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Originality

Under EU Copyright Law

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Abstract

Since the creation of what at the time was called European Community, as far as copyright laws across Europe are concerned, there have been acute differences across the various jurisdictions of Member States and especially between the common law tradition of the UK and Ireland and that of the prevalent civil law in continental Europe. Through the years, these differences have caused major problems in the Internal Market and the EU has been trying to resolve them. In recent decades, the originality standard, which constitutes the only prerequisite for the protection of a work by copyright law, has been further clarified and reached an important extent of harmonization across the Union, as far as the subject-matter covered by it is concerned (software, database and photographs), in particular through the respective Directives issued, but also in recent years, on the basis of several judgments of the Court of Justice of the European Union (CJEU), including *Infopaq*, *BSA*, *Football Association*, *Football Dataco* and *Painer*. This dissertation attempts to evaluate the contribution of this legislation and case law on the harmonization of EU copyright law, the implications of this harmonization on domestic laws of Member States such as the UK, Germany and Greece and what could be further done, in order for a more substantial harmonization to be achieved, possibly through a uniform law on copyright, especially after the entry into force of the Lisbon Treaty Reform, which makes an EU Regulation on copyright law seem more feasible than ever before.

Keywords: Copyright; Harmonization; Originality; Directives; CJEU

Preface

Before you lies the dissertation “Originality under EU Copyright Law” which was written as part of the MA in Art, Law and Economy at International Hellenic University.

The project focuses on the criterion of the originality in EU copyright legislation and the case law of the European Court of Justice (ECJ), as a key factor of the harmonization process of the copyright legislation across Member States of the Union which comes to bridge the gap between the two different systems, those being the civil and common law traditions existing in the union, which are also analyzed. It provides a thorough historical overview of this still on-going harmonization process while focusing and analyzing how it is accomplished through both specific EU Directives on copyright law and some important decisions of the ECJ on the matter, the effects of this harmonization on the different legal orders of Member States and what the future may hold for EU copyright law.

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I hope you enjoy your reading.

Aikaterini Pilichou

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1. Introduction

The main goal of this dissertation is to provide a full analysis on the criterion of originality of works that can and should be protected under the EU copyright law and how this criterion is used by both the Union's legislation and the Court of Justice of the European Union in an attempt towards a further and more tight harmonization of copyright law across Member States which first started at the end of the 1980's and has since then been accelerated and is still ongoing. Matters, such as the exact meaning of originality, especially that of its more commonly accepted wording as the "author's own intellectual creation", its different dimension within the context of the different legal traditions in the Union and the scale and extent of its validity regarding various types of works, as this is outlined in Directives 91/250/EEC (Software Directive), Directive 96/9/EC (Database Directive) and Directive 2006/116/EC (Copyright Term Directive, with regard to photographs) as well as in milestone judgments of the CJEU, such as *Infopaq*, *BSA*, *Football Association*, *Football Dataco* and *Painer*¹, are addressed in this thesis.

Another important aspect of this essay is to examine how this harmonized originality standard, if it can indeed be considered as such, has already affected and will continue to affect and reshape the national jurisdictions of specific Member States and especially those of the UK, which has been affected the most, Greece and Germany, examined hereby, and if it has or will in the end be able to minimize, if not eliminate, the differences traced between the two existing legal traditions on copyright law within the EU, these being the civil law tradition adopted in continental Europe and the common law

¹ See *Case C-5/08 Infopaq International A/S v. Danske Dagblades Forening*, *Case C-393/09 Bezpečnostní softwarová asociace – Svaz softwarové ochrany v. Ministerstvo kultury*, *Joined Cases C-403/08 and C-429/08 Football Association Premier League Ltd, NetMed Hellas SA, Multichoice Hellas SA v QC Leisure, David Richardson, AV Station plc, Malcolm Chamberlain, Michael Madden, SR Leisure Ltd Philip George Charles Houghton, Derek Owen and Karen Murphy v Media Protection Services Ltd*, *Case C-145/10 Eva-Maria Painer v. Standard VerlagsGmbH*, *Case C-604/10 Football Dataco Ltd v. Yahoo! UK Ltd*.

of the UK and Ireland, on both of which a historical overview and their current status will be provided in the following paragraphs.

Lastly, specific conclusions and proposals are pinpointed, regarding the evolution and future track of copyright law in the European Union and whether it should continue being harmonized both vertically and horizontally, that is through Directives and the case law of the ESCJ respectively, or the EU should consider moving towards the adoption of a common Regulation on copyright law and all relating rights and matters. Could the latter possibly prove to be a more effective instrument and at last unify copyright laws of the EU states by solving the issue of territoriality of copyright law and thus boost the union's capacity to produce more original works and protect them better in today's international field of copyright which constantly gets more complicated and is deeply interconnected with the highly digitalized world that we live in? The originality standard and its harmonized adoption within the EU is certainly not a panacea to all the current anomalies of copyright law but is on the right track to become the most decisive factor to the creation of a more modern, flexible and more competitive common EU copyright law, able to help Europe become the major world player in the digital economy which nowadays provides a vast spectrum of copyright subject-matter, as this is already set as one of the main goals of the Union in the 2015 document of the European Commission with the title "A digital Single Market strategy for Europe".²

2. The European Landscape before "Author's own intellectual creation" doctrine

Originality is undoubtedly the cornerstone of copyright law. Without originality there is no work, no creation. It is the major tool that has always been used in order to be assessed if a work is worthy of protection under copyright law. Only works that show

² See A digital single strategy for Europe, COM (15) 192, final, 2.4 pp. 6-7.

some minimum amount of this attribute attract protection³. Originality, especially as was seen in the romantic age, corresponds to the independent creativity of the author as reflected in his or her literary or artistic creation and makes his creation worthy of protection by copyright law. Authorship is an important aspect of creativity and originality, as it “... *plays a fundamental role in terms of recognition and, as such in determining the scope of the moral rights authors enjoy in their creations*”⁴. Though, as significant as it may be, there is still no clear and concrete definition of its true meaning and dimension. Up until today, individual copyright laws have intentionally avoided to produce a cemented definition on originality, as this task has been undertaken by national legislatures and courts, with the latter attributing to the concept a more flexible definition which serves their national interests best and suits their cultures better. Thus, the field of copyright law is and has always been open to new types of works, which need to be protected by it and do not have to be new or novel in order to gain that protection, as it happens with inventions in patent law, where ideas and not creative expression are protected. It is necessary to be understood that a work does not have to be new to be considered original. Originality is to a great extent a subjective concept, as it has to do with the personal contribution of the creator, his creative expression and the individuality of his work whereas the element of the “new” is something that can be ascertained objectively, by the existence or not, of a similar intellectual creation. If, for example a painter makes a portrait of a person for the first time, then his work is both new and original. If later another painter makes another portrait of the same person, then his work is original, but not new. Both works are protected as original under copyright law.

We have to pinpoint that till today the originality requirement as its harmonized interpretation of ‘the author’s own intellectual creation’ is clearly mentioned only in Directive 91/250/EEC (Software Directive) and its later codified version Directive 2009/24/EC, Directive 96/9/EC (Database) and Directive 2006/116/EC (Copyright Term

³ See Margoni, T 2016, ‘The harmonization of EU copyright law: the originality standard’, p. 3.

⁴ See Rosati, E 2013, *Originality in EU copyright: full harmonization through case law*, Edward Elgar Editions, UK and USA, p.58.

Directive, with regard to photographs). This interpretation of originality tends to become increasingly 'popular' among courts and lawmakers across the EU and is already the quintessential of the legal harmonization of EU copyright law. But it has not always been like this.

A first vague mention of the standard of originality as a requirement for the protection of a work by copyright law can be found on international level, in the Berne Convention for the Protection of Artistic and Literary works of 1886, which can be *considered to be the oldest convention on copyright law. In Article 2(1), it states that "The expression 'literary and artistic works' shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression,..."*. It then uses the word *original* in Article 2(3), which states that *"Translations, adaptations, arrangements of music and other alterations of a literary or artistic work shall be protected as original works without prejudice to the copyright in the original work"*. More interesting, as a notion of originality is the phrasing of Article 2(5) which stipulates that *"Collections of literary or artistic works such as encyclopedias and anthologies which, by reason of the selection and arrangement of their contents, constitute intellectual creations shall be protected as such, without prejudice to the copyright in each of the works forming part of such collections"*, a wording meaning that a work protected by the Berne Convention must be an intellectual creation, it must therefore bear originality.

On the level of the national jurisdictions of the Member States, it shall be said that there always has been a dichotomy over the meaning and definition of originality, as the threshold of copyright protection of works in these countries, and as a result the protection provided by copyright law is of a different grade and intended for different amount and type of works and cultural creations. As already mentioned in the introduction, there are two main traditions on copyright law in Europe, each with a different philosophical background, as analyzed below.

2.1. The civil law tradition

The legal systems, which have adopted this tradition, including partially that of Greece, have been influenced by the French Revolution and the Enlightenment and consider the author, the creator of the work, as the center of their subjective approach. The author's works are protected exactly because they come as a result of his creative expression and creativity. In France, the work needs to be *an oeuvre d' esprit*⁵, a work of the mind in order to be protected and recognised by the law. The Italian law requires that works of ingenuity must have a creative character⁶. This *droit d' auteur* (author's law) tradition seems to be really close to the 'author's own intellectual creation', as, for example phrases like '*persönliche geistige Schöpfungen*'⁷(personal intellectual creations), already existent in Germany at the end of the nineteenth century and the identical '*...dass sie das Ergebnis der eigenen geistigen Schöpfung ihres Urhebers sind*'⁸, can be found in German Law of intellectual property. The main focus is on the diptych author-work, with the latter bearing a significant trace of the author's mind and personality, his personal touch. An author cannot be separated from his work and vice versa. An author must control his works by having rights on them, which only belong to him and can never transfer all of them. A strong influence of the Roman law of *dominium*, an absolute right over property and the Cartesian philosophy, which regards the works of the mind as superior to those of the body, seem to underpin the whole *droit d' auteur* system⁹. As much as remuneration, financial benefits and rewards, as exclusive rights, are significant to copyright law and especially to common law tradition, as they are a strong incentive for artists to produce cultural works, recognition and labeling of the maker of the work as an independent, creative unit, moral rights are as well, and at this point is where the meaning of authorship plays an important role in the civil law tradition and in the general field of copyright. Someone in support of this system could say that originality necessarily presupposes that the protectable work must de-

⁵ Ibid., p. 71.

⁶ Ibid., p. 72. See also Margoni, T 2016, 'The harmonization of EU copyright law: the originality standard', p. 6.

⁷ Ibid. 7, p. 72.

⁸ Ibid. 7., p. 74.

⁹ See Torremans, P 2007, Copyright law: a handbook of contemporary research, Edward Elgar Editions, UK and USA, p.21.

rive from the personality of the author, otherwise, even scientific theories and research would be protected by intellectual property laws. But exactly because science hunts the natural truth, something objectively observable by everyone, something that is out there, is not a subject matter of copyright law and probably never will be. Someone could also say that this subject-oriented civil law tradition seems quite obsolete in terms of the protection that it can provide when it comes to modern, more complicated, technical mechanically produced works, e.g. databases, where the personality of the maker is much harder to be depicted and sets a high standard of originality which leaves many works unprotected. On this matter, there will be further analysis in the following sections of this dissertation.

2.2. The common law tradition

Copyright as a term, has its roots in England and Wales back in 1556, when the Crown, in its attempt to control dissemination of printed texts, due to the boom of typography experienced at the time, introduced a registration system of published works, whose management was granted to a London guild called the Stationer's Company. So, literally, copyright originally meant *the right to the copy* and not the right to stop a third party copying the author's work. Decades later and after, what at the time was called press – piracy, has taken huge dimensions, following the release of *a Bill for the Encouragement of Learning and for Securing the Property of Copies of Books to the Rightful Owners*, the *Statute of Anne* passed into law in 1710, becoming the first copyright statute of the modern world. It is obvious that copyright started more as a right of an economic and social dimension and perspective, rather than one with an aim to protect the natural rights of the owner. Of course, this orientation still underpins the copyright law in the UK. Centuries later, the *Copyright Act of 1911* was adopted and provided for the protection of author's works without formality. More recent important copyright acts in the UK are the 1956 Act and the, still in effect, *Copyright Designs and Patents Act (CDPA)* of 1988. The latter includes an exhaustive categorization of protectable works, when original, such as literary works, musical works, drama, art and computer programs. A peculiarity of the UK copyright law is the fact that copyright is also granted to tapes, records, films, broadcasts, cable programs and editions of books,

without the prerequisite of originality. At this point, a distinction between the message and the medium can be noted, though not officially stated in the CDPA and more specifically in Section 1 (a), (b), (c) of the CDPA which stipulates that: Copyright is a property right which subsists ... in the following descriptions of work – (a) *original literary, dramatic, musical or artistic works* (b) *sound recordings, films, broadcasts or cable programs, and* (c) *the typographical arrangement of published editions*. And this distinction leads to a further requirement of copyright protection in the UK. The sufficient ‘*skill, labour and judgment*’ which the author has invested in his work must be recorded in writing or otherwise, it must be transferred onto a medium of expression in the physical world.

The UK copyright law protects a work as original, simply based on the fact that the former ‘*...must not be copied from another work-that it should originate from the author*’¹⁰ and not because it bears any aspect of his personality or individuality, as it is required by the civil law system, thus providing a looser and somewhat more flexible originality standard. It suffices, if the creator made his work by investing on it his personal labour, skill, taste, knowledge and judgment and did not simply ‘stole’ it or copied it, directly or indirectly, from someone else. The work surely does not have to be ‘novel’ to attain protection. Moreover, this personal ‘skill and labour’, this ‘*sweat of the brow*’, as it has been characterized, shall not be extreme or out of the ordinary, but just above the minimal, the insubstantial. UK Copyright law mainly provides the right to the prohibition of copying of a work. The phrase ‘*what is worth copying is worth protecting*’¹¹ fully summarizes the view of common copyright law on originality. Labour has been at the center of copyright protection in the UK and not creativity. Although, in the years prior to the *Infopaq* decision of the CJEU, the skill, labour and judgment of the maker should be ‘sufficient’ in order for him not to be regarded that he merely copies and so causes an infringement of the copyright law and the traditional “SSJL” (sufficient, skill, labour and judgment’) was broadly recognized by courts of the country, especially when it comes to collective works, such as databases. This approach has

¹⁰See Rosati, E 2013, *Originality in EU copyright: full harmonization through case law*, Edward Elgar Editions, UK and USA, p. 77.

¹¹See Marinou, M 2004, *Copyright Law*, 2nd edn, Sakkoulas Editions, Athens and Komotini, p. 76.

enabled the protection of many more new types of works and creations, both creative and just skill demanding, than the stricter continental *droit d' auteur* does. Works that could otherwise be protected by laws of unfair competition, which are non-existent in the UK, are protected by copyright. In the copyright law of the common law system, the work is seen as a commodity, a product, as something only of economic value. Whoever undertakes the risk of reproduction and economic exploitation of the product-creation, also has the right to receive the economic benefits of this exploitation. The producer and distributor is of more interest to the UK copyright law than the creator of the work and his natural rights and this is something easily concluded by the lack of moral rights of the creator, safeguarding him against the publisher and producer in general, in British law. Computer programs and collections of itineraries or meteorological facts on electronic databases are much easier to be protected under UK copyright law. Although, this flexibility of accepting new, somewhat odd products under copyright protection may sometimes prove problematic and eroding to its essence, especially in regard with the typical creations of copyright.

From the above, it is obvious that the differences between the two existing systems of copyright law within the EU can only be seen as fragmenting and disruptive to the cause of a common and more functional EU copyright law. There is the need for a common approximate originality standard, which transpires both the EU copyright legislation and the jurisprudence of the CJEU, will overarch the current divergences and pave the way towards a more harmonized EU copyright law.

3. The criterion of originality in EU Copyright Law

Since the creation of the EU, previously known as the European Economic Community (ECC) with the adoption of the Treaty of Rome in 1957, copyright law was not considered by the primary ECC law as a field in need of regulation, as it then had a more cultural dimension rather than an economic one. For decades, the Berne Convention, which all Member States were then a member of, seemed to be adequate. Towards the end of the 1980's, the political, legal and technological landscapes were ripe

enough for a discussion on the reform of copyright laws across EU countries and after years of inactivity, the *Green Paper on copyright and the challenge of technology (GPCCT)* (European Commission 1988) was published. The GPCCT acknowledged that new measures had to be adopted in the field of copyright due to the many rapid, socio-economic and technological changes that were under way at the time and specifically in the context of, as its exact reading stated: “...the profound changes which have been occurring in the world economy, involving as they do important structural adaptations not least in the industrialized countries”.¹² It continued by saying that: “In sum, the growing economic importance of the industries needing copyright protection against ready misappropriation of their products, particularly by copying, has naturally produced pressure for the modernization of existing copyright protection systems at both national and Community level”.¹³ Despite the above, the Commission did not really consider a need of an attenuation of the disparities between the national copyright laws, as a factor of the proper functioning of the Internal Market, which was its primary goal, especially regarding the traditional copyright subject matter, as it stated: “Many issues of copyright law, do not need to be subject of action at Community level. Since all Member States adhere to the Berne Convention for the Protection of Literary and Artistic Works and to the Universal Copyright Convention, a certain fundamental convergence of their Laws has already been achieved. Many of the differences that remain have no significant impact on the functioning of the internal market or the Community’s economic competitiveness... The Community approach should therefore be marked by a need to address Community problems. Any temptation to engage in law reform for its own sake should be resisted”.¹⁴ This agenda of the Green Paper ignited renewed awareness on the matter and a few years later sparked a process of a vertical harmonization during the 1990’s which sought to regulate only specific subject-matter and led to several Directives, of which, those harmonizing the copyright protection of software, databases and the term of that protection, are examined hereby, always in connection with the originality standard set by them.

¹² See Green Paper on copyright and the challenge of technology: copyright issues requiring immediate action, COM (88) 172, final, 1.1.4, p. 10.

¹³ Ibid., 1.2.5, p.11.

¹⁴ Ibid., 1.4.9, p. 7, 1.4.10, p. 8.

3.1. The Software Directive (91/250/ECC)

It was clear by the orientation of the 1988 Green Paper mentioned above that it prioritized to regulate the copyright protection of new technologies, as it can be read in it that: “...the Commission concluded that a directive on the legal protection of computer programs is a necessary step for the completion of the internal market” and that “the creation of a European information services market, currently divided by juridical and linguistic barriers, is of prime importance”¹⁵. It also acknowledged the fact that in some countries such as France and Germany further requirements ought to be fulfilled, than usually expected for other works, for the protection of computer programs and this could harm the Internal Market.¹⁶ Thus, it came as no surprise, following these conclusions (Recitals 3, 4 and 5 in the preamble of the Directive remain on the same spirit)¹⁷, when in May 1991, Directive 91/250/EEC on the legal protection of computer programs was adopted, as the first of the ‘first generation’ Directives of the vertical harmonization process. It was the first time that the term ‘author’s own intellectual creation’ appeared in an EU copyright legal text and this as the only criterion of originality, which should be applied, leaving no room for other criteria, in compliance with Article 1(3)¹⁸. Furthermore, in Recital 8 of the Directive, as an additional safeguard, it is explicitly mentioned that: “Whereas, 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”. At this point, it is worth noting that, despite the aforementioned preclusion of other criteria, aiming at the

¹⁵ Ibid., 5.4.1, p.180, 6.2.1, p.207.

¹⁶ Ibid., 5.6.3, p. 187.

¹⁷ See Directive 91/250/EEC on the legal protection of computer programs, Recital 3 states that: “Whereas computer programs are playing an increasingly important role in a broad range of industries and computer program technology can accordingly be considered as being of fundamental importance for the Community’s industrial development;”, Recital 4 states that: “Whereas certain differences in the legal protection of computer programs offered by the laws of the Member States have direct and negative effects on the functioning of the common market as regards computer programs and such differences could well become greater as Member States introduce new legislation on this subject;”, Recital 5 states that: “Whereas existing differences having such effects need to be removed and new ones prevented from arising, while differences not adversely affecting the functioning of the common market to a substantial degree need not be removed or prevented from arising;”.

¹⁸ Ibid., Article 1(3) states that: “A computer program shall be protected if it is original in the sense that it is the author’s own intellectual creation. No other criteria shall be applied to determine its eligibility for protection”.

abolishment of the different, sometimes extremely strict criteria used until then in the various Member States e.g. the *'above average creative effort'* of the programmer in the 1985 Inkasso-Programm decision of the German Federal Supreme Court ¹⁹, this new harmonized standard of originality for computer programs, entails itself a qualitative test, as it requires that a work has to possess a minimum degree of 'creativity', a concept closely related to quality. In general, though, most jurisdictions do not take into account the intrinsic aesthetic, artistic value or importance of a work to assess if it is original and protectable by copyright. Law and courts should not engage themselves with this kind of judgments, which are based unavoidably on their own personal stimuli, thus characterized by subjectivity. Mummery LJ held that *'[a] work may be complete rubbish and utterly worthless, but copyright protection may be available for it, just as it is for the great masterpieces of imaginative literature, art and music.'* ²⁰ It could be easily deduced that the application of this common originality standard on computer programs seems somewhat problematic, due to the distinctiveness of the character and 'mechanical' form of these works. The programmer uses of course programming languages, algorithms and other standard patterns of informatics but has a relative freedom of creative space as well. The way he chooses to design and build the sequences of action steps, which the program follows to reach the final task, which it is meant to accomplish, rely totally upon his skill, talent and creativity. A computer program may seem as a 'one piece' work to the average user, but in reality it consists of a multitude of elements upon which the intellectual effort of the creator is reflected. Therefore, in practice, depending on the case at hand, the courts are obliged to try and detect those elements, deem the whole work as original and provide it with copyright protection. The phrasing of the originality standard clearly reflects an attempt of combining elements of the civil law and common law traditions, referred to before in this essay. *'Intellectual creation'* corresponds to the continental approach whereas *'author's own'* to that of the UK and Ireland, in the meaning that the work must come

¹⁹ See Green Paper on copyright and the challenge of technology: copyright issues requiring immediate action, COM (88) 172, final Green Paper 5.6.3, 5.6.4, p. 188.

²⁰ See Gompel, SV & Lavik, 2013, 'Quality, merit, aesthetics and purpose: an inquiry into EU copyright law's eschewal of other criteria than originality', *Revue Internationale du Droit d' Auteur (RIDA)*; Amsterdam Law School Research Paper no. 2013-51; Institute for Information Law, Research Paper no. 2013-03, pp. 14-15.

from its author and not someone else, that is, no to be a copy. It is the first true attempt, followed by the other two vertically harmonizing directives, of EU copyright legislation to find a common ground, a fine balance between the originality thresholds set by the two systems. The final phrasing of the new uniform standard for software was based on a previous term included in the *Directive 87/54/EEC on the legal protection of topographies of semiconductor products*, which was ‘creator’s own intellectual effort’. The Green Paper of 1988 had already proposed towards the adoption of a similar term for computer programs but the final term was first included in the Initial Proposal’s Explanatory Memorandum and later in the EC Amended Proposal, before appearing in the Directive.²¹

As stated in the *2000 EC Report on the Implementation of the Computer Program Directive (European Commission 2000)*, the new harmonized standard of originality set by the directive ‘has required 12 Member States to lower the threshold for granting protection and the remaining three to “lift the bar”²². For example, Germany had ceased to use its former higher standard, the ‘Schöpfungshöhe’, literally ‘creative height’, while the UK had not yet implemented the standard of the Directive and this was something that could prove to be disruptive, taking into account the lower threshold of protection under UK copyright law, i.e. ‘skill and labour’²³. Council Directive 91/250/EEC (Recital 6)²⁴ gives copyright protection to computer programs as literary works (whether written in source or object code) within the meaning of the *Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971)* (Article 2.1)²⁵. Article 4 of the *World Intellectual Property Organization (WIPO) Copyright*

²¹ See Green Paper on copyright and the challenge of technology: copyright issues requiring immediate action, COM (88) 172, final, 5.6.24, p. 196.

²² See Report on the implementation and effects of Directive 91/250/EEC on the legal protection of computer programs, COM (00) 199, final, p. 6.

²³ Ibid., pp. 8, 10.

²⁴ See Directive 91/250/EEC on the legal protection of computer programs, Recital 6 states that: “Whereas the Community’s legal framework on the protection of computer programs can accordingly in the first instance be limited to establishing that Member States should accord protection to computer programs under copyright law as literary works and, further, to establishing who and what should be protected, the exclusive rights on which protected persons should be able to rely in order to authorize or prohibit certain acts and for how long the protection should apply;”.

²⁵ See Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971), Article 2.1 states that: “The expression ‘literary and artistic works’ shall include every production in the liter-

Treaty (WCT) uses the same formulation as the Directive. Such provisions are also on a par with Article 10 (1) of the Agreement on *Trade-Related Aspects of Intellectual Property Rights* (TRIPs Agreement)²⁶. Lastly, according to the 2000 Report of the Commission on the implementation and effects of this Directive, its implementation was deemed as ‘satisfactory’, its results ‘favorable’ and its effects ‘beneficial’, with the conclusion that there is no need to revisit its substantive copyright provisions at that time²⁷. Of course, many years have passed since then and opinions may differ on the correctness of the aforementioned ascertainties.

3.2. The Database Directive (96/9/EC)

Calling for ‘investment in all Member States in advanced information processing systems’ and based on the argument that up until then, differences in the legal protection of databases in Member States ‘have direct negative effects on the functioning of the internal market’ and ‘need to be removed’ and that ‘such unharmonized intellectual property can have the effect of preventing the free movement of goods or services within the Community’ and that ‘databases are a vital tool in the development of an information market within the Community’, the Directive on the legal protection of databases was adopted in 1996²⁸. In line with TRIPs (Art.9), WCT(Art.5) and the Berne

ary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science”.

²⁶ See the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement), Article 10.1 states that: ‘Computer programs, whether in source or object code, shall be protected as literary works under the Berne Convention (1971)’.

²⁷ See Report on the implementation and effects of Directive 91/250/EEC on the legal protection of computer programs, Brussels, 10.04.2000 COM (2000) 1999 final, pp. 20-21.

²⁸ DIRECTIVE 96/91/EC on the legal protection of databases, Recital 2 states that: “Whereas such differences in the legal protection of databases offered by the legislation of the Member States have direct negative effects on the functioning of the internal market as regards databases and in particular on the freedom of natural and legal persons to provide on-line database goods and services on the basis of harmonized legal arrangements throughout the Community; whereas such differences could well become more pronounced as Member States introduce new legislation in this field, which is now taking on an increasingly international dimension;”, Recital 3 states that: “Whereas existing differences distorting the functioning of the internal market need to be removed and new ones prevented from arising

Convention [Art.2 (5)]²⁹, the Directive does not protect databases as literary or other type of works, rather what it does is to refer to them as ‘*a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means*’. In Article 3(1) of the Directive, it is made clear that the requirement for protection is similar to that already described in the Software Directive, only that, in the case of databases, it regards the selection or arrangement (different than the cumulative ‘selection and arrangement’ of the provision of the Berne Convention) of their contents. In the same article, as well as in Recital 16, it is underlined, once again, that no other criteria, such as ‘*merit or purpose*’, a wording much broader than the ‘*qualitative or aesthetic merits of the program*’ used in the Software Directive, should be used for determining the originality of a database and, as a result, its eligibility for copyright protection. An aesthetic test or other qualitative evaluation of the database, regarding its worth or artistic dynamic should in no case constitute an indicator of its originality. At first glance, the application of the harmonized originality standard in databases seems quite problematic. Due to their nature, as electronic assortments of facts, like anthologies or encyclopedias are in print, they are creations that usually encapsulate many different, heterogeneous elements and contents, which may not attain the same level of originality or may not even be original. To further clarify, the originality standard of the ‘*author’s own intellectual creation*’, as it is expressed verbatim in Recital 15 of the Directive, is applied only on the selection or the arrangement of the contents of the database and the granted

ing, while differences not adversely affecting the functioning of the internal market or the development of an information market within the Community need not be removed or prevented from arising;”, Recital 4 states that: “Whereas copyright protection for databases exists in varying forms in the Member States according to legislation or case-law, and whereas, if differences in legislation in the scope and conditions of protection remain between the Member States, such unharmonized intellectual property rights can have the effect of preventing the free movement of goods or services within the Community;”, Recital 9 states that: “Whereas databases are a vital tool in the development of an information market within the Community; whereas this tool will also be of use in many other fields;” and Recital 10 states that: “Whereas the exponential growth, in the Community and worldwide, in the amount of information generated and processed annually in all sectors of commerce and industry calls for investment in all the Member States in advanced information processing systems;”.

²⁹ See Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971), Article 2 [5] states that: “*Collections of literary or artistic works such as encyclopaedias and anthologies which, by reason of the selection and arrangement of their contents, constitute intellectual creations shall be protected as such, without prejudice to the copyright in each of the works forming part of such collections*”.

protection concerns only the structure of the database as the expression of the idea of the author and not its contents per se which can be mere facts or ideas, not protected by copyright. Article 1(2) stipulates that: *'The protection shall not extend to their contents and shall be without prejudice to any rights subsisting in those contents themselves'*. In databases, the restricted possible degree of creativity and instinct of the maker is detected on an internal level, in the design, files, sub-files, categories and sub-categories of the collection and on an external one, in search tools e.g. thesaurus, directories and mediums of expression such as texts, images, graphic presentations, charts and tables, resulting from the creativeness of the author, thus rendering the whole project original and protectable by copyright³⁰. A reasonable question is whether collections of scientific research data fulfill the criterion of originality. Due to the methodical and technical nature of science, little room is left for subjective action on the part of the collector-researcher. *'...The author can exercise little to no creativity or originality in the choice, sequence and combination of the data in the collection. Scientific databases are therefore in most cases not likely to meet the threshold for copyright protection'*³¹. An aspect of the Directive, worthy of our attention is the *double-tier protection* system, which was introduced by it. In particular, in Article 7³², the Directive established a *sui generis right*, as a form of protection of those databases that do not fulfill the originality standard, as described above. This right is a property right and not copyright. It is not granted on the basis of originality and can exist independently and simultaneously with copyright in the same database, if the necessary requirements are fulfilled for both forms of protection. According to Article 7, the object of its protection is *'... a substantial investment in either the obtaining, verification or presentation of the contents...'* of the database. Without this right, if someone extracted the contents of a database and left its structure (protected by copyright) intact, there would be no in-

³⁰See Synodinou, T 2004, *The legal protection of databases*, Sakkoulas Editions, Athens and Thessaloniki, pp. 157, 159.

³¹See Guibault, L and Wiebe, A 2013, "Safe to be open: study on the protection of research data and recommendations for access and usage", Universitätsverlag Gottingen, 2.1, p. 21.

³² DIRECTIVE 96/9/EC on the legal protection of databases, Article 7. 1. states that: *"Member States shall provide for a right for the maker of a database which shows that there has been qualitatively and/or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents to prevent extraction and/or re-utilization of the whole or of a substantial part, evaluated qualitatively and/or quantitatively, of the contents of that database"*.

fringement, which would be against the spirit of the law. It was also a kind of counter-balance for the UK and Ireland, where the lower criterion of the 'sweat of the brow' seemed not to be applicable any more.³³ Lastly, to broach the impact of the directive's implementation, according to a submission by the European Association of Directory and Database Publishers (EADP) 33 there has been "*a significant increase in the supply of and information through databases since the Directive was adopted*"³⁴. In this first evaluation of the Directive, it is also noted that: '*...the harmonized level of copyright protection for "original" databases which has not caused major problems so far*'³⁵.

3.3. The Terms Directive (2006/116/EC)

The Term Directive of 1993 (Directive 93/98/EEC) was the second one adopted towards a vertical harmonization of the originality standard. In 2006, it was codified by Directive 2006/116/EEC, currently in effect, on the term of protection of copyright and certain related rights. Before the adoption of the original Directive, it has been noted that the minimum 25-year old protection granted to photographic works by Article 7(4) of the Berne Convention while granting the rest of the works 50 years *post mortem auctoris* (pma), was discriminating and that the term of protection in Member States was considerable, with some having a multiple protection system, e.g. Germany, Spain and Italy.³⁶ Recital 17 of the original Directive expresses the necessity of a harmonized originality standard for photographic works, which due to their artistic or professional character, are of importance within the internal market, further promoting this way the harmonization of the term of protection in EU copyright law, which was the main purpose of that legal initiative³⁷. It seems that the harmonization of the origi-

³³See First Evaluation of Directive 96/9/EC on the legal protection of database, Commission 2005, Brussels, 2.1, p. 8.

³⁴Ibid, 4.2.3, p. 18.

³⁵Ibid, 6.1, p. 25.

³⁶See Proposal for a Council Directive harmonizing the term of protection of copyright and certain related rights, COM (92) 33, final - SYN 395 Brussels, 23 March 1992, I.A.8. p. 7.

³⁷See DIRECTIVE 93/98/EEC harmonizing the term of protection of copyright and certain related rights, Recital 17 of the preamble states that: "*Whereas the protection of photographs in the Member States is the subject of varying regimes; whereas in order to achieve a sufficient harmonization of the term of protection of photographic works, in particular of those which, due to their artistic or professional character, are of importance within the internal market, it is necessary to define the level of originality required in this Directive; whereas a photographic work within the meaning of the Berne Convention is to*

nality standard for photographs was not the ultimate goal rather a side effect, an ‘accident’, as it has been pointed out³⁸. Part of the phrasing was, as follows: ‘...; *whereas 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;*’, keeping in line with the definition already provided in Article 1(3) of the Computer Programs Directive. In the latest text of the codified version, in Recital 16, there is no reference to artistic or professional character but it has been established that this omission does not imply any change of the originality standard of ‘*the author's own intellectual creation*’. Although, the addition of the phrase ‘*...reflecting his personality*’ might be considered as a toughening of the standard set out by the Software and Database Directives³⁹. According to Article 6 of the codified version, photographs, as copyrightable works, if meeting the originality standard, deserve the same term protection of life of the author plus seventy years *pma*, granted to all other works, as stated in Article 1 of the same Directive. It also precludes, as the previous two Directives have done, as examined above, any other criteria, such as merit or purpose, to determine the eligibility for protection and adds that Member States may provide on a national level for the protection of other photographs, i.e. the non-original ones, by granting other related rights with different terms of protection⁴⁰. The Directive has stirred a debate about its effectiveness, with some cycles pointing out that instead of enhancing legal certainty on copyright across the

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; whereas the protection of other photographs should be left to national law;”

³⁸ See Eechoud, MV 2012, ‘Along the road to uniformity-diverse readings of the court of justice judgments on copyright’, *Journal of Intellectual Property, Information Technology and E-Commerce Law*, vol. 3; Amsterdam Law School Research Paper no. 2012-78; Institute for Information Law Research Paper no. 2012-47, C.13 p.62.

³⁹ See Rosati, E 2013, *Originality in EU copyright: full harmonization through case law*, Edward Elgar Editions, UK and USA, p. 68.

⁴⁰ See Stamatoudi, I & Torremans, P 2014, *Commentary on the EU Copyright Law*, Edward Elgar Editions, UK and USA, p. 277.

EU, which was one of its primary goals (Recitals 4,6,7,21,), *'it creates new uncertainties by using vague and in places almost unintelligible language'*⁴¹.

4. The “horizontal” judiciary harmonization of the originality standard

Following the process of vertical harmonization of the originality standard for copyright protection for software, databases and photographs, as was analyzed above, between 2009 and 2012, the Court of Justice of the European Union, with a series of rulings on specific cases, expanded the application of the originality standard to other types of works, apart from those included in the subject matter of the Directives. With its proactive role and its sometimes dubious interpretations, it has contributed tremendously towards a more substantial widespread harmonization of EU copyright law, with a dynamic of eliminating the quite extensive, in some cases, differences in approach of protection between common law and civil law countries. Below, follows a thorough analysis of the most representative of the CJEU’s decisions, which have drastically reshaped the landscape of EU copyright law, as far as the originality standard is concerned.

4.1. Infopaq International A/S v. Danske Dagblades Forening (C-5/08)

Infopaq is a Danish media monitoring and analysis business that provides customers with 11-word, the key-word plus 5 more surrounding words, summaries of articles found in Danish newspapers and journals, on the matter upon which the search is requested. First, it digitizes the prints, conducts the customized searches on the collected data and then e-mails the results to the customers. The professional association of Danish daily newspapers (Danske Dagblades Forening or shortly DDF) pointed out to Infopaq that it needs to first have the authorization of the copyright owners to continue its business without infringing copyright law. The company answered by bringing an

⁴¹ See Hugenholtz, B 2000, “Why the copyright directive is unimportant, and possibly invalid”, *European Intellectual Property Review* 11, pp. 501-502.

action against DDF in front of the competent local court which, in turn, dismissed the case and Infopaq appealed the decision in front of the higher Højesteret.

The court suspended the proceeding and referred to the CJEU with a preliminary question on the meaning of Articles 2 and 5(1) of the Infosoc Directive⁴², with respect to the reproduction right and the exemption for acts transient or incidental respectively. In Recital 34 of the Decision, the Court ruled that the reproduction right refers to 'works', which under Articles 2(5) and 8 of the Berne Convention, are protected as 'literary and artistic 'if they 'constitute intellectual creations'. It then continued in Recital 35 by saying that under The Software, Database and Term Directives, the respective subject-matters are protected by copyright in the sense that they are their 'author's intellectual creation' and in Recital 37 ended up by saying that copyright within the meaning of the Infosoc Directive is to apply only in relation to a subject-matter which is original under the originality standard set out in the three aforementioned Directives. According to this ruling, the same also applies for parts of that work, if they meet the originality standard⁴³. With this radical interpretation, the CJEU concretized a shift towards a fully harmonized originality standard applicable to subject matter other than that of the Directives, which up till then had only partially harmonized the originality criterion. With a single decision, the Court took a huge leap towards a full harmonization that policy papers and legislation had not done for so many years. It underlined in Recital 44 that newspaper articles are protected as literary works within the context of the Infosoc Directive and that originality corresponds to '*...their form, the manner in which they are presented and their linguistic form*' and in recital 45 states that these works consist of words '*...only through the choice, sequence and combination*' of which the author comes to an intellectual creation. It has been viewed that this cumulative prerequisite does not seem to stem from international law on which the decision claims to be based but more on German law.⁴⁴ It concludes that the 11-word summaries made by Infopaq are protected by the provisions of Infosoc Directive if they are

⁴² Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society.

⁴³ Case C-5/08 Infopaq International A/S v. Danske Dagblades Forening [38].

⁴⁴ See Vousden, S 2010, 'Infopaq and the europeanisation of copyright law', The WIPO Journal, vol. 1, issue 2, 197, pp. 202-203.

themselves an expression of the author's intellectual creation⁴⁵, thus confirming that the originality standard is more qualitative than quantitative and therefore national courts should not hold that copying of small extracts and passages is de minimis and so not infringing copyright⁴⁶.

4.2. Bezpečnostní softwarová asociace – Svaz softwarové ochrany v. Ministerstvo kultury (C-393/09)

In 2001, Bezpečnostní softwarová asociace (BSA), a security software association, applied to the Czech Ministry of Culture (Ministerstvo kultury – MK) for an authorization to collect copyright in computer programs and in particular graphic user interfaces (GUI). The MK denied such an authorization and after years of proceedings before court and the MK, the latter rejected the application of BSA. After a first failed appeal, the BSA appealed again before the Supreme Administrative Court of the Czech Republic, the Nejvyšší správní soud, which deemed a preliminary ruling as necessary and referred two questions to the CJEU.

The question of interest to this essay was whether GUIs fall within the scope of the phrase *'the expression in any form of a computer program'* in Article 1(2) of Directive 91/250 (the "Software Directive"). The Court ruled that the source code and the object code, as forms of expression of the computer program are entitled to be protected by copyright as a computer program by this Directive and this because, as such forms of expression, they permit the reproduction in different computer languages⁴⁷. It then continued by saying that *"...the [GUI] does not enable the reproduction of the computer program itself, but merely constitutes one element of that program by means of which users make use of the features of that program"* and thus, is not protected by copyright by virtue of the provisions of the Software Directive⁴⁸. But the Court did not

⁴⁵ Case C-5/08 Infopaq International A/S v. Danske Dagblades Forening [47].

⁴⁶ See Griffiths, J 2011, "Infopaq, BSA and the "Europeanisation" of United Kingdom copyright law', Media & Arts Law Review, vol. 16, p.3.

⁴⁷ Case C-393/09 Bezpečnostní softwarová asociace – Svaz softwarové ochrany v. Ministerstvo kultury [34], [35].

⁴⁸ Ibid. [41], [42].

stop there and astonishingly continued and said that a graphic user interface can, as a work, be protected by copyright if it is its author's intellectual creation, under Directive 2001/29 (Infosoc Directive)⁴⁹. It also broached the criteria applicable for the consideration of the eligibility of the GUI as original⁵⁰. Moreover, it goes a step further down the road than where it was with Infopaq. If the phrasing of Recital 46⁵¹ is read in a specific way, then, it seems that the Court recognizes the 'author's own intellectual creation' as the one and only indicator and prerequisite, in order for a specific subject-matter to be attributed with the character of copyright work⁵². If it is creative, it is copyright material. If this is the case, then the Court has left no doubts about the harmonization of the originality standard, already started by Infopaq.

4.3. Football Association Premier League Ltd v. QC Leisure and Karen Murphy v. Media Protection Services Ltd (C-403/08 & C-429/08)

The Football Association Premier League (FAPL), as the major football league competition in England, has obtained broadcasting rights of the matches and has granted exclusive licenses to various broadcasters who were obliged to broadcast only on a territorial, i.e. national basis and use encryption on the live transmissions to prevent third, unauthorized parties, out of the licensed territorial basis, from receiving the live broadcast of the football matches, available only to those subscribers who had the required decoding apparatus. In the joined cases under examination, the FAPL and others commenced proceedings against suppliers of decoding equipment who sold it to owners of pubs (Karen Murphy) and other public houses who used foreign decoding devices to screen live football matches which were received by foreign broadcasters. In particular, Murphy after losing her first appeal before the competent court, brought the case before the High Court of Justice of England and Wales, which referred questions to the CJEU. It did the same with similar questions in case C-429/08.

⁴⁹ Ibid. [46],[51].

⁵⁰ Ibid. [48],[49],[50].

⁵¹ Ibid. [46]. Recital 46 states that: "Consequently, the graphic user interface can, as a work, be protected by copyright if it is its author's own intellectual creation".

⁵² See Griffiths, J 2011, "Infopaq, BSA and the "Europeanisation" of United Kingdom copyright law', Media & Arts Law Review, vol. 16, p.8.

Under our work perspective, it is of importance that the Court, for determining if the national legislation at issue justifiably provided FAPL the right for territorial exclusivity in broadcasting and if this is tantamount to a restriction to provide services, first assessed if football matches themselves can be protected by copyright. It said that football matches cannot be classified as 'works', added that to be classified as such, *'the subject-matter would have to be original in the sense that it is the author's own intellectual creation'* and concluded that *sporting events cannot be regarded as intellectual creations classifiable as works within the meaning of the Copyright Directive'*, this applicable to football matches which *'... are subject to rules of the game, leaving no room for creative freedom for the purposes of copyright'*.⁵³ If our interpretation is right, the Court, as in BSA, *surpasses* the lines which already drew in Infopaq and equates the terms 'work' and 'original', in the sense that a subject-matter is a copyright work when and if it is original, creative. This view seems to differentiate from the definitions provided by Articles 2(1) and (2) of the Berne Convention, by which it is reasoned that an intellectual creation constitutes a work for copyright law if it is *'a production in the literary, scientific and artistic domain'* and belongs to one of the categories of works, described in the Treaty, thus, its originality is determined at a second stage⁵⁴. Lastly, the phrase *'creative freedom'* used by the CJEU, seems to associate originality with a degree of perceptiveness and is similar to phrases in European case law, such as the French *'reflet de la personnalité de l'auteur'* or *'empreinte personnelle'*⁵⁵.

4.4. Eva-Maria Painer v. Standard VerlagsGmbH (C-145/10)

In the case at hand, Painer, an Austrian freelance photographer had taken many portrait photographs of Natascha Kampusch, when the latter was still at nursery school. Years later the girl was abducted and police authorities used those same photographs in their searches. Many newspapers and magazines also published the photographs

⁵³ See Joined Cases C-403/08 and C-429/08 Football Association Premier League Ltd, NetMed Hellas SA, Multichoice Hellas SA v QC Leisure, David Richardson, AV Station plc, Malcolm Chamberlain, Michael Madden, SR Leisure Ltd Philip George Charles Houghton, Derek Owen and Karen Murphy v Media Protection Services Ltd, [96], [97], [98].

⁵⁴ See Rosati, E 2013, Originality in EU copyright law: full harmonization through case law, Edward Elgar Editions, UK and USA, p.138.

⁵⁵ *Ibid.*, p.139.

without permission and without giving credit to the photographer. Some of them had even released the portraits as Photofits, after processing them, to depict the possible image that the girl supposed to have at the time, as years had passed since her disappearance. After the girl was found, the photographer brought the publications before the competent national courts, which even though, determined that the defendants did not need Painer's consent to publish the photo-fit version of her photographs, they still referred their questions to the CJEU for a preliminary ruling on several matters.

In particular, in regard with the limitations for quotations and for use in the interest of public security, provisioned in Articles 5 (3) d and (e) of the *InfoSoc Directive* and whether, under the meaning of Articles 1(1) and 5(5) of the *InfoSoc Directive* and article 12 of the *Berne Convention*, “*photographic works and/or photographs, particularly portrait photos, are afforded ‘weaker’ copyright protection at all adaptations because, in view of their ‘realistic’ image, the degree of formative freedom is too minor*”⁵⁶. On answering this, the Court referred to *Infopaq* and said that protection under Article 6 of the *Term Directive* refers to photographs, only if they are their ‘*author’s own intellectual creation*’ and continued by saying that this happens when they ‘*reflect the author’s personality*’ and ‘*the author was able to express his creative abilities in the production of the work by making free and creative choices*’⁵⁷. These choices, which the Court indicatively states in the decision, permit the author to stamp his creation with his ‘*personal touch*’⁵⁸. This phrasing of the Court is clearly more similar to its interpretation of originality in *Murphy* rather than that in *Infopaq* and *Bezpečnostní softwarová asociace* and can be read as an *a contrario* argument, in connection with *Football Association*⁵⁹. Yet, again, in this case, it seems that the European originality standard is more in line with the continental system, which puts emphasis on the author’s personality. The European originality standard seems to be more of a qualitative nature, as explained above in our analysis. The Court concludes that a portrait photograph is pro-

⁵⁶ See Case C-145/10 *Eva-Maria Painer v. Standard VerlagsGmbH*, [85],[86].

⁵⁷ *Ibid.*, [87],[88],[89].

⁵⁸ *Ibid.*, [91],[92].

⁵⁹ See Rosati, E 2013, *Originality in EU copyright law: full harmonization through case law*, Edward Elgar Editions, UK and USA, p. 153. See also *Ibid.* 56, [89].

tectable to the extent enjoyed by other works and that such extent should not depend ‘... on possible differences in the degree of creative freedom in the production of various categories of works’⁶⁰.

4.5. Football Dataco Ltd v. Yahoo! UK Ltd (C-604/10)

Football Dataco and the other applicants create lists of all the fixtures to take place within a year in the English and Scottish football leagues. Yahoo! and the other opposing parties, used those lists in their respective fields of activity, e.g. news/information, betting etc. The Court of Appeal of England and Wales held proceedings and with a reference to the CJEU asked for a preliminary ruling on whether football fixtures fall within the scope of protection provided under Article 3 of the Database Directive⁶¹. The Court underlined that the protection granted by this article regards the ‘structure’ of a database and not its ‘contents’, as confirmed by Recital 15 in the preamble of the Directive, and that under Article 10(2) of TRIPs and Article 5 of the WIPO Copyright Treaty, compilations of data are protected as copyright if ‘... by reason of the selection and arrangement of their contents constitute intellectual creations’, that ‘protection does not extend to the data and is without prejudice to any copyright subsisting for that data’ and has nothing to do with ‘the creation of the data contained in the database’.⁶² It then notices that, while setting up a database, originality, as the only applicable criterion⁶³, exists *only* when the author, in the way that he *selects or arranges the data*, “expresses his creative ability ...by making free and creative choices and thus

⁶⁰ Ibid. 56, [94, [97],[98],[99].

⁶¹ See Directive 96/9/EC on the legal protection of databases, Article 3 states that: “1. In accordance with this 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. No other criteria shall be applied to determine their eligibility for that protection, 2. The copyright protection of databases provided for by this Directive shall not extend to their contents and shall be without prejudice to any rights subsisting in those contents themselves”.

⁶² See Case C-640/10 Football Dataco Ltd v. Yahoo! UK Ltd, [30], [31], [32]. Recital 15 of the Software Directive states that: “Whereas the criteria used to determine whether a database should be protected by copyright should be defined to the fact that the selection or the arrangement of the contents of the database is the author’s own intellectual creation; whereas such protection should cover the structure of the database”.

⁶³ Ibid, [37, [40]. Article 16 of the Database Directive states that: “Whereas 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;”

*stamps his 'personal touch' ”*⁶⁴. This criterion of originality, though, is not met, if during the setting up of the database, due to *'technical considerations, rules or constraints'*, there is no room left for the *'creative freedom'* of the author to be expressed⁶⁵. At this point, the Court made clear analogies to its definitions of originality in *Infopaq*, *Bezpečnostní softwarová asociace*, *Football Association* and more clearly to that of *Painer*. It then concluded that the skill and labour of the author of creating the data and the significant labour and skill that came into setting up the database can, in no case, justify its protection by copyright under the Software Directive⁶⁶ and that it is of no relevance whether the selection or arrangement of the data (e.g. date, time and identity of teams for football fixtures) *'adds important significance'* to that data⁶⁷. For example, the economic value of the data is irrelevant in determining infringement of copyright⁶⁸. Again, the harmonized originality standard is the only applicable.

Shortly summarizing the rulings examined above, it can be said that “free and creative choices” are at the center of the originality standard for all works. The *'personal touch'* of the author derives from his choices and arrangements and renders his works original and thus, protectable by copyright. The harmonized originality standard is far more subjective than it is objective.

5. Selective issues on the impact of the ECJ case law on Member State domestic laws

It is easily conducted from the above that in recent years, the CJEU with its controversial rulings has proven itself as the major driving force towards the establishment of a truly harmonized originality standard in EU copyright law. This *'harmonization bug'* of the Court has led to a *'harmonization by stealth'*, as it has been described by some

⁶⁴ Ibid., [38].

⁶⁵ Ibid., [39].

⁶⁶ Ibid., [42],[46].

⁶⁷ Ibid., [35], [41].

⁶⁸ See Davison, MJ & Hugenholtz, PB 2005, “Football fixtures, horse races and spin-offs: the ECJ domesticates the database right”, *European Intellectual Property Review*, no.3, p.1.

commentators, casting doubts over its competence to stick to this proactive stance.⁶⁹ However, it is sure that the effects of the Court's rulings in relation to the 'author's own intellectual creation' originality standard on the national level of Member States have been multiple and of a different severity, depending on the tradition, that of common or civil law, that up till now was prevalent in those jurisprudences. For the purposes of this dissertation, we will focus on the impact of the CJEU's case law in national laws of the UK, Germany and Greece, as this is currently unfolding.

It is more than obvious that the traditional UK originality standard of 'skill, labour and judgement' cannot be applied anymore. The CJEU has made it clear that even if this labour is sufficient and important, it is of no relevance. Only free and creative choices are required. The previous lower threshold that protected almost all works, if they were just not copied and were the result of a minimum labour is raised and will protect a lot fewer works by copyright from now on. In practice, though, British courts have not fully adopted the new criterion and they either deem it as right or reject it or in some cases they have actually blended the old and the new one in their decisions.⁷⁰ For instance, in the case of *Allen v Redshaw*, the competent court had completely ignored not only the CJEU's decisions but also the European criterion on the concept of originality in general, since it stated that: "...*The test for originality of artistic works is low and it is clear to me that Mr Allen created original works for the show and all the associated posters etc...*".⁷¹ Furthermore, in the case of *NLA v Meltwater*, the respective judge⁷² of the High Court recognized the European originality criterion, as shaped

⁶⁹ See Derclaye, E 2014, "Assessing the impact of the reception of the Court of Justice of the European Union case law on UK copyright law: what does the future hold?", *Revue Internationale du Droit d'auteur*, 2014 (240), p. 2. See also, Griffiths, J 2013, "Dematerialization, Pragmatism and the European Copyright Revolution", *Oxford Journal of Legal Studies* 33(4); Queen Mary School of Law Legal Studies Research Paper No. 156/2013, C.1, p. 18.

⁷⁰ *Ibid.*, p. 18.

⁷¹ See *Ian Richard Allen v Robert Redshaw* [2013] EWHC 1312. See also *Paul Gregory Allen v Bloomsbury Publishing Plc and Joanne Kathleen Murray* [2010] EWHC 2560, whether Harry Potter books infringed the copyright in the book *Willy the Wizard*. See also *Suzy Taylor v Alison Maguire* [2013] EWHC 3804 in which Clarke J states at par. 8 that: "*For an artistic work to be original it must have been produced as the result of independent skill and labour by the artist. The greater the level of originality in the work the higher the effective level of protection is, because it is the originality which is the subject of copyright protection*". However, by this ruling both *Infopaq* and *Painer* are being breached.

⁷² See *Future Publishing v Edge Interactive Media* [2011] EWHC 1489, where the same judge does not even cite the *Infopaq* case.

by Infopaq and applied it in the case, whereas, after an appeal on the same case, the Chancellor of the High Court simply dismissed the criterion set by Infopaq and only considered the criterion of originality, as formed by British jurisprudence to formulate his decision⁷³. Following a different approach, that somewhat alters the criterion of the author's own intellectual creation, Floyd J, in *Football Dataco v Britten Pool*, has regarded that a database is protected under copyright law, as being the result of not just labour but that of "*judgement, skill and discretion*"⁷⁴. To him, football fixtures are a product of skill as well⁷⁵. Lastly, some decisions of the High Court have stated both the British SSJL and the European originality criterion, without clearly indicating any difference or specifying a possible common ground between the two, thus igniting further confusion for lower courts⁷⁶. At this point, though, it is worth mentioning that Arnold J, in his *SAS* decision, seems to fully adopt the harmonized European originality standard, even though, later on, the Court of Appeal, on the same case, did not once again clarify the difference between the two criteria. It is beyond than clear that the UK case law remains confused over the interpretation and application of the originality standard of the author's own intellectual creation, something that can easily lead to incorrect decisions and disrupt legal certainty in the filed of copyright.

The categorization of the works and the prerequisite that the creation must be embodied in a physical medium, as stipulated in the Copyright, Designs and Patents Act of 1988 seem to lose on importance, too, due to the CJEU's case law. From the readings of the above rulings, it is understood that a work is copyright material if it is original. It does not need to fall within a specific subject matter category of the closed -list system, e.g. musical, dramatic or artistic, to be regarded as a work and then to be determined if it is original. British courts have not repealed the categorization as of yet and have expressed mainly negative opinions on such a perspective. Furthermore, this new dogma poses the risk to some works described as subcreative, i.e. non-original, in the

⁷³ See *NLA v Meltwater* [2010] EWHC 3099 (Ch) par. 72 and 78. See also *NLA v Meltwater* [2011] EWCA Civ 890 par. 19 and 20.

⁷⁴ See *Football Dataco v Britten Pools* [2010] EWHC 841, par. 86-87, 91.

⁷⁵ *Ibid.*, par. 41, 43.

⁷⁶ See e.g. *Forensic Telecommunications Services Ltd v Chief Constable of West Yorkshire* [2011] EWHC 2892 (Ch), par. 84 and 91, as well as, *SAS Institute v World Programming* [2010] EWHC 1829 par. 57,64,129,207,233,249,255,258-261,263,322.

UK, as there is no other legal basis for their protection, due to the lack of an unfair competition statute in this state. On the contrary, short works can be protected by copyright, if they fulfill the EU originality requirement, as Infopaq clarified, something that has not been yet common in UK case law.

Another aspect of the UK's copyright law that has been significantly affected by the Court's case law is the infringement test. Infopaq associated originality with the test of infringement of copyright under the Infosoc Directive's 'reproduction of the work or part of the work'. According to the Court, if that part copied and reproduced from a work is itself the 'author's intellectual creation', then there is infringement. On the contrary, UK's laws have always examined if the part of the work taken was 'substantial', in the sense that it included 'sufficient skill, labour and judgement' or if it was 'commercially relevant'⁷⁷. British courts continue to not fully adopt this new infringement test, by either sticking to the old rule or sporadically implementing the new one, depending on the specifics of each case⁷⁸. Taking into account the recent political developments of 'Brexit' and the forthcoming withdrawal of the country out of the EU, it will be quite interesting to see what the future holds for copyright law in this state⁷⁹.

In continental countries, the implications of the CJEU'S case law have been much less obvious. In Germany, even before the horizontal harmonization, works were already protected under copyright law, as long as they were 'personal intellectual creations of the author', a phrasing almost identical to that used by the Court. Nevertheless, German courts have expressed many deviating views on the notion of originality, e.g. the minimum degree of personal creativity and individuality⁸⁰, and their interpretations

⁷⁷ See Derclaye, E 2014, "Assessing the impact of the reception of the Court of Justice of the European Union case law on UK copyright law: what does the future hold?", *Revue Internationale du Droit d'auteur*, 2014 (240), p. 2. See also, Griffiths, J 2013, "Dematerialization, Pragmatism and the European Copyright Revolution", *Oxford Journal of Legal Studies* 33(4); Queen Mary School of Law Legal Studies Research Paper No. 156/2013, C.1, p. 14.

⁷⁸ *Ibid.*, pp. 20-21.

⁷⁹ See HM Government, 2017, *Enforcement and Dispute Resolution - A Future Partnership Paper*, p. 2, where it is stated that: "*In leaving the European Union, we will bring about an end to the direct jurisdiction of the Court of Justice of the European Union (CJEU) and that "the UK wants to respect the autonomy of EU law and UK legal systems while taking control of our own laws"*."

⁸⁰ See Stamatoudi, I 2016, 'Originality in EU copyright law', *Media & Communications Law*, vol. 49, p. 63.

have been rather flexible, though, without stretching too far from the author-centralized standard of their legislation, which has been noted by some to be the basis of the EU standard. Despite the above, in some cases, German courts have bended this relatively high originality standard, following the doctrine of ‘small change’ or ‘Kleine Munze’ in Germany, according to which even some just average works of little creativity, such as mathematical tables, recipe books and address books are also granted copyright protection⁸¹.

Finally, with regard to Greece, the concept of originality is established, as a general prerequisite for the protection of the subject matter, in Article 2 par. 1 of the Greek Copyright Law (N. 2121/1993) under which: “1. *The term work shall designate any original intellectual literary, artistic or scientific creation,...*”, while a second criterion of originality is established in par. 3 of the same article in terms of computer programs under which “...*A computer program shall be protected if it is original in the sense that it is the author’s personal intellectual creation*”. Actually, so far, this remains the only explicit reference of the EU originality standard, as an implementation of the Software Directive into the Greek law. Since the law does not define the notion of originality, theory and case law attempted to shape it by adopting the theory of “*statistical uniqueness*” of the Swiss jurist Kummer. According to this, a work is original only when there is a high probability that no other author, even under the same circumstances and with the same goals, would be able to create a similar work. As Greek courts have at times ruled, an original work has to possess a minimum of a ‘*creative height*’ and *be distant from the already known or self-evident*, which somehow is reminiscent of the term “*free and creative choices*” that the Court has used in its decisions, as already described above⁸². This approach seems to put the weight on the creative result itself, thus it sets a higher threshold of protection than the harmonized EU originality standard which is more close to the subjective standard of the continental civil tradition, as

⁸¹ See Gompel, SV & Lavik, 2013, ‘Quality, merit, aesthetics and purpose: an inquiry into EU copyright law’s eschewal of other criteria than originality’, *Revue Internationale du Droit d’ Auteur (RI-DA)*; Amsterdam Law School Research Paper no. 2013-51; Institute for Information Law, Research Paper no. 2013-03, p.31.

⁸²See Marinou, M 2004, *Copyright Law*, 2nd edn, Sakkoulas Editions, Athens and Komotini, p. 80 and See Kotsiris, L & Stamatoudi, I 2009, *Commentary on the Greek copyright act*, Sakkoulas Editions, Athens and Thessaloniki, p. 33.

it puts forward the *'personal touch'* of the author. Whilst, pursuant to CJEU case law, the criterion of statistical uniqueness should be replaced by the EU originality standard, up till today, eight years after the Infopaq decision, Greek courts seem to be either unaware or even confused in connection with their interpretation of the European originality standard and its application on various cases. For instance, the Greek Supreme Court, in order to identify whether a lottery game was entitled to copyright protection, examined its statistical uniqueness, disregarding the criterion of author's own intellectual creation and the CJEU'S case law on the matter.⁸³ Quite surprisingly, in another case on an audiovisual work, the Athens Multi-member Court of First Instance invoked the Infopaq decision. However, it does so, only in connection to the protection of some parts of those works, which may be possible to bear originality on their own. As for the recognition of those works as original, and thus, worthy of copyright protection, it completely ignores the European criterion and once again fully adopts that of statistical uniqueness, widely acknowledged by Greek courts.⁸⁴ Lastly, the only clear references of the European originality standard in recent Greek case law is restricted only to those categories of works, that triggered the adoption of the respective European Directives. Nevertheless, the majority of these decisions are quite confusing, since they invoke and sometimes even apply⁸⁵ the criterion of the statistical uniqueness together with that of the author's own intellectual creation.⁸⁶

⁸³ See Supreme Court of Greece, Decision No. 537/2010. See also Supreme Court of Greece, Decisions No. 196/2010, 1625/2014, 1267/2015, 1051/2015, 509/2015, Court of Appeal of Athens, Decisions No. 1036/2011, 2724/2012, 2969/2012 and 5190/2014, Court of Appeal of Thessaloniki, Decision No. 1033/2015 and Multi-member Court of First Instance of Thessaloniki, Decision No. 7241/2015.

⁸⁴ See Multi-member Court of First Instance of Athens, Decision No. 3562/2015, under which the court ruled that the audiovisual works from the period of the so called Regime of the Colonels, have all necessary prerequisites to be originals, since *"under the same circumstances and with the same objectives no other author would, in the ordinary course of events, create the same audiovisual works..."*. See also Multi-member Court of First Instance of Athens, Decision No. 3141/2015 with respect to works of architecture.

⁸⁵ See Multi-member Court of First Instance of Athens, Decision No. 5821/2010 par. 18 in which, even though the court accepted that *"...the said photographs are plaintiff's own intellectual creation, which do not constitute copies of others and show some minimum individuality ..."*, it finally concluded that the works at issue are original, since *"... under the same circumstances and objectives no other author would, under reasonable probability, be able to create the same photographs ..."*. See also Court of Appeal of Athens, Decision No. 2211/2010.

⁸⁶ See Supreme Court of Greece, Decision No. 509/2015, where the court judged that the photographic depictions at issue contained in the writings and the explanatory texts constituted *"... plaintiff's personal intellectual contribution with intense individual peculiarity ...with the result that the plain-*

6. Conclusions

Even after almost 25 years of both vertical and horizontal harmonisation of the originality standard in EU copyright law, national courts of Member States continue to interpret its definition based on their unique legal traditions and overall cultures, thus, leading to a fragmentation of the Internal Market and an obstruction to the further development and competitiveness of the Union. In order to avoid such negative effects, national courts shall try to keep themselves up to date with all the latest developments in European copyright law, including CJEU case law and so be able to apply the correct originality criterion. Additionally, they should carefully consider which legal precedents can still apply to the cases under examination and more willingly seek clarifications by the CJEU, whenever this is deemed necessary. In this way, courts, by issuing clear and unambiguous decisions, will achieve a better safeguarding of the legal certainty in favour of a homogeneous and utmost protection of both authors and their works.

Furthermore, Copyright law has been mainly based on the shared competence between the EU and its Member States, in relation to the establishment and the functioning of the Internal Market, by virtue of Articles 4(2)(a) and 114 of the TFEU, even though it could be argued that copyright pertains not only to areas such as trade and competition but also culture, thus the EU could intervene in copyright legislation based on its competence derived from other legal bases as well⁸⁷. The main problem with the competence of the EU under Article 114 of the TFEU is that the latter has no normative capacity. This means that it gives the EU a more functional competence to

tiff to be the original beneficiary enjoying the legal protection of the moral and property right on them..". See also Court of Appeal of Athens, Decision No. 2724/2012, Court of Appeal of Thessaloniki, Decision No. 1033/2015, Multi-member Court of First Instance of Athens, Decision No. 382/2013, as well as, Supreme Court of Greece, Decision No. 1051/2015 where the court ruled with respect to digital hunting maps that they constitute plaintiff's "own intellectual creation, since they meet the requirements of the general term of art. 2 (1) of Law 2121/1993, that is, they are original". Nevertheless, the court continued by stating that "it is judged, in other words, that under the same conditions and objectives, no other author, under reasonable probability, would be able to create a similar work, which displays a "creative height", so as to stand out and differentiate from the other works of everyday life or other similar known works, demonstrating at the same time something of the uniqueness of the personality of the plaintiff, who is naturalist...". With regard to databases, see also Supreme Court of Greece, Decision No. 1993/2014, as well as, Multi-member Court of First Instance of Thessaloniki, Decision No. 23120/2013.

⁸⁷ See Ramalho, A 2014, "Conceptualising the European Union's competence in copyright: what can the EU do?", *International Review of Intellectual Property and Competition Law* 2, 178, p.2.

achieve its objective of the in relation with the Internal Market but is not restrictive on how this will be accomplished. As a result, the Union usually chooses rather flexible legal instruments, e.g. Directives, recommendations or non-binding guidelines, that leave plenty of room to the national legislator to have the upper hand in the final choice of the measures implemented each time⁸⁸.

The Lisbon Reform Treaty of 2009 has presented the perfect opportunity for the EU copyright field to turn the page for good and at last move towards a European Copyright Law, a uniform Regulation on copyright, on the basis of Article 118 of the TFEU, as it has been proposed by the European Copyright Society⁸⁹. For the first time, it is explicitly expressed in the Treaties that the European authorities *shall* act to ‘*provide uniform protection of intellectual property rights throughout the Union...*’, though still in the context of the shared competence with a view to the internal market.⁹⁰ While improving the already existing legal framework, through further harmonisation, by perhaps amending the existing Directives, a uniform copyright Regulation, which after the Lisbon Treaty Reform could be adopted by a qualified majority and would not require unanimity, as in the past, could possibly regulate some more urgent main points, e.g. the originality standard, in a more homogenous and solid way, as it would be directly applicable within national legislations, always respecting the principles of subsidiarity and proportionality⁹¹. Such a Regulation would help the EU achieve more legal certainty for all parties affected by copyright law, which is mainly shaped by the CJEU case law, which has so far been occasional, both in terms of time and content, and significantly variable and unpredictable. Additionally, it would reduce legal costs and avoid time-consuming court proceedings, in connection with the implementation of

⁸⁸ Ibid., pp. 3-4.

⁸⁹ See European Copyright Society, 2014, *Unification of Copyright Law*.

⁹⁰ See Treaty on the Functioning of the European Union, Article 118 states that: “In the context of the establishment and functioning of the internal market, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish measures for the creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the Union and for the setting up of centralised Union-wide authorization coordination and supervision arrangements”.

⁹¹ See Eechoud, MV, Hugenholtz, PB, Gompel, SV, Guibault, L & Helberger, N 2009, *Harmonizing European copyright law: the challenges of better lawmaking*, vol. 19, Kluwer Law International, The Netherlands, pp. 19-26.

the EU Directives by Member States and increase transparency. Moreover and more importantly, it would solve the problem of territoriality of copyright rights which in turn entails extra transaction and licensing costs, poses risks to the free movement of services and undermines the dynamic of the EU to become a world pioneer and a norm-setter in the field of copyright law, with all the positive consequences that this would generate for both its economy and people. The European political and legal elites should soon agree upon the next steps which will for good unify or at least deeply harmonize the EU copyright law, and thus, modernize it and keep it up to date with the standards of the always shifting global digital and information economy.

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