



## Exclusive Rights to Carnival Parades: In Comparison with Professional Football

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### 1. INTRODUCTION

Bernt is not only an avid football fan (of Ajax Amsterdam, of course), but also has a hidden passion for carnival. That's why I'm all the more pleased that I can do justice to both passions in his *Festschrift*. Are there exclusive rights to the German 'Rosenmontagszug'? Why is carnival something fundamentally different from football?

### 2. CARNIVAL

Since 1823, so-called Rose or Shrove Monday parades have been held in the centre of Cologne as part of the annual carnival days.<sup>1</sup> These parades are the main event of the Cologne Carnival. They take place outdoors; traditionally, everyone is free to watch the procession. As a result, no entrance fees are charged for participation in the procession. Since 1950, the number of spectators has always exceeded one million.<sup>2</sup> The procession is organised by the Festkomitee des Kölner Karnevals von 1823 e.V. (hereinafter: Cologne Carnival Festival Committee or Festival Committee), an association of all the larger Cologne carnival societies.<sup>3</sup> The Festival Committee sets a fixed motto for each procession. Individual floats are decorated according to this motto by order of the Festival Committee; there are elaborate backdrops, especially with political caricatures of the day. In addition,

1. Cf. Peter Fuchs and M.L. Schwering & Klaus Zöller, *Kölner Karneval* (Greven Verlag, Cologne, 1987), 180.
2. Joseph Klersch, *Die Kölnische Fastracht von ihren Anfängen bis zur Gegenwart* (J.P. Bachem Verlag, Cologne, 1961), 197.
3. On the membership structure, see Klersch, *supra* note 2, at 207 f.

individual floats, especially princes' floats, are decorated more simply. Bands of musicians and costume groups march between the floats. Today, about 8000 people take part in the 7 km long procession, including 85 music bands and about 70 groups with just as many festive and pageant floats.<sup>4</sup>

This 'people's festival', which costs<sup>5</sup> around EUR 1 million, is financially supported by the City of Cologne and the 'Great Senate of the Cologne Carnival', an association of business sponsors. In addition, the associations participating in the procession pay a flat fee to the Festival Committee, which also covers the loan of costumes by the Festival Committee. Since 1953, the Cologne Rose Monday procession has been broadcast on television by the Westdeutscher Rundfunk (WDR).<sup>6</sup> The content of the written agreements between the WDR and representatives of the Cologne Carnival are not known. What does the WDR pay for? Could other broadcasters record and transmit the parade on Shrove Monday to the public freely without entering into an agreement?

The recording and broadcasting of the procession could conflict with copyright and neighbouring rights of the parties involved.<sup>7</sup> A transmission of the Rose Monday procession to the public could interfere with a number of copyrighted positions (section 2.1), so that consent of the rights holders is required (section 2.2).

## 2.1 Intervention

In the context of the Shrove Monday procession, a number of performances worthy of copyright protection come into play:

- insofar as the motto of the procession is creatively implemented on individual floats, they could be works of visual art (§ 2(1) no. 4 of the German Copyright Act (hereinafter: Urheberrechtsgesetz or UrhG), for the copyright protection of which, according to the decision of the German Federal Supreme Court (hereinafter: Bundesgerichtshof or BGH) in *Birthday Procession*,<sup>8</sup> no higher requirements apply than for works of art without a specific purpose. From the point of view of the average observer who is appreciative of art,<sup>9</sup> these floats are regularly artistic achievements in which an individual statement is implemented with creative forms of expression. The situation is different for the floats that do not serve to implement the motto. Although these are lightly

4. For figures, see Ilse Prass, *Treffpunkt Karneval* (J.P. Bachem Verlag, Cologne, 1995), 292.

5. Klersch, *supra* note 2, at 201.

6. Klersch, *supra* note 2, at 197.

7. Copyright issues are to be examined with priority over broadcasting law, at least as far as the right to short reporting is concerned; see Section 4(2).

8. BGH, Judgment of 13.11.2013 – I ZR 143/12 = *GRUR* 2014, 175.

9. Cf. OLG Schleswig, Judgment of 12.02.1985 – 6 U 64/8 = *GRUR* 1985, 289 (291) – *Tonfiguren*; OLG München, Judgment of 18.09.1986 – 29 U 3498/85 = *GRUR* 1987, 290 (291) – *Wohnanlage*; Nicole Fallert, 'Definitions-kompetenz – Wer entscheidet, was als Kunst gilt?', *GRUR* (2014), 719 (721).

decorated, the decoration is usually within the realm of usual and regular craftsmanship, so that copyright protection can be disregarded in this respect;

- disguises may also enjoy similar protection as works of visual art. This does not apply to standard uniforms which, as purely handcrafted, do not meet the originality requirements of copyright law. However, protection can be considered for individually designed costumes and masks, insofar as they are subject to copyright protection by reaching the requisite degree of free, creative choices;<sup>10</sup>
- the music played during the procession could also be relevant under copyright law. Here it depends on the individual circumstances of the case. Often a carnival hit is popular music for which the copyrights have already expired according to § 64 UrhG. However, there are also hit compositions which are still subject to copyright. In this case,<sup>11</sup> however, it must be noted that the rights of the television broadcast<sup>12</sup> are not administered by the composers (or their heirs) themselves, but by the German collecting society GEMA, which typically grants the broadcasting organisations the broadcasting rights based on framework agreements;
- insofar as a carnival song is or was eligible for copyright protection,<sup>13</sup> the carnival performers are to be regarded as performing artists within the meaning of § 73 UrhG;
- in addition, the Festival Committee could be classified as an organiser within the meaning of § 81 in conjunction with § 76(1) UrhG. According to these provisions, the radio broadcast requires not only the consent of the performing artist but also the consent of the owner of the company organising the performance. The committee has the organisational management and bears the economic responsibility. From this perspective, it is to be regarded as the organiser. The only question is whether the artistic performance must be in the foreground for § 81 UrhG to apply.<sup>14</sup> This is contradicted by a ruling of the Regional Court of Cologne, which subsumes an A-level ('Abitur' in German) party in a discotheque, at which only the reproduction of sound recordings with artistic perfor-

10. Schricker, Loewenheim and Grünberger, *Urheberrecht* (6th edn., C.H. Beck, Munich, 2020), Section 73 UrhG marginal no. 16.

11. This applies, for example, to the compositions of Jupp Schmitz ('*Es ist noch Suppe da*'; '*Am Aschermittwoch ist alles vorbei*'); Willi Ostermann ('*Einmal am Rhein*'), Jupp Schlösser ('*Kornblumenblau*') or the Bläack Fööss; see also Peter Fuchs and M.L. Schwering, *Kölner Karneval. Zur Kulturgeschichte der Fastnacht*, vol. 1 (Greven Verlag, Cologne, 1972), 100 and 154 ff.

12. § 1 lit. d) of the Deed of Assignment as amended on 24/25 May 2019, cited in 20 *GEMA Yearbook* (2019), 216 et seq.

13. For Section 73 UrhG, it is sufficient that the work would be worthy of protection under Section 2 UrhG; the fact that it later became public domain is not harmful. See Schricker, Loewenheim and Grünberger, *supra* note 10, at § 73 UrhG marginal no. 13.

14. In this sense Schricker, Loewenheim and Grünberger, *supra* note 10, at § 81 UrhG marginal no. 16.



mances took place, under the concept of event in § 81 UrhG.<sup>15</sup> In my opinion, however, this dispute can be left here. At the Shrove Monday procession, music is not merely an accessory; rather, the music played by participants in the procession is of central importance to the spectators. They come not only to see costumes and floats, but equally to hear the carnival music of the individual music groups. Therefore, the Festival Committee also enjoys ancillary copyright as the organiser of the musical performances;

- spectators and participants could invoke a right to their own image. In this case, however, it is to be assumed that § 23(1) no. 3 of the German Law on Copyright in Works of Fine Arts and Photography (hereinafter: Kunsturhebergesetz or KUG) applies, according to which images of meetings, processions and similar events in which the persons depicted have participated may be disseminated and displayed without their consent.

As a result, the WDR requires the consent of all the above-mentioned authors and ancillary rights holders for the broadcast of the procession. According to § 50 UrhG, an exception only applies to the area of short reporting. According to this provision, the transmission of works to the public is permitted to the extent required by the purpose. § 50 UrhG is interpreted narrowly as an exception provision to the extent that regularly only small extracts of the works presented may be broadcast.<sup>16</sup> Therefore, the right to short reporting does not cover the broadcasting of larger parts of the Shrove Monday procession.

## 2.2 Implicit Consent

Consequently, a broadcast outside of the short reporting privilege is only permitted if the authors of the floats, the costumes and the music as well as the performing artists have given their consent. No explicit declarations have been made in this regard. None of the parties concerned have so far – as far as it is known – commented on granting a simple broadcasting right to broadcasters other than the WDR. However, the parties involved could have implicitly – by the fact of their participation in the procession – waived the exercise of their rights with regard to communication to the public.

The Shrove Monday procession is a public event open to everyone in the open air. Those who take part in such an event want to be noticed by as many people as possible. They are not interested in transferring exclusive rights to an individual exploiter who may limit access to a more specific audience. Within the

15. LG Köln, Judgment of 14.7.2010 – 28 O 93/09 = ZUM (2010), 906 (908).

16. BGH, Judgment of 1.7.1982 – I ZR 118/80 = GRUR (1983), 25 (27) – *Presseberichterstattung und Kunstwerk I*; OLG Frankfurt, Judgment of 20.9.1984 – 6 U 142/83 = GRUR (1985), 380 (382) – *Operneröffnung*; LG Hamburg, Urt. 24.6.1988 – 74 S 5/88 = GRUR (1989), 591 (592) – *Neonrevier*. Similarly Otto-Friedrich Freiherr von Gamm, *Urheberrechtsgesetz* (C.H. Beck, Munich, 1968), Section 50 marginal no. 6; Schricker, Loewenheim and Grünberger, *supra* note 10, Section 50 UrhG marginal no. 32.

framework of this folk festival, their costumes, their music, their floats should be seen and heard by everyone. Within the limits of existing moral rights, the works contained in the float may therefore be compared with works in the public domain, intended for direct perception by everyone. As the director of the WDR, Fritz Pleitgen, rightly explained to the press, the procession is ‘a public event on public streets ..., anyone can set up cameras’.<sup>17</sup> This attitude also corresponds to the regulation in the above-mentioned § 23(1) no. 3 KUG, according to which pictures of assemblies, processions and similar events may be disseminated and displayed without consent. This provision refers to the implied consent of every participant in public events: those who take part ‘must expect to be depicted in pictures of the event – together with other participants’.<sup>18</sup> However, only such depictions are permissible that show the procession as such and not only single individuals; it must be a representative section.<sup>19</sup> In the case of photographs of demonstration marches *von Münch* points out that the person who ‘wants to draw the public’s attention to his political views ... cannot at the same time demand to remain unrecognised’.<sup>20</sup> However, this view is not convincing when it is a matter of individual pictures of a person who merely wants to support the aims of the demonstration by taking part in it.<sup>21</sup>

Something else could result from the fact that the WDR pays for the broadcast. The agreements that have existed with the WDR for decades could be understood to imply that the Cologne Carnival Festival Committee only wants to conclude exclusive agreements in the copyright-relevant area with a single broadcaster. Irrespective of whether such an attitude on the part of the Festival Committee should not be interpreted as a *protestatio facto contrario* (see below), the content of the agreements between the Festival Committee and the WDR already speaks against such an interpretation. It is true that the content of the contracts is neither known nor accessible, especially since there have probably been verbal agreements up to now. But from the press one can learn something about the content of the agreements. For example, in a press release published in September 1995, the WDR spokesman Jürgen Bremer pointed out<sup>22</sup> that the WDR had ‘for a long time and successfully put together an overall carnival package’ with the Festival Committee. As part of this package, the WDR paid DEM 80,000 (the national German currency prior to the introduction of the euro) for various TV and radio broadcasts of carnival meetings.<sup>23</sup> Thus, neither the WDR nor the Festival Committee were concerned with the granting of exclusive rights to the

17. Quoted from Peter Limbach, ‘Ausverkauf der kölschen Seele?’, *Kölner Stadt Anzeiger*, 14 September 1995.

18. Schricker, Loewenheim and Grünberger, *supra* note 10, § 23 KUG marginal no. 88.

19. Dreier, Schulze and Specht, *Urheberrechtsgesetz* (6th edn., C.H. Beck, Munich, 2018), Section 23 KUG marginal no. 40.

20. Ingo von Münch, ‘Die photographierenden Verfassungsschützer’, *JuS* (1965), 404 (406).

21. OLG Frankfurt am Main, Judgment of 21.4.2016 – 16 U 251/15 = ZUM-RD (2016), 573 (574f.).

22. Quoted from N.N., ‘Werbung, wenn der Zog ein Loch hat’, *Kölner Rundschau*, 15 September 1995.

23. See Stefan Volberg, ‘Fernsehschlacht, wer 1996 beim Zog zum Zug kommt’, *Kölner Rundschau*, 13 September 1995.



Rose Monday procession in their agreements. Rather, the rights for carnival sessions were to be compensated; with regard to the Rose Monday procession, it was at most a matter of a 'small assistance for the Festival Committee'.<sup>24</sup>

This view is also in line with a judgement of the Regional Court of Magdeburg, which assumed that when exclusive contractual rights are granted, the right to the pictorial marketing pursuant to §§ 22, 23 KUG cannot relate to an entire event, but only to individuals. In the underlying case, copyright protection of the event itself was out of the question.<sup>25</sup>

Finally, implied consent could be ruled out by the fact that the Cologne Carnival Festival Committee negotiated with another broadcaster – RTL – in autumn 1995 about granting 'exclusive rights' to broadcast the procession and ultimately broke off these negotiations in favour of the WDR. The fact that a refusal of consent can be inferred from the termination of negotiations presupposes, first of all, that the Festival Committee is responsible for granting rights of use. This seems problematic considering the absence of contractual agreements. However, one could argue in the light of § 31(5) UrhG that each contributor has impliedly assigned his or her rights of use to the respective carnival society and the latter, in turn, to the Festival Committee by virtue of its membership. Even if one relies on this implicit transfer for the purpose of bundling rights in the hands of the Festival Committee, however, the failure of negotiations does not mean a rejection with regard to the broadcast. The negotiations between RTL and the Festival Committee covered a special, privileged exclusive position of RTL in the broadcast. This would have made it possible for RTL to obtain special information about the line-up of the procession and the participants. At the same time, the Festival Committee could have been obliged to do its part to ensure that other broadcasters did not broadcast the procession. By breaking off the negotiations and concluding an agreement with the WDR, this 'exclusive' position was given to the WDR. However, the Festival Committee has not yet taken a position on how it views a general broadcast of the procession by broadcasters other than the WDR.

Finally, the implied consent could be thwarted by the fact that the Festival Committee explicitly rejects a transmission by RTL and tries to prevent it with all its might. In such a case, however, the rules of *protestatio facto contrario* would apply. It follows from this that 'one cannot unilaterally withdraw from an obligation which one has assumed through other, regularly concluding conduct ... cannot be unilaterally discharged by declaration'.<sup>26</sup> According to case law, this rule also applies if the custody takes place before or in parallel with the implied conduct.<sup>27</sup> In fact, when interpreting implied declarations of intent, the will of

the individual is not important; what is decisive is the typical meaning of the conduct from the point of view of the recipient of the declaration. Thus, as long as the organisers of the Shrove Monday procession go out in public with the participants, this behaviour can only be interpreted from the point of view of any broadcasting organisation to the effect that anyone can record the procession on video and audio media and communicate it to the public.

### 2.3 Interim Result

It is true that a broadcast of the Shrove Monday procession encroaches on a number of rights of exploitation under copyright and neighbouring rights law. However, broadcasters that have not concluded an agreement with the Festival Committee, such as RTL, may nonetheless broadcast the Shrove Monday procession without the separate consent of the rights holders, in particular also against the will of the Festival Committee. The participants in the procession have impliedly consented to a broadcast by the fact of their participation. A ban on broadcasting by broadcasting organisations that have not entered into an exploitation agreement with the Festival Committee would be an irrelevant *protestatio facto contraria*.

## 3. PROFESSIONAL FOOTBALL

The situation is different in professional football. Here, the German football association (DFB) and the European football association (UEFA) claim exclusive authority to conclude contracts with television and radio broadcasters for television and radio broadcasts of football matches. As Hugenholtz pointed out in his comprehensive study on Sports Organisers' Rights in the EU, this is not only the case in Germany but throughout the EU.<sup>28</sup> But as strange as the question may sound, what are these 'broadcasting rights'? And if they exist, are they transferable?

### 3.1 Legal Nature of Broadcasting Rights

The first problem can perhaps be solved easily. Referring to the judgement of the European Court of Justice (hereinafter: EuGH or CJEU) (*Football Association Premier League Ltd and Others v. QC Leisure and Others* (C-403/08) and *Karen*

24. Cited in the *Kölner Rundschau*, 15 September 1995.

25. LG Magdeburg, Judgment of 23.3.2006 – 7 O 2740/05 = *BeckRS* (2011), 11672.

26. Rietzler, *Venire contra factum proprium* (Duncker & Humblot, Berlin, 1912), 119. Cf. on this also Arndt Teichmann, 'Die protestatio facto contraria', in Hans-Martin Pawlowski and Franz Wieacker (eds.), *Festschrift für Karl Michaelis zum 70. Geburtstag* (Vandenhoeck & Ruprecht, Göttingen, 1972), 294 ff.

27. Thus already RG, Judgment of 29.9.1925 – VI 182/125 = *RGZ* 111, 310 (312); BGH, Judgment of 16.12.1964 – VIII ZR 51/63 = *NJW* (1965), 387 (388 f.); BGH, Judgment of 4.12.1967

– VIII ZR 178/65 = *WM* (1968), 115 (117); AG Hamburg, Judgment of 3.10.1957 – 51 C 207/57 = *MDR* (1958), 241; Werner Flume, *Allgemeiner Teil des Bürgerlichen Rechts, Zweiter Band: Das Rechtsgeschäft* (Springer Verlag, Berlin, 1965), § 5/5; BGH, Judgment of 14.7.1956 – V ZR 223/54 = *JZ* (1957), 61 m. Franz Wieacker; *idem.*, 'Willenserklärung und sozialtypisches Verhalten', *Göttinger Festschrift für das Oberlandesgericht Celle* (Verlag Otto Schwartz und Co., Göttingen, 1961), 263, 268 ff.

28. Bernt Hugenholtz, *Study on Sports Organisers' Rights in the EU* (T.M.C. Asser Instituut/Asser International Sports Law Centre/Institute for Information Law – University of Amsterdam, 2014), 70.



*Murphy v. Media Protection Services Ltd* (C-429/08), marginal no. 96–99) sports clubs cannot claim copyright in football matches themselves, because they cannot be classified as works. Football matches are subject to rules, so that there is no room for an author's own intellectual creation as a condition for being protected under copyright. The same applies to plays by a team or moves by an individual player during the match. Furthermore sports clubs are not entitled to organiser rights within the meaning of § 81 UrhG, as these rights are limited to the organisation of music concerts.<sup>29</sup> The alleged 'broadcasting rights' are a consequence of a sports club's house rights, insofar as it is the owner of the stadium grounds pursuant to § 903 of the German Civil Code (hereinafter: Bürgerliches Gesetzbuch or BGB) and thus also of the stadium itself pursuant to §§ 93, 94(1) BGB.<sup>30</sup> As the owner, the club can exclude others from using the property according to § 903 BGB. This exclusive right also includes what the BGH<sup>31</sup> calls the 'natural prerogative of the owner' to 'claim for himself the commercial benefit that can be derived from his property, which is only accessible with his permission'. This gives rise to the right to injunctive relief under § 1004 BGB and the criminal offence of § 123 of the German Criminal Code (hereinafter: Strafgesetzbuch or StGB). The same applies to the right of possession (§§ 861, 862 BGB) which exists parallel to ownership; the holder of actual control of the property is authorised to prevent others from encroaching on his or her dominion without authorisation. In contrast, the construction of an established and exercised business which would be protected under § 823(1) BGB,<sup>32</sup> and the application of § 1 of the German Act Against Unfair Competition (hereinafter: Gesetz gegen den unlauteren Wettbewerb or UWG) are secondary in importance. The 'transfer rights' are primarily to be regarded as an exponent of (immovable) property rights. If a third party from outside were to be able to see into a stadium, this would not infringe the club's broadcasting rights. For example, an English court has found it unobjectionable for someone to rent standing room outside

29. So also OLG München, Judgment of 20.3.1997 – 29 U 4573/96 = *NJW-RR* (1997), 1405 (1406); OLG Hamburg, Judgment of 11.10.2006 – 5 U 112/06 = *GRUR-RR* (2007), 181 (184); Dreier, Schulze and Dreier, *supra* note 19, § 81 UrhG marginal no. 3; Hugenholtz, *supra* note 28, at 30.

30. The wording of the BGH, which speaks of ownership of the 'venue', is imprecise; see, for example, BGH, Judgment of 14.3.1990 – KVR 4/88 (KG) = *NJW* (1990), 2818. The Dutch Hoge Raad also assumes ownership in the *KNVB/Nos* judgement, see *NJ* (1988), No. 310 with comment by Wichers Hoeth = *GRUR Int.* (1988), 784 and m. discussion by Ruijschnars, *GRUR Int.* (1988), 764ff., Hugenholtz, *supra* note 28, at 25 ff.

31. BGH, Judgment of 20.9.1974 – I ZR 99/73 = *NJW* (1975), 778 = *JZ* (1975), 491 with comment by Baur. Critically, however, Gerauer, 'Der Unterlassungsanspruch des Eigentümers bei gewerblichem Fotografieren', *GRUR* (1988), 672; OLG Frankfurt am Main, Judgment of 11.2.2019 – 16 U 205/17 = *GRUR-RR* (2019), 422.

32. Thus BGH, Judgment of 29.4.1970 – I ZR 30/68 = *NJW* (1970), 2060, which, however, focuses narrowly on the operational nature of the interference and restricts this narrowly to organisational work.

the stadium with a view of the stadium.<sup>33</sup> The same would apply if someone were to record a football match from a helicopter.<sup>34</sup>

The BGH,<sup>35</sup> therefore, rightly summarises that the organiser's permission to televise a sporting event 'does not constitute a transfer of rights in the legal sense, but rather consent to interventions, which the organiser could prohibit on the basis of the aforementioned legal positions'. This approach has become established case law of the BGH.<sup>36</sup>

### 3.2 Legal Nature of the Transfer of 'Transmission Rights'

Consequently, transfer rights are not about the granting of rights of use in the sense of the classical dogmatics of intellectual property law. Rather, the dispute is about the scope of material rights of dominion. On the face of it this is surprising because the contracts which the DFB concludes with television broadcasters are written in the terminology of intellectual property law and give the impression of dealing with the transfer of powers relevant to copyright or at least ancillary to copyright.

In the background, however, the much more important question arises as to why the DFB should be the holder of 'broadcasting rights'. This would presuppose that the consent of individual sports clubs to an encroachment on their domiciliary rights as transferable to third parties. In the literature on sports law, life is made easy. If the question of transferability is addressed at all, it is stated succinctly: 'This position is transferable and subject to economic traffic; the organiser issues a licence'.<sup>37</sup> As will be shown below, this statement does not correspond to legal reality.

#### 3.2.1 Transfer of the Rights to Injunctive Relief?

It is easy to clarify in advance that the claims for injunctive relief under §§ 862, 1004 BGB cannot be assigned to the DFB or UEFA. This is the case because these claims are inextricably linked to possession or ownership and therefore cannot be assigned independently. The DFB is also not entitled to assert claims

33. *Victoria Park Racing and Recreation Grounds Co. Ltd. v. Taylor* (1937) 58 CLR 4798. See also Kevin Gray, 'Property in Thin Air', 40(2) *Cambridge Law Journal* (July 1991), 252, 264 ff., and the contribution of Ansgar Ohly elsewhere in this volume. However, see also the different approach taken by US District Court of Pennsylvania, 24 F Supp. 490 (1938), *Pittsburgh Athletic Co. C. KQV Broadcasting Co.*

34. See BGH, Judgment of 9.3.1989 – I ZR 54/87 = *NJW* (1989), 2251; OLG Bremen, Judgment of 27.1.1987 – I U 58/86 (a) = *NJW* (1987), 1420; OLG Oldenburg, Judgment of 12.10.1987 – 13 U 59/87 = *NJW-RR* (1988), 951; OLG Celle, Judgment of 28.9.1979 – 13 U 86/79 = *MDR* (1980), 311.

35. BGH, Judgment of 14.3.1990 – KVR 4/88 = *NJW* (1990), 2815 (2817).

36. BGH, Judgment v. 8.11.2005 – KZR 37/03 = *NJW* (2006), 377 (379); BGH, Judgment of 28.10.2010 – I ZR 60/09 = *ZUM* (2011), 494 (496).

37. Martin Stopper, *Ligasport und Kartellrecht* (Erich Schmidt Verlag, Berlin, 1997), 78; Also proven as common approach in Hugenholtz, *supra* note 28, at 70 ff.



for protection of possession as an indirect owner. According to § 868 BGB, this would require that the DFB is connected to the football clubs by an intermediary possession relationship that secures the DFB a claim for restitution against the club and the club a temporary right of possession comparable to a loan or lease. However, the situation is at best the other way round: the DFB acts for a limited period of time; if at all, the club has a claim to surrender. The reverse is also not the case. The DFB is not to be seen as a direct third-party owner in relation to the football club. This is because direct control over the stadium remains with the relevant club.

### 3.2.2 *Transfer of Consent?*

The claims mentioned so far are characterised by the fact that they refer to the possibility of consent as a ground for justification. Thus, consent could also be the subject of the transfer of rights between the DFB and the football club, as is sometimes argued in the literature.<sup>38</sup> Consent in rem is not to be confused with the consent mentioned in § 183 BGB.<sup>39</sup> The latter is a legal transaction, the former is not. Consent to legal interests in rem is always highly personal. At most, in the case of minors or organs of legal persons, it could be considered to apply the law of representation.<sup>40</sup> This also applies to § 858(1) BGB which is based exclusively on the will of the direct owner.<sup>41</sup> Representation can only be considered there if the acquisition of ownership takes place through a legal transaction (i.e. in the case of §§ 854(2) and 870 BGB).<sup>42</sup> In the present case, such a construction is therefore out of the question; the consent itself cannot be the subject of legal transactions.

### 3.2.3 *Authorisation Based on Application of § 185(1) BGB by Analogy?*

However, it would be conceivable to authorise the club to take legal action in its own name, provided that the authorised party can prove that it has an interest in taking legal action.<sup>43</sup> In this respect, the granting of 'broadcasting rights' could be reinterpreted as an authorisation to assert injunctive claims of the individual

38. Without further justification, for example, Jörg Rodelwald, 'Die Bilanzierung von Rechten zur Berichterstattung und Übertragung von Sportereignissen im Fernsehen', *BB* (1995), 2103 (2104): 'Consent in the sense described above is a suitable object of a contract of sale ...'

39. Erman and Schiemann, *BGB*, vol. 2 (14th edn., Ottoschmidt, Cologne, 2014), § 823 BGB marginal no. 147.

40. BGH, Judgment of 16.11.1971 – VI ZR 76/70 = *NJW* (1972), 335; Kohle, 'Die rechtfertigende Einwilligung', 185 *AcP* (1985), 105 ff.

41. Soergel and Stadler, *BGB*, vol. 14 (13th edn., Kohlhammer, Stuttgart, 2002), § 858 BGB marginal no. 9.

42. Staudinger and Gutzeit, *BGB, Sachenrecht*, vol. 3 (Sellier & de Gruyter, Berlin, 2018), § 854 BGB marginal no. 52.

43. RG, Judgment of 14.3.1941 – II B 7/40 = *RGZ* 166, 283; BGH, Judgment of 14.2.1952 – IV ZR 137/51 = *BGHZ* 5, 164.

football club, for example under § 1 UWG. However, such an interpretation fails to take into account the scope of the agreements between the DFB and the individual football clubs. These agreements are not intended to authorise the DFB to assert claims by way of legal action. Rather, the DFB is to be granted a substantive power which also, and in particular, includes the marketing of the so-called 'sports rights'. Moreover, the current agreements do not assume that the DFB administers third-party rights, but rather acts as the owner of its own derived rights when marketing them. For this reason, the classification as a litigant does not do justice to the will and the interests of the parties.

Hausmann<sup>44</sup> sees an analogous application of § 185(1) BGB as justified on other grounds. He refers to § 3 no. 2 of the DFB's Statute for Licensed Players and sees this as a binding authorisation under association law to exercise the right of consent. However, this seems questionable for several reasons: the granting of consent in the sense of §§ 862, 1004 BGB does not involve a disposition. Moreover, it is not possible to rely on the analogous applicability of § 185 BGB in the case of a transfer of possession. It is true that the prevailing opinion also applies § 185 BGB to the case where a non-entitled person grants rights of possession and use to objects.<sup>45</sup> In the present case, however, precisely no rights of use are granted, but at most the assertion of prohibition claims is waived. This non-action is not to be equated with the positive allocation of rights of use. Moreover, Hausmann's construction would amount to undermining the binding of possession to the owner's will to possess and, in parallel that of ownership to the owner's will to own.

### 3.2.4 *Contract for the Benefit of Third Parties*

A solution will only be found by observing the specific requirements of possession and property law. With regard to an obligation to tolerate under § 1004 BGB, reference could be made to the agreement between the DFB and the football club. This agreement, as a contract of acquiescence under the law of obligations, excludes the illegality of future encroachments (§ 1004(2) BGB). However, in order for a third party, in particular a broadcaster, to derive rights from it against the football club, the agreement would have to be a contract for the benefit of third parties within the meaning of § 328 BGB. In this case, however, the third party must at least be identifiable at the time of the conclusion of the contract.<sup>46</sup>

44. Friedrich Ludwig Hausmann, 'Der Deutsche Fußball Bund (DFB) – Ein Kartell für "Fernsehrechte"?', *BB* (1994), 1089 (1092).

45. Cf. RG, Judgment of 15.9.1912 – Rep. III 309/12 = *RGZ* 80, 395 (399); OLG Karlsruhe, B. v. 10.2.1981 3 RE-Miet 1/81 = *NJW* 1981, 1278; Frank Bayreuther, *Münchener Kommentar Bürgerliches Gesetzbuch* (8th edn., C.H. Beck, Munich, 2018), § 185 BGB Rn. 8; Soergel and Leptien, *BGB*, vol. 2 (13th edn., Kohlhammer, Stuttgart, 1999), § 185 BGB marginal no. 9; Karl-Heinz Gursky, 'Kündigungsschutz zwischen Wohnungseigentümer und Mieter', *JR* (1983), 265; Ekkehart Reinelt, 'Der Räumungsschutz des gutgläubigen Untermieters', *NJW* (1984), 2869.

46. BGH, Judgment of 17.1.1985 – VII ZR 63/04 = *BGHZ* 93, 274; BGH, 16.11.2007 – V ZR 208/06 = *NJW-RR* (2008), 683 (684); BGH, Judgment of 5.3.2015 – IX ZR 133/14 = *NJW*



A determination on the basis of factual moments – for example in favour of the relevant owner of a certain plot of land – is permissible;<sup>47</sup> here a resolutive condition is coupled with the contract in favour of third parties.<sup>48</sup> However, at least the factual category as such must be sufficiently determined. However, this is not the case at the present time, since all the DFB's regulations merely provide that the DFB is the owner of the transfer rights, without containing regulations on the specifics of the further transfer of this right. The Statute for Licensed Players assumes that the DFB is the original holder of the broadcasting rights and that a contract is not already concluded in favour of third parties in the relationship between the football club and the DFB. This intention of the parties can hardly be disregarded – even in the context of a reinterpretation. Moreover, the construction of § 328 BGB is not applicable with regard to the football club's ownership claims. Thus, the assumption of a contract in favour of third parties is not very convincing.

### 3.2.5 Assignment of the Claim to Acquiescence

A singular succession is also permitted within the framework of § 823(1) and § 1004 BGB in the form that the contractually anchored claim to acquiescence is assigned to third parties.<sup>49</sup> However, this construction does not apply within the framework of claims for protection of possession. Moreover, the number of creditors of the claim to acquiescence would multiply in the case of several exploitations of rights. It would no longer be possible for the individual football club as a debtor to determine who is actually the creditor of the claim to acquiescence and to what extent. In my opinion, this cannot be justified in terms of assignment law.

The construction of an advance consent of the football club comes into consideration for all bases of a claim. The club agrees in advance to tolerate the broadcasting activities in the stadium of any broadcaster named by the DFB. Thus, for example, within the framework of § 858 BGB, the offence of prohibited interference with one's own power exists if the interferer acts without the owner's will. The same also applies in the context of § 1004 BGB, where actual consent also excludes the illegality of the interference.<sup>50</sup> However, both the owner's and the owner's consent can be revoked at any time. At most, a commitment can be justified via § 242 BGB in the case of special circumstances of trust. The same applies to consent under § 823(1) BGB. Here, at least in the case of consent to violations of property rights, an analogous application of § 183, sentence 1 BGB

(2015), 1672 (1676).

47. BGH, Judgment of 3.3.1983 – III ZR 93/81 = BGHZ 87, 78 f.; similarly already RG, Urt. 3.5.1930 – V B 6/30 = RGZ 128, 246; See also Erman and Westermann, *BGB*, vol. 1 (14th edn., Ottoschmidt, Cologne, 2014), § 328 BGB marginal no. 6.

48. RG, Judgment of 31.3.1930 – VI 599/29 = RGZ 128, 346.

49. Erman and Ebbing, *BGB*, vol. 2 (14th edn., Ottoschmidt, Cologne, 2014), § 1004 BGB marginal no. 45.

50. Cf. Erman and Ebbing, *supra* note 49, at § 1004 BGB marginal no. 32; on this also BGH, Judgment of 11.11.2014 – VI ZR 9/14 = NJW (2015), 1450.

is advocated.<sup>51</sup> Thus, consent is freely revocable until the act is performed (§ 183, sentence 1 BGB). However, the irrevocability may exceptionally result from the legal transaction underlying the consent or from an express and tacit waiver of revocation by the consenting party.<sup>52</sup>

So far, the focus of the analysis has been on in rem solution models. However, a purely contractual approach would also be conceivable. In this case, the club would commit itself to the DFB under the law of obligations to tolerate the disturbance of possession or ownership by the DFB and anyone appointed by the DFB. The DFB would thus have a claim to acquiescence to the effect that the club is obliged not to make use of its existing rights of defence. The association would then not be prevented from continuing to exercise its rights of defence against everyone. However, the club would then be in breach of contract with the DFB and would have to compensate the DFB for this breach of contract.

### 3.3 Consequences for Antitrust Practice

These dogmatic considerations only prove their importance when it comes to the question of how the marketing of broadcasting rights is to be organised in the future in a way that complies with the requirements of cartel law. In the decision *Europapokalheimspele*, the BGH put an end to the consideration of the law of obligations as set out above under section 3.2.5.<sup>53</sup> It would therefore have to be examined whether the other approaches – orientated towards property law – are more helpful in terms of antitrust law. In its decision, the BGH assumes, without explicitly mentioning this, that the marketing of the 'broadcasting rights' by the football clubs is in the interest of the 'buyers'.

In the more recent *Hörfunkrechte* ruling on radio broadcasting rights for football matches, the BGH did not have to deal with the transfer of broadcasting rights, as the plaintiff, a private radio broadcaster, already demanded that the football clubs grant it the opportunity to broadcast the football match via radio.<sup>54</sup> In the *Hartplatz-Helden.de* ruling, the BGH did not deal with the question of whether and in what way the broadcasting rights to the amateur football match were transferred to the Württemberg Football Association either, as the latter did not claim a violation of the house right.<sup>55</sup>

The consideration of an antitrust analysis is of central importance. Thus, decentralised marketing by the football clubs in the marketing interest of the association which ensures central, fiduciary coordination by the DFB would be ideal for all parties involved. In order to realise this goal, § 183, sentence 1 BGB could now prove to be a central point of departure. This provision allows the club to consent to the marketing of the 'broadcasting rights' via the DFB, but at

51. Erman and Schiemann, *supra* note 39, at § 823 BGB marginal no. 147.

52. Erman and Maier-Reimer, *BGB*, vol. 1 (14th edn., Ottoschmidt, Cologne, 2014), § 183 BGB marginal no. 6.

53. BGH, Judgment of 11.12.1998 – KZR 7/96 = ZUM (1998), 155 (157).

54. BGH, Judgment of 8.11.2005 – KZR 37/03 = NJW (2006), 377.

55. BGH, Judgment of 28.10.2010 – I ZR 60/09 = ZUM (2011), 494 (496).

the same time guarantees the autonomy of the clubs through the element of free revocation. The DFB's regulations could therefore be amended to the effect that the individual club authorises the DFB to assert 'broadcasting rights' but retains the right of revocation until a corresponding contract is concluded. One will have to wait and see whether the DFB and the German football clubs consider such alternatives. In any case, legal creativity is required to organise the marketing of football rights as efficiently and at the same time as competitively neutrally as possible in the interest of all parties involved.

#### 4. CONCLUSION

The result of the foregoing analysis may come as a surprise. There are property rights to the Rose Monday procession with regard to individual scales and costumes, but the participants have tacitly waived them. The football clubs claim broadcasting rights, but these are difficult to justify. In professional football, copyright protection is sought in vain. For Bernt, the news may be hard to digest. In any case, Ajax Amsterdam totally deserves to take a bow in terms of creativity and football.

## Organisers of Sport Events: A Neighbouring Right?

*Antoon Quaadvlieg*

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#### 1. INTRODUCTION

For decades, Bernt Hugenholtz and his publications have served as a lighthouse offering a beacon to IP sailors on the ocean. Bernt has an infallible nose for important new developments and used to be one of the first to put them on the agenda. His retirement means that a name of great reputation takes its leave from the University.

It has always been an extraordinary pleasure to meet Bernt at home or abroad, to exchange ideas with him, to share a beer. His conversation invariably was witty and spicy.

Bernt was critical however as to the creation of new exclusive rights and the extension of the term of protection of existing ones. For a long time therefore, it worried me that the following opinion, which proposes the creation of *two* new rights, might be a farewell present of a rather dubious character. It finally occurred to me that it might equally please him. Whereas it is found that the creation as such of exclusive rights for athletes as well as for sports organisers can be agreed upon, this creation will inevitably be preceded by a critical assessment as to the scope that should be given to the right as well as its duration. As a consequence, the exclusive right to possibly grant may be much slimmer than the potential scope of the right presently invoked (and granted) under various titles. Only that gives me the courage to propose a neighbouring right for sports organisers.

Two leading studies about the protection of sports organisers rights have been published in the EU since the turn of the new century: one from the prominent German authors Reto Hilty and Frauke Henning-Bodewig and another, eight years later, from the Asser Institute and IViR. Much more has been published