



ISSN 2582 - 211X

# LEX RESEARCH HUB JOURNAL

On Law & Multidisciplinary Issues

Email - [journal@lexresearchhub.com](mailto:journal@lexresearchhub.com)

VOLUME II, ISSUE I  
OCTOBER, 2020

<https://journal.lexresearchhub.com>

Lex Research Hub  
Publications

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**COPYRIGHT PROTECTION OF LIVE SPORTS  
PROGRAMS: COMPARATIVE ANALYSIS AND  
CHINA’S WAY FORWARD**

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## **ABSTRACT**

The healthy development of sports events entails effective legal protection of live sports programs, which is however subject to significant uncertainty under the Chinese law and practice. Up to date, the industrial interests continue to suffer a lot due to the serious piracy of live sports programs. This article first makes reference to the two approaches—copyright protection model and neighboring right protection model—in both common law and civil law jurisdictions, and then reexamines the “fixation” and “originality” requirements in the live sports programs context. It finds that live sports programs have satisfied these two requirements because the signals carrying the content of the sport programs have been stably fixed in a tangible medium during the process of live broadcasting, and the shooting, editing and production of continuous dynamic pictures reflect the creative efforts of the live broadcasting team. In view of the judicial practice of different jurisdictions and the legal analysis of the fixation and originality requirements, the author proposes that China should adopt the copyright protection model to protect live sports programs as “works”. This model is able to meet the current demands of copyright interests of creators, investors and broadcasters of live sports programs, and prevent the serious piracy of live sports programs in China so as to promote the prosperity of the local sports events and its communication industry.

**Key Words:** sports Programs; live Broadcasting; fixation; originality; copyright protection

## **INTRODUCTION**

The successful operation of significant sports events such as the Olympic Games, largely relies on the huge communication influence and economic value gained by making these events into wonderful TV programs and live broadcasting them to audiences all over the world. Hence the healthy development of sports events entails effective legal protection of live sports programs, which is however subject to significant uncertainty under the Chinese law and practice. Up to date, the industrial interests continue to suffer a lot due to the serious piracy of live sports programs. For example, according to the monitoring data provided by professional companies, hundreds of infringing organizations were found to broadcast the World Cup live sports program on different

video communication platforms or channels such as TV, video websites, mobile app, and OTT boxes during the 2014 World Cup without authorization. Also, according to the on-demand monitoring data of the 2016 European Cup qualifier, about 100 websites and 8118 on-demand links were found to pirate the qualifier live broadcasting signals from CCTV. This phenomenon became more serious during the Rio Olympic Games in 2016, where around 37 infringing video websites, 40 infringing mobile live apps and 13 infringing OTT companies were found on the closing day of the Olympic Games, despite that CCTV had hired professional organizations to shut down some of them every day.<sup>1</sup> Granted, piracy of live sports programs is not unique in China. According to the data provided by Irdeto, there were more than 2.7 million advertisements offering illicit streaming devices, and the top 100 pirate IPTV supplier websites generate more than 16,460,000 visits per month.<sup>2</sup> In June 2017, Christopher Schouten, the marketing director of NAGRA, pungently pointed out that the high-profile sports TV (Live) shows were experiencing more and more piracy, and the profits of legal television broadcasters were being swallowed as it became easier to escape legal sanctions. Taking SKY—the largest English Premier League (EPL) rights holder—as an example, its broadcast profits fell approximately 11% in the last nine months alone.<sup>3</sup>

It is said that about 80% of the economic value of live sports programs comes from live broadcasting, and in the We Media era, the competition of viewing rate of live sports programs has already crossed the platforms. When an authorized broadcaster encounters dozens or even hundreds of piracy, the loss is huge and hard to be estimated. If such situation cannot be effectively averted, it would seriously affect the economic interests of the authorized broadcasters and the enthusiasm of program investors and creators, leading to the imbalanced interests of the whole industry. In light of this, representatives of sports events organizations and media broadcasting organizations have proposed to strengthen the copyright protection of live sports programs,

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<sup>1</sup>The above data comes from CCTV Copyright and Legal Department’s monitoring report.

<sup>2</sup> See ‘From Startup to Blue Chip: Pirates Rapidly Grow Illegal Offerings to Compete for your Business’, Irdeto, (December 8<sup>th</sup>, 2016), <<https://irdeto.com/news/from-startup-to-blue-chip-pirates-rapidly-grow-illegal-offerings-to-compete-for-your-business/>>

>last visited March 4th, 2020.

<sup>3</sup> See Christopher Schouten, ‘Premium Sports and IPTV Piracy: How the Right Solutions can Protect Content Rights Holders’, NAGRA, (June 7, 2017)<<https://dtv.nagra.com/nagra-blog-premium-sports-and-iptv-piracy-how-right-solutions-can-protect-content-rights-holders>>

> last visited March 4<sup>th</sup>, 2020.

especially to improve the relevant legislation from the perspective of industrial development. Nevertheless, Chinese courts have not arrived at a consensus regarding the legal nature of live sports programs, and legal experts and scholars have different views on the legal paths to protect them. This paper attempts to explore these issues in details so as to design a more effective legal protection model for live sports programs.

## **LEGAL PROTECTION MODEL OF LIVE SPORTS PROGRAMS IN DIFFERENT JURISDICTIONS: AN OVERVIEW**

Above all, it is important to make some references to the effective experience and judicial practice of the legal protection models of live sports programs in other jurisdictions before designing one fit for Chinese context. Generally speaking, there are two approaches to protect live sports programs: copyright protection and neighboring rights protection. The following subsections proceed to discuss these two approaches in both common law jurisdictions and civil law jurisdictions.

**(1) Common Law Jurisdictions:** Focusing on Industrial Interests and Adopting “Copyright Protection” Model

### **1. U.S.: Protecting as “Works”**

As early as in 1976, the U.S. court explicitly explained that, “in a rugby event, there are four television cameras shooting, and a director guides the four photographers at the same time. He has the authority to decide which images to choose, which sequence to broadcast and present to the audiences. Undoubtedly, the live sports program designed by the director is creative enough to be a ‘work’ in the sense of copyright law and he should enjoy the authorship of this work.”<sup>4</sup> Yet, some Chinese scholars argue that the U.S. Copyright Law sets a very low requirement for “originality” of a work, and as such its practice of copyright protection for live sports programs is not worthy for our reference. The author disagrees with this argument. “To be original, a work must contain some variation that is more than trivial—material variation, or must reflect ‘minimal creative

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<sup>4</sup> See House Report No. 94-1476 (1976), p 52.

spark”<sup>5</sup> But originality is not necessarily something that satisfies a specific subjective level of creativity or artistic talent.<sup>6</sup> A very low level of creativity is required, as long as it is the artist’s original creativity. For one thing, in the process of arranging live sports programs, the director is able to direct more than four cameras at the same time and select images at will, as well as rearrange those images with personalized order. This allows the live sports programs to be original enough as a new work and enable the director to obtain the qualification as an “author”. For another, the reason why the U.S. Copyright Law does not emphasize the level of originality lies in its realization of the importance to protect the interests of copyright industry. As NBA officials noted, the interpretation of the 1976 U.S. Congress Report was the result of appeals made by NFL and other U.S. sports events organizations as well as the CBS and other TV broadcasters at the congressional hearing.

## **2. U.K.: Protecting as “Works + Ancillary Works”**

Under the U.K. Copyright Law, the content carrying signal of the broadcasters is protected as work of authors. In *UEFA v. Briscomb*, the defendants were sued for

streaming of the UEFA sports content which was broadcasted and by this live streaming they made illegal copy of the broadcast and allowed their subscribers to store it on their computers.<sup>7</sup>In this case, Judge Lindsay pointed out that, “the plaintiff is the owner of the copyright in every broadcast of a UEFA Champions League match made on Sky or ITV channels, as well as the copyright owner of the various ancillary works which are included within the live broadcasts.”<sup>8</sup> The “ancillary works” refer to “those creative elements uniformly adopted in the UEFA Champions League global programs, including but not limited to video playing sequence, on-screen patterns, logos and specially produced music such as the program content list, short clip editing, UEFA star logo and background music, etc.”<sup>9</sup> Hence live sports programs are protected as works under the U.K. Copyright Law, either as broadcasts or as copyrighted elements. The fact that live sports programs are protected as works in the U.K. reflects the country’s recognition of the directors’ creative efforts as well as the significance to protect relevant copyright industries. As we know, the EPL is the most commercialized domestic football league in the world. In the three sessions of

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<sup>5</sup>*Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991).

<sup>6</sup> *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903).

<sup>7</sup>*UEFA v. Briscomb* [2006] EWHC 11268 (Ch).

<sup>8</sup> *Ibid.*

<sup>9</sup> *ibid.*

2016-2019, its local broadcasting licensing fee is 5.136 billion pounds (nearly 50 billion yuan), and the annual copyright fee is more than 10 times of that of China Super League (CSL).<sup>10</sup> It can be seen that an effective copyright protection system plays an essential role in protecting and promoting the local sports events and its communication industry.

**(2) Civil Law Jurisdictions:** Adopting “Neighboring Right Protection” Model but Gradually Accepting “Copyright Protection” Model

**1. Germany:** Regarding them as “Moving Pictures” with Low Originality but Protecting them by Neighboring Rights

Under the German Copyright Law, audiovisual content with high originality is recognized as “works” protected by copyright, while that with low originality is deemed as “moving pictures” protected by neighboring right.<sup>11</sup> As German scholar Manfred Rehbinder noted, “the live broadcast of sequences of images and sounds reflecting the original contributions of the director can be regarded as TV works, whilst those merely redisplaying certain events and activities (such as the broadcast of sports events or the shooting of nature) are similar with the broadcast of opera or drama performances, both of which cannot be deemed as works”.<sup>12</sup> The practice of Germany to treat live sports programs as moving pictures with low originality and to protect them by neighboring right is accepted by many scholars and judges in China. But two important issues are neglected here: First, “moving pictures” enjoy a high level of neighboring right protection under the German copyright law, which is essentially not much different from that of film works. In other words, even if live sports programs are protected by neighboring right rather than copyright in Germany, they can still receive fully protection under the current legal system,<sup>13</sup> which is different from that in China, where the producer of a video recording only has limited five rights under the Chinese copyright law. Second, in recent years, some German scholars are gradually accepting the view that live sports programs can be identified as works through case-by-case analysis. For instance, one scholar pointed out that, “Live broadcasting programs can also be protected as film works, and (the legal nature of) their shooting results do not need to be explicitly stipulated by

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<sup>10</sup>CSL 1.6 Million ≈EPL 1/10 Domestic Copyright Licensing Fee NBA+5 League Match’<[http://m.cnr.cn/sp/20150925/t20150925\\_519979147.html](http://m.cnr.cn/sp/20150925/t20150925_519979147.html)>last visited March 5th, 2020.

<sup>11</sup> See Section 95 of the Germany Act on Copyright and Related Rights.

<sup>12</sup> See Manfred Rehbinder, *Copyright Law*, En’ming Zhang (tr.) (Law Press China, 2004).

<sup>13</sup>See Article 88-92 of the German Copyright Law.

law. For live broadcasting programs, it should be analyzed on a case-by-case basis, and that with high originality should be deemed as film works.”<sup>14</sup> Therefore, even in Germany, a civil law country with a high standard for originality of a work, it does not rule out the possibility to identify live sports programs as film works.

## **2. Japan:** Some Cases Supporting to Protect them as “Works”

Historically, there are two views towards legal protection of live sports programs in Japan: one is protecting as “works”, and the other is protecting as “video recordings”. As early as in the 1990s, there were cases in Japan supporting to protect live sports programs as “works”. For example, in a case decided by the Tokyo local tribunal in March 1994, live sports programs were regarded as “works”. In February 2003, the Supreme Court of Japan affirmed the Tokyo local tribunal’s judgement by reasoning that, “The appellant obtained the videos of sports events from various event organizers, and in order to display the event videos more vividly, he edited the photographic plates by using lens technology, montage and editing techniques. Hence the videos of sports events belong to ‘works’ stipulated by the Copyright Law.”<sup>15</sup> This reasoning was repeated by the Tokyo local tribunal when dealing with a case about the video of kickboxing competition in 2013.<sup>16</sup> These cases serve as evidences to prove that there are precedents in Japan to protect live sports programs as works.

## **3. Sweden:** Protecting as Video Recordings or Broadcasts by Neighboring Rights

Sweden is one of the few European countries explicitly stipulating that live sports programs cannot reach the standard of originality to be protected as works. In *C More Entertainment AB* case, the Swedish Supreme Court ruled that the broadcasts were not protected as works, because they essentially were ruled by the events of the games and the result was not considered to be an intellectual creation. However, the defendant had committed an infringement as he had communicated replays (shown by C More during the broadcasts) to the public, and the replays were protected by a neighboring right as video recordings or broadcasts.<sup>17</sup> In this case, the Supreme

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<sup>14</sup> See Dreyer/Kotthoff/Meckel/Dreyer, 3.Aufl.,Munchen 2012, UrhG§2, RN.225, Schricker/Lowenheim/Lowenheim, Munchen2010, UrhG§2, RN.186.

<sup>15</sup> Ping Cheng Year 25, No. 1918.

<sup>16</sup> Yang Li, ‘On the Property Rights Related to Sports Events’, Zhichanli, October 10<sup>th</sup>, 2015.

<sup>17</sup> ‘Swedish Supreme Court Has Ruled that Sport Broadcasts Are Not Protected by Copyright’

<<http://ipkitten.blogspot.com/2016/12/swedish-supreme-court-has-ruled-that.html>> last visited May 15, 2020.

Court gave the answer that for a sport broadcast, or parts of it, to be protected as a work, it is required that the content goes beyond what is given by the prerequisite of the game or competition and that it is a result of one's own intellectual creation. What is troublesome is that the majority and minority of the court came to different conclusions regarding the same broadcasts.<sup>18</sup> This points to the fact that the assessment is subjective and therefore uncertain. However, it is noticeable that C More as a broadcasting organization has neighboring rights and sports broadcasts can be protected by these rights.

Nonetheless, the approach adopted by the Swedish courts are not mainstream in Europe, a jurisdiction with many civil law countries. According to the survey of 28 EU Member States conducted by the International Sports Law Research Center of Amsterdam University in 2014, all other EU countries except Sweden believed that live sports programs met the requirement for copyright protection with relatively low originality.<sup>19</sup> Therefore, the mainstream view of most countries in the civil law jurisdictions is that live sports programs meet the minimum requirement of originality and thus should be protected as works, despite that some countries take an opposite view such as Germany and Sweden.

## **“WORKS” OR “VIDEO RECORDINGS” OR NEITHER? REEXAMINING THE “FIXATION” AND “ORIGINALITY” REQUIREMENTS**

The Most recent few cases in China reflect the diverse views and controversies of the Chinese courts on the legal protection of live sports programs. In 2013, the second trial of the Shanghai Intermediate People's Court clearly stated that live sports programs may constitute works or video recordings pursuant to their level of originality, so as to be protected by copyright law.<sup>20</sup> This is basically consistent with the views of most European scholars to determine the legal nature of live sports programs on a case-by-case basis. In 2014, the Beijing Zhaoyang District Court held in a case of dispute over CSL football match program (hereinafter as “CSL case”) that, “The selection

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<sup>18</sup> Ibid.

<sup>19</sup> See T.M.C. Asser Institute/Asser International Sports Law Center and Institute for Information Law, *Study on Sports Organizers' Rights in the EU*, by (University of Amsterdam, February 2014).

<sup>20</sup> (2013) Hu Yi Zhong Ming Five (Zhi) Zhong Zi No. 59.

and arrangement of filmed scenes of sports events result in viewable new images and undoubtedly constitute intellectual labor. Different selection or different arrangements would create different images, which exactly reflect the originality. Therefore, the images from filmed sports events satisfy the originality requirement under the Copyright Law and shall be deemed as works of authorship.”<sup>21</sup> However, in 2015, the Beijing Shijingshan District Court ruled in a dispute over the World Cup football match program (hereinafter as “WC case”) that, “A cameraman is not in a steering position during the filming process. Her personal selection and expression are very limited with regard to sports process control, content filmed, narratives, camera positioning, scene selection, directing and editing. As a result, the television programs of 2014 Brazil World Cup filmed by FIFA and produced by CCTV do not have the level of originality necessary for a cinematographic work under the Copyright Law. Nevertheless, it satisfies the legal requirements for a video recording under the Copyright Law and shall be deemed as such.”<sup>22</sup> Later both of these two cases were submitted to the Beijing IP Court for final judgement. The Court ruled in favor of the plaintiff in the WC case, holding that the television program met the “fixation” requirement as it was created after the competition and should be protected as a video recording;<sup>23</sup> Whilst in the CSL case, the Court rejected plaintiff’s claims by reasoning that the live sports program did not meet the “fixation” requirements in the competition process, and failed to satisfy the “originality” standard of a cinematographic work as well.<sup>24</sup> At present, these two cases have been brought to the Beijing Higher People’s Court for retrial and the rulings are pending. The author believes that current controversies in protecting live sports programs lie in the misunderstanding of the requirements of “fixation” and “originality”, and it is necessary to re-clarify these two requirements in the live sports programs context.

**(1) Misunderstandings of “Fixation” Requirement— “Live Sports Programs are not Fixed until they have been Broadcasted”**

**A. Real Situation: Random Shooting, Random Editing, Random Storage, Random Transmission, and Random Broadcasting**

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<sup>21</sup> Beijing Sina Hulian Info. Serv. Co., Ltd. v. Beijing Tianying Jiuzhou Network Tech. Co., Ltd., (2014) Chao Ming (Chu) No. 40334.

<sup>22</sup> CCTV Int’l Network Co., Ltd. v. Beijing Baofeng Tech. Stock Co., Ltd., (2015) Shi Ming (Zhi) Chu No. 572.

<sup>23</sup> CCTV Int’l Network Co., Ltd. v. Beijing Baofeng Tech. Stock Co., Ltd., (2015) Beijing IP Civil Final No. 1055.

<sup>24</sup> Beijing Sina Hulian Info. Serv. Co., Ltd. v. Beijing Tianying Jiuzhou Network Tech. Co., Ltd., (2015) Beijing IP Civil Final No. 1818.

There is a common argument that live sports programs are not fixed until they have been broadcasted. But the reality is that in the process of live broadcasting, the audio and video signals carrying the content of the program which are constantly formed by shooting and editing must be stored in the local devices(almost synchronously) before being sent to the satellite, that is, they have been “stably reproduced in a tangible form”.<sup>25</sup> After confirming with several experts who have been engaged in live sports programs with CCTV for a long time, the author learnt that the real situation of any “live” programs, including sports, variety shows and other big events, is “random shooting, random editing, random storage, random transmission and random broadcasting”. That is, photographers shoot video materials, and the director leads the designing team to synchronously edit the basic TV signals based on those video materials, and also nearly synchronously, these basic TV signals are stored in the local devices before being sent to the satellite and broadcasted by the broadcasting organization. The “synchronously” here is a subjective feeling from the audiences, while objectively each step is not completely synchronized, and the above-mentioned sequence exists in technology and logic. Therefore, there is a misunderstanding that random shooting and random broadcasting of sports programs are not fixed in a tangible medium.

**B. No Extra Requirement should be Added Except for “Being Fixed on Some Material”**

In the Beijing IP Court’s reasoning, it said that “only after the end of the live broadcasting can the whole picture be stably fixed on the tangible carrier, and only at that moment the signal carrying the picture meets the fixation requirement”.<sup>26</sup> Apparently, in the court’s opinion, to be eligible for fixation requirement, the live sports pictures should be stable and thus the time element of “after the end of the live broadcasting” is added except for “being fixed on some material”. Pursuant to this reasoning, it is hard to satisfy the fixation requirement and thus to be protected as works by copyright law for live sports programs, as well as live variety shows and reality TV shows. Article 2 of the Regulations for the Implementation of Copyright Law of the People’s Republic of China (hereinafter as “Implementation of PRC Copyright Law”) requires works to “be reproduced in a tangible form”,<sup>27</sup> and Article 4 of this Regulations requires “cinematographic works and works

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<sup>25</sup> See Article 2 of the Regulations for Implementation of the Copyright Law of the People’s Republic of China.

<sup>26</sup> Beijing Sina Hulian Info. Serv. Co., Ltd. v. Beijing Tianying Jiuzhou Network Tech. Co., Ltd., (2015) Beijing IP Civil Final No. 1818.

<sup>27</sup> Article 2 of the Regulations for the Implementation of Copyright Law of the People’s Republic of China.

created by a process analogous to cinematography” to “be recorded on some material”.<sup>28</sup>The above general provision for “works” and the special provision for “cinematographic works” shall be consistent in principle. Hence “being recorded on some material” is a specific embodiment of the principle of “being reproduced in a tangible form” on the cinematographic works, rather than a new standard or requirement. In view of the complexity and diversity of the types of works, especially the newly emerging types of works, a more flexible, appropriate and broad interpretation is required instead of staying in the literal interpretation or adding new requirements beyond the legal provisions.

## **(2) Misunderstandings of “Originality” Requirement in the Live Sports Programs Context**

### **A. Misunderstanding 1: Raising the Standard from “Originality” to “A Higher Level of Originality”**

According to the Beijing IP Court’s judgement, “the level of originality should be taken as the standard to distinguish cinematographic works and video recordings.”<sup>29</sup> This argument is not based on any legal authority but an illogical inference beyond the legal provisions. First of all, Article 2 of the Implementation of PRC Copyright Law stipulates that “The term ‘works’ as referred to in the Copyright Law means intellectual creations with originality in the literary, artistic or scientific domain, insofar as they can be reproduced in a tangible form.”<sup>30</sup> This provision only requires copyrighted works to be original, without setting any standards for the level of originality. Also, the Regulation only defines “video recordings” as “fixations of a connected series of related images or pictures, with or without accompanying sounds, other than cinematographic works and works created by a process analogous to cinematography”,<sup>31</sup> but does not set any “originality” requirement for it. Hence distinguishing cinematographic works and video recordings by taking the standard of level of originality—a higher level of originality for cinematographic works while a lower level of originality for video recordings—does not conform with these legal regulations.

From the theoretical perspective, even if copyright law sets the “level of originality” as

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<sup>28</sup> Article 4 of the Regulations for the Implementation of Copyright Law of the People’s Republic of China.

<sup>29</sup> Beijing Sina Huijian Info. Serv. Co., Ltd. v. Beijing Tianying Jiuzhou Network Tech. Co., Ltd., (2015) Beijing IP Civil Final No. 1818.

<sup>30</sup> Article 2 of the Regulations for the Implementation of Copyright Law of the People’s Republic of China.

<sup>31</sup> Article 5 (3) of the Regulations for the Implementation of Copyright Law of the People’s Republic of China.

requirement for copyrighted works, the general consensus of the academics is that a work must reflect “minimal creative spark”—a very low level of creativity, rather than a higher level requirement. In the *Feist* case, the court held that, “originality requires a work being independently created and containing a modicum of creativity”.<sup>32</sup> Hence originality in copyright law is not necessarily something that satisfies a specific subjective level of creativity or artistic talent,<sup>33</sup> as long as it is the artist’s independent creation and contains the minimal level of creativity. For the originality standard of any kind of works, it is the minimal level of creativity that should be explored. If this standard is set too high, many intellectual achievements that should have been protected will be excluded from copyright protection. This does not conform to the legislative purpose of copyright law to stimulate creation.

From the perspective of judicial practice, introducing the “level of originality” as standard would inevitably lead to great diversity in the recognition of “level” due to the different subjective understanding of judges. First of all, in order to judge the level of originality, it is only possible to compare the live sports programs produced by different teams for the same event, which rarely happens in reality. In addition, to judge the level of originality is essentially to judge the aesthetic or artistic value of the work, which is beyond the professional ability and responsibility of judges. As Professor Chen Li once stressed, “aesthetic ‘originality’ often contains the judgement of artistic value, which is beyond the legal ability”.<sup>34</sup> Professor Haijun Lu also pointed out that, “originality is a legal but not an artistic concept. In determining whether a work contains originality, the principle of aesthetic non-discrimination should be followed.”<sup>35</sup> Following this vein, originality has nothing to do with artistic value. Thus, introducing the standard of “level of originality” will bring great difficulties for judges to unify the standards in the judicial trial.

**B. Misunderstanding 2: The Originality has Something to do with Materials Selection**

It is a common belief that live sports programs do not constitute cinematographic works as there is no creative efforts in the materials selection, and there is limited space for personalized selection and arrangement of the shooting pictures. This argument is neither in line with the actual situation of cinematographic works’ creation, nor lack of scientific analysis and reasonable

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<sup>32</sup>Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340 (1991).

<sup>33</sup> Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903).

<sup>34</sup> Chen Li, *Key Words of Intellectual Property Law* (Law Press China, 2006), pp 26-27.

<sup>35</sup> Haijun Lu, ‘On the Originality of Works’ (2010) 2 Law and Social Development.

interpretation of the originality of live sports programs.

Above all, live sports program is not merely a real-time objective recording of sports event. Even though sports events are objective facts, creations based on the objective facts can also be copyrightable such as the documentary *Animal world*. An expert who was responsible for supervising the WTA Asian Pacific broadcast stated that, ‘they would give a rating report to the creation level of each live sports program from two parts: the first part is whether the technical conditions meet the standard, accounting for 30%; and the second part is the subjective creation level of the program, accounting for 70%.’<sup>36</sup>For the same sports event, the programs created by different directors are different and have their own characteristics due to different shooting angles, pictures or commentary of the host, even if their technical conditions are up to the same standard. As can be learnt that live sports programs also reflect the creativity of the director, which is not merely an objective recording of sports events.

Secondly, the constituent elements of a cinematographic work are continuous dynamic pictures fixed in a certain medium, and thus the originality of cinematographic works lie in the shooting, selection and arrangement of these continuous pictures, not in the selection of scripts, actors, scenes or other materials.<sup>37</sup>In the process of producing live sports programs, whether there is a unified production standard or not will not affect the “personalized selection space” of live sports teams. The so-called “unified production standard” is an operational standard specially formulated by the sports event organizer for the production of more exciting and wonderful live sports program signals. In fact, every program director has a huge space to develop and create his own personality according to the narrative requirements of the story plots of the competition, the characteristics of the athletes, and the performance of both sides in the battle. The selection and shooting skills of the lens and pictures, the cutting sequence and rhythm between the lens and pictures in a live sports program are all based on the creative ideas of the program director, reflecting the photography skills and montage cutting art of film art and showing the broad “personalized selection space” of the live broadcasting team.

Moreover, without scripts, actors or post production cannot be an excuse to deny the originality of a live sports program. The “cinematographic works” in copyright law are not equivalent to films

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<sup>36</sup>Bo Yan, ‘On the Way of Copyright Protection of Live Sports Programs’ (2017) 5 *China Copyright*, p 29.

<sup>37</sup>Bo Yan, *Research on the Copyright of Live Programs* (Law Press China, 2016), pp 156-173.

in real life. Even though there is a requirement of “being fixed in a certain medium”, the copyright law does not require that the cinematographic works must have the same post production process or scripts, actors and other elements as the films. As Professor Reh binder noted, as a special type of works separately listed by copyright law, cinematographic works take the “image part” and “sound part” as the constituent elements, and the expression form of this type of works reflects in the cohesion among pictures and sounds.<sup>38</sup> Professor Chuntian Liu also stated that, whether a certain form of expression is a work or not lies in the originality of the expression of ideas or feelings but not the production process.<sup>39</sup> This is also true for determining the legal nature of live sports programs.

Based on the above analysis, to determine whether live sports programs constitute cinematographic works, the standard of “a minimal level of originality” should be adopted rather than “a higher level of originality”, either from the theoretical perspective or judicial practice angle. Besides, whether it is original is not based on the materials selection, but depends on shooting, editing and production of the continuous dynamic pictures. The shooting of sports events shows the broad “personalized selection space” of the live broadcasting team, and the selection, editing and production of shooting pictures also reflect the creative efforts of the editing team. Therefore, live sports programs meet the requirement of originality to be copyrighted works.

## **CHINA’S WAY FORWARD—PROTECTING LIVE SPORTS PROGRAMS AS “WORKS”**

In view of the judicial practice of different jurisdictions and the legal analysis of the fixation and originality requirements, the author advises that China should adopt the copyright protection model to protect live sports programs as “works”.

Firstly, from the perspective of industrial interest, the neighboring right protection model can no longer match the industrial development of China. The argument of protecting live sports programs as video recordings generally makes reference to the German practice that sets a higher

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<sup>38</sup>See Manfred Reh binder, *Copyright Law*, En’ming Zhang (tr.) (Law Press China, 2004), pp 152-153.

<sup>39</sup>Yang Li (n 16).

requirement for originality of works. However, this argument ignores the fact that there is no essential difference between the neighboring right protection of moving pictures and the copyright protection of cinematographic works under the German copyright law. Under the Chinese copyright law, a producer of video recordings has the right “to permit others to reproduce, distribute, lease and disseminate to the public through information network such video recordings”,<sup>40</sup> as well as the right “to permit a television station to broadcast such videographic works”.<sup>41</sup> But these rights are far from the strong protection level of 17 copyrights enjoyed by a copyright holder. Today live sports programs have evolved into intellectual achievements with high investment, high level of creation and high economic value after more than half century of development. To protect these videographic works by neighboring right in China is apparently unable to adapt to the current demands of copyright interests of creators, investors and broadcasters of live sports programs. Taking the revenues of Tennis Open Tournament between China and U.S. as an example, it is said that 70% of the revenue of Chinese Tennis Open Tournament comes from sponsorship, while 70% of that in America comes from the copyright licensing fees of live sports programs worldwide.<sup>42</sup> The successful development and operation of sports events in other jurisdictions proves that the copyright licensing fee of live sports programs is an important and indispensable part of revenue to support the development of sports industry. At present, the serious piracy of live sports programs in China is like pouring oil on the fire, which would inevitably further hinder the prosperity of the local sports events and its communication industry if copyright protection does not offer to these live sports programs.

Secondly, from theoretical perspective, to protect live sport programs as copyrighted works has no legal barrier under the current copyright law, which also conforms to the latest legislative spirit of the law. The reason why some judges deny to consider live sports programs as works is mainly due to their misunderstandings of the “fixation” and “originality” requirements of works in the live sports programs context. The proceeding discussions show that the signals carrying the content of the sport programs have been stably fixed in a tangible medium during the process of live broadcasting, and live sports programs also meet the standard of “a minimal level of originality” because the shooting, editing and production of continuous dynamic pictures reflect the creative

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<sup>40</sup> See Article 42 of the PRC Copyright Law.

<sup>41</sup> See Article 46 of the PRC Copyright Law.

<sup>42</sup> Bo Yan (n 36), p30.

efforts of the live broadcasting team. Copyright law continues to experience developing and improving along with the development of communication technology and industry since its birth. Even though there is no specific definition for the legal nature of live sports programs under the current copyright law, it is possible to protect them through relevant typical judgements or judicial interpretations. Besides, to protect live sports programs as works is also in line with the latest legislative spirit of Chinese copyright law. The Draft Amendment of PRC Copyright Law (2020) replaces the legislative model of “cinematographic works and works created by a process analogous to cinematography” by “audiovisual works”.<sup>43</sup> Ziqiang Wang, the former director of the policy and legal department of the State Copyright Administration once noted that, ‘Live sports programs can be protected as ‘audiovisual works’ under the Draft Amendment of PRC Copyright Law (2020). From a global perspective, it is a legislative trend for most countries in the world to replace the traditional and relatively narrow concept of ‘cinematographic works’ with a broader concept of ‘audiovisual works’, so as to expand the protection scope of audiovisual works.’<sup>44</sup>In addition to the common law countries, the fact that most civil law countries have gradually accepted to protect live sports programs as copyrighted works is also a reflection of this trend.

Nevertheless, someone argues that identifying live sports programs as copyrighted works would reduce the meaning of the rights of broadcasting organization. In their opinion, the main purpose of creating neighboring right in civil law jurisdictions is to allow some un-copyrighted achievements to be protected by copyright law. If the continuous pictures broadcasted by TV stations with low originality can be protected as works, the rights of broadcasting organization given to TV stations to control the signals carrying continuous pictures would be meaningless. Hence they believe that live sports programs would be better to be protected by the rights of broadcasting organization. The author disagrees with this argument and asserts that it distorts the legislative purpose of the rights of broadcasting organization. Firstly, whether the live sports programs are protected as works has nothing to do with the rights of broadcasting organization. According to the latest *Revised Draft Basic Proposal for the WIPO Treaty on the Protection of Broadcasting Organizations*, “broadcasting organization” and “cablecasting organization” mean the legal entity that takes the initiative and has the responsibility for the transmission to the public of sounds or of images or of images and sounds or of the representations thereof, and the assembly

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<sup>43</sup> Article 3 §1(6) of the Draft Amendment of PRC Copyright Law (2020).

<sup>44</sup> Bo Yan (n 37), pp 131-140.

and scheduling of the content of the transmission.<sup>45</sup>Some scholarship indicated that the protection of the rights of broadcasting organization in civil law countries is based on the following considerations: (1) the great efforts and investments paid by the broadcasting organizations in the process of program transmission; (2) the significant contributions of broadcasting organizations to the social progress; (3) the importance to protect the interests of broadcasting organizations so as to encourage them to better serve the society. The latter two points are consistent with the understanding in common law countries. However, according to the copyright theory of civil law countries, broadcasting organizations are engaged in communication/transmission activities rather than creative activities, and they are legal entities instead of natural persons, so broadcasting organizations cannot be regarded as authors, nor can their rights—the rights of broadcasting organizations be protected through (narrow sense) copyright. For this reason, the “neighboring right” system has been set up by civil law countries to regard the right of broadcasting organization as a right adjacent to or related to copyright. As the Chief IP Officer of EBU Mr. Heijo Ruijsenaars noted, “The protection of the rights of broadcasting organization is independent from the protection of copyright, similar to the protection of the right of the producer of sound recordings (nothing to do with whether the music or sound contained is protected by copyright or not). The primary reason to establish this right is to protect the efforts of arranging the programs and the technology and commercial investment in the process of transmitting to the public, regardless of whether the programs transmitted themselves are protected as works or not.”<sup>46</sup>In addition, from the perspective of the cost of law revision, to protect live sports programs as works can be resolved simply by relevant typical judgements or judicial interpretations, while to protect them by the rights of broadcasting organization would encounter a series of controversial frontier legal issues, such as whether “broadcasting” in the right of broadcasting organization extends to the internet, whether the broadcasting organization should be provided with an exclusive protection of the right of communication through information network, whether the right of broadcasting organization should be limited by a certain period of time and if so, how long should it be, which would leave

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<sup>45</sup> Article 5 (c) of the Revised Draft Basic Proposal for the WIPO Treaty on the Protection of Broadcasting Organizations.

<sup>46</sup>Mr. Heijo Ruijsenaars is the Chief IP Officer of EBU, who participated in the formulation of the

WIPO Treaty on the Protection of Broadcasting Organizations in 1998, and is one of the most senior legal experts on this treaty and the rights of broadcasting organizations in the world.

the law revision to the indefinite future.

## **CONCLUSION**

Professor Chengsi Zheng once said, “the most difficult thing in the process of copyright protection is to confirm the existence of copyright in the works”.<sup>47</sup>The debate on whether to protect live sports programs as works, video recordings or signals has proved this saying well. After making reference to the judicial practice in both common law and civil law jurisdictions, this paper reexamines the “fixation” and “originality” requirements in the live sports programs context. It finds that live sports programs have satisfied these two requirements because the signals carrying the content of the sport programs have been stably fixed in a tangible medium during the process of live broadcasting, and the shooting, editing and production of continuous dynamic pictures reflect the creative efforts of the live broadcasting team. In view of the judicial practice of different jurisdictions and the legal analysis of the fixation and originality requirements, the author proposes that China should adopt the copyright protection model to protect live sports programs as “works”. This model is able to adapt to the current demands of copyright interests of creators, investors and broadcasters of live sports programs, and prevent the serious piracy of live sports programs in China so as to promote the prosperity of the local sports events and its communication industry.

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<sup>47</sup>Chengsi Zheng, *Copyright Law* (China Renmin University Press, 2009), p103.