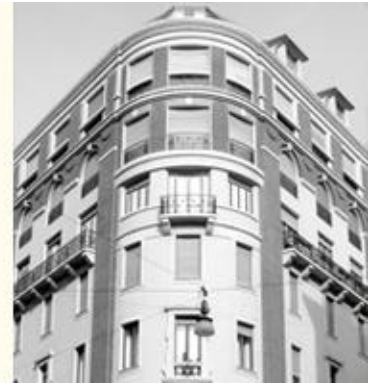




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TV rights and Copyright Regulation

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SUMMARY: 1) Introduction; 2) The (claimed) applicability of copyright to sports events; 3) Criticism to the above theory; 4) The right of the reporter (director) and of the film producer.

1) Introduction

From a copyright point of view, such as mine, the so-called “TV right” is a synonymous of transmission right, i.e. a right belonging to one of the two major families of rights (public communication and reproduction) of exploitation a work, such as a motion picture or other audiovisual work and, in the case under examination, an (audiovisually recorded) sport event.

Leaving aside, at this stage, other important issues that could be raised in connection to (the exploitation of) sports events, such as labour regulation of athletes, promotion and sponsorship, competition, ownership of TV rights and, last but not least, the necessary protection of the free speech and information right, I would like to spend a few remarks on the relationship between TV rights and copyright regulation.

2) The (claimed) applicability of copyright to sports events

1) According to some authors a sport event could be comprised in the category of works of the intellect.

Certainly, this would bring the advantage of granting automatic protection to organizers of sports events towards the generality of other subjects interested in taking advantage of the results of their entrepreneurial activity, opposable *erga omnes* should the event be filmed and publicly disseminated without their consent.

In order to do that, the mentioned theory goes through the inclusion of sports events in the category of protected works (in Italy, as laid down by artt. 1 and 2 of our Copyright Law¹); sometimes comparing sports events to theatrical works, or to other similar categories of works, such as motions pictures, and attributing to the athletes the role of performing artists; sometimes invoking for the rules of the played game the protection of schemes and formats.

In the Italian jurisprudence, this has been affirmed, for the first time (that I am aware of) by a decision of the Court of Rome of September 18, 1987², dealing with a controversy raised by a broadcasting organization claiming to have the right to access a football match in order to produce the (live) broadcast of the event, even without the consent of the football teams involved.

The Court, however, denied such right, granting the football teams the exclusive right to exploit their sport event, described as absolute and opposable *erga omnes*, by reason of the major investments borne. The reasoning, even if shareable from a mere good sense point of view, does not stand, as absolute rights must by definition (at least under Italian law) be expressly foreseen by the law (*numerus clausus*) and cannot be envisaged by extensive interpretation of general principles.

In order to circumvent the exception, the Court argued that this exercise had already been done by the previous Supreme Court decision n° 3769 of June 22, 1985³, granting (in a completely different case) a non previously codified “personal identity right” to an individual complaining that her medical records had been disclosed for commercial purposes without her consent.

¹ Law n° 633 of April 22, 1941

² In Diritto dell'Informazione e dell'Informatica 1988, pag. 132.

³ In Foro Italiano 1985, part I, pag. 2211.

The same analogy, according to the Court, should apply to various forms of exploitation foreseen by artt. 12 and following of the Italian Copyright Law and therefore, somehow, to exclusive rights protected by the said regulation.

2) The same principle has been affirmed, for a second (and last) time, by the same Court of Rome with a later decision of December 10, 1992⁴, rejecting the claim of a broadcasting organization with the argument that limitations imposed by the organizer of the sport event did not limit the right of reporting, otherwise constitutionally guaranteed, as the organizer would “*hold every exploitation right of the event*”.

How that could be, it was not explained.

3) A more recent, but equally minor, line of thought has been developed by the some Italian literature⁵, in the attempt to grant the entrepreneur, through Copyright Law, the right to exclusively enjoy the results of its entrepreneurial activity.

This, assuming that the Italian Copyright Law should protect, as a neighboring right, all forms of investments in (among others) the show business, therefore comparing the organizer of the sport event to the phonographic producer⁶, and interpretation, even if not of a protected work or material⁷, therefore comparing the athlete to the performing artist.

Quite an interesting corollary of this theory is that the rights on sports events would belong, in joint (neighboring) ownership to both the organizer and the athletes but, as the athletes are normally employees of the former, they would pertain, (partially) by derivative title, to the organizer only⁸.

3) Criticism to the above theory

The above mentioned theories are not convincing.

⁴ In Diritto dell'Informazione e dell'Informatica, 1993, pag. 695.

⁵ BORRUSO, La disciplina giuridica delle riproduzioni cinematografiche e televisive in ordine agli spettacoli sportivi, in Rivista del Diritto dello Sport 1954, pag. 105 e STELLA, Sul Diritto di riproduzione degli spettacoli sportivi, in Rivista di Diritto Commerciale 1990, II, pagg. 251, 255.

⁶ In this sense, see art. 18-1 of the French Law n° 610 of July 16, 1984, according to which, “Les fédérations (*omissis*), ainsi que les organisateurs (*omissis*), sont propriétaires du droit d'exploitation des manifestations ou compétitions sportives qu'ils organisent”

⁷ *Contra*, F. MORESE, Manifestazione sportiva: diritti dell'organizzatore e diritto di cronaca, in Diritto dell'Informazione e dell'Informatica, 1988, pag. 135.

1) First of all, because in order to satisfy their (only) intent to offer sports events promoters absolute copyright protection, they disregard the rationale of the copyright regulation.

In fact, it is a basic principle of copyright that protected material should be, *in primis*, characterized by creativity and originality, which is difficult (to say the least) to find in sport actions and, more in general, in sports events where the rules and schemes (formats) applied do not belong to any known form of art, esthetic or culture⁹.

2) Secondly, because the list (of categories) of protected works given by artt. 1 and 2 of the Italian Copyright Law, although not constituting a *numerus clausus*, can certainly not contain all (lists of) creations of the intellect that can exist, especially if they lack the indispensable characteristic of, as we said, creativity and originality.¹⁰

3) Moreover, because (audiovisually recorded) sports events are not comparable to theatrical works nor to other similar categories of works, such as motion pictures or (as a neighboring right) to audiovisual materials.

Not theatrical works, for the obvious reasons that there is no theater, no stage and, especially, not a theatrical work being performed, and not motion pictures, because movies are created in a complex series of processes and result from the assembling of different elements (subject, script, music and artistic direction¹¹).

4) From a different point of view, even game rules and schemes (format) have been considered as protected under Copyright Law by the Italian literature¹² and jurisprudence¹³, but only under condition that they do show a complete expression and manifestation of the (creative) idea from which they originate.

⁸ BORRUSO, La disciplina giuridica delle riproduzioni cinematografiche e televisive in ordine agli spettacoli sportivi, in Rivista del Diritto dello Sport 1954, pag. 105 e STELLA, Sul Diritto di riproduzione degli spettacoli sportivi, in Rivista di Diritto Commerciale 1990, II, pagg. 251, 255.

⁹ The only protected by copyright, M. FABIANI; Creatività e diritto d'autore, in Diritto d'Autore, 1998, pag. 600.

¹⁰ A unfortunate contradiction to this principle is, in the opinion of many, the extension of copyright protection to software products, frequently characterized by lack of creativity.

¹¹ Art. 44 of the Italian Copyright Law.

¹² P. Lax, E' Possibile parlare di soggetto televisivo?, in Diritto d'Autore, 1987, pag. 554.

¹³ Court of Rome, November 26, 1987, in Diritto d'Autore, 1988, pag. 613.

And if they do, this would give protection to the game itself, but not to the sport event in which the game is played.

5) Finally, even the parallel between athletes and performing artists has been criticized by the Italian literature, with the argument that the activity that they render is, by definition, “neighboring” to the work (of the intellect) that they perform¹⁴.

4) The right of the reporter (director) and of the film producer

From an entirely different perspective, some author¹⁵ argued that the work of the intellect in the (audiovisually recorded) sports events would lay, not in the sports events themselves but rather in the relevant audiovisual recording.

This, on the assumption that the creative character would be vested in the activity of the reporter of the event, acting as a director for the choice, the coordination and the assembling of the shootings to be recorded.

As such, the reporter/director would be considered as author of the work and enjoy the protection granted by Copyright Law.

Such perspective seems to be more reasonable and more coordinated with the present structure and rationale of the Italian Copyright Law, even if not at all satisfactory for the interests of athletes, sport teams and event organizers.

As a consequence, all exploitation rights on the filming of the event belong to the author thereof (and, for him, to the producer of the film) leaving it up to him to contractually discipline his relationship with and all other subjects involved in the sport event.

¹⁴ E. PODDIGHE, “Diritti televisivi” e teoria dei beni, Cedam 2003, pag. 79.

¹⁵ E. PODDIGHE, “Diritti televisivi” e teoria dei beni, Cedam 2003, pag. 80.