

The Semantics of Authorial Originality: Four Pillars

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Abstract

In March 2017, the U.S. Supreme Court published its opinion in *Star Athletica, LLC v. Varsity Brands, Inc.*; in September of 2019, the Court of Justice of the European Union published its opinions in *Cofemel v. G-Star Raw CV*; and in June 2020, its opinion in *Brompton Bicycle Ltd v. Chedech*. The American case treats the copyrightability of a design on cheerleading uniforms, and the European cases treat the copyrightability of the design of denim jeans and the design of a folding bicycle, respectively. Copyright protection for articles of clothing and designs differs markedly between the United States and Europe, but this particular trio of high court cases construes something more fundamental while parsing the contours of useful articles under their respective laws: they draw attention to the existing legal landscapes for determining originality. If originality is the *sina qua non* of copyright law, per 1991's U.S. Supreme Court opinion in *Feist Publ'ns v. Rural Tel. Serv. Co.*, then these cases, and the laws and cases they rely on, present some new—and some old—guidance and lingering questions regarding the very underpinning of copyrightability.

This paper explores and compares American and European law, underscores similarities between them and inconsistencies within them, and concludes that originality remains an essentially intimate, human faculty, and one that escapes legal definition across creative media. That said, aspects of copyright law save it from itself, for example by conferring stronger protection on works that demonstrate a higher saturation of creativity. As the digital economy grows and shines a light on the distinctions between individual jurisdictions' copyright laws, the modest—but steadfast—hurdle to copyrightability remains indicia of ideation, imagination, and individuality. This is especially important right now as countries consider whether artificial intelligence is or should be eligible to claim authorship in the works they produce. While “author's own intellectual creation” is European verbiage describing the floor for authorial originality for the Member States of the European Union, it is equally serviceable in the United States and elsewhere. Because the types of works considered copyrightable are potentially expanding on both sides of the Atlantic based on the Court decisions listed above, it is important to demonstrate, first-

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ly, that originality in a work is not a foregone conclusion and, secondly, that many jurisdictions share an approach, if not a specific test or definition, for finding originality.

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I. Introduction: Originality’s History and Inherent Imprecision

The concept of originality. . . is not used in a completely uniform manner. [S]ome . . . national laws . . . apply a more demanding originality test. Under (those) laws, it is not sufficient that a production is a result of intellectual creation; in addition to that, it is also a condition that, in a way, it must be an “individual” creation “reflecting the personality of the author.” Although the differences in respect of the concept of originality still exist under national legislation, there is a trend that they are fading away, and a kind of convergence is taking place The direction of this trend may be summed up as follows: mere “sweat of the brow” is not sufficient for a production to qualify as a work; for this, it is also necessary that it be an intellectual creation. However, at the same time, this is the only condition; that is, it is not justified to require some “higher” level of creativity or some “reflection of the personality of the author” going beyond the mere requirement of intellectual creation.¹

¹ Mihály Ficsor, GUIDE TO THE COPYRIGHT AND RELATED RIGHTS TREATIES ADMINISTERED BY WIPO, WIPO Publication 891, 2003, at BC 2.8-2.9

Human creativity, the underpinning of any copyright regime, is unbounded and fluid.² One of the principal duties of copyright law is to keep pace with the types of creative works that are introduced into the world to both effectively reward authors and responsibly foster their works' dissemination. Mihály Ficsor authored a *Guide to the Copyright and Related Rights Treaties Administered by WIPO* in 2003.³ His forecast that the originality requirement would stabilize across jurisdictions is now coming to pass while other copyright divergences attract headlines and potentially cause legal headaches for a variety of parties on a variety of issues.⁴ However, with regard to copyright's originality requirement, jurisdictional convergence is worth exploring and celebrating, both because the emerging standard is, firstly, reasonable and flexible, and, secondly, because it gives authors and artists a common denominator for originality that is generally as applicable in New York as it is in Prague.⁵ This convergence also permits countries to explore areas of actual divergence in their respective copyright laws when considering whether and how to retrofit those laws as artificial intelligence matures. The present analysis will not provide an exhaustive background on considerations that are primed to fall by the wayside, including the "sweat of the brow"⁶ doctrine, nor will it expressly consider types of

² H.R. Rep. No. 94-1476, at 51 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5664 ("Authors are continually finding new ways of expressing themselves, but it is impossible to foresee the forms that these new expressive methods will take." *Id.*

³ *See* Ficsor, *supra* note 1.

⁴ At the time of this writing, Article 17 of Europe's Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market is undergoing discussion and planning for implementation in European Member States. Article 17 of the directive on the use of protected content by online content-sharing service providers has drawn both praise and criticism from European experts. *See, e.g.,* Mihály J. Ficsor, *Comments on the German 'Discussion Draft' for non-transposition of Article 17 of the DSM Directive as adopted*, Aug. 16, 2020, available at <http://www.copyrightseesaw.net/en/papers>. In comparison, *see also* Martin Husovec and João Pedro Quintais, *Article 17 of the Copyright Directive: Why the German implementation proposal is compatible with EU law – Parts I and II*, available at <http://copyrightblog.kluweriplaw.com/2020/08/28/article-17-of-the-copyright-directive-why-the-german-implementation-proposal-is-compatible-with-eu-law-part-2>.

⁵ Note that this is not an exhaustive worldwide survey; outliers exist and it remains unclear whether, for example, the United Kingdom, which has a long history of employing different criteria to its originality examination, will continue to follow decisions of the Court of Justice of the European Union with respect to copyright.

⁶ According to the sweat of the brow approach, copyright can protect and reward the efforts of an author, even without a demonstration of originality or creativity. The approach rewards effort ("sweat") and/or financial investment. This principle was rejected in the United States by the U.S. Supreme Court in *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991) and is largely unavailable in Europe. The extent to which "sweat of the brow" is used in the United Kingdom will not be pursued in this paper because, although the European standard has moved away from the doctrine, the United Kingdom has exhibited substantial comfort with it and is in the process of exiting the European Union. CJEU case law will be detailed later in the paper, but at least three British cases transposing CJEU originality standards seem to have taken different understandings from those standards. *See, e.g.,* *The Newspaper Licensing Agency Ltd & Ors v. Meltwater Holding BV & Ors* [2011] EWCA Civ 890, in which a British court found that the most recent CJEU decision at the time (*Case C-5/08, Infopaq Int'l A/S v. Danske Dagblades Forening* [19 July 2009])

copyrightable works that necessarily require different natures of originality, including databases and joint works.⁷ Each of those streams of analysis could comprise full articles, if not longer treatments, as they have before.⁸ This paper's ambition is to look at copyright's more traditional subject matter, such as the visual arts, and to inquire into how courts are concluding that certain works are—or are not—copyrightable. Whereas historical analyses of this topic may have differentiated among the visual arts, literature, and music,⁹ later analyses tend to parse originality

ECR I-6569) did not substantially alter the British test requiring that a work merely needs to originate with an author. One year later, another court interpreted the “author’s own intellectual creation” test in *Infopaq* to be compatible with the UK’s test under which the originality is found by way of the expression of the skill and labor exercised by the author. *Temple Island Collections Ltd v. New English Teas Ltd & another* [2012] EWPC 1. But one year later, another court took a different point of view. In *SAS Institute Inc v. World Programming Ltd* [2013] EWCA Civ 1482, the court stated: “If the Information Society Directive has changed the traditional domestic test, it seems to me that it has raised rather than lowered the hurdle to obtaining copyright protection.” *Id.* at ¶ 37. Australia, New Zealand, and Canada are in various stages of employing the doctrine domestically. I agree with Australian Professor Emeritus Sam Ricketson who, in 1991, wrote: “it is highly desirable that Anglo-Australian copyright law should move consciously toward the adoption of a higher standard of originality. This should concentrate more directly on the intellectual contribution of the alleged author and emphasize the need for some minimal level of creativity.” Sam Ricketson, *The Concept of Originality in Anglo-Australian Copyright Law*, 39 J. COPYRIGHT SOC’Y U.S.A. 265 (1991-1992), 287. *See also The Compatibility of ‘Skill & Labour’ with the Berne Convention and the TRIPS Agreement*, [2004] 2 EUR. INT. PROP. REV. 75-80 (arguing that originality inquiries based on the skill and labor of the author are incompatible with the Berne Convention and possibly also with the TRIPS Agreement). *See also* Jane C. Ginsburg, *No “Sweat”? Copyright and Other Protection of Works of Information after Feist v. Rural Telephone*, 92 COLUM. L. REV. 338 (1992).

⁷ Copyright protection for databases deserves a separate treatment, in part because Europe avails itself of a separate law on this issue. *See Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases*. Moreover, in this author’s view, the selection and arrangement of data is necessarily a different type of creativity than is examined in other copyright cases. In agreement, *see* Carine Bernault, André Lucas, Agnès Lucas-Schloetter, *TRAITE DE LA PROPRIÉTÉ LITTÉRAIRE ET ARTISTIQUE*, 5e édition (Lexis Nexis, 2017), at 131. « Quand ils (les juges) octroient ou qu’ils refusent la protection revendiquée, le critère mis en avant n’est pas celui de l’empreinte de la personnalité de l’auteur. » (When judges are presented with originality cases in such subject matter as lists of data, whether they grant or refuse the originality claim, they are not looking for the imprint of an author’s personality.) *See also* John Adams, *Originality in copyright: a solution to the database problem?* in PAUL TORREMANS, *COPYRIGHT LAW: A HANDBOOK OF CONTEMPORARY RESEARCH* 1–27 (Edward Elgar Publishing 2009). *See also* F.W. Grosheide, *Database Protection—The European Way*, 8 WASH. U. J.L. & POL’Y 39 (2002).

⁸ *See* Adams and Grosheide, *id.*, for commentary on databases. For commentary on the problem of joint authorship, *see also* Stef van Gompel, *Creativity, autonomy and personal touch: A critical appraisal of the CJEU’s originality test for copyright in THE WORK OF AUTHORSHIP*. Edited by Mireille van Eechoud, Amsterdam University Press (2014) p. 95-144. “[T]he ‘author’s own intellectual creation’-test for copyright is so tied to the author as the individual creator of a work that it raises difficulties for determining the eligibility for protection of large-scale collaborative productions. The requirement that copyright only vests in works that bear the ‘personal imprint’ of their creators is especially problematic for group creations. Perhaps such a personal imprint can still be assumed if a joint work involves one or more creative leaders who have a final say on the finished product.” *Id.* at 138.

⁹ *See, e.g.,* Alain Strowel, *L’originalité en droit d’auteur: un critère à géométrie variable*, *Journal*

among artistic works, factual works, and functional works.¹⁰ This analysis will focus on the first category (artistic works) while keeping in mind that there is often overlap among them (for example in industrial design, which can be both artistic and functional).

In the United States, the 2017 *Star Athletica* Court expressly declined to decide whether the design at issue (chevrons on cheerleading uniforms) was original for purposes of copyrightability.¹¹ A dissenting opinion, however, explicitly found the designs to be *unoriginal* for those purposes.¹² The term “originality” itself is not defined in the U.S. Copyright Act,¹³ in relevant European copyright directives, or in international copyright treaties. But originality in copyright law is quietly experiencing a period of coalescence. In early copyright laws, as a prerequisite for copyrightability, its presence was frequently simply presumed although, as will be explored below, its contours and “quantum” were questioned as cases arose. Prior to the digital age, any oil painting, novel, or opera that was not a copy or derivative of someone else’s work was irrefutably the product of some sequence of original, creative alchemy in the human mind,¹⁴ and therefore copyrightable, short of another deficiency.

With the advent of such technology as photography, the spectrum of human activities that qualifies as sufficient to prompt the possibility of originality has been

des tribunaux, Vol. 110e année, no.5598, p. 513–518 (7 septembre 1991), citing Pierre Poirier, *Le droit d’auteur*, les Nouvelles, Droits intellectuels, Larquier, Bruxelles, 1936, n° 96, at Chapter 3.

¹⁰ *Id.*

¹¹ *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1012 n.1 (2017) (“We do not today hold that the surface decorations are copyrightable. We express no opinion on whether these works are sufficiently original to qualify for copyright protection, see *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U. S. 340, 358–359 (1991), or on whether any other prerequisite of a valid copyright has been satisfied.”). See also *id.* at 1018 n.2 (Ginsburg, J., concurring) (“Like the Court, I express no opinion on whether the designs otherwise meet the requirements for copyrightable subject matter. See *ante*, at 11, n.1; 17 U.S.C. § 102(a). . . . In view of the dissent’s assertion that Varsity’s designs are ‘plainly unoriginal,’ post, at 11, however, I note this Court’s recognition that ‘the requisite level of creativity [for copyrightability] is extremely low; even a slight amount will suffice,’ *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U. S. 340, 345 (1991); see *Atari Games Corp. v. Oman*, 979 F. 2d 242 (CA DC 1992).”).

¹² “[C]onsidered on their own, the simple stripes are plainly unoriginal.” *Id.* at 30 (Breyer, J., dissenting).

¹³ As proxies for a legal definition, two English dictionary definitions provide guidance: See THE MACMILLAN DICTIONARY (Springer Nature Limited 2019) (“[T]he quality of being new, interesting, and different from anything that anyone has created before”). See also THE CAMBRIDGE DICTIONARY (Cambridge University Press 2019) (“[T]he quality of being special and interesting and not the same as anything or anyone else.”).

¹⁴ The Statute of Anne protected “books and other writings” in 1710. 8 Anne, c. 19 (1710). By the end of the 1700s, France was conferring an exclusive right to authors for their intellectual property, since that property was ‘la plus sacrée, la plus personnelle de toutes les propriétés, puisqu’elle procède du fruit de la pensée, de la création intellectuelle.’ (“the most sacred and the most personal of properties; and because it is the fruit of thought and intellectual creation.”) See ROSEMARY A. PETERS, *STEALING THINGS: THEFT AND THE AUTHOR IN NINETEENTH-CENTURY FRANCE*. (Lexington Books 2013), 150–152.

examined and decided, largely in-line with existing prerequisites,¹⁵ but not without some hiccups.¹⁶ Now that hardware, software, and artificial intelligence factor into so many types of creative works' inception and realization, and during a juncture in time when "appropriation art" is popular, the attribute of originality is discreetly being reconsidered and its contours refined. This is nothing new; much of originality's genesis in copyright law is unclear, including its place in the Berne Convention. In the *travaux préparatoires* for the Brussels Revision Conference of the Berne Convention in 1951, Austria proposed the inclusion of the words "which have the character of a personal creation" to modify the description of protected works in the "literary, scientific, and artistic domain."¹⁷ Other similar proposals were made by Norway and Czechoslovakia but were not incorporated in the final text of the Convention. The reason for excluding a specific reference to intellectual or personal creation was perceived to be trepidation that it could lead courts to refuse to acknowledge authors' rights in a variety of works if they presumed by this language that there was a higher bar to protection than "literary and artistic works" already implied.¹⁸

Seventy years later, "[o]riginality . . . may be said to be the essence of authorship."¹⁹ But what is the essence of originality? Has it changed in the past century? Unsurprisingly, "originality" is used at least somewhat differently by different courts across and within jurisdictions and its requisite level of potency can depend on the work it is modifying, as well as whether a work is "new" or derivative.²⁰ For

¹⁵ See *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884). The case involved a stylized photograph of the writer Oscar Wilde. "[I]n regard to the photograph in question, that it is a 'useful, new, harmonious, characteristic, and graceful picture, and that plaintiff made the same entirely from his own original mental conception, to which he gave visible form by posing the said Oscar Wilde in front of the camera, selecting and arranging the costume, draperies, and other various accessories in said photograph, arranging the subject so as to present graceful outlines, arranging and disposing the light and shade, suggesting and evoking the desired expression, and from such disposition, arrangement, or representation, made entirely by plaintiff, he produced the picture in suit.' These findings, we think, show this photograph to be an original work of art, the product of plaintiff's intellectual invention, of which plaintiff is the author, and of a class of inventions for which the constitution intended that congress should secure to him the exclusive right to use, publish, and sell. . . ." 111 U.S. at 60.

¹⁶ See, e.g., *Société Bowstir Ltd., G.M. v. Egotrade Sarl, TGI de Paris, 3ème chambre 1ère section*, jugement rendu le 21 Mai 2015. An intellectual property chamber of the High Court of First Instance of Paris ruled that a photograph of Jimi Hendrix by photographer Gered Mankowitz was not original for purposes of copyright law. An appeals court later overturned the ruling.

¹⁷ *Documents de la Conférence réunie à Bruxelles du 5 au 26 juin 1948 (1951)*, 147.

¹⁸ See 1 SAM RICKETSON & JANE C. GINSBURG, *INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS: THE BERNE CONVENTION AND BEYOND* § 8.03 (2d ed. 2006).

¹⁹ 1 NIMMER ON COPYRIGHT § 1.06[A]

²⁰ "[C]opyright law does subject derivative works to two important and related limitations. First, to support a copyright the original aspects of a derivative works must be more than trivial. Second, the scope of protection afforded a derivative work must reflect the degree to which it relies on preexisting material and must not in any way affect the scope of any copyright protection in that preexisting material." Steven S. Boyd, *Deriving Originality in Derivative Works: Considering the Quantum of Originality needed to Attain Copyright Protection in a Derivative Work*, 40 SANTA

example with regard to the first point, the degree of originality required for a photograph of a vodka bottle against a plain background (resulting in a “thin” layer of copyright protection that only prohibits verbatim copying) will inevitably be examined with different diagnostic tools than will the originality in a freehand oil painting of a jungle landscape speckled with an exotic variety of plants and wildlife that a painter conjures in his mind’s eye (likely resulting in a “thick” layer of copyright protection).²¹ For example, with regard to the second point (originality in derivative works), American courts have adopted language (e.g., demonstrating a “distinguishable variation” from the prior work, where such variation is quantifiably “more than merely trivial”²²) that acknowledges a work is based on a pre-existing work in an effort to ascertain whether the new work is original enough on its own to merit copyright protection or to avoid an infringement claim.²³

Perhaps more to the point, “originality cannot be seen isolated. It is always a matter of the type of work, the type of infringement, and the infringer’s usage of the work.”²⁴ Although this statement is a European viewpoint from 2001, I would submit that it is no less true in Europe and the United States today. Professor Paul Goldstein, in his treatise on copyright, suggests that the most recent U.S. Supreme Court case construing originality in 2001 (*Feist, infra*) “indicates an intention to immunize most classes of copyrightable works from case-by-case scrutiny for creative content,” reserving an inquiry into creativity for such subject matter as reproductions, photographs, and directories,²⁵ which would corroborate the uncodified idea that originality analyses in fact depend on the type of work at issue. In an effort to distill some cross-border principles beyond this maxim, the present analysis will look at originality in general with some specific attention to the broad category of visual arts, to the extent they are copyrightable.²⁶

Copyright disputes often compel courts to assess the degree of creativity in a work. Even if a work is considered original enough to receive protection, the amount of creativity involved affects the scope of protection afforded the work. Copyright law provides less pro-

CLARA L. REV. 325, 357 (2000).

²¹ *Ets-Hokin v. Skyy Spirits*, 323 F.3d 763, 766 (9th Cir. 2003), *citing* *Apple Comput. Corp. v. Microsoft Corp.*, 33 F.3d 1435, 1439 (9th Cir. 1994) (“[W]hen the range of protectable expression is narrow, the appropriate standard for illicit copying is virtual identity.”).

²² *See, e.g., Alfred Bell & Co. v. Catalda Fine Arts*, 191 F.2d 99, 102–03 (2d Cir. 1951).

²³ For a useful treatment of originality in derivative works specifically, *see* Steven S. Boyd, *supra* note 20.

²⁴ Per Jonas Nordell, *The Notion of Originality – Redundant or Not?*, Nordiskt Immaterialt Rättsskydd, 1/2001.

²⁵ Paul Goldstein, GOLDSTEIN ON COPYRIGHT § 2.2.1.1 (3d ed., 2020-2 Supp. 2005).

²⁶ As alluded to in this paper’s opening paragraphs, the reader is invited to bear in mind that a range of other copyrightable subject matter will not be addressed here, but could occupy many more pages of analysis. Subject matter such as databases, software, and anthologies is copyrightable when certain conditions are met. Whereas someone’s “selection and arrangement” of data in a database might confer authorship status on that person, the present analysis is more interested in looking at the types of works that were originally covered by copyright law (artistic works rather than factual or functional works, in line with Alain Strowel’s parsing of subject matter, *supra* note 9) in order to better track the originality requirement’s trajectory.

tection (i.e., “thin copyright”) to works that involve only modest levels of originality, as opposed to “thick copyright” for more creative works.²⁷

Some scholars have highlighted the inconsistent application of the concept of originality in courts and even suggested a new and more objective test for its determination.²⁸ Some have suggested that “the notion of originality is a fiction,”²⁹ pointing to its subjective nature as a contrived means to “separate what is worthy of copyright protection from what is not.”³⁰ Another suggestion is to raise the standard of originality “based on departure from the routine and conventional.”³¹ This approach sees its value in embracing “the insight . . . that copyright protection presupposes a material difference between the work for which an exclusion right is sought and public domain material.”³² Another prominent scholar has highlighted that a whole discipline, the visual arts, suffers from courts’ inability to apply a consistent and thoughtful copyrightability assessment.³³

As a threshold matter, especially in an analysis parsing words’ meaning, it is important to differentiate among the three definitional prongs of originality: originality, creativity, and novelty.³⁴ Despite the fact that some treatments of this topic consider originality to mean “not copied,” this analysis focuses on the mean-

²⁷ Robert Kirk Walker & Ben Depoorter, *Unavoidable Aesthetic Judgments in Copyright Law*, 109 NW. U. L. REV. 343, 361 (2015) (citing *Feist Publ’ns, Inc. v. Rural Tel. Servs. Co.*, 499 U.S. 340, 349 (1991)).

²⁸ See, e.g., Russ Versteeg, *Rethinking Originality*, 34 WM. & MARY L. REV. 801, 810–811 (“[B]ecause . . . originality is, by its very nature, an elusive concept that is difficult to quantify, and because judges generally are not adequately trained to evaluate subjective levels of artistic merit, courts should fashion a standard that is as objective as possible. If some degree of objectivity is a goal, then courts must define these terms carefully and must determine whether a ‘creativity’ standard or a ‘trivial/distinguishable variation’ standard more likely will yield a practical method for evaluating . . . originality.”).

²⁹ Nordell, *supra* note 24, at 98.

³⁰ *Id.* See also Brian Frye, *Against Creativity*, 11 N.Y.U. J.L. & LIBERTY 426 (2017) (“[T]he creativity requirement should be abandoned because it is irrelevant to the scope of copyrightable subject matter and distorts copyright doctrine by encouraging inefficient ‘creativity rhetoric.’”). Interestingly, when Mr. Frye published the work *Against Creativity* a decade prior, another scholar wrote: “no one wants to be against creativity, and if copyright equals creativity then no one wants to be against copyright. Yet beneath the rhetoric, both copyright lawyers and copyright scholars tend to assume that copyright law is centrally important in stimulating a high level of creativity.” Julie E. Cohen, *Copyright, Creativity, Catalogs: Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. 1151, 1192 (2007).

³¹ Joseph Scott Miller, *Hoisting Originality*, 32 CARDOZO L. REV. 451, 488 (2009).

³² *Id.* at 489.

³³ Rebecca Tushnet, *Worth a Thousand Words: The Images of Copyright*, 125 HARV. L. REV. 683 (2012). See also Zahr Kassim Said, *Only Part of the Picture: A Response to Professor Tushnet’s Worth a Thousand Words*, 16 STAN. TECH. L. REV. 349, 366 (2013) (pointing out that Professor Tushnet’s criticisms could be more widely applicable than to only images. “These points concern how viewers encounter and decode images, and also words. Yet this line of thinking ultimately concerns styles of ‘reading’ or interpreting expressive works more generally: what one ‘hears’ in music is no more opaque or transparent than what one sees or reads. The same is true for dance, and architecture, and the full range of expressive works in any medium.”).

³⁴ See, e.g., Boyd, *supra* note 20.

ing of originality that presumes a new, uncopied work. In other words, at the risk of conflating “originality” and “creativity,” this analysis looks at originality in its Merriam-Webster sense as “the power of independent thought or constructive imagination,”³⁵ as opposed to a definition which simply means “not copied.”

Lastly, the motivation for this analysis is not to suggest any new test, to criticize the necessarily-metaphysical and subjective nature of originality, or to focus on artificial intelligence as the latest disruptive technology that challenges the precepts to which copyright law has become accustomed,³⁶ but rather to refer back to originality’s basis in copyright law, to examine how courts in different jurisdictions are interpreting its obligatory presence in copyright cases, and to suggest that its application today is more streamlined internationally than it has been for the past two centuries. This is important with respect to the evolving development of artificial intelligence because countries across the globe are considering whether and how human-designed or human-assisted algorithms might now, or in the future, be considered authors for the purpose of copyright law. By its omnivorous nature, artificial intelligence will implicate many jurisdictions’ laws in any given dispute, thereby calling into question which baseline aspects of copyrightability differ among them;³⁷ making it all the more important to show that this particular aspect of copyright law is essentially harmonized.³⁸ By refocusing on the requirement of originali-

³⁵ *Originality*, THE MERRIAM-WEBSTER.COM DICTIONARY, <https://www.merriam-webster.com/dictionary/originality>, (last visited Dec. 9, 2019).

³⁶ See, e.g., IBM Advantage Reports, *What’s Next for AI, The Quest for AI Creativity*, <https://www.ibm.com/Watson/advantage-reports/future-of-artificial-intelligence/ai-creativity.html>, accessed Nov. 25, 2019 (“[E]ven highly touted AI techniques have their limitations. ‘Creativity and where we started exploring . . . is fascinating because deep learning isn’t the answer to creativity,’ . . . ‘We still have to define what creativity means’” (quoting John Smith, Manager of Multimedia and Vision at IBM Research)). (“There’s no doubt the boundaries of AI’s role in creative endeavors will be pushed. And while it will never replace the human soul of creativity, AI can certainly offer many benefits serving as a smart, efficient, and inspirational assistant.”). See Alex Wulff, *AI is Incredibly Smart, But It Will Never Match Human Creativity*, The Next Web, Jan. 2, 2019. See also Anna Marks, *How AI is Radically Changing Our Definition of Human Creativity*, Wired UK, May 27, 2019. (“[A]s its initial conditions are created by human intelligence, AI is still a human endeavor, and although it is starting to develop creative characteristics, it lacks the complex link between imagination, abstract thinking and episodic memory which scientists believe makes up creativity.”).

³⁷ See, e.g., WIPO Revised Issues Paper on Intellectual Property Policy and Artificial Intelligence, WIPO Document WIPO/IP/AI/2/GE/20/1 Rev, at 7 (“The policy positions adopted in relation to the attribution of copyright to AI-generated works will go to the heart of the social purpose for which the copyright system exists. If AI-generated works were excluded from eligibility for copyright protection, the copyright system would be seen as an instrument for encouraging and favoring the dignity of human creativity over machine creativity. If copyright protection were accorded to AI-generated works, the copyright system would tend to be seen as an instrument favoring the availability for the consumer of the largest number of creative works and of placing an equal value on human and machine creativity.”). See also Andres Guadamuz, *Do Androids Dream of Electric Copyright? Comparative Analysis of Originality in Artificial Intelligence Generated Works*, Intellectual Property Quarterly, 2017 (2).

³⁸ The acknowledgment that this analysis would be necessary in light of developments in AI was predicted forty years ago, if not beforehand. See, e.g., Timothy L. Butler, *Can a Computer be an*

ty, including the authorial qualities it requires, this analysis aims to uncover cross-border consistencies. Whereas technology has augmented how authors envision and execute their creative works, it remains the case that copyright's bundle of rights inheres in the author who comes up with something *original*. What that means is crystalizing across the globe. At the same time, however, even a harmonized meaning or test will retain nuance and challenge in application.³⁹ As an American who has grown comfortable with copyright law's notoriously inexact fair use doctrine, I view this inherent ambiguity as a necessity.

A. The United States

American case law provides a rich, if inconsistent, mosaic of interpretations of originality for purposes of copyright law. And, because of the American registration system, the United States also has a record of registered—and refused—works that offers some insight into what can be considered original beyond its record of case law.⁴⁰ The U.S. Copyright Office puts forward the following guidance:

A work of authorship must possess “some minimal degree of creativity” to sustain a copyright claim. “[T]he requisite level of creativity is extremely low.” Even a “slight amount” of creative expression will suffice. “The vast majority of works make the grade quite easily, as they possess some creative spark, ‘no matter how crude, humble or obvious it might be.’” An author’s expression does not need to “be presented in an innovative or surprising way,” but it “cannot be so mechanical or routine as to require no creativity whatsoever.” A work that it is “entirely typical,” “garden-variety,” or “devoid of even the slightest traces of creativity” does not satisfy the originality requirement. . . . Likewise, a work “does not possess the minimal creative spark required by the Copyright Act” if the author’s expression is “obvious” or “practically inevitable.” Although the creativity standard is low, it is not limitless. “There remains a narrow category of works in which the creative spark is utterly lacking or so trivial as to be virtually nonexistent. Such works are incapable of sustaining a valid copyright.”⁴¹

And although academics and practitioners have begun to explore the uncharted territory of original works without human authors, no court has yet (to this author’s

Author - Copyright Aspects of Artificial Intelligence, 4 HASTINGS COMM. & ENT. L.J. 707, 715 (1982) (“[A]s (artificial intelligence) programs become more powerful, the character and quantity of human input necessary to satisfy traditional copyright notions of authorship and originality will have to be addressed.”).

³⁹ See, e.g., *Sean Hall v. Taylor Swift*, No. 18-55426 (9th Cir. 2019) (holding that whether a work is original is not an issue to be disposed of by a motion to dismiss) (“Originality, as we have long recognized, is normally a question of fact.”). See *Dezendorf v. Twentieth Century-Fox Film Corp.*, 99 F.2d 850, 851 (9th Cir. 1938) (stating that the “question of originality . . . is one of fact, not of law” (internal quotation marks omitted)). In the case before it, the Ninth Circuit found that the district court had improperly “constituted itself as the final judge of the worth of an expressive work,” and reversed and remanded. *Id.* at 3.

⁴⁰ For basics of the U.S. registration system, see U.S. Copyright Office, Circular 2, at <https://www.copyright.gov/circs/circ02.pdf>. Neither the European Union nor its Member States have comparable registration systems, so there is no comparable record of decision-making about originality at the front-end stage before parties are in litigation.

⁴¹ U.S. Copyright Office, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 308.2 (3d ed. 2017) (internal citations omitted).

knowledge) been called on to render a decision on the topic.⁴² Professor Jane Ginsburg explores the concept in a recent paper:

At first blush, the concept of an ‘authorless’ output may seem novel—these products appear to possess sufficient ‘originality’ to fall within the domain of copyright. But the process of creation, and not just the result, is relevant to the authorship inquiry. Works like Chapman Kelley’s *Wildflower Works* and (Agnieszka) Kurant’s termite mounds may be ‘authorless’ not because the product falls outside the subject matter of copyright, but because the process behind their creation was not sufficiently authorial.⁴³

With these propositions in mind (firstly, that “garden-variety”⁴⁴ works that do not possess a “creative spark”⁴⁵ are not copyrightable; and, secondly, that neither a large-scale outdoor live wildflower display nor mounds of vividly colored sands, gold, and glitter shaped by termites qualify as a work of authorship), this section reviews U.S. cases that have influenced the meaning of authorial originality in the American context.⁴⁶

Originality made its debut in American copyright disputes in the 1820s, by which time a range of stakeholders had sufficiently developed to lobby against a serious or difficult threshold.⁴⁷

From the outset, competing understandings of the requirement appeared. In one line of cases, judges took originality seriously by imposing relatively demanding and meaningful requirements of novelty or aesthetic merit as a precondition for copyright protection. Another line of cases constructed originality quite differently as a very minimal and narrow requirement.⁴⁸

⁴² Here, I am referring to works created by artificial intelligence, as opposed to works created by non-human sentient beings, such as was the case with a crested macaque (monkey) taking a picture of himself in *Naruto v. Slater*, 888 F.3d 418 (9th Cir. 2018). The crested macaque was found ineligible as an author.

⁴³ Jane C. Ginsburg & Luke Ali Bediardjo, *Authors and Machines*, 34 BERKELEY TECH. L.J. 343, 443 (2019).

⁴⁴ *Feist Pubs., Inc. v. Rural Tel. Svc. Co., Inc.*, 499 U.S. 340, 362 (1991).

⁴⁵ *Id.* at 359.

⁴⁶ Unlike other jurisdictions, the United States has a record of copyright registrations and refusals at the U.S. Copyright Office in addition to litigated case law on the topic. There is some commentary indicating that the Copyright Office holds works to a higher standard of originality than do the courts. The emphasis of this analysis is case law, but it is important to note that the registration or refusal of a copyright application are also important factors to consider in American copyright law. See, e.g., Roberta L. Horton, *The Threshold of Copyright Protection After American Airlines*, Intellectual Property Law 360, Feb. 26, 2018. (Ms. Horton argues that two Copyright Office refusals to register an American Airlines logo show that the Copyright Office Review Board “has required far more than ‘minimal’ creativity to register geometric shapes”). In this particular case, American Airlines went on to file a lawsuit against the Copyright Office, but settled when the Review Board undertook an unusual third review of the logo and, with more detailed specimens of the work before it, reversed and registered the logo. See Registration Decision Regarding American Airlines Flight Symbol; Correspondence ID 1-28H4ZFK; SR 1-3537494381, Dec. 7, 2018, available at <https://www.copyright.gov/rulings-filings/review-board/docs/american-airlines.pdf>.

⁴⁷ Oren Bracha, *The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright*, 118 YALE L.J. 186, 209–213 (2008).

⁴⁸ *Id.* at 190.

Seminal research by Professor Oren Bracha highlights how, by the end of the nineteenth century, the originality paradox that persists today had taken hold. The paradox is essentially the fact that originality is held up as copyright law's cornerstone while, at the same time, its prerequisite manifestation for copyrightability has been boiled down to practically nothing. Professor Bracha describes its uncomfortable evolution more eloquently: "the lower its practical bite as a substantive threshold for protection sank, the more dominant its status as a fundamental principle became."⁴⁹ Or, as Professor Christopher Buccafusco has noted: "[i]n the twentieth century, that bar (to finding originality) would be lowered nearly to the ground."⁵⁰

In 1845, Circuit Justice Story of Massachusetts put forth some language on what could constitute minimal creativity for a copyrightable work: "[h]e, in short, who by his own skill, judgment and labor, writes a new work, and does not merely copy that of another, is entitled to a copyright therein; if the variations are not merely formal and shadowy, from existing works."⁵¹

The 1879 *Trade-Mark Cases* may exemplify the zenith, modest as it may be, of a material American originality requirement. Justice Miller, in authoring an opinion ultimately holding that the Copyright Clause of the Constitution did not empower Congress to protect or regulate trademarks, stated that while the word "writings" in the Constitution may be liberally construed, "it is only such as are original, and are founded in the creative powers of the mind."⁵²

These interpretations of the originality requirement, addressing both the non-copying and requisite-creativity prongs of the word's meaning, set the stage for the relevant Supreme Court and Circuit Court decisions on the topic to follow. The three major copyright-oriented Supreme Court cases (following the *Trade-Mark Cases*) to construe the American originality requirement span almost exactly 100 years and their respective places in history influence the language the Court used to develop the concept. As noted above, the focus of the present analysis is on the second "prong" of originality—the nature of the prerequisite creative spark with a presumption that the new work is not a mere copy of an existing work.

In 1884's *Burrow-Giles Lithographic Co. v. Sarony*,⁵³ the Supreme Court confirmed that Section 4952 of the existing Copyright Law, newly sweeping photography into the ambit of copyrightable subject matter, was constitutional. In so doing, it also commented on the nature of photography and photographers:

These findings [that the photograph in question, taken by Napoleon Sarony of writer Oscar Wilde, comprises a 'useful, new, harmonious, characteristic, and graceful picture, and that plaintiff made the same entirely from his own original mental conception, to which he gave visible form by posing (the subject) in front of the camera, selecting and arranging

⁴⁹ *Id.*

⁵⁰ Christopher Buccafusco, *A Theory of Copyright Authorship*, 102 VA. L. REV. 1229, 1241 (2016).

⁵¹ *Emerson v. Davis*, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845).

⁵² 100 U.S. 82, 94 (1879).

⁵³ 111 U.S. 53.

the costume, draperies, and other various accessories’], we think, show this photograph to be an original work of art, the product of plaintiff’s intellectual invention, of which plaintiff is the author, and of a class of inventions for which the constitution intended that congress should secure to him the exclusive right to use, publish, and sell, as it has done by section 4952 of the Revised Statutes.⁵⁴

The Court refers to “intellectual invention,” which is not modern copyright phraseology, but which nonetheless nods to a work resulting from an individual’s intellectual activity. I will return to the *Sarony* case later in this analysis as a point of departure because it will be useful to compare some other case examples whose authorial work is manifested in the medium of photography.

In 1903, the Supreme Court decided in *Bleistein v. Donaldson Lithographing Company* that circus advertisement posters are copyrightable subject matter.⁵⁵ It clarified that advertisements, and commercial art more generally, could not be denied copyright protection because “their pictorial quality attracts the crowd and therefore gives them a real use.”⁵⁶ The Court also clearly articulated that it was no longer lawful to invoke any kind of meaningful aesthetic merit prerequisite or to subject copyright protection to substantive evaluations of the work,⁵⁷ which I will pick up again below.

Importantly for the purposes of authorial originality, however, the Court in this case also added an interpretive layer to the adjudication of creative works:

The copy is the personal reaction of an individual upon nature. Personality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible, which is one man’s alone. That something he may copyright unless there is a restriction in the words of the act.⁵⁸

In the wake of *Bleistein*, courts have not frequently examined whether an author’s personality is reflected in his work. But, from its inception, “[t]he expression of personality formula was an ambiguous legal concept [as well as] an effective rhetorical device.”⁵⁹ What *Bleistein*’s legacy establishes is a dual and inconsistent focus on both the inviolability of the author’s personhood on the one hand, and the acceptance of ordinary commercial artistry as copyrightable subject matter on the oth-

⁵⁴ *Id.* at 59–60.

⁵⁵ *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903).

⁵⁶ *Id.* at 251.

⁵⁷ *Id.* at 251 (“It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme, some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time.”).

⁵⁸ *Id.* at 250.

⁵⁹ Oren Bracha, *Commentary on Bleistein v. Donaldson Lithographing Co.* (1903), in *Primary Sources on Copyright (1450–1900)*, eds L. Bently & M. Kretschmer, 2003, www.copyrighthistory.org.

er hand,⁶⁰ which are difficult concepts to authentically reconcile.

Jumping ahead almost a century: In 1991, the Supreme Court decided, in *Feist Publ'ns v. Rural Tel. Serv. Co.*, that alphabetical telephone directories do not possess adequate creativity for purposes of copyright protection:

Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity. To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, 'no matter how crude, humble or obvious' it might be.⁶¹

And in its most recent case construing copyrightability, the Supreme Court, in 2017,⁶² made some observations impacting the originality inquiry, although it did not itself reach the question whether the designs on the cheerleading uniforms at issue were original:

We hold that a feature incorporated into the design of a useful article is eligible for copyright protection only if the feature (1) can be perceived as a two- or three-dimensional work of art separate from the useful article and (2) would qualify as a protectable pictorial, graphic, or sculptural work—either on its own or fixed in some other medium of expression—if it were imagined separately from the useful article into which it is incorporated.⁶³

As Professor Mark McKenna notes, “[t]his formulation has not been very well received, primarily because it seems to allow copyright protection for many more features of useful articles than was permitted by pre-*Star Athletica* doctrine, notwithstanding the wide range of tests previously used and the doctrine’s well-recognized conceptual incoherence.”⁶⁴ The Court’s finding in *Star Athletica* is relevant to an inquiry into originality because it has a similar result to recent European case law that opens the door further to what is potentially copyrightable subject matter, underlining the importance of recognizing a stable, common, and meaningful originality requirement.

Ultimately, following *Bleistein* and ensuing jurisprudence, Professor Barton

⁶⁰ *Id.* This analysis will also look at a similar trajectory of “personality” in Europe in a later section.

⁶¹ *Feist Pubs., Inc. v. Rural Tel. Svc. Co., Inc.*, 499 U.S. 340, 345 (1991), *citing* 1 M. Nimmer & D. Nimmer, Copyright §§ 2.01[A], [B] (1990). However, with regard to the telephone directory at issue, “[t]he end product is a garden-variety white pages directory, devoid of even the slightest trace of creativity.” *Id.* at 362.

⁶² *Star Athletica, LLC v. Varsity Brands, Inc.*, 137 S. Ct. 1002 (2017).

⁶³ *Id.* at 1007.

⁶⁴ Mark P. McKenna, *Knowing Separability When We See It*, 166 U. PA. L. REV. ONLINE 127 (2017). For a more detailed discussion regarding what lower courts may do without clear guidance on “separability” coming from the Supreme Court’s decision, see Jane C. Ginsburg, *Courts Have Twisted Themselves into Knots: U.S. Copyright Protection for Applied Art*, 40 COLUM. J.L. & ARTS 1 (2016–2017). Prior to *Star Athletica*, “almost every federal court of appeal that has adjudicated the copyrightability of design elements of useful articles has purported to apply a test of conceptual separability, though each court has formulated that test differently. Moreover, in some instances, courts embarked on their tortuous forays into separability tests without adequately analyzing first whether the disputed design was in fact a design of a ‘useful article.’” *Id.* at 18.

Beebe highlights: “[t]he focus on personality was lost,”⁶⁵ while “the only significant issue in the originality inquiry should be whether the work contains its creator’s personality.”⁶⁶ I believe, however, there are hints in the cases above which—purposefully or not—demonstrate that originality was and remains perceptible only by way of an imprecise test that teases out personality or, at least, something like it. Europe’s current standard of an “author’s own intellectual creation,” described in detail below, maintains some of the “personality” flavor without inflating the threshold more than necessary, but it has the salutary criteria of, firstly, keeping the focus of the test on authors as humans and, secondly, acknowledging some degree of cerebral activity. I believe these to be the salient points of departure that undergird a proper originality examination.

B. A Note on Originality’s Nexus with Authorship^[YLP2]

All these descriptions of what is—and what is not—copyrightable are useful starting points, but of course difficult to apply with any coherent consistency. The U.S. Copyright Office provides some guidance on what is and is not copyrightable in its Compendium of Practices but, as with any text attempting to describe the precise contours of copyrightability, it cannot reach the devilish details of every real world scenario.⁶⁷ Professor Ginsburg, in her thorough review of the concept of authorship (and, relatedly, originality) in comparative copyright law in 2003 suggests six principles that potentially vest authorship in an individual.⁶⁸ Aside from originality (which I will come to below) and “sweat of the brow,” which I am specifically sidestepping in this paper because I am confident that it will rightfully wane even in jurisdictions that still recognize it, these include: “mind over muscle,” or the

⁶⁵ Barton Beebe, *Bleistein, The Problem of Aesthetic Progress, and the Making of American Copyright Law*, 117 COLUM. L. REV. 319, 386 (2017).

⁶⁶ *Id.* at 386–387.

⁶⁷ In addition to the text from the Compendium (Third) already excerpted in the body of this text, it also notes with respect to derivative works:

The amount of creativity required for a derivative work is the same as that required for a copyright in any other work. “All that is needed to satisfy both the Constitution and the statute is that the ‘author’ contributed something more than a ‘merely trivial’ variation, something recognizably ‘his own.’” *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 102–03 (2d Cir. 1951) (*citing* *Chamberlin v. Uris Sales Corp.*, 150 F.2d 512, 513 (2d Cir. 1945)). Thus, “the key inquiry is whether there is sufficient nontrivial expressive variation in the derivative work to make it distinguishable from the [preexisting] work in some meaningful way.” *Schrock v. Learning Curve International, Inc.*, 586 F.3d 513, 521 (7th Cir. 2009). “While the quantum of originality that is required may be modest indeed,” courts have recognized that derivative works “[l]acking even a modest degree of originality . . . are not copyrightable.” *L. Batlin & Son v. Snyder*, 536 F.2d 486, 490 (2d Cir. 1976); *Durham Industries, Inc. v. Tomy Corp.*, 630 F.2d 905, 911 (2d Cir. 1980). Miniscule variations do not satisfy this requirement, such as merely changing the size of the preexisting work. Merely recasting a work from one medium to another alone does not support a claim in derivative authorship. *See* *L. Batlin & Son*, 536 F.2d at 491. “Nor can the requirement of originality be satisfied simply by the demonstration of ‘physical skill’ or ‘special training.’” *Id.*

U.S. Copyright Office, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 311.2 (3d ed. 2017).

⁶⁸ Jane C. Ginsburg, *The Concept of Authorship in Comparative Copyright Law*, 52 DEPAUL L. REV. 1063 (2003).

principle that the person who conceptualizes a work is that work's author as opposed to the person who executes that conception;⁶⁹ the prominence of the author's mind over any machine he may use in the execution of a work;⁷⁰ the author's intent to *be* an author;⁷¹ and the influence of patronage or economic dominance in appointing an author by way of legal fiction.⁷²

With respect to originality specifically, Professor Ginsburg found that "intellectual creation" (the term used in several European Union Directives in the copyright field) that comes from selection or arrangement, "originality," and "authorship" "may be coming to mean the same thing,"⁷³ thereby coming to a similar conclusion as did Mihály Ficsor in the same year when WIPO published his overview of the copyright treaties. Professor Ginsburg further noted in 2003: "[O]riginality's primary meaning today seems to designate a minimum of personal creative activity."⁷⁴ Both her textual construction as well as the "author's own intellectual creation" reflect my understanding of the current originality test on both sides of the Atlantic, and both demonstrate the inadvisability of further precision, while also maintaining the key touchstones of personal ideation and vision.

There is no neat bow to tie around the legislation, case law, and commentary on American originality, but I find the most useful segue to the next section on the European Union is this: "The Continental requirement of an authorial impress should not . . . be mistaken for a particularly elevated standard of creativity."⁷⁵ Or, as Professors Elizabeth F. Judge and Daniel Gervais have proposed regarding various jurisdictions' standards: "[O]riginality standards are more properly understood as constellations, rather than silos, where the surface differences in wording mask

⁶⁹ *Id.* at 1072.

⁷⁰ *Id.* at 1074.

⁷¹ *Id.* at 1085.

⁷² *Id.* at 1088–1089. In the United States, for example, the work made for hire doctrine is supported by the idea that certain copyrighted works require financial investment and professional exploitation. "Authorship attribution appears to have less to do with a philosophical equivalence of employers or commissioners with creators, than it does with a utilitarian centralization of control in the economically dominant party." *Id.* Other scholars have of course proposed alternative tests to decide whether a person is an author, but I find Professor Ginsburg's construction persuasive because of her deep understanding of both American and European copyright laws and their respective foundations. See also Jared Vasconcellos Grubow, *O.K. Computer: The Devolution of Human Creativity and Granting Musical Copyrights to Artificially Intelligent Joint Authors*, 40 CARDOZO L. REV. 387, 402 (2018) ("Thus, creativity requires an author to (1) have motivation; (2) possess intelligence; and (3) use that intelligence and motivation to create something. Anything that maintains these three elements and independently creates a work that meets copyright law's other requirements (fixation and originality) could arguably be an author."). I will weave Professor Ginsburg's principles she puts forward into my analysis below of Europe's "author's own intellectual creation" threshold.

⁷³ *Id.* at 1079.

⁷⁴ *Id.* at 1080.

⁷⁵ PAUL GOLDSTEIN & BERNT HUGENHOLTZ, *INTERNATIONAL COPYRIGHT: PRINCIPLES, LAW, AND PRACTICE* 192 (3d ed. 2013).

similarities in both concepts and results.”⁷⁶ What I believe to have changed since 2009, when their interpretation was put forward, is that the constellations are coalescing and there remain only a few outlying stars which will likely soon, or at least eventually, merge with the single main constellation. The United States and Europe provide a useful, if non-exhaustive, overview of where originality stands today.⁷⁷

C. The European Union

Where American copyright law will not protect works that lack a creative spark, European copyright laws will not protect works that are not their “author’s own intellectual creation.”⁷⁸ As Professor Eleonora Rosati explains, a string of cases coming from the Court of Justice of the European Union (CJEU) in the past dozen years has adopted this standard under which an “author’s own intellectual creation” is understood to include creative freedom; a personal touch; and free and creative choices.⁷⁹ Until now, individual European Member States have employed a variety of different formulas which, in the wake of the CJEU cases described below, will need to conform more closely to this verbiage.⁸⁰

To delve further into the evolution of this standard, this section examines a handful of CJEU decisions that treat a variety of subject matter. As a baseline description of European copyright law for those unfamiliar with it: aside from adherence to both the Berne Convention,⁸¹ the WIPO “Internet Treaties” (comprising the

⁷⁶ Elizabeth F. Judge & Daniel Gervais, *Of Silos and Constellations: Comparing Notions of Originality in Copyright Law*, 27 *CARDOZO ARTS & ENT. L.J.* 375, 403 (2009).

⁷⁷ In making a different copyright argument with respect to artificial intelligence, another recent piece of scholarship came to the same conclusion about American and European originality thresholds: “European law has a rather similar and equivalent demarcation line (as does the United States) excluding products of minimum originality and creativity from protection.” See Tim W. Dornis, *Artificial Creativity: Emergent Works and the Void in Current Copyright Doctrine*, 22 *YALE J. L. & TECH.* 1, 47 (2020).

⁷⁸ *Infopaq International A/S v. Danske Dagblades Forening*, CJEU Case C-5/08.

⁷⁹ ELEONORA ROSATI, ORIGINALITY IN EU COPYRIGHT: FULL HARMONIZATION THROUGH CASE LAW 5 (2013).

⁸⁰ A Report commissioned by the European Union Intellectual Property Office and published in 2017 provides a useful summary: “Variations of that wording include ‘personal intellectual creation’ (DE), ‘original creation’ (ES), ‘own individual creation’ (LT), or the threshold of ‘peculiarity’ (AT). Some experts state that a work is original when it reflects the author’s own creative choices (e.g. DK, HR, the Netherlands (NL), AT, UK), or the author’s personality (e.g. FR). Traditionally, the threshold of protection has been lower in copyright systems mainly based on the common-law tradition, as confirmed by the experts from Cyprus, Malta, Ireland and the United Kingdom. In Cyprus, for example, a photograph is protected when a consumer has ‘not copied it from another work. It does not further need to express creativity.’ In Malta, a photograph will be protected ‘provided that the author can demonstrate some degree of time, skill and labour in producing the photograph.’” CHRISTOPHE GEIGER & FRANCISKA SCHÖNHERR, EUROPEAN UNION INTEL. PROP. OFFICE, CONSUMERS’ FREQUENTLY ASKED QUESTIONS (FAQS) ON COPYRIGHT SUMMARY REPORT 21 (2017).

⁸¹ Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 25 U.S.T. 1341, 828 U.N.T.S. 221. (revised at Paris July 24, 1971).

WIPO Copyright Treaty⁸² and the WIPO Performances and Phonograms Treaty⁸³), and the World Trade Organization's Agreement on Trade-Related Aspects of Intellectual Property (TRIPS Agreement)⁸⁴, which they have in common with the United States, European copyright laws at the national level are underpinned by the 2001 Directive on the harmonisation of certain aspects of copyright and related rights in the information society (the "InfoSoc" Directive), as well as a copyright term Directive.⁸⁵ A new copyright Directive to unify Europe's digital single market was concluded in 2019, which will go into effect in 2021 but, because it does not have immediate relevance to the topic of originality and because it has not been introduced into European domestic laws as of this writing, I will not fully address it here (with the exception of a single provision below concerning public domain artwork).⁸⁶ The Court of Justice of the European Union (CJEU), established in 1952 with its seat in Luxembourg, is the body to which national courts address their questions about interpreting these Directives.⁸⁷

With its judgment in *Infopaq International* in 2009,⁸⁸ the CJEU made its first decision about copyright using the verbiage "author's own intellectual creation," which it imported from the text in the EU Software Directive,⁸⁹ Database Directive,⁹⁰ and Term Directive.⁹¹ It effectively extrapolated those directives' originality requirement to the InfoSoc Directive.⁹² Prior to the *Infopaq* decision, Member

⁸² World International Property Organization Copyright Treaty, *adopted* Dec. 20, 1996, 2186 U.N.T.S. 121, 36 I.L.M. 65.

⁸³ World International Property Organization Performances and Phonograms Treaty, *adopted* Dec. 20, 1996, 2186 U.N.T.S. 203, 36 I.L.M. 76.

⁸⁴ Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Apr. 15, 1994, 1867 U.N.T.S. 154.

⁸⁵ 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 O.J. (L 372) 12, 18.

⁸⁶ Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, 2019 O.J. (L 130) 118 [hereinafter Council Directive (EU) 2019/790].

⁸⁷ The CJEU "interprets EU law to make sure it is applied in the same way in all EU countries and settles legal disputes between national governments and EU institutions. It can also, in certain circumstances, be used by individuals, companies or organisations to take action against an EU institution if they feel it has somehow infringed their rights." *See Court of Justice of the European Union*, EUROPEAN UNION, https://europa.eu/european-union/about-eu/institutions-bodies/court-justice_en. (last published Nov. 17, 2020).

⁸⁸ Case C-5/08, *Infopaq Int'l A/S v. Danske Dagblades Forening*, ECLI:EU:C:2009:465, ¶ 6 (July 16, 2009).

⁸⁹ Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs, 2009 O.J. (L 111) 18 [hereinafter Computer Programs Directive].

⁹⁰ Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, 1996 O.J. (L 77) 21 [hereinafter Database Directive].

⁹¹ Directive 2006/116/EC of the European Parliament and of the Council, *supra* note 85, at 13.

⁹² Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, 2001 O.J. (L 167) 10. Of relevance to this discussion, originality of computer programs, databases, and photographs lie outside the purview of the InfoSoc Directive.

States were free to differentiate originality for copyrightable works both among jurisdictions and among subject matter.⁹³ Italy's doctrine of *scindibilità*, for example, prior to its termination in 2001 in the wake of Europe's directive on design, granted copyright only in artistic works that had been industrially applied where their artistic value was separable from the industrial nature of the product with which they were associated.⁹⁴ Although the concept defies precise definition, Italian experts have described using *scindibilità* as differentiating a work that can be esthetically appreciated regardless of its utility and therefore applied to entirely different functional products.⁹⁵ One example of how the concept worked in Italy prior to the implementation of the European design directive is the denial of protection to Le Corbusier's sinuous chaise lounge.⁹⁶

In the ensuing decade, the "author's own intellectual creation" standard has taken shape and solidified. The CJEU has, for example, made the distinction that sporting events, such as soccer matches, cannot be regarded as intellectual creations classifiable as works under the InfoSoc Directive because they are subject to rules of the game, leaving no room for creative freedom for the purposes of copyright.⁹⁷ The Court has also concluded that a computer program's graphic user interface can be protected by copyright if it is the author's own intellectual creation.⁹⁸

One year later, the CJEU honed in further on the meaning of "author's own intellectual creation" in the context of photography,⁹⁹ moving from "creative freedom" to "creative choices," thereby broadening the language to cast a wider net for activities that could qualify for originality. The Court was called on to determine whether a portrait photograph could be protected by copyright and, if so, whether that protection would be inferior to other works' protection because some argue that

⁹³ See, e.g., Germany's copyright law prior to 1965, under which works comprising "Kleine Münze" or "small change," such as catalogs or artwork reproductions, were provided a more constricted set of rights than were other copyrightable works. Begründung des Regierungsentwurfes zum Urheberrechtsgesetz [Justification of the Government Draft on the Copyright Act]: Bundestags-Drucksache IV/270, 38, (Ger.), in UFITA 45 (1965) at 252.

⁹⁴ Legge 22 aprile 1941, n.633, G.U. July 16, 1941, n.166 (It.).

⁹⁵ See Federica Cozzolino, *The Protection of Industrial Design as Works of Applied Art in Italy and China* 39 (2018).

⁹⁶ Cass., sez. un., 7 dicembre 1994, n.10516, Foro it. 1995, I, 3, 811.

⁹⁷ Case C-403/08 and C-429/08, *Football Ass'n Premier League and Others v. QC Leisure and Others*, Karen Murphy v. Media Protection Services, ECLI:EU:C:2011:631, ¶ 96–99 (Oct. 4, 2011). Note, however, that this reasoning is arguably fallible; it conflates the quality of originality with the type of work at hand. It may have been more precise to deny copyright protection because games are not choreographed to be works in and of themselves, although broadcasts of sports events (including commentary and point-by-point replays, for example, are copyrightable works capable of protection under many copyright laws). See also Mireille van Eechoud, *Along the Road to Uniformity: Diverse Readings of the Court of Justice Judgments on Copyright Work*, 3 (2012) JIPITEC, 1, ¶ 48. (2012).

⁹⁸ Case C-393/09, *Bezpečnostní softwarová asociace ("BSA") v. Ministerstvo kultury*, ECLI:EU:C:2010:816 . ¶ 46(Dec. 22 2010). Whether the originality requirement was fulfilled in the actual circumstances was left to the national court to decide.

⁹⁹ Case C-145/10, *Painer v. Standard and Others*, ECLI:EU:C:2011:798, ¶ 89 (Dec. 1, 2011).

there is less creative freedom in photography than in other visual media. While it broadened the scope of originality with its “choices” language, it also arguably cabined it in by adding a “personal touch” prerequisite. With respect to originality, the CJEU stated:

As regards 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, the photographer can choose the background, the subject’s pose and the lighting. When taking a portrait photograph, he can choose the framing, the angle of view and the atmosphere created. Finally, when selecting the snapshot, the photographer may choose from a variety of developing techniques the one he wishes to adopt or, where appropriate, use computer software. *By making those various choices, the author of a portrait photograph can stamp the work created with his ‘personal touch’.* Consequently, as regards a portrait photograph, the freedom available to the author to exercise his creative abilities will not necessarily be minor or even non-existent.¹⁰⁰

And with respect to the question of inferiority, the CJEU noted that “nothing in [the InfoSoc Directive] or in any other directive applicable in this field supports the view that the extent of . . . protection should depend on possible differences in the degree of creative freedom in the production of various categories of works.”¹⁰¹ And, as such, “as regards a portrait photograph, the protection conferred by [the InfoSoc Directive] cannot be inferior to that enjoyed by other works, including other photographic works.”¹⁰² This aspect of the opinion is also important because it highlights that no one type of media or creativity within a genre is better or stronger than another, and it arguably mandates that Member States not differentiate among subject matter in conferring copyright in national law.¹⁰³

In a later case concerning the unauthorized publication of military status reports in the press, the CJEU further clarified what “author’s own” means:

As is clear from well-established case-law, in order for subject matter to be regarded as a “work”, two conditions must be satisfied cumulatively. First, the subject matter must be original in the sense that it is its author’s own intellectual creation. In order for an intellectual creation to be regarded as an author’s own *it must reflect the author’s personality, which is the case if the author was able to express his creative abilities in the production of the work by making free and creative choices.*¹⁰⁴

¹⁰⁰ *Id.* at ¶ 90–93 (emphasis added).

¹⁰¹ *Id.* at ¶ 97.

¹⁰² *Id.* at ¶ 98.

¹⁰³ In a well-known case decided in 2013, Germany’s Federal Supreme Court, in the wake of updates to German copyright law implementing the 1998 EU Design Directive (Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs) overrode the copyright law’s previous predilection for providing protection to works of “small change.” Prior to this decision, the fine arts (or “purpose-free” arts) were presumed to be creative, whereas applied arts were presumed to be ruled by utilitarian rationale. In the “Birthday Train” decision, a toy designer’s train was conferred the potential to obtain copyright protection (final resolution was to be determined by a lower court) following initial denial. Bundesgerichtshof [BGH] [Federal Court of Justice] Nov. 13, 2013, I ZR 143/12, ¶ 45 (Ger.).

¹⁰⁴ Case C-469/17, Funke Medien NRW v. Bundesrepublik Deutschland, ECLI:EU:C:2019:623, ¶ 19 (July 29, 2019) (emphasis added).

It further explained that copyrightability arises if:

the author was able to make *free and creative choices* capable of conveying to the reader the originality of the subject matter at issue, the originality of which arises from the *choice, sequence and combination* of the words by which the author expressed his or her creativity in an original manner and achieved a result which is an intellectual creation, whereas *the mere intellectual effort and skill of creating those reports are not relevant in that regard*.¹⁰⁵

In addition to enhancing precision in the meaning of “author’s own intellectual creation,” this decision, in the last sentence excerpted above, neatly confirms that European jurisdictions cannot include a “sweat of the brow” component in their originality requirements. What is less clear is the Court’s description of how a work reflects its author’s personality. In describing that standard, the Court refrains back to the “free and creative choice” language as a means by which to discern whether an author has effectively reflected his personality.

Two more CJEU cases in the past three years offer guidance as to how domestic courts should interpret “author’s own intellectual creation”; one case confirmed the copyrightability of jeans and t-shirts;¹⁰⁶ the other case confirmed the copyrightability of a folding bicycle.¹⁰⁷ The former case, decided in the fall of 2019, offers a gloss on what the CJEU had already put forward:

The concept of ‘work’ that is the subject of all those provisions constitutes, as is clear from the Court’s settled case-law, an autonomous concept of EU law which must be interpreted and applied uniformly, requiring two cumulative conditions to be satisfied. First, that concept entails that there exist an original subject matter, in the sense of being the author’s own intellectual creation. Second, classification as a work is reserved to the elements that are the expression of such creation. . . . As regards the first of those conditions, it follows from the Court’s settled case-law that, if a subject matter is to be capable of being regarded as original, it is both necessary and sufficient that the subject matter reflects the personality of its author, as an expression of his free and creative choices. . . . On the other hand, when the realisation of a subject matter has been dictated by technical considerations, rules or other constraints, which have left no room for creative freedom, that subject matter cannot be regarded as possessing the originality required for it to constitute a work.¹⁰⁸

This decision repeats the “free and creative choice” language to modify the “reflection of the personality of the author” threshold; and it reiterates that the “author’s own intellectual creation” test is required and, once satisfied, is enough to confer originality, and therefore copyrightability, to a work. Furthermore, it now seems to be the case that Member States can no longer deny protection to works that are original enough to be copyrightable merely because they have not traditionally

¹⁰⁵ *Id.* at ¶ 23 (internal citations omitted; emphasis added).

¹⁰⁶ Case C-683/17, *Cofemel – Sociedade de Vestuário SA v. G-Star Raw CV*, ECLI:EU:D:2019:721 (Sept. 12, 2019).

¹⁰⁷ Case C-833/18, *SI and Brompton Bicycle Ltd v. Chedech / Get2Get*, ECLI:EU:C:2020:461 June 11, 2020.

¹⁰⁸ *Cofemel*, Case C-683/17 at ¶¶ 29–31.

been considered copyrightable subject matter, such as designs.¹⁰⁹ This is a complex and important point, and one that I will take up again when reviewing creation, below.

The final case construing originality in recent CJEU jurisprudence found in June 2020 that aspects of a foldable bicycle could be copyrightable.¹¹⁰ It largely repeats the findings of earlier related CJEU decisions, adding a few more clues as to what “author’s own intellectual creation” means to the CJEU:

[I]f a subject matter is to be capable of being regarded as original, it is both necessary and sufficient that the subject matter reflects the personality of its author, as an expression of his free and creative choices. . . . In that regard, it must be borne in mind that, according to settled case-law, where the realisation of a subject matter has been dictated by technical considerations, rules or other constraints which have left no room for creative freedom, that subject matter cannot be regarded as possessing the originality required for it to constitute a work and, consequently, to be eligible for the protection conferred by copyright. . . . [A] subject matter satisfying the condition of originality may be eligible for copyright protection, even if its realisation has been dictated by technical considerations, provided that its being so dictated has not prevented the author from reflecting his personality in that subject matter, as an expression of free and creative choices. . . . [T]he criterion of originality cannot be met by the components of a subject matter which are differentiated only by their technical function.¹¹¹

It reiterates that an author’s personality can be reflected by a showing of free and creative choices and confirms that that the “author’s own intellectual creation” is the only criterion necessary to find originality.

II. The CJEU’s Test is Flexible and Compatible with the State of American Law^[YLP3]

This section will attempt an application of European verbiage to American originality law. It aims to demonstrate that the “author’s own intellectual creation” test that the CJEU has put forward works similarly well in the United States, not because the United States needs a new or specific test, but to demonstrate that existing American practice and jurisprudence aligns with its European counterpart. Each word in the expression is both important and essential, as I will explore below; and there need not—indeed should not—be more criteria than these. To use CJEU verbiage on the subject, this construction is both “necessary and sufficient.”¹¹² Interestingly, when the phrase “author’s own intellectual creation” debuted in the 1996 Database Directive, the sole commentary in the recitals with respect to the language was largely repetitive of the Article (Object of Protection) it modified. “In accordance with this Directive, databases which, by reason of the selection or arrangement of their contents, constitute the author’s own intellectual creation shall be protected

¹⁰⁹ Eleonora Rosati, *COPYRIGHT AND THE COURT OF JUSTICE OF THE EUROPEAN UNION*, Oxford University Press (2019), at 40–42.

¹¹⁰ *Brompton*, Case C-833/18.

¹¹¹ *Id.* at ¶¶ 23–27.

¹¹² *Cofemel*, Case C-683/17.

as such by copyright. No other criteria shall be applied to determine their eligibility for that protection.”¹¹³

This construction is reasonable as well as flexible; Professor Jean-Sylvestre Bergé has remarked that it seems to integrate the two elements of creation, being an intellectual one and a personal one;¹¹⁴ and, as has been pointed out in scholarship before, “it is not at the terminological level that the issue (of originality) will be solved, but at the interpretative one.”¹¹⁵ In other words, whatever verbiage may be used to describe the originality threshold, it is necessarily imprecise. The proof of its value lies in its results. I aim below to demonstrate why the phrase works and to advocate its utility.

A. “Author’s”

As I have described above, the nexus between the concept of “originality” and “author” is so enmeshed as to occasionally conflate; but who an author *is* is necessarily directly correlated to whether his work is a copyrightable one. A photographer might create a copyrightable photograph; a translator might create a translated (derivative) work requiring the permission of the author of the original work; and an art restorer might create a painting that better resembles that painting’s original state than the one the restorer was presented before he began his work; whether the latter work is copyrightable is open to debate. This section will study who an author is and, in so doing, demonstrate that even with the first word (“author” in “author’s

¹¹³ Database Directive, *supra* note 90, at Art. 3(1). Recitals 15–16 state: “(15) Whereas the criteria used to determine whether a database should be protected by copyright should be defined to the fact that the selection or the arrangement of the contents of the database is the author’s own intellectual creation; whereas such protection should cover the structure of the database; (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.” *Id.* With respect to how the language was decided on, Professor Mireille van Eechoud noted in a 2012 article: “The respective directives provide that a computer program or database is protected on condition that ‘it is original in the sense that it is the author’s own intellectual creation’. It is generally accepted that this standard represents a compromise criterion. It evens out different local standards of originality and also meant do away with other adjacent criteria (such as merit or certain aesthetic appeal) that were sometimes applied to these fairly young branches of the copyright tree.” Mireille van Eechoud, *Along the Road to Uniformity: Diverse Readings of the Court of Justice Judgments on Copyright Work*, 3 (2012) JIPITEC, 1, at 61.

¹¹⁴ JEAN-SYLVESTRE BERGÉ, LA PROTECTION INTERNATIONALE ET COMMUNAUTAIRE DU DROIT D’AUTEUR : ESSAI D’UNE ANALYSE CONFLICTUELLE 141 (1996). « Cette définition de l’œuvre protégée semble intégrer les deux éléments de la conception médiane de l’originalité-individualité : une création intellectuelle et une création personnelle. » *Id.*

¹¹⁵ Thomas Margoni, *The Harmonisation of EU Copyright Law: The Originality Standard*, in GLOBAL GOVERNANCE OF INTELLECTUAL PROPERTY IN THE 21ST CENTURY REFLECTING POLICY THROUGH CHANGE 101 (Mark Perry, ed., 2016). See also Gunnar Karnell, *Europeisk originalitet – en uphovsrättslig chimär*, Nordiskt Immateriellt Rättsskydd (NIR) 1998 s. 157 f. The Swedish scholar suggested as early as 1998 that the EU originality test will persuade national courts to use the same criteria for determining copyright protection as they did before but going forward will do so with a more harmonized verbiage.

own intellectual creation”), originality is somewhat circumscribed because original works can only emanate from an *author*. I modify this statement with “somewhat” for many reasons, not the least of which is that courts do not apply the suggestions on intentionalism below with any discernible consistency. To better understand what an author is, this section will largely explore what an author is *not* (or should not be).

1. *Only Humans May Be Authors*

As referenced above, this analysis will not delve into the question whether artificial intelligence may be eligible for authorship, either soon or in the more distant future; many other dedicated analyses have been undertaken recently on that topic.¹¹⁶ Under current U.S. and European law, authors must be human, and this analysis accepts and endorses that limitation for the time being.¹¹⁷

2. *Intent Should not Be Relevant to a Finding of Originality*

In Professor Ginsburg’s paper on authorship described above, one of the principles in the concept of authorship she delineates is intent. She questions whether someone who *intends* to be an author has any relevance with respect to whether he *is* one for purposes of copyright law. But she discredits this line of thinking,¹¹⁸ as do other scholars,¹¹⁹ and as do I. As an important starting point in rejecting an intent inquiry, at least in the United States, the U.S. Copyright Office Compendium of Practices does not permit consideration of an author’s intent in determining whether

¹¹⁶ For interesting scholarship on artificial intelligence in the role of author, see Margot E. Kaminski, *Authorship, Disrupted: AI Authors in Copyright and First Amendment Law*, 51 U.C.D. L. REV. 589 (2017). See also Jane C. Ginsburg & Luke A. Budiardjo, *Authors and Machines*, 34 BERKELEY TECH. L.J. 343 (2019).

¹¹⁷ Referenced briefly above, in the United States, a crested macaque (monkey) that took a picture of himself was found ineligible to be considered an author for purposes of copyright law. See *Naruto v. Slater*, 888 F.3d 418 (9th Cir. 2018). Because “[t]he Copyright Act does not expressly authorize animals to file copyright infringement suits under the statute. . . . Naruto lacks statutory standing.” *Id.* at 426. European jurisprudence is also generally interpreted as requiring human authorship. See, e.g., Justin Daaks, *Artificial Intelligence in EU Copyright Law*, Medium.com, March 1, 2018, available at <https://medium.com/@dustin.jaacks/artificial-intelligence-in-eu-copyright-law-55798700da4>. “This particular wording [‘author’s own intellectual creation’] suggests the mandatory influence of an author’s personality, and thus could be interpreted to exclude non-human creators. This exclusion of non-human authors has far-reaching implications.” *Id.*

¹¹⁸ Ginsburg, *supra* note 68, at 1085.

¹¹⁹ See, e.g., Ryan Littrell, *Toward a Stricter Originality Standard for Copyright Law*, 43 B.C. L. REV. 193 (2001) (finding that the law’s standard for originality, when too influenced by subjective intent, requires adjustment). See also Russ VerSteeg, *Intent, Originality, Creativity and Joint Authorship*, 68 BROOK. L. REV. 123 (2002) (specifically rejecting certain instances of intent with respect to an examination of originality). See also William W. Fisher III, *Recalibrating Originality*, 54 HOUS. L. REV. 437 (2016). “Taking a cue from the EU’s approach to designs, one might modify the definition of obviousness in the copyright context to include a requirement that the overall impression that the work at issue produces on a reasonable person differs from the overall impression produced on such a person by any other single work that had been publicly available prior to the creation of the work at issue.” *Id.* at 464.

a work is copyrightable.

When examining a work for original authorship, the U.S. Copyright Office will not consider the author's inspiration for the work, creative intent, or intended meaning. Instead, the Office will focus solely on the appearance or sound of the work that has been submitted for registration to determine whether it is original and creative within the meaning of the statute and the relevant case law. . . . [T]he fact that creative thought may take place in the mind of the person who created a work (or a person viewing or listening to the work) has no bearing on the issue of originality unless the work objectively demonstrates original authorship.¹²⁰

Furthermore, it is an impossible designation to ascertain, although examples abound of courts both in the United States and Europe trying to pin down authorial intent. But under the circumstances where an author or artist would be asked to explain his intent (for purposes of granting or denying copyright protection, for example, or for purposes of defending an infringement claim by another author or artist), he is of course inclined to put forward a narrative that places his work in the light that would infuse the most creativity and least amount of imitation into his work.¹²¹

Aside from the complication of how to solicit articulate information in a consistent format from all authors and artists, I suggest that many authors and artists do not necessarily *wish* to add a narrative to their work; that an important part of their message is that the work speaks for itself.¹²² One recent, notorious example of an awkward inquiry into intent is Richard Prince's appropriation artwork that debatably added artistic nuance or intellectual value to photographer Patrick Cariou's black and white photographs. The appropriation art, a series of collages entitled *Canal Zone*, manipulated photographs from *Yes, Rasta*, a book of portraits of Jamaican Rastafarians by the photographer Patrick Cariou. Prince had cut out images from the book and painted over them, combining them in his collages with other images. The trial court in the infringement case held that by using images from *Yes, Rasta*, Prince infringed Cariou's copyright, and his work did not qualify for the fair use defense.¹²³ The trial court noted that:

Some of the paintings, like *Graduation* (2008) and *Canal Zone* (2008), consist almost entirely of images taken from *Yes, Rasta*, albeit collaged, enlarged, cropped, tinted, and/or over-painted, while others, like *Ile de France* (2008) use portions of *Yes, Rasta* Photos as

¹²⁰ U.S. Copyright Office, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 310.5 (3d ed. 2017).

¹²¹ See, e.g., *Cariou v. Prince*, 714 F.3d 694, 707 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 618 (2013) ("What is critical is how the work in question appears to the reasonable observer, not simply what an artist might say about a particular piece or body of work.")

¹²² Beyond those concerns, scholars have argued that there are First Amendment issues at stake in compelling artists to explain their works. "By forcing artists to articulate their intent, courts are not staying out of the business of making artistic judgments, as they may hope that they are. On the contrary, courts are taking sides in a running debate in the art theoretical community about whether artists or critics should be the ones to interpret artworks—a debate which tends to disfavor the artist's own statement of intent." Monika Isia Jasiewicz, "A Dangerous Undertaking": *The Problem of Intentionalism and Promise of Expert Testimony in Appropriation Art Infringement Cases*, 26 YALE J.L. & HUMAN. 143, 145. (2014).

¹²³ *Cariou v. Prince*, 784 F. Supp. 2d 337 (S.D.N.Y. 2011).

collage elements and also include appropriated photos from other sources and more substantial original painting.¹²⁴

Importantly for this discussion, the court noted that: “Prince testified that he doesn’t ‘really have a message’ he attempts to communicate when making art. In creating the Paintings, Prince did not intend to comment on any aspects of the original works or on the broader culture.”¹²⁵ This lack of ability or willingness to articulate his vision arguably cost him the opinion of the lower court,¹²⁶ although the appeals court largely found his work to be transformative, and therefore tilted the fair use factors in Prince’s favor.¹²⁷ But articulating meaning in appropriation art is certainly not the only circumstance in which this problem of intentionality arises, and scholars have thought about authorial intentionalism for over a century.¹²⁸ In 1879, French academic Eugène Pouillet posed the question in his copyright treatise: “[I]f we take for example the art of a designer, what does it matter if his design is intended to decorate a wall or be used as a label or a sign. Will its character change as a result? Will it be less a work of art? Does the artistry depend on the purpose of the work?”¹²⁹ He concluded that what counts is what is manifested in the work that the artist wrote, painted, or sculpted, and that the law should protect all original works blindly, not according to authorial explanation, whether they are long or short, good or bad, useful or dangerous, fruits of genius or more simplistic creations.¹³⁰

Some academics working in this space would disagree with an approach that avoids understanding what the author intends; Professor Christopher Buccafusco, for example, champions an originality test that examines which aspects of a work were intended by its author to create mental effects.¹³¹ In his view, “[f]or purposes of copyright law, then, a person may be considered an author when she has the categorical intention that her creation is capable of producing mental effects in an audience.”¹³² This approach has several positive characteristics, including potentially limiting copyright from protecting works such as certain mundane cell phone pho-

¹²⁴ *Id.* at 344.

¹²⁵ *Id.* at 349 (internal citations omitted).

¹²⁶ The court stated: “On the facts before the Court, it is apparent that Prince did not intend to comment on Cariou, on Cariou’s Photos, or on aspects of popular culture closely associated with Cariou or the Photos when he appropriated the Photos, and Price’s own testimony-shows that his intent was not transformative within the meaning of Section 107, though Prince intended his overall work to be creative and new.” *Id.* “Many viewed this testimony as ‘fatal’ to Prince’s defense.” Jasiewicz, *supra* note 122, at 144.

¹²⁷ *Cariou*, 714 F.3d 694.

¹²⁸ See, e.g., Monroe C. Beardsley, *An Aesthetic Definition of Art*, in WHAT IS ART? 15, 21 (1983). (“[A]n artwork is something produced with the intention of giving it the capacity to satisfy the aesthetic interest.”) For an interesting discussion about various approaches courts could take (formalism, intentionalism, and reader-response), and arguing that they need to grapple with art in a more straightforward way than they are currently doing, see Robert & Depoorter, *supra* note 27.

¹²⁹ EUGÈNE POUILLET, *TRAITÉ THÉORIQUE ET PRATIQUE DE LA PROPRIÉTÉ LITTÉRAIRE ET ARTISTIQUE ET DU DROIT DE REPRÉSENTATION* 72 (1879).

¹³⁰ *Id.* at 28.

¹³¹ Christopher Buccafusco, *A Theory of Copyright Authorship*, 102 VA. L. REV. 1229, 1269 (2016).

¹³² *Id.* at 1262.

tos, for example, and it also puts some measure of control in the hands of authors, which is beneficial on its own. That said, it still suffers from relying on authors to articulately and accurately describe their intentions and it disregards the real-world effect of a given work.¹³³ Renowned American artist Edward Hopper has been quoted as saying: “[i]f you could say it in words, there would be no reason to paint.”¹³⁴ [YLP4] Or, put at a slightly different angle for present purposes: no matter how honest and lucid an author or artist about the work he has put forth into the world, language will always be inadequate to describe it and I believe the work can only be judged *qua* work. Finally, aside from works whose authors are deceased, it is simply not always possible to locate and question an author as to his intentions.¹³⁵

An author of an original work, then, is an individual (human being) who ideates and creates a work that has, on its face, the quality of originality.

B. “Own”

The CJEU qualifies the word “own” in “author’s own intellectual creation” by noting that the work “must reflect the author’s personality, which is the case if the author was able to express his creative abilities in the production of the work by making free and creative choices.”¹³⁶ [YLP5] As a demonstration of personality, I submit that making free and creative choices is, by itself, a low threshold to overcome. At most, a series of non-technical choices (meaning choices that are not governed solely by logistical or technical considerations) would exhibit *a* personality, but not a specific person’s personality.¹³⁷ This seems to be the right standard, as opposed to an exhibition of personality that somehow demonstrates resemblance to an

¹³³ Case law from jurisdictions that require plaintiffs to demonstrate that a work is original shows that courts do not properly take those demonstrations into account in a consistent or rational way. *See, e.g.,* Brad Spitz, *Défaut d’originalité d’un livre : une décision contra legem de plus*, 96 REVUE LAMY DROIT DE L’IMMATERIEL 14 (2013). In his article, the author highlights a case from Paris’s Tribunal de Grande Instance in which the court decides that a several hundred page book about tarot is not original despite overwhelming demonstration to the contrary. TGI Paris, 3e ch., 4e sect., 13 juin 2013, n° 11/18096.

¹³⁴ Valerie Balint, *A Guide to Historic Artists’ Home and Studios* 83 (Alexandra T. Anderson ed., Princeton Architectural Press 2020).

¹³⁵ In the different context of orphan works, the inability to locate authors or copyright owners for the purposes of attempting to license a copyrighted work is well-documented. *See, e.g.,* The U.S. Copyright Office, *ORPHAN WORKS AND MASS DIGITIZATION: A REPORT OF THE REGISTER OF COPYRIGHTS* (2015) 34–35 (“Currently, anyone using an orphan work runs the risk that the copyright owner may step forward and bring an infringement action for substantial damages, attorneys’ fees, and/or injunctive relief unless a specific exception or limitation to copyright applies. In these cases, productive and beneficial uses of works may be inhibited not because the copyright owner has asserted his or her exclusive rights in the work, or because the user and owner cannot agree on the terms of a license, but merely because the user cannot identify and/or locate the owner and therefore cannot determine whether, or under what conditions, he or she may make use of the work.”).

¹³⁶ Funke Medien NRW, C-469-17, EU:C:2019:623, ¶ 19.

¹³⁷ This presupposes too that, to the extent artificial intelligence can be trained to make choices seem arbitrary or creative, there is a way to ascertain and discount that activity for purposes of an originality analysis.

artist's or author's existing oeuvre. One obvious problem with such a standard is examining an author's first or first few works when no oeuvre exists. Another problem is the restrictions it would create that contradict artistic freedom.

Artist Cy Twombly was an oil painter, a sculptor, and a photographer and, even within a single medium, it is not clear how a fact-finder, or even an art historian, could necessarily identify many of his works as emanating from him because he employed a range of styles and artistic techniques other than his signature "high art graffiti."¹³⁸ Indeed, a "signature" or "trademark" style, as the words themselves suggest, are best suited to trademark or trade dress law, permitting authors and artists seeking copyright protection the freedom to traverse the range of their interests and talents while employing new and variable methods and techniques in their respective crafts.

Interestingly, even in the European countries that have heretofore required something like the "imprint of an author's personality" to surmount the originality threshold, that imprint is nothing like a signature or a calling card as the plain language of the requirement suggests; it merely seems to require reflection of *some kind* of personality. In France, for example, the hurdle has been described as being the opposite of banality, but remaining abstract and variable.¹³⁹ The formulas for ascertaining the imprint of the author's personality employed in case law are diverse, and are historically different among Germany, Belgium, Spain, the Netherlands, and Switzerland.¹⁴⁰ In Belgium, for example, the phrase has been interpreted by a court of appeals addressing the originality of a photograph more literally: "[a]n intellectual creation belongs to its author when it reflects his personality."¹⁴¹

To the extent the CJEU cases have not already done so, however, there seems to be a trend under which an analysis of an author's "imprint" is broadening so as to come to a similar threshold as that enunciated by the CJEU. That is, creative choices are a sufficient proxy for a showing of an author's own or a specific personality. In a 2008 case decided by the Cour de Cassation in France, the inscription in gold lettering "Paradise" written over the bathroom door of a former alcoholics' dormitory in a psychiatric facility was found to be original for copyright purposes.¹⁴² The court looked at the author's aesthetic choices, including affixing the word in golden letters with a patina effect and in a particular font, over a dilapidated door with peeling paint, and, controversially,¹⁴³ found that these choices reflected the author's per-

¹³⁸ See, e.g., Twombly's biography on Artsy: "In addition to his paintings, which were sometimes dismissed as 'high-art graffiti,' he produced sculptures assembled from found objects, clay, and plaster, painted white to suggest an affinity to Classicism." <https://www.artsy.net/artist/cy-twombly>

¹³⁹ Pierre-Yves Gautier, PROPRIETE LITTERAIRE ET ARTISTIQUE, 6e édition (PUF, 2019).

¹⁴⁰ Carine Bernault, et. al., André Lucas, Agnès Lucas-Schloetter, TRAITE DE LA PROPRIETE LITTERAIRE ET ARTISTIQUE 128 (5th ed., Lexis Nexis 2017).

¹⁴¹ Comp. Cass., 3e ch., 14 dec. 2015: A&M 2016/2, p. 158.

¹⁴² Cass. 1re civ., 13 nov. 2008, n° 06-19.021.

¹⁴³ Yves Léopold Kouahou, *La Dissociation de l'Originalité et de l'Empreinte de la Personnalité de*

sonality and conferred originality to this creatively-affixed and creatively-styled single word. The decision was not based on the artist's previous works or an analysis of his intentions or personality.

C. "Intellectual"

In the word "intellectual," the next obstacle to a potential finding of originality, the universe of original works of authorship is further narrowed. It is, of course, a problematic word to define with any precision since any number of activities take place intellectually. But in looking to countries' interpretation of this requirement, along with case law, certain parallel elements can be drawn. Namely, an author's intellect does not need to create something that is beautiful or otherwise aesthetically pleasing; the author does not have to demonstrate talent of any kind; and the work for which protection is sought must reflect something visually different from an existing public domain artwork. This last assertion may seem obvious, but the European Commission has recently established a standalone article ensuring that photographs or other reproductions of existing public domain artworks may not receive copyright protection.¹⁴⁴ This somewhat niche issue—creating reproductions of public domain artwork—has received interestingly diverse treatment among a variety of countries but this provision brings Europe in line with current U.S. law, as will be explored below.

1. *Aesthetic Neutrality*

As referenced above in the section summarizing America's history with the originality requirement, the 1903 Supreme Court case deciding that circus posters are copyrightable subject matter also touched on aesthetic appeal.¹⁴⁵ One of the Court's important and often-cited conclusions was that a finding of copyrightability cannot depend on any exercise of aesthetic distinction:

It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme, some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time. At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge. Yet if they command the interest of any public, they have a commercial value—it would be bold to say that they have not an aesthetic and educational value—and the taste of any public is not to be treated with con-

l'Auteur pour Protéger une Oeuvre, Dec. 2008 (criticizing the *Paradise* decision as having eviscerated any real originality threshold).

¹⁴⁴ "Member States shall provide that, when the term of protection of a work of visual art has expired, any material resulting from an act of reproduction of that work is not subject to copyright or related rights, unless the material resulting from that act of reproduction is original in the sense that it is the author's own intellectual creation." Council Directive (EU) 2019/790, *supra* note 86, at Ch. 4, Art. 14.

¹⁴⁵ *Bleistein v. Donaldson Lithographing* 188 U.S. 239 (1903).

tempt. It is an ultimate fact for the moment, whatever may be our hopes for a change.¹⁴⁶

The CJEU, in limiting the criteria for an originality threshold to “author’s own intellectual creation” as both “necessary and sufficient”¹⁴⁷ similarly precludes European Member States from establishing any kind of high art versus low art analysis or an inquiry into an author’s or artist’s talent or virtuosity in their originality findings. Indeed, in the three Directives that originally set the language “author’s own intellectual creation,” the Recitals specified that, with respect to the criteria to be applied in determining whether or not there is an original work, no tests as to the qualitative or aesthetic merits of the work should be applied.¹⁴⁸ That concept, now extrapolated to all copyrightable works, matches *Bleistein*’s vision of aesthetic neutrality. As early as 2013, European copyright experts concluded that “national (European) laws chiefly aim to eliminate subjective evaluative judgments about the value or worth of creations.”¹⁴⁹

2. Creative Choices

Both European and American jurisprudence have pointed to creativity in authorial choices or selection as indicia of the kind of intellectual activity that signals originality. In the United States’ 1884 *Sarony* case,¹⁵⁰ outlined above, the Supreme Court confirmed that photography is copyrightable subject matter and, in so doing, described the particular qualities of the photograph at issue—a posed portrait of writer Oscar Wilde—that qualified the work as original.

[The photograph was made by the plaintiff] entirely from his own original mental conception, to which he gave visible form by posing the said Oscar Wilde in front of the camera, *selecting and arranging* the costume, draperies, and other various accessories in said photograph, arranging the subject so as to present graceful outlines, arranging and disposing the light and shade, suggesting and evoking the desired expression, and from such disposition, arrangement, or representation, made entirely by the plaintiff, he produced the picture in suit, Exhibit A, April 14, 1882, and that the terms ‘author,’ ‘inventor,’ and ‘designer,’ as used in the art of photography and in the complaint, mean the person who so produced the photograph.¹⁵¹

This decision and its formula of pointing to choices has been followed in the

¹⁴⁶ *Id.* at 300.

¹⁴⁷ *Brompton*, Case C-833/18 at ¶ 22.

¹⁴⁸ *See, e.g.*, Computer Programs Directive, *supra* note 89, Recital 8.

¹⁴⁹ Stef van Gompel & Erlend Lavik, Quality, Merit, *Aesthetics and Purpose: An Inquiry Into EU Copyright Law’s Eschewal of Other Criteria Than Originality*, RIDA – Revue Internationale du Droit d’Auteur, no. 236, 100, 103 (April 2013). The authors qualify this assertion by noting that “this does not mean that, in practice, qualitative and aesthetic criteria are totally disregarded.” This is because while “the law intends to eliminate all subjective evaluative judgments about the value or worth of a creation, . . . in practice, when judges are supposed to exclude evaluation, it sometimes proves difficult to totally ignore the success or value of a work when judging on its eligibility for protection. The same hesitation can certainly be found in U.S. law. *See, e.g.*, Walker & Depoorter, *supra* note 27.

¹⁵⁰ *Sarony*, 111 U.S. 53 at 283.

¹⁵¹ *Id.* at 282 (emphasis added).

ensuing century. In 1916, for example, a district court in New York held that a photograph of Fifth Avenue demonstrated requisite originality to confer copyright protection.¹⁵² It did not necessarily hew closely to *Bleistein's* mandate of aesthetic neutrality that was introduced in the preceding decade,¹⁵³ but it echoes *Sarony's* language as to the choices the photographer made, specifically with respect to timing in this case, that weigh in favor of a finding of originality:

[Anyone] may take a photograph of a public building and of the surrounding scene. It undoubtedly requires originality to determine just when to take the photograph, so as to bring out the proper setting for both animate and inanimate objects, with the adjunctive features of light, shade, position, etc. The photograph in question is admirable. The photographer caught the men and women in not merely lifelike, but artistic, positions, and this is especially true of the traffic policeman. The background, taking in the building of the Engineers' Club and the small trees on Forty-First street, is most pleasing, and the lights and shades are exceedingly well done. There are other features, which need not be discussed in detail, such as the motor cars waiting for the signal to proceed. The work, it seems to me, comes well within what the authorities have held to be the subject-matter of copyright.¹⁵⁴

A more recent example of *Sarony's* progeny is a beer company's advertising billboard featuring a photograph of an athlete.¹⁵⁵ In finding the relevant photograph original for purposes of copyright, the court noted that a photograph can be original in three respects, none of which are mutually exclusive: rendition, timing, and "creation of the subject,"¹⁵⁶ and all of which depend on choices and arrangements:

To conclude, the nature and extent of protection conferred by the copyright in a photograph will vary depending on the nature of its originality. Insofar as a photograph is original in the rendition or timing, copyright protects the image but does not prevent others from photographing the same object or scene. . . . By contrast, to the extent that a photograph is original in the creation of the subject, copyright extends also to that subject. Thus, an artist who arranges and then photographs a scene often will have the right to prevent others from duplicating that scene in a photograph or other medium.¹⁵⁷

Copyright protection for photographs in Europe is a more complicated trajectory to summarize because many countries have historically provided lesser protection—either by way of rights or by way of limited terms, or both—to photo-

¹⁵² *Pagano v. Chas. Beseler Co.*, 234 F. 963, 964 (S.D.N.Y. 1916).

¹⁵³ Interestingly, a parallel phenomenon has been recognized in Europe: "[W]hile courts generally refrain from using the lack of success, merit or quality as an argument to *withhold* copyright protection from a creation, this does not mean that they necessarily also ignore the success, merit or quality of a work when *granting* copyright protection to it." Van Gompel & Lavik, *supra* note 149 (emphasis in original).

¹⁵⁴ *Pagano*, 234 F. at 964.

¹⁵⁵ *Mannion v. Coors Brewing Co.*, 377 F. Supp. 2d 444, 447 (S.D.N.Y. 2005).

¹⁵⁶ *Id.* at 453. The latter term, "creation of the subject," means that a "photograph may be original to the extent that the photographer created "the scene or subject to be photographed." *Id.* at 453. Interestingly, and of interest for this comparative analysis, this court relied on British law to parse the respects in which a photograph is original, specifically Sir Hugh Laddie et al., *THE MODERN LAW OF COPYRIGHT AND DESIGNS* (3d ed. Butterworths 2000).

¹⁵⁷ *Mannion*, 377 F. Supp. 2d at 454.

graphs.¹⁵⁸ That said, in the wake of recent CJEU jurisprudence, and even in the wake of the 1996 WIPO Copyright Treaty, which nullifies the Berne Convention's Article 7(4),¹⁵⁹ contracting parties—hence European countries¹⁶⁰—cannot differentiate the term of copyright protection they provide to photographs from the term of protection for any other medium.

A useful European comparator to the American photography cases excerpted above is a French case involving a portrait photograph by Gered Mankowitz of musician Jimi Hendrix. In that case, the trial court denied copyright protection to the photograph based on an inability to find originality, regardless of its use in an advertisement for e-cigarettes.¹⁶¹ The court found it undeterminable to decide how the work crossed the originality threshold.¹⁶² It made this finding despite the photographer describing his choices and goals in effectuating the photograph. The Court of Appeals, however, highlighted some of the photographer's choices in reversing the trial court's decision. It pointed to Mr. Mankowitz's guidance in posing Mr. Hendrix during the shoot; his selection of black and white film; the particular camera he chose to use, including its wide-angle lens, and the lighting, angle, and framing of the overall composition.¹⁶³

¹⁵⁸ Historically, for example, in Germany, Austria, and Denmark, copyright protection of simplistic photographs lasted 50 years, which is twenty years shorter than the term for other works. In Italy, the law granted simplistic photographs a mere twenty years of protection; in Spain the protection was 25 years. See European IPR Helpdesk, Fact Sheet, Copyright Essentials, at 5. https://www.iprhelpdesk.eu/sites/default/files/newsdocuments/Fact-Sheet-copyright_essentials.pdf

¹⁵⁹ WIPO Copyright Treaty art. 9.; *signature* Dec. 19, 1996, 2186 U.N.T.S. 121. “In respect of photographic works, the Contracting Parties shall not apply the provisions of Article 7(4) of the Berne Convention.” Berne Convention, Article 7(4): “It shall be a matter for legislation in the countries of the Union to determine the term of protection of photographic works and that of works of applied art in so far as they are protected as artistic works; however, this term shall last at least until the end of a period of twenty-five years from the making of such a work.”

¹⁶⁰ There are no European countries that are not party to the WIPO Copyright Treaty. See WCT Contracting Parties, https://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=16.

¹⁶¹ Tribunaux de grande instance [TGI] [ordinary court of original jurisdiction] Paris, 3e civ., May 21, 2015.

¹⁶² See *id.* (“[e]n effet, seul l’auteur, dont le juge ne peut suppléer la carence, est en mesure d’identifier les éléments traduisant sa personnalité et qui justifient son monopole et le principe de la contradiction posé par l’article 16 du code de procédure civile commande que le défendeur puisse connaître précisément les caractéristiques qui fondent l’atteinte qui lui est imputée et apporter la preuve qui lui incombe de l’absence.”). (Author’s translation: “[i]ndeed, only the author, whose absence the judge cannot overcome, is able to identify the elements reflecting his personality and which justify his copyright. Under France’s civil code, a defendant shall be allowed to know precisely what portion of the work he is infringing and shall be provided proof.”).

¹⁶³ See Cour d’appel [CA][regional court of appeal] Paris, 1e civ., Jun. 13, 2017, 15/10847 (“Que les appelants font valoir que c’est M. X. qui a organisé la séance au cours de laquelle la photographie dont s’agit a été prise, au mois de février 1967, qui a guidé et dirigé Jimi Hendrix lors de la prise de vue et qui lui a demandé de prendre la pose reproduite sur la photographie en cause ; qu’ils indiquent que M. X. a choisi de prendre la photographie en noir et blanc afin de donner plus de contenance à son sujet et donner de lui l’image d’un musicien sérieux et que le photographe a opté pour un appareil photo Hasselblad 500c avec un objectif Distagon 50 mm afin d’apporter un touche de grand angle au portrait sans créer de distorsion ; qu’ils exposent encore que M. X. a

This is not to say that all photographs are automatically original. Another French case, decided in 2011, concluded that a photograph of two fish on a plate did not demonstrate the requisite level of originality to confer copyright protection,¹⁶⁴ making an arguably parallel decision to the *Feist* case for demonstrating a total lack of creativity. Interestingly, courts around the globe have been asked to decide whether photographs of artistically-plated meals are copyrightable.¹⁶⁵

Other than photography, wherein the concept of “creative choices” fits well because photographers are necessarily locked in to the capabilities of a camera to ultimately manifest their works, it is useful to imagine how other artistic media, other than design, might grapple with “creative choices.” A realist painter standing in front of a vase of flowers paints those flowers and the table it is standing on and the light coming in from an adjacent window exactly as he sees them. The more talented the painter, the more realistic the resultant painting and, arguably, the fewer choices he has made in favor of simply unleashing his painterly virtuosity. But it would be a perverse result for a realist still life painting to be found unoriginal for purposes of copyright and, even if the artist would not immediately describe his painting as a series of choices, he would have chosen how to angle his topic, the time of day to paint it, the type of paint to use to render the flowers in the paint thickness, and luminosity he employed, and a variety of other choices not dissimilar from a photographer’s choices.

Whereas “choices” at first blush seems like a binary concept as opposed to one steeped in creativity, it does provide a means by which to describe creativity and personality; if not a specific person’s personality.

3. *Using Creative Choices To Mimic Preexisting Works*

Another subtopic in this paper that could comprise an entire analysis on its own is the issue of reproductions of public domain artwork. As mentioned above, the EU’s 2019 copyright directive dedicates an entire article to the issue in an effort to harmonize Europe’s approach.¹⁶⁶ It states:

Member States shall provide that, when the term of protection of a work of visual art has expired, any material resulting from an act of reproduction of that work is not subject to copyright or related rights, unless the material resulting from that act of reproduction is original in the sense that it is the author’s own intellectual creation.¹⁶⁷

In the United States, the Second Circuit decided this issue in 1999 in a case involving Bridgeman Art Library, a licensor of public domain fine art images by way of its own professional reproductions, and the maker of a CD-ROM with a large

choisi le décor, l’éclairage, l’angle de vue et le cadrage. . .”).

¹⁶⁴ Cour de cassation [Cass.][supreme court for judicial matters] le civ., Oct. 20, 2011, 10/21251.

¹⁶⁵ See Cathay Y. N. Smith, *Food Art: Protecting Food Presentation under U.S. Intellectual Property Law*, 14 J. MARSHALL REV. INTELL. PROP. L. 1, 5 (2014) (discussing the issue thoroughly, although such discussion is now dated).

¹⁶⁶ See Council Directive (EU) 2019/790, *supra* note 86.

¹⁶⁷ *Id.* at Art. 14.

repertoire of digital images copied from Bridgeman's collection without permission or compensation.¹⁶⁸ The court held that no copyright was available to Bridgeman for the reproductions in question because the point in making the transparencies (reproductions) of the original artwork "was to reproduce the underlying works with absolute fidelity,"¹⁶⁹ which belies even a modicum of creativity. This decision has been both praised and criticized;¹⁷⁰ whether it has changed art licensing practices in America is unclear.¹⁷¹

Contrarily, in 2016 a German court ruled that digitizing public domain paintings creates newly copyrighted works, even if the intent of the digitization was to create a faithful image of the original artwork rather than to produce an artistic interpretation.¹⁷² As mentioned above, the comparison between the United States and Germany with respect to photography is nuanced and not completely parallel because certain European countries—Germany included—have historically granted shorter terms of protection to simplistic or snapshot photographs, which is the category into which the court found these museum photographs to fall.¹⁷³

In adding Article 14 to the most recent copyright directive and repeating the "author's own intellectual creation" criterion to this specific category of works, the European Council acknowledges the variance in practices among its Member States and provides the same verbiage for its analysis as for any other copyrightable work.

¹⁶⁸ *Bridgeman Art Library, Ltd. v. Corel Corp.*, 36 F. Supp. 2d 191, 192 (S.D.N.Y. 1999).

¹⁶⁹ *Id.* at 197.

¹⁷⁰ See Robin J. Allan, *After Bridgeman: Copyright, Museums, and Public Domain Works of Art*, 155 U. PA. L. REV. 961 (2007) (interestingly critiquing the creative choices being made by professional photographers to capture the proper coloring and highest fidelity to the original artwork).

¹⁷¹ See, e.g., Kathryn Goldman, *Museums that Give Away Open Access Images of Public Domain Work*, CREATIVE LAW CENTER, <https://creativelawcenter.com/museums-open-access-images/> (last updated Feb. 15, 2020).

¹⁷² Benjamin Beck & Konstantin von Werder, *Wikimedia loses German Copyright Case Over Photographs of Public Domain Paintings*, MAYER BROWN, <https://www.allaboutipblog.com/2016/07/wikimedia-loses-copyright-case-over-photographs-of-public-domain-paintings/> (last visited Feb. 25, 2021).

¹⁷³ Urheberrechtsgesetz [UrhG][Copyright Act], Sept. 9, 1965, BGBl at 1273, § 2 & 72 (Ger.) (articulating that in Germany, the protection granted to photographs is not limited to copyright for "photographic works" under section 2, para. 1, no. 5 of the German Copyright Act. Photographs can also be protected under section 72, which requires no creativity on the photographer's part. But the scope of protection conferred by this related right is essentially equivalent to copyright, albeit with a shorter term. The court in this case found the photographs to be the result of difficult technical conditions such as lighting, distance, angle, and focus and, therefore, worthy of section 72 protection).

D. “Creation”^[YLP6]

The last word in “author’s own intellectual creation” also adds some substance to the originality test.

1. *The Subject Matter of an Original Work is Broad*

With respect to the CJEU *Cofemel* decision, what was once considered a finite set of copyrightable works is now open to new subject matter, including subject matter that had been previously barred, such as designs. Professor Eleonora Rosati has outlined this shift and commented on its importance and potentially large impact in Europe:

First, the judgment suggests that only the objective criteria indicated therein need to be satisfied: hence, there is no (longer) room for any requirement of artistic value or intent, as is instead still the case in certain jurisdictions Second, in line with earlier case law, . . . *Cofemel* indicates that exhaustive lists of protectable subject matter . . . are really incompatible with EU law. Protection only arises when there is a work in the sense clarified by the Court: no other requirements are needed. And, in line with the point above, copyright protection cannot arise at different conditions depending on the ‘category’ the object at issue belongs to.¹⁷⁴

A foundational difficulty with harmonization of subject matter in Europe is that certain jurisdictions, including the United Kingdom and Ireland, include lists of copyrightable works in their copyright laws. With the CJEU’s broad statements about originality (aside from the author’s own intellectual creation standard, a work needs to “entail[] the existence of a subject matter that is identifiable with sufficient precision and objectivity”¹⁷⁵), such closed lists of works enumerating candidates for copyright protection in domestic law now seem to require revision.¹⁷⁶

2. *The United States Requires Works To Be Fixed*

Relatedly, the United States requires a work to be fixed in a tangible medium of expression for copyright protection to inhere.¹⁷⁷ Whereas the design of a garden may be protected in France,¹⁷⁸ for example, it is not readily protected in the United

¹⁷⁴ Eleonora Rosati, *The Cofemel decision well beyond the ‘simple’ issue of designs and copyright*, THE IPKAT, <http://ipkitten.blogspot.com/2019/09/the-cofemel-decision-well-beyond-simple.html> (last visited Feb. 24, 2021).

¹⁷⁵ *Cofemel*, Case C-683/17 at ¶ 32.

¹⁷⁶ Eleonora Rosati, *CJEU rules that copyright protection for designs only requires sufficient originality*, 14 J. INTELL. PROP. L. & PRAC. 931, 932 (2019) (“In line with earlier case law up till the *Levola Hengelo* ruling, *Cofemel* indicates that exhaustive lists of protectable subject matter (as is the case of, e.g., the UK) are really incompatible with EU law. Protection only arises when there is a work in the sense clarified by the Court: no other conditions need to be satisfied.”).

¹⁷⁷ See 17 U.S.C. § 102(a) (“Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”).

¹⁷⁸ GENERAL DIRECTORATE OF HERITAGE & NATIONAL COUNCIL OF PARKS AND GARDENS, THE GARDEN AND ITS IMAGES 65 (6th ed. 2012) (acknowledging how the French appeals court confirmed recognition of originality in the restoration work of the redesign of a garden, at the begin-

States for this reason.¹⁷⁹ The same can be said of performance art,¹⁸⁰ although certain unfixed artwork can be deemed “fixed” when recorded in another medium. Whether Europe is coming closer to this standard by way of the *Cofemel* decision remains to be seen; *Cofemel* reiterated language from another CJEU case which found that copyrightable subject matter:

must be expressed in a manner which makes it identifiable with sufficient precision and objectivity, even though that expression is not necessarily in permanent form. . . . [There should be] no element of subjectivity—given that it is detrimental to legal certainty—in the process of identifying the protected subject matter.¹⁸¹

While that description hints at fixation, or something close to it, it is not yet clear what ramifications it will have on streamlining the types of works that might qualify for copyright protection. But the same broadening can be seen in the *Star Athletica* decision, which has opened the scope of copyrightable subject matter.¹⁸²

3. Protection for Original Works Ranges From Thin to Thick

Whatever the medium in which the creation is manifested, it remains the inevitable case that not all media and not all creations within a single medium enjoy the same breadth of copyright protection. As foreshadowed by the case above treating the photograph of the athlete in the beer advertisement billboard, “the nature and extent of protection conferred by the copyright in a [work] will vary depending on the nature of its originality.”¹⁸³ Scholars recommend that, instead of granting a blanket, identical form of protection to all copyrightable works, copyright law should introduce a scaled originality model so that it is clear on the front end whether a work has thicker or thinner protection and, therefore, fewer or more rights of varying strength that attach to them.¹⁸⁴ In this author’s view, the “thickness” of

ning of the 20th century by Achille Duchêne); see *id.* at 67 (outlining the issue restoration and fidelity to a design that had been authored by someone else).

¹⁷⁹ *Kelly v. Chi. Park Dist.*, 635 F.3d 290, 292 (7th Cir. 2011) (holding that a work using natural materials as a medium cannot be authored or fixed for purposes of copyright protection, thereby declining to reach the merits of the complaint, which was a violation of moral rights under the Visual Artists Rights Act of 1990. That said, in other media, there are ways to “cure” the fixation requirement. Videotaping a sequence of performance art could satisfy the requirement, for example.).

¹⁸⁰ See *Comment Protéger l’Art Moderne par le Droit d’Auteur?*, LBV AVOCAT, <https://avocat-lbv.com/comment-protoger-lart-moderne-par-le-droit-dauteur/> (last visited Feb. 25, 2021) (articulating that “the materialization of ideas in a form will be protected”).

¹⁸¹ Hof’s Arnhem-Leeuwarden 29 mai 2017, ECLI:EU:C:2018:899 2018, C-310/17 m.nt. (*Levola Hengelo BV/Smilde Foods BV*) (Neth.).

¹⁸² See, e.g., Letter from Karyn A. Temple, Regan A. Smith, Catherine Z. Rowland, U.S. Copyright Office Review Board, to Joseph Petersen, Attorney, Kilpatrick Townsend & Stockton, LLP (May 18, 2019), <https://www.copyright.gov/rulings-filings/review-board/docs/yeezy-boost.pdf> (describing a reversal of refusal for copyright registration for two pairs of sock-like shoes made by Adidas based in part on the outcome of *Star Athletica*).

¹⁸³ *Mannion*, 377 F. Supp. 2d 444 at 454.

¹⁸⁴ See, e.g., Gideon Parchomovsky & Alex Stein, *Originality*, 95 VA. L. REV. 1505, 1550 (2009); *id.* at 1517 (“Under the extant regime, originality is a mere threshold requirement, and, moreover, one that minimally original works satisfy as well. The problem with this design is that it fails to differ-

copyright protection applicable to any given work, while not quantified or set at a certain degree at a work's inception, is always inherent in the work and can be measured as it becomes necessary to apply it to the circumstances as they arise.

In the case of the product shot of a bottle of alcohol, for example, the photograph of vodka at issue enjoyed a "thin" layer of protection.¹⁸⁵ And, while it took litigation to arrive at that particular finding, the case itself sets the necessary precedent for works to possess a wide range of protection. As Professor Eva Subotnik has noted: "The proper application of originality principles to photography entails protection against outright copying in most cases, but wide latitude to stage and shoot similar subject matter found in earlier photographs."¹⁸⁶ A work's volume or quantum of originality lives within the work itself and those who use the work as inspiration without permission are responsible for using only so much as the original work's layer of protection permits. Like the originality test itself, there is no one way to express a legal test that will apply to every copyrighted work, but the broad principles outlined above provide the appropriate parameters.

III. Conclusion

In making a series of decisions about the originality requirement for a variety of media—from portrait photographs to folding bicycles—the Court of Justice of the European Union has confirmed that a work that is an "author's own intellectual creation" is original for purposes of benefitting from copyright protection. That standard will likely require individual European Member States to revisit the application of their domestic copyright laws and, in certain cases, to revise the laws themselves. Originality in the United States is determined with equivalently low precision but high adaptability, and the European construction is as valid here as it is there. Setting aside specialty subject matter, such as databases and joint works, and setting aside outlying originality thresholds such as the "sweat of the brow" doctrine, the originality requirement has, as Dr. Ficsor suspected almost two decades ago, undergone a quiet harmonization which is not yet always evident by an analysis of copyright laws as they are written, but can be gleaned from the similarities in works that countries find original, either through litigation or registration. Copyrightable subject matter may be expanding on both sides of the Atlantic, but the originality requirement coming to a state of reasonableness, flexibility, and equilibrium will mitigate an avalanche of copyrightability for mundane, unoriginal works. This analysis is not blind to the inability of laws to fully capture the concept of originality but instead embraces its uncertainty as a necessary acknowledgment

entiate between different levels of originality. By rewarding minimally original works and highly original works alike, the existing law incentivizes authors to produce works containing just enough originality to receive protection, but not more. From a societal viewpoint, however, the degree of originality matters. Presumably, the more original works generate a greater benefit for society. Yet, this fact is not embedded in the current regime.").

¹⁸⁵ *Ets-Hokin v. Skyy Spirits Inc.*, 323 F.3d 763, 766 (9th Cir. 2003).

¹⁸⁶ Eva E. Subotnik, *Originality Proxies: Toward a Theory of Copyright and Creativity*, 76 *BROOK. L. REV.* 1487, 1552 (2011).

of the inadequacy of legal language and as a tribute to the limitless scope of human creativity.¹⁸⁷

¹⁸⁷ Pouillet, *supra* note 129, at 71 (finding that in 1879, one French scholar came to the same conclusion by rhetorically asking: “How could the limits of where the artistic domain ends be determined or marked? What would be the rule, the criterion? According to which characteristics can a work of art be recognized?”).