**Why originality in copyright is not and should not be a meaningless requirement**

by Eleonora Rosati[[1]](#footnote-1)\*

Is the originality requirement in copyright a non-requirement? In other words: is there any meaningful threshold to copyright protection?

While it is true that it is not a particularly difficult condition to satisfy and the general perception seems to be that copyright is everywhere, originality is still a requirement. Above all, it is not a mundane one – both in the EU and the US – and there are a few instances in which the threshold would be unlikely passed.

If we start from the EU, since the landmark decision of the Court of Justice of the European Union (CJEU) in *Infopaq*, C-5/08 – as a matter of fact – there has been a harmonized EU standard of originality that is generally applicable, that of ‘author’s own intellectual creation’. While formally EU legislature has only harmonized the standard for computer programs, databases and photographs, in *Infopaq* the CJEU held that the understanding of originality found under, respectively the Software (2009/24), Database (96/9) and Term (2006/116) directives is also the standard under the InfoSoc Directive (2001/29). The CJEU further elaborated upon the notion of ‘author’s own intellectual creation’ in its subsequent decisions, notably (though not only) those in: *BSA*, C-393/09; *FAPL*, C-403/08 and C-429/08; and *Painer*, C-145/10. We now know that the EU standard requires the making of ‘free and creative choices’ and that the work carries the ‘personal touch’ of its author. In his Opinion in *Football Dataco*, C-604/10 Advocate General (AG) Mengozzi also clarified (in case there were any doubts), that the EU standard requires a ‘creative’ aspect, and it is not sufficient that the creation of a work (a database in that specific case) has required labour and skill.

Is this standard easy to satisfy? Not necessarily.

Apart from national case law, a recent example at the CJEU level is the Opinion of AG Campos in *Renchoff.* C-161/17. Although under German law the photograph at issue would be protected, it may be questioned whether the same would be true applying the EU originality standard. The AG, in fact, did not find it straightforward to say that a photograph like the one at stake in the background national proceedings would be eligible for copyright protection. Another example – which I always make when discussing originality with students – concerns digitized images of public domain artworks. This has become common practice for several cultural heritage institutions. What is questionable is suggesting - as many do - that such institutions hold a valid copyright in the digitized images of public domain works in their collections.

If we move to the US, the landmark decision on the concept of originality arguably remains the US Supreme Court judgment in *Feist*, 499 US 340 (1991), in which the ‘sweat of the brow’ approach was rejected. The court held that "[a]s a constitutional matter, copyright protects only those constituent elements of a work that possess more than a de minimis quantum of creativity." Although some have give a reductionist reading of this judgment, post-*Feist* case law shows that the originality requirement is an actual threshold to protection. As the US Copyright Office noted in a recent decision that has denied registration to the ‘American Airlines Flight Symbol’, "While the bar for creativity is low, it does exist".  In *Satava*, 323 F.3d 805 (9th Cir 2003) the US Court of Appeals for the 9th Circuit held for that:

“It is true, of course, that a combination of unprotectable elements may qualify for copyright protection. But it is not true that any combination of unprotectable elements automatically qualifies for copyright protection. Our case law suggests, and we hold today, that a combination of unprotectable elements is eligible for copyright protection only if those elements are numerous enough and their selection and arrangement original enough that their combination constitutes an original work of authorship.”

In conclusion, while it might appear that, compared to other IP rights, copyright protection is ‘easy’ to obtain, a thorough assessment of the originality requirement might help dispel this idea (or, rather, 'myth'). If we wish originality to be regarded as an actual ‘requirement’ and not just something we pay lip service to, then its assessment should be conducted rigorously. This is necessary to determine not only copyright subsistence, but also conduct the *prima facie* assessment of its infringement. Like the ancient Roman god Janus, originality has in fact two faces: copyright subsistence and its infringement. A meaningless understanding of originality is not helpful and discredits the role and function of this precious IP right.

1. \* JIPLP Co-Editor and Associate Professor in Intellectual Property Law at the University of Southampton. Email: eleonora@e-lawnora.com [↑](#footnote-ref-1)