

RE-EXAMINING COPYRIGHT PROTECTION OF SPORTS PROGRAMS FROM *SINA V. TIANYING JIUZHOU* AND *CCTV INTERNATIONAL V. STORM*

Written by *Zhaoxia Deng*

3rd Year PhD Student, The University of Hong Kong

ABSTRACT

The paper re-examines the legal nature of the sports programs from the lessons of the *Sina* case and the *Storm* case. Although the Beijing IP Court denied to consider the sports programs as cinematographic works and put forward a more detailed analysis of the “originality” of film works, it did not rule out the possibility of identifying sports programs as cinematographic works in some special circumstances. The Beijing IP court acknowledged the loopholes of the current copyright law, but it left the problem to be solved by the anti-unfair competition law and to be further regulated by the special laws such as sports law, as well as allowing the copyright law to redefine the broadcasting organization right so as to maintain the systematic logic of the copyright law. This is a possible solution under the current situation.

Keywords: Copyright Protection; Sports Program; Cinematographic Works; Video Recordings; Broadcasting

INTRODUCTION

In recent years, the rapid development of sports industry in China has led to cultural prosperity and economic growth. As the legislative purpose of Chinese Copyright Law is to encourage the creation and dissemination of works conducive to the building of a socialist society that is advanced ethically and materially, and promoting the progress and flourishing of socialist culture and sciences,ⁱ copyright law should play an active role in the development of sports industry. However, along with the emergence of new communication technology, especially the development of internet and intelligent terminal equipment, copyright disputes against sports programs have occurred frequently in recent years. This has posed challenges to district courts on how to define the legal nature of sports programs, among which the most controversial ones are to determine the originality of the cinematographic works and works created by a process analogous to cinematography (hereinafter referred to as “cinematographic works”) and to determine two kinds of neighboring rights—the video recording rights and the broadcasting organization rights. On March 30, 2018, the Beijing IP Court concluded two trials: Beijing Sina Internet Information Service Co. Ltd v. Beijing Tianying Jiuzhou Network Technology Co. Ltd (hereinafter referred to as “Sina v. Tianying Jiuzhou”) ⁱⁱ and CCTV International Network Co. Ltd v. Beijing Storm Technology Co. Ltd (hereinafter referred to as “CCTV International v. Storm”) ⁱⁱⁱ, which triggered a great controversy in the academic and judicial circles. Despite that the Beijing IP Court has made a more detailed explanation of the copyright attribute and content of the sports programs, providing a significant guidance for judicial practice, some of their reasonings are worth deeply exploring.

SPORTS PROGRAMS AS CINEMATOGRAPHIC WORKS

“Fixation” Requirement in Cinematographic Works

“Fixation” requirement is first stipulated by the Berne Convention. Article 2 §(2) of the Convention states that it is “a matter for legislation in the countries of the Union to prescribe that works in general or any specified categories of works shall not be protected unless they have been fixed in some material form”.^{iv} In accordance with Article 2 of the Regulations for the Implementation of the Copyright Law of the People’s Republic of China (hereinafter referred to as “Regulations of Copyright Law”), “works” means “intellectual creations with originality in the literary, artistic or scientific domain, insofar as they can be reproduced in a

tangible form”.^v This clause explicitly adds “being reproduced in a tangible form” as a requirement for being a work in the sense of Copyright Law. Moreover, Article 4 §(11) of the Regulations also requires “fixation” as a prerequisite for a cinematographic work, providing that “cinematographic works” are works that “are recorded on some material, consisting of a series of images, with or without accompanying sound, and which can be projected with the aid of suitable devices or communicated by other means”.^{vi} Based on the explicit languages of these regulations, in *Sina v. Tianying Jiuzhou* and *CCTV International v. Storm*, the Beijing IP Court also held that the cinematographic works protected by Copyright Law should be “recorded on some material”, that is, the cinematographic works should be stably reproduced in a tangible form, satisfying the “fixation” requirement. In the court’s opinion, whether the picture carried by the public signal of the event has been fixed or not usually depends on the live broadcasting stages of the sports. In the process of live broadcasting, because the way of random shooting and random broadcasting is adopted, the whole game picture is not stably fixed on the tangible carrier at this time, and as such the picture carried by the public signal of live broadcasting cannot meet the fixed requirement as a cinematographic work. This is exactly how the court ruled in the *Sina* case.^{vii} However, in the *CCTV International* case, it involved an internet video-on-demand system, which happened after the live broadcasting of the event. At this moment the picture carried by the public signal has been stably fixed on a tangible form, at which it meets the fixed requirement.^{viii}

There are two ways to watch sports program, one is watching live broadcasting in real time, and the other is watching recorded broadcasting and replaying after the event. From the audiences’ perspective, there is no substantial difference in the expression between live broadcasting picture and the recorded and replayed picture. However, from the court’s understanding of the “fixed” element of the cinematographic works, live sports programs cannot constitute cinematographic works while the recorded and replayed ones can. It is apparently irrational to set such standard merely from the perspective of different playing time. Besides, digital technology can even allow the sports events to be recorded digitally while at the same time being live broadcasted, and then replayed the recorded content synchronously. Because live broadcasting must be based on digital content, there must be real-time recording in the process of live broadcasting. However, in the court’s view, live broadcasting sports events via traditional broadcasting signal cannot meet the fixed requirement whilst it can when live broadcasting through network signal. This argument is obviously untenable.

Different from other countries such as U.S.,^{ix} “the work to be fixed on some material” is not a condition for being a work stipulated by Chinese Copyright Law. Moreover, “oral works” is explicitly listed as a kind of protected works under this Law,^x which indicates that a work is not required to be “fixed on some material” in order to receive copyright protection.^{xi} As a matter of fact, the language of “being reproduced in a tangible form”^{xii} stated by the Regulations of Copyright Law refers to the “fixed element” in foreign legislations, but its meaning is misunderstood during the process of transplantation. To be more precisely, the language of “being reproduced in a tangible form” should be interpreted as “being perceived objectively as an external expression”.^{xiii} The author believes that the element of “being reproduced in some tangible form” or “being fixed on some material” should not be interpreted too rigidly in the digital era, and both live sports programs and recorded programs should be recognized to have met this requirement.

“Originality” Requirement in Cinematographic Works

“Originality” is another precondition stipulated by the Regulations of Copyright Law.^{xiv} The characteristic of a cinematographic work is “consisting of a series of images, with or without accompanying sound, and which can be projected with the aid of suitable devices or communicated by other means”.^{xv} There is a great controversy on the originality of the cinematographic work and whether live sports programs constitute cinematographic works.

Some scholars such as Professor Lu believe live sports programs meet the originality requirement and should be regarded as audio-visual works. In Professor Lu’s opinion, the production process of live sports programs is similar to the production process of movies, which is embodied in the following aspects: 1) the creative work of directors; 2) the story-like creative elements in sports programs; 3) the selection and arrangement of the recording lens of the event; 4) the originality requirement of live sports programs is acknowledged by most legislations of the two legal systems.^{xvi} In *CCTV International v. Storm*, the court held that CCTV processed, produced and broadcasted the live pictures of the World Cup Match. During the process of live broadcasting, it intercepted the information from different camera positions through multi lens switching, supplemented by commentator’s commentary and review. The finalized football match program enjoyed highly originality containing creative efforts from CCTV, and thus it should be deemed as a work protected by copyright law.^{xvii} This logic was also adopted by the court in the *Sina* case. In this case, the court ruled that the live pictures

were formed by the selection and arrangement of the recording lens of the event, which is a process of creative labor, and its originality was reflected on different picture effects produced by different choices. Therefore, the live pictures meet the requirement of originality and should be protected as works by copyright law.^{xviii}

However, opponents argued that although the live sports programs enjoy a certain degree of originality due to the facts that the lens switching, the choice of camera position, the arrangement of live pictures and the commentary of host in the process of live broadcasting all reflect the choice of the live broadcaster, this originality is too low, which is unable to constitute a work, and thus the live sports programs should be regarded as video recordings.^{xix} Some objectors also compared the live pictures of sports events with film documentaries, concluding that the live sports programs have lower originality than that of the film documentaries.^{xx} In *CCTV International v. Century Dragon*, the court acknowledged that the TV program “Deba Football Match” had a certain degree of originality, reflecting in the shooting and interpretation of on-site matches, including the setting of camera positions, the selection of lenses and the host, the participation of commentary and directors and so on. However, the court also believed that the broadcasters, unlike filmmakers, were not in a dominant position to make the live sports programs. This was because the choices and expressions that a broadcaster could make during the process of live broadcasting sports events were very limited. Hence this sports program did not satisfy the originality requirement of cinematographic works.^{xxi} Moreover, some scholars pointed out that live sports programs are a kind of industrial products which do not have the “originality” necessary for a work to be protected by copyright law. That’s due to the facts that the production of live pictures of sports events must be based on the prescribed procedures and rules, following the established objectives suitable for the audiences, and faithfully and objectively record the nature of the process of sports events.^{xxii} Some cases also ruled against plaintiffs based on the argument that live sports programs do not belong to the “field of literature, art and science” and do not constitute “works”. For example, in *CCTV International v. I Love Chatting*, the court held that the sports programs rebroadcasted by CCTV and other TV channels were not aimed at displaying literary, artistic or scientific aesthetic feeling, and thus they did not constitute works in the sense of copyright law.^{xxiii} The court also held in *CCTV International v. Dynamic View* that the 2014 Brazil World Cup did not constitute a work in the sense of copyright law for the reason that as a sports program, it mainly displayed sports strength and skills, not for the purpose of displaying literary, artistic or scientific

aesthetic feeling.^{xxiv}

Additionally, how to define the legal nature of sports events will also affect that of the live sports programs. There are three views towards whether sports events can be protected by copyright law: affirmative, negative and adjacency theories.^{xxv} Supporters argue that modern sports competitions have stronger attraction than general competitive contests, displaying high skill, profound thought, considerable appreciation and reproducibility, as such themselves should constitute works in the sense of copyright law.^{xxvi} However, in opponents' opinion, competitive sports events cannot constitute works because they are not aimed at displaying the aesthetic feeling of literature and art or science. For figure skating, gymnastics and other performance sports, providing copyright protection for them may limit competition. So it should not constitute a work.^{xxvii} Some scholars also believe that the legal nature of sports events should be analysed by types due to its diversity. According to the artistic or aesthetic value of the sports events, it can be divided into antagonistic sports events and artistic sports events. Antagonistic sports events don't have artistic or aesthetic value, which should not be protected by copyright law, whilst the opposite is true for artistic sports events.^{xxviii} In the case that sports events themselves constitute works, live sports programs may constitute copies or derivative works of sports event works. At this moment, no matter whether the program is a work or not, the producer of the sports program can file a lawsuit based on the copyright of the event work after obtaining the authorization of the event organizer.

In *Sina v. Tianying Jiuzhou* and *CCTV International v. Storm*, the Beijing IP Court provided detailed discussion on the originality requirement of the film works and whether live sports programs constitute the film works. In the court's words, both the degree of originality and the angle of originality should be considered when dealing with this issue. First of all, the court analyzed from the perspective of systematization of the Chinese copyright law, the historical development of the international copyright and neighboring right system, and the existing experience of judicial practice, arguing that there are distinguished two systems of copyright and neighboring right in Chinese copyright system, and the degree of originality should be taken as a standard to distinguish the cinematographic works and the video recordings works of a live sports program, where cinematographic works have a higher degree of originality.^{xxix} After that, the court divided the cinematographic works into documentary films and non-documentary films, and classified the live sports programs as documentary films. The

originality of documentary film works is reflected in the following three aspects: first, the selection of materials; second, the shooting of materials; and third, the selection and arrangement of shooting pictures. Each documentary film should at least reflect the author's personal choice in one or more of the above aspects.^{xxx} Different types of cinematographic works show the following progressive characteristics: generally speaking, the documentary type has smaller personalized choice space than that of the non-documentary one; in the documentary type, the live broadcasting type has smaller personalized choice space than the non-live broadcasting one; and in the live broadcasting type, the one with the requirement of shooting standard has smaller personalized choice space than the one without such requirement. To be more precisely, the one with the needs to satisfy the audiences' demand has smaller personalized choice space than the one without such needs. After the type analysis of the live sports programs, the court believed that in terms of the three angles of originality judgement of documentary films, there is basically no original labor in the selection of materials. In the case that the shooting pictures and the selection and arrangement of the shooting pictures are limited by relevant objective factors, the personalized selection space of live sports programs is greatly limited. Therefore, from the type analysis, it is difficult for the general sports programs to meet the requirement of cinematographic works in terms of originality, but it does not exclude the possibility of originality embodied in some special cases.^{xxxi} Along with this analysis path, the court re-examined the specific facts in the above two cases, and found that the programs of CSL and Brazil World Cup involved in the cases did not meet the requirements of originality of cinematographic works. The court also made it clear that the live sports programs in general do not constitute cinematographic works. The argument that the cinematographic works should have higher originality is consistent with the Chinese copyright system, which has guiding significance for the specific analysis of the originality of cinematographic works.

THE RIGHT OF BROADCASTING, THE RIGHT OF COMMUNICATION THROUGH INFORMATION NETWORK, AND OTHER RIGHTS

In the *Storm* case involving the real-time broadcasting of sports events on the internet, the court held that real-time broadcasting of copyrighted TV programs on the internet infringed the

copyright and related rights and interests of CCTV network company.^{xxxii} However, the court did not make it clear the specific types of rights that have been infringed. But in the first trial of the *Sina* case, the court reasoned that the information communicated by the real-time network broadcasting cannot be accessed by users through interaction at any time and any place, hence it should not be regulated by the right of communication through information network, rather, it should be protected by “other rights enjoyed by the copyright owner”.^{xxxiii} Article 10 §(1) of the Chinese Copyright Law stipulates the exclusive rights enjoyed by the author, among which item 12 is “the right of communication through information network, that is, the right to make a work available to the public by wire or by wireless means, so that people may have access to the work from a place and at a time individually chosen by them”.^{xxxiv} According to this definitive clause, the behavior controlled by right of communication through information network is interactive communication. Because real-time broadcasting is not interactive communication, there is no controversy that live sports programs should not be regulated by this right. Nevertheless, it is still questionable that real-time broadcasting can be regulated by “other rights enjoyed by the copyright owner” mentioned in item 17. As a civil right, copyright is exclusive which should have a clear boundary. Otherwise, the public will not be able to know the scope of other people’s rights and whether the act constitute an infringement of other people’s rights. The “other rights enjoyed by the copyright owner” can be applied only when an act does not fall into the other specific rights but there are very sufficient reasons to protect it.

The real-time broadcasting on the internet should be regulated by the right of broadcasting, that is, “the right to broadcast a work or disseminate it to the public by any wireless means, to communicate the broadcast of a work to the public by wire or by rebroadcasting, and to publicly communicate the broadcast of a work by loudspeaker or any other analogous instrument transmitting signs, sounds or images”.^{xxxv} Accordingly, the behaviors controlled by the right of broadcasting include: wireless broadcasting, rebroadcasting the broadcast of a work, and publicly communicate the broadcast of a work, among which, rebroadcasting by any wireless or wire means refers to transmitting the radio broadcast signal synchronously through radio waves or cable, so as to enable the audiences to listen or watch the broadcast works.^{xxxvi} Also, “by wire” in the right of broadcasting should be interpreted as any cable including the internet.^{xxxvii} That is to say, the real-time network rebroadcasting of sports programs is a kind of “rebroadcasting the broadcast of a work” behavior which should be regulated by the right of

broadcasting. Only when the programs can be replayed on demand by wired network that it falls into “other rights enjoyed by the copyright owner”, such as broadcasting the video of a sports match on the website at a fixed time. In the second trial of the *Sina* case, the court set a good example, ruling that the act of real-time network rebroadcasting of sports programs should constitute the act of “communicating the broadcast of a work to the public by wire or by rebroadcasting”, which should be regulated by the right of broadcasting.^{xxxviii}

THE VIDEO RECORDING RIGHTS AND THE BROADCASTING ORGANIZATION RIGHTS

When live sports programs cannot meet the originality requirement of cinematographic works, some scholars also turn to the neighboring rights—the video recording rights and the broadcasting organization rights for protection. But whether these two neighboring rights are reasonable is controversy.

Pursuant to Article 42 of the Chinese Copyright Law, “A producer of sound recordings or video recordings shall have the right to permit others to reproduce, distribute, lease and disseminate to the public through information network such sound recordings or video recordings and shall have the right to receive remuneration for it.”^{xxxix} Also, Article 45 §(1) of the Law stipulates that “A radio station or television station is entitled to prohibit the following acts which it has not permitted: (1) rebroadcasting the radio or television which it has broadcasted; (2) recording the radio or television which it has broadcasted in the audio or video carrier and to reproduce the audio or video carrier.”^{xl} In *CCTV International v. Century Dragon*, the court held that the “Deba Football Match” program embodies certain originality which can be regarded as a video recording, and defendant infringed the video recording rights of CCTV when he made real-time network rebroadcasting of the sports program without authorization.^{xli} However, some problems exist in the identification of live sports programs as video recordings. Firstly, whether the real-time (re)broadcasting meets the fixation requirement of video recordings due to the fact that it has not yet formed a copy. Secondly, whether the live broadcasting infringes the video recording rights. According to some professors, the premise for the protection of video recordings is that they have formed products. In the process of live broadcasting sports events, the objective process of the event is presented to the public in real time by the way of

intercepting signals through the network platform, at which time the video recording has not yet been formed. In such situation whether the recorder can enjoy the video recordings rights is still open to question.^{xlii} Also, in the *Storm* case, the Beijing IP Court held that whether the picture carried by the world cup signal has been fixed or not depends on the broadcasting stage of the live competition. After the live broadcasting of the event, the whole picture carried by the signal has been stably fixed on the tangible carrier, and at this moment, it meets the fixation requirement which should, at least, be regarded as a video recording.^{xliii} However, different from this case that the relevant sports event has been recorded and uploaded to the internet, in the *Sina* case, the event was live broadcasted by the defendant, in which situation the court did not consider it as satisfying the fixation requirement of a video recording.^{xliiv} The author believes that, live broadcasting or rebroadcasting of sports events should not be regarded as a video recording, because it does not meet the fixation requirement. Nor does it make any sense to do so, as the recorder does not have the broadcasting right and cannot control the one-way video content provided by wire or wireless. If the live sports programs are regarded as video recordings, producers can only prevent others from uploading the event videos into the internet without permission. This is different from the unique value of live broadcasting.

The broadcasting organization rights are provided in Article 45 of the Chinese Copyright Law. Accordingly, “A radio station or television station is entitled to prohibit the following acts which it has not permitted: (1) rebroadcasting the radio or television which it has broadcasted; (2) recording the radio or television which it has broadcasted in the audio or video carrier and to reproduce the audio or video carrier.”^{xlv} The definition of this right is basically follows that in the Rome Convention and TRIPS Agreement. But there is still a big controversy on whether its core right—the “rebroadcasting right” can regulate the rebroadcasting through internet.^{xlvi} In *CCTV International v. I Love Chatting*, the court argued that the protection of the broadcasting organization rights under the TRIPS Agreement has not been extended to the network environment, and China, as a member of the TRIPS Agreement, also referred to the TRIPS Agreement and other international treaties when revising the relevant contents of the broadcasting organizations right. Moreover, according to Article 45 of the Chinese Copyright Law, the adjustment scope of this right is only limited to the acts of rebroadcasting radio and television by wire or wireless means, without extending to the network environment. As neither the Chinese Copyright Law nor the relevant international treaties have extended the scope of the protection of the broadcasting organization right to the network environment, it is not

legitimate to make an expanded interpretation of this right merely because of the new challenges brought by the emergence or development of the new technology. The court in the *Sina* case also pointed out that the broadcasting organization right cannot limit people's act of live broadcasting or rebroadcasting.^{xlvii}

As for the subject requirement of the broadcasting organization right, the court held in the *Century Dragon* case that the subject of the exclusive right of broadcasting organizations is limited to radio station or television station, and the law does not allow these subjects to grant this right to other parties independently.^{xlviii} Some professors argued that rebroadcasting the sports programs broadcasted by others to the public through network platform by intercepting the broadcasting signal is very similar to the rebroadcasting right of the broadcasting organizations provided in Article 45 of the Chinese Copyright Law, but the main subject of this right must be the radio station or television station, while the webcasting organization does not meet this requirement.^{xlix} However, Professor Wang believed that the webcasting organization can be incorporated into the subject of the broadcasting organization right in the Chinese Copyright Law, regardless of whether there are any international practice to do so.¹ The court in the *Sina* case also ruled that, "as far as the subject of the broadcasting organization right is concerned, the transferee or licensee of broadcasting organization right can be other civil subjects except from the radio station or television station due to the fact that the law does not prohibit these subjects from transferring the right to non-broadcasting organizations.^{li} This judgement is praiseworthy as it makes a reasonable expanded explanation of the subject of the broadcasting organization right.

CONCLUSION

The Beijing IP Court clarified the relationship among cinematographic works, video recordings, and broadcasting through the above two judgements, as well as making typed analysis of the sports programs. At a conclusion it denied to consider the sports programs as cinematographic works and put forward a more detailed analysis of the "originality" of film works. According to the different process of the sports event, the court recognized the live broadcasting of the ongoing event as the object of the broadcasting organization right, while the replayed programs after the live event were considered as video recordings and were

protected by the right of communication through information network. Besides, the real-time network rebroadcasting is not regarded as a violation of the broadcasting organization right. Due to the legislative defects of the current copyright law, some courts have identified sports programs as cinematographic works, which brings in great controversy. The Beijing IP court acknowledged the loopholes of the current copyright law, but it left the problem to be solved by the anti-unfair competition law as well as to be further regulated by the special laws such as sports law, and allowed the copyright law to redefine the broadcasting organization right so as to maintain the system logic of the copyright law.

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