Do We Need More Copyright Protection for Sports Events?

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1. INTRODUCTION

This contribution discusses the protection of sports events by copyright and related rights in EU copyright law and asks a simple question: do we need more of it? Broadly speaking, it is possible to consider the protection of sports events along a spectrum of commercial exploitation: the event 'as such', its recording, and subsequent off/online transmission.[1] The focus of this contribution is on the 'beautiful game' of football, which is not only Bernt Hugenholtz's favourite sport but also particularly popular in Europe. Significant economic importance is attached to this popularity, with transmissions of matches being subject to commercial exploitation in myriad ways. At the centre of these exploitation models is the live transmission of football matches, either through traditional broadcasting or the internet. Sports events are also of immense social-cultural value, as attested by their inclusion in Member States' lists of 'events of major importance' for society, subject to specific medial law rules.[2]

It is therefore unsurprising that the legal protection of 'sports transmissions' has been subject to much legal debate, both as regards the legal basis for protection and available remedies against unauthorised (re)transmissions. In fact, copyright policy discussions regularly feature calls for additional protection

1. See Thomas Margoni, 'The Protection of Sports Events in the EU: Property, Intellectual Property, Unfair Competition and Special Forms of Protection', 47 *IIC – International Review of Intellectual Property and Competition Law* (2016) 386; Lauro Panella and Matteo Firrito, 'Challenges Facing Sports Event Organisers in the Digital Environment' (European Parliamentary Research Service 2020) Study for European Parliament, https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_STU(2020)654205, accessed 24 June 2021.
2. Margoni, *supra* note 1, 388.

of transmissions of sports events – or the events themselves – by copyright and related rights. This contribution argues that these calls are misguided and unjustified, at least from the perspective of EU law and as regards new rights. On the one hand, there already appears to be sufficient legal protection for sports events and transmissions. On the other hand, from a normative standpoint, it is difficult to justify an extension of copyright protection beyond the current levels, especially considering available and proposed enforcement measures.

The analysis proceeds as follows. After this introduction, section 2 discusses sports transmissions as an object of protection by copyright and related rights under EU copyright law, as interpreted by the Court of Justice of the European Union (CJEU or Court). Section 3 then highlights different enforcement avenues through which the copyright *acquis* enables the protection of sports events and transmissions. Both sections briefly map recent attempts to further strengthen the protection of sports events in EU law, either through the (failed) introduction of new exclusive rights or via additional enforcement measures. Building on the previous analysis, Section 4 concludes by arguing against the recognition of new layers of protection for sports events and offering a word of caution against additional enforcement measures.

2. SPORTS EVENTS, RECORDINGS AND TRANSMISSIONS AS OBJECTS OF PROTECTION

2.1 No Copyright Protection for Sports Events 'as Such'[3]

In EU law, copyright and related rights are protected through a two-tier system. On a first tier, copyright protection is recognised for authorial works, including original photographs, databases and computer programs; protection is afforded to authors.[4] On a second tier, related rights protection is recognised for a closed list of 'other subject matter': fixations of performances, phonograms, films (originals and copies), and press publications.[5] Protection is afforded to (respectively) performers, phonogram producers, producers of first fixations of films, broadcast organisations, and press publishers.[6]

3. This section partly relies on prior work with Bernt Hugenholtz. See P. Bernt Hugenholtz et al., 'Trends and Developments in Artificial Intelligence: Challenges to the Intellectual Property Rights Framework', (IViR and JIIP 2020), Final Report for the European Commission.
4. See, e.g., Arts. 2–4 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167 ('InfoSoc Directive'), Art. 6 Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights (codified version) OJ L 372, 27.12.2006 ('Term Directive'), Arts.1–2 Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (Codified version) ('Computer Programs Directive').
5. Depending on the legal qualification, it is arguable that (sui generis) databases can be included in this list.
6. See, e.g., Arts. 2–3 InfoSoc Directive and Art. 15 Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital

For the most part, what constitutes a work of authorship is not harmonised in EU legislative texts. The only explicit exceptions to this are computer programs, photographs, databases, and (possibly) works of visual art.[7] For these categories, the legal provisions at issue condition protection on the requirement that the work be original in the sense of expressing the 'author's own intellectual creation'.

Until 2009, it was generally accepted that outside the specific subject matter covered by the rules on computer programs, photographs and original databases, Member States where free to determine the concept of work of authorship.[8] After 2009, the CJEU seized on the legislative language mentioned in the earlier specific subject matter Directives to gradually harmonise the concept of work of authorship, extending it to all types of works. This judicial harmonisation process played out in a number of cases spanning different types of subject matter: *Infopaq*; *Football Dataco*; *SAS Institute*; *Premier League*; *Levola Hengelo*; *Funke Medien*; and *Cofemel*.[9]

In general terms, it emerges from these cases that subject matter may be protected by copyright if it is original in the sense that it is 'the author's own intellectual creation', meaning in addition that the author must make personal creative choices that are expressed in the subject matter.[10] The application of this test by the Court has led to a somewhat low threshold for originality, which enables the protection of a broad array of subject matter, possibly including that resulting from any minimally original selection and arrangement thereof. Conversely, protection has only been explicitly rejected by the Court thus far in relation to individual words (*Infopaq*), sporting events as such (*Premier League*), and the taste of food in *Levola Hengelo* (at least at the current state of technology).

As argued elsewhere, these exclusions can be understood as flowing from the originality test.[11] By requiring that 'the author was able to express his creative abilities in the production of the work by making free and creative choices',[12] the originality test makes it necessary to identify the parameters of the creative choices. These parameters can be configured as a series of external constraints on the assessment of originality: rule-based, technical, functional, and informational.[13] The existence of such constraints reduces the author's margin for creative freedom, sometimes below the originality threshold.

Single Market and amending Directives 96/9/EC and 2001/29/EC ('CDSM Directive').

7. Art. 1(3) Computer Programs Directive; Art. 3(1) Database Directive; Art. 6 Term Directive; Art. 14 CDSM Directive (on works of visual art in the public domain).
8. Commission Staff Working Paper on the review of copyright, SEC(2004)995, p. 14.
9. CJEU, 16 July 2009, case C-05/08, ECLI:EU:C:2009:465, *Infopaq International* (*Infopaq*); CJEU, 1 March 2012, case C-604/10, EU:C:2012:115, *Football Dataco*; CJEU, 12 May 2012, case C-406/10, EU:C:2010:259, *SAS Institute*; CJEU, 4 October 2011, Joined Cases C-403/08 and C-429/08, ECLI:EU:C:2011:631, *Football Association Premier League and Others* (*Premier League*); CJEU, 13 November 2018, case C-310/17, ECLI:EU:C:2018:899, *Levola Hengelo*; CJEU, 29 July 2019, case C-469/17, ECLI:EU:C:2019:623, *Funke Medien*; CJEU, 12 September 2019, case C-683/17, ECLI:EU:C:2019:721, *Cofemel*.
10. See e.g., CJEU, *Levola Hengelo*, para. 36, and CJEU, *Cofemel*, para. 29.
11. Hugenholtz et al., supra note 4.
12. CJEU, *Funke Medien*, para. 19; CJEU, 1 December 2011, case C-145/10, ECLI:EU:C:2011:798, *Painer*, paras. 87–88.
13. Hugenholtz et al., *supra* note 4.

For our purposes, *ruled-based* constraints are the most relevant. They are expressed in the *Premier League* judgment, which excludes sporting events 'as such' from copyright protection. In this case, the Court clarifies that football 'matches themselves … cannot be classified as works'.[14] This is because the subject matter at issue 'would have to be original in the sense that it is its author's own intellectual creation'.[15] As the Court states,

> sporting events cannot be regarded as intellectual creations classifiable as works within the meaning of the Copyright Directive. That applies in particular to football matches, which are *subject to rules of the game, leaving no room for creative freedom for the purposes of copyright*.[16]

As a result, such events 'cannot be protected under copyright', being 'undisputed that European Union law does not protect them on any other basis in the field of intellectual property'.[17]

Whereas scholars may disagree on the extent to which a finding of originality may be excluded *de toto* for all sports events, after *Premier League* there seems to be little to no space available for such protection *under EU law*, at the very least as it relates to football matches. To be sure, this portion of the ruling raised concerns, especially among sports events organisers, that it would undermine their exclusivity-based business models, leading to calls for legislative action.[18] But those concerns do not appear justified, either because protection by copyright is normatively unwarranted below the threshold of originality, or due to the myriad alternative protection instruments available for sports events, as discussed below.

2.2 Some National Protection for Sports Events as Such

This is immediately clear from the *Premier League* judgment itself. After rejecting copyright protection of sports events as such, the Court is quick to point out that the 'unique character' of sporting events allows for the possibility that Member States may, in their national laws, provide for protection 'comparable' to that of copyright.[19] Subject to the requirements of EU law, this can be done for instance through an intellectual property (IP) regime or through 'protection conferred upon those events by agreements concluded between the persons having the right to make the audiovisual content of the events available to the public and the persons who wish to broadcast that content to the public of their choice'.[20]

14. CJEU, *Premier League*, para. 96.
15. *Ibid*., para. 97.
16. *Ibid*., para. 98 (emphasis added).
17. *Ibid*., para. 99.
18. Margoni, *supra* note 1, 387. See also *infra* at 2.4 and 3.3.
19. CJEU, *Premier League*, para. 100.
20. *Ibid*., paras. 102–105 (cit. 102).

In other words, the Court opened the door for other (non-copyright) types of protection *under national law*, which may include related rights or special regimes.[21] These alternative regimes come in different flavours and shapes.[22]

One such category is often referred to as 'house right', a hybrid construction that merges legal entitlements derived from the property rights on the venue with contractual arrangements governing access and commercial exploitation of the venue and event.[23] The owner or exclusive user of such entitlements can then impose downstream conditions for the use and exploitation of the sports event on third parties, such as media companies or attendants.[24]

A different type of protection is afforded by *specific related rights* in relation to sports events. As noted, EU law contains an exhaustive list of related rights for certain beneficiaries. Although film producers and broadcasting organisations might enjoy some protection as it relates to recordings and transmissions of sports events, only performers could plausibly claim an interest in protection of their performances in the context of the sports event *as such*.

However, most national laws condition the protection of performers on performances *of a work*.[25] Since sports events 'as such' do not qualify as works of authorship, it follows that a performance of a sports event does not qualify for related rights protection. One notable exception is the Portuguese version of the event organiser's right: the '*direito ao espectáculo*'. The legal basis for this right has changed over time, casting some doubt on its existence.[26] However, both influential Portuguese scholarship and ultimately the Portuguese Supreme Court have recognised the validity of the right on the basis of its customary nature and the need to reward the investment of organisers of sports events on a par with organisers of other events, such as concerts.[27] Other than Portugal, only France appears to recognise a specific legal entitlement consisting of exploitation rights over sports events.[28]

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21. Margoni, *supra* note 1, 389.
22. For a detailed description, see Panella and Firrito, *supra* note 1.
23. Margoni defines it as a 'common hermeneutic construction' used to encapsulate 'the property based power to control admission (a jus excludendi alios from the sport event venue) and the contractual based faculty to establish entrance conditions.' Margoni, *supra* note 1, 391. Citing Opinion of Advocate General Jaaskinen delivered on 12 December 2012 in Cases C-201/11 P, C-204/11 P and C-205/11 PUEFA, *FIFA v. European Commission*, paras. 33–45.
24. For further details, see Panella and Firrito, *supra* note 1. The Achilles heel of the 'house right' as regards effective protection is its inter partes effect, which does not extend to third parties, especially those in good faith. See Margoni, *supra* note 1, 392–393 (exemplifying with a third-party online platform used to transmit a football match by a user not authorised by the sports event organiser).
25. Margoni, *supra* note 1, 394–395.
26. See the detailed discussion in Margoni, *supra* note 1, 395–396. The surviving legal basis is found in Art. 117 of the Portuguese Copyright Act.
27. See in particular Portuguese Supreme Court, No. 4986/06.3TVLSB.S1, of 21 May 2009.
28. But see Panella and Firrito, *supra* note 1 (noting also that most Member States recognise some form of 'domestic media rights' for the 'exploitation, by any media, of the controlled sports event').

2.3 Protection for Recordings and Transmission of Sports Events

In addition to the above, EU copyright law recognises protection for recordings and transmissions of sports events. First, audio-visual recordings of sports events are subject to copyright protection if they meet the required threshold of originality, explained above. In fact, this relatively low threshold might not be so challenging for the sophisticated recording of major sports events, such as economically significant football matches at EU level. The live recordings of such events are subject to complex contractual arrangements with detailed technical descriptions and ample opportunity for creative choices at different stages of the production process.[29]

Even where a recording fails to cross the originality threshold, it may still benefit from related rights protection for the producer of the first fixation of films.[30] This form of investment protection is in addition to and independent of any copyright in the recording as an audio-visual work. In this case, the joint operation of the Rental and Lending Rights Directive and the InfoSoc Directive grants producers of first fixations protection that is similar to the protection enjoyed by authors, with the exclusion of the broad right of communication to the public (but including making available online).[31]

In addition, broadcasting organisations enjoy exclusive rights over fixations of their broadcasts of sports events, their communication to the public, making available online, and public distribution.[32] Again, these rights are in addition to and independent of copyright protection of the event being broadcast. Furthermore, such broadcasts are typically subject to detailed contractual arrangements specifying the rights and remuneration of all parties involved. The multiple tiers of protection available to broadcasting organisations are well illustrated in two CJEU cases. First, in *Premier League*, where the Court clarifies the range of copyright and related rights available to broadcasters in relation to their broadcasts, namely fixation, reproduction, and communication to the public.[33] Secondly, in *ITV Broadcasting*, where the Court looked at the near real-time distribution of television broadcasts over the internet,[34] concluding that the unauthorised live streaming by a third party over the internet of signals from commercial television broadcasters constitutes an infringement of their right of communication to the public.

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29. For a detailed argument, see e.g. Margoni, *supra* note 1, 397–400.
30. Art. 2(1)(c) Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version) OJ L 376, 27.12.2006 ('Rental and Lending Rights Directive').
31. See Arts. 9(1)(c) Rental and Lending Rights Directive and 2(d) and 3(2)(c) InfoSoc Directive.
32. See: Arts. 7–9 Rental and Lending Rights Directive; Arts. 2(e) and 3(2) Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission OJ L 248, 6.10.1993, p. 15–21; and Arts. 2(e) and 3(2)(d) InfoSoc Directive.
33. CJEU, *Premier League*, paras. 147–207.
34. CJEU, 7 March 2013, case C-607/11, ECLI:EU:C:2013:147, *ITV Broadcasting*.

Finally, although the topic is outside the scope of this contribution, it should be noted that the transmission of sports events may enjoy a limited level of protection under national unfair competition law regimes, as well as 'special forms of protection' created ad-hoc in national laws.[35]

2.4 Failed Attempt for Related Rights Protection in the CDSM Directive

Against this rich tapestry of available legal forms of protection, there has nevertheless been a constant push for new rights for sport organisers in EU law. Perhaps the most prominent example of such a push came in the context of the legislative process of the CDSM Directive. Although the Commission's original proposal did not contain any provision in this respect, the Legal Affairs (JURI) Committee advanced the following text for a new Article 12a on the 'Protection of sport event organizers':

> Member States shall provide sport event organizers with the rights provided for in Article 2 [reproduction] and Article 3 (2) [making available] of Directive 2001/29/EC and Article 7 [fixation] of Directive 2006/115/EC.[36]

The provision aimed to introduce new exclusive related rights of fixation, reproduction and making available for sport event organisers. These new rights would be layered on top of existing copyright and related rights protection for sports events and transmissions described above, thereby elevating sports organisers to a standalone category of related rights holders in the *acquis*.

There is remarkably little information about the origin of Article 12a. Since it was not part of the initial Commission proposal, it was also not accompanied by an impact assessment. Despite that, Article 12a was narrowly adopted by the JURI Committee by majority vote,[37] before being dropped during the trilogue negotiations. Due to the obscure nature of these negotiations, it is difficult to ascertain the true reason for the rejection of the new right. The few reports available note inter alia the absence of a clear justification for a new right for sports organisers (unsurprising given the lack of an impact assessment), as well as the problems it would cause for otherwise lawful activities of fans at sports events.[38] Interestingly, however, Article 12a was subject to the following statement by the Commission in the final plenary debate:[39]

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35. Margoni, *supra* note 1, 405–414. See also the analysis by Ansgar Ohly elsewhere in this book.
36. See Amendments adopted by the European Parliament on 12 September 2018 on the proposal for a directive of the European Parliament and of the Council on copyright in the Digital Single Market (COM(2016)0593 – C8-0383/2016 – 2016/0280(COD))(1).
37. *Ibid*.
38. Julia Reda, 'EU Copyright Reform Will Spell Disaster for Sports Fans', *Julia Reda*, 9 April 2018, https://juliareda.eu/2018/09/copyright-sports-fans/, accessed 23 June 2021.
39. A8-0245/272, Statement of the Commission (20.3.2019), Declaration on Sports Events Organisers https://www.europarl.europa.eu/doceo/document/A-8-2018-0245-AM-272-272_EN.docx

> The Commission acknowledges the importance of sports events organisations and their role in financing of sport activities in the Union. In view of the societal and economic dimension of sport in the Union, the Commission will assess the challenges of sport event organisers in the digital environment, in particular issues related to the illegal online transmissions of sport broadcasts.

The subsequent political process eventually led to a study[40] and a report with recommendations to the Commission on the 'challenges of sports events' organisers in the digital environment'.[41] This report states that although some national laws provide for 'specific rights for sports events organisers in their legislation, including a new 'neighbouring right' to copyright', 'the creation in Union law of a new right for sports events organisers will not provide a solution as regards the challenges they face that arise from a lack of effective and timely enforcement of their existing rights'.[42] This rejection is confirmed in the follow-up 2021 European Parliament (EP) resolution with the same title.[43]

With this, the focus of the protection of sports organisers at EU level moves away from new rights to stronger enforcement measures in the digital environment.

3. ENFORCEMENT AVENUES

3.1 Blocking Injunctions

In EU law, the principal legal basis for the enforcement of copyright as regards transmissions of sports events is found in Article 8 InfoSoc Directive.[44] Under this provision, Member States are required to adopt appropriate, effective, proportionate and dissuasive sanctions in respect of infringements of exclusive rights, technological protection measures and rights management information.[45] Member States must also ensure that right holders whose rights are affected in their territory bring actions for damages and/or apply for injunctions and

40. Panella and Firrito, *supra* note 1.
41. Report with recommendations to the Commission on challenges of sports events organisers in the digital environment (2020/2073(INL)) Committee on Legal Affairs, Rapporteur: Angel Dzhambazki, A9-0139/2021, 23.4.2021, https://www.europarl.europa.eu/doceo/document/A-9-2021-0139_EN.html.
42. *Ibid*. paras. 23–24.
43. European Parliament resolution of 19 May 2021 with recommendations to the Commission on challenges of sports events organisers in the digital environment (2020/2073(INL)) ('EP Resolution Sports Events Organisers 2021'), paras. 23–24.
44. This provision implements the light obligations arising from the WIPO Treaties in this respect (Articles 14(2) WCT and 23(2) WPPT). The more detailed international provisions on enforcement laid out in TRIPS are implemented in the acquis by the Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (Enforcement Directive) [2004] OJ L157 ('Enforcement Directive').
45. Art. 8(1) InfoSoc Directive. NB additional obligations in this respect arise from the Enforcement Directive.

seizures.[46] Most relevant for our purposes, Article 8(3) obligates Member States to ensure that rights holders can apply for injunctions against intermediaries whose services are used by a third party to infringe copyright. This possibility should be available even if the intermediary is not itself directly liable for infringement.[47]

Article 8(3) InfoSoc Directive has played a significant role in the development of intermediary liability in the EU, in articulation with the liability exemptions or safe harbours in the e-Commerce Directive.[48] In particular, although it is up to national law to determine the scope and procedures to seek injunctions, the same is limited inter alia by the operation of fundamental rights recognised in the EU Charter. This implies that an injunction must strike a fair balance between conflicting fundamental rights in the Charter: to copyright as property, on the one hand (Article 17(2)); and to the protection of personal data and privacy of internet users, their freedom to receive information, and intermediaries' freedom to conduct a business (Articles 7, 8, 11 and 16) on the other.[49]

It is in the shadow of this legal regime and the Court's interpretation thereof that national laws have developed different flavours of blocking injunctions – static, dynamic and live – using several techniques and subject to varying legal requirements.[50] In some Member States, blocking injunctions are issued by administrative authorities, while in others they are issued pursuant to soft law arrangements, such as Codes of Conduct or self-regulatory measures.[51]

In this evolving landscape, rightholders in some Member States have been able to increasingly rely on *live* blocking injunctions (a subspecies of dynamic

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46. Art. 8(2) InfoSoc Directive. According to the CJEU, these provisions do not impose nor prevent member states from mandating Internet Service Providers (ISPs) to disclose personal data of their subscribers in the context of copyright infringement proceedings. See also CJEU, 17 June 2021, case C-597/19, ECLI:EU:C:2021:492, *M.I.C.M.*
47. See recital 59 InfoSoc Directive. NB Art. 8(3) remains applicable despite the existence of a provision on injunctions in Art. 11 Enforcement Directive, as clarified by recital 23.
48. See generally Martin Husovec, *Injunctions against Intermediaries in the European Union: Accountable but Not Liable?* (Cambridge University Press, 2017); Christina Angelopoulos, *European Intermediary Liability in Copyright: A Tort-Based Analysis* (Kluwer Law International, 2016). NB the availability of injunctions in the scheme of the e-Commerce Directive is clarified by Arts. 14(3) and 18(1).
49. For a description of the relevant case law, see e.g. Husovec, *supra* note 48; Christina Angelopoulos, 'Harmonising Intermediary Copyright Liability in the EU: A Summary' (Social Science Research Network, 2019) SSRN Scholarly Paper ID 3685863, https://papers.ssrn.com/abstract=3685863, accessed 26 May 2021; Christina Angelopoulos, 'Study on Online Platforms and the Commission's New Proposal for a Directive on Copyright in the Digital Single Market' (Greens/EFA Group 2017) Report, https://www.repository.cam.ac.uk/handle/1810/275826, accessed 28 May 2021; Giancarlo Frosio and Oleksandr Bulayenko, 'Website Blocking Injunctions in Flux: Static, Dynamic, and Live' 16 *Journal of Intellectual Property Law & Practice* (2021), https://papers.ssrn.com/abstract=3848063, accessed 23 June 2021.
50. Frosio and Bulayenko, *supra* note 49 (identifying the techniques of 'address blocking, Domain Name System (DNS) blocking, Uniform Resource Locator (URL) filtering, deep packet inspection, domain name-related measures, and ingress and egress filtering').
51. Frosio and Bulayenko, *supra* note 49. The authors provide as examples of the first the regimes available in Greece, Italy, Lithuania, and Spain; examples of the second are found e.g., in Denmark, UK, Germany and Finland.

injunctions) to prevent 'illegal broadcasting of live (sports) events, including online transmission (internet protocol TV or IPTV)'.[52] In essence, these orders take effect at a specific period of time when a sports event is being broadcast, and allow for the recurrent, periodic and time-limited blocking of new servers to prevent continued infringements.[53]

Moreover, the available soft-law and self-regulatory measures in different countries are often used to issue blocking injunctions regarding sports events, mostly football matches. One prominent example is that of Portugal, one of the leading countries in the world in website blocking.[54] This status is the result of two Memoranda of Understanding (MoU). The first was signed on 30 July 2015 by some public bodies and private stakeholders in order to facilitate the blocking of copyright-infringing websites.[55] This was followed in December 2018 by a second MoU to facilitate the temporary blocking of illegal transmissions of sports events on the internet, especially of football matches.[56] The latter MoU provides a streamlined procedure for what are in essence live blocking injunctions for illegal streams of national football championship matches, with thousands having been ordered since its coming into force. One main point of criticism of the Portuguese scheme from the outset – amplified by its ongoing large-scale deployment – has been its secretive nature, which makes it difficult to assess the inherent risk that its potential for over-blocking poses to freedom of expression and due process online.[57]

3.2 Article 17 CDSM Directive

In addition to the above, it is important to note that Article 17 CDSM Directive provides some level of protection against unauthorised making available of sports events, despite it not aiming at preventing the illegal streaming of sports events.[58] In simple terms, Article 17 states that online content-sharing service providers (OCSSPs) carry out acts of communication to the public when they give access

52. Frosio and Bulayenko, *supra* note 49. The Member States in question are Greece, Ireland, Spain, the Netherlands and the UK.
53. Frosio and Bulayenko, *supra* note 49.
54. See 'Intervention of the Motion Picture Association of America Before the…', https://torrentfreak.com/images/mpa-can.pdf. See also 'Portugal: "Voluntary" Agreement against Copyright Infringements' (*European Digital Rights (EDRi)*), https://edri.org/our-work/portugal-voluntary-agreement-against-copyright-infringements/, accessed 23 June 2021.
55. A copy of the MoU is available at: http://www.apel.pt/gest_cnt_upload/editor/File/apel/direitos_autor/memorando_APRITEL_IGAG_MAPINET.pdf.
56. A copy of the MoU is available at: https://www.direitosdigitais.pt/media/ficheiros/memorando2.pdf.
57. EDRI, 'Portugal: "Voluntary" Agreement against Copyright Infringements' (*European Digital Rights (EDRi)*, 8 December 2015), https://edri.org/our-work/portugal-voluntary-agreement-against-copyright-infringements/, accessed 25 June 2021; EDRI, 'Portugal: Privatised Copyright Law Enforcement Agreement Now Public' (*European Digital Rights (EDRi)*, 9 September 2015), https://edri.org/our-work/portugal-privatised-copyright-law-enforcement-agreement-now-public/, accessed 25 June 2021.
58. Arguing for the limited use of Art. 17 CDSM Directive in this context, see Panella and Firrito, *supra* note 1.

to works/subject matter uploaded by their users. As a result, these providers become directly liable for their users' uploads. They are also expressly excluded in paragraph (3) from the hosting safe harbour for copyright relevant acts, previously available to many of them under Article 14(1) e-Commerce Directive.[59]

The provision then introduces a complex set of rules to regulate OCSSPs, including a liability exemption mechanism in paragraph (4), and a number of what can be referred to as mitigations measures and safeguards. The liability exemption mechanism is comprised of 'best efforts' obligations for preventive measures, including those aimed at filtering content *ex ante*, notice and staydown, and notice and takedown.[60]

Sports events are protected at two levels in this provision. First, Recital 62 CDSM Directive clarifies that piracy websites can qualify as OCSSPs but are subject a stricter regime, since they cannot benefit from the special liability exemption mechanism in Article 17(4). In other words, such websites – including those dedicated to unauthorised dissemination of sports events – will be strictly liable once they fulfil the definition of OCSSP, without the possibility of any exemption.[61]

The second level of protection follows from the Commission's Guidance on Article 17, published in June 2021.[62] In this Guidance, the Commission states that automated content filtering or blocking in OCSSPs' platforms are only possible for two categories of content: 'manifestly infringing' and 'earmarked'. The latter category is a new concept advanced by the Commission to encompass content that, while not manifestly infringing, 'could cause significant economic harm to rightholders' and 'is particularly time sensitive (e.g. pre-released music or films or highlights of recent broadcasts of sports events)'.[63] Disregarding here the problematic nature of the concept, the upshot is that in relation to the uploading of recordings of broadcasts of sports events, the Guidance strengthens rights holders' level of protection by allowing them to 'earmark' content for automatic blocking on the platform of an OCSSP, without having to demonstrate its manifestly infringing nature.[64] In other words, should the Guidance be considered valid on

59. The corresponding provision in the DSA proposal is Art. 5.
60. Art. 17(4) (b) and (c) CDSM Directive.
61. Martin Husovec and João Pedro Quintais, 'How to License Article 17? Exploring the Implementation Options for the New EU Rules on Content-Sharing Platforms under the Copyright in the Digital Single Market Directive', *GRUR International* (2021), https://doi.org/10.1093/grurint/ikaa200, accessed 3 May 2021.
62. COM(2021) 288 final (4.06.2021), Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market ('EC Guidance Art. 17').
63. *Ibid.*, 23.
64. For early criticism, see Julia Reda and Paul Keller, 'European Commission Back-Tracks on User Rights in Article 17 Guidance', *Kluwer Copyright Blog*, 4 June 2021, http://copyrightblog.kluweriplaw.com/2021/06/04/european-commission-back-tracks-on-user-rights-in-article-17-guidance/, accessed 24 June 2021; Bernd Justin Jutte and Christophe Geiger, 'Op-Ed: "The EU Commission's Guidance on Article 17 of the Copyright in the Digital Single Market Directive" by Bernd Justin Jütte and Christophe Geiger', *EU Law Live*, 7 June 2021, https://eulawlive.com/op-ed-the-eu-commissions-guidance-

this point, these rights holders benefit from preferential treatment in using the preventive measures in Article 17 CDSM Directive.

3.3 The 2021 European Parliament Resolution on Challenges of Sports Events Organisers in the Digital Environment

The justification for the EP Resolution of May 2021 is the economic harm resulting from the illegal transmission online of live sports events.[65] It states that the value of such events lies in their live nature and that illegal streaming is 'most harmful in the first thirty minutes of its appearance online'.[66] Whilst recognising existing enforcement measures in EU law, these are considered to 'not always sufficiently guarantee an effective and timely enforcement of rights to remedy the illegal broadcast of live sports events'.[67]

The Resolution therefore calls on the Commission to take legislative action, advancing proposals for amendments to the Enforcement Directive and, to a lesser extent, some inclusions in the draft Digital Services Act (DSA).[68] On the latter, it appears to ignore its potential application to OCSSPs as online platforms, namely as regards rules on notice and action and trusted flaggers/notifiers.[69]

The main proposal is for new rules that enable 'real time takedown' of infringing live sport broadcasts by online intermediaries. Concretely, this would entail removal of, or the disabling of access to, such transmissions 'no later than within thirty minutes [*from*] the receipt of the notification from rightholders or from a certified trusted flagger'.[70] This would entail, for instance, a legal clarification of the notion of acting 'expeditiously' upon receiving a notice in Article 14(1)(b) e-Commerce Directive, to the effect that providers would have to act within the thirty-minute time-frame.[71] One important weak spot in this proposal is that although it pays lip service to the need to avoid a general monitoring

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on-article-17-of-the-copyright-in-the-digital-single-market-directive-by-bernd-justin-jutte-and-christophe-geiger/, accessed 24 June 2021.

65. EP Resolution Sports Events Organisers 2021, *supra* note 43, 6. The text and recommendations of the resolution appears to rely heavily on the study by Panella and Firrito, *supra* note 1.
66. EP Resolution Sports Events Organisers, 2021, *supra* note 43, pp. 4, 6.
67. *Ibid.*, 6–7.
68. *Ibid.*, 12 (referring explicitly to amendments to the Enforcement Directive). Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC, COM/2020/825 final (DSA). NB that the Resolution does not go as far as the suggestion to adopt 'an ad hoc EU Regulation which, while leaving unchanged the general enforcement regime envisaged by the Enforcement Directive, can put in place a specific legal instrument to aggressively tackle online piracy (a sort of "EU Antipiracy Act")', as suggested in Panella and Firrito, *supra* note 1.
69. On this topic, see João Quintais and Sebastian Felix Schwemer, 'The Interplay between the Digital Services Act and Sector Regulation: How Special Is Copyright?', https://papers.ssrn.com/abstract=3841606, accessed 9 May 2021.
70. EP Resolution Sports Events Organisers 2021, *supra* note 43, p. 6.
71. *Ibid.*, 11.

obligation[72] – which would be inconsistent with Article 15 e-Commerce Directive and Article 17(8) CDSM Directive – it provides few details as to how that would be possible.[73]

In addition, the Resolution calls for the introduction of injunction procedures in the Enforcement Directive around the model of 'dynamic' and 'live' blocking injunctions discussed above.[74] The rationale appears to be a push for further harmonisation of cross border enforcement of rights with measures that take into account the specific nature of live sports event broadcasts, leading to increased legal certainty for rights holders.[75] Still, the text offers little in the way of substantive and procedural safeguards to offset the potential risks arising from the introduction of such measures, including as regards fundamental rights of users and intermediary service providers.[76]

Finally, the Resolution endorses co- and self-regulation in this field, calling for cooperation between Member States, intermediaries and rightholders, including by promoting the conclusion of MoUs that could provide for a specific notice and action procedure.[77] Here, again, there is no discussion of potential (fundamental rights) risks which, as noted above, may arise from such mostly private enforcement mechanisms.[78]

4. CONCLUSION

This contribution examined the protection of sports events by copyright and related rights in EU law, especially vis-à-vis unauthorised online transmissions. The portrait that emerges is one where sports events enjoy multi-tiered but fragmented protection. Different facets of the commercial exploitation are protected by copyright and related rights, and specific national legal regimes. Moreover, rights holders benefit from various enforcement measures, such as notice and action procedures, and blocking injunctions. While attempts to recognise new rights for sports organisers have thus far failed, there is a renewed impetus for the introduction in EU law of far-reaching ad hoc enforcement measures, targeted at unauthorised transmissions of sports events. Regrettably, these proposals neglect adequate substantive or procedural safeguards for due process and freedom of expression.

To be sure, there are legal gaps in the protection of sports events. But it is not obvious whether they should be filled by introducing new rights and enforcement measures in EU copyright law. Rather, there are strong arguments against

72. *Ibid.*, 7.
73. On the topic of general monitoring at the intersection of IP law, the e-Commerce Directive and the DSA proposal, see Christina Angelopoulos and Martin Senftleben, 'An Endless Odyssey? Content Moderation Without General Content Monitoring Obligations' (IViR; CIPIL 2021), https://papers.ssrn.com/abstract=3871916, accessed 24 June 2021.
74. EP Resolution Sports Events Organisers 2021(n.43), pp. 8–10.
75. *Ibid.*, 6.
76. *Ibid.*, 8 (para. 22).
77. *Ibid.*, 12 (cit.), as well as p. 9, para. 25
78. See *supra* at 3.1

it. First, there is no plausible justification for why recordings or transmissions of a sports event that fail to meet the originality threshold should attract copyright protection. At the same time, as apparently recognised by the EU legislature, the introduction of a new related right for sports organisers, based on technological and financial investment, is unwarranted. As rightly noted by Bernt Hugenholtz in relation to the 'obsolete' phonographic, broadcasters', and film producers' rights before it, a new right for sports organisers would 'not provide a threshold test and corresponding rule of scope', making it 'inherently unbalanced'.[79] If this is accepted, then it is doubtful whether ad hoc enforcement measures tailored specifically for sports organisers should be introduced in the EU *copyright* framework. In other words, if it is not justified to extend substantive copyright and related rights protection to accommodate the specific needs of sports events organisers, policy makers should consider with caution whether it is sensible to put in place stricter *copyright* enforcement measures tailored to those needs. This is particularly advisable where such measures carry risks to fundamental rights of third parties. 'More copyright' is not always the right answer.

79. Hugenholtz, *supra* note 3.