

Introduction: setting the scene for non-conventional copyright

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Informal conversations and chats sometimes give rise to new ideas and trigger adventures. This is exactly what happened when we met for a ‘fika’ (Sweden’s ritual coffee break) on a cold February afternoon in Nicola’s university office in the Swedish town of Jönköping and started talking about bizarre and to some extent esoteric forms of creativity in the fields of art, music, popular culture, technology, science and beyond.

The chat took a playful turn from the very beginning. Enrico asked: ‘Nicola, what if more and more graffiti writers start enforcing their copyright against corporations that commercially exploit their tags? . . . And if disc-jockeys decide to complain about party-goers that attend their set and use Shazam [the smartphone application that can identify music] to learn about their tunes and copy the entire compilation? . . . Also, last week I was in a restaurant in East London and had a wonderful and quite eye-catching radish salad. Could the chef claim copyright in such culinary presentation?’. Nicola seemed interested and enthusiastically entered the game: ‘Yeah. That’s intriguing. And what about Michael Jordan’s classic spin move under the basket? Could he protect such an athletic movement? . . . Or could comedians and magicians hold and enforce a valid copyright over their jokes and tricks?’. The chat went on and on.

After mentioning other extravagant products of human ingenuity, including tattoos, bio, conceptual and land art, typefaces and the scents of perfumes, we both wondered if it was worth spurring a comprehensive academic debate about whether copyright laws should accommodate the interests of such an increasingly broad category of creators by guaranteeing them protection.¹ We agreed it was. That belief has not

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¹ Some scholars have already speculated about whether some non-traditional works could be protected by copyright. See for example R. Anthony Reese,

only been fuelled by our acknowledging that artists, musicians, writers and other creative people are continually exploring new ways of expression; we also started puzzling over whether copyright laws – in a world characterised by fast social and technological changes – are too obsessed with categorising works and a rigid application of the requirements for protection.

Our investigation aims therefore at offering a constructive view of the changing nature of contemporary creative efforts and verifying whether it is possible to imagine a more open and flexible copyright system which is capable of welcoming new forms of creativity.

It is not just art, music and culture which are evolving and challenging the traditional principles and comfortable contours of copyright laws. Recent technological developments are also playing a crucial role. Take synthetic biology, bioengineering, artificial intelligence and 3D printing techniques, which are increasingly helping to address some of today's most pressing industrial, technological and biomedical challenges, and are producing outputs that might soon be recognised as meriting copyright protection. It could be argued that this is just 'history repeating'. Indeed, copyright laws have always needed to adapt to and catch up with new technologies and their societal consequences; this occurred for example with the advent of photography, motion pictures, computer programs and several other 'new' works.²

We therefore believe it is time to offer a new set of perspectives on, and views of, copyright regimes, with a view to investigating whether the latter should be more flexible regarding whether new or non-conventional forms of expression in atypical fields deserve to be protected. The issues that will be addressed by the contributors to this volume, and are briefly summarised in this introduction, predominantly refer to copyrightable subject matter, the originality and fixation requirements, the functionality exception, the authorship requirement, the idea/expression dichotomy and to the debate whether illegal and immoral works should be denied protection.

Copyrightable Subject Matter in the 'Next Great Copyright Act', 29 Berkeley Tech. L.J. 1489 (2014); Pamela Samuelson, *Evolving Conceptions of Copyright Subject Matter*, 78 U. Pitt. L. Rev. 17 (2016); Christopher Buccafusco, *A Theory of Copyright Authorship*, 102 Va. L. Rev. 1229 (2016).

² See also Brad Sherman and Leanne Wiseman (eds), *Copyright and the Challenge of the New* (Wolters Kluwer, 2012) 1 (noting that 'one of the most challenging things about copyright law is that it is constantly subject to change').

1. COPYRIGHTABLE SUBJECT MATTER

As mentioned, a first hurdle for new and non-traditional works to be protected is the rigid categorisation embraced by several copyright laws. One of these is the UK copyright act, which contains a closed list granting protection to only eight categories of works, namely literary, dramatic, musical and artistic works, films, sound recordings, broadcasts, and typographical arrangements of published editions.³ Only works which happen to fit within these available boxes are protected, thus creating what can be labelled as a ‘pigeon-hole’ system. While this regime may be praised for providing legal certainty, criticisms have also been voiced. First, closed list systems may leave several works unprotected, as confirmed by the British case *Creations Records Ltd v. News Group Newspapers Ltd*.⁴ In that dispute it was held that no copyright subsists in a specially prepared scene (consisting of a white Rolls Royce in a swimming pool of a hotel and an arrangement of other objects and props), as this scene could not be categorised as a dramatic work or as an artistic work, or sculpture, collage or work of artistic craftsmanship. It has been suggested that such an outcome would create an unjustifiable discrimination, and in particular offend public policy, as the intellectual and manual efforts used to come up with the scene in *Creations Records* (the ensemble of object and props was photographed, and the official picture was used as a cover for an LP album of the band Oasis) reflected a significant amount of creativity which would deserve protection.⁵

Categorisation is not completely rigid, though. Take laws like the 1790 US copyright act which granted protection only to a very few works such as books, charts and maps; or the UK Statute of Anne of 1710 which covered just books. Both laws featured closed lists of copyrightable works, which have however expanded over time, through both the introduction of new subject matter into copyright laws⁶ and a (broad) interpretation of existing

³ Other common law jurisdictions such as Australia and New Zealand have also a closed list system.

⁴ *Creation Records v. News Group Newspapers* [1997] EMLR 444.

⁵ See Andrew Christie, A Proposal for Simplifying United Kingdom Copyright Law, 23 Eur. Intell. Prop. Rev. 26 (2001).

⁶ In the US for example, after the 1790 Act, the copyrightable subject matter was expanded by Congress by adding engravings, etchings and prints in 1802, then musical compositions in 1831, dramatic compositions in 1856, photographs in 1865, paintings, drawings and statuary in 1870, motion pictures in 1912, and sound recordings in 1971; see Christopher J. Buccafusco, A Theory of Copyright Authorship, 102 Va. L. Rev. 1229, 1238, 1242 (2016).

categories by judges and copyright offices.⁷ It has also been argued that current closed systems like the 1988 UK copyright act might be interpreted as encompassing new forms of creative expressions not explicitly mentioned in the eight categories.⁸ Indeed, following the *Infopaq* decision by the Court of Justice of the European Union (CJEU)⁹ (and even after the UK leaves the EU in March 2019), the British copyright act might be read to reflect the EU principle that anything that constitutes an ‘intellectual creation’ should be protected, and accordingly the fact that a work does not fall within those eight categories would not exclude protection.¹⁰

While the rigidity of closed list systems may still be tempered by lawmakers’ interventions or judicial interpretation – because the existing categories can actually operate in an open-ended manner¹¹ – jurisdictions that have adopted open and illustrative lists of copyrightable works, such as France, Germany and the Netherlands, at least in theory should leave the ‘copyright door’ more open to new and non-traditional works.¹² The

⁷ For example, in *Burrow-Giles Lithographic Co. v. Sarony*, 111 US 53 (1884), the US Supreme Court upheld the power of Congress to extend copyright protection to photography, by holding that photographs could be considered as ‘writings’ pursuant to Section 1(8) of the US Constitution (comparing them to engravings, etchings and prints), and noting that they embodied ‘the intellectual conception of the author’. Later, in *Edison v. Lubin*, 122 F. 240 (3d Cir. 1903) the concept of photographs was interpreted extensively to encompass films as they were considered as moving pictures. Also, under the 1909 Act the US copyright office registered computer programs as ‘books’, considering them as ‘how to do it’ books; see R. Anthony Reese, Copyrightable Subject Matter in the ‘Next Great Copyright Act’, supra note 1, at 1519. And in the UK ‘printed sheet music’ was considered as included in the sub-category of books in *Bach v Longman* (1777) 98 Eng Re p. 274, 1275 (K.B.).

⁸ See Lionel Bently and Brad Sherman, *Intellectual Property Law* (4th edn, 2014) 60–61.

⁹ Case C-5/08, *Infopaq Int’l A/S v. Danske Dagblades Forening*, 2009 E.C.R. I-6569 (setting out the EU originality standard for copyright protection).

¹⁰ See the British case *SAS Institute Inc. v. World Programming Ltd* [2013] EWHC 69 (Ch), [27]. At the time of writing it cannot be ruled out that the UK, even after leaving the EU, will still need to observe several laws governing the EU single market, including copyright-related directives and CJEU decisions. And even in the case of the departure of the UK from EU single market rules, the ‘intellectual creation’ test for copyright subsistence might still be kept by British courts.

¹¹ Tanya Aplin, *Copyright in the Digital Society: The Challenges of Multimedia* (Hart Publishing, 2005) 249. See also the recent decision of the English High Court in *Banner Universal Motion Pictures Ltd v. Endemol Shine Group Ltd & Anor* [2017] EWHC 2600 (Ch), which suggests that the format of a TV game show or quiz show can be protected by copyright as a dramatic work.

¹² It is also because of the fact that the Dutch copyright act contains an open list of copyrightable works that the local Supreme Court found that the scent of a

open list approach would have the advantage of injecting greater flexibility into the system and aim at guaranteeing comprehensiveness of protection (for example, new works will not be denied protection merely because they do not fall within any category of the list).¹³ What the US Congress noted when passing the 1976 Act and justifying the open list of protectable works it includes, is quite eloquent and relevant here: '[a]uthors are continually finding new ways of expressing themselves, but is impossible to foresee the forms that these new expressive methods will take'.¹⁴

Yet, the propensity for 'categorisation' has remained even in countries that have adopted open list systems. In the US, for instance, new works like computer programs and video games were considered copyrightable since they had been deemed as falling within already identified categories of subject matter (literary and/or audiovisual works),¹⁵ and not because they had been treated as original works of authorship belonging to a new category.¹⁶ That categories of copyrightable subject matter remain relevant in the US copyright system has led some commentators to argue that the list provided by the act is effectively a closed one.¹⁷ Also, grey areas surrounding the scope and width of these categories remain. Take the lack of definition of choreographic works and pantomimes within the current

perfume can be eligible for protection: see *Kekofa BV Lancome Parfums et Beauté et Cie SNC* [2006] ECDR 26.

¹³ See Tanya Aplin, Subject Matter. In *Research Handbook on the Future of EU Copyright* (Estelle Derclaye, ed., Edward Elgar Publishing, 2009) 49. An extensive but non-exhaustive list of works is also provided by Article 2(1) of the Berne Convention (Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, S. Treaty Doc. 99-27, 1161 U.N.T.S. 3 (amended Sept. 28, 1979) (hereinafter also: Berne Convention), which clarifies that the expression 'literary and artistic works' includes 'every production in the literary, scientific and artistic domain'.

¹⁴ 1976 House Report No. 94-1476, at 51 (also noting that '[t]he history of copyright law has been one of gradual expansion in the types of works accorded protection . . . The historic expansion of copyright has also applied to forms of expression which, although in existence for generations or centuries, have only gradually come to be recognized as creative and worthy of protection').

¹⁵ The definition of 'computer program', for instance, was added in 1980 by the US Congress to 17 U.S.C. § 101. This legislative intervention, and a court decision in *Apple v. Franklin* in 1983, clarified that the Copyright Act treated computer programs as literary works.

¹⁶ See Aplin, *Copyright in the Digital Society*, supra note 11.

¹⁷ One of these is our contributor Xiyin Tang, who has authored Chapter 1 on 'Copyright in the Expanded Field: On Land Art and Other New Mediums'. See also (again) the 1976 House Report No. 94-1476, at 51, stressing that the 1976 US Copyright Act does not aim to 'allow unlimited expansion into areas completely outside the present congressional intent'.

US copyright Act; and the ambiguity such a lack has created in relation to, for example, the protectability of sport moves as choreographic works and of magicians' performances of tricks as pantomime.¹⁸ The state of uncertainty created by such grey areas is epitomised by the 'rule of doubt' certificates occasionally issued by the US copyright office in relation to unconventional subject matter. These certificates show the office's scepticism about the copyrightability of a certain work, but give the applicant an opportunity to convince courts that the claimed subject matter is indeed protectable.

2. ORIGINALITY

Falling within the copyrightable subject matter is not enough. Whether or not forms of creativity can be protected also depends on whether the work in question meets a sufficient level of originality. Although the Berne Convention does not explicitly state that copyrightable works must be 'original', most countries do provide so. The originality test varies across jurisdictions, ranging from the US law 'minimal degree of creativity' test (as affirmed in *Feist v. Rural*)¹⁹ to the EU 'intellectual creation' requirement.²⁰ Despite such differences, the originality threshold has traditionally been low in many countries.

Requiring that copyrightable works simply be authors' intellectual creations or the result of minimum level of creativity may make the categorisation of eligible subject matter less relevant. The CJEU decisions which affirmed the copyrightability of works such as 11-word extracts from protected newspapers,²¹ a user interface in a computer program,²² or simple portrait photographs,²³ seem to confirm this point. In light of such case law – as mentioned above – it could be argued that where there is an intellectual creation, it is unnecessary to further categorise it as a particular type of work in order to consider it copyrightable. Whereas these findings may not particularly affect those EU countries that have

¹⁸ See R. Anthony Reese, Copyrightable Subject Matter in the 'Next Great Copyright Act', supra note 1, at 1526.

¹⁹ *Feist Publications, Inc., v. Rural Telephone Service Co.*, 499 U.S. 340 (1991).

²⁰ *Infopaq v. Danske*, C-5/08, supra note 9. In this case the CJEU found that anything that constitutes an intellectual creation should be protected by copyright.

²¹ See again *Infopaq v. Danske*, C-5/08, supra note 9.

²² See Case C-393/09 *Bezpečnostní softwarová asociace – Svaz softwarové ochrany v. Ministerstvo kultury*, 2010 E.C.R. I-13971.

²³ See Case C-145/10, *Painer v. Standard Verlags*, 2011 E.C.R. I-12533.

an open-ended list approach, it may instead push jurisdictions like UK (even after Brexit)²⁴ to expressly drop their closed list system and link the concept of work to originality.²⁵ This would not really come as a big surprise as also the *travaux préparatoires* for the (Berne Convention) Brussels Revision Conference of 1948 indicated that the requirement of ‘intellectual creation’ is implicit in the concept of ‘literary and artistic work’.²⁶

Against this backdrop, this volume will investigate whether various forms of expression are capable of satisfying originality tests in several jurisdictions. Can for example culinary creations (which often borrow elements from other chefs’ presentations) or certain esoteric graffiti and street artworks such as tags and short sentences written on walls be considered original? What about sport moves like those performed in figure skating? Can they be protected as choreographic works where substantial creativity exists on the athletes’ and their trainers’ side? And CAD (computer-aided designs) files which are used to print 3D products? Can we argue that a CAD file depicting an object that is simply scanned or whose picture is taken demonstrates creative and free choices? And what about DJs’ sets? It does not seem heretical to maintain that disc-jockeys display genuine artistic creativity in compiling and executing their sets and that their compilations can be considered original. Contributors to this book will expand on these and similar issues.

3. FIXATION

As copyright protects just expressions of ideas, and not ideas themselves, in several jurisdictions copyrightable works need to be fixed in a tangible medium.²⁷ Indeed, despite the Berne Convention protecting ‘literary and artistic works . . . whatever may be the mode or form of its expression’,²⁸ it also allows countries to determine that works are ineligible for protection ‘unless they have been fixed in some material form’.²⁹ The fixation require-

²⁴ See supra note 10.

²⁵ On the CJEU case law suggesting that the notion of ‘originality’ and ‘work’ conflate see Eleonora Rosati, *Originality in EU Copyright: Full Harmonization through Case Law* (Edward Elgar Publishing, 2013).

²⁶ See Sam Ricketson and Jane Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* § 8.03 (Oxford University Press, 2006).

²⁷ See also Megan M. Carpenter, *If It’s Broke, Fix It: Fixing Fixation*, 39 Colum. J.L. & Arts 355 (2016) (noting that fixation ‘is often the judicial threshold over which idea becomes expression’).

²⁸ Berne Convention, Article 2, Sec. 1.

²⁹ Berne Convention, Article 2 Sec. 2.

ment is thus allowed by Berne – and while copyright laws such as the US and UK statutes have incorporated it, others have not (this is the case with several civil law jurisdictions).

That said, some authors in this volume wonder whether certain copyright regimes are too obsessed with the tangible and physical embodiment requirement. Do contemporary copyright laws – in the words of a contributor³⁰ – remain very much focused and dependent on a specific concept of medium purity? Are these laws still focused, for example, on a kind of traditional art which is just displayed in museums and dependent on judges' subjective aesthetic judgments about what can be considered 'artistic',³¹ with the result that many pieces of contemporary art may be excluded from protection?

Old and recent cases have highlighted how a rigid application of the fixation requirement may leave new forms of art without protection. Take the garden 'Windflower Works' devised by painter and gardener Chapman Kelley, an important example of landscape art. In the seminal US case *Kelley v. Chicago Park District*,³² it was held that such a living garden lacks the kind of stable fixation normally required to support copyright: 'a garden is simply too changeable to satisfy the primary purpose of fixation; its appearance is too inherently variable to supply a baseline for determining questions of copyright protection'.³³ A not very different outcome occurred in the British case *Merchandising Corporation of America v. Harpbond*,³⁴ where it was found that the facial make-up of the pop artist Adam Ant did not constitute a painting for the purpose of copyright ('if the marks are taken off the face there cannot be a painting. . . . a painting without a surface is not a painting'). This finding attracted criticism.³⁵ It has been noted that it is difficult to see why a pop star's face is less of a surface than a piece of canvas and could not be protected by

³⁰ See Xiyin Tang's Chapter 1 'Copyright in the Expanded Field: On Land Art and Other New Mediums'.

³¹ See Anne Barron, Copyright Law and the Claims of Art, 4 *Intell. Prop. Q.* 368, 371 (2002).

³² *Kelley v. Chicago Park District*, 635 F.3d 290, 303 (7th Cir. 2011).

³³ *Ibid.*

³⁴ *Merchandising Corp. of America Inc. & ors v. Harpbond Ltd & ors* [1983] FSR 32.

³⁵ See also Anne Barron, Copyright Art and Objecthood. In *Dear Images: Art, Copyright and Culture* (Daniel McLean and Karsten Schubert, eds, Ridinghouse, 2002) 277, 293, 304 (noting that art practices nowadays are often based on 'the dematerialization of the art object: the production of art that yielded no object; or in which process, context-dependence, chance or randomness [are] prioritised over form').

copyright.³⁶ After all, in the US make-up designs have been considered as satisfying the fixation requirement.³⁷

Issues of fixation have also arisen in relation to more esoteric, and non-strictly artistic, matter, such as the taste of a cheese. In a case which at the time of writing still needs to be decided by the CJEU (*Levola Hengelo*), Advocate General Melchior Whatelet noted that the fact that tastes are ephemeral, volatile and instable prevents them from being precisely and objectively identified and thus considered copyrightable works.³⁸

Not only certain forms of artistic works may be left unprotected by a rigid application of the fixation requirement (the book will expand on subject matter as diverse as graffiti and street art, tattoos and bio art). Music can also be affected. This would be the case with jazz performers, especially when they come up with arrangements directly on stage and do not record their improvised performances. The same is true of comedians' performances. Comedians' routine may indeed depend in large part on audience interaction, such as responding to heckles from an audience member, reading subtle cues, and adapting a pre-planned routine as the performance goes on: with the result that, if comedians fail to fix their joke, they cannot rely on copyright protection.³⁹ Could we then argue that these outcomes openly challenge the paradigm in copyright laws that are predominantly based on the primacy of notated or fixed musical compositions or scripts?⁴⁰ This volume will also shed light on these points.

4. FUNCTIONALITY

Works that have prominent functional features may be considered uncopyrightable in several jurisdictions. That works must not conform to some

³⁶ See Bently and Sherman, *Intellectual Property Law* supra note 8, at 73–74.

³⁷ Make-up designs for the characters in the Broadway show 'Cats' were found to be copyrightable in *Carell v. Shubert Org., Inc.*, 104 F.Supp.2d 236 (S.D.N.Y. 2000).

³⁸ *Levola Hengelo* (Case C-310/17), Opinion of 25 July 2018, para 60. From the above comment it seems clear that a fixation-related issue has been raised, although the Advocate General took the pain to stress that EU copyright law does not provide a fixation requirement (para 59). The Advocate General also held that the only categories of works included in the definition given by Article 2(1) of the Berne Convention ("every production in the literary, scientific and artistic domain") are those that can be perceived through sight or hearing, but not other senses such as taste, smell or tactile sense (para 51).

³⁹ See Chapter 10, 'Copyright Protection for Modern Comedic Material', by Trevor Gates.

⁴⁰ See Chapter 8, 'Music Improvisation and Copyright', by Giuseppe Mazziotti.

technical necessities is a requirement which is somehow related to originality. Indeed, any work whose relevant aspects are dictated by functionalities may at the same time lack originality. Where the work also meets the requirements for patent protection, this exception serves the important policy of keeping patent and copyright regimes separate by preventing creators and innovators from relying on copyright to obtain a ‘backdoor patent’ on a functional article that cannot be patented (or whose patent protection has expired).⁴¹ Yet, where artistic features are incorporated into a functional product (for example, a garment), these features are still eligible for protection in many countries subject to various conditions: in several jurisdictions including the US such artistic features are protectable provided that they are separable from the underlying product.⁴²

A wide variety of works can be affected by the functionality exception. It is because of this exception that, for instance, the selection, ordering and arrangement of a Bikram yoga sequence was considered by a US court as a ‘process’ for achieving good health, which precludes copyright protection.⁴³ But what about other sequences, such as movements in sports like ice dancing, figure skating, synchronised swimming, skateboarding, or even wrestling? Can these moves be considered as being developed for a purely aesthetic purpose, and not as attempts to directly increase the chances of prevailing in an athletic contest (in which case they would not be functional for copyright purposes)? And tricks performed by magicians? Are they functional methods and systems for creating the illusions, and therefore not protectable by copyright? What about a device that, for example, merely appears to cut a person in half? Is this device really ‘useful’ when its only use is to entertain and create an illusion as well as evoke emotions?⁴⁴ Analogous issues are raised by food recipes (while one may consider them as functional directions for achieving a result,⁴⁵ recipes for many dishes

⁴¹ See the US case *Smith & Hawken, Ltd. v. Gardendance, Inc.*, 75 U.S.P.Q.2d 1853 (N.D. Cal. 2005).

⁴² In other countries requirements for protection of useful products seem less strict. In France, for example, it is accepted that an artistic expression should not be disqualified and deprived of copyright protection simply because it is fixed or embodied in a utilitarian article (this is the so-called theory of ‘unity of art’).

⁴³ *Bikram’s Yoga Coll. of India, L.P. v. Evolution Yoga, LLC*, 803 F.3d 1032 (9th Cir. 2015).

⁴⁴ See Chapter 11, ‘Now You Own It, No You Don’t – Or Do You? Copyright and Related Rights in Magic Productions and Performances’, by F. Jay Dougherty.

⁴⁵ See the US case *Publ’ns Int’l, Ltd. v. Meredith Corp.*, 88 F.3d 473, 481 (7th Cir. 1996) (with the court defining a recipe as ‘a set of instructions for making something . . . a formula for cooking or preparing something to be eaten or drunk: a list of ingredients and a statement of the procedure to be followed in making

may also be determined by creative expressions independent of most functional influences);⁴⁶ scents and tastes (do feelings equal function?);⁴⁷ typefaces and graffiti lettering (are they objects whose utility outweighs their artistic elements or rather stylish renditions of letters that deserve copyright protection?). This volume will expand on most of these issues.

5. AUTHORSHIP

The concept of authorship is relevant in copyright law, as without an author there cannot evidently be a copyrightable work. While the Berne Convention determines the minimum protections to be granted by countries to the works of their authors, it leaves states free to interpret the concept of authorship – and many copyright acts still do not provide a definition of authors. Indeed, few judicial decisions address what authorship means, and who an author is.⁴⁸ In the US for example the Supreme Court has defined an author as ‘he to whom anything owes its origin; originator; maker; one who completes a work of science or literature’.⁴⁹ Lower courts have also noted that an author must be more than one who contributes creativity or originality to a work;⁵⁰ basically it must be one ‘who superintended the whole work, the “master mind”’.⁵¹ In other words, authorship could be

an item of food or drink . . . a method of procedure for doing or attaining something’). The US Copyright Office seems to confirm the exclusion by stating that ‘mere listing[s] of ingredients or contents’ are amongst the materials not subject to copyright protection: see 37 C.F.R. § 202.1.

⁴⁶ See Christopher Buccafusco, *Making Sense of Intellectual Property Law*, 97 Cornell L. Rev. 501, 508 (2012). The same could be said of the creative way food is presented on plates. In Chapter 6 of this volume Cathay Smith notes that after the US Supreme Court ruling in *Star Athletica, L. L. C. v. Varsity Brands, Inc.* (580 U.S. 2017), which held that the pictorial and graphic features of cheerleaders’ uniforms could be applied to other medium and therefore could be protected by copyright, culinary presentations that present artistic qualities might also get the same protection.

⁴⁷ A case about copyright protection of tastes is the already mentioned *Levola Hengelo* (Case C-310/17), where the Advocate General Melchior Whatelet considered a taste of a cheese as not copyrightable (although he did not expand on functionality related grounds).

⁴⁸ See Jane C. Ginsburg, *The Concept of Authorship in Comparative Copyright Law*, 52 DePaul L. Rev. 1063, 1066 (2002).

⁴⁹ See again *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884).

⁵⁰ See *Aalmuhammed v. Lee*, 202 F. 3d 1227, 1233 (9th Cir. 2000).

⁵¹ *Ibid.* (citing *Burrow-Giles Lithographic Co.*, 111 U.S. at 53, 61).

defined as a requirement that no creation that does not entail at least some degree of human intervention is eligible for copyright protection.

One may therefore legitimately doubt whether works produced without a predominant human ‘touch’ can be considered protectable. Let us think about works created by animals (for instance, the sound of toads or frogs) or growing plants.⁵² A recent US case which has attracted considerable attention has dealt with whether an animal can be considered a copyright holder. A macaque monkey had used a camera belonging to British photographer David Slater in Indonesia to take a selfie, which then became famous worldwide. The judge dismissed the argument brought by the plaintiff, an animal rights organisation, which had filed a lawsuit requesting that the monkey be assigned the copyright. The argument was that US copyright law does not prohibit an animal from owning a copyright. Yet, such argument was rejected by the court which held that while the animal had constitutional standing it ‘lacked statutory standing to claim copyright infringement of photographs’.⁵³

The issue of authorship and ownership of copyright in works created by non-humans is not limited to artworks created by animals; and the debate around the required degree of human intervention in a work is not novel in copyright law. As far as computer-produced works are concerned, for instance, Australian courts have often been reluctant to affirm copyright due to a focus on requiring a human author (in other countries such as UK, Ireland and New Zealand, however, these works do attract copyright instead with the author being considered the person that has made the arrangement necessary to produce the work).⁵⁴ The debate has recently been revamped in light of the rise of creations made artificial intelligence and robots, without substantial human involvement: here the focus is not on whether ‘computers are enabling people’ to create works, but on whether ‘people are enabling computers’ to do that.⁵⁵

Authorship- (and ownership-) related issues arise in several chapters of the book. What about (again) a living garden designed by an environmentalist artist but which grows by itself, or biological resources manipulated as a consequence of genetic engineering? And what about traditional

⁵² These examples are given by Jani McCutcheon in Chapter 3, ‘Copyright in Bio Art’.

⁵³ See *Naruto v. Slater*, 2018 U.S. App. LEXIS 10129 (9th Cir. Cal., April 23, 2018).

⁵⁴ See for example Section 9(3) of the UK Copyright, Designs and Patents Act 1988.

⁵⁵ See Annemarie Bridy, *Coding Creativity: Copyright and the Artificially Intelligent Author*, 2012 *Stan. Tech. L. Rev.* 5 (2012).

folk music where a ‘chain’ of musicians have added their own creativity and variations to older tunes and songs, many of which may be orphan works or in the public domain? Also, what happens when tattoo artists receive specific instructions from their client about the style and details of the tattoo? Is there an, or who is the, author (and copyright owner) in these circumstances? Our contributors will come back on these and similar points.

6. PUBLIC INTEREST CONCERNS

Copyright laws do not only protect the interests of creators, but are also concerned with public policy. They aim in particular at guaranteeing that certain subject matter and elements are not protected (and thus cannot be taken away from the public domain) because they need to remain available for, and usable by, anybody. Judges adjudicating copyright disputes might also be inclined to exclude from protection works that display an unlawful or immoral content, or that have been illegally produced.

A key copyright principle which aims at boosting the public domain is the idea–expression dichotomy. It ensures that the manifestation of an idea is protected rather than the idea itself and therefore reconciles the interests of copyright owners with those of down-stream creators, users and the public at large, who can use and exploit non-copyrightable elements for their own purposes.⁵⁶ While this principle is codified in US copyright law (‘in no case does copyright protection for an original work of authorship extend to any idea . . . [and] concept . . .’)⁵⁷ and in the TRIPS Agreement⁵⁸ (the first international treaty to incorporate such a principle), in other jurisdictions it has been developed through case law. In theory, the

⁵⁶ Users’ interests in copyright law have often been closely looked at by scholars. For recent perspectives see Christophe Geiger, *Copyright as an Access Right, Securing Cultural Participation through the Protection of Creators’ Interests*. In *What if We Could Reimagine Copyright?* 73, 97 (R. Giblin and K. Weatherall, eds, ANU Press, 2017) (stressing the need to introduce a sort of three-step test in order to obtain access to copyright protection and arguing for the centrality of copyright’s role in permitting access to culture through the recognition of both specific obligations for copyright holders and rights for users).

⁵⁷ 17 U.S. Code § 102.

⁵⁸ See Article 9(2) of the Agreement on Trade-Related Aspects of Intellectual Property Rights, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 (hereinafter: TRIPS).

principle looks relatively easy to grasp.⁵⁹ Yet, verifying in practice whether a specific element falls within either of these categories is definitely more difficult. The crucial question is: where does the idea stop and the expression start? This dilemma is particularly evident when it comes to certain forms of art and creativity where the line distinguishing ideas and expressions is rather blurred. For example, what about conceptual art, for which the concept behind the artwork is more important than the finished art object? And bio art, which is often (again) fundamentally conceptual and process-focused? Or jokes, which seem to be based on merely funny ideas, but could also be personalised by comedians that change the arrangement of the words and perform them in a different style? These and similar issues will be dealt with by several contributors to the volume.

The often blurred line between ideas and expressions is confirmed by the doctrines of ‘merger’ and *scènes à faire*, which are sometimes referred to by US courts. The merger doctrine argues that where the idea and expression are intrinsically connected, and the expression is indistinguishable from the idea because they have merged, such an element cannot be protected by copyright. The *scènes à faire* doctrine (literally meaning ‘scenes that must be done’) refers to elements that are standard, or indispensable in the type of work at issue or sequences of events that necessarily result from the choice of a setting or situation (in an old movie focusing on cops in the Bronx, for example, it is inevitable that the scenery would include drunk people, stripped cars, prostitutes, and rats;⁶⁰ and in a spy movie we should expect to see secret agents hiding self-defence gadgets in their clothes). The rationale of both doctrines is clear. Granting the first comer monopolistic rights over these elements would significantly hinder the creation of follow-on works, and thus restrict the public’s enjoyment of further creative expressions. The application of these doctrines to specific works, such as jokes, magic tricks, sport moves and pornographic works, will be discussed in this book.

Not only ideas. Facts cannot be copyrighted either. In the (already mentioned) case *Feist v. Rural*⁶¹ the US Supreme Court confirmed that copyright can only apply to the creative aspects of a collection of data

⁵⁹ A very recent EU case where the idea-expression dichotomy has been dealt with is the above mentioned *Levola Hengelo* (Case C-310/17) on the protectability of a taste of a cheese. In his Opinion of 25 July 2018, Advocate General Whatelet was quite clear and straightforward, as he considered tastes of food as non-protectable ideas (para 55).

⁶⁰ This was actually noted by a US court in *Walker v. Time Life Films, Inc.*, 784 F.2d 44 (2d Cir. 1986).

⁶¹ *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991).

(namely, the creative choice of what data to include or exclude and the order and style in which the information is presented), but not to the information itself. Many other jurisdictions have followed this approach, thus respecting the spirit of the Berne Convention, which does not extend protection to news of the day or to miscellaneous facts having the character of mere items of press information.⁶² It is therefore understandable that several commentators have criticised recent legislative moves, for example by Germany and Spain, introducing a *sui generis* right to press publications that cover short snippets of news made available by news aggregators and web search engines.⁶³ A chapter of this book will expand on what is considered by many as too broad a right which may end up covering facts such as news items and lead to an unwelcome monopolisation of information and a consequential restriction of free speech.⁶⁴

What about works that display immoral or illegal contents (including adult entertainment), or that are illegally created (for example, graffiti)? Could they be considered uncopyrightable on the assumption that they do not advance knowledge or positively contribute to society? A positive answer to this question could be justified on the ground that denying these works protection would serve overriding public interests, such as the defence of common morality and of public order in general. On the other hand, however, it could also be argued that refusing to protect these controversial forms of expression may amount to governmental censorship, which in turn would create a chilling effect on creativity as well as put pressure on people (mainly judges) who are required to decide which works deserve to be protected by copyright. Contributors to this volume will expand on these issues and in particular on the benefits (and drawbacks) of a 'neutral' approach to the illegality and morality aspects surrounding a work.

⁶² Article 2(8), Berne Convention.

⁶³ See Lionel Bently et al., Response to Article 11 of the Proposal for a Directive on Copyright in the Digital Single Market, entitled 'Protection of press publications concerning digital uses' on behalf of 37 professors and leading scholars of Intellectual Property, Information Law and Digital Economy (5 December 2016), available at <https://www.civil.law.cam.ac.uk/sites/www.law.cam.ac.uk/files/images/www.civil.law.cam.ac.uk/documents/ipomodernisingipprofresponsepresspublishers.pdf> (last accessed on 5 February 2018); European Copyright Society, Opinion on the Proposed Press Publishers Right (April 25, 2018) available at https://europeancopyrightsocietydotorg.files.wordpress.com/2018/06/2018_europeancopyrightsocietyopiniononpresspublishersright.pdf.

⁶⁴ See Chapter 14, 'The Press Publisher's Right in the European Union', by Stavroula Karapapa.

7. THE STRUCTURE OF THE BOOK

The volume is structured in four parts, each of which highlights a broad category of works. Contributors will look at specific jurisdictions, including – depending on the chapter – the US, the UK, the EU and some of its Member States as well as Australia and India.

The investigation focuses on forms of expression which have recently attracted attention amongst courts and scholars. The subjects have been selected with the purpose of identifying trends and highlighting possible commonalities and differences in the progressive expansion of the range of protectable works. We have focused on topics that have had or may have a lasting impact on case law or policy. In providing a direct and concise insight in a new area of copyright-related research, the selection of topics for comment and analysis may appear uneven or occasionally idiosyncratic. In order to overcome this limit, such a selection follows a deliberate pattern: we have tried to identify topics that are particularly capable of stimulating academic discussion and the contamination of legal approaches amongst different legal systems, with the aim of promoting exchanges and dialogues between legislators, judges and legal scholars.

Part I analyses whether new or non-conventional forms of art can, and should be, protected by copyright. The art which is looked at in this section is not the kind of art that is usually found in traditional galleries or museums.

Chapter 1, authored by Xiyin Tang, focuses on land art. This form of art uses materials found in nature, such as the soil and rocks, vegetation and water found on-site. The author casts doubt about whether land art can satisfy the current requirements for copyright protection in the US, especially fixation, and explores other possible forms of protection when traditional copyright claims may not be feasible or successful.

In Chapter 2, Shane Burke focuses on language as a signature style of conceptual art, arguing that copyright law struggles to protect the artistic authorship inherent in text instructions used to communicate the work to those who execute its final visual form. He makes the point that, irrespective of whether more traditional or progressive approaches to the legal definition of art are employed, more systemic forms of artistic production, particularly those that involve a literary to visual ‘translation’ of the work as part of that process of production, currently struggle to be fully protected by copyright law.

Jani McCutcheon then describes, in Chapter 3, the broad spectrum of creations that might arguably fall within the definition of bio art, including art usually generated in laboratories using biotechnical media and tools, such as tissue, blood, bacteria, plants or other organisms. While explain-

ing the potential misalignment between bio art and copyright, the chapter explores the practical and normative ramifications of this dissonance.

Chapter 4, authored by Enrico Bonadio, addresses issues related to copyright protection of street art and graffiti. After focusing on whether these forms of urban and public art can satisfy the requirements for protection under US and UK laws, he expands on the possible clash between the artist's moral right of integrity and the right of the owner of the property upon which the artwork is placed, as well as on whether illegally created street artworks can and should be protected by copyright.

In Chapter 5 Yolanda King deals with tattoo art. She notes that tattoo artists increasingly claim copyright protection for subject matter that – the author argues – both fits within traditional conceptions of creativity and satisfies the fixation requirement. This form of art – she stresses – pushes the boundaries of copyrightable subject matter due to, among other factors, the unique nature of the physical support upon which it is placed, i.e. the human body.

With Chapter 6 Cathay Smith concludes this section by focusing on culinary presentations. She explores each element of copyrightability – originality, work of authorship, fixation, and useful article separability – to detail how copyright law treats such presentations. She argues that as a consequence of the recent developments in US case law, one of the biggest hurdles to copyright protection of culinary presentations – the useful article exclusion – may actually not be as big a hurdle as it has been in the past.

Part II of the volume addresses a wide category of music-related creations and other cultural endeavours.

Luke McDonagh, in Chapter 7, highlights what traditional music is and why it poses challenges to copyright. The author analyses how musicians who add originality to the arrangement of a recorded song may be entitled to copyright over that arrangement as a musical work in its own right; and makes the point that it is possible to protect traditional music under copyright – but that this might not be in the best interests of the process of music creation.

Chapter 8, authored by Giuseppe Mazziotti, focuses on improvised jazz music. It explains why copyright systems have ended up disfavouring extemporaneous authorship, in spite of an international legal framework that is strongly protective of authors' rights. The author argues that a rigid application of the fixation requirement may leave jazz performers unprotected, especially when they come up with arrangements directly on stage and often do not record their improvised performances.

In Chapter 9, Tom Iverson deals with compilations of musical works made by disc-jockeys. He wonders whether play lists created by DJs, either at parties or for radio stations, may be protected by copyright as original

selections and arrangements of songs. He does so by also analysing a recent case where a music streaming service company was sued in the UK, for alleged copyright infringement, by a company that manages a well-known London music club.

Chapter 10 is authored by Trevor Gates. It examines the requirements for and difficulties in protecting jokes under copyright law, how a court would handle a copyright infringement action between comedians, and potential solutions aimed at finding a balance between protection and enforcement. Gates concludes there are ways copyright law could be more flexible in its application to modern comedic material and proposes some solutions to assist comedians enforce their rights in their works, including one that may not require any formal legal changes.

Jay Dougherty, in Chapter 11, delves into copyright and related rights in magic productions and performances, primarily under US law. He argues that while copyright law might in theory provide magicians with a property right, its limiting doctrines preclude protection in many instances. After exploring both limits on copyright and potentially protectable subject matter, the chapter discusses two judicial decisions that confronted claims for protection of magic productions – one where the magician failed to receive protection and a more recent case where the copied magician was successful.

With Chapter 12 Péter Mezei concludes this section by focusing on the copyrightability of sport moves. Examples of famous moves are given, including Bob Cousy's behind-the-back pass in basketball, Antonín Panenka's penalty kick in football, Werner Rittberger's loop jump in ice skating and Dick Fosbury's flop in high jump. The author wonders at what juncture sporting moves may become creative pieces in their own right and thus protectable as unique artistic expressions.

Part III of the volume shifts the analyses towards works created on an industrial scale, in particular to address market demands, and in the context of scientific research.

In Chapter 13 Arul George Scaria and Mathews George expand on whether typefaces – the designs for fonts – are and should be copyrightable. By looking at US, UK and Indian scenarios, the authors look into what may be protectable (the aesthetic and ornamental features not dictated by functionality) and non-protectable (utilitarian aspects) of typefaces. They stress that legibility is clearly a utilitarian function associated with the design choices for typefaces, and this poses challenges for their acceptance as a protectable subject matter.

Stavroula Karapapa then explores in Chapter 14 the right to press publications, which has been introduced in countries like Germany and Spain, but which has also provoked harsh criticism. Devised to provide news

publishers with an additional layer of protection, this sui generis right aspires to offer a solution to the so-called ‘newspaper crisis’. The author argues however that such a new right does not constitute an appropriate measure for addressing declining revenues in the press publishing sector.

Chapter 15, authored by Charles Cronin, focuses on whether fragrances can be protected by copyright or other forms of intellectual property. The author reminds us that perfumes’ manufacturers have recently attempted to protect against the copying of their fragrances by claiming they are copyrightable works of expression – and looks at some interesting and to some extent surprising decisions by Dutch and French courts on this issue.

In Chapter 16 Teshager Dagne looks into CAD (computer-assisted) files for 3D printing and related copyright issues. CAD files are necessary components of the 3D printing process, as the file holds the instructions on which the printer relies. The author then delves into thorny questions, including whether copyright subsists in such files under Canadian, US and EU laws.

Nicola Lucchi then expands in Chapter 17 on copyright as a possible form of intellectual property protection for engineered DNA sequences. He argues that copyright might turn out to be not only flexible enough to handle contemporary technologies producing living organisms, but also socially preferable to patent protection, especially in terms of enhanced chances for users to access and use essential public knowledge assets in the life sciences sector.

Chapter 18 is authored by Massimo Maggiore, who speculates on whether computer generated works such as *The Next Rembrandt* (an artwork produced by a computer that had analysed many paintings by the Dutch maestro) can and should be protected. While pushing for a refocusing of the rationale for copyright protection from the ‘author’ to the ‘work’ as such, the author calls for a reform of copyright laws in jurisdictions which, unlike the UK and a few others, do not expressly protect this category of works.

The last part of the volume sheds light on another peculiar category of creative outputs – works that display an illegal or immoral content.

This section starts by hosting a contribution by Eldar Haber on illegal works. In Chapter 19 he wonders whether copyright law should be neutral as to content and other forms of illegality surrounding the work, on the assumption that it is beyond this branch of law to act as a censor and create a chilling effect on creators. This chapter offers a taxonomy for illegal works and lays foundations for the normative discussion on whether the law should grant rights and remedies for the makers of works which – many stress – do not advance knowledge or contribute to society.

In Chapter 20 Enrico Bonadio and Nicola Lucchi analyse the intersec-

tion between pornography and copyright. After commenting on US, UK and French cases on the copyrightability of obscene works (especially, porn movies), the authors highlight the arguments both in support and against copyright protection of this controversial subject matter. They conclude that the overriding need to protect free speech makes the arguments supporting the copyrightability of pornography stronger.

Chapter 21, authored by Marc Mimler, then addresses the question of how to deal with works that promote hate by focusing on books authored by German Nazi leaders. While noting that in some circumstances copyright in these works has been relied on to generate income, the author notes that copyright has also been applied as a tool to restrict access to and dissemination of controversial works such as the book *Mein Kampf* by Adolf Hitler.

This book is brought to an end by a concluding chapter, written by Tim Dornis, which provides an economic analysis of non-conventional works. Many chapters in this volume – Dornis stresses – address the demarcation line between non-protectable and protectable subject matter and it is in this regard that a careful handling of non-conventional copyright issues proves to be a question of fundamental economic policymaking. The author concludes that the current copyright system offers numerous ways to ‘thin out’ – and thereby economically fine-tune – rights protection.

As mentioned, the analysis offered by the volume aims at spurring an academic debate about whether certain new and non-conventional forms of creativity can, and should, attract copyright protection. While many chapters conclude that the works in question are, or should be, protectable, a few of them make the point that the opposite is the case (for example, because the requirements for protection cannot be met) and highlight instead that other legal or self-regulatory solutions may be followed to protect and reward these forms of creativity: such alternative solutions include – again, depending on the type of works analysed in each chapter – patent protection, the law of confidence, rules against unfair competition, the right of publicity as well as trespass and nuisance laws and even free and open source style licences.⁶⁵ After all, that more appropriate legal tools could

⁶⁵ Finally, a few contributors, while dealing with their own category of non-traditional works, not only look at copyrightable subject matter, requirements for protection and the other issues briefly discussed in this Introduction; they also expand on other legal specificities typical of the range of works analysed in their chapters, for example the impact of the exclusive rights of authors and publishers on derivative works (see the chapters authored by Luke McDonagh (Chapter 7 on traditional music) and Giuseppe Mazziotti (Chapter 8 on improvised jazz perform-

be available to protect creations that cannot be identified with sufficient precisions under copyright law (especially the taste of food products such as cheeses) was recently noted by a group of copyright law scholars.⁶⁶

The chapters of this book therefore not only make the point that it may be time to challenge some basic tenets of copyright laws by embracing more flexible and objective ways to identify protectable works and interpret the requirements for protection. Some contributors also cast doubts about whether copyright is the right instrument to address and regulate new and non-traditional forms of expression. This is not an entirely new issue. Several scholars have already identified a negative intellectual property (IP) space where various creative works, including some explored in this volume, are often produced without the lure of monopolistic rights.⁶⁷ In other words, making copyright available in these cases is not the main motivational trigger that pushes people to generate works. But is copyright *always* unattractive to these categories of creators? If so, will this lack of interest in copyright last *for ever*? Or could such creators instead acquire a strong interest in copyright, especially if and after their work has been imitated and exploited economically by someone without their authorisation? After all, as will be examined by several contributors in this volume, some of these creators have recently started taking copyright-related actions against imitators. Thus, the application of the IP negative space theory to several of the works highlighted in this book may need to be further tested in the not so distant future as more and more creators in the areas in question may soon nurture expectations of economic return and look for (copyright-focused) ways to protect their works and turn them into an even more profitable source of revenues.

ers)) or the need to find a balance between the moral rights of artists (especially the integrity right) and the property rights of others (see Chapter 4 'Street Art, Graffiti and Copyright', by Enrico Bonadio).

⁶⁶ See European Copyright Society, Opinion on Reference to CJEU in Case 310/17, Levola Hengolo (February 19, 2018) available at <https://europeancopyrightsocietydotorg.files.wordpress.com/2018/03/ecs-opinion-on-protection-for-tastes-final1.pdf>.

⁶⁷ See for example Karl Raustiala and Christopher Springman, *The Knockoff Economy* (Oxford University Press, 2012); Elizabeth Rosenblatt, 'A Theory of IP's Negative Space', 34 Colum. J.L. & Arts 317 (2011); Rochelle Cooper Dreyfuss, 'Does IP Need IP? Accommodating Intellectual Production Outside the Intellectual Property Paradigm', 31 Cardozo Law Review 1437 (2010); Kate Darling and Aaron Perzanowski, *Creativity Without Law: Challenging the Assumptions of Intellectual Property* (NYU Press, 2017). All these studies highlight scenarios where creativity and innovation flourish and prosper without legal incentives.