

# It Is Unnecessary for the EU “AOIC” Test to Be an International Standard of Originality

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**Abstract:** Originality standard is one of the core provisions of copyright laws in various countries. Its function is to filter those works that are not original, so as to bring the eligible works into the protection scope of copyright law. The controversial issue in this area is whether or not the harmonisation of the originality standard is necessary.

**Keywords:** Copyright; Originality; AOIC Test

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## Introduction

This essay will firstly demonstrate different standards adopted by EU member states including the UK, Germany, and France, and then discuss the harmonisation in EU (which is partly successful), and finally, by stating the international position and the US approach in relation to originality to draw a conclusion that it is difficult and unnecessary for the EU “AOIC” test to be an international standard.

## The position of UK

The UK has different thresholds of originality for different kinds of works. Firstly, section 1(1)(a) of CDPA requires the literary, dramatic, musical, and artistic works (LDMA) to be “original”, the relevant test is constituted by two elements, the first element is the work needs to be originated from the author (*University of London Press* case), and the second element is the author must put in a certain amount of labour, judgment, and skills in the process of creating works (*Walter v Lane* case). This two-elements-test was recognized by *Ladbroke v William Hill* case and *Meltwater* case. Moreover, in terms of the artistic works, the court in *Interlego v Tyco* case added another requirement that the alterations must be material or visually significant to the test of skill, labour, and judgment. Secondly, as for sound recordings (s. 5A(2)), films (s. 5B(4)), broadcasts (s. 6(6)) and published editions (s. 8(2)), the threshold of originality is not to be copied. Thirdly, the originality requirement for databases in the UK is an EU heritage which means the database is original when it is the author’s own “intellectual creation”.

## The position of France

In terms of France, the core provisions of the originality test are article L111-1, article L112-1, and article L112-3 of the French Intellectual Property Code 1992. These provisions imply that the standard of originality in France is “work of the mind”. And this statutory requirement has been described as an “imprint of the author’s personality” or “reflection of the author’s personality” through French case law. However, in terms of the specific types of works, the requirement of originality has been changed. Specifically, firstly, if the work is software, the requirement of originality is an intellectual contribution which means the court needs to see whether or not the software is original enough by comparing it with pre-existing software. For examples, in *Pachot* case, the French court found that the software in that case was original because it had intellectual input or contribution; in *Computer Associates v Faster* case, the court concluded that the stamp of the personality from possible choices during the process of creation which can be seen as an intellectual

contribution. Secondly, as for the photographs. The court in *EDI v Schwartz cf Castelli* case found that the originality comes from the creative choices during the photoshoot by the author, such as the angle, lighting, location, etc. The third one is about the titles, whether original titles are protected by copyright law in France is still controversial (*Manon case and Angélique case* have opposing judgements). The last one is about the compilation, the originality comes from the choices and arrangements of the compilation by the author, for instance, the court in *Erhmann* case concluded that the dictionary of collective agreements that shows creative choices and arrangements of the author is original.

## The position of Germany

Regarding Germany, although s. 2(2) of German Authors Rights Law 1965 regulates that the requirement of originality is “author’s own intellectual creations” which is the same as the EU AOIC standard, German courts had to establish a specific approach in judicial practice. Before 2004, Germany had a higher-level creativity requirement in originality, especially for applied art. In terms of software, in *Inkasso-Programm*, BGH held in determining whether or not a software has a significantly higher level of creativity, the court needs to compare the existing software with the software performed by the average programmer. Like Aplin argues that in doing so, the court no longer judges the originality by judging that particular software, the court is judging the software in relation to the previous works. In addition, about the photographs, Germany has two ways for protection, the first is protected as photographic works (Article 2(1), 70PMA) which need the photographs to be qualified as personal intellectual creations; the second way is based on protection of related right (Article 72) that does not need the photographs to be qualified as personal intellectual creations, and the term of protection is 50 years after publication. Moreover, as for compilations (Kleine Munze), the BGH still used the “minimum level of creativity” standard to concluded that the telephone directories were not personal intellectual creations in *CD Rom* case. However, Aplin argues that the level of creativity concept adopted by Germany may confuse originality with novelty and inventive step notions. In 2004, the amendment to designs law changed the requirement for protection to a lower level as the EU software directive was implemented. Later on, the BGH in both *Seilzirkus* and *Geburtstagszug* discussed the rationality about the level of creativity concept, and the BGH in the latter case concluded that this standard is no longer applicable. Currently, the originality standard in Germany is “author’s own intellectual creation”.

## The EU harmonization

As discussed above, there is a huge divergence between EU member states in relation to the standard of originality. Therefore, the EU wants to create a harmonizing environment in this area. According to judicial practice, since other more traditional works are more likely to conform to originality standards by nature, the disputes among member states regarding originality standards are mainly focused on software, photographs, and databases. Therefore, in the statutory aspect, the EU has introduced three special Directives to try to harmonize the standards of originality. Article 1(3) Software Dir, Article 6(1) Term Dir, and Article 3(1) Database Dir respectively stipulate a common originality standard, that is, the author’s own intellectual creation. Moreover, in the judicial aspect, the harmonization started with the EU InfoSoc Directive which has harmonised certain economic rights and exceptions for all kinds of works. Here, the *Infopaq* case is the concrete authority in relation to the test of originality for all types of works in EU. The CJEU in this case stated “only through the choice, sequence, and combination of those works that the author may express his creativity in an original manner and achieve a result which is an intellectual creation” which means the AOIC test is also applicable to literary works. Therefore, since this case, the AOIC test has been applied to all kinds of work (Rosati, 2013). After *Infopaq*, almost all subsequent cases followed the AOIC test for originality, such as *Bezpečnostni* case (user interface), *FAPL v QC Leisure* cases (sports events), *Painer* case (portrait photograph), etc. And in *Levola Hengelo* case, based on the original AOIC test, CJEU added a requirement for identifiability because the taste of a cheese is hard to be identified.

The EU harmonisation for originality is only partially successful. The successful part is that although there are only three specific Directives in the EU at the statutory aspect, they are related to three categories of works: software, databases, and photography, CJEU determined in the *Infopaq* case that the AOIC test is also applicable to literary works. After *Infopaq*, CJEU successively applied the AOIC test to other different types of works. So, in general, from this perspective, the harmonisation of the AOIC test in Europe is

successful. However, the unsuccessful part is also very obvious. Casas Vallés (2009) argues that within each harmonized sector and under the umbrella of a common AOIC test, the traditional national standards still subsist. For examples, UK only introduces “author’s own intellectual creation” in s.3A CDPA 1988 for databases, one of the typical manifestations is that the UK court followed the opinion of CJEU in the *Football Dataco v Yahoo! UK Ltd* case that it continued to rely on the InfoSoc Directive and restated that the intellectual creation was about creative choices; France has not made any changes to its domestic laws because it believes that it has met the requirements of the EU.

## The position of US

In addition to the EU, referring to the international position and the US approach of originality test is meaningful for the question of whether or not the EU “AOIC” test should be the international standard. Specifically, so far, the definition of originality standards in the Berne Convention seems vague, which leaves a lot of room for the member states to further develop their own originality standards. The reason is that the specific expression “intellectual creation” is shown by Article 2(5) of the Berne Convention. Ginsburg (2006) mentions that in the absence of a conventional definition of originality, this particular provision allows member states to develop their own different interpretations of the minimum of intellectual creation. Besides, both Article 10 of the TRIPS and Article 5 of the WIPO Copyright Treaty regard “intellectual creations” as the standard of originality in relation to computer programs and data compilations.

As for the US, section 102 of US Copyright Act regulates that copyright protection subsists in original works of authorship. Since it is also a vague statutory requirement, the US courts have been developed a relatively concrete approach. Specifically speaking, in terms of originality, take *Feist* case as the critical point, American case law can be roughly divided into two different periods: Pre-Feist case law and Post - Feist case law. Firstly, before the Feist case, the test adopted by the US court was called “sweat of the brow” test. Both in *Burrow-Giles Lithographic Co v Sarony* case, *Jeweler’s Circular v Keystone* case, and *Triangle Publications* case, the courts concluded that the requirement of originality is skill, judgement, and labour. Moreover, in *Sheldon v MGM* case, another point was clarified by the court is that the originality is not novelty. So, the Pre-Feist case law can be summarized as two-elements-test which includes skill, judgement, and labour and not novelty. Secondly, the landmark case of originality in the US is *Feist Publications v Rural Telephone* case since the court in this case overturned the previous “skill, judgement, and labour” test and adopted a more rigorous “minimal level of creativity” test. In this case, the judgment report says that original means the work was independently created by the author and that it possessed at least some “minimal degree of creativity” and the justice O’CONNOR (1991) states that the reason why Rural’s white pages lack the necessary originality is copyright law rewards originality, not effort. Thirdly, after Feist case, the courts in *Bellsouth Advertising* case, *Key Publications* case, and *Ets-Hokin v Skyy* case all followed the “minimal level of creativity” test. Accordingly, the current test of originality in the US is the “minimal level of creativity” test. After the Feist case, there have been related controversies, for example, Ginsburg (1992) states that on the one hand, the supreme court stressed a constitutional standard of creative originality and a constitutional principle of free-riding on uncreative efforts. On the other hand, Feist may also make access to information both more “burdensome and expensive”.

## Conclusion

To sum up, within the EU, although the EU harmonisation is successful since the CJEU successively applied the AOIC test to other different types of works after *Infopaq*, there is also a huge divergence between member states in relation to the originality test. Therefore, the harmonisation is only partly successful. In addition, even outside the EU, by stating the international position and the US approach, the test of originality is not harmonised. Moreover, Casas Vallés (2009) argues that based on the Working Paper of 2004, there are no indications that a lack of harmonisation would cause any problems for the internal market. Accordingly, at this stage, as discussed above, it is difficult and not necessary for the EU “AOIC” test to be an international standard.

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