

# The Harmonisation of EU Copyright Law: The Originality Standard

Thomas Margoni

## 1 Introduction

Almost 25 years have gone by since the first EU Directive in the field of copyright was enacted (Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs now consolidated in Directive 2009/24/EC of 23 April 2009). As with many other directives that followed, that Directive was “vertical” in scope, meaning that its “harmonising” effects were limited to the specific subject matter therein regulated (in this case, software). Similar examples of “vertical harmonisation” are found in the field of photographs and databases as well as in almost any other EU Copyright Directive, making this fragmented approach a typical trait of EU Copyright law harmonisation. The reason for what could be labelled ‘piecemeal legislation’ can be linked to the limited power that the EU had, until recently, in regulating copyright. As it can be easily verified from their preambles, all EU Copyright Directives are mainly grounded in the smooth functioning of the internal market. It is the internal market – rather than copyright – that has driven the harmonisation of EU copyright law to date.

Nevertheless, if we look at the entire body of EU copyright law today (the so called *acquis communautaire*) it certainly appears much more harmonised than what may be suggested by the above. The reason for this “unexpected” situation can most likely be found in the fundamental role that the Court of Justice of the European Union (ECJ) has played in interpreting and – some would argue – in creating EU copyright law. Using the example of the originality standard, this paper offers an overview of the past and current state

of EU copyright, of the case law that has allowed the ECJ to develop and affirm its own concepts and indicates what could and should be expected for the future of EU copyright law. The paper suggests that a common set of rules and standards such as those governing originality in copyright are an essential element of any economic and political union, such as the EU. How to reach these shared standards, that is to say, whether full harmonisation or unification of EU copyright law should be achieved through judicial interpretation or through legislative intervention (as a form of expression of the political and democratic process) exceeds the purpose of this article, but clearly represents a fundamental issue for the future of the EU (copyright) legal framework.

In the first part of this chapter, the international copyright landscape is sketched out, showing that the standard of originality has ultimately always been a matter of national law. The second part deals with EU copyright law and identifies two key moments in the harmonisation of originality: a first phase where the EU legislature harmonised only specific subject matter and consequently the originality standard in relation only to these subject matter (so called vertical harmonisation); a second phase where the ECJ interpreted the international and EU legislative framework in a way that expands horizontally (i.e. to all subject matter covered by EU copyright law) the originality standard therein contained. Then there is provocatively presented the argument that a third phase could be identified in the ECJ decision C-168/09 *Flos SpA v. Semeraro Casa e Famiglia SpA* [2011] E.C.R. I-00181, a case on EU design rights, that nonetheless has a direct impact on the harmonisation of copyright protection and in particular on originality. Finally, this part looks at how national courts in EU Member States have reacted to the judicial activity (or activism) of the ECJ in the field of originality: this represents a fundamental passage in determining the effectiveness of ECJ's originality standard at the Member States level. The third part of the chapter presents some conclusions on what could and should be expected for the future of EU copyright law.

## 1.1 *The International Landscape*

Originality is an essential requirement of copyright law: only works that show some minimum amount of this attribute attract protection. However, generally speaking, originality lacks a precise statutory definition (see Ricketson and Ginsburg 2005, esp. 8.05; Bently and Sherman 2014, 93; Cornish et al. 2013, 11-04; Gervais and Judge 2005, 16; Goldstein and Hugenholtz 2013, 192; Ginsburg 1992; Gervais 2002; Gravells 2007; Judge and Gervais 2010; Schriker 1995). None of the major international copyright treaties explicitly define what it is and which level it has to reach in order to enable copyright to arise, bringing a leading scholar in the field to state:

So far as a particular threshold standard for protection is concerned, the requirements [of the Berne Convention] arise chiefly as a matter of inference,

requiring the reader to work through a number of different provisions (Ricketson 2009, 59).

Indeed, the *Berne Convention for the Protection of Artistic and Literary Works* 828 U.N.T.S. 221 (1886), the oldest and most relevant convention in the field, postulates a general requirement of originality only indirectly and implicitly. Article 2(1) of the Convention, dedicated to “Protected Works”, establishes that:

[T]he expression “literary and artistic works” shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression ...

The same article then provides an illustrative list of works included in such a broad definition. Books and other writings, lectures, choreographic works, musical compositions with or without words, cinematographic works, works of drawing, painting, architecture, sculpture, engraving, photographic works, works of applied art, illustrations, maps and plans are all examples of protected works. Similar lists are found in most national Copyright Acts.

As it can be seen, “originality” is not explicitly mentioned as a requirement in the general clause or in the list present in article 2(1)

(Ricketson and Ginsburg 2005, 8.87). All the same, the word “original” is not completely absent from the Convention. It can be found in article 2(3) dealing with “translations, adaptations, arrangements ... and other alterations”, which are protected as *original* works (see Ricketson and Ginsburg 2005, 8.87).<sup>1</sup> A similar provision is present in article 14-bis dealing with cinematographic works (see *Berne Convention for the Protection of Artistic and Literary Works* article 14-bis(1) BC; Ricketson 2009, 55).

Another useful element related to the presence of originality in the Convention can be found in article 2, section 5:

Collections of literary or artistic works such as encyclopedias and anthologies which, by reason of the selection and arrangement of their contents, constitute intellectual creations shall be protected as such, without prejudice to the copyright in each of the works forming part of such collections.

Similarly to the above mentioned case of translations, collections of literary or artistic works can be protected as autonomous – yet derivative – forms of expression. Not every collection is eligible, though: only those which by reason of the selection or arrangement of their contents constitute “intellectual creations” (see Ricketson and Ginsburg 2005, 8.87).<sup>2</sup> This last expression does not only state that a form of originality is necessary in order to trigger protection, but it also gives some more information regarding the type of originality required: intellectual creations.

The requisite of “intellectual creations” is noteworthy as it does not only apply to article 2(5), i.e. to collections of literary and artistic works, but it extends to all the subject matter covered by

---

<sup>1</sup>The word “original” is used twice in article 2(3) with two different meanings. The article states: “Translations, adaptations, arrangements of music and other alterations of a literary or artistic work shall be protected as **original** works without prejudice to the copyright in the **original** work”.

<sup>2</sup>As it is well known, the English version of the *Berne Convention* incorrectly reports “selection AND arrangement”. However, the original official French text speaks of “selection OR arrangement”, and this is the version that in case of interpretative contrast prevails. Therefore, even if the English translations still nowadays reports “AND”, the real requirement is – and has always been – “OR”.

article 2 (see Ricketson 2009, 57).<sup>3</sup> It has been said that an explicit definition of “intellectual creations” was indispensable only for the case of article 2(5), because the originality inherent in collections, as opposed to that in the works collected, “may not be as readily discernible” (Ricketson 2009; Gervais 2002). Accordingly, not only collections but also any other scientific or literary work such as books, lectures, musical compositions, songs, works of photography, and sketches, in order to comply with Berne standards have to possess the required type of originality, i.e. they have to be intellectual creations. This corresponds to the view of the ECJ (see *C-5/08 Infopaq International A/S v. Danske Dagblades Forening* [2009] E.C.R. I-06569). Nevertheless, what this exactly entails, how high – or low – the level of originality is, and what are the tests, standards, and elements that can fill-up with content the concept of intellectual creation remains a matter for national legislatures and courts (see *Infopaq International v. Danske Dagblades Forening* [2009]; Gervais 2002; Ginsburg 1992).

At the national level, traditionally common law countries have phrased the requirement of originality in the sense that the work must *originate* with the author, i.e. must not be copied, and it must be the result of “skill, judgement and/or labour” (see Bently and Sherman 2014, 96; Cornish et al. 2013, 11-04).<sup>4</sup> The United States and Canada developed their own standards (see Judge and Gervais 2010, 378). The United States requires a modicum of creativity (see *Feist Publications v. Rural Telephone Service* 499 U.S. 340 (1991), 346). This implies a higher degree of originality than the traditional skill, judgement and labour (*Feist Publications v. Rural Telephone Service* (1991), 346). In Canada, the Supreme Court, in *CCH Canadian v. Law Society of Upper Canada* [2004] 1 S.C.R. 339,

---

<sup>3</sup>“A line therefore seems to run from article 2(5) through article 2(3) to article 2(1) as follows: “original translations, adaptations, etc.” under article 2(5) and collections of works that are “intellectual creations” under article 2(3) are to be protected as “literary and artistic works” under article 2(1), suggesting that both originality and intellectual creation are correlative and implicit requirements for literary and artistic productions that otherwise fall under article 2(1)”.

<sup>4</sup>This is the classical formula historically employed by courts in common law countries and especially in the UK, although the precise wording varied over time adding or substituting elements.

created a new standard that, in the same words of the Court, is higher than the one historically applied in the United Kingdom but does not require creativity as in the United States (see *CCH Canadian v. Law Society of Upper Canada* [2004]). Other countries of this family, for example Australia and the United Kingdom, are likewise adjusting their own standards (see *Newspaper Licensing Agency v. Meltwater Holding* [2011] E.W.C.A. Civ. 890; Fitzgerald and Atkinson 2011).

Countries belonging to civil law traditions, instead, have shown the tendency to stress the personal relationship or personal input that the author puts into the work (Goldstein and Hugenholtz 2013, 192-193).<sup>5</sup> This difference, however, should not be misinterpreted and is often more declamatory than material. Historically, a rather low level of originality can be seen also in civil law countries, especially in relation to certain subject matter such as catalogues or technical manuals (e.g. *kleine Münze* or *petite monnaie*) (Goldstein and Hugenholtz 2013, 192-193; Lucas et al. 2012, 121).

These variegated conceptualisations of originality are all compatible with the Berne mandated requisite of “intellectual creations” since, as it has been noted, the determination of the precise meaning is left to national laws and tribunals. While it is arguable that the product of the “sweat of the brow” may be less “creative” than that of an “*oeuvres de l'esprit*” or of a “minimum of creativity”, it is fundamental to consider the extremely high variance not only across different legal traditions but even within the same legal system of what has been held protectable in different historical periods (see generally Gordon 1993; Merges 2007).

## 2 The European *Acquis Communautaire*

Until relatively recently, EU law did not regulate the standard of originality, nor copyright more generally. The reason can be found in the absence of a clear and direct attribution of powers to the EU to regulate copyright (principle of conferral) (see generally Benabou

---

<sup>5</sup>France requires “*oeuvre de l'esprit*”, Germany personal intellectual creations, Italy works of ingenuity of creative character.

1997).<sup>6</sup> Since its creation – and until recently – the main basis for EU intervention in the field of copyright were articles 26 and 114 of the *Treaty on the Functioning of the European Union* (TFEU) [2008] OJ C115/47 (see Eechoud et al. 2009, 1.2.2),<sup>7</sup> which have given the EU the competence to respectively adopt measures with the aim of establishing or ensuring the functioning of the internal market and the approximation of the laws of Member States (European Commission 1988).<sup>8</sup> Eventually, this lack of direct attribution of powers to regulate copyright in a systematic way led to the fragmentary and subject-matter specific approach taken by EU copyright directives, especially during 1990s.<sup>9</sup>

The same decade, though, also witnessed growing divergences in national originality standards of specific subject matter such as software, a trend that became of major concern for the European Commission due to the possible obstacles to intra-Community trade and the consequent negative impact on the smooth functioning of the

---

<sup>6</sup>*Consolidated Version of the Treaty on European Union (Maastricht Treaty)* [2008] OJ C115/13 enshrines the principle of “conferral” on the basis of which the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties.

<sup>7</sup>There are other Treatises' provisions that the EU legislature identified as legal basis to regulate copyright – such as article 53 (freedom of establishment), article 167 (common cultural heritage), and article 169 (consumer protection). Nonetheless, article 114 remains the single principal source of powers used to regulate copyright.

<sup>8</sup>Other interventions in the field of intellectual property can be seen in Directive 89/104/EEC on the approximation of trade mark laws (now replaced by Directive 2008/95/EC), and Directive 87/54/EEC on the legal protection of topographies. Recently, article 118 was introduced by the *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community* [2007] OJ C306/1 empowering the EU to create European intellectual property rights. It must be noted, however, that article 118 has enabled the creation of “uniform” intellectual property rights as opposed to “harmonising” the laws of Member States. Accordingly, article 118 constitutes the legal basis for the creation of a unitary title, indicatively through a EU Regulation, which is directly applicable in all Member States.

<sup>9</sup>This can be observed in different documents of the EC. In the *Green paper on copyright and the challenge of technology: copyright issues requiring immediate action*, for example, it can be read that the “Commission concluded that a directive on the legal protection of computer programs is a necessary step for the completion of the internal market” and that “the creation of a European information services market, currently divided by juridical and linguistic barriers, is of prime importance” (European Commission 1988, 5.4.1, 6.2.1).

internal market (see generally Ramalho 2014). The situation caused the EC to intervene in the field, nevertheless, besides a handful of legislatively harmonised subject matter – which as it will be seen *infra* included software, photographs and databases – the EU legislature did not reach the conclusion that a general and “horizontal” harmonisation of the concept of originality was necessary (see European Commission 2004). A conclusion, the latter, eventually reached by the ECJ a few decades later.

### **2.1 The Vertically Harmonised Standard of Originality in EU Copyright Law**

The result of the reported lack of direct attribution of powers in regulating copyright, combined with the internal market relevance of diverging originality standards, led to a “vertical” harmonisation (i.e. through legislative interventions regulating only specifically identified subject matter) of software (Directive 2009/24/EC of 23 April 2009 on the legal protection of computer programs, article 1(3)), databases (Directive 96/9 of 11 March 1996 on the legal protection of databases, article 3(1)), and photographs (Directive 2006/116/EC of 12 December 2006 on the term of protection of copyright and certain related rights, article 6). In recent years, however, that standard has been extended “horizontally” to all kinds of works covered by EU copyright law. This horizontal expansion has been operated by way of interpretation – and not without criticisms – by the European Court of Justice, which established that any work covered by EU copyright law is original if it is the “author’s own intellectual creation”; industrial design and applied art will receive an *ad hoc* analysis (see Eechoud 2012; Bently 2012; *Infopaq International v. Danske Dagblades Forening* [2009]; C-393/09 *Bezpečnostní softwarová asociace v. Ministerstvo kultury* [2010] E.C.R. I-13971; C-403/08 and C-429/08 *Football Association Premier League and Others v. QC Leisure and Others* and *Karen Murphy v. Media Protection Services* [2011] E.C.R. I-09083; C-145/10 *Eva-Maria Painer v. Standard VerlagsGmbH and Others* [2011] E.C.R I-12533; C-604/10 *Football Dataco v. Yahoo! UK and Others* [2012] EU:C:2012:115). This



section deals with vertical legislative harmonisation, while the horizontal judiciary one is analysed in the next Section.

### 2.1.1 Software

The concept of “author's own intellectual creation” appeared for the first time in EU copyright law in the Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs. The reasons that brought the EC to require such a standardised level of originality across the EU are explained in the *Green paper on copyright and the challenge of technology* (European Commission 1988) and relate to the emergence of different standards of protection for software in various EU countries. As the 1988 Green Paper reports (European Commission 1988), in Member States such as France and Germany courts offered protection to software only under specific conditions that differed from the originality standard usually required in those countries for other subject matter. This course of action was a source of concern to the European Commission which interpreted it as a potential threat capable of jeopardising the internal market in a field, software, witnessing an exponential growth in technological and economic terms (European Commission 1988, 5.6.3).

Nevertheless, the 1988 Green Paper did not provide the final formulation of the “author's own intellectual creation” standard which will eventually be found in the Software Directive . Yet, the Green Paper showed the direction, by pointing to a definition present in the Topography Directive enacted only one year before the publication of the Green Paper (Directive 87/54/EEC of 16 December 1986 on the legal protection of topographies of semiconductor products). According to that Directive, topographies are protected if they are the result of the “creator's own intellectual effort” and are not commonplace in the field (see European Commission 1988, 5.6.7). This concept of originality, it has been argued, is closer to the English and Irish common law originality standards than to those of continental Member States (Walter and Lewinski 2010, 5.1.8; see also European Commission 1985, Chapter 2; Turner 1986).

As pointed out by Walter and Von Lewinski, the notion of originality underwent different drafting phases and the expression “author's own intellectual creation” appeared for the first time in the Initial Proposal's Explanatory Memorandum and was carried over into the EC Amended Proposal (Walter and Lewinski 2010, 5.1.9). The Amended Proposal definition of originality was included into the final text of the 1991 Software Directive, in accordance to which a computer program is original if it is the author's own intellectual creation and no other criteria such as qualitative or aesthetic merits should be considered (see Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, Recital 8; Gompel and Lavik 2013).

The formula adopted in the 1991 Software Directive possesses an undeniable nature of compromise intended to reconcile the British and Irish understanding of originality with that of continental EU countries (Walter and Lewinski 2010, 5.1.10-5.1.16). This aspect – it has been pointed out – can be seen for instance in the choice of words which combines expressions typical of continental European countries (*intellectual creations*) with those typical of countries such as the UK and Ireland (*author's own*, in the sense the work must originate with its author, i.e. not being copied) (Walter and Lewinski 2010, 5.1.10-5.1.16).

In the 2000 EC Report on the Implementation of the Computer Program Directive (European Commission 2000), the EC recognised that the level of originality for software had been harmonised for the first time all over the EU, noting that “12 Member States lower[ed] the threshold for granting protection and the remaining three “lift[ed] the bar” (European Commission 2000, III). In particular, the EC noted on the one hand that countries such as Germany had abandoned their previous (higher) requirement of protection for computer programs (*Schöpfungshöhe*), while on the other hand, the United Kingdom had not yet implemented the new EU standard. This lack of compliance with EU law could prove, the EC pointed out, particularly problematic as the United Kingdom traditionally offered a lower standard of protection, i.e. skill and labour (European Commission 2000, V.1(e)).

### **2.1.2 Photographs**

The second directive proceeding to a vertical harmonisation of the originality standard is the Term Directive, which mandates that photographs which are original in the sense that they are the author's own intellectual creation shall be protected by copyright and that no other criteria should be applied to determine their eligibility for protection (Directive 2006/116/EC of 12 December 2006 on the term of protection of copyright and certain related rights (consolidated version), article 6). The strong similarity to the definition found in the Software Directive is apparent, as it is the character of compromise of the Directive. Not surprisingly, the Software Directive has been used as a reference model for the determination of the standard of originality for photographs (Walter and Lewinski 2010, 8.6.10).

Recital 17 of the original directive of 1993 (Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights) stated that in order to achieve a sufficient harmonisation of the term of protection – the main goal of that legislative act – photographic works, which due to their artistic or professional character are of importance within the internal market, have to be governed by a harmonised level of originality. In 2006, the 1993 Directive was codified by Directive 2006/116/EC of 12 December 2006 on the term of protection of copyright and certain related rights. In the 2006 codification, the reference to artistic or professional character disappeared, but it has been submitted that the change has not modified the standard laid out in Directive 93/98/EEC, Recital 17.

An important aspect in the protection of photographs under EU law is to be found in the last sentence of article 6 of the 2006 Directive: “Member States may provide for the protection of other photographs”. Differently from other “special” forms of protection, the regulation of non-original photographs is completely left to Member States (Directive 2006/116/EC; see also Perry and Margoni 2011). While the protection afforded to photographs at the Member State level was particularly inhomogeneous and complicated by the fact that some Member States offered a double-tier system of protection, the harmonising effects of this type of provision are

dubious (European Commission 2006, Part 1, n. 9). Allegedly, the explanation for what could be defined as an unsatisfactory approach to harmonisation (since “*Le critère d'originalité ... risque de perdre de son importance pratique*”) is probably to be found once again in the character of compromise of the legislative instrument rather than in a clear policy view (Benabou 1997, 385). Indeed, it has been pointed out that the inclusion of the author’s own intellectual creation harmonised standard for photography was “accidental” (see Eechoud 2012, 62).

### 2.1.3 Databases

The 1996 Database Directive affords copyright protection to databases which, by reason of the selection or arrangement of their contents, constitute the author's own intellectual creation and no other criteria shall be applied to determine their eligibility (see Directive 96/9 of 11 March 1996 on the legal protection of databases, article 3). Once again, a strong similarity of the requirements for protection can be traced to the 1991 Software Directive. This intention was confirmed by the EC which underlined the similar creative processes at the basis of databases and computer programs. Moreover, the European Commission stressed that computer programs are an essential component in database management (see Walter and Lewinski 2010, 9.3.7).

Furthermore, an important aspect of the Database Directive is the double-tier protection system that it creates. In addition to copyright, the directive creates a *sui generis* form of protection for substantial investments in the obtaining, verification and presentation of a database. This form of protection is different and autonomous from the one based on copyright and does not require any originality.

It is noteworthy that the two forms of protection operate independently from each other and can be both present in the same database if the respective requirements are met. The crucial aspect is that they protect two totally different goods: originality in the selection or arrangement of the database in the case of copyright (see *Football Dataco v. Yahoo!* [2012]; Bently and Sherman 2014, 93); the substantial investment in the obtaining, verification and

presentation (but not creation!) of the data in the case of the *sui generis* right (see C-46/02 *Fixtures Marketing v. Oy Veikkaus Ab* [2004] E.C.R. I-10365; C-203/02 *British Horseracing Board v. William Hill Organization* [2004] E.C.R. I-10415; C-338/02 *Fixtures Marketing v. Svenska AB* [2004] E.C.R. I-10497; C-444/02 *Fixtures Marketing v. OPAP* [2004] E.C.R. I-10549; Davison and Hugenholtz 2005; Dietrich et al. 2013).

### 3 The ECJ and the “Horizontal” Expansion of the Originality Standard

Between 2009 and 2012, in five landmark decisions (*Infopaq International v. Danske Dagblades Forening* [2009]; *Bezpečnostní softwarová asociace v. Ministerstvo kultury* [2010]; *Football Association Premier League v. QC Leisure and Karen Murphy v. Media Protection Services* [2011]; *Eva-Maria Painer v. Standard VerlagsGmbH* [2011]; *Football Dataco v. Yahoo!* [2012]) the ECJ took the opportunity to elaborate on the precise contours of the EU originality standard, which can be summarised as follows:

1. Under EU copyright law the required originality standard is the “author's own intellectual creation”. This standard applies horizontally to all subject matter covered by EU copyright directives (*Infopaq International v. Danske Dagblades Forening* [2009], 36).
2. The author's own intellectual creation is present when authors can exercise free and creative choices and put their personal stamp on the work (*Football Dataco v. Yahoo!* [2012], 38; *Infopaq International v. Danske Dagblades Forening* [2009], 45; *Bezpečnostní softwarová asociace v. Ministerstvo kultury* [2010], 50; *Eva-Maria Painer v. Standard VerlagsGmbH* [2011], 89, 92).
3. When an expression is determined by technical or functional rules, such as when there is only one way to express an idea, or the expression is predetermined by a specific goal or constrained by narrow rules that leave no

space for free and creative choices no originality can be present (*Football Association Premier League v. QC Leisure and Karen Murphy v. Media Protection Services*, 98 [2011]; *Bezpečnostní softwarová asociace v. Ministerstvo kultury* [2010], 49; *Football Dataco v. Yahoo!* [2012], 39).

Additionally, a fourth point can be inferred from these cases. Whereas the evocative wording employed by the Court could suggest that the “author’s own intellectual creation” requirement is particularly high, a closer look at the facts decided probably indicates a different outcome. The ECJ recognised protection – or at least held that “it could not be excluded” – to an 11 word extract (see *Infopaq International v. Danske Dagblades Forening* [2009]), to a portrait photograph (see *Eva-Maria Painer v. Standard VerlagsGmbH* [2011]), to a graphical user interface (see *Bezpečnostní softwarová asociace v. Ministerstvo kultury* [2010]) and to a programming language (C 406/10 *SAS Institute v World Programming* [2012] E.C.J.), provided that they constitute the author's own intellectual creation – something for national courts to be determined. Match fixtures (see *Football Dataco v. Yahoo!* [2012]) and sports games (see *Football Association Premier League v. QC Leisure and Karen Murphy v. Media Protection Services* [2011]) were nonetheless excluded from protection due to the lack of free and creative choices.

Consequently, it may be argued that the new standard created by the Court gives much more emphasis to the *qualitative* rather than the *quantitative* type of authorial contributions (see Bentley and Sherman 2014, 102). Accordingly, a fourth principle may be formulated:

4. In order to reach the required level of originality it suffices that authors make some free and creative choices and therewith put their personal stamp onto the work. However, skill and labour, even in significant amounts, are not conducive to these free and creative choices and therefore do not lead to the creation of a work possessing

the required originality (see *Football Dataco v. Yahoo!* [2012], 53).<sup>10</sup>

In *Infopaq International v. Danske Dagblades Forening* [2009], the first ground-breaking decision of the ECJ in the originality “saga”, the Court underlined that it is apparent from the general scheme of the *Berne Convention*, in particular articles 2(5) and 2(8), that the protection of such certain subject matter as artistic or literary works presupposes that they are intellectual creations (*Infopaq International v. Danske Dagblades Forening* [2009], 34).<sup>11</sup> Similarly, other works (i.e. computer programs, databases and photographs) are protected by (EU) copyright only if they are original in the sense that they are their author’s own intellectual creation (*Infopaq International v. Danske Dagblades Forening* [2009], 35). In establishing a harmonised legal framework for copyright – the ECJ continued – Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (‘Infosoc Directive’) is based on the same principles, as evidenced by Recitals 4, 9 to 11 and 20 in the preamble thereof (*Infopaq International v. Danske Dagblades Forening* [2009], 36). Accordingly, copyright within the meaning of article 2(a) of the Infosoc Directive 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 (*Infopaq International v. Danske Dagblades Forening* [2009], 37). These words, successively confirmed in the other decisions under analysis, represent the crucial transition from a partially harmonised to a fully harmonised standard of originality through a process of judicial interpretation and regardless of any internal market relevance (Cornish et al. 2013, 11.10).

---

<sup>10</sup>*Football Dataco v Yahoo* [2012], 53 (1): “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”.

<sup>11</sup>Articles 2(5) and 2(8) of the *Berne Convention* respectively deal with collections of literary or artistic works which constitutes 'intellectual creations' and with news of the day having the character or mere items of press information

A subject matter possibly excluded from the full harmonisation of originality is perhaps found in the field of industrial design and applied art, although the situation is not completely clear. In *Flos v. Semeraro* [2011], the ECJ was asked to determine whether a moratorium in respect of copyright protection for industrial design was compatible with articles 17 and 19 of Directive 98/71/EC of 13 October 1998 on the legal protection of designs. While the Court's ruled against such compatibility, another aspect plays a relevant role for the case of originality, one that attracted less attention than what might have deserved (but see Bently 2012; see also Griffiths 2013; Derclaye 2014; Koenraad 2013).

At paragraph 34, the Court states:

However, 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 (*Flos v. Semeraro* [2011], 34).

The reasons why the European Court of Justice chose to take explicit position on this matter, which goes beyond what the referring court asked, are not entirely clear. A possible explanation is that in paragraph 34 the Court operated an additional extension of the concept of the author's own intellectual creation doctrine and covered the field of industrial design. This view seems supported by the Opinion of Advocate General Jääskinen in case C-5/11, even though the relevant passages were not carried over into the Court's judgement (see case C-5/11 *Criminal proceedings against Titus Alexander Jochen Donner* [2012] EU:C:2012:370, 27-31; see generally Bently 2012).

### **3.1 *Flos v. Semeraro* [2011]: Towards a Judicially Mandated (Perfect) Cumulation of Protection?**

The EU legal framework in the field of design rights protection (i.e. the protection afforded to the outer appearance of a product; see Regulation No. 6/2002 of 12 December 2001 on community designs article 3) is particularly relevant for present purposes because it



establishes the principle of cumulation with copyright, but leaves the determination of the extent and conditions of such cumulation – especially the level of originality required – to be determined by each Member State. This is the legal framework resulting from two pieces of EU secondary legislation: the Directive 98/71/EC of 13 October 1998 on the legal protection of designs – in particular article 17 – and the Regulation (EC) No. 6/2002 of 12 December 2001 on community designs – in particular article 96.

The provisions contained in article 17 of the 1998 Design Directive and article 96 of the 2002 Community Design Regulation, which represent the attempt to reconcile the variety of traditional national approaches in the field while maintaining a level of flexibility thanks to which Member States are able to choose between perfect and partial cumulation, have attracted criticisms as they allow the coexistence of different levels of originality in a market that aims to be, or become, common. The two provisions have nonetheless been successful in eliminating the solution whereby a product of applied art could be *either* protected by copyright *or* by industrial design (so called “non cumulability” or “separability”). It must be noted, however, that in the case of partial cumulation (allowed by the Design Directive and Community Design Regulation) if the level of originality chosen by the Member States is particularly high (say “artistic value” as required in Italy) the resulting situation is much closer to a system where cumulation of protections is in fact forbidden, rather than one where it is allowed. Accordingly, it can be said that the harmonising effects of the Design Directive and Community Design Regulation in terms of cumulability and originality standards are modest, only formally excluding the principle of “separability” from the possible choices available to Member States.

As it will be shown, it would have probably been preferable that the EU legislature had either allowed Member States to maintain their traditional categories (including separability), thereby granting a higher degree of discretion to Member States, or alternatively required perfect cumulation between designs and copyright, sacrificing Member States discretion for the sake of greater harmonisation. Instead, the chosen middle-way solution possesses

the disadvantages of both alternatives, without really achieving the goals of either.

Accordingly, the rules that apply in different EU jurisdictions may be fairly heterogeneous. For instance, a product of industrial design protected by a Community Registered Design is likely protected also by copyright, unless the applicable law has provisions similar to *e.g.* the Italian one, in which case it should be ascertained whether the product is not only original but possesses an artistic value (and the debate on the meaning of such standard is far from being settled, see Montanari 2010; Franzosi 2009). As a matter of fact, the same product can be protected by copyright in country A (say Germany) and not in country B (say Italy) causing clear frictions in trans-border trade, as some case law has demonstrated (see, *e.g.*, the facts of *Criminal proceedings against Titus Alexander Jochen Donner* [2012]).

Indeed, in countries implementing a partial cumulation rule, especially where the work of applied art needs to meet particularly high levels of originality such as that of the ‘artistic value’, many works belonging to industrial design and applied art will hardly benefit from copyright protection –at least in cases of registered designs.

The latter qualification is necessary because of the unclear effects of the *Flos v. Semeraro* [2011] decision, in particular by paragraphs 34 and following (cited above). To the extent that it is reasonable to assume that the cited paragraphs have the effect of harmonising the originality standard in non-registered designs, it must be accepted that in countries performing a partial cumulation between design rights and copyright (i.e. requiring a different, usually higher, level of originality for works of applied art and industrial design), this is now allowed only for registered designs (national and community based).

In the different case of unregistered designs, *Flos v. Semeraro* [2011] mandates a regime of perfect cumulation because if works which may be unregistered design are protected under the Infosoc Directive (Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society) and, after *Infopaq International v. Danske*

*Dagblades Forening* [2009], the latter requires the now fully harmonised standard of the “author's own intellectual creation”, it follows that there is no space for a different originality threshold for unregistered designs.

This conclusion, however, seems to contrast with the plain meaning of the Design Directive and the Community Design Regulation (see Bently 2012; Griffiths 2013; Koenraad 2013; Derclaye 2014). The main problem is the identification of which works that may be unregistered designs are protectable under the Infosoc. In *Flos v. Semeraro* [2011], the ECJ only refers to the Design Directive, therefore it should be excluded that unregistered designs based on the Community Design Regulation (i.e. Unregistered Community Designs) are affected by the decision. This seems the only reading of *Flos v. Semeraro* [2011] that is consistent with a literal interpretation of the Community Design Regulation. In fact, the plain meaning of articles 1 and 96(2) and Recital 32 Community Design Regulation point in the direction that *Flos v. Semeraro* [2011] cannot apply to Unregistered Community Designs. Article 1 Community Design Regulation establishes that the expression “community design” refers to both registered and unregistered community designs. Article 96(2) and Recital 32, even though not explicitly referring to “Unregistered Designs”, reserve to Member States the power to establish the level of originality for “community designs” an expression that, as provided by article 1, embraces both Registered and Unregistered Community Designs.

Consequently, there are two possible interpretations of paragraph 34 of *Flos v. Semeraro* [2011]: either it applies to unregistered designs other than Community Unregistered Designs (and it will be explained below how conceptually difficult this is), or it overwrites – or forces an unlikely reading of – the explicit allocation of powers to Member States operated by the EU legislator in article 96(2) Community Design Regulation.

The first of the two proposed interpretations brings to a paradoxical situation, since both the Directive and the Regulation have been drafted on the basis of very similar considerations and definitions (see Margoni 2013). In particular, it will not be easy to establish which works that “may be unregistered designs” can exist

that are not simultaneously Unregistered Community Designs. It could be opined that there are forms of national unregistered design protection which do not correspond entirely to Unregistered Community Designs. However, on the one side *Flos v. Semeraro* [2011] does not refer to “national unregistered designs”, but to “unregistered designs” in general, and on the other side such a form of protection seems to be currently available only in one country (see Bently 2012; Bently and Sherman 2014; Margoni 2013). Accordingly, the Court in *Flos v. Semeraro* [2011] almost certainly intended to harmonise originality for any form of unregistered designs (“works which may be unregistered designs”) including works that can be protected as Community Unregistered Designs, a conclusion that corresponds to the second of the suggested interpretations.

Nonetheless, this second interpretation of *Flos v. Semeraro* [2011] is troublesome. Given that a *Flos* unregistered design is virtually always also an Unregistered Community Design, it should be concluded that *Flos*'s harmonising effects of the originality standard apply to the Design Regulation even though the latter is not mentioned anywhere in the *Flos v. Semeraro* [2011] decision, nor in the nationally referred questions. More importantly, it should be concluded that the ECJ in *Flos v. Semeraro* [2011] proposed an interpretation that disregards what seems to be the plain meaning of an act of EU secondary legislation reserving specific powers to Member States.

While it could be argued that the latter interpretation should nonetheless be accepted in order to avoid the absurdity of the requirement of different originality standards for almost perfectly overlapping legal categories, there is yet another aspect that may cause institutional discomfort.<sup>12</sup> The expansion of *Flos v. Semeraro* [2011] harmonising effects of the originality standard can only apply to non-registered designs, as explicitly indicated by the Court at

---

<sup>12</sup>However this interpretation would contrast with the plain meaning of the Design Regulation, especially article 96(2). The latter seems to apply to both Community Registered and Unregistered Designs and therefore Member States should be free to determine the level of originality for Community Unregistered Designs. Since the protection of UCD is automatic upon creation this situation appears in logical contradiction with the statement of the ECJ at paragraph 34 of *Flos v. Semeraro* [2011].

paragraph 34 (and in article 17 Design Directive and article 96(2) Community Design Regulation). This provision is clear and explicit and there seems to be no space for ambiguity or creative interpretation.

It follows that in countries implementing partial cumulation, a non-registered design can be protected by copyright if it reaches the (usually lower) level of the author's own intellectual creation. However, if the same design is successively registered – during the 1 year grace period for example – it will most likely not qualify for copyright protection any longer, since the new (usually higher) standard, for instance “artistic value”, needs to be met and only very few works of applied art will be able to reach it.

Whereas the latter aspect could be seen favourably by critics of the possibility to protect industrial design cumulatively by design rights *and* copyright, the general legal uncertainty introduced by the ECJ decision cannot be easily accepted. In particular, it seems hard to imagine that the Court did not anticipate the above described situation and the consequent legal effects. Unless, of course, one sees in the ECJ pronouncement a “message” to those Member States that are still taking advantage of the possibility offered by article 17 Design Directive and article 96 Community Design Regulation (the questions referred by the national court in *Flos v. Semeraro* [2011] did not ask the standard of originality in design rights to be addressed, but related to a moratorium in the protection of industrial design that the Italian government insistently tried to maintain). The message that the ECJ may hypothetically have tried to convey is to abandon the possibility of different levels of originality for applied art (*sic*, registered designs) – something that the same ECJ knows cannot be obtained by interpretative harmonisation given the plain meaning of article 17 Design Directive and article 96 Community Design Regulation – and to adjust to the now pervasive standard of the “author's own intellectual creation”. In this way, not only the originality standard for copyright would achieve absolute harmonisation at the EU level (i.e. including registered designs), but also the aspect of partial/perfect cumulation of protection will be solved by implementing the same standard across the common market.

It is interesting to note that this seems the direction spontaneously taken by e.g. the German Supreme Court, which has recently abandoned its previous doctrine on the basis of which products of industrial design required a higher threshold of originality (see *Geburtstagszug* [2013] I ZR 143/12). It will be interesting to see the reactions of other Supreme Courts and national legislatures in the future.

In conclusion of this section, it must be observed that if the proposed hypothetical reading of *Flos* will be confirmed, it shall be acknowledged that the ECJ has taken yet another approach in the harmonisation of EU copyright law. In the past, ECJ decisions formed the legal basis for subsequent legislative interventions by the EU legislature, in what could be figuratively seen as institutional collaboration in the legislative process.<sup>13</sup> More recently, the ECJ directly intervened (by stealth and substituting itself to the legislature as it has been sharply pointed out, see Bently 2012) in the harmonisation of EU copyright law by interpretatively expanding a number of EU copyright concepts (see generally Bently and Sherman 2014). With this last intervention, the ECJ might have gone a step further and openly indicated to Member States how to implement secondary legislation which explicitly allowed Member States to choose among different possibilities, thereby intervening on a power that the EU legislature had explicitly reserved to Member States.

#### **4 The Effects of “Author’s Own Intellectual Creation” on Member State Domestic Laws**

The effects of the ECJ author's own intellectual creation doctrine on national courts have only recently started to unfold. Certainly, the new EU standard is unique and pervasive in the sense that no other

---

<sup>13</sup>As it is known: C-158/86 (*Warner*) led to Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property; C-341/87 (*EMI Electrola*) led to Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights; C-62/79 (*Coditel*) led to Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission.

tests are allowed under domestic laws. However, it will be a matter for national courts to establish whether a specific work meets the “author’s own intellectual creation” definition. In so doing it is safe to assume that courts will be guided – consciously or unconsciously – by their own traditional legal constructions. Legal-cultural concepts are usually deeply rooted in the minds of law practitioners and interpreters and tend to survive, at least initially, legal or judicial reforms (see generally Rouland 1994).

That being said, one aspect can certainly be considered settled: the extent to which national legal systems recognised a different level of originality other than that attributed to software, databases and photographs, this is not compliant with Union law any longer. Currently, only one standard of originality applies to all subject matter covered by EU copyright law. There may be an exception connected to registered designs on the basis of articles 17 and 96 of, respectively, the Design Directive and the Design Regulation, but, as seen above, the relationship of these provisions and *Flos v. Semeraro* [2011] is not yet completely clear (see *Criminal proceedings against Titus Alexander Jochen Donner* [2012]; Bently 2012).

Regarding the implementation of the “author’s own intellectual creation” standard by national courts, it is plausible that these will recognise the new ECJ test and interpret it in a way that reflects their own traditional standards. In some countries this is made particularly easy by an undeniable similarity in the definitions of originality. This is for example the case in Germany, where works are protected as long as they are the “personal intellectual creation of an author” (EU: “author’s own intellectual creations”). Other cases of similarity, even if not so straightforward, can be seen for instance in France and Italy where works are protected if they are *oeuvres de l’esprit* – underscoring therefore the personal elements – or if they are *opere dell’ingegno di carattere creativo*, underlying the presence of an intellectual creation.

Yet, it is not at the terminological level that the issue will be solved, but at the interpretative one. Under this perspective, UK courts have already had occasion to state that the new ECJ standard restates, but does not substantially change the legal situation (see

*NLA v Meltwater* [2010] E.W.H.C. 3099, 81, affirmed in [2011] E.W.C.A. Civ 890). Likewise, the Dutch Supreme Court held that the new EU standard is in line with the one commonly employed by courts in the Netherlands (*Stokke v. H3 Products* [2013] S.C. [4.2]) and the Dutch government repealed the part of the Dutch Copyright Act that granted protection to *non-original* writings, precisely as a consequence of the *Football Dataco v. Yahoo* [2012] decision (see Beunen 2012). In a similar fashion, the Supreme Court of Belgium in 2013 confirmed that in light of the ECJ case law and in particular *Eva-Maria Painer v. Standard VerlagsGmbH* [2011], a work – specifically a fireplace design – is original if it is the intellectual creation of the author bearing his personal stamp (see *M-Design Benelux SPRL v. Geoffrey Bontemps SPRL* [2013] S.C. C.12.0263.N/1). This ruling reversed a previous decision of the same Court holding that the “personal stamp” element was not required under Belgian law (see *Artessuto v. B&T Textilia* [2012] S.C. C.11.0108.N).

In conclusion, it is likely that when courts start consistently implementing the new “author’s own intellectual creation” standard they will still argue that a given work was the result of free and creative choices on the basis of their traditional categories to the extent that this is still possible. Beyond this limit courts (or legislatures) will need to abandon the old standard. Nevertheless, where to draw the line will likely be the object of a fair amount of national court decisions in the years to come.

## 5 Final Observations and Future Perspectives

In conclusion, and putting the issue of industrial design aside, the newly defined level of originality – the judicially defined author's own intellectual creation – can be said to be placed in between the high standard expressed in the past by some national courts (e.g. Germany), at least in relation to certain subject matter such as software, and the low standard sometimes provided by UK courts (“sweat of the brow”). This reading seems in line with the legislative history of the Directives that harmonised the requirement of originality (European Commission 1988, 5.6.4).



An aspect worth noting, however, is the view expressed by Advocate General Mengozzi in its opinion in *Football Dataco v. Yahoo* [2012], in which he pointed out that the expression *author's own intellectual creation* “echoes a formula which is typical of the continental copyright tradition” (*Football Dataco v. Yahoo* [2012] 37). This seems to contrast with the legislative history exposed above, which documented that the “author’s own intellectual creation” expression – at least in the original formulation drafted for computer programs – was a compromise standard which *if* closer to any tradition it would be to that of common law rather than civil law countries. If the statement of the Advocate General is correct, it should be logically inferred that the ECJ did not only expand the concept of “author’s own intellectual creation” beyond the three vertically harmonised subject matter.<sup>14</sup> The ECJ also modified the ambit of application of “author’s own intellectual creation”, bringing it closer to the continental formula, in spite of its original construction (see generally Derclaye 2014, 718; Griffiths 2013). So far, the Advocate General's view has not been confirmed in other pronouncements.

But perhaps, even more important than where to draw the line is the principle that a line – and only one – has to be drawn. As shown in the preceding sections a shared standard of originality is a necessary element for a copyright framework that aims to operate in a common market and society. Different levels of originality can only operate within different jurisdictions. However, if the European Union is to finally become said common market and society then standards such as that of originality in copyright law need to be fully harmonised in order to offer a level playing field to all EU citizens. How to reach these shared standards, that is to say, whether full harmonisation or unification of EU copyright law should be achieved through judicial interpretation or through legislative intervention (as a form of expression of the political and democratic process) exceeds the purpose of this article, but clearly represents a fundamental issue for the future of the EU (copyright) legal framework.

---

<sup>14</sup>Although the element of a “personal stamp of the author” was originally introduced by the EU legislature.

Recently, in a number of policy documents and initiatives, the European Commission seems to have finally reclaimed the leading role in the harmonisation of EU copyright law, beyond the simple issue of originality. In the *Public Consultation on the Review of the EU Copyright Rules* of 2013 (European Commission 2013), the Commission formulated a number of questions that revealed the fact that, at least in interlocutory terms, the European legislature is considering additional forms of intervention in the field of copyright law, including by way of a Regulation that would render uniform (i.e. not subject to national implementing legislation) the copyright framework (European Commission 2013, 36). Taking inspiration from this renewed institutional interest, different commentators showed their support in favour of a uniform copyright framework in the EU (see, e.g. European Copyright Society 2014). This solution, today (*rectius* since 2009) is made possible thanks to the new article 118 TFEU introduced by the Lisbon Treaty which gives the EU the power to create unitary titles (i.e. Regulations) in the field of intellectual property.

Realistically, since a unitary title will likely need some time to be implemented, and in consideration of the fact that some outstanding issues need immediate reform, it is advisable that the EU legislature operate on two separate but parallel ways (European Copyright Society 2014). On the one hand, a short term intervention, in the form of (amending) Directive(s), to correct the most outstanding issues connected with EU copyright law (for examples in the field of exceptions and limitations). On the other hand, a long term intervention by way of a Regulation intended to make EU copyright law uniform in all aspects, not only originality (see European Copyright Society 2014, 78).

The EU institutional framework has already shown its capacity to harmonise (copyright) concepts by way of interpretation in ways that were certainly not foreseen during the drafting phase of the Directives containing the harmonised concepts. This form of harmonisation is probably unavoidable when a properly formulated question reaches the ECJ. As evidenced in this article, these judicially driven forms of harmonisation, while certainly filling out outstanding gaps in the EU legal framework, are not exempt from

criticism. Nevertheless, they are certainly avoidable, or at least their impact can be greatly minimised, by an EU legislature that intervenes with a clear and ambitious agenda in the indicated fields. The recently published Digital Single Market Strategy seems to represent a first step in this direction, although perhaps one that is still too modest (see European Commission 2015).

## Reference list

- Benabou, Valerie. 1997. *Droits d'auteur, droit voisins et droit communautaire*. Brussels: Bruylant.
- Bently, Lionel. 2012. The return of industrial copyright? *European Intellectual Property Review* 34:654-672.
- Bently, Lionel, and Brad Sherman. 2014. *Intellectual property law*. New York: Oxford University Press.
- Beunen, Annemarie. 2012. Geschriftenbescherming: the Dutch protection for non-original writings. In *A century of Dutch copyright law*, eds. P. Bernt Hugenholtz, A Quaedvlieg, and D Visser. Amsterdam: DeLex.
- Cornish, William, David Llewelyn, and Tanya Aplin. 2013. *Intellectual property: patents, copyright, trade marks, and allied rights*. London: Sweet and Maxwell.
- Davison, Mark, and P. Bernt Hugenholtz. 2005. Football fixtures, horseraces and spin-offs: the ECJ domesticates the database right. *European Intellectual Property Review* 27 (3):113-118.
- Derclaye, Estelle. 2014. The Court of Justice copyright case law: quo vadis? *European Intellectual Property Review* 36 (11):716-723.
- Dietrich, Nils, Lucie Guibault, Thomas Margoni, Krzysztof Siewicz, and Andreas Wiebe. 2013. Possible forms of legal protection. In *Safe to be open: study on the protection of research data and recommendations for access and usage*, eds. Lucie Guibault, and Andreas Wiebe. Göttingen: Universitätsverlag Göttingen.

- Eechoud, Mireille van. 2012. Along the road to uniformity: diverse readings of the Court of Justice Judgments on copyright works. *Journal of Intellectual Property, Information Technology and Electronic Commerce Law* 1:60-80.
- Eechoud, Mireille van, P. Bernt Hugenholtz, Stef van Gompel, Lucie Guibault, and Natali Helberger. 2009. *Harmonizing European copyright law: the challenges of a better lawmaking*. The Hague: Kluwer Law International.
- European Commission. 1985. Proposal for a Directive on the legal protection of topographies of semiconductor products. The Hague: European Commission.
- European Commission. 1988. Green paper on copyright and the challenge of technology: copyright issues requiring immediate action. Brussels: European Commission.
- European Commission. 2000. Report on the implementation and effects of Directive 91/250/EEC on the legal protection of computer programs. The Hague: European Commission.
- European Commission. 2004. Review of the EC legal framework in the field of copyright and related rights. Brussels: European Commission.
- European Commission. 2006. Proposal for a Council Directive harmonising the term of protection of copyright and certain related rights. The Hague: European Commission.
- European Commission. 2013. Public consultation on the review of the EU copyright rules: consultation document. The Hague: European Commission.
- European Commission. 2015. A digital single market strategy for Europe. The Hague: European Commission.
- European Copyright Society. 2014. Submission to the Public Consultation on the review of the EU copyright rules. <http://infojustice.org/wp-content/uploads/2014/03/ECS-answer-to-EC-consultation-on-copyright-Review.pdf>. Accessed 20 November 2015.
- Fitzgerald, Brian, and Benedict Atkinson (eds). 2011. *Copyright future, copyright freedom*. Sydney: Sydney University Press.

- Franzosi, Mario (2009) Design italiano e diritto italiano del design: una lezione per l'Europa?, *Rivista di Diritto Industriale*, Parte I, 2, p. 71
- Gervais, Daniel. 2002. Feist goes global: a comparative analysis of the notion of Originality in copyright law 949. *Copyright Society of the U.S.A.* 49:949-981.
- Gervais, Daniel, and Elizabeth Judge. 2005. *Intellectual property: the law in Canada*. Quebec: Carswell.
- Ginsburg, Jane. 1992. No 'sweat?': copyright and other protection of works of information after Feist v. Rural Telephone. *Columbia Law Review* 92:338-388.
- Goldstein, Paul, and P. Bernt Hugenholtz. 2013. *International copyright: principles, law, and practice* New York: Oxford University Press.
- Gompel, Stef van, and Erlend Lavik. 2013. Quality, merit, aesthetics and purpose: an inquiry into EU copyright law's eschewal of other criteria than originality. *Revue Internationale du Droit d'Auteur* 236:100-295.
- Gordon, Wendy. 1993. A property right in self-expression: equality and individualism in the natural law of intellectual property *Yale Law Journal* 102 (7):1533-1609.
- Gravells, Nigel. 2007. Authorship and originality: the persistent influence of *Walter v. Lane*. *Intellectual Property Quarterly* (3):267-293.
- Griffiths, Johnathan. 2013. Dematerialization, pragmatism and the European copyright revolution. *Oxford Journal of Legal Studies* 33 (4):769-790.
- Judge, Elizabeth, and Daniel Gervais. 2010. Of silos and constellations: comparing notions of originality in copyright law. *Cardozo Arts and Entertainment Law Journal* 27:375-408.
- Koenraad, Hidde. 2013. Dutch Supreme Court Tripp Trapp children's chair cases. *Journal of Intellectual Property Law and Practice* 8 (12):909-912.

- Lucas, André, Henri-Jacques Lucas, and Agnès Lucas-Schloetter. 2012. *Traité de la propriété littéraire et artistique*. Paris: LexisNexis.
- Margoni, Thomas. 2013. Not for designers: on the inadequacies of EU Design Law and how to fix it. *Journal of Intellectual Property, Information Technology and E-Commerce Law* 4 (3):225-248.
- Merges, Robert. 2007. Locke for the masses: property rights and the products of collective creativity. *Hofstra Law Review* 36:1179-1191.
- Montanari, Massimo (2010) L'Industrial Design tra modelli, marchi di forma e diritto d'autore, *Rivista di Diritto Industriale*, Parte I, p. 7
- Perry, Mark, and Thomas Margoni. 2011. Scientific and critical editions of public domain works: an example of European copyright (dis)harmonization. *Canadian Intellectual Property Law Review* 27:157-170.
- Ramalho, Ana. 2014. Conceptualising the European Union's competence in copyright: what can the EU do? *International Review of Intellectual Property and Competition Law* 45 (2):178-200.
- Ricketson, Sam. 2009. Threshold requirements for copyright protection under the International Convention. *World Intellectual Property Organisation Journal* 1:51-62.
- Ricketson, Sam, and Jane Ginsburg. 2005. *International copyright and neighbouring rights: The Berne Convention and beyond*. New York: Oxford University Press.
- Rouland, Norbert. 1994. *Legal Anthropology* London: Stanford University Press.
- Schricker, Gherard. 1995. Farewell to the "level of creativity" (Schöpfungshöhe) in German copyright law? *International Review of Intellectual Property and Competition Law* 26 (1):41-48.
- Turner, Amedee. 1986. Report on the Proposal for a Directive on the legal protection of original topographies of semiconductor

Draft version

Please, send your comments to [thomas.margoni@stir.ac.uk](mailto:thomas.margoni@stir.ac.uk)

products. The Hague: Committee on Legal Affairs and  
Citizen's Rights.

Walter, Michael, and Silke von Lewinski. 2010. *European copyright  
law: a commentary*. New York: Oxford University Press.