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## SPORTS INTELLECTUAL PROPERTY: COPYRIGHTABILITY AND UNITED NATIONS

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### ABSTRACT

The primary objective of Intellectual Property Law is to protect from annexation the fruits of a person's work. This article examines Intellectual Property Law and Copyright in the sports industry. Intellectual Property Rights such as copyrights, trademarks, and designs became a source of significant value to the sporting arena. Apart from easing the way for protection of Intellectual property around the world, WIPO works to ensure that the benefits of the sports industry are spread wide and deep. Intellectual property carries commercial value for sporting clubs and organizations and covers the range of intangible assets covered by copyright, trademarks, designs. Protecting intellectual property is crucial in the sports industry because of the recent development of commercialization of sports, media scrutiny, emergence of top-level professional sports and globalization.

As the world becomes a global village, it becomes imperative that there is a predictable legal regime and global harmonisation of the rules, protocols, and conventions to regulate Sports Intellectual Property Law. The article makes classification between the various types of copyright. The chapter argues for protection of category of works which have satisfied the conditions of eligibility for registration and or protection. In this regards, the article identifies some works such as literary, dramatic, musical and artistic works that are required to be original.

In concluding, the article suggests good management of intellectual property in the sport industry in order to maximize economic returns. Intellectual property is bedrock for consolidation of the gains and momentum in the Sports industry. The article contends that there is strong need for

development of a predictable legal regime for Sports Intellectual Property globally so as to promote ethical practices in the Sports industry. It is recommended that WIPO should come up with a sports business model which could help in building an effective Intellectual property rights strategy that could address the use of patents, trademarks, designs and other forms of IP in sports.

**Keywords:** copyright, fixation, originality, copyright protection and sporting event

## 1. INTRODUCTION

In the field of sports, a lot of hard labour and efforts are given by the sportsmen, the squad, the society/club connected with the sports activity, or the organizers of the sports events. Today, both for sportsman as well as sports associations, investors, sport is not just a pastime or passion, but a huge business opportunity and multifaceted industry.<sup>1</sup>

On formation of a sports team, the team is generally recognized by a team name. For the purposes of identification, various artistic and creative logos and fancy taglines emblems are created. Off the field and on the commercial level, sportsmen get into endorsements and advertisements whereas sports associations get into branding, licensing, merchandising, sponsorship and other similar activities. Once all these creative elements are conceived and are put into commercialization, their protection becomes essential within the legal framework.<sup>2</sup> For instance, today's intangible assets such as the team names like Super Eagles, Manchester United, and events such as African Nations Cup, World Cup, Olympics etc., along with commercial value are significant components for which legal protection is necessitated to prevent third party infringement and violation. On the other hand, licensing and sponsorships, broadcasting rights, and many other important revenue stream such as live streaming also involve few legal requirements to safeguard the rights. Hence, a legal regime and international convention for Copyright and Sports Intellectual Property becomes a *desideratum*. There is no single law that protects all such proprietary material and resolves all the issues that arise out of them globally thereby necessitating the intervention of World Intellectual Property Organisation either developing protocol or convention for universal application.

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<sup>1</sup> Paras Sharma, 'Intellectual Property Rights in Sports' (8)(3) [2020] International Journal of Creative Research Thoughts; p.2581.

<sup>2</sup> *ibid.*

Intellectual property laws are the major part of such laws and are often pressed into service in tackling various legal issues. Intellectual property is an umbrella term used to describe properties created by human intellect and includes patent, trademarks, trade secrets, design and so on.<sup>3</sup> Intellectual Property is defined by World Intellectual Property Organisation as creations of the mind, such as inventions; literary and artistic works; designs; and symbols, names and images used in commerce.<sup>4</sup> Article 27 of the Universal Declaration of Human Rights states that, creators, innovators, owner and everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.<sup>5</sup> The rights protect creations from being used by others without permission, or set conditions on such use, ensuring that creators and owners can charge a price for the usage of their Intellectual Property. The protections usually last for a limited period of time.<sup>6</sup>

The various kind of intellectual property that form part of sports and provide spectacular off field action in terms of business topped with some interesting legal face-offs are as follows: <sup>7</sup>

- a) Industrial property rights which include patents for inventions.
- b) Trademarks which helps to distinguish goods and services of one enterprise from another enterprise; geographical indications of the origins of goods; and industrial designs.
- c) Copyright which include a broad range of work, including literature, films, music, artistic works and architectural design.

The main idea of and Intellectual Property right is to give power to a person or to any legal entity to guard their brain power for a certain period of time.

## 2. COPYRIGHTS IN SPORTS

Copyright, like several other terms do not lend itself to any precise definition, it is therefore however necessary to attempt a definition by looking at those proffered by statutes and scholars. Garner define copyright as,<sup>8</sup>

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<sup>3</sup> *ibid.*

<sup>4</sup> *ibid.*

<sup>5</sup> *ibid*

<sup>6</sup> *ibid*

<sup>7</sup> *ibid*

<sup>8</sup> B.A. Garner, Black's Law Dictionary, (8th edn West Publishers).p.361

The right of literacy property as recognized and sanctioned by positive law. An intangible incorporeal right granted by statute to the author or originator of certain literacy or artistic productions whereby he is vested for a limited period with the sole and exclusive privilege of multiplying copies of the same and publishing and selling them.

In what appears to be a more comprehensive definition, the World Intellectual Property Organization<sup>9</sup> describes copyright as “the exclusive right granted by law to the author of a work to disclose it as his own creation, to reproduce it and distribute or disseminate it to the public in any manner or by any means and also to authorize others to use the work in a specified ways.”

In Nigeria, for instance, the Copyright Act<sup>10</sup> does not define the term copyright expressly. The Act contains a rather simplistic definition of the term copyright as meaning copyright under the Act.<sup>11</sup> Section 6 of the Act provides that “copyright in Nigeria of an eligible work is the exclusive right to control, to do or authorize the doing of any of the acts restricted to the copyright owner.” Asein<sup>12</sup> suggests that the word copyright evokes three possible meanings. First, it suggests the right that a person has over the physical copy of his work. This was true in earlier times when the author of a work exercised effective control over his physical manuscript. It is obvious that this is hardly possible today and the author cannot be content with the mere possession of the physical copy of his work. The second idea is the right to copy, that is, the right that the owner of a work has to reproduce his work. This sense of the word is probably the closest to the modern concept of copyright. The third connotation suggests that the work must be copied right. This suggests a license to copy on the condition that the copying would be done in a manner prescribed or permitted by law leaving the copyright owner with a right to be remunerated. The legal protection of rights to sporting events is a contentious issue.<sup>13</sup>

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<sup>9</sup> The World Intellectual Property specialised agency responsible for Intellectual Property matters.

<sup>10</sup> Cap. C28, Laws of the Federation of Nigeria 2004

<sup>11</sup> Copyright Act 2004, section 51(1)

<sup>12</sup> J.O. Asein., *Nigerian Copyright Law and Practice* (2nd edn Abuja, Books and Gavel Ltd 2012)

<sup>13</sup> Asser Institute, Study on Sport Organizers’ Rights in the European Union’ (Final Report, February 2014) 1

As far as the modern scenario is concerned, copyright per se does not protect sports.<sup>14</sup>This is simply because there is no author and intellectual creation.

The question whether sporting events could qualify for copyright protection under the European Union law was raised and addressed in the context of football in the joined cases of *Football Association Premier League (FAPL) and others v QC Leisure and Other*<sup>15</sup> and also in the case of *Karen Murphy v Media Protection Services Ltd*.<sup>16</sup> In these cases, the court held:

FAPL cannot claim copyright in the Premier League matches themselves as they cannot be classified as works. To be so classified, the subject matter concerned would have to be original in the sense that it is its author's own intellectual creation.

However, 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.<sup>17</sup> Accordingly, those events cannot be protected under copyright. It is, moreover, undisputed that European Union law does not protect them on any other basis in the field of intellectual property.<sup>18</sup>

A similar approach has been adopted in the United States to question whether sporting events could qualify for copyright protection. In *NBA v Motorola Inc.*,<sup>19</sup> the United States Court of Appeal for the Second Circuit stated:

Sports events are not 'authored' in any common sense of the word. There is, of course, at least at the professional level, considerable preparation for a game. However, the preparation is as much an expression of hope or faith as a determination of what will actually happen. Unlike movies, plays, television programs, or operas,

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<sup>14</sup> *Football Association Premier League Ltd & Others v QC Leisure & Others; and Karen Murphy v Media Protection Services Ltd* Cases C-403/8 and C-429/08 (Judgement delivered on 4 October 2011) and *NBA v Motorola Inc.* (1997) 105 F.3d 841.

<sup>15</sup> [2008] EWHC 1411 (Ch).

<sup>16</sup> Cases C-403/8 and C-429/08 (Judgement delivered on 4 October 2011).

<sup>17</sup> *Ibid.*

<sup>18</sup> C-403 & 429/08, 2011 ECR I-09083, para 96-99.

<sup>19</sup> (1997) 105 F.3d 841.

athletic events are competitive and have no underlying script. Preparation may even cause mistakes to succeed, like the broken play in football that gains yardage because the opposition could not expect it. Athletic events may also result in wholly unanticipated occurrences, the most notable recent event being in a championship baseball game in which interference with a fly ball caused an umpire to signal erroneously a home run.

What “authorship” there is in a sports event, moreover, must be open to copying by competitors if fans are to be attracted. If the inventor of T-formation in football had been able to copyright it, the sport might have come to an end instead of prospering. Even where athletic preparation most resemble authorship- figure skating, gymnastics, and some would uncharitably say, professional wrestling –a performer who conceives and executes a particularly graceful and difficult- or, in the case of wrestling, seemingly painful- acrobatic feat cannot copyright it without impairing the underlying competition in the future. A claim of being the only athlete to perform a feat doesn’t mean much if no one else is allowed to try.<sup>20</sup>

For many of these reasons, Nimmer<sup>21</sup> on Copyright concludes that the “[f]ar more reasonable” position is that athletic events are not copyrightable. Nimmer notes that, among other problems, the number of joint copyright owners would arguably include the league, the teams, the athletes, umpires, stadium workers and even fans, who all contribute to the ‘work’.<sup>22</sup> Concededly, case law is scarce on the issue of whether organized events themselves are copyrightable. We believe that the lack of case law is attributable to a general understanding that athletic events were and are uncopyrightable. Indeed, prior to 1976, there was even doubt that broadcasts describing or depicting such events, which have a far stronger case for copyrightability than the events themselves, were entitled to copyright protection. Indeed, Congress found it necessary to extend such protection to recorded broadcasts of live events.

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<sup>20</sup> *ibid.*

<sup>21</sup> David Nimmer, *Nimmer on Copyright* (Lexis Nexis Store 1991).

<sup>22</sup> *ibid.*

The fact that Congress did not extend such protection to the events themselves confirms our view that the district court correctly held that appellants were not infringing a copyright in the NBA games.<sup>23</sup>

Despite the approach taken by the EU and the US courts towards copyright protection to sporting events, sometimes, these events do convey unique and original characteristics, which envisage the potential of making eligible candidates for copyright protection.<sup>24</sup> Indeed the European Court of Justice observed in *Football Association Premier League (FAPL) and others*;

Nonetheless, sporting events, as such, have a unique and, to that extent, original character which can transform them into subject-matter, that is worthy of protection comparable to the protection of works, and that protection can be granted, where appropriate, by the various domestic legal orders.<sup>25</sup>

Copyright in sports law subsists in sound recording, films, broadcasts and cable programmes. Sound recordings will include player interviews, audio files and tapes of radio broadcast.<sup>26</sup> Films are defined as recordings on a medium from which moving images may by any means be produced, which obviously encompasses audio-visual footage of football events as well as the news conferences, training sessions and player interviews that surround them, interspersed with coverage of pundits in a studio or otherwise. Therefore, while there may not be any copyright inherent in a sporting performance per se, if that performance is recorded on audio and video-tape, that recording and its subsequent broadcast will be protected by copyright. Copyright also protects literary works that emanate from football like news articles, magazines and books. It also subsists in a vast amount of original written material generated about sports, including rules and regulations, match reports, newspaper and magazine articles, event programmes, calendar of events, fixtures lists and database of statistical information. A dramatic work is one that is capable of being performed, such as by acting or dancing. Football events do not generally qualify as dramatic works because a football spectacle is by nature not scripted but improvised, indeed, uncertainty of outcome is its very essence. Therefore, while copyright may

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<sup>23</sup> Ibid para 21-24.

<sup>24</sup> Chamila Talagala, 'Copyright in Sports?' <[https://www.academia.edu/38346302/Copyright\\_in\\_Sports](https://www.academia.edu/38346302/Copyright_in_Sports)> accessed 9/11/2020 at 13:59pm.

<sup>25</sup> C-403 & 429/08, 2011 ECR I-09083, para 100.

<sup>26</sup> U.J. Amadi, 'Intellectual Property in Sports: A Trick or Two Nigeria Can Learn From the Global Game' <[https://www.researchgate.net/publication/310829749\\_Intellectual\\_Property\\_in\\_Sports\\_A\\_Trick\\_or\\_Two\\_Nigeria\\_Can\\_Learn\\_From\\_the\\_Global\\_Game](https://www.researchgate.net/publication/310829749_Intellectual_Property_in_Sports_A_Trick_or_Two_Nigeria_Can_Learn_From_the_Global_Game)> accessed 12/10/20 at 6:15pm.

subsist in the footage recorded of a sport event, it does not subsist in the sports event itself. To the extent that aspects of a sporting performance are scripted, then arguments can be made that copyright subsists in them.<sup>27</sup>

Copyright subsists in artistic works and broadcast also. Artistic works include photographic works and graphic works of any of any nature, irrespective of artistic quality. Photographic images of sport are used not only to illustrate match reports and other printed material relating to sport, but also to convey messages and illuminate themes of other news articles especially in the marketing of a broad range of products and services. Copyright subsists in venue designs (such as football courses and stadia) and other artwork relating to sports like team and event logos, mascots, livery of team kits, badges, posters and flags. These artworks form the basis for sponsorship and sports merchandising and licensing programmes.

### 3. COPYRIGHT PROTECTION IN SPORTING EVENTS

Sports, based on their nature and inherent characteristics, can be broadly divided into two categories as ‘adversarial sports’ and ‘aesthetic sports’. Adversarial sports or head to head competitions include sports games such as rugby, football, baseball, basket, cricket and hockey, whereas the category of aesthetic or choreographed’ sports comprises figure skating, cheerleading, synchronized swimming, acrobatic gymnastics, ice dancing, ballroom dancing and wrestling.<sup>28</sup> The main feature which distinguishes between these two categories is that, while adversarial sports place primary emphasis on direct competition, aesthetic sports present a more essential artistic component.<sup>29</sup>

A characteristic of aesthetic sports is their routine oriented, repetitive and choreographic nature.<sup>30</sup> In other words, aesthetic sporting events involve a repetition of basic individual movements, forming an overall choreographed presentation.<sup>31</sup> While each routine is practiced to such extent that the margin of improvisation and unpredictability is relatively low, the athletic performance in aesthetic sports is not contingent on the movements of the adversarial

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<sup>27</sup> Chamila Talagala (n.22).

<sup>28</sup> Viola Elam, ‘Sporting Events as Dramatic Works in the UK Copyright System’ (2015) 13 *The Entertainment and Sports Law Journal* <<https://www.entsportslawjournal.com/articles/10.16997/eslj.1/>> accessed 9/11/2020 at 14:22pm.

<sup>29</sup> Chamila Talagala, ‘Copyright in Sports?’ (n.22) p.16.

<sup>30</sup> Viola Elam, ‘Sporting Events as Dramatic Works in the UK Copyright System’ (n.22).

<sup>31</sup> *ibid*

players<sup>32</sup> as in the case of adversarial sports. Similar to a ballet, sports movements in aesthetic sports are devised and presented in an interrelated sequence, revealing to the audience a story or portraying an abstract idea.<sup>33</sup>

Unlike in the case of aesthetic sports, an adversarial sporting event is for the most a random series of events, which lack in certainty and unity and, consequently, are inconsistent with the concept of choreography.<sup>34</sup> While the magnetism and appeal of sports games derives from unforeseeable occurrences, despite the degree of planning involved, what happens on the field is dictated by interaction with the opposing team and it is necessarily unpredictable.<sup>35</sup> Owing mainly to the reason of performance based on a predetermined plan or a plot similar to literary work which is eligible for enumerated as work eligible for copyright protection under the Nigerian Copyright Act (NCA), 2004, aesthetic sporting events envisage a better prospect for copyright protection than adversarial sports wherein unpredictability is inherent. Be that as it may, this does not mean that individual performances in adversarial sporting events which portray unique and original character cannot transform into subject matter that is worthy of copyright protection.

#### 4. ELIGIBILITY FOR COPYRIGHT PROTECTION FOR SPORTS

Eligibility works means works of copyright which the law will protect. It is our contention that works to be considered for eligibility may include translations, adaptation, new versions or arrangements of pre-existing works, and anthologies or collection of works which, by reason of the selection and arrangement of their content, present an original character.<sup>36</sup>

In addition to what has been said about the absence of copyright in ideas, as such, courts are also reluctant to extend copyright protection to mere formats, structure or package<sup>37</sup> Since copyright is not subject to a pre-grant examination, there is a practical necessity for the copyright owner to be certain on the subject matter in respect of which he claims copyright.

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<sup>32</sup> *ibid*

<sup>33</sup> *ibid*

<sup>34</sup> *ibid*

<sup>35</sup> *ibid*

<sup>36</sup> Chamila Talagala, 'Copyright in Sports?' (n.22) p.17

<sup>37</sup> J.O. Asein., *Nigerian Copyright Law and Practice* (n.12) p.42

However, it is not all works that enjoy statutory protection. Accordingly, the following works are suggested as eligible for copyright:

- (a) Literary works;
- (b) Musical works;
- (c) Artistic works;
- (d) Cinematograph films;
- (e) Sound recordings; and
- (f) Broadcasts.

However, we do not intend the above listing of the categories of eligible subject matter as exhaustive. So, aside from neighbouring rights, there can be no copyright in any work or material that does not come expressly or impliedly within the six categories of works enumerated above. While this may appear to be unduly restrictive, it should be noted that each of the six categories is broadly defined to accommodate a wide range of materials. For instance, the protection of computer programs<sup>38</sup> is not immediately obvious from the six categories above but a further reading of the definition of “literary works” in section 51(1) shows that they are included. It must be understood that the categorisation has been influenced largely by historical factors and it does not necessary follow any logic.

In Nigeria, for instance, one would also observe that the categorisation adopted in the Universal Copyright Convention and the Berne Convention, both of which influenced the 1970 and 1988 copyright statutes, respectively, has not been followed faithfully.<sup>39</sup> For instance, although provision is made for musical works, there is no special mention of “dramatic works” which is one of the categories of works expressly provided for in Article 11 of the Berne Convention.<sup>40</sup> The NCA 2004 does not define what constitutes a “work” although rough definitions are provided for the various categories of work. As should be expected, the meaning and scope of each category of works are often wider or narrower than their understanding in common

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<sup>38</sup>The Nigerian Act uses “programme” but the internationally accepted phrase for computer software is “computer program.” Although “program” is an American spelling, it has been adopted deliberately under English law and in contemporary English language to avoid confusion with the general use of the word “programme”. The preferred spelling here is “program”.

<sup>39</sup>J.O. Asein., *Nigerian Copyright Law and Practice* (n.12) p.45

<sup>40</sup>The Article grants authors of dramatic, dramatico-musical and musical works the right to enjoy the exclusive right of authorizing (i) the public performance of their works, including such public performance by any means or process; (ii) any communication to the public of the performance of their works. The same rights are to extend to translations of such works.

parlance. It has been suggested that the description of the different categories of works today may have been influenced largely by the piecemeal fashion in which copyright law has developed over the centuries. The categorization of the subject matters of protection is not always exclusive as the same material may fall under more than one category. So, while the statutory definitions may bring a material under more than one category, there are instances where the NCA expressly limits certain works to only one category.<sup>41</sup> For instance, the definition of a cinematograph film expressly includes the recording of the associated sound track but a sound recording is defined to exclude a sound track associated with a cinematograph film. Similarly, a photograph is an artistic work only so long as the particular photograph is not comprised in a cinematograph film.<sup>42</sup>

Under Nigerian Law eligibility for copyright protection shall be hinged upon two conditions:<sup>43</sup> A literary, musical or artistic work shall not be eligible for copyright unless—

- (a) sufficient effort has been expended on making the work to give it an original character;
- (b) the work has been fixed in any definite medium of expression now known or later to be developed, from which it can be perceived, reproduced or otherwise communicated either directly or with the aid of any machine or device.

It may be deduced from section 1(2)(a) and (b) of the NCA 2004 that the requirements of originality and fixation only apply to literary, musical and artistic works and not to cinematograph films, sound recordings and broadcasts. The reason for this is not immediately clear but it stands to reason that the copyright conferred on the other three categories of works is based on the fact of creation and not on the creative content. They are essentially entrepreneurial in nature and the copyright is a reward for the financial investment rather than the artistic engagement of the mind. On the question of fixation, it goes without saying that except for broadcasts, these works (sound recordings and cinematograph films) must necessarily exist in fixed media.<sup>44</sup> In requiring fixation, the NCA is flexible and time neutral by accepting fixations in media that are presently known and those that are yet to be developed, so long as it is one from which it can be perceived, reproduced or otherwise communicated, directly or with the aid of any machine or device.<sup>45</sup>

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<sup>41</sup> J.O. Asein., *Nigerian Copyright Law and Practice* (n.12) p.45

<sup>42</sup> Section 51(1) of the Nigerian Copyright Act, 2004.

<sup>43</sup> Section 1(2) of the Nigerian Copyright Act, 2004,

<sup>44</sup> J.O. Asein (n12) p.74,

<sup>45</sup> *ibid.*

## ORIGINALITY IN COPYRIGHT AND SPORTS INTELLECTUAL PROPERTY RIGHT

Since one of the consequences of copyright protection is to give the author an exclusive right of exploitation a limited monopoly of sort it is appropriate that the law should require him to have earned the exclusive right over the work. He cannot, merely by appending his name to what would otherwise pass as common property, arrogate to himself an exclusive right to its use. He is required to show that the work is original, that is, it originates from him. The courts will consider the skill and judgment in the literary, musical or artistic expression as well as the commercial judgment in selecting the materials.<sup>46</sup> Thus, the particular skill and judgment involved in gathering and presenting vital information have conferred originality on compilations,<sup>47</sup> annotations<sup>48</sup> and such other secondary works which do not appear to entail much intellectual end.<sup>49</sup> For instance, copyright has been denied for enlarged photocopies of a drawing as against the original drawing, on the ground that the process of enlargement was wholly mechanical and involved no exercise of artistic skill and labour.<sup>50</sup> There is no statutory definition of the word “original” but it is understood that a work needs only be shown to have originated from the author. In other words, it does not require original or inventive thought, but only that the work should not be copied and that the author should have expended a sufficient amount of labour, judgment and skill.<sup>51</sup> What the Act requires is not that the expression must be in an original or novel form, but that the work must not have been copied from another work, i.e. it should originate from the author.<sup>52</sup> In the words of Megary, J. “Copyright is concerned not with any originality of ideas but with their form of expression, and it is in that expression that originality is requisite.” That expression need not be original or novel in form, but it must originate with the author<sup>53</sup> and not be copied from another work.<sup>54</sup> By originality, one does not

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<sup>46</sup> Ibid p.75

<sup>47</sup> Football League Ltd. v. Littlewoods Pools Ltd., supra; Ladbroke (Football) Ltd. v. William Hill (Football) Ltd. [1964] 1 W.L.R. 273; Kelly v. Morris (1866) L.R. 1 Eq. 697; Portway Press v. Hague (1957) R.P.C. 426.

<sup>48</sup> Macmillan & Co. Ltd. v. Cooper (1923) 93 L.J.P.C. 113, 40 T.L.R. 186; Sweet v. Benning (1855) 16 C.B. 459.

<sup>49</sup> J.O. Asein (n12) p.74

<sup>50</sup> The Reject Shop Plc. v. Robert Manners [1995] F.S.R. 870.

<sup>51</sup> Bookmakers' Afternoon Greyhound Services Ltd. v. Wilf Gilbert (Staffordshire) Ltd. [1994] F.S.R. 723 (Ch. D.).

<sup>52</sup> Ladan v. ShaKallo Publication Co. Ltd., supra. See also British Northrop Ltd. v. Texteam Blackburn Ltd. [1973] F.S.R. 241, per Megary, J., at 254: “Copyright is concerned not with any originality of ideas but with their form of expression, and it is in that expression that originality is requisite. That expression need not be original or novel in form, but it must originate with the author and not be copied from another work.”

<sup>53</sup> University of London Press Ltd. v. University Tutorial Press Ltd., supra, at 608; Christoffer v. Poseidon Film Distributors Ltd. [2000] E.C.D.R. 487 [Film script based on Greek myth held original within the meaning of the English Copyright, Designs and Patents Act 1988 as originating from the person who claimed to be the author.]

<sup>54</sup> British Northrop Ltd. v. Texteam Blackburn Ltd. [1973] F.S.R. 241, at 254.

mean that the work should necessarily be ingenious, inventive or imaginative for the law needs not concern itself with measuring these qualities.<sup>55</sup> The originality that is required for copyright purposes relates to the expression and not the idea embodied in it. While the divide between ideas and the expressions of ideas may not always be clear, the law recognizes the right of anyone to create from pre-existing materials, so long as he has thereby invested sufficient skill and labour to give the resultant work a new character.<sup>56</sup> The law permits an author to draw upon the available stock of common knowledge to create his own work and if by some co-incidence, two authors working independently were to come up with identical expressions, each of them would be entitled to his separate copyright.<sup>57</sup> Unlike the patent requirement of novelty, it does not matter that what the author has created existed before him so long as his own creation was not a copy of an existing work. According to Lord Atkinson:

It is the product of the labour, skill, and capital of one man which must not be appropriated by another, not the elements, the raw materials, if one may use the expression, upon which the labour and skill and capital of the first have been expended. To secure copyright for this product, it is necessary that labour, skill and capital should be expended sufficiently to impart to the product some quality or character which the raw material did not possess, and which differentiates the product from the raw material.<sup>58</sup>

## 5.1 ORIGINALITY OF SPORTING EVENTS

The two characterizations that have been deployed in determining originality constitute: (i) whether the work has originated with the author and is not copied, and (ii) whether the author has exercised the requisite labour, skill, or judgment in producing the work.

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<sup>55</sup>H. Laddie, P. Prescott and M. Vitoria, *The Modern Law of Copyright and Designs* (London, Butterworths, 1995) para. 1.7.

<sup>56</sup>*Dicks v. Brooks* (1880) 15 Ch. D. 22.

<sup>57</sup>*Creation Records Ltd. v. News Group Newspapers Ltd.* [1997] E.M.L.R. 444. [Defendants' separate photograph of the same scene that was composed by the plaintiffs held not to be an infringement]; *Toole v. Young* (1873-74) LR 9 Q.B. 523 [Two separate drama of a published novel held to be independent and therefore the second was not an infringement of the first].

<sup>58</sup>*Macmillian & Co. Ltd v Cooper* (1923) 93 LJPC 113

As regards authorship, a distinction could be made between adversarial sports and aesthetic sports.<sup>59</sup> While in the case of adversarial sports, the authorship of the performances would remain with the individual players who perform the action in concern, in aesthetic sports, the authorship would remain with the coach who would draw the individual movements. Although in general, the performances or action of players in adversarial sports (such as rugby, football and cricket) are subject to the rules of the game and, the players might merely perform according to how the rules would specify and sometimes, just copy or replicate the action or performances of more veteran players, there could be instances where these players would perform in extraordinary ways even within the rules, thus making their performances unique and creative.<sup>60</sup> Undoubtedly, such performances could be well construed as actions which have originated with the author that are not copied.<sup>61</sup> Similarly, it is true that most of the choreographies in aesthetic sports draw upon one or more pre-existing compositions. A coach often relies on the systems and diagrammed notations used by his former mentors and on the assistance of his present advisers.<sup>62</sup> Nonetheless, in instances where the coaches make some material additions or alterations to the pre-existing compositions when producing the choreographies in aesthetic sports (without merely or slavishly copying from elsewhere), such choreographies could be well construed as action which have originated with the author that are not copied.<sup>63</sup>

Indisputably, players in adversarial sports expend labour, skill and judgment into their performances. Likewise, coaches too expend labour, skill and judgment in drawing their choreographies in aesthetic sports. Thus, the question that remains is whether the labour, skill and judgment expended by these players and coaches are of the right kind and quantity. This is because, not all amounts and all kinds of labour, skill and judgment expended by the author would satisfy the originality test. While the wrong kind of labour, skill and judgment (such as that used for slavish copying of a painting) fails to satisfy originality, and the quantity required, will ultimately be decided by the court on a factual basis. In any event, it is submitted that unique and creative performances of players in adversarial sports, as well as, creative choreographies in aesthetic sports are capable of establishing the required amount and the kind of labour, skill and judgment needed to satisfy the test of originality.

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<sup>59</sup>Chamila Talagala, 'Copyright in Sports?' (n.22) p.17

<sup>60</sup> *ibid.*

<sup>61</sup> *ibid.*

<sup>62</sup> Viola Elam, 'Sporting Events as Dramatic Works in the UK Copyright System' (n.22)

<sup>63</sup> *Interlego AG v Tyco Industries Inc* (1989) AC 217, 260-263

## 6. FIXATION OF SPORTING EVENTS

Fixation is a key requirement that, alongside with originality, a sporting event should meet for subsistence of copyright. The second requirement should be that a literary, musical or artistic work must have “been fixed in any definite medium of expression now known or later to be developed, from which it can be perceived, reproduced or otherwise communicated either directly or with the aid of any machine or device”. Thus, in principle, an athletic performance may be fixed by a combination of written form, graphical diagrams and video-replication.<sup>64</sup> Symbolic notation, which reduces movements to symbols, may constitute an adequate means to fix choreographed performances, insofar as fixation by means of dance notation systems.<sup>65</sup> Aesthetic sports represent an accurate performative fulfilment of what is written in the notation, and to a large extent, athletes do not depart from the instructions imparted to them. It might be maintained; however, that symbolic notation may fix the work but cannot simultaneously capture the essence of the athletic performance.<sup>66</sup> Diagrammed notations cannot symbolise the true specific version of performative representation<sup>67</sup>Electronic means, rather than traditional written methods of fixation, allow far more details to be captured. The actual performance, as it is seen and perceived by the audience in all its nuances, will be recorded. <sup>68</sup>

Allegedly, an original literary work can be created through performance, rather than through written instructions, since the Act does not require a literary work to come into being before it is performed.<sup>69</sup> Two copyrights may impinge upon the recording: copyright in the recording itself and copyright in the work recorded.<sup>70</sup> The difference becomes apparent in adversarial sports, insofar as the improvised performances of the players on the pitch or field can only be fixed simultaneously by their recording through electronic means.

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<sup>64</sup> Griffith W.T. (1998), ‘Beyond the Perfect Score: Protecting Routine-Oriented Athletic Performance with Copyright Law’ [1998] (30) *Connecticut Law Review*; 711, L.J. Weber, ‘Something in the Way She Moves: The Case for Applying Copyright Protection to Sports Moves’ [1999] (23) *Columbia VLA Journal of Law & The Arts*; 317-361

<sup>65</sup> Viola Elam, ‘Sporting Events as Dramatic Works in the UK Copyright System’ (n.22)

<sup>66</sup> *ibid*

<sup>67</sup> Waelde C. S. Whatley and M. Pavis, ‘Let’s Dance!-But Who Owns It?’ [2014] *European Intellectual Property Review*, 225

<sup>68</sup> Viola Elam, ‘Sporting Events as Dramatic Works in the UK Copyright System’ (n.22)

<sup>69</sup> *ibid*

<sup>70</sup> E. Adeney, ‘Authorship and Fixation in Copyright Law: A Comparative Comment’ [2012] (53) (2) *Melbourne University Law Review*; 677-696

## 5. THE IDEA AND EXPRESSION DICHOTOMY APPLIED TO SPORTING EVENTS

The expression and idea dichotomy is well known all over the world. One illustration of how the law seeks to prevent the exercise of exclusive control over non-copyrightable subject matter is in the dichotomy between ideas and expressions.<sup>71</sup> Certain materials, such as facts, are not original and should on that note be excluded from copyright control. However, some others, such as methods, formulae and processes are also denied protection not so much because they do not involve originality – very often they are in themselves original – but more as a matter of policy since they are of immense benefit to society. Although not always given to clear analysis in logic, the general formulation of the law is that copyright protection is limited to the expression of an idea or a subject rather than the idea embedded therein.<sup>72</sup> This is a reasonable application of the rule that copyrightable works must have original character and the need to define the actual scope of copyright strictly.<sup>73</sup>

This common law principle represents a useful tool in assessing whether ideas expressed by the author(s) in a sporting event warrant copyright protection, and whether a substantial infringement by making non-literal copies of the alleged copyright work has occurred. The present analysis relates to how the idea/expression dichotomy delineates the boundary between protected and unprotected materials for the purposes of copyright protection of a sporting event.

According to the Opinion of Advocate General Bot in BSA, where the idea and the expression become indissociable, and therefore there is only one way to express or depict the idea, no one can claim copyright in that expressive form, because to do so would confer a monopoly of the idea itself. This would be the case whenever the expression is dictated by its technical function, and therefore the author cannot express his creative abilities. Thus, sporting events, and in particular football matches, comprise rules of the game, and this may pose a challenge for copyright subsistence. These rules lie on the wrong side of the border between ideas and their expression.<sup>74</sup>

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<sup>71</sup> J.O. Asein (n12) p.85.

<sup>72</sup> *ibid*

<sup>73</sup> *ibid*

<sup>74</sup> Opinion AG Bot (Case C-393/09) delivered on 14 October 2014, at pp. 75-76.

In *Designer Guild v Russell William*,<sup>75</sup> the rules of the game are not connected with the nature of the work and they are too general or commonplace to qualify as expressions. The other possible explanation is that rules can be assimilated to a system or process, to which copyright protection does not extend.<sup>76</sup> If game rules can be described as non-protectable ideas, the issue is whether they are likely or not to merge with their expression in the actual play.<sup>77</sup> Thus, the issue is whether a game is synonymous with its rules, merely because they govern and define it. It is maintained that the ways in which such rules can be expressed in an original work are limited, but there is still a room for a creative input on the part of the participants.<sup>78</sup> Thus, an athletic performance may not be entirely dictated by its technical function. By analogy, recipes that consist of a list of ingredients and instructions to follow should meet the originality threshold under Nigerian law, and be protected as literary works. The method of preparation, the process and the list of ingredients may not be protected themselves. Rather, only the actual wording of recipes is protected, and arguably an infringement should not occur when the same instructions are reproduced with different words.<sup>79</sup>

Game rules must be distinguished from the modes of expression susceptible of copyright protection in which they are stated. Rules do not tell participants exactly what to do, nor can they specify precisely what will occur during the actual game in play.<sup>80</sup> Rather, rules perform the main functions of establishing initial conditions, determining which actions are valid within the scope of the game, and setting the end conditions, such as victory. Rules represent the external container, which can be filled in by a wide range of different creative options, made from the participants' choices.

The analysis of how technical considerations may influence creative freedom can be better illustrated by reference to the sorts of sporting activities. It has been submitted that coaches' scripted plays in adversarial sports are denied copyright protection. An assertion of the contrary is also undermined by the fact that if a coach were to obtain copyright on a scripted play, where there are only a fixed number of routes that a player may take to get, for example, to the back right corner of the end zone, then he would obtain a monopoly over the expression of the idea

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<sup>75</sup> [2000] 1WLR 2416.

<sup>76</sup> Viola Elam, 'Sporting Events as Dramatic Works in the UK Copyright System' (n.22).

<sup>77</sup> *ibid*

<sup>78</sup> *ibid*.

<sup>79</sup> T. Su and Li Cheng, 'Copyright Protection of Haute Cuisine: Recipe for Disaster?' [2008] (30) (3) *European Intellectual Property Review*; 93-101.

<sup>80</sup> B.E. Boyden, 'Games and Other Uncopyrightable Systems [2011] (18) (2) *George Mason Law Review*; 450.

and the idea itself.<sup>81</sup> Moreover, rules in head-to-head competitions are more likely to influence and confine players' creative choices in the playing of the game. Arguably, an athlete's performance in team sports is not an 'intellectual' contribution to the authoring of a work, nor is it sufficiently original and creative. A player has to run from one point to another, taking a specified direction in a confined space, in order to achieve the same task, throughout the whole game. Nor are the opposing individual players executing highly composite and creative athletic performances.<sup>82</sup> Within choreographed sports, on the contrary, the single basic movements involved in the sporting performance constitute ideas. Accordingly, in figure skating, the individual 'camel spin' may not be protected due to its form as an idea.<sup>83</sup> Nevertheless, the arrangement and combination of these ideas into an entire routine may constitute the authorial contribution, which warrants copyright protection.

## 6. CONCLUSION AND RECOMMENDATION

In conclusion, in order to maximize economic returns, good management of intellectual property is very important in the Sport industry. This has been rightly pointed out by De Werra in his book entitled *Sports and Intellectual Property* in the following words:

If intellectual property has something to learn from the sports industry, it can conversely be considered that the sports industry may have something to gain from the assimilation of the key values of Intellectual property law.<sup>84</sup>

The authors feel that there is strong need for development of a predictable legal regime for Sports Intellectual Property globally so as to promote ethical practices in the Sports industry. It is indeed the need of the hour that the proprietors or the owners invest resources in proper licenses, registration and contracts in order to protect the value the sports and sporting assets as well as, keenly protecting intellectual property from infringement and abuse.

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<sup>81</sup> P.K. Das, 'Offensive Protection: The Potential Application of Intellectual Property Law to Scripted Sports Plays' [2000] (75) (3) *Indiana Law Journal*; 1094.

<sup>82</sup> Viola Elam, 'Sporting Events as Dramatic Works in the UK Copyright System' (n.22).

<sup>83</sup> W.T. Griffith (1998), 'Beyond the Perfect Score: Protecting Routine-Oriented Athletic Performance with Copyright Law' (n.56) p. 695.

<sup>84</sup> Jacques de Werra. *Sport and Intellectual Property* (Jacques de Werra, Université de Genève, 2009).

It is recommended that the legal contractual agreements must be in place guarding all forms of intellectual property created in sporting events, teams, individual players etc., so as to safeguard all the stake holders and their financial interests. In this regards, WIPO should come up with protocol or convention for protecting sporting events.

It is recommended that WIPO should come up with a sports business model which could help in building an effective Intellectual property rights strategy that could address the use of patents, trademarks, designs and other forms of IP in sports.

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