

Intellectual Property Law (6th edn)

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p. 98 **4. Criteria For Protection**

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<https://doi.org/10.1093/he/9780198869917.003.0004>

Published in print: 31 October 2022

Published online: October 2022

Abstract

This chapter examines the criteria used to determine whether a work is to be protected by copyright. More specifically, it considers the requirements for copyright protection: the work must be recorded in a material form; must be ‘original’; should be sufficiently connected to the UK to qualify for protection under UK law; and should not be excluded from protection on public policy grounds. There is discussion of the traditional British conception of originality, harmonization of ‘originality’ in Europe, analysis of differences between British and European standards on originality, and the issue of whether the UK can—and does—protect non-original works. The chapter concludes by focusing on subject matter excluded from copyright protection.

Keywords: copyright, material form, originality, entrepreneurial works, authors’ own intellectual creation, creative choices, qualification of foreign works for British copyright, non-protection of immoral works

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1 Introduction

In order for a work to be protected by copyright, it is necessary to show that, as well as being the sort of work protected by the Copyright, Designs and Patents Act 1988 (CDPA 1988), the work also satisfies the particular requirements that are imposed on it. As we will see, the requirements vary, sometimes considerably, between different categories of work.

- (i) The *first* requirement is that the work must be recorded in a material form. As we will see, this applies only to literary, dramatic, and musical works.
- (ii) The *second* requirement is that the work must be ‘original’. It should be noted that this applies only to literary, dramatic, musical, and artistic works. In contrast, there is no need for entrepreneurial works (sound recordings, films, broadcasts, and typographical arrangements) to be ‘original’. Instead, the 1988 Act declares that copyright subsists only to the extent that such works are not copied from previous works of the same sort.¹
- (iii) The *third* requirement, which applies to all works, is the work is sufficiently connected to the United Kingdom to qualify for protection under UK law.
- (iv) The *fourth* requirement is that the work is not excluded from protection on public policy grounds.

We will deal with each of these requirements in turn.

2 Recorded in Material Form

There is no requirement that a work be registered for copyright protection to arise;² copyright arises automatically. However, the CDPA 1988 provides that copyright does not subsist in literary, dramatic, or musical works ‘unless and until’ the works are ‘recorded ↗ in writing or otherwise’.³ This is usually referred to as the ‘requirement that the work be recorded in a material form’. Writing is defined to include any form of notation or code ‘regardless of the method by which, or medium in or on which, it is recorded’.⁴ Thus it seems that any digital embodiment of a work will suffice.⁵

There is no requirement of recording in the case of artistic works,⁶ sound recordings, films, and published editions. In the case of sound recording and films, ‘recording’ is implicit in the statutory definition of subject matter. In the case of artistic works, material form will often be present: for example, we have already noted that the Court of Appeal has said that a painting requires a ‘surface’,⁷ and it has been stated that an ice sculpture, although not permanent, is protected as a sculpture.⁸ In *Islestarr Holdings v. Aldi Stores*, the IPEC held that copyright subsisted in a design embossed into make-up powder,⁹ Master Linwood stating that he saw no reason why the creator of a bespoke wedding cake should not have copyright therein, despite the fact that it would inevitably be eaten.¹⁰ But what about, for example, a display of coloured lights? It could be argued that since fixation is not specifically required by the 1988 Act for artistic works, such a display could be protected.¹¹ If so, live televising of the display would infringe. The point remains to be decided by the courts. An Australian authority suggests that a work of kinetic art will not be protected.¹²

There is no requirement that broadcasts be fixed or embodied in any particular form. Thus broadcasts are protected whether or not the broadcasting organization makes a permanent version of them.

- p. 100 ↵ The requirement that literary, dramatic, and musical works be recorded is rarely a serious impediment to copyright protection.¹³ The reason for this is that the fixation requirement will be satisfied even if the recording is carried out by someone other than the creator (with or without their permission),¹⁴ whether the recorded form is in the claimant's hands or has subsequently been destroyed.¹⁵ Given that when someone infringes copyright, they will normally have reproduced the work, and that parties unconnected with the creator can carry out the requisite recording, this means that in most cases the work will in fact have been recorded.

3 Originality: Literary, Dramatic, Musical, and Artistic Works

Perhaps the most important requirement that must be satisfied for copyright protection to arise is that the work must be 'original'. It should be noted that this applies only to literary, dramatic, musical, and artistic works (authorial works).¹⁶ In contrast, there is no need for entrepreneurial works (sound recordings, films, broadcasts, and typographical arrangements) to be original for them to qualify for protection.¹⁷

While the originality requirement has been a general statutory requirement since 1911,¹⁸ it is very difficult to state with any precision what copyright law means when it demands that works be 'original'.¹⁹ Perhaps the most common account is that the work must be the result of 'labour, skill and judgement'.²⁰ This uncertainty has been exacerbated by the fact that, as part of the harmonization of copyright law in Europe, a new concept—that of the *author's own intellectual creation*—determines the originality not only of databases, computer programs, and photographs, but also of all literary, dramatic, musical, and artistic works. In what follows, therefore, we need to examine the difference between the traditional British conception of originality and the European one.

3.1 Common Characteristics of Originality

While we will explore the differences between the traditional British and European conceptions of originality later, both conceptions share a number of characteristics. First, in both traditional British and European p. 101 conceptions, 'originality' is concerned with the ↵ relationship between an author or creator and the work—that is, originality is not concerned with whether the work is inventive, novel, or unique.²¹ While the novelty requirement in patent law focuses on the relationship between the invention and the 'state of the art',²² the originality examination is primarily concerned with the relationship between the creator and the work. When copyright says that a work must be original, this means that the author must have exercised the requisite intellectual qualities (in the British version, 'labour, skill, or effort'; in the European, 'intellectual creation') in producing the work.²³ More specifically, in determining whether a work is original, copyright law focuses on the input that the author contributed to the resulting work. Consequently, a person who writes a film script based on an original story recounted by Homer in *The Odyssey* produces an 'original' work even though the story and characters have been widely known for thousands of years.²⁴

Second, the test of originality in the traditional and European conception is concerned with the manner in which the work is *expressed*—in the way in which the paint is applied, the words are chosen and ordered, ideas are executed, or the clay moulded. That is, in assessing originality, copyright law is concerned with the originality of expression rather than ideas.²⁵

Third, whether we are concerned with the traditional UK approach or the new EU test, it is clear that ‘derivative works’ can be original.²⁶ ‘Derivative works’ are works that were derived from or based upon existing works (whether or not they are protected by copyright). Obvious examples of such works are new editions, translations, arrangements of music, and engravings, as well as anthologies. To be protected, the derivative work must also be ‘original’ in itself (although as we will see, precisely what this requires in this context may vary from country to country).

It is worth reiterating that, in such cases, copyright may subsist in a derivative work even though it might infringe copyright in the existing work²⁷—that is, a derivative work may be both original and infringing. In such a situation, any copyright that is acquired in a derivative work will be distinct from and subordinate to the copyright in any prior original work that is incorporated into it. Provided that the original work is still apparent in the new version, both the maker of the new version and any third-party copier will need the licence of the owner of copyright in the original.

The fourth point to note is that the originality threshold has been set at a very low level.²⁸ English courts have accepted as original such things as railway timetables and exam papers (which were drawn from the stock of knowledge common to mathematicians, produced quickly, and included questions similar to ones that had previously been asked by other examiners), while (as we will see) the Court of Justice has implied that 11 words might amount to an original work.²⁹ One of the consequences of the originality ↪ standard being set at a low level is that there have been relatively few instances in which subject matter has been excluded on the basis that it was non-original. Most of the problems that have arisen have been in relation to informational works, derivative works, and industrial designs. That said, Advocate-General Szpunar has emphasized, in the latter context, that ‘although the threshold of originality adopted in copyright is not normally very high, it is not non-existent’,³⁰ and, at least in the context of designs, must be applied ‘strictly’.³¹

Fifth, when considering the relevance of previous cases, it is worth bearing in mind that, whatever test is applied, the question of whether a work is original inevitably depends on the particular cultural, social, and political context in which the judgment is made. In part, this is because originality turns on the way in which the inputs into the work are perceived by the courts. One of the consequences of this is that what is seen as original may change over time. A good example of this is provided by photography. When invented in the 1840s, photography was seen as a non-creative (and non-original) mechanical process whereby images were produced by exposing chemically sensitive materials to light. In the late nineteenth century, however, photography came to be seen as an artistic activity. As a result, photographs came to be seen as creative and thus potentially original works.³² Recent developments in technology may, however, have rendered some photographs that were creative in 1900 distinctly mundane in today’s terms.³³ Similar changes occurred more recently in relation to the artistic works of Aboriginal Australians, which were once assumed to be ‘non-original’ on the basis that the works reflected traditional themes and imagery, but are now recognized as not merely original, but also artistic (in the sense of being of such quality as to merit inclusion in art galleries).³⁴

3.2 Purpose of The Originality Requirement

Before going into detail, it is worth pausing for a moment and considering the ‘function’ of the originality requirement. The originality requirement sets a threshold that determines when material falling within the definition of literary, dramatic, musical, or artistic work is protected by copyright law. Nevertheless, the policy basis for the threshold requirement has never been made clear.³⁵

From one natural rights perspective, the requirement of originality merely reflects the premise that copyright ought to protect the personality of authors as expressed in their works: absent such ‘originality’—that is, indicia or traces of personality—there is no justification for protection. Consequently, works that do not reflect their author’s personality—works of labour or investment, works that different creators would come up with independently, as well as ‘objective’ features of works (facts, many ideas, functions)—would not warrant protection.³⁶ Moreover, no protection should be afforded to those features of works that are necessary for others to exercise their natural rights—in this respect, their creative or expressive freedom.³⁷

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In contrast, from a reward perspective, where effort has been made in creating a work, the creator may be said to deserve some protection from the exploitation of that effort by another (who would be unjustly enriched). This strand of thinking points towards making protection readily available for anyone who invests labour or capital in producing a work (at least where other forms of legal protection, such as unfair competition law, are unavailable).

From a utilitarian perspective, the ‘originality’ threshold might have been expected to sit at a different, often more taxing, level to ensure that copyright protects only those works that would not have been produced but for the incentive provided by copyright.³⁸ While such an approach might also justify protection of works of investment or industrious collection (even though they do not reflect the individuality of their creator),³⁹ it ought to mean that trivial and insubstantial works are unprotected (and that there is no need to offer copyright protection to works that are subject to other incentive mechanisms, such as patents or design rights). In addition, a utilitarian approach to originality might be expected to ensure that no exclusivity is conferred on matters that are essential components with which others can create or express themselves (e.g. facts, functions, ideas, names, and titles).⁴⁰ Thus ‘originality’ can be seen as a key threshold in defining the ‘public domain’.⁴¹

While the natural rights and utilitarian perspectives do seem to have influenced the development of the ‘originality’ requirement, it will be unsurprising to discover that the legal tests do not reflect with precision any particular theoretical perspective. In part, this is because the legal system does not comprise philosophers, nor is it primarily concerned with philosophical consistency (natural rights, reward theories, and incentive rationales often being merged). Moreover, the legal system inevitably takes into account other matters, such as procedural economy and the desire for certainty. This leads courts to shy away from adopting or developing tests that are difficult to apply, towards ones that are simple and objective. In traditional British case law on originality, this has tended to lead courts to dilute the originality standard so as to protect works that have not been copied.⁴² In civil law systems, originality is often assumed, particularly in relation to the productions of well-known artists.⁴³

In addition to operating as a threshold, originality may be important in establishing whether a person has infringed copyright. This is because a person will not infringe copyright if they merely copy elements that are not original in the claimant’s work.⁴⁴ That is, deciding what is original in a claimant’s work plays an

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important role in ascertaining whether a ‘part’ of a work has been taken by the defendant. (However, it should be noted that the fact that a person creates an original work does not mean that they are not infringing copyright in work on which they have drawn.⁴⁵ This is because, as we see in Chapter 8, infringement depends on what a person has taken from a copyright work; the effort that such a person adds is irrelevant.)

3.3 British Conception of Originality

It would be foolish to claim that the case law developed since 1912 (or carried over from earlier jurisprudence) has defined clearly the circumstances in which a literary, dramatic, musical, or artistic work will be treated as original. Much of the case law seems inconsistent and, according to one commentator ‘the dividing line between original ... works, and unoriginal ... works, remains an uncertain and shifting one’.⁴⁶ In part, these difficulties arise because originality ‘must depend largely on the facts of the case and must in each case be very much a question of degree’.⁴⁷ As a result, it is very difficult to explain the traditional British approach to originality in terms of any overarching principles or rules. Nevertheless, two characterizations have tended to be deployed. First, in the words of Peterson J in *University of London Press*, works are original if they originate with the author and are not copied.⁴⁸ While this highlights the fact that ‘originality’ is linked to ‘origination’, it unfortunately tells the reader very little about when we can say that a work originates with an author. Hence a second characterization has tended to be found to be more valuable: a work is original if an author has exercised the requisite *labour, skill, or judgement* in producing the work. This characterization of the originality standard was adopted at the highest level in *Ladbroke v. William Hill*,⁴⁹ a case in which the House of Lords treated football pools coupons (tables of football matches arranged such that customers could gamble on the results in a certain number of matches) as original compilations because of the labour, skill, and judgement that had gone into devising the betting system that informed the coupon.

While the phrase ‘labour, skill, or judgement’ may be a useful label by which to describe the traditional British test of originality, it should be noted that it is a form of words that has not been deployed with great precision (and thus should not be viewed as if it were a statutory phrase). Sometimes, the courts have used the phrase disjunctively, referring to labour, skill, or judgement;⁵⁰ sometimes cumulatively, as labour, skill, and judgement.⁵¹ On other occasions, the words ‘work’, ‘capital’, ‘effort’, ‘industry’, ‘time’, ‘knowledge’, ‘taste’, ‘ingenuity’, ‘experience’, or ‘investment’ are used.⁵² If ‘labour, skill, and judgement’ have been the defining characteristics of the British concept of originality, it is worth noting that the accumulation of case law had added a series of additional requirements.

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↳ First, the amount of ‘labour, skill, and judgement’ must be ‘substantial’—or at least not trivial.⁵³ British law has always declined to recognize originality where the labour is trivial or insignificant and the result is trivial or insignificant. A possible example is the case of *Merchandising Corporation v. Harpbond*,⁵⁴ in which face paint was held to be unprotected by copyright. While, as we saw in Chapter 3, protection was refused on the rather unsatisfactory basis that the work was not a painting, the decision was justifiable on the basis that the work was a trivial outcome of an insignificant amount of labour. Yet other examples can be found in the case law on titles and advertising slogans: titles, such as *The Lawyer’s Diary*, involve too trivial an amount of labour to be regarded as original.⁵⁵

Second, as Lord Oliver said in the Privy Council in *Interlego v. Tyco*, ‘only certain kinds of skill, labour and judgement confer originality’.⁵⁶ Consequently, a person may exercise a considerable amount of labour, yet the resulting work will not be original if the labour is of the wrong kind. This would be the case, for example, where there is a direct or slavish copy of another work.⁵⁷ While the tracing or copying of drawings, especially technical drawings, requires patience, skill, and labour, as Lord Oliver said in *Interlego*, ‘copying per se, however much skill or labour may be devoted to the process, cannot make a work original’.⁵⁸ More specifically, he said that a ‘well-executed tracing is the result of much labour and skill but remains what it is, a tracing’.⁵⁹ It is clear that the reason why tracing and photocopying do not produce original works is not that there is no labour; rather, it is that it is not the right type of labour.⁶⁰

3.4 European Originality

Although, as we noted in Chapter 2, a process of partial harmonization of copyright law has been inaugurated by the legislature in Europe, the Court of Justice has begun a more thoroughgoing harmonization of ‘originality’.⁶¹ While the Software and Database Directives require that a computer program or database can be protected by copyright only where the program or database is original in the sense that it is the ‘author’s own intellectual creation’⁶² (and a similar test was also introduced for photographs in the Term Directive),⁶³ the Court of Justice has held that this standard is applicable to all works of authorship.

The key case was *Infopaq*.⁶⁴ In this case, a Danish court had to decide whether an electronic news-clippings service infringed copyright when it reproduced 11-word snippets comprising the eight words either side of a search term. The Court of Justice was asked whether this comprised a ‘part’ of an article protected by copyright. The Court took the view that to decide whether 11 words were a ‘part’ required an investigation of the conditions of protection for a work. Reviewing the Berne Convention and the European Union *acquis* on copyright (the Software, Database, and Term Directives), the Court of Justice concluded that there was a generalized standard of originality—namely, the ‘author’s own intellectual creation’.⁶⁵ Whether the 11 words were a ‘part’ depended on whether they were themselves intellectual creations, which the Court indicated was a matter to be assessed by the national court.

As a matter of strict precedent, the *Infopaq* case might have been regarded as limited in its application to matters of infringement rather than subsistence,⁶⁶ but it soon came to be applied to issues of subsistence. In *Bezpečnostní softwarová asociace* (or BSA)⁶⁷ (as we noted in Chapter 3), the Court indicated that a graphic user interface would be protected under the Information Society Directive were it ‘its author’s own intellectual creation’, while in *Football Association Premier League*,⁶⁸ the Court stated that football matches were not protected, because they lacked the relevant originality. There thus seems little doubt that, going forward, as far as ‘authorial works’ are concerned, it is necessary to apply the European standard of originality.

The adoption of a generalized ‘originality’ test has a number of obvious advantages. For one, it makes the European copyright regime more coherent than it would otherwise have been—both horizontally (treating different works according to a single standard) and vertically (in creating a coherent relationship between standards of infringement and subsistence). Moreover, the adoption of a single standard removes some of the difficulties that arise from the failure of the legislature to harmonize the work concept: for example, if the standard of originality applicable to databases is the same as that applicable to ‘database-like’ entities (in UK

law, ‘tables and compilations other than databases’), legal skirmishes over the precise meaning of a database are less likely to be warranted.⁶⁹ Nevertheless, whatever its benefits, commentators have questioned whether deepening harmonization in this way is legitimate from a constitutional perspective and have highlighted the considerable uncertainties to which such judicial activism gives rise.⁷⁰ In addition, the choice of a single standard for all works removes flexibility that a number of member states employed to modulate the criterion in relation to different types of work (the most notorious example of which was the German level of creativity doctrine—*Schöpfungshöhe*—according to which a higher threshold of originality was required for works of applied art).

The new standard, in principle, applies to computer programs after 1 January 1993, photographs after 1 July 1995,⁷¹ and databases after 11 March 1996,⁷² and all other authorial works (including, possibly, designs) after 22 December 2002 (when the Information Society Directive came into force). In implementing the Database Directive, the UK Database Regulations 1997⁷³ explicitly amended the originality requirement of the CDPA

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↳ 1988 in relation to databases to include the new criterion of the ‘author’s own intellectual creation’.⁷⁴ In particular, section 3A(2) says that ‘a literary work consisting of a database is original if, and only if, by reason of the selection or arrangement of the contents of the database the database constitutes the author’s own intellectual creation’. Although the British legislature has, as yet, not responded to the emerging jurisprudence (either by extending section 3A(2) generally, or by repealing the specific reference that might otherwise be taken to imply a different standard is applicable to works other than databases) and the courts have been slow to adapt their language,⁷⁵ there can be little doubt that UK law has to be interpreted in line with the case law of the Court of Justice.⁷⁶

That said, any works that were protected prior to the relevant dates under UK law according to the traditional standard should remain protected, because all of the directives indicate that their operation should be without prejudice to ‘acquired rights’.⁷⁷ For this reason, the ‘traditional’ British jurisprudence will continue to be important *at least* in determining the subsistence of older works for many decades to come.

3.4.1 Personality and creative choices

What, then, does the requirement that a work be its ‘author’s own intellectual creation’ involve? The legislation offers very little guidance. Perhaps most notoriously, a recital in the Term Directive hints at its content when it refers to the need for a photograph to ‘reflect its author’s personality’.⁷⁸ The clear suggestion is that the test to be employed is something similar to that operative in some civil law *droit d'auteur* regimes, in which reference has frequently been made to the need for a work to bear the ‘imprint’ of the personality of its author.⁷⁹ The Court of Justice has thus felt it necessary to give further content to the concept, referring to the need for the exercise of ‘creative choices’. Thus, in *Infopaq* itself, the Court explained that:

[W]ords ... considered in isolation, are not as such an intellectual creation of the author who employs them. It is only through the choice, sequence and combination of those words that the author may express his creativity in an original manner and achieve a result which is an intellectual creation.⁸⁰

p. 108 In the *Painer* case,⁸¹ the Court considered a portrait photograph of a young girl and indicated that this would be an ‘intellectual creation’ if the photographer had been able to ↗ stamp the work with their ‘personal touch’. Similarly, in *Football Dataco*,⁸² in which the Court was asked to advise on whether the creation of football fixture lists was an act of ‘intellectual creation’, the Court observed:

As regards the setting up of a database, that criterion of originality is satisfied when, through the selection or arrangement of the data which it contains, its author expresses his creative ability in an original manner by making free and creative choices ... and thus stamps his ‘personal touch’.⁸³

Indeed, in *Cofemel*, the CJEU has stated: ‘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.’⁸⁴

3.4.2 Non-functional

The Court has also sought to indicate when originality will not be present by highlighting the potential impact that technical constraints may have on creative choices. Where expression is ‘dictated by function’, then it is not original.

In *BSA*,⁸⁵ the Court considered when a ‘graphic user interface’ would fall to be protected as an ordinary work (as opposed to a computer program). The Court indicated that there was no originality where ‘the expression of [the] components is dictated by their technical function’, explaining that ‘the criterion of originality is not met since the different methods of implementing an idea are so limited that the idea and the expression become indissociable’.⁸⁶ In *Football Association Premier League*,⁸⁷ the Court used equivalent reasoning to explain why sporting events cannot be regarded as intellectual creations: ‘[F]ootball matches, which are subject to rules of the game, leaving no room for creative freedom for the purposes of copyright.’ While no doubt, to anyone who plays or watches football, the claim that there is no ‘creative freedom’ because of the constraints provided by the ‘rules of the game’ may seem misguided (so that the absence of copyright in football matches may need to be explained in some other way),⁸⁸ the Court is making the important point that where creative choice is highly constrained by rules or functional considerations, the resulting ‘work’ is unlikely to be original. This point was reiterated by the Court in *SAS Institute v. World Programming* and *Cofemel*.⁸⁹

It is important to appreciate, however, that just because a work is informed by technical considerations or rules does not, *ipso facto*, mean it will be unprotected. The key question is always whether the author had creative freedom and took advantage of it to reflect their personality. This was made clear in the Brompton bicycle case, which concerned the potential availability of copyright for a portable bicycle that had been designed to ↗ be foldable into three in such a way that the folded bike could stand stably by itself. The question of whether the design was ‘original’ was left to the national tribunal, but the Court indicated that ‘a subject matter satisfying the condition of originality *may be* eligible for copyright protection, *even if* its realisation has been dictated by technical considerations’ (emphasis added).⁹⁰ One might have thought that being ‘dictated by function’ ruled out creative choices as a matter of fact, and thus originality, but the Court was not prepared to endorse such an assumption. Rather, the national tribunal was directed to inquire

whether being so dictated had (or had not) ‘prevented the author from reflecting his personality in that subject matter, as an expression of free and creative choices’. On the other hand, the mere existence of a variety of possible shapes by which to give effect to a technical function was not sufficient to imply originality: this is because, while one might infer ‘a possibility of choice’ the test requires that the freedom be taken advantage of, in relation to which a tribunal needed to examine the ‘the factors which influenced the choice made by the creator’.⁹¹

3.4.3 Clarifying the concept

The Court has talked about ‘creative choice’ and it is clear that decisions that are limited by functional constraints or ‘rules’ are not to be regarded as ‘creative choices’, in part because there is no—or very little—choice. But when is a choice ‘creative’? It seems clear that choices can be creative even though they are not ‘artistic’: the scope of copyright in Europe certainly includes such matters as computer programs, technical manuals, and so on, which could hardly be so if the choices required by copyright were to be ‘artistic’ in nature. The Court has referred instead to choices that focus on the form of the work: the choice, combination, and ordering of words, for example. One academic has gone further and argued that:

[A] creative choice is one made by the author that is not dictated by the function of the work, the method or technique used, or by applicable standards or relevant ‘good practice’. Conversely, purely arbitrary or insignificant selection is insufficient. A conscious, human choice must have been made, even though it may be irrational.⁹²

Does the requirement of ‘intellectual creation’ relate to the process or the outcome? Does ‘creation’ merely imply that the work has been through a process (‘creation’), or that the result has certain distinctive features? As far as the jurisprudence goes, it seems that there must be both components for the work to be protected, although usually the existence of creative freedom will mean that the outcome is an ‘intellectual creation’. Thus Advocate-General Bot has said that:

[P]rotection for a computer program is conceivable only from the point at which the selection and compilation of those elements are indicative of the creativity and skill of the author and *thus* set his work apart from that of other authors.⁹³

p. 110 ↵ In our view, it is implicit *both* that there must have been actual choices *and* that the resulting work must as a consequence be individualized.⁹⁴ The distinction would become important in a situation in which there was a high level of creative freedom, but the work was produced either by making the obvious choices or by applying an arbitrary rule. In the former case, one could say there was creative freedom and that has been taken, but the resulting work does not reflect any ‘personal touch’; in the latter, the application of an arbitrary rule (or indeed random selection) may give rise to an individualized work, but that could not properly be said to be the outcome of choices.

Must there be a certain ‘quantity’ of effort or decision making before a work is ‘original’? Recital 19 of the Database Directive states that the compilation of several recordings of musical performances on a CD does not meet the conditions for copyright protection.⁹⁵ This has been read, at least by one British court, as implying that there might be a quantitative dimension to the requirement that a work be its author’s own intellectual creation.⁹⁶ However, outside the domain of databases, the indications are that the Court of Justice envisages that even some rather small works can be ‘intellectual creations’. Thus, in *Infopaq* itself, the Court seemed to envision the possibility that 11 words from a newspaper article might be an intellectual creation, because it said that this was a matter for the national court to decide.⁹⁷ Perhaps the better view is that a quantitative threshold is not required so long as there is such an accumulation of creative decisions as to give the product the character of an intellectual creation. This may derive from a mass of decisions of limited creativity,⁹⁸ or from a smaller number of highly personal decisions, such as with the composition of an 11-word haiku.

Is it appropriate to infer ‘originality,’ that is, the existence of creative choices, merely from the outcome? In *Response Clothing*,⁹⁹ HHJ Hacon observed that ‘[i]f no sufficiently similar design existed before it was created, it must have been the expression of the author’s free and creative choices ... If the design of the Wave Fabric is original, I see no other realistic possibility than that the author, whoever he or she was, exercised their free and creative choices in devising that design.’¹⁰⁰ In contrast, in *Cofemel*, when considering whether clothes designs should be protected, the Court of Justice was at pains to point out that it did not follow that merely because a design produced a new aesthetic effect, the design was the outcome of creative choices:¹⁰¹ ‘originality’ is a distinct criterion and needs to be established in its own right. Even if a judicial shortcut, such as that taken by HH Judge Hacon, might in general fall within the zone of national procedural autonomy, the p. 111 ↵ particular inference drawn in *Response Clothing* might be regarded as in direct conflict with the CJEU’s insistence that originality could not be inferred from either novelty or aesthetic impact.¹⁰²

3.5 Differences Between the European and British Standards

Although the new EU standard is higher in some respects than the previous British standard of originality,¹⁰³ for the most part the new standard probably will not lead to different results.¹⁰⁴ Most novels, plays, poems, paintings, engravings, or sculptures that were protected under the traditional UK standard would also satisfy the requirement of ‘author’s own intellectual creation’. However, we can identify some circumstances in which the rules do differ. These relate to six situations: where the work is a product of mere labour; where creativity is involved in the creation of data; where the work is a product of mere skill; where the creative contribution to the work is at the ‘pre-expressive stage’; where the creative contribution is regarded as being ‘of the wrong kind’; and where the creative contribution is trivial. It might be noted that while the European standard may be said to be ‘higher’, it is probably preferable to say it is different.¹⁰⁵ This is because while, in the first four examples, some works that would qualify under the ‘labour, skill, and judgement’ standard will not reach the European threshold, in the latter two categories it may be that efforts disregarded under traditional British law will be relevant under the EU standard.

3.5.1 Mere labour

The most obvious area in which the new definition may lead to a change is where originality arises through the mere exercise of routine labour. Although the British position was never completely clear, some of the case law suggests that where a work resulted from a great quantity of labour, it might fall to be protected. In certain situations, the British courts had accepted that the mere exercise of a substantial amount of routine labour may give rise to an original work.¹⁰⁶ For example, where a compiler had spent a considerable

p. 112 ↵ amount of time and effort creating a chronological list of television programmes or an alphabetically ordered list of lawyers,¹⁰⁷ the resulting work was treated as original. That is, even though, in creating the table or compilation, the author might not have exercised any ‘skill or judgement’, nonetheless the work might still have been treated as original if the process of compilation involved a sufficient amount of (mundane) labour. However, this would be the case only if the amount of labour was substantial. For example, where the process of compilation involves little effort or judgement and the effect is commonplace, the work will not be treated as original; thus the selection of seven tables at the front of a diary, consisting of things such as days and dates of the year, tables of weights and measures, and postal information,¹⁰⁸ was held by the House of Lords to be non-original. Similarly, in another case involving a local timetable showing a selection of trains to and from a particular town that was prepared from official railway timetables, the compilation was held to be non-original.¹⁰⁹ In these sorts of cases, the difficult question was predicting how much labour was required for the resulting work to be original.

Insofar as these were good decisions under British law,¹¹⁰ it seems clear that they would have to be decided differently under the EU standard: mere mechanical or routine labour, even if quantitatively significant, will never render a work ‘original’ in the European sense. Where all that an author has done is to exert a considerable amount of effort in the creation of a work, it is difficult to see how this, on its own, could be seen as an ‘intellectual creation’, especially one that reflects the author’s personality. Anyone exerting the same effort would produce the same result.¹¹¹

3.5.2 Creation of data, ideas, or functions

The second area in which traditional British notions of originality have been displaced is in relation to the creativity that goes into the creation of data. Although UK copyright law did not protect data as such, the courts seemed to recognize that ‘labour, skill, and effort’ in the creation of data could itself contribute to the originality of expression of the resulting work. Thus, prior to harmonization, it was assumed that television listings would be regarded as ‘original’ because of the skill and effort that went into devising what shows to broadcast, as well as what days and times were best suited for the programmes (e.g. to avoid children seeing adult content, but also to maximize audience figures).

The new criterion does not appear to permit a court to take account of the *creation* of information included in the database. This was made clear by the Court of Justice in its decision in *Football Dataco*.¹¹² In this case, the question was whether the skill and effort that went into compiling football fixture lists constituted them as original databases. The Court held that any creativity that went into the generation of data (the dates and times of the football fixtures) was irrelevant to the originality of the database.¹¹³

p. 113 ↵ Although the reasoning of the Court in *Football Dataco* was grounded in special rules relating to databases,¹¹⁴ it seems clear that the Court regards the input into the creation of basic facts, ideas, and functions as irrelevant to the assessment of whether the ultimate production based upon those facts, ideas, and functions is an ‘intellectual creation’. In the SAS decision, when considering whether and when a user manual might be an original literary work, the Court of Justice was explicit in stating that ‘keywords, syntax, commands and combinations of commands, options, defaults and iterations’ used in creating software are unprotected because they consist of ‘words, figures or mathematical concepts’, which are not intellectual creations of the author of the computer program.¹¹⁵ However, the Court accepted that the ‘choice, sequence and combination’ of these elements might be such that the author expresses his or her creativity and produces an ‘intellectual creation’.¹¹⁶ Although it is not stated in so many words, it seems clear that the Court means that originality can arise only from the ‘choice, sequence, and combination’ of these elements, and that the skill (etc.) in creating each of them is not considered in that assessment.

Difficult questions, of course, remain as to what activity relates to the ‘creation’ of data and what to its selection or arrangement into a database (or other work). The Court of Appeal in *Football Dataco* had assumed that the data in football fixture lists was the games that would be played and that determining the chronology of the games (that is, when each team played each other) was creative effort expended on pre-existing data. The Court of Justice disagreed: on these facts, the finalization of dates and times took place at ‘the data creation stage’.¹¹⁷

3.5.3 Mere skill

A third way in which the new European test may differ from the old British test is in terms of the relevance of ‘skill’. Whatever may have been the position in relation to mere labour, it is clear that the British test of originality took account of the skill involved in producing a work. Nowhere was this clearer than in *Walter v. Lane*, in which various members of the House of Lords expressly recognized the copyright in newspaper reports of speeches because the skill involved in reducing to writing the words of a person who spoke quickly was an art requiring considerable training.¹¹⁸

The mere existence of skill has been said to be irrelevant to the assessment of whether there is ‘intellectual creation’. In *SAS Institute*, Advocate-General Bot said that:

[I]n order to determine whether a computer program is eligible for legal protection under copyright, account should be taken not of the time and work devoted to devising the program nor of the level of skill of its author but of the degree of originality of its writing.¹¹⁹

Likewise, in *Football Dataco*, the Court indicated that ‘skill’ was not itself sufficient to render a work original in the European sense.¹²⁰ It stated that:

[T]he fact that the setting up of the database required ... significant labour and skill of its author ... cannot as such justify the protection of copyright ..., if that labour and that skill do not express any originality in the selection and arrangement of that data.¹²¹

p. 114

- ↳ Skill of itself does not give rise to an author's own intellectual creation; what is required is an 'original expression of the creative freedom of its author'.¹²²

3.5.4 Pre-expressive contributions

A fourth way in which the traditional British test and the European notion of originality *may* differ (the position is not completely clear) is in the treatment of 'pre-expressive' contributions. Traditionally, the UK courts have accepted that the originality of a work may arise in the steps preceding the production of the work (that is, in the *pre-expressive stage*). So, for example, in relation to the labour that confers originality with respect to literary compilations, the courts would consider the footwork involved in discovering the information,¹²³ or the selection or choice of the materials that are later embodied in the work. This was made clear in *Ladbroke v. William Hill*, in which the question arose as to whether football pools coupons (which listed matches to be played and offered a variety of bets arranged into 16 categories) were original compilations.¹²⁴ On the basis that the expressive form of the coupons inevitably followed from the preceding commercial decisions as to the bets that should be offered, the appellants argued that the coupons were not original. The House of Lords rejected these claims.¹²⁵ According to Lord Reid, it was artificial to divide the inquiry up into, on the one hand, the commercial decisions about which bets to offer and, on the other, the form and arrangement of the table. The selection of wagers and their presentation was so interconnected as to be inseparable. Consequently, when considering originality, it is inappropriate to dissect the labour, skill, and judgement into pre-expressive and expressive stages; both elements should be taken into account to determine whether the threshold had been reached.¹²⁶

Preparatory work has been recognized as relevant to determining 'originality' under the European standard, but it seems unlikely that pre-expressive work will be relevant. In *SAS Institute*, Advocate-General Bot pointed to a stage in the production of a computer program, between defining the tasks to be performed and developing the code, from which the selection and compilation of elements could contribute towards the originality of the program.¹²⁷ In the case of a photograph, the Court has indicated that 'pre-expressive' choices will be relevant at least insofar as the 'preparation stage' is concerned—that is, choosing 'the background, the subject's pose and the lighting'.¹²⁸ In the case of databases, it is quite clear that the 'intellectual creation' must be the result of 'selection' and/or 'arrangement' of the data.¹²⁹ But it seems that the sort of commercial decisions that were considered relevant 'pre-expressive' work in the *Ladbroke* case would no longer be relevant; rather, the European standard seems focused on contributions and choices that are directly relevant to the structuring of the expression of the work.

p. 115

3.5.5 Creativity of the wrong kind

Although, in most respects, the European test of 'author's own intellectual creation' is regarded as a 'higher' standard than the former British standard, it is worth observing that this is not necessarily the case with respect to every aspect of the originality assessment. In particular, because of the traditional 'box' approach to copyright categories, the British courts have sometimes held that contributions to derivative works are to be ignored because they are of the 'wrong kind'. In *Interlego v. Tyco Industries*,¹³⁰ the Privy Council was called upon to decide whether there was copyright in drawings for the children's building blocks known as Lego

bricks. The particular drawings had been produced in 1973, but were based upon earlier drawings, so the question arose as to whether the alterations made in 1973 were sufficient to produce an original artistic work. The major differences between the drawings concerned the sharpening of the outer edges of the tubes in the brick, changes in tolerances, and increase in the radii on the outer edges of the knobs on the brick from 0.2 mm to 0.3 mm. Of the changes made, only the first was shown pictorially; the others, by letters and figures. While the Privy Council recognized that the alterations were technically important, they were not sufficient to render the work original because, in the case of artistic works, the change must be *visually significant*—that is, to confer copyright, the skill and labour must produce a change that is relevant to the category of work in question. On the facts, it was held that because the changes made to the drawings were primarily to the written specifications, this was not an alteration of visual significance.¹³¹ As such, the drawings were not original.

The reasoning employed by the Privy Council looks suspect in the light of the European jurisprudence. The Court of Justice has not been willing to differentiate between different categories of ‘creation’ or types of creativity. From the logic of the decisions, the Court would simply ask whether the addition of the text to the traced drawings of the bricks involved creativity, not whether that creativity was literary or artistic. Nevertheless, on the facts, the same outcome could be justified under the new European originality standard. Although the Privy Council found that the act of tracing involved ‘skill’, but that the skill was of the wrong kind, under European case law ‘originality’ is no longer to be conceived in terms of skill, but instead of creative freedom—and there is clearly no creative freedom in tracing. Moreover, while the decisions as to the dimensions of various aspects of the modified bricks would not be disregarded because they were ‘literary’ rather than ‘artistic’, those decisions would not have been regarded as creative, because they were heavily constrained by function and left little formative freedom to the designer.

In *Technomed v. Bluecrest Health Screening*,¹³² the High Court treated relatively trivial visual and literary changes to a drawing of a heart (see Fig. 4.1) as being sufficient to create an original work.¹³³ The claimant argued it had copyright in two images of the human heart. To develop these, two of the claimant’s employees had begun with a stock diagram of a heart (that had been licensed) and then, having copied it (to create two hearts next to each other), they labelled the left one ‘circulation system’ and the right one ‘electrical system’. To the left one, they simply added eight labels indicating where the blood was coming from or going. As to the right, they deleted 14 arrows which represented blood flow, and added two nodes and two lines in yellow, representing the electric system, along with five labels.¹³⁴ According to the Judge, the standard of originality was low, and the changes, including the words, were sufficient to create ‘a new, original work’. While we think the Court was correct to consider the changes as a whole and not to divide the work ↗ into literary and visual elements, we are surprised at some of the reasoning and the result: at no point did the court reflect on the nature of the choices made by the two authors, whether they amounted to mere skill or to creative choices. Surely, this was a good example of a situation where the differences between the traditional UK and EU test mattered.

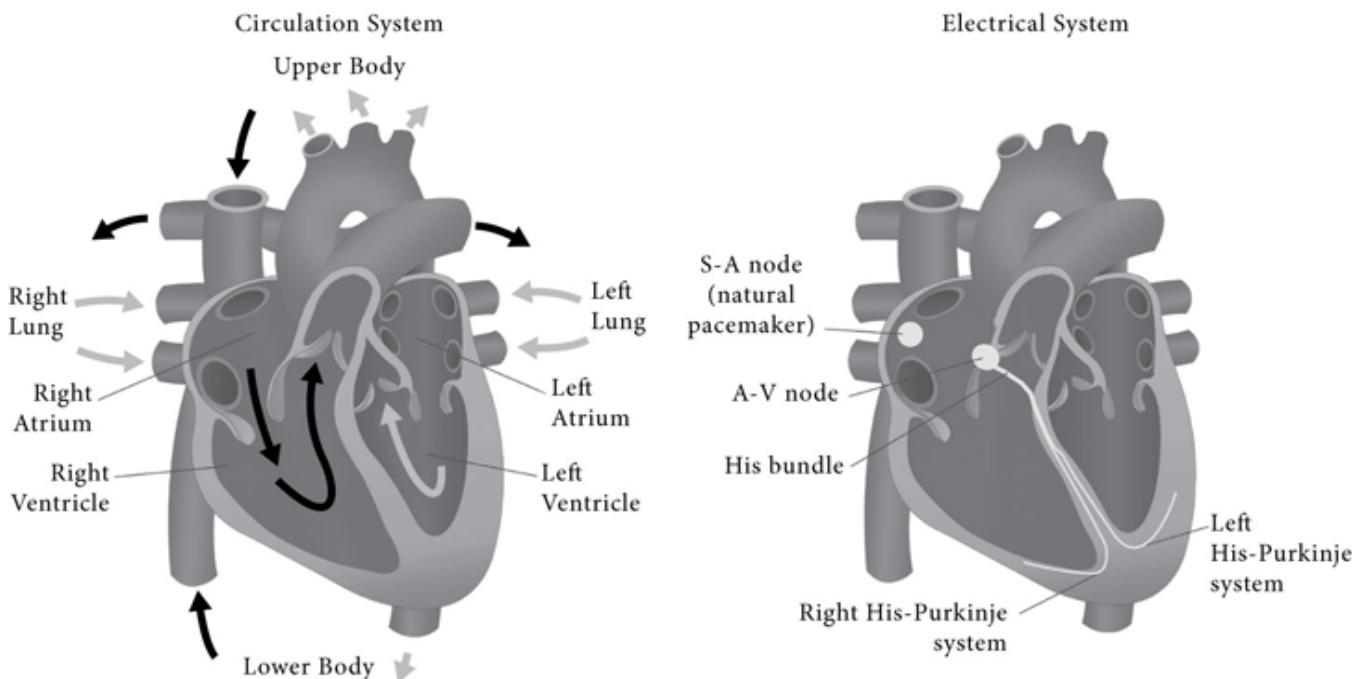


Fig. 4.1 Heart images in *Technomed v. Bluecrest Health Screening*

Source: Courtesy of Technomed Ltd

3.5.6 Trivial and insubstantial contributions

As already observed, British law traditionally refused to protect trivial and insubstantial efforts, or labour, skill, and judgement with trivial or insubstantial effects. This can be seen in the case law on titles, which ruled out protection on the basis that titles were typically ‘too insubstantial’.¹³⁵ Under European Union law, the sole test seems to be that the work is the author’s own intellectual creation. Consequently, there may well be works that would not have been protected under UK law that might qualify for protection under the European standard. For Professor Pila, this is a ‘central problem with the current European conception of originality ... for reasons of law as well as of policy’.¹³⁶

3.6 Can The United Kingdom Protect Non-Original Works? If So, Does It?

As we have seen, the new European test of originality differs from the old UK test of ‘labour, skill, and/or judgement’. One question that we have not yet considered is whether the United Kingdom—and other member states, such as Germany, which recognizes *kleine Münze* (so-called protection of ‘small change’)—are permitted to protect ‘nonoriginal writings’ (e.g. instruction manuals, recipes, knitting patterns), and if so, whether they are entitled to do so by copyright. The answer to this very important question is (except in respect of databases) unfortunately not yet clear.¹³⁷

p. 117 ↵ The first point to observe is that various directives clearly envisage the possibility of some protection being offered to non-original works. The Term Directive, which harmonizes the ‘originality’ standard for photographs, expressly allows member states to give protection to non-original photographs (that is, those that are non-original in the European sense). Similarly, the Database Directive requires protection by *sui*

generis right for databases even though they do not meet the originality standard.¹³⁸ In addition, the latter Directive preserved the system of protection afforded to non-original catalogues in the Nordic countries. Other directives have said little (in part, no doubt, because the legislature gave no explicit consideration to the question of originality outside the Software, Database, and Term Directives). However, the Software, Database, and Information Society Directives leave unaffected the operation of ‘unfair competition law’.¹³⁹

If the United Kingdom (and other member states) are free to give protection to non-original works, the question arises whether they are free to do so by ‘copyright’ or whether they must do so only by way of some sort of ‘related right’ or by ‘unfair competition’. As regards databases, the Court of Justice, in its decision in *Football Dataco*,¹⁴⁰ has made it clear that no other *copyright* protection is to be available for databases. The Court inferred this not merely from the harmonizing intent, but from the specific transitional provisions in the Directive (which would have made no sense if member states had been able to continue to offer protection through different standards).¹⁴¹ The answer is less clear as regards software and photographs, but is probably the same. The Software Directive, when referring to the originality standard, states in Article 1(3) that ‘no other criteria shall be applied to determine its eligibility for protection’ and it seems, from the context, that the term ‘protection’ means ‘protection by *copyright*’. Thus member states may not offer copyright protection to non-original programs (although they may protect any effort or investment from unfair competition). The position is even more murky in other areas, particularly as to photographs. Here, Article 6 of the Term Directive states that ‘Member States may provide for the protection of other photographs’ and says nothing about the term or scope of such protection—implying that it might be equivalent to copyright. However, because Article 6 indicates that no criteria other than that of ‘the author’s own intellectual creation’ can be applied to determining protection of photographs falling within ‘Article 1’, which relates to works within the Berne Convention, the better view is that the ‘other protection’ must be by means of a ‘related right’ rather than ‘copyright’.¹⁴² The answer must be regarded as a more open one in relation to works falling within the general remit of the Information Society Directive and the *Infopaq* ruling.

If member states are free to protect non-original works, has the United Kingdom elected to do so? The difficulty with interpreting the British law lies in the fact that the legislature said nothing about this issue when implementing the directives. So, for example, after 1 January 1996, UK law protects ‘original’ photographs, but it is unclear whether by that it means ‘original’ in the British sense or ‘original’ in the European sense. The same is true of British inaction since *Infopaq*. As things stand, the most obvious way in which to interpret the originality requirement in the CDPA 1988 so that it complies with the directives and jurisprudence is to treat the word ‘original’ as referring to the European standard—that is, as requiring all ‘original literary, dramatic, musical and artistic works’ to be an author’s own intellectual creation reflecting their personality. This was the assumption on which Judge Colin Birss QC operated in *Temple Island Collections v. New English Teas*¹⁴³ (Figs 4.2 and 4.3), in which it was held that an image of a London double-decker bus crossing Westminster Bridge, albeit modified so that the bus was in colour and the background in black and white, was original in the European sense (and infringed by the defendant’s similar image).



Fig. 4.2 The image produced by Mr Fielder for Temple Island Collection and used on various souvenirs

Source: *Temple Island Collection v. New English Teas* [2011] EWPCC 21



Fig. 4.3 The defendant's proposed image, a photograph taken by Mr Houghton and manipulated by Sphere Design, which New English Teas wished to use on packets of tea

Source: *Temple Island Collection v. New English Teas* [2011] EWPCC 21

However, it is still just about possible to argue that—databases apart—the United Kingdom continues to protect by copyright works that are merely ‘original’ in the old UK understanding.¹⁴⁴ One basis for such an argument is the recognition that the low UK threshold of originality *functioned* as a form of ‘unfair competition’ law,¹⁴⁵ which could be preserved even in areas of European harmonization. While it might then be objected that the United Kingdom wrongly protects the works from unfair competition by means of p. 119 ‘copyright’, it could be answered that the form of protection is British ↗ copyright (rather than as required under EU law) and that the general nature of directives leaves the freedom as to the technique of implementation to member states. The British legislature has, in effect, chosen to implement the various directives and their originality standard by incorporating them within a broader regime (which also protects works from unfair competition using identical property rights). This view is further supported by the absence of any transitional provisions, a fact that might suggest that the legislature intended the courts to continue to apply the traditional British standard.

3.7 Examples

While, as we noted earlier, the different tests will frequently not produce different results, the best way in which to understand what is at stake is to consider some of the difficult situations that have already come before the courts.

3.7.1 Spontaneous conversations

We have already observed that UK law has, since 1989, protected ‘spoken works’ where they have been recorded. But when will a spoken work be ‘original’? Does a person create an ‘original work’ when they order tickets by telephone (the request being taped)? Is a conversation between a television presenter and a celebrity on a chat show sufficiently original? British courts have not, as yet, been asked to rule on this issue (whether under the traditional test or under the new European standard), but the issue did arise in the Netherlands. In the *Endstra Tapes* case,¹⁴⁶ the question arose whether the contents of an interview by the police with an informant, William Endstra, were protected. Endstra ↗ had subsequently been murdered and his family wished to prevent publication of the transcripts by a newspaper to which the tapes had been leaked. The Court of Appeal of Amsterdam denied that these were works of authorship because they had not been conceived as a coherent creation, but the Dutch Supreme Court reversed this decision on appeal. Although it stated that, under Dutch law the form of the work must be a result of human creative choices and must be neither banal nor trivial, Endstra’s conversations met those standards. To require the claimant to show that the author was consciously creating a work would be unfairly burdensome. There is no reason to think that any different result would have occurred from applying the European standard of ‘author’s own intellectual creation’.

3.7.2 Insubstantial creations: words, titles, etc.

Traditionally, British courts had been reluctant to protect titles, slogans, and short phrases. As a result of *Infopaq*, however, that attitude seems to be changing. In that case, the Court indicated that 11 words of a newspaper article might be original in the European sense of an ‘intellectual creation’. In the light of that holding, in *Newspaper Licensing Agency v. Meltwater and the PRCA*,¹⁴⁷ the High Court and Court of Appeal have held that ‘policy considerations’ that may once have informed the United Kingdom’s reluctance to protect titles are now irrelevant. In that case, the Newspaper Licensing Agency (NLA), which represents publishers of newspapers, brought an action against Meltwater and the Public Relations Consultants Association (PRCA), claiming that members of the latter association needed NLA’s permission to receive electronic mailshots containing links to newspaper articles publicly available on the Internet. The links were accompanied by the title of the newspaper articles and a couple of sentences of text surrounding the search term. The issue before the Court was whether to award a declaration that the PRCA were infringers when they received these services. The NLA did not claim that *all* headlines were protected, but rather that (in order for the Court to give the declaration) the Court need be persuaded only that *some* would be protected. Proudman J, whose judgment was affirmed by the Court of Appeal, found that at least some of the titles would constitute original literary works. She adopted a definition of originality articulated in the *Infopaq* decision and concluded that the evidence established that headlines involve ‘considerable skill in devising and they are specifically designed to entice by informing the reader of the content of the article in an entertaining manner’.¹⁴⁸ The Court of Appeal affirmed. The Chancellor concluded that the finding that newspaper headlines *are capable of being* original literary works is ‘plainly correct’, so that the lower court’s conclusion was ‘unassailable’.¹⁴⁹

The ruling in *Meltwater* provides little guidance on when an individual title will be protected, apart from that this depends on whether it is original in the European sense. This seems to depend in part on length (the longer the title, the more opportunity to impose one’s personal touch), but mostly on quality—that is, whether the title describes the book, and whether the language chosen is alliterative or has other individual qualities. There seems little doubt that short descriptive titles, such as *The Lawyer’s Diary*, remain unprotected.¹⁵⁰ There is simply too little creative freedom involved in coming up with the name of a diary targeted at lawyers (and, insofar as there is freedom, in that case the claimant ↗ took the most obvious of routes). Moreover, in many cases, where titles allude to or parody existing well-known public domain titles, such as ‘A Tale of Two Council Houses’ or ‘Trunks are Too Tight to Mention’ (both examples before the courts in the *Meltwater* case), one might doubt that the creative input in substituting one or two words in *A Tale of Two Cities* or ‘Money’s Too Tight To Mention’ would give rise to copyright.¹⁵¹ More difficulty attends the determination of whether the nine-word combination ‘The Man Who Broke the Bank at Monte Carlo’ might be thought sufficiently creative,¹⁵² although Monte Carlo is primarily known for gambling and the phrase ‘to break the bank’ is a very commonly used description of winning heavily in gambling institutions.¹⁵³ Our view is that it would not do so.

On the assumption that *Meltwater* is right and that the protection of titles is governed by European law (and the *Infopaq* standard), it might have been hoped or anticipated that some guidance as to where the line is to be drawn could be elicited from case law in countries that have been applying similar criteria to those now

embraced by the Court of Justice.¹⁵⁴ However, different countries seem to draw distinctions in different places—the French being perhaps the most generous and the Germans, the most parsimonious.¹⁵⁵ Moreover, even within those jurisdictions, there seems to be very little consistency.¹⁵⁶

As we have noted, the English Court of Appeal declined to find copyright in the single word *exxon*, on the basis that it was not a literary work.¹⁵⁷ That basis for the decision may no longer be sustainable in Europe, given the Court of Justice's implicit harmonization of the 'work' concept. But could a single word be original in the relevant European sense? Although the French courts have occasionally gone so far as to protect titles comprising single words,¹⁵⁸ such an approach must now be doubtful as a matter of European law. In *Infopaq*, the Court indicated that the components of the 11-word phrases 'consist of words which, considered in isolation, are not as such an intellectual creation of the author who employs them', so that such 'words as such do not ... constitute elements covered by the protection'.¹⁵⁹ Similarly, in *SAS Institute*, the Court was explicit in stating that 'keywords, syntax, commands' were unprotected because they consist of 'words, figures or mathematical concepts', which are not intellectual creations of the author of the computer program.¹⁶⁰

3.7.3 Snapshots and non-creative photographs

No judicial guidance had been provided by British courts as to whether pointing a camera and pressing the button was sufficient 'labour, skill, and effort' to justify protection. It was possible to claim that, in such circumstances, the photograph 'originated with the author' ↵ and so should be treated as original.

p. 122 Elsewhere in Europe, simple snapshots have often been refused copyright, as have paparazzi photographs.¹⁶¹

The European standard, as described in *Painer*, allows for protection of simple portraits, as long as there is sufficient creative freedom.¹⁶² Thus a portrait photographer had creative freedom because:

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.¹⁶³

Applying a similar standard (albeit a few years prior to *Painer*)—namely, that the photographer's personality is reflected in the arrangements (motif, angle, lighting, etc.)—the Supreme Court of Austria held that a photograph of some grapes was original and added that 'a lot of amateur photographers, who take pictures of everyday scenes in the form of photos of landscapes, persons and holiday pictures' might also be protected.¹⁶⁴ Subsequently to *Painer*, the Patents County Court referred to the Austrian decision approvingly, Judge Birss QC saying that he did not think that the UK law was any different.¹⁶⁵

3.7.4 Derivative works

British courts have long recognized the possibility of protecting ‘derivative works’—that is, those based on pre-existing materials. Thus the courts have protected new editions,¹⁶⁶ compilations, anthologies, translations,¹⁶⁷ and adaptations of existing materials,¹⁶⁸ as well as arrangements of music¹⁶⁹ and engravings. Importantly, the courts have indicated that, to be protected, not only need there be skill, labour, and judgement, but also the derivative work must have ‘some quality or character which the raw material did not possess, and which differentiates the product from the raw material’.¹⁷⁰ It was for this reason that, in p. 123 *Interlego v. Tyco*,¹⁷¹ the technically significant alterations to the drawing, which ↗ were the result of considerable labour and expertise, were insufficient to render the later drawings original. The mere fact that the drawing took skill and labour to produce did not necessarily mean that it was therefore an original drawing. As Lord Oliver explained: ‘There must in addition be some element of material alteration or embellishment which suffices to make the totality of the work an original work.’¹⁷²

To date, the Court of Justice has not offered any views on ‘derivative works’. The practice in member states varies: some merely require that the added or altered material constitute a personal intellectual creation; others seem to require something more (as the United Kingdom did in *Interlego*). The Italian law, for example, refers to ‘additions constituting a substantial recasting of the original work’.¹⁷³ There may be much to be said for excluding slight variations to existing material. Certainly, the Privy Council in *Interlego* was concerned about the effects of allowing ‘evergreening’ of the copyright drawings.¹⁷⁴ Whatever the precise test for originality of derivative works, it is unlikely that copyright will protect ‘appropriation art’—that is, where artists copy existing works, but by so doing attempt to give it a different meaning rather than altering the appearance of the work itself.¹⁷⁵

3.7.5 Reporters’ copyright

In the famous case of *Walter v. Lane*,¹⁷⁶ the House of Lords held that a newspaper report of an oral speech given by Lord Rosebery, transcribed by a reporter from the talk, was protected by copyright (see Fig. 4.4). This was because, as we have noted, the reporter exercised considerable labour, skill, and judgement in producing a verbatim transcript of the speech.

THE TIMES, FRIDAY, JUNE 26, 1896.

LORD ROSEBERY ON FREE LIBRARIES.

Yesterday afternoon the Earl of Rosebery opened a new free public library, named after its munificent donor, the Passmore Edwards Library, and erected as a memorial of Leigh Hunt and Charles Keene, at Uxbridge-road, near Shepherd's-bush-green, W. The special feature of this building is the complete supervision throughout all the departments from the librarian's counter, and to insure this advantage the several public rooms are divided by glazed screens. Ample light is provided everywhere, and the interior is bright and cheerful. The exterior has been designed in accordance with the English Renaissance style with bold cornices and handsome mullioned windows. The central gable is sculptured with a life-size group representing the "Shepherd in the Bush," suggested by the name of the district in which the library has been built. The librarian's house is on the first floor of the front buildings, and above are large storage rooms in connexion with the library. The architect was Mr. Maurice B. Adams, F.R.I.B.A., of Bedford-park, Chiswick. The cost of the building, exclusive of the site, has been rather more than £6,000. Lord Rosebery and Mr. Passmore Edwards were received on their arrival by the Library Commissioners, and conducted to the central room, where the chair was taken by Prebendary Snowden, chairman of the commissioners.

The CHAIRMAN, in opening the proceedings, explained that the site, which was peculiarly well adapted for the purpose of a public library, and which was very valuable, having an excellent building frontage, was a benefaction from the copyholders and the Ecclesiastical Commissioners, and when, after the refusal of the ratepayers to increase the library rate, those in favour of the library were almost in despair as to raising the necessary funds, Mr. Passmore Edwards came forward to their relief. (Cheers.) With noble, but not unaccustomed, generosity, he had erected that beautiful building, which was complete in all its arrangements as far as experience and skill could make it so. The chairman also made a reference to Lord Rosebery's literary achievements, and expressed the hope that he would present the library with a volume of his life of Pitt, inscribed with the author's autograph.

LORD ROSEBERY, who was received with loud cheers on rising to speak, said:—Mr. Chairman, Ladies, and Gentlemen,—I have much pleasure in declaring this library open. (Cheers.) I do that at the beginning and not at the end of what I have to say because I have observed almost invariably that public speakers whenever they have a formal duty to discharge and attempt to discharge it at the end of their speech forget to do so. (Laughter.) Now, Mr. Chairman, you have been very kind in the remarks that you have made. I shall cherish your reference to my little book which I had great pleasure in seeing on your shelves, but I will not accept your invitation to present the book to your library. In the first place, you already have a copy of it, which I do not think was at all worn out. (Laughter.) And in the second place, as it is sold I believe—although I have never bought a copy myself—at the ridiculously inadequate sum of 1s. 10d. (laughter), it is not at all a suitable offering for me to make to this library. I trust to find a more valuable book that I may leave as a memento of my visit here to-day. (Cheers.)

MR. PASSMORE EDWARDS.

But I have another duty to perform besides declaring this library open, it is that of proposing a vote of thanks to the generous donor of the building. (Cheers.) You have expressed a wish that I may have a long time before me to devote to literary pursuits. (Hear, hear.) I thought my neighbour on my right expressed a particularly fervent and enthusiastic assent to that sentiment. (Laughter.) I for my part have nothing to say in contravention of it. "Sweet are the uses of adversity," or what is called adversity, and it is difficult for those who are intrusted with the government of the country to come and open public libraries or perform functions of that kind; and therefore you have reason to thank her Majesty's Opposition for their existence when it comes to any question of a function of this kind. But I am bound to say that even when I was in office, and when I was subject to the responsibilities and censures of office, I found time in the very first beginning of that period to go and open another library, founded of course, and given of course, by Mr. Passmore Edwards. (Cheers.) Now there is something about the permanence of pursuits in individuals which gives one a sense of the nothingness of time. We must all have known in our younger days some venerable ancestress or female relative who was occupied in some interminable piece of worsted work. (Laughter.) We went to school, we went on our travels, and we returned again and found that piece of worsted was still progressing (laughter), and I had something of the same feeling when I came here to-day and found Mr. Passmore Edwards still giving public libraries. (Cheers.) I do not know whether you remember the old story of the gambler who lost an enormous sum at Crockford's in the old days, and came out of that haunt with a generally vicious feeling against himself and the whole human race which he did not know how to vent. Looking opposite at White's Club-house he saw a gentleman kneeling against the stairs and tying his shoe lace. The gambler saw in him an object on which to vent his feeling, and, rushing up to the gentleman, he kicked him, and cried, "Bless you"—he did not say "Bless you," but in the presence of the chairman I will not quote the exact word he did use (laughter)—but he said, "Bless you, you are always tying up your shoe lace." (Laughter.) Well, I feel inclined to approach Mr. Passmore Edwards, not to kick him, but to say, "Bless you, you are always doing good." (Cheers.) Another word about Mr. Passmore Edwards. I am given to understand by those who are accustomed to commendation that it is not pleasant to be praised, in public at any rate, and therefore I think I shall best suit his feelings if I say nothing more on a subject which I could not adorn by eloquence, and which certainly does not need eloquence to recommend it.

OUTDOOR SPORTS IN ENGLAND.

But I think those who watch the growth of the free libraries system in this country, in spite of the almost persistent opposition of the ratepayers, have some cause to inquire, What object is it that these free libraries answer in our modern commonwealth? I confess I have formed a very clear conviction on that head. I think no one can watch the progress of our nation without seeing the enormous predominance that is given everywhere today to outdoor sports. I welcome that tendency. I think it is a healthy and rational tendency, but of course it may be carried too far. What we do see in the tendency to outdoor sport at this time is that it weans the race from occupations that might be objectionable, and it is rearing a noble and muscular set of human beings; and it subserves other objects which are not so immediately apparent. For instance, I take it the connexion between Australia and the mother country has been rendered closer than it would have been otherwise by the cricket contests which take place between the two countries; and I am given to understand, though I

Fig. 4.4 One of the newspaper reports considered protected by copyright in *Walter v. Lane*

Source: *The Times*, Friday 26 June 1896, p. 12

In the *Afghanistan Papers* case,¹⁷⁷ the CJEU was asked to consider the interaction between human rights, freedom of information, and copyright exceptions (for quotation and reporting current events), in order to determine whether a German newspaper had infringed copyright when it made available online certain government reports (relating to military deployment). As had the Advocate-General,¹⁷⁸ the Court went out of its way to advise the national court of the test that the reports would have to satisfy to be protected at all.

Invoking both the principle that copyright protects expression (not ideas) and the requirement of intellectual creation, the Court indicated that the documents would not count as works if they are ‘purely informative documents, the content of which ↗ is essentially determined by the information which they contain.’¹⁷⁹

This would be so if they were ‘drafted in simple and neutral terms’.¹⁸⁰ In such a situation, the information and

↗ the expression of those reports might be said to become merged (in the Court’s language, become ‘indissociable’). Seemingly having in mind the structure of the reports,¹⁸¹ the Court also indicated that the reports would not be protected by copyright if they were ‘entirely characterised by their technical function’ (in the case, reporting military deployments etc.), so that in drafting those reports it was impossible for the author to express his or her creativity in an original manner and to achieve a result which is that author’s own intellectual creation.¹⁸²

It is likely that the freedom contained in a military status report would be significantly less than that afforded to a newspaper journalist reporting a speech. How would a case such as *Walter v. Lane* be decided under the European standard? The reporter’s skill in using shorthand would certainly no longer be relevant, but might it be arguable that the originality derives from the choices that the reporter made in deciding what to include (e.g. audience reaction), how to describe those reactions (e.g. ‘laughter’), and how to punctuate the text? Certainly, it could be said there was some limited freedom here in deciding the way in which the report ‘expressed’ or reported the speech. In our view, however, these choices would not be treated as being sufficient. The reason for this is that the amount of freedom is too limited: choices over how to punctuate exist but are limited by rules of grammar and syntax; the choices over whether and how to report the audience reaction leave only a very few options. The reports would therefore no longer be protected by copyright (in the European sense).¹⁸³

While newspapers today tend to provide summaries and added matter to reports of speeches (thus creating original works), the conclusion that verbatim reports are no longer protected must have potentially significant consequences for law reporters (such as Martin Walsh Cherer) and parliamentary reporters (such as Hansard). Whether the removal of copyright will render such services unsustainable will depend on the business models that these services operate: it may be that exclusive rights in the reports are less important than other attributes of the service, such as speed, and reputation for accuracy.

3.7.6 Restoration and reconstruction

In *Sawkins v. Hyperion*,¹⁸⁴ the question was whether ‘performing editions’ of musical works first composed in the seventeenth and eighteenth centuries were original musical works. It was argued by Hyperion that the reconstructed and edited scores were not original musical works, because Lionel Sawkins had added no new music over and above that in the original. While he had laboured to reconstruct the manuscripts and make them more user-friendly to today’s performers, that did not involve labour, skill, or judgement of a musical sort. Mummery LJ agreed that some aspects of Sawkins’ efforts, ‘such as time and labour spent on discovery

or retrieval of the original scores and in their layout on the page', were irrelevant.¹⁸⁵ However, labour, skill, and judgement in adding information that could potentially affect the totality of sounds produced by musicians were pertinent. On the facts, the additions to the work had sufficient aural and musical significance to attract copyright protection.

How would *Sawkins* fare under the European standard? Certainly, the analysis would have to change: Lionel

p. 126 Sawkins' skills as an expert would no longer be relevant and his ← application of standardized rules to convert old formats so as to make them understandable today (e.g. by so-called 'figuring the bass') also might be regarded as insufficient to amount to 'intellectual creation', in the sense of the exercise of creative choices. But it is notable that, in parallel proceedings in France,¹⁸⁶ which has traditionally applied a standard akin to that now adopted by the Court of Justice,¹⁸⁷ Sawkins also succeeded. The French Court observed that:

Given the state of the sources, the defendants have not proven a degree of strict faithfulness of the restored work to [the composer's] intention that would be capable of denying any personal character in the restoration and composition work such that it became a mere act of transcription.¹⁸⁸

Had the case been one of pure 'reconstruction', without adding the missing notes and musical phrases, it seems difficult to imagine that either court could now describe the work as an 'intellectual creation' bearing the 'personal touch' of its author.

3.7.7 Photographs of artistic works

For art galleries, the revenues generated through *claiming* copyright in photographs of paintings and other art works that they hold can be substantial. In the United Kingdom, claims to such rights have depended on the interpretation of *Graves' Case*,¹⁸⁹ in which Blackburn J held that a photograph of an engraving of a painting was an 'original photograph' and therefore protected under the Fine Art Copyright Act 1862. However, even prior to EU harmonization, doubts had been raised as to the usefulness of this case as an authority, given that the technological apparatus for taking photographs is now so much more developed (and thus the act of taking photographs so much easier),¹⁹⁰ as well as because of developments in jurisprudence.¹⁹¹ Nevertheless, in *Antiquesportfolio.com v. Rodney Fitch*,¹⁹² it was held that copyright subsists in simple photographs of three-dimensional objects because the taking of such photographs involves judgement—that is, the positioning of the object, the angle from which the picture is taken, the lighting, and the focus.

The position after the Term Directive appears to be different. As we have seen, intellectual creation involves more than the exercise of technical skill. Instead, there must be 'formative freedom'—that is, the possibility of choices that result in an individualized outcome reflecting the author's personal touch. This may be present in portrait photography, for example in the lighting, camera angle, choice of pose, the capturing of a particular expression, etc., but it is difficult to see that any such creativity might be present in the case of a technically excellent photographic reproductions of artistic works. Indeed, ← it is notable that such protection had been denied to such photographs in the jurisprudence of countries applying a civilian standard of 'creative choices' or 'imprint of the personality'.¹⁹³

If galleries wish to have the protection for photographs taken after 1996, they should seek legislative reform to introduce a related right. Such related rights are recognized in a number of member states, including Germany and Italy.¹⁹⁴

3.7.8 Computer-generated works

Although in the 1980s there were probably very few genuine ‘computer-generated works’, the 1988 Act provides that a literary, dramatic, musical, or artistic work attracts copyright protection even where it has been generated by computer in circumstances under which there was no human author.¹⁹⁵ Today, artificial intelligence systems produce outputs that appear as, and can function as works: from automated translations to paintings based on Rembrandt’s oeuvre. While the Act clearly envisages that products generated by a computer could be classified as works, it says nothing about how the originality of such works is to be determined. The particular problem that arises with computer-generated works is that it is difficult to see how the existing criterion of originality, which focuses on the relationship between the author and the work, can be applied to computer-generated works, which, by definition, have no readily identifiable author.

Given that computer-generated works are protected where there is no human author, the question arises: what test for originality should be applied to such works? One possible test would have been to ask whether the work was produced as a result of the independent acts of the computer—that is, whether the work is original in the sense that it was ‘not copied’. Alternatively, a court might have said that originality exists where the computer has produced a work that is different from previous works (that is, it is novel). It has also been suggested that the courts ought to ask the hypothetical question: if the same work had been generated by a human author, would it have required the exercise of a substantial amount of skill, labour, and effort? If so, then the computer-generated work would be original.¹⁹⁶

Because the European standard now applies to all works, it must be doubted whether copyright protection (in a European sense) should be regarded as available at all to ‘computer-generated’ works. Advocate-General Trstenjak remarked, in her opinion in the *Painer* case, that ‘only human creations are ... protected’, although these can ‘include those for which the person employs a technical aid, such as a camera’.¹⁹⁷ It seems to

p. 128 ↵ follow that no computer-generated work can be protected by copyright in accordance with European law. As we have noted, there is no reason why such productions could not be protected by related rights or unfair competition law. It might be said that, given the special provisions on authorship and term that are applicable to computer-generated works,¹⁹⁸ this is in fact what the UK law in substance achieves. If so, the standard of ‘originality’ applicable is a matter for UK law alone.

3.8 Post-Brexit

The question of originality has been made yet more complex by Brexit. To begin, there is an issue similar to that raised in Chapter 3 in relation to the open-ended conception of a ‘work’ as to whether this counts as retained law. Clearly, section 3A(2), on databases, counts as EU-derived domestic legislation for the purposes of section 2 of the European Union (Withdrawal) Act 2018. But what about the unamended ‘originality’ standard in section 1(1)(a) of the CDPA? The better view seems to be that this is ‘EU-derived legislation’, as defined in section 1B(7) of the 2018 Act, because it ‘operated’ for the purpose of giving effect to a Community

obligation, or at the very least related to the EU. As a consequence, CJEU decisions regarding originality made before 31 December 2020 continue to be binding on the interpretation of that standard. Nevertheless, the question remains whether the Court of Appeal or Supreme Court will decline to follow the retained case law (or instead might prefer to revert to the ‘labour, skill and judgment’ standard). Although we are unsympathetic to such claims, one can anticipate arguments that the CJEU standard, applied to works of mere skill or labour, such as verbatim reports or press photographs, is ‘creating injustice’, given the absence of any broadly formulated or open-textured unfair competition law; or, that the concept of ‘personal touch’ is engendering uncertainty and thus impeding the proper development of the law.¹⁹⁹

4 Entrepreneurial Works: ‘Not Copied’

Unlike the case with literary, dramatic, musical, and artistic works (authorial works), there is no requirement that films, sound recordings, broadcasts, or published editions be original. Instead, the CDPA 1988 provides that copyright does not subsist in a sound recording, a film, or a published edition to the extent that it is itself copied from a previous work of the same kind.²⁰⁰ In relation to broadcasts, the Act provides that copyright does not subsist to the extent that it infringes copyright in another broadcast.²⁰¹ One of the consequences of this is that entrepreneurial works will be protected irrespective of whether or not the author exerted mental skill, labour, or effort in the creation of the work. This means that if a video recorder or tape recorder is turned on and left on a table, the resulting film or sound recording will be protected.

It has been suggested that the reason why a lower standard is applied to entrepreneurial works than to authorial works relates to the nature of the rights that are granted.²⁰² In relation to authorial works, copyright protects ‘the content’, not merely ‘the signal’.²⁰³ As a result, it is more important that the law monitors the types of authorial work that are protected. Conversely, in the case of entrepreneurial works for which protection is thin,²⁰⁴ there is less need to monitor the subject matter protected. This does not mean, however, that it is not necessary to regulate the types of subject matter protected as entrepreneurial works. In particular, to have allowed such works to be protected with no threshold requirement would have created the undesirable position that rights in entrepreneurial works could have continued in perpetuity. The reason for this is that, in the absence of some limitation, every time someone copied an entrepreneurial work, they would have obtained a fresh copyright in the ‘new’ work. This problem is avoided in the 1988 Act by ensuring that entrepreneurial works are protected only to the extent that they are not copied.

For the most part, these provisions are relatively straightforward. However, three issues remain unsettled. The first is whether a compilation of parts of sound recordings (such as a ‘megamix’) would be protected as a separate sound recording.²⁰⁵ On one view, if the megamix is compiled from existing recordings, then nothing is protectable. The reason for this is that each existing element is excluded on the basis that it is copied from another sound recording. However, if such an approach were to be followed, it would lead to the bizarre result that the absence of a notion of originality in respect of entrepreneurial works means that the threshold of protection is higher than with respect to authorial works (where collections of materials are protected as databases, tables, and compilations).²⁰⁶ Perhaps the better view is that a compilation of sound recordings ought to be protected as a sound recording, on the basis that the compilation is more than the sum of its parts.²⁰⁷

The second question is whether, in the process of digitally remastering an old work, the resulting work would be protected. Where no change is made to the contents of the work, it is difficult to see how the digital version of the work could be protected by copyright, since the recording is copied from existing recording of sounds. Would the position be any different if, in the process of remastering an old recording, it were to be cleaned of unnecessary noise and interfering sound? It seems that the way in which this question will be answered depends on the way in which the phrase ‘to the extent that’ is construed.²⁰⁷

5 Is the Work ‘Qualified’?

In order for a work to be protected in the United Kingdom, it is necessary to show that the work is suitably ‘qualified’,²⁰⁸—that is, it is necessary to show that the work is sufficiently connected to the United Kingdom to qualify for protection under UK law. United Kingdom law withholds protection from works that fail to establish a sufficient connection to the United Kingdom. In essence, the requirement that the work be qualified helps to balance the protection offered to British authors in other jurisdictions against the

p. 130 protection given to foreign authors in the United Kingdom. Once a work qualifies, in general, British law applies the principle of national treatment—that is, UK copyright law generally treats foreign works as it does those of British authors.²⁰⁹

5.1 Connecting Factors

The benefits of British copyright law have been extended to cover a vast array of works created by foreign authors or published in foreign countries. Nevertheless, the task of determining whether a particular work is protected under British copyright law is remarkably complex. While, in some situations, this task may be avoided through the use of statutory presumptions,²¹⁰ in most situations it needs to be undertaken. Given that British law effectively provides universal protection, some regard the complexity of the task as unnecessary.²¹¹

There are three connecting factors that enable works to qualify for copyright protection (ss 154–6). These are by reference to: (i) authorship; (ii) country of first publication; and (iii) place of transmission. A work qualifies if it satisfies *any* of these three factors. Once a work qualifies for copyright protection, British copyright law does not usually discriminate between it and a work created by an author from or first published in the United Kingdom.²¹²

5.1.1 Qualification via authorship

Section 154(1) of the CDPA 1988 provides that a work qualifies for copyright protection if, at the ‘material time’, the author of the work was a ‘qualifying person’.²¹³

In order for a work to qualify for protection, it is necessary that the author be connected to a relevant country at the ‘material time’.²¹⁴ For unpublished literary, dramatic, musical, and artistic works, the ‘material time’ is the date on which the work was made. Where the work has been published, it is the author’s status at the date of first publication that is decisive, or if the author died before publication, their status at the date of death.²¹⁵

By contrast, the material time for other types of copyright work does not change; qualification depends on the personal status of the ‘author’ of a sound recording or film at the time of its making or, for the organization broadcasting a transmission, at the date of transmission, and for typographical format, it is the publisher at publication that is relevant.²¹⁶ Since a work may take a considerable time to make, section 154(4)(a) provides that, in the case of an unpublished literary, dramatic, musical, or artistic work, the ‘material time’ is ‘a substantial part of that period’. Rather oddly, no such provision exists for films.

To qualify under section 154, it is necessary to show that the author was a ‘qualifying person’. There are three ways in which this can be achieved. First, a person will be a ‘qualifying person’ if they can show that they are: a British citizen, national, or subject; a person within certain categories of the British Nationality Act 1981; or p. 131 a person domiciled ↵ or resident in, or a body incorporated in, part of the United Kingdom.²¹⁷ The concepts of ‘domicile’ and ‘residence’ are not defined in the Act. It seems, however, that ‘domicile’ refers to the country in which a person makes their permanent home. In contrast, the concept of ‘residence’ is more flexible, simply demanding some degree of continuous association with the country in question. A person can be a resident of more than one country, although a person will not be a resident if they are a casual visitor.²¹⁸

Second, a person will qualify if they can show that they are an individual domiciled or resident in, or a body incorporated under the law of, a country to which the law has been ‘extended’.²¹⁹ In this context, it should be noted that ‘extension’ refers to the fact that Her Majesty, by Order in Council, is given the power to extend the 1988 Act to other territories, including the Isle of Man, the Channel Islands, and any colony.²²⁰ Along with the power of ‘application’ (discussed later), ‘extension’ is a technique that is used to protect works that originate from outside the United Kingdom. While only a few Orders have been made under the 1988 Act,²²¹ some Orders made under the equivalent section of the Copyright Act 1956 continue to operate,²²² for example in the Falkland Islands.²²³ The effect of such Orders is not simply to provide protection in the United Kingdom for categories of work with a relevant connection to those countries; protection is also afforded in those countries to works protected in the United Kingdom.²²⁴ Because the power to extend the 1988 Act permits the extension to be ‘subject to such exceptions and modifications as may be specified’, each Order needs to be considered individually.

Third, a person will qualify if they can show that they are a citizen or subject of, and an individual domiciled or resident in, or a body incorporated under a law of, a country to which the Act has been ‘applied’.²²⁵ Section 159 both contains generic provisions indicating when the Act will apply to works with relevant links to Convention countries,²²⁶ and empowers Her Majesty, by Order in Council, to ‘apply’ the copyright sections of the 1988 Act to other countries.²²⁷ This is done so as to allow either authors connected to such countries, works first published in such countries, or broadcasts sent from such countries to qualify for protection in the United Kingdom. Moreover, such ‘applications’ may be subjected to such exceptions and modifications as are specified or confined to certain classes of cases specified in the Order, and in this respect, care must be taken, particularly in relation to sound recordings and broadcasts.²²⁸ The power to make such Orders is

p. 132 ↵ restricted to countries that give adequate protection to the owners of copyright in respect of the class of works to which the Order relates.²²⁹ The latest version of the Order is the Copyright and Performances (Application to Other Countries) Order 2016.²³⁰

Where a work has been jointly authored, the work qualifies for copyright protection if any of the joint authors is qualified. However, the non-qualifying author is ignored when considering issues of first ownership²³¹ and duration.²³² Consequently, if one joint author qualifies and another does not, the qualifying owner alone will be first owner.²³³ Similarly, copyright in a co-written literary work expires 70 years after the death of the last qualifying co-author.²³⁴

5.1.2 Qualification by first publication

A work may also qualify for protection if it is first published in the United Kingdom or in another country to which the Act has been ‘extended’ or ‘applied’.²³⁵ (These concepts were discussed earlier.) A work is published when copies of the work are issued to the public,²³⁶ or, in the case of literary, dramatic, musical, and artistic works, when the work is made available to the public through an electronic retrieval system.²³⁷ It does not include: performing a literary, dramatic, or musical work; exhibiting an artistic work; issuing specified types of copies of such works;²³⁸ playing or publicly showing a sound recording or film; or communicating to the public any work.²³⁹

If a work is to qualify for protection by publication, the publication must be ‘authorized’ (typically by the author).²⁴⁰ The 1988 Act provides that publication does not include merely colourable publications, which are not intended to satisfy the reasonable requirements of the public.²⁴¹ The threshold for protection is very low. At a minimum, if a work attracts no interest, the mere fact that a few copies have been made available for sale will suffice.²⁴² Publication takes place wherever the publisher invites the public to acquire copies²⁴³ and may take the form of gift, hire, or sale.²⁴⁴ Since publication consists in offering reproductions to the public, it has been suggested that anything that amounts to a reproduction will suffice (although commentators have raised doubts about this view).²⁴⁵

To qualify for protection, the work must be published *first* in the United Kingdom or in another country to which the Act has been ‘extended’ or ‘applied’. The fact that publication first occurs in a non-qualifying country will not matter, so long as that work is published within 30 days in the United Kingdom or in another country to which the Act has been ‘extended’ or ‘applied’.²⁴⁶ It should also be noted that films that have been released commercially under conditions of restricted distribution may well not have been published, since copies will not have been made available to the public.²⁴⁷

5.1.3 Qualification by place of transmission: broadcasts

A broadcast qualifies for protection if it is made or sent from a place in the United Kingdom, or a country to which the Act ‘extends’ or ‘applies’.²⁴⁸ In the case of satellite broadcasts, the broadcast is made where the signals are introduced.²⁴⁹

6 Excluded Subject Matter

Although a work may be recorded in material form, may be original, and may be sufficiently connected to the United Kingdom, in some circumstances the courts may nonetheless refuse to recognize copyright for policy reasons. It appears that copyright protection will not be granted for obscene, blasphemous, or immoral

works. This can be seen from *Glyn v. Weston Film Feature*,²⁵⁰ in which Younger J refused to grant an injunction for infringement of copyright in the claimant's dramatic work, *Three Weeks*, which he described as a 'sensual adulterous intrigue' and condemned on the ground that it advocated 'free love'. Younger J said: '[I]t is clear that copyright cannot subsist in a work of a tendency so grossly immoral as this.'²⁵¹

For some time, it had been thought that *Glyn* and the other cases in which copyright had been denied to obscene, blasphemous, libellous, irreligious, or misleading works²⁵² were the products of less enlightened times and, as such, would no longer be followed.²⁵³ However, in *A-G v. Guardian (No. 2)*,²⁵⁴ the House of Lords cited *Glyn* with approval. In that case, Peter Wright, a former security services agent, had written a book (*Spycatcher*) about the various operations of the service. Importantly, in writing the book, Wright breached the duty of confidence that he owed to the Crown. The House of Lords held that Wright would not be able to bring a copyright infringement action because of the 'disgraceful circumstances' in which the book was written. As well as citing *Glyn* with approval, the Lords extended the scope of the immorality exclusion beyond the content of the work to include the circumstances in which the work was created.

While the House of Lords affirmed the continued existence of the public policy exclusion, there is still some doubt as to the exact effect of immorality. It is unclear whether it means that there is no copyright in the work at all or that equity will not enforce the copyright.²⁵⁵ The way in which this question is answered might be important given that if there were no copyright, presumably all contracts that purported to deal with the copyright would be vulnerable.

The scope of the exclusion is also unclear. Although hitherto it has been concerned with matters such as sexual morality, the exclusion may also be a basis for declining to protect so-called 'malware'—that is, software designed to appropriate sensitive information from a user's infected personal computer.

The effect of the public policy exclusions is somewhat paradoxical. Because the denial of copyright to obscene works effectively places them in the public domain, this might increase the speed and breadth of circulation. If dissemination is deemed to be undesirable, the denial of copyright seems to be counter-productive.²⁵⁶ (It may also stimulate public interest in the work.) Presumably, other reasons have motivated the courts. The approach taken by the courts is consistent with the view that the primary concern of copyright is to encourage creation rather than to control dissemination. Denying copyright will (supposedly) remove the incentive to produce obscene works.

As we have seen, a derivative work that infringes copyright in the work on which it is based can be original. In such circumstances, the question arises as to whether an original, but infringing, work should be denied protection on grounds of public policy. With one or two exceptions,²⁵⁷ the courts have generally been willing to enforce copyright in derivative works even though they infringe.²⁵⁸ This has been explained on the basis that if protection were to be denied to such works, it would lead to a substantial injustice. As Goff J said:

It is understandable that the owner of copyright should be entitled to restrain publication of an infringing work; but the idea that he should be entitled to reap the benefit of another's original work, by exploiting it, however extensive such work might be, however innocently it might have been made, offends against justice and common sense.²⁵⁹

Notes

¹ CDPA 1988, ss 5(2), 6(6), 7(6), 8(2).

² Registration requirements for published literary works and some artistic works existed until 1912. Over the last decade, there has been a revival of interest in an ‘opt-in’ copyright regime. For an extensive treatment, see S. van Gompel, *Formalities in Copyright* (2012), and the *BTLJ/BCLT Symposium: The Next Great Copyright Act* (2014) 29 *BTLJ*.

³ CDPA 1988, s. 3. This is deemed to be the time when the work is ‘made’: CDPA 1988, s. 3(2). One commentator has suggested that this requirement may no longer be appropriate in the light of European harmonization of the ‘work’ concept, which requires member states to protect ‘intellectual creations’ and says nothing about fixation: see C. Handig, ‘The Copyright Term “Work”: European Harmonisation at an Unknown Level’ (2009) 40 *IIC* 665, 673. That view might be thought confirmed by the CJEU’s comment, in *Levola Hengelo BV v. Smilde Foods BV*, Case C-310/17, EU:C: 2018:899 at [40], that original expression would be protected if expressed in a manner which makes it identifiable with sufficient precision and objectivity, ‘even though that expression is not necessarily in permanent form’. However, at least one scholar considers that the latter decision, deriving from an analogy between copyright and trade mark registration requirements, may in fact reinforce the idea of some sort of fixation requirement: C. Sganga, ‘The Notion of “Work” in EU Copyright Law after *Levola Hengelo*: One Answer Given, Three Question Marks Ahead’ [2019] *EIPR* 415; J. McCutcheon, ‘*Levola Hengelo BV v. Smilde Foods BV*: The Hard Work of Defining a Copyright Work,’ [2019] *MLR* 936, 946. Copinger (18th edn), [3–36], [3–161] treats ‘identifiability’ and ‘fixation’ as ‘not very different’ requirements, but suggests ‘fixation’ is only a requirement for works created before 22 December 2002, with ‘identifiability’ the sole prerequisite for works created after that date.

⁴ CDPA 1988, s. 178.

⁵ Written in the pre-digital era, the CDPA 1988 here seems to assume that using notation ensures that there is a material version of a work. Digitization, of course, creates the possibility that there could be highly unstable or ephemeral versions that are ‘in writing’. Consider, for example, a student’s essay that is written before the computer crashes and cannot be recovered: it seems that this was ‘in writing’, but it would be strange to say that it was ‘recorded’ until a version was saved either automatically or by the author.

⁶ But cf. *Komesaroff v. Mickle* [1988] *RPC* 204 (a device consisting of a mixture of sand, liquid, and bubble-producing substance did not qualify as a work of artistic craftsmanship).

⁷ See *Merchandising Corporation v. Harpbond* [1983] *FSR* 32, 46 (Lawton LJ), discussed in Chapter 3, section 5.1.1, pp. 78–9.

⁸ *Metix v. Maughan* [1997] *FSR* 718, 721.

⁹ *Islestarr Holdings Ltd v. Aldi Stores* [2019] *EWHC* 1473 (Ch), though in that case there was evidence of a design document identifying the powder design (as well as photographs of it), so it was clearly ‘recorded’.

¹⁰ *Ibid.*, [48].

¹¹ Such a work does not fall easily within any of the designations of artistic work in CDPA 1988, s. 4. But EU law may require that it be protected nonetheless. See Chapter 3, section 1, pp. 64–7.

¹² *Komesaroff v. Mickle* [1988] *RPC* 204, 210 (King J) (definition of the work of artistic craftsmanship on which she bases her action can be done only by a reference to a static aspect).

¹³ For a rare example, see *McCormack Training v. Goldmark Training Services* [2015] EWHC 41 (IPEC), [89] (HHJ Hacon) (on assumption that a physical restraint technique is a dramatic work, a single photograph of the technique in operation is not a recording of that technique as a dramatic work).

¹⁴ CDPA 1988, s. 3(3).

¹⁵ *Lucas v. Williams & Sons* [1892] 2 QB 113, 116; *Wham-O Manufacturing Co. v. Lincoln Industries* [1985] RPC 127 (CANZ), 142–5; *J & S Davis (Holdings) v. Wright Health Group* [1988] RPC 403, 409.

¹⁶ CDPA 1988, s. 1(1).

¹⁷ See section 4, pp. 128–9.

¹⁸ Although the requirement was introduced for paintings, drawings, and photographs by the Fine Art Copyright Act 1862.

¹⁹ E. Judge and D. Gervais, ‘Of Silos and Constellations: Comparing Notions of Originality in Copyright Law’ (2009) 27 *Cardozo AELJ* 375 (identifying and contrasting four conceptions of originality: ‘personal intellectual creation’, associated with civil law and Europe; ‘minimal creativity’, associated with the United States after *Feist Publications v. Rural Telephone Service Co.*, 499 US 340 (1991); ‘skill and judgement’, the Canadian test after *CCH Canadian v. Law Society of Upper Canada* [2004] SCC 13, [16]; and ‘labour, skill and judgement’, the traditional British test). But, there is no single ‘civil law’ approach and the traditional British test has more uncertainties than this suggests.

²⁰ See the case law described in section 3.3, pp. 104–5.

²¹ *University of London Press v. University Tutorial Press* [1916] 2 Ch 601; *Sawkins v. Hyperion* [2005] 1 WLR 3281, 3288, [3] (Mummery LJ).

²² See Chapter 18, section 1, pp. 555–6.

²³ *Ladbroke v. William Hill* [1964] 1 All ER 465, 469 (Lord Reid).

²⁴ *Christoffer v. Poseidon Film Distributors* [2000] ECDR 487.

²⁵ *University of London Press v. University Tutorial Press* [1916] 2 Ch 601, 608 (Peterson J); *SAS Institute v. World Programming*, Case C-406/10 [2012] 3 CMLR (4) 55, 68, [AG44] (AG Bot).

²⁶ This is specifically required by Berne, Art. 2(3) (‘Translations, adaptations, arrangements of music and other alterations of a literary or artistic work shall be protected as original works without prejudice to the copyright in the original work’).

²⁷ *Redwood Music v. Chappell* [1982] RPC 109, 120; *ZYX Music GmbH v. King* [1995] 3 All ER 1, 9–11.

²⁸ *Technomed v. Bluecrest Health Screening* [2017] EWHC 2142 (Ch) (D Stone), [89] (calling *Infopaq* a ‘low hurdle’). Cf. *Football Dataco v. Yahoo! UK*, Case C-604/10 [2012] 2 CMLR (24) 703, [AG41] (AG Mengozzi).

²⁹ *University of London Press v. University Tutorial Press* [1916] 2 Ch 601.

³⁰ *Cofemel—Sociedade de Vestuário SA v. G-Star Raw CV*, Case C-683/17, EU:C:2019:363, [AG 57] (AG Szpunar).

³¹ Ibid., [AG54].

³² B. Edelman, *Ownership of the Image: Elements for a Marxist Theory of Law* (1979); J. Gaines, *Contested Culture: The Image, The Voice and the Law* (1992).

³³ R. Deazley, ‘Photographing Paintings in the Public Domain: A Response to Garnett’ [2001] *EPR* 179, 181.

³⁴ See B. Sherman, ‘From the Non-original to the Aboriginal’, in Sherman and Strowel.

³⁵ T. Dreier and G. Karnell, ‘Originality of the Copyrighted Work: A European Perspective’ (1991–92) 39 *J Copyright Soc'y USA* 289, 294.

³⁶ But cf. J. Hughes, ‘Created Facts and the Flawed Ontology of Copyright Law’ (2007) 83 *Notre Dame L Rev* 43 (pointing out that many ‘facts’ are created).

³⁷ *Irene A*** v. K*** GmbH*, Case 4 Ob 162/08i (Austrian Supreme Court, 14 Oct. 2008), [2010] *ECC* (12) 186, 191 (‘To afford copyright protection to all works, including those that are mundane or banal, would intolerably hamper the creative freedom of others’).

³⁸ J. Wiley, ‘Copyright at the School of Patent’ (1991) 58 *U Chi L Rev* 119; J. S. Miller, ‘Hoisting Originality’ (2009) 31 *Cardozo L Rev* 451.

³⁹ P. Jaszi, ‘On the Author Effect: Contemporary Copyright and Collective Creativity’ (1992) 10 *Cardozo AELJ* 293, 300–1.

⁴⁰ One need only think of a whole host of products and services—from bibliographies to listings magazines—that would be placed in an uncomfortable legal position if the protection of the names and titles of books, films, etc., were to be regarded as the norm. See *Fairfax Media v. Reed International Books* [2010] *FCA* 984; *Francis Day and Hunter v. 20th Century Fox* [1940] *AC* 112 (PC), 123.

⁴¹ *CCH Canadian v. Law Society of Upper Canada* [2004] *SCC* 13, [23].

⁴² *University of London Press v. University Tutorial Press* [1916] 2 *Ch* 601.

⁴³ P. Kamina, ‘France’, in L. Bently (ed.), *International Copyright: Law and Practice* (2021), FRA-21-3.

⁴⁴ *Infopaq Int. v. Danske Dagblades Forening*, Case C-5/08 [2009] *ECR I-6569*.

⁴⁵ See *Wood v. Boosey* (1868) *LR 3 QB* 223, 229; *Redwood Music v. Chappell* [1982] *RPC* 109, 120; *ZYX Music GmbH v. King* [1995] 3 *All ER* 1, 9–11; cf. *Ashmore v. Douglas Home* [1987] *FSR* 553.

⁴⁶ S. Ricketson, ‘The Concept of Originality in Anglo-Australian Copyright Law’ (1991) 9(2) *Copyright Reporter* 1 and (1991–92) 39 *J Copyright Soc'y USA* 265.

⁴⁷ *Macmillan v. Cooper* (1923) 93 *LJPC* 113 (Lord Atkinson).

⁴⁸ *University of London Press v. University Tutorial Press* [1916] 2 *Ch* 601, 609.

⁴⁹ [1964] 1 *All ER* 465, 469 (Lord Reid).

⁵⁰ *Ibid.*, 469 (Lord Reid).

⁵¹ *Ibid.*, 473f (Lord Evershed); *Interlego v. Tyco* [1988] *RPC* 343, 371.

⁵² *Ladbroke v. William Hill* [1964] 1 *All ER* 465, 475 (Lord Hodson: ‘work, labour and skill’), 478 (Lord Devlin: ‘skill, industry, or experience’), and 480 (Lord Pearce: ‘labour or skill or ingenuity or expense’).

⁵³ *Ibid.*, 478 (Lord Devlin), 476 (Lord Hodson).

⁵⁴ [1983] *FSR* 32.

⁵⁵ *Rose v. Information Services* [1987] *FSR* 254; *Sinanide v. La Maison Kosmeo* (1928) 139 *LTR* 365.

⁵⁶ *Interlego AG v. Tyco Industries* [1989] AC 217, 268.

⁵⁷ *British Northrop v. Texteam (Blackburn)* [1974] RPC 57, 68 (a drawing that is simply traced from another drawing is not an original artistic work); *Rexnold v. Ancon* [1983] FSR 662, 664 (improbable that copyright would be given to a mere tracing); *Davis (Holdings) v. Wright Health Group* [1988] RPC 403, 409 (casts made from models are not original) and 412 (tracing not original).

⁵⁸ *Interlego AG v. Tyco Industries* [1989] AC 217, 263.

⁵⁹ *Ibid.*, 262.

⁶⁰ *The Reject Shop v. Robert Manners* [1995] FSR 870, 876.

⁶¹ See E. Rosati, *Originality in EU Copyright: Full Harmonization through Case Law* (2013); E. Rosati, ‘Towards an EU-Wide Copyright? (Judicial) Pride and (Legislative) Prejudice’ [2013] IPQ 47; A Rahmatian, ‘Originality in UK Copyright Law: The Old “Skill and Labour” Doctrine under Pressure’ (2013) 44 IIC 4.

⁶² Software Dir., Art. 1(3); Database Dir., Art. 3(1).

⁶³ Term Dir., Art. 6, states that photographs that are original in the sense that they are the author’s own intellectual creation shall be protected in accordance with Art. 1.

⁶⁴ *Infopaq Int v. Danske Dagblades Forening*, Case C-5/08 [2009] ECR I-6569.

⁶⁵ *Ibid.*, [37].

⁶⁶ T. Hoppner, ‘Reproduction in Part of Online Articles in the Aftermath of *Infopaq*’ [2011] EIPR 331, 332.

⁶⁷ *Bezpečnostní softwarová asociace–Svaz softwarové ochrany v. Ministerstvo kultury*, Case C-393/09 [2011] ECR I-13,971, [49]. See also *Nintendo Co. v. PC Box Srl*, Case C-355/12 (23 Jan. 2014), [21].

⁶⁸ *Football Association Premier League v. QC Leisure and Karen Murphy v. Media Protection Services*, Cases C-403/08 and C-429/08 [2011] ECR I-9083 (Grand Chamber).

⁶⁹ *Forensic Telecommunications Services v. West Yorkshire Police* [2011] EWHC 2893 (Ch).

⁷⁰ For discussion of transitional questions, see L. Bently, ‘Judicial Creativity and Transitions in EU Intellectual Property Law’, in N. Bruun et al. (eds), *Transitions and Coherence in Intellectual Property Law: Essays in Honour of Annette Kur* (2021), ch 2, pp. 25–45.

⁷¹ Council Dir. 93/98/EEC, Art. 13(1).

⁷² Database Dir., Arts 14(2), 16(1).

⁷³ The Copyright and Rights in Database Regulations 1997 (SI 1997/3032) (Database Regs 1997).

⁷⁴ CDPA 1988, s. 3A(2), introduced by Database Regs 1997, reg. 6.

⁷⁵ *Newspaper Licensing Agency v. Meltwater and the PRCA* [2011] EWCA Civ 890, [19]–[20] (Morritt C said that he did not understand the decision of the Court of Justice in *Infopaq* ‘to have qualified the long standing test’); *The Racing Partnership v. Done Brothers (Cash Betting)* [2019] EWHC 1156 (Ch), [59] (Zacaroli J) (assessing originality using criterion of ‘skill and judgement’). Even in cases that accept *Infopaq* as authoritative, such as *Temple Island v. New English Teas* [2012] UKPCC 1, there is still a tendency, e.g. at [27], to treat ‘skill and labour’ as interchangeable with ‘intellectual creation’. See also *Martin v. Kogan* [2019] EWCA Civ 1645, [53](v) (referring to skill), [80], [119] (referring to skill and labour), and [53](vii) and [139] (referring to *Infopaq*).

⁷⁶ See Chapter 1, section 5.1.1, pp. 18–22, for discussion of the European Union (Withdrawal) Act 2018.

⁷⁷ Software Dir., Art. 9(2); Term Dir., Art. 10(1); Database Dir., Art. 14(2), (4).

⁷⁸ Term Dir., Recital 16.

⁷⁹ In *Football Dataco v. Yahoo! UK*, Case C-604/10 [2012] 2 CMLR (24) 703, [AG41], Advocate-General Mengozzi stated that the European legislature had preferred the ‘more “rigorous”’ paradigm of the countries of the continental tradition’ to the ‘common law standard’.

⁸⁰ *Infopaq Int. v. Danske Dagblades Forening*, Case C-5/08 [2009] ECR I-6569, [45].

⁸¹ *Eva-Maria Painer v. Standard VerlagsGmbH*, Case C-145/10 [2012] ECDR (6) 89, [87]–[93]; *Renckhoff*, Case C-161/17, EU:C:2018:634, [14] (stating the test, but leaving the matter to national court). Cf. EU:C:2018:279 [AG54] (AG Sánchez-Bordona) (‘it seems doubtful to me that a simple shot of the city of Cordoba, with the Roman bridge in the foreground, satisfies the aforesaid requirements’).

⁸² *Football Dataco v. Yahoo! UK*, Case C-604/10 [2012] 2 CMLR (24) 703.

⁸³ Ibid., 724–5, [38].

⁸⁴ *Cofemel—Sociedade de Vestuário SA v. G-Star Raw CV*, Case C-683/17, EU:C:2019:721, [30].

⁸⁵ *Bezpečnostní softwarová asociace*, Case C-393/09 [2011] ECR I-13,971, [49].

⁸⁶ Ibid., [49]–[50].

⁸⁷ *Football Association Premier League v. QC Leisure and Karen Murphy v. Media Protection Services*, Cases C-403/08 and C-429/08 [2011] ECR I-9083 (Grand Chamber), [98].

⁸⁸ L. Bently, ‘The Football Game as a Copyright Work’, in M. Senftleben et al. (eds), *Intellectual Property and Sport* (2021), 305. J. Pila, ‘The Authorial Works Protectable by Copyright’, in E. Rosati, *The Routledge Handbook of EU Copyright Law* (2021), 63, 76, refers to the ‘unclear and incoherent legal reasoning’ of the CJEU in this case.

⁸⁹ Case C-406/10 [2012] 3 CMLR (4) 55, 68, [AG44] (AG Bot); *Cofemel—Sociedade de Vestuário SA v. G-Star Raw CV*, Case C-683/17, EU:C:2019:721, [30].

⁹⁰ *SI and Brompton Bicycle Ltd v. Chedech /Get2Get*, Case C-833/18, EU:C:2020:461, [26].

⁹¹ Ibid., [35].

⁹² D. Gervais, ‘Feist Goes Global: A Comparative Analysis of the Notion of Originality in Copyright Law’ (2002) *J Copyright Soc'y USA* 949, 976–7; E. Declaye and D. Gervais, ‘The Scope of Computer Program Protection after SAS: Are We Closer to Answers?’ [2012] *EIPR* 565, 567 (‘creative choices are those that one can isolate by asking whether two authors in similar situations (tools, direction, budget etc) would likely have produced essentially the same thing’); J. Hughes, ‘The Personality Interest’ (1998) 16 *Cardozo AELJ* 81, 114 (choices are ‘creative’ where they are neither mechanical nor random).

⁹³ *SAS Institute v. World Programming*, Case C-406/10 [2012] 3 CMLR (4) 55, 68, [AG48], emphasis added.

⁹⁴ B. Hugenholtz, ‘Works of Literature, Science and Art’, in B. Hugenholtz, A. Quaedvlieg, and D. Visser (eds), *A Century of Dutch Copyright Law: Auteurswet 1912–2012* (2012), 33, 43 (‘Whether the originality requirement is met depends on whether the author has had enough “creative space”—and used it so that the work shows sufficient subjective characteristics’). Cf. J. Pila, ‘The Authorial Works Protectable by Copyright’, in E. Rosati, *The Routledge Handbook of EU*

Copyright Law (2021), 63, 71 (treating the test as two stages: first, is ‘the work … of a type that affords scope for the exercise of free and creative choices (formative freedom) in its production’? Second, (if yes), has the claimant used that freedom to the right effect?).

⁹⁵ For a discussion of whether the reasoning extends to ‘playlists’, prompted by (settled) litigation between the Ministry of Sound and Spotify, see T. Iverson, ‘Can Copyright Subsist in a Music Compilation or Playlist?’ [2014] *Ent L Rev* 145.

⁹⁶ *British Horseracing Board v. William Hill* [2001] *ECDR* 257, 269 (Laddie J).

⁹⁷ One example before the Court was ‘a forthcoming sale of the telecommunications group TDC which is expected to be bought’: *Infopaq Int. v. Danske Dagblades Forening*, Case C-5/08 [2009] *ECR I-6569*, [21].

⁹⁸ E.g. choosing the 1,000 ‘most important’ poems: *Gedichttitelliste [Poem Title List]* (2008) 39 *IIC* 985 (German Supreme Court).

⁹⁹ *Response Clothing Ltd v. The Edinburgh Woollen Mill Ltd* [2020] *EWHC* 148 (IPEC), [59], [60], [68].

¹⁰⁰ *Ibid.*, [60].

¹⁰¹ *Cofemel—Sociedade de Vestuário SA v. G-Star Raw CV*, Case C-683/17, EU:C:2019:721, [54].

¹⁰² K. Güven, ‘Eliminating “Aesthetics” from Copyright Law: The Aftermath of Cofemel’ [2021] *GRUR Int.* 1, 12 (arguing that the Court reduced the originality standard to the ‘not copied’ test). But cf. A. Kur, ‘Unité de l’art is Here to Stay—Cofemel and its Consequences’ (2020) 15(4) *JIPLP* 290, 295 (while not dealing with *Response Clothing*, implicitly approving the focus on the object when critiquing *Cofemel* on the basis that ‘creative processes cannot be watched directly, but are necessarily appraised on the basis of the results they have yielded’).

¹⁰³ *SAS Institute v. World Programming* [2013] *EWCA Civ* 1482, [37] (Lewison LJ) (‘raised rather than lowered the hurdle’); *Football Dataco v. Yahoo! UK*, Case C-604/10 [2012] 2 *CMLR* (24) 703, [AG41] (AG Mengozzi); Davison, 15–16. Cf. W. Blocher and M. Walter, ‘Computer Program Directive’, in Walter and von Lewinski, *European Copyright Law*, 94, [5.1.11] (suggesting test in Software Dir. corresponds to UK and Irish standard); M. Walter, ‘Term Directive’, in Walter and von Lewinski, 587, [8.6.10] (suggesting standard in Term Dir. ‘is a compromise’); E. Judge and D. Gervais, ‘Of Silos and Constellations: Comparing Notions of Originality in Copyright Law’ (2009) 27 *Cardozo AELJ* 375, 386–7 (suggesting standard is close to that of the United Kingdom).

¹⁰⁴ Judge and Gervais, ‘Of Silos and Constellations’, at 404; E. Derclaye and D. Gervais, ‘The Scope of Computer Program Protection after SAS: Are We Closer to Answers?’ [2012] *EIPR* 565, 567; *Action Storage Systems v. G-Force Europe.com* [2016] *EWHC* 3151 (IPEC), [2017] *FSR* (18) 418, [22] (HHJ Hacon) (in context of unregistered design right, distinction between UK and EU tests made no difference).

¹⁰⁵ Laddie et al. (5th edn), [3.46].

¹⁰⁶ *Ladbroke v. William Hill* [1964] 1 *All ER* 465, 478 (Lord Devlin).

¹⁰⁷ *BBC v. Wireless League Gazette Publishing Co.* [1926] *Ch* 433; *Independent Television Publications v. Time Out* [1984] *FSR* 64; *Waterlow Directories v. Reed Information Services* [1992] *FSR* 409; *Dun & Bradstreet v. Typesetting Facilities* [1992] *FSR* 320; *Football League v. Littlewoods Pools* [1959] 1 *Ch* 637, 656–7 (Upjohn J).

¹⁰⁸ *Cramp v. Smythson* [1944] *AC* 329.

¹⁰⁹ *Leslie v. Young* [1894] *AC* 335.

¹¹⁰ *Ice TV Pty v. Nine Network Australia Pty* [2009] HCA 14 (the Australian High Court—Gummow, Hayne, and Heydon JJ—suggested that cases in which routine labour had been held sufficient to give rise to copyright should be treated with caution). See K. Bowrey, ‘On Clarifying the Role of Originality and Fair Use in Nineteenth Century UK Jurisprudence’, in C. W. Ng, L. Bently, and G. D’Agostino (eds), *The Common Law of Intellectual Property* (2010), ch. 3.

¹¹¹ Cf. *Technomed v. Bluecrest Health Screening* [2017] EWHC 2142 (Ch), [122] (D Stone) (claiming that there was no difference between how the EU and old UK originality standard might apply, and concluding that ‘sufficient, non-negligible intellectual effort was expended’ in each patient definition to give rise to protection. This would hardly seem likely to meet the CJEU’s threshold).

¹¹² Case C-604/10 [2012] 2 CMLR (24) 703.

¹¹³ Ibid., 723–4, [32]–[33], [37].

¹¹⁴ Ibid., 723, [31].

¹¹⁵ *SAS Institute v. World Programming*, Case C-406/10 [2012] 3 CMLR (4) 55, [66].

¹¹⁶ Ibid., [67].

¹¹⁷ Case C-604/10 [2012] 2 CMLR (24) 703, [AG29].

¹¹⁸ *Walter v. Lane* [1900] AC 539, 551–2 (Lord Davey), 554 (Lord James of Hereford).

¹¹⁹ *SAS Institute v. World Programming*, Case C-406/10 [2012] 3 CMLR (4) 55, 71, [AG66]. But cf. at 68–9, [AG 48] (referring to the ‘creativity and skill of the author’).

¹²⁰ Case C-604/10 [2012] 2 CMLR (24) 703, [AG35].

¹²¹ Ibid., 725, [42].

¹²² Ibid., 725, [45]. See also *Funke Medien NRW GmbH v. Republic of Germany*, Case C-469/17, EU:C:2019:623, [23] (‘the mere intellectual effort and skill of creating’ military reports was not relevant to determining their originality).

¹²³ *Kelly v. Morris* (1866) LR 1 Eq 697.

¹²⁴ [1964] 1 All ER 465, 469 (Lord Reid), 477 (Lord Hodson), 479 (Lord Devlin), and 481 (Lord Pearce). See also *Football League v. Littlewoods* [1959] Ch 637, 656; *Bookmakers’ Afternoon v. Gilbert* [1994] FSR 723.

¹²⁵ Note, however, *Ladbroke v. William Hill* [1964] 1 All ER 465, 472 (Lord Evershed, who considered the task of expressing the wagers a distinct one involving ‘considerable skill, labour and judgement’).

¹²⁶ Even under the traditional British test, pre-expressive work was relevant only where (i) it was causally relevant to the expression and (ii) was undertaken with expression as its object: *Purefoy Engineering v. Sykes Boxall & Co.* (1955) 72 RPC 89; *Sawkins v. Hyperion* [2005] 1 WLR 3280, 3291, [43]; *Ladbroke v. William Hill* [1964] 1 All ER 465, 477 (Lord Hodson), 479 (Lord Devlin), and 481 (Lord Pearce).

¹²⁷ *SAS Institute v. World Programming*, Case C-406/10 [2012] 3 CMLR (4) 55, 68–9, [AG47]–[AG48] (AG Bot).

¹²⁸ *Eva-Maria Painer v. Standard VerlagsGmbH*, Case C-145/10 [2012] ECDR (6) 89, 106, [91].

¹²⁹ Database Dir., Art. 3(1).

¹³⁰ [1989] AC 217.

¹³¹ Ibid., 268 (Lord Oliver).

¹³² [2017] EWHC 2142 (Ch) (D Stone).

¹³³ See also the wave diagram in Chapter 3, Fig. 3.4, p. 80.

¹³⁴ At [29].

¹³⁵ See Chapter 3, sections 2.1–2.2, pp. 69–70.

¹³⁶ J. Pila, ‘The Authorial Works Protectable by Copyright’, in E. Rosati, *The Routledge Handbook of EU Copyright Law* (2021), 63, 75.

¹³⁷ The Dutch regarded the issue as clear enough to abolish the protection of ‘non-original writings’: P. B. Hugenholtz, ‘Goodbye, Geschriftenbescherming!’, Kluwer Copyright Blog, 6 March, 2013, available online at <http://copyrightblog.kluweriplaw.com/2013/03/06/goodbye-geschriftenbescherming/>.

¹³⁸ See Chapter 13, section 3, pp. 380–90.

¹³⁹ Software Dir., Art. 9(1); Database Dir., Art. 13; Info. Soc. Dir., Art. 9. The Term Dir. has no such saving, but in any case it explicitly leaves open the possibility of protecting non-original photographs.

¹⁴⁰ Case C-604/10 [2012] 2 CMLR (24) 703.

¹⁴¹ Ibid., 716, [AG51]; 726, [49]–[52]. See E. Derclaye, ‘Football Dataco: Skill and Labour is Dead!’ (1 Mar. 2012), Kluwer Copyright Blog (protection via unfair competition is also precluded).

¹⁴² D. Visser, ‘Directive 93/98/EEC’, in T. Dreier and B. Hugenholtz (eds), *Concise European Copyright Law* (2013), 299; C. Angelopoulos, ‘Directive 2006/116/EC’, in T. Dreier and B. Hugenholtz (eds), *Concise European Copyright Law* (2nd edn, 2016), 364; cf. M. Walter in Walter and von Lewinski, *European Copyright Law*, [8.6.12], 588 (suggesting extending copyright protection to non-original photographs might be compliant); Copinger (18th edn), [3–237] (suggesting lower UK standard applies).

¹⁴³ [2012] EWPCC 1, [20] (common ground).

¹⁴⁴ See e.g. *Islestarr Holdings Ltd v. Aldi Stores* [2019] EWHC 1473 (Ch), [27] (‘Originality requires the maker’s own intellectual creation or independent skill and effort’). However, that statement was made by Master Linwood sitting as a judge in the IPEC’s shorter trial scheme hearing an application for summary judgment, rather than following a careful analysis of the relationship between old British and more recent CJEU case law, and was obiter, to the extent that, at [101], the Judge determined from the evidence that the putative authors ‘made their own and/or joint intellectual choices in the creation of both the starburst and powder designs.’

¹⁴⁵ *Ladbroke v. William Hill* [1964] 1 All ER 465, 478 (Lord Devlin); S. Ricketson, ‘The Concept of Originality in Anglo-Australian Copyright Law’ (1991–92) 39 J Copyright Soc’y USA 265, 269.

¹⁴⁶ *Zonen Endstra v. Nieuw Amsterdam* [2008] EIPR N73 (Netherlands Supreme Court, 30 May 2008), described in B. Hugenholtz, ‘Works of Literature, Science and Art’, in B. Hugenholtz, A. Quaedvlieg, and D. Visser (eds), *A Century of Dutch Copyright Law: Auteurswet 1912–2012* (2012), 33, at 52–3.

¹⁴⁷ [2010] EWHC 3099, [67]–[72], [2011] EWCA Civ 890, [19]–[22].

¹⁴⁸ [2010] EWHC 3099, [70].

¹⁴⁹ [2011] EWCA Civ 890, [22]. For a critical appraisal, see D. Liu, ‘Meltwater Melts not Water but Principle! The Danger of the Court Adjudicating an Issue outwith the Ambit of Referral’ [2013] EIPR 327.

¹⁵⁰ *Rose v. Information Services* [1987] FSR 254.

¹⁵¹ Cf. the Belgian decision rejecting copyright in the reworking of a proverb ‘So many men, so many minds’ into ‘So many people, so many shoes’: [2002] AM 414 (Brussels, 21 Sept. 2001), note F. Brison and A. Coppieeters.

¹⁵² *Francis Day and Hunter v. 20th Century Fox* [1940] AC 112 (PC).

¹⁵³ *Ibid.*, 123.

¹⁵⁴ J. Klink, ‘Titles in Europe: Trade Names, Copyright Works or Title Marks?’ [2004] *EIPR* 291 (comparing Germany, France, and the United Kingdom).

¹⁵⁵ M. Gruenberger, ‘Germany’, in L. Bently (ed.), *International Copyright: Law and Practice* (2021), GER-52-3.

¹⁵⁶ P. Kamina, ‘France’, in Bently (ed.), *International Copyright*, FRA-36-7.

¹⁵⁷ *Exxon Corp. v. Exxon Insurance* [1982] *RPC* 69.

¹⁵⁸ E.g. the Lyon Court of Appeal protected ‘Clochemerle’ (the name of a satirical novel written by Gabriel Chevallier and published in 1934 about installing a urinal in a French village square): Cour d’appel Lyon, 5 July 1979.

¹⁵⁹ *Infopaq Int. v. Danske Dagblades Forening*, Case C-5/08 [2009] *ECR I-6569*, [45]–[46].

¹⁶⁰ *SAS Institute v. World Programming*, Case C-406/10 [2012] 3 *CMLR* (4) 55, [66].

¹⁶¹ A. and G. Bercovitz, ‘Spain’, in Bently (ed.), *International Copyright*, SPA-96 (referring to decision of Audiencia Provincial (Court of Appeal) Madrid (Section 28), 28 November 2016, Aranzadi Civil 2016, no. 2152 (holding that a photograph of Spanish Prince leaving a cinema was not an original work)); M. Pavis, ‘Paparazzi and Copyright’, IPKat, 31 May 2018.

¹⁶² *Eva-Maria Painer v. Standard VerlagsGmbH*, Case C-145/10 [2012] *ECDR* (6) 89, [87]–[93].

¹⁶³ *Ibid.*, [91].

¹⁶⁴ *Peter O**** v. F**** KG* [2006] *ECDR* (9) 77 (Austrian Supreme Court, 16 Dec. 2003), 79, [2.1]. See also *Decision of the Supreme Court*, 20 June 2006, Case No. 4 Ob 47/06z, (2007) 38 *IIC* 622, 624, [4] (photographs of famous sports personalities); C. Handig, ‘The Copyright Term “Work”: European Harmonisation at an Unknown Level’ (2009) 50 *IIC* 665, 674–5. But cf. Audiencia Provincial (Court of Appeal) Pontevedra (Section 1), 3 May 2013, Westlaw JURisprudencia 2013, no. 206,951, cited in A. and G. Bercovitz, in Bently (ed.), *International Copyright*, SPA-19 (Spanish court declining to treat as an original work a photograph of a live butterfly, even though this required a great deal of patience).

¹⁶⁵ *Temple Island v. New English Teas* [2012] *EWPOCC* 1, [20].

¹⁶⁶ *Black v. Murray* (1870) 9 *Macph* 341, 355.

¹⁶⁷ *Byrne v. Statist Co.* [1914] 1 *KB* 622; *Cummins v. Bond* [1927] 1 *Ch* 167.

¹⁶⁸ *Warwick Films v. Eisinger* [1969] 1 *Ch* 508.

¹⁶⁹ *ZYX Music GmbH v. King* [1995] 3 *All ER* 1.

¹⁷⁰ *Macmillan v. Cooper* (1924) 40 *TLR* 186, 188 (a passage described in *Interlego* as ‘perhaps the most useful exegesis’ on the issue of originality).

¹⁷¹ [1989] AC 217. But a gloss was added in *LA Gear Inc. v. Hi-Tech Sports plc* [1992] FSR 121 (each successive drawing made during design process by single designer was original).

¹⁷² *Interlego v. Tyco Industries* [1989] AC 217, 268. This leads to the rather bizarre conclusion that good reproductions are denied copyright, but poor ones have sufficient visually significant variation. This was explicitly stated by Lord Oliver, *ibid.* For further discussion, see Laddie et al. (5th edn), [4.44].

¹⁷³ Italian Copyright Law 1941, art. 4, cited in V. Falce, 'Italy', in Bently (ed.), *International Copyright*, ITA-19.

¹⁷⁴ *Interlego v. Tyco Industries* [1989] AC 217, 256.

¹⁷⁵ *Irene A*** v. K*** GmbH*, Case 4 Ob 162/08i [2010] ECC (12) 186 (Austrian Supreme Court, 14 Oct. 2008) (copy of standard ladies' shoe in chocolate, even though the idea was that of a well-known artist, was not original). For discussion, see B. Sherman, 'Appropriating the Postmodern: Copyright and the Challenge of the New' (1995) 4 S & LS 31; D. McClean and K. Schubert (eds), *Dear Images: Art, Copyright and Culture* (2002), 405.

¹⁷⁶ [1900] AC 539, treated as being good law in *Sawkins v. Hyperion* [2005] 1 WLR 3280, 3288, [33] (Mummery LJ), [79] (Jacob LJ). For a creative interpretation, see E. Derclaye, 'Debunking Some of UK Copyright Law's Longstanding Myths and Misunderstandings' [2013] IPQ 1 (claiming that the reporter has copyright in the report as a sound recording), and a persuasive response from N. P. Gravells, 'Reporter's Copyright and Sound Recordings: A Reply to Professor Derclaye' [2013] IPQ 91.

¹⁷⁷ *Funke Medien NRW GmbH v. Republic of Germany*, Case C-469/17, EU:C:2019:623.

¹⁷⁸ *Funke Medien*, EU:C:2018:870, [AG19] (AG Szpunar).

¹⁷⁹ *Funke Medien*, [24]. The Court here echoes [AG19] ('The content of purely informative documents that are inevitably drafted in simple and neutral terms is entirely determined by the information they contain, so that such information and its expression become indissociable, thus precluding all originality').

¹⁸⁰ At [AG19].

¹⁸¹ EU:C:2018:870, [AG19] (AG Szpunar).

¹⁸² *Funke Medien NRW GmbH v. Republic of Germany*, Case C-469/17, EU:C:2019:623, [24] (referring to [AG19]). AG Szpunar thought that Art. 11 of the Charter prevented Germany from invoking copyright in such reports: EU:C:2018:870, [32], [33], [53]–[66], [73].

¹⁸³ Practitioner texts have been slow to understand the impact of EU law: Laddie et al. (5th edn), [3.58] ('uncertain' whether shorthand reports would now be protected); Copinger (18th edn, 2021), [3–190] ('open to argument' that *Walter v. Lane* does not comply with EU test).

¹⁸⁴ [2005] 1 WLR 3280.

¹⁸⁵ *Ibid.*, 3291, [43].

¹⁸⁶ *Sawkins v. Harmonia Mundi* (2006) 37 IIC 116.

¹⁸⁷ See (2006) 37 IIC 116, 119 (a work must bear the intellectual and personal stamp of author).

¹⁸⁸ *Sawkins v. Harmonia Mundi* (2006) 37 IIC 116, 119.

¹⁸⁹ *Graves' Case* (1869) LR 4 QB 715. See R. Deazley, 'Photography, Copyright and the South Kensington Experiment' [2010] IPQ 293.

¹⁹⁰ R. Deazley, 'Photographing Paintings in the Public Domain: A Response to Garnett' [2001] EIPR 179, 181.

¹⁹¹ See e.g. K. Garnett, ‘Copyright in Photographs’ [2000] *EIPR* 229; cf. Deazley, ‘Photographing Paintings in the Public Domain’ (arguing that *Graves’ Case* is inapplicable in the light of *Interlego*); S. Stokes, ‘*Graves’ Case Revisited in the USA: The Bridgeman Art Library v. The Corel Corporation*’ [2000] *Ent L Rev* 104; S. Stokes, ‘Photographing Paintings in the Public Domain: A Response to Garnett’ [2001] *EIPR* 354 (arguing for copyright in such works to protect the labour and skill of the photographer); R. Deazley, ‘Copyright; Originality; Photographs; Works of Art’ [2001] *EIPR* 601 (responding to Stokes); S. Stokes, ‘*Graves’ Case and Copyright in Photographs: Bridgeman v. Corel*’, in D. McClean and K. Schubert (eds), *Dear Images: Art, Copyright and Culture* (2002), 109.

¹⁹² [2001] *FSR* 345; [2001] *ECDR* 51.

¹⁹³ *SOFAM v. Galerij Montevideo* [1999] *AM* 355 (Brussels Cour de Cassation, 10 Dec. 1998) (suggesting some aesthetic requirement where photograph merely copies a work of art), cited in A. Strowel and N. Ide, ‘Belgium’, in Y. Gendreau, A. Nordemann, and R. Oesch, *Copyright and Photographs: An International Survey* (1999), 83; *Pretura of Saluzzo* [1995] *AIDA* 311 (13 Oct. 1993), 453, cited in L. C. Ubertazzi, ‘Italy’ in Gendreau et al., 165–6 (‘Rarely ... does the photographic reproduction of works of figurative art and, in particular, works of architecture ... involve creativity’); Court of Appeal, Warsaw, 5 July 1995, cited by J. Barta and R. Markiewicz, ‘Poland’, in L. Bently (ed.), *International Copyright: Law and Practice* (2021), POL-11.

¹⁹⁴ German Copyright Act 1965, art. 72; Italian Copyright Law 1941, art. 87; Swedish Copyright Act 1960, art. 49a. For a comparative overview, see R. Hilty, ‘Images in Sports: Reflections on Related-Rights Protection’, in M. Senftleben et al., *Intellectual Property and Sports* (2021), 347.

¹⁹⁵ CDPA 1988, ss 9(3), 178. See A. Ramalho, ‘Will Robots Rule the (Artistic) World?’ (2017) 21 *Journal of Internet Law* 12; J. McCutcheon, ‘Curing the Authorless Void?’ (2013) 37 *Melb ULR* 46.

¹⁹⁶ Laddie et al. (4th edn), [36.44]; (5th edn), [22.44].

¹⁹⁷ *Eva-Maria Painer v. Standard VerlagsGmbH*, Case C-145/10 [2011] *ECDR* (13) 297, 324, [AG121]. See IPO, *Artificial Intelligence and Intellectual Property: Copyright and Patents* (29 Oct. 2021) (noting that the law was said to be ‘unclear and contradictory’).

¹⁹⁸ CDPA 1988, ss 9(3), 12(7).

¹⁹⁹ See Chapter 1, section 5.1.3, pp. 26–8.

²⁰⁰ CDPA 1988, ss 5A(2), 5B(4), 8(2).

²⁰¹ CDPA 1988, s. 6(6).

²⁰² Laddie et al. (5th edn), [6.16].

²⁰³ See Chapter 6, section 2.1, pp. 157–9.

²⁰⁴ P. Theberge, ‘Technology, Economy and Copyright Reform in Canada’, in S. Frith (ed.), *Music and Copyright* (1993), 53.

²⁰⁵ It might be the case that a ‘megamix’ would indirectly create an original musical work.

²⁰⁶ *Football Association Premier League v. QC Leisure* [2008] *EWHC* 1411, [2008] *FSR* (32) 789, [224].

²⁰⁷ Laddie et al. (5th edn), [6.16] (sound recording) and [7.31] (films) (preferring the rule to be applied only to ‘mere’ copies); Kamina (2nd edn), 106–7 (noting that the film producers’ copyright required under the Rel. Rights Dir. and Term Dir. refers to the *first fixation*).

²⁰⁸ For further details, see Copinger (18th edn), [3–328] *ff.*

²⁰⁹ But see Chapter 7, section 1, p. 200 for an exception to this concerning duration (applying shorter term in country of origin). Note also that the Order specifying to which countries that Act ‘applies’ may specify that the rights granted are limited in particular respects: CDPA, s. 159(4); Copyright and Performances (Application to Other Countries) Order (SI 2016/1219).

²¹⁰ See *Microsoft Corp. v. Electro-wide* [1997] FSR 580, 594.

²¹¹ Laddie et al. (5th edn), [5.10]–[5.11], [5.157]–[5.161].

²¹² But note the special rule on duration: see Chapter 7, section 1, p. 200.

²¹³ This may make determination of authorship important: see *Century Communications v. Mayfair Entertainment* [1993] EMLR 335.

²¹⁴ CDPA 1988, s. 154(4).

²¹⁵ CDPA 1988, s. 154(4).

²¹⁶ CDPA 1988, s. 154(4), s. 154(5).

²¹⁷ CDPA 1988, s. 154(1)(a). References to the EEA were added by the Intellectual Property Act 2014, s. 22 and deleted by the Intellectual Property (Copyright and Related Rights) Amendment (EU Exit) Regulations (SI 2019/605), reg. 14.

²¹⁸ Laddie et al. (5th edn), [5.63].

²¹⁹ CDPA 1988, s. 154(1)(b); British Nationality Act 1981, s. 51.

²²⁰ CDPA 1988, s. 157.

²²¹ Copyright (Cayman Islands) Order 2015 (SI 2015/795), as amended by Copyright (Cayman Islands) (Amendment) Order 2016 (SI 2016/370).

²²² They continue to operate because of CDPA 1988, Sch. 1, para. 36.

²²³ Copyright (Falkland Islands) Order 1963 (SI 1963/1037) and Copyright (Computer Software) (Extension to Territories) Order (SI 1987/2200).

²²⁴ Laddie et al. (5th edn), [5.86].

²²⁵ CDPA 1988, s. 154(1)(c).

²²⁶ CDPA 1988, s. 159(1) (Berne Convention and WTO Countries, for literary, dramatic, musical and artistic works, films, and typographical arrangements); s. 159(2) (Rome Convention, for sounds and broadcasts); s. 159(3) (WPPT, for sound recordings). This was added by the Intellectual Property Act 2014, s. 22, with effect from 1 December 2016. It is on this basis now that all EEA countries are covered for those works.

²²⁷ CDPA, s. 159(4).

²²⁸ For sound recordings, the Order differentiates between connections to WTO countries, WPPT countries, Rome signatories, and miscellaneous countries, offering different levels of protection to each: SI 2016/1219, regs 3–5.

²²⁹ CDPA, s. 159(6). Under CDPA 1988, s. 160, the Order may limit protection by virtue of first publication in respect of works from a country that does not adequately protect British works.

²³⁰ SI 2016/1219 (as amended).

²³¹ Under CDPA 1988, s. 11.

²³² Under CDPA 1988, s. 12.

²³³ But the non-qualifying author, it seems, can claim moral rights and therefore should be named on the work, and the work should not be subjected to any derogatory treatment without their consent.

²³⁴ CDPA 1988, s. 154(3).

²³⁵ CDPA 1988, s. 155(1). References to the EEA deleted by the Intellectual Property (Copyright and Related Rights) Amendment (EU Exit) Regulations (SI 2019/605), reg. 15, but the substantive position is unaffected because EEA countries are parties to relevant Conventions mentioned in CDPA, s. 159(1)–(3).

²³⁶ CDPA 1988, s. 175.

²³⁷ CDPA 1988, s. 175(1).

²³⁸ CDPA 1988, s. 175(4)(a)–(b). Publication of an artistic work does not include issuing copies of a film depicting such a work, nor copies of graphic works or photographs representing a sculpture, a work of artistic craftsmanship, or a work of architecture. However, the construction of a building is the equivalent of publishing the architectural work that it embodies: CDPA 1988, s. 175(3).

²³⁹ CDPA 1988, s. 175(4). But an electronic retrieval system may still serve to publish literary, dramatic, musical, or artistic works even if it operates by way of broadcasting: CDPA 1988, s. 175(4)(a)(ii), (b)(iv).

²⁴⁰ CDPA 1988, ss. 175(6) (no account shall be taken of any unauthorized act), 178.

²⁴¹ CDPA 1988, s. 175(5).

²⁴² *Francis Day & Hunter v. Feldman* [1914] 2 Ch 728; cf. *Bodley Head v. Flegon* [1972] 1 WLR 680.

²⁴³ *British Northrop v. Texteam* [1974] RPC 57.

²⁴⁴ *Ibid.*

²⁴⁵ *Merchant Adventurers v. Grew* [1973] RPC 1; *British Northrop v. Texteam* [1974] RPC 57, doubted in Laddie et al. (5th edn), [5.31]–[5.32].

²⁴⁶ CDPA 1988, s. 155(3).

²⁴⁷ Cf. *Bodley Head v. Flegon* [1972] 1 WLR 680.

²⁴⁸ References to the EEA were added by the Intellectual Property Act 2014, s. 22 and deleted by the Intellectual Property (Copyright and Related Rights) Amendment (EU Exit) Regulations (SI 2019/605), reg. 16. The Copyright and Performances (Application to Other Countries) Order 2016 (SI 2016/1219) specifies the countries to which the Act applies with respect to broadcasts in regs 6–8. In respect of wireless broadcasts, these regulations differentiate between, on the one hand, those made by persons or entities appropriately connected to Rome countries, which receive ‘full protection’ and, on the other, those by parties thus connected to WTO countries, which benefit from a more modest regime of rights.

²⁴⁹ CDPA 1988, s. 156(1).

²⁵⁰ [1916] 1 Ch 261.

²⁵¹ *Ibid.*, 269.

²⁵² One difficulty with the *Glyn* decision is that it is by no means clear when a work is immoral. Generally, the criminal law restricts circulation of obscene works—works that are likely to deprave and corrupt. Immorality appears to be a wider test. It is certainly difficult to believe that a work that ‘advocated free love’ would today be denied copyright. In *Stephens v. Avery* [1988] Ch 449, in the context of breach of confidence, Browne-Wilkinson V-C stated that he thought the *Glyn* exception should not apply in the absence of public consensus that the work in question was immoral. In *Fraserside Holdings v. Venus* [2005] FMCA 997, the Federal Magistrates’ Court of Australia was prepared to enforce copyright in ‘adult films’, explaining that the Court should look at the attitudes taken towards the work both in Australia and overseas.

²⁵³ *Chaplin v. Frewin* (1966) 1 Ch 71.

²⁵⁴ [1990] 1 AC 109.

²⁵⁵ Copinger (18th edn), [3–450] ff (copyright subsists, but will not be enforced, though noting that the case law needs ‘to be treated with caution’, given the EU Enforcement Directive); also, generally, A. Sims, ‘The Denial of Copyright on Public Policy Grounds’ [2008] *EIPR* 189.

²⁵⁶ See *Fraserside v. Venus* [2005] FMCA 997, [39]–[42].

²⁵⁷ E.g. *Ashmore v. Douglas Home* [1987] *FSR* 553.

²⁵⁸ See *Wood v. Boosey* (1868) LR 3 QB 223, 229; *Chappell v. Redwood Music* [1982] *RPC* 109, 120; *ZYX Music, GmbH v. King* [1995] 3 All ER 1, 9–11; *Ludlow Music Inc. v. Williams* [2002] *FSR* (57) 868, 886, [39]–[40]. Cf. Indian Copyright Act 1957, s. 13(3) (denying copyright to films or sound recordings which infringe copyright).

²⁵⁹ *Chappell v. Redwood Music* [1982] *RPC* 109, 120.

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