Intellectual Property Law

“The concepts of ‘originality’ and ‘work’ in copyright law are clear and unambiguous.” Critically discuss this statement by evaluating recent case law of the UK courts and relevant jurisprudence of the CJEU.

Word Count: 5000
Introduction

For a long time, the concepts of “originality” and “work” in copyright law seemed settled in the UK. However, renewed debate over these two terms has been triggered by recent decisions in the Court of Justice of the European Union (henceforth CJEU). Moreover despite appearing settled, the task of precisely defining originality and determining the correct categorisation of a work was never easy for borderline cases. With limited legislative guidance, copyright law has been compelled to rely on case law and ad hoc EU Directives. This has restricted the chance for a unified comprehension of copyright to exist. This essay will focus on the understanding of “originality” and “work” for copyright law in the UK to establish if a clear and unambiguous understanding of each term has emerged. More specifically for originality, this essay focuses on originality at the stage of protection for copyright, not the infringement stage.

In the first section, this essay will determine whether the traditional concepts of originality and work in UK copyright law are clear and unambiguous. Section two analyses the new standard of originality and work introduced by the CJEU in Infopaq1 and its progenies. In section three, the UK’s reception of the new CJEU standards will be explored. This essay will ultimately conclude that while recent CJEU cases have the potential to establish a coherent understanding of work and originality in UK copyright law, reality reveals that ambiguities remain. Indeed, the concept of work is now more ambiguous than ever and originality cannot be settled until courts unanimously replace traditional notions with its new formulation.

1. The traditional concepts of originality and work in UK law

(a) Originality

UK copyright law dictates that a work must be original (not copied and originates from the author2) to be protected. As there is no statutory definition of originality, other than for databases, the concept has been developed through case law. While this allows for flexibility, it has not led to a precise understanding and application of the originality test. Generally it has been accepted that originality means the author has invested “skill, labour and judgment”

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1 Case C-5/08 Infopaq International A/S v Danske Dagblades Forening [2009] ECDR 16 (henceforth Infopaq)
2 University of London Press Limited v University Tutorial Press Limited [1916] 2 Ch 601 at 609 per Peterson
in the work.\textsuperscript{3} This sets a very low threshold to pass as Mummery LJ made clear, applying Walter v Lane,\textsuperscript{4} that copyright does not impose “objective standards of novelty, usefulness, inventiveness, aesthetic merit, quality or value” but only requires the author not to “slavishly” copy.\textsuperscript{5} For derivative works Interlego\textsuperscript{6} clarifies that the “skill, labour or judgement” cannot be in relation to copying but must be to add something new.\textsuperscript{7} It seems the central purpose of UK copyright law has been to protect labour or effort expended by a person rather than to promote creativity.

Why does the traditional concept of originality remain unclear? Firstly court phraseology is inconsistent - sometimes disjunctively referring to “labour skill or judgment” and sometimes cumulatively referring to “labour skill and judgment”.\textsuperscript{8} This would not matter if they mean they same thing, however its application has been unclear. Secondly, Atkinson J notes it is not obvious what precise level of knowledge, labour and judgment is necessary.\textsuperscript{9} How much variation by an improvising jazz musician amounts to a new original work? How much labour must a person demonstrate before a photograph becomes original? Often the answer is a question of degree in fact. Third, contrary to Peterson J’s seminal decision in University of London Press Limited\textsuperscript{10}, cases such as Hadley\textsuperscript{11} and Robin Ray\textsuperscript{12} value creativity over labour in defining originality and thus reveal an inconsistency. Whether originality should be more labour intensive, creativity orientated or equal parts both is debatable. While courts do not like to admit it, ultimately judges cannot remain completely objective and case outcomes vary depending on the facts and the presiding judge.

In conjunction with the UK’s traditional concept of originality, EU Directives have now set a higher standard of “author’s own intellectual creation” for databases, photographs and computers through the Database Directive,\textsuperscript{13} Term Directive\textsuperscript{14} and Software Directive\textsuperscript{15}

\textsuperscript{3} C Waelde, G Laurie, A Brown, S Kheria and J Cornwell, Contemporary Intellectual Property Law and Policy, 3rd edn (2014) at para 2.34
\textsuperscript{4} Walter v Lane [1900] AC 539
\textsuperscript{5} Sawkins v Hyperion Records Ltd [2005] 1 WLR 3281 at para 31
\textsuperscript{6} Interlego AG v Tyco Industries Inc [1989] AC 217
\textsuperscript{7} ibid at 262 - 263
\textsuperscript{8} E Derclaye, “Assessing the impact and reception of the Court of Justice of the European Union case law on UK copyright law: What does the future hold?” (2014) 240 Revue Internationale du Droit d’auteur
\textsuperscript{9} Macmillan & Co Ltd v Cooper [1923] 93 LJPC 113 at 121 Per Atkinson J
\textsuperscript{10} University of London Press Limited (n2)
\textsuperscript{11} Hadley v. Kemp [1999] EMLR 589 at 643
\textsuperscript{12} Robin Ray v. Classic FM [1998] FSR 622 at 636
\textsuperscript{14} Directive 2006/116/EC at Article 6 (Term Directive)
respectively. So far, only the Database Directive has been directly implemented into UK law.¹⁶ Thus the legislature and courts have generally ignored this new standard and wrongly assumed the originality test has not changed.¹⁷

**(b) Work**

Under the Copyright, Designs and Patents Act 1988 (henceforth CDPA), the UK provides eight separate categories of protectable work – namely literary, dramatic, musical, artistic works, sound recordings, films, broadcasts and typographical arrangements of published editions.¹⁸ These categories matter for two principle reasons: as a closed-list system¹⁹ the categories act as a barrier to protection for creations outside this list and there are varying levels of protection depending on which category a work falls under.

On the face of it, the UK’s concept of work in copyright law is straightforward. A creation either falls within one of the eight categories listed above and qualifies as a ‘work’ within the meaning of copyright law, or it does not. Yet on further examination, even without reference to the effect of recent CJEU case law, there are areas that require elucidation.

The main problem is not the broad idea of work itself but rather defining the parameters of particular categories of work. For example, the CDPA unhelpfully defines a musical work as “a work consisting of music”.²⁰ The dispute over John Cage’s infamous “4 minutes, 33 seconds” composition suggests silence could be a musical work, though it should be noted the case was settled out of court.²¹ Much conceptual art is difficult to definitively categorise for the purposes of copyright law. For instance, it remains unclear whether Tracey Emin's “Unmade Bed” is a “collage, a sculpture, a work of artistic craftsmanship or a dramatic work”²². This is an issue worth considering because it means square works may be forced

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¹⁵ Directive 2009/24/EC at Article 1(3) (Software Directive)
¹⁶ Copyright and Rights in Databases Regulations 1997 Act
¹⁷ Derclaye (n8)
¹⁸ Copyright, Designs and Patents Act 1988 s 3-8
¹⁹ ibid s 1(3)
²⁰ ibid s 3(1)
²¹ C L Saw, “Protecting the sound of silence in 4’33” – a timely revisit of the basic principles in copyright law” (2005) 27(12) EIPR 467 - 476
into a round category\textsuperscript{23} in an effort to prevent original works falling through the gaps of protection. Why have categories if they do not clearly define the subject matter within?

It is unsurprising such a rigid system of works has come under fire by academics and courts alike.\textsuperscript{24} An issue arises where categorisation blocks from copyright protection works that arguably ought to be protected. In \textit{Creation Records}\textsuperscript{25} a highly original photo-shoot scene created for the cover of an Oasis album was denied copyright protection because it did not fit any category of work under the CDPA. Further notable cases include \textit{Nova Productions},\textsuperscript{26} which denied protection to video games, and \textit{Norowzian}\textsuperscript{27} where a key part of discussion was whether a film could be a dramatic work. If the purpose of copyright is to protect creative endeavours, it does not seem fair that some creations should be denied access simply because they do not fit the “straightjacket”\textsuperscript{28} list of works.

The UK approach to categorisation of subject matter must evolve to consider 21\textsuperscript{st} century developments. Modern judges are struggling to categorize new types of work generated from developments in technology\textsuperscript{29} and an unmodified CDPA will only be increasingly less able to address modern species of works.\textsuperscript{30} Perhaps this categorisation issue will soon be a problem of the past as a concept of work may cease to be relevant in UK copyright law analysis. This is due to recent CJEU case law. The extent of its influence on the UK’s approach to copyright law shall now be discussed.

2. CJEU Judicial Activism: a new standard

\textit{(a) Originality – author’s own intellectual creation}

While there has been little legislative action over copyright law, political discussions have provided the impetus for the CJEU to dramatically shape EU copyright law. The CJEU

\textsuperscript{24} J Pila, “Copyright and Its Categories of Original Works” (2010) 30(2) OJLS 229 ff
\textsuperscript{25} Creation Records v. News Group Newspapers [1997] EMLR 444
\textsuperscript{26} Nova Productions Ltd v Mazooma Games Ltd [2007] BusLR 1032
\textsuperscript{27} Norowzian v Arks Ltd (No.2) [2000] ECDR 205
\textsuperscript{28} M Leistner, “Europe’s copyright law decade: recent case law of the European Court of Justice and policy perspectives” (2014) 51(2) CMLRev 559 at 564
\textsuperscript{29} Bandey (n 23)
\textsuperscript{30} A Christie, “A proposal for simplifying United Kingdom copyright law” (2001) 26(1) EIPR 26 at 30
decision in *Infopaq* and subsequent cases have de facto harmonised the concept of originality at the EU level.\(^{31}\) *Infopaq* concerns the action of a media monitoring and analysis business against an association of Danish daily newspaper publishers, for a declaration that they are entitled to select articles by a data capture process without consent from the association. To help resolve this issue, the Danish Court of Appeal asked the Court of Justice to clarify Article 2(a) and 5 of the InfoSoc Directive 2001/29.

Primarily, for the purposes of our discussion, the judgment in *Infopaq* sets a universal test of originality for all copyrightable subject matter:

"copyright within the meaning of art. 2(a) of Directive 2001/29 is liable to apply only in relation to a subject matter which is original in the sense that it is its author’s own intellectual creation"\(^{32}\)

As Articles 1(3) of the Software Directive, 3(1) of the Database Directive and 6 of the Term Directive already deem computer program, database and photograph works to be protectable if they are original in the sense that they are the author’s own intellectual creation; the court reasoned that copyright under the InfoSoc Directive also applies only to original works in the sense of being the author’s own intellectual creation since the InfoSoc Directive is based on the same principle. In addition, the court held that Article 2(5) and (8) of the Berne Convention for the Protection of Literary and Artistic Works presupposes that protected artistic or literary work are intellectual creations.

Critics of *Infopaq* highlight three main issues. First, many experts doubt whether legislators ever intended a uniform interpretation of original copyright work since Directives have only addressed three separate categories of work and ignored other subject matter so far.\(^{33}\) Second, the CJEU’s assumption about the Berne Convention is wrong since it would mean the UK’s skill and labour test contravenes the Convention and thus excludes the UK from the Berne Convention.

\(^{31}\) E Rosati, “Originality in a work, or a work of originality: the effects of the *Infopaq* decision” (2011) 33(12) EIPR 746 at 747

\(^{32}\) *Infopaq* (n 1) at para 37

\(^{33}\) C Handig, “’The ‘sweat of the brow’ is not enough! - more than a blueprint of the European copyright term ‘work’”’ (2013) 35(6) EIPR 334
Most importantly such “harmonization by stealth” raises questions of legitimacy and whether the court has overstepped its role.

However, such opposition to the far-reaching implications of *Infopaq* no longer matters. Contrary to initial resistance, the CJEU has only reinforced its notion of originality in subsequent decisions. *Bezpecnostni* affirmed *Infopaq* by finding a computer program’s graphical user interface could be protected under the general law of copyright if it was its author’s own intellectual creation. In *Infopaq*, expressing creativity through the “choice, sequence and combination” of words fulfills the test of author’s own intellectual creation.

The court further developed this definition as “creative freedom” in the joined cases of *Murphy* and *Football Association Premiere League (FAPL)*; a “personal touch” reflecting the author’s “personality and expressing his free and creative choices in the production of that photograph” in *Painer*; and expressing creativity by “choice, sequence and combination” in *SAS*.

It is proposed in this essay that the CJEU has successfully formed a more coherent explanation of originality (unlike the traditional UK notion) using the “author’s own intellection creation” test. A number of points are clear. The author’s own intellectual creation test is different from the UK’s traditional skill, labour and judgment test. Crucially, expending labour or effort is no longer enough to amount to originality. What is required is an element of creativity. The CJEU makes this point clear in *Football Dataco*, by referring back to its previous decisions to conclude an author can express creativity by “making free and creative choices and thus stamps his ‘personal touch’.” Clearly what is now important

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34 A Rahmatian, “Originality in UK copyright law: the old ‘skill and labour’ doctrine under pressure” (2013) 44(1) IIC 4 at 11
35 J Griffiths, “Dematerialization, pragmatism and the European copyright revolution” (2013) 33(4) OJLS 767 at 781
36 Case C-393/09 *Bezpecnostni softwarova v Ministerstvo kultury* [2011] ECDR 3 (*Bezpecnostni*) at para 45
37 *Infopaq* (n1) at para 45
38 Joined Cases C-403/08 *Football Association Premier League Ltd and others v QC Leisure and others* and C-429/08 *Karen Murphy v Media Protection Services Ltd.* (FAPL and Murphy)
39 Case C-145/10 *Painer v Standard VerlagsGmbH* [2012] ECDR 6 at para 92 and 94
40 *ibid* at para 66
41 E Rosati, *A non-English native speaker’s perspective on puns (and copyright)*, available at https://ipkitten.blogspot.co.uk/2013/01/a-non-english-native-speakers.html
42 Case C604/10 *Football Dataco Ltd and others v Yahoo! And others* [2012] BusLR 1753
43 *ibid* at para 38
is the availability of choices (which are not merely “dictated by technical considerations”\textsuperscript{44}) and that the author exploited that freedom.

While the CJEU’s formulation of originality is agreed to set a higher barrier than the UK’s traditional test of originality, it is not necessarily a difficult standard to meet. Extracts as short as 11 words can be protected.\textsuperscript{45} A very limited scope of creative freedom can still be enough for an author to display his own intellectual creation (in Painer portrait photographs which are obviously constrained by technical requirements could still be original work). Therefore for many cases, it is inconsequential whether the traditional or new concept of originality is followed. It is only in borderline cases where the choice between a traditional “skill, labour and judgment” test and the new “author’s own intellectual creation” test matters.

(b) A new standard of work?

In its most radical interpretation, the CJEU has potentially completely removed work categories in UK copyright law.\textsuperscript{46} This is because the court has treated “intellectual creation” and “work” as though they were synonymous.\textsuperscript{47} That is, when determining if copyright exists, the CJEU has repeatedly held copyright can be found in “subject-matter which is original in the sense that it is the author’s own intellectual creation”\textsuperscript{48} Indeed the court has gone out of its way to “promote a uniform approach” to protection for all copyright works.\textsuperscript{49} Essentially the CJEU has stated that something only needs to be original to qualify for copyright. Once a work qualifies as copyrightable there is no hierarchy between the works.

If accepted this marks a huge departure from the long-standing tradition of limiting protection to specific statutory categories. Categories have provided the ability to differentiate levels of protection (duration, rights and exceptions) given to different types of work.\textsuperscript{50} Supporters of the UK system argue this is useful in finding the optimal level of IP protection for each

\textsuperscript{44} ibid at para 39
\textsuperscript{45} Infopaq (n 1)
\textsuperscript{46} C Handig, “Infopaq International A/S v Danske Dagblades Forening (C-5/08): is the term “work” of the CDPA 1988 in line with the European Directives?” (2010) 53 EIPR 54-55
\textsuperscript{47} Griffiths (n 35) at 782
\textsuperscript{48} Infopaq (n 1) at para 37; Bezpecnosti (n 36) at para 46; FAPL (n 38) at para 97
\textsuperscript{49} Griffiths (n 35) at 783
\textsuperscript{50} Derclaye (n 8) at 11
industry. Furthermore the requirement of categories allows time for a reasoned debate before new matter can become protectable.

This essay contends that a departure from traditional notions would advance the British understanding of work in copyright law. Theoretically, if work is no longer a barrier to protection to consider, it is not something that requires clarification. The debate over if something is artistic or dramatic no longer exists. Previously excluded subject matter would now be protected as long as original in the sense of being the author’s own intellectual creation.

Rarely is a solution so simple though. Without the concept of work, copyright law is opened up to an array of other obscurities. For one thing, it would lead to a greater danger of mere ideas being copyrightable. This violates the fundamental principle of the idea and expression dichotomy. While the CJEU expounds a higher threshold of originality, it is doubtful that the own intellectual creation test does enough to replace a test of work (subjects with a modicum of creativity have been copyrightable).

It appears highly unlikely that the UK will remove its categories of copyright work. The CDPA remains a pillar of copyright law in the UK. To overcome such an entrenched system would require legislative action, which currently does not exist. Though there is evidence the UK is not completely closed to the idea of loosening its categories. In *Designers Guild Ltd* the House of Lords held the Court of Appeal had erred in overemphasizing the difference in material form between the defendant’s and the claimant’s work. A more likely result is that UK courts will choose to follow an open-ended and flexible system like its continental neighbours. Using the list of works provided by the CDPA as a guide but being open to new subject matter that do not fit an exact category of work. This author believes such a system is preferred.

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52 *Painer* (n 39)
53 *Designers Guild Ltd v Russell Williams (Textiles) Ltd* [2000] 1 WLR 2416
3. The UK reaction to CJEU decisions

(a) Originality

So far we have discussed the CJEU’s judicial activism in carving out a new approach to copyright protection and indicated its potential to greatly affect the UK’s conception of originality and work in copyright law. Has the UK realized this potential?

Following the CJEU’s originality test based of creative choices could help “bridge the conceptual gap between common law and civil law countries”. However the reality is stark. A worrying number of judges have misinterpreted or ignored the CJEU and commentators have adopted diverging views. Until the UK resolves tension between the traditional and new approach to the interpretation of originality and work, both concepts will remain ambiguous under UK law. To establish the extent CJEU activism has impacted the UK’s concept of originality and work we will now examine the reaction of UK courts.

One of most discussed applications of Infopaq in the UK is the Meltwater case. Similar to Infopaq, Meltwater centers on whether there was copyright infringement by a media monitoring service that provided copies of headlines and extracts to third parties without licenses. At the High Court level, Proudman J held:

“citing Interlego Originality involves the application of skill or labour in the creation of the work”

“In my judgment the test of quality has been re-stated but for present purposes not significantly altered”

“The effect of Infopaq is that even a very small part of the original may be protected by copyright if it demonstrates the stamp of individuality reflective of the creation of the author or authors of the article”

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56 Newspaper Licensing Agency Ltd v Meltwater Holding BV [2011] ECDR 10 (Meltwater)
57 ibid at para 30
58 ibid at para 81
Rather confusingly, Proudman applied both Infopaq and the UK traditional test for originality. This is worrying, as she has wrongly equated the two tests. What does Proudman mean when she says the test is “not significantly altered”? Clearly Infopaq’s creative approach of finding the author’s own intellectual creation sets a new higher threshold. Yet later in Meltwater, the Court of Appeal continued to misconstrue originality when it restated that Infopaq has not affected the test for originality and praised Proudman for being “clear, careful and comprehensive”.

If this were this only opinion of Infopaq held by UK courts then we could perhaps develop a more certain idea of the concept of originality in UK copyright law today. However, Derclaye points out at least fifteen decisions in the High Court and Court of Appeal of England and Wales since the Infopaq ruling that show great variation in their application of originality in copyright law.

Moreover in a decision half a year later, Proudman did not mention Infopaq but instead returns back to the traditional test:

“What is required for artistic originality is the expenditure of more than negligible or trivial effort or relevant skill in the creation of the work”

Following this, it appears Proudman either (unlikely) forgot about Infopaq or decided it has no impact on UK law and should be discarded. Whatever the reason, the judgment is inconsistent with her previous ruling which specifically stated that “Domestic legislation must be construed in conformity with, and so as to achieve the result intended by, EU Directives” and that any “historical perspective has for the purposes of this Court been overtaken by the decision of the ECJ in Infopaq” By choosing to only apply the UK traditional test of skill and effort in the later case, Future Publishing Ltd this judge has only generated more uncertainty for future cases.

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59 ibid at para 83
60 Lau (n 55) at 48
62 Derclaye (n 8) at 18
63 Future Publishing Ltd v Edge Interactive Media Inc [2011] EWHC 1489 (Ch); Lau (n 55) at 49
64 Meltwater (n 56) at para 40
65 Meltwater (n 56) at para 67
While a number of judges have been distinctly unaware of how CJEU decisions have affected the concept of originality, Floyd J applied Infopaq’s test and even added that originality can be show by “judgement, taste or discretion”66 of the author. Floyd’s judgment is one of the earlier rulings for Football Dataco.67 It is striking that here is a judge that has listened to the European court and added a creativity element to the test for originality. Upon appeal to the CJEU for clarification, the court was adamant that the traditional UK requirement and new Infopaq requirement for originality are different.

Yet confusion ensues in UK courts. In 2012, Judge Birss applied the Infopaq standard in Temple Island:68

“Common ground that Infopaq meant copyright could subsist in a photograph if the author’s own intellectual creation, same effect from Painer”69

While application of Infopaq shows progress, the case reveals that confusion remains on the actual content of this new test. Birss found no difference in substance between the UK approach and the approach (found in the Austrian Supreme Court applying CJEU rules) requiring evidence of the personality to be reflected.70 Moreover at the infringement stage of his analysis, Birss mixed the UK traditional test of “skill and labour” with “intellectual creation”.71 Rosati elucidates that the judge “failed to follow the conceptual and logical implications of Infopaq consistently”.72

It is clear from the reaction of UK courts that originality remains an unsettled concept. Infopaq make a bold statement about how to interpret originality. Thus it is understandable for the UK judiciary to question the decision’s meaning and force. However since then, the CJEU has reinforced and even expanded upon Infopaq in a line of cases. Therefore it is absurd for UK courts to continue to ignore this new test for originality. Until the UK judiciary accepts European standards, the impact of Infopaq may “merely be in terms of

66 Football Dataco v Britten Pools [2010] EWHC 841 at para 86-87
67 ibid
68 Temple Island Collections Ltd v New English Teas Ltd [2012] ECDR 11 (Temple Island)
69 ibid at para 18
70 E Rosati, Originality in EU Copyright: Full Harmonization through Case Law (2013) at 191
71 Temple Island (n 68) at para 53
72 Rosati (n 70) at 200
phraseology”. Ever so slowly, the UK has acknowledged the new author’s own intellectual creation test without realising its full meaning. Derclaye optimistically suggests that Arnold J’s recent choice to ignore the traditional originality test perhaps finally indicates an acceptance that the skill, labour and judgment test “is now clearly dead”. If this is the case, the concept of originality is becoming more concrete. Only time will reveal the future direction of the UK judiciary.

(b) Work

Where UK courts have shown an unwillingness to apply a new standard of originality, they have shown even less interest in opening up categories of work. That is, judges are still undergoing the traditional method of analysis when deciding a case. In Temple Island, Birss first identifies that copyright subsists in original artistic works under the CDPA. Similarly in Meltwater, Proudman establishes that headlines are capable of being literary work. Like many other cases, it was easy to identify the categories of artistic work (for a photograph) and literary work respectively.

Perhaps if the issue arises over a less obvious subject matter the UK judiciary will be forced to address the matter of work. Specifically, courts should decide whether they wish to follow the CJEU and amalgamate work with the originality test or at least operate under an open-list categorization of works. Following Infopaq, UK courts could be “obliged to adopt a more consistently dematerialized system of copyright law”.

Most recently, the judiciary does appear to be relaxing its stance on copyright work. In 2013, Arnold J held in SAS:

“it may be arguable that it is not a fatal objection to a claim that copyright subsists in a particular work that the work is not one of the kinds of work listed in section 1(1)(a) of the Copyright, Designs and Patents 1988 and defined elsewhere in that Act.

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73 Lau (n 55) at 50  
74 Rosati (n 70) at 19  
75 Temple Island (n 68) at para 17  
76 Meltwater (n 73) at para 71  
77 Griffiths (n 35)
Nevertheless, it remains clear that the putative copyright work must be a literary or artistic work within the meaning of Article 2(1) of the Berne Convention.78

Therefore though courts have not found copyright in an original subject matter that does not fit a category of work just yet, Arnold opens up the possibility of this happening in the future. This would be a desirable outcome since technological developments will only make classification of works take more time and effort. Arnold’s concession should however be taken with a pinch of salt. In the case itself he ultimately denies copyright protection to computer programming language because it is not a copyright work.

What is preventing the judiciary from embracing an open-ended system of works? Firstly the CDPA 1988 is the foundational pillar of copyright law. Under the UK system, it is highly unlikely any judge would ignore a domestic statute without at least some indication from the legislative body that this statute is outdated. Secondly, deciding to abandon work as a test for copyright protection could leave originality to be the only test for something to be granted copyright. As the concept of originality remains unsettled and it is questionable if originality sets a high enough barrier to protection. One should be apprehensive before placing too great a reliance on originality at this moment in time.

What is obvious is that the UK concept of work in copyright law is currently unsettled. Until legislators or courts definitively choose its interpretation of the CJEU approach to work, little more can be said. The concept of work remains in flux.

**Conclusion**

The establishment of a clear concept of originality and work in UK copyright law is a work in progress. Traditionally the UK has adhered a rigid system of work. While this has been useful, strict work categorisation has failed to keep up with modern advances. Therefore the traditional concept of work, while generally clear as a structure, leaves ambiguity over its treatment of new types of subject matter. The traditional notion of originality was also rather settled in the UK, however it was far from perfect.

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78 *SAS Institutes v World Programming* [2013] EWHC 69 at para 27
Did *Infopaq* clarify the field of copyright law in the UK? This author sees much potential for the future development of copyright law leading from CJEU jurisprudence. Indeed, following the CJEU would unify UK copyright originality, which already existed on two levels (the traditional skill, labour and judgment test generally and the author’s own intellectual creation test for specific Directive subjects). However it seems that due to judicial resistance, the importation of EU rules has only added confusion to the UK concepts of originality and work. It is not clear if the concept of work will be adapted to be an open-list system or perhaps even nullified as a copyright protection requirement altogether. Equally it is unclear when courts will generally accept and understand the new originality standard. UK resistance to such dramatic changes is unsurprising but goes against the tide of wider discourse.
Bibliography

A Bellan, *Again on food, porn and food porn: who cares about top cuisine IP?*, available at https://ipkitten.blogspot.it/2014/02/again-on-food-porn-and-food-porn-who.html


A Rahmatian, “Originality in UK copyright law: the old ‘skill and labour’ doctrine under pressure” (2013) 44(1) IIC 4-34

A Rahmatian, “The concepts of ‘musical work’ and ‘originality’ in UK copyright law – Sawkins v Hyperion as a test case” (2009) 40(5) IIC 560-591

A Searle, *Should I eat it or frame it?*, available at http://www.theguardian.com/lifeandstyle/2008/sep/15/foodanddrink.restaurants

A Waisman, “Revisiting originality” (2009) 31(7) EIPR 370-376


C Handig, “*Infopaq International A/S v Danske Dagblades Forening (C-5/08): is the term “work” of the CDPA 1988 in line with the European Directives?”* (2010) 53 EIPR 54-55

C Handig, “The ‘sweat of the brow’ is not enough! - more than a blueprint of the European copyright term ‘work’” (2013) 35(6) EIPR 334-340

C J Craig, *Copyright, Communication and Culture: Towards a Relational Theory of Copyright Law* (2011)
C L Saw, “Protecting the sound of silence in 4’33” – a timely revisit of the basic principles in copyright law” (2005) 27(12) EIPR 467 – 476


D J Gervais, “The compatibility of the skill and labour originality standard with the Berne Convention and the TRIPs Agreement” (2004) 26(2) EIPR 75-80


E Rosati, A non-English native speaker’s perspective on puns (and copyright), available at https://ipkitten.blogspot.co.uk/2013/01/a-non-english-native-speakers.html

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) 1 IPQ 47-68

G Minero, “Case Comment: Did the Database Directive actually harmonize the database copyright? Football Dataco Ltd v Brittens Pools Ltd and the ECJ’s rules against subsistence of database copyright in fixtures lists” (2012) 34(10) EIPR 728-732

J Griffiths, “Dematerialization, pragmatism and the European copyright revolution” (2013) 33(4) OJLS 767-790


J Pila, “Copyright and Its Categories of Original Works” (2010) 30(2) OJLS 229-254


M Leistner, “Europe’s copyright law decade: recent case law of the European Court of Justice and policy perspectives” (2014) 51(2) CMLRev 559-600

M Stanganelli, “Spreading the news online: a fine balance of copyright and freedom of expression in news aggregation” (2012) 34(11) EIPR 745-753

M Weiss, Paris Court denies copyright protection to Jimi Hendrix photograph, available at http://the1709blog.blogspot.co.uk/2015/05/paris-court-denies-copyright-protection.html

P Lewis, *Can you copyright a dish?*, available at http://www.theguardian.com/lifeandstyle/2006/mar/24/foodanddrink.uk


R Burbidge, *Originality or author’s own intellectual creation? What is the legal test for copyright subsistence in photographs?*, available at http://aandalawblog.blogspot.co.uk/2012/01/originality-or-authors-own-intellectual.html


S Jacques, “Mash-ups and mixes: what impact have the recent copyright reforms had on the legality of sampling?” (2016) 27(1) EntLR 3-10


T Cook and E Derclaye, “An EU Copyright Code: what and how, if ever?” (2011) 3 IPQ 259-269


V Jones, “Case Comment - Musical works: out with the old and in with the new?” (2005) 16(4) EntLR 89-91

W Patry, *How to Fix Copyright* (2011)