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RECONSIDERING THE THRESHOLD FOR ORIGINALITY IN EU COPYRIGHT LAW IN LIGHT OF DERIVATIVE WORKS OF ART

Bachelor's thesis

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ABSTRACT

This bachelor's thesis was written as part of the Bachelor (BA) of Arts in Social Sciences at Tallinn University of Technology.

This thesis aims to research the threshold for originality in European copyright law in light of derivative works of art known for challenging the boundaries of copyright law. It also proposes the most suitable solutions to protect appropriation art instead of limiting it through copyright law. These legal concerns will be reviewed by utilizing European Union (EU) and United States (U.S.) case laws relating to the copyright protection of derivative works and the U.S. fair use doctrine. An integral aspect of the study is the case law analysis of these historically significant rulings, which have notably impacted the harmonization of the EU standard for originality and paved the way for further interpretation of copyright law originality.

Copyright protection is essential for artists as it gives them exclusive rights and protects their creativity. Intellectual Property Rights (IPR) have a substantial yet complex role in protecting appropriation art. The complexity in this scope relates to the nature of appropriation art, which often collides with the cornerstone of copyright law, originality. The issue is that unlike traditional visual arts, derivative works, such as appropriated artistic works, typically do not enjoy a similar degree of copyright protection. The existing legal framework needs to be revised in this field. With the ongoing development of technology, the role of IPR will become even more vital regarding the protection of appropriation art and the everchanging forms of creation. Therefore, this thesis reviews these primary challenges related to the status quo of copyright protection of derivative works while also inspecting them through the prism of digitalization.

Keywords: Copyright, Originality, Derivative Work, Appropriation Art, Fair Use

INTRODUCTION

"*What we call originality, relies on a good deal of imitation, and even a bit of theft.*"[1]

Europe and the U.S. can be considered centers of the global art market.[2] Art deriving from Europe is recognized on a worldwide scale. The Art Industry is very Intellectual Property (IP) orientated, and its value is therefore evident in European legislation. In addition to being a form of art, derivative works[3] are a significant industry dealing with different IP forms. Artistic creations can be protected through various forms of IP, namely, copyrights, trademarks, design rights, and patents. Essentially, copyright plays a critical role in preserving derivative works and protecting the interests of authors' artistic creations.[4] Thus, creativity and originality are copyright fundamentals. With the digitalization of art, the Internet is overflowing with articles on derivative works, artistic creations, and the limits of copyright law, giving rise to its topicality.

As derivative works are based on pre-existing copyrighted works, they challenge the basic notion of originality in EU copyright law. Therefore, IP-related concerns are at the core of derivative works, blurring the relationship between artistic freedom and copyright law. Art develops faster than the legal framework, leaving artists in an unclear position to determine under what criteria appropriation art may enjoy copyright protection and what can be considered original. Despite the theoretical purpose of IPR to facilitate and enable innovation, copyright may, in this manner, create obstacles in the creative process behind derivative works. This leads us to the complexity of the research problem, addressing an appropriate threshold

[1] Kleon, A. (2011). "What we call originality relies on a good deal of imitation and even a bit of theft." [Tumblr post]. Austin Kleon. Retrieved February 6, 2023, from https://tumblr.austinkleon.com/post/12610047015

[2] Velthuis, O. (2015). The Art Newspaper: There is no single global art market. Retrieved April 20, 2023, from https://www.theartnewspaper.com/2015/06/22/there-is-no-single-global-art-market

[3] Merriam-Webster. (n.d.). Derivative work: "A piece of intellectual property that substantially derives from an underlying work." In Merriam-Webster Dictionary. Retrieved February 18, 2023, from https://www.merriam-webster.com/legal/derivative%20work

[4] Geiger, C. (2021). Contemporary Art on Trial–The Fundamental Right to Free Artistic Expression and the Regulation of the Use of Images by Copyright Law. In T. Dreier & T. Andina (Eds.), *Digital Ethics–The Issue of Images* (pp. 387-415). Springer.

for originality in EU copyright law in relation to appropriation art. Thus, this thesis assesses the efficiency of the current copyright framework for the protection of derivative works considering the originality requirement and explores the extent to which the current threshold for originality accommodates derivative works by examining the links between derivative works and originality from the perspectives of EU and U.S. case laws. The aim of this thesis is to find a solution for safeguarding and enabling the copyrightability of appropriation art through a redefined and more consistent approach to the concept of originality.

The research questions of the thesis are the following: (a) What is the relevance of the American doctrine of fair use in the context of derivative works under EU Copyright Law? (b) What is the threshold for originality in the context of derivative works when seen through the prism of appropriation art? (c) What should be the assessment of originality for copyright protection of appropriation art?

The author will focus on retrieving data from various sources, as this will provide for a multidisciplinary approach to the thesis. The findings of this research will be retrieved from legal journal articles, previous research papers and dissertations, IP law textbooks, EU and U.S. case law, and the relevant legal framework. Although being legal research, the author must also gather data outside the scope of the law to serve the research objectives, as the art industry needs to be briefly shed light upon. Therefore, the first chapter of the thesis discusses art law concisely. Nevertheless, the most integral aspect of this research is examining the current EU copyright law environment, its links to appropriation art, and challenging the threshold for originality. Thus, in the first chapter, the research also goes into the types of IPR and their applicability in appropriation art, providing insight into the criteria for copyright protection. For the purpose of this thesis, the author will not focus on challenges relating to other forms of IPR that go beyond copyright and appropriation art.

The Court of Justice of the European Union ('CJEU') has played an integral role in interpreting the concept of originality.[5] Therefore, the second chapter analyzes the notion of originality in view of landmark rulings of the CJEU. Through this, the harmonization of the concept of originality and how originality is interpreted through copyright law is detailed. The third chapter provides case law examples of how the American doctrine of fair use has been utilized

[5] Rosati, E. (2022). Copyright at the CJEU: Back to the start (of copyright protection). *Forthcoming in H Bosher–E Rosati (eds), Developments and Directions in Intellectual Property Law*, *20*.

in the U.S. to determine the originality and copyright protection of derivative works. The comparative tone between the EU and the U.S. will provide the author with material for analysis of the possibilities of Europe following the leads of the U.S. fair use doctrine. Finally, the fourth chapter offers possible solutions for a redefined approach to copyright protection of appropriation art and the threshold for originality, along with underlying potential prospects of the European copyright environment considering the digitalization of derivative works.

1. INTELLECTUAL PROPERTY RIGHTS AND DERIVATION ART

1.1. The Emergence of Art Law

In current times, appropriation has become a common characteristic of artistic activities, and it is per se considered an artistic method. According to the Oxford Reference, appropriation art "refers to a tendency in contemporary art in which artists adopt imagery, ideas or materials from pre-existing works".[6] Central characteristics of appropriation art include modification, transformation, repurposing, and reusing pre-existing original work in a new artistic context.[7] Artists throughout the twentieth century have appropriated elements of existing art.[8] Recognized artists such as Marcel Duchamp and Pablo Picasso incorporated previous works of art or elements of popular culture into their creations.[9]

With the rapid growth and development of the art movement, legal challenges in this scope do not fall short. Primarily, contemporary artists frequently encounter challenges associated with the threshold for originality in copyright law by using pre-existing works protected by copyright, thus infringing on original copyright holders' works. Even more so now, with the ongoing increase in digital art. Therefore, the core characteristics of appropriation art challenge the prominent cornerstone of copyright law, originality in its classical form, and create a legal gray zone between copyright, its boundaries, and artistic freedom. To better understand this, we are going to review the viewpoint that art law offers on the emergence of art and IP matters.

[6] Marter, J. (Ed.). (2011). The Grove Encyclopaedia of American Art. Oxford University Press. Print ISBN-13: 9780195335798. Retrieved February 8, 2023, from https://www.oxfordreference.com/display/10.1093/acref/9780195335798.001.0001/acref-9780195335798-e-67
[7] Geiger (2021), *supra nota* 4, p. 2.
[8] Van Camp, J. C. (2007). Originality in postmodern appropriation art. *The Journal of Arts Management, Law, and Society*, *36*(4), 247-258.
[9] *Ibid.*, p. 247.

Art law has become means by which various cultures of societies are governed and encouraged to develop.[10] With more global experts devoted to the area, European and American law schools have started offering art law classes.[11] The field comprises elements from different areas of law; IP law, international law, the law of contracts, property law, and other commercial laws.[12] In this manner, art law is developing into a notable legal discipline dealing with many areas of law safeguarding, governing, and supporting art production, consumption, and selling. Art law is described by James J. Fishman as "*the practices of traditional legal specialties such as commercial law, contracts, copyright, entertainment, international law, labor relations, and tax law as they have evolved to meet the ever more particular needs of the visual artist*."[13] Essentially, art law and industry practices are greatly influenced by IP law, particularly copyright matters, and these legal disciplines often collide. Despite the emergence of the two disciplines and the shift in the legal community, in contrast to other traditional art forms, appropriation art remains an unconventional type of IP with low legal credibility. Although copyright law is critical for the progression of the arts, it does not necessarily always correspond to or accommodate the demands of contemporary art or work in artists' favor.[14] For this reason, current copyright laws arguably impede innovation in appropriation art.

In the following chapters, to better understand the types of IPR appropriation art may enjoy and how they connect to the art industry, we will cover the fundamentals of the various kinds of IPR accessible to protecting the arts.

1.2. Forms of IPR and Their Applicability in Appropriation Art

A. Patent

Patents are a technology-oriented form of IP intended for technical solutions to technical problems. A patent's purpose is to grant the inventor an exclusive right.[15] Following an

[10] Pryor Cashman LLP. (2021). Art Authentication: Legal and Practical Considerations. Retrieved February 10, 2023, from https://pryorcashman.gjassets.com/content/uploads/2021/01/Art-Authentication-1.pdf
[11] *Ibid*., vii
[12] *Ibid*., viii
[13] Fishman, J. J. (1977). The emergence of art law. *Clev. St. L. Rev.*, *26*, p. 481.
[14] Antonopoulou-Saliverou, P. (2018). Copyright Protection in Contemporary Art: A State of Insufficiency [Master's thesis, International Hellenic University]. IHL repository https://repository.ihu.edu.gr/xmlui/handle/11544/29114
[15] Pila, J., & Torremans, P. (2019). *European intellectual property law*. (2nd ed.) USA: Oxford University Press.

invention that constitutes a technological improvement, patents are granted.[16] Fundamentally, patents are innovative and have a novel aspect regarding what is previously known. Therefore, patents must show some new characteristics unknown to the prior art and avoid forming a part of the "state of the art."[17] Art cannot be generally patented as artistic works are regarded as a form of creative expression rather than technical functions. Nonetheless, artists frequently develop novel techniques for creating works of art.[18] The methodology, technique, or procedure used to create art, or the creative components integrated into technical inventions may still be eligible for patent protection if they satisfy relevant conditions.[19] For this reason, patents are still necessary for the art industry, despite not working in the traditional sense.

B. Industrial design

Industrial design is a form of IPR concerned with creating both functional and aesthetically pleasing products that meet the needs of consumers.[20] Legal safeguarding of industrial designs in the EU is facilitated by the European Parliament and Council Directive (CDR) 98/71/EC, which operates in conjunction with the Council Regulation (EC) No. 6/2002 of December 2001 on community designs.[21] CDR Article 3(1) details designs as the way products look, including their various visual features such as colours, shapes, textures, materials, and ornamentations.[22] As a result of these features and aesthetics playing a crucial role in the industry, industrial designs often incorporate artistic elements, and designers frequently draw on artistic strategies when developing their designs.[23] Therefore, industrial designs share many similarities with works of fine art, and some works of applied arts incorporated in products can classify as industrial designs.[24]

With the overlapping of industrial designs and copyrights, it is necessary to make a distinction between the two, as copyright protection only arises when works of applied arts are exclusively

[16] Cornish, W. et al. (2019). Intellectual property: Patents, copyrights, trademarks & allied rights (9th ed.). Sweet & Maxwell.
[17] Pila (2019), *supra nota* 15, pp. 100.
[18] Artrepreneur. (2022). Types of Intellectual Property for Artists. Retrieved February 18, 2023, from https://artrepreneur.com/journal/types-of-ip/
[19] Ibid.
[20] Rahman, S. S. (2014). Industrial design in different jurisdictions: a comparison of laws. *Journal of Intellectual Property Rights*, 19(3), 223-228.
[21] Pila (2019), *supra nota* 15, p. 461.
[22] Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs, Art 3 (1).
[23] World Intellectual Property Organization. (2002, October). Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications. Ninth session. Geneva, Switzerland.
[24] *Ibid*., p. 4.

considered artistic works. Industrial designs must satisfy specific criteria outlined in Articles 5 and 6 of the CDR, namely, novelty and individual character,[25] to be eligible for protection and, thus, avoid appropriation. Nevertheless, while industrial designs may classify as forms of artistic expression and share similarities with appropriation art, the two are fundamentally different practices with distinct objectives. The extent to which industrial design rights can protect appropriation art depends on the specific context and goals of the art in question.

C. Trademark

A trademark acts as a badge of origin for businesses. The trademark legal framework in the EU is set out in the Trademark Directive (TMD) and the Trademark Regulation (EUTMR).[26] The TMD defines trademarks as "*a sign capable of distinguishing the goods or services of one undertaking from those of other undertakings*."[27]

Traditionally, artists are not subject to trademark law, apart from how they brand their business.[28] Appropriation artists may use pre-existing images, objects, or other materials in their works. Yet, they are typically not eligible for trademark protection as trademark law does not extend to the preservation of artistic works as such. However, trademark protection may be available for appropriated artworks if an artist incorporates the art into the sign and meets the relevant requirement of trademark law, primarily distinctiveness.[29] Nevertheless, it is worth noting that when an appropriation artist incorporates someone else's trademark or parts of it in their work, they may potentially infringe on someone's trademark and the rights of others.

Patents, industrial designs, and trademarks are undeniably central to protecting the arts. As such, it is necessary that artists familiarise themselves with the types of IPR available. Nonetheless, copyright remains the essential form of IPR for protecting creative works. Therefore, when it comes to safeguarding creative works, artists should, above all, rely on

[25] Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs, Art. 5-6.
[26] Regulation (EU) 2017/1001 of the European Parliament and the Council of 14 June 2017 on the European Union trademark
[27] Directive (EU) 2015/2436 of the European Parliament and the Council of 16 December to approximate the laws of the Member States relating to trademarks, Art. 3 (a).
[28] Creekmore, J., & Connors, A. P. (2012). Understanding Intellectual Property: A Guide for Artists. *Liberty UL Rev.*, *7*, p. 326.
[29] Senftleben, M. (2022). No Trademark Protection for Artworks in the Public Domain–A Practical Guide to the Application of Public Order and Morality as Grounds for Refusal. *GRUR International*, *71*(1), 3-17.

copyright law as their primary means of protection. Hereon, the author will solely focus on copyright law and derivative works for the remainder of this thesis.

D. Copyright

Copyright is inherently oriented toward promoting innovation, creativity, and the arts. Copyrights are defined by the World Intellectual Property Organization (WIPO) as "legal rights protecting creators of original literary and artistic works."[30] European copyright law is comprised of several legal acts outlining the basic principles of copyright law and harmonizing laws across Member States.[31] The international framework governing copyright law includes the Berne Convention for the Protection of Literary and Artistic Works and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).[32] The Berne Convention protects "literary and artistic works,"[33] covering the works and their author's rights. The Berne Convention stipulates that a work should be original, artistic, musical, dramatic, or literary and demonstrate its author's creativity to be copyrightable.[34] Therefore, copyright law does not extend to the protection of ideas but rather the tangible expression of an idea.

Copyright gives an author exclusive economic and moral rights to their artistic works.[35] Articles 6 and 9 of the Berne Convention define these rights to include the right to be identified as the work's author, use, and manage their work—including the ability to reproduce, license, distribute, and exhibit it—and allow or prevent others from using given works. These exclusive rights are essential for preserving author's economic and moral interests and promoting innovation by providing an incentive to create new works.[36] Once a piece of creative work is created, copyright protection applies, and the creator is automatically regarded as its "author" without needed registration.

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[30] World Intellectual Property Organization. (n.d.). Copyright. Retrieved February 22, 2023, from https://www.wipo.int/copyright/en/

[31] European Commission website: Shaping Europe's digital future. Retrieved April 7, 2023, from https://digital-strategy.ec.europa.eu/en/policies/copyright-legislation.

[32] Margoni, T. (2013). Not for designers: on the inadequacies of EU design law and how to fix it. *J. Intell. Prop. Info. Tech. & Elec. Com. L.*, *4*, 225-248.

[33] Berne Convention for the Protection of Literary and Artistic Works, 09.09.1886, Art. 2 (1).

[34] *Ibid*., Art. 2.

[35] *Ibid*., Arts. 6bis, 9.

[36] Pila (2019), *supra nota* 15, pp. 80, 587.

1.3. Criteria for EU Copyright Protection

The essential requirement for copyright protection in the EU is that an artistic work must be original. Artistic works must demonstrate an 'author's own intellectual creation'[37] (AOIC) per Article 2(5) Berne Convention.[38] Originality refers to the prerequisite that a work must be an AOIC, showcasing the author's skill, judgment, labor, and creative choices.[39] The originality requirement is crucial as copyright aims to balance the interests of those who create content while only granting copyright if a work results from the AOIC. Hence, the originality criterion is fundamental to EU copyright law.

Originality should not be confused with novelty. The two are related but distinctive concepts in the realm of IP law. To be considered original per copyright law, a work cannot be a copy of a prior work. However, this does not suggest that creative works should be entirely new or unique and that they cannot build upon other works. Creative works may be original despite closely resembling different works as long as they are not the results of copying. As will become evident in the further text, originality in copyright law is ultimately evaluated based on the author's creative choices rather than through novelty, uniqueness, or the quality of the work. As with other traditional art forms, copyright law applies to appropriation art. However, legal issues in this scope are often complex due to the originality requirement remaining ambiguous within the EU and the common characteristics of appropriation art. Although the consistent standard for AOIC has been established by CJEU case law, its ability to harmonize the concept of originality remains uncertain as it most often depends on a case-by-case analysis and is subject to interpretation. Determining whether a derivative work is sufficiently original for copyright protection to arise or whether a specific use of copyrighted material in appropriation art infringes on another author's copyright depends on several factors assessed by the individual subject matters of each case left for national courts to resolve.[40] The implications of the criterion will be addressed in more detail in the following chapters.

[37] Gompel, S. V., & Lavik, E. (2013). Quality, merit, aesthetics and purpose: An inquiry into EU copyright law's eschewal of other criteria than originality. *Revue Internationale du Droit d'Auteur (RIDA)*, (236), 100-295.
[38] *Ibid.*, p. 8.
[39] Margoni, T. (2016). The harmonisation of EU copyright law: the originality standard. In T. C. Ng & L. Guibault (1st ed.), Global governance of intellectual property in the 21st century: Reflecting policy through change (pp. 85-105). Edward Elgar Publishing.
[40] *Ibid*., p. 14.

2. THE NOTION OF ORIGINALITY IN CJEU CASE LAW

2.1. The Harmonization of the Concept of Originality: Legal Implications of Infopaq C-5/08

In 2009, the CJEU made the landmark judgment of *Infopaq*, C-5/08[41], addressing the issue of whether a reproduction of a small portion of a copyrighted work under Article 2(a) of the InfoSoc Directive constitutes an infringement and violates copyright law.[42] The *Infopaq* judgment introduced an EU standard for originality in copyright law, the "author's own intellectual creation" [43] criterion, for computer programs, databases, and photographs.[44] The Court's ruling reveals that a part of a work is reproduced under Article 2(a) of the InfoSoc Directive if that part is original and hence protectable by itself.[45] The Court's ruling holds that works exhibiting sufficient originality to qualify as the AIOC enjoy copyright protection.

The *Infopaq* guidelines for the originality standard and the AOIC requirement have substantially influenced the development of copyright law.[46] The CJEU's ruling has been considered the catalyst for initiating the harmonization of the originality requirement for EU copyright law. Since the 2009 decision, the CJEU has gradually extended the application of originality and the AOIC criterion to include other forms of copyrightable subject matter beyond computer programs, databases, and photographs,[47] and *Infopaq* continues to work as a

[41] Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009] EU:C: 2009:465
[42] Rosati, E. (2012). Judge-made EU copyright harmonisation: the case of originality [Doctoral dissertation, European University Institute]. EUI Library https://opac.eui.eu/client/en_GB/default/search/detailnonmodal/ent:$002f$002fSD_ILS$002f0$002fSD_ILS:291266/one
[43] *Ibid*., para. 35–37.
[44] *Ibid*., para. 35.
[45] Rosati (2022), *supra nota* 5, p. 10.
[46] Rosati (2022), *supra nota* 5, pp. 9-10.
[47] Gompel (2013), *supra nota* 37, p. 1.

guideline for subsequent cases brought to the CJEU relating to originality and copyright protection.

For appropriation art, the decision of *Infopaq* is very influential, providing that appropriated works meeting the standard of originality qualify for copyright protection. The decision removed Member States' rights to rule on additional conditions to be satisfied for copyright protection, such as aesthetic effects and artistic value. Theoretically, no criterion other than the AOIC should measure originality. Based on this, the *Infopaq* decision provides greater flexibility for appropriation artists to enjoy. It allows for using pre-existing works as source material for their creations while still satisfying the requirement for originality. Moreover, the AOIC criterion stipulates that the creation must reflect the author's personality and "free and creative choices."[48] The impacts of this criterion will be addressed more precisely in the chapter that follows, which discusses the legal implications of *Painer* C-145/10.[49]

2.2. Case: Painer C-145/10

Painer C-145/10 is a case dealing with the originality criterion in relation to the copyright protection of portrait photographs. The main question addressed by the CJEU was whether a photograph taken by the plaintiff, Mr. Painer, met the originality criterion and reflected their intellectual creation. The CJEU ruled that the photograph was original and, therefore, was eligible for copyright protection. In determining originality, the Court stressed the different skills and creative choices, namely, the photograph's angle, lighting, and atmosphere, that went into creating the photograph.[50] The CJEU found that authors of artistic works can stamp their 'personal touch' by demonstrating these creative choices.[51]

The *Painer* ruling, along with *Infopaq,* continues shaping EU copyright law. *Painer* highlights the importance of the AOIC criterion, demonstrating that an artistic work must not necessarily be ground-breaking to be deemed original. Instead, the CJEU's ruling on the copyrightability of the photograph emphasizes the recognition of creative contributions by authors to works, such as photographs, that extend beyond conventional art forms and stresses the importance of

[48] Case C-145/10 *Eva-Maria Painer v Standard VerlagsGmbH and Others* [2011] ECLI:EU:C:2011:798, para. 88-90.
[49] *Ibid*.
[50] *Ibid*., para. 91.
[51] *Ibid*., para. 92.

encouraging artistic freedom rather than limiting it through copyright law. For this reason, the decision is particularly important for appropriation art. The judgment reinforces the idea that new works created through pre-existing copyrighted works must meet the originality standard by reflecting their AOIC through creative contributions that leave a personal stamp. Essentially, these personal stamps reflect the originality of a work. What this stipulates for appropriation art is that appropriated artistic works cannot be mere copies with minor adjustments of the incorporated pre-existing source material. In such situations, courts would unlikely discover originality. To avoid infringing on others' rights, artists should incorporate new elements that make the distinctive elements of the primary work disappear.

Although clarifying the links between copyright protection of derivative works and originality, *Painer* also inquires us to consider how courts will legitimately assess the level of creativity used in works built upon pre-existing works[52] and how contemporary artists can meet this vague definition of creativity. The free and creative choices stipulated by the AOIC criterion will likely pose national courts to evaluate derivative works carefully and "investigate their production process in order to discover aspects in which the originality of such works resides."[53]

2.3. Case: Football Dataco C-604/10

Football Dataco C-604/10[54] is another landmark case revolving around the question of whether a database of sports statistics could be considered an original work. The CJEU ruled that for a database to be considered original, it must similarly reflect the AOIC criterion by demonstrating creative freedom.[55] In contrast to the prior cases examined, the Court noted that significant labor or effort in collecting and organizing data is inadequate to trigger copyright protection[56], as this does not exhibit an AOIC. The database was deemed ineligible for copyright protection since it was observed as merely factual, lacking creative freedom.[57]

[52] Jankovic, M. (2019). Effects of the EU harmonisation Process in the Field of Copyright on the Application of Originality Standard to Photograph Works in the Copyright Framework of the United Kingdom [Master's thesis, Tilburg University]. Tilburg University Library Digital Collection http://arno.uvt.nl/show.cgi?fid=148976
[53] *Ibid*., p. 23.
[54] Case C–604/10 *Football Dataco v. Yahoo! UK, Ltd and Others* [2012]., EU:C:2012:115
[55] *Ibid*., para. 45.
[56] *Ibid*., para. 42.
[57] *Ibid*., para. 39.

In the ruling of *Football Dataco,* both Advocate General Mengozzi and the CJEU emphasized that labor or skill in creating a work does not amount to the creativity that meeting the originality standard needs.[58] These considerations set a higher bar for the level of creativity required to meet the threshold for originality and reflect that the EU originality standard is progressing towards an expression of creativity over skill or labor. However, CJEU's decision still leaves a degree of confusion regarding what type of supplemented creative elements incorporated in works with data could reflect originality. The originality criterion in relation to databases stipulates "that some intellectual judgment that is the author's own must have gone into the selection of the materials or the method of their arrangement."[59] This indicates that national courts will probably have to determine, on an individual basis, what type of labor and skill is creative and justifies copyright protection. In this sense, artists will need to bear in mind that creative freedom and, thus, originality should be demonstrated by the selection of materials and their arrangement rather than concentrating on whether the selection or arrangement gives additional meaning to the data.[60]

Although not directly related to derivative works such as appropriation art, *Football Dataco* does have implications for using data in derivative works. The decision particularly impacts appropriation artists using factual data in their art, which will likely grow with the ongoing digitalization of art. Considering derivative works in the digitalized environment, *Football Dataco* implies that data-based works created with artificial intelligence (AI) may not be eligible for copyright protection if they do not reflect substantial originality in the choice and organization of the data-driven materials. In contrast, such artists may also argue that incorporating factual data into their artistic works does not necessarily infringe on existing copyrights by displaying sufficient creativity and, thus, meeting the originality threshold. Nevertheless, artists must still be aware that the use of such data may be subject to other means of legal protection.

2.4. Case: Cofemel C-683/17

[58] Opinion of Advocate General Mengozzi in Football Dataco and Others, C-604/10, EU:C:2011:848, [35].
[59] Pila (2019), *supra nota* 15, *p.* 489.
[60] *Ibid*.

The final landmark ruling that this thesis will explore in the scope of EU copyright law is the 2019 CJEU decision of *Cofemel* C-683/17.[61] *Cofemel* similarly deals with the threshold for originality, specifically addressing copyright protection for works of applied art and industrial designs.[62] The CJEU ruled that applied arts should be entitled to the same copyright protections as other copyrightable works.[63] The Court asserted that for copyright protection to arise, the level of originality required can be relatively low. The AOIC criterion is satisfied if a work is the outcome of its author's creative and free choices. The *Cofemel* decision importantly rules out other standards for copyright protection, such as artistic or aesthetic value,[64] further reinforcing the Court's stance established in *Infopaq*; Member States cannot apply different conditions for copyright protection to arise.

The *Cofemel* decision, while primarily concentrating on industrial designs, has profound implications for appropriation art. *Cofemel* reinforces originality as the main requirement for copyright protection. While *Cofemel* lowers the threshold for originality in the context of derivative works, it also further establishes equality between traditional and non-conventional forms of art by prohibiting discriminatory standards for artistic works.[65] Disregarding these possible national approaches to copyright protection, *Cofemel* asserts that originality is a threshold that must be passed, and its evaluation must remain comprehensive.[66] This implies that appropriation artists may claim copyright protection for their creations, regardless of whether they are aesthetically appealing. For appropriation artists, this ought to be great news.

2.5. Conclusion on EU Case Law

These landmark rulings continue to shape the direction of EU copyright law in relation to achieving greater harmonization in the interpretation and consistent application of the originality requirement. Although the analyzed case laws touch on varying subject matters, they all give insights into the EU originality standard. The unifying matter in all four cases

[61] C-683/17 *Cofemel v. Sociedade de Vestuário SA v G-Star Raw CV* [2019], ECLI:EU:C:2019:721
[62] Rosati (2022), *supra nota* 5, p. 14.
[63] Rosati (2022), *supra nota* 5, p. 13.
[64] Inguanez, D. (2020). A Refined Approach to Originality in EU Copyright Law in Light of the ECJ's Recent Copyright/Design Cumulation Case Law. *IIC-International Review of Intellectual Property and Competition Law*, *51*(7), 797-822
[65] Härkönen, H. (2021). 'Fashion and Copyright: Protection as a Tool to Foster Sustainable Development' [Doctoral Dissertation, University of Lapland]. Lauda digital institutional repository https://urn.fi/URN:ISBN:978-952-337-265-8 pp. 35-34.
[66] Rosati (2022), *supra nota* 5, p. 14.

relates to challenging originality while balancing the interests of original copyright holders. As illustrated above, the standard for originality is harmonized within the EU to a certain degree. Although originality has not been defined in relevant legislation, the CJEU has elaborated on its meaning through applicable case law, which provides that copyright protection should be accessible to works that constitute an AOIC. As observed above, the EU standard for originality can be satisfied by all types of artistic works that carry the personal touch of their author and demonstrate their free and creative choices.[67] Determining originality requires the application of all these factors. All these notions relate and make the most sense when viewed as manifestations of the originality standard.[68] Copyright protection, in this sense, works through a uniform application of the standard of originality.

While it may not sound challenging to satisfy, originality is still a requirement, and appropriation art frequently fails to meet this threshold. Despite the consistent approach provided by the CJEU following the *Infopaq* ruling, some national courts still resist accepting and implementing the principles and implications of harmonizing the notion of originality.[69] An author expressing their free and creative choices should not relate to aesthetics. However, in theory, aesthetic considerations cannot necessarily be entirely excluded when considering copyright protection.[70] It appears that this may be due to the subject matter of copyright frequently depending on the cultural and aesthetic domain to a significant extent.[71] In practice, aesthetic considerations may find their way into legal deliberations, particularly when national courts attempt to resolve whether unconventional subject matters, like appropriation art, belong to the domain of copyright and meet the originality standard. This often becomes evident in disputes concerning the copyright protection of photographs. Such as, in the ruling of *Painer*, courts tend to reflect whether a photograph can be regarded as original by demonstrating the author's personality through aesthetic and creative choices or if it is a result of technical skills.[72] These contradictions show that the originality criterion does not always provide courts sufficient guidelines to determine whether a work rightfully fits the domain of copyright law, particularly when it comes to appropriated artistic works, which may demonstrate low originality. However, following the guidelines of the above rulings, particularly *Cofemel*,

[67] Rosati, E. 'Originality in copyright: a meaningless requirement?' (2018) *IPKat*, Retrieved March 13, 2023, from https://ipkitten.blogspot.com/2018/05/originality-in-copyright-meaningless.html.
[68] Inguanez (2020), *supra nota* 64, p. 808.
[69] Rosati (2022), *supra nota* 5, p. 17.
[70] Gompel (2013), *supra nota* 37, pp. 2-3.
[71] *Ibid*.
[72] Gompel (2013), *supra nota* 37, p. 28.

courts should not determine originality under different requirements; this would diminish the uniform application of the criterion for all EU residents. The author believes that getting more CJEU judgments, such as *Cofemel* reinforcing the occurrence of the AOIC criterion between diverse forms of art, would also strengthen the legal credibility and position of appropriation art.

Even though harmonizing the standard for originality is already in place, it remains limited. *Infopaq, Painer, Football Dataco,* and *Cofemel* all reveal the Court's emphasis on the AOIC criterion for originality to exist. What can be understood from the Court's application is that the originality requirement, defined as the AOIC, determines the eligibility of protection. The above cases reveal that the CJEU has overlooked expanding on the meaning of creativity. While the CJEU provides that originality imposes creative and free choices, the Court should elaborate further on the amount of creativity needed to meet originality for creations known to challenge its limit. As the art industry is currently under reform due to the rise of generative AI[73] and the digitalization of art, defining creativity is increasingly topical. The possibility of making entirely replicated digital art, even more so, threatens the copyright law understanding of originality. In the long run, the CJEU defining creativity would also provide guidance on current issues of whether AI-generated artistic works may be considered an AOIC and, in this context, increase general stability in the copyright environment. Looking ahead, the burden of providing a more precise and consistent application for the threshold for originality remains and should be prioritized by legislators and the CJEU. If left unresolved, the originality standard will propose issues for the EU copyright law environment, particularly in the digital age.

In view of these landmark rulings, the more consistent assessment of originality in appropriation art could be fulfilled by the following recommendations, which will be addressed in depth in Chapters 4.1 and 4.2:

- Further developing and clarifying the "author's own intellectual creation" test
- A method of "filtration"; assessing what elements of the work in question are unoriginal and not protected as such[74]

[73] "Generative AI refers to the broad category of artificial intelligence (AI) that is meant to generate something new based on preexisting materials and user-defined parameters. The output of generative AI can be in the form of new text, images, audio, video, and combinations of these." Retrieved April 18, 2023, from https://marketing-dictionary.org/g/generative-ai/

[74] Inguanez (2020), *supra nota* 64, pp. 808-809.

- Adopting the point of view of an "objective observer"; providing necessary, however not definitive, evidence to determine originality[75]

The upcoming chapter will shift its focus to examining case law in relation to U.S. copyright law and its doctrine of fair use. Through this comparative approach, we hope to gain an understanding of how questions of copyright law, particularly fair use, has been utilized to determine originality in derivative works. The chapter will conclude by comparing the EU and U.S. perspectives, hoping to gain insight into whether the doctrine of fair use could provide prospects for further developing the EU copyright law threshold for originality considering derivative works.

[75] Inguanez (2020), *supra nota* 64, pp. 811, 813.

3. DOCTRINE OF FAIR USE: CASE LAW EXAMPLES

3.1. Fair Use in U.S. Copyright Law

The copyright standard of originality in the U.S. is codified in the Copyright Act of 1976, detailing copyright protection to "original works of authorship".[76] Although left intentionally undefined as to what constitutes originality, the Committee Reports have clarified that the standard of originality does not include novelty, ingenuity, or aesthetic value requirements.[77] U.S. courts have been able to elaborate that derivative works demonstrating a "minimal degree of creativity" are considered original and, thus, copyrightable.[78] The Supreme Court has further drawn on these ideas by demonstrating through court practice that "the vast majority of works make the grade quite easily, as they possess some creative spark, "no matter how crude, humble or obvious" it might be".[79] In addition to these codifications, in U.S. copyright law, there are circumstances in which the public interest in promoting free expression may outweigh the copyright holder's interest in controlling the use of their work.[80] The legal doctrine of fair use is applicable in this situation. Fair use is a doctrine of copyright law founded on the notion that there are possibilities in which fair use allows for certain limited use of copyrighted content without the copyright holder's consent for intentions such as commentary, criticism, and parody.[81] Fair use is determined under four criteria codified in Section 107 of the Copyright Act of 1976, as follows:

[76] 17 U.S.C. § 102(a) (1976).
[77] Abrams, H. B. (1992). Originality and creativity in copyright law. *Law and Contemporary Problems, 55(2),* 3-44
[78] *Ibid*., pp. 10-11.
[79] Murray, M. D. (2006). Copyright, originality, and the end of the scènes à faire and merger doctrines for visual works. *Baylor L. Rev., 58*, p. 785.
[80] Harvard University Office for Scholarly Communication. (n.d.). Copyright and fair use. Retrieved March 15, 2023, from https://ogc.harvard.edu/pages/copyright-and-fair-use
[81] *Ibid*.

"1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

2) the nature of the copyrighted work;

3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole;

4) the effect of the use upon the potential market for or value of the copyrighted work."[82]

The four factors outlined in Section 107 provide a tentative framework for analyzing whether copyrighted material is likely to be regarded as original and fair use. The fair use test requires a collective assessment of these four factors.[83] Over time, the doctrine has gradually expanded and developed through court decisions and the relevant codification in legislation. Today, fair use has a prominent role in U.S. copyright law, providing legal flexibility for people using copyrighted materials and working as an essential defense available for artists accused of copyright infringement.[84] In relation to determining originality in artistic works, fair use works as a means through which artists may demonstrate that their work is theirs and original instead of being just a replica of a pre-existing work.[85]

Due to the nature of appropriation art, it frequently raises questions on fair use, its scope, and limits. Theoretically, appropriation art is considered to fall under the doctrine; such artistic works are often transformative by adding new meanings to pre-existing materials. Nevertheless, fair use should not be viewed as a static doctrine. It is a gradually developing and evolving concept.[86] Whether appropriated copyrighted materials fall under fair use and are deemed original depends on whether the precise conditions of each case satisfy the four-part test, placing a large margin of discretion for courts.

In the chapters that follow, the focus will be on examining notable U.S case laws addressing the doctrine of fair use in the light of derivative works, such as appropriation art. Considerable emphasis will be given to examining how courts have applied the doctrine in determining originality.

[82] 17 U.S.C. § 107 (1976).
[83] Harvard (n.d.), *supra nota* 82.
[84] *Ibid*.
[85] Wong, M. W. (2008). Tranformative User-Generated Content in Copyright Law: Infringing Derivative Works or Fair Use. *Vand. J. Ent. & Tech. L.*, *11*, p. 1096.
[86] Burk, D. L. (2019). Algorithmic Fair Use. U. *Chi. L. Rev*., 86, 283. pp. 297-298.

3.2. Case: Rogers v. Koons

The first case addressing fair use we will examine is *Rogers v. Koons* 960 F.2d 301 (2d Cir. 1992).[87] The legal question of the case can be summarized as whether artists' Koons' use of Art Roger's copyrighted "Puppies" work constituted a parody under the fair use defense.[88] The Court ruled in favor of Rogers, applying the four-part test, noting that the work and the facts of the case did not justify fair use.[89] The Court found that Koons had copied not only the idea of the photograph but also its expression, as the two works had been substantially similar, indicating that the copies were made in bad faith, primarily for Koons' monetary purposes.[90] The Court declined Koons' argument of the work being a parody under fair use, as it did not fulfill the purpose of parody: comment or criticize the original work whatsoever.[91]

Rogers v. Koons is a prominent case in light of the appropriation of art. The case sets a precedent for the use of pre-existing works and the limits of fair use in the art world. The four-part test application of the Court illustrates the importance of giving credit where credit is due: protecting the rights of original artists while still accommodating modern artists' practices. The application of the four-part test displays that for a work to be considered fair use and, thus, original, it must be transformative and not harm the original work's market. Concerning originality, the case serves as a reminder that even if a new work is transformative from the original, it may still be considered a copyright infringement if it copies the original idea and expression without adding new meaning. *Rogers v. Koons,* therefore, is a challenging case considering appropriation art as it inquires us to consider what amount of appropriation is permissible for a work to be considered original, which was left unclear by the Court.[92]

3.3. Case: Cariou v. Prince

[87] Rogers v. Koons 960 F.2d 301 (2d Cir. 1992).
[88] French, R. A. (1993). Copyright: Rogers v. Koons: Artistic Appropriation and the Fair Use Defense. *Okla. L. Rev.*, *46*, 175-204.
[89] Ibid., p. 177.
[90] Quentel, D. L. (1996). Bad Artists Copy-Good Artists Steal: The Ugly Conflict between Copyright Law and Appropriationism. *UCLA Ent. L. Rev.*, *4*, 39-80.
[91] French (1993), *supra nota* 88, p. 595., p. 200.
[92] French (1993), *supra nota* 88, p. 595., p. 201.

Cariou v. Prince 714 F.3d 694 (2d Cir. 2013)[93] is a high-interest copyright battle in the realm of appropriation art concerning whether Richard Prince's appropriation artwork incorporating Patrick Cariou's photograph was a copyright infringement or could be considered fair use. The Southern District of New York ruled in favor of Cariou that Prince's works were infringing and could not be fair use, as they were not transformative.[94] Prince appealed to the Second Circuit, which reevaluated the initial ruling, finding that most pieces were transformative and fair use.[95] The Court found that works do not necessarily need to comment on or critique the original work to be considered fair use. Instead, presenting new aesthetics in the artwork which can be "reasonably perceived" and give new meaning or context to the work can amount to fair use.[96] The Court gave special attention to the composition, presentation, scale, color palette, and media of the work[97] while simultaneously considering that Prince's works did not monopolize the primary or derivative market for Cariou's photographs.[98]

The settlement of *Cariou v. Prince* has been regarded as a win for appropriation art, a decision leaving "appropriation art alive and well".[99] While further clarifying the lines between appropriation art and the terms of fair use for artists, the final ruling also details the extent to which artists can use pre-existing materials and yet meet the originality criterion. By doing so, the settlement allows artists to enjoy greater copyright protection by allowing more space for artistic freedom. The Court's justification of fair use in *Cariou v. Prince* supports copyright law's purpose of supporting the arts and fostering creativity rather than minimizing it. Therefore, artworks being "reasonably perceived" is a fairly low perspective on originality.

3.4. Case: Fairey v. Associated Press

Fairey v. Associated Press (AP), 578 F. Supp. 2d 1060 (S.D.N.Y. 2008)*[100]* is a copyright dispute concerning AP and artists Shepard Fairey's Obama "HOPE" Portrait, which has

[93] Cariou v. Prince, 714 F.3d 694 (2d Cir. 2013).
[94] Landsman, K. J. (2013). Does Cariou v. Prince Represent the Apogee or Burn-out of Transformativeness in Fair Use Jurisprudence; A Plea for a Neo-Traditional Approach. *Fordham Intell. Prop. Media & Ent. LJ*, *24*(2), 322-379.
[95] *Ibid*., p. 343.
[96] *Ibid*., p. 342.
[97] *Ibid*., p. 343.
[98] Cariou v. Prince, 714 F.3d 694 (2d Cir. 2013). para 61-62.
[99] Enriquez, A. R. (2013). The Destructive Impulse of Fair Use After Cariou v. Prince. *DePaul J. Art Tech. & Intell. Prop. L*, *24*, p. 25.
[100] Fairey v. Associated Press, 578 F. Supp. 2d 1060 (S.D.N.Y. 2008).

become a globally recognized piece of IP. The underlying legal issue was whether Fairey's use of the work could be considered an original work and thus protected by fair use or whether it constituted a copyright infringement.[101] Additionally, Fairey used the image for posters and merchandised it through his clothing company.[102]

The dispute was resolved privately, so there was no official court ruling on whether the photo constituted fair use. However, the case settlement suggests that the fair use defense would have been insufficient in front of a court. To predict whether Fairey's use of the work could be considered original and would constitute fair use, prior case laws and the four-part test can provide insights.[103] Though there was no official court verdict, the case highlights the complexities of how much originality a piece of art must possess to be considered new rather than infringing on the original work, particularly in the digital age, where it is easier than ever to reproduce copyrighted materials.[104] Similar to *Rogers v. Koons,* Fairey profited from the merchandise sold with the image from the poster, indicating that the poster's purpose was for monetary gain, which could be considered to damage the original work's market and be done for commercial purposes. Thus, under Section 107 (1), Fairey's fair use claims would not likely be justified. Furthermore, considering the *Cariou v. Prince* ruling, in which the distinctive artistic elements of Prince's work were emphasized, it is evident that, on the contrary, Fairey's portrait largely replicated the original expression without altering the distinguishing features of the original photograph or presenting new aesthetics.[105] Based on these components, a court would have likely not found originality and ruled in favor of AP.

Nonetheless, as it remains officially unknown whether the portrait constituted fair use, it is worth mentioning that although fair use provides flexibility, rightholders are frequently unable certainly predict the outcomes, pushing more minor defendants often to settle or alter their behaviors.[106] Therefore, despite providing a degree of legal certainty in determining originality, fair use only occasionally works to benefit those who even have copyright law on their side.[107] Although fair use permits building upon previous works, copyright law must protect original

[101] Rosenfeld, S. (2011). A Photo Finish-Copyright and Shepard Fairey's Use of a News Photo Image of the President. *Vt. L. Rev.*, *36*, 355-372.
[102] *Ibid*., pp. 355-356.
[103] *Ibid*., p. 356-357.
[104] *Ibid*., p. 356.
[105] *Ibid*. pp. 368–369.
[106] Pila (2019), *supra nota* 15, p. 595.
[107] *Ibid*.

creators. Even so, the tentative guidelines that fair use provides for what constitutes originality remain necessary.

3.5. Comparing EU and U.S perspectives

Conducted research reveals that originality in both the EU and U.S. copyright law is a concept that has been influenced and shaped by court practice to a great extent. The analyzed case laws reveal that both legal systems have a long tradition of acknowledging the conflict between originality in derivative works and copyright protection and recognizing the struggle between original copyright holders and appropriation artists. Originality is viewed as a copyright standard in both legal systems, particularly underlined by creative expression, a prerequisite for a work to fall into the domain of copyright law. While U.S. courts have clarified that derivative works meeting the "minimal degree of creativity" are considered original, the CJEU has undefined this level of creativity. Both understandings of originality suggest that the author's effort, skill, or labor in establishing an artistic work does not amount to originality but, instead, the tangible expression of the author's intellectual effort and personality portrayed through various creative aspects. This is particularly evident when comparing the resonating outcomes of *Painer* and *Cariou v. Prince*. Both courts considered the unique characteristics that gave the works their distinctive nature and reflected their author's personalities, making them original.

As demonstrated by Chapters 3.2-3.4, fair use works as a relevant defense for artists creating works with appropriated elements that challenge the copyright law threshold for originality. Although originality and fair use are separate concepts in IP law, as observed, they often overlap and work collectively in considerations dealing with the copyright protection of derivative works. The case law examination reveals that in American copyright law, fair use is determined by the intent and nature of the use, the character of the copyrighted work, the quantity of the pre-existed materials used, and the impacts of the usage on the market of the original work.[108] What can be understood is that the U.S. codification of fair use has offered artists leeway and frequently serves as a defense.

[108] 17 U.S.C. § 107 (1976).

The author recognizes that both legal systems can learn from one another. However, to serve the purpose of this thesis and address the objectives it is meant to explore, the considerable focus will be given to whether fair use could provide prospects for EU copyright law in the context of discovering originality and safeguarding derivative works. The author believes European copyright law could benefit from the fair use doctrine. The codification of fair use works as a means for greater legal flexibility[109], artistic freedom, and transparency when determining originality. From the author's point of view, these are precisely the factors missing in CJEU's attempts to harmonize the notion of originality. Compared to the U.S., it can be argued that the EU has more rigid copyright laws, imposing uncertain legal positions for authors of derivative works.[110] The author argues that the four-part test, for this reason, provides more open guidelines for determining originality than the European "free and creative choices" stipulated by the AOIC criterion. The cases examined reveal that the doctrine fundamentally supports the notion of copyright law promoting the arts rather than blocking future creativity. Fair use provides spaces for artists to work, which should be preserved. In this context, our perspective is that fair use even encourages originality and creative expression in the arts. Further, it benefits appropriation artists by setting a precedent for what constitutes originality and what is considered a mere copy.

The author regards that fair use does not make copyright protection easier, justify copying, negate balancing the rights of original copyright holders, or discredit the originality requirement. Instead, under the defense, artists must still create transformative works to be considered original, as it holds the requirement that derivative works provide a separate artistic intent while preserving harmony between protecting original copyright holders.[111] The ruling of *Rogers v. Koons* fundamentally solidifies this stance, as it holds that copyright protection allows no space for copying both a work's idea and expression.

Even with this, the author also considers that while fair use promotes legal flexibility, it can cause legal uncertainty and unpredictability in determining originality, as seen in the two different court outcomes in *Fairey v. Prince.* The doctrines' case-by-case application and the

[109] Geiger, C. (2021). 'Fair Use' through Fundamental Rights: When Freedom of Artistic Expression allows Creative Appropriations and Opens up Statutory Copyright Limitations. *published in: S. Balganesh, WL Ng-Loy and H. Sun (1st ed..), "The Cambridge Handbook of Copyright Limitations and Exceptions", Cambridge, Cambridge University Press*, *174*, 2020-06.
[110] Cabay, J., & Lambrecht, M. (2015). Remix prohibited: how rigid EU copyright laws inhibit creativity. *Journal of Intellectual Property Law & Practice*, *10*(5), 359-377.
[111] McEneaney, C. L. (2012). Transformative Use and Comment on the Original-Threats to Appropriation in Contemporary Visual Art. *Brook. L. Rev.*, *78*. p. 1551.

fact that European courts lack experience with fair use and its balancing raise concerns.[112] The introduction of the doctrine could benefit the European copyright law environment; however, it certainly would not fit easily in, and how it would be implemented is a conversation that goes beyond the scope of this thesis. We do not believe that EU copyright law has time to develop such an adoption. Therefore, while the significance of the legal flexibility and guidelines fair use could serve for establishing originality in derivative works of art is undeniably noteworthy, the author is of the stance that the recommendations set out in Chapter 2.5 would be more legitimate tests of further developing the EU threshold for originality.

Hereby, the upcoming chapters will focus on finally addressing recommendations for further harmonizing the CJEU-paved interpretation of originality in view of appropriation art while also considering the future of the European copyright law environment with the digitalization of derivative works.

[112] Pila (2019), *supra nota* 15, p. 596.

4. REDEFINED APPROACH TO COPYRIGHT PROTECTION

4.1. What Should be Considered Original in Appropriation Art?

The commonly held view is that subjectivity is the foundation of the creative arts.[113] This open interpretation complicates the assessment of whether originality should also be viewed subjectively, calling into question what is "original" or "originality". Challenging the concept of originality, philosophers among appropriation artists have been of the stance that there is no such thing as "originality" in art.[114] Julie C. Van Camp argues that by outright denying the existence and significance of originality, such stances fail to consider the complex nature of originality.[115] The author of this thesis agrees with the latter view; originality should not be taken as a pointless copyright criterion. Although originality in art remains in the eye of the beholder, the legal definition of it must be more definite and understood objectively despite an author's intent.

Originality is the basis of copyright protection, and disregarding it would discredit the ongoing EU's copyright originality harmonization progress. The above reveal that originality is nuanced and a complex copyright matter that cannot be viewed in a black-and-white sense. The same idea applies to appropriation art. As addressed, originality in appropriation art is linked to various factors: the degree of transformation, the context of the artwork, the creative input, and even the portrayal of the author's personality. All around, these creative factors determining originality come down to the extent to which an artist transforms pre-existing materials used in artistic works into something distinctive and, thus, original. The creative elements an artist incorporates into their work give it originality in both idea and expression, making it fall in the domain of copyright protection. More, with the above, it is evident that merely copying and

[113] Ellis, J. W. (2020). Appropriation Art and the Law: Originality is in the Eye of the Beholder. *IOSR Journal of Humanities and Social Science*, 25(10), p. 23.
[114] Van Camp (2007), *supra nota* 8, p. 247.
[115] Van Camp (2007), *supra nota* 8, p. 252.

reproducing pre-existing materials without adding personal creativity or altering the idea or the expression of a work does not amount to originality; copyright leaves room for inspiration but opposes copying. Although fake and original works may appear alike, they have distinct backgrounds; essentially, original works reflect the author's personal creativity.[116] Thus, secondary works are not necessarily intended to substitute the original works but rather work as a means for societies to reconsider how the originals are perceived and benefit societies through this.[117] Hence, the author believes that including various considerations in assessing originality and filtering what is unoriginal clarifies the threshold for originality in the context of appropriation art and ultimately helps establish whether an artist's creative choices exceed copying.

In view of our research question, "What is the threshold for originality in the context of derivative works when seen through the prism of appropriation art?" we argue that originality in appropriation art should be first understood as the relationship between an artist and their work; a work originating from its author[118], and thus, amounting to an AOIC. The nature of appropriation art suggests that such works are rarely created in complete obliviousness, uninfluenced by prior artistic works and artists.[119] As copyright allows for inspiration, such appropriation is still within the limits of copyright as long as an author demonstrates their creative input. Gaining influence from pre-existing works in creating secondary works does not diminish the fact that a work originates from a particular artist and is transformative. Therefore, originality in appropriation art should be evaluated based on the secondary work originating from its author and their creative contributions in creating it. To draw on this, we should also evaluate the methods for determining originality; "how do we determine whether a work originated with an artist or not?"[120] Based on this analysis, if a work is created from pre-existing materials, the threshold for originality would still be reasonable for such appropriated artworks. In determining whether a work originates with an artist, our recommendations in the chapters that follow will assist.

[116] Derakhshani, M. (2020). Investigation of Originality and "Appropriation" in the Creation of Visual Arts. *Peykareh*, *8*(18), p. 91.
[117] Quentel (1996), *supra nota* 90, p. 75.
[118] Van Camp (2007), *supra nota* 8, p. 255.
[119] *Ibid.*
[120] *Ibid.*

4.2. Rethinking the Requirements for Copyright Protection in Appropriation Art

With these preliminary considerations, we must again keep in mind the purpose of copyright to support the arts and provide incentives to create further while safeguarding the rights of original copyright holders. Therefore, a balance must be struck between protecting appropriation art as a form of modern creation while providing that a legitimate test of originality remains so that artists do not have the free will to do whatever they please. The author maintains that the recommendations underlined in Chapter 2.5 help develop the assessment of originality and answer the final research question of this thesis, "What should be the assessment of originality for copyright protection of appropriation art?". Again, the tests are: (a) developing the author's own intellectual creation test, (b) the filtration method, and (c) the objective-observer test. This section aims to clarify and provide guidance on the meaning of each recommendation.

A. Developing the author's own intellectual creation test

The first recommendation for assessing originality in appropriation art this thesis will address is further developing the AOIC test. We have concluded through the analysis of the CJEU cases that despite remaining vague, the AOIC criterion is essential for copyright protection. The author believes that the AOIC criterion should be developed and clarified for the reasons bellow:

Within the article "*Rethinking Originality in Copyright Law and Exploring the Potential for a Global Treshold*," Kotigala importantly notes that international conventions (Berne Convention, WIPO copyrights treaty, TRIPS) regulating IP law have suggested the criterion.[121] Therefore, signatory countries that have already ratified these treaties can incorporate the test into national court practices, and national court structures would remain.[122] Moreover, with this, the criterion alters the existing European legal system the least[123] as the CJEU has already introduced it. In this sense, we believe that the AOIC criterion ensures consistency with international copyright standards. The other significant reason the author supports applying the

[121] Kotigala, M. I. (2016). Rethinking Originality in Copyright Law and Exploring the Potential for a Global Threshold. Retrieved April 14, 2023, from https://www.researchgate.net/publication/311377345_Rethinking_Originality_in_Copyright_Law_and_Exploring_the_Potential_for_a_Global_Threshold
[122] *Ibid*., p. 25.
[123] *Ibid*.

criterion is that we believe it is consistent with copyright law's incentives of promoting the progression of arts. The AOIC test diminishes all other criteria for copyright protection. Hence, originality solely relies on the creative contributions of an author, which carry their personal touch, leaving the threshold relatively low and solidifying copyright supporting creativity.

The author's analysis suggests that applying the criterion is an adequate test of originality; however, despite its positive implications on copyright law, the criterion remains ambiguous. While originality and creativity are often used interchangeably, they have distinctive meanings in the realm of copyright law. As the EU threshold for originality is shifting towards an expression of creativity, the author even more, believes that the CJEU needs to elaborate further on the meaning of creativity and the required level of creativity to meet originality. Defining creativity would prevent varying understandings and applications of the originality criterion in national courts. This would help courts and artists assess what is needed for a work to fall into the domain of copyright protection and, thus, potentially minimize artists infringing on copyrights. We believe that the U.S. copyright law clarification of the "minimal degree of creativity" to meet originality already adds transparency to the standard and sets a precedent for what type of creativity appropriation art should demonstrate. Our reflections on this are that it would also be beneficial for the CJEU to take steps toward determining the minimum level of creative and free choices needed for artistic works to be original and eligible for EU copyright protection. Our stance is that by doing so, copyright could be adaptable enough to accommodate evolving manifestations of creativity better and possibly provide early guidelines for even determining originality in AI-generated artistic works.

B. The filtration method

By the filtration method, we refer to filtrating out what is an unoriginal subject matter.[124] It may be less challenging to identify which aspects of art are *not* original instead of exclusively focusing on finding originality.[125] What is being proposed here is that European courts could apply the filtration test by identifying the potential unoriginality of a work first and then proceeding to establish whether it forms a significant portion of the new work. Once the potential unoriginality of a work is determined, courts could then proceed to consider whether the remaining elements of a work are original and reflect the AOIC because of their creative

[124] Inguanez (2020), *supra nota* 64, p. 808.
[125] *Ibid*.

choices. Adopting this approach would be consistent with the CJEU's *Infopaq* decision, which holds that "*the various parts of a work thus enjoy protection, provided that they contain elements which are the expression of the intellectual creation of the author*".[126] As we have come to understand, the assessment of originality must be an extensive one. The filtration method ultimately proposes that courts assess an artistic work's various relevant and fundamental features while also delimitating what is unoriginal in detail. Hence, this method would make the assessment of originality more multifaceted with the additional focus on whether an artistic work has unoriginal features.

C. The objective-observer test

The objective-observer test is the final recommendation this thesis will address for assessing originality for copyright protection of appropriation art. The objective observer in this context refers to a hypothetical person whose perspective could be utilized as a benchmark for more consistently and reliably determining originality and copyright protection.[127] The idea of an objective observer originates from the fact that having the author of a work determine originality would be a subjective point of view on originality[128] and, therefore, be inadequate, since originality, in legal terms, is an objective test.

In the article "*A Refined Approach to Originality in EU Copyright Law in Light of ECJ's Recent Copyright/Design Cumulation Case Law*," Daniel Inguanez introduces the idea of an objective observer, a "design expert", to help determine originality in industrial designs. In the context of appropriation art, the objective observer could manifest as adopting an art expert's perspective instead of relying on a design expert. An art expert is probably well-equipped to understand industry practices, prior art, cultural and historical contexts of both the original and appropriated work, and the creative process and considerations involved in appropriation art, thus providing a nuanced interpretation of the artwork. An art expert would ultimately aid in determining whether a work originates with an artist, according to our analysis in Chapter 4.1, and acknowledge that appropriation is commonly used in artistic expression. In line with CJEU rulings, an art expert would have to exclude aesthetic considerations and solely focus on the creative aspects of the work. However, it is necessary to note that while an expert could help

[126] Inguanez (2020), *supra nota* 64, p. 808.; referenced in Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009] EU:C:2009:465, para 39.
[127] Inguanez (2020), *supra nota* 64, p. 818.
[128] Inguanez (2020), *supra nota* 64, p. 812.

determine a work's originality, their views should not dictate the adjudication process.[129] Instead, when a judge faces issues of copyright protection and appropriation of art, they could consult the objective observer; therefore, their views would constitute evidence in evaluating originality rather than being definitive.[130]

While no solution is flawless, the proposed recommendations involve a number of amendments that both European courts and artists could follow to clarify further the originality assessment for copyright protection of appropriation art. Hopefully, such considerations could work as a means for greater transparency and certainty regarding the originality standard, enhance the court's capacities to deal with particular issues and balance out interests of protecting original authors while promoting creativity in appropriation art and considering the public's rights to benefit from increased creative expression.

4.3. The Future of Copyright in Derivative Works

This thesis has addressed the impact of the copyright law originality standard in view of derivative works. However, it has yet to consider the impacts of technological developments in these fields thoroughly. In recent years, the arts have gained a new ally: generative AI. Generative AI has altered how we produce, consume, and distribute the arts. These new forms of technology-induced and aided creation will continue to influx, as will the novel legal questions related to the emergence of the technological and legal discipline.

Courts and legislators will undoubtedly face challenges adapting copyright law to literary and artistic works created by AI. Given the rapidly developing digital environment, the evolution of the law alone falls short in protecting the expanding forms of creation. Current IP laws remain steadfast, lacking specific guidelines regarding generative AI and the unique issues imposed by given works.[131] A clear regulatory framework in these areas is needed, primarily concerning two topics "(1) how can IP rights for AI systems be protected, and (2) how should creations of AI systems be protected".[132] The EU has already allocated resources and increased

[129] Inguanez (2020), *supra nota* 64, p. 813.
[130] *Ibid*.
[131] Lanquist, E. D., & Rota, D. (2023). Intellectual Property Legal Issues Impacting Artificial Intelligence. Baker Donelson. Retrieved April 28, 2023, from https://www.bakerdonelson.com/intellectual-property-legal-issues-impacting-artificial-intelligence
[132] Wolf Theiss. (2021). Artificial Intelligence and the Future of IP Rights. Wolf Theiss Insights. Retrieved April 18, 2023, from https://www.wolftheiss.com/insights/artificial-intelligence-and-the-future-of-ip-rights/

efforts to determine the most suitable approaches to dealing with copyrights for AI-generated works.[133] Still, these topics remain blurry, with limited data available to scholars indicating that there will likely be no definite answers in the near future on whether AI-induced works can be considered derivative and, thus, copyrightable. Nonetheless, the findings of the previous chapters of this thesis imply that, in principle, AI-generated creations cannot likely fall into the domain of EU copyright protection. As established, copyright protects original works created by human authors reflecting their own intellectual creations with the author's personal stamp and free and creative choices. Moving forward, if we were to consider AI-generated works original, whether we must redefine the scope of authorship to include non-legal entities is a burning question.

A recent example of these challenges is the case of the viral AI-generated song 'Heart on My Sleeve' featuring Canadian artists Drake's and The Weeknd's vocals. The song has been removed from multiple streaming sites, and the Universal Music Group (UMG) has condemned the song for "infringing content created with generative AI".[134] The use of AI to create new works per se begs the question of the limits of copyright, particularly in terms of authorship and the fair use doctrine. Thus, an appropriate distinction must be struck between AI creations made with human intervention and those made without any. Another relevant example is the case of non-fungible tokens (NFTs), which are revolutionizing the digital art market. Applying copyright law to NFTs has also remained uncertain, and courts have yet to determine whether copyright protection should be expanded to NFTs.[135] Although inherently linked to a pre-existing work, NFTs lack the necessary "embodiment" to be considered copies or derivative works.[136] NFTs are associated with the underlying work, but an actual NFT does not contain the underlying work; instead, the encrypted data only contains URLs that permit access to digital content.[137] Hence, the content would be considered infringing if the digital content on the links contains a sizable portion of the pre-existing copyrighted material.[138] These examples highlight the complexities of how digital technology is already transforming the arts and how

[133] Hristov, K. (2020). Artificial intelligence and the copyright survey. *Journal of Science Policy & Governance,* 16(1). p. 2.
[134] The Guardian. (2023). AI song featuring fake Drake and Weeknd vocals pulled from streaming services. Retrieved April 18, 2023, from https://www.theguardian.com/music/2023/apr/18/ai-song-featuring-fake-drake-and-weeknd-vocals-pulled-from-streaming-services
[135] Behzadi, E. (2022). The Fiction of NFTs and Copyright Infringement. *University of Pennsylvania Law Review Online's, 170,* 1-7.
[136] *Ibid*., p. 7.
[137] *Ibid*., p. 6.
[138] *Ibid*.

it is now more accessible than ever before for people to use pre-existing works for their creations. As a result of these causes stretching the limits of what art is, IP law must adapt. It is certain that these newly emerging developments are just the beginning of the future of European IP law.

To conclude, the emergence of generative AI has already challenged the current copyright law system and will continue to do so. The legal field will have to continue to work to keep up with changing forms of art facilitated by new technological advancements. These factors press us to consider whether copyright law suffices in its present forms and whether principles of copyright law, including originality and authorship, should be reconsidered. AI-generated content even calls into doubt whether copyright protection is suitable for safeguarding given works.[139] Overall, it is evident that looking ahead, a re-evaluation of copyright law is necessary to guarantee that it continues providing proper protection in the face of technological advancements in the digital age. Further research, studies, and case laws addressing these issues would give more insights into the future course of the EU copyright environment for derivative works.

[139] Florea, F. (2022). Artificial intelligence and the future of IP rights: A distinct system for creations by AI may be the answer. Wolf Theiss. Retrieved April 25, 2023, from https://www.wolftheiss.com/app/uploads/3000/09/Flavius_Florea-AI-and-the-future-of-IP-rights.pdf

CONCLUSION

The threshold for originality in derivative works of art has been a polarizing topic in EU copyright law and remains a complex matter requiring a nuanced approach. What is the threshold for originality in the context of derivative works when seen through the prism of appropriation art? What should be the assessment of originality for copyright protection of appropriation art? What is the relevance of the American doctrine of fair use in the context of derivative works under EU Copyright Law? These are the fundamental questions this thesis has aimed to explore and answer.

This thesis begins by discussing the emergence of art law. Then it moves on to analyze and consider the most suitable choices for protection that IP law offers to artistic and literary works. Through the cases underlined in this thesis, we have come to understand that copyright law remains the fundamental form of IPR applicable to the protection of the creative industry and, as such, was given the primary focus by the author. Hereon, this thesis focused on examining and presenting the key notions for protecting derivative works under European and American copyright laws while considering the originality standard and assessing the U.S. fair use doctrine. Thus, we considered whether the EU threshold for originality needs to be revised to enhance the copyright protection of derivative works of art and whether adopting the fair use doctrine could provide solutions. Also, this thesis has proposed the most effective solutions in light of adding more transparency into the CJEU assessment of originality, particularly concerning appropriation art, with hopes of further enabling the ongoing CJEU-paved harmonization of the notion of originality. Moreover, as art is already beginning to look different with its digitalization, this thesis also briefly underlined the future challenges digitalized derivative works pose for the European copyright environment.

The CJEU cases present that originality requires artistic works to reflect the AOIC by demonstrating their personality and free and creative choices. Although the CJEU's efforts in this realm, originality is still understood vaguely, as underlined, artists and legal scholars tend to have contrasting perspectives on what qualifies as originality in artistic works. Upon

reflection, determining originality in derivative works remains complicated, placing a large margin of discretion on courts. Here, our study reveals a need to further clarify the concept, particularly in terms of creativity stipulated by the AOIC criterion more extensively.

While the requirement for originality is essential for safeguarding the interests of creators, copyright law must also maintain a balance with supporting innovation in the arts. Therefore, this thesis recommends that EU copyright law should adopt a more transparent approach to determining originality in cases involving unconventional forms of art. The recommendations set out by this thesis are mainly directed toward the CJEU and national courts at the EU level. As presented, these recommendations include further clarifying the author's own intellectual creation test, the filtration method, and the hypothetical objective observer. We believe these recommendations would provide more guidance to courts and artists while ensuring copyright law remains effective in the digital age.

We are hopeful that the findings of this thesis could contribute to the ongoing conversations on the role of IPR in the art industry and assist in finding a middle ground between protecting copyright holders and fostering creativity in the arts.

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