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# Along the Road to Uniformity – Diverse Readings of the Court of Justice Judgments on Copyright Work

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**Abstract:** For a long time, EU law's impact on the meaning of copyright work seemed limited to software and databases. But recent judgments of the CJEU (*Infopaq*, *BSA*, *Football Association [Murphy]*, *Painer*) suggest we have entered an era of harmonization of copyright subject matter after decades of focus on the scope of exclusive rights and their duration. Unlike before, however, it is the Court and not

the legislator that takes centre stage in shaping pivotal concepts. This article reviews the different readings and criticisms evoked by the recent case law on copyright works in legal doctrine across the EU. It puts them in the wider perspective of the on-going-development towards uniform law and the role of the preliminary reference procedure in that process.

**Keywords:** Copyright; Databases; CJEU; *Infopaq*; *BSA*; FA Premier League; *Painer*;

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## A. Introduction

- 1 It was with slight apprehension but still a fair amount of confidence that we wrote in our 2009 book on the harmonization of EU copyright law<sup>1</sup> that after nearly two decades of EU copyright-specific legislation, the subject matter of copyright protection was only harmonized to a limited extent. The Berne Convention and subsequent international treaties had already had a certain unifying effect on domestic copyright laws, of course, but the EU directives had not gone beyond those international norms, with the exception of software, databases and photographic works. The slight apprehension arose when, just after the final proofs had been sent off to the publishers, the *Infopaq* judgment was handed down. After some pleading the publisher agreed to a last-minute change to the paragraphs on the transient copying exemption of the Information Society Directive, which after a quick read seemed the bigger issue addressed by the Court.
- 2 In retrospect, of course, in a short space of time *Infopaq* became regarded as the landmark judgment in which the Court of Justice started to elaborate an EU-wide concept of copyright 'work'. A string of cases followed in which the Court explicitly addressed

when something is a copyrighted work: *BSA* (2010), *Football Association Premier League* (also known as 'Murphy', 2011), *Painer* (2011), and *Football Dataco* (2012),<sup>2</sup> with more cases pending.

- 3 It is still too early to establish the exact impact of the Court's judgments on the copyright laws of Member States, even if national courts have started to refer to the CJEU's judgments. Meanwhile, notably *Infopaq* and *BSA* have already generated lots of commentary from copyright scholars across the EU. In this article, my primary aim is to analyse the reception of these cases, exploring the type of readings legal scholars take. This should give us a more comprehensive understanding of the issues at stake. I distinguish 'positivist-comparative' readings, which address what the harmonized law now is and what impact this has on national laws, from methodological-critical readings of the case law. The latter comprise a variety of criticisms on the tools the Court uses for its apparent construction of an EU-wide work standard, which is the most controversial outcome of the cases.
- 4 The preliminary reference procedure plays a crucial role in legal practice as it is the primary instrument through which the Court shapes EU copyright law. We know surprisingly little about how it operates in copyright, though, and in the final part I advocate

that scholars engage with the role of the preliminary reference procedure as an instrument of further harmonization and its limitations. But first, by way of introduction, a brief reminder of how the existing directives deal with the copyright work.

WCT, too, is primarily concerned with making international copyright norms more suited to the digitally networked environment and contains no new norms on subject matter beyond those already laid down in the BC and the TRIPS Agreement.

## B. The Europeanized copyright landscape

- 5 Until 1991 there was no secondary EU law on copyright. But the Court of Justice had begun to apply primary law to intellectual property in the 1970s and 1980s. First came judgments on how territorially defined national copyrights and related rights were to be viewed in light of the EC Treaty provisions aimed at ensuring the free movement of goods in the internal market. From the 1990s onwards the Court also addressed equal treatment of citizens (non-discrimination) and the impact of competition law on the exercise of copyright, especially as regards the prohibition to abuse a dominant position of what is now Article 102 TFEU.<sup>3</sup>
- 6 Work on the approximation of domestic copyright laws for the purpose of establishing the single internal market started in earnest in the late 1980s. In fact, of today's seven copyright-specific directives, all but one can be traced back to the first major policy documents: the Commission Green Paper on the Challenge of Technology of 1988 and its 1991 Follow-up.<sup>4</sup> These set the stage for the 1991 Computer Programs Directive (91/250/EEC, codified by 2009/24/EC), the 1992 Rental and Lending Directive (codified by 2006/115/E), the 1993 Satellite and Cable Directive (93/83/EEC), the 1993 Term Directive (codified by 2006/116/EC, amended by 2011/77/EU), the 1996 Database Directive (96/9/EC) and the 2001 Resale Right Directive (2001/84/EC).
- 7 Some of the topics in the 2001 Information Society Directive (2001/29/EC) were already on the 1988 agenda also. But the more comprehensive ideas on its scope are found in the 1995 Commission Green Paper on Copyright and Related Rights in the Information Society and the 1996 Follow-up.<sup>5</sup> Limitations and exceptions, which are an important part of the Information Society Directive, were initially not really on the agenda. The 1995 Green Paper was all about adapting exclusive rights to the digital environment, with a heavy focus on the scope of economic rights online and on the protection of digital rights management information and technological protection measures.
- 8 As is well known, the process that led to the Information Society Directive ran in tandem with the creation of the 1996 WIPO Copyright Treaty (and the WPPT), which entered into force for the EU and its Member States as the WCT on 14 March 2010. The

## C. Works in the directives

- 9 With the exception of the Information Society Directive then, all instruments basically deal with a very limited set of copyright issues (duration), for only certain kinds of works (software, databases) or certain types of exploitation (rental and lending, satellite and cable, resale). From that perspective it is not surprising that, taken together, the directives shed little light on what the constitutive requirements for copyright are. If one considers the green papers and legislative preparatory materials, clearly there were only two harmonization projects where the requirements for protection as a copyright work were a key issue: the Computer Programs and Database Directives.
- 10 The respective directives provide that a computer program or database is protected on condition that 'it is original in the sense that it is the author's own intellectual creation'. It is generally accepted that this standard represents a compromise criterion. It even does away with other adjacent criteria (such as merit or certain aesthetic appeal)<sup>6</sup> that were sometimes applied to these fairly young branches of the copyright tree. Crucially, both directives do not just lay down the originality test, but also specify what kind of 'work' a database or computer program is and to what elements protection applies. Because the Database Directive introduced a sui generis intellectual property right in databases in addition to 'normal' copyright, it obviously made particular sense to elaborate what the object of either right is.
- 11 Computer programs were not defined as a distinct genre, but classed in the broader category of literary works as named in Article 2 Berne Convention. At the time it was not at all universally accepted that software was to be regarded as a literary work under the Berne Convention. In its 1988 Green Paper, the European Commission also professed that a change to the Berne Convention would be needed to bring software within its scope.<sup>7</sup> In the event, of course, international protection was secured through the TRIPS Agreement (1992) and the WCT (1996), which essentially impose an obligation on contracting states to treat computer programs as literary works within the meaning of the Berne Convention.
- 12 The directive may not define the meaning of 'computer program', but it does specify in some detail what characteristics are protected: 'the expression in any form of a computer program', but not 'ideas and prin-

ciples which underlie any element of a computer program, including those which underlie its interfaces' (Art. 1 Computer Programs Directive, cf. Art. 9(2) TRIPs, Art. 2 WCT). The recitals give additional pointers on the protection of logic, algorithms and programming languages.

- 13 The Database Directive does not classify a database as a literary work or other type. In fact, the directive does not even speak of the database directly as a 'work' of any kind, just as an 'intellectual creation'. So does TRIPs (Art. 9) and in its wake the WCT (Art. 5). Of course, all these references echo Article 2(5) Berne Convention, which deals with the protection of collections of literary or dramatic works.<sup>8</sup> A database is 'a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means' (Art. 2 Database Directive). Its original character must show in 'the selection or arrangement of the contents', and protection for the database as such does not extend to its contents (Art. 3 Database Directive, cf. Art. 5 WCT).
- 14 Photography is the third area where blackletter law is explicit about subsistence. Harmonization of the originality test here is accidental, one could say, as it is a side effect of the harmonization of the term of protection for all genres of copyright works. Some Member States have a two-tier regime for photographs (e.g. Austria, Germany). In the past, in these states photographs only qualified for copyright protection as artistic works when they met a higher than average originality standard ('*Lichtbildwerke*' in the German copyright act).<sup>9</sup> A related right protects photographs as such ('*Lichtbild*').<sup>10</sup> When the term of protection was harmonized for all literary and artistic works, it had to be clarified that the new default term of 70 years post mortem auctoris applies to original photographs only.
- 15 Initially the Commission and European Parliament did not think the Term Directive would have to specify what constitutes a photographic work, or harmonize the originality test. This is what the Explanatory Memorandum to the original proposal for the Term Directive suggests. It states:
- 16 To secure proper harmonization of the term of protection, Article 3 provides that the term for photographic works is always to be seventy years, even though the actual substance of the right may be different, notably in Member States where there are different rules for different categories of photograph. Of course if the photograph is not protected under the law of the Member State in which the protection is claimed this paragraph will have no effect, as the substance of copyright entitlements is outside the scope of the Directive.<sup>11</sup>
- 17 The proposed article read: 'Protected photographs shall have the term of protection provided for in Article 1'. No amendments to this article and its accompanying recital were proposed by the European Parliament.<sup>12</sup> The subsequent Commission proposal amended in 1993 did not contain changes on photographic works either.<sup>13</sup> So it must have been in the Council that the decision was made to lay down a harmonized standard. Article 6 Term Directive now provides that '[p]hotographs which are original in the sense that they are the author's own intellectual creation shall be protected in accordance with Article 1 [meaning: term of protection of life of the author plus 70 years, mve]. No other criteria shall be applied to determine their eligibility for protection. Member States may provide for the protection of other photographs.'
- 18 The originality standard of Article 6 is viewed as lower than the traditional standard for photographic works in Austria and Germany.<sup>14</sup> The preparatory documents and the text of the Directive itself do not make clear whether the test for photographs is the same as that for software under the Computer Programs Directive.
- 19 Turning to the other directives, the term 'intellectual creation' is absent there, but obviously the term 'work' is also to be found. After all, it is the normal descriptive term to denote copyright subject matter and it is difficult to specify rights without referring to their object. The references to 'work' tend to be a function of whatever the core issue is that the provision regulates. For example, the Term Directive mentions different types or works such as joint works, collective works and anonymous works; for these the general rule for calculating the term of protection cannot be applied, so special rules were needed.
- 20 There is no indication, however, that by giving special calculation rules the legislator intended to harmonize notions of collaborative works. The most recent change to the Term Directive confirms this reading. For co-written musical works, a new calculation rule was added in 2011, precisely because in some jurisdictions musical compositions with lyrics are treated as a joint work, whereas in others they are viewed as separate works.<sup>15</sup> This can lead to differences in the term of protection for songs. Under the old rule, for example, the musical compositions of George Gershwin (d. 1937) would have become public domain in the UK and the Netherlands around 2008, while the lyrics by brother Ira (d. 1983) remained in copyright. In these countries, lyrics and composition are viewed as separate works, not as a joint work. Obviously, if there was such a thing as a harmonized concept of a 'joint work', a special term rule for co-written music would be superfluous.
- 21 In the area of applied arts, EU design law clearly recognizes that although design protection and co-

pyright protection are cumulative, the requirements for protection under copyright are a matter for Member States. As recently as 2002 the Community legislator expressly provided that the standard of originality for copyright in works of applied art remains a matter for Member States to determine (Community Design Regulation Art. 96; similar in Art. 17 Design Directive).<sup>16</sup> The *Flos* judgment of January 2011 throws up many questions about the effect of this provision (see discussion below at para 5.1.2).<sup>17</sup>

- 22 The Resale Right Directive grants visual artists the right to a share in each sale of an artwork. It therefore contains a very particular reference to the subject matter it covers: the resale right exists for certain categories of ‘art’, namely ‘original works of graphic or plastic art’ made by the artist, as either a unique artefact or in a limited edition. Finally, in the Information Society Directive and other directives there are some very general references to ‘the work’. Arguably this is to distinguish it from other protected subject matter that the directive also covers in the related rights area (rights of performers, etc.).
- 23 From this overview it seems clear that policy makers and legislators essentially did not give much thought to the constitutive requirements of copyright subject matter. The ‘work’ and its categories were generally not seen as concepts requiring a uniform EU interpretation, other than for software and databases. A similar chequered picture can be drawn for that other pivotal concept in copyright: the notion of author. The *acquis communautaire* has very little to say about who qualifies as (co-)author or initial owner of copyright, beyond some provisions for software, databases and film.

#### D. Works in the Court of Justice’s case law: *Infopaq*, *BSA*, *FA Premier League* and *Painer*

- 24 So what has happened? How do we find ourselves in a situation where – as a matter of EU law, it seems – a harmonized originality standard is upon us? The reactions on the *Infopaq* judgment were still quite mixed in terms of what its impact would be. But the subsequent *BSA* ruling on the scope of the Computer Programs Directive brought home that the Court of Justice is actually extending the ‘author’s own intellectual creation’ test from the Software and Database Directive to other areas. What is more, *BSA* also confirmed that the Court of Justice is moving towards a harmonized concept of ‘the work of authorship’. The *Football Association Premier League (FAPL aka Murphy)* judgment on broadcasting of sports events stows this line.<sup>18</sup> *Painer* is so recent most analysis is yet to come; this is even more true for *Football Dataco*.<sup>19</sup> In the former judgment the Court considered the subsistence

of copyright in photographs under the Term Directive, but with reference to its earlier ‘work’ judgments. To help the analysis of the readings and criticisms the four judgments have evoked, a short reminder of the cases and the principal findings of the court are in order.

#### I. *Infopaq*: Reproduction in part of newspaper articles

- 25 The questions asked by the referring Danish court in *Infopaq*<sup>20</sup> concerned the interpretation of the reproduction right of Article 2 Information Society Directive and the exemption for acts of transient or temporary copying of Article 5.
- 26 *Infopaq* is a media monitoring and analysis business that provides customers with tailor-made summaries or snippets of newspaper and journal articles. The company digitizes print newspapers by scanning them. It then runs customized searches and stores the hits on a search term with surrounding words. The search results are then mailed to the customers. The judgment contains an example of what they would report back, in this case to a customer who is interested in the company TDC, the largest Danish telecom company:

4 November 2005 – *Dagbladet Arbejderen*, page 3:

TDC: 73% ‘a forthcoming sale of the telecommunications group TDC which is expected to be bought’.

- 27 To determine whether (combinations of) such quotes constitute reproduction in part within the meaning of Article 2 Information Society Directive, the Court asked itself this preliminary question: To what subject matter does the reproduction right apply? According to Article 2, the short answer is ‘works’. For copyright lawyers this is obvious shorthand for works of literature and art in a broad sense, to be distinguished from the other subject matter of related rights (in broadcasts, records, performances, first fixations of films) for which the reproduction right also exists. This is so obvious that we may overlook the possibility that to the non-specialized Court, the reproduction right of Article 2 Information Society Directive ‘for authors, of their works’ requires elaboration. Maybe that is why the Court set out to arrive at a more extensive answer.
- 28 It first lists what it considers to be the relevant international and EU law. The TRIPs Agreement is relevant because by approving this agreement, the EU obliged itself to comply with Article 2 Berne Convention as it elaborates which productions count as works of literature. It also lists the provisions on subject matter of the Computer Programs, Database and Term Directives. It then concludes that ‘[c]opyright...

[within the meaning of Art. 2(a) *Infosoc*] is liable to apply only in relation to a subject-matter which is original in the sense that it is its author's own intellectual creation'.

- 29 For newspaper articles –the type of text at issue here– the Court says that since individual words are not copyrightable, '[i]t is only through the choice, sequence and combination of those words that the author may express his creativity in an original manner and achieve a result which is an intellectual creation'. It then addresses whether short extracts of the kind made by *Infopaq* constitute reproductions in part under Article 2 Information Society Directive (consideration 47):

*That being so, given the requirement of a broad interpretation of the scope of the protection conferred by Article 2 of Directive 2001/29, the possibility may not be ruled out that certain isolated sentences, or even certain parts of sentences in the text in question, may be suitable for conveying to the reader the originality of a publication such as a newspaper article, by communicating to that reader an element which is, in itself, the expression of the intellectual creation of the author of that article. Such sentences or parts of sentences are, therefore, liable to come within the scope of the protection provided for in Article 2(a) of that directive.*

## II. BSA: Graphic User Interface as protected subject matter

- 30 Indisputably, to be able to say something about when there is reproduction of a 'work' – that is, to elucidate the infringement test to be applied – the Court had to go into the work concept at some level. In the *BSA* case, however, it had to address subject matter head on. The Czech Supreme Court asked whether a computer program's graphic user interface was part of the protected expression of a computer program within the meaning of the Computer Programs Directive. The case originated in a dispute between the Czech business software alliance, which sought permission from the Czech authorities to act as a collective management organization and secure compensation for the showing of GUI-generated images (e.g. as part of a television program).
- 31 The Court –like the Advocate General– rephrased the question as follows: Is 'the graphic user interface of a computer program ... a form of expression of that program within the meaning of Article 1(2)' of the Computer Programs Directive? The answer to that question is no, because according to the Court, protected software includes only '...the forms of expression of a computer program and the preparatory design work capable of leading, respectively, to the reproduction or the subsequent creation of such a program.' Since the graphic user interface 'does not enable the reproduction of that computer program, but merely constitutes one element of that program by means of which users make use of the features of that program', it is not protected under the Computer Programs Directive. This interpretation of the directive sparked much criticism and further questions.<sup>21</sup>
- 32 For our purposes, the most interesting element which arguably caused the most consternation is that the Court did not stop at concluding that GUIs are in principle not protected as software. Instead, it went on to say that 'it is appropriate to ascertain whether the graphic user interface of a computer program can be protected by the ordinary law of copyright' by virtue of the Information Society Directive. The Court refers to its *Infopaq* judgment and opines that 'the graphic user interface can, as a work, be protected by copyright if it is its author's own intellectual creation.'

## III. Football Association Premier League: Infringement test for reproduction

- 33 Questions on copyright subsistence at first glance are incidental to what the Football Association Premier League (FAPL) joined cases are about. The central issue was whether the Premier League et al. could enforce its territorial licensing system for broadcasts of football matches, and prevent English pubs from showing matches using a foreign satellite decoder card rather than one from a supplier authorized for the UK. Murphy used Greek decoder cards in her pub and was prosecuted for infringement of the Copyright, Design and Patents Act 1988. This penalizes the reception of unauthorized transmissions. The Football Association and others also brought claims for infringement in the civil courts against Q.C. Leisure and others for supplying pubs in the UK with non-UK decoder cards. The administrative court before which Murphy appealed her conviction and the court seized with the civil action made preliminary references to the CJEU.
- 34 Much of the dispute turned on the free movement of goods and the freedom to provide services and on EU broadcasting law, specifically the two directives that regulate inter alia television broadcasting services: the Television without Frontiers Directive (revamped as Audiovisual Media Services Directive)<sup>22</sup> and the Conditional Access Directive.<sup>23</sup>
- 35 The copyright questions that were asked–like those in *Infopaq*– concerned primarily the scope of the reproduction right and the exemption for transient or incidental copying in the Information Society Directive.<sup>24</sup> The communication right also comes into play, but the judgment on this issue is of less relevance from the work perspective I am interested in here. The referring court had to determine under UK

law ‘whether copies of a substantial part of any relevant copyright work are made in the decoder boxes or on the television screens’ in the process of receiving and showing the broadcast football matches.

- 36 In a judgment that runs to almost 100 pages,<sup>25</sup> the English civil court gives a detailed analysis of the production of televised football matches and the potential types of protected subject matter involved to which the football association (rather than broadcasters) holds rights. The coverage is produced in a series of stages. The broadcasters film the football match using twenty or more cameras that also record ambient sound. These video and audio streams are edited ‘live’ into a feed that is relayed for further production to an off-site company that adds logos, video sequences, on-screen graphics (bars showing player or team names, yellow cards, etc.), music and English commentary. The resulting signal is transmitted by satellite to the foreign broadcaster, who can add its logo and commentary before sending the re-encrypted signals to the audience.
- 37 Judge Kitchin found that various elements embodied in the Premier League match coverage attracted copyright or related rights.<sup>26</sup> It is worth noting that the distinction between copyright works and related rights subject matter that is commonly made in the laws of most Member States (and the EU directives) is not as clearly present in UK law. Notably, the UK’s Copyright Designs and Patents Act 1988 uses the term ‘film’ to mean audio-visual recording, which in other jurisdictions corresponds to the related right of producers in first fixations of films.<sup>27</sup> The ‘cinematographic work’ is known in other jurisdictions as a category of works of authorship, but is not a category as such under UK law.<sup>28</sup> In *Norowzian v Arks*, however, the Court of Appeal accepted that in principle a film can be considered a dramatic work under the CDPA.<sup>29</sup>
- 38 The parties agreed that copyright exists in certain graphics such as logos (as artistic works) and in the Premier League theme music (‘anthem’, as a musical work). The sound recording of the anthem was protected as such (‘a related’ right in EU-speak). So were various pieces of film, such as highlights of previous matches as well as the video streams captured from the 20+ cameras used. As far as I understand it, the ‘film copyrights’ refer primarily to related rights in the audio-visual recordings, not to copyright in films as dramatic works.
- 39 The referring court did not ask what the preconditions are for copyright or related rights to exist in (elements of) the televised football matches under EU intellectual property directives. It just wanted to know whether the Information Society Directive allowed it to apply a national infringement test or an EU one. In the UK the reproduction of a work or other protected subject matter is infringing if it in-

volves copying a ‘substantial part’, either qualitatively or quantitatively. Was this test to be applied, or does the Information Society Directive prescribe a different one? Kitchin J asked, ‘If it is a matter of interpretation of Article 2 of Directive 2001/29/EC, should the national court consider all of the fragments of each work as a whole, or only the limited number of fragments which exist at any point in time? If the latter, what test should the national court apply to the question of whether the works have been reproduced in part within the meaning of that Article?’<sup>30</sup>

- 40 The Court of Justice rephrases the question thus:

*By this question, the referring court asks, in essence, whether Article 2(a) of the Copyright Directive must be interpreted as meaning that the reproduction right extends to the creation of transient sequential fragments of the works within the memory of a satellite decoder and on a television screen which are immediately effaced and replaced by the next fragments. In this context, the referring court is uncertain, in particular, whether it must conduct its appraisal by reference to all the fragments as a whole or only by reference to those which exist at a given moment.*

- 41 It then answers it by repeating its finding in *Infopaq*, that the reproduction right must be ‘given an autonomous and uniform interpretation’. It also repeats that the reproduction right applies to works – that is, ‘subject-matter which is its author’s own intellectual creation’ – and that the reproduction right protects against copying in part, if the copied parts contain elements that are the expression of the intellectual creation of the author of the work.
- 42 With respect to the sub-question about the test for reproduction in part, the Court opines as follows:

*This means that the unit composed of the fragments reproduced simultaneously – and therefore existing at a given moment – should be examined in order to determine whether it contains such elements. If it does, it must be classified as partial reproduction... In this regard, it is not relevant whether a work is reproduced by means of linear fragments which may have an ephemeral existence because they are immediately effaced in the course of a technical process.*

- 43 With its focus on copying elements that reflect originality, the test the Court lays down can only apply to copyright works. This raises the question of the autonomous test(s) the Court will develop for the related rights subject matter covered by Article 2: broadcasts, performances, sound recordings and first fixations of film. The answer it gives in *FAPL* will not be of much use to the English courts, bearing in mind that the referring court’s question was about frames of digital video and audio that form part of various types of protected productions.
- 44 The infringement test for copyright works is not crystal clear either. The first leg of the answer says not to take all the copied fragments together, but

only those that ‘exist at a given moment’ (which immediately raises the obvious question: what unit of time is relevant- seconds, nanoseconds, attoseconds?). The second leg could be read to imply that all copied fragments must be considered, in which case the Court contradicts itself. Or it just stresses that temporary copies are reproductions, which makes it a superfluous statement. The text of Article 2 Information Society Directive expressly includes all manner of temporary reproductions. In turn, of course, this explains why the exemption for transient copying in Article 5(1) was needed. A third and most plausible reading is that the Court makes clear it embraces a highly technical interpretation of copying, which basically means that any communication that involves digital equipment triggers the reproduction right.

- 45 In the event, the transient copying exemption brings relief. The Court considered the reception of the broadcast signals and the embedded content as a lawful use and any transient copying going on in the decoder and on the television screen met the relevant criteria for Article 5(1) to apply.
- 46 It is remarkable nonetheless that the Court of Justice glosses over the variety of protected subject matter involved and treats the question as if it concerned the reproduction of one copyright work of authorship. The Court set itself up on that train of thought earlier in the judgment, where it considered whether the CDPA's provisions which protect right holders against foreign decoder devices is compatible with the freedom to provide services in the internal market (Art. 56 TFEU). The protection of intellectual property rights can after all justify a restriction on the freedom to provide services.
- 47 In the analysis it simplified the intellectual property question, and in the process shed more light on what it considers to be a copyright work. The Court reasoned that *FAPL* cannot claim copyright in the Premier League matches themselves, as they cannot be classified as works under the *Infopaq* test. It arrives at this conclusion by reasoning that sporting events are not intellectual creations within the meaning of the Information Society Directive: ‘That applies in particular to football matches, which are subject to rules of the game, leaving no room for creative freedom for the purposes of copyright.’
- 48 The implications of this view on copyright works, which seems to conflate an originality standard with the work concept, are discussed in more detail below. What is important to note at this stage is that in *FAPL*, the Court seems to affirm its position in *BSA*, which is that the Information Society Directive operates on the basis of a harmonized concept of the work of authorship.
- 49 What is also remarkable in *FAPL* is that the Court does not stop at dismissing sports events as copyright works –not a necessary statement to answer the referring court’s intellectual property questions– but muses on potential alternative protection under domestic law: ‘sporting events, as such, have a unique and, to that extent, original character which can transform them into subject-matter that is worthy of protection comparable to the protection of works, and that protection can be granted, where appropriate, by the various domestic legal orders.’ An open invitation to Member States if ever there was one. At the same time, it implies that the harmonization of related rights has resulted in only narrow exclusive competence of the EU legislature. This is quite the opposite from the scarce room the Court seems to allocate to domestic copyright laws.

#### IV. Painer: Reproduction of a photograph

- 50 As in *Infopaq* and Football Association Premier League, the referring court –Austrian this time– sought elucidation on the scope of the reproduction right of Article 2 Information Society Directive in relation to exempt uses under Article 5. This time the dispute was over the adaptation and use of portrait photos. In the case at hand, a freelance photographer from Austria had made a series of portrait photos of a six-year-old girl at a nursery school. The girl was later abducted. The Austrian authorities released some of the photos that the photographer had given to the parents and police. At some point the father commissioned a graphic designer to make a Photofit (a facial composite) of one of the portraits, showing what his daughter would look like now. After eight horrific years in captivity the girl managed to escape. It was a major news item across Europe. Lacking current photos, the defendant newspapers published the old ones. The photographer had neither been asked for permission nor credited.
- 51 The photographer brought various actions in Austrian courts against newspapers and the graphic designer. In these disputes it was hotly debated to what extent the photos were protected under German and Austrian copyright law. The proceedings that led to a preliminary reference were against five newspapers established in Austria and Germany.<sup>31</sup> The referring court did not ask about standards for subsistence of copyright. Rather, its principal copyright questions concerned the interpretation of the limitations for quotations and for use in the interest of public security (Art. 5(3)(d) and (e) Information Society Directive). It further asked if ‘...Article 1(1) of Directive 2001/29 in conjunction with Article 5(5) thereof and Article 12 of the Berne Convention, particularly [in the light of the fundamental right to respect for property] to be interpreted as meaning



that photographic works and/or photographs, particularly portrait photos, are afforded 'weaker' copyright protection or no copyright protection at all *against adaptations* [my italics] because, in view of their 'realistic image', the degree of formative freedom is too minor?

- 52 What is important to note is that with this last question, the Austrian court is second-guessing the Austrian Supreme Court's earlier findings about the Photofit, in a separate action for injunctive relief against the graphic designer. The Supreme Court held that the Photofit was not an adaptation of the source photo but a new, independent work ('*Freiebenützung*'). The end result was too far removed from the portrait photo. The source portrait does meet the modest originality criterion required for copyright protection under Austrian law. But considering the limited creative possibilities when making a portrait photo, the resulting protection is narrow: 'the stronger the individuality of the source work, the more removed must be the creation it inspired for it not to be regarded as an unauthorized adaptation, and vice versa' (case 4Ob170/07i).
- 53 For the sake of argument, let us assume that all adaptations are a species of reproduction and therefore come within the exclusive reproduction right of Article 2 Information Society Directive. What the Austrian Supreme Court says then seems to be consistent with the CJEU's reasoning in *Infopaq* on reproduction in part: only if the part reproduced expresses the author's own intellectual creation does the reproduction right come into play. Unauthorized copying is about copying what is original.
- 54 But in the proceedings on the merits, the parties disagreed fiercely on the OGH's reading, so much that the Landgericht Wien thought it wise to make the preliminary reference. Its question may not be the most aptly phrased. Arguably, the fact that the question is not phrased in terms of Article 2 signals that the court does not consider the right to authorize adaptations to be subsumed in the right to authorize reproduction. Why else would it have opted to ask only about Article 1 Information Society Directive and Article 12 Berne Convention? The latter provides for a right to authorize adaptations, albeit only for foreign authors and works from other Berne states. Article 1 Information Society Directive merely indicates the general scope of the directive and contains no substantive norms as such. Article 5(5) mirrors the three-step test for limitations laid down in Articles 9 Berne Convention, 10 WCT and 16 WPPT.
- 55 On any reading, and especially considering the preceding questions on the exemptions for quotations and public security uses, the Austrian court seems squarely focussed on the scope of protection. The Court of Justice, however, follows the Advocate General (who may have been taking his cue from the submissions made by the Commission and the Austrian government) and rephrases the question completely by turning to the Term Directive 93/98. As we have seen above, Article 6 of the latter harmonizes the standard for protection of photographs as copyright works. The CJEU posits that the Austrian court
- must be understood as asking, in essence, whether Article 6 of Directive 93/98 must be interpreted as meaning that a portrait photograph can, under that provision, be protected by copyright and, if so, whether, because of the allegedly too minor degree of creative freedom such photographs can offer, that protection, particularly as regards the regime governing reproduction of works provided for in Article 2(a) of Directive 2001/29, is inferior to that enjoyed by other works, particularly photographic works.*
- 56 Not surprisingly, the CJEU concludes with reference to *Infopaq* and *Football Association* that in principle, portrait photographs can be copyrighted. The 'author's own intellectual creation' of *Infopaq* is invoked alongside recital 17 of the Term Directive on Article 6; thus 'an intellectual creation is an author's own if it reflects the author's personality'. That can be achieved if 'the author was able to express his creative abilities in the production of the work by making free and creative choices'. For example, these choices can relate to pose, framing, angle, lighting and atmosphere, but also the use of developing techniques and 'post production' (Photoshop). 'By making those various choices, the author of a portrait photograph can stamp the work created with his "personal touch"'. The Court concludes that 'consequently, as regards a portrait photograph, the freedom available to the author to exercise his creative abilities will not necessarily be minor or even non-existent.'
- 57 Is it significant that the Court refers to *Infopaq* and *Football Association* but not *BSA*? In other words, does *Painer* confirm the existence of a common originality standard for all types of works, or are software (and databases) still to be regarded separately? The latter does not seem likely, since as we have seen the *Infopaq* standard is borrowed from the Computer Programs Directive, Database Directive as well as from the Term Directive on photographs. In *Football Dataco* the Court keeps its analysis strictly to Article 3 Database Directive and not to other 'work' provisions, but it does refer to all the above judgments in elaborating the criterion of originality of the Database Directive. This again suggests a common standard. The more elaborate standard for all works would then be an intellectual creation of the author 'reflecting his personality and expressing his free and creative choices in its production'. Presumably, the shorthand for this is: 'personal touch stamp'.
- 58 On the scope of protection, the Court goes on to say that 'nothing in Directive 2001/29 or in any other directive applicable in this field supports the view that the extent of such protection should depend on pos-

sible differences in the degree of creative freedom in the production of various categories of works'. Therefore, as regards a portrait photograph, the protection conferred by Article 2(a) of Directive 2001/29 cannot be inferior to that enjoyed by other works, including other photographic works.

- 59 Like the English court before it in *Football Association*, the referring Austrian court will probably not have much use for this answer in deciding whether the reproduction right was actually infringed. Analogous application of the *Infopaq* infringement standard for reproduction in part – only the taking of elements that contribute towards the original character of the copied work is relevant for a finding of reproduction – will get it further. And arguably, in the same place as its Supreme Court.

## E. Readings

- 60 With the exception of the *BSA* case, in none of the preliminary references procedures treated here do the primary questions directly concern constitutive requirements of the copyright work. The Court's apparent construction of an EU-wide work standard is arguably the most controversial outcome of the cases, however. In this section, the focus is on how the 'work' judgments have been received in copyright doctrine in various jurisdictions. The predominant types of readings can be grouped in two broad categories. The first are positivist-comparative: they attempt to establish and clarify what is now the positive European law, and to what extent particular domestic copyright laws comply with post-*Infopaq* standards. The second are methodological-critical: they zoom in on the methods the Court uses to forge European copyright law in relation to its role as the ultimate authority on the interpretation of EU law.

### I. Positivist-comparative readings

- 61 The initial reactions to a court's judgment predictably ask two questions: Does the court say anything new? Do domestic courts need to revisit their normal approach? Especially *Infopaq* and *BSA* have elicited comments which in essence revolve around these two questions. Three readings stand out, treated here in ascending order of magnitude in terms of ramifications for domestic copyright laws. The first is that the Court of Justice recognizes that copyright may exist in very short works. The second is that the Court has interpreted EU law as containing an autonomous standard of originality for copyright works. The third is that the Court of Justice has not just set an originality standard, but has established that the subject matter of copyright is equally harmonized as a domain through 'intellectual creation'

as an open-ended concept covering all conceivable types of authored matter.

### 1. Short works

- 62 In *Infopaq*, the Court holds (consideration 47) that 'the possibility may not be ruled out that certain isolated sentences, or even certain parts of sentences in the text in question, may be suitable for conveying to the reader the originality of a publication such as a newspaper article, by communicating to that reader an element which is, in itself, the expression of the intellectual creation of the author of that article....' According to a number of commentators, this consideration means that under EU law, very short works can attract copyright.<sup>33</sup>
- 63 An alternative – and I think a more convincing reading – is that the Court, engaged as it is in infringement analysis, merely expresses the generally accepted view that the taking of unprotected elements of a text does not count towards a finding of infringement of the reproduction right.<sup>34</sup> In other words, there is a threshold: no quantitative amount of copying constitutes a partial reproduction; what matters is the quality of what is copied. I would equally argue that the Court's careful phrasing 'that the possibility may not be ruled out' that reproduction of isolated sentences constitutes a reproduction in part (in a qualitative sense) indicated that this will not readily be the case, especially in informational texts as opposed to fiction.
- 64 That we should view the *Infopaq* considerations on parts of sentences reflecting originality – that is, counting as elements protected against reproduction – is also in keeping with the later *Football Association* judgment. This also is much focused on what the right infringement test is for Article 2 Information Society Directive, and not at all on the protectability of audio-visual and sound fragments as independent works, a key issue in the national proceedings.
- 65 Hobson observed that the wording used in *Infopaq* does not permit the distinction between subsistence (and therefore qualification for protection) and infringement.<sup>35</sup> But this is only true on the view that the Court equates a part of a text which is capable of conveying the original character of the text as a whole, as a part that for that reason constitutes an original intellectual creation – that is, a copyright work in its own right. To be sure, there is no point in having a right against 'partial' reproduction if the test is whether the something that is copied independently qualifies as a work of authorship.<sup>36</sup> After all, there would then be a full reproduction of the latter and not a partial one.
- 66 I am not convinced that the ECJ in *Infopaq* must be understood as saying that as a matter of EU law, co-

pyright exists in short texts if they are original. But even if it would say that, I agree with the commentators that nothing much would change at the domestic level. The possibility that a short text – especially a slogan or title – qualifies as a copyright work is generally not ruled out under domestic copyright laws, or even explicitly recognized in the Copyright Act (e.g. France). But the finding that a slogan, for example, is protected as a work of course involves originality closely linked as a constitutive requirement for copyright. On this matter, there seems to be widespread agreement that the Court has harmonized originality, although opinions are divided about what this standard is.

## 2. Type of harmonized originality standard

- 67 The literature on *Infopaq* and *BSA* queries what sort of harmonizing standard the Court has set: Is it a fully harmonized standard or rather a minimum one that leaves Member States room, notably to maintain stricter tests for some types of works? This issue is related to the question to which categories of works the originality test applies to begin with: only some, or across the board to all conceivable types of works, or to most but with some exceptions (like applied arts)? A number of commentators have also enquired into the nature of the standard as compared to those known in domestic copyright law, notably whether the ‘author’s own intellectual creation’ is to be viewed as an ‘objective’ or ‘subjective’ test.
- 68 In German literature, it has been argued that *Infopaq* sets only a minimum standard, the common lowest denominator, a threshold all works have to meet, but Member States can still apply higher standards for specific work categories.<sup>37</sup> While it is true that application of the standard is left to courts of Member States – i.e. they will have to determine whether the requisite level of creativity shows in the case at hand – this does not make it a *minimum* standard.<sup>38</sup> Of course, when applying the criterion, national courts will continue to consider that some information products are more determined by functional demands than others, and to the extent that functionality limits creative choices, it may be that certain types of work jump the hurdle less easily. The Court recognizes this in *Infopaq*, *BSA* and again in *Painer*, though in the latter case it also makes clear that no *ex ante* distinction must be made between genres as such (such as portrait photographs). In light especially of the *Painer* judgment, a reading of the originality test as a minimum norm no longer seems tenable.
- 69 The more common opinion indeed is that in *Infopaq* and *BSA* the Court has made the ‘author’s own intellectual creation’ a uniform standard that displaces local deviating ones.<sup>39</sup> What is more, it also seems generally accepted – though grudgingly by many commentators – that the standard applies to all categories of works. The one possible exception could be for applied arts, since as was noted above the Design Directive and Design Regulation explicitly recognize that originality standards are a domestic affair. Article 9 of the Information Society Directive itself states it is without prejudice to provisions on design rights.
- 70 But here the Court’s judgment in *Flos*<sup>40</sup> casts doubt on how much discretion actually remains for individual Member States to set the preconditions of copyright protection for design (usually categorized as applied arts). The question put before the Court concerned the interpretation of Article 17 Design Directive, on the accumulation of copyright protection and design protection for registered designs. The Court holds *inter alia* that accumulation is mandatory for registered designs, so a registered design must be copyright-protected if it meets the relevant local criteria. Although the Design Directive does not apply to unregistered designs, the Court says ‘it is conceivable that copyright protection for works which may be unregistered designs could arise under other directives concerning copyright, in particular Directive 2001/29, if the conditions for that directive’s application are met, a matter which falls to be determined by the national court.’ This implies that the own intellectual creation standard articulated in *Infopaq* and *BSA* applies to national unregistered designs.
- 71 That in turn begs the question whether Member States could still maintain a higher local originality requirement for copyright in designs that are registered under domestic design law. After all, the Designs Directive expressly leaves the subsistence of copyright in design to Member States. If so, in theory that could lead to the existence of two different copyright standards for one and the same work of applied art. In practice the problem would be limited to the UK since – as far as I am aware – that is the only Member State with a national unregistered design right.<sup>41</sup> But with respect to the (un)registered Community Design, where cumulative protection under copyright is also mandatory, a similar problem looms.
- 72 On the reading that the *Infopaq*, *BSA*, *Football Association* and *Painer* all point towards one harmonized originality standard, what do commentators think the consequences for domestic law are? In France, Belgium and the Netherlands, the prevailing view seems to be that in practice not all that much will change.<sup>42</sup> In the UK, Austria<sup>43</sup> and Germany,<sup>44</sup> the application of the ‘author’s own intellectual creation’ is more problematic, at least for some categories of works. Derclaye sees problems primarily for ‘sub creative’ literary works, the *Infopaq* standard being higher than what is normally required under UK law. For works of applied art (‘works of artistic craftsmanship’ under section 4(1) of the UK’s Copyright, Designs and Patents Act 1988), it implies that the standard must be lowered. Some doubt is also

reported about whether the skill and labour standard as normally applied (for works other than databases and software) is lower than the ‘intellectual creation’ standard.<sup>45</sup> Whether in practice the protection it offers is less depends largely on the infringement test applied, which until *Infopaq* at least was that reproduction is only infringing if a substantial part was copied.

- 73 Benabou also sees a danger in the *Infopaq* standard, where the Court concludes that even if the parts (individual words) are unprotected, their selection, arrangement and combination can be. This exporting of the criterion of the Database Directive (and Art. 2(5) BC) to other genres could in her view signify an unwelcome ‘reductionist’ view of the work, which in turn leads to less protection against the copying of parts than is currently available under French law.<sup>46</sup>
- 74 In German doctrine, opinion remains divided on whether the ‘own intellectual creation’ standard of the Computer Programs Directive and Database Directive is the same as the personal creation standard of 2(2) German Copyright as applied to ‘*kleine Münze*’.<sup>47</sup> Also, various authors have drawn attention to the potential impact on the higher standards applied in Germany for functional texts, for example. All comments predate *Painer*, however, and it is conceivable that commentators would reach a different conclusion about the level of creativity required considering the Court’s choice of words in *Painer* (‘personal touch’).
- 75 Some authors analyse the originality standard of *Infopaq* in terms of the objective or subjective nature of the test. The difference between an objective and subjective test of originality is essentially presented as the requirement that a work should originate from the author – i.e. not be copied – versus a requirement that the work shows the imprint or personal stamp of the maker. The Court’s judgments are viewed through this lens by Belgian scholars, with mixed conclusions. Michaux argues that the *Infopaq* criterion of ‘author’s own intellectual creation’ can be read as an objective criterion, especially in light of the legislative history of the Computer Programs Directive and the Database Directive, but also as a subjective one that maps better with the more common standard in Belgium.<sup>48</sup> Brison estimates that the Court seems to have abandoned an objective approach in favour of a subjective one by making the expression of creativity a central element.
- 76 The distinction seems inspired by a fairly schematic view of Anglo-Saxon versus continental European notions of originality. In the UK, of course, the relevant criterion is that not only must the work originate from the author (not be copied), it must also involve some labour, skill or independent judgment. In the Netherlands, the Supreme Court articulated a test that also contains ‘objective’ and ‘subjective’ ele-

ments: a work must originate from the author (‘*eigen, oorspronkelijkwerk*’) and bear the personal stamp of the author. The latter requirement is very modest and does not seem to differ much from similarly worded requirements in French and Belgian case law, and also appears to be close to the German *kleine Münze* notion that to be a personal intellectual creation, there must be a minimum degree of ‘*Gestaltungshöhe*’.

### 3. Generalized concept of work of authorship

- 77 Commentators are in broad agreement that the Court holds it a matter of European law that there is such a thing as a generalized work concept (‘the author’s own intellectual creation’). After *Infopaq*, the notion could still be entertained that at most the Court had set a standard for literary works. But when the Court held in *BSA* that a graphic user interface can be a work ‘under the ordinary law of copyright’ (as opposed to under the Computer Programs Directive), the conclusion seemed inescapable: no freedom remains for Member States to condition which subject matter warrants copyright protection. The *Football Association* judgment confirms this reading.
- 78 Three lines of criticism predominate. One is that the European legislature never intended to harmonize the work of authorship across the board. The Court should therefore have left it to Member States to determine the preconditions of copyright protection, in compliance with the relevant international and European norms. It was, in other words, not proper for the Court to generalize the standards set for software, databases and original photographs by giving the term ‘works’ of Articles 2 and 3 Information Society Directive an autonomous interpretation. More is said on this point below.
- 79 A second criticism is that the ‘author’s own intellectual creation’ as used by the Court is not actually a complete work standard. The Court fails to distinguish between originality as a constitutive standard and other requirements.<sup>49</sup> At most, what the Court really does in *Infopaq* is elaborate that originality means a certain level of creativity is evident in the work. This does not tell us what – if any – other preconditions need to be met for subject matter to be copyrighted. In *BSA* and *Football Association*, the conflation of originality and work is even more apparent.
- 80 In *BSA* the Court ponders whether a graphic user interface is protected by ‘ordinary’ copyright. It makes a blanket reference to the criterion of *Infopaq* but sheds no light at all on where to draw the domain boundaries of these ‘intellectual creations’, artistic, literary, or otherwise. Worse still is the argument in *BSA*. There the Court basically reasons that a foot-

ball match is not a work because the rules of a football game leave no room for creative freedom. But even if that were so (a statement even those with no interest in football will probably disagree with), the constraining effect of rules is hardly the point here. The Court's reason seems analogous to the conclusion that a particular poem is not an original work because it has the formal properties of the Italian sonnet (for example) as a poetic genre. It is beyond dispute that a chosen form or an intended functionality of a text or design can limit creative freedom available to the author and impact how 'thick' the copyright in the object is.<sup>50</sup> In the *BSA* judgment, the Court says as much: expression that is dictated by technical function does not count towards finding originality.<sup>51</sup>

- 81 Originality understood as the result of creative activity is only one factor in the work equation. The creative form must bear on the right kind of production, a domain which in the Berne Convention is broadly described as 'every production in the literary, scientific and artistic domain'. In addition, we only call something a work if it is either expressed in a manner perceptible to the senses (continental copyright laws) or fixed in some form (Anglo-Saxon tradition). If the Court is on a road to a truly harmonized concept of a work of authorship, it will have to address these criteria as well. The differences among Member States with respect to the (often controversial) copyright status of food design, perfumes, conversations, fashion shows, and conceptual art suggest it will be difficult to construct a work notion on the basis of the existing directives. But the Court will also have to elaborate, for example, to what extent government information is copyrighted, or whether quasi-copyright such as the Dutch non-original writings protection (*geschriftenbescherming*) is consistent European copyright law. References to the Berne Convention, TRIPs, and WIPO Copyright Treaty cannot truly help settle such questions, a matter elaborated upon below.
- 82 A third criticism is that if the Court indeed means to say that as a matter of European law, there is such a thing as a generalized work concept, it causes an acute problem for those jurisdictions that have a closed list system. The Irish and British copyright clearly operate with a limited number of work categories,<sup>52</sup> and if a particular creation does not fit within the definition of any of them, there is no copyright in it. Not surprisingly, we find the fiercest criticism of *Infopaq* and *BSA* in the UK.<sup>53</sup> Either the existing work categories must be opened up to different types of creation, or the notion of a closed list must be abandoned altogether.

## II. Methodological-critical readings

- 83 It is perhaps striking how much of the literature is highly critical of the Court's approach to harmonizing subjectmatter; then again, if the judgments were uncontroversial, few would be inclined to write about them. It is possible to map the types of arguments voiced to the role of the Court as the ultimate authority on European law and the function of the preliminary reference procedure as an instrument of interpretation. Three lines of critique stand out. Critics take issue with how the Court rephrases the questions referred to it in order to draw in matters on which the referring court sought no clarification. Another objection made is that the Court is too liberal in its use of the tool of autonomous interpretation. Yet another strand of criticism attacks the use and interpretation of international sources in the construction of European copyright law.

### 1. Rephrasing questions

- 84 The preliminary reference procedure of Article 267 TFEU is the primary mechanism through which uniform interpretation of EU copyright law is achieved. The initiative lies with the courts of Member States, for they decide to refer questions to the CJEU. Under Article 267 TFEU, an obligation exists for the domestic court of final resort (with an option for lower courts) to refer to the CJEU when a decision on a question of EU law is necessary to enable it to pass judgment in the case before it. Such an obligation does not exist when the question of EU law has already been answered by the Court of Justice, or is 'acteclair'. But the standard for acteclair is high: the domestic court must establish 'that the correct application of Community law is so obvious as to leave no scope for any reasonable doubt'.<sup>54</sup>
- 85 The Court in principle has to answer to every request for a preliminary ruling, and will rarely find that a request is inadmissible.<sup>55</sup> In *Padawan/SGAE* it clarified that the alleged inapplicability of the Information Society Directive on the ground that it provides for only minimum harmonization is not a matter of admissibility but of substance. Where it concerns admissibility, 'there is a presumption of relevance in favour of questions on the interpretation of Community law referred by a national court, and it is a matter for the national court to define, and not for the Court to verify, in which factual and legislative context they operate'.<sup>56</sup> That is not to say that the Court will answer the questions as posed. As we have seen clearly in *Painer* and *BSA*, it is not uncommon for the Court to rephrase them.
- 86 In the context of the preliminary reference procedure, the court cannot itself apply Community law or judge a provision of national law by reference to

EU law. Its task is to ‘provide the national court with an interpretation of Community law which may be useful to it in assessing the effects of that [national] provision’.<sup>57</sup> To be able to do that, it has the liberty to rephrase questions if they have been ‘improperly’ formulated, or to go beyond the scope of the powers conferred on the Court of Justice under its preliminary reference jurisdiction. In those cases, ‘the Court is free to extract from all the factors provided by the national court and in particular from the statement of grounds contained in the reference, the elements of Community law requiring an interpretation ...having regard to the subject-matter of the dispute’.<sup>58</sup>

- 87 Were questions improperly formulated in the copyright cases discussed here? Vousden argues that in *BSA*, the Court preloaded the key question – ‘Is a graphic user interface part of the expression of a computer program?’ – (to which the answer might possibly have been yes), by turning it into ‘Is a graphic user a form of expression of a computer program?’ (to which the answer is more obviously no).<sup>59</sup> In the *Painer* case, the questions of the referring court were squarely on the scope of protection for photographs under the Information Society Directive in light of international copyright norms. The Court, however, rephrased them into a question on constitutive requirements: When is a photograph an original work under the Term Directive?
- 88 In neither case did the referring court obviously formulate its questions improperly, or ask the Court for the interpretation of international norms beyond its powers (more on these below). So from the perspective of the ‘cooperation’ mechanism between national courts and the EU court that Article 267 TFEU regulates, it is indeed hard to see why the Court did not stick with the original questions. From the outside looking into the Court’s kitchen, it is difficult to ascertain why it rephrases questions that are not formulated properly enough to answer. One likely explanation is that it enables the Court to arrive at an interpretation of directives that creates a more ‘coherent’ system of European copyright law.
- 89 Here we enter the realm of methods used by the Court to construct Community law. It is far beyond the scope of this article to query all the various methods of interpretation (legal-historical, textual/grammatical, teleological/purpose-oriented, etc.) the Court applies or could apply in intellectual property cases. But the principle of autonomous interpretation deserves some scrutiny. Much of the criticism levelled against the Court concerns its expansionist attitude, which shows first and foremost in how it opts for autonomous interpretation of terms and concepts in the directives.

## 2. Autonomous interpretation

- 90 As was discussed above, a common reading and criticism of *Infopaq* and *BSA* is that in these cases the Court generalized a very specific standard of originality and made it a Community standard for all work categories, even going beyond that to also Europeanize the work of authorship. The Court did so by deciding that protected subject matter (‘works’) requires autonomous interpretation.
- 91 The principle of autonomous interpretation is an important tool for the Court to ensure uniform application of Community law. In its earlier case law, the ECJ seemed to accept more readily that instruments could contain both explicit and implicit references to domestic law,<sup>60</sup> but in subsequent cases, room for the latter diminished.<sup>61</sup> Today it appears that autonomous interpretation is the default, and that if the legislature means for a provision or term to refer back to national law, it must make this explicit. And indeed, in recent years the Court has reiterated this principle in *SENA*, *SGAE*<sup>62</sup> and *Infopaq*. In the latter case, the Court stressed that autonomous interpretation is ‘of particular importance with respect to Directive 2001/29, in the light of the wording of recitals 6 [averting further fragmentation of national laws] and 21 [need for a broad definition of exclusive rights] in the preamble to that directive’. So far, of course, copyright directives seldom contain explicit references to national copyright law.<sup>63</sup>
- 92 Logically one would think that autonomous interpretation can only be used to give a Community-wide meaning to legal concepts that are within the scope of a directive. It is here that many commentators take issue with the Court.<sup>64</sup> Some argue that it was wrong to take the lower standard of Database and Computer Programs Directives as informing the ‘work’ in the Information Society Directive. Others point out that if the Court had left Member States more room to interpret the reproduction right, it would not have needed to interpret what the object of protection exactly is.<sup>65</sup> But most (also) argue, simply put, that the legislature did not intend to harmonize the work concept, so the Court has no business labelling it as a Community-wide notion. By seizing on the occurrence of the word ‘works’ in Article 2 Information Society Directive, mingling it with work definitions for specific categories in earlier directives and tying it up with notions of subject matter in the Berne Convention and other treaties, the Court has of course done just that.
- 93 This brings out the complex relationship between the level and kind of harmonization pursued at the legislative stages of each instrument on the one hand, and the methods used by the Court to attach a uniform meaning to legal concepts once instruments have become law. The Court’s mantra is that ‘in interpreting a provision of European Union law it

is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it is part.<sup>66</sup> Here is surely a recognition of different interpretative methods: textual, purposive/teleological, and systematic.

- 94 But in reality, the Court seems to focus primarily on recitals to construct objectives and underlying principles, so it still engages in a textual interpretation more than anything else. It also does not consider the wider preparatory materials for purposive interpretation, nor is it prone to engage in legal-historical analysis.<sup>67</sup> Unilateral statements made by Member States in the Council, for example, cannot be used to interpret a directive.<sup>68</sup> Nor do Commission Green Papers or Staff Working Papers seem to matter.
- 95 On the other hand, to arrive at an interpretation the Court does look to other directives in the field. From a viewpoint of systematic interpretation and coherence of Community law, this is a necessary thing to do. But it can also suggest links where no relevant ones exist. For example, take the consideration in *Painer*, where the Court says that ‘nothing in Directive 2001/29 or in any other directive applicable in this field supports the view that the extent of such protection [for photographs against reproduction] should depend on possible differences in the degree of creative freedom in the production of various categories of works.’ What are the other applicable directives, one might ask? The term is about just that: duration. It is silent on the scope of exclusive rights and limitations. No general reproduction right existed for authors before the Information Society Directive. The scope of rights in the Computer Programs Directive and the Database Directive necessarily concerns only those categories of works. So why consider all these earlier directives?
- 96 It is fair to say that the Court has a very strong focus on textual interpretation of the acts themselves. As a result, a key feature of the harmonization process may get lost in translation: the piecemeal approximation of laws as a direct consequence of the principles of subsidiarity and proportionality, which necessarily results in a mix and match of varying harmonization standards. Harmonization measures can be full or partial (excluding certain issues), lay down minimum or maximum norms (level of protection), and concern mandatory or optional rules (e.g. with respect to limitations). If autonomous interpretation is the norm, and the sacrosanct high level of protection (recital 9 Information Society Directive) becomes a regular fixture in the Court’s assessment, it should come as no surprise if full, minimum and mandatory readings win out.
- 97 There is also the danger that what a majority of Member States held to be self-evident (e.g. that the Computer Programs Directive contains no uniform criteria for establishing when a production other than software is a copyright work) does not show in the instrument and therefore has no bearing on the interpretation of the Court. If the Court would answer the call for more consideration of the historical background of provisions of Community law, it might conclude with respect to the work of authorship that it is a matter for Member States to specify preconditions for protection on the basis of the following narrative:
- 98 The obvious explanation for why the directives – with the exception, of course, of the Computer Programs and Database Directives and the Term Directive on photographs – do not concern themselves with specifying what copyright-protected subject matter is, is that this was not an area where differences among Member States were considered pressing problems from an internal market perspective. Hard cases were not something the EC needed to deal with unless they involved significant industries. The computer industry and the budding database industries of the 1980s were a case in point.
- 99 Equally important, the introduction and approximation of economic rights in the other directives (rental right, lending right, right of communication to the public via cable or satellite broadcasting) took place in the context of protecting classic mainstream media against new forms of exploitation. In other words, there was no reason to debate differences in criteria for the existence of copyright, because the focus was on firmly established work categories such as books, journals, musical compositions, photography and film. A similar argument can be made with respect to the Resale Right Directive, which applies to visual art works existing as a single artefact or made in a limited edition.
- 100 Another clue that harmonization of subject matter was generally not on the agenda can be found in the Green Paper of 1995.<sup>69</sup> It led directly to the Information Society Directive but does not identify a problem with diverging standards in work. It unequivocally states that originality is not and need not be a harmonized standard. It does discuss multimedia works as new genre, but it does not expect it will be a problem to protect them under existing laws as they are essentially a mixture of old recognized protected genres.
- 101 With respect to the issue of fixation, it is also fair to assume that this was just not an issue. Software, databases or photographs are ‘genres’ of works that are hard to imagine as not fixed in some material form (as opposed to music, poetry, choreography, or lectures, for example, which can be created ‘live’). So the European Commission, as the initiator of legislative proposals, may simply not have flagged it as relevant.

**102** Granted, where the (wider) preparatory materials are silent or unclear, it makes sense for the Court to limit itself to a textual analysis of a directive's provisions. And indeed, the Court has in the past said that 'in the absence of preparatory materials that clearly express the purpose of a provision, the Court can only base its interpretation on the purpose of the text as it has been established and give it the meaning which flows from a literal and logical interpretation'.<sup>70</sup>

**103** It should be noted that although many commentators—including me—think that the Court should not have turned the work into a (incomplete) Community-wide notion, some are more sympathetic.<sup>71</sup> It is undoubtedly true that now that so many aspects of copyright are explicitly harmonized, it makes no apparent sense to leave pivotal questions on subsistence and initial ownership largely a matter of Member States. From that perspective, the Court's activist attitude is understandable. It also creates its own uncertainties, however, dependent as the process is on the limits of the preliminary reference procedure. It also has the potential to change the dynamics of legislative action. Increasingly, whatever freedom Member States want to maintain to tailor their domestic copyright will have to be made very explicit in further acts, which can greatly complicate negotiations in what already is a volatile policy area.

### 3. Interpretation of international sources

**104** The final strand of criticism I would like to discuss concerns how the Court deals with international law in its construction of harmonized criteria for the protection of copyright works. To put this in perspective, it may be useful to give a short reminder of the competence of the Court to interpret international norms in the context of a preliminary reference procedure.

**105** International agreements concluded by the European Union form an integral part of the EU legal order, and can therefore be the subject of a request for a preliminary ruling. TRIPs, WCT and WPPT are directly binding on the EU, so the Court can give interpretations that bind the Member States (though not the other parties to these treaties, of course). It determines the boundaries between obligations that remain the sole responsibility of Member States and those of the EU.<sup>72</sup> The Court can also interpret the norms of the Berne Convention, at least those laid down in Articles 2-21 BC and appendices, because of the EU's obligation to comply with them under Article 9 TRIPs and Article 1(4) WCT. Even if an international convention is not binding on the EU (e.g. the Rome Convention of 1961 on related rights), the Court's role under Article 267 TFEU means it is competent to interpret a convention's provisions insofar as the European Union has assumed the powers pre-

viously exercised by the Member States in the field to which the convention applies.

**106** It is also settled case law that in relations between EU Member States, conventions concluded by Member States with non-member countries cannot be applied to the detriment of the objectives of European Union law.<sup>73</sup> On the other hand, considering the primacy of international instruments to which the EU is a party, EU law must be interpreted in accordance with such international norms whenever possible.<sup>74</sup> If it is evident from the objectives of a directive that compliance with an international treaty was a concern, the Court can bring in the relevant norms to arrive at a purposive reading.<sup>75</sup>

**107** In sum, the Court has several avenues through which it can take copyright treaties into account, and its interpretation of them is binding upon Member States. So what are the objections against the approach it takes in its copyright judgments? Not surprisingly, the issue critics take with the Court is not so much that it interprets provisions of the international conventions, but the way it does it and the results it arrives at.

**108** *Infopaq* draws the most criticism, which can be explained by the fact that although in the other three judgments the Court makes some references to international treaties with respect to protected subject matter, it attaches no independent meaning to them. *BSA* contains no more than a token reference to Article 10(1) TRIPs Agreement. It obliges the EU and its Member States to protect software whether expressed in source code or in object code as a literary work within the meaning of the BC. The TRIPs Article mirrors the obligation that the EU imposes on its Member States to protect software as literary works (Art. 1(1) Computer Programs Directive). In *Football Association*, the relevant references to international law are to Article 9(1) TRIPs (obligation to respect Art. 1-21 Berne Convention except for moral rights), and the similar obligation of Article 1(4) WCT. It is only with respect to the scope of the communication to the public right (Art. 3 Information Society Directive) that the Court considers the treaties more closely. Otherwise, the references are to *Infopaq*. In *Painer* the Court refers to TRIPs and Article 1(4) of the WIPO Copyright Treaty as a way into the articles of the Berne Convention it deems relevant: the inclusion of photographs in the work list of Article 1, the adaptation right of Article 12, and the right to quote of Article 10(1). With respect to the requirements for protection, it refers to its judgments in *Infopaq* and *Football Association*, and it does not elaborate on the Berne Convention's significance.

**109** *Infopaq* then is the cornerstone judgment. In it, the Court focuses on Article 2 Berne Convention. It cites the exclusive reproduction right of Article 9 and parts of Article 2, which defines the scope of protec-



ted subject matter covered by the BC: the examples list of Article 2(1); the provision that extends the scope to include collections of literary or artistic works which, by reason of the selection and arrangement of their contents, constitute intellectual creations (Art. 2(5)); and the exclusion of news of the day or miscellaneous facts having the character of mere items of press information (Art. 2(8) BC).

- 110** On the basis of these provisions, the Court concludes ‘that the protection of certain subject-matters as artistic or literary works presupposes that they are intellectual creations.’ Since the Computer Programs Directive, Database Directive and Article 6 Term Directive uses similar terminology (‘original in the sense that they are their author’s own intellectual creation’), and the Information Society Directive builds upon previous directives, the works referred to in its Article 2(a) can only be ‘subject-matter which is original in the sense that it is its author’s own intellectual creation’.
- 111** A first observation is that though the EU is obliged to comply with the Berne Convention, this does not mean its concept of protected works must be integrated one on one in internal Community copyright law. After all, the Berne Convention concerns itself only with the protection of foreign authors and works (on the basis of national treatment), but the minimum substantive norms on protection do not apply in internal situations. In practice, of course, these norms have a certain unifying effect on domestic copyright laws because contracting states generally will not put foreign authors in a better position than their own citizens. That may be so, but it is not clear to me how that would create a direct *obligation* for the EU to adopt the Berne Convention’s concept of protected works in Community law.<sup>76</sup>
- 112** The Court can (and does) take into account the stated intention of the Community legislator to integrate specific international norms in directives. But of course, not every reference to the Berne Convention, TRIPs, WCT or WPPT in the directives necessarily reflects such an intention. For example, the legislative history of the harmonization of the term of protection for photographs suggests that the reference in Article 6 Term Directive to a photograph as a work within the meaning of the Berne Convention merely helps distinguish photographic works protected under normal copyright (of the kind central to the Berne Convention) from photographs protected by related rights.
- 113** In *Infopaq*, the Court suggests that the Berne Convention actually provides a uniform work concept. But the BC’s elaboration of protected literary and artistic works (‘every production in the literary, scientific and artistic domain’) is commonly understood as not establishing a particular originality criterion. Also, because the convention elaborates minimum

standards, the EU and its Member States are free to extend copyright protection to types of works not within the scope of international conventions.<sup>77</sup>

- 114** The Court is also criticized for lifting out the ‘original intellectual creation’ criterion of Article 2(5) BC and treating it as the leading concept. Article 2(5) only deals with collections of works (such as anthologies) and not with all databases.<sup>78</sup> The Court makes no reference in *Infopaq* to Article 10(2) TRIPs, which, unlike Article 2(5) BC, is not limited to collections of works.<sup>79</sup> In the recent *Football Dataco* judgment, which is all about protection of football fixtures lists as databases by copyright,<sup>80</sup> the Court on the other hand refers to Article 10 TRIPs and Article 5 WCT, but not at all to the Berne Convention. Whatever the explicit international sources the Court uses, it is not clear to me why the standards for databases as agreed in TRIPs and the WCT should be generalized to all types of works. It is also noted that although the exclusion of news of the day is listed among the relevant provisions of international law, the Court actually pays no further attention to it when it elaborates the standard for protection.<sup>81</sup>
- 115** Finally, Vousden is of the opinion that on closer inspection the Court does not actually apply provisions from the international treaties, even though that is what it says it does, but rather takes its inspiration from French and German copyright doctrine.<sup>82</sup> Heinze, on the other hand, wonders whether *BSA* shows signs of incorporating the merger doctrine known from US law.<sup>83</sup> All in all then, commentators are not particularly impressed with the way the Court looks to international norms to construct a Europeanized notion of the copyright work. But perhaps the Court will be asked to revisit the line of reasoning it took in *Infopaq* in one of the undoubtedly many more requests for preliminary references to come.

## F. Further down the road

- 116** Little has been written about the characteristics and role of the preliminary reference procedure in shaping European copyright law. After twenty years of harmonization, it seems odd to say that the interpretation of the copyright directives through preliminary references is only now coming up to steam. Yet this is what a short survey on the growth of preliminary reference procedures shows.

### I. Growing numbers of preliminary references

- 117** If we take a closer look at the number of preliminary references brought before the Court, we can distinguish two periods: the decade from the implemen-

tation date of the first directive, the Computer Programs Directive (1993-2002), and the near decade since the implementation date of the Information Society Directive (2003-2011).

**118** A quick and dirty check of the number of copyright cases<sup>84</sup> before the Court of Justice indicates that prior to 2003 roughly twenty cases had been lodged and resulted in judgments. Of these, about half were not concerned with the interpretation of provisions in directives but were about copyright in relation to the free flow of goods and services or abuse of a dominant position in the internal market (EC Treaty, then Arts. 30, 36, 85, 86). In the other half, cases about rental and lending were overrepresented, while none of the preliminary references concerned the Computer Programs Directive.

**119** It was not until late 2009 that the first software case was lodged that made it to judgment (*BSA*). In the second ‘post-*Infosoc*’ period of 2003-2011, twice as many cases were lodged as in the first period. In half of these, national courts asked questions about the Information Society Directive. A quarter of these cases were about the Rental and Lending Directive, including a handful of proceedings brought by the Commission against Member States for failures to properly implement the public lending right provisions.<sup>85</sup> Still, the Rental and Lending Right Directive comes in a comfortable second place in the ranking of most preliminary reference-prone copyright directives, trailing the Information Society Directive but leading before the Satellite and Cable Directive.

**120** The Information Society Directive is so broad in terms of rights and limitations covered that it is predictable that it generates the most preliminary references, and one would also expect that the Information Society Directive would be drawn into cases where the primary questions asked are about earlier directives. And indeed, where before cases lodged typically concerned the interpretation of only one directive, there now is a trend toward cases where preliminary questions are asked about various directives. The Court of Justice’s practice to draw in various copyright directives in its discussion of questions asked about a single one may well further stimulate national courts to do the same in their references.

## II. A new stage in copyright harmonization?

**121** One could say that the Council and Parliament’s failure to engage with the question ‘what is a work’ beyond the specific genres of software, databases and photographs has forced the Court to start answering it. Many questions still go unanswered about the boundaries of the domain of copyright, exclusions of protection (for news of the day, official texts),

requirements of fixation, the possibility to maintain national systems with closed lists of work categories, and on and on. Inevitably, I would think, once national courts are taken further down the road to an all-inclusive Community-wide notion of what constitutes a work, there will be no escape from a Community-wide notion of authorship (and initial ownership). And eventually also of moral rights, which has been kept out of the discussion in EU institutions so far with the convenient ‘excuse’ that it has no particular internal market relevance. As Benabou observed, the Information Society Directive has opened a Pandora’s box, enabling the Court of Justice to interpret key concepts of copyright.<sup>86</sup>

**122** Unless, of course, the legislator were to step in. Copyright law becomes more and more politicized, however, to the point where one-issue parties with an anti-copyright agenda are now represented in several national parliaments and the EP. And with nearly double the number of Member States that were involved in drafting previous instruments, one can expect that decision making in the Council and Parliament will not speed up. What is more, much energy these days goes into the enforcement of IP; the much-maligned Anti-Counterfeiting Trade Agreement (ACTA) is a case in point. So perhaps on issues of work, authorship, ownership and the like, the legislator will not do anything for years to come. At most, a few years down the line and many judgments further, it might initiate a ‘recast’ round of existing directives, in which the judgments of the courts are codified.

**123** The preliminary reference tool takes on a new meaning. The numbers of copyright cases brought before the Court of Justice are rising, and the Court shows itself rather activist and willing to construct pan-European notions of copyright that are not clearly in (or even squarely out of) the directives. It is therefore high time for scholars to start studying more profoundly the intricacies and dynamics of the preliminary reference procedure as a mechanism for the unification of European copyright law. It will drive changes in domestic laws for years to come, and I think understanding how national courts and the ECJ through the preliminary reference procedure shape the development of copyright norms is crucial for ensuring the quality of any instruments of intellectual property law to come. There are many questions. Some that come to mind concern the fact that the process is of necessity locally driven. The initiative is with national courts, for in the end they decide to take a matter to Luxembourg. Do some Member States drive the process more than others? How come? Does this push the law in a certain direction? Then there are questions that have to do with the type of disputes that are litigated in copyright. Are some types of disputes more likely to result in preliminary references— e.g. involving certain industries focussed on the scope of exclusive rights –

rather than disputes over ownership, for example? If so, does this set the Court on a certain path, which in turn may invite more preliminary references? If there is such a circular effect, is there a danger that it promotes lopsided development of the law, especially considering the enormously broad and diverse areas of cultural production that copyright law impacts? Are national courts the drivers in name, but is the Court of Justice in the seat? Surely such questions deserve greater scrutiny from intellectual property scholars.

124 With some judgments fresh off the press and major ones in the pipeline, there will also be plenty of positivist-comparative work to do. To end with Posner: ‘The messy work product of the judges and legislators requires a good deal of tidying up, of synthesis, analysis, restatement, and critique.’<sup>87</sup> And indeed, the tidying up that the Court of Justice itself engages in while attempting to forge common copyright and related rights concepts ‘given the requirements of unity of the European Union legal order and its coherence ...’ is blowing up plenty of dust for now.

- 1 Mireille van Echoud, Bernt Hugenholtz et al., *Harmonizing European Copyright Law: The Challenges of Better Lawmaking*, Information Law Series 19, Alphen aan den Rijn: Kluwer Law International 2009.
- 2 In the Football Dataco judgment of March 1, 2012 (Case C-604/10), the ECJ interprets Art. 3 Database Directive (requirements for copyright protection). This case is not discussed in as much detail as the 2009-2011 cases here, as it was handed down after the manuscript for this article was submitted, and has not yet generated in-depth commentary.
- 3 Cases on the limitations to the free movement of goods allowed in the interest of copyright and related rights (Art.28/30 TEC, now: 34/36 and TFEU) started with *Deutsche Grammophon v Metro SB*, ECJ 8 June 1971, Case 78/70, ECR [1971] 487. On the principle of non-discrimination, the first copyright case was *Phil Collins v Imtrat*, ECJ 20 October 1993, joined cases C-92/92 and C-326/92, ECR [1993] I-5145. The application of EU competition law was at the heart of *Magill (Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission*, ECJ 6 April 1995, joined cases C-241/91 and C-242/91, ECR [1995] I-743) and *IMS Health (NDC Health Corporation and NDC Health v IMS Health Inc. and Commission*, ECJ 29 April 2004, Case C-418/01, ECR [2004] 5039).
- 4 European Commission, COM (88) 172 final, Brussels, 07.06.1988.
- 5 European Commission, COM (95) 382 final, Brussels, 19.07.1995.
- 6 See i.a. recital 16 Database Directive: ‘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 [italics added].’
- 7 Green Paper on Copyright and the Challenge of Technology 1988, p. 197.
- 8 The definition of the Database Directive (and Art. 5 WCT) differ from Art. 2(5) BC because the wording of the latter implies that only collections of literary or artistic works (as opposed to other materials) come within its scope, and that originality must show in both selection and arrangement (as opposed to selection or arrangement, i.e. alternative rather than cumulative elements of the test).

- 9 For an analysis of the current situation in Germany, see T. Büchner, *Schutz von Computerbildern als Lichtbild(werk)* ZUM 2011, 549.
- 10 Initially for 25 years, but subsequent changes have led to a term of life plus 50 years. The term of protection for photographic works is life plus 70 years.
- 11 Proposal for a Council Directive harmonizing the term of protection for copyright and related rights. COM (92) 33 final, March 1992, p. 36.
- 12 At the time the European Parliament only had advisory powers. The Maastricht Treaty, which introduced the co-decision procedure between Parliament and Council as the default procedure for legislative instruments, only entered into force in November 1993.
- 13 Proposal for a Council Directive harmonizing the term of protection for copyright and related rights, COM(92) 602 final - SYN 395.
- 14 M. Walter, *Europäisches Urheberrecht*, Michel M. Walter, Silke von Lewinski et al., p. 597; A. Nordemann & L. Mielke, *Zum Schutz von Fotografiennach der Reform durch das dritte Urheberrechts-Änderungsgesetz*, ZUM 1996, 214-218 at 216.
- 15 Art. 1, recitals 18-19 Directive 2011/77/EU of 11.09.2011.
- 16 Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs, recital 32 ‘leaving Member States free to establish the extent of copyright protection and the conditions under which such protection is conferred’; Art. 96(2): ‘A design protected by a Community design shall also be eligible for protection under the law of copyright of Member States as from the date on which the design was created or fixed in any form. The extent to which, and the conditions under which, such a protection is conferred, including the level of originality required, shall be determined by each Member State’; see also Directive 98/71/EC of the European Parliament and of the Council 13 October 1998.
- 17 ECJ 21 January 2011, Case C168/09, *Flos*.
- 18 Joined Cases C-403/08 and C-429/08 *Football Association Premier League and Others*.
- 19 ECJ 1 March 2012, Case C-604/10, on whether English and Scottish football league fixture lists are copyright protected works (collections) under Art. 3 Database Directive. The Court ruled inter alia that copyright in a collection of data exists ‘provided that the selection or arrangement of the data which it contains amounts to an original expression of the creative freedom of its author, which is a matter for the national court to determine’. The author must express ‘his creative ability in an original manner by making free and creative choices’ where the selection and arrangement is concerned. That criterion is not satisfied when the setting up of the database is dictated by technical considerations, rules or constraints which leave no room for creative freedom. Significant skill or labour do not justify copyright under the Database Directive unless they express originality (cons. 38-46).
- 20 ECJ 16 July 2009, Case C-5/08, *Infopaq*, [2009] ECR I-06569.
- 21 Thomas Büchner, *Schutz von Computerbildern als Lichtbild(werk)*, ZUM 2011, 549; S. Dürager, *Die Schutzfähigkeit der Benutzeroberfläche im Immaterialgüterrecht*, *österreichische Blätter für gewerblichen Rechtsschutz und Urheberrecht* 2011, 100-106; C. Heinze, *Software als Schutzgegenstand des Europäischen Urheberrechts*, *JIPITEC* 2011, Vol. 2.; P. B. Hugenholtz, comment on Hof van Justitie EU 16 juli 2009 (*Infopaq*) and 22 december 2010 (BSA), *NJ* 2011, 288 and 289; Jochen Marly, *Der Urheberrechtsschutz grafischer Benutzeroberflächen von Computerprogrammen. Zugleich Besprechung der EuGH-Entscheidung BSA/Kulturministerium*, *GRUR* 2011, 204; Hermann Lindhorst, *Anmerkung bei EuGH: Grafische Benutzeroberfläche gegen die Urheberrechtsschutz als Computerprogramm*, *GRUR-Prax* 2011, 61; A. van Rooijen, Case comment in *AMI* 2011, 99-101; Leigh J. Smith, *Whether copyright protects the graphic user interface of a computer programme*,

- C.T.L.R. 2011, 17(3), 70-72; Stephen Vousden, *Protecting GUIs in EU law: Bezpečnostní 'Softwarová' Asociace*, Journal of Intellectual Property Law & Practice, 2011.
- 22 The original Council Directive 89/552/EEC 'on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities' (known as 'Television without Frontiers' or 'TWF' Directive), was amended by Directive 97/36/EC, and again amended and renamed by the Audiovisual Media Services Directive of 2007 (since consolidated in Directive 2010/13/EU).
  - 23 Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access.
  - 24 Peculiarly, the Court refers to the directives as the 'Copyright Directive' rather than the Information Society Directive, to the 'Related Rights Directive' rather than the more usual Rental and Lending Right Directive, and to the Satellite and Cable Directive as the 'Satellite Broadcasting Directive'. I stick to the more commonly used terminology here.
  - 25 25 [2008] EWHC 1411 (Ch).
  - 26 Subjectmatter that in other jurisdictions (and various directives) is known as the object of related or neighbouring rights (performance, sound recording/phonogram, first fixation of film) is not so named in the UK's Copyright Designs and Patents Act 1988, but is generally also called 'copyright'.
  - 27 Initially the related rights for audio-visual recordings were harmonized in the Rental and Lending Right Directive (Art. 2 Rental and Lending Right, Distribution Right Art. 9, Art. 7 Reproduction Right - repealed, now Art. 2 Information Society Directive), now also through the Information Society Directive.
  - 28 See P. Kamina for an in-depth analysis of differences in the law of Member States, esp. as viewed from a UK and French perspective, *Film Copyright in the European Union*, Cambridge University Press 2002.
  - 29 *Norowzian v Arks Ltd & Anor* (No. 2), [1999] EWCA Civ 3014.
  - 30 J. Kitchin summarized the issue thus in para. 222 [2008] EWHC 1411 (Ch): 'It is clear that fragments of the various film works, the musical work and the sound recording are stored sequentially in the decoder. The question is whether such fragments individually amount to a substantial part of the copyright work and, if not, whether they should be considered collectively.'
  - 31 For a discussion of another important aspect of this case-namely, do the Austrian courts have jurisdiction to hear a joint claim against the Austrian newspapers and German newspaper under the Brussels I regulation - see my case comment Multiple defendants and territorial intellectual property rights: *Painer* revisits Roche through Freeport on the Conflict of Laws net blog.
  - 32 Whether the reproduction right includes the right to authorize adaptations is a contentious issue; see Mireille van Eechoud et al., *Harmonizing European Copyright Law*, Kluwer 2009, p., 73-76, 83-84 (arguing there is no harmonized adaptation right).
  - 33 Inter alia: Fabienne Brison, 'Originality' in Copyright: A Community-wide Notion, Winter 2010 <<http://ipintelligence.howrey.com/originality-in-copyright-a-community-wide-notion/>>; LexBruinhof, *Elf woordenkunnengenoegzijnvooreenverveelvoudiging. KortcommentaarbijHvJ EG, 16 juli 2009, zaak C-5/08, B9 8070, Infopaq /DanskeDagbladesForening*, at Wieringa Advocaten; Frey, *Leistungsschutzrecht für Presseverleger - Überlegungen zur Struktur und zu den Auswirkungen auf die Kommunikation im Internet*, MMR 2010, 291; B. Michaux, *L'originalité d'oeuvre, une notion d'avantage communautaire après l'arrêt Infopaq*, Auteurs & Media 2009 (5), 473-488; Artur-Axel Wandtke, NJW 2010, 3144 (book review).
  - 34 Cf. also focussing on reproduction, P. Petersen, *Reproduction of 11 word snippets of copyright work, case comment on Infopaq*, Cri 5/2009, 146-147; Andrew Hobson, *Newspaper Licensing Agency Ltd v Meltwater Holdings BV*, Entertainment Law Review 2011, 22(3), 101-104.
  - 35 Andrew Hobson, *Newspaper Licensing Agency Ltd v Meltwater Holdings BV*, Entertainment Law Review 2011, 22(3), 101-104.
  - 36 Under UK law, the relevant test (prior to *Infopaq*) was whether a 'substantial part' was copied. On that test, Lord Hoffman opined in *Designers Guild* ([2000] 1 WLR 2416): 'So it may sometimes be a convenient short cut to ask whether the part taken could by itself be the subject of copyright. But, in my view, that is only a short cut, and the more correct approach is first to determine whether the plaintiffs' work as a whole is "original" and protected by copyright, and then to inquire whether the part taken by the defendant is substantial.'
  - 37 In this vein: M. Leistner et al. *ALAI report Germany* <<http://www.alaidublin2011.org/wp-content/uploads/2011/04/Germany.pdf>>; v. Ungern-Sternberg, *Die Rechtsprechung des Bundesgerichtshofs zum Urheberrecht und zu den verwandten Schutzrechten in den Jahren 2008 und 2009 (Teil I)*, GRUR 2010, 273; W. Erdmann, *Die Relativität des Werkbegriffs*, in: Festschrift für Michael Loschelder zum 65. Geburtstag, Köln: Schmidt 2010, 61-73; S. Von Lewinski, *Recent Developments of German Authors' Rights Law*, Auteurs & Media, 2011, 162; Jochen Marly, *Der Urheberrechtsschutz grafischer Benutzeroberflächen von Computerprogrammen. Zugleich Besprechung der EuGH-Entscheidung 'BSA/Kulturministerium'*, GRUR 2011, 204 (different criteria for software as work and graphic user interface as work).
  - 38 If I understand correctly, this is what some writers referred to in M. Leistner et al. 2011 ALAI report Germany.
  - 39 Among others: P. Sirinelli, RIDA; D.J.G. Visser, 'Endstraingehaald door *Infopaq*', B9 8122; V. Benabou, Note d'observations, C.J.C.E. (4e ch.), 16 juillet 2009, RDTI 2009, no. 39, 61 ff.; Jonathan Griffiths, ECJ decision in Czech GUI case could pose questions for UK copyright law, <<http://ipandit.practicalcall.com/6-504-8145>>; C. Handig, *The copyright term 'work' - European harmonisation at an unknown level*, 40 IIC 665-685 (2009).
  - 40 CJEU 27 January 2011, Case C-168/09, *Flos*.
  - 41 For an in-depth comparative analysis of design protection in the UK, France and Italy, see E. Derclaye, *Are Fashion Designers Better Protected in Continental Europe than in the United Kingdom?*, The Journal of World Intellectual Property Vol. 13, no. 3, 315-365 (2010).
  - 42 P.B. Hugenholtz, NJ 2011, 288, 289; D.J.G. Visser, *Kroniek Intellectuele Eigendom*, NJB 2010, 779; K. Koelman, *Nootbij HvJEG 16 juli 2009, zaak C-5/08 (Infopaq)*, AMI 2009, p. 198-205; B. Michaux, *L'originalité d'oeuvre, une notion d'avantage communautaire après l'arrêt Infopaq*, Auteurs & Media 2009 (5), 473-488; V. Benabou, states that the 'intellectual creation' will eclipse the 'empreinte personnelle' standard of French law, but it is unclear whether she sees this as a substantive change; see V. Benabou, *Note d'observations*, C.J.C.E. (4e ch.), 16 juillet 2009, RDTI 2009, no. 39, 61 ff. At any rate, in *Painer* the CJ uses the 'personal stamp' criterion.
  - 43 See C. Handig, *Wieviel Originalität braucht ein urheberrechtliches Werk?*, RdW 1/2010, Artikel-Nr. 16.
  - 44 P. Petersen, *Reproduction of 11 word snippets of copyright work, case comment on Infopaq*, Cri 5/2009, 146-147; C. Heinze, *Software als Schutzgegenstand des Europäischen Urheberrechts*. JIPITEC (2011) Vol. 2; Christian Handig, *The Copyright Term 'Work' - European Harmonisation at an Unknown Level*, 40 IIC 665 (2009).
  - 45 Isabella Alexander, *The concept of reproduction and the 'temporary and transient' exception*, C.L.J. 2009, 68(3), 520-523; E. Derclaye, *Infopaq International A/S v Danske Dagblades-Forening (C-5/08): Wonderful or worrisome? The impact of*

- the ECJ ruling in *Infopaq on UK copyright law*, 32(5) EIPR 247-251 (2010), arguing that the skill and labour is a lower standard than originality under *Infopaq*.
- 46 V. Benabou, *Note d'observations, C.J.C.E. (4e ch.), 16 juillet 2009*, RDTI 2009, no. 39, 61 ff.
  - 47 C. Heinze, *Software als Schutzgegenstand des Europäischen Urheberrechts*. JIPITEC (2011) Vol. 2.
  - 48 B. Michaux, *L'originalité en droit d'auteur, une notion davantage communautaire après l'arrêt Infopaq*, *Auteurs & Media* 2009 (5), 473-488.
  - 49 V. Benabou, *Note d'observations, C.J.C.E. (4e ch.), 16 juillet 2009*, RDTI 2009, no. 39, 61 ff; E. Declayre, *Wonderful or worrisome? The impact of the ECJ ruling in the Infopaq on UK copyright law*, 32(5) EIPR 247 (2010); Jonathan Griffiths, *ECJ decision in Czech GUI case could pose questions for UK copyright law*, <<http://ipandit.practicallaw.com/6-504-8145>>.
  - 50 See, however, Jonathan Griffiths, *ECJ decision in Czech GUI case could pose questions for UK copyright law*, <<http://ipandit.practicallaw.com/6-504-8145>> on the protection by copyright in musical scores of baroque music.
  - 51 Cons. 48: 'When making that assessment, the national court must take account, inter alia, of the specific arrangement or configuration of all the components which form part of the graphic user interface in order to determine which meet the criterion of originality. In that regard, that criterion cannot be met by components of the graphic user interface which are differentiated only by their technical function.'
  - 52 Handig notes that in Austria it is disputed whether a work must fit one of the categories of the Copyright Act: C. Handig, *The copyright term 'work' - European harmonisation at an unknown level*, 40 IIC 665-685 (2009).
  - 53 Jonathan Griffiths, *ECJ decision in Czech GUI case could pose questions for UK copyright law*, <<http://ipandit.practicallaw.com/6-504-8145>>; E. Derclaye, 'Wonderful or worrisome? The impact of the ECJ ruling in the *Infopaq* on UK copyright law', 32(5) EIPR 247-251 (2010); 'The Lionel, the Bezpečnostní softwarová asociace and the Wandering Court of Justice', Tuesday, 11 January 2011, posted at <<http://ipkitten.blogspot.com/2011/01/lionel-bezpecnostni-softwarova-asociace.html>>; Leigh Smith, *Whether copyright protects the graphic user interface of a computer programme*, C.T.L.R. 2011, 17(3), 70-72.
  - 54 ECJ 6 October 1982, Case 283/81 (CILFIT), ECR 1982, 3415.
  - 55 If it is manifest that the 'interpretation of Community law that is sought bears no relation to the actual facts of the main action or to its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it'. See ECJ 20 May 2010, Case C-138/09 (Todor-Nunziatina), ECR 2010, I-4561 and cases cited there.
  - 56 ECJ 21 October 2010, Case C-467/08 (Padawan).
  - 57 Case 20/87 *Gauchard* [1987] ECR 4879, and later cases
  - 58 See inter alia ECJ 29 November 1978, Case 83/78 *Pigs Marketing Board v Redmond* [1978] ECR 2347.
  - 59 Stephen Vousden, 'Protecting GUIs in EU law: Bezpečnostní Softwarová Asociace', *Journal of Intellectual Property Law & Practice*, 2011.
  - 60 Hagen OHG, ECJ 1 February 1972, Case 49-71, [1971] ECR 23.
  - 61 See e.g. ECJ in *Ekro* (18 January 1984, Case 327/82, [1982] ECR 107) where implicit reference to national customs is accepted; *Schwedler/Parlement* (8 March 1990, Case T-41/89, [1990] ECR II-79) where explicit reference is required; *Díaz García/Parlement* (18 December 1992, Case T-43/90, [1992] ECR II-2619) where implicit reference is accepted because the Court cannot establish autonomous meaning using elements of EU law and principles.
  - 62 Case C 245/00 SENA [2003] ECR I 1251, paragraph 23, and Case C-306/05 SGAE [2006] ECR I 11519.
  - 63 Examples are Art. 2 Computer Programs Directive (authorship of collective works), Art. 2(2) Rental Right Directive, Art. 2(1) Term Directive (co-authorship of audio-visual works), recital 27 Resale Right Directive. On the latter, in *Dali* the Court held that with respect to royalties of resale due to 'those entitled under' the deceased author (Art. 6), national law determines who is entitled. But here, of course, it is relevant that typically the law of succession (not copyright law) governs the issue (ECJ 15 April 2010, Case C518/08 (*Dali*)).
  - 64 Inter alia V. Benabou, *Note d'observations, C.J.C.E. (4e ch.), 16 juillet 2009*, RDTI 2009, no. 39, 61 ff; Gernot Schulze, 'Schleichende Harmonisierung des urheberrechtlichen Werkbegriffs? - Anmerkung zu EuGH', *Infopaq/DDF*, GRUR 2009/11, p. 1019; P.B. Hugenholtz, NJ 2011, 288, 289; Isabella Alexander, 'The concept of reproduction and the 'temporary and transient' exception' C.L.J. 2009, 68(3), 520-523; F.W. Grosheide, *Comment on Infopaq v Danske Dagblades Forening*, *Intellectual Eigentum & Reclamerecht* 2009 nr. 6, 318-32.
  - 65 Another angle, not explored here, is that the Court does not consider the wider social and economic effects of its interpretation. Axel Metzger, for example, argues that the Court's textual (literal) interpretation in *Infopaq* results in an overly restrictive standard that causes social costs and seems to have little positive effect for the supposed beneficiaries. Axel Metzger, 'Licensing and collecting in the 21st century: What's in sight and who's ahead?', GRUR Int 2010, 687.
  - 66 See Case C-301/98 KVS International [2000] ECR I-3583, paragraph 21; Case C 298/07 Bundesverband der Verbraucherzentralen und Verbraucherverbände [2008] ECR I-7841, paragraph 15; and Case C-403/09 PPU *Detiček* [2009] ECR I 0000, paragraph 33.
  - 67 C. Handig, *The copyright term 'work' - European harmonisation at an unknown level*, 40 IIC 665-685 (2009).
  - 68 ECJ 30 January 1985, Case 143/83 (Commission/Denmark), [1985] ECR 427.
  - 69 European Commission, *Green Paper on Copyright and Related Rights in the Information Society COM (95) 382 final*, Brussels, 19.07.1995. p. 27.
  - 70 ECJ 1 June 1961, Case 15-60, (Simon) ECR 1961, 225 [translated from the French version].
  - 71 H.M.H. Speyart, *Comment on Infopaq*, NTER 2009/10, p. 335; C. Handig, *The copyright term 'work' - European harmonisation at an unknown level*, 40 IIC 665-685 (2009).
  - 72 See e.g. ECJ 8 March 2011 Case C-240/09 (*Lesoochránárske zoskupenie*).
  - 73 Case 286/86 *Deserbais* [1988] ECR 4907.
  - 74 ECJ 10 September 1996, Case C-61/94 (*Commission / Germany*), [1996] ECR I-3989.
  - 75 See in this vein the Advocate General's opinion of 29 June 2011 in Case C-135/10 (SCF *Consortio Fonografici*), on the application of the Rome Convention 1961.
  - 76 In practice, of course, it is the fact that individual Member States are obliged to provide authors from other (EU) Member States the minimum substantive rights that makes it necessary for the EU to ensure that its harmonized copyright standards comply with the Berne minimum.
  - 77 Isabella Alexander, *The concept of reproduction and the 'temporary and transient' exception* C.L.J. 2009, 68(3), 520-523; E. Derclaye, *Infopaq International A/S v Danske Dagblades Forening* (C-5/08): wonderful or worrisome? The impact of the ECJ ruling in *Infopaq on UK copyright law*, 32(5) EIPR 247-251 (2010); G. Schulze, *Schleichende Harmonisierung des urheberrechtlichen Werkbegriffs? - Anmerkung zu EuGH*, *Infopaq/DDF*, GRUR 2009, 1019; C. Handig, *The copyright term 'work' - European harmonisation at an unknown level*, 40 IIC

- 665-685 (2009); V. Benabou, *Note d'observations, C.J.C.E. (4e ch.)*, 16 juillet 2009, RDTI 2009, no. 39, 61 ff.
- 78 Stephen Vousden, *Infopaq and the Europeanisation of copyright law*, W.I.P.O.J. 2010, p. 197-210; V. Benabou, *Note d'observations, C.J.C.E. (4e ch.)*, 16 juillet 2009, RDTI 2009, no. 39, 61 ff.;
- 79 E. Declayre, *Wonderful or worrisome? The impact of the ECJ ruling in the Infopaq on UK copyright law*, 32(5) EIPR 247-251(2010).
- 80 See note 19 above for a short description.
- 81 B. Michaux, *L'originalité en droit d'auteur, une notion d'avantage communautaire après l'arrêt Infopaq*, *Auteurs & Media* (2009) no. 5, 473-488.
- 82 Stephen Vousden, *Infopaq and the Europeanisation of copyright law*, W.I.P.O.J. 2010, p. 197-210, and *Protecting GUIs in EU law: Bezpec'nostni' Softwarova' Asociace*, *Journal of Intellectual Property Law & Practice*, 2011.
- 83 C. Heinze, *Software als Schutzgegenstand des Europäischen Urheberrechts*, JIPITEC (2011) Vol. 2.
- 84 I looked at cases reported in the CJE's case law digest at <<http://curia.europa.eu>>, counting on the basis of the year in which a case was lodged. This does not include cases withdrawn.
- 85 The Commission brought five such cases before the Court between 2002-2005 (excluding infringement proceedings which did not result in judgment), which testifies to the controversial nature of the Rental and Lending Right Directive, esp. its provisions on compensation for public lending.
- 86 V. Benabou, *Note d'observations, C.J.C.E. (4e ch.)*, 16 juillet 2009, RDTI 2009, no. 39, 85.
- 87 Richard Posner, *How Judges Think*, Cambridge (Mass), Harvard University Press (2010), 210.