
SPORT AND COPYRIGHT



According to current practice commonly accepted in most countries, sports performances are not, in principle, works protected by the laws of copyright. Athletes apparently are excluded from protection under the neighbouring rights which performing artists enjoy. Do athletes therefore have no right over their own image when they perform in competition or in exhibition sports?

Sports performances are not protected under copyright law unless they comply with the definition of an artistic work contained in the relevant international Conventions, and principally the Bern Convention, revised in Stockholm and then in Paris in 1971. The Paris text applies in most countries of the world including Germany, China, Spain, the United States, France, Great Britain, Italy, Japan, the Netherlands, Sweden and Switzerland. The concept of a work is so universally accepted that it allows a similar application of copyright rules throughout the world.

ARTISTIC WORKS

An artistic work is defined as any literary or artistic intellectual creation that has an individual character, regardless of its value or use, which may or may not have a material embodiment. Copyright protection is effective without formal procedure or registration, and does not require the use of a copyright symbol.

As an intellectual creation, an artistic work must be an expression of human thought, although the intellectual activity involved does not need to be quantitatively or qualitatively significant. Second-rate productions enjoy the same protection as masterpieces. They must, however, contain a degree of newness, however slight, which distinguishes them different from previous works. Intellectual creations exist in the fields of literature

by François Vouilloz*

and art, in the broadest sense of the terms. Almost every photograph and video, however mundane, are artistic works, regardless of their value or aesthetic quality. "Individual character" means the work's own style, which is a mark of its author's personality. News programmes and sports broadcasts, for example, are often protected by copyright law. The Convention sets out the categories (choreographic works and dumb shows) which most resemble sports performances. Copyright protection applies to the work of choreography or dumb show as it is written, and not to its performance, which is covered by neighbouring rights set out in legislation in almost all countries. Many visual performances made by human effort are likely to have their own individual style. The line that separates them from artistic works is not always easy to see, especially when a series of movements is involved. Each person moves in a characteristic way. Football or ice-hockey matches, downhill skiing or athletics events, have a certain individual style. but can they really be described as artistic? The requirement that a work be artistic appears to exclude athletes from enjoying the same protection as performing artists; however, difficulties arise with activities that are on the borderline between art and sport.

SPORTS PERFORMANCES

A literary or artistic work is the fruit of intellectual performance. This requirement has led a section of legal doctrine to exclude athletes from protection under copyright or neighbouring rights. For example, a downhill skier's movements are determined not by intellectual activity in planning for the race, but rather by the topography of the piste and the athlete's physical reflexes. Unlike a work of cho-

reography, the way a football or hockey match is played is not determined in advance as a work of the mind. The playing of a competition is governed only by the rules of the game, and situations may crop up which are unforeseeable. Like a skier, a football player does not predetermine his moves. which are for the most part dictated by reflex, leaving few possibilities for purely intellectual activity. Such performances are often comparable to an improviser's. However, unlike an improviser, who performs according to a pre-established format and can benefit from copyright protection, a football player makes his movements one by one. independently of the others. Inasmuch as the decisions to make these moves are acts of the mind, they are often not "individual" in the sense defined above: they are not a mark of their author's personality. One section of the doctrine considers that the dominant spirit of competition in sports performances eliminates any artistic character. Protecting players by considering them as performing artists, and thereby giving them a neighbouring right, is theoretically possible under the Rome Convention on the protection of performance artists. Under the terms of Paragraph 9, *"any contracting State may, in the terms of its national legislation, extend the protection provided for in this Convention to artists who do not perform literary or artistic works"*.

ACTIVITIES ON THE BORDERLINE BETWEEN ART AND SPORT

It follows that athletes who wish to enjoy the protection that is provided for performing artists must execute a work in the sense of Paragraph 2 of the Bern Convention. Italian practice seems to exclude sports competitions from any copyright protection. The German Federal Court (*Bundesgerichtshof*) has, however, ruled that a skating show (*"Eisrevue"*)

contained elements of operetta and could be described as an artistic work. A decision by the Paris court of appeal places bullfighters in the same category as artists, rather than athletes, for purposes of social security. It also ruled that “a move-

while the other is derived from the activity’s intellectual nature. Some consider that an activity which contains a degree of artistic character (figure skating, sports dancing) does not enjoy copyright protection when the per-

right protection. The criterion of competition - which has no real legal grounding is probably not the best decision-making factor. In my opinion, it should be set aside. Instead, we should consider that the uncertainty of the outcome, which



Opening ceremony of the 1992 Olympic Winter Games in Albertville.

ment which combines diving and somersaulting on a trampoline is a dumb show and therefore constitutes a work of the mind which is eligible for protection under the law on literary and artistic property". The notion of dumb show therefore encompasses all “*arts of bodily expression*”, including mime and gymnastic routines.

Legal scholars generally speak of two main distinguishing criteria based on which an activity can be defined either as artistic or simply sports-related (and therefore not protected by copyright): one criterion is derived from competition

performance takes place in a competition. It is argued that the “choreography” of such activities serves mainly to prove to the judges the athletes’ ability to execute difficult movements. But why should one make a distinction between a figure skating performance given during an exhibition and the same performance in a sports competition, when the same distinction is not made between a ballet performed in a theatre and the same performance given in a competition for young dancers? This question suggests that similar performances, when presented in a sports format, are prejudiced with regard to copy-

is characteristic of various competitions. is the determining criterion.

If one rejects the criterion of competition, any sports event, whether it takes place in or out of competition, could benefit from copyright protection as an expression of human thought with an individual character that bears the mark of its author’s personality. From this point of view, gymnasts, skaters, “synchronized” swimmers, divers, “freestyle” skiers, riders (dressage, acrobatic riding), skysurfers, etc. could protect their performances as authors or performing artists.

A choreographic (or theatrical) work is the product of an intellectual activity, however modest, with a degree of originality. Conceived in advance so that it can be executed again and again, it constitutes a protected work. By contrast, a bull fight may be appreciated as a work of art, but the fight itself, in which the movements are determined by a confrontation between a human and an animal, is not a choreography, for choreography can be reproduced or reused in subsequent performances. Thus, a confrontation between living beings (matches, combats) or between living beings and the elements (water, air) in movement (surf, yachting) are fundamentally different from artistic, musical or choreographic improvisations which are memorized or fixed, for example on video, and constitute artistic works that can be executed again by the same performing artist, or by another. Performances made in a stable or relatively stable water or air environment (such as aquatic dance, synchronized swimming, parachute figures, aerobatics) can be protected.

Choreography and sports performances It transpires that sports performances must be likened to choreographic works or dumb shows in order to benefit from protection by copyright.

The Paris version (the text which currently is applied) of the Bern Convention no longer requires that choreographic works or dumb shows be based on written or otherwise set directions. Unlike French law, Swiss copyright law does not require this type of predetermination. Hence, a choreographic work may be relayed directly from the author to the dancers, or from the instructor to the pupils. It can also be conveyed with videograms or choreology, a kind of choreographic script. Naturally, all transcriptions which use this medium can be protected by copyright as literary works. Many sports performances are prepared in the same way as choreographic works or dumb shows and bear a strong visual resemblance to them. The next paragraphs describe the sports events which most resemble dance and for which protection is possible.

ARTISTIC SPORTS

The International Skating Union has codified various skating figures used both in individual and pairs events and in ice-dancing. Performance of these figures is generally required in compulsory exercises and they are often included in free programmes as well. The technical regulations describe - in the form of text and diagrams - the movements which the skater must make to execute these figures, specifying for example the appropriate type of music and tempo. Using the definition above, it would be difficult to deny that these figures fit the description of a work of art. Their written descriptions are literary in nature. Moreover, original dance and free dance creations are fully fledged artistic works. Skaters should therefore benefit from the neighbouring rights provided for performing artists.

Performances in both artistic and rhythmic gymnastics require individual written instructions transcribed in the form of



signs similar to those of the choreological script. The symbolic script used in gymnastics comprises mainly signs drawn from visual observation of the elements or follow-through of a movement (for example, the body's centre of gravity). As it is not possible to extend this principle to all concepts in gymnastic, letters and figures are also necessary, enabling each part of an exercise to be described. Both general symbols that are applicable to all apparatuses, and symbols specific to particular disciplines, are used.

It is thus possible to set the chronological sequence of an exercise in a limited space. The written description of the details of these performances therefore are protected as literary or technical works. These exercises, whether in competition or exhibition, possess a degree of originality and comply with the definition of a work of art, and they should therefore be considered as artistic works, and the gymnasts, as performing artists.

In equestrian sport, dressage and acrobatic riding events include a free programme set to music which requires creativity on the part of the athlete. The same applies to synchronized swimming or diving if the latter is a composition by the swimmer. Performances in trampoline, sports dance, parachuting, acrobatics, weightlifting, athletics, fitness or free-style skiing events should also be eligible for protection.

CONCLUSION

Artistic sports performances which express a human thought that bears the mark of their author's personality can be protected by copyright. The criterion that they must have the intellectual nature of a predetermined activity thus extends the possibility of copyright protection to a whole series of sports and allows many athletes to be recognized as performing artists. Other athletes also have rights, including the right to protect their image, which can be used as a defence against wrongful exploitation of it.

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