

Kluwer Copyright Blog

The football game as a copyright work (Part I)

Lionel Bently (University of Cambridge) · Tuesday, February 1st, 2022

This post is based on the chapter “The Football Game as a Copyright Work” in Natalie Helberger, Joost Poort, Martin Senftleben, Mireille van Eechoud, Stef van Gompel (eds.). Intellectual Property and Sports: Essays in Honour of P. Bernt Hugenholtz, Kluwer Law International, 2021. It derives from a paper given at the 25th Anniversary celebration of IViR on 4 July 2014 and at the University of Oxford IP Moot “converzazione” on 18 March 2016. The topic of the 2014 paper was provided by Bernt Hugenholtz.



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Speaking about developments in the jurisprudence of the Dutch courts on copyright, Bernt Hugenholtz expressed his fear that their reluctance to define and limit copyright’s domain to that of “literature, science and art,” instead “reducing the subject matter test to mere originality and personal stamp,” might lead to “infinite expansion of the concept of the work of authorship. Anything touched by human hand, including for instance sports performances, would be deemed a work.” Given these concerns, Hugenholtz would have been relieved, no doubt, when the CJEU apparently declared that “sporting events cannot be regarded as intellectual creations classifiable as works” within the meaning of Directive 2001/29 on Copyright in the Information Society. Football games, as such, would remain free from copyright. The CJEU had, apparently, come to the rescue. Three years after the CJEU gave its *FAPL* decision, Hugenholtz led an IViR study of the rights of sports organisers in the European Union which confirmed that no Member States treated sports events as copyright works.

A closer look, however, reveals that the purported exclusion of sports events, and

football in particular, from copyright is far from secure. Indeed, this essay argues that European Union copyright law has been developing down a path that implies that football games, or parts thereof, must be protected; and, like the Dutch courts before, the CJEU has excluded from copyright jurisprudence key mechanisms that might have justified the exclusion of football games from protection. The statement to the contrary made in *FAPL* seems to be a consequence of surprising levels of ignorance about the nature of football itself. Once the place of “creative choice” within football is understood, the conclusion that football games (or parts thereof) are protected becomes difficult to resist.

The purported exclusion of football from copyright: misunderstanding the rules

In Joined Cases C-403/08, *FAPL v QC Leisure* and Case C-429/08, *Karen Murphy v Media Protection Services Ltd.*, the Court held that football was not in fact protected by copyright because EU copyright law protected only subject matter which was “original in the sense that it is its author’s own intellectual creation.” Football matches could not be works because these “are subject to rules of the game, leaving no room for creative freedom for the purposes of copyright.”

What are ‘the rules of the game’ and is the Court correct that they exhaust the possibilities of action to such an extent that they preclude ‘creative choices’? The ‘rules of the game’, which are often said to derive historically from rules adopted by the English Football Association as long ago as 1863, have since 1886 been under the aegis of the International Football Association Board. The rules are structured around 17 ‘laws’. Some of the rules are constitutive; some regulatory (defining, for example, what happens if the rules are breached). Do these rules “leave no room for creative freedom for the purposes of copyright” as the Court states?

The strongest case that creativity is constrained by the rules of the game can probably be made in relation to the penalty kick, the rules for which are embodied in Law No 14, which operates largely as a regulatory rule to punish offences. The penalty kick was introduced in 1891, in response to the perceived unfairness of a number of goal-line handball incidents, and subsequently modified in 1902. Today there are six key features of the Law: the ball must be placed on the penalty spot (a spot 12 yards from the goal); the taker must be identified; the goalkeeper must be on the goal line between the goalposts facing the kicker until the ball has been kicked; all other players must be on the pitch but outside the penalty area and 10 yards from the penalty spot (an area demarcated since 1923 by the so-called ‘D’); the taker must play the ball forward; the taker must not touch the ball again unless another player has touched it.

As most readers know, in the vast majority of cases, the taker simply kicks the ball towards the goal, attempting to minimise the opportunities for the goalkeeper to stop the shot. In such situations, the taker faces an initial choice: whether to attempt to control the shot and determine its precise trajectory towards some part of the goal that the goalkeeper cannot reach (to 'place it'), or rather to sacrifice control for power and hit the ball so hard the goalkeeper will be unable to react in time and deflect the ball away from the goal (to 'blast it'). If the taker chooses to place the shot, they face at least five choices - whether to shoot to their left or their right, to the top or bottom corner, or instead to shoot in the centre (anticipating that the goalkeeper will have dived left or right). Similar choices face a player 'blasting' the ball, though precision may be less important. Whatever the basic choice, the kicker also faces further decisions as to run up and presentation, as the player may wish to disguise any visual cues that might otherwise assist the goalkeeper's decision as to whether, and if so, where to dive. None of these choices can be said to be dictated by the rules of the game, but neither could it be said that they are creative. That is not to say they are easy choices. As the Dutch footballing legend Johan Cruyff observed, "The thing is that a penalty seems to be very easy, which is why it's very difficult."

The execution of a penalty in this way undoubtedly involves skill (as well as composure), but skill is insufficient to give rise to copyright in the European Union. In *Football Dataco v Yahoo! UK*, in which the CJEU was asked whether football fixture lists are protected by copyright, it ruled that the fact that the production required "significant labour and skill of its author... cannot as such justify the protection of it by copyright ... if that labour and that skill do not express any originality."

That said, there may still be room for creative choices - and thus originality - even with penalties. Indeed, social media is replete with [collections](#) of 'unusual' penalty kicks. These collections typically include the audacious chip off the underside of the cross bar executed by French captain Zinedine Zidane in the World Cup Final in Berlin between *Italy v France* on 9 July 2006 (a final that France lost, and for which Zidane is usually remembered for being sent off); and the backheel by the 21-years old Emirati player Theyab Awana in a 6-2 victory for the UAE against Lebanon, 2011. They also usually include a penalty taken by Cruyff [internationally known as Johan Cruyff], who has been described as "perhaps the most original of all football's global superstars." When playing for Ajax against Eredivisie-newcomers, *Helmond Sport*, in 1982, Cruyff elected not to shoot directly at the goal at all. Instead, the Dutch maestro passed the ball to his left, where the ball was collected by his team-mate, Jesper Olsen. As the goalkeeper approached, Olsen returned the ball to Cruyff who, having stayed behind the ball and thus onside, scored into the undefended goal. The unexpected execution required an understanding of the breadth of what was possible within the rules of the game and its success depended both on the execution of basic skills and on the opponents being caught off-guard. However, it also comprised choices both by Cruyff and Olsen that can hardly be said to be anything other than "creative."

If it is right that even a penalty can be taken in a “creative” way, it seems clear that the Court of Justice was simply wrong to say the rules of the game leave no room for creative choice. As Gavin Kitching explains:

“Rules provide games with an objective to achieve (‘win by scoring more goals than the opposition’), but in regard to play their role is primarily negative. They say what cannot be done, what is foul or illegal, but they say nothing about what can be done, what constitutes good or effective play.”

The rules certainly leave room for a huge amount of variation and unpredictability; if it were otherwise, it would be difficult to comprehend how the sport had [3.5 billion fans](#) (more than any other) and revenue, in Europe alone, of [Euro 29 billion](#). If football is to be excluded from potentially falling within the subject of copyright, an explanation must be found elsewhere.

An alternative basis for excluding football from copyright’s domain: the problem of cheese

Perhaps the most obvious way to exclude football from copyright protection would be to hold that it falls outside the domain of copyright – football is not within what Article 2(1) of the Berne Convention refers to as “the literary, scientific and artistic domain.” This, I think, is Hugenholtz’s preferred solution. However, in *Levola Hengolo*, in response to a reference from the Court of Appeal Arnhem-Leeuwarden concerning the protectability of the taste of a spreadable cream cheese mixed with herbs (known in the Netherlands as ‘*Heksenkaas*’ or ‘*Heks’nkaas*’, meaning Witches’ cheese), the CJEU declined to rely on such reasoning to establish that such tastes were inappropriate subject matter. Instead, having referred to Article 2(1) of the Berne Convention, the CJEU identified only a single limiting criterion therein: that creations should be identifiable with clarity and precision. What the CJEU did not say, as it might easily have done, was that tastes were not within the literary, scientific and artistic domain. Had it done so, similar reasoning would have provided a mechanism by which to exclude sporting events from the field of copyright.

While the requirement of a ‘precise and objective form of expression’ was a sufficient basis for the conclusion that a taste is unprotected, it implies the opposite outcome with respect to football matches. Of course, the *aesthetic appreciation* of a football match, like that of taste or design, may vary from one person to another. However, in contrast with taste, the incidents that comprise such a match are capable of being understood with a high level of certainty. Football concerns connected movements of bodies and ball across physical space; these movements can be recorded and analysed as objective facts.

Part II of this post examines further arguments against copyright protection for football games and draws a conclusion on their protectability.

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