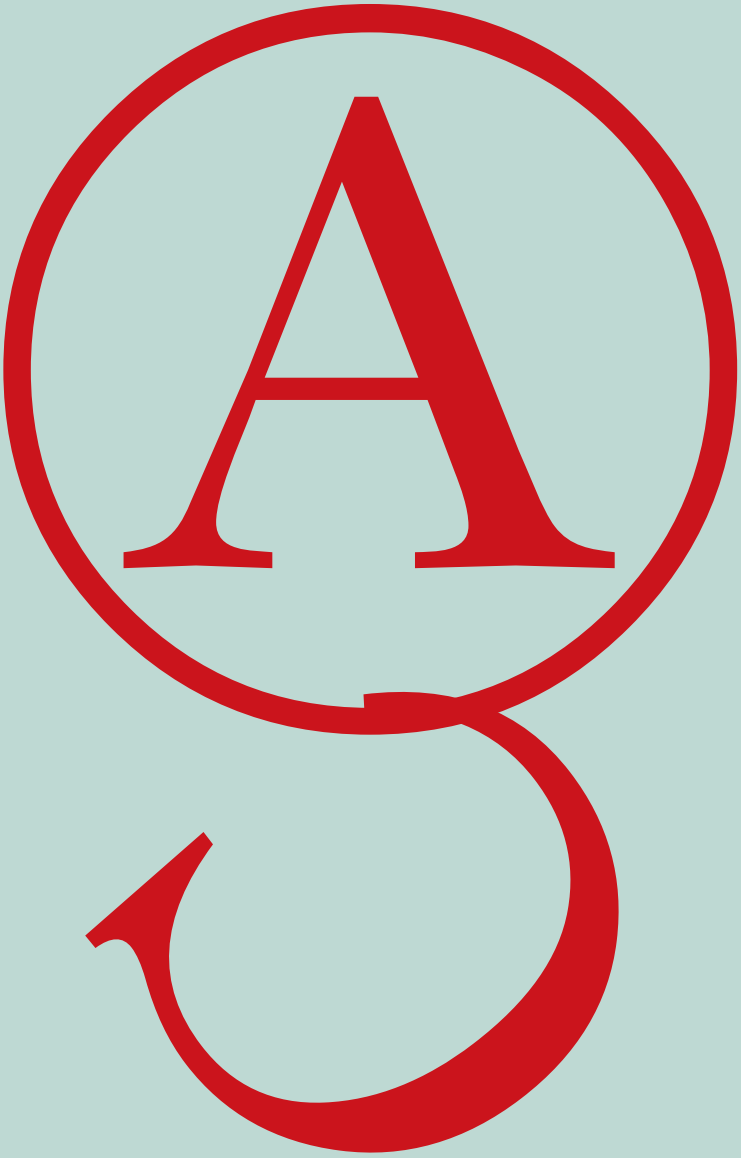
Edited by Mireille van Eechoud

The Work of Authorship



Amsterdam
University
Press

The Work of Authorship

Edited by
Mireille van Eechoud

Amsterdam University Press

This book is published in print and online through the online OAPEN library (www.oapen.org).

OAPEN (Open Access Publishing in European Networks) is a collaborative initiative to develop and implement a sustainable Open Access publication model for academic books in the Humanities and Social Sciences. The OAPEN Library aims to improve the visibility and usability of high quality academic research by aggregating peer reviewed Open Access publications from across Europe.

Amsterdam University Press English-language titles are distributed in the US and Canada by the University of Chicago Press.

ISBN 978 90 8964 635 4
e-ISBN 978 90 4852 300 9
NUR 820 / 823

Contents

Creativity, autonomy and personal touch

A critical appraisal of the CJEU's originality test for copyright

Stef van Gompel

Copyright protects a wide range of productions in the literary, scientific and artistic domains. This not only includes cultural creations, such as works of literature, music, drama, film, photography and art, but also functional types of subject-matter, such as computer programs, databases, industrial design and works of applied art. As a rule, copyright protects works regardless of their 'merit' or purpose: the design of ordinary household items is eligible for copyright protection just as much as creations of 'high' art. The only threshold that must be satisfied for a work to attract copyright is that its expression is sufficiently 'original', in the legal sense of that word.

Copyright law's originality threshold is not a high-to-attain standard. Recent case law of the Court of Justice of the European Union (CJEU) confirms that copyright extends to subject-matter that is original in the sense that it is the 'author's own intellectual creation' (*Infopaq International*, 2009, § 37; *Bezpečnostní softwarová asociace*, 2010, § 46; *Football Association Premier League*, 2011, § 97; *Painer*, 2011, § 87; *Football Dataco*, 2012, § 37; and *SAS*, 2012, § 45) and that no other criteria may be applied to determine its eligibility for protection. In the *Eva-Maria Painer* case, the Court clarified that an intellectual creation is the author's own 'if it reflects the author's personality' and that this is the case 'if the author was able to express his creative abilities in the production of the work by making free and creative choices' (2011, §§ 88–89). This was reiterated in the *Football Dataco* case, where it was once more emphasised that, for an intellectual creation to be original, the author must have stamped it with his 'personal touch' by making 'free and creative choices' during its production (2012, § 38).

For readers untrained in copyright law, the language used by the CJEU may give the false impression that copyright law's originality test is not at all that easy to satisfy. The references to 'the author's personality', 'creative abilities' and 'free and creative choices' seem to suggest that only culturally significant creations carrying an obvious personal stamp of the author qualify for protection. This is not the case. Copyright applies to a wide range

of culturally trivial objects with no unique distinctiveness, as the *Eva-Maria Painer* case perfectly illustrates. This case involved a simple school portrait photograph – indeed, those school portraits that are impossible to tell apart, except for the images of the persons they portray. The CJEU found that the creation of such photographs could involve sufficient 'free and creative choices' to regard them as the own intellectual creations of the photographer (2011, § 93). This shows that, in reality, the words defining copyright law's originality criterion differ considerably from what they mean to convey in everyday speech.

The CJEU's endeavours to define copyright law's standard of originality and to craft an EU-wide legal notion of copyrighted works came somewhat unexpected. Up until the *Infopaq International* decision of 2009, it was thought that the originality standard and the subject-matter definition of copyright were largely unharmonised terrains that are not governed by EU law but that instead fall to national regulation. Accordingly, the CJEU's appropriation of the work concept has consequences for Member States that have traditionally applied other criteria to determine whether or not creations are eligible for copyright, such as the United Kingdom (Alexander, 2009; Derclaye, 2010; Griffiths, 2011). Due to the CJEU's harmonisation of the originality standard, such national criteria will possibly need to be reassessed so as to put them on par with the 'author's own intellectual creation'-test. More specifically, it seems that the national criteria must be brought into line with the 'free and creative choices' language, which the CJEU has made a corner stone of its 'author's own intellectual creation'-test. By accentuating the author's personality as a key constituent of the originality criterion, this test has been tied closely to the author as the individual creator of a work.

Interestingly, the meaning and substance of the CJEU's originality criterion has not yet attracted much analytical scrutiny. In particular, the limits inherent in the CJEU's originality standard have received little attention in legal doctrine – let alone in court decisions (although that is probably not where one would expect a critical review of the test be conducted in the first place). This is remarkable, seeing that copyright regulates such a wide variety of cultural production and may restrict the use of even the most low-key, routine creations that surround us in everyday life.

A more critical and out-of-the-box reading of the 'free and creative choices'-language suggests that the CJEU's originality standard may perhaps impose more limitations than is currently recognised in legal discourse. For one thing, authors are of course not autonomous creators who work in a vacuum. Creative processes are contingent on many external

factors. Cultural productions are usually made with audiences in mind and individual creators operate within social, technical and institutional environments with all of the attendant constraints. This implies that, in reality, the autonomy of authors to make free and creative choices is often naturally restricted.

Moreover, it is questionable whether the 'author's own intellectual creation'-test is an appropriate standard for determining the eligibility of protection of joint works. If free and creative choices imply that the autonomy of the individual creator is a key factor, how then are works to be rated that result from complex collaborative processes such as those that online communities create (whether art, software or encyclopaedias)? Whose free and creative choices count for this matter? Only those of the main author or all choices made by individual contributors? The weaker the connection between a work and the authors who created it, the more difficult it seems to apply the 'author's own intellectual creation'-test as it is currently defined by the CJEU.

Since 'free and creative choices' has become the mantra in decisions on copyrightable subject-matter, it is high time for a considerate study of the limits of the 'author's own intellectual creation'-test. Given that the originality standard is so easy to attain that even works of minimal creativity qualify for protection, there is need for a more nuanced understanding of how the 'author's own intellectual creation'-test operates in law. That is where this chapter aims to make a contribution.

This chapter consequently examines what the elements 'free and creative choices' and the author's 'personal touch' entail and how limits to creativity, autonomy and the expression of personality in creative processes may have bearing on the practical application of the CJEU's originality test. In so doing, it draws upon aesthetics and creativity studies to explain how creative processes can be affected by conventions and constraints. As has been remarked in the Introduction of this book, creativity studies is not a homogenous discipline, but rather a complex of diverse specialisations and approaches in the humanities and social sciences, each studying creativity from certain perspectives. Between these specialisations, creativity may be treated differently, depending on the specific strands that are examined and the approach that is taken. Because this chapter covers diverse areas, it necessarily takes a broad-brush approach to creativity and does not provide such a detailed account of concepts of creativity as many specialisations in the humanities and social sciences do.

For the most part, this chapter has the law as its object. Apart from the CJEU's case law, which is at the heart of the examination, I also discuss the

rich case law on copyrightable subject-matter from the Netherlands. Dutch courts not only tend to pass elaborately argued decisions, they often also have an open attitude towards court decisions and doctrine from other EU Member States. Furthermore, the Dutch originality test shows close similarity to the CJEU's 'author's own intellectual creation'-test. In the *Zonen Endstra v. Nieuw Amsterdam* case, the Dutch Supreme Court has ruled that a work must have an 'own, original character' and 'bear the personal stamp of the author' to attract copyright. This means that its form 'may not be derived from another work' and that it 'must be the result of creative human labour and thus of creative choices, so that it is a production of the human mind' (2008, § 4.5.1). The Supreme Court considers this to be on par with the CJEU's originality test (*Stokke v. H3 Products*, 2013, § 3.4(a); *Stokke v. Fikszo*, 2013, § 4.2(a); *Hauck v. Stokke*, 2013, § 4.2(a)) and so do Dutch legal commentators (see, e.g., Koelman, 2009, p. 205; Visser, 2010, p. 986; Hugenholtz, 2011). Accordingly, the Dutch case law can be considered sufficiently representative for illustrating the limitations of relying on the author's 'free and creative choices' and 'personal touch' in copyright cases.

The chapter consists of four parts. First, it clarifies what the CJEU alludes to when it uses the word 'creative'. It will be seen that, in copyright law, this notion has an entirely different connotation than it has in aesthetics and creativity studies. This explains why insights from these disciplines are difficult to apply for the purpose of reinterpreting or reconfiguring copyright law's originality test. Nevertheless, there are ways in which creativity studies can help to refine specific elements of the test. This will be elucidated in the next two sections on autonomy and personal touch. I explore how creative autonomy of authors can be constrained and whether such constraints are – or ought to be – accommodated for in copyright law's originality test. In addition, I show the difficulty of determining whether the author's personality is sufficiently reflected in works, in general, and jointly created works in particular. The chapter concludes with a synthesis of the main findings.

Creativity: a concept with diverse meanings

As explained in the introduction of this chapter, for readers unfamiliar with law, the terms 'originality' and 'creativity' in copyright law may have a somewhat surprising meaning. To illustrate this, this section contrasts copyright law's concept of creativity with that in aesthetics and creativity studies and explains the reasons for the difference of approach. It concludes

that it is not useful to reinterpret creativity in copyright law by drawing upon the same concept in aesthetics and creativity studies, but that further study of creative constraints and the imprint of the author's personality is necessary and desirable.

The creativity standard in copyright law

At first sight, the degree of creativity reflected in a work seems to be a critical factor for accepting copyright protection. In multiple instances, the CJEU has ruled that, for the author to achieve a result which is an intellectual creation of his or her own, the author must have 'express[ed] his creativity in an original manner' (*Infopaq International*, 2009, § 45; *Bezpečnostní softwarová asociace*, 2010, § 50). If understood in the ordinary day-to-day meaning of the word 'original', this language appears to suggest that copyright only extends to intellectual creations that, at least to some extent, are novel, innovative or unique in the sense that they depart from conventional expression.

On closer inspection, however, this is not how originality in copyright law is interpreted. The word 'original' merely signifies that the work must originate from the author or, in the words of the CJEU, that it is the 'author's own intellectual creation'. The CJEU does not specify when something is a 'creation' for the purposes of copyright. It seems to entertain the idea that it covers a very broad array of productions of the mind. The CJEU neither tests whether the subject-matter at issue belongs to the category of copyrightable works, nor categorically excludes specific types of creations in advance. Accordingly, it has denied copyright to sporting events for the reason that they 'cannot be regarded as intellectual creations classifiable as works' (*Football Association Premier League*, 2011, § 98), while accepting that copyright may extend to other – non-aesthetic – creations, including graphic user interfaces (*Bezpečnostní softwarová asociace*, 2010, § 46), football fixture lists (*Football Dataco*, 2012, §§ 29–45), programming languages and the format of data files in computer programs (*SAS*, 2012, § 45).

On the whole, a work only needs to reflect a minimum level of creative input to attract copyright. It suffices that the author has made 'free and creative choices' in its production (Van Eechoud, 2012, §§ 56–57). In particular, it is not required that a work is new or that it possesses certain quality or merit (Van Gompel & Lavik, 2013). The CJEU has explicated that, for literary works, the author's 'free and creative choices' can exist in the selection, sequence and combination of words (*Infopaq International*, 2009, § 45) and, for photos, in fixing the background, pose, lighting and framing,

choosing the angle and atmosphere and using developing techniques or computer software (*Eva-Maria Painer*, 2011, § 91). Here it must be stressed that copyright does not protect mere facts or ideas. Its protection does not extend beyond the individual expression that the author has given to his or her thoughts.

Interestingly, the CJEU has acknowledged that there are constraints to creativity that need to be taken into consideration when determining the eligibility for protection of works. It has explicitly ruled that copyright does not protect features of a work that are predetermined by technique or function and therefore are not based on free and creative choices (*Bezpečnostní softwarová asociace*, 2010, §§ 48–49; *Football Association Premier League*, 2011, § 98; *Football Dataco*, 2012, § 39; *SAS*, 2012, § 39). Yet, the CJEU is not really clear on what the requirement to disregard technically or functionally dictated choices means. Given that often it is feasible to make small, subjective deviations in the design of technical products (see Quaedvlieg, 1987, pp. 22–25), it is not at all so obvious where it has set the limit at which the author's creative freedom is too narrow for the work to attract copyright.

In general, the originality standard is very low. As observed in the introduction of this chapter, even regarding ordinary school portrait photos, the CJEU has held that 'the freedom available to the author to exercise his creative abilities will not necessarily be minor or even non-existent' (*Eva-Maria Painer*, 2011, § 93). This is also recognised at the national level, where there is an abundance of examples of low level creative works having received copyright protection. In the Netherlands, copyright has been conferred on 'passport photographs, striped wallpaper, the design of simple games like "four in a row" and designs of basic holiday homes' (Hugenholtz, 2012, p. 44).

It remains unclear from the CJEU's case law whether there are any further constraints to creativity that may render creations ineligible for copyright protection. Since the CJEU relies so heavily on the author's free and creative choices, it seems safe to assume that copyright does not extend to too obvious or trivial creations that insufficiently express the author's creative abilities. That is at least how originality's lower limit is traditionally understood in most Member States. Here too, however, it is not easy to draw a bright line between works that possess just enough creativity and those that are too obvious or trivial to attract copyright, at least if courts are expected to eliminate evaluation beyond the 'author's own intellectual creation'-test of the CJEU (see Van Gompel & Lavik, 2013, pp. 219–229).

The final judgment in the Dutch court case of *Zonen Endstra v. Nieuw Amsterdam* corroborates this. The case dealt with the question of whether copyright subsists in (transcripts of taped) conversations. These conversa-

tions took place during a series of secret meetings between police officers and Endstra, a real estate broker who was later murdered. The tapes were transcribed into official police reports, a copy of which found its way to crime reporters who published a book of the transcripts, with minor edits. The sons of the murdered businessman sought to stop publication by claiming copyright in the conversations. The case made it all the way to the Supreme Court (2008) and was ultimately remanded to the Court of Appeal of The Hague. In 2013, this court ruled that Endstra's conversations with the police were not original works, because Endstra had expressed himself in a nigh-endless sequence of incomplete, badly versed phrases that involved insufficient creative labour. Copyright protection was denied because Endstra had construed his speech in a form too 'ordinary or trivial' (§ 5.13). With this finding, some argue, the court makes, or at least comes close to making, an aesthetic quality judgment on the coherence of Endstra's speech (Tsoutsanis, 2013; Grosheide, 2013; Cohen Jehoram, 2013). It can also be argued, however, that the court actually sought to apply the originality test as phrased by the Dutch Supreme Court by critically examining whether Endstra had made 'free and creative choices' in expressing himself (Van Gompel, 2013, p. 203).

Creativity standards in aesthetics and creativity studies

The low standards of creativity and originality in copyright law stand in stark contrast with how these notions are understood in aesthetics and creativity studies. Although, within and between these disciplines, there are obviously many variations in the way these terms are used (Parkhurst, 1999), in general, the various definitions of creativity have in common that they involve an element of novelty and an element of quality or usefulness (Sternberg and Lubart, 1999, p. 3; Sternberg and Kaufman, 2010, p. 467). That is, to be creative, a work must exhibit some sort of novel, original or innovative outcome, either in its appearance or in its underlying ideas. In addition, it must also be appropriate (significant, valuable or useful) within the specific context (Mayer, 1999, pp. 449–450). As Amabile and Tighe describe it, creativity does not merely rest on a work being 'different for the sake of difference' but also requires it to be 'appropriate, correct, useful, valuable, or expressive of meaning' (1993, p. 9).

Regardless of the common elements, the definitions of creativity and originality vary greatly in detail. This can perhaps be explained by the variety of disciplines in which creativity has been studied, including psychology, sociology, biology and economics, with a vast 'panoply of perspectives on

creativity' within these disciplines (Kozbelt, Beghetto and Runco, 2010, p. 21). Richard E. Mayer notes for example that creativity can be perceived as a property of people, products or processes, as a personal or social phenomenon, as a common or exceptional incidence, as a domain-general or domain-specific concept or as a qualitative or quantitative matter (1999, pp. 450–451).

Despite the broad variety of disciplines and perspectives on creativity, however, both aesthetics and creativity studies seem to have in common that they treat creativity and originality as relative or comparative notions (cf. Moran, 2010, p. 75). That is, these notions are used as criteria to determine how one person, product or process stands out creatively against other people, products or processes within the same symbolic domain (Csíkszentmihályi, 1999, p. 316). This is an important observation, because it allows us to understand the fundamental difference with the way in which originality and creativity are applied in copyright law. There, these notions are treated not as relative or comparative, but as independent, normative concepts.

Explaining the difference of interpretation and approach

The main reason for the difference of interpretation is that especially aesthetics and art studies on the one hand and copyright law on the other start from completely different points when examining notions of originality and creativity. At an abstract level, these points of departure can be described as being one of assessing distinctiveness versus one of legal demarcation.

Having artistic evaluation as one of its principal objectives, aesthetics clearly takes a relative approach to creativity by considering how original, novel or unique a work is in comparison with other works within a specific genre or cultural domain. That is not to say that aesthetic evaluation depends solely on how an artwork relates to similar works that precede it. It is also relevant what contribution the work makes to the further development of a genre (Levinson, 1990). As Sherri Irvin explains, if 'the characteristics for which a work is praised are … developed further by other artists … this, in turn, will reflect favorably on the initial work' (2007, p. 295). Whether the significance of an artwork is evaluated retrospectively or prospectively, however, it is evident that in making the assessment, other works within the same genre serve as key reference points.

Other disciplines do not concentrate on aesthetic creativity or value the superiority of one creative person, product or process over another. Creativity studies can also be oriented on organisational creativity (Puccio

and Cabra, 2010), educational creativity (Smith and Smith, 2010), functional creativity (Cropley and Cropley, 2010), et cetera. As a general rule, however, the degree to which creativity or innovation manifests itself in organisational, educational or functional settings is also measured in relation to other – sometimes hypothetical – settings to which they compare.

In copyright law, by contrast, the courts do not generally draw a comparison with other works to determine whether an intellectual creation meets the required level of creativity. Because copyright law's originality test 'is primarily concerned with the relationship between the creator and the work' (Bently and Sherman, 2009, p. 93) and not with how novel or meritorious a work is compared with earlier works, originality is examined solely on the basis of the work itself. Reference to pre-existing works is usually only made if there is doubt about whether a work is truly the author's own intellectual creation, for example, if there are indications that the author has copied parts of earlier works or draws upon unprotected ideas, elements of style or materials that are in the public domain (Van Gompel & Lavik, 2013, p. 217).

The reason why copyright law's originality test is primarily author-oriented and does not require a comparison of works with prior art is largely historically determined. In the 19th century, the justification for copyright was found to exist in protecting the labour and expense incurred by the author in creating the work (the labour theory of copyright) or in protecting the author's personality as manifested in the work (the personality rights theory of copyright) (Buydens, 2012, pp. 258–309, 315–340). This was reflected in the originality test being centred on the author as the creator of the work (Van Gompel & Lavik, 2013, p. 215). Since copyright extends only to the author's individual expression and not to facts and ideas, an originality criterion that focuses on the author's own intellectual endeavours in creating the work was considered a sufficient threshold. For the purpose of a legal demarcation of copyright, no further object-oriented criteria such as novelty, quality or merit were thought to be required.

Restyling copyright's creativity standard: an arduous task

Since the concept of creativity differs greatly between the humanities and copyright law in terms of interpretation and points of departure, reinterpreting copyright law's originality test by using insights from the humanities appears to be a difficult task. Although, in theory, the idea of drawing upon aesthetics or creativity studies to rephrase copyright law's creativity standard in more positive terms looks sympathetic, in practice,

raising the standard along these lines would seem to create far more problems than it solves. As Erlend Lavik also argues in this book, aesthetics and creativity studies simply do not provide sufficiently well-defined and coherent principles for the purpose of creating legal certainty in the copyright domain. This has been explained in greater detail elsewhere (Lavik & Van Gompel, 2013).

Without repeating the said discussion here, it is evident from the comparison above that if copyright law were to move away from the low, author-oriented originality criterion by adopting a higher creativity test akin to the one applied in aesthetics and creativity studies, then this would undoubtedly mark a departure from the core principles upon which copyright law rests. It would subject copyright to a novelty-like criterion and would require courts to determine whether a work creatively stands out against other, comparable works. Rather than centring protection on the author's own intellectual creation, it would require evaluating a work's merit vis-à-vis other works to ascertain whether it is worthy of protection. This is undesirable, as it would completely upset the current copyright system and the principles upon which it is based.

Still, this does not change the fact that creativity is part of copyright law's originality criterion and that it will remain a hollow term unless it is taken more seriously. For this reason, the following two sections will examine whether it would be practical and feasible to reinforce the current 'free and creative choices'-test by requiring courts to take full account, first, of constraints that may restrict the author's creative autonomy and, second, of the bond between a work and its creator so as to determine whether his or her personality is sufficiently reflected in it.

Autonomy: Exercising free choice within creative constraints

Creativity requires certain autonomy on the part of the creator. Without autonomy, creators may lose the intrinsic motivation for creating works, which can affect their sense of intellectual ownership (Amabile, 1998, p. 82). Moreover, as Mark A. Runco writes, '[o]riginality implies that the person is doing something that is different from what others are doing, and that is probably easiest if he or she is independent and autonomous' (2007, p. 288). Hence, there is a certain relationship between the degree of freedom that creators enjoy and the level of creativity evident in the works they produce.

This is also acknowledged in copyright law. As observed, the CJEU has judged that copyright protection is granted only to works that result

from the author's *free* and creative choices. Conversely, it has ruled that copyright's originality threshold is not met when the creation of a work is dictated by technical or functional considerations, rules or constraints that leave no room for creative freedom (*Bezpečnostní softwarová asociace*, 2010, § 48–49; *Football Association Premier League*, 2011, § 98; *Football Dataco*, 2012, § 39; *SAS*, 2012, § 39). The CJEU has held that copyright extends neither to the functionality of a computer program, nor to the programming language, the format of data files and the graphic user interface insofar as these components are differentiated by their technical function only (*Bezpečnostní softwarová asociace*, 2010, § 48; *SAS*, 2012, § 39).

From a legal perspective, since the originality criterion requires a work to express the author's free and creative choices, it makes sense that courts, in deciding on a work's eligibility for protection, ignore elements that do not result from autonomous creative choices by the author. However, the difficulty remains how the originality of a work as a whole is to be judged when it contains technical, functional or other non-original features. This will be considered in more detail below. In the *Bezpečnostní softwarová asociace* case, the CJEU has further explained the importance of discounting technical or functional considerations, rules or constraints when making judgment on the originality of a work. It stated that, if the different methods of implementing an idea are so limited that idea and expression become indissociable, then the space for authors to express their creativity in a personal manner is too narrow to create a work that constitutes an intellectual creation of their own (2010, §§ 49–50). Although the way in which the CJEU brings in the idea/expression dichotomy is odd, it clearly seeks to prevent that the originality test is interpreted in such a way that it would enable a monopolisation of ideas 'to the detriment of technological progress and industrial development' (*SAS*, 2012, § 40). Competition or innovation must not be excluded by authors who claim exclusive protection for elements of works that are merely technically or functionally defined and that leave no room for creative choices.

Creative constraints also play a role outside the mere technical or functional domains. At least, that can be inferred from the *Football Association Premier League* case, in which the CJEU denied protection to football matches on the grounds that they 'are subject to rules of the game, leaving no room for creative freedom for the purposes of copyright' (2011, § 98). It would have been more straightforward had the Court denied protection by reasoning why a football game is not a literary or artistic 'work'. Copyright is indeed not intended to protect football matches or, more precisely, to cover sports techniques and tactics. If the Dutch athlete Epke Zonderland could claim copyright protection for the three consecutive flight elements which

he introduced and successfully completed in the men's horizontal bar final during the 2012 Olympics in London, then he could eliminate competition and innovation in this sport by precluding others from performing the same. The objective of sports being to attain maximum physical performance in fair competition with other participants, any athlete may seek a competitive advantage through physical training, mental preparation, refining skills, better applying knowledge, using better equipment or developing new techniques. It would be unthinkable, however, if the one athlete has a competitive advantage over the other due to an intellectual property right over the execution of sports elements (with the exception maybe of choreographed movements in disciplines such as figure skating or free style gymnastics). That is why it makes sense to exclude sports from the copyright domain altogether, as they are commonly understood to be in most countries (Spoor, Verkade and Visser, 2005, p. 127). It is somewhat surprising that, instead, the CJEU applied the 'creative freedom'-test to football matches, because by doing so it seems to imply that sports events are in principle eligible subject-matter. That in turn raises the thorny question of authorship. Who qualifies as 'author' of football matches? (The players, captain, technical staff, the coach, one team, both teams, all of the above?).

In practice, the challenge is to determine how much freedom authors actually have for making creative choices. Creative processes and outcomes are always contingent on conventions and constraints of some kind. These may exist in various forms and may vary from soft, self-imposed restrictions to hard limitations that are imposed from outside. This section first explains how creativity and constraints interact and then sketches types of constraints by which the author's creative freedom may be inhibited. Because the object is to illustrate that the author's autonomy in creative processes is invariably restricted, in these sections the copyright implications are not examined in much detail. That will be done in the subsequent section, which examines how courts deal with creative constraints when judging on copyright law's originality test. It will be seen that courts often only investigate the creative space that is available, without observing how that space is used and whether the author has been restricted in any way during the creative process.

The interplay between creativity and constraints

In creativity studies, there is extensive literature on how tradition, conventions and constraints affect creative processes. Most writings focus on the intricate relationship between creativity and constraints, explaining that, while the latter obviously restrict the creative freedom of authors, at the

same time, they are an intrinsic and perhaps necessary part of creative processes. If a sufficient degree of freedom is critical for artists to be able to make creative choices, then creativity will be stifled if there are too many restrictions. Yet, too much freedom can also paralyse creativity. If authors are offered too many choices, then the creative space may be too large to make adequate creative decisions. Linda Candy rightly observes that, since '[a] totally free or unoccupied space in which to begin a creative work is both unimaginable and probably undesirable', constraints can also be conducive to creativity by providing the author with 'a more manageable creative space' (2007, p. 366).

For Igor Stravinsky, for example, rules and restrictions were an integral and essential part of musical composition. He wrote:

> The creator's function is to sift the elements he receives from [imagination], for human activity must impose limits upon itself. The more art is controlled, limited, worked over, the more it is free. As for myself, I experience a sort of terror when, at the moment of setting to work and finding myself before the infinitude of possibilities that present themselves, I have the feeling that everything is permissible to me. … My freedom thus consists in my moving about within the narrow frame that I have assigned myself for each of my undertakings. I shall go even further: my freedom will be so much the greater and more meaningful the more narrowly I limit my field of action and the more I surround myself with obstacles. Whatever diminishes constraint, diminishes strength. The more constraints one imposes, the more one frees one's self of the chains that shackle the spirit (1970, pp. 63–65).

Hence, in constraint theories, creativity is typically defined as 'a process of exercising free choice in the context of a range of existing constraints' (Candy, 2007, p. 366). In a similar vein, Jon Elster interprets creativity as 'working within constraints' and originality as 'changing the constraints' (2000, p. 180), thus qualifying originality as a higher to attain standard than creativity. At the very end of this spectrum is Patricia D. Stokes' constraint model, according to which genuine artistic freedom is left only to artists like Motherwell, Mondrian, Klee and others 'who self-select and self-impose constraints on their current successful solutions' and, in so doing, pursue 'a novel goal and in the process of realising it [enlarge] a domain' (2008, pp. 234, 235).

Obviously the way in which constraints affect creativity fully depends on their nature. As in the example of Stravinsky, the restrictions are totally self-imposed and therefore part of the creative process. This does not directly upset creative freedom. In fact, it is creative autonomy that allows artists to

set the boundaries within which they wish to create. However, every creative choice, even if imposed by entirely idiosyncratic constraints, involves subsequent restrictions that may have an effect on the creative space available to authors. For this reason, Jon Elster suggests in his book *Ulysses Unbound* (2000, p. 176) that artistic creation must be envisaged as a two-step process, i.e., as a '*choice of constraints* followed by *choice within constraints*'. The first step involves voluntary choices of constraints that include, for example, the choice to work in a certain genre or the choice of materials. Such choices inevitably require authors to make subsequent – not necessarily voluntary – choices based on the external constraints that working in a particular genre or with the one or the other type of material implicate.

At the same time, there are also many external and internal constraints to creativity to which authors would usually not submit themselves voluntarily. Examples vary from psychological barriers, such as writers' blocks and early creativity that limits future achievements (Goncalo, Vincent and Audia, 2010), to external restrictions, such as fixed deadlines and limited budgets. The former are personal and do not affect all authors, but the latter are very common. Nearly all authors are somehow restricted by time and money. In one way, these constraints are useful as they keep authors focused on creation. Jon Elster (2000, pp. 210–211) writes: 'For a movie director, an unlimited budget may be disastrous. For a TV producer, having too much time may undermine creativity'. On the other hand, the same constraints may also restrict creative freedom, especially if the deadlines are too short or the available budget too tight.

Table 1. Some sources of creative constraints

	Voluntary/Autonomous	Involuntary
Internal	Choice of genre Choice of audience Choice of topic and content Choice of medium, format, methods and materials	Psychological barriers such as mood, writer's block, early creativity, etc. Personality of the author, including personal traits, habits and preferences
External	Rules of the genre Trends and audience expectations Functional demands Work environment, including creative briefs and instructions, imposed deadlines and available budget	Barriers to understanding, such as limits of language Physiological barriers such as range of hearing and vision Limits to physical performance such as musical performance Properties of texture, strength and structure of materials Technical limitations

Table 1 provides examples of internal and external constraints to creativity and the voluntary or involuntary nature of them. Several of these examples are dealt with in more detail in the next section on creative conventions and constraints.

Conventions and constraints in creative processes

The previous section shows that, while different types of conventions and constraints affect creative processes, not all of them truly inhibit the author's creative freedom. In fact, authors often exercise their creative autonomy to actually impose restrictions on themselves. The voluntary internal constraints indicated in Table 1 clearly illustrate this. Other constraints, such as the psychological barriers to create as a result of mood, writer's block or early creativity hinder the creative process, but copyright discounts these factors because they are viewed as involuntary internal constraints. Hence, for the purpose of establishing whether a work passes or fails copyright law's originality test, all internal constraints mentioned in Table 1 are not directly relevant or useful, either because they do not impede but rather facilitate the author's ability to make 'free and creative choices' (the voluntary internal constraints) or because they are totally accidental and unintentional (the involuntary internal constraints).

Having said that, the voluntary internal constraints are not entirely irrelevant. They can serve as a useful starting point for laying bare the external constraints to creativity that will affect the ability of authors to make 'free and creative choices'. This follows from Jon Elster's depiction of artistic creation as a '*choice of constraints* followed by *choice within constraints*'. Because every creative process requires authors to make creative decisions (the voluntary internal constraints), these decisions eventually will also inflict various external constraints on them. Therefore, this section discerns three types of internal decisions that creative processes involve, namely, the choice of genre, the choice of medium, format, methods and materials and the choice of the audience that authors want to reach. It ascertains how these choices may impose external constraints on authors that limit their freedom of action. Next, it analyses how creative freedom may be inhibited by external constraints that may arise in employment or contractual relationships.

This approach differs from other ways of systematising constraints to creativity. Jon Elster, for example, distinguished purely between soft, self-imposed constraints and conventions, on the one hand, and hard, intrinsic and imposed constraints, on the other hand (2000, p. 190). Another division

was proposed by Brian Moeran who, in his paper on cultural production, creativity and constraints (2011, p. 16), differentiates between material, temporal, spatial, social, representational and economic restrictions. While these scholars engage in a treatment of how creativity is limited in a general way, our intention is to categorise constraints that restrict the author's ability to make free and creative choices in shaping their work. That is why the approach in this chapter differs.

At first sight, many constraints mentioned in the following sections may appear not very problematic from a copyright viewpoint, since the required originality threshold is so easily reached. However, the deeper we dig into the constraints to creativity, the more we shall realise that it cannot automatically be assumed – as courts sometimes do – that authors have made 'free and creative choices' in producing their works.

The choice of genre

The specific genre in which authors create their works clearly imposes a number of restrictions. While the term 'genre' has multiple meanings, varying from discipline to discipline and sometimes even within disciplines, in this section, it is used in a rather general fashion. It refers to any type, class or category of literature, music or art – in the broadest sense of the word – that is defined by shared characteristics of content, form, style, mood, et cetera. Genres are necessarily formed retroactively, as they require (informal) recognition of their shared characteristics by a specific artistic community or culture. Genres are thus defined by established conventions, the so-called 'rules of the genre'. These are – implicit or explicit – norms or understandings, to which nearly all authors in a particular genre submit themselves. Blues compositions, for example, traditionally have a twelve-bar chord scheme and a distinguishable A-A-B rhyme and lyric pattern.

Another example is Western movies, which comprise not only various visual conventions, such as their location in the countryside or in towns with saloons, people wearing wide-brimmed hats, high-heeled boots with spurs, using rifles, riding horses, and so on (Buscombe, 1970, pp. 36–38). Perhaps even stronger genre characteristics of Westerns are the recurring repertoire of situations and events that draw on the history of the American frontier, including 'gunfight, drifters from a defeated south, confrontations of cavalry and Indians, ambushes, gambling, cattle drives and railway building' (Collins, 1970, p. 70). It is these and possibly other conventions that allow audiences to recognise a film as belonging to the genre of Western movies.

In practice, it is very common that authors choose to work within certain artistic conventions of genre. While this obviously is a free choice, it may

restrict them in a way that is far more restraining than other constraints that they impose on themselves. This is, as Elster argues, because artistic conventions are not invented by authors who submit themselves to the rules of the genre (Elster 2000, pp. 175 and 196). For authors, artistic conventions can be 'normatively compelling' in the sense that, in the view of other artists, critics and the audience, they 'embody the right way of doing things' (ibid., p. 198). If authors would disobey the conventions, they risk being rejected or misunderstood by the public whom they wish to address. Additionally, authors may have no real incentive to deviate from artistic conventions, because their works can only be evaluated by competent judges if a reasonable comparison can be made with similar works. This ultimately compels all authors who work within a particular genre to conform to the same set of artistic conventions (ibid., p. 199).

This does not mean that, by working in a specific genre, authors cannot freely express themselves. With regard to blues music, Steven C. Tracy writes:

> [...] the blues provide a basic structure free enough to accommodate individual temperament, abilities, and creativity. Far from being a limited genre, it provides a structured but expansive place for the individual to relate to and express the community, and for artists to touch home base but still express themselves individually (2004, p. 124).

The rules of some genres are more strictly defined than others. In contrast to Western movies, for which there are scores of – more or less – loosely organised conventions (of which usually only part need to be included in a movie to qualify it as a Western), some poetry follows clearly defined rules. To give an example, a sonnet always consists of a fourteen-line verse with a specific metrical structure and a fixed rhyme scheme (i.e. usually three quatrains and a couplet or an octave and a sestet). Limericks and other verse forms follow similar conventions. The rules of these genres 'may be so specific as to leave little room or necessity for elaborate rhetorical planning' (Flower and Hayes, 1981, p. 379). Still, the large variety of poems that are created over the years reveal that these genres leave ample room for individual expression.

The point is, however, that while genres may leave enough creative space for personal expression, authors cannot disregard the rules and conventions that intrinsically define it. Certainly, authors may challenge certain conventions or even abandon ones that have become too cliché. For 'avant-garde' works, pushing the boundaries of existing norms or genres is even

an essential aspect. This allows artistic conventions to evolve or change over time. Still, as it takes time to gain enough institutional momentum for recognition and appreciation of new conventions in existing genres, such progress can only occur slowly. To be understood and accepted, authors cannot recklessly deviate from the conventions of a genre. They must always remain somewhat traditional and conservative in their approach (Csíkszentmihályi, 1996, p. 71). This suggests that a work 'may bend or break the rules, but it cannot simply ignore them' (Lavik and Van Gompel, 2013, p. 396). Authors must somehow obey the rules of a genre.

Copyright law recognises creative constraints imposed by rules of genres in literature, film, visual arts, music, and so on, insofar as 'style' is excluded from protection. This means that authors are free to use the shared characteristics of form, content, style, or mood of existing genres, as long as they refrain from copying the original expression of specific works within those genres. However, as will be explained below, difficulties may arise in copyright infringement cases when it needs to be determined how elements of 'style' must be disregarded in comparing the overall impression of a work with the allegedly infringing copy. Another problem may occur when a new genre is born, that is, when an innovative style that emerged with one particular artist is followed by other artists and retroactively defined as a new 'genre'. In such a case, separating the unprotected elements of 'style' from the protected 'original expression' of works created by a trendsetting artist at the time when he was still the only person using his or her own invented style may be very difficult (Verkade, 1996, § 9). This raises the question whether (parts of) the trendsetter's works would not gradually degenerate into an unprotected style (Hugenholtz, 1999, § 3). This problem, which is manifested particularly in fashion, industrial design and other areas driven by trends, has stirred quite some debate in the Netherlands. Some legal scholars have argued that copyright protection can indeed 'dilute' and degenerate into an unprotected style (see e.g. Quaedvlieg, 2004), but the Supreme Court has denied that the scope of copyright protection can diminish over time (*Stokke v. Fikszo*, 2013, § 6.3.6).

The choice of medium, format, methods and materials

Other than by the choice of genre, authors may be constrained by the choice of the medium and format in which to cast their works and the methods and materials that they will apply. Nowadays, authors have the choice between digital and 'analogue' means of production and dissemination. This has opened new possibilities, but also introduced new constraints. In the digital arts, for example, while the space available for creative expression

is enormous, authors must duly understand digital technology to generate the desired outcome. Linda Candy (2007, p. 366) writes that producing digital art often requires a trade-off between artistic aspiration and digital constraints, explaining that '[t]he choice of whether to program or to use a software application can be critical to how much the artist has control over the character of the constraints to be specified'. The creative freedom of digital artists is consequently limited to the extent that they run into technological deficiencies of their own or of technologists with whom they collaborate. Not only does this challenge the boundaries of creative partnerships and the perception of authorship, as Elena Cooper's chapter in this book demonstrates, but digital artists must also accept the limitations of existing software applications and tools that they apply for creating their works. Even with state-of-the-art technologies, they simply cannot always create what they have envisaged.

Creative constraints may be stricter or looser depending on whether or not a work also has a utilitarian function. For example, while architectural works may be designed for aesthetic appeal, they ultimately must lead to the construction of real houses or buildings. In the drafting process, therefore, architects are constrained first of all by the utilitarian purpose of a building. If it is meant for living, then it must have certain basic facilities, such as a living space, a kitchen, one or more bedrooms, a toilet and bathroom, et cetera. Although there are various ways in which architects may spatially organise these facilities, in the end, there must be a – more or less – appropriate order between them if the architect wants the building to suit the purposes for which it is designed (Hall and Hall, 1975). A building must moreover have a firm construction. While any futuristic building can be designed on a creation table, it is not a given that constructing it is technically feasible. This will depend on the strength of materials, the distribution of stress, and environmental factors, including the level of hurricane or seismic activity in a region. Architects must use the right combination of materials, composition structures and assembly methods to ensure that their creations are durable and safe (Place, 2007). In practice, architects must also handle a large number of external constraints. They have to follow various statutory protocols and building regulations, such as technical regulations about minimum ceiling heights and room sizes and safety instructions about the place and number of fire exist doors in public spaces. Furthermore, they may be bound to comply with urban planning permissions, which not only have an impact on what can be built, but may also impose (aesthetic) guidelines on how buildings must be shaped (Imrie and Street, 2011).

For other, more artistic types of works such as music, literature, photos and films, the creative freedom in choosing the appropriate medium, format, methods and materials is usually much larger (unless the work is commissioned to be cast in a specific form, as will be discussed further below). Film directors, for example, can opt to shoot their movies with specific cameras (varying from 8mm to HD to 3D), silent or with sound, in colour, black-and-white or other toning effect, et cetera. Painters can choose between particular surfaces (e.g. canvas, wood or paper), painting sizes, types of paint (e.g. oil or acryl), specific painting techniques (e.g. aquarelle or airbrush), and so on. For other visual artists, photographers, music composers and novelists, the range of available media, formats, methods and materials is likewise very broad.

This does not mean, however, that these artists are not in any way constrained by the choice of medium, format, methods and materials. Just as works of architecture are meant to be built, so are musical compositions meant to be performed. Composers must therefore realise that there are limits to what musicians can physically perform (Elster, 2000, p. 191). Furthermore, artists must take account of the specific nature of the materials that they intend to use. Natural materials such as wood, clay and stone have specific properties of texture, structure and strength, which make them better or less suited for creating particular types of works. Other materials, including metal and glass, require special processing techniques like metalworking and glassblowing that involve specific constraints of their own. This has significance for the way in which authors can ultimately shape and cast their works (Moeran, 2011, pp. 19–21).

Here too, creative constraints may be tighter once a work receives a more utilitarian purpose. A good example is the creation of portraits, the object of which is to display the characteristic features of a person. This requires artists to compose the portrait in such a way that it enables viewers to instantly recognise the portrayed person. This obviously limits artistic freedom to some degree, but it certainly does not eliminate it. However, where it concerns passport photos made for official purposes, the creative freedom is almost certainly absent. To prevent crime, fraudulent uses and identify theft, states prescribe strict requirements for passport photographs in terms of size, photo quality, background, framing, exposure, position, visibility of facial features and expression of the portrayed person. Such regulations leave hardly any room for photographers to make ‘free and creative choices’.

The intended audience

Limitations further derive from the anticipated relation to the audience. In his book *Values of Art*, Malcolm Budd (1995, p. 11) writes 'that the role of the artist, properly understood, requires the artist, in the creation of her work, to adopt or bear in mind the role of the spectator'. While this does not prevent authors from making creative choices, it does limit the creative space in one way or the other. Since most works are created with an audience in mind, authors will somehow be constrained by their own expectations about the expectations of intended readers, viewers or listeners. As Jon Elster (2000, p. 188) argues: 'Once the artist has constructed his idea of the reader, he is constrained to write in a way that the reader will find instructive, entertaining, puzzling, moving, disturbing, and so on'. The same applies to painters, film directors, music composers and other artists. They usually also paint for intended viewers, make movies for intended spectators, compose for intended listeners, and so forth (although some authors may only be interested in the act of creation, but this is irrelevant for our present purposes because copyright presupposes communication: no proprietary legal regime is needed for authors who merely keep creation to themselves).

Authors must also understand that there are limits to what an expected audience can rationally endure. This is certainly important for works that attract a captive audience in theatres, cinemas and concert halls. As Thomas G. Pavel (1986, p. 98) remarks: 'a play cannot usually sustain the audience's attention for more than a couple of hours; a movie's duration depends on the eye's tolerance to strain'. Such restrictions will thus define the average length of a work within these genres. But even if the audience can freely choose the time and interval of consuming a work, as is typically the case for novels, then authors must still construct the plot and story line in such a way that they keep the reader's attention continuously alive (Elster, 2000, p. 191). This certainly also imposes limits on length, style and order of story telling.

Especially on the Internet, authors are bound to communicate their works as clearly and effectively as possible. Usability studies show that, on average, it takes only a few seconds to grab the attention of website visitors. If a page loads too slowly (Krishnan and Sitaraman, 2012) or visitors do not promptly find something of interest to them (Nielsen and Pernice, 2010), then the website is likely to be abandoned during the first couple of seconds of interaction. Authors that create and disseminate their works online can therefore easily lose (part of) their audience if a creation does not meet the immediate expectations of viewers. While this may be different for works that make greater demands on the audience's patience, such as modern

art, here too, there are specific challenges for engaging online users, as experience with virtual museums and art exhibitions corroborates (Soren and Lemelin, 2004; Soren, 2005). This means that websites not only need to operate well. To satisfy online users, web developers and creators must also take full account of online user expectations. For this purpose, they may adapt online content to make it more appealing to the target audience, for example, by including catchy headlines, writing short introductory notes, or using specific colours that are favoured by most users (Bonnardel, Piolat and Le Bigot, 2011).

Adaptations of such kind, although authors may freely apply them, are not necessarily based on autonomous choices. If they are primarily guided by user demands, it cannot truly be upheld that they result from the author's free and creative choices.

Constraints in employment or contractual relationships

The author's freedom of action may also be limited in cases of commissioned works or works created in the course of employment. A good example is journalists who work for a newspaper, either as freelancers or in employment. They must typically conform to an editorial statute or ethical code that guides them in writing their reports. Reuters (2008), for example, has published an online Handbook of Journalism, which contains detailed accounts on how to write a journalistic report, including rules on story length, basic story structure, consistency of style, key words, language that must be avoided, et cetera. While Reuters indicates on the homepage that 'the handbook is not intended as a collection of "rules"' that seeks to constrain journalism, its guiding principles do restrict creative writing in the sense that journalists are expected to use the handbook 'as guidance to taking decisions and adopting behaviours' (ibid.). Hence, they are not allowed to make creative choices fully at their own discretion.

Likewise, 'no creative team in an advertising agency starts out with a blank piece of paper, but is given a "creative brief" by the client who directs the strategy to be taken by a particular campaign' (Moeran, 2011, p. 18). Such a brief unmistakably leads the authors of the campaign in a particular direction. Commercially this may be attractive, as it instructs the team to draft a campaign that will satisfy the client, but artistically, it comes with a number of restrictions. As Jeremy Bullmore (1999, p. 56) explains, a brief may encourage creative thinking and ensure the relevance of the message being conveyed, but it may also restrict creativity. Being informed by clients' demands that often follow consumer beliefs and expectations, advertising campaigns cannot be said to result from the free and creative choices of

authors alone. The advertising industry clearly also follows consumer trends and impacts (see e.g. Sinclair, 2012).

Other than creative instructions, authors may be constrained by the available budget and imposed deadlines. Although there seem to be few productions where time is not an issue, deadlines are obviously most critical for authors who create works on regular intervals, such as writers of daily newspaper columns or producers of daily or weekly TV shows (Elster, 2000, p. 193). But time constraints are also common in other areas, such as film production, where the schedules for shooting and production are to a considerable extent determined by factors like the availability of actors, access to set and locations and, ultimately, the allocated budget (Barnwell, 2004, p. 50).

That budget matters in creative endeavours is clearly illustrated by film and television production. Although there are many examples of low-budget films that are regarded as highly artistic, as for example Alfred Hitchcock's thriller *Psycho* illustrates, there often is a strong correlation between the available budget and what filmmakers can eventually put on the screen (Barnwell, 2004, p. 48). While it certainly does not prevent creative choices being made, the allocated money may have bearing on the creative freedom of filmmakers (and other types of creators) in the sense that it may prevent them from making the creative choices that they would have preferred to make (see e.g. Affron and Affron, 1995, p. 16; Jørholt, 2010, p. 107).

For copyright purposes, these types of diverse financial constraints will usually not be relevant for the question of whether there is a work, since copyright law's originality test is so low. However, they possibly are relevant in copyright infringement analyses, for example, where film directors reuse costumes, props or sets or even entire scenes or shots from earlier films to cut corners in their production budget. Such 'recycling' regularly occurs in the film industry, but will not easily lead to court cases, as films are often produced by the same company that owns the reused materials.

Implications for copyright law's originality test

As the preceding section has illustrated, authors may be invariably confronted with various restrictions during the creation of their works. For this reason, it cannot be unquestioningly presupposed that a work results from the author's 'free and creative choices', as the CJEU's originality test for copyright requires. Therefore, one would expect that in the assessment that courts make of the original character of a work, or the lack of it, ample consideration is given to the presence and impact of constraints. This section examines recent case law of the CJEU and Dutch courts on this point.

After some preliminary remarks and a short discussion of copyright and creative constraints generally, specific attention is given to how the case law handles technical and functional constraints and other constraints to creativity in applying copyright law's originality test.

Preliminary remarks

Before discussing the impact of creative constraints on copyright law's originality criterion, two observations must be made. First, it is important to understand that, in practice, there are very few stand-alone cases about the question of whether a creation is original enough to qualify as a copyright-protected work. For obvious reasons, copyright's originality test appears as part of infringement analyses, where the defendant disputes that the plaintiff's work attracts copyright or claims that no copyright relevant parts are copied in the allegedly infringing work. Accordingly, in such cases, courts necessarily make a comparison between the plaintiff's work and the allegedly infringing copy. Even if a court finds that certain borrowings (e.g. of technical or functional elements) are not infringing by themselves, they may still find infringement if they see much similarity in the 'overall impression' of the two works under consideration.

Second, it must be noted that manufacturers and designers of technical and functional products regularly claim copyright infringement as a subsidiary fall-back option to obtain protection against competitors, with infringement of registered design rights as the main claim. Before Dutch courts, actions for design right and copyright infringements are sometimes accompanied by an action in the tort of slavish imitation (*slaafse nabootsing*). Copyright can easily be relied upon, as the right comes into existence automatically upon the creation of an original work of authorship. It does not depend on registration or any other formality. Moreover, in most countries, the copyright term lasts for the author's life plus 70 years which is much longer than the usual 25-year term for design rights. If manufacturers and designers cannot rely on design protection because they failed to fulfil the formalities required for acquiring or maintaining design rights, or because the term has expired, or the use made is allowed under design law, they often can still fall back on copyright protection. Such copyright cases are primarily about thwarting competition, not about protecting artistic or creative achievements.

Copyright and creative constraints

Some constraints to creativity are difficult to accommodate in copyright law, because they do not restrict choice but merely limit creative freedom to

a certain degree. That is the case, for example, with deadlines and budgetary ceilings. While clearly limiting the freedom of action of authors, within the time and budget that is allocated to them, authors can exercise considerable autonomy to make creative choices of their own. Thus, time constraints and limited budgets are of no relevance in determining the eligibility for protection of works. As long as authors have made free and subjective choices within the creative space that is available to them, their works should benefit from the protection afforded by copyright law.

Other types of constraints, however, limit creative freedom to such a degree that it is more difficult to assume that they leave sufficient room for free and creative choices. Examples include cases where there are limited possibilities to accomplish the same or a similar artistic effect or utilitarian purpose, where the author's choices are clearly informed by audience demands or trends, and where creation is shaped by external instructions, such as those imposed by law or regulation. This suggests that courts should take such restrictions into account, since they might impinge on the question of whether a work is sufficiently the author's own to be eligible for protection.

Technical and functional constraints

As observed above, the CJEU has explicitly recognised that copyright does not extend to elements of works that leave no room for creative freedom. This principle is widely accepted, as case law at the national level of the EU Member States corroborates.

In the Netherlands, it is settled case law that functional or technical characteristics of a work – i.e. aspects of form that are determined by functional or technical demands – cannot attract copyright, as they fail to reflect the author's subjective creativity. This has recently been confirmed by the Dutch Supreme Court in *Kecofa v. Lancôme* (2006) and *Gavita v. Puutarhaliike Helle* (2010). Most published cases in which functional and technical constraints play a role concern productions in the applied arts and industrial design, e.g. furniture, upholstery, utensils, fashion accessories. These categories of works reside more on the edge of copyright, as evidenced by their optional protection under Art. 2(7) of the Berne Convention and their special treatment in the copyright laws of countries such as Italy, where they attract copyright only if they have 'inherent artistic value', and the UK, where they receive copyright only if they fit the statutory categories of 'artistic' or 'literary' works (Bently and Sherman, 2009, pp. 679–681). However, they obviously are eligible for copyright protection, as explicit in the Dutch Copyright Act (Art. 10(1) under 11).

The Dutch Supreme Court even assumes that works of applied art are subject to the same CJEU's 'author's own intellectual creation'-test as all other creations, as is evident from three cases involving Stokke's *Tripp Trapp* children's chair (*Stokke v. H3 Products*, 2013, § 3.4(b); *Stokke v. Fikszo*, 2013, § 4.2(b); *Hauck v. Stokke*, 2013, § 4.2(b)). In these cases, it was held that copyright may extend to technical or functional design if the author had sufficient room for making creative choices. Interestingly, the Supreme Court further ruled that also a selection of individually unprotected elements can attract copyright if it bears the author's personal imprint (*Stokke v. H3 Products*, 2013, § 3.4(e); *Stokke v. Fikszo*, 2013, § 4.2(e); *Hauck v. Stokke*, 2013, § 4.2(e)).

The latter is remarkable and, from a doctrinal viewpoint, not necessarily satisfactory. It testifies to the move of copyright's originality test towards a 'creative collection'-test. While before, creative collection was a concept at the macro level, designating an outlier category of works like anthologies and collections of texts, now it seemingly becomes a core concept at the micro level of the originality test. Of course, it can be argued that all protected works essentially consist of an 'original' combination of unprotected elements. Literary works are also made up of individual words that, taken in isolation, are unprotected (*Infopaq International*, 2009, § 46) – safe perhaps for a few exceptional cases where new words might attract copyright (cf. Spoor, Verkade and Visser, 2005, p. 118). However, this comparison does not really fit.

The difficulty is to establish the units, elements or resources from which to select. For example, saying that a written text is made up of 'units' of a language (a system of signs that encode information) or that a musical composition is made up of 'elements' of sounds (distinct manifestations of frequencies audible to the human ear) is not the same exercise as constructing the 'pool' of possible units, elements or resources from which industrial design may be composed. In the latter case, it is not only the object, but also the function of the design and the constraints that this poses on the eventual form and materials used (including functional restraints like e.g. stackability of say garden furniture, and market-oriented restraints like limiting production costs) that determine the relevant pool of resources. The question is whether making such a distinction is feasible, as it requires a comparison of works of industrial design to a theoretical pool of possible – creative and/or functional – choices to ascertain whether the combination of elements of which such work is composed would represent a sufficiently 'original' selection.

Legal reasoning on this point is not very well developed, probably because copyright covers such a vast array of cultural production. The 'unit' problem

is studied more in depth per category of work in other disciplines such as literary studies, visual arts, and film studies. In copyright law, by contrast, resort is made to more general statements and sweeping comparisons that do not easily withstand scrutiny from expert domains within the humanities. In practice, what happened in the three *Stokke* cases is that the defendants unpacked various elements of form of the *Tripp Trapp* chair to show that they could not qualify as 'original'. The Supreme Court, however, urged the Court of Appeal to look at the chair's overall impression and to repack all elements to determine whether the collection of elements constituted an intellectual creation by the author. This question is often resolved by assessing how much creative space a designer had at his or her disposal when creating a work. Still, while the existence of creative space is a *prerequisite* for an author to make an 'original' creation, this does not of itself lead to the conclusion that the creation must therefore also *be* original. Instead, as will be argued below, courts should distinguish the *presence* of creative space from how it is used. An individual assessment of the use of space in expressive form should thus be the ultimate test for establishing originality.

Obviously, if a combination of unprotected elements is deemed sufficiently original to attract copyright, then protection would only extend to the specific combination of unprotected elements. This means that competitors can create similar products using a different combination and/or a different set of protected or unprotected elements. The overall impression of the product must differ from that of the original. This needs to be determined by the facts of each case (*Stokke v. H3 Products*, 2013, § 3.4(e)(f); *Stokke v. Fikszo*, 2013, § 4.2(e)(f); *Hauck v. Stokke*, 2013, § 4.2(e)(f)).

While this assumes that the scope of protection granted is 'thin', in practice, it is not without significance. Once a court in an infringement case accepts that a work attracts copyright, this also has consequences reaching beyond the infringement case at hand. One important consequence is that, unless a copyright exception or limitation applies, third parties are prohibited from reproducing or communicating the work to the public (e.g., for advertising purposes or in a film documentary or TV special) without the copyright owner's consent. This may affect freedom of speech. It is unclear whether the Supreme Court realised this when drawing the originality criterion into copyright law's infringement analysis, as it did in the *Stokke* cases. From a doctrinal viewpoint, it would have been better if the Court had more critically approached the question of whether copyright extends to combinations of unprotected elements, especially where it concerns products created under technical and functional constraints.

Other creative constraints

Apart from functional and technical elements, the courts generally acknowledge that copyright does not extend to mere facts, ideas or elements of style, but only protects original expression. In the landmark case of *Van Gelder v. Van Rijn* (1946), the Dutch Supreme Court ruled that a style or method of treatment that confers a specific artistic effect on an object – in this case: applying burn and steel-brushing techniques to create wooden sculptures – cannot attract copyright. This was reiterated in the *Decaux v. Mediamax* case (1995), where it was held that style, trends and fashion are not copyrightable, but that protection may extend to the author's own individual way of expressing a design in a particular style, trend or fashion. In 2013, in the *Broeren v. Duijsens-Kroezen* case, the Supreme Court once more underlined that copyright does not protect style and further held that, save for exceptional circumstances, tort law does not grant protection against slavish imitation (*slaafse nabootsing*) of style. Doing so would harm the principle underlying the exclusion of style from copyright law, which is to foster cultural growth by ensuring that authors have enough freedom to build upon ideas and abstractions developed by others.

In practice, however, courts sometimes do recognise copyright in creations that balance on the edge of convergence of idea and expression. This includes productions like family board games and formats of TV programmes (Hugenholtz, 2012, pp. 44–45). Illustrative is that the courts in such cases often abstain from assessing whether authors, in expressing their works, exerted creative autonomy or whether the creative choices they made were rather informed by external considerations.

In the *Impag v. Hasbro* case (2001), for example, the Supreme Court upheld the ruling of the Court of Appeal of Amsterdam that, notwithstanding the uncopyrightability of game concepts, the design of family games like 'Jenga' (a wooden tumbling stacking tower game), 'Connect Four' (a first to get four-in-a-row game) and 'Guess Who?' (a flip-and-find face game) was sufficiently original to attract copyright protection. As it concerned a case in summary proceeding, the Supreme Court accepted that the Court of Appeal had only briefly motivated its decision. Nevertheless, it is fairly remarkable that both courts overlooked that the concepts of most family games are based on early playing games that, if protectable, would be in the public domain. 'Connect Four', for example, is a variant of tic-tac-toe and tower building games have also been known for many centuries. Furthermore, the courts too easily glossed over the fact that the simplicity of many game concepts puts restraints on the execution of form. The creative choices involving the design of a stacking block tower game like 'Jenga', for instance,

leave little choice for variation. The blocks must be stackable, their height must exceed the average diameter of a finger (but not too far), their surface must be smooth enough to allow their removal from the tower, and so on. In reality, therefore, the creative space for designing such a game is limited. This raises questions about how much creativity the designer truly exercised in creating the game, other than in developing and elaborating the game concept along technical or functional constraints.

As regards TV programme formats, in the *Castaway v. Endemol* case, the Court of Appeal of Amsterdam (2002) ruled that such formats might attract copyright if they are sufficiently elaborated in detail and their specific elements, which alone do not need to attract copyright, together form a 'unity' with an own, original character. This decision, which was upheld by the Supreme Court in 2004, resembles the protection conferred on original combinations of unprotected elements in the three *Stokke* cases discussed above. In this case, which concerned the format of a reality TV show, the court identified twelve elements of the format and concluded that, together, these elements were sufficiently original to attract copyright. How the court arrived at this conclusion is unclear, but nothing in the judgment reveals that it examined how much of the format essentially resulted from the author's own, subjective choices and how much of it was based on established conventions within the genre and thus resided outside the author's autonomy. That is disappointing, because it could have shed more light on whether the format was really the author's own intellectual creation. While in the end, the court did not find copyright infringement in this case, the fact that it gave the format the status of a copyrighted work may have consequences for third parties who wish to create similar formats for other reality TV shows. In this regard, it should be noted that it is debateable whether TV programme formats actually need copyright protection. As Stefan Bechtold (2013) argues, despite the difficulty of claiming protection for TV show formats under intellectual property laws, the international trade in them is thriving. In practice, their protection is often jealously guarded through contracts and industry norms (Kretschmer, Singh and Wardle, 2009). This places question marks on the importance of copyright for protecting TV show formats in the first place.

In cases concerning the copyrightability of websites, the courts also look at the overall impression of webpages to consider whether they are sufficiently original. Sometimes protection is denied because a webpage mainly consists of elements that are also used on other websites (*Social Deal v. Wowdeal*, 2012) or because the design and layout of a webpage are too trivial and obvious to involve any type of creative labour (*Union v.*

Calleur, 2012). Other times protection is granted if the court finds the text, design and layout of a webpage to sufficiently reflect the author's creative choices, as the *E2Ma v. Malicor* case (2012) illustrates. Oddly, in this case, the District Court of Utrecht based its analysis on the choice and arrangement of elements that, on closer inspection and save for individual texts and pictures, are common and basic features of webpages, such as the division and placement of texts and fields, the use of banners, arrows and other indicators, the letter type, the colour pattern, et cetera. While such elements can be combined in various ways, the question remains whether the webpage design was the result of the author's 'free and creative choices' or primarily informed by trends and audience expectations about how websites are logically organised.

Courts' overly one-sided analysis of creative autonomy

The above examples reveal that examining creative constraints is usually not part of the court's analysis when ascertaining the eligibility for protection of works. Dutch courts look at the creative space that is available, without actually observing how the space is used and whether, in the course of the creative process, the author has been restricted in any way. As a result, they evaluate whether creative space exists and then apparently assume that if it does, the way in which it is used automatically produces an original result of the author.

The CJEU seems to sanction that. In the *Eva-Maria Painer* case (2011, §§ 90–93), it generally observed that photographers of a school portrait photograph, 'can make free and creative choices in several ways and at various points in its production', thereby pointing at the possibility to fix the background, pose, lighting and framing, choose the angle and atmosphere and use developing techniques or computer software. The CJEU then concluded rather one-dimensionally that school portrait photographers enjoy a considerable freedom to exercise their creative abilities, without considering that making portrait photographs also involves various creative constraints, as has been clearly demonstrated above. In the end, it was left for the national court to determine whether the photograph was an intellectual creation of the author reflecting his personality, but the positive way in which the CJEU constructed the creative space available to the author gives the impression that the national court could not simply deny protection to it.

In the Netherlands, a similar one-sided analysis of creative freedom led the district court of Haarlem to accept copyright in basic passport

photographs (*X v. Ringfoto Nederland*, 2010). The case concerned 'old style' passport photographs which did not have to meet the strict requirements for official passport photographs, e.g. no smiling, head kept straight, earlobes visible, plain background, no head attire. The Court ruled that, in comparison to official passport photographs, the photographer had made 'various autonomous, subjective choices' in producing the photo, including the cropping of the image, the posing of the portrayed person, the lighting of the face, and the fixing of hair. It can be disputed, however, whether these choices were really part of the photographer's creative freedom: they could have also been prompted by demands of the portrayed person, who probably was also responsible for fixing his or her hair and perhaps even for choosing the pose. Moreover, the making of passport photos is often a highly standardised and automated process in a fixed studio setting, making it questionable to what extent the photographer actually exercises creative freedom. Nevertheless, the Court held that there was enough space for making personal and creative choices and that the passport photo therefore qualified as an own intellectual creation.

This line of argument is remarkable and unsatisfactory, because it gives an incomplete picture of the creative autonomy exerted by authors. There are several possible explanations for the approach taken. One reason seems to lie in the low originality criterion itself. Since the design of creative products nearly always leaves some room for small variations, it is arguably harder for courts to establish that authors did in effect not exercise any creative autonomy than that they did. Creative space thus seems easier to demonstrate, or at least to assume, than creative constraints, especially in the absence of a clear appraisal by the courts of the creative process. In many cases, however, it is not feasible for a court to dig into every detail of each case, particularly when it concerns summary proceedings or when the list of judicial proceedings set down for trial is long. Judges may further be confronted with poorly defended cases, where creative freedom is insufficiently put into question. This may also have to do with the cost of expert witness testimonies and the fact that parties are not necessarily eager to accept instructions of proof. Lastly, courts may sometimes also be guided by notions of fairness or unjust enrichment, especially in cases where copyright is used as an instrument against competitors. This shows how policy considerations may affect the interpretation and application of legal concepts such as originality.

This is not to say that courts always ignore limits to creative autonomy. In the case of *Doréma v. Isabella* (1996), the Arnhem Court of Appeal declined copyright protection to caravan awnings because of the lack of originality.

The Court held that the different elements of the awnings, including the austere lines and simplicity of the design, the combination of colours, the dimensions, the circular canopy, and the layout of panes that creates a special light effect, were either technically or functionally determined, or elements of style, or existing features of known awnings produced by third parties, or clearly designed to fit in with current trends in the awning industry. Further, it found that the selection and combination of unprotected elements of which the caravan awnings were made up was insufficiently original for vesting copyright. The awnings too much followed patterns and trends that are common in the caravan awning branch to constitute own intellectual creations eligible for copyright protection.

Similarly, in the case of *Timans v. Haarsma et al.*, the Leeuwarden Court of Appeal refused to grant copyright to the design of basic, low-cost holiday homes, holding that the margins for designing them in an original way were too limited. The Court argued that Timans' design was very similar to existing design traditions in holiday housing in the Netherlands and that, generally speaking, holiday homes must satisfy the same functional requirements. The Supreme Court, however, overruled this decision as it found that the Court of Appeal had erred in putting these considerations at the heart of its originality analysis (2006, § 3.7). It is unclear from the Supreme Court's ruling whether it reversed the decision because the Court of Appeal had put relatively much weight to the 'common fact' of similar holiday homes having been built under similar circumstances (thus giving lesser importance to the specific facts of the case at hand), or because the Court of Appeal had recognised that the creative freedom in this case was marginal due to the constraints that designing basic holiday homes involves. The latter reasoning would be odd, at least in light of the current 'author's own intellectual creation'-test. If copyright is granted only to works that result from the author's free and creative choices, then it would appear that protection must be denied whenever a court finds that the author's creative autonomy is restricted too tightly.

Personal touch: the author as key constituent of the originality test

A last key element of copyright law's originality criterion is unmistakably the author. Pursuant to the CJEU's case law, an intellectual creation is original if it reflects the author's personality. To that end, the author must have left a personal imprint on the work (*Eva-Maria Painer*, 2011, §§ 88–89). This requirement applies not merely to cultural types of works, such as

books, music and works of art, but also to functional and technical types of works like computer programmes and databases, for which it seems difficult to determine in which elements the 'personal touch' of authors can be found. The CJEU has ruled, however, that such works must also bear the imprint of the author's personality to attract copyright (*Football Dataco*, 2012, § 38).

This directly shows that the requirement of a 'personal touch' or 'personal stamp' is somewhat problematic. Only in certain aesthetic genres, such as high-end visual arts and music, would an (trained) audience recognise works as emanating from a specific person, or at least attribute it to him or her. Apart from the creator's own, individual way of expressing him/herself in a specific work, therefore, the notions of 'personal touch' and 'personal stamp' cannot mean to signify an easily detectible 'signature' or personal 'style' of a creator, such as the style of painting of Vincent van Gogh. Similarly, these notions cannot be linked to individuality of personhood as in personal traits, habits or preferences of a creator that can be actually recognised in the work. Probably, the reflection of the author's personality is merely required to show that the work must be the author's own individual expression, i.e., that is must originate from the author in the sense of not being copied (see Laura Biron's chapter in this book on the meaning of 'originating from'). Yet, this raises a broader difficulty. If copyright law's originality criterion is so tied to the individual author, how then must the original character of large-scale collaborative works, such as Wikipedia entries, be assessed?

This section examines how the courts deal with the requirement that a work must bear the personal imprint of the author to attract copyright. Do they first establish who the author is and what types of subjective choices he or she has made in producing the work? The CJEU's originality test would arguably require such an analysis, but in reality, courts do not seem to systematically examine the question of authorship in assessing the originality of a work. This section then examines the question of how the originality of large-scale collaborative works must be determined if the co-contributors' expressive marks are not readily ascertainable. This question is highly relevant to the digital environment, where works are increasingly produced in online creative communities or with the help of audience participation.

Who is the creator? And does that actually matter?

As observed above, the justification of copyright is largely premised on protecting the author as creator of the work. This personality-based justifi-

cation materialises clearly in connection with moral rights, which concern the immaterial interest of authors to receive protection against acts that can damage or alter their work or harm their name or reputation. However, it is also reflected in the originality standard, which subjects copyright to the requirement that the work is the 'author's own intellectual creation' that exhibits his or her personality. This suggests that, to determine whether a work is sufficiently original, it is of utmost importance to know who is the creator and which subjective choices he or she has made during the creative process.

In the Netherlands, the Supreme Court has also emphasised that the bond between the author and the work matters in ascertaining originality. In the *Van Dale v. Romme* case (1991), which concerned the copyrightability of a list of headwords in a dictionary, it held that a collection of words by itself does not satisfy the originality test, because it consists of no more than factual data that as such do not attract copyright. It ruled that a collection of headwords would be eligible for protection only if it 'were the result of a selection process expressing the author's personal views'. By so ruling, it tied the originality test closely to the author's individual creative endeavours.

In practice, however, the courts – especially those adjudicating cases at first instance and in summary proceedings – tend to disregard who actually created the work. Instead of looking at the work and the process that led to its creation to ascertain which creative choices have been made by the author, they ask themselves the theoretical question whether it is conceivable that two or more authors, independently from each other, create exactly the same work. If they consider this to be (nearly) impossible, then they typically assume that the work satisfies the originality test (*Eek BV v. Esfera*, 2007). Otherwise, they will accept that the work lacks originality and deny protection to it (*Social Deal v. Wowdeal*, 2012). In such rulings, the courts clearly overlook the actual author in assessing whether a work is the author's own intellectual creation.

The courts' reliance on a hypothetical situation, whereby a comparison is made with other, fictitious creators, seems to be based on doctrine developed in scholarly literature. One of the leading treatises on copyright law in the Netherlands suggests that, in practice, the courts can apply such a pragmatic comparison as a rule of thumb to determine whether a work meets the originality standard (Spoor, Verkade and Visser, 2005, p. 66). While it may ease the originality analysis, such an approach is not entirely satisfactory, since it virtually eliminates the author from the originality test. Applying a hypothetical comparison of this kind means that courts only consider whether subjective choices *can* be made, without actually

examining whether creative choices *have* been made by the author during the production of the work.

Therefore, it is undesirable if the rule of thumb is used as a stand-alone criterion for establishing originality, as Spoor, Verkade and Visser (2005) themselves admit. They warn against the risk that the courts may lose sight of 'the relationship between author and work, which is the foundation of copyright' (p. 73). Moreover, they argue that, if applied too strictly, the rule of thumb may convert the originality test into an analysis of whether a creation is considered 'statistically unique' (p. 66), which is an argument about the distinctiveness of works, not about the author's use of the available creative space. In the *Technip v. Goossens* case (2006), the Supreme Court also considered that the answer to 'the question whether it is inconceivable that two (teams of) scientists, working independently from each other, would have arrived at the same selection … is but one of the viewpoints to be considered in assessing [originality]' (§ 3.5).

Nonetheless, since the rule of thumb is mentioned in a leading treatise on copyright and the Supreme Court, by presenting it as 'one of the viewpoints to be considered', has recognised that courts may base their originality analysis on it, it is not unlikely that the rule enters the mind-set of judges who must decide on the copyrightability of works, as the above cases illustrate. Thus, it cannot be excluded that courts assess the originality of a work by ascertaining whether it is virtually unrepeatable, rather than by examining whether it results from the author's free and creative choices.

Still, there are examples of courts adjourning a ruling if they want more information about the 'chain of authorship to copyright owner'. In its interim decision in the case of *Inspirion v. Pokonobe et al.* (2011), for instance, the District Court of The Hague required the defendant, the producer of the tower game 'Jenga', to deliver proof of the chain of title. Although this was not to examine the author's role in creating the work but to demonstrate copyright ownership, the final verdict (2012) reveals that, in the end, the court took notice of the right owner's statements on the chain of title about how the author had made own, subjective choices in the process of creating the game. However, this did not help the plaintiff who claimed that the 'Jenga' game could not attract copyright. The court found both the design of the game and the elaboration of the game concept to be sufficiently original to attract copyright, thereby arguing that 'other choices are possible'. Competitors could, for example, make the tower round or rectangular. As observed above, while other creative choices are probably feasible, in general, the creative space for designing a game like 'Jenga' is restricted. A round or rectangular stacking tower most probably has entirely different

stacking properties, so the shape of the game clearly affects the play. Hence, the court could have entertained a much more critical approach to the question of originality in this case.

Moreover, there are cases where the courts deny copyright protection to a work while the authorship status is obscure. In the *Melano v. Quiges Fashion Jewels* case (2013), for example, the Court of Appeal of 's-Hertogenbosch dismissed a claim for copyright in pieces of jewellery with interchangeable coloured elements on the ground that the plaintiff insufficiently substantiated the authorship of the jewellery and the required personal stamp of the author. This stands in contrast to the *SEVV v. AY Illuminate* case (2010), where the District Court of Amsterdam held that the plaintiffs, of which it was sufficiently convinced that they were the actual creators, had made creative choices in designing decorative lamps with comparable, interchangeable elements.

In the end, the outcomes of court proceedings will obviously depend on a variety of factors, including the value of the case, the resources available to argue it, the way the facts are presented to the courts, the strengths or weaknesses of arguments entertained by lawyers defending the case, et cetera. However, the manner in which the originality test is applied and interpreted is clearly also of relevance. As can be derived from the case law above, courts do not consistently and systematically review the rudimentary questions of who is the author of a work and whether free and creative choices have been made in the course of its creation. This is remarkable. If courts need to resolve whether an intellectual creation is truly the author's own, as the CJEU's originality test seems to imply, then it would appear that these questions must be an integral part of the analysis of whether or not a work qualifies for copyright protection.

Personal touch in collaborative works

The reflection of the personality of authors seems more difficult, if not impossible, to identify in large-scale collaborative productions. Traditional examples are film, TV and theatre productions. Often, but not always, these are created within more or less tightly organised structures with a more or less specified division of roles among the actors involved. In the online environment, examples abound of productions that are co-created within online communities. This includes open source software and collaborative projects like Wikipedia and other wikis. Outwardly, these projects have a less strict division of roles, but that does not mean that they lack organisational structure. On the contrary, within Wikipedia, there

is a complex hierarchical division of developers, stewards, bureaucrats, administrators, registered users, and anonymous contributors, which is not immediately visible (Pink, 2005; Reagle, 2010, pp. 126–127; O'Neil, 2011, p. 314). Furthermore, online communities often share a set of norms and ethics, guided by principles of etiquette on how to work with others in the community and by requirements on attribution, modification and exploitation of the output (Kelty, 2008; Reagle, 2010). This illustrates that in online collaborative projects, there is also control over the manner of participation of individual contributors.

Other examples are user-generated productions that involve the public in creating a movie, book, song or other type of work. Sometimes, these projects are led by known artists, such as Paul Verhoeven's film project *Entertainment Experience*, which won an International Digital Emmy Award in 2013. This project involves the audience in creating the script and scenarios, composing the music, acting, directing and filming and editing the final product. In the end, two movies will be created: one completely user-generated movie and one user-inspired movie directed by Paul Verhoeven and his team. Other examples are the twitter book *Wie een kuil graaft*, which was drawn up by Simon de Waal on the basis of hundreds of tweets of different people, and the *Koningslied*, a song composed by John Ewbank for the instalment of King Willem-Alexander of the Netherlands, to which many citizens contributed by proposing lyrics. But there are also myriads of examples of user-created productions that do not involve one or more main artists directing, editing or finalising the end-results, but that purely rely on self-governance and editorial control within creative communities.

When it comes to ascertaining the personal touch of authors in collaborative creations, it seems that a distinction should be drawn between works created under the direction or guidance of one or more leading authors and works of which it is nearly impossible to identify who of the authors were in creative control. For the purpose of establishing *whose* personal touch is reflected in the work, so as to resolve whether the threshold for copyright is met, it is convenient if one of more creative leaders can be identified, as it seems reasonable to assume that, one way or the other, they will have left their personal imprint on the work. On the other hand, the fact that no creative leader can be identified does not mean that works produced by large-scale creative communities lack originality in a copyright sense. For the latter types of works, it is more suitable to assess the group level creativity than to unpack the creative choices made by the various individual creative co-contributors when it comes to ascertaining the existence of creative space and how is it used.

The personal touch of distinct creative leaders

Who counts as a leading contributor to a joint work depends on various circumstances and must be determined on a case-by-case basis. Legal rules on co-authorship are not necessarily useful in drawing distinctions between co-creators, as the focus must lie on identifying the natural creative persons who are the source of the work's original character. Furthermore, as Lionel Bently's chapter in this book clearly shows, there may be a disparity between who legally counts as a co-author and who is recognised as a co-creator in specific businesses or particular fields of practice.

In general, however, it seems that artists whose names are attached to a work, such as Paul Verhoeven, Simon de Waal and John Ewbank in the above-mentioned examples, can be reckoned among the leading creators, unless they have merely lent their name and reputation to it for marketing or identification purposes. Yet, if they are seriously involved in the creative process, they probably have had an important, if not ultimate, saying in the creative decision-making. This is relevant, because the personal touch of authors who had a final say on the finished product is likely to reflect better in a work than the personal touch of those who made relatively small creative contributions.

This is also recognised in contemporary cinema, where the director is often assumed to be the creator who has the 'final cut' and thus deserves to be credited as the main author of a film, even though many other creators collaborated on it. According to this *auteur* theory, 'there is a guiding, dominant, creative identity that is responsible for the essence and personality of the work', such as the film producer or actor but, more frequently, the director (Cahir, 2006, pp. 86-90). It is debatable whether such an *auteur* cinema concept fits new forms of filmmaking, including user-aided film projects like the *Entertainment Experience*. Probably it would still fit the user-inspired movie that Paul Verhoeven directs, but not the entirely user-generated version that comes out of the project. It may not be easy to establish who counts as authors of the latter types of productions, or whose personal imprints they reflect. As Paul Sellors has argued with respect to collective authorship in film, the question of who counts as an author ultimately depends on the contribution that is made to the filmic utterance, whether that be 'the film's authorial body, [or] the number of authored components that contribute to the overall film' (2007, pp. 269–270).

The fact that a main artist or director leads a project does not mean that he or she is solely responsible for making creative choices. Except perhaps for the twitter book, many individuals were creatively involved at

different stages of the user-aided projects mentioned above. For example, John Ewbank worked together with Dutch artists like Alain Clark, Guus Meeuwis, Jack Poels and Daphne Deckers in arranging, editing and writing the lyrics for the *Koningslied*. Paul Verhoeven's *Entertainment Experience* likewise involves a team of creative specialists including an art director, a casting director, a scriptwriter, a script doctor, and a composer.

The question remains, however, whether the creators assisting the principal artist will necessarily also make creative choices that are expressed in the final product's form. Whether creative collaborators can thus leave a personal imprint on a finished work depends on the nature and closeness of the collaboration. Vera John-Steiner writes in her book *Creative Collaboration* that, through intellectual and artistic collaboration, individuals can develop 'thought communities' in which the participants 'construct mutuality and productive interdependence' with the aim 'to develop a shared vision as well as achieve jointly negotiated outcomes' (2000, p. 196). 'Thought communities' of this kind vary from loosely organised distributed collaborations with a common interest, such as online discussion forums; to symbiotic partnerships dividing labour 'based on complementary expertise, disciplinary knowledge, roles, and temperament'; to steady family collaborations with flexible and interchangeable roles; to integrated collaborations where partners interact during 'a prolonged period of committed activity' with a 'desire to transform existing knowledge, thought styles, or artistic approaches into new visions' (ibid., pp. 197–204).

It seems that the stronger the creative collaboration is, the more the final work will reflect the joint personal imprint of the collaborators. Eva Novrup Redvall describes this clearly in her work on screenwriting in Danish filmmaking (2009). She followed the scriptwriting process of the feature film *Lille soldat*, on which director Annette K. Oleson and scriptwriter Kim Fupz Aakeson worked together 'all the way from an original idea to not only the final draft of the script, but also to the finished film with the writer also often being brought in during the "rewriting" of the film in the final editing' (ibid., p. 36). The film being based on a shared vision of director and scriptwriter, she concludes that such intense collaboration challenges 'the traditional notion of a film being the personal statement of one auteur' (ibid., p. 52). While the director still had the final say in the decision-making, 'the finished film is very much the unique result of two people with complementary skills … creating something that they could never have created by themselves' (Redvall, 2010, p. 76).

This raises the question whether joint subjective traces of co-creators also count as a reflection of the 'personal stamp' necessary for establishing

copyright protection. It seems that copyright law indeed recognises a personal stamp, not only of individual creators, but also of groups of creators. Otherwise it would be impossible to explain how it could protect works of co-creators who constructed a hybrid subjective work on the basis of a joint vision. At the same time, however, it seems that the larger the group creation is, the more awkward it is to require a reflection of a 'personal stamp' of the creators as a condition for copyright protection, as the next section on large-scale (online) creative collaborations will illustrate.

The personal touch of contributors in creative communities

The requirement that copyright only vests in works that bear the personal imprint of their creators does not correspond well with creations that are produced by a myriad of different co-creators. How can the user-generated movie created in the context of the *Entertainment Experience* project reflect the personal touches of the numerous contributors who sent in their suggestion for a plot, the script, the music or perhaps even actual film footage? How about the persons who submitted tweets for the twitter book or lines of lyrics for the *Koningslied*? In these examples, it can still be asserted that the principal artists have left their personal imprint in the work, but in many other examples it is difficult to identify the leading contributors. That is frequently the case with programmers developing open source software and contributors writing entries on Wikipedia. Socially, culturally or economically speaking, such group creations are certainly as significant as other types of creations, but from a copyright perspective, they sit quite uneasily with the requirement that they must reflect the personal touch of their creators to attract protection. Although copyright has never been denied on these grounds, because usually courts merely take account of the existence of creative space without observing the contributions of actual creators (as was set out above), it is fairly remarkable that such large-scale creative collaborations are not well accommodated in the wording of the 'author's own intellectual creation'-test for copyright.

Even a small individual contribution can be copyrighted on its own accord, if it is the author's own intellectual creation that somehow reflects his or her personality. In the *Infopaq International* case (2009, §§ 46–47), the CJEU held that the expression of the author's intellectual creation can be reflected in isolated sentences, or even parts of sentences, of a work such as a newspaper article. This means that, to the extent that copyright applies, permission may be required for including individual contributions in a joint work. For works created in online communities, such permission is usually explicitly or implicitly given when the contributions are submitted. That

is not to say, however, that authors whose contributions are used would then immediately also be entitled to copyright protection in the joint work. Whether that is the case depends on legal rules on co-authorship, which vary between different jurisdictions (cf. Ginsburg, 2003; Van Eechoud, et al., 2009, pp. 236–243; Margoni and Perry, 2012).

Irrespective of the rules on co-authorship, for the purpose of establishing whether the originality threshold is met, it is immensely difficult to identify the personal touch of each individual contributor in insignificantly small parts of a final production, such as parts of a sentence in a twitter book or in lyrics of a song, even if, in isolation, these parts would reflect (some of) the author's personality. In the broader creative context, such small individual contributions merely constitute the building blocks from which the final work is created. This may be different, however, if a personal contribution is independently recognisable and occupies a prominent place in a work, for instance, as the opening line or refrain of a song. In such case, the work probably will reflect the personal touch of the individual creator who contributed the specific lyrics.

The difficulty remains how to deal with large-scale collaborative productions, such as entries on Wikipedia and open source software, which are often created by numerous, sometimes anonymous, contributors and which are constantly being updated by other, subsequent contributors. Here, the problem is not only to ascertain the identity of the different creative co-contributors, but also to determine the 'work' or 'unit' of which the original character is established. As is argued in Van Eechoud's chapter on adaptation in this book, for these types of works (as well as for drafts, versions and spin offs of other types of creative works), there is an important temporal aspect to the determination of originality. Because the group of co-creators changes over time, the question is at which point in time is the original character tested?

The example of Wikipedia can illustrate this. When a new Wikipedia entry is started, it will almost certainly reflect the personal touch of the first contributor (unless he or she has copied it from another person's work). The personal imprint of subsequent contributors that substantially change the entry or add sections later on may perhaps also still be recognisable in it. However, the more the entry is elaborated on, the more pertinent the question becomes how much space is left for subsequent contributors to leave a personal stamp on it. Being part of a group effort not only creates restrictions for individual choice, but succeeding contributors also seem to be constrained by the creative choices that others have made before them. Over time, the entry may undergo changes by so many different people

that recognisable personal imprints of earlier co-creators can completely be erased by alterations of later contributors.

This shows that it can be very challenging to ascertain whether a Wikipedia entry is sufficiently original to attract copyright protection. Perhaps this can be meaningfully done only at the stage of a copyright infringement analysis, when it is exactly known from which version the allegedly infringing work is copied. However, even then, the requirement that Wikipedia entries must bear the personal imprint of their creators to attract copyright may raise difficulties. If this requirement is interpreted too literally, this may imply that, through the course of time, an entry that once attracted copyright protection may lose protection, should the personal touch that links the entry to the various co-creators have evaporated due to successive changes. Moreover, if too much weight were put on the constraints faced by subsequent contributors who elaborate on existing entries, then copyright's originality test would arguably set a higher threshold for large-scale collaborative works than for single-authored works. It seems that these are unjustifiable consequences, which copyright law does not wish to draw.

Accordingly, the 'author's own intellectual creation'-test seems inapt for determining the eligibility for copyright protection of large-scale collaborative productions, at least as far as it requires an unpacking of creative choices of individual co-contributors. If copyright would depend on how the personality of individual co-creators is reflected in a collaborative work, then this could have the unintended result that no protection may be granted, if due to the large number of contributors or the successive changes that have been made over time, the work unduly expresses the personal touches of the various co-contributors. For large-scale collaborative productions, it would be better to focus on group level creativity when it comes to ascertaining both the existence of creative space and how is it used. The increasing body of literature on group creativity (e.g. John-Steiner, 2000; Paulus and Nijstad, 2003; Sawyer, 2007; Mannix, Nealeand and Goncalo, 2009) can perhaps provide helpful guidance in this respect.

Conclusion

Originality in copyright law is a loose, but certainly not a meaningless, criterion. To attract copyright, a work does not have to be new, innovative or unique in comparison with other works in the same symbolic domain. The only requirement is that the work is the 'author's own intellectual creation'. Drawing upon studies in the humanities and social sciences,

this chapter has reviewed copyright law's originality test and the 'free and creative choices' and 'personal touch' requirements that are part of it. It follows from this analysis that copyright law's understanding of originality can only partly be informed by aesthetics and creativity studies. In these disciplines and sub-disciplines within them, the meanings of 'creativity' and 'originality' are much more vague and plural than in copyright law. Moreover, they generally apply a more novelty-oriented originality test that requires works to creatively stand out against comparable works in the same domain. Thus, other than in copyright law, where originality is tested solely on the basis of a work itself, most disciplines in aesthetics and creativity studies treat originality and creativity as relative or comparative concepts. If a novelty-oriented originality test were introduced in copyright law, this would completely overturn the core principle on which the system rests, namely that a work attracts copyright as long as it can be regarded as the own intellectual creation of the author.

Even so, the humanities can provide some valuable insights to reach more fine-tuned decisions about protecting original works of authorship. If attention is focused on the autonomy that authors enjoy in creative processes, then it becomes apparent that, in practice, it is not always a given that a work results from the author's free and creative choices. Creators are often constrained by audience expectations (e.g. about a logical organisation and order of things), trends, rules of the genre, utilitarian considerations, et cetera. Apart from excluding from protection elements of works that are technically or functionally defined or that resemble ideas rather than expression, however, Dutch courts do not systematically examine whether creative choices were made freely or whether they were informed by outside constraints. They merely look at the available creative space, without observing whether the creative autonomy was inhibited in any way. That is remarkable. If free and creative choices made within the available space are part and parcel of the originality test, then courts need to acknowledge this in their analysis of copyrightability and dismiss those elements of a work that leave no room for creative choices or that are inspired by other motives than creativity.

This does not mean that in cases where creation is guided by technical or functional considerations or audience expectations, authors cannot produce works with an own, original character, as the Dutch Supreme Court confirmed in the *MB v. Mattel* case about the copyrightability of Barbie dolls (1992). However, to determine whether a functional work attracts copyright, it cannot merely be observed whether there was space for making free and creative choices. Such space almost always exists, at least to some degree.

To demonstrate originality, the question should be answered whether the author has made use of the creative space to produce an intellectual creation that can be considered the author's own. For this purpose, courts should take more account of the creative decision-making process. In addition, the law could perhaps impose a higher burden of proof on authors who seek copyright protection to better substantiate their claim by demonstrating their use of creative space in expressive form.

Moreover, the 'author's own intellectual creation'-test for copyright is so tied to the author as the individual creator of a work that it raises difficulties for determining the eligibility for protection of large-scale collaborative productions. The requirement that copyright only vests in works that bear the 'personal imprint' of their creators is especially problematic for group creations. Perhaps such a personal imprint can still be assumed if a joint work involves one or more creative leaders who have a final say on the finished product. However, if no main authors can be identified or if the work is in a constant process of evolution, as is typically the case for Wikipedia entries and open source software, the current originality test creates problems. A first difficulty arises in relation to the question at which point in time is the original character tested. Since the group of co-contributors changes over time, this is a relevant question if the individual contributions matter for ascertaining originality. Taking apart the creative contribution of each individual co-author would moreover create a supplemental set of functional limitations at the level of the individual, because being part of a group effort undeniably creates restrictions for individual choice. This would imply a higher threshold for joint works than for single-authored works. Since copyright must not punish group creation, when it comes to ascertaining the existence of creative space and how is it used in large-scale collaborative productions, the originality test should rather focus on group level creativity than on individual creative choices.

References

Books and articles

Affron, Ch. and Affron, M.J., 1995. *Sets in motion: art direction and film narrative*. New Brunswick, N.J.: Rutgers University Press.

Alexander, I., 2009. 'The concept of reproduction and the "temporary and transient" exception'. *The Cambridge Law Journal*, 68(3), pp. 520–523.

Amabile, T.M., 1998. 'How to Kill Creativity'. *Harvard Business Review* 76(5), pp. 77–87.

Amabile, T.M. and Tighe, E, 1993. 'Questions of Creativity'. In: J. Brockman (ed.), *Creativity*. New York: Simon & Schuster, pp. 7–27.

Barnwell, J., 2004. *Production Design: Architects of the Screen*. London: Wallflower Press.

Bechtold, S., 2013. 'The Fashion of TV Show Formats'. *Michigan State Law Review* (forthcoming), paper of 8 February 2013 available at SSRN: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2191664>, accessed 6 February 2014.

Bently L. and Sherman, B., 2009. *Intellectual Property Law*. 3rd edn. Oxford: Oxford University Press.

Bonnardel, N., Piolat, A. and Le Bigot, L., 2011. 'The impact of colour on Website appeal and users' cognitive processes'. *Displays*, 32(2), pp. 69–80.

Budd, M., 1995. *Values of art: pictures, poetry and music*. London [etc.]: Allen Lane.

Bullmore, J., 1999. 'The advertising creative process'. In: J.P. Jones, (ed.), *The advertising business: Operations, creativity, media planning, integrated communications*. Thousand Oaks, CA [etc.]: Sage Publications, pp. 51–60.

Buscombe, E., 1970. 'The Idea of Genre in the American Cinema'. *Screen*, 11(2), pp. 33–45.

Buydens, M., 2012. *La propriété intellectuelle: Evolution historique et philosophique*. Bruxelles: Bruylant.

Cahir, L.C., 2006. *Literature into Film: Theory and Practical Approaches*. Jefferson, NC: McFarland.

Candy, L., 2007. 'Constraints and Creativity in the Digital Arts'. *Leonardo*, 40(4), pp. 366–367.

Cohen-Jehoram, T., 2013. 'Het persoonlijk stempel van de maker. Hoe stel je dat vast?' In: P.J.M. von Schmidt auf Altenstadt, F.E. Vermeulen and B.T.M. van der Wiel (eds), *Middelen voor Meijer: Liber Amicorum voor mr. R.S. Meijer*. The Hague: Boom Juridische uitgevers, pp. 61–70.

Collins, R., 1970. 'Genre: A Reply to Ed Buscombe'. *Screen*, 11(4–5), pp. 66–75.

Cropley, D. and Cropley, A., 2010. 'Functional Creativity: "Products" and the Generation of Effective Novelty'. In: J.C. Kaufman and R.J. Sternberg (eds), *The Cambridge Handbook of Creativity*. Cambridge [etc.]: Cambridge University Press, pp. 301–317.

Csíkszentmihályi, M., 1996. *Creativity: flow and the psychology of discovery and invention*. New York, NY: HarperCollins Publishers.

Csíkszentmihályi, M., 'Implications of a Systems Perspective for the Study of Creativity'. In: R.J. Sternberg (ed.). *Handbook of Creativity*. Cambridge [etc.]: Cambridge University Press, pp. 313–335.

Derclaye, E., 2010. 'Infopaq International A/S v. Danske Dagblades Forening (C-5/08): wonderful or worrisome? The impact of the ECJ ruling in Infopaq on UK copyright law'. *E.I.P.R.*, 32(5), pp. 247–251.

Elster, J., 2000. *Ulysses Unbound: Studies in Rationality, Precommitment, and Constraints*. Cambridge [etc.]: Cambridge University Press.

Flower, L. and Hayes, J.R., 1981. 'A Cognitive Process Theory of Writing'. *College Composition and Communication*, 32(4), pp. 365–387.

Ginsburg, J.C., 2003. 'The Concept of Authorship in Comparative Copyright Law'.
DePaul Law Review, 52(4), pp. 1063–1092.

Goncalo, J.A., Vincent, L.C. and Audia, P.G., 2010. 'Early Creativity as a Constraint on Future Achievement'. In: D.H. Cropley, A.J. Cropley, J.C. Kaufman and M.A. Runco (eds), 2010. *The Dark Side of Creativity*. Cambridge [etc.]: Cambridge University Press, pp. 114–133.

Griffiths, J., 2011. 'Infopaq, BSA and the "Europeanisation" of United Kingdom Copyright Law'. *Media & Arts Law Review*, 16, 2011, paper of 4 March 2011 available at SSRN: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1777027>, accessed 6 February 2014.

Grosheide, F.W., 2013. 'Een einde aan de Endstra-saga?'. IE-Forum.nl, IEF 13188.

Hall, M.R. and Hall, E.T., 1975. *The Fourth Dimension in Architecture: The Impact of Building on Behavior*. Moline, Illinois: Eero Saarinen's administrative center for Deere & Company.

Hugenholtz, P.B., 1999. Annotation of Hoge Raad 16 April 1999 (*Bigott v. Doucal*) (in Dutch). *NJ* 1999, 697.

Hugenholtz, P.B., 2011. Annotation of CJEU 16 July 2009, case C-5/08 (*Infopaq*) and CJEU 22 December 2010, case C-393/09 (*BSA*) (in Dutch). *NJ*, 2011(29/30), 288, 289, pp. 2890–2893.

Hugenholtz, P.B., 2012. 'Works of Literature, Science and Art'. In: P.B. Hugenholtz, A.A. Quaedvlieg and D.J.G. Visser (eds), 2012. *A Century of Dutch Copyright Law: Auteurswet 1912–2012*. Amsterdam: Delex, pp. 33–55.

Imrie, R. and Street, E., 2011. *Architectural Design and Regulation*. Sussex: Wiley-Blackwell.

Irvin, S., 2007. 'Forgery and the Corruption of Aesthetic Understanding'. *Canadian Journal of Philosophy*, 37(2), pp. 283–304.

John-Steiner, V., 2000. *Creative Collaboration*. Oxford: Oxford University Press.

Jørholt, E., 2010. 'Peter Schønau Fog'. In: M. Hjort, E. Jørholt and E. Novrup Redvall (eds), 2010. *The Danish Directors 2: Dialogues on the New Danish Fiction Cinema*. Bristol [etc.]: Intellect, pp. 95–108.

Kelty, C.M., 2008. *Two Bits: The Cultural Significance of Free Software*. Durham [etc.]: Duke University Press.

Koelman, K., 2009. Annotation of CJEU 16 July 2009, case C-5/08 (*Infopaq*) (in Dutch). *AMI*, 2009(5), pp. 204–205.

Kozbelt, A., Beghetto, R.A. and Runco, M.A., 2010. 'Theories of Creativity'. In: J.C. Kaufman and R.J. Sternberg (eds), *The Cambridge Handbook of Creativity*. Cambridge [etc.]: Cambridge University Press, pp. 20–47.

Kretschmer, M., Singh, S., and Wardle, J., 2009. *The Exploitation of Television Formats*. ESRC Digital Resource, Bournemouth University. Available at: <http://tvformats.bournemouth.ac.uk>, accessed 6 February 2014.

Krishnan, S.S. and Sitaraman, R.K., 2012. 'Video stream quality impacts viewer behavior: inferring causality using quasi-experimental designs'. In: *IMC '12: Proceedings of the 2012 ACM conference on Internet measurement conference*. New York, NY: ACM, pp. 211–224.

Lavik, E. and Van Gompel, S.J., 2013. 'On the prospects of raising the originality requirement in copyright law: Perspectives from the Humanities'. *Journal of the Copyright Society of the USA*, 60(3), pp. 387–443.

Levinson, J., 1990. 'Artworks and the Future'. In: J. Levinson, *Music, Art, and Metaphysics: Essays in Philosophical Aesthetics*. Ithaca, N.Y. [etc.]: Cornell University Press, Ch. 9.

Mannix, E.A., Neale, M.A. and Goncalo, J.A. (eds), 2009. *Creativity in Groups*. Bingley, UK: Emerald.

Margoni, T. and Perry, M., 2012. 'Ownership in Complex Authorship: A Comparative Study of Joint Works'. *European Intellectual Property Review*, 34 (1), pp. 22–32.

Mayer, R.E., 1999. 'Fifty Years of Creativity Research'. In: R.J. Sternberg (ed.), 1999. *Handbook of Creativity*. Cambridge [etc.]: Cambridge University Press, pp. 449–460.

Moeran, B., 2011. 'Perspectives in Business Anthropology: Cultural Production, Creativity and Constraints'. *International Journal of Business Anthropology*, 2(1), pp. 16–30.

Moran, S., 2010. 'The Roles of Creativity in Society'. In: J.C. Kaufman and R.J. Sternberg (eds), *The Cambridge Handbook of Creativity*. Cambridge [etc.]: Cambridge University Press, pp. 74–90.

Nielsen, J. and Pernice, K., 2010. *Eyetracking Web Usability*. Berkeley, CA: New Riders.

O'Neil, M., 2011. 'Wikipedia and Authority'. In: G. Lovink and N. Tkacz (eds), 2011. *Critical Point of View: A Wikipedia Reader*, Amsterdam: Institute of Network Cultures, pp. 309–324.

Parkhurst, H.B., 1999. 'Confusion, Lack of Consensus, and the Definition of Creativity as a Construct'. *Journal of Creative Behavior*, 33(1), pp. 1–21.

Paulus, P.B and Nijstad, B.A. (eds), 2003. *Group Creativity: Innovation through Collaboration*. New York [etc.]: Oxford University Press.

Pavel, Th.G., 1986. *Fictional Worlds*. Cambridge, Mass. [etc.]: Harvard University Press.

Pink, D.H., 2005. 'The Book Stops Here'. *Wired Magazine*, 13(3). Available at: <http://www.wired.com/wired/archive/13.03/wiki.html>, accessed 6 February 2014.

Place, J.W., 2007. *Architectural structures*. Hoboken, New Jersey: John Wiley & Sons.

Puccio, G.J. and Cabra, J.F., 2010. 'Organizational Creativity: A Systems Approach'. In: J.C. Kaufman and R.J. Sternberg (eds), 2010. *The Cambridge Handbook of Creativity*. Cambridge [etc.]: Cambridge University Press, pp. 145–173.

Quaedvlieg, A.A., 1987. *Auteursrecht op techniek: De auteursrechtelijke bescherming van het technisch aspect van industriële vormgeving en computerprogrammatuur*. Zwolle: W.E.J. Tjeenk Willink.

Quaedvlieg, A.A., 2004. 'Baanbrekende ontwerpen en vrijheid van stijl: het dilemma van de trendsetter in het auteursrecht'. *Bijblad bij de Industrieele Eigendom*, 72(11), pp. 488–494.

Reagle, J.M. (Jr.), 2010. *Good Faith Collaboration: The Culture of Wikipedia*. Cambridge, Mass. [etc.]: MIT Press.

Redvall, E.N., 2009. 'Scriptwriting as a creative, collaborative learning process of problem finding and problem solving'. *MedieKultur: Journal of Media and Communication Research*, 46, pp. 34–55.

Redvall, E.N., 2010. 'Teaching screenwriting in a time of storytelling blindness: the meeting of the auteur and the screenwriting tradition in Danish film-making'. *Journal of Screenwriting*, 1(1), pp. 59–81.

Reuters, 2008. *Handbook of Journalism*. 2nd ed. [online] Available at: <http://handbook.reuters.com/index.php?title=Main_Page>, accessed 6 February 2014.

Runco, M.A., 2007. *Creativity – Theories and Themes: Research, Development, and Practice*. Burlington, MA: Elsevier Academic Press.

Sawyer, K., 2007. *Group Genius: The Creative Power of Collaboration*. New York: Basic Books.

Sellors, C.P., 2007. 'Collective Authorship in Film'. *The Journal of Aesthetics and Art Criticism*, 65(3), pp. 263–271

Sinclair, J., 2012. *Advertising, the Media and Globalisation: A World in Motion*. London: Routledge.

Smith, J.K. and Smith, L.F., 2010. 'Educational Creativity'. In: J.C. Kaufman and R.J. Sternberg (eds), *The Cambridge Handbook of Creativity*. Cambridge [etc.]: Cambridge University Press, pp. 250–264.

Sorena, B.J., 2005. 'Best practices in creating quality online experiences for museum users'. *Museum Management and Curatorship*, 20(2), pp. 131–148.

Sorena, B.J. and Lemelin, N., 2004. '"Cyberpals!/Les Cybercopains!": A Look at Online Museum Visitor Experiences'. *Curator: The Museum Journal*, 47(1), pp. 55–83.

Spoor, J.H., Verkade, D.W.F. and Visser, D.J.G., 2005. *Auteursrecht: auteursrecht, naburige rechten en databankenrecht*. 3rd ed. Deventer: Kluwer.

Stravinsky, I., 1970. *Poetics of Music in the form of six lessons*. Translated from French by A. Knodel and I. Dahl, with a preface by G. Seferis. Cambridge: Harvard University Press.

Sternberg, R.J. and Lubart, T.I, 1999. 'The Concept of Creativity: Prospects and Paradigms'. In: R.J. Sternberg (eds), *Handbook of Creativity*. Cambridge [etc.]: Cambridge University Press, pp. 3–15.

Sternberg, R.J. and Kaufman, J.C., 2010. ‚Constraints on Creativity: Obvious and Not So Obvious'. In: J.C. Kaufman and R.J. Sternberg (eds), *The Cambridge Handbook of Creativity*. Cambridge [etc.]: Cambridge University Press, pp. 467–482.

Stokes, P.D., 2008. 'Creativity from constraints: What can we learn from Motherwell? From Mondrian? From Klee?' *Journal of Creative Behavior*, 42(4), pp. 223–236.

Tracy, S.C., 2004. 'The blues novel'. In: M. Graham (ed.), 2004. *The Cambridge Companion to the African American Novel*. Cambridge [etc.]: Cambridge University Press, pp. 122–138.

Tsoutsanis, A., 2013. 'Vaagheid Endstra-tapes is irrelevant'. *NRC Handelsblad*, 10 August.

Van Eechoud, M.M.M, 2012. 'Along the Road to Uniformity: Diverse Readings of the Court of Justice Judgments on Copyright Work'. *JIPITEC*, 3(1), pp. 60–80.

Van Eechoud, M.M.M, Hugenholtz, P.B., Van Gompel, S.J, Guibault, L. and Helberger, N., 2009. *Harmonizing European Copyright Law: The Challenges of Better Lawmaking*. Alphen aan den Rijn: Kluwer Law International.

Van Gompel, S.J., 2013. Annotation of Hof Den Haag 16 July 2013 (*Zonen Endstra v. Nieuw Amsterdam*) (in Dutch). *AMI*, 2013(6), pp. 201–203.

Van Gompel, S.J. and Lavik, E., 2013. 'Quality, merit, aesthetics and purpose: An inquiry into EU copyright law's eschewal of other criteria than originality'. *RIDA*, no. 236 (April), pp. 100–295.

Verkade, D.W.F., 1996. Annotation of Hoge Raad 29 December1995 (*Decaux v. Mediamax*) (in Dutch). *NJ*, 1996, 546.

Visser, D.J.G., 2010. 'Kroniek van de intellectuele eigendom'. *NJB*, 2010(15), pp. 982–988.

Cases

EU

Case C-393/09 *Bezpečnostní softwarová asociace v. Ministerstvo kultury* [2010] ECR I-13971.

Case C-145/10 *Eva-Maria Painer v. Standard VerlagsGmbH* (CJEU, Third Chamber, 1 December 2011).

Joined Cases C-403/08 and C-429/08 *Football Association Premier League Ltd v. Karen Murphy* (CJEU, Grand Chamber, 4 October 2011).

Case C-604/10 *Football Dataco & others v. Yahoo! UK & others* (CJEU, Third Chamber, 1 March 2012).

Case C-5/08 *Infopaq International A/S v. Danske Dagblades Forening* [2009] ECR I-6569.

Case C-406/10 *SAS Institute Inc. v. World Programming Ltd.* (CJEU, Grand Chamber, 2 May 2012).

The Netherlands

Broeren v. Duijsens-Kroezen (2013) ECLI:NL:HR:2013:BY8661, HR 29.03.2013, RvdW 2013, 472.

Castaway v. Endemol (2002) ECLI:NL:GHAMS:2002:AE4818, Hof Amsterdam 27.06.2002, AMI 2004, no. 13.

Castaway v. Endemol (2004) ECLI:NL:HR:2004:AO3162, HR 16.04.2004, AMI 2004, no. 13.

Decaux v. Mediamax (1995) ECLI:NL:HR:1995:ZC1942, HR 29.12.1995, NJ 1996, 546.

Doréma v. Isabella (1996) ECLI:NL:GHARN:1996:AK3667, Hof Arnhem 10.09.1996, IER 1996, no. 42.

E2Ma v. Malicor (2012) Vzr. Rb Utrecht, 08.02.2012, IEPT20120208.

Eek BV v. Esfera (2007) ECLI:NL:RBALK:2007:AZ8924, Vzr. Rb. Alkmaar 20.02.2007, AMI 2007, p. 104

Gavita v. Puutarhaliike Helle (2010) ECLI:NL:HR:2010:BK1599, HR 29.01.2010, RvdW 2010, 223.

Hauck v. Stokke (2013) ECLI:NL:HR:2013:BY1533, HR 12.04.2013, RvdW 2013, 590.

Impag v. Hasbro (2001) ECLI:NL:HR:2001:AB2391, HR 29.06.2001, NJ 2001, 602.
Inspirion v. Pokonobe et al. (2011) Rb. Den Haag, 19.01.2011, IEPT20110119.
Inspirion v. Pokonobe et al. (2012) ECLI:NL:RBSGR:2012:BW3624, Rb. Den Haag 18.04.2012, IEPT20120418.
Kecofa v. Lancôme (2006) ECLI:NL:HR:2006:AU8940, HR 16.06.2006, NJ 2006, 585.
MB v. Mattel (1992) ECLI:NL:HR:1992:ZC0513, HR 21.02.1992, NJ 1993, 164.
Melano v. Quiges Fashion Jewels (2013) ECLI:NL:GHSHE:2013:BZ1057, Hof Den Bosch 29.01.2013, IEPT20130129.
SEVV v. AY Illuminate (2010) Vzr. Rb. Amsterdam 19.05.2010, IEPT20100519.
Social Deal v. Wowdeal (2012) Vzr. Rb. Roermond, 05.12.2012, IEPT20121205.
Stokke v. Fikszo (2013) ECLI:NL:HR:2013:BY1532, HR 12.04.2013, RvdW 2013, 589.
Stokke v. H3 Products (2013) ECLI:NL:HR:2013:BY1529, HR 22.02.2013, RvdW 2013, 331.
Technip v. Goossens (2006) ECLI:NL:HR:2006:AU7508, HR 24.02.2006, NJ 2007, 37.
Timans v. Haarsma et al. (2006) ECLI:NL:HR:2006:AX3171, HR 08.09.2006, NJ 2006, 493.
Union v. Calleur (2012) Rb. Alkmaar, 14.11.2012, IEPT20121114.
Van Dale v. Romme (1991) ECLI:NL:HR:1991:ZC0104, HR 04.01.1991, NJ 1991, 608.
Van Gelder v. Van Rijn (1946) HR 28.06.1946, NJ 1946, 712.
X v. Ringfoto Nederland (2010) ECLI:NL:RBHAA:2010:BN0985, Ktr. Rb. Haarlem 07.07.2010, B9 8978.
Zonen Endstra v. Nieuw Amsterdam (2008) ECLI:NL:HR:2008:BC2153, HR 30.05.2008, NJ 2008, 556.
Zonen Endstra v. Nieuw Amsterdam (2013) ECLI:NL:GHDHA:2013:2477, Hof Den Haag 16.07.2013, AMI 2013, no. 13.