Introduction: An Information Law Approach to Intellectual Property and Sports

Martin Senftleben, Joost Poort, Mireille van Eechoud, Stef van Gompel and Natali Helberger

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With this collection of essays on intellectual property and sports, we celebrate the enormous achievements of Professor Bernt Hugenholtz in the field of intellectual property and information law. Under his leadership, the Institute for Information Law (IViR) has prospered and grown into an institute of world fame – widely known as a central place of inspiration that brings a diverse group of researchers and academic disciplines together, offers ample room for innovative thinking based on respect for each other's ideas and expertise, and provides training and career opportunities for the next generation of researchers. In fact, Bernt Hugenholtz' strict but fair approach to research work and PhD supervision – giving space for independent thinking while insisting on a critical and rigorous assessment of proposed new concepts and solutions – has led to a very successful school of information law training that regularly enabled alumni to obtain top positions in academia and legal practice.

Perhaps even more importantly, however, Bernt Hugenholtz is a very influential pioneer and champion of the information law approach to intellectual property. His passionate campaign against term extensions and excessive grants of protection, commitment to fair use and the recognition of rights and interests of users in the light of the guarantee of freedom of expression and information, tireless efforts for a copyright contract law that ensures fair remuneration of creative labour, and commitment to Creative Commons and open access, has shaped the intellectual property agenda during the last decennia and impacted the evolution of new law and practice.

With his doctoral thesis, he laid important groundwork for the subsequent debate and critical evaluation of new legal norms in the field of database

protection as early as 1989.[1] The 1995 Conference 'The Future of Copyright in a Digital Environment' – organised in Amsterdam in collaboration with the Royal Netherlands Academy of Sciences (KNAW) as a Royal Academy Colloquium – was a propelling force in establishing information law as a legal discipline and the information law approach to intellectual property as a reference point for the renewal of legal theory, lawmaking and teaching. As many other milestones of Bernt Hugenholtz' work, the proceedings of the Conference have been published in the Information Law Series.[2] After his 1999 inaugural speech 'Sleeping with the Enemy'[3] – a powerful plea for strengthening the position of authors and performers vis-à-vis publishers and producers – the publication of a study (with Lucie Guibault) described avenues towards the implementation of a new copyright contract law and provided important impulses for a new legal regime in the Netherlands.[4] The adoption of a Copyright Contract Act providing a robust set of author's contract rights followed in 2015.[5] Various studies for the European Commission and other international policymakers, such as *The Recasting of Copyright and Related Rights for the Knowledge Economy*[6] and *Trends and Developments in Artificial Intelligence: Challenges to the Intellectual Property Rights Framework*[7] followed. Further groundbreaking publications, such as *The Future of the Public Domain – Identifying the Commons in Information Law*,[8] *Harmonizing European Copyright Law*,[9] and *Copyright Reconstructed*,[10] appeared in the Information Law Series. As founder and Series Editor, Bernt Hugenholtz has taken care of the selection and publication of more than forty-five high quality book publications since the introduction of the Information Law Series in 1991. Further examples of Bernt Hugenholtz' achievements and impactful work could easily be added.

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1. Bernt Hugenholtz, *Auteursrecht op informatie*, (Kluwer, Deventer, 1989).
2. Bernt Hugenholtz (ed.), *The Future of Copyright in a Digital Environment* (Kluwer Law International, The Hague/London/New York, 1996).
3. Bernt Hugenholtz, *Sleeping with the Enemy – Over de verhouding tussen auteurs en exploitanten in het auteursrecht* (Vossiuspers Amsterdam University Press, Amsterdam, 1999).
4. Bernt Hugenholtz and Lucie Guibault, *Auteurscontractenrecht: naar een wettelijke regeling?* (IViR, Amsterdam, 2004).
5. Wet auteurscontractenrecht of 30 June 2015, available at https://wetten.overheid.nl/BWBR0036745/2018-09-19.
6. Bernt Hugenholtz, Mireille van Eechoud, Stef van Gompel et al., *The Recasting of Copyright & Related Rights for the Knowledge Economy* (IViR, Amsterdam, 2006).
7. Christian Hartmann, Jacqueline Allan, Bernt Hugenholtz, João Quintais, Daniel Gervais, *Trends and Developments in Artificial Intelligence: Challenges to the Intellectual Property Rights Framework* (European Commission/IViR/ Joint Institute for Innovation Policy, Brussels, 2020).
8. Lucie Guibault and Bernt Hugenholtz (eds.), *The Future of the Public Domain – Identifying the Commons in Information Law* (Kluwer Law International, The Hague/London/New York, 2006.
9. Mireille van Eechoud, Bernt Hugenholtz, Stef van Gompel, Lucie Guibault and Natali Helberger, *Harmonizing European Copyright Law: The Challenges of Better Lawmaking*, Information Law Series 19 (Kluwer Law International, Alphen aan den Rijn, 2009).
10. Bernt Hugenholtz (ed.), *Copyright Reconstructed. Rethinking copyright's economic rights in a time of highly dynamic technological and economic change*, Information Law Series 41 (Kluwer Law International, Alphen aan den Rijn, 2018).

Turning to the collection of essays in this edited volume, it is noteworthy that the focus on sports-related intellectual property issues – following Bernt Hugenholtz' suggestion for the 2021 IViR Conference 'Intellectual Property and Sports' – offers an ideal starting point for exploring core questions and regulatory dilemmas of information law. Sport-related news and information on sports events has particular value – not only from an economic but also from a broader cultural and societal perspective. Impressive individual sporting achievements, as well as organisational efforts and financial investments of clubs and sports associations raise complex and delicate questions as to the availability and desirability of legal protection, sufficient room for disseminating sports events and related information, and the reconciliation of available protection with freedom of expression and information, and freedom of the press. At the same time, legal rules in the area of sports and intellectual property evolve in a climate that is pervaded by powerful lobby pressures. As other societal phenomena with a strong information law dimension, new technologies have a deep impact on developments in the sports arena.

Against this background, it may come as a surprise that the arsenal of legal protection tools in intellectual property law is still in flux. While branding and merchandising efforts may lead to trademark portfolios, the legal status of individual player performances and organisational efforts of sports event organisers is much less clear. Protection under copyright law may be unavailable for sports events as such. Protection against unfair competition only enters the picture on a case-by-case basis. Leading case law in the field of database protection, however, attests to the central importance of one of Bernt Hugenholtz' particular areas of expertise – database law and database rights – to the regulation of revenue streams and rewards for investment in the area of sports.

The essays in this volume address this panoply of fascinating information law issues through widely varying lenses and in different styles. Reflecting the broad academic network and worldwide impact of Bernt Hugenholtz' work, the authors from both sides of the Atlantic are not only prominent experts in the field of information and intellectual property law. Many are co-authors and/or co-editors of one or more of Bernt Hugenholtz' many publications, and have become friends of Bernt in the process. The analysis focuses first on the sporting achievements of players and the commercialisation of player popularity (Part 2) before turning to sports clubs and their substantial investment in event organisation, branding and merchandising (Part 3). After this exploration of legal issues and protection interests arising from the activities of central protagonists in the sports arena, the rules of the game, the value of event data and the need for freedom of event reporting enter the picture in Part 4. A discussion of the impact of new technologies and potential future scenarios for sports and intellectual property law completes the analysis in Part 5. The concluding Part 6 offers an intriguing reflection on the different contributions to this edited volume.

In Part 2 – exploring the legal position and protection interests of players – *Willem Grosheide* opens the discussion with an essay about the desirability of intellectual property protection for sports achievements. Examining the substantive criteria and case law of the CJEU, he arrives at the conclusion that elements of sports

can enjoy copyright protection under certain circumstances, but that a non-legal approach to protect sports performances is preferable. Continuing with a focus on individual movements, *Séverine Dusollier* asks whether intellectual property law, and copyright law in particular, vests individual ownership or reward in sports moves, dance moves or other moves. She concludes that it would be ill-advised, for various reasons, to recognise that someone's movements attract copyright, however genius or skilful they might be. Composing a text choreography of her own, *Marie-Christine Janssens* explores the intricacies of copyright protection for choreographies in the field of dance and ballet. She points out that established copyright criteria do not neatly fit all aspects of choreographic works, showing that copyright law is incapable of protecting all genuine creative achievements in modern dance and ballet. Turning from dance moves to the art of manoeuvring in chess, *Gerard Schuijt* takes the reader back to the writings of copyright's doctrinal giants like Josef Kohler in his essay querying why copyright law has so little to offer chess players. Honing in arguments that (great) players have distinctive styles of playing, the contribution clarifies why one must take the 'personal style' as an argument for copyright with a large grain of salt.

Abandoning the focus on sports achievements and switching to player popularity and individual player characteristics, *Thomas Dreier* reflects on the ownership of tattoos, such as those worn by sports celebrities, from a cultural-historical, social-aesthetical and legal perspective. On the basis of German and US law, he discusses possible copyright and data protection implications of realistically depicting tattoos of sports players in videogames. *Egbert Dommering* discusses portrait rights and their somewhat contrived relationship with copyright law using a well-known ruling of the Dutch Supreme Court on the portrait of Johan Cruijff, one of the most famous footballers of all time. Placing the Cruijff case in the wider context of privacy protection, he shows how Dutch courts edge towards developing the commercial side of privacy law as property law. *Feer Verkade* continues the discussion of commercial aspects of rights in personal portrayal. Drawing a parallel with the position of authors in their relationship with publishers, he raises the question whether sports celebrities, and portrayed persons more generally, should be placed in a better legal position when entering into contractual agreements about the exploitation of their portraits. He proposes a 'Lex Hugenholtz II': a new set of norms akin to the contractual protections for authors which Bernt Hugenholtz was instrumental in framing in the Netherlands.

Turning to questions arising from merchandising, *Paul Torremans* explores legal strategies which the merchandising industry may deploy to ensure protection for the commercial exploitation of products relating to sports celebrities and their attributes. More specifically, he scrutinises the tort of passing off and the three requirements of goodwill, misrepresentation, and damage that constitute key tests in UK law. Finally, *Thomas Riis* analyses case law addressing the use of sports data and player characteristics in the production of computer games that put the player in the position of a team manager. Popular sports manager games based on European handball championships and Olympic games have given rise to the question whether the use of players' names and characteristics infringes personality rights.

In Part 3, the investments, organisational efforts and branding activities of sports clubs occupy centre stage. Opening the discussion, *Stef van Gompel* draws attention to the fact that major sports organisations, such as the International Olympic Committee, FIFA, UEFA, Formula One and Tour de France, have combined their efforts to initiate policy debates at the World Intellectual Property Organisation and the EU legislative bodies to ensure the recognition of the value of sport and protect sports events through intellectual property law. In the light of efforts to prevent piracy of sports event broadcasts, he discusses recent endeavours undertaken by sports event organisers to preserve the broadcast business model for live sports coverage and contrasts them with critical accounts in legal scholarship, including those of Bernt Hugenholtz. Surveying the arsenal of existing protection tools – ranging from 'house rights' to specific 'audiovisual rights' that may be available in certain national systems – *Raquel Xalabarder* contrasts the ownership and control position of sports event organisers with the legal position of individual players who may show an impressive performance during a sports event, while not being eligible for neighbouring rights protection because of the requirement that the performance be connected to a work. The analysis conducted by *João Pedro Quintais* confirms that sports event organisers enjoy multi-tiered protection against unauthorised online transmissions on the basis of copyright, neighbouring rights and specific national legal regimes. They also benefit from various enforcement measures, including notice and action procedures, and blocking injunctions. While highlighting the fragmented nature of available protection tools, Quintais warns that new initiatives aiming at broader protection are likely to neglect the need for adequate substantive or procedural safeguards for due process and freedom of expression. *Thomas Hoeren* draws a comparison between exclusive rights that can be invoked with regard to carnival parades and protection tools that are available in the area of football. His analysis sheds light on a paradox: while copyright in individual scales and costumes can be invoked to protect the Rose Monday procession, these rights are tacitly waived in practice. In professional football, by contrast, copyright protection is difficult to justify. Nonetheless, football clubs claim broadcasting rights. Seeking to strengthen the legal position of both players and clubs, *Antoon Quaedvlieg* argues in favour of new intellectual property rights for players as a natural reward for the performance shown during sporting events. He points out that the creation of a right for players could be accompanied by a new neighbouring right for sports event organisers as entrepreneurs. Following a different rationale, this neighbouring right could offer investment protection. However, its term of protection should be very short to avoid inroads into freedom of information.

In contrast to this plea for a new neighbouring right, *Dirk Visser* concludes on the basis of a survey of specific intellectual property protection regimes that have been established in addition to copyright, patent and trademark protection, that it may be preferable to leave it to the courts to decide on a case-by-case basis whether an activity raising doubts about adequate protection should be covered by unfair competition law or one of the aforementioned central intellectual property rights. Instead of creating new sui generis protection regimes for every new phenomenon, he recommends the cultivation of unfair competition law as a safety net in cases where copyright, patent and trademark protection

are unavailable. Exploring protection avenues in unfair competition law, *Ansgar Ohly* analyses Anglo-Australian, US, German and French case law. He concludes that unfair competition law is strong in the area of misrepresentation where it safeguards sports organisers' rights and protects the interests of fans, for instance, by prohibiting the sale of black-market tickets and preventing false impressions of sponsorship. As a shield against the misappropriation of investments and organisational efforts of sports clubs, however, unfair competition law is weak. Given the flexibility and case-sensitivity of the doctrine, unfair competition law fails to provide a proper basis of markets for broadcasting rights. Focusing on the specific issue of (unauthorised) ticket resales, *Joost Poort* explores the phenomenon from an economic perspective and considers practices of reselling sports tickets and concert tickets. He concludes that, given the economic logic behind ticket resale, 'fighting it is like arm-wrestling with Adam Smith's invisible hand.'

The final discussion points in Part 3 concern branding activities. *Neil Netanel* provides a thoughtful and thought-provoking discussion of how trademark law should address the use of ethnic references as sport brands, in particular where ethnic references are used as badges of honour for particular minority groups, but where such uses could also easily be abused or cause sensitivities and even offence to the very same groups. The essay has been inspired by the Ajax 'Jews'. However, it also explains how US courts have dealt with the issue of ethnic references in cases relating to Braves, Chiefs, Warriors, Redskins, Squaws, and Dykes on Bykes. Discussing use of the name of the Greek hero 'Ajax' as a trademark for the Amsterdam football club, *Martin Senftleben* queries whether a cultural sign loses its value for cultural creativity if it is adopted as a trademark and, as a result of branding efforts, is no longer primarily perceived as a cultural sign, but rather as a commercial marketing instrument. He concludes that freedom of expression and freedom of information should play a bigger role in decisions about the grant of trademark rights in cultural signs.

After this foray into legal issues surrounding players and clubs, Part 4 brings sports events and related information into focus. Focusing on the protection of sports data, *Mireille van Eechoud* looks at the place of the Database Directive and sport-related milestone rulings of the CJEU in the Data Strategy of the European Commission. She predicts that the EU Data Strategy will not have a profound impact on sports data markets directly. Given the objective to facilitate the sharing of data, as opposed to subjecting it to exclusive rights, however, there might be significant indirect effects, such as the adoption of a harm-based infringement criterion, or the introduction of a spin-off criterium excluding sui generis database rights in data collections that result from a producer's main activities. *Matthias Leistner* scrutinises the functionality doctrine developed in the CJEU's case law in relation to copyright-protected works, which also holds relevance for the protection of collections of football fixtures and football matches. He shows that, despite its imperfections, the CJEU's functionality doctrine actually allows national courts to develop workable criteria to effectively carve out functional elements from the domain of copyright protection. From the perspective of US law, *Pam Samuelson* unpacks the extent to which copyright law offers protection to the various creative aspects of games, ranging from the initial game design

and the articulation of game rules to selections and arrangements of information about games and their players. However, her analysis shows that copyright has little to offer when it comes to the protection of games (or sporting events) in themselves, which is largely due to the functional nature of games as systems. *Ole-Andreas Rognstad* discusses the conditions for intellectual property protection of sporting events against the background of the Premier League decision of the CJEU. He emphasises that the intellectual property protection of sporting events is subject to the limitation that follows from the guarantee of the free movement of services in primary EU law. As a result, the invocation of intellectual property protection to prevent the cross-border dissemination of content in the EU must have a justification based on the opportunity to acquire 'adequate remuneration' for the exploitation in question. In line with Bernt Hugenholtz' vision of a unitary European copyright regime, no restrictions can be based on territoriality in itself. Exploring options for awarding copyright protection, *Lionel Bently* examines the conditions for protecting the football game as a creative work for copyright purposes. Providing numerous examples of creative passages of play in football games, many of which are so notorious that they be instantly recalled by regular football watchers, he argues that no convincing reasons have been put forward by the CJEU to exclude at least parts of many football games from EU copyright law.

Returning to the Premier League decision, *Christina Angelopoulos* draws attention to problems arising from the UK's failure to distinguish properly between copyright and related rights in films. As a result of the UK legislator's initial failure to appreciate the need, under international copyright law, to protect cinematographic works as such, films have developed into a known problem area in UK copyright law which cannot be rectified until the UK's closed list of subject matter is amended to separate the protection granted to film creators from that given to film producers. Continuing the discussion of the protection status of audiovisual material, *Tatiana Synodinou* analyses the protection of sports event broadcasts as original works in EU copyright law. Putting the filming of sports events to the CJEU's originality test, she concludes that while a sports event as such cannot be protected by copyright, its audiovisual coverage can attract copyright protection since various creative choices can be made before, during and after the filming of the event as well as in the ancillary content included in the live sports broadcast. *Reto Hilty* deepens the discussion by focusing on photography and the question whether protection on the basis of related rights could be justified in the case of photographs not meeting the originality threshold in copyright law. His analysis shows that, from a purely economic perspective, any justification for protecting photographs below the threshold of copyright has lost relevance in the digital environment. With the boom in image production and dissemination via online platforms for user-generated content, an indication of market failure is sought in vain. Nonetheless, there may be fairness-based reasons that could justify the protection of certain groups of photographers and film producers below the threshold of copyright law. Protection could be granted, for instance, to those who depend on the exclusive exploitation of their products, which may include amateurs who wish to commercialise them now and then.

In the final essay of Part 4, *Peter Jaszi* discusses the need for copyright exemptions that allow the use of a short clip of sports-related material without

permission or payment in a new narrative context. More specifically, he discusses new avenues in the interpretation and application of the US fair use doctrine in the light of Google v. Oracle. With regard to the first fair use factor concerning the 'purpose' of the use, his analysis identifies useful clarifications and answers to unresolved questions. The central element, however, concerns the analysis of economic consequences from unlicensed uses that the fourth fair use factor mandates. In this respect, Google v. Oracle introduces a whole new category of considerations that have the potential to broaden the inquiry substantially by taking public value added into account along with private monetary losses.

Part 5 of the analysis discusses the impact of new technologies and scenarios for the future of sports and intellectual property. *Paul Goldstein* discusses two central developments in US case law that threaten to tilt liability disproportionately away from equipment and service providers: the judge-made requirement that in order to avoid the imposition of 'unreasonable liability' only conduct animated by 'volition or causation' should be treated as direct infringement; and the expansion of the fair use defence to exonerate not only widespread non-commercial uses, such as home taping, but also transformative uses. The reduction of primary liability as a result of the expansion of the fair use defence, inevitably, erodes the basis for a finding of secondary liability and reduces the occasions for secondary liability of equipment or service providers. Turning to developments in Europe, *Christophe Geiger* critically discusses the European digital agenda, and the need to modernise and adapt the intellectual property framework to the digital environment, data-driven practices, and opportunities arising from artificial intelligence. Highlighting the particular importance of breathing space for text and data mining to the development of AI-driven services and applications, he argues that the current copyright framework in the EU fails to offer sufficient room for text and data mining – a lack of flexibility that is likely to have a negative impact on innovation. In their analysis of attitudes regarding the use of AI in refereeing, *Natali Helberger* and *Brahim Zarouali* explore a very practical and pressing question that everyone interested in sports undoubtedly grapples with: will AI replace referees? And if it does, can we expect this to be a change for the better or worse? The chapter is also a tribute to Bernt Hugenholtz' openness to interdisciplinary approaches in information law, understanding the role of new technologies and evidence-based policy making. *Thomas Vinje* discusses the relationship between intellectual property and competition law in the context of e-sports. He concludes that market definition is likely to play a central role in future competition law issues in this area.

With regard to future scenarios, a rather exotic contribution stems from the mysterious author *Just Szynkovid*, giving an account of a discussion between an intellectual property lawyer and his AI-parrot about drafting an intellectual property scheme for Mars. *Daniel Gervais* introduces Jaap, a law professor at the University of Amsterdam, who is trying to teach his students about liability of robots, before bumping into Emeritus Professor H., who is disgruntled about robots who have taken over the noble game of football.

Finally – looking back on the collection of essays in Part 6 – *Martin Kretschmer* takes us to a fantasy future where the Hugenholtz League (editors and

authors of this volume) is kicking off for its twenty-fifth season of professional academic e-gaming. This piece of fantasy offers legal analysis of the nature of e-sports, as well as veiled critique of academia and developments in science publishing.

At the end of this introductory chapter, we would like to thank all authors for the preparation of contributions to this collection of essays in honour of Bernt Hugenholtz – despite all unforeseen challenges and difficulties that have evolved during the corona pandemic. We are very grateful for the excellent organisational work and support provided by Anja Dobbelsteen and Margriet Pauws-Huisink at IViR, the strong support for this special project which the editor, Christine Robben, offered at Wolters Kluwer, and the very diligent and incredibly fast copy-editing carried out by Steve Lambley. Our special thanks go to Gerrit de Jager who used his ingenuity to provide illustrations for several essays.