

1810-P

**2018 WANHUIDA-BFSU INTELLECTUAL PROPERTY
MOOT COURT COMPETITION
IN BEIJING INTELLECTUAL PROPERTY COURT**

P Company
(Petitioner)

v.

S Company
(Respondent)

PETITIONER
P Company

WRITTEN BRIEF FOR THE PETITIONER

TABLE OF CONTENTS

TABLE OF AUTHORITIES	1
SUMMARY OF PLEADINGS	4
PLEADINGS.....	5
I. THE PROGRAM IS NOT “WORK”.....	5
A. The program is not “cinematographic works”	5
(a) The program is not expressed ideas within in the fields of literature, art, science and technology.	5
(b) The program is not produced in a process analogous to cinematography.	6
(c) The originality does not satisfy the requirements.....	6
i. The cameramen’s placement of cameras and choice of the scenes, is standardized.	8
ii. Director's selection and arrangement of the scenes are standardized.	9
iii. Highlight collection does not increase the originality of the program as a whole.....	10
B. The program is “video recordings”.....	11
II. THE PETITIONER DID NOT INFRINGE COPYRIGHT, EVEN IF PROGRAM IS “WORK”	11
A. The Petitioner did not violate the Respondent’s right of broadcasting... ..	11
B. The Petitioner did not violate the Respondent’s right of information network dissemination.	12
C. The Respondent does not have claim to author’s rights.	12
(a) The Respondent is not the lawful copyright owner of the program. ...	12
(b) Sports events organizers do not have copyrights of programs without contracts.	13
III. THE PETITIONER DID NOT INFRINGE NEIGHBORING RIGHTS.	14
A. The Respondent does not have right to prohibit Petitioner from dissemination through network.	14
B. The Respondent does not have the right to prohibit Petitioner from rebroadcasting.	14
(a) The Respondent is not the lawful subject to prohibit others from rebroadcasting.	14

(b) The right of rebroadcasting does not include live broadcasting online.
14

C. The Respondent does not have claim to neighboring rights. 15

IV. PETITIONER IS NOT THE RIGHTFUL SUBJECT OF ANTI-UNFAIR COMPETITION SUIT. 15

A. The petitioner’s conduct did not constitute act of unfair competition 15

(a) Petitioner bear no malice. 16

CONCLUSION..... 16

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SUMMARY OF PLEADINGS

CLAIM I

The program Petitioner rebroadcasted is not protected “work” under the *Copyright Law*. Specifically, it does not suffice the requirement of “cinematographic works”. It is not expressed ideas or thoughts in the field of literature, art science and technology; not created by a process analogous to cinematography; and exhibits not enough originality. It is “video recordings”.

CLAIM II

The Petitioner did not infringe upon the author’s right of the live program. Even if the program constitutes protected “work”, live broadcasting does not infringe right of broadcasting and right of information network dissemination. The Petitioner (P Company) did not infringe upon the Respondent’s (S Company) rights for it does not have claim to author’s rights of the program.

CLAIM III

The Petitioner did not infringe upon the neighboring rights of the program. The Respondent does not have the right to prohibit the Petitioner from disseminating through network or rebroadcasting. And the Respondent is not the lawful subject of neighboring rights.

CLAIM IV

The Petitioner is not the rightful subject of anti-unfair competition litigation in this case.

PLEADINGS

I. THE PROGRAM IS NOT “WORK”.

The Petitioner did not infringe the copyright of the program because the program is not protected “work” under the *Copyright Law of the People’s Republic of China*¹. The program exhibits the features of “cinematographic works”, of which it does not satisfy the prerequisites. Even if the program constitutes protected “work”, the Petitioner (P company) did not infringe the Respondent’s (S Company) rights, for it did not have authorization from the copyright owner.

A. The program is not “cinematographic works”.

In *China Sports Press v. Guangdong Audio and Video Publishing Co., LTD.*², the court stated the prerequisites for a work to be protected as “cinematographic works and works created by a process analogous to cinematography” (hereinafter referred to as “cinematographic works”) under the *Copyright Law*: 1) it must be overt expressions of ideas within in the fields of literature, art, science and technology; 2) it should be produced in a process analogous to cinematography 3) it must exhibit enough originality. The program at issue does not satisfy either of the three prerequisites, therefore, it is not protected “work”.

- (a) The program is not expressed ideas within in the fields of literature, art, science and technology.

As a signatory state to *WIPO*³ and *The Universal Copyright Convention*, China honored the treaties and stated in the very first article of the *Copyright Law* that ‘This Law is enacted, for the purposes of protecting the copyright of authors in their literary, artistic and scientific works and rights related to copyright’. Also, stipulated in Article 2 of *Regulation for the Implementation of the Copyright Law*⁴, the term “works” in the *Copyright Law* means intellectual creations with originality in the literary, artistic or scientific domain. The two clearly written articles demonstrate that the rightful objects of protected work are expressions of certain ideas or thoughts within the field of literature, art and science⁵. And in essence, they are the creative expressions with the intention of conveying ideas or thoughts⁶. If a work does not deliver any thoughts or is not within literary, artistic or scientific domain, it could never be protected, no matter how high level of originality it exhibits⁷.

Programs of football game are the documentary of matches. Football, as an adversary sport, its goal lies in winning the competition, breaking a record, etc., not in the expression of ideas nor thoughts in the field of literature, art or science. It is a competition of skills, stamina and strength between two teams of players. For instance, kicking the ball into the goal is not an expression of the players’ thoughts or opinions. Unlike aesthetic sports that emphasis on artistry and aesthetics like

¹ *Copyright Law of the People’s Republic of China* (2010). [*Copyright Law*]

² *China Sports Press v. Guangdong Audio and Video Publishing Co., LTD*, Beijing Western District Court (2012)

³ World Intellectual Property Organization

⁴ *Regulation for the Implementation of the Copyright Law of the People’s Republic of China* (2013), Art 2. [*Copyright Regulations*]

⁵ Ling Zongliang, ‘*The Classification and Ways of Protecting the Broadcasting Rights of Sports Events*’

⁶ Cui Guobin, ‘*Copyright Law, Cases and Materials*’, p. 115

⁷ *China Sports Press v. Guangdong Audio and Video Publishing Co., LTD*, Beijing Western District Court (2012)

gymnastics, in which the movements of contestants are deliberately designed ahead, everything that happens on the soccer field is spontaneous and unplanned. Scenes of football programs are mechanical and objective recordings of the game, not deliberate arrangements of plots. Therefore, the program disputed is not a rightful object of work under the *Copyright Law*, for it does not express thoughts and is not in the field of literature, science and arts.⁸

In *Beijing TV Fan Network Technology Co., Ltd. v. CCTV (2014)*⁹, the court affirmed this requirement and held that the football programs of the 2012 London Olympics aired on CCTV 5th channel are not protected “work”, because the programs are not in the fields of literature, art, science and technology. In our case, there is no difference, and the precedent is to be followed.

(b) The program is not produced in a process analogous to cinematography.

As defined by words, to qualify as “cinematographic works and works created by a process analogous to cinematography”, it must be created with similar methods and processes. If a program is produced merely as a simple documentation of what happened in real life, it is not “cinematographic works”.

In *Beijing YaoTaiYang Co. v. Geng*¹⁰, Beijing High People’s Court held that TV programs without scripts are not “cinematographic works”. The court reasoned that “cinematographic works” should be created by analogous method of film production, which usually begins with a scriptwriter. After the selection of scripts, actors perform in guidance of a director. It also involves editing, costume choosing, lighting, special effects, etc. Programs that document what happened as it is not created by methods analogous to films for it lacks originality. In *Ma Xiaogui v. Qianjun Network Technology Co., LTD.*¹¹, Beijing Chaoyang District People's Court affirmed this requirement and held that programs of recorded and edited opera are not “cinematographic works”.

In our case, programs of football games are also documentation of reality. Therefore, the precedents that programs without scripts are not “cinematographic works” should be followed.

(c) The originality does not satisfy the requirements.

For a product of one's labor to be qualified as "Cinematographic works and works created by a process analogous to cinematography" (hereinafter referred to as “Cinematographic works”), the product has to demonstrate a high level of originality.

The originality of a work is reflected in the author’s careful deliberation on the arrangement and design of scenes in order to convey certain ideas. In *CCTV International Network Co., Ltd. v. 21CN Co., Ltd*¹², Guangzhou Intermediate Court ruled that the live broadcasted program of the 2008 Beijing Olympic Torch Relay constitutes “cinematographic work”. And in *CCTV v. Tudou Company*¹³, Shanghai First Intermediate Court held that the live program of London 2012 Olympics

⁸ Ling Zongliang, ‘*The Classification and Ways of Protecting the Broadcasting Rights of Sports Events*’

⁹ *Beijing TV Fan Network Technology Co., Ltd. v. CCTV International Network Co., Ltd.*, Beijing First Intermediate Court (2014)

¹⁰ *Beijing YaoTaiYang Culture Co. v. Geng XX*, Beijing High People's Court (2004)

¹¹ *Ma Xiaogui v. Qianjun Network Technology Co., LTD.*, Beijing Chaoyang District People's Court (2011)

¹² *CCTV International Network Co., Ltd. v. 21CN Co., Ltd.*, Guangdong Guangzhou Intermediate Court (2010)

¹³ *CCTV International Network Co., Ltd. v. Shanghai Tudou Cultural Transmission Co., Ltd.*, Shanghai First Intermediate Court (2014)

Opening Ceremony constitutes “cinematographic work”. The rationale behind the courts’ decision was that both the 2008 Beijing Olympic Torch Relay and the London 2012 Olympics Opening Ceremony entail elaborate plotting and planning ahead by directors and script writers. The two programs both were carefully designed, rehearsed and recorded to deliver to the audience the spectacularity of human civilization and the spirit of Olympics. They were creative performances with distinct personal features. Thus, the originality exhibited met the requirement of “cinematographic works”, therefore the Olympics programs constituted “Cinematographic works”. Although the two cases involved the live streaming of events relating sports, they are not analogous to our case here. Because the facts of the two cases differ in great extent. In our case, the content of the live broadcast is not plotted and rehearsed performances but a football match, whose outcome is unplanned and spontaneous. The rulings cannot be recklessly recognized as precedents. More similar cases were decided later: *CCTV International Network Co., Ltd. v. 21CN Co., Ltd (2010)*¹⁴, *CCTV v. BaoFeng TV Co.(2015)*¹⁵ and *CCTV v. Beijing TV Fan Network Technology Co., Ltd. (2014)*¹⁶. In these three cases, the content of the program were all football matches, and respectively, the courts all decided that the programs did not constitute “cinematographic works” because of their lack of originality. These are precedents that the court today should follow.

When live broadcasting a sports event, it is standard practice that after the broadcasting service provider (in this case, C TV) received offer from the organizing committee (in this case, Super League Company), the live streaming project is formally established, and a technical manual for the production of public signals is crafted.¹⁷ However, even if the team does tailor manuals for each and every event, they do not differ much. Yang bin, deputy manager and director of CCTV sports channel wrote in his book ‘*Standard Guide for the Production of Television Public Signals in Sports Events*’ (hereinafter referred to as “*Standard guide*”) that the technical manual is standardized and unified in order to ensure the professionalism and specialization of the production. Meanwhile, teams must strictly abide rules and follow standards set by the industry. In *Broadcaster Handbook*¹⁸, a foundation book for live sports broadcast, the philosophies and principles of producing a football live broadcast was enumerated: impartiality and equality, sports and emotions. The principles require that the crew should never be impartial towards or against one team over the other, giving it an unfairly large or small amount of time on camera, also the crew should deliver the emotions and inner thoughts of the player through close-up shots of their body language, facial expressions etc. and demonstrate the vibe of the game through the audiences’ detailed reaction by contrast. The principles make the job responsibilities and workflows of cameramen and six different roles of directors extremely standardized. In Yang’s article ‘*Analysis on the Creation of Television Public Signals in Sports Events*’¹⁹ he wrote that the productions of professional crews are significantly alike and audience normally has the same viewing experience.

¹⁴ *CCTV International Network Co., Ltd. v. 21CN Co., Ltd.*, Guangdong Guangzhou Intermediate Court (2010)

¹⁵ *CCTV International Network Co., Ltd. v. Beijing Baofeng Technology Co., Ltd*, Beijing Shijingshan District Court (2015)

¹⁶ *Beijing TV fan Network Technology Co., Ltd. v. CCTV International Network Co., Ltd.*, Beijing First Intermediate Court (2014)

¹⁷ Yang Bin and Ren Jinzhou, *Standard Guide for the Production of Television Public Signals in Sports Events*

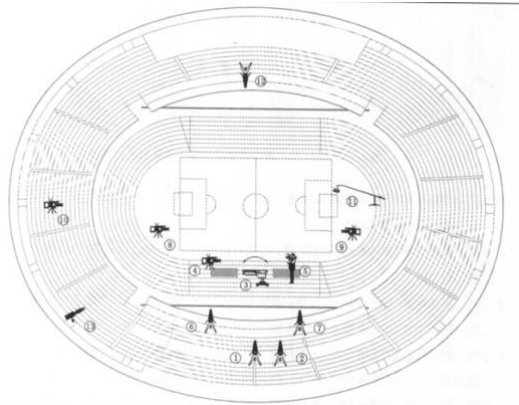
¹⁸ *Broadcaster Handbook, Athens Olympic Broadcasting*, p3

¹⁹ Yang Bin, ‘*Analysis on the Creation of Television Public Signals in Sports Events*’

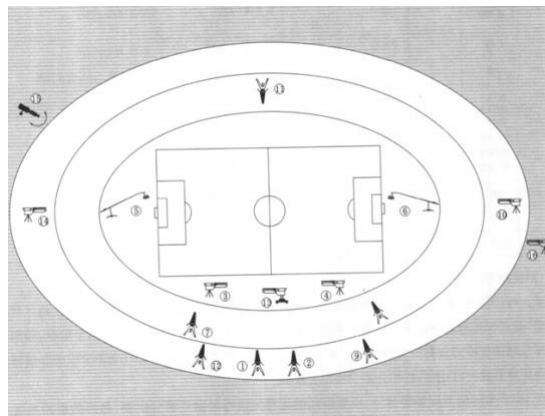
For any work to be deemed as “cinematographic works”, it should demonstrate at least some high standard of creativity in the following respect: 1) The photographer's consideration given to the angle, placement of camera; 2) Director's adaptation and special consideration of the script, the selection and arrangement of the scenes, the instruction to the actors, etc., as well as 3) The editing and special effects in post-production.²⁰

However, as discussed in great detail below, the program lacks originality due to the strict constraints imposed by standardizations in the industry.

i. The cameramen's placement of cameras and choice of the scenes, is standardized.

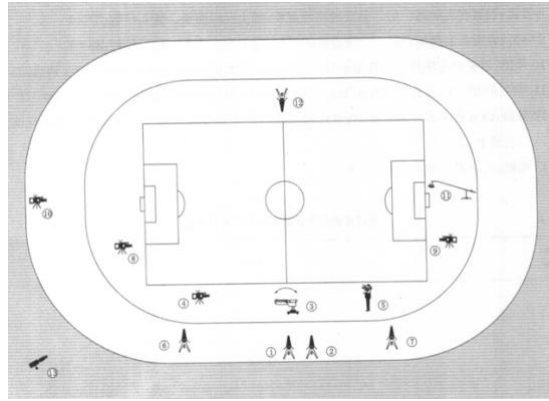


Standard Camera Placement in the industry



Camera Placement in 2004 Athens Olympics

²⁰ Wang Qian, ‘The Study on the Copyright Protection of Sports Events Programs’



Camera Placement in 2004 Beijing Asian Cup²¹

Sketch maps shown above are illustrations of camera placement in different football tournaments. As seen in the maps, it is a regular practice that more cameras are used in large-scale matches and less cameras in smaller ones. No matter large or small in size, the camera placements are in essence the same: four cameras on the outer and bottom part of the track, two or four cameras opposing each other at the left and right and five to seven cameras in the inner track of the field. Take camera 1 in all of the sketch maps as an example, it is placed in a high place shooting the overview of the football track. Camera 2 is set alongside camera 1, taking mid-shots and close shots. In our case, the camera arrangement is no exception. The way the crew placed their camera followed the standard of the industry, thus, it exhibits little originality in the location of cameras.

Besides the placement of cameras, the industry also set strict limitations on how and when to shoot what kind of material. When streaming sports events, cameramen individually control one camera at a fixed spot. The scene the cameramen is expected to show at a given time, the range expected to exhibit etc. are fixed and standardized. For example, illustrated in the book *Standard Guide*²², when a football player is dribbling the ball past his opponents, the cameraman should follow the player, showing a rather full view of all the players. The camera should never be randomly oriented to any irrelevant scenes, such as the bill board for advertisement or a piece of the track. When a player scores, the camera should immediately point at the audience to capture the expression from both side to create tension and drama. These guidelines provide enough instructions on the work of a cameraman, which greatly reduce the likelihood of the photographer making personalized choices. Therefore, it almost impossible for cameramen to exhibit originality through his choice of scenes.

ii. *Director's selection and arrangement of the scenes are standardized.*

In the production of a football match live broadcast, there are six kinds of directors, namely, general director, assistant director, venue director, subtitle director, slow motion director and switch director. Venue directors serve the general director in case of an emergency. Subtitle director add pre-game, live-game and after-game subtitles to the scenes. Slow motion director adds slow motion scenes in specific scenarios to help

²¹ Yang Bin and Ren Jinzhou, 'Illustrations from Standard guide for the production of television public signals in sports events'

²² Yang Bin and Ren Jinzhou, 'Illustrations from Standard guide for the production of television public signals in sports events'

the audience better appreciate the game. Switch director combines the signals from cameramen, subtitle director and slow-motion director into a single comprehensive signal under general director's command. These four types of directors' responsibilities are very objective, which are to follow the standard industry practices and add necessary elements to the program. They are like machines on an assembly line, doing complicated but uncreative jobs. For the general director and the assistant director, they are the commander in chief. Their main responsibility is to select and arrange scenes, coordinate with other crews. Their jobs are most likely to demonstrate originality.

However, even if they have leeway over the scenes they choose, it is extremely restricted. Any choice of scenes the director made must comply with the real-time situation and serve the audience's expectation. For audience who has on a rather good understanding of rules and processes of the game, he can reasonably expect what is to show at a given stage. Even if the lineups, clashes and results of disparate matches are unique from each other, the way sports events advance and are captured rarely fall out of a reasonable person's expectations. For instance, at the beginning of the game, it is expected to show an overall perspective of the football field, with players warming up, entering the field. At the end of the game, it is common practice to attach comments from the commentator and interviews of the players. The directors have to choose scenes that best reveal the progresses and clashes of the game. This means that the general director and the assistant director are restricted in their choices of selection arrangement of scenes. They are also bound by the philosophical principles of production: impartiality and equality, sports and emotions. This means that it's not allowed to be impartial towards or against one team over the other, allocating unfair amounts of exposure time.

Moreover, in a football match program, the scenes that have the most potential to exhibit a high level of originality are slow motion replays of a player's movement and contrasting depictions of the audience. In the *Standard guide*, it documented in detail when and how to insert a slow-motion replay or contrasts of scenes of the audience from what camera. In the book, it reads "highlight moment such as the scoring of a free kick, a red yellow card given for a flagrant foul should be replayed with a slow-motion shot. And it should be accompanied by the contrasts of scenes of the audience. Free kick shall use the footage of camera 2, following of the player passing the ball shall use the footage of camera 3, penalty kick shall use that of camera 4, foul play shall use camera 8 etc."²³ It proved that even the most potential scenes of the broadcast fall into the range of standard practice. Given the elaborate technical specifications, if several independent specialized crews were asked to live stream the football game disputed at the same time, the works they produce won't be that different. Therefore, it is highly unlikely that high level of originality is exhibited through the directors' selection and arrangement of scenes.

iii. Highlight collection does not increase the originality of the program as a whole

Programs of football always contain a few minutes of highlights. Nonetheless, it does not change the fact that the program as a whole lacks the originality for "cinematographic works".

²³ Yang Bin and Ren Jinzhou, 'Illustrations from Standard Guide for the Production of Television Public Signals in Sports Events', p46

In most cases, before the airing of highlights, the director is given sufficient time to select and assemble highlight scenes from the through game, which gives him enough room to make individualized choices. However, highlights often take up only a few minutes' length of time. When deciding whether a work is "cinematographic works and works created by a process analogous to cinematography", the originality of the work as a whole needs to be considered. As discussed in elaborate detail above, given the technical specifications, originality regarding the cameramen's choices and the directors' selections is not enough. Even if the court takes the compilation of highlights into consideration, it still would not render the show as meeting the required standard of originality. As the program is not expressed ideas within in the fields of literature, art, science and technology, not produced in a process analogous to cinematography, and does not show enough originality, it is not "cinematographic works".

B. The program is “video recordings”.

As elaborately reasoned above, the program is not “cinematographic works”. Stipulated in Article 5(3) of *Copyright Regulations*²⁴, "video recordings" are fixations of a connected series of related images or pictures, other than cinematographic works. The program fits the definition and should therefore be recognized as such.

Courts held in concurrence in the following cases: *CCTV International Network Co., Ltd. v. 21CN Co., Ltd (2010)*²⁵, *CCTV v. BaoFeng TV Co. (2015)*²⁶ and *CCTV v. Beijing TV Fan Network Technology Co., Ltd. v. CCTV (2014)*²⁷ that the live broadcasts of sports programs do not constitute “cinematographic works” because of their lack of originality and constituted “video recordings”.²⁸²⁹ It is well supported that the court to follow these precedents regarding our case.

II. THE PETITIONER DID NOT INFRINGE COPYRIGHT, EVEN IF PROGRAM IS “WORK”

A. The Petitioner did not violate the Respondent’s right of broadcasting.

‘The right of broadcasting is the right to publicly broadcast or disseminate works by wireless means, to disseminate broadcast works to the public by wired dissemination or rebroadcast, and to disseminate broadcast works to the public by audio amplifier or other similar instruments for transmission of signs, sounds or images’. The right of broadcasting is normally invoked to protect non-cyber rebroadcasts such as one TV station picking up the program signal of another TV station. It does not cover conducts on the internet.³⁰ Therefore, the Respondent does not have the right to prohibit Petitioner from rebroadcasting the program.

²⁴ *Regulation for the Implementation of the Copyright Law of the People's Republic of China* (2013), Art. (3)

²⁵ *CCTV International Network Co., Ltd. v. 21CN Co., Ltd.*, Guangdong Guangzhou Intermediate Court (2010)

²⁶ *CCTV International Network Co., Ltd. v. Beijing Baofeng Technology Co., Ltd.*, Beijing Shijingshan District Court (2015)

²⁷ *Beijing TV fan Network Technology Co., Ltd. v. CCTV International Network Co., Ltd.*, Beijing First Intermediate Court (2014)

²⁸ Liu Chuntian, ‘*Intellectual Property Case Study*’

²⁹ Cui Guobin, ‘*Copyright Law, Cases and Materials*’

³⁰ Yuan Bo, ‘*The Legal Relation and Rights Protection of Sports Games Live Programs*’

B. The Petitioner did not violate the Respondent's right of information network dissemination.

Originated from *WCT*³¹ and *WPPT*³², which are development and enhancement of the *Berne Convention*³³ and *Rome Convention*³⁴, the right of information network dissemination describes the right to make content available on the internet whenever a user wants to gain access.³⁵³⁶ As defined equally clear in the *Copyright Law*³⁷, 'the right of information network dissemination is the right to provide the public with works to make the public able to respectively obtain the works at the individually selected time and place'. It emphasized on interactivity, which means that works must be stored online and made available for users to access any given time³⁸³⁹. As a fundamental principle of interpreting law in judicial practices, literal explanation comes undoubtedly first.⁴⁰ Only when the definition in the law is ambiguous in words, can judges resort to expanding explanation.⁴¹ Therefore, expanding explanation should not be applied in this case and the 'interactivity' feature of the right of information network dissemination is required by law.

Live broadcasting does share interactivity as a feature. Live broadcasted programs are shown as event happens in reality, after which, no longer accessible.⁴²⁴³⁴⁴ In *CCTV v. CUTV*⁴⁵, the court acknowledged this difference and held that live broadcasting is not an infringement of the right of information network dissemination. Therefore, the Petitioner's conduct should not be deemed as violation of right of information network dissemination.

C. The Respondent does not have claim to author's rights.

Even if the conduct of live broadcasting infringes right of broadcasting or right of information network dissemination, the Respondent is not the rightful subject of this lawsuit, for it is not the copyright owner.

(a) The Respondent is not the lawful copyright owner of the program.

Given that the logo of C TV was marked on the program,⁴⁶ and there is no evidence proving otherwise, the lawful owner of copyright of the programs is C TV.

³¹ *WIPO Copyright Treaty*(1996)

³² *WIPO Performances and Phonograms Treaty*(1996), Art. 10, 14.

³³ *Berne Convention for the Protection of Literary and Artistic Works* (1886)

³⁴ *Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations* (1964)

³⁵ WIPO, 'Guide to the Berne Convention for the Protection of Literary and Artistic Works'

³⁶ WIPO, 'Basic Proposal for the Substantive Provisions of the Treaty on Certain Questions Concerning the Protection of Literary and Artistic Works to Be Considered by the Diplomatic Conference'

³⁷ *Copyright Law of the People's Republic of China* (2010), Art. 10 (12).

³⁸ Wang Qian, 'The Study On the Copyright Protection of Sports Events Programs'

³⁹ *CHC Home Cinema of State Administration of Radio, Film and Television Program Production Center with Satellite Channels V. Shanghai Interactive Television Co. Ltd.*, Beijing Haidian District Court (2010).

⁴⁰ Sun Guangning, 'On Hierarchy Problems of Legal Methods'

⁴¹ Chen Jinzhao, 'Literal interpretation: the Legal Method is the Superior Choice'

⁴² Yue Lihao, 'Legal Nature of Non-Interactive Information Network Dissemination'

⁴³ Li Ruiqin, 'The Practical Dilemma of the Application of Information Network Dissemination Right System and Its Perfect Construction'

⁴⁴ Wang Qian, 'On the Proper Application of "the Right of Information Network Communication"'

⁴⁵ *CCTV International Network Co., Ltd. v. China United Television Co., Ltd.*, Guangdong Shenzhen Futian District Court (2015)

⁴⁶ Moot problem, p.5 para.11

Article 11 of the *Copyright Law* reads, ‘Except otherwise provided in this Law, the copyright in a work shall belong to its author. Without the contrary proof, the legal entity whose name is affixed to a work is the author of the work.’ Also, in Article 7 of *Interpretation of the Supreme People's Court Concerning the Application of Laws in the Trial of Civil Disputes over Copyright*⁴⁷, it stipulates that ‘The legal persons which appear on a work or production as authors shall be deemed as the holder of copyright or copyright-related rights and interests unless there are evidences that prove the opposite.’ The articles instructed that the burden of proof is on the Respondent to prove to the court that he is the rightful copyright owner of the program. Therefore, unless the Respondent shows evidence that C TV is not the owner of copyright, the Respondent does not have any claim to program.

(b) Sports events organizers do not have copyrights of programs without contracts.

Sports events are not the lawful object of the *Copyright Law*, only the programs are.⁴⁸ Rights to the organization of sports events are not equivalent to that of sports events program. In *China Sports Media Co., Ltd. v. Tudou Co., Ltd.*⁴⁹, the court reaffirmed that rights entitled by the sports events organizers such as FIFA and CFA are house rights⁵⁰, which is the exclusive use right based either on contractual agreements between the organizer and owner of the stadium or on the right of property of the stadium⁵¹. The rights are to prevent others from entering into venues without permission, not that to copyright of programs of the game. Even if the charters of both CFA and FIFA claim that they are the lawful owner of copyright to the game, it does legally establish they are. Because organization charters do not create absolute rights⁵². Author’s right and neighboring rights are typical absolute rights, whose obligors are not limited to a specific number of people.⁵³ The basis of copyrights must be established by law. In our case, the Respondent claimed to have obtained authorization from CFA through a chain of organization charters.⁵⁴ However, as C TV is the rightful copyright owner of the program and it did not enter into any agreement with neither FIFA, CFA nor S Company⁵⁵, whatever rights owned by the football game organizers are not copyrights to the football program. In other words, rights to sports events are not in any way related to copyrights of sports programs absent of a contract. Therefore, Respondent was never authorized by the copyright owner and the Respondent is not entitled to copyright of the program.

⁴⁷ *Interpretation of the Supreme People's Court Concerning the Application of Laws in the Trial of Civil Disputes over Copyright* (2002), Art. 7

⁴⁸ Wang Ziqiang, ‘*Research on Copyrights Protection of Sports Events Program*’

⁴⁹ *China Sports Media Co., Ltd. v. Shanghai Tudou Cultural Transmission Co., Ltd.*, Shanghai First Intermediate Court (2013)

⁵⁰ Asser International Sports Law Centre, ‘*Study on Sports Organizer’s Rights in the European Union*. p. 25, para. 1. 2. 1

⁵¹ *See Opinion of Advocate General Jääskinen delivered on 12 December 2012 in Cases C-201/11 P, C-204/11 P and C-205/11 P UEFA, FIFA v. European Commission*, 18 July 2013, 33–45

⁵² Ma Junju, Yu Yanman, ‘*Civil Law*’

⁵³ Wang Qian, ‘*The Study on the Copyright Protection of Sports Events Programs*’

⁵⁴ Moot problem, p.1-3 para.1-4

⁵⁵ Moot problem, p.3 para.7

III. THE PETITIONER DID NOT INFRINGE NEIGHBORING RIGHTS.

As noted above, the program at issue is “video recordings”, which is object of neighboring rights. However, live broadcasting is not regulated in the *Copyright Law* as an infringement upon neighboring rights, neither information right of network dissemination nor right of broadcasting.⁵⁶

A. The Respondent does not have right to prohibit Petitioner from dissemination through network.

The range of protection of neighboring rights is no more than that of copyrights.⁵⁷ Same as discussed above, the right of information network dissemination emphasizes on interactivity, allowing users to access the material at any time they please, which is not a feature of live broadcasting. Therefore, the Petitioner’s conduct should not be deemed as an infringement on the right of information network dissemination.

B. The Respondent does not have the right to prohibit Petitioner from rebroadcasting.

Article 45 of the *Copyright Law*⁵⁸ reads: Radio station and television station has the right to prohibit others from rebroadcasting the radio or television programs which it has broadcasted. However, the Respondent is not the lawful subject of the right of rebroadcasting and the right of rebroadcasting does not extend into network dissemination.

- (a) The Respondent is not the lawful subject to prohibit others from rebroadcasting.

Stated in Article 45 of the *Copyright Law*, the lawful subjects of right of broadcasting are clearly limited to radio station and television station.⁵⁹ In *CCTV International Network Co., Ltd. v. 21CN Co., Ltd.*⁶⁰, Guangzhou Intermediate Court affirmed that legal entities such as companies should not be regarded as TV or radio stations and are not entitled to the right to prevent others from rebroadcasting. In our case, the Respondent is neither a TV station nor a radio station. It does not enjoy rights to prohibit others from rebroadcasting programs. Therefore, the Respondent does not have the right to prohibit Petitioner from rebroadcasting.

- (b) The right of rebroadcasting does not include live broadcasting online.

There is no clear definition of right of rebroadcasting under the *Copyright Law*⁶¹. The definition traces back to *Rome Convention*⁶². In *Rome Convention*, rebroadcasting was defined as the simultaneous broadcasting by another broadcasting organization from the original broadcasting organization. The definition was later followed by *TRIPS Agreement*.⁶³ As mentioned above, copyright and neighboring rights are both typical

⁵⁶ Liu Yinliang, ‘Limits to Information network dissemination Right and Broadcasting Rights’

⁵⁷ He huaiwen, ‘The Chinese Copyright Law: Case Studies and Normative Analysis’, p490

⁵⁸ *Copyright Law of the People’s Republic of China* (2010), Art. 45.

⁵⁹ Wang Qian, ‘The Study On the Copyright Protection of Sports Events Programs’

⁶⁰ *CCTV International Network Co., Ltd. v. 21CN Co., Ltd.*, Guangdong Guangzhou Intermediate Court (2010)

⁶¹ *Berne Convention for the Protection of Literary and Artistic Works* (1971)

⁶² *Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations* (1961), Art. 3 (6) (7).

⁶³ *Beijing TV Fan Network Technology Co., Ltd. v. CCTV International Network Co., Ltd.*, Beijing First Intermediate Court (2014)

absolute rights and expanding interpretation shall not be exerted when the definition is explicit.⁶⁴ Due to the clarity of the definition of rebroadcasting, disseminating programs through internet is not prohibited.

It is not a lack of prospect of the legislation to not include disseminating through internet into the right of rebroadcasting. On the contrary, it is a balance of interest. It is the tradeoff of conflict between the legal protections of the disseminators' investment and the people's right to obtain information. The court should not abuse the power of interpretation before the legislator shows determination of protection. Moreover, expanding the scope of right of rebroadcasting would inevitably snatch the author's copyright.⁶⁵ Therefore, Petitioner's conduct should not be deemed as an infringement on right of rebroadcasting.

C. The Respondent does not have claim to neighboring rights.

As discussed above, neighboring right is also absolute right, which means it can only be established by law, instead of charters of civil organizations. The *Copyright Law* and *Copyright Regulations* specifically stipulates that it is the producer of sound recordings who enjoys the right of information network dissemination⁶⁶, and the radio or television station enjoys the right of rebroadcasting⁶⁷. However, CFA, from whom the Respondent obtained authorization, is neither a producer who recorded the program, nor a television station who broadcasted the program. The Respondent is not a lawful subject to be entitled to the right of information network dissemination or the right of broadcasting. Even if the right of information network dissemination and right of broadcasting of the live program are protected under the Copyright Law, the Respondent is not a lawful neighboring right owner of the live program. Therefore, the conduct of live broadcasting of the Petitioner should not be deemed as an infringement.

IV. PETITIONER IS NOT THE RIGHTFUL SUBJECT OF ANTI-UNFAIR COMPETITION SUIT.

A. The petitioner's conduct did not constitute act of unfair competition

Business opportunity is not in itself an established legal right. In order to obtain the civil remedy from competition, the injured party must prove that the competitor's behavior is unjustified. Only when competitors are competing for the business opportunities in a way that violates the principle of fairness principle, good faith principles and accepted business ethics, can the competing activities be regulated by *Anti-Unfair Competition Law*.⁶⁸ The supreme people's court has released a prerequisite for the invocation of *Anti-Unfair Competition Law*.⁶⁹ It states that 3

⁶⁴ Wang Qian, 'On "Retransmission" in China Copyright Law: A Commentary on Recent Cases and the Draft Amendment of China Copyright Law'

⁶⁵ *Jiaxing Wasu TV and Communication Co., Ltd. v. China Telecom Co.*, Zhejiang Jiaxing Intermediate Court (2012)

⁶⁶ *Regulation for the Implementation of the Copyright Law of the People's Republic of China* (2013), Art. 5(5).

⁶⁷ *Copyright Law of the People's Republic of China* (2010), Art. 45.

⁶⁸ *Shandong Foodstuffs Import and Export Corporation, Shandong Sanfod Group Co., Ltd. and Shandong Sanfod Nissui Co. Ltd. v. Ma Daqing and Qingdao SKD Credit Trading Co., Ltd.* (2009)

⁶⁹ *The Supreme People's Court's Annual Report on Intellectual Property Cases* (2010)

elements must be met at the same time to apply article 1 and 2 of the *Anti-unfair Competition Law*:

- 1) Laws of other areas do not provide special provisions regulating activities
- 2) Legitimate rights and interests of managers are causally damaged by the activities
- 3) The activities are done maliciously and are attributable to the conductor
 - (a) Petitioner bears no malice.

Petitioner's conduct is merely a business collaboration with L company. Petitioner did not provide content on its own website. What it did was gathering information for users and placing a jump-link to help its business partner with the program's promotion. Petitioner was not aware that L Company was not allowed to enter into collaboration with other company and did not have legal obligation to be. P Company's conduct was in good will and the unfair competition activities were not attributable to Petitioner. Petitioner is not the rightful subject of anti-unfair competition lawsuit. Thus, it did not constitute infringement.

CONCLUSION

For the foregoing reasons, the judgment of the trial of the first instance should be reversed and the Petitioner's claims should be upheld.

Respectfully Submitted,
Attorney for the Appellant