Get a Move On: Copyright in Movement[1]

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Minister: Good morning. I'm sorry to have kept you waiting, but I'm afraid my walk has become rather sillier recently, and so it takes me rather longer to get to work. Now then, what was it again?

Mr. Pudey: Well sir, I have a silly walk and I'd like to obtain a Government grant to help me develop it.

Minister: I see. May I see your silly walk?

Mr. Pudey: Yes, certainly, yes.

(He gets up and does a few steps, lifting the bottom part of his left leg sharply at every alternate pace. He stops.)

Minister: That's it, is it?

Mr. Pudey: Yes, that's it, yes.

Minister: It's not particularly silly, is it? I mean, the right leg isn't silly at all and the left leg merely does a forward aerial half turn every alternate step.

Mr. Pudey: Yes, but I think that with Government backing I could make it very silly.

Minister: (rising) Mr. Pudey, (he walks about behind the desk in a very silly fashion) the very real problem is one of money. I'm afraid that the Ministry of Silly Walks is no longer getting the kind of support it needs. You see there's Defence, Social Security, Health, Housing, Education, Silly Walks … they're all supposed to get the same. But last year, the Government spent less on the Ministry of Silly Walks than it did on National Defence!

1. This article expands on a former dialogue we held, Valérie-Laure Benabou and myself, on copyright in movement in 2008 in Brussels, during the Jonctions festival organised by the artists collective Constant. It has been partially published as V.L. Benabou and S. Dusollier, 'Du droit d'auteur sur les mouvements, de l'interprétation du droit d'auteur', *Le journal des laboratoires,* Les Laboratoires d'Aubervilliers (May–August 2012), 26–33.

> Now we get £348,000,000 a year, which is supposed to be spent on all our available products.[2]

Bernt Hugenholtz would certainly immediately recognise this dialogue, extracted from one of the most famous Monty Python sketches. John Cleese, one pillar of the British troupe, was already a source of inspiration for one of Bernt's most brilliant and funniest lectures on copyright exceptions, 'Fierce creatures – Copyright Exemptions: Towards Extinction?'.[3] I heard him delivering that talk in Amsterdam in October 1997, during one of the EU-funded IMPRIMATUR conferences that then gathered all stakeholders and scholars who mattered around the nascent topic of digital rights management in copyright. For a young researcher starting her career in a satellite research project on the same theme, as for a confirmed academic alike, Bernt's publications and conferences have always been stimulating and thought-provoking. 'Fierce creatures' was one of the first attempts in copyright scholarship to distinguish between exceptions and strengthen their existence in the digital environment. As with many of his publications, it has become a classic.

But let's come back to silly walks, which give me the pretext to talk about copyright in movement, the only topic that my complete absence of interest in sports could most closely associate with the topic of IP and sports, to which this *Festschrift* is dedicated. John Cleese plays the Minister in charge of development of silly walks and assesses the merit of a walk performed by Michael Palin in order to grant him some subsidy to further develop his particular walk. Behind the hilarious walks performed by the actors, this sketch is an interesting allegory to rights in valuable intangible products. Only walks that go beyond banality could get a grant helping individuals to support and develop their particular walk, upon condition of its silliness (the walk, not the individual).

This policy of supporting innovation and originality in ways of walking is of paramount importance, according to the Minister, as much as health, education or national defence. As in intellectual property, the objective is incentivisation, as well as a matter of national development of 'walkative' innovation, to be able to compete with the outstanding Japanese or Israeli walkers Cleese refers to later on in the sketch. Compared to our intellectual property system, the grant does not appear to confer any exclusivity or property right in the walk, only a State-supported award to enhance its development, which is a rather different model to incentivise intellectual innovation. However, by definition, the walk will be proper to one individual as it would convey his or her idiosyncratic gait, as a fact if not by law. Each silly walker will 'own' it in a way.

Could our intellectual property system, and particularly copyright, similarly vest some individual ownership or reward in movement?

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2. Transcript of 'The Ministry of Silly Walks' sketch from the television show *Monty Python's Flying Circus*, series 2, episode 1, first aired on 15 September 1970.
3. P. Bernt Hugenholtz, 'Fierce creatures – Copyright exemptions: Towards extinction?', in *Rights, Limitations and exceptions: Striking a proper balance*, Conference IFLA/IMPRIMATUR, Amsterdam, 30–31 October 1997.

The closest the CJEU got to address this question was in the *Football Association Premiere League* case and the issue of copyrightability of football matches (back to sports!). When the judges in Luxembourg had to decide whether a football match could be a copyrighted work, they largely avoided the question, or to use a sporting metaphor, they kicked the ball into touch (it might work better with the French expression '*botter en touche*'). Instead, the European jurisdiction resorted to originality by considering that 'football matches, … are subject to rules of the game, leaving no room for creative freedom for the purposes of copyright'.[4] This assertion is more than contestable as originality and creative choices might have a place even when creation is constrained by rules. Football fans could also blame the Court for its indifference to the genius of football players and the creativity they deploy in the game.

Anyway, the decision did not really solve the copyrightability of a sporting move in itself, such as a penalty kick, a skating jump, a rugby pass, an elegant dive or any graceful gymnastic figure. If the athletes who 'create' or embody them could sometimes have their names associated with them in a permanent way, could they also enjoy an exclusive right or a monopoly therein?

Without pretending to carry out an extensive overview of the issue of IP rights in sports,[5] I will rather idly explore the issue, before expanding the question of copyright in any type of movement and its recent digital embodiment.

1. TESTING THE COPYRIGHTABILITY OF SPORTING MOVEMENT

Copyrighting sporting movement is a 110-metres hurdles event. A first obstacle is the notion of literary and artistic work. This concept is not limited to the artistic or cultural field, yet the expression needs to be conveyed in a literary or artistic medium or form.

A move in sports has a function: a good move would be to score or outrun other players; it is useful and aims for success.[6] Conversely the objective of a copyrightable work is not a matter of utility but of aesthetics. The work does not need to be beautiful, it can be ugly, but it seeks an aesthetic expression, irrespective of its possible usefulness. Yet numerous works protected by copyright are situated on the indistinct blurry border between aesthetics and utility, and it is certainly true with some sports.[7] For instance, artistic skating or synchronised swimming are a hybrid between choreography and sportive performance and skill.

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4. CJEU, 4 October 2011, C403/08 & C429/08, ECLI:EU:C:2011:631, *Football Association Premiere League*, para. 98. However the CJEU recognised the possibility of protection of the broadcast of the match. See also, *Baltimore Orioles, Inc., v. Major League Baseball Players Association,* 805 F.2d 663 (7th Cir., 1986) (admitting the copyrightability of the telecasts of baseball games, as audiovisual works).
5. Such an extensive analysis can be found in the excellent paper by Peter Mezei, 'Copyright Protection of Sport Moves' in Enrico Bonadio and Niccola Lucchi (eds.), *Non-Conventional Copyright* (Edward Elgar, Cheltenham, 2018), 271–297.
6. *Ibid*., 279.
7. *Ibid*., 281 et seq., for a comprehensive and fascinating empirical study of the role of creativity and functionality in different sports.

The functionality of a work is not in itself an obstacle to copyright protection, but in the *Brompton* decision, the CJEU insisted that the technical effect of a work should however leave enough space for free and creative choices to satisfy the condition of originality.[8]

Another hurdle is the possible lack of intentional creation. Indeed a work is eligible to copyright if it results from an act of creation. Many copyright laws state that the work is protected *from* the act of creation, which not only precludes any formality or registration, but also relates the subject matter of protection to a creative 'act'. Can it be read as requiring some level of consciousness of the creation or of the creation process?[9] I would say yes. Likewise, Bernt Hugenholtz once wrote, in a critical comment of the *Endstra tapes* case in the Netherlands that addressed the question of copyrightability of conversations,[10] that creation is by its very nature a conscious human act.[11] Spontaneous works, created on the spur of the moment, could benefit from copyright protection, but only if that spontaneity partakes of a process that is thought of as creative. Whereas the silly walker consciously walks in that fashion after much effort and investment, my own walk might be ridiculous, but I am not consciously creating it, nor am I improvising it in a creative frame. If some sporting moves are the outcome of thoughtful consciousness, others might be highly improvised. That intentionality of creation might distinguish again between the skater and the footballer.

Relatedly, the CJEU requires that the work could be identified with sufficient precision and objectivity,[12] a condition that it borrows from trade mark law. I disagree with that additional condition as there is no need in copyright law, in contrast to trade mark law, to ascertain the exact scope of the object to be protected: copyright works can be subjectively perceived and are to some extent indeterminate. Choreographic moves might be improvised but still protected, and the necessary delimitation of the scope of protection is an evidentiary issue, not a condition for protection.

Yet, the Spanish Supreme Court has applied this requirement of a precise and objective determination of the work to deny copyright protection to moves of a matador during a bullfight.[13] The sequence that was registered by the matador consisted in a shift of hands from one side to the other that distracts the animal and enables the man to bypass the bull. The Spanish judges held that, despite the possibility to make beautiful movements and figures, the sequence cannot be copied as it would depend each time on uncertainty introduced by a different

8. CJEU, 11 June 2020, C-833/18, ECLI:EU:C:2020:461, *Brompton Bicycles*, para. 26.
9. See on that point, André Lucas, Agnès Lucas-Schloetter and Carine Bernault, *Traité de propriété littéraire et artistique* (5th edn., LexisNexis, Paris, 2017), 77, as well as the Swiss Federal Court decision (14 June 1990, *ATF* II 116 351) granting copyright to messages pronounced by a medium in trance. In the Netherlands, the Hoge Raad has refused to impose a condition of conscious choice, see Hoge Raad, 30 May 2008, *Zonen Endstra v. Nieuw Amsterdam,* NJ 2008, 556, commented by P. Bernt Hugenholtz, 'De Endstra tapes', *Ars Aequi* (November 2008), 1–4.
10. Hoge Raad, *supra*, note 9. That decision held that no intentionality of creation is required.
11. Hugenholtz, *supra*, note 9, 4.
12. CJEU, *Brompton*, *supra* note 8, para. 32.
13. Tribunal Supremo, sala de lo Civil, 16 February 2021, Sentencia núm. 82/2021.

bull and its random behaviour.[14] The requirement of reproducibility introduced in that decision is however not a condition for copyright protection.

A further requirement for protection is originality. To enjoy copyright, the move, whether in sport or in daily life, needs to result from creative choices and reflect the personality of its author. On that ground, the court of appeals of Paris declined to recognise copyright protection in a sequence of moves performing some form of martial art, considering that such a performance consisted in a series of technical and codified positions that did not convey a personal or original choreography,[15] even if such moves were re-enacted during an event promoting this sport, thus choreographed to some extent, and not during a fight or competition. As seen above, the CJEU similarly denied copyright protection to football moves due to the existence of the rules of the games that prevent creative choices. The moves of a matador during a bullfight are likewise devoid of free and creative choice by reason of the many constraints and rules of corrida, according to the Spanish Supreme Court.[16]

2. MOVES AS IDEAS

The requirement of originality excludes banal movements, such as kicking a ball, jumping, flicking, or scratching one's nose. But what about a succession of banal movements? If I scratch my nose six times in a row, before pulling my ear,[17] would this sequence of moves gain in originality? Is it a matter of degree then? Or should the originality be found only in sequences of moves, that are closer to choreography, for they convey creative and intentional choices?

Formulating the question as such is close to considering simple movements as the basic blocks for an expression that could be subject of copyright, like notes or words that in themselves are not protected. Moves would be the basic vocabulary that could never be monopolised or subject to private and exclusive rights. They would belong to the category of ideas, immune from copyright protection, or would not amount to an intellectual creation.[18]

On that ground, a US court of appeals refused copyright protection to a sequence of twenty-six yoga poses and two breathing exercises.[19] More precisely the sequence of postures was considered as a process to maintain optimal

14. The judges compared it with choreography where a system of notation enables the movements of the dance in which the original creation of the author consists to be identified with precision and objectivity.
15. Cour d'appel de Paris, 14 décembre 2007, *Hassane Thierry Guerrib et Frank Delhaye v. Européenne de Magazine*, *Propr. intell.*, 2008, 225, obs. Jean-Michel Bruguière.
16. Tribunal Supremo, *supra* note 13.
17. Some contemporary choreographers excel in the art of combining banal movements.
18. By analogy, CJEU, 2 May 2012, C-406/10, ECLI:EU:C:2012:259, *SAS Institute*, para. 66 ('the keywords, syntax, commands and combinations of commands, options, defaults and iterations consist of words, figures or mathematical concepts which, considered in isolation, are not, as such, an intellectual creation of the author of the computer program').
19. *Bikram's Yoga College of India, L.P., v. Evolation Yoga, LLC, et al.*, 803 F.3d 1032 (9th Cir. 2015).

health 'which primarily reflects function, not expression'. The decision held that: 'successions of bodily movement often serve basic functional purposes. Such movements do not become copyrightable as "choreographic works" when they are part and parcel of a process.' Even beyond that particular sequence of yoga *asanas* that the court of appeals would connect with a healing function, the decision hints at the impossibility that movements in themselves would be eligible to copyright protection on the ground of the idea/expression dichotomy:

> Our day-to-day lives consist of many routinized physical movements, from brushing one's teeth to pushing a lawnmower to shaking a Polaroid picture, that could be (and, in two of the preceding examples, have been) characterized as forms of dance. Without a proper understanding of the idea/expression dichotomy, one might obtain monopoly rights over these functional physical sequences by describing them in a tangible medium of expression and labeling them choreographic works. The idea/expression dichotomy thus ensures that expansive interpretations of the categories enumerated as proper subjects of copyright will, '[i]n no case', extend copyright protection beyond its constitutional limits.

According to this reasoning, isolated movements would not be protected, constituting basic blocks of expressions or mere ideas, nor sequences of movements that pursue a determined function. This decision walks a fine line between the exclusion of functions from copyright and the idea/expression dichotomy. A similar argument can be found in the Spanish decision about bullfighting as the matador did not claim protection in individual passes that are the basic vocabulary of that 'sport', but only in a specific sequence he deemed original and personal.

Would that leave the door open to sequences of movements that are not properly functional? Copyrighting a walk would then be impossible, but copyrighting a silly walk that stands in the way of the normal function of moving forward could be.

Choreographic sequences of movements, even trivial ones, have been protected by copyright in many countries, if they are creative and original.[20] For instance a scene in a ballet consisting of a dancer crossing the stage at a slow pace, with TV sets attached to his feet, interrupted by a pause, is a work of authorship, but the slow-paced walk in isolation would not be.[21]

3. MOVING IN DIGITAL STEPS

If simple moves generally do not claim copyright protection, very brief sequences of moves might raise some issues, as demonstrated by recent litigations related to dance in digital contexts. In the US, several copyright infringement suits were filed against Epic Games, the company owning the Fortnite game, by individuals who had developed a particular dance move or routine, to stop their moves from

20. See the contribution by Marie-Christine Janssens in this volume.
21. Civ. Bruxelles (cess.), 27 February 1998, *Frédéric Flamand v. Maurice Béjart*, *J.L.M.B.*, 1998, p. 821; Court of Appeal of Brussels, 18 September 1998, *I.R.D.I.*, 1998, p. 346.

being used as 'emotes' by digital avatars in the game, emotes being movements that an avatar performs to express emotions. Dances performed on TikTok have also resulted in reappropriation in digital form, in Fortnite or in other contexts. The creators of the dance routine are mostly unhappy that they are not credited when the dance is integrated into a video game or any other commercial product, but they sometimes seek financial compensation too.

Most of the time, the movement at stake is rather short and could not easily qualify as a choreography. One example is the claim made by the rapper 2 Milly that his Milly Rock Dance[22] was reproduced without his authorisation as an 'emote' performed by an avatar in season 5 of *Fortnite*.[23] Actually the portion of the dance reproduced by the digital character is limited to two or three postures and basic moves, consisting, according to the rapper, in 'a side step to the right while swinging the left arm horizontally across the chest to the right, and then reversing the same movement on the other side'.

The rapper finally withdrew his suit[24] and the registration of the dance was refused by the US Copyright Office,[25] but comments thrived on the web on the issue of admitting a monopoly on a dance step and routines, and their proper delineation from copyrightable choreographies. The Copyright Office has also rejected the registration of the so-called Carlton dance, first performed by Alfonso Riveiro in the Fresh Prince of Bel-Air, and faithfully reproduced by another Fortnite emote, for being too simple.[26] The Copyright Office dictum is supported by its circular on copyright registration of choreography and pantomime that indicates that 'choreography and pantomimes consisting of ordinary motor activities, social dances, commonplace movements or gestures, or athletic movements may lack a sufficient amount of authorship to qualify for copyright protection'.[27] Among the moves ineligible for protection, the circular evokes individual movements, dance steps, yoga positions, simple routines, social dances, functional physical movements, athletic movements, ordinary motor activity, skateboarding or

22. That can be seen at https://www.youtube.com/watch?v = MWkJAE9J9SM.
23. The copied movement can be seen at https://www.youtube.com/watch?v = LRTEFcB1zSI.
24. For recent news on that case and other suits against Epic Games, see A.J. Park, The dance-off ends: a (partial) resolution to Fortnite's slurry of copyright law-suits, 17 November 2020, available at https://www.lexology.com/library/detail.aspx?g = 32bcca55-88e7-4b47-92de-52e8bfc5762e.
25. With a disputable motivation as choreographic works are said to be reserved to performances by skilled dancers for an audience, whereas 'social dances' and similar movements not created by professional dancers would be excluded from this definition (quoted in M.A. Weiss, 'Copyrighting a dance step? Between a Hard (Milly) Rock and a Copyright Office', *The 1709 Blog,* 18 February 2019, available at http://the1709blog.blogspot.com/2019/02/copyrighting-dance-step-between-hard.html). That would exclude urban dances from copyright protection which conveys an inadmissible racial and social bias.
26. E. Harris, 'Carlton Dance Not Eligible for Copyright, Government Says', *New York Times*, 15 February 2019, https://www.nytimes.com/2019/02/15/arts/dance/carlton-dance.html
27. Available at https://www.copyright.gov/circs/circ52.pdf. See also chapter 800, sections 805 and 806 of the *Compendium of US Copyright Office Practices,* available at https://www.copyright.gov/comp3/chap800/ch800-performing-arts.pdf.

snowboarding tricks or routines not performed by humans.[28] The Monty Pythons would have had a hard time registering their silly walks!

4. THE MOVING SUBJECT

Last but not least, an issue in copyright and movement is the presence of a body, which is the indispensable vehicle of the movement, its 'embodiment'. Movements are performed by bodies, whether athletes, dancers or John Cleese.

Who owns the move then? Its creator, or the body who performs it? They are the same for sporting moves and silly walks, but not necessarily for other sorts of movement, choreographic or not, and the dividing line between a copyright and performer's right here might be difficult to draw. The limited size of this paper will prevent me from delving into this fascinating question.[29]

Sometimes, the body is even absent. The recent cases against Fortnite could completely turn the question upside down: what about moves originally performed by digital avatars? Would they be creations, and by whom? If not performed by human body, is a move by an object or a digital embodiment of a move a copyrightable work (the question of artificial intelligence left aside)?

In 2003, the court of appeal of Paris decided an intriguing case about the copyrightability of a flying piano.[30] This trick performed during a magic show consisted of a white piano that would elevate in the air along with the pianist. The movement was described as follows:

> the piano slowly rises in the air in a seemingly irregular looping trajectory, the front foot of the piano lifts off the ground first, followed by the whole front of the piano. Then, it swings from one side to the other until it reaches the vertical position, marks a stop in its evolutionary movement, before continuing it, until being totally upside down. The pianist who has kept legs tight throughout the illusion has his back on the ground, and back and forth loops are performed, one or more, depending on the timing of the show, following which the piano and the musician land back on the ground, the front foot lands first.[31]

The court held that this scene might have been practised by other magicians before, but rarely and in a less complex way. The musical score that accompanies the taking off in its rhythm and the atmosphere accentuated by the whiteness of the instrument added some weightlessness to the scene, which contains the personal imprint of the magician and demonstrates the originality of his trick. However, a similar performance by another magician was held to be not infringing, as it copied the rise of the piano and its evolution in loops, which is

28. In the case of an elephant trainer and a German TV channel having filmed her show without her authorisation, a German court had to decide whether the moves of the animal could be protected. See Landgericht München, 21 March 1967, *Holzmüller v. W.D.R.*
29. On this point see Charlotte Waelde, Sarah Whatley and Mathilde Pavis, 'Let's Dance! But who owns it?', 36(4) *EIPR* (2014), 217–228.
30. Court of Appeal of Paris, 17 December 2003, *Prop. Intellect.*, 2004, no. 10, 537.
31. *Ibid*.

only the standard common to the same trick, but distinguishes itself by many differences in its execution. The decision here rests on the recognition of the originality of the moves, that are said to be quite different from usual moves of a levitating object, and the qualification of such moves as a common standard, hence an unprotectible idea.

5. MOVING TO A CONCLUSION

Silly moves lead to silly questions, which abound in this paper. Let's be more serious: would copyrighting simple moves even make sense? What about our freedom of movement and our basic right to mobility? Or the sports ethics? E. Rosenblatt rightfully remarks that:

> Athletes seldom seek intellectual property protection for their moves because doing so would violate the principles of sport and deprive others of an 'even playing field'; they believe that society – or at least the athletic microcosm thereof – benefits from free access to athletic innovations.[32]

From copyright in sports to commons, this is a territory in which I feel more at ease.

The idea of a commons or a public domain of walks is missing in the Monty Python kingdom. Their sketch contains many tropes of the intellectual property narrative, such as the incentive-based justification of a reward for intellectual creations, the need to sustain innovation and innovators based on a public interest, or individual originality and genius in creations. The question of copyrighting moves, in sports or elsewhere, might sound like a silly one, as silly and entertaining as the Pythons' idiotic walks. Yet, intellectual property is regularly filled with claims, that appeared rather excessive at first and slowly made their way into its realm, artificially supported by similar arguments of incentives or public interest, that ultimately further erode what is left for all to use, copy and get inspiration from. Bernt Hugenholtz has repeatedly denounced such expansion, from the extended duration of neighbouring rights in recorded music to rights for news publishers. Despite his passion for sport, he would vehemently reject exclusive rights in its moves and skilled figures. Whatever the genius and skill that some iconic moves, in sports, dance and comedy could contain, copyrighting them for the sole benefit of some would be a dangerous move, another step too far in copyright voracity.

32. Elizabeth Rosenblatt, 'Intellectual Property's Negative Space: Beyond the Utilitarian', 40 *Fla. St. U. L. Rev.* (2013), 441, at 474. For a similar argument, Stef van Gompel, 'Creativity, autonomy and personal touch – A critical appraisal of the CJEU's originality test for copyright', in M. van Eechoud (ed.) *The Work of Authorship* (Amsterdam University Press, 2014), 105–106.