

## Quality, merit, aesthetics and purpose: An inquiry into EU copyright law's eschewal of other criteria than originality

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One of the most debated topics in European copyright law today is the harmonization of the concept of originality and the subject-matter of copyright by the Court of Justice of the EU (CJEU). Up until the *Infopaq I* decision of 2009, in which it ruled that copyright subsists in subject-matter 'which is original in the sense that it is its author's own intellectual creation',<sup>1</sup> computer programs, photographs and databases were the only three types of works for which the originality test was explicitly harmonized at the EU level.<sup>2</sup> Beyond these cases, it was thought that 'Member States remain free to determine what level of originality a work must possess for granting it copyright protection'.<sup>3</sup> The CJEU nonetheless extended the application of the criterion of the author's own intellectual creation to other types of works, including newspaper articles (*Infopaq I*); graphic user interfaces of computer programs (*BSA*); (unregistered) industrial design (*Flos*); works exploited within the framework of television broadcasts, such as opening video sequences, anthems, pre-recorded films and graphics (*Football Association Premier League*); and programming languages and the format of data

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<sup>1</sup> CJEU (Fourth Chamber), judgment of 16 July 2009, *Infopaq International A/S v. Danske Dagblades Forening* (Case C-5/08), *ECR* 2009 I, p. 6569, para. 37.

<sup>2</sup> Art. 1(3) Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs, *OJL* 111/16 of 5 May 2009; art. 1(3) (old) Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, *OJL* 122/42 of 17 May 1991; art. 6 Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights, *OJL* 372/12 of 27 December 2006; art. 6 (old) Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights, *OJL* 290/9 of 24 November 1993; art. 3(1) Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, *OJL* 77/20 of 27 March 1996. See also CJEU (Third Chamber), judgment of 1 December 2011, *Eva-Maria Painer v. Standard VerlagsGmbH* (Case C-145/10), para. 87-94 (with respect to realistic photographs, particularly portrait photographs); and CJEU (Third Chamber), judgment of 1 March 2012, *Football Dataco & others v. Yahoo! UK & others* (Case C-604/10), para. 29 and 37-39 (with respect to football league fixture lists constituting a 'database' as defined by Directive 96/9/EC).

<sup>3</sup> Commission Staff Working Paper on the review of the EC legal framework in the field of copyright and related rights, SEC(2004)995, Brussels, 19 July 2004, at 14. See also European Commission, Green Paper on Copyright and Related Rights in the Information Society, COM(95)382 final, Brussels, 19 July 1995, p. 25; and M.M.M. van Eechoud et al., *Harmonizing European Copyright Law: The Challenges of Better Lawmaking*, Information Law Series, vol. 19 (Alphen aan den Rijn: Kluwer Law International, 2009), p. 41.

files used in computer programs (*SAS*).<sup>4</sup> This CJEU's case law has been criticized by scholars for being 'harmonization through the back-door' or 'harmonization by stealth'.<sup>5</sup>

When analysing this newly harmonized concept of originality, most commentaries focus on the criterion of the author's own intellectual creation and how this impacts on national law.<sup>6</sup> Little attention has been given, however, to the meaning of the 'no other criteria'-clause contained in some of the Directives in relation to the harmonized originality criterion. The Computer Programs Directive provides that '[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 shall be applied to determine its eligibility for protection.'<sup>7</sup> Recital 8 of the same Directive explains what this means: '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 aesthetic merits* of the program should be applied [emphasis added]'. Similar rules and recitals are contained in the Term Directive and the Database Directive, explaining that 'no other *criteria such as merit or purpose*' and 'no *aesthetic or qualitative criteria*' must be applied to determine the eligibility for copyright protection of a photographic work and a database, respectively.<sup>8</sup>

Interestingly, neither the Directives nor the preparatory materials define the terms 'quality', 'aesthetic', 'merit' and 'purpose'. It is uncertain, therefore, what these terms precisely mean in a legal context. Whereas the word 'purpose' seems to signify the reason for which a work is created, the meaning of the other terms may vary, depending on the context in which they are used. In everyday life, the word 'quality' can refer to a distinguishing attribute, but also to a grade of excellence of a subject or object. 'Merit' seems to be a synonym of 'quality' in the latter meaning, as it relates to worth or excellence or to a commendable quality or virtue of a subject or object. Similarly, the adjective 'aesthetic' can have the more objective connotation of 'relating to perception by the senses', but also the more subjective meaning of 'relating to the perception, appreciation, or criticism of that which is beautiful'. Since the EU provisions exclude any other criterion than originality from being applied in determining the eligibility for protection of works, however, it does not seem to matter too much that the terms can be interpreted differently. If applied literally, the EU Directives preclude *all* other criteria than originality, regardless of their meaning or the context in which they are used.

However, such a broad meaning and application cannot possibly be conferred on the 'no other criteria'-rule. Since the subject-matter of copyright belongs to a considerable degree to

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<sup>4</sup> CJEU *Infopaq I* (2009), *supra* note 1, para. 44; CJEU (Third Chamber), judgment of 22 December 2010, *Bezpečnostní softwarová asociace (BSA) v. Ministerstvo kultury* (Case C-393/09), para. 46; CJEU (Second Chamber), judgment of 27 January 2011, *Flos SpA v. Semeraro Casa e Famiglia SpA* (Case C-168/09), para. 34; CJEU (Grand Chamber), judgment of 4 October 2011, *Football Association Premier League Ltd v. Karen Murphy* (Joined Cases C-403/08 and C-429/08), para. 149; and CJEU (Grand Chamber), judgment of 2 May 2012, *SAS Institute Inc. v. World Programming Ltd.* (Case C-406/10), para. 45.

<sup>5</sup> See e.g. M. van Eechoud, 'Along the Road to Uniformity - Diverse Readings of the Court of Justice Judgments on Copyright Work', *JIPITEC* 2012-1, p. 60-80, providing a comprehensive analysis of criticisms of the CJEU's case law on copyrighted works; and L. Bently, 'Harmonization through the back-door: the role of the ECJ', address to the CRIDS-IViR conference InfoSoc @ Ten - Ten Years after the EU Directive on Copyright in the Information Society: Looking Back and Looking Forward, European Parliament, Brussels, 13 January 2012.

<sup>6</sup> See e.g. the annotation of the *Infopaq I* and *BSA* judgments by P.B. Hugenholtz, *NJ* 2011, no. 288 and 289, p. 2890-2893, stating that the consequences of the newly harmonized originality criterion are probably felt most intensely in Germany, which traditionally applies the seemingly higher originality standard of individuality, and the UK, where the originality of works is tested against the seemingly lower standard of skill and labour.

<sup>7</sup> Art. 1(3) (old) Computer Programs Directive 1991; currently, art. 1(3) Computer Programs Directive 2009.

<sup>8</sup> See art. 6 (old) and recital 17 (old) Term Directive 1993 and art. 6 and recital 16 Term Directive 2006 (emphasis added). See art. 3(1) and recital 16 Database Directive 1996 (emphasis added).

the cultural and aesthetic domain, it seems that qualitative and aesthetic criteria cannot really be totally excluded in practice. These criteria somehow tend to sneak into legal deliberations anyway, especially where it must be determined whether or not new types of subject-matter rightfully belong to the domain of literary and artistic property and where the courts attempt to demarcate the aesthetic domain of copyright law from the technical or functional domain of other intellectual property rights. Moreover, the criterion of ‘the author’s own intellectual creation’ does, in itself, involve a qualitative test: it requires a work to possess a minimum degree of ‘creativity’, which is an indisputably qualitative element.<sup>9</sup> In practice, therefore, judgments on originality may well involve some sort of qualitative distinction: in determining whether a work sufficiently reflects the author’s ‘free and creative choices’,<sup>10</sup> the courts must naturally disregard all choices that are too obvious or trivial. This sometimes requires them to distinguish between productions that possess just enough creativity to attract copyright and productions that are too commonplace to be protected. Identifying a small distinctive creative component of a work unmistakably requires a qualitative assessment of some kind.

Consequently, because national courts cannot necessarily make a clear distinction between protectable and unprotectable subject-matter on the basis of the originality standard alone, the question arises how the ban on applying ‘other criteria’ than originality in EU copyright law must precisely be understood. Is it meant to absolutely preclude any other criterion, including all qualitative and aesthetic criteria, when determining the eligibility for protection of works, as the text of the provision seems to imply? Or does it aim at eliminating particular evaluative judgments about the quality or aesthetic value of works only? If so, to what extent would the courts still be allowed to – implicitly or explicitly – rely on qualitative and aesthetic criteria in determining whether or not an intellectual creation attracts copyright?

By answering these questions, this article aims to clarify the scope of the ‘no other criteria’-clause and to enhance understanding of how it relates to the requirement that a work must be original to be copyrightable. While it seems conventional wisdom that criteria such as merit, quality, aesthetic character and purpose ought to play no role in decisions about copyrightable subject matter, the preclusion of these criteria is little elaborated and has not attracted much academic scrutiny. In view of this, there is a need to thoroughly appraise the exact scope and effects of this preclusion, especially with the current trend at the EU level that judgments on originality and copyrightable subject-matter are increasingly passed by the CJEU.

The article therefore looks into the origins of the ‘no other criteria’-rule and its relationship to copyright’s originality requirement. Section 1 explores the legislative history and background of the three EU Directives harmonizing the standard of originality. Since the drafting history does not give any substantive justification for the rule, Section 2 examines the law and case law of France, the United Kingdom, the Netherlands and Germany to establish the extent to which qualitative and aesthetic criteria are actually banned at the Member State level and what this ban entails. We conclude that the national laws chiefly aim to eliminate subjective evaluative judgments about the value or worth of creations. However, this does not mean that, in practice, qualitative and aesthetic criteria are totally disregarded. As the next sections will explain, national courts sometimes make a qualitative or aesthetic appraisal to assess whether a creation resides inside or outside the domain of copyright law (Section 3) and/or meets the

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<sup>9</sup> R.G. Howell, *Database Protection and Canadian Laws*, report prepared for Industry Canada and Canadian Heritage, October 1998, <<http://publications.gc.ca/collections/Collection/C2-370-1998E.pdf>>, p. xiv, stating in relation to the criterion of ‘the author’s own intellectual creation’ in the EU Database Directive that ‘[t]he reference to “intellectual creation” would appear to stipulate some qualitative or creative factor.’

<sup>10</sup> See CJEU *Painer* (2011), *supra* note 2, para. 89; and CJEU *Football Dataco* (2012), *supra* note 2, para. 38.

originality standard (Section 4). This suggests that the ‘no other criteria’-rule in EU copyright law must not be understood literally in the sense that it bans all other criteria than originality. If the originality criterion is meant to define the subject-matter of copyright, there should be some room for taking other criteria into account in cases where the originality criterion fails to adequately demarcate protectable from unprotectable subject-matter (Section 5).

## 1. Legislative history of the ‘no other criteria’-clause in EU copyright law

The legislative history of the EU Directives harmonizing the originality criterion is obviously the first place to find out what the ban on other criteria than originality precisely entails. As this section reveals, however, neither the drafting history of the Computer Programs Directive nor of the Term Directive or the Database Directive offer a substantive explanation for why other criteria, including in particular aesthetic and qualitative criteria, must be avoided when judging on the eligibility for copyright protection of a work. The only justification that the preparatory materials put forward for precluding criteria of this kind is the pragmatic reason of approximating the Member States’ laws. National courts had to be instructed to abandon prior case law in which aesthetic or qualitative criteria were taken into consideration, so as to eliminate national divergences in protection. To fix the threshold for protection at one and the same level, all criteria raising or lowering the bar simply had to be removed.

### 1.1 *Computer Programs Directive*

The initial proposal for a Directive on the legal protection of computer programs did contain a provision on originality, but failed to define it.<sup>11</sup> This attracted criticism from the Economic and Social Committee, which reasoned that without harmonization ‘the continued existence of different degrees of originality in different Member States could act as a barrier to trade in computer programs between Member States.’<sup>12</sup> The committee suggested that the test for originality should be that the program has not been copied from another program. Moreover, it argued that there should be no requirement that the program meet aesthetic, qualitative or quantitative criteria or display a particular level of programming expertise.<sup>13</sup>

The European Parliament responded to these suggestions and proposed that ‘[a] computer program shall be protected if it is original in the sense that it is the result of the author’s own creative intellectual effort. No other criteria shall be applied to determine its eligibility for protection.’<sup>14</sup> The Commission accepted this amendment, but changed ‘the author’s own creative intellectual effort’ into ‘the author’s own intellectual creation’. Moreover, it added the recital: ‘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 aesthetic merits of the program should be applied’.<sup>15</sup> These clauses were adopted in the final text of the Directive.

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<sup>11</sup> Art. 1(4)(a) Proposal for a Council Directive on the legal protection of computer programs, COM(88) 816 final, *OJ C* 91/4 of 12 April 1989 read: ‘A computer program shall not be protected unless it satisfies the same conditions as regards its originality as apply to other literary works’.

<sup>12</sup> Economic and Social Committee, Opinion on the proposal for a Council Directive on the legal protection of computer programs, *OJ C* 329/4 of 30 December 1989, par. 3.3.3.1.

<sup>13</sup> *Ibid.*, par. 3.3.3.3.1 to 3.3.3.3.3. This echoes the Explanatory Memorandum of the proposal for a Directive on the legal protection of computer programs, *supra* note 11, which included a similar statement.

<sup>14</sup> Amendment no. 4 of the Proposal for a Council Directive on the legal protection of computer programs (Text amended by the European Parliament), *OJ C* 231/78 of 17 September 1990.

<sup>15</sup> Amended proposal for a Council Directive on the legal protection of computer programs, *OJ* No C 320/22 of 20 December 1990.

The legislative history reveals that, when establishing legal protection for computer programs in the EU, the main reason for harmonizing the originality criterion and for introducing the clause that ‘no other criteria shall be applied’ was to eliminate barriers to the free movement of computer programs within the Community.<sup>16</sup> Before adoption of the Computer Programs Directive, there was great disparity amongst Member States on the matter of protection of computer programs. Not all Member States expressly protected computer programs under copyright law and in those Member States that did, the courts applied different standards of originality to determine whether a computer program qualified for protection.<sup>17</sup>

In the 1985 *Inkasso-Programm* decision, for example, the German Federal Supreme Court adopted a high standard of originality for computer programs, requiring an ‘above-average creative effort’ on the part of the programmer. It held that, in comparison with pre-existing computer programs, the program must not only reveal ‘the presence of original, creative characteristics’; the creativity expressed in the selection, accumulation, arrangement and organization of the program must also exceed ‘the know-how of the average programmer, mere craftsmanship, [and] the mechanical/technical linking and assembly of the material’.<sup>18</sup>

By contrast, in the 1986 *Atari* and *Williams Electronics* judgments, the French Court of Cassation overturned two rulings by the Paris Court of Appeals denying protection to video games on aesthetic and artistic grounds. In *Atari*, the Court did not accept the claim for copyright protection because it found that the computer program did not manifest the kind of originality of expression likely to confer on it ‘an aesthetic character worthy of the concerns of the legislator’.<sup>19</sup> In *Williams Electronics*, the Court rejected the claim that there was similarity between the video game and a cinematographic work, holding ‘that the creator of the video game, in contrast to a filmmaker, was not in any way preoccupied with aesthetic or artistic pursuit’.<sup>20</sup> The French Court of Cassation found that the Court of Appeals had erred in both instances and ruled that copyright extends ‘to any work that is the result of an original intellectual creation and does not depend on aesthetic or artistic considerations’.<sup>21</sup>

These examples clearly illustrate that courts in different Member States applied substantially divergent standards of originality to determine whether a computer program was eligible for

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<sup>16</sup> See European Commission, Green Paper on Copyright and the Challenge of Technology – Copyright issues requiring immediate action, COM(88)172 final, Brussels, 7 June 1988, p. 187-188 (only carefully indicating the need for legislative action, arguing that it was still ‘premature to exaggerate the seriousness of the problem’); the Explanatory Memorandum of the proposal for a Directive on the legal protection of computer programs, *supra* note 11; and the Opinion of the Economic and Social Committee, *supra* note 12, par. 2.3 and 3.3.3.

<sup>17</sup> See Green Paper on Copyright and the Challenge of Technology 1988, *supra* note 16, p. 178 and 186-188; and Report from the Commission to the Council, the European Parliament and the Economic and Social Committee on the implementation and effects of directive 91/250/EEC on the legal protection of computer programs, COM(2000) 199 final, Brussels, 10 April 2000, p. 5 and 8-10.

<sup>18</sup> BGH, 9 May 1985, I ZR 52/83, *IIC* 1986, 681 (‘Collection Program’ (*Inkasso-Programm*)), p. 688. This ruling was upheld in BGH, 4 October 1990, I ZR 139/89, *IIC* 1991, 723 (‘Operating System’ (*Betriebssystem*)), p. 725, but later abandoned following the implementation of the Computer Programs Directive in German copyright law. See e.g. BGH, 14 July 1993, I ZR 47/91, *GRUR* 1994, 39 (*Buchhaltungsprogramm*).

<sup>19</sup> CA Paris (*13e ch.*), 4 June 1984, *Valadon v. Atari*, *RIDA* no. 123 (1985), 178-182, p. 181.

<sup>20</sup> CA Paris (*13e ch.*), 20 February 1985, *Williams Electronics v. Claudie Tel & Société Jeutel* (unpublished).

<sup>21</sup> Cass. ass. plén., 7 March 1986, *Williams Electronics v. Claudie Tel & Société Jeutel*, *RIDA* no. 129 (1986), 132-133, p. 133; Cass. ass. plén., 7 March 1986, *Atari v. Valadon*, *RIDA* no. 129 (1986), 134-138 (note A. Lucas), p. 135. See also Cass. ass. plén., 7 March 1986, *Babolat Maillot Witt v. Jean Pachot*, *RIDA* no. 129 (1986), 130-131, arguing ‘that the scientific character of computer programs was no obstacle to their protection by copyright law’ and accepting that the software developed by Mr. Pachot was sufficiently original, because it ‘bore the mark of his intellectual contribution’ and resulted from ‘a personalized effort that goes beyond the mere application of an automatic and compulsory logic’.

copyright protection. In Germany, the Federal Supreme Court required creativity to surpass a certain level of programming expertise, which according to some commentators introduced ‘a qualitative criterion to preserve the purity of the system’.<sup>22</sup> Initially, some French courts had required video games to satisfy a particular aesthetic degree in order to qualify for copyright protection, but later these rulings were overturned by the French Court of Cassation.

In the drafting process, it was argued that the distortions arising from the divergent standards of originality had to be eliminated in order to create a genuine common market for computer programs. This explains why the EU legislator harmonized the originality criterion in this area. Other than defining originality as the author’s own intellectual creation, it ruled that ‘no other criteria shall be applied’. This should remind courts in the Member States to abandon earlier national originality standards, at least insofar as quality, merit or any other criterion that does not concern the author’s own intellectual creation was deemed part of them.<sup>23</sup>

## 1.2 Term Directive

The rationale for harmonizing the originality criterion with regard to photographs in the Term Directive follows a similar internal market reasoning, although it was rather a side-effect of harmonizing the copyright term for photographic works than a premeditated goal.<sup>24</sup> That is, defining originality was deemed necessary to satisfactorily harmonize the term of protection for photographic works.<sup>25</sup> At the time, national rules governing the protection of photographs diverged widely amongst the Member States. Some Member States, such as Germany, Spain and Italy, even had a two-tier protection regime, granting copyright (with a longer term of protection) to photographic works that were sufficiently original and a neighbouring right (with a shorter term of protection) to photographs lacking originality.<sup>26</sup>

Initially, the Commission and the European Parliament did not find it necessary to harmonize the substance of copyright entitlements in relation to photographs.<sup>27</sup> The Commission’s initial and amended proposals merely stipulated that ‘[p]rotected photographs shall have the term of protection provided for in Article 1’,<sup>28</sup> thus conferring one and the same harmonized term of protection on all protected photographs (whether protected by copyright or by a neighbouring right).<sup>29</sup> The European Parliament did not propose any amendment to this rule.<sup>30</sup>

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<sup>22</sup> R. Casas Vallés, ‘The Requirement of Originality’, in *Research Handbook on the Future of EU Copyright*, ed. by E. Derclaye (Cheltenham, UK [etc.]: Edward Elgar, 2009), 102-132, p. 120.

<sup>23</sup> Report on the legal protection of computer programs, *supra* note 17, p. 10.

<sup>24</sup> See Van Eechoud 2012, *supra* note 5, p. 62 (para. 14), qualifying the harmonization of the originality test in the field of photography as ‘accidental’.

<sup>25</sup> See the Common Position of the Council of 22 July 1993 on the amended proposal for a Council Directive harmonizing the term of protection of copyright and certain related rights, the Council’s reasons, 7831/1/93 REV 1 ADD 1, Brussels, 10 August 1993, p. 9. See also recital 17 (old) Term Directive 1993.

<sup>26</sup> See S. von Lewinski, ‘Der EG-Richtlinienvorschlag zur Harmonisierung der Schutzdauer im Urheber- und Leistungsschutzrecht’, *GRUR Int.* 1992, 724, p. 728.

<sup>27</sup> See European Commission, Proposal for a Council Directive harmonizing the term of protection of copyright and certain related rights, COM(92) 33 final, Brussels, 23 March 1992, p. 36.

<sup>28</sup> See the Proposal for a Council Directive harmonizing the term of protection of copyright and certain related rights of 23 March 1992, *supra* note 27, p. 53 (Article 3); and European Commission, Amended proposal for a Council Directive harmonizing the term of protection of copyright and certain related rights, COM(92) 602 final, Brussels, 7 January 1993, p. 6 and 21 (Article 3).

<sup>29</sup> See Von Lewinski 1992, *supra* note 26, p. 728.

<sup>30</sup> See the Proposal for a Council Directive harmonizing the term of protection of copyright and certain related rights (Text amended by the European Parliament), *OJ C* 337/205 of 21 December 1992.

However, the Council found the reference to ‘protected photographs’ unsatisfactory. It feared that, if the term of protection relied on divergent national rules, ‘some photographs which were of importance within the internal market would receive no protection in certain Member States, while being protected in other Member States for a term expiring 70 years after the death of the author.’<sup>31</sup> For this reason it suggested only to harmonize the term of protection for ‘original’ photographs, leaving the protection of ‘other’ photographs to the discretion of Member States.<sup>32</sup> The European Parliament regarded this as ‘an acceptable compromise’,<sup>33</sup> to which later also the Commission agreed.

The distinction between ‘original’ and ‘other’ photographs, as proposed in the Council’s Common Position of 22 July 1993,<sup>34</sup> inevitably required a definition of what constitutes an ‘original’ photograph. The Council argued that ‘the appropriate criterion for considering a photograph original was that it should be the author’s own intellectual creation, a criterion already used in respect of computer programs in Article 1(2) of Directive 91/250/EEC’.<sup>35</sup> It also maintained that ‘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’<sup>36</sup> – a somewhat misleading assertion given that the Berne Convention contains no definition of originality.<sup>37</sup> Even so, this proposal raised no controversy and the originality criterion was eventually adopted together with the ‘no other criteria’-clause.<sup>38</sup>

The provision that ‘no other criteria shall be applied’ is not further clarified in the preparatory documents or the text of the Directive, except for the futile explanation in one recital that ‘no other criteria such as merit or purpose’ should be applied.<sup>39</sup> Although the originality criterion and the ‘no other criteria’-clause are copied verbatim from the Computer Programs Directive, the recitals of the latter Directive do not refer to ‘merit’ or ‘purpose’. These words do appear, however, in the French Copyright Act (see Section 2 below). This strongly suggests that the introduction of the provision is somehow connected to national affairs.

Indeed, an examination of the national regimes for the protection of photographs in the years prior to the adoption of the Term Directive shows that some Member States, notably France, had made copyright protection of photographs conditional on additional requirements. Until 1985, copyright in France extended only to photographs that possessed an ‘artistic or documentary character’.<sup>40</sup> This required the courts to determine whether a photographic work was artistic or documentary in nature, thus inviting them to delve into considerations of merit or purpose.<sup>41</sup> It is very plausible, therefore, that the EU legislator introduced the ‘no other

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<sup>31</sup> Common Position of the Council of 22 July 1993, the Council’s reasons, *supra* note 25, p. 9.

<sup>32</sup> *Ibid.*, p. 9-10.

<sup>33</sup> Recommendation of the Committee on Legal Affairs and Citizens’ Rights on the Common Position established by the Council with a view to the adoption of a directive harmonizing the term of protection of copyright and certain related rights (C3-0300/93—SYN 0395), rapporteur: Mr Carlos María Bru Puron, European Parliament session documents A3-0278/93 of 8 October 1993, p. 6.

<sup>34</sup> Common Position adopted by the Council on 22 July 1993 with a view to adopting a directive harmonizing the term of protection of copyright and certain related rights, 7831/1/93 REV 1, Brussels, 22 July 1993.

<sup>35</sup> Common Position of the Council of 22 July 1993, the Council’s reasons, *supra* note 25, p. 9.

<sup>36</sup> Recital 17 of the Common Position adopted by the Council on 22 July 1993, *supra* note 34. This recital was adopted as recital 17 (old) Term Directive 1993 and is still included in recital 16 Term Directive 2006.

<sup>37</sup> See Van Echoud et al. 2009, *supra* note 3, p. 32-33.

<sup>38</sup> Art. 6 (old) Term Directive 1993; art. 6 Term Directive 2006.

<sup>39</sup> See recital 17 (old) Term Directive 1993 and recital 16 Term Directive 2006.

<sup>40</sup> Art. 3 of the French Copyright Law of 11 March 1957, as abolished by the Law of 3 July 1985.

<sup>41</sup> See e.g. J.C. Ginsburg, ‘Reforms and Innovations Regarding Authors’ and Performers’ Rights in France: Commentary on the Law of July 3, 1985’, (1985) 10 *Colum.-VLA J.L. & Arts* 83, p. 114.

criteria'-clause so as to remind national courts, when determining the eligibility for copyright protection of original photographs, not to consider previous national standards that rely on criteria such as merit or purpose. The only thing that counts is whether the photograph is original. As observed above, this would be consistent with the rationale behind the 'no other criteria' provision and recital in the Computer Programs Directive.

### 1.3 Database Directive

The drafting history of the Database Directive shows that the originality criterion and the 'no other criteria'-clause were included from the very start. Both the initial and the amended proposals provide that copyright extends to databases which are 'the author's own intellectual creation' and that '[n]o other criteria shall be applied to determine the eligibility of a database for this protection', thereby referring in particular to 'aesthetic or qualitative criteria' in the proposed recitals.<sup>42</sup> These provisions made it into the final text of the Directive.<sup>43</sup>

The rationale for harmonizing the originality criterion for databases was clearly to remove barriers to the free movement of database products across the Community resulting from differences in national originality standards.<sup>44</sup> The Explanatory Memorandum states that:

'A first and fundamental difference relates to the standard of originality which a particular Member State might apply to determine whether a database is protectable or not. Given the considerable variations in the tests of originality which are currently applied, the same database could be protected in some Member States and not protected in others, or protected not as a database but as a different type of work.'<sup>45</sup>

The first evaluation report states more explicitly that at the time of adoption of the Directive 'the difference between the lower "sweat of the brow" copyright standard ... that applied in common law Member States and the higher "intellectual creation" standard that applied in *droit d'auteur* Member States created distortion of trade in "database products".'<sup>46</sup>

The Explanatory Memorandum further explains that it was a deliberate choice to apply the same definition of originality in the Database Directive as the one retained in the Computer Programs Directive. It states: 'Given the similarity in the creative processes involved and the fact that software is an essential component in database management, it seems appropriate to rationalize the definition of the criteria for eligibility for protection into one and the same formulation.'<sup>47</sup> The 'author's own intellectual creation' test was deemed to be an originality standard that is in compliance with Article 2(5) Berne Convention.<sup>48</sup>

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<sup>42</sup> See European Commission, Proposal for a Council Directive on the legal protection of databases, COM(92) 24 final, Brussels, 13 May 1992, p. 60 (recitals 14 and 15) and 67 (Article 2(3)); and European Commission, Amended proposal for a Council Directive on the legal protection of databases, COM(93) 464 final, Brussels, 4 October 1993, p. 10 (recitals 14 and 15) and 17 (Article 2(3)).

<sup>43</sup> Art. 3(1) and recital 16 Database Directive 1996.

<sup>44</sup> European Commission, DG Internal Market and Services Working Paper: First evaluation of Directive 96/9/EC on the legal protection of databases, Brussels, 12 December 2005, p. 3. See also recitals 3 Database Directive 1996.

<sup>45</sup> Proposal for a Council Directive on the legal protection of databases, *supra* note 42, p. 14 (para. 2.2.5).

<sup>46</sup> First evaluation of Directive 96/9/EC on the legal protection of databases, *supra* note 44, p. 3.

<sup>47</sup> Proposal for a Council Directive on the legal protection of databases, *supra* note 42, p. 42 (para. 2.3).

<sup>48</sup> See Follow-up to the Green Paper: Working Programme of the Commission in the field of Copyright and Neighbouring Rights, COM(90) 584 final, Brussels, 17 January 1991, p. 20. Art. 2(5) BC relates to 'collections of literary or artistic works ... which, by reason of the selection and arrangement of their contents, constitute intellectual creations'.



The ‘no other criteria’-rule reinforces the harmonized ‘author’s own intellectual creation’ test by fixing the standard of originality at one and the same level for all Member States. The rule is particularly directed at the courts in those Member States that prior to the adoption of the Database Directive entertained a lower originality test in relation to databases.<sup>49</sup> In the UK, for example, the originality of tables, compilations and databases was traditionally assessed against the ‘sweat of the brow’ criterion, pursuant to which originality is considered to arise from the author’s skill, labour and effort, whether that be ‘the appropriate skill, labour, and effort’ or ‘a sufficient amount of routine labour’.<sup>50</sup> If the eligibility for copyright protection of databases in the UK continued to depend on the investment of skill, labour and effort without any element of creativity being exerted, this could obfuscate the two-tier protection of the Database Directive. In addition to copyright protection for original databases, the Directive provides for a *sui generis* right to protect non-original databases that involve ‘qualitatively or quantitatively a substantial investment in either the obtaining, verification or presentation’ of their contents.<sup>51</sup> Thus, the copyright protection provided for by the Database Directive should only extend to those databases that are the ‘author’s own intellectual creation’.

This reading seems to be corroborated by the CJEU’s judgment in the *Football Dataco* case, ruling that the significant labour and skill required for setting up a database ‘cannot as such justify the protection of it by copyright under Directive 96/9, if that labour and that skill do not express any originality in the selection or arrangement of that data’.<sup>52</sup> The CJEU also held that, for the purpose of assessing the eligibility of the database for copyright protection, it is irrelevant whether or not the selection or arrangement of the data ‘includes “adding important significance” to that data’, since the Database Directive explicitly excludes any other criteria than originality.<sup>53</sup> Consequently, the CJEU affirmed that databases can only attract copyright protection if they are the author’s own intellectual creation, thus excluding any ‘sweat of the brow’ criterion for the purpose of assessing the originality of a database.<sup>54</sup>

## 2. The preclusion of quality, merit, aesthetics and purpose at the national level

The previous overview demonstrates that, except for the purpose of harmonizing the level of originality in particular areas, the EU legislator has not given any substantive justification for the ‘no other criteria’-clause. Also, it refrained from defining the elementary terms ‘quality’, ‘merit’, ‘aesthetics’ and ‘purpose’, thus leaving uncertainty about the legal significance and practical implications of the ban on taking other criteria than originality into account.

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<sup>49</sup> See e.g. P.B. Hugenholtz, ‘Het einde van het omroepbladenmonopolie nadert’, *Mediaforum* 1995-7/8, p. 82, asserting that the ‘no other criteria’-clause suggests that ‘[t]he EU legislator apparently did not want national (quasi) copyright regimes with a lower originality threshold to subsist’. See also First evaluation of Directive 96/9/EC on the legal protection of databases, *supra* note 44, p. 8.

<sup>50</sup> See L. Bently & B. Sherman, *Intellectual Property Law*, 3rd edn (Oxford: Oxford University Press, 2009), p. 104-106. See e.g. *Football League Ltd. v. Littlewoods Pools Ltd.*, [1959] Ch. 637, 656 (Chancery Division, 13 May 1959), Upjohn J. arguing that, while copyright cannot extend to a compilation in which ‘there is no element of skill, of selection, of taste, of judgment or of ingenuity’, the production of a chronological list from a clubs’ list may well involve sufficient ‘painstaking hard work’ and accuracy to justify a claim for copyright.

<sup>51</sup> Art. 7(1) Database Directive 1996.

<sup>52</sup> CJEU *Football Dataco* (2012), *supra* note 2, para. 42.

<sup>53</sup> *Ibid.*, para. 41.

<sup>54</sup> See e.g. Howell 1998, *supra* note 9, p. xiv: ‘The preclusion of “other criteria” [in the EU Database Directive] would likely exclude any “sweat of the brow” criterion’; and E. Derclaye, ‘Football Dataco: skill and labour is dead!’, *Kluwer Copyright Blog*, 1 March 2012, <<http://kluwercopyrightblog.com>>.

The fact that the phrasing of the recitals of the EU directives is somewhat different adds to the uncertainty. While the Computer Programs Directive refers to ‘the qualitative or aesthetic merits of the program’, the Term Directive excludes ‘other criteria such as merit or purpose’ and the Database Directive states that ‘no aesthetic or qualitative criteria should be applied’. Especially the latter reference seems to have a broader meaning than the language used in the other two directives. The word ‘merit’ most probably relates to evaluative judgments about the work’s value or worth,<sup>55</sup> whereas the term ‘aesthetic criteria’ can have a broader meaning and might also include, in addition to aesthetic evaluations, descriptive judgments about the work’s artistic or decorative features (which of course does not rule out that such judgments also have an element of evaluation implicitly or explicitly enshrined in them).

Consultation of the different language versions of the Database Directive suggests, however, that the reference to ‘aesthetic or qualitative criteria’ also signifies the work’s aesthetic value or worth, as the French text refers to ‘*la qualité ou ... la valeur esthétique*’ and the German text to ‘*der Qualität oder des ästhetischen Wertes*’. Accordingly, the different language of the three EU directives does not necessarily imply a variation in meaning.

Still, this does not explain what these terms precisely entail. Since EU copyright law is clearly inspired by national law, this section attempts to find evidence for the meaning of the ‘no other criteria’-rule in the laws of the Member States. In particular, it examines whether there is some consensus between EU Member States about qualitative and aesthetic criteria that necessarily need to be avoided by the courts in determining copyright eligibility. To this end, the law and case law of France, the United Kingdom, the Netherlands and Germany are analysed with a view to find qualitative and aesthetic criteria that the lawmakers or the courts have identified as being irrelevant for establishing copyright, and to learn what these criteria actually mean to suppress. We shall conclude that the law intends to eliminate all subjective evaluative judgments about the value or worth of a creation, but that, in practice, when judges are supposed to exclude evaluation, it sometimes proves difficult to totally ignore the success or value of a work when judging on its eligibility for protection.

## 2.1 France

Since 1957, the French Law on Literary and Artistic Property states that: ‘The provisions of this law shall protect the rights of authors in all works of the mind, whatever their kind, form of expression, merit or purpose.’<sup>56</sup> This rule, which applies to all works of authorship, is now laid down in Article L 112-1 of the French Code of Intellectual Property.<sup>57</sup> Consequently, in France, the law specifically instructs courts not to consider the ‘merit’ or ‘purpose’ of a work when judging on its eligibility for protection. The Court of Cassation has explained what this entails, namely that the law protects all original creations, regardless of their artistic value or their aesthetic merit.<sup>58</sup> This has been repeatedly reaffirmed in French case law.<sup>59</sup>

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<sup>55</sup> See also C. Carreau, *Mérite et droit d’auteur* (Paris: L.G.D.J., 1981), p. 35 (para. 20), stating with regard to Art. L112-1 of the French Intellectual Property Code: ‘*L’exclusion du mérite, c’est-à-dire l’interdiction de tout jugement sur la valeur ou la qualité des œuvres de l’esprit ...*’.

<sup>56</sup> Art. 2 of the French Law no. 57-298 of 11 March 1957 on Literary and Artistic Property.

<sup>57</sup> Art. L 112-1 of the French Intellectual Property Code, Law no. 92-597 of 1 July 1992.

<sup>58</sup> Cass. crim., 2 May 1961, *Sté Gautreau v. Legrod*, JCP éd. CI 1961, 69466, note P. Aymond.

<sup>59</sup> See e.g. Cass. civ. 1<sup>ère</sup>, 11 February 1997, *Sté Zip Zag*, JCP G 1997, II, 22973, note X. Daverat, reversing a ruling by the Paris Court of Appeals in which copyright protection was refused to a button in the shape of a marine node on the ground that the model was not new; and TGI Paris (31<sup>e</sup> ch.) 14 March 2012, *Ministère public v. Riazuelo*, *Revue Lamy Droit de l’Immatériel* no. 83, 2012, p. 22-23 (excerpts of the ruling), dismissing

The courts, however, do not totally abstain from making qualitative or aesthetic observations about works. As we shall see in Sections 3 and 4, they sometimes invoke qualitative criteria to categorically exclude certain types of creations, mostly products of know-how or technique, from the scope of copyright protection. Also, to determine whether a work is amply original to attract copyright, they occasionally assess whether it shows signs of aesthetic choices that reflect the author's personality. Obviously, there is a thin line between qualitative or aesthetic observations of this kind and judgments about artistic value or aesthetic merit. To understand what the statutory ban on considering merit or purpose precisely entails, therefore, we must consider the origins and the historical background of this rule.

The rule dates back to the Law of 11 March 1902, which introduced a provision into French copyright law, stating that sculptors and designers of ornaments enjoy copyright protection, 'whatever the merit or purpose' of their works. This provision is an elaboration of the theory of the 'unity of art' (*'l'unité de l'art'*),<sup>60</sup> pursuant to which works of applied art and industrial design must be protected on the same footing as 'pure' artistic works (e.g. works of fine or graphic art). The background is the controversy around the protection of works of applied art and industrial design as artistic works in the second half of the nineteenth century.

The nineteenth century case law in France reveals that the subject matter brought before the courts were not really masterpieces, to say the least. As Renouard observes: 'In artistic as in literary matters, there is no correlation between the amount and weightiness of judicial debate, and the importance of the productions in question. The flimsiest are often those that give rise to the greatest number of trials.'<sup>61</sup> Indeed, in his study of nineteenth century French case law, Lalignant found that the courts had conferred protection on various productions of a non-aesthetic nature, including simple advertisements, trade circulars, humble instructions for a pump, synoptic tables, tables of contents, technical drawings of a strictly industrial nature, a simple hallmark for stamping jewelry, and so forth.<sup>62</sup> This stood in stark contrast to the belief 'that the natural and original calling of the literary and artistic property right was to protect works of the belles-lettres and the beaux arts, that is to say works of an aesthetic nature'.<sup>63</sup> As Lalignant explains, due to a renewed historical consciousness, 'an unprecedented importance began at last to be attached to art' around the 1860's.<sup>64</sup> In an attempt to distinguish works of applied art or industrial design from works of art proper, therefore, some French courts began to consider whether useful products were aesthetic or artistic in nature.<sup>65</sup>

This raised the question of whether criteria such as merit and purpose should actually matter. Some legal commentators strongly refuted that copyright could only extend to works with an

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arguments that, because of its disputable scientific quality, a draft thesis could not attract copyright, holding that the work was sufficiently original because it showed enough marks of the researcher's personality.

<sup>60</sup> See e.g. G. Finnis, 'The Theory of "Unity of Art" and the Protection of Designs and Models in French Law', 46 *Journal of the Patent Office Society* 615 (1964).

<sup>61</sup> A.-Ch. Renouard, *Traité des droits d'auteurs, dans la littérature, les sciences et les beaux-arts*, 2 vols (Paris: Renouard, 1838-1839), II, p. 81 (no. 36). Citation taken from F. Rideau, 'Commentary on the Court of Cassation on originality (1857)', in: *Primary Sources on Copyright (1450-1900)*, eds L. Bently & M. Kretschmer, www.copyrighthistory.org (2008), para. 5.

<sup>62</sup> O. Lalignant, 'La révolution française et le droit d'auteur ou pérennité de l'objet de la protection', *RIDA* no. 147, 1991, 2-123, p. 32-47.

<sup>63</sup> *Ibid.*, p. 52-53.

<sup>64</sup> *Ibid.*, p. 50-51.

<sup>65</sup> See Trib. corr. Seine, 20 June 1891, *Lévy*, Ann. 1894, p. 51; Cass. crim., 3 March 1898, *Charrier v. Tixier*, Ann. Prop. Ind. 1899, p. 72; CA Paris, 17 November 1900, *Dalloz* 1901, 2, p. 336; Cass. req., 27 July 1903, *Lavagne et Cie v. Chautrel frères*, *Dalloz* 1903, 1, p. 488; Angers, 19 January 1904, *Dalloz* 1904, 2, p. 137.

aesthetic purpose or with literary or artistic quality or merit. In 1879, Pouillet asked: ‘if we take for example the art of a designer, what does it matter if his design is intended to decorate a wall or used as a label or sign. Will its character change as a result? Will it be less a work of art? Does the artistry depend on the purpose of the work?’<sup>66</sup> He emphasized that creation was the only relevant factor for vesting an exclusive property right in the author’s work. He wrote: ‘What belongs to the author, what he can claim, is the form of his thought as manifested in the work that he wrote, painted or sculptured.’<sup>67</sup> From this principle, he deduced that criteria such as quality and merit ought to be insignificant in establishing copyright. He contended: ‘We have established as a principle that the right of the author derives from creation; now there are certainly many different degrees of creation, and if the law only owed its protection to the Homers and the Phydias, it might well be called a law of exception. The law does not, therefore, judge works: it weighs neither their merit, nor their importance; it protects them all, blindly; short or long, good or bad, useful or dangerous, fruit of genius or of the mind, simple product of labour or patience, every literary or artistic work is admitted and may benefit from the provisions of the law’.<sup>68</sup> He argued that the law is not concerned with the intrinsic value of a work. Ultimately it is for the public to decide whether or not to buy it.<sup>69</sup>

In these extracts, Pouillet bundles together a number of arguments for why purpose and merit ought to be ignored by the courts in deciding whether or not a work attracts copyright. First, he makes a link between the purpose of the creation and the genre or category of works to which it belongs, stating that creation is the only relevant act for establishing copyright and that protection ought not to be denied to works that are not made solely or largely for their aesthetic effect. Historically, this argument seems very much tied to the inclusion of works of applied art and design in copyright law. Second, he contends that copyright must not depend on the quality of the creation, thus arguing that courts should not evaluate whether a work succeeds or fails as art. Third, Pouillet implicitly states that the commercial success of a work ought to be irrelevant for establishing copyright, as it is up to the public to decide whether or not to buy a work. This observation follows from the idea that courts should not skew the market by making aesthetic evaluations. Thus, in his plea for disregarding merit and purpose, Pouillet uses arguments based not only on genre or work distinctions and aesthetic evaluation, but also on commercial success. This shows that the exclusion of merit and purpose may actually cover more than what it suggests at first. This might create confusion when courts try to apply these criteria in practice.

On a more pragmatic level, evidence that the merit or purpose of a work is irrelevant was also found in the law, which granted protection to works without discrimination. The Decree of 19 July 1793, which governed the protection of copyrightable works in France throughout the nineteenth century, explicitly referred to ‘writings of all kind’, engravings and ‘any other product of the mind or of genius within the domain of the fine arts’.<sup>70</sup> This broad wording gave the courts wide discretion to protect ‘all writings, whatever their purpose, whether it related to history, science, the arts, philosophy or business’ and ‘any composition relating to

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<sup>66</sup> E. Pouillet, *Traité théorique et pratique de la propriété littéraire et artistique et du droit de la représentation* (Paris: Marchal, Billard et Cie., 1879), p. 72 (no. 78); Renouard 1838-1839, II, *supra* note 61, p. 81-82 (no. 36).

<sup>67</sup> Pouillet 1879, *supra* note 66, p. 26 (no. 14).

<sup>68</sup> *Ibid.*, p. 28 (no. 16). Citation and translation taken from F. Rideau, ‘Commentary on the Court of Cassation on compilations (1814)’, in: *Primary Sources on Copyright (1450-1900)*, eds L. Bently & M. Kretschmer, [www.copyrighthistory.org](http://www.copyrighthistory.org) (2008), footnote 1. See also A. Gastambide, *Traité théorique et pratique des contrefaçons en tous genres* (Paris: Legrand et Descauriot, 1837), p. 49.

<sup>69</sup> Pouillet 1879, *supra* note 66, p. 32 (no. 20).

<sup>70</sup> Art. 1 and 7 of the French Decree of 19 July 1793 regarding the property rights of authors to writings of all kinds, of composers of music, of painters and illustrators.

the fine arts that owed its existence to an effort of the human mind'.<sup>71</sup> The Court of Cassation confirmed that, in the absence of legislative clarity, it was up to the courts to decide which categories of creation could be counted among the artistic works protected by the 1793 decree.<sup>72</sup> Because the law did not distinguish between different types of writings or different works of fine arts, protection was considered to depend neither on the value or beauty of a work, nor on its character, its object or its purpose.<sup>73</sup>

Furthermore, even if the law would want to discriminate between works on the basis of their literary or artistic character, it would be difficult to find an adequate and objective legal criterion to determine whether a work is sufficiently literary or artistic to attract copyright. With regard to artistic works, Pouillet queried: 'How could the limits of where the artistic domain ends be determined or marked? What would be the rule, the criterion? According to which characteristics can a work of art be recognized?'<sup>74</sup> It was feared that, if the law allowed courts to rely on criteria such as quality and merit, this could result in subjective and perhaps arbitrary decisions. As one French scholar observed in the early 1980's:

'Literary, musical or artistic creation appear too much a potential breeding ground of sentimental judgments for the legislator to tolerate an experiment based on individual aspirations and inclinations. ... Merit, like art itself in a way, challenges a rational understanding and appreciation of the productions under consideration. Essentially dependent on aesthetic speculation, the borders of which are far from being known, it lies in a grey area, outside the sphere of influence of the very concept of the law, verging on the arbitrary.'<sup>75</sup>

## 2.2 *The United Kingdom*

In the UK, the principle that criteria such as quality and merit are irrelevant for establishing copyright protection has been upheld by the courts with respect to literary works. In 1916, it was held by Peterson J. that the examination papers of the University of London were subject to copyright protection, even though they drew upon the stock of common knowledge, the questions they contained were of common type and the time expended in their creation was small.<sup>76</sup> He argued that copyright in literary works extends to works 'expressed in print or writing, irrespective of the question whether the quality or style is high'.<sup>77</sup> It is only required that 'the work must ... originate from the author'.<sup>78</sup> This principle was accepted by the House of Lords in a 1964 case about fixed odds football betting coupons, which the Lords found sufficiently original. They held that it was irrelevant for copyright purposes that the coupons

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<sup>71</sup> Pouillet 1879, *supra* note 66, p. 32 (no. 20) and p. 71 (no. 78).

<sup>72</sup> Cass. crim., 21 November 1862, *Betbéder et Schwalbé v. Mayer et Pierson*, *Dalloz* 1863, I, 52, available at: <[http://copy.law.cam.ac.uk/record/f\\_1862](http://copy.law.cam.ac.uk/record/f_1862)>, p. 54: 'the law, having provided no definition of the characteristics which constitute an artistic product as a creation of the mind or of genius, it is up to the case judge to declare, by a determination which must necessarily have supreme authority, whether the product submitted to his consideration may by its nature be counted among the works of art protected by the law of 19 July 1793'.

<sup>73</sup> Pouillet 1879, *supra* note 66, p. 32 (no. 20) and p. 71 (no. 78), with respect to works of art.

<sup>74</sup> *Ibid.*, p. 71-72 (no. 78).

<sup>75</sup> C. Carreau, 'Mérite et droit d'auteur', *RIDA* no. 109 (1981), 2-137, p. 7-9.

<sup>76</sup> *University of London Press Ltd v. University Tutorial Press Ltd* [1916] 2 Ch. 601 (Chancery Division, 1916), p. 608-610.

<sup>77</sup> *Ibid.*, p. 608.

<sup>78</sup> *Ibid.*, p. 609.

were created for business and not for literary purposes and that they involved no literary taste or quality.<sup>79</sup> These rulings have been reinforced by UK courts ever since.<sup>80</sup>

Since 1956 the UK Copyright Act also explicitly states that copyright subsists in most artistic works ‘irrespective of artistic quality’.<sup>81</sup> This rule is now laid down, with regard to graphic works, photographs, sculptures and collages in the 1988 Copyright, Designs and Patents Act.<sup>82</sup> Although the law does not contain a similar rule for works of architecture, many scholars submit that such works need not be ‘artistic’ to be protected.<sup>83</sup> They suggest that, rather than an artistic quality test, copyright in architectural works depends on whether such works exceed ‘the common stock of architectural ideas’ that everyone is entitled to use.<sup>84</sup> An exception does apply to works of artistic craftsmanship,<sup>85</sup> which receive copyright protection only if they have ‘an element of real artistic or aesthetic quality’.<sup>86</sup> This is often not easy to establish and, in practice, many works of craftsmanship fail to meet the test.<sup>87</sup>

Apart from this exception for works of artistic craftsmanship, the UK courts generally accept that, without any further requirement, a work is considered to be original if it originates from the author. In 2005, the UK Court of Appeal held that musical scores embodying performing editions of music were ‘original’ musical works, even though the author worked on the scores of pre-existing pieces of music that are out of copyright and had no intention of adding any new notes of music of his own.<sup>88</sup> Mummery LJ held that ‘[a] work need only be “original” in the limited sense that the author originated it by his efforts rather than slavishly copying it from the work produced by the efforts of another person.’ He explained that the ‘requirement of an “original” work has been interpreted as not imposing objective standards of novelty, usefulness, inventiveness, aesthetic merit, quality or value’, since copyright neither prevents another person from using the information, thoughts or emotions expressed in the copyright work nor from independently creating a similar work on his own. Therefore, ‘[a] work may

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<sup>79</sup> See *Ladbroke (Football) Ltd. v. William Hill (Football) Ltd.* [1964] 1 W.L.R. 273 (House of Lords, 1964), p. 281 (Lord Evershed), p. 285 (Lord Hodson), p. 290 (Lord Devlin) and p. 291 (Lord Pearce).

<sup>80</sup> See e.g. *Sawkins v. Hyperion Records Ltd.*, [2005] 1 W.L.R. 3281 (Court of Appeal, Civil Division, 19 May 2005), p. 3289 (para. 31); and *Newspaper Licensing Agency Ltd v. Meltwater Holding BV*, [2011] EWCA Civ 890 (Court of Appeal, 2011), para. 19-20.

<sup>81</sup> Sec. 3(1)(a) Copyright Act 1956.

<sup>82</sup> Sec. 4(1)(a) Copyright, Designs and Patents Act 1988.

<sup>83</sup> See Bently & Sherman 2009, *supra* note 50, p. 77; W.R. Cornish, D. Llewelyn & T. Aplin, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights*, 7<sup>th</sup> edn (London: Sweet & Maxwell, 2010), p. 454 (para. 11-16); and H. MacQueen, C. Waelde, G. Laurie & A. Brown, *Contemporary Intellectual Property: Law and Policy*, 2<sup>nd</sup> edn (Oxford: Oxford University Press, 2011), p. 78 (para. 2.82).

<sup>84</sup> See e.g. *Jones v. London Borough of Tower Hamlets* [2001] R.P.C. 23 (Chancery Division, 2000).

<sup>85</sup> Sec. 4(1)(c) Copyright, Designs and Patents Act 1988.

<sup>86</sup> Bently & Sherman 2009, *supra* note 50, p. 78.

<sup>87</sup> See e.g. *George Hensher Ltd. v. Restawile Upholstery (Lancs) Ltd.* [1976] A.C. 64 (House of Lords, 1974), affirming that furniture with a ‘boat-shaped’ design was not a work of artistic craftsmanship: ‘the appellants had failed to establish on the evidence that the prototype of their suite of furniture was regarded as a work of artistic character’; *Merlet v. Mothercare Plc.* [1984] F.S.R. 358 (Chancery Division, 13 April 1984), ruling that a hand-made prototype garment of a baby’s cape was a work of craftsmanship, but not one that is *artistic*: ‘The onlooker derived no aesthetic satisfaction from contemplating the garment itself’; *Lucasfilm Ltd v. Ainsworth*, [2008] E.C.D.R. 17 (Chancery Division, 31 July 2008), para. 134 (Mann J.) holding that the Stormtrooper helmets in the Starwars movies are not works of artistic craftsmanship: ‘Their purpose was not to appeal to the aesthetic at all’, but ‘to give a particular impression in a film’. The claim that the helmets were works of artistic craftsmanship was abandoned on appeal.

<sup>88</sup> *Sawkins v. Hyperion Records Ltd* (2005), *supra* note 80, p. 3290 (para. 36).

be complete rubbish and utterly worthless, but copyright protection may be available for it, just as it is for the great masterpieces of imaginative literature, art and music.’<sup>89</sup>

### 2.3 *The Netherlands*

In the Netherlands, the legislator has also made clear that works are to be protected regardless of their literary or artistic quality. The 1912 Copyright Act broadly defines the subject matter of copyright as ‘any production in the literary, scientific or artistic fields, whatever may be the mode or form of its expression’.<sup>90</sup> The non-exhaustive list of categories of works that are covered by the law includes, among other things, ‘books, brochures, newspapers, periodicals *and all other writings* [emphasis added]’.<sup>91</sup> The drafting history shows that the latter phrase was purposely added so as to ensure that protection would extend to all writings ‘even if they possess no literary or scientific quality whatsoever’.<sup>92</sup> The background is the protection that low/non-original writings, such as listings of sermons, festivity guides and theatre programs received under the 1881 Copyright Act. Although the protection of low/non-original writings was criticized from the very start as muddying the essence of the law and repudiating the principle that copyright law aims to protect intellectual creations in the cultural or aesthetic domain,<sup>93</sup> the legislator was very keen on maintaining this protection, considering that, in practice, it was not without economic and commercial significance.<sup>94</sup>

Likewise, the legislative history reveals that the Dutch Government did not intend to limit the application of the law to artistic works with ‘a specific and apparent artistic quality’.<sup>95</sup> Aware of the challenges posed by artistic interpretation and evaluation by the courts, it stated:

‘The question arises whether one is conscious of the particular difficulties that the legislature would impose on the court if the protection of the law was expressly or implicitly limited to works with artistic value. Where would the court have to draw the line? Which particulars should be taken into consideration? Artistic value is a matter of personal appreciation. Art history, especially of later times, gives numerous examples of artworks, which at first were denied any artistic value by very competent critics, but which eventually were praised as masterpieces.’<sup>96</sup>

Although, in the last part of the quote, the legislator conflates formal properties of what is art and substantive properties of what is influential or successful art, the point that it rightly

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<sup>89</sup> Ibid., p. 3289 (para. 28 to 31).

<sup>90</sup> Art. 10(1) Dutch Copyright Act 1912.

<sup>91</sup> Art. 10(1) sub 1 Dutch Copyright Act 1912.

<sup>92</sup> *Parlementaire geschiedenis van de Auteurswet 1912, zoals sedertdien gewijzigd* (loose-leaf), ed. by L. de Vries, 3 vols (Den Haag: Sdu, 1989 - ...), I, 10.5 (Explanatory Memorandum (*Memorie van Toelichting*) 1912).

<sup>93</sup> See e.g. L.G. van Praag, *De Auteurswet 1912 en haar verband tot de herziene Berner Conventie* (Rotterdam: Nijgh & Van Ditmar, 1912), p. 29; and F.W.J.G. Snijder van Wissenkerke, *Het auteursrecht in Nederland: Auteurswet 1912 en herziene Berner Conventie* (Gouda: Van Goor Zonen, 1913), p. 162.

<sup>94</sup> *Parlementaire geschiedenis van de Auteurswet 1912* (1989), *supra* note 92, I, 10.6 (Memorandum in Reply (*Memorie van Antwoord*) of the Dutch Lower Chamber 1912), stating that abolishing the protection of non-original writings would be a step backwards and cause a great disadvantage to many people. The legislator argued that if the protection of newspapers were restricted to that part of their contents that has literary value, this could have grave economic and commercial consequences for newspaper publishers.

<sup>95</sup> Ibid., I, 10.14 (Memorandum in Reply (*Memorie van Antwoord*) of the Dutch Lower Chamber 1912).

<sup>96</sup> Ibid., I, 10.6 (Memorandum in Reply (*Memorie van Antwoord*) of the Dutch Lower Chamber 1912).

makes is that, if even art critics cannot agree on the artistic merit of a work, how are judges supposed to arrive at solidly grounded rulings?<sup>97</sup>

The principle that copyright protection does not depend on the literary, scientific or artistic quality of a work was reinforced by Dutch courts. In a 1937 case concerning a telephone directory, the Dutch Supreme Court confirmed that, where the law qualifies a work as a ‘work of literature, science or the arts’ without stipulating any requirement of merit or purpose, it does not have to possess literary, scientific or artistic value to qualify for protection.<sup>98</sup> Although this ruling seems to merely dismiss qualitative criteria as a ground for upholding the protection for low/non-original writings, as instigated by the lawmaker, the courts also explicitly disregarded criteria such as quality and merit when ruling on the eligibility for protection of other types of works, such as works of architecture, works of applied art and other artistic works.<sup>99</sup> The courts confirmed that the originality test is the only test for determining whether a work qualifies for copyright protection.

#### 2.4 Germany

Lastly, in Germany, the Federal Supreme Court has also consistently held that copyright does not hinge on the aesthetic or artistic value of a work.<sup>100</sup> To avoid the risk of judicial prejudice or discrimination on subjective grounds,<sup>101</sup> it has repeatedly emphasized that courts ought not to engage in subjective artistic evaluations when deciding on a work’s eligibility for copyright protection.<sup>102</sup> To determine whether an object qualifies for copyright protection, the courts in Germany only have recourse to the – more or less – objective and value-neutral standard of originality.<sup>103</sup> This also fits the non-discriminatory nature of copyright law, which obviously is not a law for elite authors only. Therefore, decisions must not be evaluative in

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<sup>97</sup> See E. Lavik & S. van Gompel, ‘On the prospects of raising the originality requirement in copyright law: Perspectives from the Humanities’ (forthcoming, *Journal of the Copyright Society of the USA*, vol. 60, no. 3, spring 2013).

<sup>98</sup> Supreme Court of the Netherlands, 1 November 1937 (*Telefoongids*), NJ 1937, 1092.

<sup>99</sup> District Court Groningen, 19 November 1926 (*Smit v. Meersma*), NJ 1927, p. 162, holding that ‘originality’ is the only condition for an architectural work to be protected, stating that it is not required that it has artistic value; Court of Appeal of Amsterdam, 2 March 1961, *BIE* 1961, no. 77 (*Eierdopjes*), p. 180, stating the same with respect to works of applied art (in this case a design for eggcups); and President of the District Court ’s-Hertogenbosch, 20 April 1990, *AMI* 1992, p. 50-51, note F.W. Grosheide, holding that, irrespective of the artistic value, the design of a garden is a copyrightable work.

<sup>100</sup> BGH, 9 December 1958, I ZR 112/57, *GRUR* 1959, 289 (Rosenthal-Vase), p. 290; BGH, 3 November 1967, Ib ZR 123/65, *GRUR* 1968, 321 (Haselnuß), p. 324-325; BGH, 26 September 1980, I ZR 17/78, *GRUR* 1981, 267 (Dirlada), p. 268. See also OLG München, 15 March 1990, 29 U 4346/89, *GRUR* 1990, 674 (Forsthaus Falkenau), p. 675; and OLG München, 17 January 2002, 29 U 2021/00, *GRUR-RR* 2002, 281 (Conti), p. 281.

<sup>101</sup> See e.g. M. Kummer, ‘Die Entgrenzung der Kunst und das Urheberrecht’, in P. Brügger (ed.), *Homo creator: Festschrift für Alois Troller* [etc.]: Helbing & Lichtenhahn, 1976), 89-115, p. 100 and 102-103; and K. Knap, ‘Künstlerisches und Wissenschaftliches Werk als Schutzobjekt des Urheberrechts’, in P. Brügger (ed.), *Homo creator: Festschrift für Alois Troller* (Basel [etc.]: Helbing & Lichtenhahn, 1976), 117-133, p. 131-132.

<sup>102</sup> BGH, 3 November 1967, Ib ZR 123/65, *GRUR* 1968, 321 (Haselnuß), p. 325. This idea was already voiced in the nineteenth century. See O. Dambach, *Fünfzig Gutachten über Nachdruck und Nachbildung* (Leipzig: Verlag des Börsenvereins des Deutschen Buchhändler, 1891), p. 106, quoting a decision of the preußische Obertribunal of 1861 dismissing literary merit as criterion for protection.

<sup>103</sup> See e.g. Knap 1976, *supra* note 101, p. 126, emphasizing that the German criterion of originality is a value-free (*wertfreies*) criterion and that any effort to attach a quality standard to it misses ground.



the sense of giving preference to high literature or art.<sup>104</sup> Light fiction and industrial design are eligible for protection just as much as serious books and the *beaux arts*.<sup>105</sup>

These rulings are obviously also inspired by the desire on the part of the German legislator to continue protecting ‘works of little creative value’ (*Werke von geringem schöpferischen Wert*) under the Copyright Act 1965.<sup>106</sup> As we shall see below, works of ‘small change’ (or ‘*Kleine Münze*’) also enjoyed copyright protection in Germany before the copyright reform of 1965. The drafting history clearly shows that the German legislator did not want to give up on that.<sup>107</sup> Although the law does not explicitly provide that works are protected irrespective of quality or merit, it follows from the express recognition of protection of ‘small change’ by the German lawmaker that criteria such as quality and merit are irrelevant for establishing protection. After all, it would not fit the lawmaker’s objective to extend copyright protection to ‘works of little creative value’, if quality or merit actually mattered.

## 2.5 *Interim observations about the preclusion of qualitative and aesthetic criteria*

As the previous overview shows, in several EU Member States the idea that criteria such as quality, merit and purpose are irrelevant for determining whether something is an original work of authorship features in black letter, judge-made rules. In France, it even features in the law. From the court decisions and scholarly writings examined, it seems safe to conclude that, at a minimum, the laws of the countries considered prevent courts from making evaluative judgments about a work’s value or worth, measured in aesthetic or economic terms. Thus, the grant or refusal of copyright must not depend on public or private sentiments about intrinsic worth, literary or artistic value or commercial success.<sup>108</sup> It does not matter whether a work is admired or despised by the public or regarded as good or bad, beautiful or ugly or honorable or disreputable by the judge deciding the case.<sup>109</sup> Copyright does not hinge on the question of whether a work is a success or a failure or representative of high or low culture.

The motivations behind the exclusion of quality, merit, aesthetics and purpose as criteria for protection are mixed. One argument that is often made is that judgments on quality, merit and aesthetics are not useful in legal discourse, because they are susceptible to variation between different persons and, for that reason, cannot properly inform legal interpretation. Indeed, if even art critics cannot reach agreement on the aesthetic merit of most works, then copyright decisions must certainly not be guided by evaluations of such kind. Historically, the preclusion of criteria such as merit and purpose is also tied to genres and the reception of new

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<sup>104</sup> See e.g. G. Schulze in: T. Dreier & G. Schulze, *Urheberrechtsgesetz, Urheberrechtswahrnehmungsgesetz, Kunsturhebergesetz: Kommentar* (München: Beck, 2004), p. 52 (§ 2 note 19); and Loewenheim in: G. Schrickler & U. Loewenheim, *Urheberrecht: Kommentar*, 4th edn (München: Beck, 2010), p. 113 (§ 2 note 45);

<sup>105</sup> See e.g. BGH, 9 December 1958, I ZR 112/57, *GRUR* 1959, 289 (Rosenthal-Vase), p. 290, holding that for copyright purposes it is irrelevant whether the work (in this case an asymmetrical vase for flowers) qualifies as high or low art; and BGH, 3 November 1967, Ib ZR 123/65, *GRUR* 1968, 321 (Haselnuß), p. 323-324, confirming that copyright protection cannot be denied on the basis of the low artistic level of a musical work (in this case *Schlager* music with simple lyrics and easy tunes).

<sup>106</sup> See BGH, 3 November 1967, Ib ZR 123/65, *GRUR* 1968, 321 (Haselnuß), p. 324; and BGH, 26 September 1980, I ZR 17/78, *GRUR* 1981, 267 (Dirlada), p. 268, referring to the drafting history of the 1965 Copyright Act in which the legislator recognized that ‘works of little creative value’ continued to enjoy copyright protection.

<sup>107</sup> Begründung des Regierungsentwurfes zum Urheberrechtsgesetz (1965), Bundestags-Drucksache IV/270, 38, in: *UFITA* 45 (1965), 240-336, p. 252.

<sup>108</sup> A. Françon, ‘Préface’, in: C. Carreau, *Mérite et droit d’auteur* (Paris: L.G.D.J., 1981), 7-11, p. 7-8, stating that the French no-merit rule ‘is primarily intended to prevent that, in the event of a lawsuit, the grant or refusal of protection would depend on the greater or lesser value that the judge confers on the work’.

<sup>109</sup> See e.g. BGH, 9 May 1985, I ZR 52/83, *IIC* 1986, 681 (‘Collection Program’ (*Inkasso-Programm*)), p. 687.

categories of works in copyright law. In France, for example, the origins of this preclusion are clearly also rooted in the wish to accommodate applied arts in copyright law.

Interestingly, copyright law's ban on qualitative and aesthetic criteria has also been inspired by a desire to confer protection on 'even the most mundane of works'.<sup>110</sup> In the Netherlands and Germany, the legislature explicitly refused such criteria to ensure that particular types of low/non-original works also received protection. Accordingly, the exclusion of quality, merit, aesthetics and purpose is also motivated by an express policy choice to grant broad protection. The same can be concluded for France, and presumably also for the United Kingdom. As one legal commentator has observed, historically, in France 'the irrelevance of the aesthetic character of the subject matter of author's rights stems less from the possibility of finding an objective criterion for this aesthetic element than from the concern of the legislature and the courts to open the protection offered by author's rights as widely as possible.'<sup>111</sup>

This is an important observation. If the eschewal of criteria such as quality, merit and purpose is largely a means to induce broad protection, this suggests that it mainly instructs the courts not to use the lack of success, merit or quality of a creation as an argument to *deny* copyright to it. This does not mean that success, merit and quality are necessarily also disregarded when the courts *grant* copyright protection. In fact, in the *University of London Press v. University Tutorial Press* case, while holding that protection does not depend on whether the quality or style of writing is high, Peterson J. at the same time introduced the maxim 'what is worth copying is prima facie worth protecting'.<sup>112</sup> By prima facie conferring protection on creations that others deem worthy of copying, this maxim invites the courts to consider the commercial value of these works. This is pretty odd. If commercial failure cannot be a ground for refusing protection, why should copyright putatively extend to works wherever there is a market for them? If it is accepted that originality is the only criterion for vesting copyright, then any commercial consideration ought to be irrelevant in deciding whether a work attracts copyright, irrespective of whether such consideration affects the decision negatively or positively.

Nevertheless, in practice, it appears that copyright is sometimes easier granted to works that are successful, commercially valuable or created by renowned authors with a proven literary or artistic track record. In France, for example, there have been cases in which courts have referred to the incontestable fame of a work (in this case a videogame) as an argument that originality cannot be totally absent.<sup>113</sup> Likewise, a photographer's talent has been evoked to support a decision to protect a photograph.<sup>114</sup> In Germany, the creator's fame and reputation seems to have also played a role, at least indirectly, where the courts granted protection to the illustrious 'Wrapped Reichstag' of Christo and Jeanne Claude,<sup>115</sup> famous pieces of jewelry,<sup>116</sup> and works of well-known designers such as Charles Eames, Mart Stam and the Bauhaus artist Marcel Breuer.<sup>117</sup> It also appears that the German courts sometimes cannot escape observing

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<sup>110</sup> MacQueen et al. 2011, *supra* note 83, p. 52 (para. 2.35).

<sup>111</sup> Lalignat 1991, *supra* note 62, p. 62-63.

<sup>112</sup> *University of London Press Ltd v. University Tutorial Press Ltd* (1916), *supra* note 76, p. 610 (Peterson J.).

<sup>113</sup> TGI Paris (31<sup>e</sup> ch.), 12 December 1997, *Pierre Tel v. Midway Manufacturing Company & A.P.P.*, *Gazette du Palais* 1999, 2, sommaire, p. 447.

<sup>114</sup> CA Paris (ch. 4), 20 September 1994, *Fédération Française de Gymnastique v. Philippe Cottret*, *RIDA* no. 164 (1995), 367-373, p. 370, referring to 'the stamp of the personality and the talent of the author'.

<sup>115</sup> BGH, 24 January 2002, I ZR 102/99, *IIC* 2003, 570 ('Wrapped Reichstag - Christo').

<sup>116</sup> Oberlandesgericht Düsseldorf, 30 May 2000, 20 U 4/99, *GRUR-RR* 2001, 294 ('Niessing-Spannring').

<sup>117</sup> Oberlandesgericht Frankfurt, 19 March 1981, 6 U 160/79, *IIC* 1982, 777 ('Lounge Chair'), p. 778, protecting Charles Eames' lounge chair, considering inter alia that, despite its practical use, the chair has a 'highly aesthetic structural composition' and 'has received several awards as a work of art, and is part of the permanent

the commercial value of a work, for instance, where they conferred protection on jewelry that was imitated by a competitor and sold at an auction house for jewelry.<sup>118</sup>

These examples show that, despite the ban on quality, merit, aesthetics and purpose, national courts sometimes cannot resist referring to the commercial value and success of a work or the fame or reputation of its author when granting copyright protection to it. Therefore, when it comes to legal interpretation, courts do not necessarily find it all that easy to totally eliminate value judgments. In particular, as the next two sections reveal, while judges must certainly avoid making subjective evaluative judgments about the intrinsic value of a work, in practice, they cannot necessarily escape making some qualitative or aesthetic considerations when it comes to defining the subject-matter of copyright and applying the originality test.

### **3. Quality, aesthetics and the domain of copyright law**

The previous section demonstrates that, at the Member State level, it is widely accepted that the eligibility for copyright protection of works must not depend on a subjective qualitative or aesthetic evaluation by the courts. The ‘no other criteria’-clause at the EU level probably has a similar meaning. While this interpretation appears to be fairly straightforward, in practice, it may cause problems in court, when judges are supposed to eliminate qualitative and aesthetic evaluation. As this and the following section will illustrate, in determining whether or not a work properly fits the domain of copyright law and satisfies the originality standard, the courts sometimes cannot do without qualitative or aesthetic considerations. This suggests that the ‘no other criteria’-clause in EU copyright law must not always be applied literally.

One particular question that is not always easily answered is whether genres and categories of works are definable on formal properties alone. In practice, the courts must sometimes make a qualitative or aesthetic assessment to determine the genre or category of works to which a creation belongs. This is certainly the case in the United Kingdom, where a creation attracts copyright only if it fits one of the statutory categories of works (Section 3.1). Elsewhere, the courts must make a similar appraisal when they have to resolve whether a new type of subject matter rightly belongs to the copyright domain (Section 3.2). Finally, aesthetic observations can also help courts to decide cases at the borderline between copyright law and the technical or functional domain (Section 3.3). This section examines these three situations.

#### *3.1 The statutory categories of works*

In most countries, no own, separate significance is attached to the words ‘literature’, ‘science’ and ‘art’ as categories of copyrightable works. In France, Germany and the Netherlands, the law does not exhaustively state the types of creations that are eligible for copyright protection, but only lists examples to indicate the kinds of categories of works that attract copyright.<sup>119</sup> As a result, in determining whether or not a creation is eligible for protection, the courts do not consider whether it properly fits the category of ‘literary works’, ‘scientific works’ or ‘artistic works’. The only test that they apply is whether the work is sufficiently original.

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exhibit at the Museum of Modern Art in New York City’; Oberlandesgerichts Düsseldorf, 19 March 1996, 20 U 178/94, *ZUM* 1998, 61 (‘Stahlrohrstuhl von Mart Stam’), p. 64; and Oberlandesgerichts Düsseldorf, 30 May 2002, 20 U 81/01, *ZUM-RD* 2002, 419 (‘Breuer-Hoocker’), p. 423-424.

<sup>118</sup> Oberlandesgericht Frankfurt am Main, 22 March 2005, 11 U 49/03, *ZUM-RD* 2005, 504.

<sup>119</sup> See art. L 112-2 French Intellectual Property Code; art. 2(1) German Copyright Act and art. 10(1) Dutch Copyright Act.

This is different in the UK, where the law contains a closed list of protectable works.<sup>120</sup> To be eligible for copyright protection, a creation must fit one of the statutory categories of works. This means that, before establishing whether a work is sufficiently original, UK courts must first determine whether it actually qualifies as a ‘literary work’, a ‘dramatic work’, a ‘musical work’, an ‘artistic work’, etc.<sup>121</sup> This clearly requires them to identify the formal properties of a work, by answering questions such as ‘what is art?’ or ‘what is music?’ for the purposes of the Copyright, Designs and Patents Act 1988. As Justice Arnold contends, this ‘is not an aesthetic question’.<sup>122</sup> Focusing on music, he argues that the question relies on a functional test of whether the object possesses the features to afford a kind of musical experience in the listener.<sup>123</sup> He states: ‘The question is essentially a functional one: if sounds are presented and consumed as music, that is to say, for aural enjoyment, then they are music’.<sup>124</sup>

Even so, determining whether a work fits one of the statutory categories of works sometimes requires the courts to balance on the edge of making qualitative or aesthetic considerations.<sup>125</sup> For example, in the *Lucasfilm* case, the courts had to consider whether the Stormtrooper helmets used in the Star Wars movies were ‘sculptures’ within the meaning of Section 4(1) of the UK Copyright, Designs and Patents Act. Both the Court in the first instance and the Court of Appeals asserted that, in making such determination, ‘[n]o judgment is to be made about artistic worth’.<sup>126</sup> To assess whether the helmets are sculptures, however, they did conceive their artistic character, holding that this is a slightly different criterion than artistic merit.

As Mann J. argued, while artistic merit involves making ‘a judgment about the quality of the art, or the level of artistic achievement’, looking at the artistic character determines whether ‘something ... of its nature is capable of appealing to artistic sensibilities, whether or not it succeeds in doing so’.<sup>127</sup> He believed that a work can only be a sculpture if it has an artistic character, elevating it above being a purely functional object. He held that, to be a sculpture, an object must ‘have the intrinsic quality of being intended to be enjoyed as a visual thing’ – that is, it must have ‘some element of artistic expression, however unsuccessful’.<sup>128</sup>

While the distinction proposed by Mann J. appears sensible at first sight, on closer inspection, it is not so obvious that artistic merit and artistic character are entirely distinct. There is some overlap between the two. It seems that people intuitively tend to think of an artwork’s ability to appeal to artistic sensibility as meritorious or as part of its aesthetic quality. Moreover, even if we agree that merit and character can be told apart, it does beg the question: Is it any easier to recognize artistic character than artistic merit? We think that this is a very complex

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<sup>120</sup> See Bently & Sherman 2009, *supra* note 50, p. 58 et seq.

<sup>121</sup> See sec. 1 in conjunction with sec. 3 to 8 Copyright, Designs & Patents Act 1988.

<sup>122</sup> R. Arnold, ‘Reflections on *The Triumph of Music: Copyrights and Performers’ Rights in Music*’, Oxford Intellectual Property Invited Speaker Seminar, 20 October 2009, <<http://www.oiprc.ox.ac.uk/papers/Mr%20Justice%20Arnold%27s%20paper.pdf>>, p. 2.

<sup>123</sup> *Ibid.*, p. 2, explaining that the perception of what is music is subject to generational values: ‘As is notorious, what is music to some is mere noise to others, particularly if there is a generational difference.’

<sup>124</sup> *Ibid.*, p. 2.

<sup>125</sup> See *Lucasfilm Ltd v. Ainsworth* (2008), *supra* note 87, para. 119 (Mann J.), arguing: ‘The question: “What is a sculpture?” has some of the elements about it of the unanswerable question: “What is art?”’.

<sup>126</sup> *Ibid.*, para. 118 (point iv) (Mann J.). See also *Lucasfilm Ltd v Ainsworth*, [2010] Ch. 503 (Court of Appeal, Civil Division, 16 December 2009), para. 54 and 71, accepting the point made by Mann J. Similarly, in the case of *George Hensher Ltd. v. Restawile Upholstery (Lancs) Ltd.* (1974), *supra* note 87, p. 87, Viscount Dilhorne uttered: ‘I am conscious ... of the need to avoid judicial assessment of artistic merits or quality, but I do not think that any such assessment is involved in deciding whether a work is an artistic work.’

<sup>127</sup> *Lucasfilm Ltd v. Ainsworth* (2008), *supra* note 87, para. 116 (Mann J.).

<sup>128</sup> *Ibid.*, para. 112 and 118 (point vii).

question that does not have a simple answer. The treatment of the *Lucasfilm* case below also confirms this. The judges in this case merely established some ‘loose’ guidelines to determine the artistic character of the Stormtrooper helmets. Nonetheless, in all instances, the courts came to the same conclusion that the helmets were non-artistic by nature.

At first instance, Mann J. essentially adopted a functional test to determine whether the Stormtrooper helmets were sculptures. He relied on the ability to distinguish between the artistic and the utilitarian qualities of the objects. The Court of Appeal accepted this, although it recognized that it is difficult to precisely draw the line.<sup>129</sup> Instead of adopting a single test for defining what a ‘sculpture’ is, Mann J. formulated a list of guidelines to be taken into consideration. Among other things, it includes the normal use of the word, the ordinary view of what a sculpture is, whether the object’s visual appeal is part of its purpose and whether it is made by an artist’s hand. The display of the object in a museum or gallery, although not a decisive criterion, can also be a reason for qualifying it as a sculpture.<sup>130</sup> In the end, Mann J. mostly relied on the purpose of the object, holding that the Stormtrooper helmet is not a sculpture, as it merely served to portray a character in the film. Hence, he argued that the helmet lacks artistic purpose, because ‘its primary function is utilitarian’.<sup>131</sup>

The Court of Appeal arrived at the same conclusion. It agreed that, to qualify for protection, a sculpture must ‘be a work at least intended to be a work of art’ and accepted that Mann J., by adopting the above guidelines, had taken ‘the existence of what can loosely be described as a work of art as the key to the identification of sculpture’.<sup>132</sup> However, in determining whether the sculpture is a work of art, the Court of Appeal focused chiefly on what most people would accept to be a sculpture.<sup>133</sup> Admitting that ‘this may be close to adopting an elephant test of knowing one when you see one’, it argued that this ‘is almost inevitable in this field’.<sup>134</sup>

The Supreme Court affirmed the decisions of the trial judge and the Court of Appeal that the Stormtrooper helmet is not a work of art, but ‘utilitarian in the sense that it was an element in the process of the production of the film’.<sup>135</sup> It maintained that it would not accord with the normal use of language to apply the term ‘sculpture’ to a helmet used in the making of a film, ‘however great its contribution to the artistic effect of the finished film’.<sup>136</sup> The Supreme Court was not enthusiastic about the elephant test adopted by the Court of Appeal, because ‘a judge, even one very experienced in intellectual property matters, does not have some special power of divination which leads instantly to an infallible conclusion, and no judge would claim to have such a power’.<sup>137</sup> Still, it upheld the decisions because the trial and appellate courts had neither erred in law nor reached obviously untenable conclusions.<sup>138</sup>

The *Lucasfilm* case clearly illustrates that, in the UK, a creation is not automatically treated as a ‘work’ that comes within the confines of copyright law. The courts must first determine whether the formal properties of an object fit one of the statutory categories of works. This is not always an easy task. As one Lord stated in the *George Hensher v. Restawile Upholstery*

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<sup>129</sup> *Lucasfilm Ltd v. Ainsworth* (Court of Appeal, 2009), *supra* note 126, para. 72.

<sup>130</sup> *Lucasfilm Ltd v. Ainsworth* (2008), *supra* note 87, para. 118 (Mann J.).

<sup>131</sup> *Ibid.*, para. 121 (Mann J.).

<sup>132</sup> *Lucasfilm Ltd v. Ainsworth* (Court of Appeal, 2009), *supra* note 126, para. 70 and 82.

<sup>133</sup> *Ibid.*, para. 74-76

<sup>134</sup> *Ibid.*, para. 77.

<sup>135</sup> *Lucasfilm Ltd v. Ainsworth*, [2012] 1 A.C. 208 (Supreme Court, 27 July 2011), para. 44.

<sup>136</sup> *Ibid.*, para. 44.

<sup>137</sup> *Ibid.*, para. 47.

<sup>138</sup> *Ibid.*, para. 46.

(*Lancs*) case: ‘The word “artistic” is not an easy word to construe or apply not only because it may have different shades of meaning but also because different people have different views about what is artistic.’<sup>139</sup> In this case, the House of Lords failed to reach agreement on what makes a work one of *artistic* craftsmanship. The Lords made various suggestions about how to define the word ‘artistic’ but could not agree on a common interpretation.<sup>140</sup> While some maintained that ‘the intent of the creator and its result’ or the ‘conscious intention of the craftsman’ were decisive factors for assessing the artistic nature of a work,<sup>141</sup> others held that ‘the work must be viewed in a detached and objective way ... without giving decisive weight to the author’s scheme of things.’<sup>142</sup> The Lords relied on different types of evidence, namely expert opinions, the public opinion or their own intuition,<sup>143</sup> but they still came to the same conclusion that the works under consideration (i.e., boat-shaped pieces of furniture) were not works of artistic craftsmanship.<sup>144</sup> Accordingly, even without a single defining criterion, they were able to arrive at a decision about the non-artistic nature of the works.

### 3.2 *The reception of new categories of works*

While considerations of the kind made in the UK are uncommon in countries where the law does not require a work to specifically fit the categories of literature, science or art, an assessment of formal properties can still be relevant, especially in the case of new types of subject matter. One example is perfume,<sup>145</sup> which has received copyright protection in some Member States but not in others. In 2006, the Dutch Supreme Court ruled that the scent of a perfume could attract copyright, provided that it satisfies the originality test. It held that ‘the description given in Article 10 of the Copyright Act of what is to be understood as a “work” within the meaning of that Act is general and does not rule out the inclusion of scents’.<sup>146</sup> By contrast, the French Court of Cassation ruled that a perfume fragrance ‘does not constitute the creation of a form of expression ... capable of benefiting from the protection afforded to intellectual works by copyright’. It considered that a perfume fragrance cannot give rise to a protected work because it ‘is the result of the simple application of know-how’.<sup>147</sup>

Thus, while the Dutch Supreme Court accepts that the scent of a perfume can qualify as a copyrighted work, the French Court of Cassation categorically excludes this type of creation from the scope of copyright protection.<sup>148</sup> Although little can be derived from the very brief French ruling, it seems as if the Court of Cassation does not deny that creativity is involved in

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<sup>139</sup> *George Hensher Ltd. v. Restawile Upholstery (Lancs) Ltd.* (1974), *supra* note 87, p. 78 (Lord Reid). See also, *ibid.*, p. 97 (Lord Kilbrandon).

<sup>140</sup> *Ibid.*, p. 98 (Lord Kilbrandon).

<sup>141</sup> *Ibid.*, p. 95 (Lord Simon of Glaisdale) and 97 (Lord Kilbrandon).

<sup>142</sup> *Ibid.*, p. 81 (Lord Morris of Borth-y-Gest). See also, *ibid.*, p. 78 (Lord Reid), stating that the intention of the maker or designer to give a work an artistic appeal was neither necessary nor conclusive.

<sup>143</sup> Expert evidence was relied on, *inter alia*, by Lord Morris of Borth-y-Gest and Lord Simon of Glaisdale (*ibid.*, p. 82 and 94), while Lord Reid favoured listening to the opinion of ‘any substantial section of the public’ (*ibid.*, p. 78) and Viscount Dilhorne and Lord Kilbrandon held that, while expert witnesses may testify, it is eventually for the judge to decide whether the work is artistic (*ibid.*, p. 87 and 97).

<sup>144</sup> The House of Lords unanimously dismissed the appeal.

<sup>145</sup> See A. Quaedvlieg, ‘Droit d’auteur et parfums: Le nez, l’esprit et l’industrie’, *RIDA* no. 230 (2011), p. 6-77.

<sup>146</sup> Supreme Court of the Netherlands, 16 June 2006 (*Kecofa v. Lancôme*), *NJ* 2006, 585, note J.H. Spoor, para. 3.3.2. Translation taken from Quaedvlieg 2011, *supra* note 145, p. 6.

<sup>147</sup> Cass. civ. 1<sup>ère</sup>, 13 June 2006, *Nejla Bsiri-Barbir v. Sté Haarmann et Reimer*, *RIDA* no. 210 (2006), 348-353, p. 351.

<sup>148</sup> P. Sirinelli, ‘Chronique de jurisprudence’, *RIDA* no. 210 (2006), 184-319, p. 206-207, qualifying the decision of the French Court of Cassation as a ‘leading case’ pursuant to which ‘[n]o fragrance will ever be able to accede to the rank of a protectable work’.

the conceptual phase, when the fragrance is still an abstract ‘idea’. Looking at the substance of the perfume that constitutes the form of expression of the fragrance, however, the Court concludes that a fragrance cannot come within the copyright domain, as it only results from a technical process.<sup>149</sup> In the execution phase, when the substance that comprises the fragrance is composed, it is all about skill and expertise and not about creative choices.<sup>150</sup>

Accordingly, the French Court of Cassation refuses to extend copyright protection to perfume as it considers that nothing but skill and know-how is exerted in composing the substance that comprises the perfume and that the freedom of choice is therefore too limited to constitute a copyright relevant creative contribution. It thus perceives the quality of the perfume maker’s contribution to the finished product to be of the wrong kind. By focusing its judgment on the technical contribution to producing the substance of the perfume rather than on the creative contribution to producing the fragrance itself (as did the Dutch Supreme Court),<sup>151</sup> the French Court made some kind of qualitative judicial qualification. Although, here, it obviously does not involve aesthetic evaluation, the different outcomes of the two national rulings show that the courts have wide discretion in granting or denying copyright protection by assessing the formal properties of new types of subject-matter to establish what is the work.

A much earlier example is photography. Since photographs are a mechanical representation of things, it was long disputed whether they could actually attract copyright protection.<sup>152</sup> In Germany, photography was long regarded as ‘merely a technical, chemical or mechanical act’ rather than a form of art.<sup>153</sup> Initially, therefore, photographs received a lesser form of protection than other types of works.<sup>154</sup> In 1965, this evolved into the two-tier protection regime for original and other photographs that German copyright law still applies today. Also, in France, ‘the controversy around the technical nature of photography ... has been forcing the courts and commentators to explain the creative aspect of this medium’.<sup>155</sup> French courts in the nineteenth century sometimes actually observed the artistic quality of a photograph to determine whether it exceeded the mere technical copying of reality.<sup>156</sup> Later, the law granted

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<sup>149</sup> For the same reason, some legal scholars in the Netherlands have queried whether the Supreme Court did not too easily skim over the question of whether perfume fragrances rightfully belong to the domain of literary and artistic property. See e.g. the annotation of the case by P.B. Hugenholtz, in: *Ars Aequi*, 2006, p. 821-824.

<sup>150</sup> But cf. Quaedvlieg 2011, *supra* note 145, p. 22-23 (‘The production of the physical medium ..., which depends on know-how, must not be amalgamated with the olfactory form that prompted the author to create the work; that form is a personal expression and an intellectual work’).

<sup>151</sup> Supreme Court of the Netherlands, 16 June 2006 (*Kecofa v. Lancôme*), NJ 2006, 585, note J.H. Spoor, para. 3.3.2, holding that the fragrance itself is the work, not the substance of the perfume that comprises the fragrance.

<sup>152</sup> See e.g. S. Ricketson, ‘International Conventions’, in: *Copyright and Photographs: An International Survey*, ed. by Y. Gendreau, A. Nordemann & R. Oesch, Information Law Series 7 (London: Kluwer Law International, 1999), 15-45, p. 19.

<sup>153</sup> A. Nordemann, ‘Germany’, in: *Copyright and Photographs: An International Survey*, ed. by Y. Gendreau, A. Nordemann & R. Oesch, Information Law Series 7 (London: Kluwer Law International, 1999), 135-160, p. 135-136. See also F. Kawohl, ‘Commentary on the German Copyright Acts 1876’, in: *Primary Sources on Copyright (1450-1900)*, eds L. Bently & M. Kretschmer, www.copyrighthistory.org (2008).

<sup>154</sup> The *Gesetz betreffend den Schutz von Photographien gegen unbefugte Nachbildung* of 10 January 1876 and the *Gesetz betreffend das Urheberrecht an Werken der bildenden Künste und der Photographie* of 9 January 1907 granted *sui generis* protection instead of copyright protection to photographs.

<sup>155</sup> Y. Gendreau, ‘France’, in: *Copyright and Photographs: An International Survey*, ed. by Y. Gendreau, A. Nordemann & R. Oesch, Information Law Series 7 (London: Kluwer Law International, 1999), 117-133, p. 118.

<sup>156</sup> See F. Rideau, ‘Commentaire sur la décision de la Cour de Cassation sur la photographie (1862)’, in *Primary Sources on Copyright (1450-1900)*, eds L. Bently & M. Kretschmer, www.copyrighthistory.org (2008).

protection to photographs as artistic works, but only if they had an artistic or documentary character.<sup>157</sup> As observed, this condition was finally abandoned in 1985.

Other examples of new creations that were introduced fairly late into the copyright system and that raised issues about formal properties are computer programs and databases. Although their status as copyrightable works has now been firmly settled, this was not always the case. Each time that a claim for protection for such new types of subject matter arose, the courts had to resolve whether they rightfully belonged to the domain of literary and artistic property and whether they possessed intellectual creativity of the right kind. Because of their technical nature, this often involved considerations about the nature or character of these works and sometimes involved aesthetic observations by the courts. The case law discussed in Section 1 – which need not be repeated here – is illustrative.

Outwardly, the kinds of considerations made here may appear to be no different from any other analysis of classification made elsewhere in the law. In practice, however, determining whether or not an object belongs to the domain of literary and artistic property is not as clear-cut as determining whether or not a newly invented hybrid vehicle must count as a motorized vehicle for legal purposes or nor (to pick a random example). While the latter obviously also requires judicial assessment, it seems as if the courts can come to a fairly objective decision in such matters: it can be established quite objectively whether the vehicle is actually motor-driven and whether qualifying it as such fits the policy objectives of the law. Determining whether a new type of subject-matter qualifies as a work within the domain of copyright law, however, seems to impose a much more subjective assessment onto the courts. It is apparent that judges cannot make such assessment on the basis of the originality criterion alone. They must revert to other criteria to establish whether a new creation fits the object of protection of copyright law. This may, but need not, involve criteria of a qualitative or aesthetic kind; other considerations may relate, for example, to political economy. Even so, this practice clearly challenges the ban on taking other criteria than originality into account.

### 3.3 *Functional or technical works*

Qualitative or aesthetic considerations are sometimes applied by the courts to demarcate the cultural domain of copyright law from the functional or technical domain of other intellectual property laws. In Germany, the Federal Supreme Court has consistently defined a work of art as ‘an individual intellectual creation ... that is particularly intended to generate aesthetic feelings through observation’.<sup>158</sup> This does not mean that the courts generally test whether an object qualifies as a work of art. On the contrary, the artistic merit of traditional works of art, such as paintings and sculptures, is usually assumed to be present.<sup>159</sup>

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<sup>157</sup> See Gendreau 1999, *supra* note 155, p. 119-120, explaining that the condition that the photograph be artistic was rooted in nineteenth century case law examining the artistic nature of photographs and that the reference to documentary character were added because there was ‘a concern that some photographs that would be worthy of protection could fail to meet the artistic standard’.

<sup>158</sup> See BGH, 21 May 1969, I ZR 42/67, *GRUR* 1972, 38 (Vasenleuchter), p. 39 (‘eine eigenpersönliche Schöpfung ... die ... vorzugsweise für die ästhetische Anregung des Gefühls durch Anschauung bestimmt ist’). See also BGH, 22 January 1952, I ZR 68/51, *GRUR* 1952, 516 (Hummel-Figuren), p. 517; BGH, 27 November 1956, I ZR 57/55, *GRUR* 1957, 291 (Europapost), p. 292; BGH, 29 March 1957, I ZR 236/55, *GRUR* 1957, 391 (Ledigenheim), p. 393; BGH, 9 December 1958, I ZR 112/57, *GRUR* 1959, 289 (Rosenthal-Vase), p. 290, BGH, 19 January 1979, I ZR 166/76, *GRUR* 1979, 332 (Brombeerleuchte), p. 336; BGH, 2 October 1981, I ZR 137/79, *GRUR* 1982, 107 (Kirchen-Innenraumgestaltung), p. 110; BGH, 17 June 1992, I ZR 182/90, *GRUR* 1992, 697, (ALF), p. 698; and BGH, 19 March 2008, I ZR 166/05, *GRUR* 2008, 984 (St. Gottfried), p. 985-986.

<sup>159</sup> See Schulze in: Dreier & Schulze 2004, *supra* note 104, p. 80 (§ 2 notes 150-151).



However, the courts do consider the formal properties of an object when its aesthetic characteristics are difficult to distinguish from its functional or technical features, as in the case of industrial design and works of applied art. Works simply cannot possess the required artistic ‘individuality’ (i.e. originality) if their shape is determined entirely by functional or technical considerations.<sup>160</sup> Accordingly, in Germany, the threshold for copyright protection is higher for works of applied art than for ‘pure’ artistic works. One important reason for this is that such works can also be protected as registered designs under the Designs Act.<sup>161</sup>

To establish whether a work of applied art is eligible for copyright protection, German courts consider whether it is sufficiently artistic, based on the overall impression of its individual features.<sup>162</sup> To attract copyright, the aesthetic level must reach such a degree that, according to the prevailing norms in society, the average observer amenable to the arts considers it an artistic work.<sup>163</sup> Because this ‘average observer’ is a fictitious person, the courts enjoy a wide margin of appreciation in making such determinations.<sup>164</sup> Typically the courts do not rely on expert opinions (although experts are sometimes consulted), but make use of – more or less – objective indicators, such as the display of works of applied art in museums or art exhibitions or the recognition of such works as art by artistic circles or the general public, to corroborate their decisions.<sup>165</sup> As long as the courts do not evaluate the work’s artistic quality, but merely assess whether it meets the required level of artistic creativity or originality (the so-called ‘*Schöpfungshöhe*’), this has been fully accepted in German legal doctrine.<sup>166</sup>

In the Netherlands, the courts these days seem to avoid any reference to the work’s aesthetic character when deciding on the eligibility for protection of works of applied art. Even so, it is settled case law that functional or technical characteristics of a work cannot attract copyright,

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<sup>160</sup> See e.g. BGH, 23 October 1981, I ZR 62/79, *GRUR* 1982, 305 (*Büromöbelprogramm*), p. 307; OLG Köln, 19 September 1986, 6 U 199/85, *GRUR* 1986, 889 (*ARD-I*), p. 890; and LG Nürnberg-Fürth, 28 October 1994, 3 O 3342/93, *GRUR* 1995, 407 (*Playmobil-Figur*), p. 408.

<sup>161</sup> Loewenheim in: Schricker & Loewenheim 2010, *supra* note 104, p. 108 (§ 2 note 34). See also BGH, 22 June 1995, I ZR 119/93, *GRUR* 1995, 581 (*Silberdistel*), p. 582; Kammergericht (Berlin), 26 September 2000, 5 U 4026/99, *GRUR-RR* 2001, 292 (*Bachforelle*), p. 293; and BGH, 15 July 2004, I ZR 142/01, *GRUR* 2004, 941 (*Metallbett*), p. 942.

<sup>162</sup> See BGH, 14 April 1988, I ZR 99/86, *GRUR* 1988, 690 (*Kristallfiguren*), p. 692. See also OLG Düsseldorf, 4 September 1992, 20 U 144/91, *GRUR* 1993, 903 (*Bauhaus-Leuchte*), p. 906-907; OLG Düsseldorf, 30 May 2000, 20 U 4/99, *GRUR-RR* 2001, 294 (*Spannring*), p. 295-296; OLG Hamburg, 3 May 2001, 3 U 130/00, *GRUR* 2002, 419 (*Move*), p. 419-420; and Kammergericht (Berlin), 16 August 2005, 5 U 66/03, *GRUR* 2006, 53 (*Bauhaus-Glasleuchte II*), p. 54.

<sup>163</sup> See BGH, 21 May 1969, I ZR 42/67, *GRUR* 1972, 38 (*Vasenleuchter*), p. 39; BGH, 19 January 1979, I ZR 166/76, *GRUR* 1979, 332 (*Brombeerleuchte*), p. 336; BGH, 2 October 1981, I ZR 137/79, *GRUR* 1982, 107 (*Kirchen-Innenraumgestaltung*), p. 110; BGH, 10 December 1986, I ZR 15/85, *GRUR* 1987, 903 (*Le Corbusier-Möbel*), p. 904; BGH, 14 April 1988, I ZR 99/86, *GRUR* 1988, 690 (*Kristallfiguren*), p. 692; and BGH, 19 March 2008, I ZR 166/05, *GRUR* 2008, 984 (*St. Gottfried*), p. 985-986. See also OLG Schleswig, 12 February 1985, 6 U 64/84, *GRUR* 1985, 289 (*Tonfiguren*), p. 290; OLG München, 18 September 1986, 29 U 3498/85, *GRUR* 1987, 290 (*Wohnanlage*), p. 290; OLG Karlsruhe, 11 June 2003, 6 U 132/02, *GRUR* 2004, 233 (*Kirchenchorraum*), p. 233; OLG Hamm, 23 August 2005, 4 U 10/05, *ZUM* 2006, 641, p. 643; and OLG Hamburg, 5 July 2006, 5 U 105/04, *ZUM-RD* 2007, 59, p. 63.

<sup>164</sup> See Loewenheim in: Schricker & Loewenheim 2010, *supra* note 104, p. 145 (§ 2 note 139).

<sup>165</sup> See e.g. BGH, 10 December 1986, I ZR 15/85, *GRUR* 1987, 903 (*Le Corbusier-Möbel*), p. 905. See also OLG Düsseldorf, 4 September 1992, 20 U 144/91, *GRUR* 1993, 903 (*Bauhaus-Leuchte*), p. 906-907; OLG Karlsruhe, 22 September 1993, 6 U 92/93, *GRUR* 1994, 283 (*Eileen Gray*), p. 284; and OLG Hamburg, 1 November 2001, 3 U 115/99, *ZUM-RD* 2002, 181 (*Kinderhochstuhl*), p. 192.

<sup>166</sup> See Loewenheim in: Schricker & Loewenheim 2010, *supra* note 104, p. 113 (§ 2 note 45). See also Schulze in: Dreier & Schulze 2004, *supra* note 104, p. 80 (§ 2 note 150), arguing that, in German copyright law, there are various cases in which particular value judgments cannot be easily avoided.

as they fail to reflect the author's subjective creativity.<sup>167</sup> To determine whether copyright extends to a work of applied art, the courts must identify creative elements that result from the author's free and creative choices. Such elements must be distinct from the mere technical elements of the work. This can be shown by establishing that the work fulfils a decorative or aesthetic function. Making aesthetic considerations therefore seems inevitable. As one Dutch scholar recently observed, copyright should only extend to purely functional design if it has a marked aesthetic character. The mere choice of the designer to give it a specific functionality is insignificant for vesting copyright. As the originality test requires the author's personality to be sufficiently expressed, the design ought to have some aesthetic appeal.<sup>168</sup>

The Dutch court's abstention from aesthetic consideration is fairly recent. Until 2002, the Benelux Uniform Law on Designs or Models explicitly provided that designs and models could not attract copyright unless they possessed a 'marked artistic character'.<sup>169</sup> To establish whether a design or model was eligible for copyright protection, the courts applied a marginal aesthetic test.<sup>170</sup> They typically examined whether the work expressed the artistic intent of the author or harmoniously combined functional elements with aesthetic appeal.<sup>171</sup> This was not considered to be a judgment on the merit of a work.<sup>172</sup> Rather, it was a test aimed to identify whether the design or model was sufficiently creative or decorative, as opposed to functional or technical, to attract copyright. The courts thus tried to demarcate the 'aesthetic' domain of copyright law from the 'technical' domain of other intellectual property rights.<sup>173</sup>

Even though the 'marked artistic character' test was not directed toward aesthetic evaluation, it was long unclear whether, in addition to the originality criterion, a certain minimum degree

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<sup>167</sup> See Supreme Court of the Netherlands, 16 June 2006 (*Kecofa v. Lancôme*), NJ 2006, 585, note J.H. Spoor; and Supreme Court of the Netherlands, 29 January 2010 (*Gavita v. Puutarhaliike Helle*), LJN: BK1599, RvdW 2010, 223. See also Court of Appeal of Amsterdam, 17 January 2012 (*Stokke v. Jamak*), AMI 2012-2, p. 81; District Court Utrecht, 12 October 2011 (*Rubik v. Beckx Trading & Out of the Blue*), AMI 2011-6, p. 239 and District Court Den Haag, 7 December 2011 (*Bodum v. Ten Berg*), AMI 2012-2, p. 83.

<sup>168</sup> A.A. Quaedvlieg, 'Auteursrecht en techniek: Fuzzy functionality en subjectieve anorexia tarten de banvloek - Bespiegelingen over de Tripp Trapp en de Fatboy', BIE 2008, 182-193, p. 190.

<sup>169</sup> Art. 21(1) and 21(2) Benelux Uniform Law on Designs or Models of 1 January 1975, as repealed by the 2002 Protocol amending this law. The Benelux Convention on Intellectual Property, which replaced the Benelux Uniform Law on Designs or Models in 2005, contains no similar provisions.

<sup>170</sup> F.W. Grosheide, M. de Cock Buning & Th.C. J.A. van Engelen, 'Artikel 10 Aw', in: *Intellectuele eigendom, artikelsgewijs commentaar* (loose-leaf), ed. by J.J. Brinkhof et al. ('s Gravenhage: Elsevier Juridisch, 1996 - ...), Au II-Art.10, p. 19-32.

<sup>171</sup> See e.g. Court of Appeal of Amsterdam, 2 February 1978, BIE 1979, no. 44 (*Mistral v. Windsurfer*); Court of Appeal of Amsterdam, 29 June 1979, BIE 1982, no. 31 (*Wopla-krat v. Curver-krat*); Court of Appeal of 's-Hertogenbosch, 24 September 1980, BIE 1982, no. 97 (*Kinderkleding*), note W.L. Haardt; Court of Appeal of Amsterdam, 16 July 1981, BIE 1982, no. 50 (*Rubik's kubus*); Court of Appeal of Amsterdam, 15 July 1982, BIE 1984, no. 96 (*Dievenklauwen met montagevoorschriften*); Court of Appeal of 's-Hertogenbosch, 20 October 1982, BIE 1985, no. 5 (*Zig Zag-dessin*); Court of Appeal of 's-Gravenhage, 13 April 1983, BIE 1985, no. 6 (*Rear-spoiler*); and Court of Appeal of Arnhem, 16 April 1984, BIE 1986, no. 17 (*Poker; Woord Mix/Sriptogram*). Case law prior to 1975 includes Court of Appeal of Amsterdam, 5 March 1959, BIE 1976, no. 77; Court of Appeal of Amsterdam, 2 March 1961, BIE 1961, no. 77 (*Eierdopjes*); Court of Appeal of Amsterdam, 15 June 1963, BIE 1976, no. 88 (*Haard*); and Court of Appeal of Amsterdam, 21 September 1972, BIE 1973, no. 12 (*Laboratoriumtafel*).

<sup>172</sup> See Court of Appeal of Amsterdam, 2 March 1961, BIE 1961, no. 77 (*Eierdopjes*), p. 180. But see Supreme Court of the Netherlands, 9 March 1962 (*Vitri-gieter*), NJ 1964, 403, granting copyright to a plastic watering on the basis of expert opinions verifying that the can had own characteristics and possessed artistic merit.

<sup>173</sup> See Th.C.J.A. van Engelen, *Prestatiebescherming en ongeschreven intellectuele eigendomsrechten* (Zwolle: W.E.J. Tjeenk Willink, 1994), p. 70-72.

of artistic merit was required for designs or models to be eligible for copyright protection.<sup>174</sup> In the 1987 *Screenoprints* judgment, the Benelux Court of Justice answered this question negatively, holding that, to attract copyright, a design or model must satisfy the originality threshold only.<sup>175</sup> Accordingly, the Court confirmed that no special higher threshold existed for this genre of copyrighted works. In 2002, the rule that designs and models must have a ‘marked artistic character’ to attract copyright protection was finally repealed.

By contrast, in some EU Member States, copyright protection of design is still subject to the requirement that the work must have artistic value. In Italy, for example, works of industrial design are eligible for copyright protection only if they have inherent artistic value.<sup>176</sup> To determine the artistic value of the design, Italian courts apply an objective test. They examine whether the work, irrespective of its functional aspect, is recognized as a work of art in the cultural sector.<sup>177</sup> Evidence of the artistic value of the design includes the treatment of the work as art by art critics, the recognition by the artworld that it belongs to a particular art movement, its exposure in art exhibitions, its inclusion in permanent collections of museums, etcetera.<sup>178</sup> Irrelevant for assessing the artistic value is the designer’s artistic intention, as well as name and reputation.<sup>179</sup>

The artistic value-test adopted by the Italian courts clearly follows the institutional theory of art,<sup>180</sup> which does not define artworks by their intrinsic properties or by reference to a critic’s subjective evaluation, but rather by reference to their recognition as art by the artworld.<sup>181</sup> In Italy, this test is criticized for being unstable and fluctuant, first, because often it takes time before a work is recognized as art by the relevant art communities and, second, because the perception of what is art may change over time.<sup>182</sup> This means that courts might reasonably deny protection to a work at its time of creation, but just as reasonably grant it protection at a later date. This raises the question of just how objective and predictable court decisions are in

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<sup>174</sup> See J.H. Spoor, ‘The Novelty Requirement in Design Protection Law: The Benelux Experience’, (1996) 24 *AIPLA Q. J.* 725, at 744.

<sup>175</sup> Benelux Court of Justice, 22 May 1987 (*Screenoprints*), *NJ* 1987, 881, note L. Wichers Hoeth.

<sup>176</sup> Art. 2 under 10 of Italian Law for the Protection of Copyright and Neighbouring Rights (Law no. 633/1941), as amended by Legislative Decree no. 95/2001. Before 2001, the threshold for protecting industrial design under copyright law was even stricter, as its artistic value needed to be separable from the industrial character of the product. See e.g. A. Barbieri & F. De Santis, ‘Copyright Protection of Design: Approach of Italian Courts and Italian Law after ECJ’s Decision in *Flos vs Semeraro*’, 16 October 2012, <<http://www.portolano.it>>.

<sup>177</sup> G. Spedicato, ‘Italy: Copyright protection only for “high level” industrial design’, *Kluwer Copyright Blog*, 11 October 2012, <<http://kluwercopyrightblog.com>>.

<sup>178</sup> See e.g. Tribunale di Milano, 26 April 2011, *Cassina v. High Tech SRL*, R.G. 72203/2010, para. 4, granting copyright to three pieces of furniture designed by Le Corbusier, accepting that they have sufficient artistic value because numerous museums and cultural institutions have recognized that they are among the most important expressions of industrial design; Tribunale di Milano, 3 May 2012, *FLOS v. Semeraro Casa & Famiglia*, R.G. 74660/06, granting copyright to the ARCO lamp, holding that it has sufficient artistic value because it has figured for decades in the permanent collection of the Museum of Arts and Design in New York and many other cultural institutions around the world; and Tribunale di Milano, 17 May 2012, *Vitra Patente A.G. v. High Tech SRL*, R.G. 1983/07, para. 4, granting copyright to the Panton Chair designed by Verner Panton, using the exact same argument to explain that this chair has sufficient artistic value to qualify for protection.

<sup>179</sup> See e.g. Tribunale di Milano, 3 May 2012, *FLOS v. Semeraro Casa & Famiglia*, R.G. 74660/06, para. 2 and 4. See also F. Spreafico, ‘Lying on a copyrightable chaise longue?’, *Kluwer Copyright Blog*, 8 June 2011, <<http://kluwercopyrightblog.com>>; and Spedicato 2012, supra note 177.

<sup>180</sup> Spedicato 2012, supra note 177.

<sup>181</sup> See e.g. G. Dickie, *Aesthetics: An Introduction* (Indianapolis: Pegasus, 1971), p. 101; and G. Dickie, *Art and the Aesthetic: An Institutional Analysis* (Ithaca [etc.]: Cornell University Press, 1974).

<sup>182</sup> See e.g. Spedicato 2012, supra note 177, explaining that ‘[s]ome commentators actually argued that the “artistic value” should be identified applying an ex ante approach’ and ‘that the presence of this requirement should be properly evaluated having regard to the very moment of the creation of the work’.

practice. Moreover, it is by no means easy in practice to determine whether or not an object is part of the artworld, to find common consensus about this, and to distinguish precisely when the object in fact can be said to have entered the artworld. Even so, the Italian courts defend the institutional approach, stating that it allows them to identify design with a ‘consolidated and permanent representative and evocative character’.<sup>183</sup> The result is that, in Italy, only few works of design actually attract copyright. This is believed to correspond well to the intention of the legislator to restrict copyright protection to ‘high level’ industrial design.<sup>184</sup>

In France, on the other hand, due to the application of the unity of art theory, works of applied art and industrial design are protected on the same basis as ‘pure’ artistic works. Even so, French courts occasionally refer to the author’s aesthetic pursuit to counter arguments that the work is comprised of unprotectable technical elements or know-how only.<sup>185</sup> In the field of photography, courts sometimes consider whether a photograph shows signs of aesthetic choices or is merely the result of technical know-how.<sup>186</sup> As Sirinelli notes, such observations, although they may come close to considerations of merit, are clearly aimed to show that the photograph is not ‘the simple reflection of a photographed reality’ but an effort of the photographer ‘to achieve a scenic and artistic result’, thus exposing that the photograph bears the personal imprint of the photographer.<sup>187</sup> Paradoxically, however, French courts have occasionally accepted copyright protection for photographs that, in their visual effects, reveal not the slightest spark of the photographer’s personal contribution, such as photographs that reproduce paintings as accurately as possible.<sup>188</sup> This has been criticized by French scholars who believe that the coherence of the entire discipline of copyright law is undermined if protection is conferred on works that show no sign of originality whatsoever.<sup>189</sup>

Apart from photographic works, copyright protection has also been withheld from other types of works on the ground that they resulted merely from technical competences or know-how on the part of the author. In 2008, for example, the Paris Court of Appeals ruled that general conditions of sale lacked originality. It held that they are the product of intellectual labour signifying technical expertise and know-how, but that they do not reveal any creative effort exhibiting the stamp of the author’s personality.<sup>190</sup> Likewise, in 1989, the Court of Cassation refused to recognize the director of a series of television broadcasts as the co-author of the

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<sup>183</sup> See e.g. Tribunale di Milano, 26 April 2011, *Cassina v. High Tech SRL*, R.G. 72203/2010, para. 4.

<sup>184</sup> Spedicato 2012, *supra* note 177, referring to such ‘high level’ industrial design as ‘design icons’.

<sup>185</sup> It is settled case law that copyright does not extend to works created by a ‘mere technician’. See Cass. civ. 1<sup>ère</sup>, 1 March 1988, case n° 86-12.211, Bulletin 1988 I n° 61, p. 40. See also TGI Paris (*ch. 3, sect. 1*), 6 October 2009, *Henrard v. City of Paris*, RIDA no. 226 (2010), 506-509, p. 508, holding that photographs that map the city of Paris systematically are not original, as they do not reveal the imprint of the photographer’s personality: they could have also been made by another technician working under the same conditions.

<sup>186</sup> Cass. civ. 1<sup>ère</sup>, 20 October 2011, case n° 10-21.251 (not published in the Bulletin), available at: <http://legimobile.fr/> (approving a judgment of the Court of Appeal of Aix-en-Provence in which protection was denied to a photograph, holding that ‘its different constituent elements did not reveal any aesthetic pursuit and that it was a simple performance of technical services expressing know-how only’).

<sup>187</sup> Sirinelli 2006, *supra* note 148, p. 188-189.

<sup>188</sup> See CA Paris (*ch. 4, sect. B*), 27 January 2006, *Éditions Arfise v. Descharnes*, RG n° 04/02645, *Comm. com. électr.* 2006, comm. n° 60, note Ch. Caron, ruling that photographs of the paintings of Dali were sufficiently original, as they were not the result of a technical approach alone, but also revealed the author’s personality through the choice of lighting, frame, angle and the use of filters. But see CA Paris (*ch. 4, sect. B*), 24 June 2005, *L’Hoir & SNADI v. Éditions Larousse*, RG n° 03/11140, *Comm. com. électr.* 2005, comm. n° 131, note Ch. Caron, denying protection to photographs of paintings, as they were too accurate a reproduction of the original work that all subjectivity or interpretation on the part of the photographer was excluded a priori.

<sup>189</sup> See e.g. Sirinelli 2006, *supra* note 148, p. 200-201.

<sup>190</sup> CA Paris (*ch. 4, sect. A*), 24 September 2008, *Venteprivée.com v. Kalypso, Propriétés Intellectuelles* 2009, p. 49, note J.-M. Bruguère.

audiovisual work, since his personal contribution consisted in providing technical assistance only. He was considered not to have contributed to creating an intellectual work.<sup>191</sup>

#### 4. Quality, aesthetics and the criterion of originality

The case law in Section 3 already reveals that courts sometimes make qualitative or aesthetic assessments to resolve whether a work satisfies the originality threshold. Hence, there is a connection between (the exclusion of) quality, merit, aesthetics and purpose and the criterion of originality. To properly understand this connection, we must first identify the origins of the originality criterion in nineteenth century doctrine and case law (Section 4.1). As will be seen, the originality test adopted in copyright law is essentially subject-oriented. This has important consequences for qualitative and aesthetic criteria, which are mostly object-oriented and, for that reason, became increasingly irrelevant (Section 4.2). Even so, in practice, courts cannot always escape making a qualitative or aesthetic appraisal in cases where they must determine whether works of low creativity actually meet the originality test (Section 4.3).

##### 4.1 *The nineteenth-century origins of originality*

In the nineteenth century, the courts and legal commentators eagerly sought to rationalize and define the criteria for copyright protection. The laws of many countries specifically indicated the types of works that could attract copyright,<sup>192</sup> but they did not always specify the criteria for determining whether a work qualified for protection. In the UK, only the 1814 Sculpture Act and the 1862 Fine Arts Copyright Act explicitly required protected works to be ‘new and original’ and ‘original’, respectively.<sup>193</sup> The statutes in other countries contained no comparable threshold criteria for establishing copyright.<sup>194</sup>

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<sup>191</sup> Cass. civ. 1<sup>ère</sup>, 29 March 1989, *J. Rutman v. Société des Gens de Lettres*, *RIDA* no. 141 (1989), 290-297, p. 262-263. The director claimed authorship on the ground that he collaborated in choosing the scene of the show and to be responsible for the editing process, including the cuts and alternate frames. Under current French copyright law, a legal presumption of authorship applies to the director, which means that he no longer has to prove to be a co-author of the work. See art. L 113-7 French Intellectual Property Code.

<sup>192</sup> In the Netherlands protection extended to literary and artistic works in printable form (art. 1 in conjunction with art. 6 Dutch Copyright Act 1817) and later to writings and other printable matter and dramatic(-musical) works (art. 1 of the Dutch Copyright Act 1881); in Germany to works of literature, illustrations, musical compositions and dramatic works (German Federal Act of 11 June 1870 concerning author’s rights to works of literature, illustrations, musical compositions and dramatic works) and works of the fine arts, photographs and designs and models (German Federal Act of 9 January 1876 concerning author’s rights to works of the fine arts; German Federal Act of 10 January 1876 concerning the protection of photographs against unlicensed reproduction; and German Federal Act of 11 January 1876 concerning author’s rights to designs and models); in the UK to books and other writings (An Act for the Encouragement of Learning (1710), 8 Anne, c. 19; Copyright Act (1814), 54 Geo. III, c. 156; Literary Copyright Act (1842), 5 and 6 Vict. c. 45), engravings, prints and lithographs (Engravers’ Copyright Act (1735), 8 Geo. II, c. 13), sculptures, models and casts (Models and Busts Act (1798), 38 Geo. III, c. 71; Sculpture Copyright Act (1814), 54 Geo. III, c. 56) and paintings, drawings and photographs (Fine Arts Copyright Act (1862), 25 & 26 Vict., c. 68). In France, on the other hand, the Decree of 19 July 1793 referred more broadly to ‘writings of any kind’, musical compositions, engravings of paintings and illustrations and ‘any other production of the mind or of genius’ (art. 1 and 7).

<sup>193</sup> Sec. 1 of the Sculpture Copyright Act (1814), 54 Geo. III, c. 56; Sec. 1 of the Fine Arts Copyright Act (1862), 25 & 26 Vict., c. 68. The other British copyright laws included no such requirements.

<sup>194</sup> The 1793 French decree and the German Federal Copyright Acts of 1870 and 1876, for example, contained no originality threshold or other requirement. Art. 1 of the Dutch Copyright Act 1817 did refer to ‘original’ (*oorspronkelijke*) literary and artistic works, but this arguably meant nothing more than ‘not copied’. This can be derived from the scope of the 1817 Act, which protected the printed work rather than the product of the mind. See C. Schriks, *Het kopijrecht - 16de tot 19de eeuw* (Zutphen [etc.]: Walburg Pers/Kluwer, 2004), p. 424. Fact is that the word ‘original’ did not reappear in the Dutch Copyright Act 1881 and that, in practice, Dutch courts

Despite the absence of a clear-cut criterion for determining the eligibility for protection of a work, it was generally acknowledged that copyright could not limitlessly extend to literary and artistic works, as this would confer an undesirably broad monopoly upon writings and the arts. Accordingly, some minimum threshold for protection was needed, but in the absence of legislative and perhaps doctrinal guidance, it was not yet clear on which principles it should be founded – e.g., novelty, originality or another (quantitative or qualitative) criterion.<sup>195</sup>

In France, the courts initially could not settle on a principle to underpin copyright protection. They employed different criteria, varying from a ‘novelty’ standard in the earlier period to an ‘originality’ requirement in the last decennia of the nineteenth century.<sup>196</sup> In 1814, the Court of Cassation ruled that the protection of the 1793 Decree also extends to compilations and other works of the same nature, provided that the author has given it ‘a new form and a new character’.<sup>197</sup> This required the author to exercise ‘a discerned taste, scientific selection and mental labour’ in the execution of the work.<sup>198</sup> Similarly, in 1857, the Court of Cassation subjected copyright protection to the requirement that the work (in this case a sculpture) bore a ‘special character’ by showing something ‘proper to the author’.<sup>199</sup> In 1862, it was held that, to be eligible for protection, a photograph should be marked with the ‘imprint of personality’ of the author,<sup>200</sup> a criterion earlier applied by the Court of Appeal of Bordeaux in relation to press articles that *a priori* lacked apparent aesthetic or emotive appeal.<sup>201</sup> Only in 1869 did the Court of Cassation explicitly refer to ‘originality’ when it confirmed that copyright extends not only to ‘entirely original creations’ but also to compilations.<sup>202</sup> Since the 1890’s, the requirement that a work must be original in the sense that it bears the ‘imprint of the author’s personality’ has been the principal threshold for copyright in France.<sup>203</sup>

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in the nineteenth century extended protection to all writings, regardless of whether they were the result of any intellectual effort on the part of the author. See the case law, *infra*, notes 218 and 219.

<sup>195</sup> See Rideau 2008, *supra* note 68, para. 3.

<sup>196</sup> Rideau 2008, *supra* note 61, para. 4.

<sup>197</sup> Cass. crim., 2 December 1814, *Leclerc v. Villeprend and Brunet, Sirey* (1<sup>er</sup> Sér.) 1812-1814, 636, available at: <[http://copy.law.cam.ac.uk/record/f\\_1814a](http://copy.law.cam.ac.uk/record/f_1814a)>, p. 637.

<sup>198</sup> *Ibid.*, p. 637.

<sup>199</sup> Cass. crim., 13 February 1857, *Fontana v. public attorney, Dalloz* 1857, I, 111, available at: <[http://copy.law.cam.ac.uk/record/f\\_1857](http://copy.law.cam.ac.uk/record/f_1857)>, p. 111: ‘however well-known the features of a common type ... may be, and in spite of the fact that tradition requires any copy to respect those features, this indispensable fidelity still leaves space for the talent of the artist, allowing him to create a work that bears a special character, and which becomes as such a property protected by law ... it must be expressly recognised that, in their execution, there was nothing proper to the author’ (translated by Rideau 2008, *supra* note 61, para. 3).

<sup>200</sup> Cass. crim., 21 November 1862, *Betbéder et Schwalbé v. Mayer et Pierson, supra* note 72, p. 54, approving a ruling of the Imperial Court of Paris which ‘specifies and details the circumstances and conditions that, leaving it to artistic sentiment, “may give to the photographer’s work the mark of his personality ...”’.

<sup>201</sup> Rideau 2008, *supra* note 61, para. 4. See Cass. req., 8 August 1861, *Havas, Bullier & Co. v. Gounouilhou, Dalloz* 1862, I, 136, available at: <[http://copy.law.cam.ac.uk/record/f\\_1861](http://copy.law.cam.ac.uk/record/f_1861)>, p. 137-138, confirming a ruling of the Bordeaux Court of Appeal that ‘the leading articles on politics and literature that newspapers publish ... are works of the mind, the product of the writer’s labour, bearing to some extent the imprint of his personality’, but refusing protection to telegraphic cable-messages because they could not be regarded as works of the mind in the meaning of the 1793 French decree.

<sup>202</sup> Cass. crim., 27 November 1869, *Prud’homme v. Dubus’ widow and Bellanger, Dalloz* 1870, I, 186, available at: <[http://copy.law.cam.ac.uk/record/f\\_1869](http://copy.law.cam.ac.uk/record/f_1869)>, p. 186: ‘the right of property guaranteed ... to the authors of all productions of the mind or of genius covers not only entirely original creations, but extends also to those works whose elements, though borrowed from previous publications, have been chosen with discernment, placed in a new order, given a new form and intelligently made available to more or less general use’.

<sup>203</sup> See Rideau 2008, *supra* note 61, para. 2.

Similarly, in Germany at the end of the nineteenth century, the courts gradually also began to accept that copyright could extend only to works constituting a personal intellectual creation (*‘eine persönliche geistige Schöpfung’*).<sup>204</sup> In 1898, the Court of the German Empire denied protection to the letters of Richard Wagner, holding that they were merely a friendly correspondence consisting of everyday statements and practical arrangements that did not qualify as an intellectual creation. The fact that the exploitation of the letters could be profitable did not change the opinion of the Court.<sup>205</sup> The level of originality or ‘individuality’ that the German courts required, however, was not very high: a small degree of individual creativity sufficed for protectability. The courts granted protection as long as a work surpassed the ordinary level of commonplace, stereotype or purely mechanically produced works.<sup>206</sup> The courts held that copyright protection also extends to works of little creativity, the so-called *‘kleine Münze’* or ‘small change’, such as mathematical tables, recipe books and address books.<sup>207</sup> The originality standard that presently applies in Germany still requires works to possess individuality and a minimal level of creativity.<sup>208</sup>

In the UK, an interesting body of case law arose around compilations, collections and other works, the virtue of which lies in the arrangement of existing subject matter or ‘information derived from sources common to all’,<sup>209</sup> rather than in creating something entirely new.<sup>210</sup> The case law of the second half of the nineteenth century reveals that, while UK courts were generally prepared to protect alphabetical trade directories, stock and price catalogues and other compilations of such kind, they used slightly different criteria to show why these works merit protection. While some courts required the collection and arrangement to result from at least some intellectual skill on the part of the compiler,<sup>211</sup> others granted protection on the basis of mere investment of labour or expense incurred by the compiler.<sup>212</sup> Occasionally, the courts also struggled to find the right demarcation line between protectable collections and

<sup>204</sup> This concept was largely based on the personality rights theory of copyright as developed by German legal scholars in the second half of the nineteenth century. See e.g. M. Vogel, ‘Urheberpersönlichkeitsrecht und Verlagsrecht im letzten Drittel des 19. Jahrhunderts’, *GRUR* 1994, 587-593, p. 589-590.

<sup>205</sup> Reichsgericht, 28 February 1898 (*Richard Wagner-Brief*), *RGZ* 41, 43, 49.

<sup>206</sup> See e.g. Reichsgericht, 30 January 1924 (*Wanderkarte*), *RGZ* 108, 62, 65; and Reichsgericht, 16 March 1927 (*Wiesbadener Adressbuch*), *RGZ* 116, 292, 294.

<sup>207</sup> Reichsgericht, 30 June 1928 (*Rechentabelle*), *RGZ* 121, 357, 358; Reichsgericht, 18 December 1912 (*Kochrezept*), *RGZ* 81, 120, 123; Reichsgericht, 16 March 1927 (*Wiesbadener Adressbuch*), *RGZ* 116, 292, 294.

<sup>208</sup> See Loewenheim in: Schrickler & Loewenheim 2010, *supra* note 104, p. 103-104 (§ 2 notes 23 and 24).

<sup>209</sup> See *Kelly v. Morris*, (1865-66) L.R. 1 Eq. 697 (Court of Chancery, 8 March 1866).

<sup>210</sup> See e.g. J. Pila ‘Compilation copyright: A matter calling for “a certain ... sobriety”’, University of Oxford Legal Research Paper Series, Paper No 45/2008, November 2008, <<http://ssrn.com/abstract=1299012>>, p. 4-19 for an overview of compilation copyright under the UK Literary Copyright Act of 1842.

<sup>211</sup> See e.g. *Jarrold v. Houlston*, (1857) 3 K&J 707; 69 ER 1294 (Court of Queen’s Bench, 9 July 1857), p. 1297, holding that the ‘pains and labour’ that the compiler incurred in collecting, reducing and arranging questions and answers ‘under certain heads and in a scientific form, is amply sufficient to constitute an original work of which the copyright will be protected’; and *Hotten v. Arthur*, (1863) 1 H&M 603; 71 ER 264 (Court of King’s Bench, 9 July 1863), holding that copyright protection cannot be refused if the compiler has ‘honestly exercised his mind upon his work’, thus rendering the catalogue ‘the product of his mental exertion’.

<sup>212</sup> See e.g. *Morris v. Ashbee*, (1868-69) L.R. 7 Eq. 34 (Court of Chancery, 10 November 1868), p. 40, granting protection to a trade directory comprised of an alphabetical list of names and occupations of London merchants and traders, holding that the compiler ‘incurred the labour and expense first of getting the necessary information for the arrangement and compilation of the names as they stood in his directory, and then of making the actual compilation and arrangement’; and *Collis v. Cater, Stoffell and Fortt, Ltd.* (1898), 78 L.T. (N.S.) 613, p. 614, holding that a pharmacist’s catalogue containing ‘nothing whatever but a simple list’ of articles and their prices in alphabetical order was entitled to copyright, because the compiler ‘has incurred labour in its preparation, or it may be expense and trouble in its preparation, and has done it for the advantage of having his own catalogue’.

productions that could not attract copyright, such as bare lists of names,<sup>213</sup> thereby invoking criteria such as ‘literary value’ or usefulness or referring to the purpose of literary works to validate their decisions.<sup>214</sup> The UK courts eventually adopted a ‘sweat of the brow’ approach to originality, according to which a greater or lesser expenditure of skill, judgment or labour by the author is sufficient to confer a copyright in a work.<sup>215</sup> Arguments that a work ought to be ‘original’ in the sense of it being novel (e.g., as in patent law) were explicitly rejected.<sup>216</sup> The ‘sweat of the brow’ criterion is still applied in UK copyright law today.<sup>217</sup>

In the Netherlands, the courts in the nineteenth century did not apply an originality threshold to determine whether a work qualified for copyright protection. They generously conferred protection on all writings, including festivity guides, lists of sermons and other writings that merely consisted of factual information and did not result from any intellectual creativity.<sup>218</sup> They argued that, because the law does not distinguish between different types of writings, it also protects writings that do not contain any ‘literary thought’ or ‘lasting scientific or literary merit’.<sup>219</sup> This was criticized by Dutch legal scholars in the early twentieth century who argued that a work at least had to be a creation of the mind (*‘geesteschepping’*) and proceed from authorial labour of some kind.<sup>220</sup> Only after the introduction of the 1912 Copyright Act

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<sup>213</sup> That simple lists of names could not attract copyright protection was established case law. See e.g. *Hotten v. Arthur*, (1863) 1 H&M 603; 71 ER 264 (Court of King’s Bench, 9 July 1863), holding that copyright does not extend to ‘a mere dry list of names, like a postal directory, Court guide, or anything of that sort, which must be substantially the same by whatever number of persons issued and however independently compiled’.

<sup>214</sup> See *Hollinrake v. Truswell*, [1894] 3 Ch. 420 (Court of Appeal, 8 August 1894), p. 428 (Davey L.J.), holding that ‘a literary work is intended to afford either information and instruction, or pleasure, in the form of literary enjoyment’, thus denying protection to a sleeve chart that ‘is intended, not for the purpose of giving information or pleasure, but for practical use in the art of dressmaking’; and *Weatherby & Sons v. International Horse Agency and Exchange Ltd*, [1910] 2 Ch. 297 (Chancery Division, 9 June 1910), p. 303-304 (Parker J.), affirming ‘that there can be no copyright in a mere list of names, and this may be true where the list of names conveys no useful information whatever, because to support every copyright there must be an element of literary value’.

<sup>215</sup> See e.g. *Walter v. Lane*, [1900] A.C. 539 (House of Lords, 6 August 1900), granting copyright to newspaper reports consisting of a verbatim reproduction of an oral speech, holding that authorship arises from ‘the labour of reproducing spoken words into writing or print and first publishing it as a book’ (p. 546). So held by Earl of Halsbury L.C. and Lords Davey, James of Hereford, and Brampton. Lord Robertson dissented.

<sup>216</sup> *Ibid.*, p. 546-547 and 548-549. See also *University of London Press Ltd v. University Tutorial Press Ltd* (1916), *supra* note 76, p. 608 (Peterson J.): ‘The word “original” does not in this connection mean that the work must be the expression of original or inventive thought.’

<sup>217</sup> See Bently & Sherman 2009, *supra* note 50, p. 93-111.

<sup>218</sup> See District Court Tiel, 13 February 1840, *Staat der Nederlanden v. Johannes Noman & Zn.*, accepting that the protection of the Act of 1817 extended to ‘lists of tariffs for judicial proceedings and salary costs for clerks’ published by the State, holding that ‘literary works’ in the Act of 1817 referred to ‘everything that is letter-printed’ (*‘al, hetgeen met letters gedrukt wordt’*). This judgment was upheld by the Provincial Court of Appeal of Gelderland on 12 March 1840, but reversed by the Supreme Court of the Netherlands on 8 September 1840. The Supreme Court denied protection, not because it refused the broad interpretation of ‘literary works’, but because it held that the State could not be an ‘author’ in the meaning of the 1817 Copyright Act. See *Weekblad van het Recht*, 1840, no. 90 and the intensive treatment of the case in Chris Schriks, *Staatsauteursrecht Cum Annexis* (Zutphen [etc.]: Walburg Pers, 2010), p. 131-181, p. 509-515 (English summary).

<sup>219</sup> See Supreme Court of the Netherlands, 21 November 1892, *Weekblad van het Recht*, no. 6274 (Feestwijzer Leidens Ontzet), granting protection to a festivity guide even though it contained no ‘literary thought’; Supreme Court of the Netherlands, 29 April 1895, *Weekblad van het Recht*, no. 6647 (Predikbeurtenlijst Rotterdamsche Kerkbode), granting protection to a list of sermons even though it missed ‘lasting scientific or literary merit’.

<sup>220</sup> See e.g. H.L. de Beaufort, *Het auteursrecht in het Nederlandsche en Internationale recht* (Utrecht: Den Boer, 1909; repr. Amsterdam: Buma, 1993), p. 173-174, criticizing the nineteenth century Dutch case law in which protection was conferred on simple festivity guides and bare lists of sermons, stating that it is difficult to detect the authorial labour and intellectual creation in these productions.



did the courts adopt the principle that a work ought to be ‘original’ to attract copyright.<sup>221</sup> As observed, however, until the present day, the Dutch lawmaker has continued the protection by copyright law of low/non-original writings that have been published or that are intended for publication.<sup>222</sup> The criterion that was finally adopted decrees that a work is original if it has an own, individual character and bears the personal stamp of the author.<sup>223</sup> Today, this is still the leading criterion for determining originality in Dutch copyright law.

#### 4.2 *The consequence of relying on an author-oriented originality test*

Interestingly, while the courts in the UK took a different direction than the courts in France, Germany and the Netherlands when creating a criterion for copyright protection, in all four countries the courts centred the threshold test around the author as creator of the work. This closely ties in with the nineteenth-century ideological underpinnings of copyright. In the UK, where the justification for copyright was found to exist in the labour and expense incurred by the author in creating the work,<sup>224</sup> the courts upheld the argument that skill, judgment or labour sufficed to establish protection. The originality criterion in most continental European countries is based on an even stronger author-centred rationale for protection. In Germany, for example, a work was deemed worthy of protection because it was seen as an extension of the author’s self in the sense that it captured and manifested the author’s personality.<sup>225</sup> As a consequence, the sole criterion for granting copyright was that the work, as a product of the author’s mind, reflected at least some individuality or a personal stamp.

Hence, the originality test devised by the courts in these countries is unquestionably subject-oriented.<sup>226</sup> copyright relies on the sweat of the author’s brow in the UK, the imprint of the author’s personality in France, the individuality of the author’s contribution in Germany and the individual character and personal stamp of the author in the Netherlands. The courts deemed it unnecessary to adopt a stricter object-oriented threshold criterion, like the novelty

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<sup>221</sup> See District Court Groningen, 19 November 1926 (*Smit v. Meersma*), NJ 1927, p. 162, holding that since the 1912 Copyright Act aims to protect a person’s ‘own intellectual creation’, a work of architecture must possess ‘an own, new original character’; District Court Amsterdam, 3 May 1932 (*Electrische Kachels*), NJ 1934, p. 124, considering whether the creator has given ‘an own character’ to the object; Supreme Court of the Netherlands, 17 April 1953 (*Het Radioprogramma*), NJ 1954, 211, note D.J. Veegens, stating that copyright protection hinges on whether the creator ‘endowed the work with a personal imprint’; and Supreme Court of the Netherlands, 27 January 1961 (*Explicator*), NJ 1962, 355, note Hijmans van den Bergh, referring to ‘works that, as fruits of creative labour, bear an own or individual character’. For an overview of the Dutch twentieth century case law on ‘originality’, see Grosheide et al. (1996), *supra* note 170, Au II-Art.10, para. 2.3 and 2.4.

<sup>222</sup> See e.g. A. Beunen, ‘*Geschriftenbescherming: The Dutch Protection for Non-original Writings*’, in: *A Century of Dutch Copyright Law: Auteurswet 1912-2012*, P.B. Hugenholtz, A.A. Quaadvlieg & D.J.G. Visser (eds.), Amsterdam: Delex 2012, p. 57-97.

<sup>223</sup> Supreme Court of the Netherlands, 29 November 1985 (*Screenoprints v. Citroen*), NJ 1987, 880; Supreme Court of the Netherlands, 1 June 1990 (*Kluwer v. Lamoth*), NJ 1991, 377, note D.W.F. Verkade; Supreme Court of the Netherlands, 4 January 1991 (*Van Dale v. Romme*), NJ 1991, 608, note D.W.F. Verkade; Supreme Court of the Netherlands, 30 May 2008 (*Zonen Endstra v. Nieuw Amsterdam*), NJ 2008, 556, note E.J. Dommering.

<sup>224</sup> See e.g. Giffard V.C. in the case of *Morris v. Ashbee* (1869), *supra* note 212, p. 40: ‘no one has a right to take the results of the labour and expense incurred by another for the purpose of a rival publication’.

<sup>225</sup> See e.g. J.C. Bluntschli, *Deutsches Privatrecht*, 2 vols (Munich: Literarisch-artistische Anstalt, 1853-1854), I (1853), p. 191-192; A.W. Volkman, *Die Werke der Kunst in den deutschen Gesetzgebungen zum Schutze des Urheberrechts* (München: Piloty & Löhle, 1856), p. 19; C. Gareis, ‘Das juristische Wesen der Autorrechte, sowie des Firmen- und Markenschutzes’, *Archiv für Theorie und Praxis des allgemeinen deutschen Handels- und Wechselrechts* vol. 35 (1877), 185-210, p. 197-198 and 200; and O. Gierke, *Deutsches Privatrecht*, 3 vols (Leipzig: Duncker & Humblot, 1895-1917), I (1895), p. 756.

<sup>226</sup> See Rideau 2008, *supra* note 61, para. 4, observing that, in the nineteenth century, the copyright threshold in France shifted from the objective criterion of ‘novelty’ to the more subjective criterion of ‘originality’.

requirement in patent law or an aesthetic criterion based on literary or artistic quality.<sup>227</sup> One reason for this is that, since copyright protection ‘is necessarily restricted to the particular expression, the form, the developments that the author has given to his thought’,<sup>228</sup> all creators are free to use and build upon the ideas and knowledge previously expressed by a different author. An originality test that focuses on the author’s endeavours in creating the work was thus considered to be a sufficient threshold for copyright protection.

This had some important consequences. Since originality is perceived through the lens of the authorial contribution, the existence of prior art has relatively little significance in the domain of copyright law.<sup>229</sup> In determining the eligibility for protection, it is irrelevant whether a work is novel or stands out against pre-existing works.<sup>230</sup> Whether the authorial contribution is sufficiently reflected in the work must be ascertained from the work itself.<sup>231</sup> Thus, in the UK, it suffices to establish that the work comes from the efforts (i.e., the skill, judgment or labour) of the author and, in continental Europe, that it bears the imprint of the personality of the author. The only occasions in which prior art is relevant is when a defendant uses it to negate the originality of a work, e.g., by proving that it is copied from a pre-existing work or consists of unprotected elements of style, materials in the public domain, etc.<sup>232</sup>

In the absence of such proof, a work is often presumed to be original if it contains sufficient individuality or results from the author’s skill, judgment or labour. However, as we shall see next, when determining whether a creation satisfies the originality test, courts cannot always entirely ignore the qualitative or aesthetic aspects of an intellectual creation.

#### 4.3 *The difficulty of totally disregarding quality and aesthetics in assessing originality*

Qualitative and aesthetic deliberations are sometimes difficult to avoid when courts are asked to determine the eligibility for protection of low/non-original works. Serious music, literature and works of the *beaux arts* are almost automatically presumed to possess enough originality, but this is different when it comes to creations at the lower end of the originality spectrum. Given that the originality threshold in copyright is already very low, it is often not an easy task for courts to establish precise criteria on the basis of which they can deny copyright

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<sup>227</sup> See e.g. *Walter v. Lane* (1900), *supra* note 215, p. 548-549 (Earl of Halsbury L.C.), p. 552 (Lord Davey) and p. 558 (Lord Brampton), confirming that the ‘statute has prescribed no standard of merit in a book as a condition to entitle its author to become the proprietor of copyright in it’; and *Maple & Co v Junior Army and Navy Stores*, (1882) L.R. 21 Ch. D. 369 (Court of Appeal, 29 June 1882), p. 380 (Lindley, L.J.). See also Bluntschli 1853, *supra* note 225, p. 194-195; Dambach 1891, *supra* note 102, p. 106; and Gierke 1895-1917, *supra* note 225, I (1895), p. 770, stating that it was irrelevant whether the work had literary or artistic character, whether it was of excellent or poor quality and whether it had aesthetic merit or other marked significance.

<sup>228</sup> Pouillet 1879, *supra* note 66, p. 71 (no 76).

<sup>229</sup> Rideau 2008, *supra* note 61, para. 4.

<sup>230</sup> See *Walter v. Lane* (1900), *supra* note 215, p. 558 (Lord Brampton): ‘I do not agree that the question of the authorship of a book depends upon the literary quality of it. If a person chooses (and many do) to compose and write a volume devoid of the faintest spark of literary or other merit, I see no legal reason why he should not, if he desires, become the first publisher of it and register his copyright, worthless and insignificant as it would be.’

<sup>231</sup> See Bently & Sherman 2009, *supra* note 50, p. 93, observing that ‘[w]hile the novelty requirement in patent law focuses on the relationship between the invention and the state of the art, the originality examination [in copyright law] is primarily concerned with the relationship between the creator and the work’; and A. Lucas & H.-J. Lucas, *Traité de la Propriété Littéraire et Artistique*, 4th edn (Paris: Litec, 2012), p. 120 (no. 110).

<sup>232</sup> Sometimes the existence of identical mistakes can be an indication of an unaccepted borrowing from a pre-existing work. However, the courts cannot merely assume that a work which is derived from a pre-existing work is a ‘slavish copy’. See Cass. civ. 1<sup>ère</sup>, 11 February 1997, *Haddad*, *JCP G* 1997, II, 22973, note X. Daverat, arguing that the courts must examine a work on its own merits to determine whether it has an original character and therefore qualifies as a work of the mind.

protection. A bright line between creations that possess just enough originality to be protected by copyright law and those that simply lack originality is not easy to draw.

In Germany, to establish whether ‘works of little creative value’ (so-called ‘*Kleine Münze*’) possess sufficient individuality to be protected, the courts must typically make an evaluative judgment about the degree to which such works express the author’s creativity.<sup>233</sup> This is known as an assessment of the ‘*Schöpfungshöhe*’ of a work.<sup>234</sup> For works of art, music and literature, the courts normally require a minimum degree of creativity, which means that protection easily extends to such works, even if their level of originality is low.<sup>235</sup> For other types of works, the courts apply a higher threshold. As observed in Section 3.3, this is certainly the case for works of applied art. Another example is purely functional texts,<sup>236</sup> such as instruction manuals, which attract copyright only if the level of creativity is significantly above average. It is settled case law that copyright does not extend to ordinary, everyday and banal texts that merely connect materials in a mechanic-technical way.<sup>237</sup>

The courts enjoy a considerable margin of appreciation in determining whether a work is too banal or too commonplace to be protected. In the absence of clear-cut criteria, some degree of subjective evaluation on the part of judges is inescapable.<sup>238</sup> Nevertheless, over the years, the courts in Germany have established a set of guidelines that help them maintain a reasonable degree of objectivity in accepting or denying the level of individuality of works for which the level of creativity is not immediately obvious.<sup>239</sup> To determine whether such works meet the threshold, the courts sometimes rely on expert opinions,<sup>240</sup> but more often they use a mixture of other indicators, such as the institutional acceptance of the work (evidence of which can be found in the discussion of the work in professional literature or its exhibition in a museum or gallery), its success, the complexity of its creation, the first impression that it gives, its social function, the incentive for buying it, its presentation, the intention of the author, etcetera.<sup>241</sup> Obviously, these factors alone cannot provide firm guidance for establishing protection. They are therefore not given autonomous weight, but merely serve as indicators assisting the courts in finding the level of individuality and creativity in borderline cases. As long as judges focus on assessing the level of creativity and not on passing judgment on literary or artistic quality or merit, it seems to be accepted in German legal doctrine that, every now and then, copyright rulings are somewhat evaluative – and perhaps even subjective – by nature.<sup>242</sup>

The principle that copyright protection does not extend to works that are too banal or trivial is also recognized in other countries. In the 2008 *Endstra* case, the Dutch Supreme Court ruled that ‘excluded from copyright at any rate is anything that has a form so ordinary or trivial that

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<sup>233</sup> See Loewenheim in: Schricker & Loewenheim 2010, *supra* note 104, p. 113 (§ 2 note 45).

<sup>234</sup> See Schulze in: Dreier & Schulze 2004, *supra* note 104, p. 52 (§ 2 note 20); Loewenheim in: Schricker & Loewenheim 2010, *supra* note 104, p. 104 (§ 2 note 24).

<sup>235</sup> Schulze in: Dreier & Schulze 2004, *supra* note 104, p. 53-54 (§ 2 note 24-31).

<sup>236</sup> See Loewenheim in: Schricker & Loewenheim 2010, *supra* note 104, p. 109 (§ 2 note 35).

<sup>237</sup> BGH, 10 October 1991, I ZR 147/89, *GRUR* 1993, 34 (Bedienungsanweisung), p. 36. See also BGH, 12 March 1987, I ZR 71/85, *GRUR* 1987, 704 (Warenzeichenlexika), p. 706; BGH, 29 March 1984, I ZR 32/82, *GRUR* 1984, 659 (Ausschreibungsunterlagen), p. 660-661; and BGH, 17 April 1986, I ZR 213/83, *GRUR* 1986, 739 (Anwaltsschriftsatz), p. 740-741.

<sup>238</sup> See Schulze in: Dreier & Schulze 2004, *supra* note 104, p. 52 (§ 2 note 19).

<sup>239</sup> *Ibid.*, p. 61 (§ 2 note 61).

<sup>240</sup> *Ibid.*, p. 60-61 (§ 2 note 58 and 59).

<sup>241</sup> *Ibid.*, p. 61 (§ 2 note 62 to 66).

<sup>242</sup> See Loewenheim in: Schricker & Loewenheim 2010, *supra* note 104, p. 113 (§ 2 note 45).

it does not point to any type of creative labour of any kind being involved.<sup>243</sup> This leaves it rather open how to deal with the large ‘grey area’ of works that are not ordinary or trivial, but that do not obviously involve creative labour either.<sup>244</sup> In practice, the courts assess whether a work is sufficiently original in the sense that the author has made creative and subjective – as opposed to ordinary or trivial – choices in creating the work.<sup>245</sup> This threshold is easily met. Occasionally, copyright is rejected on the basis that a creation is too ordinary,<sup>246</sup> but thus far the courts have not yet duly explained how they have arrived at such a conclusion.

In the UK, the originality requirement also finds its limits where (the result of) the author’s labour is insignificant or trivial.<sup>247</sup> Akin to the Netherlands, however, there are relatively few occasions where copyright is denied to a work because the author has not exercised enough labour, skill or judgment in its creation or because the end result is trivial. Examples include (short) titles and compilations that involve little labour, skill or effort and that are selected automatically, mechanically or in a formulaic manner.<sup>248</sup> Here too, it is unclear where courts precisely draw the line. There are various cases in which the courts have accepted that simple works or works that result from (a substantial amount of) mundane labour can be original.<sup>249</sup> As Bently and Sherman observe: ‘In these circumstances the difficult question is knowing how much labour needs to be exercised for the resulting work to be original.’<sup>250</sup>

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<sup>243</sup> Supreme Court of the Netherlands, 30 May 2008 (*Zonen Endstra v. Nieuw Amsterdam*), NJ 2008, 556, note E.J. Dommering.

<sup>244</sup> M.M.M. van Eechoud, S.J. van Gompel, L. Guibault, B. van der Sloot & P.B. Hugenholtz, *Report of the Netherlands for ALAI 2011 Study Days (Dublin)*, available at: <<http://www.alaidublin2011.org/wp-content/uploads/2011/05/Netherlands.pdf>>.

<sup>245</sup> See e.g. District Court Den Haag (summary proceeding), 15 September 2009 (*Kisses*), AMI 2010-1, nr. 4, note J.H. Spoor; District Court Den Haag, 18 April 2012 (*Inspirion v. Pokonobe*), AMI 2012-4, p. 182-183.

<sup>246</sup> District Court ’s-Hertogenbosch (summary proceeding), 6 November 2009 (*Eisers v. Matheeuwsen*), AMI 2010-3, nr. 11, note N. van Lingen, denying copyright to statements of witnesses of an airplane crash, holding that they are realistic, usual and ordinary and not based on subjective choices; Court of Appeal of Arnhem, 28 September 2010, (*Deltex v. Jade*), AMI 2011-1, p. 37-38, denying copyright to characteristic elements of a pillow because they are ordinary and trivial; Court of Appeal of Amsterdam, 29 March 2011 (*Chocolate King v. Dobra*), AMI 2011-4, p. 148, denying protection to the design of chocolate sticks on the basis that it is ordinary and commonplace and the form of the sticks is the inevitable result of the preparation method applied; and District Court Den Haag (summary proceeding), 6 December 2011 (*New Steps v. Schuurman*), AMI 2012-1, p. 46-47, denying copyright to particular elements of boots on the basis that they are common and ordinary, but granting copyright to other elements that exhibit subjective choices.

<sup>247</sup> Bently & Sherman 2009, *supra* note 50, p. 94 and 98.

<sup>248</sup> See e.g. *Rose v. Information Services Ltd*, [1987] F.S.R. 254, 255 (Chancery Division, 22 October 1986), stating that the words “The Lawyer’s Diary” are ‘a simple and accurate description of the product’ and therefore ‘not ... a literary work of originality which qualifies for copyright protection’; and *Bookmakers Afternoon Greyhound Services Ltd v. Wilf Gilbert (Staffordshire) Ltd*, [1994] F.S.R. 723, 736 (Chancery Division, 6 May 1994), holding that copyright does not subsist in a list of forecast dividends, because insufficient skill, labour and judgment was exercised in its creation; calculating the dividends applying a specially devised formula ‘is a repetitive job requiring a certain amount of education and thereafter a meagre amount of labour.’

<sup>249</sup> See e.g. *British Northrop Ltd v. Texteam Blackburn Ltd*, [1973] F.S.R. 241, 255 (Chancery Division, 15 March 1973), arguing that ‘a single straight line drawn with the aid of a ruler would not seem to me a very promising subject for copyright. But apart from cases of such barren and naked simplicity as that, I should be slow to exclude drawings from copyright on the mere score of simplicity. I do not think that the mere fact that a drawing is of an elementary and commonplace article makes it too simple to be the subject of copyright’; and *Independent Television Publications Ltd v. Time Out Ltd and Elliott*, [1984] F.S.R. 64, 72 (Chancery Division, 9 May 1983), holding that chronological television programme schedules are copyright protectable compilations, because their creation involves ‘a great deal of skill and labour’. See also *Waterlow Directories Ltd v. Reed Information Services Ltd*, [1992] F.S.R. 409, 412-413 (Chancery Division, 1 October 1990) and *Dun & Bradstreet Ltd v. Typesetting Facilities Ltd*, [1992] F.S.R. 320, 324 (Chancery Division, 29 November 1991).

<sup>250</sup> Bently & Sherman 2009, *supra* note 50, p. 105.

Banality of a creation is also a ground for rejecting copyright protection in France. There are various examples of cases where copyright was denied to works because they were deemed too cliché or banal. In 2004, the Court of Cassation confirmed that photographs of car races were devoid of originality, as they portrayed ‘scenes of great banality that did not disclose the photographer’s sensibility or his personal competences’. It found that the photos consisted merely of a series of snapshots that were taken from positions imposed by the organisation or by using a camera fixed to the rear of the race cars.<sup>251</sup> In 2007, the exact same argument was used by the Paris Court of Appeals to reject the protection of paparazzi photographs of prince William and Kate Middleton disclosing their relationship. It held that the photographs did not bear the imprint of the personality of the photographers, given that they had remained hidden in the snow for several days only to seize the moment to take a few snapshots of the new couple with their long-lens cameras.<sup>252</sup> Copyright protection has also been withheld from ordinary photographs that have no specific creative character, or that could have been taken by any photographer with basic equipment. The courts often regard such photographs as mere ‘clichés’ that do not bear the personal imprint of the photographer.<sup>253</sup> Other types of works that have been refused protection because they were considered too cliché or banal include architectural plans for the construction of ordinary houses;<sup>254</sup> booklets for training mediation officers; a descriptive article on making weapons for aircraft carriers; and a scientific method of treatment or diagnosis in the form of an ordinary questionnaire.<sup>255</sup>

Additionally, while in France copyright subsists in a work regardless of its purpose or merit, the author’s ‘aesthetic refinement’ as reflected in the characteristic elements of the work is not irrelevant in the assessment of originality.<sup>256</sup> In fact, to establish whether a work bears the imprint of the author’s personality, the courts sometimes actively seek to identify the author’s aesthetic choices in the combination of characteristic elements of a work. For example, in 2008, the Court of Cassation granted copyright protection to a work of art consisting of the word ‘Paradise’ being affixed ‘in gilded letters with a patina effect and in a specific graphic style on a dilapidated door with a lock in the form of a cross, set in a decaying wall with the paint peeling off’. The Court ruled that, despite its setting in a pre-existing environment, ‘this combination implies aesthetic choices reflecting the author’s personality’.<sup>257</sup>

Similarly, in 1995, the Court of Cassation approved a decision of the Paris Court of Appeal, holding that the design of a bag created by Chanel was protected, as it ‘reflected, through the combination of its particular features, a personal creative effort and a concern for aesthetic refinement which characterized its originality’;<sup>258</sup> and, in 2006, it confirmed a ruling by the same Court, holding that the blouses of Rayure were original, since ‘the characteristics of the designs, in the combinations that are made of them, stem from an aesthetic choice reflecting a

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<sup>251</sup> Cass. civ. 1<sup>ère</sup>, 3 February 2004, case n° 02-11400 (not published in the Bulletin), available at: <http://droit-finances.net>.

<sup>252</sup> CA Paris (*ch. 4, sect. A*), 5 December 2007, *SIPA Press v. Eliot Press*, *RIDA* no. 216 (2008), 499-502, p. 500.

<sup>253</sup> See e.g. Cass. civ. soc., 13 November 2008, case n° 06-45.991 (not published in the Bulletin), available at: <http://legimobile.fr>; and CA Rennes (*ch. 2, comm.*), 7 September 2004 (unpublished), available at: <http://droit-finances.net>.

<sup>254</sup> Cass. civ. 1<sup>ère</sup>, 27 June 2000, case n° 97-22537 (not published in the Bulletin), available at: <http://www.juricaf.org>.

<sup>255</sup> See CA Versailles (*ch. 12*), 30 July 2003, *Propriétés Intellectuelles* 2003, p. 376, note A. Lucas; CA Paris (*ch. 4, sect. A*), 14 January 2004, *Propriétés Intellectuelles* 2004, p. 630, note A. Lucas; and CA Paris (*ch. 4, sect. B*), 26 September 2008, *Propriétés Intellectuelles* 2009, p. 50, note A. Lucas.

<sup>256</sup> A. Kéréver, ‘Chronique de jurisprudence’, *RIDA* no. 166 (1995), 226-269, p. 232-233.

<sup>257</sup> Cass. civ. 1<sup>ère</sup>, 13 November 2008, *B. Rheims v. J. Gautel*, *RIDA* no. 219 (2009), 352-361, p. 356-357.

<sup>258</sup> Cass. civ. 1<sup>ère</sup>, 10 May 1995, *JLRT Rolande Tapiou v. Chanel*, *RIDA* no. 166 (1995), 290-297, p. 294-295.

creative approach bearing the stamp of the author's personality'.<sup>259</sup> While we do not suggest that the courts are prejudiced in any way, in such cases, the obvious question arises whether the same bag or the same blouse designed in a Chinese factory would have been judged in the same way. It is not unthinkable that – directly or indirectly – the courts have been informed by a desire to protect a successful designing house, luxury items, and so forth.

## 5. Conclusion

Our examination of national law and case law reveals that the ban on criteria such as quality, merit, aesthetics and purpose aims to prevent courts from making evaluative judgments about a work's intrinsic value or worth, measured in aesthetic or economic terms. For the purpose of vesting copyright, it is irrelevant whether a work has literary or artistic merit or no merit whatsoever. It also does not matter whether a work is accurate or inaccurate or whether it is a commercial success or outright failure. Judges simply are not art critics, but observers of the law.<sup>260</sup> Therefore, they must not assess whether a work sufficiently stands out aesthetically or commercially, but only determine whether it meets the originality standard.

In practice, however, the exclusion of criteria such as quality, merit, aesthetics and purpose is not so straightforward. Problems of application may arise in court, when judges are supposed to eliminate evaluation. As observed, while the courts generally refrain from using the lack of success, merit or quality as an argument to *withhold* copyright protection from a creation, this does not mean that they necessarily also ignore the success, merit or quality of a work when *granting* copyright protection to it. Moreover, for a creation with an as yet uncertain status in copyright law, the analysis of what category of works it belongs to may include qualitative or aesthetic criteria, but also considerations of political economy. This shows that, in practice, originality alone does not always provide an appropriate legal instrument allowing the courts to conclusively establish whether or not a creation rightfully fits the domain of copyright law. Additionally, for the more functional types of works, a qualitative or aesthetic assessment can sometimes be helpful to distinguish the functional/technical elements from the aesthetic ones. Last but not least, to determine whether works of low originality attract copyright, the courts must actually establish whether they surpass the level of ordinary/everyday creations. This often also does not go without making qualitative or aesthetic considerations.

It follows that, at the Member State level, the law does not absolutely prohibit courts from making qualitative or aesthetic observations when judging on the subject-matter of copyright. In practice, such criteria may well assist the courts in externally demarcating the domain of copyright law or assessing the level of originality or creativity of works. This unmistakably involves a certain degree of subjectivity on the part of judges, but legal doctrine nonetheless seems to accept this. As one German scholar observed: 'A judge who is blind with regard to literary or artistic values would be a bad judge in copyright cases.'<sup>261</sup> Thus, as long as they are not applied in a purely evaluative manner, it seems that qualitative or aesthetic criteria may play some role in determining whether or not a work attracts copyright.

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<sup>259</sup> Cass. comm., 28 November 2006, Bulletin 2006 IV n° 233 p. 256.

<sup>260</sup> See e.g. H. Cohen Jehoram, 'De rechter als kunstrecensent', *NJB* 1995, 660-663. See also *George Hensher Ltd. v. Restawile Upholstery (Lancs) Ltd.* (1974), *supra* note 87, p. 77 (Lord Reid) and p. 94-95 (Lord Simon of Glaisdale); Knap 1976, *supra* note 101, p. 132; and Lucas & Lucas 2012, *supra* note 231, p. 103 (no. 86).

<sup>261</sup> E. Ulmer, *Urheber- und Verlagsrecht*, 3rd edn (Berlin [etc.]: Springer, 1980), p. 133: 'Ein Richter, der literarisch oder künstlerisch wertblind ist, wäre ein schlechter Richter in Urheberrechtssachen.'

This obviously should also have some bearing on the interpretation of the ‘no other criteria’-clause in EU copyright law. It would be odd if a legal practice that is so well established at the national level of many Member States is rendered impermissible by a broad application and interpretation of the rule in EU copyright law that any other criterion than originality must be disregarded in determining the eligibility for protection of works. This is especially so, given that the ‘no other criteria’-rule was introduced without any consideration of its substantive meaning. The CJEU should therefore not stare blindly on the broad wording of the rule and the accompanying recitals that seem to ban all qualitative and aesthetic criteria, but interpret these provisions in the light of existing legal practice in the Member States.

From a doctrinal point of view, it also makes sense to allow national courts to make certain qualitative or aesthetic assessments when denying protection to subject-matter that does not really fit the copyright domain, that is mainly comprised of technical or functional elements or that does not meet the required threshold of originality. Given that the subject-matter of copyright consists of ‘abstract objects that ... do not have physical boundaries but are legal constructs’,<sup>262</sup> it is up for the lawmakers and the courts to give them a more concrete shape by formulating a clear threshold for protection. Historically, the threshold has been put at a very low level. As observed, in various countries, the lawmakers deliberately chose to eliminate all evaluative judgments regarding the merit or purpose of a work, so as to ensure that copyright extended to a broad catalogue of works. Should the ‘no other criteria’-clause in EU copyright law be applied literally and national courts would actually ban all qualitative and aesthetic criteria, including the ones that are established legal practice and that are virtually impossible to do without, this entails the risk that, in practice, the copyright threshold transforms into such a low standard that it fails to adequately define the subject-matter of copyright. As this article has demonstrated, it simply is not always possible to distinguish works that attract copyright protection from those that do not on the basis of the originality criterion alone.

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<sup>262</sup> D. Booton, ‘Framing pictures: defining art in UK copyright law’, *Intellectual Property Quarterly* 2003, 1, 38-68, p. 38.