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

Thomas Margoni[1]

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, 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; sports events; right to consent to bets.*

* This article has been published in IIC (2016) 47: 386. doi:10.1007/s40319-016-0475-8

1* Senior Lecturer in Intellectual Property and Internet Law and CREATe, University of Glasgow, UK. The author thanks Fabienne Dohmen for invaluable research assistance in particular in the chapter on unfair competition.

Table of Contents:

Introduction

The object of this paper is to analyse 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.[2]

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[3]. 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.[4] 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 moral values particularly at the grass-root and amateur level.[5] 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 complexity 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 lead to the creation at the MS level of dedicated remedies that may not be fit for the new internal digital market.[6]

2See European Commission 2014; SportsEconAustria et al 2012.
3See *ex pluris* the Sports Rights Owners Coalition (SROC) posittion at:
http://sroc.info/files/9513/8667/7878/SROC_position_paper_on_Asser_Study_-_08_11_13.pdf
4See Van Rompuy & Margoni 2014, 14; Boyle 2015.
5See Van Rompuy & Margoni 2014, 14.
6This article does not look at competition law rules in the EU sport sector. For a detailed analysis, see in general Van Rompuy & Margoni 2014.

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 level 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 even *as such* (chapter 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). Chapter 2 looks at the protection afforded to the recording of the sport events by copyright (2.1) and neighbouring rights (2.2). Chapter 3 looks at the protection of the broadcast of sport events; Chapter 4 is dedicated to unfair competition and the extent to which this largely national based remedy can be used to protect sports events; Chapter 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). Chapter 6 presents the conclusions.

1. The sport event as such

1.1 Copyright

The 2011 EU Court of Justice (ECJ) decision in *Premier League v QC Leisure* stated that sports events *as such* (notably football games) do not qualify as protected subject matter under EU copyright law.[7] 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*.[8] However, sporting events cannot be regarded as intellectual creations within the meaning of the EU Information Society Directive.[9] This applies in particular to football matches, which are subject to rules of the game which leave no room for creative expressive freedom.[10] 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.[11]

7See 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.
8Id., 97. For a detailed analysis of the ECJ defined originality standard see Margoni 2015 and literature therein cited.
9Directive 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.
10See 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/.
11Id., 99.

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".[12] 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 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.[13]

It can be further observed that the Court, following its line of jurisprudence inaugurated with the famous *Infopaq* decision,[14] grounds its ruling denying copyrightability to sports events *as such* to the lack of free and creative choices and of the personal stamp of the author. At 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.[15]

Second, the very argument that sports events lack free and creative choices could be challenged. As it 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.[16] 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 all[17]); (*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 movements copyrightable should a goal scored using without authorisation a protected trick be annulled for copyright infringement?) weight in favour of the denial of protection as copyright subject matter.

12Id., 100.

13Bently, 2012; Margoni 2016.

14For a brief account of the originality case law of the ECJ see Margoni 2015 and literature therein cited.

15See 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 & Bruguière 2012, 1059.

16See *supra* fn 4.

17For 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, n. 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 Resta, 43, et seq.

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.

1.2 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.[18]

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 exclusive right to use) are usually stipulated to determine who and under which conditions can view, film, or broadcast the event. However, this determination is based on a contractual relationship, not on a property right .[19]

Leaving aside for the moment considerations relating to special forms of protection as well as considerations relating to the ownership of copyright and 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.[20] 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.[21]

18See e.g. Hilty & Henning-Bodewig, 42 et seq. See also Paal, 74 et seq. For case law see e.g.: German Federal Supreme Court (BGH), 8 November 2005, KZR 37/03 ("Hörfunkrechte"); Dutch Supreme Court (Hoge Raad), 23 October 1987, NJ 1988, 310 (KNVB v NOS); and also Hoge Raad, 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] 2KB 125, CA.

19See 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 reproduced the detailed analysis on property rights developed by the AG.

20See Lawrence & Taylor 2008, 1077.

21Id., 1119.

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.[22] 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).[23]
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.[24]
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 to sports organisers[25] (and in any case they still represent a breach of contract[26]), the gap in the "house right" based legal protection of sports organisers is in the absence of third-party effects.[27]

Case law from national courts in EU MS 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*".[28] However, "merely informing the public" or "reporting on a match after it is over" is not unlawful.[29] In a subsequent decision the Court of Appeal of The Hague 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.[30] The Court of Appeal's decision was subsequently upheld by the Supreme Court.[31]

Similarly, according to the case law of the German Federal Supreme Court (*Bundesgerichtshof*, BGH), "house rights" may be invoked by sports organisers to protect their events against certain unauthorized uses. In the landmark *Hörfunkrechte* case the BGH 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

22See Gardiner et al 2012, 246; Lawrence & Taylor 2008, 1077 and 1092–1094.
23Id.
24See Gardiner et al 2012, 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 in Blackshaw et al 2009, 137; Lawrence & Taylor 2008, 1077.
25See 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).
26See Van Rompuy & Margoni 2014, 27 and fn 30;
27These types of considerations lead some renown doctrine to be skeptical towards the category; See Hilty & Henning-Bodewig 2006, 42.
28See Hoge Raad, 23 October 1987, NJ 1988, 310 (KNVB v NOS). See also Hoge Raad, 23 May 2003, NJ 2003, 494 (KNVB v Feyenoord).
29Id.
30See Court of Appeal of The Hague, 31 May 2001 (KNVB v Feyenoord).
31See Hoge Raad, 23 May 2003, NJ 2003, 494 (KNVB v Feyenoord).

stadium based on their house rules. If attendees do not respect these rules they can be removed from the stadium or forbidden entry.[32]

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.[33] The Court, in particular, clarified that tenants are entitled to invoke the "house 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.[34]

1.3 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.[35]

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 the Member States. Three of these are recognised also 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.[36]

With regard to the sports events *as such* the only neighbouring right that might be of some relevance is the right of performers (broadcasts and films' 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*".[37] 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.[38] 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 and similar script-based sports. No case law on this hypothetical issue has been found.

32BGH 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] 2KB 125, CA.

33See Arts. 339, 344, 354, 362 and following of Austrian Civil Code (*Allgemeines Bürgerliches Gesetzbuch*, ABGB).

34See 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.

35See 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.

36Performer'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; 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society.

37See Rome Convention Article 3(a); See also the almost identical definition of Article 2(a) of the WPPT.

38See Goldstein & Hugenholtz 2010, 234.

At 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 Article 81 of the German Copyright Act.[39] This neighbouring right, in fact, also requires the performance of a *work* protected by copyright in order to come into existence.[40] As seen above, sports events *as such* are not protected by copyright and therefore the protection offered by Article 81 German Copyright Act is not available to organisers of sports events.[41]

Interestingly, the opposite conclusion has been reached by Portuguese scholars and courts in respect of a right similar to the German event organiser's right: the *direito ao espectáculo.*[42] 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.[43] 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 Article 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.[44] 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.[45] Following a wave of legislative reforms and amendments[46], 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.[47] 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 Article 49 n.2, which confers on the owner of the show the right to limit access to shows for which a fee is required.[48]
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 Article 19 of the old law specifically mentioned that right.[49] Nevertheless, the Supreme Court (and the Court of Appeal) seemed to use Article 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.[50]

39 See Article 81 *Gesetz über Urheberrecht und verwandte Schutzrechte* of 1965, as amended.

40 See Hilty & Henning-Bodewig 2006, 40 and literature therein cited. See also German Supreme Court (Bundesgerichtshof, BGH) I ZR 60/09 of 28 October 2010 (Hartplatzhelden.de); Oberlandsgericht Hamburg, decision of 11 October 2006, 5 U 112/6.

41 Id.

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

43 See *Codigo do Direito de Autor e dos Direitos Conexos*, of 1985, as amended.

44 See Oliveira Ascensão 2008, 590, and the references therein cited. See also Menezes Leitão 2011, 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 copyrighability 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.

45 The right first appeared in 1985 in Article 117 of the Copyright Act. The *direito ao espectáculo* finds explicit recognition in the field of sport in Article 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, 270.

46 See Article 19.2 of "Lei n. 1/90", of January 13th, 1990; repealed by "Lei n. 30/2004 of July 21st, 2004" (Article 84); repealed by "Lei 5/2007 of January 16th, 2007" (Article 49); see Menezes Leitão 2001, 270; Oliveira Ascensão 2000, V. 71-78.

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

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

49 See Portuguese Supreme Court (*Supremo Tribunal de Justiça*), n. 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*) n. 3599/2008-6, of 17 December 2008.

50 See Portuguese Supreme Court (*Supremo Tribunal de Justiça)*, n. 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.

In conclusion, athletes competing in a race or players in a team are not “performers” in the sense of international, national and EU copyright law, as the activities they are performing 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 Article 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.

2 The recording of sports events

2.1 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 work.[51] 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.[52] 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 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”.[53] In particular these choice can be made in three phases: In the preparation phase, the photographer can choose the background, the subject’s pose and the lighting.[54] 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 concludes 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.

51In the current version of the Berne Convention cinematographic works are present in Article 2 as a protected subject matter and are further regulated in Articles 4, 7, 14, 14bis, and 15. See generally Bently & Sherman 2009, 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 Court of first instance (Tribunal de Grand Instance de Paris), *S.A. Television Francaise 1v Youtube LLC*, of 29 May 2012, RG: 10/11205.

52After 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 cumulability 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 & Sherman 2009, Margoni 2015.

53See Painer, 90.

54Id., 91

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.[55] 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. 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.[56] 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.[57] By making those various choices the director of the audiovisual recording is arguably capable of stamping the work created with his personal touch.[58]

55Id.

56Id.

57See 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 Appeals decision that the audiovisual recording of an ice hockey game (with added commentary) could not be considered an original work of authorship; See Court of Appeal of Southern Norrland of 20 June 2011, n. B 1309-10.

58Painer, 92.

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".[59] Likewise, in the case of the audiovisual recording of a sporting event (i.e. a non copyrighable subject matter) originality cannot be denied on the sole basis of it being a "realistic sequence of images".[60] Copyrightablity has to be verified in the 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 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.[61] 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.[62] 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[63]. 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[64].

According to national law, and in contractual practice, the main economic rights in an audiovisual work are commonly vested in the film producer. Consequently, in so far 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*).

59 Painer, 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).

60 As a matter of fact, the ECJ seems to suggests 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.

61 See Perry & Margoni 2012, 22.

62 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.

63 See Article 2(2) Term Directive.

64 Id.

In some jurisdictions (e.g. UK and Ireland), works in general, therefore including cinematographic works, have to be fixed in a tangible (material) form for copyright protection to arise[65]. Under the 1988 UK Copyright Act (CDPA[66]), films are defined as a *recording* on any medium from which a moving image may be produced by any means.[67] 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).[68] 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.[69] 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).[70]

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 to 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.

65Sec. 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.

66Copyright, Designs and Patent Act 1988.

67See s. 5B(1) CDPA.

68See 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"*).

69If 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.

70See 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, 51 – 60.

2.2 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.[71] The Directive defines films in Article 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 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).[72] 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[73]. 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.[74]

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.[75] 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.[76] However, the right does not include, at least at the EU level, the broader right of communication to the public.[77] 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.[78] 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.[79]

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.[80] According to some authors this approach fails to properly implement EU law.[81] 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.[82] It must be noted, however, that even if under certain conditions a 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*.[83]

71See 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.
72But see above the analysis of the UK for the case of films.
73See Goldstein & Hugenholtz 2010, 232; See German Federal Supreme Court, October 22, 1992, Case 1 ZR (300191), in 25 IIC 287, 288 (1994).
74See Recital 5 Rental Directive.
75See Article 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 Article 11(1)(a) of the InfoSoc Directive.
76See Article 3(2)(c) InfoSoc Directive.
77See Article 3(2) InfoSoc Directive.
78See Article 9 (1)(c) Rental Directive.
79See Article 3(3) Term Directive, which however uses an incomprehensible way to express this.
80But under some circumstances the film could be considered also a dramatic work, restoring, somehow, the EU duality; see Kamina 2002, 137.
81See Kamina 1998, 109-114.
82See 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".
83See Article 13D Copyright, Designs and Patents Act 1988.

3 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[84]. These broadcast signals, which usually contain cinematographic or audiovisual works or moving images, are protected by a neighbouring right (or copyright in the UK[85]) that operates independently from, and regardless of, any copyright in the content of the signal.[86] 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.[87] 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".[88] This right, in other words, affords protection to broadcasters' technical contributions to the assembly, production and transmission of live and pre-recorded events.[89] The signals transmitted merit protection because the value is in the act of communication itself, rather than the content of what is being communicated.[90]
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.[91] Additionally, the same Directive requires the grant of public rebroadcasting and communication rights and public distribution rights to broadcasters.[92] 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.[93] 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"*.[94]

84The relevant EU directives in this field are the Rental Directive (particularly Articles 7–9), the Satellite Directive, and the InfoSoc Directive (See arts 2(e) and 3(2)). At the international level see Article 14(3) TRIPs Agreement. In substantially similar terms see Article 13 Rome Convention. See also the Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite, done at Brussels on May 21, 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.
85See 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.
86See Bently & Sherman 2009, 86.
87See Case C 403/08 *Football Association Premier League Ltd et al v QC Leisure et al*, of 4 October 2011, 150.
88See Rome Convention Article 3(f). Similarly, Article 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".
89See Goldstein & Hugenholtz 2010, 237.
90*Id.* See also Bently & Sherman 2009, 86; Court of first instance of Paris (Tribunal de Grand Instance de Paris), S.A. Television Francaise 1 et al v S.A. Dailymotion, of 13 September 2012, RG:09/19255.
91See in general Guibault & Melzer 2004, 2 – 8.
92See Rental Directive Articles 7 – 9.
93See arts 2(e) and 3(2) InfoSoc Directive; See also Goldstein & Hugenholtz 2010, 342.
94See Bently & Sherman 2009, 92.

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.[95] In the case of sports events, the broadcasting organization can be the same club or federation when it autonomously acts as the actual broadcasting entity[96] 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.[97] As the ECJ explains, broadcasters of sporting events can invoke the right of fixation of their broadcasts which is provided for in Article 7(2) of the Rental 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 provided for by Article 2(e) of the Infosoc Directive.[98]

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.[99] The reason is to be found in a particular provision of the applicable domestic law (the UK Copyright Act, CDPA), which in Section 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 Section 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.[100]

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 European Court of Justice in a judgement concerning the interpretation of Article 3(1) of the 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.[101] In light of this judgement, the meaning of Article 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.[102]
In this context the Court reaffirmed that, on the basis of Article 3(3) of the 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.[103][104]

95Broadcasting 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).
96This was the case of Eredivisie Live, which until recently was an undertaking of the Dutch Eredivisie clubs.
97See 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.
98Id., 150.
99Id., 151.
100Id., 152
101See Case C-607/11, *ITV Broadcasting Ltd v TVCatchup* Ltd, of 7 March 2013.
102Id., 40.
103Id., 23.
104See Case C-607/11, *ITV Broadcasting Ltd v TVCatchup* Ltd, of 7 March 2013, 25.

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".[105] In the Court's opinion, this is confirmed by Articles 2 and 8 of the Satellite Directive[106], 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.[107]

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 Article 3(1) Copyright Directive.[108] 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.[109]

4 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 occasions resorted on rules based on unfair competition, parasitics 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 object of legislative intervention.[110] 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.[111]

105Idem., 24.
106See 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.
107See Case C-607/11, *ITV Broadcasting Ltd v TVCatchup* Ltd, of 7 March 2013, 25.
108*"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 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. 194.
109See Case C-607/11, *ITV Broadcasting Ltd v TVCatchup* Ltd, of 7 March 2013, 29.
110See Henning-Bodewig 2006, 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.
111See Henning-Bodewig 2006. See also de Vrey 2005.

4.1 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.[112] Common law systems tend to have a more sceptical approach to unfair competition law. The United Kingdom does not have a general 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.[113]

Germany regulates unfair competition in its "Act against unfair competition" of 3 July 2004 (*Gesetz gegen den unlauteren Wettbewerb*, UWG).[114] The UWG regulates all unfair competition practices in the interest of consumers, competitors and the general public. The basis of the UWG is the "general clause" in Section 3 UWG 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 (Section 4-7) UWG.

Misappropriation of goods and services is covered by Sec. 4 no. 9 UWG 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.[115]

112See Henning-Bodewig 2006. See also de Vrey 2005.
113See Davis in Hilty & Henning-Bodewig 2007, 183-198.
114BGBI Bundesgesetzblatt (Federal Law Gazette) 2004, p.1414: GRUR 2004, 660. See also BGH 07 May 1992, I ZR 163/90, GRUR 1992, 619 (Klemmbausteine II) and BGH, 02 December.2004, I ZR 30/02, GRUR 2005, 349 (Klemmbausteine III); Harte-Bavendamm et al 2013, 4 Nr. 9 53-70
115See Ohly 2010, 506-524.

Looking at specific case law on unfair competition claims in sports cases, the *Hartplatzhelden* case of the German Federal Supreme Court (*Bundesgerichtshof, BGH*) stands out.[116] *Hartplatzhelden.de* (Hhard 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 by-laws 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 on article 4 nr. 9 of the UWG. The Court of First Instance, the *Landgericht Stuttgart*, as well as the Court of Appeal, the *Oberlandesgericht Stuttgart*, decided in favour of WFV.[117] The German *Bundesgerichthof* however overturned the decision of the lower Courts by stating that the conditions laid down in article 4 nr. 9 UWG were not met. The Supreme Court stated that the uploaded videos are not "imitations" of the football games within the meaning of article 4 nr. 9 UWG and that there were no circumstances in this case that made this practice unfair.[118] 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*.[119] 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 section 3 UWG. 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.[120] Interestingly, the Court also considered that the commercial value of sports matches lies in the ticket sale and the exploitation of audio-visual broadcasting rights and that these assets can be protected under the "house right" of the organisers.[121]

The Netherlands do not have a general law regulating unfair competition.[122] 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 (Article 6:162 Civil Code).[123] 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.*[124] 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.[125]

116See See German Supreme Court (BGH), I ZR 60/09 of 28 October 2010 (Hartplatzhelden.de); Jlussi 2011, 1; Henning-Bodewig 2006, 128.
117See *Landgericht Stuttgart*, LS 41 O 3/08 of 8 May 2008, and *Oberlandesgericht Stuttgart*, OLG 2 U 47/08 of 19 March 2009.
118German Supreme Court (BGH) I ZR 60/09 of 28 October 2010 (Hartplatzhelden.de) 16.
119Id., 18.
120Id., 27-28.
121Id.,25. See also Ohly 2011, 436.
122See Gielen 2007, 569.
123Hoge Raad 31 January 1919, NJ 1919, p. 161 Lindenbaum v Cohen.
124Hoge Raad 27 June 1986, Holland Nautica v Decca NJ 1987, 191 para. 4.2 and Hoge Raad, 20 november 1987, Staat v Den Ouden NJ 1988, 311, annotated by Wichers Hoeth.
125See van Engelen 1994, 233.

More recently, the Dutch Supreme Court has explicitly refrained from granting legal protection on the basis of unfair competition law to organisers of sports performances.[126] 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 "É*énlijnsprestatie*" 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 "É*énlijnsprestatie*" 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.[127]

The United Kingdom does not have a generally acknowledged notion of unfair competition[128] nor does it recognise a general prohibition of unfair competitive practices in its law.[129] 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.[130] 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.[131] For a claim of passing off to succeed three elements must be proven by the claimant: the existence of goodwill, misrepresentation (the defendant must mislead the public as to the origin of the products or services) and a damage.[132]
An example of passing off in relation to sports events can be seen in the case of *BBC v Talksport*.[133] 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 her 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.[134]

126Hoge Raad 23 October 1987, NJ 1987, 310 KNVB/NOS para. 5.1
127Code du Sport Nr. 2006/569 23 may 2006, Journal Officiel 25.5.2006
128In the *Mogul Steamship Co v MC Gregor* 1892 ac 25, The Courts have argued that; *'dividing a line between fair and unfair competition between what is reasonable and unreasonable surpasses the power of the Court's*".
129Unfair 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, 13; Sanders 1997, 53.
130See Carty 2001, 225.
131See e.g. *Reddaway v Banham* 1896, AC 199, 204, 13 RPC 218, 224.
132Case *Reckitt & Colman v Borden* 1990 RPC 340 HL.
133*BBC v Talksport* 2001 FSR 53
134Id. See Lewis & Taylor 2008, 1084-1087; See also Breitschaft 2010, 427-436.

In Denmark unfair competition law is based upon the Marketing Practices Act of 1994 as amended in 2003.[135] 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.[136] 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 have been provided. This legal remedy is based on a theory of non-statutory commercial misappropriation, somewhat similar to the U.S. INS doctrine[137], and has been recognised by the Danish Supreme Court in 1982.[138] 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.[139] 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.[140] 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 iteresting 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.

135See Henning-Bodewig 2006, 94.
136Id., 100.
137See *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 pre-empted 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"*).
138See Danish Supreme Court U 1982 179 H.
139See Danish Supreme Court U2004 2945 H.
140Id.

5 Special forms of protection

A number of Member States have enacted special forms of protection for sports organisers in their sports laws.[141] These provisions deserve their own categorization ("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.

5.1 Sport codes: the French example

France enacted a specific provision for sports organisers in Law no. 84-610 of July 16th, 1984 on the organization and promotion of sportive and physical activities[142], successively amended and now codified in Article L.333-1 of the French Sports Code.[143] 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'Ètat*, the highest administrative court) in a recent case on the interpretation of Article 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 Article L.333-1 of the Sports Code,[144] leading many commentators to speak of a property (as opposed to intellectual property) right in sports events.[145] However, the exact nature of this right remains uncertain, and while some sources, including the highest administrative Court, refer to it as a property right[146], others classify it as a type of (uncodified) neighbouring or related right to copyright.[147]

141See below.

142See Loi n°84-610 du 16 juillet 1984 relative à l'organisation et à la promotion des activités physiques et sportives, Article 18-1.

143See Code du Sport, created by Ordonnance n° 2006-596 du 23 mai 2006 relative à la partie législative du code du sport, as amended.

144Article 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 Article L. 333-1; See Court d'Appel de Paris, Arrêt du 14 octobre 2009, 08/19179 (Unibet Int. v Federation Francaise de Tennis).

145"[...] 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 Conseil d'État (France), 5ème et 4ème sous-sections réunies, 30 mars 2011, 342142 (http://www.juricaf.org/arret/FRANCE-CONSEILDETAT-20110330-342142).

146Id.; 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; *Court d'Appel de Paris, Arret 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").*

147See Vivant & Bruguiére 2012, 1053 et seq. Lucas & Lucas calls this right a *sui generis*, or non-typified, related right to copyright; Lucas & Lucas 2012, 934.; For an immaterial property right in the form of a *Leistungsschutzrechts* see Hilty & Henning-Bodewig 2006, 57; Geiger 2004, 278 – 281.

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.[148] 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".[149] 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.[150] 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.[151] 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.[152] 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 Court of First Instance of Paris 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 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.[153] 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.[154] 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.[155] 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.[156] Nevertheless, the compatibility with EU law of this type of interventions should be closely scrutinised not only for the case of the French right to consent to bets, but for other national initiatives as well.[157]
Bulgaria,[158] Greece,[159] Hungary[160] and Romania[161] (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.

148See Court of Appeal of Paris decision of 28 Mars 2001 (Gemka Productions SA v Tour de France SA).
149See Court of Appeal of Paris decision of 14 October 2009 (Unibet Int. v Federation Francaise de Tennis 08/19179),4.
150See French Supreme Court (Cour de cassation - Chambre commerciale) decision n. 542 of 17 March 2004 (Andros v Motor Presse France), available at http://www.courdecassation.fr/jurisprudence_2/financi_re574/arr_ts_575/arr_ecirc_925.html.
151"... 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 (*Cour de cassation - Chambre commerciale*) Decision n. 542 of 17 March 2004 (Andros v Motor Presse France).
152See Paris Commercial Court (Cour de Commerce), December 12th, 2002 (Gemka v Tour de France).
153See TGI, Paris, 30 May 2008 (Fédération Française de Tennis (FTT) v. Unibet).
154See Paris Court of Appeals, 14 October 2009 (Fédération Française de Tennis (FTT) v. Unibet).
155Id. See also TGI, Paris 30 May 2008 (FFT / Expekt.com); Verheyden 2003, 18.
156For a complete analysis of the French right to consent to bets, see Van Rompuy & Margoni 2014, chapter 4; For a discussion on a proposal to introduce a similar right in the UK see Margoni & Van Rompuy 2015.
157See Margoni & Van Rompuy 2015.
158Physical Education and Sorts Act Bulgaria, cited in the Bulgarian questionnaire and available at http://www.lex.bg/bg/laws/ldoc/2133881857.
159See Article 84(1) of Law 2725/1999 ("Amateur and Professional Sport and Other Provisions").
160See Act I of the Sport Act of 2004.
161See Article 45 of the Romanian Sport Law.

5.2 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 Article 78-*quater* titled "audiovisual sports rights".[162] The article provides that "the provisions of the present law shall be applied to the audiovisual sports rights established by the Law of 19 July 2007 n. 106 and implementing legislative decrees, if compatible".[163] Law 19 July 2007 n. 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...".[164]

Article 2 of the implementing legislative decree of 9 January 2008 n° 9 on sport and audiovisual rights [Sport Decree][165] 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)[166]. 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 Article 3 Sport Decree, the organiser of the competition and the organiser of the event are joint owners of sports audiovisual rights.[167] However, the exercise of audiovisual sports rights relating to single events of the competition vests in the organiser of the competition (Article 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 Article 4(4) and 4(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, Article 78-*ter* is the implementation into Italian law of Article 3 Rental Directive which regulates the right of the producer of the first fixation of a film.[168] As seen, Article 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 Article 78-*quater* (sports media rights). 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 establishing the prevalence of Article 78-*quater* over Article 78-*ter* should be deemed in contrast to EU law.[169]

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

162The new neighbouring right is based on Law 19 July 2007, n. 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, 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.

163See Italian Copyright Law, *Capo I-ter Diritti Audiovisivi sportivi, Article 78-quater.*

164See Article 1 Law 2007 n. 106.

165See legislative decree *"Sport e diritti audiovisivi" Decreto legislativo 09.01. 2008, n.9.*

166See Article 2 Sport Decree.

167Archival rights, as defined in Article 2(7) of the Sport Decree belong exclusively to the organiser of that event.

168See Article 3 et seq. Rental Directive and see Section 1.4.2.2 above.

169The 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 Article 78-quarter seems to be contrary to EU law.

copyright rules and contractual practice, with little to no necessity for the event organiser (e.g.: *Lega Calcio*) to intervene in the proceedings.[170]
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.[171]

6 Conclusions

From the analysis developed in this article, it emerged 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" 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 to the opposite direction, that is to say, to a general recognition of the interests of sports organisers based on property plus contracts, as recently confirmed by AG Jääskinen in its 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 to be 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.
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 of the 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 lead 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.[172]

170See e.g. Court of first instance (Tribunale) of Rome, order of 2 December 2011, *Reti Televisive Italiane v. Google Inc.* (ordinanza depositata il 13 dicembre 2011); and order of 19 August 2011, *Reti Televisive Italiane v. Rojadirecta.es.*
171See Zeno Zencovich 2008, 695–710.
172See Margoni Van Rompuy 2015.

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 MS, the UK.[173] 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 it seems 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 provisions of services is yet to be proved.[174]

173See Margoni Van Rompuy 2015.
174Id.

Reference List

Andriychuk Oles (2009) The legal nature of premium sports events: IP or not IP?, in Blackshaw Ian, Cornelius Steve and Siekmann Robert R (eds.) TV rights and sport – legal aspects, T.M.C. Asser Press, The Hague

Arnold Richard (2001/2002) Copyright in Sporting Events and Broadcasts or Films of Sporting Events after Norowzian, The Yearbook of Copyright and Media Law 51

Auteri Paolo (2003) Diritti esclusivi sulle manifestazioni sportive, in AIDA, 183

Bently Lionel and Sherman Brad (2009) Intellectual Property Law, 3rd Ed., Oxford University Press

Bently Lionel (2012) The Return of Industrial Copyright?, E.I.P.R., Vol. 10, September 2012.

Breitschaft Andreas (2010) The Future of the passing-off action in the law against unfair competition – an evolution from a German perspective, 32 E.I.P.R. (9).

Boyle Raymond (2015) Copyright, Football and European Media Rights, CREATe Working Paper 2015/09 (November 2015)

Carty Hazel (2001) An analysis of the economic torts, 2nd edition, Oxford University Press, Oxford

Cornish William, Llewelyn David, and Aplin Tanya (2013) Intellectual Property: Patents, Copyrights, Trademarks & Allied Rights, 8th edition, Sweet and Maxwell, London.

Davis Jennifer (2007) Unfair competition law in the United Kingdom, in Hilty Reto and Henning-Bodewig Frauke, Law against unfair competition, Towards a new paradigm in Europe, Springer Verlag, Berlin

de Oliveira Ascensão José (2008) Direito Civil – Direito de autor e direitos conexos, Coimbra

de Oliveira Ascensão José (2000) Titularidade de licença de emisor de televisão e direito ao espetáculo no rescaldo do litígio S.L. Benfica/Olivedesportos, in Colectânea de Jurisprudência, ano XXV – V.

de Menezes Leitão Luís (2011) Direito de Autor, Coimbra

Engelen Th. C.J.A. van (1994) Prestatiebescherming en ongeschreven intellectuele eigendomsrechten, W.E.J. Tjeenk Willink, Zwolle

European Commission (2014) Sport keeps not only you, but also industry fit (Memo), 21 January 2014

Ferrari Luca (2010) Rights to broadcast sporting events under Italian Law, The international sports law journal, I-II, 65 – 73.

Mihaly Ficsor, *The WIPO „Internet Treaties" and Copyright in the „Cloud"*, ALAI 2012 Congress Kyoto, 16-18, October 2012.

Garaci Ilaria (2006) La tutela privatistica dell'organizzatore di eventi sportivi e I limiti allo sfruttamento economico dello spettacolo, in Studium iuris, 288

Gardiner Simon et al (2012) Sports law, 4th edition, Routledge, Oxford

Geiger Christophe (2004) Droit d'auteur et droit du public à l'information, Litec, Paris

Gielen Charles (2007) Kort begrip van het intellectuele eigendom, Kluwer, Deventer

Goldstein Paul and Hugenholtz Bernt (2010) International copyright law, Principles, law and practice, 2nd edition Oxford University Press, Oxford

Guibault Lucie and Melzer Roy (2010) The legal protection of broadcast signals, IRIS Plus, 10

Harte-Bavendamm Henning et al (2013) Gesetz gegen den Unlauteren Wettbewerb UWG Kommentar, Verlag C.H. Beck, München

Henning-Bodewig Frauke (2006) Unfair competition law European Union and Member States, Kluwer Law International, The Hague

Hilty Reto and Henning-Bodewig Frauke (2006) Leistungsschutzrecht für Sportveranstalter?, study commissioned by the German Football association, the German Football League, the German Olympic association, and others, available online at the MPG website

Kamina Pascal (2002) Film Copyright in the European Union, Cambridge University Press

Kamina Pascal (1998) British film copyright and the incorrect implementation of the EC Copyright Directives, Ent. L.R. 9(3).

Jlussi Dennis (2011) Hard Court Heroes annotations to Bundesgerichtshof, Case I ZR 60/09, Judgement of 28 October 2010 (*Hartplatzhelden*), 3 JIPITEC 250.

Lawrence Clive and Taylor Jonathan (2008) Proprietary rights in sports events, in Lewis Adam and Taylor Jonathan (eds.) Sport: Law and Practice, 2nd edition, Tottel Publishing, London

Lucas André & Lucas Henri-Jaques (2012) Traité de la propriété littéraire et artistique, 4th Ed., Paris

Margoni Thomas and Van Rompuy Ben (2015) UK horserace betting right: at odds with EU law? in European Intellectual Property Review (EIPR) 37(8), 479 – 483.

Margoni Thomas (2015) The digitisation of cultural heritage: originality, derivative works and (non) original photographs, IViR research paper series, available at www.ivir.nl

Margoni Thomas (2016) The Harmonisation of EU Copyright Law: The Originality Standard, in Perry Mark (Ed.) Intellectual Property Governance for the 21st Century: Global Evolution, Springer, forthcoming

Ohly Ansgar (2010) The Freedom of Imitation and Its Limits - A European Perspective, 41 International Review of Intellectual Property and Competition Law (IIC) 506 – 524

Ohly Ansgar (2011) Kein wettbewerbsrechtlicher Leistungsschutz für Amateurfussbalspiele, GRUR no. 5, 436

Paal Boris (2014) Leistungs- und Investitionsschutz für Sportveranstalter, Nomos, Berlin

Perry Mark and Margoni Thomas (2012), Authorship in complex ownership: A comparative study of joint works, in European Intellectual Property Review 34(1), 22.

Resta Giorgio (Ed.) (2010) Diritti esclusivi e nuovi beni immateriali, Milano

Sanders Kamperman (1997) Unfair competition law. The protection of intellectual and industrial creativity, Clarendon Press, Oxford

Sammarco Pieremilio (2006) I diritti televisivi sulle manifestazioni sportive: natura giuridica e loro tutela da sfruttamento non autorizzato agevolato dalle tecnologie informatiche, Dir. Inf. 746

SportsEconAustria et al (2012) Study on the Contribution of Sport to Economic Growth and Employment in the EU

Troiano Onofrio (2003) Il “diritto” sullo spettacolo sportivo (tutela giuridica dell'interesse alla sua utilizzazione economica, in AIDA, 144

Van Rompuy Ben and Margoni Thomas (2014) Sports organizers rights in the EU, Study commissioned by the European Commission, EU Publication Office, Luxembourg available at http://ec.europa.eu/sport/news/2014/study-on-sport-organisers-rights_en.htm.

Verheyden Delphine (2003) Ownership of TV rights in professional football in France, in The International Sports law journal 3, 18.

Vivant Michel and Bruguière Michel (2012) Droit d'auteur et droits voisins, 2nd edition, Dalloz

Vrey Rogier W. de (2005) Towards a European unfair competition law. A clash between legal families, University of Utrecht

Zeno Zencovich Vincenzo (2008) La statalizzazione dei diritti televisivi sportivi, in Il diritto dell’informazione e dell’informatica, XXVI, 6, 695–710.