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Sporting events as dramatic works in the UK copyright system

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ABSTRACT

The Court of Justice of the European Union, in the Football Association Premier League and Murphy rulings, categorically concluded that sporting events themselves, and in particular football matches, could under no circumstances be classified as works for the purposes of copyright at the EU level, as they are not a given 'author's own intellectual creations', within the meaning of the Information Society Directive 2001/29/EC. Besides dismissing copyright in a sporting event per se, the CJEU leaves open to domestic legal orders its inclusion into subject matter that is worthy of protection, comparable to that granted to works.

*The proposal advocated in this article is to entitle certain sporting events – the so called 'choreographed' sports – to copyright protection in the UK, rather than to other IPRs or specific agreements concluded between a 'holder' of IPRs and a broadcaster. Owing to the absence of UK case law on the issue, determining the extent to which a sporting event warrants copyright protection calls for an enquiry into existing and stipulated forms of expression and other requirements for copyright subsistence, specified in the Copyright, Designs and Patents Act 1988 ('CDPA'). It is submitted in this paper that the most plausible route is to ascertain whether an analogy can be drawn between a sporting event and a 'dramatic work', pursuant to section 3(1) of the CDPA, which is inclusive of a work of dance. The other conceivable option, in light of *Norowzian v Arks Ltd (No 2)*, would be to qualify the content of films or broadcasts, reproducing sports competitions, as dramatic works.*

KEYWORDS

Sporting Events, UK Copyright Law, Dramatic Work, FAPL & Murphy

INTRODUCTION

The CJEU made a broad statement in its decision in joined cases C- 403/08 & C-429/08, 1 *Football Association Premier League et al. v QC Leisure et al. & Murphy v Media Protection Services Ltd* ('FAPL') [2012] 1 CMRL 29, ruling out sporting events from the subject matter that attracts copyright protection at the EU level. The present analysis enquires into the

potential inclusion of sporting events as copyright 'works' in the UK legal system. It provides guidance on whether it is appropriate to equate all sporting events, rather than distinguishing among various categories of athletic performances, for the purposes of copyright subsistence.

It is argued that the so-called 'choreographed' sports shall be subsumed within the terms of the statutory definition set forth in section 3(1) of the Copyright, Designs and Patents Act 1988 ('CDPA'), insofar as they share the same standard features of a dramatic work, they meet the originality threshold and they can be fixed in a tangible medium. On a par with other copyright subject-matter, such as drama, music and film, sports games and athletic performances are a form of entertainment that convey a recreational experience to users. 2

Furthermore, on close examination, UK copyright law does not require novelty or a high degree of inventiveness, and athletes devote time, effort, skill and labour to refining their performances. Nonetheless, recent case law from the CJEU, following the decision in *Infopaq International A/S v Danske Dagblades Forening* (C-5/08) [2009] ECR I-6569 puts forth that the English test of originality might need to be slightly reshaped, at least to the extent that a work can no longer be exclusively dependent on skill and labour. Under the 'author's own intellectual creation' test, a production which is solely dictated by its technical function does not embed the modicum of creativity and individuality required to be original. Nonetheless, it is submitted that choreographed sports reflect their author's personality, and endow free and creative choices notwithstanding the operation of the game rules and the goal of winning a competition. 3

The present discussion will not take the form of a policy debate. It is however important to underline that the granting of copyright implies a balance between conflicting interests. The massive growth in popularity of sports has certainly resulted from the significant development of the global television and broadcasting industry over the last decades, which in turn can be attributed to the rapid changes that communications technology has undergone. The financial incentive for athletes to enhance their performances and to seek for protection of their 'creations' is similarly strong. 4

Nevertheless, the term for protection of dramatic works in the United Kingdom is 70 years plus life of author, pursuant to section 12 of the CDPA. An uncontrolled enforcement of copyright law might harm the development of new athletic performances, which are necessarily inspired by, and based upon, pre-existing contributions. On the assumption that the creation of a statutory monopoly over a particular sport movement would drastically impair future competitions and finally destroy the sport at stake, the pool of universal moves should be left for other athletes to use in their own creative endeavours. 5

In this respect the 'idea and expression dichotomy' comes into play. Simple movements in sporting activities, like simple steps in dance, can be expressed only in one way, or embody the underlying idea of performing an action that is functional in the context of a competition. On the contrary, the expressive form of such multiple ideas may constitute the 'intellectual creation' or 'skill and labour' imparted by the author. 6

CATEGORIES OF SPORTING EVENTS

The category of sports that this analysis will refer to as 'adversarial' sports or 'head-to-head competitions' includes sports games such as football, baseball, basketball, cricket, and hockey, whereas the category of 'aesthetic' or 'choreographed' sports comprises figure skating, cheerleading, synchronised swimming, acrobatic gymnastics, ice dancing, ballroom dancing and wrestling. Adversarial sports differ from choreographed sports in that the former category places primary emphasis on direct competition while the latter presents a more essential artistic component (Weber, 1999, p. 321; Griffith T, 1998, pp. 677-678). 7

A distinctive characteristic of choreographed sports lies in their routine-oriented, repetitive and choreographic nature. Hence, they consist in a repetition of basic individual movements, forming an overall choreographed presentation. Each routine is practiced to such an extent that the margin of improvisation and unpredictability is relatively low. Likewise, the athletic performance is not contingent on the movements of the adversarial players. 8

In a way that closely resembles a ballet, sports movements are devised and presented in an interrelated sequence, revealing to the audience a 'story' or portraying an abstract idea. A ballet is composed of several elements, music, story, or libretto, choreography or notation of the dancing, scenery and costumes (*Massine v De Basil* (1937) 81 Sol. Jo. 173, at p. 670 per Luxmore J). Likewise are aesthetic sports. Wrestlers' performances are also choreographed and include a narrative constituent or a 'plot', which is entirely told in action on a stage before an audience. 9

On the contrary, a Canadian case, *FWS Joint Sports Claimants v Canada (The Copyright Board)* [1991] 22 IPR 429, may be significant in order to measuring the dissimilarities between *adversarial sports* and a ballet, such as a performance of *Swan Lake*. The Canadian Federal Court of Appeal upheld the Copyright Board's finding that, unlike dance, a sporting event is for the most a random series of events, which lack in certainty and unity and, consequently, are inconsistent with the concept of choreography. The magnetism and appeal of sports games derives from unforeseeable occurrences. Despite the degree of planning involved, what happens on the field is dictated by the interaction with the opposing team and it is necessarily unpredictable. 10

Thus, a considerable degree of *predictability* of the various components of a ballet, where '*what it is performed is exactly what is planned*', is intended as a fundamental condition for copyright subsistence in a choreographic work (*FWS Joint Sports Claimants at 432-3*). The adequateness of such a conclusion in the UK copyright system, weighing against copyright eligibility of adversarial sports, will be discussed below. At this point it should be however noted that the strongest arguments for copyright entitlement still pertain to *aesthetic sports*. 11

This paper also takes into account a third category of sporting activities, the so-called '*routine-oriented non-competitive activities*', which embraces sports that are primarily designed to achieve fitness and health, such as yoga and Pilates (Jesian, 2007, p. 635). It is maintained that these activities can more easily be equated to a process or a system that do not warrant copyright protection. 12

COPYRIGHT SUBJECT MATTER

The preliminary issue in evaluating copyright in a sporting event is whether it may amount to a '*work*'. It is therefore of critical importance to identify in the first place when a copyright *work* comes to being. There is no harmonized approach to subject matter, and to what may constitute a work under copyright law (Aplin and Davis, 2013, p. 111). Pursuant to the CDPA, in order to perceive a work *qua* work one must perceive it in relation to one of the categories of works in which copyright subsists (Pila, 2010, p. 230). The relevance of such categories of works is also apparent when assessing the claimant's allegation of substantial copying, and whether or not the smaller parts of the work should be treated as separate and independent copyright works. 13

The statutory definitions of literary, dramatic, musical and artistic works ('LDMA'), provided in the CDPA, are a matter of significant legal uncertainty and offer limited assistance in ascertaining the meaning and scope of the subject matter. Furthermore, these definitions reflect the formalistic conception that intrinsic properties of form (i.e. a literary work is written, spoken or sung) determine the categorisation of a work. Each subject matter has peculiar expressive and representational characteristics, and arguably LDMA works are not premised on a common and core concept of '*work*'. 14

The CDPA does not include sporting events under its definitions of works. The exhaustive nature of protected subject matter denotes that it is only through the courts' creative interpretation of the existing categories that copyright protection can be contemplated for new expressive forms. Henceforth, in light of the courts' practice of identifying works from a formalistic perspective, sporting events have to be perceived with reference to the particular category of '*dramatic works*', in order to ascertain whether they lack those formal properties, which are the *standard* features (Walton, 1970, pp. 338-339), determining the subject matter. Certain athletic performances might reveal similarities of *form* with a *drama* or work of dance, which would thereby make them the legitimate subject matter of copyright protection. 15

However, it must be noted that, in contrast with jurisdictions where the subject matter is defined in open-ended terms, the rigid categorisation of works in the UK has led courts to exclude from copyright law 'unconventional' creative contributions, such as perfumes. It is submitted though that a choreographed athletic performance is distinguishable from this example, because it closely resembles existing subject matter categorisation. Thus, in principle, it may be worthy of protection. 16

Furthermore, the decisions of the CJEU in *FAPL*, in *Bezpečnostní Softwarová Asociace v Ministerstvo kultury* (C-393/09) [2011] ECDR 3 ('BSA'), and in *Painer v Standard Verlags GmbH* (C-145/10) [2012] ECDR 6, seem to move toward a harmonized concept of 'work of authorship', although EU and international norms leave it to Member States to determine which subject matter warrants copyright protection. The literature on the CJEU's rulings attempts to clarify to what extent domestic copyright laws would need to comply with the apparent construction of the 'author's own intellectual creation' as a generalized work standard. 17

The possible outcomes in those jurisdictions that have a closed-list system, such as the UK, would be either to accommodate and open up the existing categories of works to different types of authors' creations, or to abandon the closed-list approach to subject matter altogether (Aplin and Davis, 2013, p. 111). Thus, according to recent case law from the CJEU, whether the 'author's own intellectual creation' conflates the *originality* and *work* conceptions, it might no longer be appropriate to carry out an analysis of how a dramatic work has been understood in the UK copyright model. There may be space for the inclusion of a combination of athletic movements, irrespective of how the work is called, being or not a subset of dramatic work. Therefore, the principal hurdle, in light of the CJEU's judgements, pertains to those *technical considerations*, and *games rules*, that might dictate the extent of *creative choices* and *freedom* in a sporting activity. 18

Some commentators have suggested that while there is a close relation between the work and the subject matter, the work cannot be equated with the way the subject matter is defined. Nor can it be determined merely by reference to the intellectual contribution of the author. The work might be seen as a *hybrid* that is tangible and intangible at the same time (Sherman, 2011, pp. 105-6). Furthermore, while it seems that subject matter needs to be defined in open-ended terms, to allow copyright law to accommodate new creative works and respond to change, fluid definitions can provide limited assistance in deciding when a work should be protected (Sherman, 2011, p. 119). This is demonstrated by the following attempt to establish precisely what constitutes a *dramatic work*, or the subset of a *work of dance*, for the purposes of UK copyright law. 19

By contrast, in the U.S. the list of stipulated categories of works of authorship is not exhaustive or all-encompassing, since it merely *includes* those set forth in Section 102 of the Copyright Act 1976. The American decision in *National Basketball Association ('NBA') v Motorola, Inc.* 105 F.3d 841 (2nd Cir. 1997) brings about that organised events are not copyrightable themselves and cannot constitute an additional category of copyrightable subject matter. The Second Circuit held that a sporting event, such as a basketball game, is not even similar to any of the listed categories. This was further supported by the scarceness of case law, owing to the general understanding to the contrary. In addition, if Congress had had the intention to grant copyright protection to sporting events, it would have encompassed them in section 102 of the Copyright Act 1976 (*NBA* at 846-7). 20

Nevertheless, the option to include *aesthetic* sports within choreographic works, pursuant to section 102 (a)(4) of the Copyright Act 1976, has been the subject of intense debate over the last twenty years, because it might be incorrect to follow the *NBA's* assertion that all athletic performance is comparable to organised events. 21

DEFINITION OF DRAMATIC WORKS

The definition of *dramatic work*, pursuant to section 3(1) of the CDPA, is less wide-ranging than that of a literary work (that is 'written, spoken or sung') or a musical work (that is 'intended to be sung, spoken or performed with the music'), and it just refers to the inclusion within the category of a work of dance or mime. The same proviso refers to a 'literary work' 22

as a work other than a dramatic work, the latter involving acting for its correct presentation.

Some standard formal features of a dramatic work can be identified, by tracing a line through 23
UK courts' decisions. In particular, an essential characteristic of a dramatic work is the
inclusion of some sort of movement, story or action, as opposed to purely static scenes, as
exemplified by Lloyd J in *Creation Records Ltd v News Group Newspaper Ltd* [1997] EMLR
444. Therefore, stage effects, sets, scenery or costumes in choreographed sports could only
be protected as artistic works (*Shelley Films v Rex Features* [1994] EMLR 134).

In *Norowzian v Arks Ltd (No.2)* [2000] EMLR 67, the Court of Appeal placed an emphasis on 24
the performative nature of a dramatic work, as a '*work of action, with or without music, which
is capable of being performed before an audience*'. Mr Norowzian's film was not a recording of
a dramatic work, because it was not the recording of anything that is capable of being
performed before an audience. The editing techniques employed by the filmmaker, such as
jump-cutting, made the actor appear, in the final version of the film, to move in a way that a
human performer could not carry out in real time and space.

Applying this reasoning to a sporting event that is fixed on film, the latter must record the 25
performance or game in an unchanged state. In fact, if Norowzian's film had shown all the
movements of the actor, its content would have been protected as a dramatic work.
Furthermore, overturning the lower court's finding, the Court of Appeal held that Rattee J had
been wrong to exclude that a film could be a dramatic work in itself. The ordinary or 'natural'
meaning of a dramatic work includes most – though not all – films, the content of which
should be displayed and perceived as a drama (*Norowzian* at 366-7 per Nourse LJ).

While a film that is merely a recording of real life events may not be considered as a 'work of 26
action', a cartoon or a '*docu-soap*' may be (Laddie, Prescott and Vitoria, 2011, p. 3.117). To
the extent that the filmmaker provides authorial input and stamps his personal touch on the
work, films of a football match would be 'works of action' produced for entertaining the
audience, which enjoy dramatic copyright in their own right. Thus, the kind of skill and
labour, and the creative choices, employed in editing the film should accentuate the
entertainment and dramatic purpose of, let's say, the shooting of a football match in the
finished work.

Once it is established that a film can be a dramatic work, and the showing of it amounts to a 27
performance of the work, the scope of its protection is no longer limited to 'photographic
copying', which shall involve the exact reproduction of one or more frames of the film
(Arnold, 2001, I.P.Q. 10). This is why *Norowzian* is of specific importance for those who
promote *dramatic* copyright in a sporting event.

The requirement that a dramatic work should be capable of being performed has been 28
interpreted in a more restrictive way in *Green v Broadcasting Corporation of New Zealand*
[1989] RPC 700. Lord Bridge of Harwich found that the 'dramatic format' of a television show,
comprising some repeated features, such as the use of catch phrases and a clapometer, that
were unrelated to each other, could not be isolated from the changing material shown in each
individual performance (*Green* at 702). Therefore, it could not qualify as copyright subject
matter. A dramatic work must have sufficient unity to be capable of being performed and
must not lacking in certainty.

These decisions were applied in *Nova Productions Ltd v Mazooma Games Ltd* [2007] EWCA 29
Civ 219 at 110-119, to conclude that a coin-operated game, based on the theme of pool,
could not be classified as a dramatic work, being to the contrary just a game and lacking in
sufficient unity for it to be capable of being performed. A relevant strand to the court's finding
is that, although a game has a set of rules, the particular sequence of images displayed on
the screen will depend on the actual play, which will always vary from one game to another,
even if the game is played by the same individual.

As already mentioned above, in the Canadian case *FWS Joint Sports Claimants*, the reasoning 30
for denying copyright protection in team sports games relied primarily on the *unpredictability*
of the performance's outcome, despite the high degree of planning involved.

INCLUSION OF SPORTING EVENTS IN THE CATEGORY OF DRAMATIC WORKS

In theory, performances executed by athletes in a sporting event, even if improvised, may 31
qualify for protection under Part II of the CDPA, either as dramatic performances or as
performances of a variety of acts. Nevertheless, performances are not the subject of
copyright as such. The issue is whether athletes who participate in a sporting event are also
creating an *intellectual* production of an original character, namely a dramatic *work*, which is
eligible for copyright protection.

In terms of adversarial sports the inquiry focuses on whether athletes (or *performers*) may 32
also be entitled to copyright protection in respect of the improvisations they produce in the
field, irrespective of whether these consist mainly of matter of a fluctuating, impermanent
and indefinite nature, which is in part dictated by technical considerations. In fact, in head-to-
head competitions, the decisions made on the pitch or field originate with the players
themselves. The coach's instructions merely serve as an idea or a system, and athletes run
and play in response of the opposing team's reactions and positioning.

It may well be that the line-ups, the actions and passages recommended in the coach's 33
diagrammed play will not be duplicated on the field. In this respect, it is arguable whether the
playing of a game would represent the expression of the ideas contained in the coach's
playbook. In theory, each part of the game that is not part of the scripted play should not be
taken into consideration. Thus, the components of a game that are independent of the
scripted play or dictated by random circumstances should be filtered out. This *abstraction test*
leads to screening out the field, the fans, the stadium, the opposing team and the referee.
What remain are merely the players under the coach's control, running around in space, and
their movements would not represent the expressive form of a scripted play (Das, 2000, p.
1093).

It is also apparent from the above-mentioned UK case law that dramatic works have 34
traditionally been conceived as arrangements of behavioural elements that are stable when
presented in performance. Changing materials and unpredictability might prevent the
requisite level of certainty and unity for adversarial sports to qualify as 'works' in first place. A
line of criticism is that nothing in the CDPA requires a dramatic work to exist before it is
performed, and improvised dramatic works can be protected as well as the pre-scripted ones
(Arnold, 2001, p. 3).

UK case law on identifying whether interpretation in performance would appear to be the 35
subject of copyright is scarce. On general principles, it seems to suggest that even if
improvised, a dramatic piece needs to be sufficiently definite and permanent in nature to be
capable of being recorded in some form of notation (Laddie, Prescott and Vitoria, 2011, pp.
3.44 – 3.50).

A test that has been applied, in order to ascertain the extent to which matter of unstable and 36
indefinite nature can be protected in the case of dramatic works, is whether it can be printed
and published. Accordingly, as such mere acting style and *ex tempore* interpretation seems
not to warrant copyright protection (*Brighton v Jones* [2004] EMLR 26 at 56). Nevertheless, it
is a question of degree. For instance, *aleatoric*^d musical or dramatic works have become very
popular in recent years. The adaptations of these works, made by performers on stage, rather
than being mere performances, entitle the authors of copyright protection.

Elements in adversarial sports that can be written down in sufficient detail, to show the 37
requisite level of unity, are lackingⁱⁱ. Arguably the coach's diagrammed play, and the referee's
decisions, could be printed out and published, but these elements are insufficient to
reconstruct the contents of the match, and are not suitable for copyright protection as in the
case of a dramatic work. The only conceivable solution would be to contend that, although
improvised matter in sporting events cannot be reduced to written form, it nevertheless
achieves the requisite status of certainty when the event is filmed or recorded by electronic
means.

Nevertheless, the question is whether participants in the game contributed the right kind of 38

skill and labour, substantial enough to make them joint authors, pursuant to section 10(1) of the CDPA. It can be maintained that this not the case, because the contribution is of a different kind than the *intellectual* input required for the 'authoring' of a dramatic work. UK copyright law would arguably be stretched beyond its limits if adversarial sports plays were to be classified as original authorial works. However significant and skilful the players' contribution may be, it still needs to be a contribution to the creation of the work, rather than to its performance.

Furthermore, among other problems, the number of joint copyright owners would probably include the league, the athletes, umpires, stadium workers and even fans, who all contribute to the work (Nimmer M & Nimmer D, 1996, p. 2.09 [F]), assuming that they do all endow substantial creative labour, '*in furtherance of a common design*' (*Levy v Rutley* (1871) LR 6 CP 523). Multiplying copyright ownership of a work might hinder its commercial exploitation, given the difficulty to obtain consent on the part of all the participants to the event. 39

Adversarial sports can be contrasted with aesthetic sports, which are scripted, not improvised, designed for a public performance, and likewise arrayed with a sufficient degree of certainty and stability, to constitute a *work*, once they are fixed by diagrammed and symbolic notations. In figure skating, acrobatic gymnastics and synchronised swimming each individual routine is choreographed and practiced repeatedly in a rehearsal space. Furthermore, in choreographed performances no contribution on part of the audience or the judges intercedes. 40

For dance, it is well established that the author of the work is the choreographer, while it is rare to consider the dancers as co-creators of it. Therefore, in theory, the coach in aesthetic sports would be the owner of the copyright in the dramatic work, and the interpretation of the choreography by the athletes would be in the nature of a performance, protected under performers' rights. Nevertheless, in addressing the role that athletes play in the case of choreographed sports, it is disputable whether their contribution is limited to the performance of the work. The more that the work created has been stamped with the athletes' personal touch, by making free and creative choices, the more the athletes' contribution shall be deemed to be an authorial input for the purposes of copyright, and the final event shall be considered the result of an iterative and collaborative process (Waelde, Whatley and Pavis, 2014, p. 8). 41

Another challenging issue, following a line through the decision in *Norowzian* and the statutory definition, attains to the most appropriate test to assess whether a sporting event is a work of '*action*', which includes a work of dance. One consideration is that the work should be a piece of entertainment, as most of sports events are. In choreographed sports only, athletes are mainly judged on the aesthetic outcome and artistic impression of their performance, which is usually scored on how well bodily movements are synchronised with music. The inclusion of graceful movements, costumes, lighting and make-up places in question the public perception of these sports as *dramatic*, in the same way as a ballet. 42

Nevertheless, the implication of the formalistic perspective on copyright is that of aesthetic neutrality. Any test for the subsistence of dramatic copyright in a work must not be based on taste or sensibility, but on what is perceived by anyone with normal eyes, ears and intelligence (Pila, 2010, p. 5). It would be a risky task for courts, trained to apply the law, to evaluate the worth of athletic performances on the basis of their *aesthetic merit*. What about a wrestling performance or the elaborate routines in a football or basketball game, which the athletes generate for the first time on the pitch? 43

Some commentators have, in fact, suggested that certain moves in adversarial sports, such as the slam dunks in the NBA All-Star Game, are far from basic and should be found to meet the threshold of originality to obtain copyright protection (Kieff, Kramer and Kunstadt, 2009, p. 779). For the sake of completeness, it must also be stressed that singular and distinctive sports movements or gestures, which are associated with particular sportsmen, could be granted protection by way of non-traditional trademarks, i.e. motion trademarks. 44

Although such an inquiry goes beyond the scope of this paper, it brings to light that all sports disciplines give rise to remarkable routines and to a continual refinement of athletic skills. Spectacular routines, such as the famous 'donkey kick' goal scored by William Carr for 45

Coventry City against Everton, back in 1970, to a great extent are devised and crafted to generate aesthetic appeal and to entertain the audience.

Furthermore, there can be no dispute that, in aesthetic sports, judges score the choreographed performances also on the basis of technical merit, and the degree of perfection in executing strokes and figures. Athletes are not acting or dancing, but rather they are participating in a competition. Thus one can argue that the line of demarcation between various categories of sports is somewhat blurred. Since they are all competitive activities, which nevertheless involve the entertainment of the audience, they might all – or not – be consumed by the latter as an art form, resulting from an *intellectual* input, in the same way as a film or a ballet. 46

A line of criticism is that formalism fails as a theory of the work. An alternative theoretical model may guide courts in determining whether something should be recognised as a work. The work has to be recognised by *society* as falling within the relevant category, and this understanding needs to correspond to the author's intention when he created the work (Pila, 2010, p. 31). According to this approach, the categorisation of sports as works under copyright law will largely depend on a matter of cultural and social perception and conditioning. 47

On one side, sports are of great interest to the public, as it is shown by attendance at the organised events, the social demand for the resulting expressive media, and by professional athletes' high salaries. Furthermore, nowadays, the perception of sports is highly influenced by their competitive nature. Athletes are identified as idols for their talent and their ability to achieve goals. In contrast, in their origins, sporting contests such as the Greek Olympics were forms of art, and athletes were competing with poets, orators and musicians. Sports were not motivated by economic compensation and were embedded with profound religious or ritualistic significance (Griffith T, 1998, pp. 666-667). 48

On the other side, it could be maintained that in the present commercial world, copyright also serves the purpose of protecting business products and 'human capital' investment, rather than being merely concerned with high artistic creativity (Rahmatian, 2013, p. 31). Moreover, the competitive nature of sports might not weigh against the option to offer copyright protection, insofar as contemporary arts are becoming increasingly competitive, as more and more prizes are instituted (Arnold, 2008, p. 2.19, footnote 39). Henceforth, if sporting events command the interest of the public and consequently they take on commercial value, this might also entail aesthetic and educational value (*FAPL* at 108-109). 49

In principle, therefore, nothing prevents a sporting activity from being assimilated to a form of art or an intellectual creation. However, an approach based on the 'content', and on the general understanding of what constitutes a dramatic work, supports the assumption that, irrespective of their aesthetic merit, only choreographed sports resemble a form of dance or a ballet. They authentically express the idea contained in an underlying script, which, at least to a certain extent, is aimed at telling a story. 50

As a consequence, choreographies that were originally crafted for taking part in a sport competition could easily be turned into a theatrical spectacle, which can be played before an audience. This factor plays a crucial role when drawing the line between various categories of sporting events for the purposes of copyright protection. For instance, the figure skaters Torvill and Dean, rather than merely competing with their choreography based on the well-renowned Ravel's composition 'Boléro', could have brought their work on a tour worldwide. 51

ORIGINALITY IN UK COPYRIGHT LAW

Under the CDPA, a composition can only qualify as a dramatic work to the extent that it is sufficiently original. In the UK, the classic notion of 'originality' for copyright purposes has not been substantially revised during the pre-*Infopaq* period. In numerous decisions, it has been understood as meaning 'originating from the author', not requiring that the expression of the thoughts be in an original or novel formⁱⁱⁱ. The requisite amount of 'skill, labour, and judgement' (*Ladbroke v William Hill* [1964] 1 WLR 273, at p. 289 per Ld Devlin) has historically been rather low, depending on the special facts of the case, and it is a question of degree. One of the consequences of setting a low threshold of originality is that there have 52

been relatively few instances in the UK where subject matter has been excluded on the grounds that it was unoriginal (Bently and Sherman, 2009, p. 70).

The CJEU, in *Infopaq* at 51, left discretion to national courts to apply the possibly modified 53 'own intellectual creation' test of originality, and determine whether the reproduction of elements of a work falls foul of Article 2 of the Information Society Directive. However, the extremely minimalistic approach shown in the English case of *Newspaper Licensing Agency Ltd v Meltwater Holding BV* [2010] EWHC 3099 (Ch), [2011] EWCA Civ 890, in relation to the impact of the *Infopaq* decision upon the UK model of copyright, has been exposed to criticism^{iv}. At first instance Mrs J Proudman stressed that the test of originality has only been re-stated but not significantly altered by *Infopaq* (*Newspaper Licensing* at 81). The Court of Appeal held that *Infopaq* denoted 'intellectual creation' in the sense of origin and did not qualify the long-standing 'originating from the author' test recognised in the UK (*Newspaper Licensing*, at pp. 19-20 per Chancellor Morrit)^v.

Conversely, it seems that the CJEU has shed light on the fact that the essential component of 54 intellectual creation is the exercise of creative choices and creative freedom. A test based on creative choices 'has the potential to bridge the conceptual gap between common law and civil law countries' (Gervais, 2002, p. 976). It might therefore be appropriate to reshape slightly the concepts of 'skill, labour, and judgement' by embedding the modicum level of creativity and individuality required in the element of 'judgement' (Rahmatian, 2013, p. 31), so as to assimilate the UK test to the one operative in the USA, established in the very well-known Supreme Court decision in *Feist Publications v Rural Telephone Service 111 S Ct 1282* (1991) at 345-348.

Nevertheless, the amount of creative authorship required in the USA to pass the originality 55 hurdle is still a *de minimis* one, and courts avoid making aesthetic decisions about the worth or merit of a work^{vi}. Thus, it is presumed that highly creative choices would not be required in the concrete application, within domestic legal orders, of the allegedly reshaped test of originality. The 'dictated by technical considerations' proviso, within the new case law of the CJEU, may however challenge the protection of works traditionally subsumed within the framework of UK copyright law.

The following analysis, therefore, attempts to clarify whether the rules of the game or 56 technical considerations in a sporting activity may have a significant influence over the making of the alleged 'work', in such a way that there is no space for the expression of *creative freedom*. On close examination, the decision in *FAPL* reveals that it is of pivotal importance not to make general assumptions in an area that is not fully harmonised.

ORIGINALITY OF SPORTING EVENTS IN LIGHT OF THE CJEU DECISION IN *FAPL*

On 4 October 2011, the Grand Chamber of the Court of Justice of the European Union 57 delivered its preliminary ruling in the joined cases *FAPL & Murphy*, upon a reference from the High Court of Justice of England and Wales. The CJEU made a far-reaching statement, holding that Premier League matches themselves cannot enjoy copyright protection, as they cannot be classified as *works* within the meaning of the Information Society Directive (*FAPL* at 96-98). Following the *Infopaq* decision, the CJEU held that, to be so classified, the subject matter concerned would have to be original, in the sense that it is its *author's own intellectual creation*. Sporting events, and in particular football matches, which are subject to the rules of the game, leave no room for creative freedom for the purposes of copyright. Moreover, European Union law does not protect them under any other intellectual property right (*FAPL* at 99).

Nonetheless, the extent of this conclusion is in part narrowed by the CJEU's additional 58 findings. First, in light of their 'unique and original' character, sports events are worthy of protection *comparable* to that accorded to works under various domestic legal orders (*FAPL* at 100-101). In addition, the CJEU clarified that, as opposed to the matches themselves, the broadcast material for which *FAPL* may claim copyright protection includes the opening video sequence, the Premier League anthem, pre-recorded films showing highlights of recent Premier League matches, or various graphics (*FAPL* at 149). As underlined above, the

predominant reading of the *FAPL* decision is that the Court went even beyond the construction of a harmonised originality standard, by endorsing the open-ended notion of 'author's own intellectual creation' as a EU-wide 'work of authorship' conception (Van Echoud, 2012, pp. 77-82).

Recent case law of the CJEU confirms this reading. Thus, creativity would be the only criterion 59 for copyright protection in the European *acquis*, which is satisfied where the author expresses his creative abilities in an original manner, by making free and creative choices (*BSA* at 50; *Football Dataco v Yahoo! UK Ltd* (C-604/10) [2013] FSR 1 at 38) and stamping the work created with his 'personal' touch (*Painer* at 92). This would not be the case if the work at stake were the result of technical considerations, rules or constraints that leave no room for creativity (*Football Dataco* at 39; *FAPL* at 98; *BSA* at 48).

Accordingly, sporting events, and specifically live football matches, are *undisputedly* ruled out 60 from the category of 'works' within the meaning of 'authors' own intellectual creation'. What is remarkable, in the first place, is that this finding was not necessary in order to answer the referring court's questions, and the CJEU gave little or no guidance in support of such a clear-cut statement. A second line of criticism of the *FAPL* and subsequent decisions of the CJEU is that the European legislature did not intend to Europeanise protected subject matter. The Court's autonomous interpretation, therefore, can only be justified as a means to harmonise legal concepts that are within the scope of the directives (Van Echoud, 2012, p. 90).

The same outcome of the *FAPL* decision, in relation to sporting events, would probably be 61 reached applying the domestic *originality* doctrines in continental-European traditions, such as France^{vii} and Germany^{viii}. In a *droit d'auteur* system, such as France, courts may categorically exclude a football match from copyright protection, owing to the level of intellectual originality required and the element of choice, which is a constituent component of creativity, with respect to any type of work. However, as opposed to football matches, other sporting activities, such as synchronised swimming, comprise both 'technical' and 'free' routines. A technical routine needs to comply with set movements and time limits, whereas a free routine varies from team to team and has no set time limit. The combination and arrangement of different routines may well accomplish the 'own intellectual creation' notion of originality, due to the individual and creative stamp imparted by the author.

It must also be noted that most of the choreographies in aesthetic sports draw upon one or 62 more pre-existing compositions. A coach often relies on the systems and diagrammed notations used by his former mentors and on the assistance of his present advisers (Das, 2000, p. 1092). Nevertheless, derivative works are protected in the UK, if they are the product of a material change. The mere process of copying the work slavishly from elsewhere does not involve a sufficient amount of labour, while the additions of some material alterations to the existing work, may suffice to confer originality (*Interlego AG v Tyco Industries Inc* [1989] AC 217, at pp. 260-263 per Lord Oliver).

One of the possible implications of the CJEU case law on the UK copyright model must 63 however be noted. A production of something in a new form, which under the classical originality conception is the result of sufficient skill and labour, may no longer be protected if the author's skill is not sufficiently *intellectual* (that is, the expression of creative choices) in order to count (Laddie, Prescott and Vitoria, 2011, p. 3.72). This would probably be the case for certain works that have been protected historically, although they are derivative works, limited and conditioned by their technical function.

For instance, the Court of Appeal, in the pre-*Infopaq* ruling in *Hyperion Records*, confirmed 64 that the decision in *Walter v Lane* [1900] AC 539 remained good law, and found that performing editions of the seventeenth-century composer M.R. de Lalande were original, to the extent that they were the product of one person's effort, skill and time, even though the authorial input was largely determined by technical considerations (*Hyperion Records*, at p. 56 per Mummery LJ).

It is maintained that the constraint that technical requirements generate upon the making of 65 choreographed routines does not necessarily preclude the author from expressing a modicum of individuality, required in light of the CJEU's rulings on originality, within a creation that satisfies the statutory description of a dramatic work. An appreciation on a case-by-case basis

may reveal that, irrespective of the implementation of rules, creative choices in *aesthetic* sports can be exercised in the combination and arrangement of the single routines. The pool of athletic movements, which are available to be combined in a 'free' choreographed routine, is broad enough to make the latter original.

THE IDEA AND EXPRESSION DICHOTOMY APPLIED TO SPORTING EVENTS

The idea and expression dichotomy is very well known all over the world^{ix}. Copyright does not extend to ideas, procedures, systems or methods; it protects the expression of ideas, not the ideas themselves. This common law principle represents a useful tool in assessing whether ideas expressed by the author(s) in a sporting event warrant copyright protection, and whether a *substantial* infringement by making non-literal copies of the alleged copyright work has occurred, pursuant to Section 16 of the CDPA. The present analysis relates to how the idea/expression dichotomy delineates the boundary between protected and unprotected materials for the purposes of copyright protection of a sporting event. 66

As reiterated in *Designer Guild v Russell Williams* [2000] 1WLR 2416; [2001] FSR 11 (HL), at pp. 2422- 3 per Lord Hoffmann, it all depends on what you mean by ideas. In fact, certain types of ideas, which are sufficiently detailed, can be protected under UK copyright law, and it is a matter of degree. Thus, courts face a difficult task in drawing the line between what constitutes the form in which ideas are expressed and the ideas themselves. Certain ideas are not protected because they are not connected with the LDMA nature of the work, others because they are not sufficiently original or are too commonplace to form a substantial part of the work. 67

According to the Opinion of Advocate General Bot in *BSA*^x, where the idea and the expression become *indissociable*, and therefore there is only one way to express or depict the idea, no one can claim copyright in that expressive form, because to do so would confer a monopoly of the idea itself^{xi}. This would be the case whenever the expression is dictated by its technical function, and therefore the author cannot express his creative abilities. Thus, sporting events, and in particular football matches, comprise rules of the game, and this may pose a challenge for copyright subsistence. These rules lie on the wrong side of the border between ideas and their expression. 68

On the one hand, following *Designer Guild*, rules of the game are not connected with the *dramatic* nature of the work and they are too general or commonplace to qualify as expressions. The other possible explanation is that rules can be assimilated to a system or process^{xii}, to which copyright protection does not extend. If games rules can be described as non-protectable ideas, the issue is whether they are likely or not to merge with their expression in the actual play. Thus, the issue is whether a game is synonymous with its rules, merely because they govern and define it. 69

It is maintained that the ways in which such rules can be expressed in an original work are limited, but there is still a room for a creative input on the part of the participants. Thus, an athletic performance may not be entirely dictated by its technical function. By analogy, recipes that consist of a list of ingredients and instructions to follow should meet the originality threshold under UK law, and be protected as literary works. The method of preparation, the process and the list of ingredients may not be protected themselves. Rather, only the actual wording of recipes is protected, and arguably an infringement should not occur when the same instructions are reproduced with different words (Su T and Li Cheng, 2008, EIPR 93). 70

Game rules must be distinguished from the modes of expression – susceptible of copyright protection – in which they are stated. Rules do not tell participants exactly what to do, nor can they specify precisely what will occur during the actual game in play (Boyden, 2011, p. 450). Rather, rules perform the main functions of establishing initial conditions, determining which actions are valid within the scope of the game, and setting the end conditions, such as victory. Rules represent the external container, which can be filled in by a wide range of different creative options, made from the participants' choices. 71

The analysis of how technical considerations may influence creative freedom can be better 72
illustrated by reference to the sorts of sporting activities. It has been submitted that coaches'
scripted plays in adversarial sports are denied copyright protection. An assertion of the
contrary is also undermined by the fact that if a coach were to obtain copyright on a scripted
play, where there are only a fixed number of routes that a player may take to get, for
example, to the back right corner of the end zone, then he would obtain a monopoly over the
expression of the idea and the idea itself (Das, 2000, p. 1094).

Moreover, rules in head-to-head competitions are more likely to influence and confine players' 73
creative choices in the playing of the game. Arguably, an athlete's performance in team
sports is not an 'intellectual' contribution to the authoring of a (dramatic) work, nor is it
sufficiently original and creative. A player has to run from one point to another, taking a
specified direction in a confined space, in order to achieve the same task, throughout the
whole game. Nor are the opposing individual players executing highly composite and creative
athletic performances.

Within choreographed sports, on the contrary, the single basic movements involved in the 74
sporting performance constitute *ideas*. Accordingly, in figure skating, the individual '*camel
spin*' may not be protected due to its form as an idea (Griffith T, 1998, p. 695). Nevertheless,
the arrangement and combination of these ideas into an entire routine may constitute the
authorial contribution, which warrants copyright protection.

Moving to '*routine-oriented non-competitive*' activities, such as yoga or Pilates, the underlying 75
idea consists in the achievement of physical and/or mental fitness and health through bodily
movement. With regard to this category of sports, a stringent problem lies in drawing the line
between ideas and their expression. On the one hand, it can be argued that, similarly to
choreographed sports, the combinations of postures available to accomplish the same result
or idea will give rise to different expressive forms.

In fact, the ways by which bodily movements can pursue fitness or health are not limited, and 76
the number of possible combinations of *asanas* is quite wide. Only absolute monopolies on
basic poses would prevent the creation of other works thereafter. Nor would an infringement
occur where individuals employ yoga poses or other sports moves embodying the same idea
(Bussey, 2013, pp. 15-24). However, the problem arises from a more reasonable analogy
between routine exercises and processes or systems.

A process requires a sequence of steps to be taken, in order to achieve a specific *external* 77
result. In head-to-head competition and in choreographed sports, rules define the steps for
athletes to follow. The aim of these sports competitions, namely a victory, is, however, part
of the game rules themselves, and is therefore not an external objective, necessary for a
process to subsist. Following the steps described by the process (hence, following the process
itself) is not the same as achieving the result at which the process is aimed (Boyden, 2011, p.
469). In contrast, yoga postures or *asanas* may qualify as steps to be followed in the process,
and the improvement of health and fitness is the final external result. For that reason, there
is no room for creative freedom.

In the USA, a solution to the problem was suggested by the U.S. Copyright Office's statement 78
of policy on 22 June 2012^{xiii}, which, however, is not binding. The Office specifically referred to
a compilation of simple routines, social dances or even exercises, such as yoga poses, to
state that it would no longer be copyrightable, *unless* they are combined in such a way that
the resulting work amounts to an 'integrated and coherent compositional whole', so that a
claim of choreographic authorship would be supported by the requisite level of originality. A
mere selection of *functional* physical movement does not give rise to the minimum level of
choreographic authorship.

In light of the Copyright Office's position, claims in compilation authorship of functional 79
physical movements or exercises, such as for Bikram yoga^{xiv}, would now be refused. Once
exercise routines are combined and performed in a specific order, they constitute a functional
system or process, the result being the improvement in one's health.

FIXATION OF SPORTING EVENTS

Fixation is a key requirement that, alongside with originality, a sporting event should meet for 80 subsistence of copyright as a dramatic work. The CDPA, s. 3(2), requires a dramatic work to be recorded in 'writing or otherwise'. Thus, in principle, an athletic performance may be fixed by a combination of written form, graphical diagrams and video-replication (Griffith T, 1998, p. 711; Weber, 1999, footnote 123). Symbolic notation, which reduces movements to symbols, may constitute an adequate means to fix choreographed performances, insofar as fixation by means of dance notation systems, such as *Laban* or *Banesh*, has been traditionally deployed for dance.

Aesthetic sports represent an accurate performative fulfilment of what is written in the 81 notation, and to a large extent, athletes do not depart from the instructions imparted to them. It might be maintained, however, that symbolic notation may fix the work but cannot simultaneously capture the *essence* of the athletic performance. Diagrammed notations cannot symbolise the true specific version of performative representation (Waelde, 2014, p. 225). Electronic means, rather than traditional written methods of fixation, allow far more details to be captured. The actual performance, as it is seen and perceived by the audience in all its nuances, will be recorded.

Allegedly, an original dramatic work can be created through performance, rather than through 82 written instructions, since the CDPA does not require a dramatic work to come into being before it is performed. Two copyrights may impinge upon the recording: copyright in the recording itself and copyright in the work recorded (Adeney, 2012, p. 681). The difference becomes apparent in adversarial sports, insofar as the improvised performances of the players on the pitch or field can only be fixed simultaneously by their recording through electronic means.

CONCLUSION

The question of whether an *original* work has come into being in the UK copyright system has 83 often depended on the particular social, cultural and political context in which the judgement was made. What courts perceive as original may change over the time (Bently & Sherman, 2009, p. 96). Furthermore, the uncertain nature of the copyright *work* implies that is difficult to recognise what is a work in first place (Pila, 2010, p. 119).

In the event that a work will have to be determined in purely intangible terms, as the author's 84 intellectual creation, the protection of each contribution may be afforded in the abstract, without categorising it within the exhaustive list of protected subject matter. Nevertheless, the eight categories of work referred to in the CDPA reflect the logical and general understanding of what a work is. For instance, it is logical that a ballet qualifies for copyright protection as a dramatic work.

The natural meaning of *dramatic work* gives rise to the resemblance between this category of 85 work and *choreographed sports*, given that they reveal a large number of formal properties that are *standard* features with respect to the relevant category (Pila, 2010, p. 248). Gymnasts and their coaches devise complex set of moves, which are intended to be performed with a high level of accuracy on a stage, and they are judged in large part on the aesthetic aspect of their performance (Kukkonen, 1998, p. 810). It follows that performers are interpreting a predetermined set act in cohesion with one another, and the play will carry out the same intrinsically choreographed steps as a theatrical play or ballet (Das, 2000, p. 1086).

Adopting the CJEU's terminology, 'creative freedom' may be engaged in the selection and 86 arrangement, within the overall choreography, of the numerous 'free' routines, which are not exclusively subject to technical considerations. Furthermore, routines performed at competitive events are identical to those performed during the rehearsal of non-competitive events. Finally, choreographed sports can move from the competitive sports category into the non-competitive one, and this strengthens their eligibility for copyright protection (Bussey, 2013, p. 32).

A restriction on *creative freedom* imposed by game rules and technical requirements might be 87

more easily established in adversarial sports and routine exercises, such as yoga or Pilates. It has been argued that a scripted sport play is not an authorial contribution of the right kind, and cannot be separated from the game itself (Das, 2000, p. 1094). A diagrammed play only sets the line-ups and tells the players how to move around the field or pitch. The final expressive form would not be in accordance with the original idea contained in the coach's playbook.

In theory, sporting events might be equated with an improvised dramatic piece that can be fixed by electronic means. Two different lines of arguments have been advanced in this regard. Adversarial sports are entertaining and might generate spectacular routines, which arguably could be protected as such under copyright law. Nevertheless, athletic movements exhibited during the play are usually rather simple, repetitive, and mainly dictated by the game rules. 88

Although players may inject elements of individuality in the context of the game, perhaps their contribution is not the right kind of skill and labour, or intellectual creation, to make them authors of an original dramatic work. It has also been noted that English courts have often dismissed mere interpretation from copyright protection, for lack of certainty of subject matter (Laddie, Prescott and Vitoria, 2011, p. 3.47). Furthermore, exercise routines, such as yoga, have been assimilated to a system or process, in which no copyright subsists. 89

It is therefore maintained that there might be legal grounds to provide copyright protection to choreographed sports. Sports command the interest of the public, are entertaining, and have a significant commercial value. It is a matter of debate whether to grant copyright would result into a wider protection than is actually required, with the result that social costs would overpass any dynamic benefit associated with property rights. 90

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Endnotes

iIn aleatoric works many elements of the composition are left to chance or dependent on the performers' or even the audience's interpretation. See, for example, works by the composer John Cage, or by the dramatist Alan Ayckbourn.

iiSee, however: Arnold, 2002, p. 55. The author maintains that each individual match cannot change once it has been played and simultaneously filmed.

iiiMost importantly, *University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch. 601 at 608; *Hyperion Records v Sawkins* [2005] 1 WLR 3281, at p. 31 per Mummery LJ. This was also the approach shown by the House of Lords in *Express Newspapers plc v News (UK)Ltd* [1990] 1 WLR 1320 at 365, after the inclusion of the term 'original' in the CDPA.

ivRahmatian, 2013, p. 11; see, however, Griffith J (2013), stressing the implicit and understated recognition, in Meltwater, of an altered model and concept of 'work'.

vSee also *Temple Island Collections Ltd v New English Teas Ltd* [2012] EWPC 1 at 20-27.

viNote that, in 1984, the U.S. Copyright Office has provided its own definition of choreographic work, clarifying that social dance step and simple routines (i.e. jumping jacks and walking steps) are not copyrightable, but they can still be incorporated in choreography. See Copyright Office, *Compendium II of Copyright Office Practices*, § 450, pp. 400-419. A choreographic work need not tell a story nor be presented in front of an audience to be so classified.

viiLucas A and Lucas HJ, 2006, p. 73: 'the mark of the author's personality'.

viiiGerman Copyright Act 1965, s. 2(2): 'personal intellectual creation'.

ix This doctrine was already established in the late nineteenth century in *Hollinrake v Truswell* [1894] 3 Ch 420. The statutory basis for the idea and expression dichotomy can be found in international instruments, to which the United Kingdom is a party: art. 9(2) of the Agreement on Trade-Related Aspects of Intellectual Property Rights; art. 2 of the WIPO Copyright Treaty; Art. 1(2) of the Software Directive.

xOpinion AG Bot (Case C-393/09) delivered on 14 October 2014, at pp. 75-76.

xiThe 'merger doctrine' in US copyright law. The related doctrine, referred to as '*scenes a faire*', is when the expression embodied in the work necessarily flows from a commonplace idea, which is essential to treat the subject matter. Changing the expression would change the very idea itself.

xiiFor a comparison, see the 7th Circuit's decision in *Seltzer v Sunbrock* 22 F. Supp. 621, at 630 (S.D. Cal. 1938), holding that the description of fictional roller derbies in Seltzer's pamphlets, which were employing the same rules as those engaged in the real roller derbies, were nothing more than a description of a system for conducting races on roller derbies, which at most can be patented.

xiiiFederal Register/vol. 77, No. 121/Friday, June 22, 2012/Rules and Regulations, 37605 ss.

xivA compilation of twenty-six yoga poses (asanas) and two breathing exercises, devised by Choudhury, was registered in 2002. The arranged sequence of yoga postures is called 'Bikram yoga', which has to be practiced in a room heated to more than a hundred degrees Fahrenheit and forty per cent humidity.

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