

Copyright Protection for a Bullfight

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The judgment of the Supreme Court of Spain (hereinafter SC) of 16 February 2021 –82/2021 (1st Chamber, Civil Law)¹ provides that bullfighting (*faena*) cannot be considered a work according to Art. 10 of the Spanish Intellectual Property Law (IPL). It therefore cannot be protected under copyright. Following the doctrine of the European Court of Justice (ECJ) in the Case C-310/17 *Levola Hengelo*, ‘to be a work as referred to in Directive 2001/29, the subject matter protected by copyright must be expressed in a manner which makes it identifiable with sufficient precision and objectivity, even though that expression is not necessarily in permanent form’,² which it is not possible for a specific bullfight. Nor did the SC accept an attempt to make an analogy between *faenas* and choreographic works, which can be pinned down with precision by the use of notation, making it possible to objectively identify the work.

The case opened with the decision of the Territorial Registrar of Intellectual Property of Extremadura to refuse registration, presented by the bullfighter of a work entitled ‘Faena with two ears and a request for the tail of the bull ‘Curioso’ n° 94, weighting 539 kgs, born on February 2010, bull-breeding farm Garcigrande Feria de San Juan of Badajoz, day 22 June 2014’. The *faena* was described as consisting of ‘natural left hand pass changing hands on the back and gives a pass on the right. The bull comes out loose and the bullfighter goes towards him giving a pass over the top with his right hand’. An audiovisual recording and descriptive book of the *faena* accompanied the application. The Commercial Court No. 1 of Badajoz³ dismissed the bullfighter’s claim against the Registrar’s decision, confirming it. The 2nd Section of the Provincial Court of Badajoz⁴ did the same with the appeal lodged by the bullfighter. Against this last judgment an extraordinary appeal for procedural infringement and an appeal in cassation were lodged.

The judgment at first instance applied the doctrine contained in the judgment of the CJEU of 4 October 2011, Case C-403/08 and C-429/08 *Football Association Premier League*, considering that in a bullfight, as in a football match, the rules of the game leave no room for creative freedom as Copyright requires.⁶ The Court held that in the *faena* concerned there is nothing more than technique – it merely consists of a series of predetermined ‘passes’ which are regulated by the rules of bullfighting. Even when they are performed by the torero with his own particular touch, this does not reach enough singularity for copyright protection. The regulation of bullfighting (time, clothing, form, phases, positioning of the performers, chronological order, etc.)⁷ does not leave room for creative choices. This argument was confirmed by the Court of

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¹ ECLI: ES:TS:2021:497.

² Case C-310/17 *Levola Hengelo* ECLI:EU:C:2018:899, para 40.

³ Judgment of 10 April 2017 <https://www.todanelo.com/sites/default/files/common/170419_pi_-_sentencia_toreo.pdf> accessed 1 June 2021.

⁴ Judgment of 22 January 2018 (ECLI:SP:APBA:2018:50).

⁶ Case C-403/08 and C-429/08 *Football Association Premier League* ECLI:EU:C:2011:631, para 98.

⁷ Bullfighting is perfectly regulated in the National Bullfighting Regulation 145/96, of 2 February, (<<https://www.boe.es/buscar/pdf/1996/BOE-A-1996-4945-consolidado.pdf>> accessed 1 June 2021) which contains rules, including the characteristics of the bull, its breed, weight, horns, etc. Also, about the dimensions of the arena, instruments and tools, phases, duration, people involved in each one of them, etc.

Appeal which also said the consequences of the *ius prohibendi* of copyright on a *faena* would prevent any other torero, ‘at such a dramatic moment as a bullfighting event’, from carrying out a *faena* such as the one indicated without committing an infringement of the registered right. And, finally, ‘it is not possible for each and every bullfighter to register as many *faenas* as they see fit, because that would be to put an end to bullfighting’.⁹

Reacting to the ruling of the Court of Appeal the bullfighter asked the Supreme Court in cassation to establish a doctrine in relation to the interpretation of the requirement of originality with regard to the bullfighters’ work (fixed on an audiovisual medium), given the contradictory jurisprudence of the provincial courts. In this regard, it should be noted that the doctrine of the Spanish courts is very disparate. Despite the fact that the CJEU understands the concept of work as an autonomous concept of EU Law and its interpretation of originality leans decidedly towards subjective originality,¹⁰ the current trend in Spanish case law is to interpret originality in an objective sense, identifying it with novelty.¹¹ In other words, whether or not a work is protected depends on whether it is outwardly different from those already known within its genre. Some well-known Spanish authors also defend the concept of objective originality.¹²

The SC analyses what exactly the protection is sought for, what the intellectual creation would be about, and what the consequent moral and economic rights would be attributed to the author. It remembers that the appellant is not requesting protection ‘for the passes, moves or means to dominate the bull, be they those already known or other new ones that could be ‘invented’, but for the *faena* as a whole (from the moment the bull comes out into the ring until it ends with its death), with the cape (*capote*), the red cape (*muleta*), and the final blow (*estocada*). With the singularity, mentioned above, that each bullfight is unrepeatable, necessarily different from previous bullfights that the bullfighter might have done and those that they might do in the future’.

The Court states that the intellectual creation attributable to the bullfighter’s personal creative talent would take the form of the interpretation of the bull that has been randomly assigned to him in the bullfight. The bullfighter's state of mind and level of inspiration would also have a great influence.

The SC confirms that the fact that bullfighting is not mentioned in Art. 10 IPL does not prevent its possible protection by Copyright. After the mentioned statement, the Court clarifies that the

⁹ Judgment of the Badajoz Court of Appeal of 22 January 2021, Case 82/2018, ECLI:ES:APBA:2018:50 <<https://www.poderjudicial.es/search/AN/openDocument/22d97b731a02b6ed/20180313>> accessed 1 June 2021.

¹⁰ What means to apply the standard of ‘the author’s own intellectual creation’; Case C-5/ ECLI:EU:C:2009:465; Case C-145/10 *Painer* ECLI:EU:C:2011:798; Case C-683/2009 *Infopaq International /17 Cofemel* ECLI:EU:C:219:721; Case C-161/17 *Renckhoff* ECLI:EU:C:2018:634.

¹¹ Since Judgment (1st Chamber) of 24 June 2004 (ECLI:ES:TS:2004:443) there have been further rulings in this direction, ie Judgments of 26 April 2017 (ECLI:ES:TS:2017:1644); of 16 January 2020 (ECLI:ES:TS:2020:55); Provincial Court of Toledo of 5 April 2017 (ECLI:ES:APTO:2017:374); Provincial Court of Castellón of 5 July 2012 (ECLI:ES:APCS:2012:900); Provincial Court of Barcelona of 1 December 2016 (ECLI:ES:APB:2016:9287), 26 April 2019 (ECLI:ELI:APB:2019:4105); these last judgments expressly mention the current trend towards objective originality as a criterion for protection. Alongside this tendency, we find other judgments in which the subjective criterion is applied: Judgment of the Provincial Court of Madrid of 15 September 2017 (ECLI:ES:APM:2017:1404).

¹² Expressly mentioned in the judgment of the Court of first instance, Rodrigo Bercovitz Rodríguez-Cano (ed), *Comentarios a la Ley de Propiedad Intelectual* (4th edn, Tecnos 2017) 162 ff.

doctrine of the CJEU in the *Football Association Premier League* case¹³ cannot be directly applied to this case. This is because bullfighting is – according to Law 18/2013, of 12 December, for the regulation of bullfighting – an artistic manifestation. However, while acknowledging that art is closely related to copyright, there is certainly no equivalence between the two terms. The notion of “work” is a legal concept, independent of aesthetic or subjective factors. It requires the observance of certain requirements, the interpretation of which is ultimately left to the courts. Therefore, the fact that bullfighting is considered art does not exempt it from complying with these general requirements of protection under Copyright Law, which the SC links specifically to the CJEU in the *Cofemel* case,¹⁴ (namely originality and the existence of a subject matter identifiable with sufficient precision and objectivity).

In relation to the first point, for a work to be original it is sufficient that it constitutes an intellectual creation of its author¹⁵ and so reflects his or her personality and expresses his or her free and creative choices.¹⁶ This is not possible when what is expressed is conditioned by technical considerations (*Brompton* case), rules (*Football Association Premier League* case) or other requirements.¹⁷ The SC seems to place bullfighting among those kinds of expressions in which there is no room for creativity, since it ‘shares a common argument: the bullfighter is confronted with a fierce bull, which they try to dominate and finally kill, albeit with the intention of doing so in an artistic manner. This *faena* is carried out in a sequence of acts that is to a certain extent regulated, in that it takes place in three stages (*varas*, *banderillas* and *muleta*), in addition to the death of the bull, and the content of each one of them, the place where it is to take place and the function to be performed, is predetermined’. To this, the Court adds the important weight of the bullfighter’s technique and skill, aspects which form part of the common heritage and, therefore, mere ‘skills’ which are not susceptible to this specific protection. This notwithstanding, it seems the SC does not categorically exclude a bullfighting performance from being original, and considers that the personal character would be placed in the interpretation of the bull that has been randomly assigned to the *torero* in the bullfight, in which his own interpretation and mood would have a great influence, in addition to the singularity of the bull.

However, the main problem is that this creation would have to be expressed in an original formal expression, which in this case could be the sequence of movements of the passes made by the bullfighter. In order to be original these should respond to free and creative choices, or to a combination of choices with an aesthetic expression that projects their personality. And, in any case, ‘this original formal expression should be identifiable with precision and objectivity’.

So, it is the second requirement for protection of an artistic result as a work under Copyright Law – namely its precise and objective identification, even if this expression is not permanent – which fails in a bullfight performance. The aim is for anyone to be able to know exactly what the protected object is. In this regard, the CJEU has already pointed out that this is not the case when what is to be protected is the taste (a subjective perception) of a foodstuff, at least not yet

¹³ *Football Association Premier League* (n 6).

¹⁴ Case C-683/17 *Cofemel* ECLI:EU:C:2019:721. The SC also mentioned other CJEU judgments, but *Cofemel* case was the most recent at the time and its para 29 referred to *Infopaq International* (n 10) and to *Levola Hengelo* (n 2).

¹⁵ *Cofemel* (n 14) para 29.

¹⁶ *ibid* para 30, quoting also *Painer* (n 10) paras 88, 89 and 94, and *Renckhoff* (n 10) para 14.

¹⁷ *Cofemel* (n 14) para 31.

by means of the technical resources available at the current stage of scientific development.¹⁸ In the opinion of the SC, this does not happen in a bullfight ‘as it is not possible to express in an objective way what the artistic creation of the bullfighter would consist of when they perform a specific bullfight, beyond the feeling that it transmits to those who witness it, due to the beauty of the forms generated in this dramatic context’.

The Court notes that it has considered the possibility of protection as a work of choreography (a creative genre that does find mention in the list of Art. 10.1 TRLPI, specifically in letter c). Choreographic works consist of a composition of movements for stage or any other patterned succession of gestures mostly created to accompany music.¹⁹ The Court does not rule out the possibility of equating choreography and bullfighting, but in our opinion the argument used to support such a decision does not seem very convincing. The SC refers to the fact that the precise and objective identification of a choreography is possible thanks to the notation that, in the end, allows it to be reproduced.²⁰ It should not be overlooked that the choreographic work is protected *solely* as a sequence of movements without the need to be accompanied by music. If accompanied by music, it would be a composite work (Art. 9 IPL),²¹ the authorship of which will usually be different. Furthermore, the Spanish Intellectual Property Registry requires choreographic works to be registered as a written description of the stage movement on paper and a recording of the same on a medium whose content can be examined by the Registry.²² All this leads to a conclusion affirming that the written description of all these stage elements is the relevant element to identify a choreographic work, whether or not they are accompanied by music notation.

Going a step further, the original choreographic work also allows for improvisation, being able in that case to determine the authorship of those performers who incorporate sufficiently original elements. It is precisely here where the great difference between an improvised choreographic work and a bullfighting performance lies. In the latter, the bullfighter's narrow capacity for reaction while fighting prevents the choice of the sequence of his movements from being formally free, **with** strength, bravery and skill – all of which are elements that form part of the public domain – predominating.

¹⁸ *Levola-Hengelo* (n 2) para 43.

¹⁹ WIPO, ‘Glossary of terms of the Law of Copyright and neighboring rights’ <https://www.wipo.int/edocs/pubdocs/es/wipo_pub_816.pdf> accessed 1 June 2021.

²⁰ This reasoning remembers to the opinion of Advocated General Wathelet who held, regarding the identification of a taste by the court or a court-appointed expert, ‘it would remain, by its very nature, being a subjective exercise’. He also remarks the main aim of identifying a work with sufficient precision and objectivity, which is delimiting the scope of its copyright protection, and therefore, ‘complying with the principle of legal certainty in the interests of the copyright holder and, more specifically, third parties who may face legal proceedings, *inter alia* criminal or infringement proceedings for infringement of copyright’; Case C-310/17 *Levola Hengelo* ECLI:EU:C:2018:618, Opinion of AG Wathelet, para 58.

²¹ Collection compiled from preexisting Works, without the personal participation of the authors of the works selected. Only the person who has made a composite work may qualified as its author, without prejudice, however, to the copyright in each contribution; see WIPO (n 19).

²² art 14 c) of Royal Decree 281/2003 of 7 March 2003, approving the Regulations of the General Intellectual Property Registry.