

“SPORTS IMAGE” AND THE LAW

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ABSTRACT

In the context of what is called the new media environment, the term “sports image” is used meaning the athlete’s right to their own image as well as the right to exploit commercially a sports event.

Under Greek law sports events are not recognised as original intellectual products, so they are not protected under the Law on Intellectual Property. Individuals (sportsmen) producing the sports event, are not aware of the result, i.e. its final form. The elements of competition and improvisation combined with physical contact are enough to guarantee a different result every time, no matter how many times the event is repeated. This is why a special legal provision had to be introduced.

To what the athlete’s right to their own image is concerned the Greek legislator seems to have defined the personality right in a general way allowing thus the content of this right to be constantly expanded in order to cover for the ever growing needs of our times. As a result enumerating all the rights contained in the general personality right is neither possible nor useful. It is up to the bearer of the right to decide each time whether their personality is offended in any way. The protection of one’s image right does not come without restrictions or exceptions. Also the athlete as a bearer of the right may “legitimise” an infringement. The most common legal tools in order to justify an otherwise illegal infringement in most European countries are the athlete’s consent or the doctrine of the acceptance of risk or the public’s right to information.

The purpose of the present paper is to present the Greek law concerning the protection of the sports image as well as the exceptions to this protection and to compare the provisions to those of other European countries in order to show that more often than not similar problems inevitably result to similar solutions.

A. SPORTS EVENTS

I. The sports event as original work of intellectual property

Individuals (sportsmen) producing the sports event, are not aware of the result, i.e. its final form. This conclusion comes naturally when we refer to sports events involving the so-called “contact sports”, such as soccer, basketball, boxing etc. The elements of competition and improvisation combined with physical contact are enough to guarantee a different result every time, no matter how many times the event is repeated. For this reason, the sportsman cannot by any means be considered as performing a show consisting of rehearsed, predetermined and predesigned moves. However even in those sports where there is no physical contact, such as tennis or volleyball, the competition and improvisation elements alone can affect the final result to such an extent that the event cannot be considered an original piece of work. The only sports events which could be considered original pieces of work and could be protected under the intellectual property regulations are athletic demonstrations, in which there is no competition or in which the competition consists of executing a specific programme with movements fixed in advance, such as a choreography or gymnastics and figure skating. It is for these reasons that also under Greek Law sports events are not recognised as original intellectual products, so they are not protected under the Law on Intellectual Property.

II. The sports event as audiovisual material of intellectual property

Under Greek Law the image of a sports event is an intangible good consisting a mere piece of information and not an intellectual creation. The recording of a sports event cannot even as an audiovisual material be protected under intellectual property law since there is usually no originality even in the direction thereof.

II. The sports event as an audiovisual transmission (broadcasting)

The broadcasting of a sports event by a TV channel or a radio station as an audiovisual transmission is a right protected by Law.¹ This right however does not protect the organisers of the sports event, who invest in organising sports events, but

¹ Article 48 Law 2121/1993.

the radio stations and TV channels as well as those investing in broadcasting sports events.²

II. The rights of the organiser of a sports event

Up to 1999, when the Greek Law on Sports³ came into force to regulate this issue, the organisers of sports events could only be protected under Competition Law,⁴ which prevented the unauthorized broadcasting of sports events, as it was considered an exploitation of the event organisers' work and thus contrary to good morals.⁵ ⁶The fact that the interests of the sports events organisers are not protected, together with the importance private investments have in sports have contributed to introducing a new law regulating the matter.⁷ Thus the Greek Sports Code⁸ stipulates that the company or club considered "home team" in a sports event has the exclusive right to allow recording or reproducing a live or delayed radio or TV broadcast of a sports event upon payment. The recognised sports federations have the same exclusive right to exploit the sports events of the national teams as well as the matches held for the Greek Cup.

What the Intellectual Property Law had up to that point before the introduction of the Greek Law on Sports failed to provide for, was covered under these provisions, creating a similar right for the organiser as the one provided for the creators of an original work in the provisions of Intellectual Property Law. It should be noted however that although the Law provides for the organiser's interests as well as those of the venue's rightholder, it does not do the same with the sportsmen who produce the spectacle.

Although in Greece there is a specific provision protecting the rights of the home team as an organizer, it is well known that the home team is not the sole organizer of the event. Even in countries where there is no specific provision the event organizers had to wait for the case law to acknowledge their right by invoking general

² Synodinou, T.-E., "The Image in the Law", A.N. Sakkoulas Publications Athens-Thessaloniki, 2007, p.150.

³ See Papaloukas, M., "Sport Law and the European Union" *Choregia. Sport Management International Journal*. Vol. 3(2): 39-49, 2007. <http://www.choregia.org/4.pdf>

⁴ See Art. 1 Law 146/1914.

⁵ See Decision of the Single-Member Court of Athens No. 10851/2001

⁶ See Legal Opinion Polyzogopoulos, K. as published in the Law Magazine *Dikaio Epixeiriseon kai Etairion* 2/2002, pp. 178-183.

⁷ See Papaloukas, M., "Sport Law and the European Union" *Choregia. Sport Management International Journal*. Vol. 3(2): 39-49, 2007. <http://www.choregia.org/4.pdf>

⁸ Greek Law 2725/1999.

provisions. Such is the case in Germany, Norway, Denmark.⁹ Besides these provisions in most countries the event organizers hold the commercial right to an event either by statutory provision or by competition provisions. In any case contract law can be of help since the athlete can always transfer their rights to the organizers. This in common law countries such as in the UK is called assignment of rights or licencing.

III. The EU Directives on sports broadcastings

As soon as pay-TV made its appearance and TV channels as well as radio stations started acquiring exclusive rights to broadcast sports events it became clear that not all sports events were equally important. Some sports events are so important for the public that all people must be given the possibility to watch free of charge.¹⁰ Thus in accordance to the EU Directives 89/552/EEC και 97/36/EEC on “Television without Frontiers”, Article 84 Section 7 of the Greek Law on Sports provides that a list of these international, national or local sports events considered as of major importance to the public is drafted within the first 15 days of August by a joint decision of the Minister for the Press and Media, the Minister of Culture and the Minister of Sports. The public is thus given the opportunity to watch these events through free channels on a fully or partially live coverage or fully or partially delayed broadcast. The Greek Law on pay-TV and radio services¹¹ includes similar provisions.¹²

B. THE ATHLETE’S IMAGE

I. The image as a personality right

The Greek Civil Code¹³ provides for the protection of personality right and name right in terms of civil law. These provisions derive from the combination of two very important constitutional provisions, on the value of the human being and on the freedom to develop one’s personality.¹⁴ The Greek legislator seems to have defined

⁹ See Blackshaw, I., Siekmann, R., “Sports Image Rights in Europe”, TMC Asser Press, 2005, p. 129, 223, 84.

¹⁰ Tsigkou, H., legal opinion published in the Law Magazine DiMEE, 3/2009, pp. 328-337.

¹¹ Article 11 of Greek Law 2644/1998.

¹² Sinodinou, T.-E., “The Image in the Law”, Sakkoulas Publications, Athens-Thessaloniki, 2007, pp. 156-158.

¹³ Articles 57 and 58 of the Greek Civil Code

¹⁴ Article 2 Section 1 of the Constitution and Article 5 Section 1 of the Constitution.

the personality right in a general way allowing thus the content of this right to be constantly expanded in order to cover the ever growing needs of our times.

Greek Law sees image as a particular aspect of the personality right, together with life, health, physical integrity, freedom, honour and repute, name and privacy in the sense that infringing any of these rights entails infringement of the personality as a whole.

It is thus prohibited to take the image of a person (photographs, video-recording) as well as to publicly reproduce it without their consent. It is also prohibited to publicly show a person's image without their consent even if this does not offend their honour or invade their privacy.¹⁵

In many European countries the image right is conceived as a personality right. Such is the case in Germany, France, Spain Portugal, Belgium.¹⁶

II. The image as trademark

The Greek Law on Trademarks¹⁷ having incorporated the European Directive 89/104/EEC and having taken into consideration the current developments in advertising provides for the right to register as trademark not only one's name but also one's image. So it is possible today for the sports clubs to register their logos as trademarks as well as for sportsmen to do the same with their name and image.

In most European countries trademark law is the solution to the problem of protecting sport club's name and indicia. For example Germany, Austria, Belgium, The Netherlands, Spain, Ireland, U.K., Sweden have also opted for this solution.¹⁸ As a result it is very common today to see the name or even the image of a sportsman as trademark on products usually having to do with sports.¹⁹

III. The image as intellectual property

¹⁵ Karakostas, I., "Personality and Press", Third Edition, A.N. Sakkoulas Publications, Athens-Komotini, 2000, pp. 81-82.

¹⁶ See Blackshaw, I., Siekmann, R., "Sports Image Rights in Europe", TMC Asser Press, 2005, p. 109, 92, 262, 246, 59.

¹⁷ Greek Law 2239/1994

¹⁸ See Blackshaw, I., Siekmann, R., "Sports Image Rights in Europe", TMC Asser Press, 2005, p. 124, 45, 59, 20, 265, 164, 317, 294.

¹⁹ An example to this would be John Weider's name and image, one of the most known bodybuilders, which is used as brand name of food products.

A photograph is the most common way of showing a person's image. These photographs are protected under the Greek Law on Intellectual Property²⁰ and they are intellectual property products as long as they appear to have elements of originality. Any literary, artistic or scientific product expressed in any way is considered an original intellectual product. Their creator acquires the intellectual property right over their works, their creations, which includes the right to exploit their creations, the so-called property right, as well as the right to protect the personal bond existing between the creator and the creation, the so-called creator's moral right.

The fact is however that since modern cameras allow capturing an image by simply pressing a button, it is very difficult to decide as to whether the image of a person (a sportsman for instance) has been captured mechanically or whether the photographer has contributed in a creative way, thus justifying protection under the Intellectual Property Law. In any case, the law aims at protecting the rights of the photographer as creator of an original piece of work and not the rights of the sportsman pictured in it.²¹

IV. The image as a Data of Personal Nature

In many countries such as Greece, Sweden, U.K. the image is also considered and protected as data of personal nature.²²

A person's image distinguishes them from any other human being and is inherent to their personality. In this sense a person's image is also a data of personal nature as described in Greek Law 2472/1997 and any kind of image processing, such as collection, registration, archiving and distributing, is strictly prohibited without the consent of the person having the right to this image.

C. EXCEPTIONS TO THE PROTECTION OF THE IMAGE

I. The consent granted by the offended

By granting consent a contractual nexus is created whereby the bearer of the right is bound not to take legal action, usually upon reward. On the other hand the breach of one's personality right is no longer considered illegal, and the party infringing this

²⁰ Greek Law 2121/1993

²¹ Garoufalia, O., "A person's image and its reproduction on intellectual property works", Law Magazine Hronika Idiotikou Dikaiou, 2005, p. 494.

²² See Blackshaw, I., Siekmann, R., "Sports Image Rights in Europe", TMC Asser Press, 2005, p. 295, 326.

right cannot be punished. One's consent has to be granted before one's personality is offended. When granted after the infringement has been established it is called approval and though it does not remove the unlawfulness of the offence it deprives however the right bearer of seeking legal protection.²³ Such is the case in Greece. Consent however is considered an exception also in other countries such as Italy, Germany and Bergium.²⁴

II. Acceptance of risk by the bearer of the right

Consent and risk acceptance are two notions very close to one another. The latter is distinguished from the former in the sense that it does not refer to a specific infringement but to an eventual infringement of unknown content. The acceptance of risk may be considered an indirect implicit consent.

III. The public's right to information

An infringement upon the image right may be justified also by the person's right to free access to information, which is protected under Greek Constitution.²⁵

Some persons or events are so important that attract particular public interest. The demand for information about these people and/or events may be considered as a justified interest of the public to get informed. The offended party may rely upon the Constitutional protection of their personality or of their dignity as human being. Therefore with the exception of an infringement upon the value of human being, the public may generally claim access to information invoking the Constitutional public's right to information; the media may diffuse this information to the public relying on Constitutional right of freedom of press.

It is therefore considered that the public shows particular interest in getting information about these people and/or events; acquiring such information may in some cases entail breach of these persons' personality right, or image right for that matter. Therefore this justified public interest outweighs the protection of their image.

In most european countries this right is known as the public's right to information and it is either included in their Constitution (directly or indirectly) as it is in Greece

25. Karakostas, I., "Personality and Press", Third Edition, A.N. Sakkoulas Publications, Athens-Komotini, 2000, pp. 84-87.

²⁴ See Blackshaw, I., Siekmann, R., "Sports Image Rights in Europe", TMC Asser Press, 2005, p. 192, 111, 64.

²⁵ Article 5a of the Greek Constitution.

or recognised by other legal provisions as is the case in Germany or finally it can be recognised by case law as is the case in the U.K.. In the U.S. the same right is called the newsworthiness doctrine.²⁶

D. CONCLUSIONS

Civil law is based on the theory that law is a theoretical construction which is already constructed however it may need some minor repairs from time to time. Common law on the other hand views the law as something that is under construction and will always remain that way. As a result in civil law countries a problem has to be resolved by applying existing statutes whereas in common law problems are resolved by inventing new solutions. This is why civil law judges feel very uncomfortable to acknowledge that there is no remedy existing whereas a common law judge will have no problem to do so.

It is very interesting to note that the most common notions concerning the matter of image rights are three (3)

1. The personality right. In this case the image is considered as a part of the athlete's personality and any interference with it as a personality infringement.
2. The right of privacy. This is understood as the right to be left alone. It is very similar to the personality right.
3. The right of publicity. This is considered as the right to exploit one's image in the commercial sense.

In civil law European countries the Judge will mainly rely on the personality right. In such cases notions like rightholders consent or the public's interest may come into play. In Common Law countries such as the U.S. the judge will invoke the right of privacy or the right of publicity.²⁷ In such cases notions like passing off or newsworthiness may be invoked. It makes no difference which is the theoretical starting point. The personality right theory in fact grants the athlete a right to be left alone. Also the privacy right theory deals with an infringement as an intrusion on a personal level.

²⁶ See Blackshaw, I., Siekmann, R., "Sports Image Rights in Europe", TMC Asser Press, 2005, p. 112, 365.

²⁷ See Blackshaw, I., Siekmann, R., "Sports Image Rights in Europe", TMC Asser Press, 2005, p. 214.

In any case a person's image will be protected. This protection is valid both on a personal level as well as on a commercial level. This means that an infringement of an athlete's image is dealt with as an infringement of his personality-privacy and also as a pecuniary loss. This protection may come from a constitutional or a common statutory provision, whereas in other countries from case law. The difference between these systems is not so much on the level of protection but on the theoretical approach of the matter. In practical terms therefore, similar problems inevitably result to similar solutions.