmission of encrypted signals is ‘broadcasting’ where the means for decrypting are provided to the public by the broadcasting organization or with its consent”.

transmission of live and pre-recorded events.⁸⁸ The signals transmitted merit protection because the value is in the act of communication itself, rather than the content of what is being communicated.⁸⁹

In the EU, the Rental Directive requires Member States to grant broadcasting organizations the exclusive right to fix their broadcasts whether these broadcasts are transmitted by wire or over the air, including by cable or satellite, expanding therefore the protection contained in the Rome Convention to include also transmissions by wire or cable.⁹⁰ Additionally, the same Directive requires the grant of public rebroadcasting and communication rights and public distribution rights to broadcasters.⁹¹ The InfoSoc Directive of 2001 extends the reproduction right of broadcasting organizations to include temporary digital copies and also introduces a right of making available online.⁹² Under UK law, where usually fixation is a requirement for copyright protection, broadcasts seem to escape this condition. According to Bently and Sherman, “[a]rguably, the ephemeral nature of broadcasts makes them one of the most intangible of all forms of intellectual property”.⁹³

Whereas an internationally or EU shared definition of what constitutes “broadcasting organizations” has not been developed, it can be assumed that these are commonly represented by the entities that organise the broadcasting, i.e. the transmission by wire or wireless means for public reception of sounds or of images and sounds.⁹⁴ In the case of sports events, the broadcasting organization can be the same club or federation when it autonomously acts as the actual broadcasting entity⁹⁵ or, usually, an external enterprise that professionally operates as a broadcaster and that has acquired the exclusive right to broadcast the sports event on the basis of contractual agreements signed with the sports event/manifestation organiser, or jointly, depending on factual circumstances.

In the landmark decision *Premier League v. QC Leisure* the ECJ found that broadcasters can assert copyright or copyright-related rights in their broadcasts of sporting events, together with the authors of the works eventually contained in the broadcasts.⁹⁶ As the ECJ explains, broadcasters of sporting events can invoke the right of fixation of their broadcasts, which is provided for in Art. 7(2) of the Rental

⁸⁸ See Goldstein and Hugenholtz (2010), p. 237.

⁸⁹ *Id.* See also Bently and Sherman (2009), p. 86; Paris District Court, S.A. *Television Francaise 1 et al. v. S.A. Dailymotion*, of 13 September 2012, RG:09/19255.

⁹⁰ See in general Guibault and Melzer (2004), pp. 2–8.

⁹¹ See Rental Directive Arts. 7–9.

⁹² See Arts. 2(e) and 3(2) InfoSoc Directive; See also Goldstein and Hugenholtz (2010), p. 342.

⁹³ See Bently and Sherman (2009), p. 92.

⁹⁴ Broadcasting organizations are not better defined by international and EU legislation. Member States usually regulate the broadcasting activity and set the requirements to qualify as broadcasting organizations. In the UK, the CDPA defines authors as the person making the broadcast or, in the case of a broadcast which relays another broadcast by reception and immediate re-transmission, the person making that other broadcast; see CDPA 9(2)(b).

⁹⁵ This was the case of *Eredivisie Live*, which until recently was an undertaking of the Dutch Eredivisie clubs.

⁹⁶ See Joined Cases C 403/08 and 429/08 *Football Association Premier League Ltd and others v. QC Leisure and others* and *Karen Murphy v. Media Protection Services Ltd* (2011) ECR-I-9083,148.

Rights Directive, the right of communication of their broadcasts to the public which is laid down in Art. 8(3) of that Directive, or the right to reproduce fixations of their broadcasts, which is provided for by Art. 2(e) InfoSoc Directive.⁹⁷

Premier League v. QC Leisure is an interesting case also because, as the same Court points out, the questions asked in the main proceeding did not relate to the existence of such broadcasting rights.⁹⁸ The reason is to be found in a particular provision of the applicable domestic law (the UK Copyright Act, CDPA), which in Sec. 72b provides that “The showing or playing of a broadcast in public, to an audience who have not paid for admission to the place where the broadcast is to be seen or heard does not infringe any copyright in the broadcast or any film included in it.” In other words, in the case before the Court, publicans were communicating FAPL’s broadcasts (the live sporting events) to the public via screens and speakers of televisions placed in the pubs. However, pursuant to the Sec. 72b defence such communication to the public was exempted. Nonetheless, if pubs were to charge an admission fee or to show other content not covered by the exception – such as FAPL logos or anthem, as the Court hinted – the exception would not operate thereby restoring the normal course of affairs, i.e. making it a copyright infringement.⁹⁹

Similarly, any unauthorized use of a television broadcast whether on another TV channel or on the Internet, is to be considered an infringement of the neighbouring right (or copyright) in the broadcast. As confirmed by the ECJ in a judgement concerning the interpretation of Art. 3(1) InfoSoc Directive in a case of unauthorized retransmission of television broadcasts over the Internet, the neighbouring right of broadcasters is protected against any act of communication to the public, including any online retransmission by way of streaming.¹⁰⁰ In the light of this judgement, the meaning of Art. 3(1) must be interpreted as covering retransmissions of the television broadcast, where the act of retransmission is conducted by an organization other than the original broadcaster. The fact that the subscribers to the streaming service (the British company “TVCatchup”) were within the area of reception of the original terrestrial television broadcast and were allowed to lawfully receive the broadcast on a television receiver, was considered irrelevant by the Court.¹⁰¹

In this context the Court reaffirmed that, on the basis of Art. 3(3) InfoSoc Directive, authorizing the inclusion of protected works in a communication to the public does not exhaust the right to authorize or prohibit other communications of those works to the public.¹⁰²

It follows that “by regulating the situation in which a given work is put to multiple use, the European Union legislature intended that each transmission or retransmission of a work which uses a specific technical means must, as a rule, be individually authorized by the author of the work in question”.¹⁰³ In the Court’s

⁹⁷ *Id.*, 150.

⁹⁸ *Id.*, 151.

⁹⁹ *Id.*, 152.

¹⁰⁰ See Case C-607/11, *ITV Broadcasting Ltd v. TVCatchup Ltd*, of 7 March 2013.

¹⁰¹ *Id.*, 40.

¹⁰² *Id.*, 23.

¹⁰³ *Idem.*, 24.

opinion, this is confirmed by Arts. 2 and 8 of the Satellite Directive,¹⁰⁴ which require independent authorization for the simultaneous, unaltered and unabridged retransmission by satellite or cable of an initial transmission of television or radio programs containing protected works, even though those programs may already be received in their reception area by other technical means, such as by wireless or terrestrial networks.¹⁰⁵

It must be noted, however, that on the basis of the Court's previous case law a mere technical means to ensure or improve reception of the original transmission in its reception area does not constitute a "communication" within the meaning of Art. 3(1) Copyright Directive.¹⁰⁶ Nevertheless, this interpretation can be considered correct only as long as the intervention of such technical means is limited to maintaining or improving the quality of the reception of a pre-existing transmission and cannot be used for any other type transmission.¹⁰⁷

5 Protection of Sports Events Under Unfair Competition Law in Europe

In spite of the wide range of property and intellectual-property-based tools available to sports organisers, the latter have on occasion resorted on rules based on unfair competition, parasitic copying and misappropriation. While these forms of protection have thus far proved of limited help to sports organisers, a brief survey of the most significant judicial cases related to sports events will contribute to a thorough analysis.

In Europe there is no general harmonisation of the law against unfair competition and only specific areas have been the object of legislative intervention.¹⁰⁸ Apart from these areas, unfair competition law is regulated by the domestic laws of the Member States. Consequently, the level and object of protection of unfair competition law may vary from one Member State to another.

¹⁰⁴ See Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission.

¹⁰⁵ See Case C-607/11, *ITV Broadcasting Ltd v. TVCatchup Ltd*, of 7 March 2013, 25.

¹⁰⁶ "Such activity is not to be confused with mere provision of physical facilities in order to ensure or improve reception of the original broadcast in its catchment area, which falls within the cases referred to in paragraph 74 of the present judgment, but constitutes an intervention without which those subscribers would not be able to enjoy the works broadcast, although physically within that area"; see Joined Cases C-431/09 and C-432/09 *Airfield and Canal Digitaal*, at 79. See also Joined Cases C 403/08 and 429/08 *Football Association Premier League Ltd and others v. QC Leisure and others and Karen Murphy v. Media Protection Services Ltd* (2011) ECR-I-9083, para. 194.

¹⁰⁷ See Case C-607/11, *ITV Broadcasting Ltd v. TVCatchup Ltd*, of 7 March 2013, 29.

¹⁰⁸ See Henning-Bodewig (2006), p. 25. See Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising (codified version) (2006) OJ L 376/21 and Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ("Unfair Commercial Practices Directive") (Text with EEA relevance) (2005) OJ L 149/22.

5.1 Unfair Competition and Sports Events in Selected Members States' Case Law

In very general terms, continental legal systems prohibit unfair commercial practices if they are likely to significantly affect the interests of competitors, consumers and other market participants.¹⁰⁹ Common law systems tend to have a more sceptical approach to unfair competition law. The United Kingdom does not have a generally acknowledged notion of unfair competition and no general law prohibiting unfair competitive practices. Specific acts that could qualify as unfair towards competitors are covered by tort law.¹¹⁰

Germany regulates unfair competition in its Act Against Unfair Competition (Gesetz gegen den unlauteren Wettbewerb) of 3 July 2004.¹¹¹ The Act Against Unfair Competition regulates all unfair competition practices in the interest of consumers, competitors and the general public. The basis of the Act is the “general clause” in its Sec. 3, which prohibits “unfair commercial practices if they are likely to significantly affect the interests of competitors, consumers or other market participants”. The general clause is illustrated by seven (non-exhaustive) examples of commercial behaviour that are seen as particularly unfair (Secs. 4–7) Act Against Unfair Competition.

Misappropriation of goods and services is covered by Sec. 4(9) of the Act, which states that “copying goods and services may be unfair if the product/service is of a competitive individuality” (*wettbewerbliche Eigenart*) and if additional factors are present, in particular: causing confusion as to the source, taking unfair advantage or causing damage to a competitor’s goodwill and breach of confidence. All these factors have to be proven at trial otherwise, as a general rule, one is “free to imitate” the products/services of a competitor unless these are protected by intellectual property rights.¹¹²

Looking at specific case law on unfair competition claims in sports cases, the *Hartplatzhelden* case of the German Federal Supreme Court (Bundesgerichtshof) stands out.¹¹³ *Hartplatzhelden.de* (hard-court heroes) is a German website that allows its members to post and share short clips of amateur football matches. WFV is an organiser of amateur football matches and its main organisational activities lie in creating match schedules and instructing referees. According to its bylaws, WFV owns exclusive commercial exploitation rights in the amateur matches they organise. WFV brought legal proceedings against *Hartplatzhelden* claiming that by posting video footage of their games on its website *Hartplatzhelden* misappropriated WFV’s commercial performance in organising these matches. WFV based its claim

¹⁰⁹ See Henning-Bodewig (2006). See also de Vrey (2005).

¹¹⁰ See Davis in: Hilty and Henning-Bodewig (2007), pp. 183–198.

¹¹¹ BGBl Bundesgesetzblatt (Federal Law Gazette) 2004, p. 1414: 2004 GRUR 660. See also German Federal Supreme Court, 7 May 1992, I ZR 163/90, 1992 GRUR 619 (*Klemmbausteine II*); and German Federal Supreme Court, 2 December. 2004, I ZR 30/02, 2005 GRUR 349 (*Klemmbausteine III*); Harte-Bavendamm et al. (2013), 4 No. 9 53–70.

¹¹² See Ohly (2010), pp. 506–524.

¹¹³ See German Federal Supreme Court, I ZR 60/09 of 28 October 2010 (*Hartplatzhelden.de*); Jussi (2011), p. 1; Henning-Bodewig (2006), p. 128.

on Art. 4(9) Act Against Unfair Competition. The first instance court, the Stuttgart District Court, as well as the appeal court, the Stuttgart Court of Appeal, decided in favour of WFV.¹¹⁴ The Federal Supreme Court, however, overturned the decision of the lower courts by stating that the conditions laid down in Art. 4(9) Act Against Unfair Competition were not met. The Supreme Court stated that the uploaded videos are not “imitations” of the football games within the meaning of Art. 4(9) of the Act, and that there were no circumstances in this case that made this practice unfair.¹¹⁵ WFV’s performance consisted in organising the match schedule and training referees; clearly none of these services were imitated by the videos published on Hartplatzhelden.¹¹⁶ The Court then moved to an analysis of whether WFV’s commercial performance in organising the match could be protected under the General Clause of Sec. 3 Act Against Unfair Competition. The Court declined this protection by stating that sports events as such are not protected by intellectual property rights, and therefore the freedom of imitation applies. The legislator deliberately left sports events unprotected; therefore, competition law should not be abused to fill the gap.¹¹⁷ Interestingly, the Court also considered that the commercial value of sports matches lies in the ticket sale and the exploitation of audiovisual broadcasting rights and that these assets can be protected under the “house right” of the organisers.¹¹⁸

The Netherlands do not have a general law regulating unfair competition.¹¹⁹ The concept of unfair competition has been developed by the jurisprudence of the Dutch Supreme Court (Hoge Raad) on the basis of the Civil Code’s general prohibition of unlawful acts (Art. 6:162 Civil Code).¹²⁰ According to the Dutch Supreme Court, performances cannot normally be protected by unfair competition law unless in the exceptional case of performances that are similar to (or are in line with) those that would receive protection under intellectual property law: this is known as the doctrine of *Éénlijnsprestatie*.¹²¹ In the landmark case of *Holland Nautic v. Decca* the Court held that profiting or using someone else’s performance is not unfair as such; it may become an act of unfair competition under certain circumstances – for example, when the goodwill of the original performance is being exploited or when the original performance was covered by an unregistered right of intellectual property.¹²²

More recently, the Dutch Supreme Court has explicitly refrained from granting legal protection on the basis of unfair competition law to organisers of sports

¹¹⁴ See Stuttgart District Court, LS 41 O 3/08 of 8 May 2008; and Stuttgart Court of Appeal, OLG 2 U 47/08 of 19 March 2009.

¹¹⁵ German Federal Supreme Court, I ZR 60/09 of 28 October 2010 (“Hartplatzhelden.de”) at 16.

¹¹⁶ *Id.*, at 18.

¹¹⁷ *Id.*, 27–28.

¹¹⁸ *Id.*, at 25. See also Ohly (2011), p. 436.

¹¹⁹ See Gielen (2007), p. 569.

¹²⁰ Dutch Supreme Court, 31 January 1919, NJ 1919, p. 161 *Lindenbaum v. Cohen*.

¹²¹ Dutch Supreme Court, 27 June 1986, *Holland Nautica v. Decca* NJ 1987, 191 para. 4.2; and Dutch Supreme Court, 20 November 1987, *Staat v. Den Ouden* NJ 1988, 311, annotated by Wichers Hoeth.

¹²² See van Engelen (1994), p. 233.

performances.¹²³ In the case of KNVB (the Dutch national football federation) against public broadcaster NOS the Supreme Court was called to answer the question whether the organisation of a sport event may be considered an “*Éénlijnsprestatie*” and therefore receive protection under unfair competition law against third parties that take unfair advantage of this performance. KNVB claimed a fee from NOS for the right to broadcast on the basis of unfair competition law. The Supreme Court held that organizing a sport event is not an “*Éénlijnsprestatie*” that would justify protection under unfair competition law; therefore, NOS was not taking unfair advantage of the KNVB’s organisational performance. However, as seen above, according to the Court, KNVB may claim a fee from NOS for the right to broadcast on the basis of the “house right” in the stadium. In sum, also under Dutch law sport event organisers have no remedy under unfair competition law, but they may claim protection against unauthorised makings of audio and video recordings on the basis of their “house right” in the stadium.

The United Kingdom does not have a generally acknowledged notion of unfair competition¹²⁴ nor does it recognise a general prohibition of unfair competitive practices in its law.¹²⁵ English law has defined specific economic torts that under circumstances may protect traders against certain types of unfair behaviour of competitors, for example, passing off.¹²⁶ The tort of passing off was first developed by the English Courts in order to prevent competitors from passing their goods off as goods of a competitor.¹²⁷ For a claim of passing off to succeed three elements must be proven by the claimant: (1) the existence of goodwill, (2) misrepresentation (the defendant must mislead the public as to the origin of the products or services), and (3) a damage.¹²⁸

An example of passing off in relation to sports events can be seen in the case of *BBC v. Talksport*.¹²⁹ Talksport, a radio station, had broadcast commentaries on football matches from a hotel room based on the live television coverage of the matches by the BBC. Talksport had advertised that they were broadcasting live commentaries of the matches. The BBC brought legal proceedings against Talksport claiming that Talksport passed off its services as BBC’s, since they owned the exclusive broadcasting rights. The Court, however, dismissed BBC’s claim since it did not succeed in proving that Talksports’ commentaries caused damage to BBC’s goodwill.¹³⁰

¹²³ Dutch Supreme Court, 23 October 1987, NJ 1987, 310 KNVB/NOS para. 5.1.

¹²⁴ In *Mogul Steamship Co v. MC Gregor* 1892 ac 25, it was argued that “dividing a line between fair and unfair competition, between what is reasonable and unreasonable surpasses the power of the Court”.

¹²⁵ Unfair competition law can be a synonym for passing off, it can cover all causes of action against unlawful acts done by a competitor or general tort of misappropriation of trade values. See for example Cornish et al. (2013), p 13; Sanders (1997), p. 53.

¹²⁶ See Carty (2001), p. 225.

¹²⁷ See e.g. *Reddaway v. Banham* 1896, AC 199, 204, 13 RPC 218, 224.

¹²⁸ Case *Reckitt & Colman v. Borden* 1990 RPC 340 HL.

¹²⁹ *BBC v. Talksport* 2001 FSR 53.

¹³⁰ *Id.* see Lawrence and Taylor (2008), pp. 1084–1087; See also Breitschaft (2010), pp. 427–436.

In Denmark unfair competition law is based upon the Marketing Practices Act of 1994 as amended in 2003.¹³¹ Section 1 of the Act deals with protection against imitation of goods and services (misappropriation), requiring that a product or service be distinctive and the presence of a risk of confusion of the public.¹³² Interestingly, Denmark provides a specific protection for “game-in-progress” news; i.e. sports organisers have been recognised the right to oppose the transmission of “game-in-progress” news before the end of the match, regardless of how the news has been provided. This legal remedy is based on a theory of non-statutory commercial misappropriation, somewhat similar to the U.S. INS doctrine,¹³³ and was recognised by the Danish Supreme Court in 1982.¹³⁴ However, more recently, the same Court, while confirming its earlier ruling, confined the protection to cases where the news did not come from a legitimate public source, such as radio and television broadcast.¹³⁵ This form of protection in favour of sports organisers is based on the fact that they have a proprietary interest in the sports event itself, that the organisers control the admission to the stadium, and that they enforce restrictions on the recording of sound and images on admission tickets in the stadium.¹³⁶ Interestingly, this proprietary interest (yet again another manifestation of the identified “house right”) apparently extends to a certain degree to the news generated by the organised event and creates a limited and temporal third-party effect.

In conclusion, this section, while limiting its analysis to only a sample of EU Member States, identified an interesting pattern. EU domestic courts seems reluctant to recognise a remedy based on unfair competition for subject matter that: (i) were implicitly or explicitly excluded from statutory IP protection, and (ii) can find suitable remedies in other legal concepts such as the described house right.

6 Special Forms of Protection

A number of Member States have enacted special forms of protection for sports organisers in their sports laws.¹³⁷ These provisions deserve their own categorization

¹³¹ See Henning-Bodewig (2006), p. 94.

¹³² *Id.*, p. 100.

¹³³ See *International News Service v. Associated Press*, 248 U.S. 215 (1918), where the Court recognized a proprietary interest in “hot-news” in absence of any copyright infringement on the basis of misappropriation. The extent to which such form of protection still survives after the enactment of the U.S. 1976 Copyright Act is debated, but commentators agree that the doctrine has been largely preempted by the enactment of the 1976 Act; See *Barclays Capital Inc. v. Theflyonthewall.com, Inc.* 650 F.3d 876 C.A.2 (N.Y.), 2011, at 878 (“... we conclude that because the plaintiffs’ claim falls within the “general scope” of copyright, 17 U.S.C. § 106, and involves the type of works protected by the Copyright Act, 17 U.S.C. §§ 102 and 103, and because the defendant’s acts at issue do not meet the exceptions for a ‘hot news’ misappropriation claim as recognized by NBA, the claim is preempted”).

¹³⁴ See Danish Supreme Court U 1982 179 H.

¹³⁵ See Danish Supreme Court U2004 2945 H.

¹³⁶ *Id.*

¹³⁷ See below.

(“special form of protection”) not just because they are codified in dedicated sports codes or acts, but also – mainly – because of their intrinsic characteristics. As it will emerge from the discussion below, they possess some unique traits in terms of nature, structure, and functioning, at least with regard to the most advanced and developed of these examples: the French *Code du Sports* and the Italian Sports Audiovisual Rights Act.

6.1 Sport Codes: The French Example

France enacted a specific provision for sports organisers in Law No. 84-610 of 16 July 1984 on the organization and promotion of sportive and physical activities,¹³⁸ successively amended and now codified in Art. L.333-1 of the French Sports Code.¹³⁹ The French approach deserves particular attention because it represents the first and so far the most developed example of its kind in the EU.

Article L.333-1 of the Sports Code establishes that sports federations and organisers of sports manifestations are proprietors of the exploitation rights of the sports manifestations or competitions they organize. The Article does not clarify what rights are included in the definition of “exploitation” of sports events. The French Council of State (Conseil d’État, the highest administrative court) in a recent case on the interpretation of Art. L.333-1-2 held that sports federations and the organisers of sports manifestations are “*propriétaires*” of the right to exploit such manifestations according to Art. L.333-1 of the Sports Code,¹⁴⁰ leading many commentators to speak of a property (as opposed to intellectual property) right in sports events.¹⁴¹ However, the exact nature of this right remains uncertain, and while some sources, including the highest administrative court, refer to it as a

¹³⁸ See Loi n°84-610 du 16 July 1984 relative à l’organisation et à la promotion des activités physiques et sportives, Art. 18-1.

¹³⁹ See Code du Sport, created by Ordonnance n° 2006-596 du 23 May 2006 relative à la partie législative du code du sport, as amended.

¹⁴⁰ Article L. 333-1-2 codifies the ruling of the court of appeal of 2009, establishing that the organization of bets on the results of the sports events is a form of commercial exploitation and therefore is included in the scope of Art. L. 333-1; See Paris Court of Appeal (Cour d’appel), Arrêt du 14 October 2009, 08/19179 (*Unibet Int. v. Federation Francaise de Tennis*).

¹⁴¹ “[...] l’article L. 333-1 du code du sport attribue aux fédérations sportives et aux organisateurs de manifestations sportives la propriété du droit d’exploitation des manifestations ou compétitions qu’ils organisent, eu égard, notamment, aux investissements financiers et humains ...”; See State Council (Conseil d’État, France), 5ème et 4ème sous-sections réunies, 30 March 2011, 342142 (<http://www.juricaf.org/arret/FRANCE-CONSEILDETAT-20110330-342142>).

property right,¹⁴² others classify it as a type of (uncodified) neighbouring or related right to copyright.¹⁴³

The French right is probably best conceptualized as a neighbouring or related right to copyright. Like most neighbouring rights, this right has as its primary justification rewarding the substantial investments of sports organisers in the organization of the event, which constitutes a risky financial undertaking.¹⁴⁴ According to the Paris Court of Appeal, the scope of this right is to cover “each and every economic activity, with the purpose of generating a profit, which would not exist if the sports event did not exist”.¹⁴⁵ As a matter of fact, however, French courts have interpreted the right quite extensively, well beyond what the rationales underlying copyright or related rights would normally justify. In a decision of 2004 the right has been interpreted to include any form of exploitation of the images taken at an event.¹⁴⁶ In this decision the French Supreme Court held that organisers of sports events have the right to authorize the recording of all the images of the manifestations they organized notably by distribution of the pictures taken on the occasion.¹⁴⁷ Lower courts have held that the right of exploitation of the sport event even encompasses the right to publish a book dedicated to that event.¹⁴⁸ Courts have gradually expanded the right of commercial exploitation of sports events beyond the audiovisual dimension thus far emerged and went as far as including a right to consent to bets.

In 2008 the Paris District Court held that the right of exploitation of sports events allows a sport organiser or sports federation to collect all the profits arising from their efforts to organize the events. The court considered that the organization of

¹⁴² *Id.*; See also the Report to the French National Assembly “*fait au nom de la commission des finances, de l’économie générale et du contrôle budgétaire sur le projet de loi relatif à l’ouverture à la concurrence et à la régulation du secteur des jeux d’argent et de hasard en ligne (n° 1549), par M. Jean-François Lamour, Député*” of 2009, at 312, available at: <http://www.assemblee-nationale.fr/13/pdf/rapports/r1860.pdf>; Paris Court of Appeal (Cour d’appel), Arrêt du 14 Octobre 2009, 08/19179 (*Unibet Int. v. Federation Francaise de Tennis*), at 4 (“*Considérant, en l’absence de toute précision ou distinction prévue par la loi concernant la nature de l’exploitation des manifestations ou compétitions sportives qui est l’objet du droit de propriété reconnu par ces dispositions, que toute forme d’activité économique, ayant pour finalité de générer un profit, et qui n’aurait pas d’existence si la manifestation sportive dont elle est le prétexte ou le support nécessaire n’existait pas, doit être regardée comme une exploitation au sens de ce texte*”).

¹⁴³ See Vivant and Bruguière (2012), p. 1053 et seq. Lucas and Lucas calls this right a *sui generis*, or non-typified, related right to copyright; Lucas and Lucas (2012), p. 934. For an immaterial property right in the form of a *Leistungsschutzrechts* see Hilty and Henning-Bodewig (2006), p. 57; Geiger (2004), pp. 278–281.

¹⁴⁴ See Paris Court of Appeal, 28 March 2001 (*Gemka Productions SA v. Tour de France SA*).

¹⁴⁵ See Paris Court of Appeal, 14 October 2009 (*Unibet Int. v. Federation Francaise de Tennis* 08/19179), at 4.

¹⁴⁶ See French Supreme Court (Commercial Chamber) (Cour de cassation – Chambre commerciale), decision No. 542 of 17 March 2004 (*Andros v. Motor Presse France*), available at http://www.courdecassation.fr/jurisprudence_2/financi_re574/arr_ts_575/arr_ccirc_925.html.

¹⁴⁷ “... l’organisateur d’une manifestation sportive est propriétaire des droits d’exploitation de l’image de cette manifestation notamment par diffusion de clichés photographiques réalisés à cette occasion”; see French Supreme Court (Commercial Chamber), Decision No. 542 of 17 March 2004 (*Andros v. Motor Presse France*).

¹⁴⁸ See Paris Commercial Court (Cour de Commerce), 12 December 2002 (*Gemka v. Tour de France*).

online bets is an activity generating revenues that are directly linked to the event. Accordingly, the organisation of online betting is not an exception to the right of commercial exploitation that vests in sports organisers and should therefore be also included.¹⁴⁹ The ruling was upheld on appeal, where the court clarified that any form of economic activity that generates a profit, which would not arise without the sports event itself, should be considered an exploitation of the sport event.¹⁵⁰ In this case the court justified such an extensive interpretation of the right of exploitation through reference to the prevention of corruption and the role of sports federations in preserving and promoting sport's ethical values.¹⁵¹ This judicially elaborated right to consent to bets has eventually found statutory recognition in the *Code du Sport*. A detailed analysis of the French right to consent to bets, and in particular whether it can be considered compatible with EU law provisions in the field of database protection, competition law and internal market rules, exceeds the scope of this study.¹⁵² Nevertheless, the compatibility with EU law of this type of intervention should be closely scrutinised not only for the case of the French right to consent to bets, but for other national initiatives as well.¹⁵³

Bulgaria,¹⁵⁴ Greece,¹⁵⁵ Hungary¹⁵⁶ and Romania¹⁵⁷ (and Italy, although in a slightly different manner which justifies a separate analysis in this study, see below) are other examples of countries that regulate ownership of rights of economic exploitation in sports events through dedicated legislation. No relevant case law has been found in these other jurisdictions.

6.2 Audiovisual Sports Rights: The Italian Approach

In Italy a new neighbouring right was recently introduced by legislative decree amending the Italian Copyright Act and creating a new Art. 78^{quater} entitled “audiovisual sports rights”.¹⁵⁸ The Article provides that “the provisions of the present law shall be applied to the audiovisual sports rights established by the Law

¹⁴⁹ See Paris District Court, 30 May 2008 (*Fédération Française de Tennis (FTT) v. Unibet*).

¹⁵⁰ See Paris Court of Appeal, 14 October 2009 (*Fédération Française de Tennis (FTT) v. Unibet*).

¹⁵¹ *Id.* See also Paris District Court, 30 May 2008 (*FFT/Expekt.com*); Verheyden (2003), p. 18.

¹⁵² For a complete analysis of the French right to consent to bets, see Van Rompuy and Margoni (2014), chapter 4; for a discussion on a proposal to introduce a similar right in the UK see Margoni and Van Rompuy (2015).

¹⁵³ See Margoni and Van Rompuy (2015).

¹⁵⁴ See Physical Education and Sports Act of Bulgaria of 2008.

¹⁵⁵ See Art. 84(1) of Law 2725/1999 (“Amateur and Professional Sport and Other Provisions”).

¹⁵⁶ See Act I of the Sport Act of 2004.

¹⁵⁷ See Art. 45 of the Romanian Sport Law.

¹⁵⁸ The new neighbouring right is based on Law 19 July 2007, No. 106, “Diritti televisivi sugli eventi sportivi nazionali: delega per la revisione della disciplina” Legge 19.07.2007 n° 106, and on the decrees implementing such framework act, mainly the legislative decree “Sport e diritti audiovisivi” Decreto legislativo 09.01. 2008, n.9. For a detailed account see Ferrari (2010), pp. 65–73; For a detailed analysis of the protection of sports events before the introduction of the new law see Auteri (2003); Sammarco (2006); Troiano (2003); Garaci (2006); for a critical analysis centered on the *numerus clausus* of rights on immaterial goods see in general Resta (2010).

of 19 July 2007 No. 106 and implementing legislative decrees, if compatible”.¹⁵⁹ Law 19 July 2007 No. 106 constitutes an ambitious attempt to regulate organically the entire field of sports TV rights and among the goals of the statutory intervention there are “the competitive equilibrium of participants to sports events, the enactment of an efficient system of measures to grant transparency of the transmission and communication to the public of rights for the radio and television market and on other electronic networks of sports events of professional championships and tournaments...”.¹⁶⁰

Article 2 of the implementing legislative decree of 9 January 2008 n° 9 on sport and audiovisual rights [Sport Decree]¹⁶¹ defines a number of basic concepts. Of particular interest for present purposes is the definition of *audiovisual rights* (which corresponds to the concept of *audiovisual sports rights* in the Italian Copyright Act).¹⁶² Audiovisual rights are defined as the exclusive rights lasting 50 years from the date of the event covering the fixation and the reproduction live or delayed, temporal or permanent, in any manner or form of the event, its communication and making available to the public, distribution to the public; rental and lending, and the fixation, elaboration, or reproduction of the broadcast of the event.

According to Art. 3 Sport Decree, the organiser of the competition and the organiser of the event are joint owners of sports audiovisual rights.¹⁶³ However, the exercise of audiovisual sports rights relating to single events of the competition vests in the organiser of the competition (Art. 4). Agreements contrary to this rule are considered void.

Significantly, Art. 4(6) states that the ownership of the rights resulting from the audiovisual production regulated in Art. 4(4) and (5) belongs to the event organiser, amending, if necessary, Article 78^{ter} of the Italian Copyright Act. The latter Article establishes that the producer of cinematographic or audiovisual works and of sequences of images in movement is the exclusive owner of the right of reproduction, distribution, communication to the public, and rental of the first fixation of a film for a period of 50 years from the date of first fixation. In other words, Art. 78^{ter} is the implementation into Italian law of Art. 3 Rental Directive, which regulates the right of the producer of the first fixation of a film.¹⁶⁴ As seen, Art. 3 provision mandates that the owner of the related right of first fixation is the producer. Thus, it would appear in contrast to EU law to attribute that ownership to a different subject, such as the sports organiser identified by Art. 78^{quater}. In other words, as long as the producer of the first fixation of the film is a different subject than the event organiser identified by the Sport Decree, the provision

¹⁵⁹ See Italian Copyright Law, Capo I-ter Diritti Audiovisivi sportivi, Art. 78^{quater}.

¹⁶⁰ See Art. 1 Law 2007 No. 106.

¹⁶¹ See legislative decree “Sport e diritti audiovisivi” Decreto legislativo 09.01. 2008, n.9.

¹⁶² See Art. 2 Sport Decree.

¹⁶³ Archival rights, as defined in Art. 2(7) of the Sport Decree belong exclusively to the organiser of that event.

¹⁶⁴ See Art. 3 et seq. Rental Directive.

establishing the prevalence of Article 78^{quater} over Art. 78^{ter} should be deemed in contrast to EU law.¹⁶⁵

The limited case law available to date suggests that the party with the strongest commercial interest and incentive in preventing the unauthorized diffusion of the recordings of sports events are – unsurprisingly – the licensees of the audiovisual and broadcasting rights. These entities already possess title and standing on the basis of standard copyright rules and contractual practice, with little to no necessity for the event organiser (e.g. *Lega Calcio*) to intervene in the proceedings.¹⁶⁶

Commentators have been particularly critical towards this legislative intervention in general and in particular towards the decision, reached at a late stage in the legislative process, to amend the Copyright Act and create a new specific neighbouring right.¹⁶⁷

7 Conclusions

From the analysis developed in this article, it emerges that the exclusivity so constantly sought by sports organisers and the media sector is commonly reached thanks to the mix of exclusive rights to use the sport venue and conditional access contracts. The latter are employed to regulate not only access but also the types of activities that fans, media and broadcasting organizations are allowed to perform once in the stadium. Whereas this “house right” has received explicit recognition only in a few Member States, its availability can be assumed for all of them. The reason has been already identified and lies in the fact that the “house right” is nothing else than a specific name for a common hermeneutic construction based on two main pillars of modern legal traditions: property and contracts. It would certainly be surprising, and a violation of the EU legal order, if a Member State did not give recognition to basic fundamental rights such as property and personal autonomy. As a matter of fact, evidence points in the opposite direction, that is to say, toward a general recognition of the interests of sports organisers based on property plus contracts, as recently confirmed by AG Jääskinen in his 2013 opinion. If a limit to the “house right” can be identified, it is in the fact that remedies based on contracts do not possess third party effects. This is, however, a natural consequence of the principle of privity of contracts. Nonetheless, it must be borne in mind that the main feature of the “house right” is that it is based on a mix of real and personal obligations. This mix greatly empowers the effectivity of contracts: while it cannot, of course, add to them third-party effects, it makes them a *sine qua non* condition for a licit stay in the sport venue.

¹⁶⁵ The main difference consists in the indication that the owner of the right of commercial exploitation is not the producer of the cinematographic or audiovisual work but the event organiser. In all those cases where the two roles do not coincide in the same subject or entity, the amending intent of Art. 78^{quater} seems to be contrary to EU law.

¹⁶⁶ See e.g. Rome District Court, order of 2 December 2011, *Reti Televisive Italiane v. Google Inc.* (ordinanza depositata il 13 December 2011); and order of 19 August 2011, *Reti Televisive Italiane v. Rojadirecta.es*.

¹⁶⁷ See Zeno Zencovich (2008), pp. 695–710.

In addition to the house right, copyright and related rights are generally available to sports organisers. The decisive factor with regard to these rights is that they cannot protect the sport event as such, as established by the ECJ. However, most if not all forms of use of those sports events (recording, broadcast, webcast, fixation, etc.) are in fact acts that are usually protected by copyright (when enough originality is present) or relevant related rights.

Unfair competition rules and misappropriation doctrines on the contrary do not appear to offer a sound and stable remedy to sports organisers. While their use in the past has led to some limited success, recent case law seems to have clearly established the principle that the protection of sports events has been pre-empted by national legislators who decided not to offer copyright protection to sports events as such. This finding points in favour of the view that unfair competition remedies cannot be used as default substitutes of intellectual property protection.

Finally, five Member States offer additional forms of protection, usually in the form of special provisions in sports codes or in related acts. One of these Member States has amended its copyright act giving formal neighbouring right recognition to such an intervention. It does not seem that these special forms of protection add much, if anything, to what is already available to sports organisers, with one significant exception. The French model includes a right to consent to bets, a solution that is currently under discussion at least in another Member State, the UK.¹⁶⁸ Putting any consideration regarding the speciality or ethical nature of sports aside, one aspect has to be clarified. Traditional copyright theory never contemplated a right to consent to bets, nor does it seem easy to justify its inclusion on the basis of the current structure or of the normative function of copyright law. If a place for such a right to consent to bets exists, it has to be found outside the realm of (intellectual) property rights. Whether this is possible at all in the light of EU rules on competition law and freedom of provision of services is yet to be proved.¹⁶⁹

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¹⁶⁸ See Margoni and Van Rompuy (2015).

¹⁶⁹ *Id.*

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