

[ES] A bullfighter's performance is not copyrightable

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The world of bullfighting in Spain has been subject to controversy again. This time, not due to the opposition of animal's defense groups, but due to the Supreme Court's ruling No. 497/2021 of 16 February 2021, which denies a bullfighter's performance in a bullfight being considered as an original work and artistic creation.

Spain is one of the 8 countries in which bullfighting is still protected under its Cultural Heritage Act 18/2013 of 12 November 2013 which, in its preamble, observes the artistic component of bullfighting, which is "an artistic manifestation in itself, decoupled from ideologies and in which profoundly human values are highlighted (...)".

Facts referred to in the Supreme Court's ruling consisted in that, after the performance of a famous bullfighter in Spain, the said bullfighter sent a request to the Extremadura Intellectual Property Registry for the registration of a work titled "Faena de dos orejas con petición de rabo al toro "Curioso" nº 94, de peso 539 kgs, nacido en febrero de 2010 ganadería Garcigrande Feria de San Juan de Badajoz, día 22 de junio de 2014" ("The two-eared performance with request for the tail of the bull named "Curioso" number 94, weighing 539 kilograms, born on February 2010 on the Garcigrande Ranch, at the San Juan de Badajoz Festival on 22 June 2014"), providing audiovisual materials and a dossier for registration. Once the Intellectual Property Registry analyzed the provided documentation, the said Registry denied the registration of the work. The bullfighter challenged this decision, arguing that the bullfighter's performance is an artistic manifestation and a piece of art, which should be subject to intellectual property protection. Said claim was dismissed by the Commercial Court number 1 of Badajoz and by the Extremadura Provincial Court, since they both considered that the bullfighter's performance lacked the condition of artistic creation and therefore is not susceptible of protection as an intellectual property work; The Supreme Court subsequently reconfirmed both dismissals.

The Supreme Court reminds in its ruling the concept of "Work" and expressly cites the judgment of the Court of Justice of the EU (CJEU) of 12 September 2019 in the *Cofemel* case (C-683/17). "Work" constitutes an autonomous concept of EU law which must be interpreted and applied uniformly, requiring two cumulative conditions to be satisfied: (i) there exists original subject matter, in the sense of

being the author's own intellectual creation; (ii) classification as a "Work" is reserved to the elements that are the expression of such creation.

The Supreme Court, on the basis of the second of these elements for the definition of "Work", considers the following:

(i) The original formal expression of the bullfighter should "objectively and precisely" identify the bullfighter's original artistic creation in order it to be considered as a "Work";

(ii) This notwithstanding, the bullfighter's performance in the arena, only causes subjective feelings and sensations to the public, due to the beauty of the forms generated in said dramatic context.

The Supreme Court, under this consideration and following various CJEU's rulings such as the ruling of 13 November 2018 regarding the *Levola Hengelo* case (C-310/17), states that it is not possible to recognize the bullfighter's performance as a "Work" subject to protection and registration for intellectual property, since it is impossible to "objectively and precisely" identify what the artistic creation of the bullfighter actually consists of.

Likewise, the Supreme Court concludes that it is not feasible to equate a bullfight to a choreography, the latter being subject matter to protection by applicable legislation. In choreography it is possible, through dance notation, to identify the original creation of its author, since it is possible to "objectively and precisely" identify the movements and forms of the dance. This may not be replicated in a bullfighter's performance since, regardless of certain movements with the cape and certain challenges and stages of the bullfight (which may not be claimed to exclusively belong to a certain bullfighter since they are part of every bullfight), it is extremely difficult to objectively identify the bullfighter's original artistic creation in order to recognize exclusivity rights corresponding to an intellectual property work.

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