

Kluwer Copyright Blog

The football game as a copyright work (Part II)

Lionel Bently (University of Cambridge) · Wednesday, February 2nd, 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 “converzatione” on 18 March 2016. The topic of the 2014 paper was provided by Bernt Hugenholtz.



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Part I of this post considered whether the ‘rules of the game’ or the CJEU’s Levola Hengolo requirement of ‘precise and objective’ expression mean that football games are excluded from copyright. It found that these conditions do not mean that football cannot be protected. Part II now moves on to examine further arguments against copyright protection for football games and to draw a conclusion.

Ideas and expression in football: tricks, turns and strategies

Might football games instead be excluded from copyright as “ideas”? The CJEU has recently recognised that ideas are indeed unprotected by EU copyright. In case C-833/18, *Brompton Bicycle*, the Court noted that

... copyright protection does not extend to ideas. Protecting ideas by copyright would

amount to making it possible to monopolise ideas, to the detriment, in particular, of technical progress and industrial development.

The Court tells us categorically that copyright should not protect technical ideas, and offers some reasons why. But it has yet to explain how we identify when something is an idea, and when it is expression.

According to Bernt Hugenholtz, the idea/expression dichotomy does “not have intrinsic normative meaning” but is a “mere legal instrument [...] for the courts to distinguish between what should be protected and what not.” While that might suggest that a court that was reluctant to protect a football game could invoke the exclusion of ideas, that normative openness is probably not limitless. It would probably only exclude particular manoeuvres and styles of play.

The ordinary meaning of ‘idea’ would seem to exclude from protection a simple routine such as the Crujff-Olsen penalty : indeed Crujff himself described it as ‘an original idea’. However creative it was, it is still open to all other players to decide to pass the ball rather than shoot. The emphasis of the CJEU in *Brompton* on the significance of the exclusion of ideas from copyright for technical progress suggests that also implies that the exclusion of ideas would preclude copyright protection from inventions in technique such as the ‘Crujff turn.’ First brought to public attention in the Netherlands 0-0 draw with Sweden in the [1974 World Cup finals](#) in Germany, the Crujff turn has become a classic trick in which a player with the ball who is being pressed by a defender feigns to pass the ball and instead drags the ball in the opposite direction with the inside of the foot, the player then turning 180 degrees to continue with the ball. Crujff himself described the turn as “a physical response to a flash of the brain”, which might imply it was intuitive rather than creative. Whether it is creative or not, it would almost certainly be regarded as just “an idea.” It has been copied many times, and recognising any exclusivity in such a move would undoubtedly impede the “technical progress” of the game.

It seems, too, that a “style of play” would not be treated as subject matter of copyright. In his exploration of Dutch football, *Brilliant Orange: The Neurotic Genius of Dutch Football*, David Winner seeks to understand the rise of a particular style of play developed in the Netherlands during the 1960s and 70s (and particularly at Ajax under manager Rinus Michels) and described as *totaalvoetbal* (“total football”). Winner situates the emergence of this paradigm as to how to play football within a range of influences, particularly those of art and architecture. Winner claims that total football reconceived the game as one not merely about power, athleticism or technique but as primarily about space. Winner makes out his case, in part, by interviewing experts in the field of these arts. For example, he cites Rudi Fuchs, director of the Stedelijk Modern Art Museum in Amsterdam, explaining that the pioneer exponent of total football, Johan Crujff, “seemed to see football as a total

movement of the whole field, not as individual actions in only one part of it". To similar effect, Ron Ruurs of the Amsterdam Art History Institute recognised Dennis Bergkamp as "certainly a great artist. It is to do with his use of space..." While, as Winner argues, this vision of how to play football may have emerged in the Netherlands "because for centuries [the Dutch] have had to think innovatively about space in every other area of their lives," it was soon adopted elsewhere. The possibility that such a strategy might be held exclusively by any single person is unthinkable. "*Totaalvoetbal*" is an unprotectable idea.

Although particular tricks and approaches to play are excluded from copyright protection as "ideas", there are many passages in football games that involve a series of creative choices that cannot as readily be reduced to (and excluded from protection as) ideas. Total football is certainly an idea; but moves developed while playing within that style are more obviously characterised as expression. An example of such a team-move, hardly reducible to an idea, is Jack Wilshere's "[goal of the season](#)" of 2013-14, scored in a match between Arsenal and Norwich City. The play leading to the goal involved a series of nine increasingly intricate passes (Wilshere-Gibbs-Cazorla-Wilshere-Cazorla-Giroud-Wilshere-Giroud-Wilshere) to thread the ball past Norwich's midfield and defence, followed by a dinked finish by Wilshere from the six yard box. Arsenal's then manager, Arsène Wenger described it as "near perfection": "it combined speed and calmness, improvisation and technique... [It] was exceptional." Former table-tennis player turned journalist, Matthew Syed described the goal as "not about individual skill...Rather, it was about the co-ordination of actions and a (literal) sense of unity emerging from the disparate parts. Football teams that combine effectively also begin to articulate a new language." Another sports journalist, Michael Calvin, called it a "goal of geometric grace, lacerating speed, and compelling innovation." This is an example of elaborated decision-making that one would struggle sensibly to label as an idea.

Copyright and pre-conception: what went on in Bergkamp's mind?

Are there other legal mechanisms to exclude football from copyright? Synodinou has suggested that football is not protected by copyright because it does not satisfy the requirement of authorship. The Court of Justice has not, as yet, ruled that authorship is an "autonomous concept of European Union law," but she argues that there is an indissociable relationship between the notion of "works", "originality" and "authorship" reflected in the very standard of the "author's own intellectual creation." Significantly, for our purposes, she elaborates that authorship is an exercise of "creative will" which involves pre-conception of expression. This, she argues, is the real reason why sports events, such as football games, fall outside the protection of copyright.

I have two significant doubts about Synodinou's claim. The first relates to the desirability of a requirement of creative will of the sort she proposes; the second to whether such a requirement would in practice exclude football from copyright protection.

First, while I accept that it is a small jump from the references to "creative freedom" and "creative choices" in the existing jurisprudence on originality to "creative will", it is a leap with which I am uncomfortable. My concern is that this instates an individualist romantic author at the centre of European Union copyright law and thus is likely to marginalise collaborative, improvised and spontaneous creativity. This critique has been previously elaborated in relation to existing US jurisprudence, *inter alia*, in the work of Peter Jaszi and Martha Woodmansee and does not require repeating here. The most obvious example of creative productions that would be threatened by such a prerequisite is improvised jazz music.

Second, were the CJEU to elaborate a notion of authorship that demands a level of pre-conception, I am not sure that this, of itself, would exclude football. To return to the example of 'penalty kicks' (as well as free kicks, corners and other 'set pieces'), it seems clear there is frequently a high level of pre-conception, and very frequently a single creative will (the penalty taker or possibly the coach). To any football supporter, it would be perverse to offer protection to such set-pieces but to deny it to improvised moves involving large numbers of players in free-flowing movement.

Much, of course, depends on how far one understands the notion of 'pre-conception'. If it requires detailed pre-planned choreography, of the sort that a dance instructor or American football coach might present, then such a requirement inevitably excludes the genuinely spontaneous improvisation of football players. But even what appears as 'spontaneous improvisation' will often be the outcome of explicit conversations and unarticulated understandings developed between players in training. Compare, for example, the Jack Wilshere goal with [Tomas Rosicky's goal](#) against Sunderland a few months later in the 2013-2014 season (Arteta-Cazorla-Wilshere-Rosicky-Cazorla-Wilshere-Rosicky-Giroud-Rosicky). Although the play is on the right hand side of the pitch, and involved different players than those in the Wilshere goal, there are [remarkable similarities](#) such that one feels fairly certain the players did possess a common plan to pass the ball in a series of "one-tvos" through the opposition defence and right into the six-yard box.

In that respect, it is important to understand that 'pre-conception' is precisely one of the facilities that great football players are understood to possess. Consider, for example, [Dennis Bergkamp's goal](#) for Arsenal against Newcastle, voted by BBC viewers in 2017 as the [best Premier League goal](#) and by Arsenal fans in 2013 as the best ever. Bergkamp initially received the ball in the middle of his own half from

Patrick Vieira and passed to Robert Pires on the left wing at about the halfway line; Pires carried the ball twenty yards and spotting that Bergkamp had sprinted forty yards to the edge of the Newcastle penalty area, Pires fed a low hard pass, travelling perhaps 20 or 25 yards, arriving slightly behind Bergkamp; in a single move, Bergkamp flicked the ball with the outside of his right foot towards goal and out of reach of the Newcastle defender Nicos Dabizas, while turning round the other side of Dabizas to collect the spinning ball a few yards closer to goal; at that point, facing just the goalkeeper, Bergkamp calmly passed the ball into the right bottom corner of the Newcastle goal. It is, by any standard, a remarkable goal. Former Arsenal striker and football pundit, Ian Wright who had played with Bergkamp, exclaimed:

“The touch! The turn! They should slow that goal down with some classical music and put it in a museum. Yeah! And make people see that it’s a real bit of poetry in motion.”

According to [David Winner](#), “it was the divine spark where muscle memory and imagination and split-second creativity all combined and produced something new and breathtaking.”

I don’t think there is any doubt that football watchers would call Bergkamp the author of that goal. But was he, in Synodinou’s terms, the ‘creative will’? Was the move ‘pre-conceived’? Of course, as Bergkamp himself explained, it wasn’t preconceived in the sense that when he got on the coach to Newcastle he had planned to score a goal like that. But he certainly “meant it” in the sense that faced with the situation, Bergkamp had decisions to make; choices about whether to control the ball; to pass it to others in a better position; or to try and develop an opportunity himself; and having decided on the latter, how to get the ball and himself round Dabizas; and finally, what to do when he collected the ball. Moreover, on being reminded, Bergkamp acknowledged he had previously done something very similar in training. If pre-conception is satisfied when someone means something in a fluid and developing situation, then Bergkamp’s goal was a pre-conceived act of creative choice. As teammate Thierry Henry observed of Bergkamp, “most of his goals he thought about before he received the ball.” Football journalist Alex Hayes wrote in *The Independent*:

If F Scott Fitzgerald is right when he says that genius is the ability to put into effect what is in your mind, then Dennis Bergkamp must qualify twice over. Once for being able to execute the plans, but also for having the audacious ideas in the first place. What, for example, possessed the Dutchman to attempt one of the most daring moves ever witnessed on a football pitch against Newcastle United last March?

David Winner analogises it to improvisation by actors when filming:

It is a moment of supreme human creativity. I would put it on a level with a great piece of music or a great piece of cinema. James Stewart, one of my favourite actors, talked in an interview once about how the point of doing movies was that every so often you had these moments, sublime moments, breakthrough moments, where nobody has planned it. Film is very considered and planned but the things that are really extraordinary happen in front of camera when nobody knew they were going to

happen. Like Robert De Niro doing his ‘you talking to me?’ speech; that’s not in the script, he just did it. There’s an ecstasy of the moment somehow that comes in; when very talented geniuses are in their peak moments, this is what can happen.

Conclusion

This essay suggests that, as yet, the Court of Justice has not offered a coherent reason to think football games – or at least, some parts of many football games – are excluded from EU copyright law. Criticising the judgment of the Hoge Raad in the *Endstra* case that recognised the possibility of copyright in a casual conversation, Hugenholtz bemoaned the failure of the Court to consider whether copyright protection was justified, asking:

Is er werkelijk een cultureel of ander algemeen belang gemoeid met de bescherming (door een langlopend exclusief recht) van normale menselijke conversatie?

One might ask the same question about football: is there really a cultural or other public interest involved in the protection (by a long-term exclusive right) of parts of football games?

Certainly, today, there is no economic need to recognise such protection. Broadcasts are protected by neighbouring rights; and clubs already benefit from huge broadcasting revenues as a result of exclusive control deriving from land ownership in stadia and contractual arrangements with broadcasters. One would not expect the economic organisation of football to alter were football declared a copyright work: clubs would insist that players (coaches, managers and any potential ‘authors’) cede any such copyrights to them, and in turn would, as now, make further exclusivity arrangements with broadcasters.

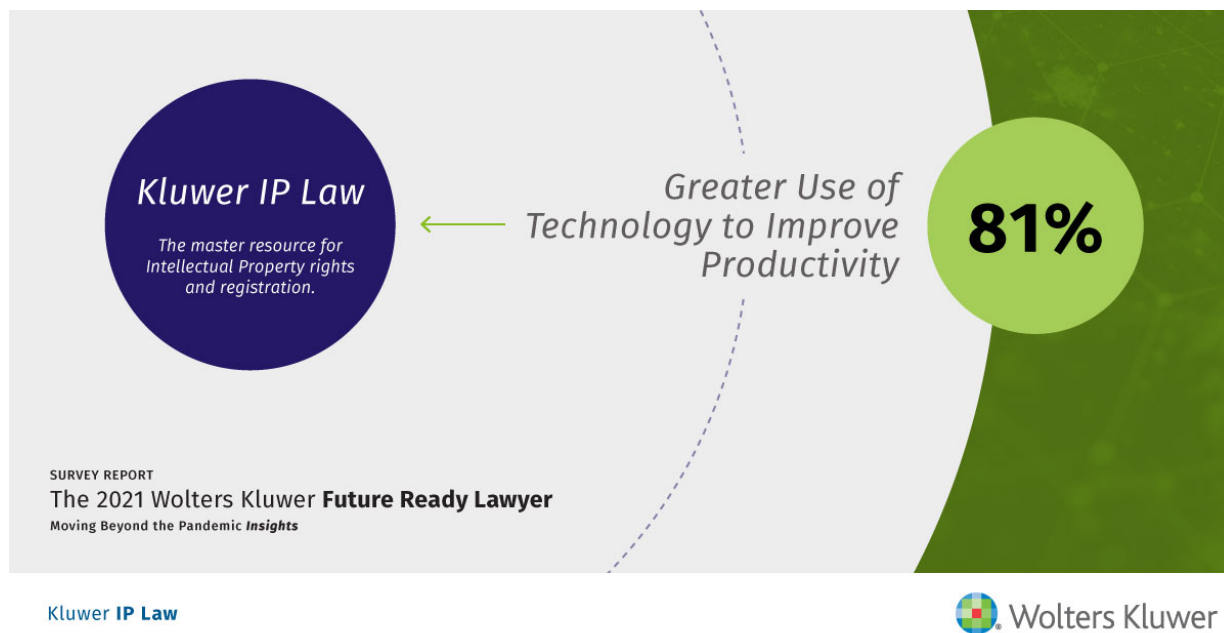
The consequence might be different, however, were there no broadcasting rights or rights in first fixations on film (as Bernt Hugenholtz has recently recommended). Were that the case, the exclusivity afforded to broadcasters would depend, in part, on copyright in the games themselves. In other words, the protection of broadcasters and generation of broadcasting revenues would require the existence of creative passages of play. In turn, one would expect a certain reorientation of football itself to maximise the frequency of passages of creative play (or at least ensure there was at least one such passage in every game). Finance would depend on, and thus likely promote, the creative quality of the game. Reflecting on the relationship between football and finance, Crujff declared in 2000, “the first goal of football must be the quality of the game.” If neighbouring rights were abolished, it might be that recognising copyright in creative passages of football would help to ensure that the primary goal of professional football becomes the quality of the game.

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