The Concept of Originality in EU Copyright Law and the Effect of AI on the 'Margin of Manoeuvre'

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Abstract

This paper explores the evolving concept of originality within EU copyright law, focusing on its implications in the context of mass production and artificial intelligence (AI). While originality, defined as the author's own intellectual creation, has long served as a foundational yet low-threshold requirement for copyright protection, recent technological developments and legal harmonization efforts have challenged its adequacy and coherence. Drawing from legislative history, CJEU case law, and doctrinal literature, the authors investigate two core questions: (i) how the existing low originality threshold affects copyright in an AI-driven creative landscape, and (ii) whether this threshold should or could be adjusted or refined. The study highlights how the proliferation of creative content – both human- and AI-generated – narrows the 'margin of manoeuvre', i.e., the room for creative freedom, complicates originality assessments, and raises systemic questions about authorship, expression, and protection. Proposals such as AI-based originality assessments and a double-threshold system are examined for their potential to address these challenges. Ultimately, the paper argues for a re-evaluation of originality's role and criteria, with a stronger focus on the existing criteria regarding the author's 'personal touch', to maintain the integrity and adaptability of European copyright law in the digital age.

Keywords: EU copyright law, creative freedom, AI, narrow margin of manouvre, personal touch

1. Overview and Research Questions

Originality, as a minimum requirement for copyright protection, is the cornerstone of copyright law. Recently, the definition of originality has come under the spotlight in relation to its suitability to handle the reception of

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non-human contributions, and its meaningfulness in the process of content produced by artificial intelligence (hereinafter: AI). This paper does not intend to contribute to this stream of research, but rather focuses on the impact of the extremely low threshold that has been set over the last few decades of the copyright law in the context of the shift to 'mass production'. Following a review of the international law and EU law foundations through a survey of the literature and a case law analysis, it examines two interrelated research questions that put the issue in a different perspective.

This paper aims to explore the impact and the effects of the very low entry threshold for copyright in the context of AI *(RQ1).* Moreover, bearing in mind its side effects, the paper examines whether the low threshold needs to be raised, or whether other methods for examining and establishing the entry threshold might be a possible option *(RQ2).*

Therefore, the first part of the paper gives a brief overview of how originality has become a central requirement for copyright protection in the EU. The concept signifies that a work must be the author's own intellectual creation, reflecting their personal choices, creativity, and perspective. EU copyright law is largely harmonized through directives and regulations, beginning with the Berne and Rome Conventions, followed by the EU's own legislative efforts such as the InfoSoc-, Term-, Software-, and Database Directives. These instruments set a unified standard of originality across the Member States, repealing additional national requirements such as artistic quality or significant labor.

The case law of the CJEU has further clarified this standard. In *Infopaq* and *Painer,* the CJEU emphasized that even small creative choices, applied for example in photography, can meet the originality threshold. In *Football Dataco,* the CJEU distinguished creativity from mere labor or skill, moving away from the UK's former 'sweat of the brow' approach. Later rulings like *Cofemel* and *Brompton Bicycle* reinforced that originality lies in the author's creative freedom, even when it comes to functional or industrial designs. Thus, EU copyright law embraces a low threshold of originality, fostering broad protection for creative expression across various forms and sectors.

In the second part, the paper examines the evolving nature and challenges of copyright law in light of the historically low entry threshold and automatic protection under the Berne Convention, which removed formalities such as registration. Initially rooted in the author's personal connection to their work, this approach emphasized originality as a binary threshold, not a qualitative one. However, the digital era has dramatically increased the volume and complexity of creative output, blurring lines between profes-

sional and amateur creators, and challenging traditional notions of originality.

As copyright attempts to encompass all creative expression, differentiation based on the type, purpose, and use of works becomes increasingly relevant. New questions arise about how to assess originality, especially in functional or AI-generated works, where the 'margin of manoeuvre', *i.e.,* the room for creative choices is narrower. Legal systems are struggling to adapt, particularly as mass production and digital tools flood the public domain with similar content, making it harder to identify truly original works.

Emerging proposals, like using AI to assess 'originality scores' or applying a double threshold, reflect attempts to redefine thresholds more clearly.

This paper explores both the current impact of originality in the context of AI and the theoretical and practical viability of modifying the threshold and its examination. In doing so, it seeks to contribute to a more coherent and forward-looking understanding of originality in European copyright law.

2. Originality in EU Copyright Law

Copyright is a legal framework which grants creators exclusive rights over their intellectual work;[1] it belongs to the author, the sole creator of a unique artwork.[2] Copyright protection aims to protect and value creativity, which is considered to be a uniquely human trait. For an artistic work to qualify for copyright protections, it must satisfy a set of standards, one of which is the requirement of originality. The threshold of originality is a concept to determine whether an artistic work is entitled to copyright protection. Creators can express themselves through their creations, using their imagination, creativity, intentionality, and their personal point of view. Artists infuse their work with emotional depth, allowing their works to reflect not only their individual personalities, but also their human consciousness.[3]

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1 Nooshin Ardalan Manesh, 'The Nexus Between Creativity and Copyright Infringement: A Practical Guide in Nutshells', *Fashion Law Journal,* at https://fashionlawjournal.com/the-nexus-between-creativity-and-copyright-infringement-a-practical-guide-in-nutshells/.

2 Martha Woodmansee, 'On the Author Effect: Recovering Collectivity', *Case Western Reserve University School of Law Scholarly Commons,* Vol. 10, 1997, p. 279.

3 Deep Dream Generator Blog, '*AI-Generated Art and the Question of Originality',* at https://deepdreamgenerator.com/blog/ai-art-originality.

2.1. Concept of Originality in EU Primary Law

Copyright law is harmonized in the EU to a large extent. A total of 23 directives and 2 regulations harmonize the essential rights of authors, performers and producers. By establishing these harmonized standards, EU Copyright Law aims to reduce national discrepancies,[4] and guarantee the protection needed to foster creativity in the copyright field.[5]

The long road to harmonization will not be exhaustingly covered in all its significant stages, therefore only the most pertinent legislation regarding the threshold of originality will be outlined in this essay.

The first milestone in copyright law is the Berne Convention,[6] to which all EU Member States are parties. While the Berne Convention had created the foundations of copyright protection, the Rome Convention[7] emphasized the protection of performers, producers of phonograms and broadcasting organizations. Being parties to the above-mentioned conventions, Member States of the EU have already achieved a certain level of approximation, but there were still significant differences regarding copyright protection in national laws.

EU level harmonization began with the recognition of the need to create a unified legal approach to copyright protection, since the emergence of new technical innovations brought with them new challenges to copyright, which required a Community-level solution.

The first step towards further harmonization was undertaken by the Commission by releasing the '*Green Paper on copyright and the challenges of technology*'[8] in 1988. In this document the Commission instituted the harmonization of various areas of copyright law all at once, aiming to protect and elevate the recognition of intellectual and artistic creativity, which serves as a fundamental source of Europe's cultural identity.[9]

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4 The EU Copyright Legislation, at https://digital-strategy.ec.europa.eu/en/policies/copyright-legislation.

5 EU Copyright, at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=legissum:eu_copyright.

6 Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886 (as amended on September 28, 1979) (hereinafter: BC).

7 Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, Rome, Italy, 26 October 1961.

8 Green Paper on Copyright and the Challenge of Technology – Copyright Issues Requiring Immediate Action, at https://op.europa.eu/en/publication-detail/-/publication/f075fcc5-0c3d-11e4-a7d0-01aa75ed71a1

9 WIPO National Seminar on Copyright and Related Rights Organized by the World Intellectual Property Organization (WIPO) in Cooperation with the State Intellectual Property Office of the Republic of Croatia Opatija, 17–19 June 1998, p. 2.

Ten years later, in 1998 the Commission submitted a Proposal for a European Parliament and Council Directive on the harmonization of certain aspects of copyright and related rights[10] in the Information Society[11] which was later adopted as the InfoSoc[12] Directive. This enshrined the basis of copyright protection, but originality as a requirement was not yet defined in its provisions.

Originality was first defined in detail in the Term Directive,[13] the Database Directive[14] and the Software Directive.[15] Each of these directives contain similar provisions, stating that in order for a work to be considered original, it has to be the author's own intellectual creation, with no other criteria foreseen for its eligibility for protection.

The aforementioned directives laid the groundwork for defining originality, and in April 2010 the Wittem Group – formed by leading copyright academics – released the European Copyright Code.[16] Their main concern was, that EU-level copyright legislation lacked transparency and consistency. They intended to create a reference tool that could be used as a guideline for the future harmonization of copyright. Article 1.1(1) defined *'work'* as "any expression within the field of literature, art or science insofar as it constitutes its author's own intellectual creation" setting the general originality standard.[17]

The CDSM Directive,[18] one of the most recent EU directives aiming to adapt copyright law to the digital environment, has a special provision re-

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10 Eleonora Rosati, '*Originality in Eu Copyright, Full Harmonization Through Case Law',* Edward Elgar, Cheltenham, 2013, p. 18.

11 Proposal for a European Parliament and Council Directive on the harmonization of certain aspects of copyright and related rights in the information society, COM(97) 628 final.

12 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

13 Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights.

14 Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases.

15 Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs.

16 Eleonora Rosati, 'The Wittem Group and the Project of a European Copyright Code', *Journal of Intellectual Property Law and Practice,* Vol. 5, Issue 12, 2010, pp. 862–868.

17 P. Bernt Hugenholtz, *'The Wittem Group's European Copyright Code',* Chapter 17, at https://www.ivir.nl/publicaties/download/ILS_29_chapter17.pdf.

18 Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.

garding the legal status of the reproductions of artworks belonging in the public domain, clarifying that in case the protection of a work of visual art has expired, the reproduction of the work is not eligible for copyright protection, unless it is original in the sense that it is the author's own intellectual creation.[19]

It is clear from the above that EU legislation establishes a relatively low threshold of originality, allowing for a broad range of creative works to be embraced. Before harmonization several Member States had national copyright laws that included additional requirements for protection beyond the minimum standards set by the EU, usually involving criteria like labor, quality or other subjective measures. For example, the German *Urheberrechtsgesetz*[20] required a certain level of creative artistry, whereas the French *Code de la propriété intellectuelle*[21] demanded a quality condition to be fulfilled, resulting in a higher threshold for originality.

2.2. The Secondary Sources on Originality

Besides legislation, harmonization has also been achieved through case law of the CJEU. The first outstanding decision which shaped the understanding of originality was *Infopaq*[22] in 2009. The CJEU laid down the definition of work in the context of copyright containing two conditions, particularly that *(i)* artworks must be original meaning that they are the author's own intellectual creation, and *(ii)* only those creations may be defined as a 'work' that are the expression of the author's own intellectual creation.[23]

Building upon *Infopaq,* the CJEU continued to refine the concept of originality in *Painer,*[24] where the preliminary matter to be decided by the CJEU was related to a question of free use and reproduction of a photograph by

19 Alexandra Giannopoulou, 'The new copyright directive: Article 14 or when the public domain enters the new copyright directive', *Kluwer Copyright Blog,* 27 June 2019.

20 Urheberrechtsgesetz (UrhG), Gesetz über Urheberrecht und verwandte Schutzrechte (Copyright Act) of 9 September as last amended by Article 28 of the Act of 23 October 2024.

21 Code de la propriété intellectuelle (CPI, Intellectual Property Code) consolidated version as of 22 May 2020.

22 Judgment of 16 July 2009, *Case C-5/08, Infopaq,* ECLI:EU:C:2009:465.

23 David Linke, 'Copyright work and its definition with regard to originality and AI – Conference report on the fourth binational seminar of TU Dresden and Charles University in Prague, 27 June 2019', *GRUR International,* Vol. 69, Issue 1, 2020, p. 41.

24 Judgment of 1 December 2011, *Case C-145/10, Painer,* ECLI:EU:C:2011:798.

the press, particularly, whether a realistic portrait photograph with a rather minor creative freedom can obtain copyright protection under Article 6 of the Term Directive. The ruling reflected the reasoning of *Infopaq,* as it made clear that the author of a photograph can also 'stamp the work with his personal touch' by using his creative freedom and own perspective – for example by choosing perspective, adjusting the lights or framing – therefore the creation can be protected by copyright.[25]

A similar approach to originality was followed in *Football Dataco,* when the CJEU held in the context of databases, that "the criterion of originality is satisfied when – through the selection or arrangement of the data which it contains – its author expresses his creative ability in an original manner by making free and creative choices and thus stamps his personal touch", however copyright protection is not granted solely on the basis that setting up a database required labor and skill. According to the decision's reasoning, solely the amount of labor and skill it took to create the artwork cannot justify copyright protection without an expression of originality which – in this case – is in the selection or arrangement of data.[26] Advocate General Mengozzi clarified in his Opinion that in terms of copyright protection a 'creative' aspect is required, and it is not sufficient that the creation required 'significant labor and skill'.[27] He also pointed out the huge difference between the common law tradition and the civil law tradition regarding the level of originality required for copyright protection. While the UK used to apply[28] the 'skill and labor' standard, also known as the 'sweat of the brow' doctrine – meaning, that they grant copyright protection based on the amount of labor, skill, diligence and effort it took for the author to create a work – countries of the civil law tradition require works to have a creative element in order to be eligible for copyright protection.[29]

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25 Andreas Rahmatian, 'Originality in UK Copyright Law: The Old "Skill and Labour" Doctrine Under Pressure', *International Review of Intellectual Property and Competition Law,* Vol. 44, Issue 1, 2013, pp. 4–34.

26 Judgment of 1 March 2012, *Case C-604/10, Football Dataco Ltd,* ECLI:EU:C:2012:115.

27 Eleonora Rosati, 'Why originality in copyright is not and should not be a meaningless requirement', *Journal of Intellectual Property Law and practice,* Vol. 13, Issue 8, 2018, pp. 597–598.

28 Eleonora Rosati, *'Copyright and the Court of Justice of the European Union (Second Edition)',* Oxford University Press, Oxford, 2023, pp. 311–350. "After leaving the EU in 2020, United Kingdom had the chance to return to the previous interpretation of originality, but so far the court decisions regarding originality are in line with the CJEU case law."

29 Opinion of Advocate General Mengozzi delivered in 15 December 2011, *Case C-604/10, Football Dataco Ltd,* ECLI:EU:C:2011:848.

Jumping ahead in time to more recent rulings, both in *Cofemel*[30] and *Brompton Bicycle*[31] the CJEU delivered quite unique decisions involving originality. In 2013. G-Star, a clothing brand accused *Cofemel* of infringing their copyright regarding multiple clothing items, claiming, that their 'ARC' jeans and 'ROWDY' t-shirt and sweatshirt designs are original intellectual creations, they are to be considered 'works' and are therefore entitled to copyright protection. *Cofemel,* on the other hand, argued that clothing items could not be classified as 'works'. After the Portuguese Supreme Court made a referral to the CJEU for a preliminary ruling, the CJEU declared, that once a design is the original intellectual creation of the author, and therefore the subject matter fulfils the originality requirement, it is protected by copyright.[32] Aesthetic effects and the artistic value of the work cannot be a requirement for copyright protection, and any national provision is inadmissible, such as the 'aesthetic effect' requirement in Portuguese copyright law.[33]

The basis of the dispute in *Brompton Bicycle,* was a copyright infringement against a particular design of a bicycle made by *Brompton Bicycle,* which allowed the two-wheeled vehicle to fold into three different positions. The special feature was protected by a patent, which eventually expired, giving the opportunity for others to use it. Get2Get, a Korean Company marketed a bicycle called 'Chedech', quite similar to the iconic folding bike, allegedly infringing copyright protection. In response to the claim, Get2Get argued, that the appearance of their bike is dictated by the technical solution sought, to ensure that the bike can fold, and that the technique could only be protected under patent law.[34] In response, Brompton Bicycle highlighted, that the three positions could have been obtained in several ways, making the particular method of folding the creator's own creative choice, which is therefore eligible for copyright protection. The main question was, whether copyright protection under the InfoSoc Directive applies when the appear-

30 Judgment of 12 September 2019, *Case C-683/17, Cofemel,* ECLI:EU:C:2019:721.

31 Judgment of 11 June 2020, *Case C-833/18, Brompton Bicycle Ltd,* ECLI:EU:C:2020:461.

32 Simon Clark & Sara Witton, *'Cofemel v G-Star Raw (C-683/17) and its effect on UK copyright law before and after Brexit',* 2020, at https://www.bristows.com/viewpoint/articles/cofemel-v-g-star-raw-c-683-17-and-its-effect-on-uk-copyright-law-before-and-after-brexit/.

33 EU Copyright in Designs – CJEU Rule in Cofemel that 'Originality' is the Only Requirement for Protection, 2019, at https://cms-lawnow.com/en/ealerts/2019/10/eu-copyright-in-designs-cjeu-rule-in-cofemel-that-originality-is-the-only-requirement-for-protection.

34 *Case C-833/18, Brompton Bicycle Ltd,* para. 14.

ance of a product is necessary to achieve a technical result.[35] In its ruling the CJEU relied on *Cofemel,* and confirmed, that for a work to be considered original, it is both necessary and sufficient that the subject matter reflects the personality of the author, as an expression of their free and creative choices. In line with this reasoning, the CJEU ruled, that a creation could be eligible for copyright protection, if it satisfies the originality requirement, even if the realization is dictated by a technical consideration, as far as it does not prevent the author from reflecting his personality and express their free and creative choices when creating the subject matter.[36]

3. Side Effects of the Copyright 'Entry Point'

The low entry threshold cannot be considered by itself, but only within its context. One of the defining principles of this context – established in the Berne Convention[37] – is that copyright protection is formality-free, *i.e.* it arises automatically. This means that protection is generated by the creation of the work itself, without any registration, evaluation, approval or notification.[38] Despite the fundamental differences between the civil law and common law approaches, the principle of protection without formalities has become a fundamental concept in international copyright law. In the infamous *Wheaton v Peters,* Craig Joyce bitterly observes that by joining the Berne Convention, the United States' previously effective tool, the "statutory formalities beast", has suddenly become a "toothless tiger".[39] Furthermore, the prohibition of formality reinforced the approach of copyright as a fundamental, natural right of man, deriving from the personality of the creator. By

35 Eleonora Rosati, *'CJEU rules that functional shapes are eligible for copyright protection, in so far as they are original works',* 2020, at https://www.twobirds.com/en/insights/2020/global/cjeu-rules-that-functional-shapes-are-eligible-for-copyright-protection-in-so-far.

36 *Case C-833/18, Brompton Bicycle Ltd,* para. 38.

37 BC Article 5(2) "The enjoyment and the exercise of these rights shall not be subject to any formality; such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work."

38 "[…] formality-free (or "automatic") protection ("automatic", since, in the absence of formalities, the creation – and where it is a condition, the fixation – of a work directly, "automatically" brings copyright protection into being." Mihály Ficsor, *'Guide to the Copyright and Related Rights Treaties Administered by WIPO',* 2003, at https://www.wipo.int/edocs/pubdocs/en/copyright/891/wipo_pub_891.pdf.

39 Craig Joyce, '"Curious Chapter in the History of Judicature": Wheaton v. Peters and the Rest of the Story (of Copyright in the New Republic)', *Huston Law Review,* Vol. 42, Issue 2, 2005, p. 389.

contrast, it is easier to fit the limitation of the entry point into the system of property right approach , *i.e.,* to impose some formality on the creation of copyright.[40] However, where copyright derives from the personality of the author, its limitation can be perceived within a different – narrower – framework. Thus, the principle of protection without formalities has – in addition to its original purpose – been coupled with the principles and objectives that define the basic characteristics and function of copyright and represent a choice of values. This principle arose from the need to ensure the absence of censorship and the orderly succession of rights, and which were of course justified by the specific nature of the legal relationship, such as the interdependence of moral and economic rights or the typically weaker position of the author in the contracting process.[41] Although originally it was mainly intended to close loopholes aimed at circumventing the principle of equal treatment of the Berne Convention,[42] more and more arguments have been brought forward to substantiate it: the position of unfinished but already original works and fragments of works had been added to this list.[43] Moreover, given that, as van Gompel points out, the historical justification for the principle of protection without formalities has now virtually disappeared,[44] having lost their original purpose and function, it is these new objectives and arguments that now serve as its rationale.

Another important factor that must be mentioned in order to accurately portray the context is the fact that, in the meantime, the 'mass production' of artworks has been accelerating, and there has been an increasing number of frequently complex and high quality works of art, even of new types, requiring incredible creativity (*e.g.,* animated films, software). This has created a particular environment in the light of the fact that, as we have explained, it is relatively easy for anyone to create a work that meets the requirement of originality.

As Bobrovszky explains, "the requirement of the individual-original work […] is not a quality-evaluation scale, but a binary threshold of intellectual

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40 "[…] the Court had made clear that copyright in the United States, at least respecting published works, was a creature of federal statute only." Id. p. 384.

41 Caterina Sganga, '*Propertizing European Copyright History, Challenges and Opportunities',* Edward Elgar, Cheltenham–Northampton, 2018, p. 28.

42 *See in detail* Anett Pogácsás, 'One Hundred Years of International Copyright', *Hungarian Yearbook of International Law and European Law,* Vol. 10, Issue 1, 2022, pp. 246–259.

43 Sam Ricketson & Jane C. Ginsburg, '*International Copyright and Neighbouring Rights: The Berne Convention and Beyond, 1',* Oxford University Press, Oxford, 2006, p. 321.

44 Stef van Gompel, '*Formalities in Copyright Law: An Analysis of Their History, Rationales and Possible Future',* Wolters Kluwer, Amsterdam, 2011, p. 292.

property."[45] Although it seems a contradiction in terms that there is a *mass* of *individual, original* works, since we typically imagine authorship and creativity as 'special' – in reality they are very 'common'.

3.1. Everything (and Anything) is Equally Original?

Several differentiation points have emerged within copyright law, and if we look closely at these 'breakpoints', we can see that they have essentially affected the concept and content of originality. Many of the points of differentiation that have emerged have become more pronounced over the last decade, new fracture points are taking shape, and others need to be smoothed over. The issue of eliminating differences in Europe was explicitly addressed in the context of national divergences that hamper the Digital Single Market: "[…] the rapid removal of key differences between the online and offline worlds to break down barriers to cross-border online activity."[46] However, this is another dimension of differentiation – in the context of our topic, we should focus on a number of systemic differentiations, their rationale and lack thereof.

The differentiation in copyright started with the protection of different types of works. Today, a clear separation of regulation along categories of genres would not be easy simply because of the mixed content and diversity of works, and their convergent use further complicates the matter. As we have seen, the digital/analogue dividing line alone is not a useful demarcation, although it will be an important aspect of differentiation. While different types of works and performances may require different approaches in the digital world, the distinction may increasingly be made on the basis of their other characteristics, which are already reflected to some extent in the regulation. In 1989, Boytha argued:

> "Let us pass to the structural changes within the law on authors' rights which are revolutionary all over the world. [W]e have to change the traditional interpretation of the role of authors' rights, according to which it is a somewhat exclusive branch of law, concerning only a few persons, and

45 Jenő Bobrovszky, 'A szellemi tulajdon néhány dilemmájáról a körte és a sajt között', *in* Miklós Király & Péter Gyertyánfy (eds.), *'Liber Amicorum. Studia Gy. Boytha Dedicata. Ünnepi dolgozatok Boytha György tiszteletére',* ELTE ÁJK, Budapest, 2004, p. 42.

46 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A Digital Single Market Strategy for Europe, Brussels, 6.5.2015. COM(2015) 192 final, point 1.

> which related only to the field of a narrowly defined culture. This interpretation follows from the traditional concept of culture. Culture should no more be confined to creations of literature and art, the activities of writers, artists, painters and sculptors, or composers. Today technology and technical creative activities represent an integral part of modern culture. The development of the quality of life is no more determined merely by the performances of the Opera house, by books sold in bookshops, by works of architecture or visual arts, *etc*. Culture covers also production of goods satisfying human demands, technical conditions of everyday life, the development of our scientific concept of the world, ecology and robotics, electronics in general, *etc*."[47]

In the three decades since the above statement, this structural change has become even more pronounced. The smallest common denominator of the various protected works and performances is less and less the 'aesthetic' and increasingly the 'expression of creativity'. Whether it is correct that copyright law seeks to protect all forms of creative expression without distinction regarding the origin of protection,[48] and whether the uncertainty of users can be eliminated while maintaining the principle of the non-registration of the vast amount of 'creative content' are questions inseparable from the fight against censorship. However, even if the threshold of protection cannot be changed, precisely in order to guarantee the freedom of expression or participation in cultural life, the importance of the characteristics of the works/performances arises in regard to the substance of protection.

The importance of the original art copy is decreasing (even in the field of fine arts, and some works are even mass-produced using 3D printers, but in other cases the work is still expressed in a single or limited number of copies, for example of a painting or a ceramic piece, the digital copies of which have a different artistic value). The form of expression of the work (digital/analogue, number of copies, significance), the recording of the performance and the way it is recorded have a considerable impact on regulation and its application.[49] This is because in the digital medium, the focus is less and less

47 György Boytha, 'Topical Questions Concerning the Development of the Protection of Computer Programs', *in Proceedings of the Hungarian Group of IAPIP, No. 16,* 1989, p. 56.

48 According to Naughton, protection that goes beyond the protection of printed books necessarily produces a dysfunctional result. John Naughton, *From Gutenberg to Zuckerberg. Disruptive innovation in the age of the internet,* Quercus, New York–London, 2012, p. 7.

49 This soon became clear in the context of music. *See e.g.* Mihály Ficsor, 'Szerzői jog: változtatás és megőrzés – avagy miért hamisak a védelem kiterjesztéséről szóló legendák és veszélyesek a gyengítését célzó elképzelések', *in* Gábor Faludi (ed.), '*Liber amicorum.*

on individual content and increasingly on the flow and enabling of content, where material objects serve less to capture and express a certain creative content (including works, performances) but more to provide a platform for its flow instead.

In this circulation, various works and performances are involved in different ways, according to their essential characteristics (which are also closely related to the creative intent of their creator). The information content of the work/performance, its cultural role, its 'utility', its commercial value, its role in the distribution of information are delicate differences, only part of which can be captured by the law. In this regard, reference is often made to the wording of the Statute of Anne, according to which the original purpose of protection was not for the encouragement of the creation of any work in general, but "for the encouragement of learned men to compose and write useful books."[50] The question of whether a value judgment on the 'usefulness' of a work can serve to determine the threshold for protection was clearly answered in the fight against censorship, just as the adjective 'useful' in the US IP Clause[51] is not employed to filter out 'useless' works.

There are significant differences not only in the 'usefulness' of works/performances, but also in their 'value' in economic terms – the latter factor, however, is already relevant to the appearance of the work/performance on the cultural market and thus also affects the application of copyright, without however influencing its existence.

Thus, while the economic significance of works and, above all, their informational content and cultural significance as characteristics are brought to the foreground in the differentiation of regulation and the application of rules, in a gradually dematerializing world, there has also been a tendency for the application of law to "focus upon creativity in the Abstract, rather than distinguishing between different forms of creativity".[52]

In this context, the importance of the person and the will of the creator has also shifted. This is not to say that the relationship between the work and its creator has closer for all works and similar performances. Moreover, in a number of cases, a greater consideration for the will of the creator shall contribute to making works more freely accessible.

Studia P. Gyertyánfy dedicata. Ünnepi dolgozatok Gyertyánfy Péter tiszteletére', ELTE ÁJK Polgári Jogi Tanszék, Budapest, 2008, p. 225.

50 The Statute of Anne; April 10, 1710, 8 Anne, c. 19 (1710), point I.

51 US Constitution, Article I. Section 8.

52 Jonathan Griffiths, 'Dematerialization, pragmatism and the European copyright revolution', *Oxford Journal of Legal Studies,* Vol. 33, Issue 4, 2013, p. 788.

Today, the central question of copyright is how it relates to a broad and very heterogeneous spectrum of creators, and how creators themselves relate to copyright. Differences between original rightsholders are not only reflected in the types of works and performances and the uses to which they are put (notably that the motivations and interests of a software creator may differ significantly from those of a sculptor), but also in the way rightsholders within each category seek to use the possibilities offered by copyright. While more and more people are becoming receptive to open models for the use of copyright, a line is being drawn between the holders of commercially significant works – created especially for the 'cultural market' – and the creators of other works. The differences between 'typical' and 'atypical', 'professional' and 'hobby' creators, those who use the right of attribution and those who choose to stay anonymous also result in fundamental differences in the application of copyright. A database, a commissioned graphical advertisement, an individual, original ten liner written for Wikipedia, a poem, a sound recording, or a radio broadcast – the motivations behind the creation of different protected works/performances can be quite diverse, and the effect of this on the future application of copyright should not be underestimated. Copyright law can, in principle, deal with these differences. The *opt-out* enabled by the CDSM Directive, according to which creators and other rightsholders can explicitly reserve the use of their works for text and data mining in an appropriate manner, such as through machine-readable means in the case of content made publicly available online, opens up new opportunities for rights holders.[53]

The fact that the author is at the center of copyright law, classically and perhaps even more so in the future, does not mean that the creator is given the means by the legislator to jealously guard the 'tree of knowledge' at the expense of users and the public. The debates on the future of copyright have innocuously confronted the public and the creator, although their relationship is far from hostile even in the digital environment of the 21st century. In copyright law, there is a great need for a strengthening of private autonomy, a return to the author's person to ensure the viability of the chain of access and to support individual, original creative activity in the chaos of mass production. The digital age has indeed 'mined' a new layer of authorship: "questioning the author's originality and ability to create something

53 Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (CDSM Directive), Article 4(3).

new also means highlighting the creation of texts as a collective work across time and space, and the texts themselves as multi-source, multi-voiced, constantly changing formations."[54] However, the existence of collective creation, the frequent blurring of the lines between creator/recipient, strong interdependence, the short term life of works do not shape the essence of copyright, but rather, its application.[55] In cases where creators are not themselves attached to their work, the main goal is not to artificially maintain that attachment, but to avoid uncertainty. The rightsholders have always been free to allow the use of their work, even without remuneration. It is essential to arrive at a much simpler way of expressing this will, resulting in a transparent framework. If, throughout this process, no dividing line can be drawn between the 'amateur' and the 'professional' creator by means of the law, it is apparent that the various creative groups wish to use the possibilities offered by copyright in different ways. Particularly because the exercise of a private right cannot be made compulsory even if it cannot be waived for otherwise well-founded ethical/philosophical reasons.

As Handke explained, "rights holders would probably gain greater flexibility to adapt the level of protection to their own needs."[56] These are questions that are far from being generated by the AI 'panic', in fact, academics have been ruminating over the issue for decades. Alongside the specific exercise of the right, the extent to which the content of the legal relationship needs to be modified is also of relevance. Common law and civil law copyright approaches take up fundamentally different positions on the treatment of moral rights and the waiver of the same,[57] but their exercise and signifi-

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54 Anna Gács, '*Miért nem elég nekünk a könyv: A szerző az értelmezésben, szerzőségkoncepciók a kortárs magyar irodalomban*', Kijárat, Budapest, 2002, p. 32.

55 Despite what the title "The death of the author is the birth of the reader" suggests, the reader and the author are not enemies, and Barthes' critique does not attack the activity of the author, but the authors' determination of the interpretation of texts from a text-theoretical perspective. Roland Barthes, 'A szerző halála', *in* Roland Barthes, *A szöveg öröme, Irodalomelméleti írások*, Osiris, Budapest, 1996. *See in detail* Zoltán Varga, 'Szöveg – mű, olvasás – írás. Roland Barthes szövegelmélete negyven év múltán', *Literatura,* 2013/3.

56 Christian Handke, 'The Economics of Copyright and Digitalisation – A Report on the Literature and the Need for Further Research', 1 May 2010, p. 39.

57 Jonathan Griffiths, 'Moral rights from a copyright perspective', *in* Fabienne Brison *et al.* (eds.), '*Moral rights in the 21st century. The changing role of the moral rights in an era of information overload*', Larcier, Brussels, 2015, p. 83; Antoon Quaedvlieg, 'Introduction. Trying to find a balance', *in* Brison *et al.* (eds.) 2015, p. 93. The Posnerian idea that the abandonment of moral rights can be economically rational for the right holder, and that we must therefore examine the existence of a balance on a case-by-case basis, is expressed in both approaches, with the possibility of abandoning the *exercise* of the right in the

cance are similar. While it is clear that the identity of the creator cannot be 'hermetically separated from the creation', it is also evident that this connection is not always of equal significance.[58]

"The discourse on the protection of intellectual property" is increasingly "moving out of the autonomous author/unique work context",[59] nevertheless, the point of reference will always be the author. It is a further question that, with the gradual eclipse of individual licensing, the mass presence of specific methods of creation and specific types of works, the impact of the particular purposes of creation and use, there is often no social demand either for the identity of the author or for the work's emergence from the digital content. 'Flexibility', as well as the very essence of fairness, is not even a legislative issue. As Boytha warns in relation to the assessment of plagiarism, it is not a question of law, but of fact.[60] The ever-expanding public domain makes it increasingly difficult to meet the threshold of individual originality, particularly in certain fields such as music, and this has a major role to play in the assessment of plagiarism. Indeed, the originality threshold is constantly rising.

3.2. The Threshold Rising, or the 'Margin for Manoeuvre' Narrows?

As Gompel points out, what many of the different national definitions have in common is that they place some form of emphasis on the author's choices that are not primarily constrained by the function of the work, the tools used, or the standards and general practices that apply – in other words, works are based on 'creative choices'.[61]

Therefore, there are significant differences between the works in terms of the scope of creative freedom and, in this context, in the assessment of the

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continental solution. Richard A. Posner, '*The Little Book on Plagiarism*,' Pantheon Books, New York, 2007, pp. 108–110.

58 As Keserű points out, the works that underlie the design protection of passenger-carrying craft and the topographical protection of microelectronic semiconductors hardly reveal the romantic authorial personality. Barna Arnold Keserű, 'John Locke tulajdonelmélete a szellemi tulajdonjogok nézőpontjából', *in* Barna Arnold Keserű & Ákos Kőhidi (eds.), '*Tanulmányok a 65 éves Lenkovics Barnabás tiszteletére*,' Eötvös, Budapest–Győr, 2015, p. 220.

59 Balázs Bodó, '*A szerzői jog kalózai*,' Typotex, Budapest, 2011, p. 137.

60 Boytha 1989.

61 Daniel J. Gervais, '*(Re)structuring Copyright. A Comprehensive Path to International Copyright Reform*,' Edward Elgar, Cheltenham–Northampton, 2017, p. 95.

originality of expression. The degree of 'margin for manoeuvre' available to the creator to express originality varies from case to case and from genre to genre, and this margin of manoeuvre is very limited particularly in the case of functional works,[62] but it also raises some striking questions about the copyright protection of photographs.[63] Beside the well-known *Painer* case, the CJEU pointed out also in *Funke Medien,* that the starting point is whether the author was able to express his creative abilities in the production of the work by making free and creative choices.[64] This is not a European characteristic, similarly 'formative freedom' is a recognized requirement in the US: just to refer to the much cited *Burrow-Giles Lithographic Company v Sarony,*[65] where the court also discussed the importance of creative choices in relation to photographic images. As Travis reminds, countries in North America and much of Europe require only minimally creative choices to qualify as a work of authorship.[66]

However, we are applying this standard in a context where mass production is rapidly increasing the number of what can now be called 'commonplace solutions', an "unprotected cliché" that belongs to the public domain.[67] "Copyright law does not protect works (or specific elements of works) which are not original, which consist of familiar or expected clichés".[68] Numerous legal disputes and famous cases (concerning *e.g.,* musical chords and melodies)[69] highlight the fact that, through natural processes, the public

62 Paul Torremans, 'The Role of the CJEU's Autonomous Concepts as a Harmonising Element of Copyright Law in the United Kingdom', *Intellectual Property Quarterly,* 2019/4, p. 271.

63 Judgment of 1 December 2011, *Case C-145/10, Painer,* ECLI:EU:C:2011:798. Marian Jankovic, 'How the Two Child Abuse Cases Helped to Shape the Test of Originality of Photographic Works', *Masaryk University Journal of Law and Technology,* Vol. 17, Issue 2, 2023, pp. 197–218.

64 Judgment of 29 July 2019, *Case C-469/17, Funke Medien,* ECLI:EU:C:2019:623.

65 *Burrow-Giles Lithographic Company v Sarony,* 111 U.S. 53 (1884).

66 Hannibal Travis, 'Augmented Creativity in a Harmonized Trans-Atlantic Knowledge Economy', *in* Péter Mezei *et al.* (eds.), *Harmonizing Intellectual Property for a Trans-Atlantic Knowledge Economy,* Brill, Leiden, 2024, p. 76.

67 Gideon Parchomovsky & Alex Stein, 'Originality', *Virginia Law Review,* Vol. 95, Issue 6, 2009, p. 1539.

68 Tyler T. Ochoa, 'Origins and Meaning of the Public Domain', *University Dayton Law Review,* Vol. 28, Issue 2, 2002, cited in Pamela Samuelson, 'Enriching Discourse on Public Domains', *Duke Law Journal,* Vol. 55, Issue 4, 2006, pp. 783–834.

69 *See from early time:* M.D. Calvocoressi, 'Innovation and Cliché in Music', *The Musical Times,* Vol. 64, Issue 959, 1923, pp. 25–27; Changsheng Xu *et al.,* 'Automatic Structure Detection for Popular Music', *IEEE Multimedia,* Vol. 13, Issue 1, 2006, p. 67.

domain is constantly expanding and the scope for creativity is becoming narrower.[70]

In other words, time itself, and the tremendous amount of content that is being produced – supposedly protected or unprotected, but of a similar character – is closing the door to authors. Of course, if the threshold can be raised, that in itself may be a very welcome (side)effect, but it still leaves creators and practitioners in a difficult position to deal with it under the existing regulatory framework. Into this already difficult situation AI brings its own changes. On the one hand, prompting also offers the artist a very narrow margin of manoeuvre, mostly excluding the possibility of creating an original work,[71] but it also has a much wider impact: the existence of creations that are produced at a very fast rhythm, competing with and similar to the author's works, also generally narrows the margin of manoeuvre. Although the concept of copyright protection does not refer to *new* content, the concept of originality does raise the question of whether a similar solution already exists, and somehow we measure the presence of originality to the existing set of works (now more correctly, content). And the more elements there are in the existing set, the harder it is to cross the threshold. In deciding whether something is a 'commonplace' solution, it is obviously relevant if a number of very similar creations are known. "These creative choices can be characterized as those which can be isolated by a method of asking whether two authors would have been likely to produce essentially the same work in comparable circumstances."[72]

The CJEU points out in *Brompton* that in the context of crossing the threshold, the court has to explore whether the conditions are met.[73] In the literature, the use of AI tools as a means of doing so has been suggested. The issue has also been raised by a Member State in the policy questionnaire that the level of originality could be assessed with the assistance of new technol-

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70 Aviv H. Gaon, '*The Future of Copyright in the Age of Artificial Intelligence*,' Edward Elgar, Cheltenham–Northampton, 2021, p. 232. Referring to Gervais, that if the creation is determined, there is no "room for creativity".

71 Gergely Csősz, 'A prompt szerepe az alkotásban', *Iparjogvédelmi és Szerzői Jogi Szemle,* Vol. 19, Issue 5, 2024, p. 120.

72 Jankovic 2023, p. 207.

73 *Case C-833/18, Brompton Bicycle Ltd,* para. 34. Therefore, in order to establish whether the product concerned falls within the scope of copyright protection, it is for the referring court to determine whether, through that choice of the shape of the product, its author has expressed his creative ability in an original manner by making free and creative choices and has designed the product in such a way that it reflects his personality.

ogies.[74] The capabilities of AI applications developed for certain purposes can also be beneficial in this regard, such as the ability of a method of Microsoft to create a traceable path for greater transparency between the model and users.[75] Another example, that some authors have called for the introduction of 'originality points':

> "In fact, we assume that choices regarding originality reflect normative tradeoffs, which should be decided by social institutions (*e.g.,* courts, regulators, standard-setting bodies) using acceptable procedures. Nevertheless, such choices could now be better informed by evidence. Originality scores could empower policymakers to go beyond ensuring compliance."[76]

This raises another fundamental copyright issue: in copyright doctrine, in theory, parallel creation can lead to parallel protection (even if the scope of works, where there is a realistic chance of this, is limited). Parallel creation, however, becomes practically impossible if, as in the field of industrial property, reference is made to existing protected subject matter.

Until recently, it was possible to tell whether something was a work of art simply by looking at it. Today, the picture has fundamentally changed. It is a good illustration of how far back we have to go in the footprint of digital technologies, and AI in particular, that the questions put to the CJEU in September 2023 in the request for a preliminary ruling in *Mio* go right back to the very basics. After all, it has also become uncertain how to decide whether a subject matter of applied art reflects the author's personality by giving expression to his or her free and creative choices.[77] The first question is particularly relevant to our topic: in the assessment of whether a subject matter of applied art merits the far-reaching protection of copyright as a work, how should the examination be carried out – and which factors must or should be taken into account – in the question of whether the subject matter reflects the author's personality by giving expression to his or her free

74 Member States contributions on the policy Questionnaire on the relationship between generative artificial intelligence and copyright and related rights Prepared by the Hungarian Presidency Brussels, 20 December 2024 (OR. en) 16710/1/24 REV 1.

75 Microsoft Filed Patent Application on Method for Eliminating Artificial Intelligence Hallucinations, at https://natlawreview.com/article/microsoft-filed-patent-application-method-eliminating-artificial-intelligence.

76 Uri Y. Hacohen & Niva Elkin-Koren, 'Copyright Regenerated: Harnessing GenAI to Measure Originality and Copyright Scope', *Harvard Journal of Law & Technology,* Vol. 37, Issue 2, 2024.

77 *Case C-580/23, Mio and others,* pending.

and creative choices? In that regard, the question is in particular whether the examination of originality should focus on factors surrounding the creative process and the author's explanation of the actual choices that he or she made in the creation of the subject matter or on factors relating to the subject matter itself and the end result of the creative process and whether the subject matter itself gives expression to artistic effect.[78] The third question is also highly pertinent: how should the assessment of similarity be carried out and what similarity is required in the examination and in particular whether the examination should focus on whether the work is recognizable in the allegedly infringing subject matter or on whether the allegedly infringing subject matter creates the same overall impression as the work, or what else the examination should focus on.[79]

The theoretical literature has been experimenting for some time with the use of a new originality test, either in general or for specific types of works.[80] While the role of protection is obviously not to ensure the recognition of a few creators 'highlighted' from society, at the same time, it is also a problem to interpret the existence of a 'personal touch' into every piece of content. Gyertyánfy believes that the doubling of the threshold for copyright entry cannot be avoided, arguing for the need to differentially raise the threshold of protection.[81]

However, it is also a question of whether it is possible to create an original work at all, if the creative scope is extremely limited, either because of the functional nature or because of the mass availability of similar works. Is a minimum margin of manoeuvre really enough to reflect personality? The CJEU also requires a reflection of personality in functional works – which does not, however, indicate an increase of the threshold in practice, although such a meaning could be attributed to the maintenance of this requirement.[82] As Advocat General Szpunar underlined in his Opinion delivered on 8 May 2025, "in copyright law, what distinguishes two works is not the overall impression but the details that uniquely personalize them."[83] He

78 Id. Question 1.

79 Id. Question 3.

80 *See e.g.* Emma Steel, 'Original sin: reconciling originality in copyright with music as an evolutionary art form', *European Intellectual Property Review,* Vol. 37, Issue 2, 2015.

81 Péter Gyertyánfy, 'A holliwoodi takácsok és a szerzői jog', *Iparjogvédelmi és Szerzői Jogi Szemle,* Vol. 19, Issue 5, 2024, p. 228.

82 Audrey Pope: 'Recovering Personality in Copyright's Originality Inquiry.' *Harvard Law Review,* Vol. 138, Issue 4, 2025, p. 1123.

83 Opinion of Advocate General Szpunar delivered on 8 May 2025, *Case C-580/23, Mio and others,* ECLI:EU:C:2025:330. para. 67.

also warns of two extremes: neither choices dictated by the various constraints that bind the creator are creative, nor those that "although free, do not bear the imprint of the author's personality by giving the subject matter a unique appearance. In particular, the possibility of making free choices, at the time of creation, does not give rise to a presumption that those choices are creative."[84] In the light of this, the CJEU's judgment in *Mio* will be particularly significant, where we can also hope for further guidance on the degree of originality.[85] The questions asked in this case twenty years ago would have seemed completely pointless, however, due to digital mass production, and even recognizability and transparency, they could have a significant impact now also in terms of AI.

4. Chances and Reflections

Answering our first research question (RQ1), we have to evaluate the rise of AI, which has a great impact on creative industries, particularly in the realm of the artistic creations. Algorithms used by AI-programs are becoming ever so subtle. AI-driven art platforms such as DEEPArt, Deep Dream Generator, DALL-E – to only name a few – are capable of generating artistic images based on text prompts, thereby creating unique visual effects. Their advanced deep learning technologies and user-friendly platforms allow users to experiment with AI without the need for extensive programming knowledge.[86]

With the growing popularity of AI among art enthusiasts, the phenomenon raises fundamental questions about the nature of creativity and the threshold of originality. As Marketa Trimble points out in an interesting parallel, Socrates believed that writing would weaken the human memory, as

> "[…]. this invention will produce forgetfulness in the minds of those who learn to use it, because they will not practice their memory. […]You have invented an elixir not of memory, but of reminding; and you offer your pupils the appearance of wisdom, not true wisdom, for they will read many things without instruction and will therefore seem to know many

84 Id. para. 62.

85 *Case C-580/23, Mio and others,* Question 4(a).

86 Deep Dream Generator Blog: '*AI-Generated Art and the Question of Originality',* at https://deepdreamgenerator.com/blog/ai-art-originality.

> things, when they are for the most part ignorant and hard to get along with, since they are not wise, but only appear wise."[87]

The impact of AI models are quite similar, as this new and effortless way to create could potentially effect human creativity negatively.[88] While AI has the potential to accelerate the creation process, it also includes the risk of losing thoughtful human touch and the value of individuality.[89] Creators are no longer forced to use their full potential of creativity and imagination when creating an artwork.

Regarding our first research question (RQ1), we concluded that the very low entry threshold for copyright has already generated a number of side effects, such as the difficulty of treating the diverse genres of works differently, the ambiguous position of orphan works, the issue of grey zones of licensing and free use in mass production. However, AI has added a massive additional dimension by fundamentally shaking up the notion of the work itself, its identification and the proof and examination of originality in relation to content that appears to be creative.[90]

While the basic criterion of originality for copyright protection has been examined in a number of recent studies, it is clear that because of the low threshold for entry also includes works that are questionable for protection, but the discourse tends to move in the direction of whether to protect creative content that appears to have a similar outcome to human creation, or AI-assisted works more generally. Yet we can thank the cutting-edge scientific discourse spawned by AI for making copyright originality 'show its hand'. With rapid technical innovations of AI-models, it is becoming increasingly difficult to distinguish whether a particular work was created by a generative AI, with the assistance of AI, or is it the direct result of human craftsmanship. AI-generated works are appearing in large numbers on the market. We have identified problems with massification *per se,* one of which is that, although individual originality can only be examined on a case-by-case basis, there is neither time nor adequate tools available. The other one

87 Plato, *'The Phaedrus',* Translated by Benjamin Jowett, Dover Publications, 2000. (Original work published circa 370 BCE).

88 Marketa Trimble, 'Artificial Intelligence and Human Intelligence', *GRUR International,* Vol. 72, Issue 1, 2023, pp. 1–2.

89 Michael Machado, 'Preserving Craft in the Era of AI', 2025, at https://devrev.ai/blog/era-of-ai.

90 Francesca Mazzi, 'Authorship in artificial intelligence-generated works: Exploring originality in text prompts and artificial intelligence outputs through philosophical foundations of copyright and collage protection', *Journal of World Intellectual* Property, Vol. 27, Issue 3, 2024, p. 41.

is related to the scope of creative freedom. This is the issue we addressed under our second research question (RQ2).

Several ideas for raising or doubling the low entry threshold, and for the method of assessing originality, have been outlined in the academic literature. Our research has led us to conclude that, on the one hand, there seems to be a shift in the way we look at existing copyright presumptions and the proof of the existence of protection, with a greater emphasis on the comparison with the existing body of work. On the other hand, the scope for creativity is naturally narrowing as a result of massification, which also means a *de facto* increase in the threshold for entry. In addition, by taking seriously the concept of the 'personal touch', *i.e.,* the personality reflected in the work and performances, which is consistently included in the practice of the CJEU and which is also required for functional works, a considerable contribution could be made to clarifying the doctrine of copyright protection and making it more effective.