

DOI 10.5817/MUJLT2023-2-2

HOW THE TWO CHILD ABUSE CASES HELPED TO SHAPE THE TEST OF ORIGINALITY OF PHOTOGRAPHIC WORKS*

by

MARIAN JANKOVIC †

The author intends to assess the approach to finding originality in photographic works in the courts of the United States of America and the approach developed by the Court of Justice of the European Union. The means through which such assessment is to be made are two cases, each decided in a respective jurisdiction; nonetheless they are connected via both factual and legal circumstances - both involving child abuse and a dispute regarding a copyright infringement in a photographic work. The article will thoroughly assess the legal circumstances of each case and describe the methods of identification of originality applied therein. Following the said assessment, an analysis of the possible merger of both methods will be conducted, with emphasis on the possible added value for the test of originality applied to photographic works within the copyright framework of the European Union. The author's intention is to conduct a comparison between both approaches to highlight their individual advantages and disadvantages, with a final assessment of their possible joint application in cases involving copyright infringement of photographic works within the copyright framework of the European Union.

KEY WORDS

Originality, Photographic Works, Photography, Originality Standard, Court of Justice of the European Union

* This paper was written within the project, and with the financial support of the Grant Agency of the Czech Republic, No. GA22-22517S ("Copyrighted Works and the Requirement of Sufficient Precision and Objectivity").

† marian.jankovic@law.muni.cz, doctoral student and expert, Institute of Law and Technology of Masaryk University Brno, Czech Republic.

1. INTRODUCTION

Initially, at the time of its invention in the early 19th century, photographers made no claims to be artists and declared photographs were obtained rather than made and emphasized the mechanical nature of the production process.¹ Nonetheless, shortly after its invention, copyright protection was extended to this new medium, despite copyright law not being completely comfortable with it - a state of affairs that persists to this day.² The issue at hand was the difficulty of understanding the distinction between the “original” and the “copy” of a photograph, a situation unlikely to occur within the realm of traditional works of art.³ Nevertheless, with the gradual expansion of the technology, photography came to be considered an artistic activity, and its output – a photographic work - as potentially artistic and original.⁴ Still, being a special subject matter, photographic works have continued to create problems for copyright law.⁵ Even nowadays, widespread new photographic technologies contribute to numerous and significant challenges and implications within the said domain of law.⁶

As described above, the photography as a medium still raises ambiguities. Due to this, it also enjoys different treatment when it comes to its appropriation by copyright or related-right protection in various national legal frameworks. The link created by the factual circumstances of the two selected cases, as well as the shared medium at the centre of their interest – the photographic work - inspired the conducted assessments of the understanding of originality of photographic works in the two contrasting copyright frameworks: the one of the United States of America and the European Union.

Just two years apart, two cases concerning the analysis of photographic works were decided by courts in different jurisdictions. The first one could be considered ground-breaking, but nonetheless within the context of the court’s continuous stance on the matter. The second one, for the purpose of this article, is in many ways a possible addendum to the first one. The former being the Painer case⁷ decided by the Court of Justice of the European Union

¹ Farley, C. H. (2004) The lingering Effects of Copyright’s Response to the Invention of Photography, *University of Pittsburgh Law Review*, 65(3).

² Bently, L. and Sherman B. (2014) *Intellectual Property Law*. 4th ed. Oxford University Press, p. 75.

³ Bowrey K. (1995) Copyright, Photography and Computer Works: The Fiction of an Original Expression. *UNSW Law Journal*, 18(2).

⁴ Bently L. and Sherman B. (2004) *Intellectual Property Law*. Oxford University Press, p. 91.

⁵ Laddie, H. (2011) *The Modern Law of Copyright and Designs*. LexisNexis, p. 253.

⁶ Katzenberger P. (1989) Neue Urheberrechtsprobleme der Photographie – Reproduktionsphotographie, Luftbild – und Satellitenaufnahmen. *GRUR*, 116.

⁷ Judgment of 1 December 2011, Painer, C-145/10, EU:C:2011:798.

(“CJEU”). The latter being the *Harney v. Sony Pictures Television*, decided by the United States Court of Appeals For the First Circuit.⁸ The analysed national test of originality applied in each selected case within its respective jurisdiction might, however, result in a different outcome if applied outside of it. The implications of this possibility will be elaborated on in the following text.

2. DEFINING ORIGINALITY - THE WAY TOWARDS EU ORIGINALITY STANDARD OF PHOTOGRAPHIC WORKS

As part of the first phase of the harmonisation process undertaken in the European Union (“EU”) in the field of copyright, an originality standard deriving from the traditions of the continental EU was formed. However different the copyrightable subject matters might be, the basis of the originality standard is always the “author’s own intellectual creation”. This established originality standard for works was to be applied to every area of copyright harmonised through its corresponding Directive. All relevant Directives touching upon the issue of originality are consistent in their terminology: protection by copyright can be provided only to works that are the author’s own intellectual creation.⁹ Other criteria, such as aesthetics¹⁰,

⁸ *Harney v. Sony Pictures Television Inc.* (2013) 704 F.3d 173.

⁹ For example, amongst such relevant Directives explicitly referring to the notion of “author’s own intellectual creation” are the Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the Legal Protection of Computer Programs. *Official Journal of the European Union* (L111/16), 23 April. Available from: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32009L0024> [Accessed 20 August 2023], the Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the Legal Protection of Databases. *Official Journal of the European Union* (L 77/20) 11 March. Available from: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31996L0009> [Accessed 20 August 2023], the Directive 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 Directive 96/9/EC and 2001/29/EC. *Official Journal of the European Union* (L130/92) 17 April. Available from: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L0790&qid=1692731521579> [Accessed 20 August 2023] and the 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. *Official Journal of the European Union* (L 372/12) 12 December. Available from: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32006L0116> [Accessed 20 August 2023]

¹⁰ Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the Legal Protection of Databases. *Official Journal of the European Union* (L 77/20) 11 March. Available from: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31996L0009> [Accessed 20 August 2023] Recital 16

quality¹¹, merit¹² or purpose¹³ are explicitly prohibited from being applied to determine work's eligibility for copyright protection. Given its direct relation to the subject of photographic works, only the provisions of the Term Directive¹⁴ will be elaborated on in detail. Also, the development of the Directive itself, as well as the originality standard contained therein, will be given substantial attention.

The earliest codified version of the Term Directive, the Council Directive 93/98/EEC¹⁵, included the first uniform standard of originality to be applied solely to photographic works in all Member States. The wording of its Recital 17 was later transposed in full into the Recital 16 of the currently effective Term Directive. Both the Recital 17 of the Council Directive 93/98/EEC and Recital 16, of the Term Directive read as follows:

*“... a photographic work within the meaning of a Berne Convention is to be considered original if it is the author's own intellectual creation reflecting his personality, no other criteria such as merit or purpose being taken into account...”*¹⁶

To fully comprehend its meaning and implications in terms of applicability to photographic works, we shall proceed to deconstruct the quoted originality standard by providing individual definitions of its notions.

The first notion, “photographic work”, represents an umbrella term used in both the Council Directive 93/98/EEC and the Term Directive for photographs and other photographs. The former is considered to be an original work worthy of copyright protection, while the latter is not. From a traditional (analogue) technical standpoint, a photographic work can be characterised as product of the art or a process of producing images by means of the chemical action of light upon a sensitive film on a basis of paper, metal,

¹¹ *Ibid.*

¹² 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. *Official Journal of the European Union* (L 372/12) 12 December. Available from: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32006L0116> [Accessed 20 August 2023] Recital 16

¹³ *Ibid.*

¹⁴ 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. *Official Journal of the European Union* (L 372/12) 12 December. Available from: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32006L0116> [Accessed 20 August 2023]

¹⁵ Council Directive 93/98/EEC of 29 October 1993 Harmonizing the Term of Protection of Copyright and Certain Related Rights. *Official Journal of the European Communities* (L 290/9) 29 October. Available from: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31993L0098> [Accessed 20 August 2023]

¹⁶ *Op. cit.*, Recital 17.

glass, etc.¹⁷ However, this definition must be revised to reflect the current state of the art of photographic apparatus and equipment. In simplified wording, a photograph is an image created by light on any photosensitive surface, whether it be a photographic film or a digital electronic image sensor. However, the notion of a photographic work should always be understood within the meaning of the “Berne Convention”, according to both versions of the Directive. Direct references to the Berne Convention only emphasize the importance of this international treaty. Photographic works have been in the scope of protection provided by the Berne Convention since its inception, although they were officially added to the wording of its Article 2 (1) only after the “Brussels Revision” in 1948.¹⁸ All Member States of the European Union (“Member States”) are also its contracting parties. The photographic work must also be “original”, i.e. not secondary, derivative or imitative.¹⁹ In this sense, the notion “originality” therefore requires a photographic work to be the first instance or initial source.

In general terms, the fourth selected notion of the “author” signifies the originator or a creator of something.²⁰ When photographic works are created, their author is called a photographer. In overly simplified terms, a photographer is thus a person who produces a photographic work using a photographic apparatus. Closely connected to the person of an author is the fifth notion of “own intellectual creation”. The adjective “intellectual” is meant to stem from one’s intellect. The notion itself can be defined as the faculty of reasoning and understanding objectively, especially with regard to abstract matters.²¹ The condition highlights the photographer’s intellectual input into the creation of a photographic work, emphasising the level of the originality standard for input in the form of abstract concepts into photographer’s mind and their transformation into an objectively perceived medium: the photographic work. This input has to be the photographer’s own and personal, as indicated in the formulation of the originality requirement. The resulting creation represents an act of creating or bringing something into existence - something that is created.²²

¹⁷ Gendreau Y. and Nordemann A. and Oesch R. (1999) *Copyright and Photographs, An International Survey (Informational Law Series Set)*. Kluwer International, p. 26.

¹⁸ Ricketson, S. and Ginsburg J. C. (2006) *International Copyright and Neighbouring Rights*. Oxford University Press, p. 442.

¹⁹ (2023) *Original* [online] The Merriam-Webster.com Dictionary. Available from: <https://www.merriam-webster.com/dictionary/original> [Accessed on 20 August 2023]

²⁰ (2023) *Author* [online] The Merriam-Webster.com Dictionary. Available from: <https://www.merriam-webster.com/dictionary/author> [Accessed on 20 August 2023]

²¹ (2023) *Intellect* [online] Lexico Dictionaries. Available from <https://en.oxforddictionaries.com/definition/intellect> [Accessed on 20 August 2023]

²² (2023) *Creation* [online] Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/creation> [Accessed on 20 August 2023]

In addition to the above, a photographic work must reflect its creator's personality. The sixth notion of "personality" can be defined as a combination of characteristics or qualities that form an individual's distinctive character.²³ Apart from the requirement of own intellectual creation, the photographic work must be unique in the way it displays the photographer's personal distinctive touch. This part of the originality requirement ensures that the photographic work is distinguishable from the works of other photographers based on the uniqueness of each photographer's personality as an individual.

The seventh notion is "merit" and the final eighth notion is "purpose". Merit can be characterised as a quality of being particularly good or worthy, especially so as to deserve praise or reward.²⁴ Purpose, which shall not be taken into account when assessing the originality of a photographic work, represents the reason for which something is done or created or for which something exists.²⁵ Evaluating the merit and purpose of a photographic work can lead to assessments based on the reputation or popularity standing of the photographic work, the genre it belongs to, or its author's profile in society or amongst other photographers. This can lead to biased court decisions. Merit and purpose are excluded to prevent subjective assessments of the originality of photographic works. Photographic works would, therefore, be assessed without prejudice related to the reason behind their creation or their creator as a person.

However, Recital 17 of the Council Directive 93/98/EEC, the predecessor of the Term Directive, also included the following wording:

*"...whereas in order to achieve a sufficient harmonization of the term of protection of photographic works, in particular of those which, due to their artistic or professional character, are of importance within the internal market..."*²⁶

To some degree, this is contradictory to further statements prohibiting the assessment of the merit and purpose of a photographic work, as described above. It is hard to understand the descriptors "artistic" or "professional" other than to indicate the context or aesthetic worth of the photographic

²³ (2023) *Personality* [online] Lexico Dictionaries, <https://en.oxforddictionaries.com/definition/personality> [Accessed on 20 August 2023]

²⁴ (2023) *Merit* [online] Lexico Dictionaries, <https://en.oxforddictionaries.com/definition/merit> [Accessed on 20 August 2023]

²⁵ (2023) *Purpose* [online] Lexico Dictionaries, <https://en.oxforddictionaries.com/definition/purpose> [Accessed on 20 August 2023]

²⁶ Council Directive 93/98/EEC of 29 October 1993 Harmonizing the Term of Protection of Copyright and Certain Related Rights. *Official Journal of the European Communities* (L 290/9) 29 October. Available from: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31993L0098> [Accessed 20 August 2023] Recital 17.

work.²⁷ It has been suggested, that the decision whether or not there is a sufficient amount of creative input may, therefore, depend illogically on the type of context in which the photographic work was taken.²⁸ This contradiction was later amended by the Term Directive, in which the reworded diction of its now Recital 16 completely left out references to artistic or professional character as well as to importance within the internal market, thus declaring the requirement of total objectivity when assessing the originality, in accordance with the originality standard stated therein.

Having covered the development of the Recital 16 of the Term Directive, the focus will now be put on its Article 6, which has the following wording:

*“Photographs which are original in the sense that they are the author’s own intellectual creation shall be protected ... No other criteria shall be applied to determine their eligibility for protection...”*²⁹

The cited wording of the Article 6 of the Term Directive sums up the general originality premise already outlined in its Recital 16. Additionally, the Article 6 is not only in line with Recital 16 but also with the originality provisions of other relevant aforementioned Directives. Therefore, the wording of Article 6 can be considered a completion and manifestation of efforts to establish a standard of originality for photographic works.

To conclude this section, the concept of the “author’s own intellectual creation” was adopted as a compromise formula during the first phase of the harmonisation process between the relatively low originality threshold required as a precondition for copyright protection in the UK and the higher standards being used throughout the Member States.³⁰ Nonetheless, the true meaning of this definition and its applicability remained still rather unclear. Further clarification of the drafted originality standard was left to the CJEU through its case law during the second harmonisation phase.

²⁷ Tritton G. (2008) *Intellectual Property in Europe*. Sweet & Maxwell, p. 519.

²⁸ *Ibid.*

²⁹ 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. *Official Journal of the European Union* (L 372/12) 12 December. Available from: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32006L0116> [Accessed 20 August 2023] Article 6.

³⁰ Stamatoudi, I. and Torremans P. (2014) *EU Copyright Law: A Commentary*. Edward Elgar, p. 1103.

3. THE PAINER CASE³¹

The official guide to the Berne Convention leaves the question of originality to be answered by courts.³² In light of this, copyright law of the EU must rely on further interpretation of the Article 6 of the Term Directive by the CJEU through its case law. Such additional interpretation of legislation by the CJEU represents the second phase of the harmonisation process.³³

Further interpretation of legislation by the CJEU provides an additional significant source of information on the applicability of legal provisions and their approximation to factual situations. In the past, the CJEU was asked to decide a number of cases related to originality and copyright. The case law chosen to demonstrate the development of originality standard was selected with respect to its relevance in terms of the degree of assessment of originality of works and suitability of its analogous applicability to photographic works. Due to the limited space provided by this paper, only the most relevant decisions of the CJEU to the paper's topic are to be described in detail below. Amongst the cases intentionally left out for the aforementioned reasons are the following: The Infopaq case³⁴, The Bezpečnostní softwarová asociace case³⁵, The Murphy case³⁶, The Football Dataco case³⁷, The SAS case³⁸, The Levola case³⁹, The Cofemel⁴⁰ and The Brompton Bicycle case⁴¹. Fundamentally, the underlying principle of fulfilment of the originality requirement set by the CJEU is achieved when, through the choice, sequence and combination of elements, an author expresses their creativity in an original matter.⁴²

In essence, the referring Austrian court in the Painer case sought clarification, as to whether the originality standard for photographic works, as defined in Article 6 of the Term Directive and according to which copyright protection vests in photographs that are their "author's own intellectual

³¹ JUDGMENT OF 1 DECEMBER 2011, PAINER, C-145/10, EU:C:2011:798.

³² (1978) *Guide to the Berne Convention for the Protection of Literary and Artistic Works* (Paris Act, 1971). Geneva: World Intellectual Property Organization, p. 18.

³³ Margoni, T. (2016) *The Harmonization of EU Copyright Law: The Originality Standard*. [online] SSRN. Available from: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2802327 [Accessed on 20 August 2023].

³⁴ Judgment of 16 July 2009, Infopaq International, C-5/08, EU:C2009:465.

³⁵ Judgment of 22 December 2010, Bezpečnostní softwarová asociace, C-393/09, EU:C:2010:816.

³⁶ Judgment of 4 October 2011, Football Association Premier League and Others, C-403/08, EU:C:2011:631.

³⁷ Judgment of 1 March 2012, Football Dataco and Others, C-604/10, EU:C:2012:115.

³⁸ Judgment of 2 May 2012, SAS Institute, C-406/10, EU:C:2012:259.

³⁹ Judgment of 13 November 2018, Levola Hengelo, C-310/17, EU:C:2018:899.

⁴⁰ Judgment of 12 September 2019, Cofemel, C-683/17, EU:2019:721.

⁴¹ Judgment of 11 June 2020, Brompton Bicycle, C-833/18, EU:C:2020:461.

⁴² Rosati, E. (2021) *Copyright in the Digital Single Market: Article-by-Article Commentary to the Provisions of Directive 2019/790*. Oxford University Press, p. 246.

creation”, includes photographic works of portrait genre.⁴³ If the answer to this question were affirmative, the follow-up question of the referring Austrian court was whether the threshold for protection should be higher than for other categories of photographic works, because of the allegedly minor degree of creative freedom that such photographic works display.⁴⁴ In other words, the referring court wanted to clarify if the photographic works of portrait genre are afforded “weaker” copyright protection or no copyright protection at all due to their realistic nature and the minor formative freedom of a photographer connected with it.⁴⁵

Apart from the main question brought before the CJEU concerning the issue of copyrightability of the photographic work or, essentially, the features of a work, two additional questions were also referred to the CJEU. The first concerned the jurisdiction to sue a defendant abroad (whether joint legal proceedings are to be precluded if the actions are brought against several defendants for copyright infringement, which are identical in substance, but based on differing national legal grounds).⁴⁶ The second concerned the public security exception (the need of official appeal for publication of a photographic work made by criminal justice bodies in the context of public security).⁴⁷ The CJEU answered both additional referred questions in the negative.⁴⁸ Therefore, a claimant can sue defendants coming from various Member States of the EU if the substance of the action brought against them, in this case, the copyright infringement, is identical. Also, criminal justice bodies are exempt from obtaining a prior consent of the rightsholder in cases where a publication of a photographic work is required for the matters of public security.

Before moving to the analysis of the merits of the case itself, a breakdown of the Advocate General Trstenjak’s opinion⁴⁹ will be presented first to provide the broadest insight possible. Amongst other considerations, Trstenjak noted that the creator of a portrait photographic work enjoys a small degree of individual formative freedom, thus the copyright protection

⁴³ Rosati, E. (2013) *Originality in EU Copyright: Full Harmonization through Case Law*. Edward Elgar, p. 151.

⁴⁴ *Ibid.*

⁴⁵ Judgment of 1 December 2011, Painer, C-145/10, EU:C:2011:798, paragraph 43.

⁴⁶ Brophy, D. (2011) *All photos are created equal – the Painer case in the CJEU*, [online] The IPKat, Available from: <https://ipkitten.blogspot.com/2011/12/all-photos-are-created-equal-painer.html> [Accessed 20 August 2023]

⁴⁷ *Ibid.*

⁴⁸ Judgment of 1 December 2011, Painer, C-145/10, EU:C:2011:798, paragraph 84 and paragraph 116.

⁴⁹ Opinion of advocate general Trstenjak of 12 April 2011, Painer, C-145/10 Painer, EU:C:2011:239.

of such photographic work is accordingly narrow.⁵⁰ In order for such a photographic work to be original in similar cases, a photographer must utilise the available formative freedom available to them.⁵¹ Trstenjak also noted the absence of several aspects, such as a certain degree of artistic quality or novelty, purpose of creation, expenditure and costs.⁵² In respect to the aforementioned, the conclusion reached by Trstenjak stated that due to the not excessively high criteria governing copyright protection of photographic works in the Term Directive, photographic works of the portrait genre are afforded copyright protection if they are an original intellectual creation of a photographer, which requires them to have left their mark by using the available formative freedom.⁵³

In her opinion, Advocate General Trstenjak also engaged in considerations regarding a question: whether a photo-fit created from the original portrait photographic work infringes the copyright bestowed on it.⁵⁴ Although not directly addressed by the CJEU, in her opinion, the Advocate General Trstenjak expressed that the publication of such a photo-fit constitutes reproduction within the meaning of the Article 2 (a) of the Digital Single Market Directive, only if in such a photo-fit the personal intellectual creation justifying the copyright protection is still embodied.⁵⁵

In line with its previous case law on the subject, the CJEU held that in order for a photographic work to be eligible for copyright protection, it must be the author's own intellectual creation⁵⁶ provided that the author was able to express their creative abilities in its production by making free and creative choices.⁵⁷ The most recent referral to the stated requirement of author's own intellectual creation prior to the decision in the Painer case was made in the *The Bezpečnostní softwarová asociace* case.⁵⁸ Following the decision in the Painer case, the importance of free and creative choices was confirmed in the *The Brompton Bicycle* case⁵⁹. Repeated application of both requirements by the CJEU highlights their significance for the EU copyright doctrine and also retrospectively confirms its correct application in the Painer case.

⁵⁰ *Op. cit.*, paragraph 108.

⁵¹ *Op. cit.*, paragraph 122.

⁵² *Op. cit.*, paragraph 123.

⁵³ *Op. cit.*, paragraph 215.

⁵⁴ Eechoud, M. (2014) *The Work of Authorship*. Amsterdam University Press, p. 166.

⁵⁵ Opinion of advocate general Trstenjak of 12 April 2011, Painer, C-145/10 Painer, EU:C:2011:239, paragraph 129.

⁵⁶ C Judgment of 1 December 2011, Painer, C-145/10, EU:C:2011:798, paragraph 87.

⁵⁷ *Op. cit.*, paragraph 89.

⁵⁸ Judgment of 22 December 2010, *Bezpečnostní softwarová asociace*, C-393/09, EU:C:2010:816, paragraph 46

⁵⁹ Judgment of 11 June 2020, *Brompton Bicycle*, C-833/18, EU:C:2020:461, paragraph 26.

These creative choices can be characterised 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.⁶⁰ It is these creative choices that produce the protectable expression – an original work.⁶¹ According to the CJEU, copyright-protected expression in the form of an original photographic work may manifest in several ways and at various points throughout its production:

“In the preparation phase, the photographer can choose the background, the subject’s pose and the lighting. When taking a portrait photograph, he can choose the framing, the angle of view and the atmosphere created. Finally, when selecting the snapshot, the photographer may choose from a variety of developing techniques the one he wishes to adopt or, where appropriate, use computer software.”⁶²

The remaining room for creative choices, however limited, is nonetheless still sufficient to produce an original photographic work.⁶³ Therefore, the creative choices, as described by the CJEU, can be conveniently executed by photographers in the context of production of a photographic work. However, the CJEU did not provide guidance on how much significance should be attributed to the creative part of the choices taken.⁶⁴ Accordingly, whether or not the input in the form of creative choices is sufficient for a finding of originality depends on the context of a photographic work.⁶⁵ Nonetheless, the final decision on the presence of the “personal touch” of a photographer in the photographic work is to be determined by national courts on case-to-case basis.⁶⁶

The CJEU’s emphasis on the presence of a “personal touch”, the manifested outcome of the author’s creative choices in a work, serves the purpose of clarifying the applicable sole criterion for originality – a combination of author’s personality and their own intellectual creation.⁶⁷ Additionally, the concept of a personal touch itself serves as a convenient

⁶⁰ Gervais D. and Derclaye E. (2015) The Scope of computer program protection after SAS: are we closer to answers?, *European Intellectual Property Review*, 34(8), pp. 565-572.

⁶¹ *Ibid.*

⁶² Judgment of 1 December 2011, Painer, C-145/10, EU:C:2011:798, paragraph 91.

⁶³ Handig C. (2013) The “sweat of the brow” is not enough! – more than a blueprint of the European copyright term “work”, *European Intellectual Property Review*, 35(6), pp. 334-340.

⁶⁴ *Ibid.*

⁶⁵ Stamatoudi, I. and Torremans P. (2014) *EU Copyright Law: A Commentary*. Edward Elgar, p. 278.

⁶⁶ Judgment of 1 December 2011, Painer, C-145/10, EU:C:2011:798, paragraph 94.

⁶⁷ Rosati, E. (2013) *Originality in EU Copyright: Full Harmonization through Case Law*. Edward Elgar, p. 153.

tool to differentiate between carefully composed photographic works and mere “point and shoot” snapshots.⁶⁸ The CJEU’s decision in the Painer case has had an immense impact on the subject matter categorisation. The CJEU stressed the need to focus on the actual presence of originality in the photographic work, rather than on the photographic genre the assessed photographic work belongs to.⁶⁹

Through its decision in the Painer case, the CJEU forces national courts to explore the potential of photography as a medium. National courts have to assess photographic works in detail and investigate their production process to discover aspects in which the originality of such works might reside. The CJEU has also affected photographers. They now have a manual of steps that, if taken and manifested in photographic works via the notion of a “personal touch”, shall ensure originality – thus strengthening their position in terms of copyright protection. Last but not least, the CJEU has also influenced the social perception of certain traditionally non-original photographic genres as original; in other words no distinctions ought to be made between different types of photographs.⁷⁰ Lastly, the opinion of the CJEU is also consistent with the general legal principle of equal treatment that is to be applied in the European Union.⁷¹

To conclude this section, by application of CJEU’s guidance, whether it be direct instructions or tests derived from its case law, the national courts must make a finding of originality in works that, at that time, appeared to be the sole requirement qualifying a work for copyright protection.⁷² However, the notion of a copyright-protectable work now also presupposes the fulfilment of requirement of “sufficient precision and objectivity” of the expression, apart from originality.⁷³ Therefore, following the decisions in *The Levola*, *The Cofemel* and *The Brompton Bicycle* cases, any creative product, regardless of its nature, may be considered an object of copyright protection if

⁶⁸ Lee Y. H. (2012) Photographs and the standard of originality in Europe: *Eva-Maria Painer v Standard VerlagsGmbH, Axel Springer AG, Süddeutsche Zeitung GmbH, SPIEGEL-Verlag Rudolf AUGSTEIN GmbH & Co KG and Verlag M. DuMont Schauberg Expedition der Kölnischen Zeitung GmbH & Co KG (C-145/10)*, *European Intellectual Property Review*, 34, pp. 290-293.

⁶⁹ *Op. cit.*, p. 154.

⁷⁰ Rosati, E. (2013) *Originality in EU Copyright: Full Harmonization through Case Law*. Edward Elgar, p. 155.

⁷¹ Pila, J. and Torremans P. (2019) *European Intellectual Property Law*. 2nd ed., Oxford University Press, p. 254.

⁷² Rosati, E. (2013) *Originality in EU Copyright: Full Harmonization through Case Law*. Edward Elgar, p. 188.

⁷³ Rosati, E. (2019) *The Cofemel decision well beyond the “simple” issue of designs and copyright*. [online] The IPKat. Available from: <https://ipkitten.blogspot.com/2019/09/the-cofemel-decision-well-beyond-simple.html> [Accessed on 20 August 2023].

the cumulative requirements of originality and identification with sufficient precision and objectivity are fulfilled.⁷⁴ However, objectivity and precision are considered to be criteria known for their hard conceptualisation and application to artistic expressions.⁷⁵ Nevertheless, their fulfilment should not pose a problem for photographic works.

4. HARNEY V. SONY PICTURES TELEVISION

In 2013, the United States District Court for the district of Massachusetts (“the District Court”) and later the United States Court of Appeals (“the Court of Appeals”) both decided and reached the same conclusion in a case involving alleged copyright infringement in a photographic work. The case involved claimant Donald A. Harney, the photographer, and defendants Sony Pictures Television Inc. and A & E Television Networks, LLC, the alleged infringers of Mr. Harney’s copyright (the “Harney v. Sony”).⁷⁶ The main issue before the District court and later the Court of Appeals was whether the defendants infringed Mr. Harney’s copyright in his photographic work by recreating certain parts of the image depicted in the said photographic work.⁷⁷ Although the merits of Harney v. Sony substantially differ from those of Painer case, the former case can be used to complete the missing pieces of originality establishment test applicable to photographic works hinted by the CJEU in the Painer case.

The question that stood before both courts was whether the claimant’s photographic work, depicting a girl sitting on man’s shoulders, a man who would later abduct his daughter and be exposed as a famous impostor, was infringed by recreation of its certain parts by defendants for their documentary about the case.⁷⁸ Even though the originality of a photographic work in the Harney v. Sony was not contested, a matter which was settled by the Court of Appeal’s acknowledgement of the fact on several occasions, the Court of Appeals has provided a step-by-step test on how to identify and distinguish originality-forming elements in a photographic work, which might prove useful for additional enhancement of the originality test applied to photographic works in the copyright framework of the European Union.

⁷⁴ Sganga, C. (2018) *The Notion of “Work” in EU Copyright Law After Levola Hengelo: One Answer Given, Three Question Marks Ahead*. [online] SSRN. Available from: <https://ssrn.com/abstract=3323011> [Accessed on 20 August 2023].

⁷⁵ *Ibid.*

⁷⁶ *Harney v. Sony Pictures Television Inc.* (2013) 704 F.3d 173.

⁷⁷ Wallace, R. (2014) Framing the issue: avoiding substantial similarity finding in reproduced visual art. *Washington Journal of Law, Technology & Arts*, 10(2), p. 93.

⁷⁸ Kogan, T. S. (2017) *How photographs Infringe*. [online] SSRN, Available from: <https://doi.org/10.2139/ssrn.2963353> [Accessed on 20 August 2023].

Traditionally, the courts in the United States of America have been applying two types of tests (methods) when deciding substantial similarity cases, such as the one in question⁷⁹ since separating copyrightable and non-copyrightable elements might often prove difficult in reality.⁸⁰ First, the “ordinary observer test”, which involves a two-step method requiring dissection of the elements of a photographic work in its first step followed by a response of the “ordinary observer” or the “laypeople” in its second.⁸¹ The second employed test also involves two parts: “extrinsic”, in which objective elements of a photographic work are analysed and “intrinsic”, in which it is up to jury to decide whether, based on the first part, infringement occurred.⁸² As a consequence, both approaches result in a thorough examination of individual elements of a photographic work.⁸³

In *Harney v. Sony*, both courts chose to perform a “judicial surgery” to excise the central originality-forming elements.⁸⁴ In other words, the idea behind the applied excision is to make room for a clear distinction between originality-forming elements and those which occur naturally, or without the photographer’s contribution in a particular photographic work. In respect to this, a process labelled by both courts in the respective case as an “ordinary dissection analysis”⁸⁵ was performed in order to separate all expressive elements present in the photographic work and assess the extent to which these were willingly affected by the photographer’s choices.

The said “ordinary dissection analysis” was applied due to circumstances of the alleged infringement involving recreation of certain parts of the photographic work in question. Parts of both the original and the recreated photographic works were dissected, compared, and their origin assessed in order to establish their originality forming potential. In other words, to identify the expressive choices of a photographer in the photographic work that qualify as original, and therefore, copyright constituting, one must dissect the photographic work in question and inspect whatever elements are present and distinguish between their origin – the author of the said photographic work or someone else.

Similar to the *Painer* case, the Court of Appeals noted that elements of originality in a photographic work may include, amongst other, posing of the

⁷⁹ Meaning the *Harney v. Sony Pictures Television Inc.* (2013) 704 F.3d 173.

⁸⁰ Mazurek, C. (2017) Through the looking glass: photography and the Idea/Expression dichotomy. *New York Journal of Intellectual Property & Entertainment Law*, 6(2), p. 281.

⁸¹ *Op. cit.*, p. 282

⁸² *Ibid.*

⁸³ *Ibid.*

⁸⁴ Kogan, T. S. (2017) *How photographs infringe*. [online] SSRN, Available from: <https://doi.org/10.2139/ssrn.2963353> [Accessed on 20 August 2023].

⁸⁵ Henceforth, the term will be used to refer to the excision of elements of a photographic work.

subjects, lighting, angle, selection of film and camera, achieving the desired expression of the subject, and any variants of combination of the listed.⁸⁶ Such elements, bearing the mark of the author's willingly performed choices in the course of the production process of a photographic work in the form of arrangement or creation of the depicted content, are, in fact, those of originality-forming type.

However, when the author is not involved in creating the subject or object depicted in the photographic work, such element is to be considered equivalent to an idea and, therefore, not protectable by copyright.⁸⁷ Such elements can be therefore viewed as mere facts not entitled to copyright protection.⁸⁸ The way an element constituting originality is formed via choices made by the author, thus transforming their idea into a protectable expressive work.⁸⁹ Nonetheless, the camera related choices - the protectable elements - made by the photographer of the allegedly infringed photographic work were not found to be substantially similar to the photographic work of the defendant by the court.⁹⁰ To draw from this conclusion, if the photographer does not create relationships between the elements in a photographic work, or the elements themselves, such photographic works might not be viewed as original.⁹¹

To conclude this section, even though as the originality of the photographic work in question was not contested, the applied excision provides a far deeper insight into the very production process of a photographic work. When originality of any photographic work would, in fact, be contested, the said analysis can be employed to "dissect" the photographic work, identify, separate and assess its elements in order to reach a conclusion regarding its originality and, with it, connected copyrightability. The final take from the case is that it is permissible, in other words, not copyright-infringing, to imitate those elements of a photographic work that were found to be non-copyrightable by the aforementioned excision method.⁹²

⁸⁶ *Harney v. Sony Pictures Television Inc.* (2013) 704 F.3d 173, p. 13.

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*

⁸⁹ *Op. cit.*, p. 14.

⁹⁰ Kogan, T. S. (2017) *How photographs Infringe*. [online] SSRN, Available from: <https://doi.org/10.2139/ssrn.2963353> [Accessed on 20 August 2023].

⁹¹ Woo Jiang Ming, S. (2020) The basis for originality in photographs, *Singapore Academy of Law Journal*, 32(2), pp. 1101-1152.

⁹² Wallace, R. (2014) Framing the issue: avoiding substantial similarity finding in reproduced visual art. *Washington Journal of Law, Technology & Arts*, 10(2), p. 94.

5. THE ENHANCED TEST OF ORIGINALITY OF PHOTOGRAPHIC WORKS?

Following the decision of the CJEU in the Painer case, the originality of a photographic work was also touched upon, amongst other considerations, only once - in the Renckhoff case.⁹³ The photographic work at the heart of this case, taken in the Spanish city of Cordoba, by a professional German photographer, depicts a cityscape. In his opinion, Advocate General Campos Sánchez-Bordona expressed doubts whether the photographic work in question, a simple shot, satisfies the requirements for originality laid down in the Painer case.⁹⁴ In accordance with this decision, it may be assumed that the free and creative choices may also be expressed in a landscape or cityscape photograph.⁹⁵ However, the doubt cast on the originality of this photographic work was unfortunately not further elaborated on by the CJEU, apart from a general preliminary point reference to originality of photographic works and the Painer case.⁹⁶ Nonetheless, the string of case law of the CJEU on the subject of originality is united by one common notion – the “author’s own intellectual creation”. The notion itself, first adopted as a standard for originality of photographic works in the Painer case, is to be understood as consisting of “creative freedom”,⁹⁷ “personal touch”⁹⁸ and “free and creative choices”.⁹⁹

The CJEU in the Painer case does not explicitly mention elements but rather focuses on the three phases of a production of a photographic work and the actions a photographer can make within the defined phases. This is in opposition to the approach in the United States of America, where the choice of various elements and the effects these produce, prevails over the choices the photographer has made during the course of the production process, thereby making the photographic work original.¹⁰⁰ The approach of the CJEU might seem rather superficial in situations where a more thorough inspection

⁹³ Judgment of 7 August 2018, Renckhoff, C-161/17, EU:C:2018:634.

⁹⁴ Opinion of advocate general Campos Sánchez-Bordona of 25 April 2018, C-161/17, EU:C:2018:279, paragraph 54.

⁹⁵ Synodinou, T. (2019) *The Renckhoff Judgement: The CJEU Swivels the Faces of the Copyright Rubik’s Cube (Part I)*, [online] Kluwer Copyright Blog, Available from: <http://copyrightblog.kluweriplaw.com/2018/09/27/renckhoff-judgement-cjeu-swivels-faces-copyright-rubiks-cuber-part> [Accessed on 20 August 2023]

⁹⁶ Judgment of 7 August 2018, Renckhoff, C-161/17, EU:C:2018:634, paragraph 14.

⁹⁷ Judgment of 4 October 2011, Football Association Premier League and Others, C-403/08, EU:C:2011:631.

⁹⁸ Judgment of 1 December 2011, Painer, C-145/10, EU:C:2011:798.

⁹⁹ Judgment of 1 March 2012, Football Dataco and Others, C-604/10, EU:C:2012:115.

¹⁰⁰ Woo Jiang Ming, S. (2020) The basis for originality in photographs, *Singapore Academy of Law Journal*, 32(2), pp. 1101-1152.

of an allegedly infringed photographic work is required. Although it belongs to a different jurisdiction, the reasoning of the Court of Appeals in the *Harney v. Sony* regarding the dissection of a photographic work and extraction of its elements hypothetically adds an additional universal and deeper layer of actions to the test of originality applicable to photographic works, which a court can apply in its decision-making within the copyright framework of the EU.

However, the application of the “ordinary dissection analysis” might raise questions in connection with the *Painer* case decision, if it were applied by the CJEU. The said question involves the omitted analysis by the CJEU of the original photographic work depicting the missing girl. The sued magazines have only used a cut-out of the original photographic work, depicting the child’s face and a small part of the background. Applying the ordinary dissection analysis or considering the remark of the Advocate General Trstenjak related to the photo-fit’s originality in her opinion, would maybe assess the depicted elements as non-original. In light of this, the said parts would, in fact, be treated differently than the original “whole” photographic work, since the parts would not be able to share the originality of the original copyright-protected photographic work.¹⁰¹ Therefore, depending on the photofit’s size and elements it would display, the final decision on originality might be different if the said excision were employed.

6. CONCLUSION

To conclude, the decision in the *Harney v. Sony* provides theoretical guidance in terms of argumentation regarding the copyrightability of any photographic work. According to it, if one can argue only non-copyrightable elements of a photographic work were copied or reproduced, a copyright infringement may not be even considered.¹⁰² Combining parts of both tests, the one applied by the courts in the United States of America and the one of the CJEU, it seems to introduce a more complex tool for identifying production phases of a photographic work and also the manifested elements - the results of the said phases in better detail. Moreover, such joint approach, incorporating both originality assessment methods, might prove to be more thorough. If the factual circumstances of the case would require it, a deeper insight into the production process of a photographic work and, through it, the identification of individual originality-forming elements and creative steps of the photographer would be enabled with greater precision. This could

¹⁰¹ Judgment of 16 July 2009, *Infopaq International*, C-5/08, EU:C2009:465, paragraph 38.

¹⁰² Wallace, R. (2014) Framing the issue: avoiding substantial similarity finding in reproduced visual art. *Washington Journal of Law, Technology & Arts*, 10(2), p. 95.

prove to be beneficial to photographers in a role of claimants, strengthening their position in terms of evidence and arguments.

However, despite the apparent benefits mentioned above, the thorough excision of elements of a photographic work, even a deconstructionist analysis¹⁰³, applied by the courts in the United States of America does not seem to be compatible with the approach applied by the CJEU. It appears that the CJEU has recognised the potential issues that such an approach might bring in copyright infringement cases. Despite Advocate General Trstenjak's aforementioned considerations on the matter in her opinion, the CJEU has decided to reject such an approach and instead, continue to apply its previous jurisprudence on the matter. The CJEU maintains the doctrine of "parts sharing the originality of the whole work",¹⁰⁴ which was firstly introduced in the Infopaq case.

Consequently, however beneficial the approach in the United States of America might be in terms of theoretical analysis of the components of a photographic work, it would prove to be quite the contrary in the application practice within the copyright framework of the EU. Therefore, the omitted deeper dive into the identification process of elements in a photographic work by the CJEU might seem to have the purpose of enabling the provision of copyright protection to a larger number of photographic works. In other words, by the CJEU's decision of not applying the approach from the United States of America, the copyright protection is extended to more photographic works and the risks of its refusal on the basis of their dissection into separate parts is to a large extent mitigated. Simply put, the authors in the role of photographers would not benefit in practice from the merger of both approaches in the current copyright doctrine of the EU. As a result, photographic works or their parts are still looked upon as a whole in the eyes of the copyright framework of the EU and not dissected into individual elements when their originality is challenged.

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¹⁰³ Mazurek, C. (2017) Through the looking glass: photography and the Idea/Expression dichotomy, *New York Journal of Intellectual Property & Entertainment Law*, 6(2), p. 282.

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