

Paper proposal

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Copyright eligibility of sporting events and performances

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Apart from being the subject of neighboring rights when broadcasted on TV or cinematographic work when fixed to a tangible medium including a hard drive, the copyright eligibility of a sporting event or performance has once again given rise to controversy following the CJEU judgment in the *Murphy*¹ case.

Most of the arguments which deny copyright protection for sporting events and performances focus on the fact that “unlike movies, plays, television programs, or operas, athletic events are competitive and have no underlying script.”² However this rhetoric is rather weak since several types of performances such as improvised musical or dramatic shows may still be protected by copyright despite the fact that they are not based on a script. Moreover, this argument may simply be addressed with the view put forward in the renowned Dutch case *Endstra Tapes*³ that originality and personal stamp would suffice for copyright protection.⁴

The core reason that sporting events or performances may not be granted copyright protection is that any sporting performance, by definition, aims certain functionality as winning the game, scoring, eliminating an opponent, obstructing a shot and etc., but not scientific or artistic expression in whatsoever form.⁵ In that respect, the mental/intellectual dimension of a sporting performance is akin to a method of operation which is not copyright eligible. Expanding copyright protection to functional performances may give rise to unintended claims by the athletes that their copyrighted tackle, shoot, pass, cross etc. were unlawfully used by an opponent, along with further restrictions on reporting and photographing of sporting events.

Such expansion will clearly undermine the *ratio legis* of copyright laws since it will give rise to excessive commodification of information beyond the needs of a viable market economy. Therefore remedies other than copyright protection such as unfair competition and unjust enrichment may be considered to redress the damages sustained by the investors of sporting events, due to practices such as ambush marketing.

¹ *Football Association Premier League Ltd v QC Leisure and ors, Murphy v Media Protection Services Ltd* [2012] 1 CMLR 29, 769.

² *National Basketball Assoc. v. Motorola, Inc.*, 105 F.3d 841 (2nd Cir. 1997), para.21.

³ Supreme Court 30 May 2008, NJ 2008, 556 (Zonen Endstra v. Nieuw Amsterdam)

⁴ Works of Literature, Science and Art, in: *A Century of Dutch Copyright Law. Auteurswet 1912-2012*, P.B. Hugenholtz, A.A. Quaedvlieg & D.J.G. Visser (eds.), Amsterdam: Delex 2012, p. 19-41.

⁵ sports involving certain choreography, such as rhythmic gymnastics or synchronized swimming may be exceptions .