The Notion of Originality – Redundant or not?

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1 Introduction

The prerequisites for protection of copyright works, and especially the notion of *originality*, are some of the most dealt with, discussed, and debated features within the realm of intellectual property. The criterion of *originality* is not specifically claimed as a condition of protection under the *Berne Convention*. Nor is the meaning of *originality* defined in the majority of national copyright legislations. Instead the interpretation of what is to be *original* has been left mainly to the courts.[1] Nevertheless, it is clear that *originality* is the internationally accepted main criterion for what has to be added to the literary, scientific or artistic creation to achieve copyright protection.

The notion of *originality* was discussed at the ALAI the Congress of the Aegean Sea II in 1991.[2] The General Report by *Dreier* and *Karnell* dealt to a large extent with the interpretation of the concept of *originality* in relation to *novelty*. Furthermore some, at that time, categories of work of current interest, foremost data programs, computer-aided works, and databases, were focused on. Today I have got the impression that the debate, to a greater extent, focuses on more general aspects of the copyright work and the prerequisites for protection at large. The reason therefore seems to be recent changes due to European harmonisation and internationalisation as well as cultural and economic, infrastructural changes. In this article I shall try to describe the criterion of *originality* and analyse what can be meant by *originality* generally today. Finally, I shall discuss whether the notion of *originality* can be seen as *redundant* within a modern concept of copyright.

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1 Sterling, *World Copyright Law*, 1998, 7.06; *cf.* Dreier and Karnell in ALAI Congress of the Aegean Sea II (19–26 April 1991), 154 and 161.

2 *See* Dreier/Karnell *op. cit*., 153 *and* Ricketson *op. cit*. 183 *et seq.*

2 The Notion of the Work and the Notion of *Originality*

Perhaps one can talk about the *beautiful* copyright, contrary to a *modern* one. Within the *beautiful* copyright protection we find the creations of genius (the great works of art). It might be the garden of *Debussy*, *Rousseau* or *Eliot*. This garden is the ground on which our copyright protection has grown. Of course those kinds of work exist even today. There is indeed a need for protection of symphonies, works of fine arts and poetry. But within the scope of copyright, there is today also a need for protection of other kinds of work, such as information and data, data programs, photographic pictures, databases, television programs or formats, layouts of marketing campaigns, trademarks and so on.

Much of what is found within the scope of copyright protection today is products of one or another kind of industry: media industry, information technology, computer software, and designs.[3] In many cases these kinds of work need another type of protection than what is granted under a traditional copyright legislation. Thus, it is clear that the need for protection is different for various kinds of work. Accordingly, we can see a spectrum of different kinds of work – from the creations of genius to mere facts – each of them with its own need of protection. At the same time we can se a spectrum of various kinds of usage. Works are used in different ways and treated differently on the market. Therefore, we could say that there are different kinds of copyright protection today, all of them covered under the same legislation. Striking is also that we have to take new prerequisites under consideration, such as *investments* in time, effort, and money as well as acquired *goodwill* within the assessment of copyrightability. Perhaps also activities from an alleged infringer, such as *unfair competition*, *unfair dealing* and *sponging* may be part of the consideration of copyrigtability in the present situation. Despite this significant difference between various kinds of expressions, the notion of *originality* is still used as qualification for copyright protection for any type of work. To handle this, we have to adapt a varying notion of *originality*. Does this influence or redefine the notion of *originality* or the notion of *work*; or does it even make the traditional prerequisites for *copyright* redundant?

It is important to keep in mind that the notion of *originality* is a fiction. It is not tangible, but a means to separate what is worthy of copyright protection from what is not. Also when talking about the "work" it is clear that we are confronted with a fiction.

> This is evidently shown in the so-called *idea-expression dichotomy*.[4] It is impossible to draw a line between the idea and its expression. As an example, what is the works of the famous artist *Christo*, when wrapping buildings? The wrapping as such is an idea. His wrapping of them is the expression. Anyone can wrap *Pont Neuf* in Paris. He wraps his buildings in his own way. But mannerism is commonly held not to be protected as such, so what is left. Nevertheless none

3 *Cf*. Grosheide, in Of Authors trade, 1994, 230.

4 *See* Cherpillod, *L'objet du droit d'auteur*, 1985; Karnell in The protection of Ideas, ALAI Workshop, Sitges 4–7 October 1992, 145; *id* in 7 Copyright World 1989, 16; Geller in Festskrift till Gunnar Karnell 1999, 198.

today would say that *Christo's* wrapping of *Pont Neuf* is not protected under copyright law.

Originality is in most copyright legislations the central prerequisite for copyright protection. Beside the fact that something has to be literary, scientific or artistic, it has to maintain a certain level of *originality* (commonly known as a level of *creativity*[5]). Thus the level of *originality* has to be seen as the amount – higher or lower – of literary, scientific or artistic activity or creativity, which is necessary to constitute a "work". The level differs from one kind of work to another. The level of *originality*/*creativity* and, accordingly, the "scope", "range", or "sphere" of protection ("*Schutzumfang"*) is higher for creations of genius or the great works of art than for "*kleine Münze*" ("small coins" or the doctrine of *small change*), i.e. works with a low level of *originality*.[6] *Originality* can also be understood as different tings in different countries and the differences mirror "different approaches to life, commerce, industry and culture".[7] There is still a difference between the Anglo–American objective/quantitative notion of *originality* and the subjective/qualitative one within the Continental/ Scandinavian European copyright legislations.[8] The level of *originality* also differs from one time to another. What is to be protected is accordingly a question of *time*, *room*, and *mode*.

The level of *originality* has been lowered over time. Evidence therefore could be the debate about the protected work, which rose on the European continent in the late middle of the 20th century about the copyrightability of certain modern expressions, foremost within the scope of fine arts and music.[9] In the Nordic Countries a similar debate, based on Scandinavian realism, took place almost at the same time.[10] The discussions did not just focus upon at that time avantgardistic features, such as the "Bathtub" by *Beuys*[11] and Cage's famous composition "4'33"", but also the dadaistic so-called *ready mades* from the

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5 Traditionally, the level of creativity is seen upon as a static level (*see* Schricker, 26 IIC 1995, 41). The expression "level of *originality*" is however here used in another sense, i.e. as a varying amount of *originality*, *c.f.* the expression "threshold requirement of creativity" (*see* Patry, *Copyright Law and Practice*, Volume I, 1994, 151 *et seq*).

6 Schulze, *Die kleine Münze und ihre Abgrenzungsproblematik bei den Werkarten des Urheberrechts*, 1983.

7 Dreier/Karnell, *op. cit*., 158.

8 *See* Strowel, *Droit d'auteur et copyright. Divergences et convergences. Etude de droit comparé*, 1993.

9 *See, inter alia* Kummer, *Das Urheberechtlich schützbare Werk*, 1968; Girth, Peter, *Individualität und Zufall im Urheberrecht*, 1974; id., FuR 1974, 433; Rau, *Antikunst und Urheberrecht. Überlegungen zum urheberrechtlichen Werkbegriff*, 1974; Samson, 56 UFITA 1970, 117; Schmieder, 52 UFITA 1969, 107; Ulmer, GRUR 1968, 527.

10 *See, inter alia*, Karnell, *Upphovsrättens jämförelseobjekt*, 1964; id. TfR 1968, 401; Ljungman in Nordisk gjenklang. Festskrift till Carl Jacob Arnholm, 1969, 179; Strömholm, *Upphovsrättens verksbegrepp*, 1970; Törnqvist, TfR 1986, 365; *c.f.* Rosenmeier *Værkslæren I ophavsretten*, 2001 33 *et.seq*.

11 About the fantastic adventure of Beuy's, "Bathtub" *see* Hamann *Urheberrechtsprobleme um Beuys-Badewanne. Schadensbemessung für Beschädigung des Werkoriginals* (FuR 1976, 166).

beginning of the 20th century of *Duchamp*. They had actually never before been considered as objects for copyright protection, but they are probably today.[12]

I can se several grounds for the lowered levels of *originality*; most of them are found in new expressions of literature, art, or media:

2.1 The Appearance of New Kinds of Work

The investments in new kinds of expressions, such as computer programs, databases, advertisements, and television program formats are asking for an adequate intellectual property protection. Traditionally, copyright has been held to prove the most appropriate one. Probably, the lack of registration procedures has served as an argument therefore. Consequently, as new types of creation with low *originality* are introduced on the copyright field, the level of *originality* in general has lowered.

2.2 The Changing Characters of Traditional Types of Works

Traditional types of work have changed due to new technology and infrastructural changes at large. Also the change of several kinds of cultural expressions within fine arts, modern music and poetry, such as dadaism, meta art, computer generated works, minimalism etc., lead to a need for copyright protection even for works of low *originality*.

2.3 Changed Behaviour in Using Copyrighted Materials

The mass production of copyrighted materials together with the development of information technology make it easier to quote, compile, and "reuse" copyrighted materials. There is today, hence, often an economic interest in getting remuneration even for usage of small parts of works and for *small coins*, the result of which is that the courts have substantially lowered the degree of *originality* required.[13] This is also an effect of how copyrighted materials are treated in the post-modern era, where allusions and quotations are natural elements of creative activities.

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12 As indicia for protection today could be the fact that on the back of any postcard presenting the readymades of Duchamp, there is a copyright notice addressing ADAGP and that Cage's work "4'33"" is found in the databases over protected music within the collecting societies.

13 Dreier/Karnell *op. cit.*, 160.

2.4 European Harmonisation

Through a couple of EC-Directives in the copyright field the European Union has tried to harmonise several aspects of the copyright legislation within the Union:

- According to the Computer Program Directive, a computer program shall be protected if it is *original* in the sense that it is the aut*hors' own intellectual creation*. No other criteria shall be applied to determine its eligibility for protection.[14]

- Photographs, which are original in the sense that they are the au*thor's own intellectual creation* shall in accordance with the Term of Protection Directive be protected. No other criteria shall be applied to determine their eligibility for protection.[15]

- In accordance with the Database 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.[16]

Of course, one can doubt if the endeavour of harmonisation will result in a common concept of *originality*.[17] But, as the notion of the work, such as stated in the Directives, has to be – more or less – the same on the Common Market, countries with a traditional high level of creativity, at least to some extent, have to draw their prerequisites for protection closer to the countries with lower levels. From experience, it seems to be easier to adapt lower levels of creativity, than to strengthen the prerequisites for protection.

2.5 International Trade

If something is held protected in one country it has to be held protected also in another country. Otherwise a rightowner would not be willing to negotiate about the usage of his work in the other country. It will then lie near at hand for right owners in a land with a high level of *originality* to accept the lower level of *originality* in another country.

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14 Directive 91/250/EEC of May 1991 on the legal protection of computer programs.

15 Directive 93/98/EEC of October 1993 harmonising the term of protection of copyright and certain related rights.

16 Directive 96/9/EC of 11 March 1996 on the legal protection of databases.

17 *Cf.* Karnell in Intellectual Property and Information Law. Essays in Honour of Herman Cohen Jehoram, 1998, 206.

2.6 Investments and Goodwill

Investments in marketing in the media industry generate goodwill. Many authors and artists acquire great fame, which makes it interesting for others to use their frameworks. Whether original or not, it is in such cases important to the author to achieve protection of this goodwill or fame. The creators have got an interest to license their investments by, for instance, merchandising. It seems to be a trend that creations with a low level of *originality*, which are made by famous authors, are presumed protected under copyright law. Hence, today the author's goodwill seems to be a part of the consideration. A question, which is also raised now and then, is if it is possible to acquire copyright protection through *establishment on the market*. To some extent it seems to be feasible, at least as concerns some famous pieces of modern art, such as, for example, the ready-mades of *Duchamp*.[18]

2.7 Presumption of Protection in Licensing and Other Kinds of Contracts

The administrative registration procedure applied to industrial property rights has given certain strength to the possession of such rights and influenced the scope of protection of patents and trademarks. This is not found in the realm of copyright outside the U.S.A. As there is normally no authority giving this security of protection, the copyright protection is forced into an area where the protection as such is jeopardised because of the uncertainty, firstly about the existence of a protection, and furthermore about the scope of protection. In trade, it is today interesting for both parties to claim that the subject matter of the contract is protected under copyright, because of the fact that this could not be clarified otherwise than by a court decision. In such cases there is also often an interest in protecting mannerism, concepts and ideas. I think that this kind of presumption in the long run leads to lowered levels of *originality*, not least because that courts tend to make their decisions partly on the basis of customs of trade.

2.8 Overlapping Protections

A low level of *originality* in general and presumptions for protection also lead to an increasing risk for overlapping intellectual properties, as for example between copyright and trademark protection. The more protected items, the more risks for overlappings. This is of course not only a risk but in many cases also a possibility for right owners to strengthen their position on the market and we see today an increasing interest in overlapping intellectual property rights as an IP strategy. As long as this will be a strategy, I also think that it will itself lead to lowered claims of *originality*. But there is somewhere a limit. This is clearly

18 Even if, as for instance, Malewitch and Klein have made almost identical monocrome paintings, nobody seems to doubt the *originality* in their works respectively.

seen in the *Dior Case*,[19] where *Dior* claimed copyright protection of perfume packages. Even though the packages theoretically were held to be protected under copyright, *Dior* could not claim their right to it. If the level of *originality* is set so low, as to lose its economic strength, it will be doubtful to talk about *originality* in a practical sense in the specific case.[20]

2.9 The Development Towards an Unfair Competition Perspective

As any expression may seem to be protected under any intellectual property right the risk to make an infringement increases. Therefore it will be more important to look at the alleged infringers' negligence or if the alleged infringement otherwise is wilful or unfair.[21]

In some countries, there are effective supplementary unfair competition legislations, catching improper usages of creations or investments made by others, which do not fall within the traditional scope of copyright protection. In other countries, a lack in that respect can be observed. A trend, at least in Sweden, where the protection against unfair competition is rather weak, is that the Supreme Court today tend to pay attention to such aspects within its considerations in a copyright infringement case, the result of which is that a creation may be held as protected, just because of the conditions of the infringement.[22]

3 The Notion of Originality may not be Seen Isolated

One must not forget that *originality* cannot be seen isolated. It is always a matter of the type of work, the type of infringement and the infringer's usage of the work. Even the purposes of usage are of importance. *Realiter* one can say that there is also a level of fair use as well as of infringement. Together those factors are parts, not only of the determination of whether there is an infringement, but indirectly of the determination of *originality* in the specific case.

In the USA we have seen an amazing development in case law. This is perhaps most distinct in cases about copyright infringements in computer programs. While in earlier cases, such as the famous *Whelan* case,[23] where the

19 *Parfums Christian Dior S.A. v. Evora BV*, 4. November 1997 (C-337/95).

20 *Cf.* Kur, in GRUR Int 1999, 24 *et seq.*

21 *Cf.* Dreier/Karnell, *op. cit.*, 160; Dietz in Gedenkschrift Schöner, 1986, 1119; Schricker, GRUR 1992, 242 *et. seq.*

22 *Cf.* Nordell, JT 1998-99, 661. The impact of competition law on intellectual property rights and the relations between intellectual property and unfair competition are detailed discussed in Danish literature by Koktvedgaard, *Immaterialretspositioner* 1965 *and* Schovsbo, *Grensefaldespørgsmål*, 1996.

23 *Whelan Associates, Inc. v. Jaslow Dental Laboratory Inc.*, 797 F.2d 1222 (3d Cir. 1986).

Court adopted a general formula to decide the copyrightability of the work,[24] the common way to decide the copyrightability as well as the matter of infringement today consists of a rather complicated two- or three-step-test in which certain features of the work and the alleged infringement object are defined, selected and compared.[25] From a European point of view, where an overall perspective is commonly applied, this way of cutting the judgement into pieces appears as rather unfamiliar. An advantage of a divided test over a broader over-all perspective is perhaps that the courts more openly show exactly which features are of interest and how they influence on the judgement. However a disadvantage with this kind of assessment is that it reduces the possibilities to give a balanced picture of the situation. Irrespectively of which method is applied, one may allow oneself to be enticed by the focus on the *originality*, while the final supposition is based on other facts such as the alleged infringement object as well as the characteristics and extent of the infringement.

4 Redundancy of *Originality*

As there are so many factors, which influence the determination of copyrightability and of *originality*, it is today perhaps futile to talk about *originality* and sometimes even about a "work", i.e. at least in a traditional understanding. A relatively new concept related to copyright protection is the *redundancy* of its notion of *originality*. It seems to have been initially introduced in an article by *Sherwood-Edwards* in 1994.[26] The term *redundancy*, as I se it, has to be interpreted as *no longer needed* or s*uperfluous*. But does it mean that the concept of *originality* is unnecessary because of the fact that it is already contained within the definition of *work*, or does it mean that the traditional concept of *originality* has lost its fundamental meaning, so that we have to introduce a totally new scheme of copyright protection. According to *Sherwood-Edwards* it seems to mean something rather likely to the latter.

4.1 Redundancy of Originality According to Sherwood-Edwards

The article of *Sherwood-Edwards* is concerned only with copyright in facts (or information) *per se*, irrespective of selection and arrangement. However the reasoning also applies to unoriginal works and unoriginal elements of works.[27]

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24 The decision has been criticised, not the least because of the court's failure to clearly define the protectable features of the program (*see* Miller in Harvard Law Review 106/1993 p 997 and Nimmer, *On Copyright*, § 13,03 [A][1][d].

25 *Brown Bag Software v. Symantec Corp*. 960 F.2d 1465 (9th Cir. 1992) cert. denied, 113 S. Ct. 198 (1992); *Interactive Network v. NTN Communications*, 875 F. Supp. 1398, N.D. Cal. 1995; *Lotus Development Corp. v. Paperback Software International*, 740 F. Supp. 37 (D. Mass. 1990); *Apple Computer, Inc. v. Microsoft Corp. and Hewlett-Packard Co*., 35 F.3d 1435 (9th Cir. 1994), cert. denied, 115 S. Ct. 1176 (1995).

26 25 IIC 1994, 658; *id*. 1995, Ent. LR 94. (Footnotes refer to IIC.)

27 Sherwood-Edwards *op. cit*., 660.

To a large extent, the article is a criticism of the famous American so-called *Fiest* Case[28] of 1991. For a long time, U.S. courts have applied either tests of invested labour ("sweat of the brow") or creativity to assess the fulfilment of the *originality* criterion. A turning point in U.S. copyright in that respect was the *Feist* case, in which the Supreme Court rejected the *invested labour* test. By this case it was clear that the test of *originality* under U.S. copyright law to some extent has become aproximated to the European civil law notion of *originality*.[29]

> *Rural Telephone Service* was the sole provider of telephone service in its service area. *Feist Publications*, a publishing company making area-wide telephone directories, paid for the rights to use listings from telephone companies in different service areas near *Rural's* service area. Since *Rural* did not allow *Feist* to use its listings, *Feist* used them without consent. *Feist* removed several irrelevant listings, then verified and attempted to obtain additional information on a large number of remaining listings for use in its directory. However, about 1,000 of the 46,878 listings in *Feist's* directory were used directly from *Rural Telephone Service's* white pages.

The Supreme Court held that the *sine qua non* of copyright was *originality*. *Originality*, as the term is used in copyright, did, however, only mean that the author independently creates the work and that it possesses at least some minimal degree of creativity. The Court found that the telephone book as a whole was a copyrightable work but that the compilation of listings and the individual listings were not copyrightable. The Court emphasised that the individual listings were uncopyrightable facts and that the Telephone Company had not selected, co-ordinated, or arranged the facts in an original way sufficient to satisfy copyright requirements. The primary objective of copyright was not to reward the labour of authors, but to promote the Progress of Science and useful Arts. To this end, copyright assured authors the right to their original expression, but encouraged others to build freely upon the ideas and information conveyed by a work.[30]

In his criticism against the notion of *originality*, *Sherwood-Edwards* goes out from a comparison between facts and tangible property. An example given is the fruit seller, who finds apples in a valley. Neither the valley, nor the trees, nor the fruit belongs to anyone. The fruit seller loads his truck up with apples. He brings them to the town and sells them there. According to *Sherwood-Edwards*, the fruit seller should be given property rights in the fruit because everyone benefits, as it is cheaper for us to pay him than to drive to the valley and pick the apples ourselves.[31] As the apples in the example, facts are part of the public domain available to every person.[32] "Both pre-exist, both are in the public domain, but in both cases it might be cheaper to pay someone to collect fruit or facts than to

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28 499 U.S., 113 L. Ed. 2d 358, 111 S. Ct. (1991).

29 Sterling, *op.cit*, 7.10.

30 *See* about the Case *inter alia* Ginsburg, 92 Col. L. Rev., 1992, 338 and Strong, 42 Journal of the Copyright Society of the U.S.A., 1994, 39.

31 Sherwood-Edwards *op. cit*., 662.

32 Sherwood-Edwards *op. cit*., 663 (Sherwood-Edwards here relates to Feist at 370 [3d, 6].

collect them yourself".[33] *Sherwood-Edwards* then concludes "that, given the way business works in a market economy, some form of protection for facts is required. And if *appropriation* (without any requirement of creativity) is sufficient to found property in tangible matter, why should *appropriation* not also be sufficient to found property in non-created intellectual property, such as facts? If there is no requirement of originality in physical property, why have it for copyright?"[34]

Without all forms of *originality*, what will then be left necessary for a functioning property system? According to *Sherwood-Edwards*, there are *the work*, *the mode of appropriation*, the *modes of misappropriation*, and a set of *antitrust rules*.[35] If it is a type of *work* in which property is recognised, copyright can be claimed in it. There is no point in refusing copyright either because of insufficient labour, or because the labour is of the wrong type. Given that the type of work is tradable, it would be for the market to decide what has value.[36] Whereas *originality* conflates both *propertisation* and *appropriation*, a system without *originality* will require a more explicit form of *appropriation*. Some form of physical connection between the work and the person claiming it is required, if only to prevent someone claming everything that has not yet been *appropriated*. Pre-existing material should be *appropriated* in the same way as tangibles are – by being collected. The rule against *misappropriation* presumes that the thing *appropriated* already belongs to someone else, otherwise *appropriation* increases availability. Since all antitrust, whether of physical or intellectual property, is a restriction on exclusionary rights – and therefore diminishes the right holder's ability to maximise profits and *appropriate* a reward on the market – there is, *prima facie* no reason to differentiate between antitrust in relation to copyright and antitrust in relation to physical property.[37]

4.2 Some Critical Aspects on Redundancy According to Sherwood-Edwards

The theory of *Sherwood-Edwards* is interesting and striking, but does it work? I may have misunderstood his argumentation, but perhaps it has to be examined more deeply and from some other perspectives.

The difference between the fruit in *Sherwood-Edwards'* example and the facts on one hand and copyright works on the other is that facts and fruit are no-ones property, but copyright works belong to someone. Accordingly you are not allowed to steal fruit, which belongs to someone else. Of course you can collect data or facts and claim property in it. What is worth to pay for are not the data or the facts, but the collection.[38] As concerns copyright works, they are none's

33 Sherwood-Edwards *op. cit.*, 663.

34 Sherwood-Edwards *op. cit.*, 664.

35 Sherwood-Edwards *op. cit.*, 687. A fifth thing mentioned by Sherwood-Edwards is the duration of property.

36 Sherwood-Edwards *op. cit.*, 688.

37 *Loc. cit.*

38 *Cf.* Lea who points out the difference between the mere facts and information, i.e. the data properly processed and presented (Lea, 1. Ent. LR, 1996, 26).

property until they are created. What you will pay for in such a case is the creation. No one prevents you from selling facts, but you must not sell another's collection of facts or another's work, because it is not your property. It is the result of another's creation. *Originality* distinguishes what is a creation from what is not.

Sherwood-Edwards reasons wrongly that copyright, apart from tangible property is based on reward and incentive. Since long, that is not the single aim of copyright protection. It is much more complex than so.[39] According to *Sherwood-Edwards*, one could legitimately compare to tangible property, which has no equivalent threshold test for conferral of property rights. Is that really truth? As there is *originality* distinguishing a work from what is not, there is a level between what is tangible property from what is not or what divides one type of tangible property from another, i.e. an apple is not a *work* because it is not literary, scientific or artistic, nor were it *original* until it was found at an exhibition of works of arts by the famous Fluxus artist *Yoko Ono*.

Sherwood-Edwards' article has also been criticised by *Lea*. Of interest here is Lea's remainder that property is not a single, nor a unified, nor an absolute concept. Therefore property laws have evolved separately and specific features for identification and delimination of each type of property. Property rights have also been imbued with considerations of morality or public policy.[40] Hence, as tangible properties have different, so to say, legal values, it is comprehensible to apply the same to intellectual properties.

For me it seems like *Sherwood-Edwards* has "re-invented the wheel". Can a *work*, which is *appropriated* or *propertised* and which resist *antitrust or competition* law be else than *original*? What is, as for an example, the difference between his model and the one presented by *Kummer* some thirty years ago about the concept of *statistische Einmaligkeit*, or *Duchamp's* claim for copyright protection in his *ready-mades*, by now almost a century ago. Just point something out as your own work and claim the copyright in it! Perhaps someone else claims the right to the same work, well, if he was first, it simply is not yours. If someone else finds your "work" too banal, it is probably already "created". Then it would probably be held as unfair to claim copyright in such a "work": it has not got *originality*.

The effect of a copyright system such as pointed out by *Sherwood-Edwards*, is that the determination of *originality*, i.e. exclusivity, were moved from the inherent determination within the copyright legislation to a consideration, so to say, *ex post*, which has to rely upon effective measures against unfair competition.[41] But has it not always been an interaction between the scope of protection given by intellectual property legislation and the legislation against unfair competition? Copyright already suffers from the lack of registration. To leave any consideration of legitimacy of property to the court would be risky, the

39 One reminder might be that most investments in capital stocks so far have exceeded the ones in arts.

40 Lea, 1. Ent. LR, 1996, 25.

41 Sherwood-Edwards uses the term "antitrust law", which seems to comprise competition law in a wide sense; cf. Lea, who consequently uses the notion of "antitrust/competition law" (Lea, 1. Ent. LR, 1996, 21 et seq.).

result of which would be that the right owners, even of products of fact and information, should be aware of creating products with a high level of originality.[42]

4.3 Redundancy in Some Cases

Anyhow, in some cases the notion of *originality* may be of minor importance for some types of work, such as databases and scientific works, as well as in some types of infringement situations. But that does not mean that originality is of no importance at all. As will be recognised in the examples given below, the redundancy appears only in some specific treatments.

4.3.1 Databases

When facing the nature of database, it is often clear that it is the mere data or the information, which are of primary interest. As long as the usage of the database is limited to single users' rights, the database owner would not claim any originality in his database.

4.3.2 Scientific Works

As concerns scientific works, the interest seldom lies in its literary value. Instead, it is the result of the scientific research, which is of economic and even moral importance. Therefore the scientists rarely bother about copyright aspects in their works in a traditional sense, but about the interest to have their results spread and to be quoted to in a proper way. Copyright protection may then be a measure to fulfil just those interests.

4.3.3 Contracts

There is a considerable difference between an infringement by a third party and an infringement, which has its origin in a breach of contract. As the contracting parties are free to decide that the subject matter of the contract shall be treated as a copyright work, the court is obliged to treat the subject matter of the contract as a work irrespective of its originality. Hence, by contract, the "rightowner" may secure protection for materials that are not copyrightable. The "author" can of course not claim such a right against third parties. The development of digital technology may however today afford possibilities to restore control even over third parties' exploitation of any media content. If a media content is available only "on line", the right owner can control the access to it, and impose by

42 *Cf.* Lea, who, by reference to Schmidtchen/Koboldt, 13 Intl R Law & Econ. 413 (1993) concludes that the application of antitrust/competition law in the copyright domain is recognised as an unpredictable, difficult, and potentionally dangerous solution.

contract the conditions of usage and substitute contractual protection for copyright coverage. This makes it possible for him to ensure a broader scope of protection than copyright protection itself would afford.[43]

5 Towards a "Functional" Notion of the "Work" – a Hypothesis

There are several arguments favouring that the most adequate definition of the scope of copyright protection is to apply what could be called a *functional* notion of the work. Outmost, the need for protection seems to be the main reason for the lowered levels of *originality*. An attractive supposition would therefore be to let the equity on an aggregated market define, or at least to have an influence on the scope of protection. What is worthy of protection would then be found on the market place. Worth striving for should be to look upon how the word "work" is understood and used in practice in different situations.[44] But to what extent does the market itself has got the opportunity to define its own notion of *originality*, the notion of *work*, or the scope of protection?

The legislator has usually taken the first step. That is to put the most effective level between the protected area and the, so to say, public domain. Of considerable importance are the customs developed in different branches of the market. Then the market itself has got its own possibility and its own interests and its own prerequisites for protection, i.e. to some extent. This means that we are confronted with two main types of notions of the work: The first one is described in the literature and defined through case law. The latter one is defined through the market's *de facto*-usage of media content. It is based upon the behaviour of the actors on the marketplace and their idea of what is to be protected within the field of copyright.

A necessary condition for a modern copyright system is an effective formation of contract on an aggregated market, a result of which is that the legitimacy to define the *per se* vague legal definition of "work" could be transferred to powers, which have the strength to define it. As the notion of work has ever more removed from a traditional dogmatic and, so to say, static understanding into a market-related one, the market has been able to set the standard to an ever greater extent.

Several factors determine the demand of literary, scientific, and artistic creations, but first of all it should be their *originality* and the exclusiveness of their exploitation. From a production perspective, the price is determined, firstly by the production costs and the costs to put the creation on the market. Furthermore, the author has got his individual talent and skill, which is developed by investments in education and practise. The more talent, the more *originality* of the work and the wider its scope of protection. The user would, accordingly, be willing to pay extra for exclusivity, this would end up in the conclusion that the more exclusive the right, the higher the demand. If there is little originality, there will be little or no exclusivity at all. In such a case the user pays for nothing but the mere costs for production and distribution.

43 Ginsburg in 41 Journal of the Copyright Society of the USA, 235 (1994).

44 *Cf.* Strömholm, *Upphovsrättens verksbegrepp*, 1970, 87.

However, even a low level of originality may give rise to demand because of a cheaper prise for the usage. As the originality is low, the right owner cannot afford to grant exclusivity. Hence the usage will probably end in a single user's right. Also several other aspects such as goodwill and an artist's talents may play a crucial part.

Protection qualification prerequisites, which are set by the *de facto*-usage on the market, should, in principle, lie at the level of market equity. This is also probably the case today in certain fields, not least where there is a lack of case law. As the dogmatic level of creativity has often been static and set at a relatively high level, the one set by the market seems to vary and to be gradually lowered. I think that these two levels of *originality* should have an influence on each other. It is important to take into consideration the level determined by the market, because it is the creations, which give rise to demand, that are served by protection. Despite this, the dogmatic level still plays a considerable part, because of the risk that the level of *originality* otherwise would be lower than the desired incentive for competition, i.e. that the level of *originality* might not reach the incentives for new creations and the sufficient amount of exclusivity.[45]

6 Concluding Remarks

Sherwood-Edwards seems to understand *originality* as something virtual or tangible. But it is not. Probably *originally* was earlier held as something as much – not the least in German 1900 century legal doctrine, but today, at least for me, the notion of *originality* is a fiction. It is a way to describe a very complex set of facts and considerations. When *Sherwood-Edwards* writes about the *redundancy* of *originality* it is, at least for me, nothing but another – perhaps more up to date – view or definition of the notion of *originality*, which as such shows considerable lacks of effectiveness.

What do we have? We have something that we want to protect. We would like to call it a "work", because of the fact that it makes it easy for us to describe it and to separate it from other things that we do not want to call a "work". The "work" has to differ from other tings.

Whether redundant or not, the prerequisites for copyright protection seems to be nothing but a matter of definition. If we abandon the notion of *originality* what do we have left? We got a *work*, which is protected *irrespective of originality*. But something has to divide what is to be protected – a *work* – from what is not. Why not call this "something" *originality*? *Originality* is mainly just a matter of definition – a game of words.[46] *Originality* is not static. The *copyright work* seems to end in a *black box*. We do not know what is in the box, just what is put into it – an expression or a media content – and what is coming out – either a *work* or noting at all. What has mainly been worthy searching for in the box has been a traditional concept of *originality*. Within the box there

45 The hypothesis of the functional notion of the work is more deeply examined in Nordell, *Rätten till det visuella*, 1997, 400 *et sec*.

46 *Cf*. Karnell in *Intellectual Property and Information Law. Essays in Honour of Herman Cohen Jehoram*, 1998, 205.

have also been components such as *aesthetic value*, *tradition* and *manner*. Some of those components are probably still there at the bottom. But today they seem to share the content with other features, such as *unfair competition*, *unfair dealing*, *goodwill* or *investments* – we do not know. I should like to suggest that we call the entire content of the box *originality*. The meaning of *originality* differs from one country to another. The notion of *originality* also seems to have changed over time. More interesting is perhaps that *originality* seems to differ from one type of work to another and even from one (infringement)situation to another.[47] As culture, markets, and infrastructure have changed, that is also the case for the *work* and the notion of *originality*. That is a growing insight, which seems to influence the entire copyright world. Courts seem to have taken such a view for a long time. Of course, we still see decisions where the courts relapse into a traditional *static* or *dogmatic* interpretation of the notion of *originality*, but usually, when analysing their considerations more deeply, we find a balanced overall picture.

There is no golden measure to compare the work to. The consideration of what is a work has to be based mainly on experience. To be able to make statements about what is covered within, respectively outside the scope of protection, one must have considerable knowledge about not just the type of work in question but also about the market and circumstances at large, as well as in the specific case. The experiences refer mainly to legal conditions, but to a large extent also to knowledge about the subject matters in question and prerequisites for creation, the market place and society *at large* as well as positions taken in the specific case.

In certain aspects the traditional concept of *originality* definitely seems to have lost its meaning in a modern copyright world. However the notion of *originality* seems to be able to carry a burden of new kinds of features, some of them may be already contained within a modern definition of *work*. The concept of *originality* is therefore not redundant, but something to build upon for the future.

47 *Cf. op. cit*, 207.