



# “European” Originality in Copyright Law in the English Case of *THJ Systems Ltd. v. Sheridan*

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**Abstract** The recent Court of Appeal case *THJ Systems v. Sheridan* (*THJ Systems Ltd. v. Sheridan* [2023] EWCA Civ 1354, [2024] E.C.D.R. 4, CA, 20 November 2023) is of great interest because it confirms the test for originality in copyright law in the UK after Brexit. The result of this decision is not too surprising, but the judicial clarification is nevertheless welcomed.

**Keywords** Copyright · Originality · *THJ Systems Ltd. v. Sheridan*

## 1 The Background: The Concept of Originality in Copyright Law

As is well known, the classical British definition in copyright law was that the author had to exercise “skill, labour and judgement” when creating a work of copyright if it is an authorial work<sup>1</sup> – only that, together with a recording of the work,<sup>2</sup> leads to copyright protection. This was the position since the Copyright Act of 1911,<sup>3</sup> as decided in *University of London Press*<sup>4</sup> in 1916, and affirmed in *Ladbroke*<sup>5</sup> (decided under the 1956 Copyright Act).<sup>6</sup> These cases initially remained good law under the present CDPA 1988: “original” means that the work

<sup>1</sup> Today in CDPA 1988, chap. 48, Sec. 3–4.

<sup>2</sup> CDPA 1988, Sec. 3 (2). There is no explicit recording requirement for artistic works because artistic works cannot come into existence without some form of recording.

<sup>3</sup> Copyright Act 1911, chap. 46, 1 and 2 Geo. 5.

<sup>4</sup> *University of London Press v. University Tutorial Press* [1916] 2 Ch 601, at 609.

<sup>5</sup> *Ladbroke v. William Hill* [1964] 1 W.L.R. 273, at 280–281, 287, 289, [1964] 1 All E.R. 465.

<sup>6</sup> Copyright Act 1956, chap. 74, 4 and 5 Eliz 2.

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“originates” from the author. It does not mean creative, bearing certain traces of the author’s individual personality, although this will often be the case, especially if the work is a work of art in the ordinary meaning (such as a novel as an instance of a literary work). However, the rationale for protection is safeguarding a person’s investment, the skill, work, effort, knowledge and also the assumption of the commercial risk. The author’s protection materialises in the grant of the property right of copyright to the maker-author as first owner for his or her *own* effort and investment, and protection excludes results arising from copying someone else’s effort and investment.<sup>7</sup> This conception of originality is generally shared by other copyright systems in the Common Law world,<sup>8</sup> but with some qualifications, particularly in the USA with the case of *Feist*, according to which not just “sweat of the brow”, not pure routine, but only some limited creativity amounts to originality and confers protection.<sup>9</sup> In fact, where exactly the threshold of originality is situated only emerges in decisions for each individual case, and the originality levels have arguably not been consistent for all categories of copyright works within one jurisdiction.<sup>10</sup>

The author’s rights countries on the European continent, however, consider works as original if “they bear the stamp of the author”,<sup>11</sup> so the work must show some individuality as a result of the author’s specific decisions and choices: the work is not commonplace but can be traced back to a certain person as its maker, which indicates a modicum of creativity on the author’s part. In reality, the difference between copyright-originality and author’s right-originality is much smaller than this academic juxtaposition may suggest.<sup>12</sup> The protection philosophies are, however, indeed different: in short, in copyright systems, the author is protected as property maker and owner through the work he or she creates, in author’s rights countries, the work is protected through the author’s personality which shines through the work and so confers some individuality on it.<sup>13</sup>

<sup>7</sup> Compare *Ladbroke v. William Hill* [1964] 1 W.L.R. 273, at 291: per Lord Devlin: “[Copyright] law does not impinge upon freedom of trade; it protects property. It is no more an interference with trade than is the law against larceny. Free trade does not require that one man should be allowed to appropriate without payment the fruits of another’s labour, whether they are tangible or intangible”.

<sup>8</sup> Australia: *Telstra Corporation Ltd. v. Desktop Marketing Systems Pty Ltd.* [2002] FCAFC 112; Canada: *CCH Canadian Ltd. v. Law Society of Upper Canada* [2004] 1 S.C.R. 339, para. 16.

<sup>9</sup> *Feist Publications, Inc. v. Rural Telephone Service Company, Inc.*, 499 U.S. 340, US Supreme Court, paras. 47–48, and at para. 53: “... originality is not a stringent standard; it does not require that facts be presented in an innovative or surprising way. It is equally true, however, that the selection and arrangement of facts cannot be so mechanical or routine as to require no creativity whatsoever. The standard of originality is low, but it does exist”.

<sup>10</sup> An example is the surprisingly high level of originality required in the UK in *Macmillan v. Cooper* (1924) 40 TLR 186, (1923) 93 LJPC 113 (a derivative work, an abridgement of texts).

<sup>11</sup> This and similar definitions are given by the French Cour de cassation, see e.g. “*tempérament et style propre de l’auteur*” (Cass. 1re civ. 1er juill. 1970: D. 1970, p. 734); or “*empreinte du talent créateur personnel*” (Cass. 1re civ. 13r nov. 1973: D. 1974, p. 533).

<sup>12</sup> Rahmatian (2013), pp. 18–21; Rahmatian (2011), pp. 56–60.

<sup>13</sup> Rahmatian, (2013), pp. 15–16.

Under the influence of case law by the Court of Justice of the European Union (CJEU), starting with the decision of *Infopaq* in 2009,<sup>14</sup> the traditional British skill and labour approach had to transform somewhat. In a line of cases, the CJEU developed an interpretation of EU copyright law regarding the meaning of “own intellectual creation” as the definition of originality in the Software Directive,<sup>15</sup> the Term Directive,<sup>16</sup> the Database Directive,<sup>17</sup> for certain types of works of copyright, initially to ascertain the meaning of “work” in the reproduction right of the Information Society Directive.<sup>18</sup> In *Infopaq*, the court said – in relation to possible originality of a sequence of eleven words – that “words ... 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”.<sup>19</sup> This view was expressed even more clearly in *Painer*: “As regards a portrait photograph, the photographer can make free and creative choices in several ways and at various points in its production. ... By making those various choices, the author of a portrait photograph can stamp the work created with his ‘personal touch’”.<sup>20</sup> The emphasis on creative choices for establishing originality appears in several later decisions, particularly in *Cofemel*.<sup>21</sup> These and a few other relevant CJEU cases will reappear in the discussion of *THJ Systems Ltd. v. Sheridan* below.

Although the starting point was a statutory interpretation of EU Directives dealing with specific types of copyright work, the CJEU’s approach seems to be that it has distilled a general definition of originality for all categories of copyright works which needed to be implemented in the national copyright laws of the EU Member States, including Britain at the time. Some academics then estimated that the CJEU decisions would provoke a decisive transformation of the traditional originality approach to “skill and labour” in UK copyright law.<sup>22</sup> However, I have always maintained that the CJEU cases would only produce a change of emphasis in the classical British originality definition from “skill, labour and judgement” to “judgement” (or: “choice”) in particular, that is, an orientation of originality more towards the position in *Feist* in the USA.<sup>23</sup> This raises the standard of originality in

<sup>14</sup> *Infopaq International A/S v. Danske Dagblades Forening*, Case C-5/08, EU:C:2009:465.

<sup>15</sup> Directive 2009/24/EC of 23 April 2009 on the legal protection of computer programs (codified version), Art. 1 (3).

<sup>16</sup> Directive 2006/116/EC of 12 December 2006 on the term of protection of copyright and certain related rights (codified version), Art. 6.

<sup>17</sup> Directive 96/9/EC of 11 March 1996 on the legal protection of databases, Art. 3(1).

<sup>18</sup> *Infopaq International A/S v. Danske Dagblades Forening*, Case C-5/08, EU:C:2009:465, paras. 9, 33–35; Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, Art. 2(a).

<sup>19</sup> *Infopaq International A/S v. Danske Dagblades Forening*, Case C-5/08, EU:C:2009:465, para. 45.

<sup>20</sup> *Painer v. Standard Verlags GmbH*, Case C-145/10, EU:C:2011:798, paras. 90, 92.

<sup>21</sup> *Cofemel – Sociedade de Vestuário SA v. G-Star Raw CV*, Case C-683/17, ECLI:EU:C:2019:721, para. 30.

<sup>22</sup> E.g. Derclaye (2010), pp. 248–249.

<sup>23</sup> Rahmatian (2013), pp. 30–32.

the UK to some extent (although with little practical effect),<sup>24</sup> but it does not abandon the copyright protection philosophy. The USA undoubtedly have a copyright system, as particularly the US rules on works made for hire and the possibility of corporate authorship<sup>25</sup> demonstrate. Therefore, the argument, the CJEU imposes on UK copyright law an alien author’s rights approach to originality, is in substance unfounded, despite the more continental European language of “intellectual creation” and “personal touch” in the CJEU decisions.

After Britain left the EU on 31 January 2020, existing EU law remains in force in the UK as national law unless amended by Parliament, according to the European Union (Withdrawal) Act 2018. In addition, UK courts are no longer bound by the decisions of the CJEU after Brexit and can depart from EU case law.<sup>26</sup> If, for example, an English court is invited to revisit the definition of originality in UK copyright law, it could affirm the position following the line of CJEU cases beginning with *Infopaq*, or it could revert to the traditional skill and labour position, as stated particularly in *University of London Press v. University Tutorial Press*. Let’s see what the Court in *THJ Systems Ltd. v. Sheridan* did.

## 2 The Decision in *THJ Systems Ltd. v. Sheridan*

In *THJ Systems Ltd. v. Sheridan*<sup>27</sup> the Court of Appeal had to decide whether the graphic user interface in question, and the graphic displays which the software used produces, are artistic works in which copyright subsists.<sup>28</sup> The artistic works at issue were risk and price charts produced with the software. On appeal it was no longer contentious that the charts are artistic works, and if originality subsists, who the author and copyright owner of these works is.<sup>29</sup> Thus only originality had to be ascertained, and relevant here was the interpretation of the meaning of “originality” in relation to the artistic works. Arnold LJ (who gave the only judgment with which the other judges agreed), set out the legal basis, including the case law of the CJEU on originality.<sup>30</sup> Originality has to be ascertained in accordance with the decisions of the CJEU that interpreted the definition of “own intellectual creation” in the EU

<sup>24</sup> See e.g. Bently, Sherman, Gangjee and Johnson (2022), p. 111.

<sup>25</sup> US Copyright Act 1976, 17 USC §§ 101, 201(b).

<sup>26</sup> European Union (Withdrawal) Act 2018, chap. 16, Secs. 3, 6, 7, and Schedules 1, reg. 2, and 8, reg. 1.

<sup>27</sup> *THJ Systems v. Sheridan* [2023] EWCA Civ 1354, [2024] E.C.D.R. 4, CA. In the following, paragraph numbers without any further indications refer to this case.

<sup>28</sup> There was initially also the copyright protection of a logo as an artistic work at issue, but the defendants did not resist that point, so the Court did not deal with it, see paras. 1, 11. Furthermore, the appeal to the Court did not concern the finding of the High Court that the software involved was a literary work, see para. 8.

<sup>29</sup> Para. 13.

<sup>30</sup> He also made reference to a case he decided earlier, *Wright v. BTC Core*, [2023] EWCA Civ 868, [2023] F.S.R. 21, paras. 54–55.

Directives, and the Court cited in particular *Infopaq*, *Painer*, *Cofemel*, *Football Dataco*<sup>31</sup> and *Brompton Bicycle*:<sup>32</sup> “own intellectual creation” means that an author can express their creative abilities in the production of the work by making free and creative choices so as to stamp the work created with their personal touch.<sup>33</sup> Only where the content of the work is dictated by technical considerations, rules or other constraints which leave no room for creative freedom, the originality criterion is not fulfilled,<sup>34</sup> and for that rule Arnold LJ referred especially to *BSA*<sup>35</sup> and *Brompton Bicycle*.<sup>36</sup> This denotes the general idea in intellectual property law that executions solely dictated by technical function,<sup>37</sup> or being the result of a “merger” of idea and expression,<sup>38</sup> cannot obtain protection because no originality or creative freedom can emerge. The ruling in *THJ Systems Ltd.* makes clear that “originality” in copyright law in the UK has to be ascertained for all categories of work according to the criteria as developed by the CJEU, also after Brexit.

The defendants-appellants claimed that the judge at the first instance had not applied the correct test for ascertaining originality, and if he had, he would have found that there is no originality and no copyright in the charts. The Court of Appeal agreed that the judge did apply the wrong test, that is, the old British “skill and labour” test,<sup>39</sup> while he ought to have applied the EU “own intellectual creation” test instead.<sup>40</sup> The risk and price charts fall under the “artistic works” category as graphic works, whereby the Court stressed that artistic merit does not come in (“irrespective of artistic quality”),<sup>41</sup> and CJEU case law does not indicate anything else either. In relation to the originality of the visual appearance of the charts, the Court remarked that the designer-author designed the display and made a number of choices as to which commands are put where and what fonts and colours are to be used. It was not raised in court that the visual appearance was dictated only by technical considerations or other constraining rules which would not have allowed creative choices. Although only a low level of visual creativity went into the charts, there is still creativity and therefore copyright protection. However, with such a low

<sup>31</sup> *Football Dataco Ltd v. Yahoo! UK Ltd.*, Case C-604/10, EU:C:2012:115, paras. 37–38.

<sup>32</sup> *SI v. Chedech/Get2Get (Brompton Bicycle)*, Case C-833/18, EU:C:2020:461, paras. 23, 26.

<sup>33</sup> Para. 16.

<sup>34</sup> *Ibid.*

<sup>35</sup> *Bezpečnostní Softwarová Asociace – Svaz Softwarové Ochrany v. Ministerstvo Kultury (BSA)*, Case C-393/09, EU:C:2010:816, paras. 48–49.

<sup>36</sup> *SI v. Chedech/Get2Get (Brompton Bicycle)*, Case C-833/18, EU:C:2020:461, paras. 24, 27.

<sup>37</sup> See (i) shape of three-dimensional trade marks (lack of distinctiveness): e.g. *Henkel v. OHIM*, Joined Cases C-456/01P and C-457/01P, ECLI:EU:C:2004:258, paras. 38–39; (ii) designs: e.g. *Unger Marketing International v. EUIPO and Orben Wasseraufbereitung*, Case T-325/20, ECLI:EU:T:2022:23, paras. 41–44, 60–62, 69–70 (in the UK persuasive).

<sup>38</sup> The “merger doctrine” from US copyright law originally, since *Baker v. Selden* (1879) 101 U.S. 99 (11 Otto 99). In the EU clearly at least since *BSA v. Ministerstvo Kultury*, Case C-393/09, EU:C:2010:816, para. 49.

<sup>39</sup> The High Court followed *Navitaire Inc v. easyJet Airline Co Ltd.* [2004] EWHC 1725 (Ch), [2006] R.P.C. 3, and *Nova Productions Ltd v. Mazooma Games Ltd.* [2006] EWHC 24 (Ch), [2006] R.P.C. 14.

<sup>40</sup> Paras. 22–23.

<sup>41</sup> CDPA 1988, Sec. 4(1)(a).

degree of creativity the scope of protection is narrow and only a close copy would infringe.<sup>42</sup> As a result, also when the correct EU “own intellectual creation” test according to CJEU case law is applied, the charts are original and protected by copyright as artistic works.<sup>43</sup>

### 3 EU-Originality Is UK-Originality

*THJ Systems Ltd. v. Sheridan* has shown that originality in UK copyright law continues to follow the CJEU’s settled case law on the interpretation of “own intellectual creation”, the statutory definition of originality in certain EU directives, initially for certain types of copyright work. But in the understanding of the CJEU its judicial interpretation of originality applies across all work categories. The old British “skill and labour” method was reshaped by the CJEU cases, starting with *Infopaq*, when the UK was still a member of the EU; the new approach was, in summary: “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”.<sup>44</sup> The difference between the UK skill and labour concept and the “European” understanding of originality was always quite limited, as the application of the skill and labour-test in *Sawkins v. Hyperion*<sup>45</sup> shows, before the CJEU judgment of *Infopaq*. In that decision, in effect a restoration case concerning manuscripts of scores of baroque music (which was itself never copyright-protected), the Court of Appeal gave the musicologist who prepared the music performing edition or restoration copyright protection for the edition on the basis of the traditional “skill and labour test” in the UK. However, in France in a parallel case with the same claimant on the same facts just before the English case, the French court also granted author’s rights protection for the restorations, using the traditional French personality-creativity test of originality. This is a real test case because it involved two decisions at the same time on the basis of the same facts using the conceptually different British copyright and French author’s right originality tests, with the same outcome.<sup>46</sup>

In a similar vein, *THJ Systems Ltd. v. Sheridan* showed that the initially (though incorrectly) applied traditional “skill and labour” test at the first instance and the newer, accurate “own intellectual creation” test by the Court of Appeal lead to the

<sup>42</sup> The Court referred here to *Infopaq*, paras. 45–48, but that appears to be a fairly liberal interpretation of these passages, although a convincing one. However, this kind of reasoning by the Court of Appeal can already be found, long before any EU law, in *Kenrick v. Lawrence* (1890) 25 Q.B.D. 99, at 102: In case of “the most mechanical representation of the commonest object ... it must surely be nothing short of an exact literal reproduction ... that can constitute the infringement, for there seems to me to be in such a case nothing else that is not the common property of all the world”.

<sup>43</sup> Paras. 24–28. The decision of the Court of Appeal on the cross-appeal by the claimants (from para. 29), that the first instance judge was wrong in dismissing copyright infringement, is not discussed here.

<sup>44</sup> Taken from *Cofemel*, Case C-683/17, ECLI:EU:C:2019:721, para. 30. The CJEU considers the case law in this area as settled, *ibid*.

<sup>45</sup> *Sawkins v. Hyperion* [2005] EWCA Civ 565, [2005] 1 W.L.R. 3280.

<sup>46</sup> Rahmatian (2009), pp. 588–589.

same results.<sup>47</sup> Admittedly, each test requires a different emphasis: “skill and labour” would focus more on the work and investment originating from the author, while “own intellectual creation” would stress more the judgement and choices by the author which are personal and render the work more individual, separated from pure commonplace products. In this way, the work reflects the author’s personality to some extent, as a result of the author’s creative choices – or judgement. The expression “to some extent” is of central importance, because the whole “European” originality conception is based on pragmatism as much as the British one. This becomes apparent particularly from the practical example in *Painer*<sup>48</sup> and *THJ Systems Ltd* emphasises that point:<sup>49</sup> the exercise of choices need not amount to much to become sufficiently creative for originality and protection; in particular, an artistic element is never necessary to achieve an intellectual creation. This pragmatism – labour traced back to the author involving some free individual choices – ensures a very similar outcome for both originality conceptions in the vast majority of cases.

The “own intellectual creation” test is usually referred to in the UK as the “European” originality concept,<sup>50</sup> but what is now the “European” element of this test if it is evidently applied in the UK as well after the UK has left the EU? “European” really means “European Union”, not “Continental European”. It is debatable to what extent the EU approach to originality that the CJEU sets out is really a true representative of the originality conception of Continental European author’s rights systems; it is perhaps more a specific EU-law conception in its own right.<sup>51</sup> The supranational quality of EU law transforms the national originality tests in the author’s rights systems of EU Member States as well. However, the UK is no longer a member of the EU, and, as said earlier, the EU Withdrawal Act 2018 stipulates that the Supreme Court is not bound by any retained case law of the CJEU.<sup>52</sup> But generally, any question as to the meaning or effect of any retained EU law is to be decided by all courts in accordance with any retained case law and any retained general principles of EU law, as far as that retained EU law is unmodified and as far as retained case law and EU principles are relevant to it:<sup>53</sup> that should cover the CJEU case law on “own intellectual creation” as stated in the (retained) EU-Directives.

The Supreme Court could theoretically overrule decisions like *THJ Systems Ltd*,<sup>54</sup> but that is improbable. It is more likely that the CJEU and the Supreme Court may deviate somewhat from one another in equivalent cases over time, as it happens within the (formerly imperial) Anglo-Saxon copyright family as well. However, the

<sup>47</sup> Para. 28.

<sup>48</sup> *Painer*, Case C-145/10, EU:C:2011:798, paras. 91–92.

<sup>49</sup> Para. 27.

<sup>50</sup> E.g. Bently, Sherman, Gangjee and Johnson (2022), p. 105.

<sup>51</sup> Rahmatian (2013), pp. 21–22, 26.

<sup>52</sup> European Union (Withdrawal) Act 2018, chap. 16, Sec. 6(4).

<sup>53</sup> European Union (Withdrawal) Act 2018, chap. 16, Sec. 6(3)(a).

<sup>54</sup> Bently, Sherman, Gangjee and Johnson (2022), p. 128, who are rightly unsympathetic to such a development.



CJEU will certainly remain persuasive authority for the time being, and this is in line with the general trend to harmonisation of intellectual property law at international level. It appears that English law has now fashioned its own concept of “own intellectual creation” originality under the influence of EU law. It frequently happens in comparative law that originally foreign legal institutions are incorporated into, and adapted to, the domestic legal system. What we have now is a newer British conception of originality which is currently aligned with EU law. Therefore, decisions like *THJ Systems Ltd* could also serve as persuasive authority in the EU in cases with equivalent facts. This suggests that the term “European originality”, denoting something foreign, becomes increasingly misplaced in the UK in relation to the newer “own intellectual creation” interpretation of originality as initially developed by the CJEU. We rather find a reshaped British understanding of originality, not an “alien imposition” from outside. Critics who disapprove of influences from abroad may also want to think of expurgating about a third of the words in the English language because they derive from the French. Any destructive nationalism, which has surged in Brexit politics, should remain consigned to the dark epochs in history.

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