5 The requirement of originality

Ramón Casas Vallés

1. Introduction

The requirement of originality is common in copyright. Overarching, sine qua non, essence of copyright, touchstone, cornerstone etc. these are terms often used by specialists. It is understandable, originality being the criterion or concept that normally defines the borders of this institution, both internally (to distinguish copyright from neighbouring rights – where admitted) and externally (to distinguish it from other forms of protection – proprietary or not – of intangible goods). It is also used to establish the degree of protection, albeit this may cause some problems to the extent that it implies fragmenting a regime which is theoretically envisioned as unitary, hence without granting more or fewer rights depending on the degree of originality. In any case, both the law and the case law agree to grant it a decisive role. Originality is the evidence and materialization of authorship and what justifies the granting of copyright. Paraphrasing Plato’s Academy motto ‘Let no one ignorant of geometry enter here’, the threshold of Copyright’s citadel could read: ‘Let nothing non-original enter here’ . . . although originality, like geometry, can be ultimately variable.

The central role assigned to the requirement of originality does not correspond to the doubts it generates. This is a striking and uncomfortable issue. On the other hand, courts have been relatively at ease when dealing with this requirement, under the interpretative latitude afforded by imprecise legal terms. For judges – and others – the difficulty is not deciding but rather explaining it. To that extent, the popular image of the pink elephant by Belgian jurist Franz van Isacker (easy to recognize but difficult to define) and the recurrent quotation from Saint Augustine concerning time (‘If no one asks me, I know what it is. If I wish to explain it to him who asks, I do not know’, Confessions, XI, 14) are applicable.

All that said, the problem of originality is far more complicated since it not only affects its definition but also its specific assessment or valuation. Unanimity is ensured when identifying the pink elephant or assessing that a certain time has lapsed (except when some visual or other impairment exists, of course!). Instead, when assessing originality there may be different criteria resulting, to a certain extent, from the extreme polysemy of the term. Original is used to identify both what is old and what is new: what exists at the begin-
ning and at the end. For Christians, for instance, there is a difference between the original sin and an original sin (if that is possible, nowadays), but in both cases the same term is used. On the other hand, leaving the linguistic problems aside and focusing on a juridical context, the concept of originality is an issue of policy, related to different traditions and legal contexts. This is an essential aspect that should be completely clear.

The point is not only deciding what the subject matter of copyright is but rather what subject matter we want it to be. In other words, what kind of intellectual output should be granted, without any formalities, exclusive economic rights for a term that covers the life of the author plus seventy years, in addition to other moral rights? How far should the traditional hospitality of copyright be taken? What is at stake is the future of copyright. A future which, in fact, is both current and past, since the same questions could be rephrased: Did the sorts of creations that have been granted protection, de facto or de iure, deserve it? Can authors’ rights countries maintain a concept which requires a necessary link between a work and its author, and all that entails (i.e., the granting of moral rights)? Are we facing a new regime of copyright or, at least, several regimes depending on the work? Does it make sense to entrust the custody of the Empire limes to a showy gatekeeper with no specific instructions?

Anyhow, at the end, the container defines its contents. Substance results from form: forma dat esse rei. Originality, perhaps thought of as a conservative criterion, has become – due to its fluidity – a factor of change. Barbarians are already in and the Empire, for better or for worse, is now different. It remains to be seen whether this is a general change, for all protected subject matter or, on the contrary, whether it is limited to self-contained sectors, thus breaking the unity of the system.

The question of originality is, therefore, not mere theology. We need to know what lies beneath the thick blanket of nominalism and logomachy that hampers the debate. To that extent, it would be useful to establish the origins and purpose of originality (since when and why is this criterion used and what

---

purpose does it serve?) This first question will allow us to understand and assess the differences that may be seen between the two great families or traditions of *Copyright* and *Droit d’auteur* and their gradual approach. Afterwards, we will analyse the criteria commonly used (or excluded) to decide when a formal expression of human creativity complies with this requirement. Finally, we will analyse the state of the matter within the context of EU harmonization and future perspectives.

### 2. The origins of the requirement and its purpose

Contrary to expectations, the problem of originality is relatively recent.² For a long time a generic reference to literary and artistic works was deemed enough to define the subject matter of copyright. The concept of work was self-evident. Legislators did not feel obliged to provide any further explanation. As an example, a statute prior to the Berne Convention (BC), the Spanish Law of Intellectual Property of 1879 (already revoked), simply stated that ‘Intellectual property comprises, for purposes of this law, the scientific, literary or artistic works that can be born by any means’. The Regulation provided some examples: ‘Works will comprise [...] all works produced and published by means of writing, drawing, printing, painting, engraving, lithography, stamping, autography, photography or any other printing or reproducing system now known or later invented’. As can be seen, this rule did not indicate the substantive conditions of the concept of work. However, it did not generate many problems. Courts used the concept without much difficulty, and its neutrality allowed the Statute to survive several technological revolutions, and even to be applied to computer programs.³

According to the jurisprudence of the time, the Statute protected the author as long as ‘his work could be deemed a production of the spirit or genius, that is, when its creation required a labour of spirit or intelligence’.⁴ Originality, as a requirement for protection, was not present.⁵ Of course, the term was

---

² As pointed out by Strowel, it would be interesting to study the ‘archaeology of originality’, back to the Enlightenment and beyond; see Strowel, A. (1993), *Droit d’Auteur et Copyright, Divergences et Convergences. Etude de droit comparé*, Brussels: Bruylant; Paris: LGDJ, 470, fn. 381.

³ As stated by the Spanish Supreme Court in its Judgment of 8 November 1995.

⁴ In the words of Danvila, father of the Spanish Intellectual Property Law of 1879; see Danvila, M. (1882), *La propiedad intelectual*, Imprenta de la correspondencia de España, Madrid, 340.

⁵ As an example, the arguments used in the old Resolution of 21 March 1901 by the Spanish Ministry of Public Instruction and Fine Arts, when denying registration (in the Intellectual Property Register) of several notes designed to announce weddings, christenings, anniversaries and deaths: ‘In order to be considered a work, it must have the nature of “scientific, literary or artistic”, that is, it must be the daughter of a man’s
frequently used (in fact, the previous Law of Intellectual Property of 1847 expressly referred to ‘authors of original writings’), but it was not used to define the subject matter of protection but rather to distinguish between pre-existing works and derivative works, a distinction that still subsists in many national laws. Original, therefore, was used in the sense of originary; that is, to identify the work in which another work has its origin.

The same idea may be found in the Berne Convention, which reiterates the term ‘originality’ but not precisely to define the subject matter of protection. Article 2.1 BC only states that: ‘The expression “literary and artistic works” shall include every production in the literary and artistic domain, whatever may be the mode or form of its expression.’ Nobody considered it necessary to go any further, so the issue was left to national laws. However, it is worth mentioning that in addition to the useful list of examples in that same article 2.1, article 2.5 BC limits the protection of collections to those which ‘constitute intellectual creations’ according to the ‘selection or arrangement of their contents’. The work is, hence, an ‘intellectual creation’ or, to be more precise, a personal intellectual creation. M. Plaisant explained it to the national delegates on the occasion of the Brussels Revision:

You have not considered it necessary to specify that those Works [eligible for protection] constitute intellectual creations because [. . .] if we are speaking of literary and artistic works, we are already using a term which means that we are talking about ‘personal creation’ or about an ‘intellectual creation’ within the sphere of letters and the arts.

As we shall see, the partial harmonization of the requirement of originality adopted by the EU is a response to this idea: the work is the author’s own intellectual creation.

intelligence, talent or inventiveness’, which does not happen in the case at stake, since ‘its basic and simple confection, more than daughter of the man’s mental faculties is a work of his senses’ reproducing what is of common property. Notice that the work’s ‘originality’ is never mentioned.

6 The same formula, ‘intellectual creations’, is used for compilations in art. 10.2 TRIPS Agreement.

Several national laws (probably most of them) omit a general reference to the requirement of originality when defining the subject matter of copyright, an exception being made for specific references on borderline products (such as titles\textsuperscript{8} or advertising slogans\textsuperscript{9}), and on derivative works. Instead of a conclusive single word, these laws adopt descriptive formulas, less ambitious but to some extent more useful in solving problems. Several laws can be mentioned: France (‘œuvres de l’esprit’: works of the mind, article L 122-1, Intellectual Property Code 1992), the Netherlands (‘ieder voortbrengsel op het gebied van letterkunde, wetenschap of kunst’: any creation in the literary, scientific or artistic areas, art. 10, Copyright Act 1912), Germany (‘persönliche geistige Schöpfungen’: personal intellectual creations, ss. 1 and 2 Copyright and Related Rights Act 1965), Italy (‘opere dell’ingegno di carattere creativo’: works of the mind having a creative character, art. 1, Copyright Act 1941) or Portugal (‘criações intelectuais do domínio literário, científico e artístico’: intellectual creations in the literary, scientific or artistic areas, art. 2 Code of Author’s Right 1985).

Nevertheless, many other laws have opted for an express reference to originality as a requirement for protection. This is the case with the current Spanish Law (Consolidated Text of 1996) when its article 10.1 states: ‘The subject matter of intellectual property shall be all “original” literary, artistic or scientific creations expressed in any manner or medium, whether tangible or intangible, that is known at present or may be invented in the future’. Reference is also made to originality in the laws of Ireland (‘original literary, dramatic, musical or artistic Works’, s. 17(2)(a), Copyright and Related Rights Act 2000), Greece (‘any original intellectual literary, artistic or scientific creation’, art. 2(1), Copyright, Related Rights and Cultural Matters Act 1993) and the United Kingdom (‘original literary, dramatic, musical or artistic works’, s. 1(1)(a), Copyright Designs and Patents Act 1988). It is also worth pointing out that the Tunis Model Law on Copyright of 1976 also expressly refers to the requirement of originality (‘original literary, artistic and scientific Works’, art. 1(1)).\textsuperscript{10}

\textsuperscript{8} Some laws accept the protection of titles as long as ‘original’ (for instance, see art. 10.2 Spanish LPI, and art. 112-4 French CPI). Case law on this issue tends to disturb – if not plunge into despair – legal scholars who, understandably, point out that the problem is not so much one of copyright but rather of trademarks or unfair competition. See a summary of the rich French case law in Lucas, A. and H.J. Lucas (1994), \textit{Traité de la propriété littéraire & artistique}, Paris: Litec, 91 and 111 ss.

\textsuperscript{9} See an express reference to their protection in art. 2.1(m) Portuguese Code of Author’s Right, where slogans, even commercial ones, are protected as long as they are original.

Whether expressly mentioned or not, the fact is that the requirement of originality is constant in doctrine and case law. Why is this so? It is reasonable to think that successive lawsuits regarding simple products (calendars, catalogues and the like) made some distinctive criterion necessary. Yet, the solution adopted has proved problematic. In an attempt to reinforce an open concept of work (work of the spirit) with more precise terminology, it ended up not only overlapping with the basic concept (it may well be a redundant requirement) but failing to afford the intended security. Due to its own abstract nature and the lack of a legal definition, originality has served less as a wall than as a Trojan Horse. The central role invested in this fluid concept has profoundly transformed (albeit without any formal changes) many national copyright regimes.

Initially, a strict definition of originality could be defended (like the well-known and unsinkable French notion of ‘empreinte de la personnalité’ of the author), but it was soon flexibilized to ensure protection to what is known as ‘kleine Münze’ or ‘small change’ products. Such a change did not per se disturb the foundations of the system: exceptions simply confirmed the general rule. The Ivory Tower, where traditional artistic works (which express the spirit of their creators) reside, occupied the central space in the citadel of copyright.

Nevertheless, what used to be ‘small change’ became bigger. As in cities, old walls have crumbled and the scene has changed profoundly. The centre remains intact and plays the essential role of aristocratic model. But investment has moved to the suburbs. Old marginal neighbourhoods have grown and changed, housing some creations (some of them very recent) of high economic and social value that constitute the capital of new industries claiming strong protection for their investments. This is the case, mostly, with factual works

---


13 In Kerever’s words: ‘What bothers is that the “small change” of copyright has fallen in the pockets of powerful investors who intend to find in copyright not so much the protection of creations, where existing, but rather the protection of their investments’; see Kerever, A. (1991), ‘Debate’, ALAI Congress of the Aegean Sea II, 237–8.
(information works) and applied works (functional works).\textsuperscript{14} Databases and computer programs do not easily agree with the stricter traditional concepts and have forced their amendment. In addition, within the realm of artistic works, a significant change occurred with the irruption of new creations which combine a high value in the market with very thin personal input. This is the case with commercial signs and logos, as well as the musical ring-tones used in cell phones or by radio broadcasting stations.\textsuperscript{15}

The extension of the subject matter of copyright affects the concept of work and requires fine-tuning of the instrument. It is a problem similar to (though not precisely the same as) the growth of the European Union. Initially, nobody tried to define Europe; at least, no one felt an urgent need to do so. The concept was taken for granted with an implicit reference to geography and history. But Europe has been growing and, as it does, we become aware of the need for a definition: a border to avoid denaturalizing the idea of reference. From that perspective, the omnipresence of the word originality is, first, an alarm signal. Regardless of what it means exactly, its mere use amounts to a declaration in itself. The concept of work is not rigid and can grow, albeit not infinitely. There must be a point beyond which intellectual products are not works but different realities, which may certainly generate some sort of income or protection (even of a property nature) but not copyright. An out-of-control extension may kill the institution as a consequence of its own success. Against what is sometimes said, not everything that is worth copying is worth protecting; at least, not by copyright. It is one thing to reward intellectual creation, and another to punish laziness or predatory behaviour.

\textsuperscript{14} The inoperative and classic tripartite classification of works as artistic, literary and scientific may be complemented by a distinction between artistic works (at large) and factual and functional works; see Strowel, A., \textit{Droit d’Auteur et Copyright}, 471).

\textsuperscript{15} In Spain, a well-known case concerns the signature tune of the Spanish National Radio (the main State-owned public radio station), consisting of a few notes, which is at the top of the list of compensation for communication to the public by means of broadcast (Judgment of the Supreme Court of 10 October 1995). Originality was not even an issue, although it is a transformation of a work already in the public domain; see Bercovitz, R. (1996), ‘Comentario a la sentencia del Tribunal Supremo de 10 octubre 1995’, in \textit{Cuadernos Civitas de Jurisprudencia Civil}, enero-marzo, 1996, 369–81.
As in the case of Europe, the concept of originality is not only descriptive. Its nature is also, and mainly, prescriptive; which vests some flexibility in it. We are talking about Law, not Physics. The definition of juridical concepts always implies goals and, therefore, as already mentioned, includes a considerable dose of policy. Anyone who has followed the debates about the doctrine of possession – one of the toys of European doctrine for a long time – knows that, in essence, it all boils down to what sort of relationship with the goods, and with what intensity, we want to afford. Like possession, originality is not in its pure state in the heaven of juridical concepts. Copyright has a reason, which is expressed by means of a requirement and decides both the grant or denial of protection and, to some extent, its form. This explains why differences exist among traditions and national laws, and why these are not static realities. Justification of copyright, as well as the existence of a regime to protect related rights or unfair competition or designs, are all decisive factors for that purpose. When lacking other resources, the judicial extension of copyright and its consequent denaturalization – or, if you like, reconfiguration – becomes difficult to avoid.16

3. Copyright and Droit d’Auteur

Copyright and Droit d’auteur share a solid common ground, and it would be absurd to deny it. The conflict between them is often exaggerated, sometimes for didactic purposes (characteristics are better perceived in a caricature than in a picture), or for reaffirmation purposes (we are what the others are not).17 Nevertheless, one should not overlook the differences, especially when they affect ideological foundations and, specifically, the justification. The tradition of Copyright views the granting of exclusive rights as a tool. It emphasizes social or collective goals. The tradition of Droit d’auteur, instead, prefers to rely on individual considerations. Thus, while Copyright is granted because it is useful (in addition to fair), Droit d’auteur is recognized because it is fair (in addition to useful). Inevitably, in the first case, one looks at the object (the work is of interest for the community and is therefore protected),18 while in

---

16 Cornish’s comment is understandable; see Cornish, W. (1991), ‘Debate’, ALAI Congress of the Aegean Sea II, 225: ‘Given that there is no such unfair competition protection in British commonwealth Common law, copyright serves a useful function and I would be reluctant to see it disappear.’ See also, on the same issue, Nabhan, V., ibidem, 236 and Spoor, J.H., ibidem, 459.

17 On the actual differences and affinities between Copyright and Droit d’auteur, see Strowel, A., Droit d’Auteur et Copyright.

18 This explains, for instance, why the British copyright law protects computer-generated works, that is, works ‘generated by computer in circumstances such that there is no human author of the work’ (s. 178, Copyright, Designs and Patents Act 1988, ‘Minor definitions’).
the second, one looks at the subject (the work is the result of the expressive capacity of one or several persons and must therefore be protected\(^\text{19}\)). Ideological and justification differences have, of course, in practice, organizational consequences: among them, the definition of the subject matter and a different concept of originality.

According to the *Droit d’auteur* tradition, the work is the result of the expressive capacity of human beings; a *qualified form of human communication* as G. Schricker puts it.\(^\text{20}\) It is not an object, resulting from mere ability or effort. Somebody has something to tell and, in order to do so, uses any of the available languages (literary, visual, musical, plastic, digital . . .). The author *is in* the work; this is why he is granted exclusive rights and, especially, moral rights. It is understandable that for a long time, it has been affirmed (not only in France) that originality is but the *imprint of personality* of the author. It is a classic thesis of *Droit d’auteur* countries which is uncontroversially applied in works of art, even anonymous ones (despite what has been said\(^\text{21}\)), but which is difficult (even fictional) to use when dealing with functional and factual works.

In the tradition of *Copyright* the substantive requirements of protection – what we call originality – tend to be described in less strict terms: what is important is that the work has not been copied. In other words, the work must be an independent creation and imply a *quantum* of creativity, albeit small. The first element brings us to the etymology of the term (in Latin, *orior\(^\text{22}\)*) and

\(^{19}\) It must be protected, since in *Droit d’auteur*’s tradition there is some input of iusnaturalism. In this same line, art. 27.2 of the *Universal Declaration of Human Rights* of 1948 should be noted: ‘Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.’ See also art. 15.1.c of the International Covenant on Economic, Social and Cultural Rights of 1966, and General Comment No. 17 Committee on Economic, Social and Cultural Rights, 21 November 2005. On the basis of these norms, the question of originality acquires a specific dimension that should be explored.


\(^{21}\) The object indicates there is an author, whoever that may be. In fact, not too many words are so powerful at referring to the idea of authorship and original creation as the word ‘anonymous’. If, in the end, an anonymous creation does not have its origins in an author, we would deny it the category of work, unless we assign a fictional author to it, as is often proposed for works generated by computer programs.

means that the work comes from the one who is proclaimed to be the author, and no one else. As stated in the seminal British case *University of London Press, Ltd. v. University Tutorial Press, Ltd.* ((1916) 2 Ch 601) concerning some examination papers: 'The work must not be copied from another work [...] it should originate from the author’. On that point, it coincides with the tradition of the *Droit d’auteur*. On the other hand, the same cannot be said as to the second element, which refers to the effort and intellectual ability invested (skill, labour or judgement) on a *de minimis* ground: the *sweat of the brow* and little more. J. Ginsburg explains it with a suitable quotation from Shakespeare: ‘A poor thing, Sir, but mine own’.23

The difference between both traditions is also found in the terms used – more solemn (and abstract) by one, less ambitious (and more specific) by the other – but also in their consequences. The Anglo-American approach has been historically seen as a more receptive, more favourable to a wide concept of work, compensated by the existence of formalities. On the contrary, the other tradition adopts a more restrictive approach, compensated by the absence of formalities and a presumption of originality which is frequently used by courts in a way that significantly inverts the general rules of evidence and burden of proof.24 Nevertheless, in practice, in this matter too the differences between copyright and *Droit d’auteur* are fewer than are usually stated. To begin with, we should look at the regime of related rights which allows countries in the second tradition to require a high level of originality and at the same time offer some protection to those creations or products which do not meet it. Besides that, there is clear evidence of a progressive coming together of both systems. A global market tends to convergence and, on the common ground of the Berne Convention and the TRIPS Agreement, it should be expected that the same tendency will intensify.

It is worth remembering, in the well-known *Feist*25 case, that the US Supreme Court, correcting the conclusion of lower courts, denied copyright protection to a telephone directory by explaining that:

The ‘sine qua non’ of copyright is originality. To qualify for copyright protection, a work must be original to the author. [...] Original, as the term is used in copyright, means only that the work was independently created by the author (as

---

24 In principle, it is the person claiming the copyright who must prove originality, as recognized by many decisions, for instance, *Cour d’Appel de Rennes*, 7 September 2004 (Case la Recouverance), ‘Service de Documentation de la Cour de Cassation’, http://www.legifrance.gouv.fr. Yet more abundant are the judgments which *de facto* take the existence of originality for granted.
opposed to copied from other works), and that it possesses at least some minimal degree of creativity. [ . . ] Originality, not ‘sweat of the brow’, is the touchstone of copyright protection in directories and other fact-based works.  

It is only one country, and other Common Law jurisdictions have kept their distance, but that may well be because of terminology (which somehow evokes the *Droit d’auteur* tradition) rather than substance.  

In a contrary sense, case law in *Droit d’auteur* countries does not reflect the grandiloquent traditional declarations. It is easy to realize that beyond phraseology, the standards of originality have lightened up to afford protection to factual and functional works. The Spanish Supreme Court, for instance, did not refrain from admitting that a leaflet explaining how to install a shower screen qualified as a work, or that the short ads for job offers published in a newspaper were also protected works (a decision that has been strongly criticized). Of course, the unstoppable trend towards a more objective criterion of originality does not prevent courts and legal scholars from referring to the

---

26 The importance of this decision is strengthened by the fact that it is interpreting the US Constitution itself, rather than the Copyright Act: ‘Originality is a constitutional requirement. The source of Congress’ power to enact copyright laws is Article I, § 8, cl. 8, of the Constitution, which authorizes Congress to “secure for limited Times to Authors . . . the exclusive Right to their respective Writings”. In two decisions from the late 19th Century – *The Trade-Mark Cases*, 100 U.S. 82 (1879); and *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884) – this Court defined the crucial terms “authors” and “writings”. In so doing, the Court made it unmistakably clear that these terms presuppose a degree of originality.’

27 See for instance, the well-known Canadian case *CCH Canadian Ltd. v. Law Society of Upper Canada* [2004] 1 SCR 39.


29 Judgment of 30 January 1996, FJ 6º: ‘Regardless of the literary value of the leaflet, understood as the quality of the noble art of expression by means of word, what the Law protects is the original creation of a written language composition, which exists in this case.’

30 Judgment of 13 May 2002, FJ 2º: ‘These ads, known as “job and employment offers” are plain and simple a creative activity with a load of originality, that cannot be limited to style clauses or typographic usages [ . . . ] It should not be forgotten that an offer of an employment position, with the socio-economic burden it implies, requires an intellectual activity of some importance in order to make the offer attractive and to obtain a success in favour of both the tender of the offer and the future applicant, as well as of the means where it is published which – for this reason – is entitled to have its creative endeavour protected.’
‘imprint of personality’, no one being unaware of its limitations and, in particular, its incapacity to explain current reality or serve as an operative criterion. It is a showy and useless tool. An elegant explanation a posteriori of what is obvious: we can say that Guernica reflects Pablo Picasso’s personality because we have no doubt that Guernica is a work. Yet, this should not be seen as mere inertia or passivity. In essence, scholars in the Droit d’auteur tradition feel that the imprint of personality, despite everything, works as an anchorage to a specific understanding of the institution which will be in crisis if the subjective referent were completely lost. What would become of the Droit d’auteur if the work was not seen as an expression of the person? How could one defend, for instance, the existence of moral rights? From that perspective, the imprint of personality becomes a spell against danger. It may not rule, but it reigns.

It would be inexact to conclude that the differences between Copyright and Droit d’Auteur have disappeared, but the process of convergence promoted from both sides should not be ignored. One, upwards; the other, downwards. In Droit d’auteur countries, regardless of the terminology used, the work must have its origin in one or several persons who have invested their creative ability to produce an output which is neither ordinary nor fatally resulting from external conditions. The work is original because it has its origin in an author, but also – essentially – because it results from the freedom of choice among several expressive forms. If a margin of choice exists and it is not copied, there will be originality, hence, a work. Originality, in short, means creative formal choices. I do not think we should require any more. Is this criterion very far

31 As an example, among others, the document ‘Basic notions about copyright and neighbouring rights’ available on the UNESCO website (www.unesco.org) states: ‘Broadly speaking, a work is original when it reflects the personality of its creator.’ In French courts, regardless of scholarly criticism, this term remains deeply rooted. See Judgment of Cour de Cassation of 7 November 2006, which criticizes the appealed decision for having found originality in the novelty of choices, instead of establishing whether ‘these choices, no matter how arbitrary, showed the imprint of their authors’ personality’. Similarly, Judgment of Cour d’Appel de Paris (4e Chambre) of 28 February 2007, explaining the originality of a biography: ‘[the authors] have [. . .] made choices among important documents and, later, arranged the documents selected by them in a way that showed the imprint of their personality’ (Revue Internationale du Droit d’auteur, April 2007, 212, 310). Commenting on a prior decision (by Cour d’Appel de Paris, 4e Chambre, 27 January 2006), Sirinelli, P. criticizes the fact that the Court took into account the ability or savoir faire of the photographer: ‘Thus, we are in the antipodes of the Droit d’auteur [. . .] Originality is a personal imprint shown in the work’ (Revue Internationale du Droit d’auteur, October 2006, 210, 197).

32 In the words of Lucas, a formula ‘parfois incantatoire’ (Lucas, A. and H.J Lucas, Traité, 100).

from the one used in Copyright courts? The terminology is different, of course, but examination of the case law indicates that these differences, albeit real, are not so important.

4. What is originality and where can it be seen? Some common places

A work is an original formal expression of human creativity. Ideas, facts, data, methods . . . are not subject to copyright, no matter how personal and new they may be. To talk about copyright, the substance must have acquired a minimal formal development. The work must be made flesh, to paraphrase John’s gospel. It is from that moment, therefore relating to its form, internal or external (structure), that one can question originality, although courts often mix them up.

Originality of the subject matter is irrelevant. This is an uncontested issue. So is the negative definition: merit and artistic value are irrelevant. Case law from all countries tends to emphasize that judges are not referees on artistic merit. However, it is very unlikely that a judge refrains from using this factor to decide on originality, whether as a subjective assessment or, indirectly, as an objective reference to its author’s social acknowledgement.34

Furthermore, it is accepted that the functional or applied nature of the work does not affect its condition as such. However, nobody ignores its influence. Originality, as said above, requires some margin for decision. Investing effort and intellectual ability in obtaining an inevitable result does not bring copyright. Functionality is the enemy of originality, but not a mortal one. The same happens with the concepts of exhaustiveness and, especially, of truth. As all scientists know, the intellectual effort applied to finding the truth is not rewarded with copyright because that would amount to establishing a monopoly on facts.

Nevertheless, the margin of decision may lead to the opposite conclusion. Spanish courts, for instance, have admitted that an exercise book of mathematical problems in statistics qualifies as a work, even though they were all

---

34 The recent judgment by the Juzgado de lo Mercantil núm. 1 of Bilbao, of 23 November 2007, may serve as an example. Well-known architect Santiago Calatrava claimed infringement of his moral right of integrity over a bridge designed by him, where a pedestrian byway had been added. Among several other arguments, the defendant alleged that the bridge was not an original work. The judge, instead, granted protection with a very orthodox reasoning: the bridge is original because it is a ‘creation resulting from its author and has personality and relevance’. However, the judgment also mentioned the ‘social acknowledgement of Calatrava, as many other well-known architects and engineers’ and the numerous rewards and international commissions he had received. Françon had already qualified the expectation that judges would not take into account the value of the work as a ‘chimera’ (Françon, A. (1998), ‘Preface’, in C. Carreau, Mérite et droit d’auteur, Paris: LGDJ, 10).
Especially interesting, since they come from different traditions, are the De Lalande cases as decided by the courts of France and the United Kingdom. Both cases dealt with some modern performing editions of works by Michel-Richard de Lalande, composer at the courts of Louis XIV and Louis XV. The compositions were different in both cases but, in essence, the issue in both of them was whether well-known musicologist Mr Sawkins could be deemed an author, for reviving (not transforming) de Lalande’s works, by restoring their integrity and expressing them in modern notation. The defendants alleged that Sawkins had not created original works, but had only reconstructed De Lalande’s works which were already in the public domain. The French court decided that ‘a work of the spirit must contain the mark of the intellectual and personal contribution of the author, being of little importance its level of originality’, and that such a requirement was met since Sawkins ‘has used his historical and musical knowledge, but also needed to make personal and arbitrary artistic choices’. However, this judgment makes clear that the result would have been different had it been proven that Sawkins’ production was exactly the same as de Lalande’s works: ‘Defendants did not prove the degree of strict fidelity of the work to de Lalande’s intention, which would deny any personal character in the work of restoration and composition in favour of a simple work of transposition’.

The British decision considers the usual terms such as effort, skill and time and concludes that ‘a work need only be “original” in the limited sense that the author originated it by his efforts rather than slavishly copying it from the work produced by the efforts of another person’. The attempt to faithfully reproduce something done or said by another does not per se exclude the possibility that the result is original to the person who is reproducing it: ‘In my judgment, on the application of “Walter v. Lane” to this case, the effort, skill and time which the judge found Dr Sawkins spent in making the three performing editions were sufficient to satisfy the requirement that they should be “original” works in the copyright sense. This is so even though (a) Dr Sawkins worked on the scores of existing musical works composed by another person (Lalande); (b) Lalande’s works are out of copyright; and (c) Dr Sawkins had no intention of adding any new notes of music of his own.’

---

35 Judgment by Audiencia Provincial de Madrid (s. 12) of 3 March 2004.
37 The cited case (Walter v. Lane, [1900] AC 539) dealt with a political speech given in public and reproduced by a newspaper on the basis of notes taken by its employees, which were later included in a compilation of political speeches.
Nothing prevents others from doing the same, but what Sawkins ‘can prevent them from doing, without his consent, is taking the short cut of copying his performing editions in order to save themselves the trouble that he went to in order to produce them’. The British decision stresses the intellectual effort and accepts, in theory, that results may eventually coincide and still be protected, as long as not copied; therefore admitting the possibility of double creation. The French court, instead, refers to the imprint of personality and sets a theoretical limitation: the hypothesis of a complete success in the reconstruction, that is, once again, the truth. Still, ultimately, both decisions acknowledge Sawkins’ original creation.38

It is generally accepted that the work is the result of a creative labour, and for that purpose, one distinguishes between effort, ability and creativity. The first is rewarded with a wage; and so is the second. The design of a bridge, for instance, requires specific knowledge and ability, but the architect or engineer is just a qualified professional, entitled to a higher remuneration than a worker. In order to enjoy copyright, he must do something more than applying his technical abilities: he must create a work, hence, something original.

In an attempt to specify the concept of originality, one may turn to two pairs of adjectives. First, one may distinguish between absolute and relative originality – a distinction which has been strongly criticized since absolute originality can never exist:39 all works owe something to others. True or not, this distinction may still be preserved since it is useful to underline that derivative creation may – and should – be original. Apart from that, courts often

38 On the issue of restoration/reconstruction of old damaged or incomplete works, see also the famous case of the Dead Sea Scrolls resolved by the Supreme Court of Israel on 30 August 2000 (unofficial English translation by Birnhack, M. at http://lawatch.haifa.ac.il/heb/month/dead_sea.htm#_ftn1, accessed 1 December 2007). The appellant (Eisenmann) denied that the person who deciphered them (Quimron) had created an original work: ‘There was only discovery of facts, in the framework of a research of the historical and scientific research, and as such, it is not protected by copyright law. Even if Qimron has invested effort, time, knowledge and talent, there is no originality. [. . .] Since Qimron presented the work as reflecting the “real” text of the scroll, he cannot argue that it is an original work’. Instead, the court reached the opposite conclusion: ‘Examining the work, with its various phases, as one whole work, reveals undoubted originality and creativity. Qimron’s work was not technical, “mechanical”, like simple labor which result is pre-known. His SH’AR RU’ACH, “the additional soul” he put in the fragments of the scroll, that turned the fragments to a living text, were not just the investment of human resources, in the meaning of “the sweat of man’s brow”. It was the fruit of a process in which Qimron applied his knowledge, skill, imagination; in which he applied discretion and chose among various options.’ Criticizing the decision, see Nimmer, D. (2001–2), ‘Copyright in the Dead Sea Scrolls. Authorship and Originality’, Houston Law Review 38, 1–217.

39 Strowel, A., Droit d’Auteur et Copyright, 409.
use the expression relative originality to refer to works with a limited level of originality.

Far more important and frequent is the distinction between subjective and objective originality which, in addition, turn out to be opposite self-excluding terms. In the first sense, the work is original to the extent that it expresses the personality of the author or, at least, results from an autonomous and independent intellectual effort. The work is the author’s own work. For this reason, the possibility of a double creation is admitted, at least in theory. Several quotations from Judge Learned Hand and Borges come in handy. In the objective sense, originality equals novelty: the work shows characteristics which distinguish them from other pre-existing or possible works. The well-known thesis of statistical uniqueness is a clear example of objective originality. From a traditional point of view, the objective concept is usually disregarded with the argument that it amounts to introducing into copyright a foreign concept (of novelty) which belongs to the realm of industrial property. In that sense, the explanation provided in the Tunis Model Law reproduces the famous example by H. Desbois:

The original character of a work is a matter of fact. It should, however, be noted that originality is not to be confused with novelty. Thus, two craftsmen carving a wood figurine representing an elephant each create an original work although the two figurines are similar and the subject is not a novelty. Both have engaged separately in a creative activity. This would not be the case if one of the craftsmen had simply copied the other’s work.

Nevertheless, novelty or singularity is certainly a parameter easier to use than the imprint of personality and it would be neither easy nor reasonable to do without it. In practice, courts tend to use both criteria; sometimes one prevailing over the other, sometimes cumulatively, hence, disregarding their

---

40 In an often quoted paragraph, Judge Learned Hand speculated on a poem by Keats: ‘If by some magic a man who had never known it were to compose anew Keats’s Ode on a Grecian Urn, he would be an “author”, and, if he copyrighted it, others might not copy that poem, though they might of course copy Keats’s’ (Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49 (2nd Cir. 1936). Similarly, Jorge Luis Borges, in Pierre Menard autor del Quijote, considered the hypothesis of a new writing of the work by Cervantes (word by word) but without any copying.

41 As an example of this reasoning, see Judgment by Juzgado Mercantil núm. 2 de Madrid, of 9 June 2005, which, mixing originality and protection of ideas, ends up denying protection to a TV reality program (Big Brother-type), with the argument that the ‘probability of somebody [. . .] giving birth autonomously to the same or similar project’ is very high.

theoretical contraposition. One could say that both the theoretical approach and the presentation of the conclusions tend to be subjective while, in the context of evidence, the objective considerations are decisive: the personal character is deemed to derive from the novelty character, in particular when dealing with very simple creations. ‘If as far as the condition of existence of the right, one can talk about a subjective criterion, as far as evidence of originality, one must seldom turn to objective elements.’

In practice, judges are not lenient towards claims of double creation, albeit accepting them in theory. The judgment of the Spanish Supreme Court of 29 May 1992 is illustrative. The case dealt with plagiarism of Christmas cards and the defence of independent creation was expressly rejected: ‘The virtually total coincidence of themes, composition, colour, ambiance, etc of two artistic works’ is ‘enough to appreciate the existence of plagiarism’, lacking any evidence ‘that the same work [was] conceived in two minds simultaneously.’ The more simple the creation, the more prone the court is to rely on objective considerations requiring singularity or individuality; this being perfectly comprehensible. For that same reason, it makes sense that the

---

43 See, for instance, Judgment by the Spanish Supreme Court, of 26 October 1992, which denied that originality existed in some pieces of jewellery, both subjectively (since the author was not known, it could not be determined whether they reflected his personality) and objectively (since the jewels reproduced ornamental forms of common use).

44 See Strowel, A. (2001), ‘L’originalité de l’œuvre. Belgian Report’, in ALAI Congress of the Aegean Sea II, 392–407, 395. The same idea may be seen in Bercovitz, R. (2006), in Bercovitz, R. (ed.), Manual de Propiedad Intelectual [sic], Valencia: Tirant lo Blanch, 54: ‘Probably, in both cases in conflict – if departing from a subjective approach – one should insist on (and prove) [. . .] that no copy existed; instead, from an objective approach, one should insist on (and prove) that the creation is different from previous pre-existing work or works. In both cases, the novelty (objective originality) or its opposite (similarity) will have a strong importance; virtually decisive to deny the existence of originality when similarity is higher, decisive when the similarity is absolute’.

45 Along the same lines, the Audiencia Provincial de Valencia, in its judgment of 3 January 2007, concluded that it is ‘impossible [. . .] to justify that the same language results from chance’ in a case of literary coincidences between a legal article and a doctoral thesis.

46 Judgment of 12 July 2004 by Audiencia Provincial de Madrid is a good example of this reasoning. It was discussed whether the arrangement of a well-known song – in itself very simple – was a mere reproduction or, since it met the requirement of originality, a transformation. The court denied the existence of originality based on an expert witness: ‘originality [. . .] only exists when the form chosen by the author incorporates a specificity that allows it to be considered a singular or different reality due to the impression it produces on the consumer, which on the one hand, should distinguish it from other similar or analogous works and, on the other, confers it some appearance of peculiarity’.
Swiss Statute of 1992 tries to avoid the uncertainties of the traditional criterion of *imprint of personality* by defining protected works as ‘literary and artistic creations of the mind, irrespective of their value or purpose, that possess an *individual nature*’. 47

5. The European harmonization: a work in progress

In a globalized economy, under the umbrella of the Berne Convention and similar treaties, it is unlikely that the subject matter of protection differs among different countries. The need for an approximation is stronger in regions which aspire to build a single market for goods and services, such as in the European Union. Nevertheless, the concept of work is not harmonized. Several copyright directives exist but none of them provides for a concept of work common to all countries. European copyright, still in a protean state, may be presented as an unfinished tapestry showing something similar to the old maps of the Holy Roman Empire: some enclaves of a different nature and status, and wide empty spaces, one of them being originality.

On paper, this looks like a spectacular gap, with, one may think, very harmful effects, 48 especially if we take into account that within the European Union both traditions of copyright and *Droit d’Auteur* coexist. However, in practice this does not seem to generate any significant problems. As stated in the *Working Paper on the review of the EC legal framework in the field of copyright and related rights*: ‘In theory, divergent requirements for the level of originality by Member States have the potential of posing barriers to intra-Community trade. In practice, however, there seems to be no convincing evidence to support this.’ 49

The reasons for this are several. First, most conflicts do not go beyond the borders of a country. The *small change* circulates within the national borders and each national jurisdiction deals with the problems that may be generated. Second, as we have already pointed out, although theoretical postulates differ, practical solutions do not. Thus, for instance, the differences between French, German or Spanish judgments are less acute than differences existing in

---

47 Although not in agreement with it, the development of this criterion was prompted by the theory of *statistical uniqueness* put forward by Swiss legal scholar M. Kummer. See Dessemontet, F. (2006), ‘Switzerland’, in Geller, P.E. (ed.), *International Copyright Law and Practice*, § 2[1][b].


national judgments within each jurisdiction. In that sense, the different criteria entertained by the Provincial Audience of Barcelona and by the Supreme Court – concerning job ads in newspapers – is more spectacular than any difference that may result from the traditions of Copyright and Droit d'Auteur. Third, the European Union has reacted promptly when facing troublesome cases, capable of trans-frontier effects, because they concern works that have (or are expected to develop) a fully supranational market. Partial harmonization has been designed for computer programs, databases and photographs.

5.1 Computer programs
The problem with the protection of computer programs arose when software began to be commercialized separately from the hardware. They presented two elements that had been traditionally entitled to proprietary protection: high value and high vulnerability. Copyright was seen as the more appropriate option, with the consequent rejection of the two other possible options considered (patents and ad hoc protection). However, once qualified as literary works, the protection of computer programs depended on the meeting of the general requirements and, in particular, of originality. It was soon discovered not only that courts in different countries applied divergent criteria but also that in some of them the standard of originality was so high it threatened to deny protection to most software. This was the case in Germany, with the well-known Inkassoprogramm case, when the Supreme Court required a level of creativity significantly higher than that of an average programmer, thus introducing a qualitative criterion to preserve the purity of the system.50 Other countries, instead, adopted a different approach or, at least, opened the door to it. Almost contemporary with the German decision, the French Supreme Court decided the no less famous Pachot case, where the traditional reference to the imprint of personality gave way to expressions such as intellectual input ('apport intellectuel') and personalized effort ('effort personnalisé allant au-delà de la simple mise en oeuvre d’une logique automatique et contraignante').51 The new formula was received with surprise and some criticism. One must concede that its positive content (that which is originality) is far from clear and it could easily lead to the opposite result, that is, of granting copyright to any software.52 But its negative content (that which is

50 Inkasso-programm, BGH (Federal Supreme Court), 9 May 1985. In the same sense, case Betriebssystem, BGH (Federal Supreme Court), 4 October 1990.
51 Cour de Cassation, 7 March 1986. The court found that the appealed judgment had correctly assessed originality since the computer programs resulted from ‘a personalized effort that goes beyond the mere application of an automatic and compulsory logic’ and they ‘had the imprint of an intellectual input’ by Mr Pachot.
52 As pointed out by Lucas, A. and Pascal Kamina: ‘Unfortunately the lower
not originality) was eloquent: for this new type of work, the classic concept was not valid.

It is only logical that EU harmonization was deemed a priority and that a uniform standard of originality was necessary. This became one of the most significant issues of the Directive 91/250/EEC, on the legal protection of computer programs (CPD). Nevertheless, the initial Proposal was far from conclusive. Its Explanatory Memorandum referred to ‘intellectual effort’, ‘creative intellectual human activity’ and ‘degree of creativity, skill and inventiveness’. It specifically added: ‘The only criterion which should be applied to determine the eligibility for protection is that of originality, that is, that the work has not been copied. No other aesthetic or qualitative test should be applied.’ This reflected a lower level of originality, close and even coincident with the copyright tradition (independent creation and a modest amount of creativity). Yet, its Recitals did not contain any explanations of this kind and its article 1.4 (a) simply stated that: ‘A computer program shall not be protected unless it satisfies the same conditions as regards its originality as apply to other literary works.’

It was probably a deliberate option to clearly state that computer software was to be protected, rather than to open a debate on the essence of originality. Within its proceedings, further precision was requested. The Economic and Social Committee observed – regarding article 1.4 – that: ‘The Commission does not define “originality”. As the interpretation of this word in law differs from Member State to Member State, this clause does not harmonize anything.’ In other words, lacking an express statement, the diverse concepts of originality will remain an obstacle to the single market. In order to avoid it,

courts were left with only, or at the best open ended, language that does not allow them to delineate any clear criterion of originality’; see Lucas A. and Pascal Kamina (2006), ‘France’, in Geller, P.E. (ed.), International Copyright Law and Practice, New York, Matthew Bender, § 2[1][b][iii][B]. In that same sense, see Lucas, A. and Pierre Sirinelli, ‘French Report’, ALAI Congress of the Aegean Sea II, 436. It should be mentioned that in the later Isermatic case, of 16 April 1991, the French Cour de Cassation referred to the ‘personal input’ and the ‘creative choices characteristics of true programs’.

54 Proposal, Explanatory Memorandum, Part two, art. 1, n. 3.
55 A program is a work ‘created by the expenditure of human skill and labour’ (Proposal, Explanatory Memorandum, Part two, comments on art. 1, n. 2). ‘Provided that copying does not take place, a program maker might, in theory, even produce an entire program which bears a very great similarity to existing programs’ (ibidem, Part One, n. 2.6).
the Committee proposed a definition of originality that included the following declarations: ‘There should be no requirement that the program meets aesthetic, qualitative or quantitative criteria’; ‘There should be no requirement of level of programming expertise’; ‘The test for originality should be that to the extent the program has not been copied from another program it should be protected’. Along the same lines, but on a somewhat higher level, the Parliament proposed the following language for article 1.4: ‘A computer program shall be protected if it is original in the sense that it is the result of the author’s own creative intellectual effort. No other criteria shall be applied to determine its eligibility for protection.’

These proposals were collected in the Amended Proposal of 1990 and, ultimately, in the Directive. According to article 1.3 CPD: ‘A computer program shall be protected if it is original in the sense that it is the author’s own intellectual creation.’ And, to avoid any doubt, it adds: ‘No other criteria shall be applied to determine its eligibility for protection’; while Recital 8 explains: ‘In respect of the criteria to be applied in determining whether or not a computer program is an original work, no tests as to the qualitative or aesthetic merits of the program should be applied.’

It was undoubtedly a harmonization downwards. As a result, most countries were forced to accept – for computer programs – a concept of originality lower than that applied – at least, in theory – to other works. Some did so by

---

57 Opinion on the proposal, cit., n. 3.3.3.3.
58 Legal Protection of Computer Programs, Amendment No. 4, OJEC No. C 231/78, 17/9/90.
60 This criterion is closely linked to the one already proposed in the WIPO Model provisions on the protection of computer software of 1977 (Copyright, January 1978, 6 ff): ‘This Law applies only to computer software which is original in the sense that is the result of its creator’s own intellectual effort’ (s. 3). In the comments, the need to overcome originality was justified, due to the lack of consensus on its meaning: ‘In some countries, a protectable work must simply “originate” with the person claiming copyright in it; in others, it must in addition be of a certain “qualitative” standard.’ Adding a few interesting observations: ‘The word “own” emphasizes the idea that the computer software must originate with its creator; the words “intellectual effort” could, for example, be understood as excluding trivial computer programs consisting of few instructions. […] The word “effort” would seem particularly appropriate since computer programs may take many man-months to prepare […] It should be noted that “own” does not mean “independent” in the sense that the creator did not make use of other computer software […]’ (ibidem, 16).
61 As explained in the Directive Report: ‘This uniform level has required 12 Member States to lower the threshold for granting protection and the remaining three to “lift the bar”’ (Report from the Commission to the Council, the European Parliament and the Economic and Social Committee on the implementation and effects
reverently transposing the exact formula of the Directive (Germany, Spain and Italy\textsuperscript{62}); others, by simply assuming it as an interpretative criterion (Denmark, Finland, France, Luxembourg, the Netherlands, Sweden). The \textit{Report} of 2002 only pointed out some reservations concerning the United Kingdom: given its \textit{skill and labour doctrine}, it said, ‘it remains to be seen whether this will lead to an over-extensive protection of computer programs in the UK’.\textsuperscript{63} British commentators took for granted that the \textit{European concept} (‘author’s own intellectual creation’), despite being a reduction of the traditional standard, continued to imply a higher standard than the British one. Still, this does not seem to have any practical consequences. As stated by L. Bently and W. Cornish: ‘A common lawyer might find it difficult to see how the phrase materially differs from the words used in the seminal case “University of London Press”’.\textsuperscript{64} As to countries in the family of \textit{Droit d’Auteur}, the concept was soon accepted by the courts of the country that had initially raised the alarm, Germany, with the consequent and explicit change of criterion.\textsuperscript{65} Nevertheless, it is difficult to know whether in practice the concept has been further clarified. The protection of computer programs tends to be taken for granted, in spite of the inevitable references to the formula of the Directive. As


\textsuperscript{62} Arts. 69a(3) German Copyright Law, 96.2 Spanish Copyright Law and 2(8) Italian Copyright Law. The Directive’s formula (\textit{author’s own intellectual creation}) is similar to the general criterion of art. 2(2) German Copyright Law (\textit{personal intellectual creation}), although debates generated in German case law precedent advised a literal incorporation.

\textsuperscript{63} \textit{Report}, cit., sub V(1)(e).

\textsuperscript{64} \textit{University of London Press v. University Tutorial Press}, (1916) 2 Ch 601, at 608: ‘The Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work – that it should originate from the author.’ In any case, British law still presents a specific problem in the case of computer-generated works, to which it is difficult to apply the criterion of originality, whether understood either as skill, labour or judgement, or as originated by the author.

\textsuperscript{65} The doctrine of \textit{Inkassoprogramm} was expressly abandoned by the German Federal Supreme Court in the case \textit{Buchhaltungsprogramm} (\textit{Federal Supreme Court, 14 July 1993}). Although the contested computer program did meet the previous (more demanding) criterion, the Court did not miss the opportunity to align itself with the new European concept: ‘This Court required an individual creative achievement, clearly superior to the average programmer’s performance, which must be reflected by and find expression in the selection, compilation, arrangement and organization of the information. [. . .] It should be noted though, that, according to the reformulation of the EC Directive [. . .] less stringent requirements will be applicable to the protection of computer programs in the future’ (\textit{IIC}, 26, no. 1/1995, with a Note by Lehmann, M.). In that same sense, see case \textit{Holzhandelsprogramm} (\textit{Federal Supreme Court, 20 January 1994}).
A. Lucas observes, concerning the French experience: ‘Absent more precise guidance, most courts have not hesitated to take the originality of computer programs for granted because these fall into a protected class of works.’

5.2 Photographs

The second harmonized sector is the protection of photographs, by Directive 93/98/CEE, of 29 October 1993, harmonizing the term of protection of copyright and certain related rights. This is a very peculiar case, as can already be perceived from the title of the Directive. What factors specific to photographs required the harmonization of the concept of originality and, on top of that, in a Directive foreign to that issue? There is certainly a European market for photographs, in particular, through digital networks, but nothing indicates that they presented more problems than other kinds of works.

In fact, the ruling on the originality of photographs was the unforeseen result of an incorrect approach. Leaving aside the unquestionable need for harmonization of the term of protection to avoid distortions in the internal market, the Directive Proposal pointed out that several regimes of protection applied to photographs. Some countries protected them by copyright, while others did so by means of alternative formulas or a combination of both. As a result, the terms of protection did not coincide. The Proposal tried to put an end to this by imposing ‘the complete harmonization of these differing terms of protection’. In order to do so, it suggested a radical solution: subject all photographs to the term envisioned for copyrighted works. According to article 3 of the Proposal: ‘Protected photographs shall have the term of protection provided for in Article 1.’ This suggestion survived until the Amended Proposal.

The solution was clear and comfortable, but had a serious inconvenience: it resulted in an undue extension of the term of protection for photographs which did not qualify as works, while still maintaining the variety of protecting regimes. In order to avoid this, it was necessary to distinguish between photographs subject to copyright and the rest, with a corresponding reference

---


to the concept of originality. Article 6 of the Directive stated that: ‘Photographs which are original in the sense that they are the author’s own intellectual creation shall be protected in accordance with Article 1. No other criteria shall be applied to determine their eligibility for protection. Member States may provide for the protection of other photographs.’ By doing so, the goal of unifying the term of protection of all photographs was ultimately given up, albeit one further step was taken towards the formal harmonization of the subject matter of copyright.

In principle, the concept of originality applicable to photographs is that applicable to computer software and requires two familiar elements: an intellectual creation that is the author’s own. Recital 17, however, introduced other elements that deserve to be mentioned since they may lead to a very different conclusion. First, it referred to the ‘level of originality’, which implies that originality is not all or nothing, but may be graded. Second, despite expressly excluding other criteria, among them the ‘merit or purpose’ of the work, Recital 17 introduced an unequivocal reference to the value of photographs and the professional or amateur status of their authors. In that sense, it is pointed out that the harmonization of the concept of originality is necessary, especially for works which are important within the internal market ‘due to their artistic or professional character’. It is only logical – and significant – that this paragraph disappeared in the codified version of 2006, where Recital 17 became Recital 16.69 Last, and most importantly, Recital 17 escaped the traditional idea of imprint of personality: ‘A photographic work within the meaning of the Berne Convention is to be considered original if it is the author’s own intellectual creation reflecting his personality.’

One might think that the Directive has opted for a downwards harmonization, aligned with the level of originality provided for computer programs. It is significant that the United Kingdom maintained the traditional standard because, according to article 6.2, ‘Member States may provide for the protection of other photographs’.70 But this is a very obscure issue and one might argue that photographs are subject to their own criterion of originality.71 In

69 In the codified version, Recital 16 only states: ‘The protection of photographs in the Member States is the subject of varying regimes. A photographic work within the meaning of the Berne Convention is to be considered original if it is the author’s own intellectual creation reflecting his personality, no other criteria such as merit or purpose being taken into account. The protection of other photographs should be left to national law.’


71 Cf. Karnell, G. ‘European Originality: A Copyright Chimera’, 208. Similarly, see IVIR (2006), The Recasting of Copyright and Related Rights for the Knowledge
countries where a double system of protection (of copyright and related rights) is granted (such as Germany, Austria, Denmark, Spain, Italy or Portugal), the need to distinguish between works and mere photographs will probably lead to the retention of the traditional – stricter – concept of originality for photographic works, or even make it tougher; otherwise, there would be no way to differentiate between them and mere photographs. In other words, it may be required that the photograph should not result from chance, but from decisions or personal choices made by the author when preparing, executing or, in general, treating the image (set, frame, light, developing, etc). In this sense, some decisions deny copyright to photographs on the grounds of mere ability or technical perfection, and request that the photograph expresses something more than reality. This tendency may render difficult the effectiveness of

Economy, November 2006, http://www.ivir.nl, accessed 1 December 2007. The authors of this study understand that Recital 16 ‘seems to imply a stricter test than is laid down for software and databases’. Although acknowledging that it is not clear whether or not these are diverging concepts of originality, they prefer the affirmative answer: ‘Given the different rationale of both provisions, it is likely that the criterion for photographs indeed refers to the stricter continental-European test which requires that a creation be a “personal expression” and not merely an own intellectual creation. This interpretation would comply with the stated intention of the framers of this provision, which is to clarify that the normal term of protection does not apply to “simple” photographs (which qualify for a neighbouring right in some member states’ (n. 2.2.3). It is significant that in Spain, a country usually very disciplined in the literary transposition of the Directives, the harmonized standard for photographs did not make it into the Statute, unlike what happened with computer programs and, to a lesser extent, to databases. The Spanish Supreme Court (Judgment of 29 March 1996), dealing with an image rights claim, affirmed that in order to be deemed a work, the photograph must reflect ‘a very personal doing which goes beyond the mere reproduction of the image’. It is the photograph, not the photographed object, which must reach the public. In the same sense, see judgments by Audiencia Provincial de Barcelona, of 21 November 2003 (mere photographs of an old codex: the photo must ‘transmit to the audience emotions or ideas which, being a product of creativity, would not be derived from the contemplation of the mere capture of the reality of things’) and of 1 February 2005 (mere photographs for a swimsuit catalogue: ‘it neither bears any specific creative or intellectual ability by the claimant, nor they show the imprint of his personality, artistically transforming the captured external reality’). The Audiencia Provincial de Alicante (19 June 2006) also denied qualification as works to some photos of religious images with similar arguments: ‘The mere technical perfection of frame, light, position or contrast is not sufficient at all. Photographs are “plain”, that is, they do not convey anything else than the picture of images as they are, without bearing any element that makes them original with respect to any other photos that could be made of these figures. In conclusion, they may be perfect from a technical point of view [. . .] but they do not bear the plus of originality that upgrade them to the category of artistic works.’ The same was concluded by the Audiencia Provincial de Valencia (6 February 2007) concerning a series of photographs of tombstones: ‘they only transmit the image as is and as it appears in reality, through a simple process of capturing the object, without
harmonization. It may also help to keep the traditional concepts – high or low – in countries that only envision one system of protection for photographs (such as Belgium, France, Ireland and the United Kingdom). Although France and the United Kingdom, to mention but two, share the same harmonized concept of originality for photographic works, it will take time to move away from traditional concepts or at least, from the language commonly used to explain them. In France, under current Recital 16 (formerly 17) of the Directive, one may still refer to the imprint of personality, while in the United Kingdom copyright may be granted to photographs with a low input of creativity.

5.3 Databases
The third harmonized sector is databases, through Directive 96/9/EC of 11 March 1996. The criteria applied to decide whether databases were or were not protected by copyright differed among Member countries. An important decision, shortly before the US Feist case, by the Dutch Supreme Court subjected copyright protection on a dictionary to the requirement that the specific choice of terms expressed the personal imprint of the author. Although it is always any creative novelty’. The Juzgado Mercantil 1 de Madrid (27 September 2005) concluded that the photograph of poet Pablo Neruda qualified as a work because it shows a ‘non casual treatment’ destined to cause ‘a specific effect on the spectator’.

73 This is the case in France, where although only photographic works are protected, the traditional and strict standard of the author’s personality imprint continues to be applied. See, for instance, Judgments by Cour de Cassation of 1 March 1988 (photos taken during the making of a film: ‘the instance judges have sought the personal imprint [...] they have concluded that it was in fact a work of a mere technician’); 30 June 1993 (photograph of a landscape: ‘the exam did not reveal [...] the imprint of its authors’ personality, not being original works’) and 3 February 2004 (photographs of car races: ‘scenes of great banality which do not reveal the sensibility of the photographer or his personal abilities’). See also Cour d’Appel de Caen, 6 October 2006 (‘photographs [...] are banal and without any specific creative character, similar to clichés which bear no personal imprint’) and Cour d’Appel de Rennes, 7 September 2004 (photographs of the schooner La Recouvrance: ‘clichés which do not bear his imprint and could have been taken by any photographer equipped with the necessary material’).

74 See, for instance, Fraser-Woodward Ltd v. British Broadcasting Corporation Brighter Pictures Ltd [2005] EWHC 472 (Ch) (23 March 2005), where nobody contested whether a series of snapshots of the Beckham family were subject to copyright. In Droit d’auteur jurisdictions, the issue would, at least, have been raised.

a risk, it is likely that the same dictionary could have easily met the standard of skill, labour and judgement required in the United Kingdom. Differences such as these in the assessment of originality could become an obstacle for the internal market and a handicap for the European database industry. Hence, the need to harmonize it:

In particular, the Commission argued that the difference between the lower ‘sweat of the brow’ copyright standard (i.e. involving considerable skill, labour or judgment in gathering together and/or checking a compilation) that applied in common law Member States and the higher ‘intellectual creation’ standard that applied in droit d’auteur created distortion of trade in ‘database products’.76

A concept of originality was proposed, based on the Droit d’auteur approach, albeit with a slightly lower standard than the more demanding jurisdictions. According to article 3.1 of the Directive, ‘databases which, by reason of the selection or arrangement of their contents, constitute “the author’s own intellectual creation” shall be protected as such by copyright’. And, it adds, once again that ‘No other criteria shall be applied to determine their eligibility for that protection’. Although the term originality is not expressly mentioned, there is no doubt that it also applies to databases. As confirmed in Recital 16: ‘No criterion other than originality in the sense of the author’s intellectual creation should be applied to determine the eligibility of the database for copyright protection, and in particular no aesthetic or qualitative criteria should be applied’ (see also Recital 39).

The concept of originality as applied to databases responds to the downwards harmonization trend, but still within the orthodoxy of Droit d’auteur principles. In that sense, the requirement of ‘intellectual creation’ prevails over the traditional criterion used in Common Law countries. Therefore, the United Kingdom and Ireland were forced to upgrade their standard.77 Nevertheless, to compensate for this, a new sui generis right was granted to ‘the maker of a database which shows that there has been qualitatively and/or

---

77 Ibidem.
quantitatively a substantial investment in either the obtaining, verification or presentation of the contents’ (art. 7.1). This investment, as explained in Recital 40, ‘may consist in the deployment of financial resources and/or the expending of time, effort and energy’. Thus, a clear line was drawn between original (in the sense indicated) and non-original databases, also affording the latter some reasonable protection.

This regime has been substantially altered by the European Court of Justice case law in the cases C-46/02 (Fixtures Marketing Ltd v. Oy Veikkaus Ab), C-203/02 (The British Horseracing Board Ltd and Others v. William Hill Organisation Ltd), C-338/02 (Fixtures Marketing Ltd v. Svenska Spel AB) and C-444/02 (Fixtures Marketing Ltd v. Organismos prognostikon agonon podosfaiou AE – ‘OPAP’). In principle, one may think that the term ‘obtention’ was wide enough to include the ‘production’ of data. However, the Court rejected such interpretation: no *sui generis* right is granted when a substantial investment is applied to producing (generating) the contents. This may deny protection to many databases which, in fact, constitute a subproduct (a spin-off) of a principal activity, such as TV listings in the *Magill* case.78 This has led some to consider the convenience of amending the Directive, so as to repeal the *sui generis* right which does not seem to have been an incentive for the databases industry. However, for the time being, this has been put aside. The evaluation Report did not want to reopen the debate on originality or open the door for Common Law countries to reintroduce the sweat of the brow criterion to assess it.79 But could the ECJ doctrine induce Ireland and the United Kingdom to bring back the old concept of originality?

### 5.4 Some other concepts of originality and other different criteria

Although not often mentioned there is a fourth Directive which also refers to originality: Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art. It is obvious that in this case the term originality is used in a different sense from the one used to decide the granting of copyright: the creation must be a work and, accordingly, comply with the standard of originality required by national legislation, be it the *imprint of personality* or a mere *personalized intellectual effort*. Only when such requirement is met,
will copyright apply. Originality in the Resale Right Directive is not aimed at identifying the work but rather the specific object (the original, not the copies) to which it will apply. For this reason, it is required that works be ‘made by the artist himself’ (art. 2.1 Directive) or ‘under his authority’, in limited editions. There must be an element of personal implication of the author. In any case, this originality has nothing to do with the concept of originality used to assess the granting or denial of copyright.

The harmonized term of originality, as a criterion to grant copyright, may be tuned by referring to the criteria used to define other protected subject-matter, such as topographies of semiconductors products and designs. In the first case, topographies must be the result of its ‘creator’s own intellectual effort’ and must not be ‘commonplace’ in the semiconductor industry.80 In the second case, the creation must be ‘new and [have] an individual character’.81 Despite being a personal creation of its author, a non-novel design will not be protected.

6. Future perspectives

The European harmonization of the concept of originality is a very limited operation: first, because it only affects three categories of works; second, because it is not clear that it is one identical concept or two (one for computer software and databases, and another for photographs); and third, because even within each harmonized sector and under the umbrella of a common standard (the author’s own intellectual creation, the ‘AOIC mantra’ in the words of G. Karnell82), traditional national standards could subsist.

Would it make sense to go beyond the current status and grant the harmonized standard transversal application? There are reasons for doing so. As explained in the Working Paper of 2004:83 ‘In theory, divergent requirements for the level of originality by Member States have the potential of posing barriers to intra-Community trade’. However, in practice, this does not seem to be the case, as accepted in the same document before concluding that there is no need to adopt any action in that sense:

The Community harmonisation was needed, and has been enacted, with technology-related categories of Works, notably computer programs and databases. However, there are no indications that the lack of harmonisation of the concept of originality would have caused any problems for the functioning of the Internal Market with respect to other categories of Works, such as compositions, films or books. Therefore, legislative action does not appear necessary at this stage.84

‘Not necessary’ is different from ‘not possible’. Would it be counter-productive to generalize this concept? I do not think so. Legislators and judges have not been uncomfortable with the harmonized concept. Some countries brought it into their laws when incorporating the corresponding Directives. But many others simply understood that their concepts (in theory and practice) of originality were already adjusted to the new definition. Even when transposition was deemed necessary, as in the case of the United Kingdom with respect to databases,85 it seems that no significant changes should be expected in case law.86 The same happened in Spain as far as computer programs were concerned: the Statute includes the Directive’s definition (art. 96.2 Intellectual Property Law), but commentators and courts do not read it as different from the general rule of originality.

The introduction of a new criterion could have confirmed the idea that originality is a concept of variable geometry. Under the pressure of factual and functional works, one could proceed to an ordered retreat, creating separate compartments by distinguishing between artistic works, on the one hand, and factual and functional works, on the other. The first would remain subject to a high standard of personal imprint. For the second, instead, a personalized intellectual effort (not a copy, plus a reasonable quantum of creativity) would suffice. This proposal has been endorsed by a significant part of the legal doctrine.87 But


85 For further interest, see the debates that took place in the Fourth Standing Committee on Delegated Legislation, 3 December 1997 at http://www.publications.parliament.uk/pa/cm199798/cmstand/deleg4/st971203/71203s01.htm, accessed 1 December 2007.


87 See, for instance, contributions by Cornish, W., A. Kerever, F.W. Grosheide and A. Quaedvlieg in ‘Debate’, *ALAI Congress of the Aegean Sea II*, 225, 237–8, 244 and 251–2.
it would imply a fundamental rupture with traditional copyright concepts. As happened with the property right (which moved from property to properties), the diversity of subject matter would bring different legal regimes. This does not look like a desirable option. One may accept a different level of protection resulting from the specific delimitation of the protected subject matter (thus, a factual or functional creation or a simple artistic creation would have less protection against copies since a significant number of them belong to the realm of common), but for all of them, the nature and contents of copyright must be the same as granted to other works. As A. Lucas beautifully puts it, admitting different concepts of originality would amount to demagnetizing the compass that should guide us. The proverbial hospitality of copyright has brought us to modify the admission criteria to the club in order to accept new members. But, once this is done, the only reasonable next step is to apply the new criteria in general.

In this context, why not extend the European formula, harmonizing originality for all works? It would, of course, be a rather symbolic operation. But symbols are important. The concept of work is the very basis of copyright and it would make perfect sense to make it clear that a common denominator exists as to requirements for protection. The question, of course, will remain subject to casuistic assessment by courts, without prejudice of a hypothetical and improbable intervention by the European Court of Justice. Nevertheless, at least, laws and courts in the whole European Union would be using the same words and should be arriving at similar conclusions. It is not a lot, but it is some progress.