

‘More’ Originality for Cypriot Copyright Law According to the CJEU’s Case Law

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Abstract

The adoption of copyright laws at EU level has always been a battle between the two main traditions in copyright: civil law and common law. Cyprus belongs to the latter for which it suffices that a work is not a copy of another work. Originality in the EU has only been partially harmonised. In fact it is provided that photographs, software and databases are protected insofar that they are ‘their authors’ own intellectual creations’. It was never clear whether this criterion resembled that of the continent or the common law countries. EU member states usually opted to interpret it according to their own tradition. Recently the Court of Justice of the European Union (CJEU) shed light on the matter. This article examines the CJEU’s case law in the area and draws conclusions as to how it shapes originality in the EU (in general) and in Cyprus (in particular).

Keywords: copyright, Cypriot copyright law, EU originality, originality, *Infopaq*, *Murphy*, *Painer*, *Football Dataco*, *BSA*, *SAS*, *Ryanair*, Court of Justice of the European Union

Introduction

The adoption of copyright laws at the European Union level has always been a battle between the two main traditions in copyright:² civil law and common law. The former corresponds to the countries of Continental Europe, whilst the latter essentially corresponds to England and its former colonial territories, including Cyprus.³ One of

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2 If one is to take this criterion further by encompassing traditions originating outside Europe, one could argue that there are four traditions concerning originality, including the US criterion on ‘minimal degree of creativity’ and the Canadian one on ‘non-mechanical and non-trivial exercise of skill and judgement’. The former derives from the US Supreme Court’s decision in *Feist* (*Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 US 340 (1991)) whilst the latter is from the CCH decision (*CCH Canadian Ltd v. Law Society of Upper Can* (2004) 1 SCR 339), as referred to in E. F. Judge and D. Gervais, (2009) ‘Of silos and constellations: comparing notions of originality in copyright law’, *Cardozo Arts & Ent L J* Vol. 27 (2009), 375 and 377–378. According to my view, both the US and the Canadian criteria of originality are variations of the common law tradition and may be considered part of it.

3 ‘The common law tradition emerged in England during the Middle Ages and was applied within British colonies across continents. The civil law tradition developed in continental Europe at the same time and was applied in the colonies of European imperial powers such as Spain and Portugal. Civil law was also adopted in the nineteenth and twentieth centuries by countries formerly possessing distinctive legal traditions, such as Russia and Japan, that sought to reform their legal systems in

the dividing lines between the two traditions in the area of copyright is the criterion of originality. The civil law tradition runs a strict originality criterion, usually placing the emphasis on the work having the author's personal imprint (or reflecting his personality). For the common law tradition, it suffices that a work is not a copy of another work or presupposes 'skill and labour'.

Originality in the EU has only been partially harmonised. This is done in relation to photographs,⁴ software⁵ and databases.⁶ In all three cases the criterion provided was that a work should be its 'author's own intellectual creation'.

The EU criterion was said to be a compromise between the civil law and the common law originality criteria.⁷ In this sense, it raised the 'skill and labour' criterion to meet the requirements of the EU (i.e., the 'author's own intellectual creation'), whilst it lowered the continental one to meet the needs of technology works, i.e., photographs, software and databases.⁸ There was also the view that the EU criterion

order to gain economic and political power comparable to that of Western European nation-states'. The Robbins Collection, University of California at Berkeley, available at <https://www.law.berkeley.edu/library/robbins/CommonLawCivilLawTraditions.html>.

- 4 Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights (2006) OJ 2006 L 372/12, art. 6. See G. Minero, 'The Term Directive'. In *EU Copyright Law*, ed. I. Stamatoudi and P. Torremans (Cheltenham, UK: Edward Elgar Publishing, 2014), 248.
- 5 Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs (1991) OJ 1991 L 122/42, art. 1(3). See M-Chr. Janssens, 'The Software Directive'. In *EU Copyright Law*, 89.
- 6 Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (1996) OJ 1996 L 77/20, art. 3(1). See E. Derclaye, (2014) 'The Database Directive'. *EU Copyright Law*, Vol. 27 (2014), 298.
- 7 See also I. Stamatoudi 'Article 2, §§ 27'. In *Commentary on the Greek Copyright Act*, ed. L. Kotsiris and I. Stamatoudi, (Athens: Sakkoulas, 2009) 36, where it is argued that this criterion is a compromise between the common law and civil law traditions. See also A. Lucas-Schloetter, 'Is there a concept of European copyright law?', and Janssens, 'The software directive' and Minero, 'The term directive', all in *EU Copyright Law*, 13, 101, 278, 308–309, respectively. See also C. Seville, *EU intellectual property law and policy* (Cheltenham, UK: Edward Elgar, 2009) 28, which argues that the EU criterion has an inclination towards the civil law originality criterion.
- 8 See also Stamatoudi, 'Article 2, §§ 27', 36. There is the view that the EU criterion comes closer to the continental one, as this is reflected in the Berne Convention and later adopted by the TRIPs Agreement (see article 9(1) TRIPs Agreement, which refers to articles 1–21 of the Berne Convention). See D.J. Gervais, 'The compatibility of the skill and labour standard with the Berne Convention and the TRIPs Agreement', *European Intellectual Property Review* (EIPR), Vol. 26 (2004): 75, 79. Article 2(5) of the Berne Convention provides that 'Collections of literary or artistic works such as encyclopaedias and anthologies which, by reason of the selection and arrangement of their contents, constitute intellectual creations shall be protected as such, without prejudice to the copyright in each of the works forming part of such collections' (emphasis added). Yet, one has to observe that the states' parties to the Convention operate different originality criteria. It should also be taken into account that the same author provides in an earlier work that copyright subject matter should be applied in accordance with the law of the country where protection is claimed (D. Gervais, *The TRIPs Agreement. Drafting history and analysis*, 2nd ed. (London: Sweet & Maxwell, 2003), 131, as

was introduced to reflect the needs of more functional and utilitarian works closely linked to technology rather than classic works of art, science or literature.

The obscurity of the notion of originality – relating both to its philosophical foundations⁹ and to the vagueness of the concept of 'author's own intellectual creation', which was to some extent a convergence of existing (national) elements resulting in an entirely new concept – allowed a considerable degree of flexibility to Member States. To this the view (no longer valid) that, if a concept is not defined in EU law, it is for the Member States to define it according to their national law,¹⁰ should be added. On top of it, many countries ended up operating two separate originality criteria: one for copyright works in general and another for photographs, software and databases.¹¹

Recently the Court of Justice of the European Union (CJEU) ended the discussion on originality. It came to the conclusion that there is only one originality criterion for all types of works, which should be interpreted uniformly throughout the EU by all member states. The content of the EU originality criterion was also defined to a certain extent.

This article examines the CJEU's case law in the area and draws conclusions as to how this affects originality in the EU (in general) and in Cyprus (in particular).

The CJEU's Case Law

Uniform Interpretation of 'Originality' for All Types of Works: The *Infopaq* Case

The *Infopaq* case¹² is about a firm, which, on its customers' request and on the basis of agreed subject criteria, draws up summaries of articles from Danish newspapers by means of a 'data capture process'. These summaries are then e-mailed to its customers. Danske Dagblades Forening (DDF) is an association of Danish daily newspaper

these are referred to in E. Rosati, *Originality in EU Copyright* (Cheltenham, UK: Edward Elgar, 2013), 62–63. See also K. Garnett, G. Davies and G. Harbottle, *Copinger and Skone James on copyright*, 16th ed., (London: Sweet & Maxwell, 2010), 1476, who refer to B. Czarnota and R. J. Hart, *Legal Protection of Computer Programs in Europe: A Guide to the EC Directive* (London: Buttersworth, 1991), 44, who argue that the EU originality criterion was intended to adopt the UK originality criterion.

9 See, for example, B. Vermazen, 'The aesthetic value of originality', *Midwest Studies in Philosophy* (MSIP), Vol. 16 (2010), 266; B. Gaut, 'The philosophy of creativity', *Philosophy Compass*, Vol. 12 (2010), 1034; W. Niu and R. J. Sternberg, (2006) 'The philosophical roots of Western and Eastern conceptions of creativity', *Journal of Theoretical and Philosophical Psychology*, Vol. 26 (2006), 18; J. Hoaglund, 'Originality and aesthetic value', *British Journal of Aesthetics*, Vol. 16 (1976), 46.

10 'Staff Working Paper on the Review of the EC legal framework in the field of copyright and related rights', 19 July 2004, SEC 995, 13–14.

11 Stamatoudi, 'Article 2, §§ 27', 38–39.

12 Case C-5/08 *Infopaq International A/S v. Danske Dagblades Forening* (2009), judgment of 16 July 2009 ECR I-656.

publishers, whose function is, *inter alia*, to assist its members with copyright issues. DDF argued that the rightholders' consent was required for Infopaq to conduct these activities legally. Infopaq disputed DDF's claim and applied to the competent courts. The case was brought before the Danish Supreme Court (Højesteret), which stayed the proceedings and referred questions to the CJEU. The questions related to the interpretation of the Information Society Directive, particularly to the concept of reproduction.

In order for the CJEU to reply to the questions referred to it, it also had to deal with the extent to which a text extract from an article in a daily newspaper, consisting of a search word and the five preceding and the five subsequent words (i.e., a text extract of 11 words), is protected by copyright.¹³

The Court stated that the author's right to authorise or prohibit reproduction applies to a 'work'. According to the Berne Convention (particularly Articles 2(5) and (8)), the protection of certain subject matters as artistic or literary works presupposes that they are 'intellectual creations'. EU law provides that works, such as computer programs, databases or photographs, are protected by copyright only if they are original in the sense that they are their 'author's own intellectual creation'. That means that copyright protection applies only in relation to subject matter that is original in the sense that it is its author's own intellectual creation.

The Court also stated that the protection extends to the parts of a work, since, as such, they share the originality of the whole work and contain elements that are the expression of the intellectual creation of its author.¹⁴ With regard to newspaper articles, their author's own intellectual creation is evidenced from the form, the manner in which the subject is presented and the linguistic expression.

Words as such are not protected (since they do not constitute elements covered by protection nor are they the intellectual creation of the author who employs them).¹⁵ It is only through the choice, sequence and combination of these words that the author

13 Especially regarding questions 1 and 13, referred by the Danish Court to the CJEU.

14 See also para 22 of Case C-355/12 *Nintendo* (2014), judgment of 23 January 2014, (published in the electronic Reports of Cases: https://curia.europa.eu/jcms/jcms/P_106320/en/?rec=RG&jur=C&anchor=201401C0018#201401C0018), where it is provided that [a]s regards the parts of a work, it should be borne in mind that there is nothing in Directive 2001/29 indicating that those parts are to be treated any differently from the work as a whole. It follows that they are protected by copyright since, as such, they share the originality of the whole work (see *Infopaq International*, paragraph 38). In relation to videogames the Court went on to provide in para 23 [a]s is apparent from the order for reference, videogames, such as those at issue in the main proceedings, constitute complex matter comprising not only a computer program but also graphic and sound elements, which, although encrypted in computer language, have a unique creative value which cannot be reduced to that encryption. In so far as the parts of a videogame, in this case, the graphic and sound elements, are part of its originality, they are protected, together with the entire work, by copyright in the context of the system established by Directive 2001/29.

15 *Infopaq* [45]–[46].

may express his creativity in an original manner and achieve a result, an intellectual creation. Certain isolated sentences, or even certain parts of sentences in a text, 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 may therefore be protected.¹⁶

In the light of the above, even an extract of 11 consecutive words is copyright protected insofar as it contains an element of the work that, as such, expresses the author's own intellectual creation. Yet, this determination is for the national court to make.

On the basis of the above, the following conclusions have been reached in *Infopaq*:

(a) The EU criterion covers all works and not just photographs, software and databases. All works, irrespective of their nature or particular characteristics, should be assessed in the same manner in terms of originality.

(b) The EU originality criterion is a qualitative rather than a quantitative one in the sense that even small extracts of works (in the case at issue, literary works) may qualify for copyright protection as long as they contain elements, which are the expression of the intellectual creation of the author of the work. So the criterion is not how small a work is but rather whether it is original (i.e., whether it constitutes its author's own intellectual creation). A *de minimis* assessment cannot be applied.¹⁷

(c) The sole criterion for copyright protection is originality, excluding in essence any other criterion (e.g. classification of works, fixation and so on).

(d) The EU originality criterion should be construed in a uniform and autonomous manner throughout the EU, preventing Member States from using their national legal systems for defining it.¹⁸

¹⁶ *Infopaq* [47].

¹⁷ In other words, a work is *de minimis* and therefore not infringing. See J. Griffiths, 'Infopaq, BSA and the "Europeanisation" of United Kingdom copyright law', *Media & Arts Law Review*, Vol. 16 (2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1777027. See also C. Moran, (2011) 'How much is too much? Copyright protection of short portions of text in the United States and European Union after *Infopaq International A/S v. Danske Dagblades*', *Washington J L Tech & Arts* Vol. 6, No. 3 (2011), 248, at 258.

¹⁸ See also Case C-5/08 *Infopaq International* (2009) ECR I6569 [27]; Case C34/10 *Brüstle* (2011) ECR I-09821 [25]; and Case C-510/10 *DR and TV2 Danmark* (published in the electronic Reports of Cases: https://curia.europa.eu/jcms/jcms/P_106320/en/?rec=RG&jur=C&anchor=201204C0076#201204C0076) [33], as referred to in Case C-128/11 *UsedSoft GmbH v. Oracle International Corp.* [39] (published in the electronic Reports of Cases: https://curia.europa.eu/jcms/jcms/P_106320/en/?rec=RG&jur=C&anchor=201207C0127). See also, Case C-357/98 *Yiadom* (2000) ECR I9265 [26], Case C-245/00 *SENA* (2003) ECR I1251 [23] and Case C-306/05 *SGAE* (2006) ECR I-11519 [31].

‘Author’s Own Intellectual Creation’ means Creative Choices and a Personal Touch: The *Murphy*, *Painer* and *Football Dataco* Cases

Murphy

The issue of originality was further clarified in a number of judgments that followed *Infopaq*. One of them was *Murphy*.¹⁹

Murphy concerned the extent to which a system of licences for the retransmission of football matches, which grants broadcasters territorial exclusivity per Member State and which prohibits television viewers from watching these broadcasts with a decoder card in other Member States, is contrary to EU law. The issue of originality was dealt with in the context of the Court considering whether sporting events, which formed the object of the retransmission, were protected by copyright.

The Court provided that Premier League matches themselves cannot be considered as works because they cannot be original in the sense that they are not their author’s own intellectual creation.²⁰ It also stated that sporting events could not be regarded as intellectual creations because they are not works within the meaning of the Information Society Directive. That applies to football matches, which are subject to the rules of the game, leaving no room for creative freedom for the purposes of copyright. According to the Court, either copyright or any other intellectual property right cannot protect sporting events.

With regard to television broadcasts the Court stated that two categories of persons could assert intellectual property rights: the authors of the works contained in the broadcast and the broadcasters.²¹ Works contained in the broadcast include the opening video sequence, the Premier League anthem, pre-recorded films showing highlights of recent Premier League matches, and various graphics.²² Parts of a work may enjoy copyright protection, provided that they contain elements that are the expression of the intellectual creation of the author of the work.²³

The Court also stated that sporting events have a unique and original character, which can transform them into subject-matter that is worthy of protection comparable to the protection of works. In this light, Member States may grant them protection, where appropriate,²⁴ by either putting in place specific national legislation or by recognising, in compliance with European Union law, protection conferred upon

19 Cases C-403/08 and C-429/08 *Football Association Premier League Ltd and Karen Murphy*, judgment of 4 October 2011, (2011) ECR I-9083.

20 *Murphy* [96–99].

21 *Murphy* [148].

22 *Murphy* [149].

23 *Infopaq* Judgment [39] and *Murphy* [156].

24 *Murphy* [100].

those events by agreements concluded between the persons having the right to make the audiovisual content of the events available to the public and the persons who wish to broadcast that content to the public of their choice.

According to Murphy, there is subject matter that falls outside the scope of protection of copyright by reason of the fact that it does not constitute a work. This applies to sporting events, including football games. Sporting events are not works in the sense that they are not intellectual creations. Intellectual creations require creative freedom whilst sporting events are dictated by the rules of the game, leaving no room for creative freedom. Overall a new parameter (which is not mentioned in EU law) is brought into assessing originality; that of the author's creative freedom.

Painer

Almost two years later, the *Painer*²⁵ judgment shed more light with respect to originality in photographs.

Ms Painer is a freelance photographer specialising in images of children in nurseries and day homes. In the course of her work, she took photographs of Natascha K., designing the background, deciding the position and facial expression, and producing and developing those photographs. The photographs indicated her name and business address. Ms Painer sold those photographs but without conferring on third parties any rights over them and without consenting to their publication. After Natascha K., then aged 10, was abducted in 1998, the competent security authorities launched a search appeal in which the contested photographs were used. The defendants were newspaper and magazine publishers in Austria and Germany. When Natascha K. managed to escape from her abductor in 2006 and, prior to her first public appearance, the defendants published Ms Painer's photographs in their newspapers, magazines and websites without indicating the name of the photographer or a name other than Ms Painer's as the photographer. Some of them also published a 'photo-fit'— an age-progression portrait, created by computer from Ms Painer's photographs, which, since there was no recent photograph of Natascha K. until her first public appearance, represented her supposed image.

Ms Painer turned to the Austrian courts to cease the reproduction and/or distribution, without her consent and without indicating her as author, of the photographs and the photo-fit. Regarding the photo-fit, the Austrian court (Oberster Gerichtshof) held, applying the relevant national rules, that the defendants in the main proceedings did not need Ms Painer's consent to publish the contested photo-fit. In that court's view, Ms Painer's photograph, which had been used as a template for the photo-fit, was, admittedly, a photographic work protected by copyright. However, the

25 Case C-145/10 *Eva-Maria Painer v. Standard VerlagsGmbH and others* (2013), judgment of 7 March 2013 (2011) ECR I-12533.

production and publication of the contested photo-fit was not an adaptation for which the consent of Ms Painer, as author of the photographic work, was needed, but a free use, which did not require her consent. The referring court (Handelsgericht Wien) considered that the question whether it was an adaptation or a free use depends on the creative effort in the template. According to the Court, the greater the creative effort in the template, the less conceivable is a free use. In the case of portrait photographs like the ones at issue, the creator enjoys only a small degree of individual formative freedom. For that reason, the copyright protection of that photograph is accordingly narrow. In addition, the photo-fit based on the template is a new and autonomous work, which is protected by copyright. In this light, the Austrian court stayed proceedings and decided to refer a number of questions to CJEU, including whether photographic works and/or photographs, particularly portrait photos, are afforded 'weaker' copyright protection or no copyright protection at all against adaptations because of their 'realistic image' and the minor degree of formative freedom allowed by such photographs.²⁶ To put it otherwise, whether article 6 of the Term Directive²⁷ 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 is inferior to that enjoyed by other works, particularly photographic works, according to article 2(a) of the Information Society Directive.

The Court referred to *Infopaq* and to the fact that copyright applies only in relation to a subject-matter, such as a photograph (including realistic photographs such as portrait photographs), which is original in the sense that it is its author's own intellectual creation.

In this case the Court drew an *a contrario* argument from Murphy.²⁸ A work is original if the author is able to express his creative abilities in the production of the work by making free and creative choices. With a portrait photograph, the photographer can make free and creative choices in several ways and at various points in its production. In the preparation phase, he can choose the background, the subject's pose and the lighting. When taking the photograph, he can choose the framing, the angle of view and the atmosphere created. Finally, when selecting the final image, the photographer may

26 This forms question 4, which was addressed on the basis of article 1(1) of the Information Society Directive in conjunction with articles 5(5) and 12 of the Berne Convention, particularly in the light of Article 1 of the First Additional Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 17 of the Charter of Fundamental Rights of the European Union.

27 Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights (1993), OJ L 290/9/24.11.1993.

28 Joined Cases C-403/08 and C-429/08 *Football Association Premier League and Others* (2011) (2011) ECR I-09083 [98].

choose from a variety of developing techniques or use computer software. By making these choices the photographer can stamp the work created with his 'personal touch'. In this perspective, the freedom available to the author/photographer to exercise his creative abilities will not necessarily be minor or even non-existent. Yet, it is for the national court to determine whether a particular photograph is the author's intellectual creation reflecting his personality and expressing his free and creative choices in the production of that photograph.

With regard to article 2(a) and the issue of whether the protection afforded to portrait photographs is inferior to that enjoyed by other works, particularly photographic works, the Court held that there is nothing in the Information Society Directive or in any other directive applicable in this field that supports the view that the extent of such protection should depend on possible differences in the degree of creative freedom in the production of various categories of works. In that sense, the protection of a portrait photograph cannot be inferior to that enjoyed by other works, including other photographic works.²⁹

Painer develops further the analysis on the EU criterion of originality. New elements come into play and existing ones are expanded. According to *Painer*, a work is original if it is the author's own intellectual creation. That means that the work should reflect the author's personality (in the sense that the author stamps the work with his 'personal touch') and expresses the author's free and creative choices in its production (i.e., creation).

Painer also states that there are no varying levels of protection (i.e., inferior protection) of works depending on the degree of creative freedom for their production. It thus confirms that there is only one criterion – originality; and it is the same for all types of works.

Interestingly, the analysis of originality in this case is akin to the one followed in the continent, making references to the author's personality or personal touch. Taking this into account, one may argue that the EU originality criterion comes closer to the continental one than the common law one; this issue was considered under *Football Dataco*.

Football Dataco

*Football Dataco*³⁰ and the other applicants in this case drew up annual fixture lists of the football leagues in England and Scotland on the basis of particular rules and procedures. The process of preparing the football fixture lists was not purely

29 *Painer* [85]–[99]. See also the dictum (2) of the judgment.

30 Case C-604/10, *Football Dataco Ltd and Others v. Yahoo! UK Ltd and Others* (2012), Judgment of 1 March 2012 (published in the electronic Reports of Cases: https://curia.europa.eu/jcms/jcms/P_106320/en/?rec=RG&jur=C&anchor=201203C0031).

mechanistic or deterministic. It required very significant skill and labour to satisfy the multitude of competing requirements while respecting the applicable rules as far as possible. In effect, the lists were not subject to rigid criteria, as is the case with the compilation of a telephone directory. They required skill and judgment at each stage, particularly where the computer program found no solution for a given set of constraints. In fact, the process was only partially computerised, leaving room for judgment and discretion.

The applicants claimed (amongst other things) that they were entitled to copyright and *sui generis* right protection under the Database Directive for their fixture lists.³¹ The defendants contested their allegations, claiming that *they* were entitled to use the lists in the conduct of their business without having to pay financial compensation. The Court of Appeal (England and Wales) (Civil Division) decided to stay the proceedings and refer to the CJEU the following issues: an interpretation of Article 3(1) of the Database Directive, particularly,

(a) whether the intellectual effort and skill of creating data carries any weight in relation to the application of this provision;

(b) whether the ‘selection or arrangement’ of the contents, within the meaning of that provision, includes adding important significance to a pre-existing item of data; and

(c) whether the notion of ‘author’s own intellectual creation’ within the meaning of that provision requires more than significant labour and skill from the author and, if so, what that additional requirement is.

It also asked whether the Directive prevents Member States from introducing national rights in the nature of copyright in databases other than those provided for by it.

In an earlier decision, the CJEU³² judged that a football league fixture list constitutes a ‘database’ (within the meaning of the Database Directive). It held that the combination of the date, the time and the identity of the two teams playing in both home and away matches has autonomous informative value, which renders them ‘independent materials’ within the meaning of Article 1(2) and that the arrangement, in the form of a fixture list, of the dates, times and names of teams in the various fixtures of a football league meets the conditions set out in this article as to the systematic or methodical arrangement and individual accessibility of the data contained in the database.³³

31 Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (1996), OJ L 77/20/27.3.1996.

32 Case C444/02 *Fixtures Marketing* (2004) ECR I10549 [33]–[36].

33 *Fixtures Marketing* [26].

In this case, the Court stated that copyright and the sui generis right form two independent rights whose object and conditions of application are different. The fact that a database does not satisfy the conditions of eligibility for protection under the sui generis right³⁴ does not automatically mean that it is also not eligible for copyright protection.³⁵ In order for one to assess copyrightability, one has to see whether the selection or arrangement of the database’s contents constitute its author’s own intellectual creation. It is the structure of the database that is assessed, not its ‘contents’ or the elements constituting its contents. This also conforms with Article 10(2) of the TRIPs Agreement and Article 5 of the WIPO Copyright Treaty, according to which copyright protection is afforded to compilations of data, which, by reason of the selection or arrangement of their contents, constitute intellectual creations. That protection neither extends to the contents/data nor prejudices any copyright subsisting in them. In this regard, it does not also extend to the creation of those contents. Therefore, the Court concluded that *any intellectual effort and skill of creating data contained in the database are not relevant in order to assess the eligibility of that database for copyright protection.*³⁶

The Court also referred to Recital 16³⁷ of the Database Directive and to relevant case-law³⁸ to substantiate its point, namely that the originality criterion refers to the notion of the ‘author’s own intellectual creation’ and is satisfied when, through the selection or arrangement of the data, which the database contains, its author *expresses his creative ability in an original manner by making free and creative choices*³⁹ and thus *stamps his ‘personal touch’*.⁴⁰ By contrast, that criterion is not satisfied when the setting up of the database is dictated by technical considerations, rules or constraints, which leave no

34 At this point the Court referred to Article 7 of Directive 96/9 and to cases (in relation to fixture lists) C-46/02 *Fixtures Marketing* (2004) ECR I10365 [43]–[47], C-338/02 *Fixtures Marketing* (2004) ECR I10497 [32]–[36] and C-444/02 *Fixtures Marketing* (2004) ECR I10549 [48]–[52].

35 Under article 3 of the Database Directive.

36 *Fixtures Marketing* [33], emphasis added. In [35] the Court stated, [t]hat analysis is confirmed by the purpose of that directive. As is apparent from recitals 9, 10 and 12 of that directive, its purpose is to stimulate the creation of data storage and processing systems in order to contribute to the development of an information market against a background of exponential growth in the amount of information generated and processed annually in all sectors of activity (see Case C-46/02 *Fixtures Marketing*, cited above [33]; Case C-203/02 *The British Horseracing Board and Others* (2004) ECR I10415 [30]; Case C-338/02 *Fixtures Marketing* [23]; and Case C444/02 *Fixtures Marketing* [39], cited above and not to protect the creation of materials capable of being collected in a database.

37 Recital 16: ‘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’.

38 Case C5/08 *Infopaq International* (2009) ECR I6569 [35], [37], [38], C-393/09 *Bezpečnostní softwarová asociace* (2010) ECR I13971 [45], Joined Cases C-403/08 and C-429/08 *Football Association Premier League and Others* (2011) ECR I9083 [97] and C-145/10 *Painer* (2011) ECR I12533 [87].

39 *Infopaq* [45], *Bezpečnostní softwarová asociace* [50], *Painer* [89]. Emphasis added.

40 *Painer* [92]. Emphasis added.

room for creative freedom.⁴¹ No criteria other than originality apply to determine the eligibility of a database for copyright protection.⁴² In this perspective, it is irrelevant, for assessing the eligibility of a database for copyright protection, whether or not the selection or arrangement of the data (contained in it) includes the addition of important significance to that data.

The issue of significant skill and labour and whether it suffices for the eligibility of a database for copyright protection was also considered. According to the Court, the author's significant skill and labour cannot as such justify copyright protection in the sense that they do not express any originality in the selection or arrangement of the data contained in the database. If the procedures for creating the fixture lists are not supplemented by elements reflecting originality in the selection or arrangement of the data contained in those lists, these lists are not eligible for copyright protection. It is, of course, for the national court to determine whether the databases at issue (i.e., the fixture lists) are original.⁴³ In effect, the Court linked (once again) originality to the author's free and creative choices and to the stamping of his personal touch on the work.

With regard to whether the Database Directive must be interpreted as precluding national legislation that grants databases (as defined in the directive) copyright protection under conditions which are different to those set out in the directive, the Court pointed to recitals 1 to 4. According to them, the directive aims to remove the differences that existed between national laws on the legal protection of databases, particularly regarding the scope and conditions of copyright protection, and which adversely affected the functioning of the internal market, the free movement of goods or services within the European Union and the development of an information market within the European Union. In that context (and as it also derives from recital 60 and article 3) the directive carries out a 'harmonization of the criteria for determining whether a database is to be protected by copyright'.⁴⁴ In that sense, Member States are precluded from enacting legislation conferring on databases copyright protection under conditions that are different from those set out in the directive.

Yet, in *Ryanair*,⁴⁵ a few years later, the same Court stated that the Directive is not

41 See, by analogy, *Bezpečnostní softwarová asociace* [48], [49] and *Football Association Premier League and Others* [98].

42 Database Directive, art. 3(1), rec. 16.

43 See [46] of the judgment according to which, the intellectual effort and skill of creating that data are not relevant in order to assess the eligibility of that database for protection by that right; it is irrelevant, for that purpose, whether or not the selection or arrangement of that data includes the addition of important significance to that data, and the significant labour and skill required for setting up that database cannot as such justify such a protection if they do not express any originality in the selection or arrangement of the data which that database contains.

44 BSA [48], [49].

45 Case C-30/14, *Ryanair Ltd v. PR Aviation BV* (2015), Judgment of 15 January 2015

applicable to a database, which is not protected either by copyright or by the *sui generis* right. Articles 6(1), 8 and 15 do not preclude the author of such a database from laying down contractual limitations on its use by third parties, without prejudice to the applicable national law. The issue of originality was not examined in that case because it was taken for granted by the referring court that Ryanair's dataset, which contained flight and other relevant data, did not qualify for either copyright or *sui generis* protection. Thus, although Member States cannot extend protection for databases – especially those not covered by the Database Directive – by copyright or quasi-copyright means, national contract law could work in some instances as a powerful alternative.

Summing up the findings in *Football Dataco* regarding the EU originality criterion, the following can be observed. Firstly, the findings of previous case law have been confirmed. Secondly, the Court has focused strictly on linking the assessment of a database's originality to its structure (i.e., the selection and arrangement of its contents) leaving out any other aspect and especially any aspect relating to the contents/data of the database. Thirdly, the Court precludes the application of the skill and labour criterion, even if skill and labour have been significant. According to the Court, the author's significant skill and labour cannot as such justify copyright protection in the sense that they do not express any originality in the selection or arrangement of the data contained in the database. Originality exists if the author of the work (in the case at issue, the database) expresses his creative ability in an original manner by making free and creative choices and by stamping his 'personal touch' on the work. Member States cannot provide any other copyright or quasi-copyright protection for databases.

Originality in Computer Programs: The BSA and SAS Cases

The CJEU dealt with the issue of originality in two cases concerning computer programs. These cases confirm the Court's findings in its earlier case law and elaborate on them with regard to software.

BSA

In 2001, BSA,⁴⁶ as an association, applied to the Czech Ministry of Culture for authorisation for the collective administration of copyrights to computer programs. That application was refused, and legal actions ensued. The case at some stage reached the Court of Appeal (Nejvyšší správní soud). BSA submitted – amongst other things – that the definition of a computer program also covers the user interface. According to BSA, a computer program can be perceived at the level of the source or object code

(published in the electronic Reports of Cases: https://curia.europa.eu/jcms/jcms/P_106320/en/?rec=RG&jur=C&anchor=201501C0010#201501C0010).

46 Case C-393/09, *Bezpečnostní softwarová asociace – Svaz softwarové ochrany v. Ministerstvo kultury* (2010) ECR I-13971, Judgment of 22 December 2010, (2010) ECR I-13971 .

and of the method of communication (communication interface). It also argued that a computer program is used when it is shown in a display on user screens and that, consequently, such use must be protected by copyright. The Court of Appeal decided to stay the proceedings and refer to the CJEU the following issues: (1) whether the Software Directive (article 1(2)) should be interpreted as meaning that, for the purposes of copyright protection of a computer program as a work under that directive, the phrase ‘the expression in any form of a computer program’ also includes the graphic user interface of the computer program or part thereof, and (2) in case the answer is in the affirmative, whether television broadcasting, whereby the public is enabled to have sensory perception of the graphic user interface (GUI) of a computer program or part thereof, albeit without the possibility of actively exercising control over that program, constitutes making a work or part thereof available to the public within the meaning of Article 3(1) of the Information Society Directive. For the purposes of this chapter, we shall focus on the first issue alone.

The Court stated that, given that the Software Directive does not define the notion of ‘expression in any form of a computer program’, such notion must be defined according to the letter and context of Article 1(2), where this notion is provided, and in the light of the overall objectives of that directive as well as international law.⁴⁷ It also pointed to recital 7, which provides that the term ‘computer program’ includes programs in any form, including those that are incorporated into hardware. Reference was also made to Article 10(1) of the TRIPs Agreement, according to which computer programs, whether expressed in source code or in object code, are protected as literary works pursuant to the Berne Convention.

Thus the Directive protects the expression in any form of a computer program, which permits reproduction in different computer languages, such as the source code and the object code. The term ‘computer program’ also includes preparatory design work leading to the development of a computer program, provided that the nature of the preparatory work is such that a computer program can result from it at a later stage, i.e., is capable of leading to the reproduction or the subsequent creation of such a program.⁴⁸ Overall, the Court stated that any form of expression of a computer program must be protected from the moment when its reproduction would engender the reproduction of the computer program itself, thus enabling the computer to perform its task.

Interfaces constitute parts of a computer program, which provide for interconnection and interaction of elements of software and hardware with other software and hardware and with users in all the ways in which they are intended to

⁴⁷ BSA [30]. The Court also referred by analogy to *Infopaq* [32].

⁴⁸ See recital 7.

function.⁴⁹ In particular, the graphic user interface is an interaction interface that enables communication between the computer program and the user. 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. In this perspective, the interface does not constitute a form of expression of a computer program and consequently cannot be protected by copyright.

The Court went on to say that, although the graphic user interface is not protected as a computer program, it may be protected as a work if it is its author's own intellectual creation. This is for the national court to determine. In the course of such determination, the national court should take into account, *inter alia*, the specific arrangement or configuration of all the components that form part of the graphic user interface. Components dictated by their technical function do not permit the author to express his creativity in an original manner and achieve a result that is an intellectual creation of that author. In that sense, components are not protected by copyright because the different methods of implementing an idea are so limited that the idea and the expression become indissociable.

BSA seems to bring into the definition of a computer program a new element: that of the capability of the subject matter at issue to lead to the reproduction or the subsequent creation of a computer program. This condition is, however, provided in the Directive in relation to the preparatory design work of a computer program and not in relation to the 'expression in any form of a computer program'.⁵⁰ It seems that the Court in this decision has extended the prerequisite of this 'capability' to cover each and every aspect of a computer program. One may wonder how it is possible for aspects of a work (i.e., a computer program) to have as a requirement, in order to be considered parts of it, being capable of leading to its creation and enabling the computer to perform its task. Although this is a viable argument in relation to preparatory design work, it sounds like a circuitous argument for parts of the work itself. If the reasoning of the Court is followed, the parts of a work qualify for copyright protection not only if they are original, but if they also satisfy the additional criterion of being capable of leading to the program's creation and enable its function. It seems that this additional requirement (concerning software only) does not necessarily follow from the letter (or the context) of the Directive.

Effectively, the Court stated that, although GUIs are not protected as computer programs, they may be protected as works if they are their author's own intellectual creation. The Court by its ruling provides that GUIs may be works but not a particular type of work, i.e., computer programs. By differentiating between computer

⁴⁹ The Court referred to recitals 10 and 11.

⁵⁰ See recital 7.

programs and other works, the Court places on computer programs an additional (to the originality) requirement for their protection: the ability to perform their task. In that sense the Court seems to imply that originality (or else creativity) is not the sole criterion for protection as it indicated in other cases. One, of course, may argue that the Court's analysis falls under protectable (or qualifying) subject-matter and not under originality. If, however, we follow the premise that what is creative is protectable (i.e., in the sense that a work is an intellectual creation), an exercise of prior classification (either with regard to whether something is a work or not or with regard to what type of a work it is) may not be justified.

The Court also seems to make a distinction between the idea and the expression. Components dictated by their technical function come closer to an idea rather than an expression. According to the Court, when the different methods of implementing an idea are so limited, then the idea and the expression become indissociable. In these cases, no creativity exists and therefore no qualifying subject matter for copyright protection.

SAS

SAS⁵¹ also deals with software. The applicant, SAS Institute, is a developer of analytical software. It has developed an integrated set of computer programs that enable users to carry out a wide range of data processing and analysis tasks, in particular, statistical analysis ('the SAS System'). The core component of the SAS System, called 'Base SAS', enables users to write and run their own application programs in order to adapt the SAS System to work with their data (Scripts). Such Scripts are written in a language that is specific to the SAS System ('the SAS Language'). SAS's customers wrote application programs using the SAS Language. A customer wanting to continue using these application programs (or create new ones) in SAS Language had to continue acquiring a licence by SAS to use its components. If the customer wished to change software suppliers, he had to re-write the applications in a different language. WPL realised that there was a market demand for alternative software capable of executing application programs written in the SAS Language and produced the 'World Programming System'. This software tried to emulate the SAS components as closely as possible and, with a few minor exceptions, attempted to ensure that the same input would produce the same output. This would enable SAS System users to run the scripts on the 'World Programming System'. The High Court of Justice of England and Wales (Chancery Division), which referred the case to CJEU, did not establish that WPL had access to the source code of the SAS components, copied any of the text

51 Case C-406/10, *SAS Institute Inc. v. World Programming Ltd* (2012), Judgment of 2 May 2012 (published in the electronic Reports of Cases: https://curia.europa.eu/jcms/jcms/P_106320/en/?rec=RG&jur=C&anchor=201205C0081#201205C0081).

of that source code or copied any of the structural design of the source code. SAS Institute brought an action before the referring court claiming that WPL conducted a number of infringements. The issues relevant to our analysis are whether Article 1(2) of the Software Directive⁵² should be interpreted as meaning that the functionality of a computer program and the programming language and the format of data files used in a computer program to exploit certain functions constitute a form of expression of that program and may, as such, be protected by copyright in computer programs for the purposes of that directive.

According to Article 1(1), computer programs are protected by copyright as literary works within the meaning of the Berne Convention. Article 1(2) extends that protection to the expression in any form of a computer program. The ideas and principles, which underlie any element of a computer program, including those which underlie its interfaces, are not protected by copyright.

According to recital 11, in accordance with the principle that only the expression of a computer program is protected by copyright, to the extent that logic, algorithms and programming languages comprise ideas and principles, those ideas and principles are not protected by copyright. According to the legislation and jurisprudence of the Member States and the international copyright conventions, the expression of those ideas and principles is protected by copyright.

The Court stressed the principle that according to copyright law it is only the *expression* rather than the *idea* that is protected. In this respect, it stated Article 2 of the WIPO Copyright Treaty and Article 9(2) of the TRIPs Agreement, which provide that copyright protection extends to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such. According to Article 10(1) of the TRIPs Agreement, computer programs, whether in source or object code, are to be protected as literary works under the Berne Convention.

The Court also referred to the *BSA* case, in which the Court interpreted Article 1(2) of the Software Directive as meaning that the object of the protection conferred by that directive is the expression in any form of a computer program, such as the source code and the object code, which permits reproduction in different computer languages. According to recital 7, the term 'computer program' also includes preparatory design work leading to the development of a computer program, provided that the nature of the preparatory work is such that a computer program can result from it at a later stage. According to the Court, the object of protection of the Directive includes 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

52 Council Directive 91/250/EEC on the legal protection of computer programs (1991) OJ L 122/42/17.05.1991.

such a program.⁵³ It thus concluded that the source code and the object code of a computer program are forms of expression thereof that, consequently, are entitled to be protected by copyright as computer programs. Yet, it held that a graphic user interface does not enable the reproduction of the computer program, but merely constitutes one element of that program by means of which users make use of the features of that program.⁵⁴ Overall, neither the functionality of a computer program nor the programming language and the format of data files used in a computer program in order to exploit certain of its functions constitute forms of expression of that program for the purposes of the Directive. The programming language and the format of data files used in a computer program to interpret and execute application programs written by users and to read and write data in a specific format of data files, (these) are elements of that program by means of which users exploit certain of its functions.

Interestingly, the Court, in paragraph 45 of its judgment, points out that there is a possibility that the SAS language and the format of SAS Institute's data files are protected, as works, by copyright, if they are their author's own intellectual creation.⁵⁵

Another issue referred to the Court was whether Article 2(a) must be interpreted as meaning that the reproduction, in a computer program or a user manual for that program, of certain elements described in the user manual for another computer program protected by copyright constitutes an infringement of that right in the latter manual.

The Court referred to *Infopaq* and to the fact that the various parts of a work enjoy protection provided that they contain some of the elements that are the expression of the intellectual creation of the author of the work.⁵⁶ The Court held that in the case at issue the keywords, syntax, commands and combinations of commands, options, defaults and iterations consist of words, figures or mathematical concepts that, considered in isolation, are not, as such, an intellectual creation of the author of the computer program. It is only through the choice, sequence and combination of those words, figures or mathematical concepts that the author may express his creativity in an original manner and achieve a result, namely the user manual for the computer program, which is an intellectual creation. This is a determination to be made by the national court.

53 The Court referred to *BSA* [37].

54 *BSA* [34], [41].

55 *BSA* [44]–[46].

56 *Infopaq* [39].

The Notion of 'Work': The Levola Case

In a recent decision⁵⁷ the CJEU has to decide on whether the taste of cheese is copyright protected. This case gave rise to issues such as whether subject matter such as taste and smell come within the ambit of copyright works. Up to that moment there had been decisions in some Member States that accepted the protectability of smells.⁵⁸

On the basis of the CJEU's case law, it was clear that there was one only prerequisite in order for a work to be copyright protected, i.e. to be an original expression of the mind. Originality was defined as being its 'author's own intellectual creation'. The understanding was that work is anything within the domain of literature, science and art as this is provided in the Berne Convention,⁵⁹ the WIPO Copyright Treaty,⁶⁰ and the TRIPs Agreement.⁶¹ The Information Society Directive makes no express reference on the matter but it is clear that the EU needs to respect the international treaties that have been ratified by all its Member States. The Court came to the conclusion that a taste of a food product does not qualify as a work because

'it cannot [...] be pinned down with precision and objectivity. Unlike, for example, a literary, pictorial, cinematographic or musical work, which is a precise and objective form of expression, the taste of a food product will be identified essentially on the basis of taste sensations and experiences, which are subjective and variable since they depend, inter alia, on factors particular to the person tasting the product concerned, such as age, food preferences and consumption habits, as well as on the environment or context in which the product is consumed'.⁶²

The Court also added that

'it is not possible in the current state of scientific development to achieve by technical means a precise and objective identification of the taste of a food product which enables it to be distinguished from the taste of other products of the same kind'.⁶³

In other words the Court came to the conclusion⁶⁴ that only visual and aural works can be protected as the rest do not present precision and objectivity. The Court also noted that this does not presuppose permanence.⁶⁵ Although one could argue that

57 C310/17, *Levola Hengelo BV v Smilde Foods BV* (2018), Judgment of 13 November 2018 (nyr).

58 In 2016 the Supreme Court of the Netherlands accepted that the smell of a perfume could be protected. *Hoge Raad der Nederlanden, Lancôme* (NL:HR:2006:AU8940) (16.6.2016).

59 Article 2(1).

60 Article 2.

61 Article 9(2).

62 Para [42]

63 Para [43].

64 It did not form part of the Court's Dictum.

65 '[...] for there to be a 'work' as referred to in Directive 2001/29, the subject matter protected by copyright must be expressed in a manner which makes it identifiable with sufficient precision and

precision and objectivity are terms inherently found in ‘fixation’, one could easily come to the conclusion that neither fixation forms a prerequisite, as it was clearly stated so by the Advocate General in the case at issue.⁶⁶ The AG’s statement was not incorporated in the actual text of the judgment, but one should not draw conclusions from that as the Court has been clear in its judgments on originality, that originality was to form the sole prerequisite for protection. Precision and objectivity were not mentioned to signify fixation but rather to make the distinction between literary and artistic works on the one hand and taste and smells on the other.⁶⁷ Although the reasoning of the Court may be disputed on grounds that there could also be visual and aural works that are not necessarily precise or objective, in the sense that they are not perceived by everyone in the same manner,⁶⁸ it throws light on the notion of a work (or rather ‘expression’). The Court could have avoided perhaps all this discussion that led to additional factors for identifying a work, i.e. precision and objectivity, and could have closed the discussion on the basis that taste does not constitute a literary or artistic work (as the international conventions provide). The fact that the Court did not go down this route raises the problem that its reasoning leaves open the possibility that in the future taste and smells may also qualify as copyright works in the sense that although in the current state of scientific development we have not achieved by technical means a precise and objective identification of the taste of a food product, which enables it to be distinguished from the taste of other products of the same kind, in the future, we may.

We also need to note here that on the basis of this judgment the Court leaves open the list of subject matter that may qualify as a work (and thus for copyright protection). That practically means that classification of works as a prerequisite for copyright protection is no longer compatible with EU copyright law. There should be an open-ended list of qualifying subject matter in this respect.

There is also the issue of whether works of applied art and industrial models and

objectivity, even though that expression is not necessarily in permanent form’. Para [40]. See older UK cases where permanence formed a prerequisite: *Merchandising Corporation of America v Harpbond Ltd* [1983] FSR 32. It no longer does though.

66 Opinion of the Advocate General Whatelet, 25 July 2018, para [59].

67 E. Derclaye, ‘Copyright law does not protect the taste of cheese’, Copyright Licensing Agency (2018, December 3), available at <https://www.cla.co.uk/blog/higher-education/copyright-cheese>.

68 Not all people perceive colour in the same way. See e.g., Jordan Gaines Lewis, ‘When it Comes to Color, Men & Women Aren’t Seeing Eye to Eye’, *Psychology Today* (2015, April 8), <https://www.psychologytoday.com/intl/blog/brain-babble/201504/when-it-comes-color-men-women-arent-seeing-eye-eye>; A. Rodgers, ‘The Science of Why No One Agrees on the Color of This Dress’, *Wired.com* (2015, February 26), available at <https://www.wired.com/2015/02/science-one-agrees-color-dress/>, as referred to in Derclaye, See also N. Kritikou, *Comment of the Lavola Case*, DIMEE (in print, 2018), where she queries if a white painting can be protected by copyright (e.g., White Painting (1951), Robert Rauschenberg) or the recording of continuous noise (e.g. “White noise video on YouTube hit by five copyright claims” BBC: <https://www.bbc.com/news/technology-42580523>).

designs form a special case according to the *Flos* case,⁶⁹ which is based on Article 17 of the 98/71/EC Directive (Design Directive). According to it,

[a] design protected by a design right registered in or in respect of a Member State in accordance with this Directive shall also be eligible for protection under the law of copyright of that State 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.⁷

In *Flos*, the Court stated that

'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'.⁷⁰

Yet, this case law seems to be rather outdated in the light of the Court's case law on originality, as explained above. Member States can no longer interpret EU notions according to their national law and these notions can only interpret in a uniform and autonomous manner throughout the EU. The *Flos* case will be tested whether it survives in time by a recent request for a preliminary ruling in the *Cofemel* case.⁷¹ It remains to be seen whether the Court in this case will stick to its principle that for all works the same prerequisite applies, i.e. originality (in order for them to be protected) and originality can only be construed in a particular way.⁷²

Conclusion

The CJEU's case law has been rather instructive in the area and comes down to the following conclusions:

1. The EU originality criterion (i.e. that a work needs to be an 'author's own intellectual creation') should be construed in a uniform and autonomous manner throughout the EU. Member States can no longer apply their national tradition to interpret the term.
2. It also applies to all works in the EU and not just to photographs, software and databases (where it is expressly mentioned in the relevant EU directives).
3. If a work forms a copyrightable subject matter, the only criterion for it to

69 C168/09, *Flos SpA v. Semeraro Casa e Famiglia SpA*, [2011] ECR I-00181.

70 Para [34].

71 C-638/17, *Cofemel – Sociedade de Vestuário SA v. G-Star Raw CV* (request for a preliminary ruling 6.12.2017).

72 I. Stamatoudi, 'Present and future of the copyright/design interface in Greece', in *Copyright/Design Interface in the EU*, ed. E. (Cambridge: Cambridge University Press, 2018), 80.

be protected is to be original, i.e. to be its author's own intellectual creation. No other criteria are applicable (such as fixation, registration, quantity, aesthetic criteria, permanence, distinction between different types of works (i.e. utilitarian v. artistic works), etc.).

4. Classification is also precluded as it is capable of leaving out of the scope of copyright protection subject matter that does not fall in one of the predefined categories in the law, which may however be considered to be original.

5. According to the EU originality criterion, the work should not solely involve substantial skill and labour; its author needs to have made free and creative choices and to have stamped the work with his or her 'personal touch'.

6. Even small parts of a work are protected as long as they are original (i.e., in the sense that they contain some of the elements, which are the expression of the intellectual creation of the author of the work). In effect, the criteria that apply in relation to a work or part of it are qualitative rather than quantitative since the length of a work should not be an issue.

7. In the light of the above, copyright law should not preclude the protection of a work on the basis of a *de minimis* criterion.

Subject matter (i.e. expression) qualifying for copyright protection should be precise and objective. In that sense, taste and smell do not qualify for copyright protection.

Thus, expression, which is precise and objective, qualifies for copyright protection as long as it is original.

8. In the case of computer programs, the expression in any form of a computer program is protected in as far as its reproduction engenders the reproduction of the computer program itself, thus enabling the computer to perform its task. If that is not the case, the subject matter at issue is not protected as a computer program. However, it may be protected as a work (in as far as it is original).

The above findings seem to affect significantly the notion of originality in Cyprus. According to Cypriot copyright law, an object is not protected unless it is a) classified, b) fixated, and c) original. Originality is defined in s. 3(2)(b) Law 59/1976 as amended⁷³

'[a] work is original if it is a personal intellectual creation of the author and not a copy of an existing work or preliminary work or model work. The recognition of protection does not depend on the implementation of any additional criteria'.

According to *Socratous v. Gruppo Editoriale Fabbri* and *Gnosis Publishing Company Limited* (1992) case, where the judge referred to the Peterson's wording in *University of*

73 The Copyright Law, Law 59/1976, as amended by Law 63/1977, Law 18(I)/1993, Law 54(I)/ 1999, Law 12(I)/200, Law 128(I)/2002, Law 128(I)/2004, Law 123(I)/2006, Law 181(I)/2007, Law 207(I)/2012, Law 196(I)/2014, Law 123(I)/2015 and Law 66(1)2017.

London Press Ltd. v. University Tutorial Press Ltd. Case [1916] 2 Ch. 601 (UK):

'The word "original" does not in this connection mean that the work must be the expression of original or inventive thought. Copyright Acts are not concerned with the originality of ideas, but with the expression of thought [...]. The originality, which is required relates to the expression of the thought. But the Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work – that it should originate from the author'.

In other words, according to the Cypriot originality criterion, it suffices, for a work to be protected, it should not be a copy of another work and should originate from its author.

CJEU case law suggests that the Cypriot originality criterion on 'judgment, skill and labour', which provides that a work is original if it originates from the author⁷⁴ and is not copied from another work, no longer suffices, even if the skill and labour involved are significant. The Cypriot criterion should be construed in a manner that comes closer to the continental notion of originality and conforms to the CJEU's case law. Even if Cyprus opts to maintain its current wording in the law, this wording should be interpreted to reflect the fact that a work should not only originate from the author but that the author should have also made free and creative choices and should have stamped the work with his personal touch.

There also seem to be repercussions on the requirements of classification and fixation under Cypriot law. According to s. 3(2)(b) Law 59/1976 as amended, for a work to attract copyright protection it needs to come within one of the specific categories of works as listed in the relevant act.⁷⁵ According to EU copyright law, works are protected insofar as they are original. No other prerequisite applies. One could argue that any other (national) prerequisite contradicts EU law and therefore cannot stand. Other criteria such as *de minimis* or quantitative criteria with regard to a work or parts of it (such as its length), classification and fixation (or permanence),⁷⁶

74 See UK case law in this respect, which reflects the ideas adopted by Cypriot law, e.g. *Ladbroke (Football) Ltd v. William Hill (Football) Ltd* (1964) 1 All ER 465, per Lord Pearce, 479. See also *University of London Press Ltd v. University Tutorial Press Ltd* (1916) 2 Ch 601, per Peterson J, 609. See the *Walter v. Lane case* (1900) AC 539 and *Interlego AG v. Tyco Industries Inc.* (1988) 3 All ER 949. See also *Sawkins v. Hyperion Records Limited* (2005) All ER 636. See also P. Torremans, *Holyoak & Torremans Intellectual Property Law*, 6th ed. (Oxford: Oxford University Press, 2010), 180. Yet, skill, judgment and labour merely in the process of copying someone else's work cannot confer originality. *Biotrading & Financing OY v. Biobit Ltd* (1998) FSR 109 and *Interlego v. Tyco*.

75 Section 3(1) Subject to the provisions of this section, the following are protected by this law: (a) under copyright; (i) scientific works; (ii) literary works; (iii) musical works; (iv) artistic works; (v) films; (vi) databases; (vii) sound recordings; (viii) broadcasts; and (ix) publications of works that were formerly unpublished.

76 Section 2(1).

also cannot be maintained. In this respect Cypriot copyright law has to be amended to meet the requirements of EU copyright law.

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