European Originality: A Copyright Chimera*

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Article 100 of the EC Treaty has provided the Council of Ministers with a mandate to approximate – to harmonize – *inter alia* national copyright laws within what is now the European Union.[1] By means of a number of directives, considerable effects have been achieved. Three directives contain provisions that attempt to provide harmony between Member States regarding what I shall here call the "originality criterion", intended to determine to what, as factual elements, copyright protection shall apply within the Union. They thereby express the Commission's view that the EU "requires clear predictability for rightholders and users of what exactly is protected".[2] It has been said that the originality definition of the directives may be "en passe de devenir un 'standard' international".[3] If this is correct, it is, in my view, what has been, at least

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1 A succinct presentation of EC harmonization endeavours regarding copyright is given in ICC Vol. 25, No. 6/1994, pp. 821-839, by my friend and colleague Herman Cohen Jehoram, to whom I wish to render homage by this article of mine. On pp. 828-829, he approaches the subject of my article.

2 *Folllow-up to the green paper on copyright and related rights in the information society*, Brussels, 20.11.1996, COM(96) 568 final, p. 10.

3 Lucas, A., and Lucas, H.-J., *Traité de la propriété littéraire et artistique*, Paris 1994, p. 105. A push in this direction provides a recommendation to the German Government – in a study undertaken at the Max-Planck Institut für ausländisches und internationales Patent-, Urheber- und Wettbewerbsrecht, Munich, now presented in book form *Urheberrecht auf dem Weg zur Informationsgesellschaft*, Baden-Baden 1997, edited by the Director of the Institute, Schricker, G., – that any regulation relating to digital and multimedia works should be used to implement the "partial handicaps" ("die partiellen Vorgaben") attained by the three Directives to define anew and uniformly the protection standard in § 2 (2) of the German Copyright Act. At that, "individuality in the meaning of the authors own intellectual creation should be implied ("vorausgesetzt") without use of other criteria, thereby excluding in particular the requirement of a particular level of creativity" (my translation), p. 50.

initially, an unintentional effect of the harmonization endeavours of the European Commission and Council of Ministers.

The title to this article should indicate that I do not believe – although not entirely without regret – in the success of such originality harmonization, not for the European Union, and at least not to the extent that may appear to have been in the mind of those who drafted the directives and of the European Council of Ministers.[4] Even worse, I believe that there will be few, if any possibilities to verify the effects of the criteria developed, other than by possible default in the use of language by national courts; courts being what they are.[5] Thus, I would be astonished if the European Court of Justice were to issue any clarification on the directives in question. It would not know what to correct if national courts, when arguing, only mind their Ps and Qs in carrying on as ever before.

Each of the respective articles on originality in the three directives aims at determining a standard for interpreting what is to be considered a literary or artistic work within the meaning of national law in the Member States. Certainly, the Berne Convention, to which they all adhere, provides guidance about what subject matter is to be protected, but it omits the crucial issue concerning eligibility for protection of whatever kind of literary or artistic product which it mentions – by way of examples – in its Article 2, be it a computer program, a photograph or a database or other kind of work. Only some databases are given a specification in Article 2 (5), namely in so far as they qualify as collections of literary or artistic works, in which case we learn that they "shall be protected as such", if by reason of "the selection and arrangement of their contents" they "constitute intellectual creations".

Now, after a lengthy process, provisions aiming at a clarification of what protectability standard to apply to a specific item have been introduced for each of the three types of work just mentioned, by the Directives 1) 91/250/EEC of 14 May 1991 "on the legal protection of computer programs", 2) 93/98/EEC of 29 October 1993 "harmonising the term of protection of copyright and certain related rights" – concerning, in respect of what is of interest here, just photographic works – and 3) 96/9 of 11 March 1996 "on the legal protection of databases". The texts of the relevant articles and their preambles read as follows:

1) *computer programs*: "A computer program shall be protected if it is original in the sense that it is the author's own intellectual creation. No other criteria

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4 It is evident that the directives have not been drafted to bring about a radical change of the language and terminology employed in courts in the Member States when discussing the protectability of literary and artistic works. Indeed, it is my contention that any harmonization following from the directives will be subject to the courts' own preference for the *status quo*. Parties before them are used to traditional language, which they may also prefer themselves.

5 In an article in [1995] 3 *ENT. LR*, pp. 94-106, Sherwood-Edwards, M., under the title *The Redundancy of Originality*, questions "whether originality has any useful role" in a test for "propertisation" of copyright works. His arguments are interesting. Still, be that as it may, we shall have to live with "originality" as a criterion for protection, if for no other justifiable reason than tradition and that it now forms part of European law tools, notwithstanding the fact that it only very rarely appears as such in copyright statutes.

shall be applied to determine its eligibility for protection." (Article 1 (3)), explained by preamble (8): "Whereas, in respect of the criteria to be applied in determining whether or not a computer program is an original work, no tests as to the qualitative or æsthetic merits of the program shall be applied;"

2) *photographs*: "Photographs which are original in the sense that they are the author's own intellectual creation shall be protected in accordance with Article 1. No other criteria shall be applied to determine their eligibility for protection. Member states may provide for the protection of other photographs." (Article 6), explained by preamble (17): "Whereas the protection of photographs in the Member States is the subject of varying regimes; ... it is necessary to define the level of originality required in this Directive; whereas a photographic work within the meaning of the Berne Convention is to be considered original if it is the author's own intellectual creation reflecting his personality, no other criteria such as merit or purpose being taken into account; whereas the protection of other photographs should be left to national law;".

3) *databases*: "In accordance with this Directive, databases which, by reason of the selection or arrangement of their contents, constitute the author's own intellectual creation shall be protected as such by copyright. No other criteria shall be applied to determine their eligibility for protection." (Article 3), explained by preamble (16): "Whereas no criterion other than originality in the sense of the author's intellectual creation should be applied to determine the eligibility of the database for copyright protection, and in particular no æsthetic or qualitative criteria should be applied;".

In all the European originality definitions of the Articles proper of the directives, we find the same positive and negative criteria. In the texts of the articles proper, the positive criteria are all similarly worded, giving originality the meaning of "the author's own individual creation". However, we have already seen that in the directive about photographs we also find – in the preamble and there referring to an interpretation of the Berne Convention which, in fact, is mute on the subject – that the creation by the author shall be "reflecting his personality". The negative criteria, under the general negative criterion as stated in the articles that "no other criteria shall be applied" than the one and only positive one, show greater variety in the texts of the preambles: (1) "no test as to the qualitative or æsthetic merits", (2) "no other criteria such as merit or purpose" and (3) "in particular no æsthetic or qualitative criteria". In my opinion, the wordings of the preambles show an intention to distinguish computer programs and databases, being functional or utility items, from photographs which, as possibly artistic works, deserve a more "classic" approach to determination of their originality and about which the negative attitude to "æsthetic merits" in the Computer Programs and Databases Directives is replaced by a negative attitude towards "purpose". This, in turn, shows that there is really no common ground of originality established by the directives, and there is no more clarification to be found in European copyright language when protectability is the issue.

EC law does not provide any explanation about the reasons behind the varying drafting of the definitions of the originality criteria as mentioned and explained in all three directives. Still, it is well known that when the "author's own intellectual creation"– criterion – hereafter referred to as the AOIC-criterion – together with the "no other criteria" criterion, was first introduced in the 1991 directive, what was, in essence, aimed at was to overrule, Europe-wide, the criterion that had been introduced by the German Supreme Court in 1985, that the creative elements in a computer program should be such as to show creativity that far surpasses the work of an average programmer.[6] The German Copyright Act, § 2 (2), then contained the provision that a copyright work must be a "personal individual creation" ("eine persönliche geistige Schöpfung") and it still does.[7] It may be said that in 1985 the German expression may only have become interpreted as such by the Supreme Court, but that it also added elements on the top of the criterion of personal individual creation, which have now become intended to be put out of date by the European "no other criteria shall be applied"-criterion. If thus interpreted, there would now – and not only because of the verbal implementation of the Computer Programs Directive of its originality criterion into § 69(a)(3) of the German Copyright Act – be no basic difference in German law between "author's own" and "personal" as components of the one and only criterion to apply in accordance with article 1 (3) of the Computer Programs Directive. Nevertheless, the proposed German implementation of the Databases Directive – UrhG-Nov 1997 – contains in § 6 about copyright protection of collections, including databases, the criterion "eigentümliche geistige Schöpfung", and nothing about either an "author's own" creation or a "personal" one.

If German statutory law can be seen to comply with the texts of the articles in the directives, the directives show no trace in UK statutory law, where, in Ch. 48 s. 1 (1) of the Copyright, Designs and Patents Act 1988 the word "original" is the only one defining a protected "literary, dramatic, musical or artistic work". Nor are they mirrored in any of the Nordic Copyright Acts, where the protectability criterion appears in the form of a definition of "author" to be the person who "creates" ("skapar", "frembringer") a "literary or artistic" "work". The Nordic criteria have remained unchanged since 1961, unperturbed by any originality concepts of EC law origin, but nevertheless covering all subject matter concerned therein. The present French Intellectual Property Code, by only stating that its provisions protect the rights of authors to any "œuvres de l'esprit" in article L.112-1 (=Norwegian: "åndsverk"), does not give a hint about

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6 "If the overall comparison with the previously known shows the presence of original, creative characteristics, then this must be contrasted with the work performed by the average programmer. The know-how of the average programmer, the mere craftsmanship, the mechanical/technical linking and assembly of the material do not fall within the subject matter of copyright. The minimum requirements of copyrightability are met only at a somewhat higher level; they presuppose a significant amount of creativity with respect to selection, accumulation, arrangement and organization, as compared to the general, average ability"; Federal Supreme Court , May 5, 1985, Case No. I ZR 52/83, here quoted from *IIC* Vol. 17, No.5/1986, p. 688.

7 *Cf.* footnote 3 *supra.*

a specific originality concept. The closest we get to any more specific notion of the kind is in its Article 112-3 on collections, which are protected if they constitute intellectual creations ("des créations intellectuelles"). In Italy works need to be of a "creative character" to be protected (Article 1 of the 1941 Copyright Act and Article 2575 of the Civil Code).

In other EU countries we find the same absence of definitions of what is "original" in terms of "the author's own intellectual creation" in a positive sense and of what is nothing else in the negative sense. Still, it is a fact that under EC law, to the extent that it has manifested itself in the three directives, for any item to be protected under copyright law only its "originality", as defined there, shall count. Of course, it can be argued that this builds upon national court rulings, using an originality criterion or synonymous words in arguments that express an evaluation about, in the respective national vernacular, "originality".[8] But now, following EC law, such varied terminology would be thrown together into an "originality container", here labelled AOIC, for all fundamental protectability criteria that would otherwise be used in the three factual domains covered by the directives.

It has been expressed by Herman Cohen Jehoram that "intellectual creation" in the EC directives" originality definition is the choice for the intermediate position of Western Continental Europe between the German and the UK/Irish legal traditions, whereas the wording "the author's own" could be "a formal bow to the common-law terminology of 'original'".[9] But, is not this simply a game of words?

OK, for composting some extra German originality load of over-average programmers – if at all effected by the wordings used in the directives, because such creative "over-averageness" certainly does not in itself succumb to the forbidden "quality-test" that has become attached to the *result* of programming – but what else has actually been achieved? Have we discarded "intellectual efforts", "personalised efforts", "the author's personal imprint"? Are there more definitions waiting to be discarded? It will be interesting to watch the courts exert their pleasure about subject matter protectability in summing up their views about facts under the minimal EC law constraint about which terminology to apply. National courts are not likely to denationalize such views, just because the directives indicate that they should be guided by a spirit of harmonization so as to erase trade barriers between Member States, by putting on the right track "the smooth functioning of the Internal Market and the proper development of

8 "Individuality" has been used as one such expression, allowing more freedom to the choice of what may be brought together so as to form a literary or artistic work, to become a "personal intellectual creation"; *see* about this Strömholm, S., GRUR Int. 1996 *Spielraum, Originalität oder Persönlichkeit? Das Urheberrecht vor einer Wegwahl*, pp. 529-533 (530). Strömholm has, in my view refreshingly, rejected the "personality reflection" language, built on "personality" and "originality" concepts to cover what should instead, in his view, – for most kinds of work – be surrendered to "a purified terminology, working openly with scope of protection ['Spielraum'], own work and objective novelty".

9 *Ibid*., p. 829.

the Information Society in Europe".[10] Effects of such an ambition could certainly in itself – in a way – be seen to establish an additional criterion about protectability. However, until now at least, I have seen no sign of any express will to bring just such a criterion into national case law, even as something of the kind.

In my view, this all forms a rather "muddy" foundation for harmonization of a *generalized* European originality concept by national courts of law, and I am not the first to express doubts about the attempts to define an originality standard for Europe-wide application.[11] It cannot create any problems for courts to avoid applying terminology that circumvents the German "creativity surpassing considerably the work of an average programmer" criterion, already because these specific notions cannot be found used as criteria in other European jurisdictions.[12] If, as a consequence of EC directives, the German "level of creativity" criterion is thrown overboard, as has been suggested[13], so as to pave the way for "small coins"-protection under an "intellectual creation" criterion, German copyright law may continue to work, but other national law systems might not be so hospitable. In my understanding the verb "to create" and the substantives "author" and "work" of a "literary" or "artistic" character in the decisive phrase of §§ 1 of all Nordic copyright acts – the criterion words for application of any originality test in Swedish statutory legal language – will continue to be used to cover within their own meaning, i.e., as applied by a court with no further ado, scales of levels of crativity for various kinds of work items and various sets of elements for protection against infringements. Also, I should

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10 *Cit*. from the *Preliminary draft for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society*, Brussels, October 20, 1997, 393ML97, Preamble (5). An indication about manifest unwillingness to accept what is taken for an EC originality philosophy of just a continental character is given us by Cornish, W.R. in the third edition of his book *Intellectual Property. Patents, Copyright, Trade Marks and allied Rights*, London 1996, pp. 332-336. There we meet the "British approach, pragmatic and practical" contrasted to the "authors' rights systems", which "tend to maintain in their law some initial criterion relating to creative expression", differing from "the common law test that what is not copied is original" (p. 335).

11 *See*, for instance, Dreier in [1991] 9 EIPR, p. 320, already about the Computer Programs Directive, or Pfeifer, K.-N. reviewing the dissertation by Fuchs, U., *Der Werkbegriff im italienischen und deutschen Urheberrecht*, München 1996, in *ZUM* 05/1997, p. 413.

12 Thus a court may – without getting into conflict with EC law "originality" – try to include, in what it writes about as originality, elements which lead to the final comment that an item deserves protection because it has resulted from a "personal contribution" by the author (Fr. "apport personnel de l'auteur"), even if it would mean that the court believed that that contribution depended upon specific traits in his "personality"; this comment relates to a discussion about French copyright law and computer programs in Strowel, A., *Droit d'auteur et copyright. Divergences et convergences. Ètude de droit comparé*, Brussels & Paris 1993, pp. 402 ff.

13 *See* in particular Schricker, G., *Farewell to the 'Level of Creativity' ['Schöpfungshöhe'] in German Copyright Law*, ICC Vol. 26, No. 1/1995, pp.41-48. Also, in his article in *Wanderer zwischen Musik, Politik und Recht, Festschrift für Reinhold Kreile*, 1994, pp. 719 ff., Schricker advocates the idea that the criteria of the directives be given generalised application. *See also* footnote 3 *supra*.

be surprised to find that the AOIC-criterion with its negating clauses would bring any changes to that.

Because of the variety of subject matter – specific, detailed elements, reflections of circumstances etc. – that claim protection, there will be nothing *in fact* to give the EU originality definition one consistent meaning and application. Intellectual creativity, referring, as it does, not to matter but to the concealed spiritual status of a person, cannot be established as factual matter with an identifiable level of creativity. *Copyright/authors' rights originality will be, as always, about difference; difference to what has been and difference to what has become in relation to what already differed.* To define it should be to look for a *working definition* to apply to differing elements as work-constitutive *instead of a static one*. Whoever creates, creates differences and differences must be allowed to be found from one kind of subject matter to another and from one situation of comparison to another, *e.g.* under the aspect of infringement where difference or similarity are what it is all about. At that, a choice between novelty differences of a subjective character (unknown to the suspected infringer when acting) on the one hand and of an objective character (non-existent earlier) on the other, may well call for different burden of proof rules, but it really has nothing to do with originality.

Instead, but very much related to it, that is the case with the "double-creation-criterion" under which material independence – i.e. sufficient difference – is established by the test, which can be used so to say both backwards and forwards, whether it would, with reasonable certainty, have been practically excluded that any other person or persons could have made something closely alike.[14] This test, openly used by the Swedish Supreme Court as by other European courts, makes it possible to vary the difference requirement from one art or literary form or subject matter to another and it will, in conformity with traditions and ideas about a need for legal continuity, result in differences of a varied scope so as to represent "the author's own intellectual creation".[15] Here, it is not a question of a generally applied, level-raising criterion; what is concerned is the "sphere of protection" that widens with the individually unique and narrows with what, due to functionality or banality, is protected only within a comparatively limited sphere. Should it nevertheless be "banned" from European copyright language?

Only if it would be an obligation for European Union national courts to apply as originality criterion in infringement suits "the common law test that what is not copied is original"[16], and that such originality were, as in, *e.g.*, Anglo-Australian law, "the only criterion that must be met before protection is

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14 *See* Dreier, Th. and Karnell, G.W.G., *Originality of the copyrighted work: a European perspective*, Journal of the Copyright Society of the USA, Vol. 39, No. 4, Summer 1992, pp.289-302 (292 f.). Also, Karnell, G.W.G, *Die Doppelschöpfung als urheberrechtliches Problem*, in: Mélanges Joseph Voyame, Lausanne 1989, pp.149-157.

15 Interesting aspects about the double-creation criterion are – in Swedish – presented by Nordell, P.J., in NIR Nordiskt Immateriellt Rättsskydd 1995 pp. 630-639.

16 Cornish, W.R., *ibid*. p. 335. Somehow, however, a "striking similarity" may be allowed to put the burden of proof on a prospective infringer when access to copying has not been established.

accorded"[17], would they be confined to leaving out the "creation" or "creativity" element inherent in the double-creation test. But such an obligation most certainly does not exist in European law . The three directives do not require the common law test to be used. Their criterion "the author's own" can be interpreted to mean not only the ostracized "quality" but – positively – *sufficient difference* as well as "non-copied"; there lies a compromise in the three directives covering different legal philosophies.

In my view, the harmonizing originality concept of the three directives reflects an ambition to bring computer programs and data bases as such into the copyright domain without being troubled by any distinguishing within the respective categories. Such *products* should get their protection by copyright, quite simply, without the conflicts of competing copyright philosophies. In this light it is not surprising that the photographs received "special treatment" in the preamble to its directive.

Why should the fact of unavoidably varying difference not be allowed to be called "creative step" so as to attain one "level of creativity", "Gestaltungshöhe" or "Schöpfungshöhe", "verkshöjd", etc. or another in any specific case where the difference factor is at stake?

If we comply with the directives by disregarding "merit" as well as "purpose", which in both respects is common copyright practice with regard to photographs, and "æsthetic merits" for computer programs, and also an unqualified "æsthetic" for databases, a notion which in that context anyhow appears rather abstruse, while leaving for the latter two products only the reasonable freedom from being exposed to any determination about their respective "qualitative merits" and "quality", then we will find that – broadly taken and with a possibly insignificant exception based on reasons *behind* the text of the Computer Programs Directive – national laws are free to develop originality wording at will, as long as the legislators and courts take care not to use the wrong, "ugly words" just mentioned but give more specific explanations of their fact-related reasons by the word "originality" or by the phrase "the author's own individual creation", if at all they feel that they need such a verbal umbrella. To proceed thus cannot be too burdensome. Indeed it is perfectly consistent with traditional common copyright views, in authors' rights countries as well as in common law ones, not to attach any positive importance just to the "qualitative or æsthetic *merits*" of a computer program, to the "merit or *purpose"* of a photograph or to what may be – if at all possible – "æsthetic" or even "qualitative" about a database. On the other hand it seems quite possible, and in conformity with legal thinking in countries where a distinction is made between the protection of photographs as artistic works and where other photographic pictures have been confined to the class of items protected by neighbouring rights, to apply to the former the language of "personality reflection" from the preamble of the relevant directive.

As I see it, the directives do not expose any really consistent view about even an abstract meaning of originality that could be of anything other than only very

17 Ricketson, S., *The concept of originality in Anglo-Australian copyright law*, Journal of the Copyright Society of Australia, Vol. 9, No. 2, October 1991, p. 1.

slight – if any – importance for the development of harmony in the national laws of the Member States.

There are also very strong, so to say extraneous reasons for this, reasons that have nothing to do with the difficulties to find appropriate formulas to include in directives. Not only will appliance of "originality", as it is defined in the directives as a concept not be possible to test as a fact-related criterion against the reasoning of the courts, provided that they do not continue to give reasons in summing up their views just as variably as they are used to;[18] but also the courts do not even look at, let alone refer to, case law as it develops in neighbouring countries. In Sweden this is the case even in relation to Denmark, Finland and Norway, notwithstanding the fact that we have the same basic statutory legal foundation for copyright in all the countries. I have reason to believe that a lack of interest in looking around for opportunities to harmonize by case law is equally present in all Europe. This, of course, does not mean that a certain case would necessarily lead to a different "originality outcome" in one country than in another.

Even if there are great differences in legal language between countries and courts, I foresee that the only noticeable general effect that may come out of the EU originality endeavours will be that the legal language of the courts may become less florid[19], if for no other real reason than that they would not be brought up before the European Court for using "bad language" instead of a prescribed "AOIC mantra" for originality. Safest , of course, is just to use the words "original" and "originality" in summing up more precise and detailed matter-of-fact considerations, while leaving off even any AOIC-wording, which may invite sliding into "bad language" or to such writing errors as the sectorially already forbidden "the author's own *individual* creation".

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18 Where, in Sweden, protection has been accorded, it is founded upon wordings of the Supreme Court such as "the tunic must … because of its balance between various knitting techniques and the combination of upper and lower parts be found to show … individual and artistic form" (*NJA* 1995, 256), "originality and individuality because of an expression of technical knowledge and logical construction, such that the same form for a similar work result would be almost excluded", and "the result of conscious creative work in producing a listing that was systematised in a certain fashion" (*NJA* 1995,256), "garment which was originally and individually created in an individual and artistic design or shape" (*NJA* 1995,164), and "individuality and distinctiveness in concrete, specific form while artistically using given elements" (*NJA* 1994,74) (the quotations are here synthesised so as to include just words that appear as decisive in the reasons given by the court). These are a few examples from decisions that have all been given rather lately, in a period of time not covered by Swedish EU membership implementation of EC law. Nevertheless, will the Supreme Court amend its language? Will it have to do so?

19 Thus Swedish courts may for reasons of European harmony forthwith abstain from referring, as has been done, to the wording in the committee report upon which the Copyright Act of 1960 was built – beautiful as the expression may sound in Swedish language – that in order to attain copyright protection the product must "have risen to a certain level of individuality and originality, it must at least to a certain extent be an expression of the author's individuality; a purely mechanical production is not adequate" (*NJA* II 1961 p.12; my translation).