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"The common definition of a copyright work in the European Union

- the harmonization of the originality standards five years after "Infopaq" ruling of the European Court of Justice"

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Introduction

The legal definition of a copyright work determines the requirements that have to be fulfilled in order to be granted protection by copyright. It describes the subject and the scope of the copyright law.[1] It differentiates the works protected by copyright from those which are not protected. Furthermore, the copyright work definition is helpful for solving possible overlaps with the other intellectual property rights, particularly with the industrial design rights. A "work" concept should also determine a balance between the interest of authors and users of their works while the first group is interested in obtaining the widest possible protection of their works, and the second group would like to have free access to all the cultural achievements without respect to the copyrights.[2]

Due to the territoriality principle and lack of full harmonization of the copyright law within the European Union, each Member State is generally entitled to determinate the copyright protection requirements independently.

In the last years, we were witnessing a progressive development in the area of a common concept regarding copyright work requirements at the EU-level. This development has been achieved in several steps, but it has not been completed yet. The first step was the selective harmonization of the copyright protection requirements in the copyright directives that are applicable to particular kinds of works such as computer programs, databases or photographs. Since 2009, we have also been able to observe partial standardization of the definition of a work established by the European Court of Justice in its judicature. The significant rulings have been issued in the preliminary questions proceedings according to interpretation of the provisions of copyright directives.

Since the ruling given in the case "Infopaq"[3], the ECJ has adopted the originality standard ("author's own intellectual creation") of computer programs, databases and photographs for the other categories of works. In the subsequent judgments: "BSA/Ministry of Culture"[4], "Painer/Standard"[5], "FAPL/Murphy"[6], "Football Dataco"[7] or "SAS Institute"[8] the ECJ referred to the "Infopaq" decision, concretized an originality standard and confirmed that this kind of interpretation shall be binding.

Some controversies arise from the above mentioned ECJ's rulings connected with the methods used by the ECJ and with the competence of the ECJ in harmonization of the copyright issues which have not been regulated voluntarily by the Member States yet. It is also not clear whether the national courts are bound by the rulings issued by the ECJ or whether they are allowed to rule using their own originality standards.

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[1] Loewenheim, in: Schricker/Loewenheim, Urheberrecht. Kommentar, 4th Ed. 2010, § 2 point 2.
[2] Straub, Individualität als Schlüsselkriterium des Urheberrechts, in GRUR-Int., 2011, p.3.
[3] European Court of Justice (ECJ), judgment of 16.07.2009, in GRUR 2009, p. 1040 et. seq.
[4] ECJ, judgment of 22.12.2010, in GRUR 2011, p. 220 et. seq.
[5] ECJ, judgment of 1.12.2011, in GRUR 2012, p. 166 et. seq.
[6] ECJ, judgment of 4.10.2011, in GRUR-Int. 2011, p. 1063 et. seq.
[7] ECJ judgment of 1.03.2012, in ZUM-RD 2012, p. 181 et. seq.
[8] ECJ, judgment of 2.05.2012, in GRUR-Int. 2012, p. 534 et. seq.

Five years after "Infopaq" ruling, there is no doubt that the ECJ's judicature provoked in some Member States a discussion over a definition of copyright protection. It may be also observed that the ECJ's rulings were transposed to some extent into the national jurisprudence of the Member States. Consequently, the national courts are increasingly taking the common standards into account (for example in UK in the case "Meltwater"[9],"Red bus"[10] or recently in Germany in the decision of BGH "Geburtstagszug"[11]).

This short article is an attempt to present the development of the common copyright work definition in the European Union from the introduction of the first common regulation dedicated to software till the current times. The paper includes analysis of common originality standards set forth by the ECJ's jurisprudence. The subject is analyzed from a continental perspective of copyrights, however the author took also into account a diversity of the legal systems within the European Union.

I. Between *droit d´auteur* and *copyright*

To better understand difficulties of the development of common copyright standards it is necessary to pay attention to the problem of diversity of copyright traditions existing within the European Union. There are the continental *droit d' auteur* on the one hand and the Anglo-Saxon copyright tradition on the other hand. Under these legal and political circumstances, the full harmonization of the European copyright law was not possible. All the more so, these both systems have large differences in the general principles, inter alia in the definition of a copyright work.

(a) An author and his personal as well as economic interests stand in the foreground of the **continental tradition**. The focus on the author's person and his work as a result of the creation process has also an impact on the understanding of protection requirements. In the national copyright regulations a work is described in several different ways: in Germany as "personal intellectual creation"[12], in Austria as "original intellectual creation"[13], in Poland as "any manifestation of creative activity of individual nature",[14], in France as " intellectual work"[15] or in Italy as "intellectual work with the creative character".[16]

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[9] England and Wales Court of Appeal, Case No: A3/2010/2888/CHANF, [2011] EWCA Civ 890.

[10] England and Wales Patent County Court, case No: 1CL 70031, [2012] EWPCC 1.

[11] German Federal Court of Justice (BGH), judgment of 13.11.2013, in NJW 2014, p. 469 et seq.

[12] § 2 Abs. 2 of the German Act on Copyright and Related Rights of 9.09.1965, BGBl. I 165 p. 1273, "*persönliche geistige Schöpfung*".

[13] § 1 sec. 1 of the Austrian Federal Act on Copyright in Works of Literature and Art and on Related Rights, Federal Law Gazette No. 111/1936 (StR: 39/Gu BT:. 64/Ge p 19), *"eigentümliche geistige Schöpfung"*.

[14] article 1 sec. 1 of the Polish Act on Copyright and Related Rights of 04.02.1994, Dz. U. nr 80 z 2000r. poz. 904, *"każdy przejaw działalności twórczej o indywidualnym charakterze, ustalony w jakiejkolwiek postaci"*.

[15] article L 122-1 of the French Intellectual Property Code of 1.07.1992, "*ouvres de l'esprit*'.

[16] art. 1 of the Italian Copyright Act No 633 of 22.04.1941, "*opere dell ingegno di carattere creativo*".

All these definitions have a common element, namely copyright works shall not only meet the criteria of originality, but be also influenced by the author's individuality.[17] However, it is important to emphasize that the jurisprudence in each country developed its own understanding of the originality. Differences between them relate primarily to the required individuality level ("Gestaltungshöhe"). This level may be defined in such way that even the so called "kleine Münze" ("small coin")[18] will be protected or it may be advanced to protect only a very individual creation. Most of the national copyright systems include not only generally formulated protection requirements, but also the enumeration of the protectable work categories according to the provisions of the Berne Convention.[19] Differentiation between the copyrights and related rights is also characteristic of the continental copyright systems.[20]

(b) The ***copyright* system** focuses on an effect of an author's contribution to a work and on interests of people who gain economic profits from the work. It is not necessary to be an author. Copyright protection is all what is "worth of copying".[21] The term "work" refers to the work itself in the classic, continental sense and to the related rights.[22]

The criterion of originality is fulfilled if a work comes from the author and is not a copy of another work.[23] In the United Kingdom a test is known for literary, dramatic, musical and artistic works by which it can be checked whether there was sufficient "*labour, skill and effort*" expended into the work.[24] In comparison with the continental understanding of originality, the British criteria are not very strict. No special creativity level is required. The test result is positive if some investment in the form of a work or special author's knowledge was given or some expenses were made. This fundamental difference between both systems arises from the fact that the common law system has no sufficient protection against unfair competition.[25]

In the last years, the harmonization of two systems within the European Union has been observed, but it is still remarkable that these systems originate from very different traditions and requirements. At the EU-level, it leads to conflicts of interests over the shape and direction of the development of common copyright legislation. For this reason and in order to strike a compromise, the sui generis right for a producer of

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[17] Dreier, in Schricker/Bastian/Dietz, Konturen eines europäischen Urheberrechts, p. 17, 22.

[18] Schulze, Der Schutz der kleinen Münze im Urheberrecht, in GRUR 1987, p. 769 et seq.

[19] *Berne Convention* for the Protection of Literary and Artistic Works. of September 9, 1886, completed at PARIS on May 4, 1896.

[20] Ellins, Copyright law, Urheberrecht und ihre Harmonisierung in der Europäischen Gemeinschaft, p. 87.

[21] Ellins, ibid., p. 92.

[22] sec. 1(1) of the British Copyright Design and Patent Act (CDPA) of 1988, "*Copyright is a property right which subsists in accordance with this Part in the following descriptions of work: (a) original literary, dramatic, musical or artistic works, (b) sound recordings, films or broadcasts, and (c) the typographical arrangement of published editions.*"

[23] Ellins, ibid., p. 91; v. Gamm, Die Problematik der Gestaltungshöhe im deutschen Urheberrecht, p. 210.

[24] Ellins, ibid., p. 90.

[25] Ellins, ibid. p. 93.

databases has been introduced by the Database Directive.[26] Also the harmonized originality standard is interpreted as a "middle line" between *droit d'auteur* and *copyright*.

II. Definition of a work in *acquis communautaire*

The copyright law is one of the areas of the European private law that has been only partially harmonized. There is no common legal act regulating all the aspects of copyright, so it can only be said that "creation of the system" is in progress[27]. This system exists at two levels, there is the national copyright legislation with territorially limited areas of its application on the one hand and the EU law with numerous directives which attain their validity after their implementation in national legal systems on the other hand.[28]

The copyright *acquis communautaire* currently consists of eight directives that regulate rather specific issues such as software[29] or databases protection, the resale rights,[30] a term of a protection,[31] the rental and lending rights,[32] satellite and cable transmission,[33] the distribution and reproduction rights in the information society[34] or the use of orphan works.[35] It is also necessary to add the Enforcement Directive,[36] which refers to an infringement of the intellectual property rights in general.

The *acquis communautaire* contains no general definition of the copyright work. The term "work " can be found in all copyright directives in relation to various types of work such as

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[26] article 7 et seq., Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, OJ L 77, 27/03/1996, p. 20–28.

[27] Riesenhuber, in: Riesenhuber, Systembildung im Europäischen Urheberrecht, Schriften zum Europäischen Urheberrecht, INTERGU-Tagung 2006, p. 5 et seq.

[28] Dreier, in: Riesenhuber, Systembildung..., p. 45.

[29] Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (Codified version) (Text with EEA relevance), OJ L 111, 05/05/2009, p. 16–22.

[30] Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art, OJ L 272, 13/10/2001, p. 32–36.

[31] Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights, OJ L 265/1, 11/10/2011,

[32] Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version), OJ L 376, 27/12/2006, p. 28–35.

[33] Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, OJ L 248, 06/10/1993, p. 15–21.

[34] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, OJ L 167, 22/06/2001, p. 10–19.

[35] Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works Text with EEA relevance, OJ L 299, 27/10/2012, p. 5–12.

[36] Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, OJ L 157, 30.4.2004.

music, visual arts, architecture or cinematographic works.[37] Most often, the directives do not introduce any legal definition of the work but just refer to the relevant national law.

The protection requirements have been determined only for three kinds of works, namely for computer programs (a), databases (b) and photographs (c).

The need to harmonize protection requirements for these types of works was justified by the fact that "whereas copyright protection for databases exists in varying forms in the Member States according to legislation or case-law, and whereas, if differences in legislation in the scope and conditions of protection remain between the Member States, such unharmonized intellectual property rights can have the effect of preventing the free movement of goods or services within the Community"[38]

(a) The first step to the uniformity was the harmonization of the protection requirements for the computer programs introduced by the Software Directive. According to article 1 sec. 3 clause 1 of the Software Directive a computer program shall be protected if it is "original in the sense that it is the author's own intellectual creation". No other criteria shall be applied to determine its eligibility for protection what indicate an exclusive character of originality criterion.

(b) There followed the harmonization of the protection requirements for a database. Databases are defined as "collection of works, data or other independent elements arranged in a systematic or methodical way and individually accessible by electronic or other means".[39] The protection is ensured by the two-track system: copyright on the one hand and sui generis right on the other hand. Whereas the sui generis right protects interests of database developer who takes the initiative and the risk of investing, copyright protection is oriented more on the author who created a database.[40] For sui generis protection it is sufficient to make substantial investments, while for copyright protection an additional requirement has to be met.

According to article 3 sec. 1 of the Database Directive, databases which by reason of selection or arrangement of their contents, constitute the author's own intellectual creation shall be protected as such by copyright. Also here no other criteria shall be applied to determine eligibility for protection, in particular such criteria as qualitative or aesthetic values of a database. Because databases are classified as collective works, the above originality standard refers to "selection or arrangement of the contents". This is related to the extent of copyright protection that spreads only to the form and not to the content of a database.[41] The copyright of a person who has created a database by selecting and compiling the individual elements in an original way, need to be distinguished from the copyright protection of the substantial elements used in a database and has no influence on their protection.

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[37] Riesenhuber, in Riesenhuber, ibid., p. 136.
[38] recital 4 of the Database Directive.
[39] article 1 sec. 2 of the Database Directive.
[40] recital 41 of the Database Directive.
[41] article 3 sec. 1 of the Database Directive.

(c) The originality criteria for the photographs have been unified in article 6 of the Term of Protection Directive. Photographs also enjoy copyright protection if they are "original in the sense that they are the author's own intellectual creation". As well as for both other categories of works, no other criteria shall be applied to determine the eligibility for protection of photographs. Especially the value or purpose shall not be taken into consideration.

Additional hints to the originality requirement, which were not laid for software and databases, are provided by Recital 17 of the Term of Protection Directive, which states that "a photographic work within the meaning of the Berne Convention is to be considered original if it is the author's own intellectual creation reflecting his personality, no other criteria such as merit or purpose being taken into account". The introduction of personality elements by assessment of the originality of the photographs is the only difference in comparison with both earlier harmonized categories of works.

The Member States are obliged to gain copyright protection for all photographs that meet the above requirements, but they are also entitled to provide protection for the other photographs in the national legal systems.[42] That means that in particular Member States the photographs which do not represent own intellectual creation, can also be a subject of protection .

All three above presented definitions are based on the same originality criterion regarding the form of "author's own intellectual creation". This criterion shall be the sole requirement for the copyright protection. This "core of a uniform work concept"[43], from the German perspective "reduced originality standard",[44] shows that the European legislator assumed a common understanding of originality concept for so different categories of works.[45] It could indicate that there is some kind of direction in which the European copyright protection is going to develop.

In this context, in the German literature forecasts were formulated that "the European legislator will follow this model also for other categories of works" and for this reason the originality concept of three directives shall "be kept in mind".[46] From today's perspective, this statement was quite accurate, considering the fact that the originality criterion of three Directives was adopted by the ECJ as a ground for EU-wide originality standard.[47]

The harmonization of a definition of work for only three categories of works caused the discussion whether the legislator shall maintain such a solution or shall take further steps towards harmonization of originality standards within the EU. Despite the initial skepticism,

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[42] article 6 sec. 3 of the Term of Protection Directive.
[43] Riesenhuber, in Riesenhuber, ibid., p. 137.
[44] Walter, in Walter, Europäisches Urheberrecht, p. 117.
[45] Riesenhuber, in Riesenhuber, ibid., p. 138.
[46] Walter, in: Walter, ibid., p. 118.
[47] ECJ, Infopaq, sec. 34.

the partial harmonization was successful to that extent that the provisions that laid down the criterion of "own intellectual creation" have been implemented in the national copyright laws. The introduction of universal protection requirements was generally expected, but rather through adopting further legislative measures that reflect a pattern arising from three above mentioned Directives.[48]

In the legal literature, it was raised that further lack of harmonization can cause negative consequences for the internal market. As long as the differences between the Member States are so significant, it comes to the situations that this same object can be protected in one Member State and unprotected in the other.[49] This is an obstacle in the process of further harmonization of copyright standards on the EU-level.[50]

Nevertheless, in 2004 the European Commission has clearly confirmed in the Working Paper that there is no need for harmonization of the originality standard and the Member States can further freely decide about protection requirements in relation to the other categories of works.[51] The Commission was aware of the fact, that in theory, divergent requirements for the level of originality by Member States have the potential of posing barriers to intra-Community trade. However in practice, this seems to be no convincing evidence to support the harmonization. Consequently, the Commission found that "there are no indications that the lack of harmonization of the concept of originality would have caused any problems for the functioning of the Internal Market with respect to other categories of works, such as compositions, films or books" and that "legislative action does not appear necessary at this stage".[52]

The ECJ's ruling in the "Infopaq" case as well as further decisions concerning the originality criterion reopened the discussion about the necessity of the introduction of the common originality standards within the EU. The ECJ, unlike the Commission, found that the copyright protection requirements are indispensable to guarantee uniformity of the interpretation of the Directives.

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[48] Leistner, Konsolidierung und Entwicklungsperspektive des europäischen Urheberrechts, p. 56 et seq.; Loewenheim, in Schricker/Loewenheim, ibid., § 22 point 33.

[49] *Berger*, Aktuelle Entwicklungen im Urheberrecht. Der EUGH bestimmt die Richtung, in ZUM 2012 p. 354.

[50] *Walter*, Updating and consolidation of the acquis. The Future of the European Copyright, "Santiago Speech", p. 5.

[51] Commission Staff Working Paper on the review of the EC legal framework in the field of copyright and related rights, SEC(2004)995, 3.1.

[52] ibid.

III. The rulings of the European Court of Justice regarding to criterion of the originality

1. Procedual issues

The role of the ECJ in the field of copyright law and the number of rulings have risen significantly in recent years. Mainly because of the fact that the copyright directives have now been fully implemented into the national legal systems and cause difficulties with their interpretation. Especially high activity of the ECJ has been observed since the expiry of the implementation period for the so-called InfoSoc Directive in 2003.[53]

Compared to the case law of the 90's, which mainly related to the problem of the relation between copyright and the fundamental freedoms of the internal market[54], competition law[55] or non-discrimination principle[56], the ECJ is dealing nowadays more with the interpretation of terms used in copyright directives, as well as with the solution of issues which go beyond the framework of one directive.

The issues which need to be clarified are submitted to the ECJ by national courts according to the preliminary ruling proceeding. According to article 267 TFEU[57], the ECJ has jurisdiction to give preliminary rulings concerning the interpretation of the Treaties, the validity and interpretation of acts of the institutions, bodies, offices or agencies of the European Union. The competence for interpretation relates to both primary and secondary Union law.

According to the above mentioned regulation, the ECJ is also competent to solve problems with interpretation of copyright directives. The directives have been in the meantime implemented into the national legal systems. However, due to lack of common protection standards it is sometimes difficult to solve very specific cases without actual knowledge of what is the subject of copyright protection.

It should be emphasized, that according to article 288 sec. 3 TFEU, the Member States are not only obliged to implement the directives into national law, but also to interpret the national law in accordance with the provisions and aims of those directives.[58] Due to the various interpretation problems, the courts of Member States can use the preliminary ruling proceeding and request from the ECJ some clarification of the EU-law. Such situation happens, when the interpretation and a decision in the matter of the preliminary question is necessary to give fair judgment by the national court. National courts of the last instance against whose decisions there is no judicial remedy under national law are even obliged to

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[53] van Eechoud, Along the Road to Uniformity - Diverse Readings of the Court of Justice Judgments on Copyright Work, in 3(2012) JIPITEC, sec. 117 et seq.

[54] e.g. ECJ, judgment of 08.06.1971, in GRUR-Int. 1971, p. 450 - Deutsche Grammophon/Metro.

[55] e.g. ECJ, judgment of 06.04.1995, in. ZUM 1996, p. 78 - Magill/ Commission; ECJ, judgment of 29.04.2004, in GRUR 2004, p. 524 - IMS Health.

[56] e.g. ECJ, judgment of 20.10.1993, in ZUM 1993, p. 612 - Phil Collins/Imtrat.

[57] Treaty on the Functioning of the European Union.

[58] Roth, in Riesenhuber, Europäische Methodenlehre, p. 396.

bring the matter before the ECJ. They can depart from this rule only if "the question raised is irrelevant or the community provision in question has already been interpreted by the court or that the correct application of community law is so obvious as to leave no scope for any reasonable doubt."[59]

The scope of the questions concerning the copyright issues is very broad. However, the ECJ often takes over the initiative and reformulates the question appropriate if it finds the explanation of some problematic issues as necessary. It should be pointed out, that the ECJ's case law concerning the concept of the definition of a copyright work was issued on the occasion of the interpretation of the Software, Database, Term of Protection, Satellite broadcasting and InfoSoc Directives. The references were made by the national courts from the Member States such as Denmark, Czech Republic, United Kingdom or Austria. It shows also that the national courts have many concerns about the interpretation of the national copyright provisions in accordance with the directives.

In the above mentioned context, it has to be also emphasized that the national courts play an important role in the development of the European copyright law. Through the submission of the appropriately formulated reference questions they have power to enforce the preliminary ruling of the ECJ and consequently to cause the progress in the harmonization of some aspects of copyright law.[60] As the "Infopaq" and further ECJ's rulings show, this way could be even more effective than the political efforts which have not been successful for many years.

2. The most significant rulings of the ECJ

(a) Infopaq, case C-5/08

A turning point for the common copyright work definition was the ruling of the ECJ in case "Infopaq" of July 2009. In this decision, the ECJ decided that copyright within the meaning of provision of the InfoSoc Directive 2001/29 can only be applied in relation to objects which were "original in the sense that it is its author's own intellectual creation".

The preliminary question actually considered the interpretation of "reproduction in part" and "transient" concepts in the Articles 2 and 5 of the InfoSoc Directive (2001/29/EC). The Danish court asked inter alia whether the concept of 'reproduction in part' within the meaning of Directive 2001/29 has to be understood as the storing and subsequent printing out on paper a text extract consisting of 11 words.[61] The ECJ decided that the exclusive author's right to authorize or prohibit reproduction covered the 'work'.[62] Moreover, it should be understood in the similar way like the term "work" regarding computer programs, databases or photographs. A work in the above mentioned context

[59] ECJ, judgment of 06.10.1982, case 283/81 - CILFIT.
[60] Leistner, Die Methodik des EuGH und die Garantenfunktion der nationalen Gerichte bei der Fortentwicklung des europäischen Urheberrechts, s. 9, online version on https://www.jura.uni-bonn.de.
[61] ECJ, Infopaq, sec. 30.
[62] ibid. sec. 33.

is protected by copyright law only if it is original in the sense that it is its author's own intellectual creation.[63]

The ECJ concluded that the copyright directives are establishing a harmonized legal framework for copyright and the InfoSoc Directive is based on the same principle as the other directives.[64] As a result, the criterion of originality previously applicable only to computer programs, databases and photographs was used by ECJ for the first time in relation to another category of work. This ruling of the ECJ shows that the test whether a work meets the requirements for a copyright protected work is not subject to a national test anymore, but it is a part of an EU-wide concept.

(b) BSA ./. Ministry of Culture, case C-393/09

In July 2010, the ECJ issued the next decision concerning the definition of a copyright work. The preliminary question was submitted by the court of the Czech Republic and concerned interpretation of the Software and InfoSoc Directives. The background of the case was a refusal of the Czech Ministry of Culture to grant BSA authorization to carry out collective administration of copyrights in the field of computer programs. The ECJ had to consider whether a graphical user's interface of a computer program should be protected by copyright law.

Firstly, the ECJ considered whether the graphical user interface can be protected as a computer program and denied such interpretation because of the fact that it only enables communication between the computer program and the user and does not enable a reproduction of a computer program.[65] On this ground it cannot be classified as an expression of computer program in any form and be protected according to the Software Directive.

Furthermore, the ECJ considered whether the graphical user interface of a computer program can be protected by the ordinary law of copyright. The ECJ left the decision to the national court, but gave some concrete hints how to decide it. Consequently, the ECJ referred to the "Infopaq" decision and stated that the graphical user interface can be protected by copyright if it is its author's own intellectual creation.[66] In order to assess it, the national court shall take into account i.a. specific arrangement or configuration of all the components. Moreover, the ECJ expressed the opinion that the criterion of the originality cannot be met by components of the graphical user interface which are differentiated only by their technical function.[67] This element concretized to some extent the originality concept established in the "Infopaq" case but generally the ECJ confirmed the validity of the formerly formulated definition of the originality.

[63] ibid, sec. 37.
[64] ibid., sec. 36.
[65] ECJ, BSA/Ministry of Culture, sec. 40-41.
[66] ibid., sec. 46.
[67] ibid., sec. 48.

(c) FAPL ./. Murphy, joined cases C-403/08 and C-429/08.

In the "FAPL/Murphy" case of October 2010, apart from other interesting statements relating to the interpretation of the Satellite Broadcasting Directive, the ECJ stated that the sports events such as football matches are not capable of being the copyright works. The case concerning the use of decoding devices in the United Kingdom which give access to the satellite broadcasting services, in disregard for the will of broadcasters, namely outside the geographical area for which they have been issued.

In the ECJ's opinion the Premier League matches cannot be qualified as an author's own intellectual creation, because they are subject to rules of the game, leaving no room for creative freedom in the sense of copyright work.[68] Furthermore, the ECJ confirmed, that EU law does not protect sport events in the field of intellectual property, however the Member States can grant them the appropriate protection in other form.[69]

The decision in the "FAPL/Murphy" case referred also to the "Infopaq" case, showing that the ECJ is willing to continue its autonomous and uniform interpretation of the criterion of originality.

(d) Painer ./. Standard, case C-145/10

About a year later, in December 2011 the ECJ issued a judgment in the case Painer/Standard". This case concerned a claim of an Austrian photographer against several press publishers. The press published a school portrait of the kidnapped girl Natascha Kampusch made by Mrs. Painer, which had been made available by the photographer to the police for investigation purposes. One of the questions of the Austrian Court (Handelsgericht Wien) was whether realistic photographs, particularly portrait photographs are copyright protected under Article 6 of the Directive No. 93/98.

The ECJ referred again to the "Infopaq" case and decided that a portrait photograph can be protected by copyright law if it is "an intellectual creation of the author reflecting his personality and expressing his free and creative choices in the production of that photograph".[70]

It should be pointed out, that in this ruling the ECJ added another test which shall be used to check the originality of a work. The concretization of the criterion of originality was based on the Recital 16 of the Term of Protection Directive. As it has already been mentioned, only in this particular Directive there appears an additional element concerning an author's personality. That is why it was not clear at the beginning whether so formulated originality test shall be applied also to the other types of work.

[68] ECJ, FAPL/Murphy, sec. 98.
[69] ibid., sec. 99-100.
[70] ECJ, Painer/Standard, sec. 99.

Furthermore, the ECJ stated that the national court shall in each case determine whether the criteria are fulfilled by the particular photograph and since it has been determined that it is a work, its protection shall not be different from the protection granted to any other work, including other photographic works.[71]

(e) Football Dataco, case C-604/10

The decision issued in the case "Football Dataco" in March 2012 the ECJ summarized the originality criteria formulated in the previous judgments. This case concerned intellectual property rights claimed by Football Dataco and Others over the English and Scottish football league fixture lists. The ECJ stated that it is apparent from recital 16 of Directive 96/9 that the notion of the author's own intellectual creation refers to the criterion of originality.[72]

Furthermore, by analogy with the decision in the cases "Infopaq", "BSA/Ministry of Culture" and "Painer/Standard" the ECJ stated that the criterion of originality is satisfied when, through the selection or arrangement of the data which it contains, its author expresses his creative ability in an original manner by making free and creative choices and thus stamps his 'personal touch'.[73] Finally, the ECJ referred also to the case "FAPL/Murphy" as well as "BSA/Ministry of Culture", because the ECJ stated also that above mentioned criterion is not satisfied when the setting up of the database is dictated by technical considerations, rules or constraints which leave no room for creative freedom.[74]

In this manner, the ECJ confirmed that the criterion of originality established in all its rulings shall be applied regardless of the category of work.

(f) SAS Institute, case C-406/10

The last here presented ruling, which relates to the copyright originality criterion, was issued by the ECJ in May 2012 in the "SAS Institute" case. The reference was submitted by the High Court of Justice of England and Wales in the case concerning an infringement of copyright law in computer programs and manuals relating to the computer database system.

In this case the ECJ referred to the prior decisions about the criterion of an author's own intellectual creation, confirming that the keywords, syntax, commands and combinations of commands, options, defaults and iterations consist of words, figures or mathematical concepts, considered in isolation, are not an intellectual creation of the author of the computer program. However, through the choice, sequence and

[71] ibid., sec. 97-98.
[72] ECJ, Football Dataco, sec. 37.
[73] ECJ, ibid., sec. 38.
[74] ECJ, ibid., sec. 39.

combination of those words, figures or mathematical concepts the author may express his creativity in an original manner and achieve a result, namely create the user manual for the computer program, which will be an intellectual creation.[75] The reasons for "SAS Institute" decisions are formulated quite laconically. It may be a consequence of the fact, that the criterion of originality established by the ECJ in the meantime became a general principle and there was no need to explain the grounds in great detail.

Obviously, the above presented ECJ's rulings show the development of the common originality standard and the EU-wide definition of a copyright work which was the aim of the ECJ since the decision in the "Infopaq" case. The further rulings only have concretized the criterion of an author's own intellectual creations and have confirmed that it should be applicable to all categories of work.

IV. Features of the common definition of a copyright work

Five years after "Infopaq" ruling, it still cannot be said with certainty that the common definition of a work gained a foothold in all Member States. However, some actual decisions of the national courts show that the jurisprudence of the ECJ has exerted an influence on the national notion of the "work" concept.[76]

It is worth mentioning that the reactions to the verdict in the "Infopaq" case were quite cautious and skeptical. It was not expected that the "creeping harmonization"[77] will have an impact on the national protection requirements. The criterion of "own intellectual creation" was merely interpreted as a European minimum standard whose concretization remains within the competence of national courts.[78] In the literature, the point of view was also represented that the full harmonization of the work concept can only be achieved through legislative instruments in the form of a directive concerning only this matter[79] or in the form of the long-awaited EU-wide copyright regulation.[80]

Although the next rulings have confirmed the intention of the ECJ to set up the requirements for the common European work concept.[81] , the process of recognition of the EU-wide work definition has occurred in the typical for the ECJ way of further concretization of its own decisions. At this stage, the contours of the single European concept of a copyright work can

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[75] ECJ, SAS Institute, sec. 66.

[76] e.g. England and Wales Patent County Court, case No: 1CL 70031, [2012] EWPCC 1. - Red Bus; BGH, judgment of 13.11.2013, in NJW 2014, p. 469 et seq - Geburtstagszug.

[77] Schulze, Schleichende Harmonisierung des Urheberrechtlichen Werkbegriffs?, in GRUR 2009, p. 1019 et. seq.

[78] [78] e.g. Leistner, Bei Spielen nichts Neues? - Zugleich Besprechung von BGH, Urt. v. 1.6.2011 - I ZR 140/09 - Lernspiele, in GRUR 2011, p. 763; Schulze, ibid, p.1021.

[79] Schulze, ibid., p. 1021.

[80] Leistner, Konsolidierung..., p. 63 et seq.

[81] Metzger, Der Einfluss des EuGH auf die gegenwärtige Entwicklung des Urheberrechts, in GRUR 2012, p. 121; Berger, ibid., p. 355; Handig, Durch "freie kreative Entscheidungen" zum europäischen urheberrechtlichen Werkbegriff, in GRUR-Int. 2012, p. 973 et seq.

be characterized as author's own intellectual creation which expresses his personality.[82] A work concept is also based on two tests which are collectively referred to as criterion of originality or "simple individuality".

Furthermore, an assessment of eligibility for protection should not rely on any other criteria, in particular may not rely on any qualitative or aesthetic evaluations. The work concept remains open which means that there is no prescribed catalogue of protectable categories of works. Each object that meets the above mentioned criteria may also enjoy copyright protection without differentiation according to the categories of work.[83] Parts of works can also be protected as far as they reach the necessary threshold of originality.[84] Hereinafter, the most important components of the common copyright work definition will be discussed.

(a) the author's own intellectual creation

As previously shown, the main requirement which a copyright work has to fulfill is the originality in the sense of "own intellectual creation of its author".[85] The ECJ deduced this criterion from the matching definitions of three copyright directives and extended it by way of analogy with the unharmonized types of work. This definition corresponds to the provisions of directives applicable to computer programs, databases and photographs.

The concept of the "author's own intellectual creation" connects both elements of objective and subjective originality. On the one hand, the "own" creation means that it comes from the author himself and is not a copy, on the other hand, that it contains at least a touch of his individuality. In other words, the author must only have the ability to "express his creativity in an original manner and achieve a result which is an intellectual creation of that author".[86]

Consequently, a work should fulfill a requirement of the so called "simple individuality in sense of the presence of at least minimum creative elements".[87] From the German perspective, "own intellectual creation" can be perceived as a "reduced originality concept" because in comparison with "personal creation" which is required by § 2 of the German Copyright Act, it is not necessary to reach any special individuality level (so called "Gestaltungshöhe").

As already stated above, the ECJ has chosen the solution adopted in all three copyright directives which define the protection requirements. This notion of a work concept was in the past and can be also now interpreted as a compromise between the higher requirements of the continental European copyright tradition and the lower

[82] ECJ, Football Dataco, sec. 38.
[83] ECJ, Painer/Standard, sec. 97.
[84] ECJ, Infopaq, sec. 47.
[85] ECJ, ibid., sec. 37.
[86] EuGH, GRUR 2011, 220(222), Tz. 50 - *BSA/Kulturministerium*.
[87] Leistner, Konsolidierung, p. 13.

requirements of the Anglo-Saxon copyright.[88] This "middle line" means not only that the minimum requirements of the British law are too low, but also that a requirement for some kinds of work to be "above-average creativity'" in German law sets too high a threshold.[89]

Moreover, additional hints can be found in the ECJ's rulings which show how to assess whether a particular type of work meets the requirement of own intellectual creation or not. For example, the originality of newspaper articles follows from the form, the manner in which the subject is presented as well as from the linguistic expression.[90] The ECJ also notes that "the particular copyright protected works consist of words which, considered in isolation, are not as such an intellectual creation of the author who employs them. But through the choice, sequence and combination of those words the author may express his creativity in an original manner and achieve a result which is an intellectual creation".[91]

Furthermore, in the case "SAS Institute" the ECJ stated that a user manual for a computer program can also be qualified as a literary work. In the ECJ's opinion, particular elements such as keywords, syntax, commands and combinations of commands, options, defaults and iterations consist of words, figures or mathematical concepts, which considered in isolation, are not, as such, an intellectual creation of an author of a computer program.[92] But the author may express his creativity in an original manner and through the choice, sequence and combination of those words, figures or mathematical concepts achieve a copyright protected result. Only under these circumstances, an author's own intellectual creation comes into being.

(b) the "personal touch"

The ECJ specified the originality criterion in its further decisions. In the case "Painer/Standard", the ECJ ruled that an author's own intellectual creation should also reflect his personality.[93] That is the case if the author was able to express his creative abilities in the production of the work by making free and creative choices.[94] In this way the author can stamp the work created with his "personal touch".[95]

These additional requirements bring the European work concept closer to the theory of the creative freedom (so called "Gestaltungsspielraum"), which is also known in the German copyright doctrine. According to this concept, an author should have enough

[88] Riesenhuber, in: Riesenhuber, Systembildung..., p. 132; Handig, The Copyright Term "Work" - European Harmonisation at an Unknown Level, in IIC 2009, p. 672.
[89] Loewenheim, Harmonisierung des Urheberrechts in Europa, in GRUR-In. 1997, p. 288.
[90] ECJ, Infopaq, sec. 44.
[91] ECJ, ibid. sec. 45 et seq.
[92] ECJ, SAS Institute, sec. 66 et seq.
[93] ECJ, Painer/Standard, sec. 100.
[94] ECJ, ibid., sec. 89.
[95] ECJ, ibid., sec. 92.

freedom for development of his own creative abilities and for making free decisions regarding his work.

It can be mentioned, that this method was proclaimed in the German literature as a modern version of the theory of personality stamp because it focuses on the possibility of creativity during the creation process.[96] To assess whether an author's personality has left a stamp on his work, there is no need to evaluate particular features of the work. It is sufficient to determine that there is a space for the author's free choices.

With regard to the portrait photography, the ECJ showed how to determine whether an author has an appropriate creative leeway. A photographer can basically make "free creative choices" in several ways by choosing different options and exerting an influence on the result of his work at various points of its production.

In the preparation phase, a photographer can choose the background, the subject's pose and the lighting. Further, by taking a photograph he can choose the framing, the angle of view and the atmosphere created. At the end, by selecting the snapshot, the photographer may choose from a variety of developing techniques, the one he wishes, to adopt or use computer software.[97]

In this context the personal touch of an author can be confirmed if an author were not bound by the rules prescribed a priori. Nobody demands a complete freedom of creation, because there are always various circumstances that can affect the creative process. However, the scope of an author's creative freedom shall not be reduced to zero. Otherwise, the ECJ denies originality of the work, in particular if the features of the work were determined by technical or functional conditions. Such as in the "FAPL/Murphy" case concerning the protection of football matches where the ECJ stated that there is no room for creative freedom if a sports event is subordinated to particular rules which have to be obeyed.[98]

The element of the "personal touch" as well as the possibility of making creative free choices expressed in the case "Painer/Standard" was also confirmed in the decision "Football Dataco". The ECJ referred to the prior decision and stated that the author of databases has to expresses his creative ability in an original manner by making free and creative choices and stamps his personal touch.[99]

The solution adopted by the ECJ can be understood as a simple individuality rule. This standard is definitely higher than the "skill, labour and judgment" test, but lower than the individuality which is demanded in some Member States in continental Europe.

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[96] Metzger, ibid., p. 122.
[97] ECJ, Painer/Standard, sec. 91.
[98] ECJ, FAPL/Murphy, sec. 98.
[99] ECJ, Football Dataco, sec. 38.

(c) the common level of copyright protection

The assumption that the ECJ has laid down a common originality standard for all types of works has two important consequences. First of all, a "work" concept should be interpreted uniformly in all copyright directives. Secondly, there is no acceptance for the distinction of protection requirements for different types of work.

The unity of work concept results especially from the fact that the ECJ has opted for the autonomous interpretation of this term.[100] The Court has stated that "in those circumstances, and given the requirements of unity of the European Union legal order and its coherence, the concepts used by that body of directives must have the same meaning, unless the European Union legislature has, in a specific legislative context, expressed a different intention"[101]

In the literature, there are also voices speaking out against identical requirements of the copyright protection. They raise an objection that the definition of a copyright work was not formulated by the ECJ in abstract terms but with regard to a particular type of work.[102] For example, in the "Football Dataco" case the ECJ considered the criterion of originality only in relation to the databases and in the "Painer/Standard" case" - to the photographs. In some opinions, it supports the thesis that the concept of a work should be considered every time in view of the characteristic of a particular category of work.[103]

However, the above mentioned point of view should not be supported because the jurisprudence of the ECJ in its entirety clearly shows the will to set the common standards of originality. The ECJ applied the criterion of an author's own intellectual creation which reflects his personality to very different types of work, so there is no doubt as to the motives lying behind the ECJ's rulings. Any special level of individuality should not be demanded regardless of the real extent of an author's creative freedom.

It should be also mentioned, that the quite low originality standard (especially in comparison with such Member States as Germany) should not be evaded through the limitation of the scope of the copyright protection granted. The ECJ represents a clear standpoint that any of the copyright directives supports the view that "the extent of such protection should depend on possible differences in the degree of creative freedom in the production of various categories of works".[104]

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[100] Handig, Was erfodert "die Einheit und die Kohärenz desUnionsrechts"?, in GRUR-Int. 2012, p. 10.
[101] ECJ, FAPL/Murphy, sec. 188.
[102] v. Ungern-Sternberg, Die Rechtsprechung des EuGH und des BGH zum Urheberrecht und zu den verwandten Schutzrechten im Jahre 2012, in GRUR 2013, p. 250.
[103] ibid.
[104] ECJ, Painer/Standard, sec. 97.

(d) exclusion of other criteria

As it was already mentioned, all three directives which harmonized the original criterion contain the provision that no other criteria shall be applied to assess eligibility for copyright protection. In the evaluation of computer programs, databases or photographs such criteria as the aesthetic value[105] or purpose[106] of the work do not play a role.

Although it is explicitly regulated only for these three types of work, the common originality standard established by the ECJ indicates that this rule shall be applied to other works too.

The ECJ confirmed this rule for example with regard to the databases protection in the "Football Dataco" case where it stated that such elements as significant labour and skill of their author do not justify the copyright protection, if they do not result in the originality of the work.[107] In the opinion of the ECJ for the purpose of assessing eligibility of a database for copyright protection it is also irrelevant whether the selection or arrangement of the data includes 'adding important significance' to those data.[108]

The ECJ's rulings point to the conclusion that the criterion of originality stated for all types of work at the EU-level is of an exclusive nature.

(e) no protection of ideas

According to the provisions of two most important sources of the international copyright law, namely article 9 sec. 2 of the TRIPS[109] and article 2 of the WIPO Copyright Treaty[110], copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such. These provisions are applicable to all categories of the copyright works.

In the EU-law this principle is stated expressly only in article 1 sec. 2 of the Software Directive and is intended for computer programs in particular. According to this provision, ideas and principle which underlie any element of a computer program, including those which underlie its interfaces, are excluded from the copyright protection under this Directive.

The ECJ referred to the above mentioned principle in the decision "BSA/Ministry of Culture" and concretized it through the statement that the copyright protection can be granted to "the expression in any form of a computer program which permits

[105] recital 16 of the Databases Directive.
[106] recital 16 of the Term of Protection Directive.
[107] ECJ, Football Dataco, sec. 42.
[108] ECJ, ibid., sec. 41.
[109] Agreement on Trade-Related Aspects of Intellectual Property Rights, Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, signed in Marrakesh, Morocco on 15 April 1994.
[110] The World Intellectual Property Organization Copyright Treaty.

reproduction in different computer languages, such as the source code and the object code".[111] In this particular case, the graphic user interface has not fulfilled that criterion because it does not enable a reproduction of the computer program and can be used only for communication between the computer program and the user. It is worth mentioning that the ECJ did not exclude that the user interface could be protected as another type of a work, not necessarily under the Software Directive. The concretization of this issue can be found in the grounds for the "SAS Institute" case where the ECJ listed the elements which cannot be classified as an expression of computer programs. Neither functionality of a computer program nor the programming language as well as the format of data files used in a computer program in order to exploit its functions are its expression.[112]

Both rulings presented above relate to the computer programs as a special type of work to which the Software Directive is applicable. The ECJ did not make an explicit statement regarding other categories of a work. However, interpretation of the EU-law in the light of international law allows for the assumption that the principle excluding pure ideas from copyright protection shall be applied without exceptions.

V. Methodology of the European Court of Justice

Herein below, the issues are presented connected with the methods used by the ECJ in the process of establishing the EU-wide standard of originality. In its rulings concerning the copyright issues, the ECJ does not only use the traditional interpretation methods, but goes beyond their limits. The analysis of the ECJ judgments leads to the conclusion that the autonomous interpretation of the directives terms is very close to the judicial law-making. This method can be dogmatically controversial considering that most of the Member States originate from the continental law tradition and differentiate strongly between the competences of the legislation and the judicatory.

However, in view of the fact that EU law describes only in a general way the tasks of the ECJ and does not contain any methodological indications, the ECJ shall be empowered to work out its working method with respect to the distribution of competences between the EU and Member States.[113] The specific methodological tools of the ECJ can be also justified by the peculiarities of the EU legal system which combine the different traditions of the Member States and evaluate in consideration of the difficult task of the ECJ to develop the appropriate working method.[114]

Before focusing on particular interpretation methods of the ECJ, it should be emphasized that in the above mentioned decisions issued by the ECJ there is no sharp marking line between

[111] ECJ, BSA/Ministry of Culture, sec. 35.
[112] ECJ, SAS Institute, sec. 39.
[113] Walter/v.Lewinski, in: Walter, Europäisches Urheberrecht, point 30.
[114] Röthel, in: Riesenhuber, Europäische Methodenlehre, p. 353.

the interpretation of directives terms and law-making. Moreover, through the widening of the "own intellectual creation" standard on the unharmonized categories of work and further through the subsequent developing this standard in the next rulings, the ECJ went beyond the boundaries of the traditionally understood interpretation of law. In the European methodology, this method typical of the ECJ is called "concretization" or "bounded law-making".[115] It is based on the judicial filling of general clauses and normative-indeterminate legal concepts, and connects "the methods of the ruling through law interpretation with the methods of creative law-making."[116]

With regard to interpretation methods used by the ECJ, the Courts specified them by themselves stating that "in those circumstances, those concepts (of work) must be defined having regard to the wording and context of Article 2 of Directive 2001/29, where the reference to them is to be found and in the light of both the overall objectives of that directive and international law (see, to that effect, SGAE, paragraphs 34 and 35 and case-law cited)".[117] Among the applied interpretation methods there are the traditional methods such as literal, systematic and teleological interpretation, as well as interpretation according to international law. A special position in the ECJ's jurisprudence has the principle of uniform and autonomous interpretation of the EU-law terms, which will be presented first.

(a) uniform and autonomous interpretation

The principle of an autonomous and uniform interpretation of the EU-law provisions plays a fundamental role among the interpretation methods used by the ECJ. The issue whether all provisions or particular terms used in the legal instruments shall be interpreted as autonomous or with reference to the national law systems of the Member States is determined on the basis of their wording, legislative context, their history and purpose.[118]

The development of the ECJ's jurisprudence shows that the principle of the autonomous interpretation became in the meantime rather a rule, whereas a reference to the national law is treated more like an exception.[119] Namely, in the cases where the formation of the uniform concept is impossible or where it seems more appropriate because of only partial harmonization of a particular area.[120] Although the copyright law is not a fully harmonized area, the ECJ decided to use the method of the autonomous interpretation of the protection requirements used in copyright directives. However, in view of the fact that the majority of the copyright directives neither contain the protection requirements nor the reference to the national law, this statement of the ECJ was in principle well-founded.

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[115] ibid., p. 351.
[116] *ibid., p. 351.*
[117] ECJ, Infopaq, sec. 32; ECJ BSA/Ministry of Culture, sec. 30.
[118] Riesenhuber, in Riesenhuber, Europäische Methodenlehre, p. 322.
[119] ibid., p. 319.
[120] ibid., p. 319.

In the decision "Infopaq", the ECJ stated that regarding the requirement of a uniform application of the community law and the principle of equal treatment, that EU-law provisions which do not contain any express reference to the legal systems of the Member States, shall normally be given an autonomous and uniform interpretation throughout the EU.[121] The ECJ pointed out a similarity between the definition of work stated in the "Infopaq" case and that used in three directives concerning harmonized types of work, i.e. computer programs, databases and photographs. This standpoint of the ECJ results from the assumption that all directives base on the same principles. Therefore, the work should be understood universally as an original in the sense of the author's own intellectual creation.[122] It has to be mentioned, that the critical voices raising objections that the harmonization of the originality concept in three directives relates only to these particular categories of works and shall not be extended to the other categories.[123]

Furthermore, the decision in the "FAPL/Murphy" case contains an interesting statement about the autonomous interpretation of copyright terms, which may be significant for the other areas of law as well. The ECJ emphasized that due to the requirements of unity of the European Union legal order and its coherence, the concepts used in several directives must have the same meaning.[124] However, this principle is not applicable if the European Union legislature has, in a specific legislative context, expressed a different intention.[125] The above mentioned statements indicate that the ECJ is speaking out in favor of autonomous and uniform interpretation of the copyright terms in absence of explicit references to the provisions of the national law. It should be pointed out, that with regard to the originality concept in fact there is no direct reference to the national law. However, considering an intention of the European legislator, in particular the statements of the Commission made in Green Papers or Staff Working Papers and the history of the EU copyright policy in its legal-historical aspects, the issue of the originality concept has been left within the competence of individual Member States. Therefore, harmonization of the definition of the copyright work achieved through the autonomous interpretation of the directives' terms was criticized because of the unauthorized divergence from the legislator's will.[126]

(b) interpretation in the light of international law

Firstly, the ECJ explicitly referred to the relevant provisions of the international copyright law. It follows from the principle recognized by the ECJ in the different

[121] ECJ, Infopaq, sec. 27.
[122] ibid., sec. 36.
[123] Schulze, Schleichende..., p. 1020.
[124] ECJ, FAPL/Murphy, sec. 188.
[125] ibid.
[126] van Eechoud, ibid., point 94.

judgments that the EU copyright directives must, so far as possible, be interpreted in a manner that is consistent with international law, in particular taking account of the Berne Convention and the Copyright Treaty.[127]

In the ruling "Infopaq", the ECJ pointed out that the general scheme of the Berne Convention, in particular article 5 sec. 5 and 8 shows that the protection of certain subject-matters as artistic or literary works presupposes that they are intellectual creations. However, this standpoint of the ECJ does not take into account that the Berne Convention actually does not state a common definition of work and the concept of intellectual creation concerning only compilations of literary and artistic works.[128] Moreover. The ECJ also does not take into consideration that in the light of the Berne Convention a decision about the protection requirements is a matter of the Convention Parties. The sole condition is that the categories of works enumerated in article 2 of the Convention will be protected. Therefore, the reference to the provisions of the Berne Convention can be interpreted as too wide-ranging.

Similarly, the principle of interpretation in conformity with international law can be found in the decision "Football Dataco" where the ECJ referred to the database's definition following from the article 10 § 2 of the TRIPS Agreement and article 5 of the WIPO Copyright Treaty. Under these copyright acts, databases are compilations of data or other material, whether in machine readable or other form which by reason of the selection or arrangement of their contents constitute intellectual creations and shall be protected as such.[129] The ECJ used also the principle that the protection shall not extend to the data or material used in a database.[130] Having regard to the foregoing provisions, the ECJ stated, that the originality of a database within the meaning of article 3 § 1 of the Database Directive basically refers to a particular choice of the data and their arrangement, that is to the structure of the database and not to its content.

As the above mentioned examples show, the ECJ takes into consideration international obligations of the Member States, but the result of the interpretation of the EU copyright law in the light of the international copyrights act can not always be evaluated as appropriate. In particular, in the ruling "Infopaq", the ECJ interpreted the provisions of international law in a way other than it is usual made.

(c) traditional interpretation methods

The ECJ uses in its jurisprudence traditional interpretation methods such as literal, systematic interpretation as well as the interpretation of the objectives of the legal provisions.

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[127] ECJ, Painer/Standard, sec. 126; ECJ, FAPL/Murphy, sec. 189.
[128] Schulze, Schleichende..., p. 1020.
[129] ECJ, Football Dataco, sec. 31.
[130] ECJ, ibid., sec. 32.

A fundamental aspect of these methods is a literal interpretation of the terms of the directives. First, the ECJ examines the usual meaning of the particular terms, and then tries to connect them with the intention of the legislator. The ECJ checks whether a particular term is used in all directives in the same context, and on these grounds determines whether an autonomous interpretation of this term in all EU legal acts is necessary or not. This literal interpretation of the EU-provisions causes some difficulties because of the multilingualism existing within the EU.[131] Therefore, the literal interpretation should not be the only applied method.

Furthermore, the ECJ interprets the provisions of the EU law as an interconnected system and tries to draw conclusions about the significance of the norm on the basis of its position within the system.[132] The ECJ considers not only the position of the particular provision in the context of a specific directive, but also interprets European copyright law as a system with uniform principles and with legal terms that should have the same meaning. The special role of the ECJ in the field of copyright law comes from the fact that this area of law is not fully harmonized, and therefore the special coherence of the system should be guaranteed by the uniform interpretation of the directives' provisions.

For instance, the ECJ seems to apply a systematic interpretation method in the "Infopaq" decision, where it extends the originality criterion used in the three directives to the other types of work by way of analogy. However, the opinion of some legal scholars is that the ECJ has focused too strongly on textual interpretation to the detriment of other methods.[133] Furthermore, the scholars are concerned that the ECJ creates some links between the particular directives, even where they do not exist.[134]

Finally, the interpretation of the objectives of the directives' provisions has an importance in the ensuring of the coherence of the copyright system. In particular, the ECJ takes into consideration the recitals of the directives. For example, in the case "Painer/Standard" the ECJ introduced into the originality criterion an additional test of the "personal note" basing on the recital 17 of the Term of Protection Directive.[135] On the one hand, in this context the ECJ was criticized that the ECJ did not pay enough attention to the historical aspect of the copyright regulations and did not took into account for example the views of the Member States expressed in the Council.[136] On the other hand, it should be considered that the ECJ determines the "*telos*" of the directive always according to the EU's overall objectives.[137] The method used by the ECJ can be interpreted as an expression of the "*effet utile*" principle, because the

[131] Riesenhuber, in Riesenhuber, Europäische..., s. 322, 325.
[132] Ibid., p. 326.
[133] van Eechoud, ibid., point 94.
[134] e.g. ECJ, Painer/Standard, sec. 97.
[135] ibid., sec. 217.
[136] van Eechoud, ibid., point 97.
[137] Riesenhuber, ibid., p. 336.

correct application of the EU-law and achieving of the objectives of the copyright directives is possible only after the concretization of the copyright work concept.

(d) elements of the judicial law-making

The rulings of the ECJ on the copyright work concept based to some extent on the development and completeness of the prior established rules concerning the evaluation of the originality test. After the issuing of the "Infopaq" decision the legal scholars were expressing opinions that it is not possible to harmonize the copyright work term only by the judicial law-making.[138] They saw the common legislative regulation which could establish the originality standard within the EU as necessity. The next rulings of the ECJ has been seen more as the complementation of the partially harmonized originality concept in the three copyright directives by way of the judicial law-making.[139] The ECJ exceeded the boundaries of the law interpretation through applying the criterion of the "own intellectual criterion" on the categories of work which was not harmonized by the legislator.[140] Furthermore, in the "Football Dataco" decision the ECJ transfers the personality test which was applied only to the photograph on the databases as well.[141]

It should be pointed out, that the competence of the ECJ to proceed with the law-making measures results from the primary law provisions. However, this kind of rulings method is allowed only if there is a loophole in the EU law. It is not so obvious whether the partially harmonization of the copyright requirements can be interpreted as the loophole. In contrary, it could be assumed on the grounds of the historical interpretation that the Member States did not want to regulate this area of the law. In this context, the ECJ's jurisprudence could be interpreted as the concretization of the originality standard against a will of the Member States.[142] Despite of these critical voices, the harmonization of this area is generally welcomed and therefore the measures taken by the ECJ can be justified, in particular in the light of the many years' passiveness of the EU legislator.[143]

VI. Impact on the national copyright law systems

It has to be pointed out that it is not sure whether the harmonization of originality criterion for all types of work will have permanent effects. The effectiveness of the legislative harmonization instruments is guaranteed at least by the obligation of the Member States to implement directives in national legal systems. However, in regard to the case law

[138] Schulze, Schleichende...., p. 1021.
[139] Berger, ibid., p. 355; Metzger, ibid., p. 121.
[140] ECJ, Infopaq, sec. 35.
[141] ECJ, Football Dataco, sec. 38.
[142] van Eechoud, ibid., point 78, 90 et seq.
[143] Metzger, ibid., p. 125.

established by the ECJ some doubts arise. In particular, an extent of the overriding character of the ECJ-rulings is not clearly defined as well as the question if these rulings are binding on the national courts in all cases, in particular in these Member States where different protection levels are applied.

(a) the scope of jurisdictional competence of the national courts

It should be pointed out that the ECJ generally assumes that the national courts have a competence to evaluate whether a particular creation meets the originality criterion. It results from the established allocation of roles within the preliminary ruling proceedings. The ECJ is responsible for interpretation of the EU-law, whereas the national courts apply the interpreted law provisions and issue decisions based on the circumstances of a particular case.[144]

However, the current case-law of the ECJ concerning the common originality concept has shown that the boundary line between establishment of the general criteria and the application of these criteria is not always clear. The ECJ pointed out that its role is limited to the autonomous interpretation of the provisions of the copyright directives, but at the same time concretized the original criterion to the extent which does not leave much freedom of decision to the national courts.

The ECJ in the case "Infopaq" did not prejudge whether a particular excerpt from a newspaper article consisting of 11 words reflects an author's own intellectual creation, but concluded that it is for the national court to make this determination.[145] Hence, this statement of the ECJ was initially interpreted in that way that the national courts still shall have competence to assess the non-harmonized types of work according to theirs own criteria.[146] From this perspective, the judgment of the ECJ laid down only a minimum standard and did not limit the discretion of the national courts.

The ECJ showed in the next ruling that its impact of the criteria used by the national courts should be more significant. In the ruling "BSA/Ministry of Culture", the ECJ noted first that "it is for the national court to ascertain whether that is the case in the dispute before it",[147] but in the next sentence gave the hints how the assessment should be made. The ECJ stated that the national court "must take account, inter alia, of the specific arrangement or configuration of all the components which form part of the graphic user interface in order to determine which meet the criterion of originality".[148]

Similarly, in the case "Painer/Standard" the ECJ presented very precise instructions and described the steps to be taken in order to determine the eligibility for protection of a portrait photography. Nevertheless, these indications of the ECJ had still the

[144] Stotz, in Riesenhuber, Europäische..., p. 663 et seq.
[145] ECJ, Infopaq, sec. 48.
[146] ECJ, BSA/Ministry of Culture, sec. 47.
[147] ECJ, ibid., sec. 48.
[148] ibid.

character of a general interpretation of the directives' provisions and could not be treated as an attempt to influence a decision in certain matters.

The problems arise in the cases where the ECJ expressly denied the copyright protection for some kind of creations and in this way reduced discretion of the national courts almost to zero. For example, in the "FAPL/Murphy" case the ECJ stated that the "sporting events cannot be regarded as intellectual creations classifiable as works within the meaning of the Copyright Directive."[149] This method of deciding the case made the British High Court of Justice, who submitted a preliminary question, have no other options than to deny the copyright protection for the football matches. Similarly, in the case "Football Dataco" the ECJ made a statement according to which the football matches plans cannot be classified as the original work in the sense of an author's own intellectual creation.[150]

It should be mentioned that it was one of the main objections against the jurisprudence of the ECJ concerning the definition of a copyright work. Therefore, there were comments that the ECJ shall only offer some structural general guidelines and leave the application of these guidelines to the national courts.[151] This opinion is represented further in many Member States and until the decision in the case "Geburtstagszug" (see below) the German literature did not see any other options as the determination of the protection level by the national courts.[152]

Although the jurisprudence of the ECJ does not directly bind any other court except for the court who submitted preliminary questions, it should not be ignored that the Member States have a duty to interpret the national law in conformity with the provisions of the EU-directives. Regarding the fact that the ECJ established the uniform and autonomous interpretation of the originality criterion in all copyright directives, the Member States cannot ignore the ECJ's rulings and decide against the established rules. Otherwise, they could be exposed to the liability for the violation of their obligations.

The review of the national jurisprudence after "Infopaq" ruling shows that the national courts take the established principles into account. However, they still have a wide scope of their own discretion. It will be shown below on the grounds of chosen decisions of the national courts.

(b) between continental and Anglo-Saxon understanding of copyright work

As it has been previously mentioned, the originality concept established by the ECJ is interpreted as the middle line between continental and Anglo-Saxon copyright tradition.

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[149] ECJ, FAPL/Murphy, sec. 98.

[150] ECJ, Football Dataco, sec. 44.

[151] Leistner, Das Murphy-Urteil des EuGH: Viel Lärm um Nichts oder Anfang vom Ende des Territorialitätsgrundsatzes im Urheberrecht?, in JZ 2011, p. 1144.

[152] e.g. Leistner, Bei Spielen..., p. 764; Schulze, Schleichende..., p. 2021.

The reactions to the above presented ECJ's rulings concerning the definition of a work showed that the differences between the protection requirements in both systems are still significant. But it can be also observed that the national courts are also to some extent open to find a compromise and accept the criterion of originality understood as an "author's own intellectual creation".

Establishment of this criterion in the case "Infopaq" confirmed that the originality level should not be set as high as in Germany but also not as low as in the British law. However, subsequent ruling of the ECJ, particularly the decision in the case "Painer/Standard", was interpreted in such a way that the common EU-wide concept of originality should be kept "closer to the continental level".[153] It is because of the introduction of an additional element to the originality test. The requirement of the personal touch of an author is similar to the individuality requirement which is present in the continental copyright systems.

Finally, the ruling in the case "Football Dataco" was a clear information that the ECJ rejected the copyright approach oriented at the investment protection.[154] In this case, the ECJ found that the fact that the setting up of a database required, irrespective of the creation of the data which it contains, significant labour and skill of its author (...) cannot as such justify the protection of it by copyright under Directive 96/9, if that labour and that skill do not express any originality in the selection or arrangement of those data."[155]

Even if the originality criterion could be interpreted only as a minimum standard, it still would not conform to the "skill, labour and judgement" test. Especially as there are numerous voices in the literature speaking out against the role of the "supplementary unfair competition law" which could lead to the reduction of the originality standard.

Finally, from the copyright system's perspective it could be problematic that the common concept of a work has an open character. That means that any object that satisfies the originality criterion can be qualified as a work, whereas a closed catalog of the protected works exists in the British copyright law. Pursuant to sec. 1(1) of the CDPA, copyright subsists in original literary, dramatic, musical or artistic works, sound recordings, films or broadcasts and the typographical arrangement of published editions. Whereas the ECJ confirmed that also the other works, such as a graphic user interface, can be copyright protected if they meet the originality criterion.

In view of the presented differences between the continental droit d'auteur and the copyright system, it is postulated that the ECJ shall pay more attention to the comparative legal analysis in order to ensure the convergence of the basic principles of all legal systems existing within the European Union.[156] It does not change the fact that

[153] Handig, Durch "freie..., p. 976.
[154] Götting, EuGH: Originalität als maßgebliches Kriterium für den Begriff der "geistigen Schöpfung" - Football Dataco/Yahoo, in: LMK 2012, No 337357.
[155] ECJ, Football Dataco, sec. 42.
[156] Leistner, Das Murphy..., p. 1144.

the ECJ's judgments are closer to the criterion of the "simple individuality" which is known in the continental tradition.

In the light of the issues pointed out above, an interesting question is whether the British courts will apply the new originality standards established by the ECJ. It will be shown hereinafter with the example of two cases which were decided by the British courts after "Infopaq" decision of the ECJ was given, namely "Meltwater"[157] and "The Red Bus".[158]

The first opportunity for the British courts to apply "Infopaq" decision was the case "Meltwater". The High Court of Justice (the decision upheld by the Court of Appeal) made a statement that copyright is capable of subsisting in newspaper headlines as original literary works, which were sometimes capable of being independent literary works as they may be original in the sense of being their author's own intellectual creation. The British court directly referred in this matter to the "Infopaq" decision. The judge said that it is so "whether one is applying the test of whether there has been an unfair appropriation of the author's labour and skill which went into the creation of the original article or whether parts of sentences have been appropriated which may be suitable for conveying to the reader the originality of a public".[159] In this way the question of applying the common originality criterion by the British court was left open. The Court of Appeal agreed about this standpoint and confirmed that the test from the "Infopaq" decision should not be understood as the change of the test of originality which is constituted in the long-standing English case law. In the opinion of the Court of Appeal, "the word "original" does not connote novelty but that it originated with the author."[160] However, at that moment the implications of the "Infopaq" had not yet been worked out, although it was obvious that the ECJ introduced the criteria which were not convergent with the British "labour, skills and judgement" test.

Moreover, references to the ECJ's judgment can be also found in the decision issued by the British Patents County Court in the case "The Red Bus". This case concerning a copyright infringement by using a black and white photograph of a London bus (emphasised in red) travelling across Westminster Bridge in front of the Houses of Parliament on the souvenirs from London. The Court noticed the impact of the European Union law on the national copyright law and confirmed that in accordance with the judgment of the ECJ in the "Infopaq" case, copyright may subsist in a photograph if it is an author's own intellectual creation.[161] In further part of this ruling the British Court referred also to the ECJ's judgment in the case "Painer/Standard" and

[157] England and Wales Court of Appeal, Case No: A3/2010/2888/CHANF, [2011] EWCA Civ 890 - Meltwater.
[158] England and Wales Patent County Court, case No: 1CL 70031, [2012] EWPCC 1 - Red Bus.
[159] Meltwater case, sec. 85.
[160] ibid., sec. 19.
[161] Red Bus case, sec. 18.

described explicitly which elements of the photographs decide whether there is a room for originality or not.[162]

The Court found that the photograph was a result of the claimant own intellectual creation "both in terms of his choices relating to the basic photograph itself: the precise motif, angle of shot, light and shade, illumination, and exposure and also in terms of his work after the photograph was taken to manipulate the image to satisfy his own visual aesthetic sense."[163] Further, the Court stated that the fact that it is a picture combining some iconic symbols of London does not mean the work is not an original work in which copyright subsists.[164] The Court found the comparisons with other similar works as not important, because the originality concept should focus on the issue how different choices made by different photographers lead to different visual effects.[165]

In the light of the above, there are reasonable grounds to say that the ECJ's rulings concerning the common originality criterion find a reflection in the jurisprudence of the British courts. It means that the established protection standards can be successfully applied even in the Anglo-Saxon copyright system.

(c) towards the uniform originality level for all types of work – works of applied art in Germany

As previously shown, according to the ECJ's rulings, all types of work should be protected under the same conditions. The originality criterion is set forth on the level of "simple individuality" and it is not necessary to introduce any additional requirements. To come back to the continental copyright tradition, it should be emphasized that in some Member States such as Germany, there existed a non-homogenous level of protection. Although in the context of § 2 sec 2 of the German Copyright Act there is a unified concept of a protected work and even the so called "small coin" deserves copyright protection. However, in practice the higher standards were required from such work as non-literary texts or works of applied art. The German courts demanded originality "clearly above an average creation level".[166] In view of the possible conflict with the common originality standard, standardization of the protection level was declared in the literature. After "Infopaq"-decision, the German courts still uphold the differentiation but recently in the case "Geburtstagszug" the judgment in the area of design and applied art works has been overruled.[167]

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[162] ibid., sec. 18.
[163] ibid., sec. 51.
[164] ibid., sec. 51.
[165] ibid., sec. 53.
[166] e.g. BGH, judgment of 22.06.1995, in GRUR 1995, p.582 - Silberdistel.
[167] BGH, judgment of 13.11.2013, in NJW 2014, p. 469 et seq - Geburtstagszug.

According to the German copyright law, the works of applied art belong to the catalogue of the works in § 2 sec. 1 no 4 of the German Copyright Act and can be copyright protected if they are qualified as personal intellectual creations. Considering that the works of applied art are used commonly on the daily basis and in comparison with the purpose free arts they should serve a particular purpose, the German copyright law applied (till November 2013) the higher originality standard for this type of work.[168] In the judgment it was pointed out that because of the existing cumulative protection of designs under the rules of copyright and design law, this type of work should meet more strict requirements. According to the former legal status, the design protection was seen as a sublevel of the copyright protection. [169]

Moreover, in 2004 the fundamental reform of the German Act on Registered Designs was carried out in order to fulfill the requirements of the Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs. Since then in the literature it was pointed out that there is no need more to see the design rights as lex specialis to the copyright. The both areas of IP law are separable and do not exclude one another.[170] Furthermore, toughening up of the protection requirements to common level was postulated because of the existing homogenous definition of work in § 2 of the German Copyright Act as well as in the light of the development of the EU-wide protection standard.[171]

It should be mentioned, that the obligation to implement into the national jurisprudence the common originality criterion established by the ECJ in regard to the works of applied art is not so obvious. According to § 17 of the Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs, the extent to which, and the conditions under which, such a protection is conferred, including the level of originality required, shall be determined by each Member State. Regarding this regulation, after decision in the case "Infopaq" it was with interest expected when the BGH will take a stand on this issue.

In the judgment "Seilzirkus"[172], which relates to the protection eligibility of the climbing nets for children's playgrounds, the BGH has referred to the previous ruling but also pointed out that its continuation is criticized because of the development of the European copyright law. The BGH left open the important question of whether the higher originality standard can be demanded from the works of applied art. However, the Court emphasized that even if the higher originality level is given up, an object of applied arts could be copyright protected only on condition that it was the result of

[168] e. g. BGH, judgment of 22.06.1995, in GRUR 1995, p.582 - Silberdistel; BGH, judgment of 05.03.1998, in NJW 1998, p. 3773 et seq - Les-Paul-Gitarren.
[169] BGH, judgment of 22.06.1995, in GRUR 1995, p.582 - Silberdistelö Koschtial, in GRUR 2004, 555 et seq.
[170] Loewenheim, in Schricker/Loewenheim, § 2 point 32.
[171] Koschtial, in GRUR 2004, p. 448.
[172] BGH, judgment of 12.05.2011, in ZUM 2012, p. 36 et seq. - Seilzirkus.

artistic creation and its outward appearance was not conditioned by technical requirements.[173]

Also the next BGH's decision in the case "Lernspiele" has not changed the previous ruling regarding the works of applied arts. Despite of the ECJ's judgment, the BGH upheld the higher requirements for works of applied arts. It stated that the control devices used by the learning toys serves a practical purpose and therefore belongs to the area of the applied art and not of the purpose free arts. Due to this, they can be personal intellectual creations only if their aesthetic content "has reached such a degree, that in the opinion of the persons familiar with the arts and having reasonably view on the arts direction, can be qualified as artistic creation".[174] In this particular case the BGH analyzed the outward form of the control devices and found that they are not artistic in the way which could justify the copyright protection. It shows that the German courts should further use the criteria stricter than for the other types of work where even a "small coin" is protected.

Finally, in November 2013 the BGH issued a decision in the case "Geburtsagszug" relating to a popular toy in the form of a wooden train with birthday candles. This ruling seems to be revolutionary in the area of design and applied art in Germany. In this decision, the German Supreme Court has overruled the previous judgment[175] and decided that no higher level of originality can be demanded from the works of applied art in sense of § 2 sec. 1 no 4, sec. 2 of the German Copyright Act.

In the BGH's opinion, it is not allowed to impose on the design works other requirements than on the works of plastic arts, literary or music works. It is sufficient that a work achieves an originality level which makes it possible to say that it is an artistic creation. The assessment should be carried out from the perspective of recipients who are familiar with arts and who have reasonable view of the arts direction.[176]

Furthermore, the BGH referred again to the ECJ-judgment and emphasized that an "author's own intellectual creation require a kind of freedom which enables him to express his creativity in an original manner".[177] The BGH pointed out that there is no regulation on the common definition of work at the EU-level, however the ECJ recognized that even elf words of a newspaper article can be own intellectual creation. It shows that also for the other categories of works no special individuality shall be required. The BGH interprets the ECJ-judgment in such a way that within a wider

[173] BGH, judgment of 1.06.2011, in NJW-RR 2012, p. 174 et seq. - Lernspiele.
[174] BGH, Lernspiele, sec. 31
[175] e.g. BGH, Silberdistel.
[176] BGH, Geburtstagszug, sec. 25.
[177] ibid., sec. 30.

scope the national courts are allowed to decide according to their own criterion whether the particular creation can be evaluated as own intellectual creation of the author.[178]

The above presented decision of the BGH will have a significant impact on further interpretation of the copyright protection requirements in German law. It also showed that development of the common definition of work at the EU-level heads in good direction and leads to real changes in the national legal systems.

(d) limitation of the scope of the copyright protection

In the decision "Painer/Standard" the ECJ made an interesting statement concerning the scope of copyright protection. This statement can be interpreted in such a way that all the categories of work shall enjoy the copyright protection on equal terms. The ECJ stated that "nothing in Directive 2001/29 or in any other directive applicable in this field supports the view that the extent of such protection should depend on possible differences in the degree of creative freedom in the production of various categories of works".[179] In the light of the above presented statement, there shall be no differentiation between stronger and weaker protected categories of work. The ECJ concluded that since the copyright protection was granted to a particular photographic work, this protection is not weaker than the protection given to other works.

In the light of the above mentioned argumentation, it could be problematic that the German copyright law knows the limitation of the protection scope for illustration of a scientific or technical nature that are mentioned in article 2 sec. 1 no 7 of the German Copyright Act. In the "Lernspiele" decision the ECJ stated that this kind of works does not require a very high creation level, but in return its protection is quite narrow.[180] Consequently, the illustrations of a scientific or technical nature are generally classified as copyright works, however their protection can be illusionary because of the limitations applied by courts.

Similarly, in the recent case "Geburtstagszug", the BGH confirmed the ruling in regard to the works of applied arts and persists in the opinion that the low originality requirements shall result in the limited scope of copyright protection. In the BGH's opinion, this limitation of the scope of copyright protection should guarantee that the public will not be excluded from the free access to some design forms which shall not be reserved.

The above presented cases show that the BGH holds further on the different scope of protection of the different types of work which was protected even as so called "small coin". Whereas the ECJ in the "Painer/Standard" case spoke directly out against the

[178] ibid., sec. 32.
[179] ECJ, Painer/Standard, sec. 97.
[180] BGH, Lernspiele, sec. 63.

differentiation of the protection's scope, the jurisprudence of the BGH does not take it into account and still rules according to its own rules.

Conclusion

The term of a copyright work was established by the ECJ at the level of an author's own intellectual creation which reflects to his personality. An author should have a freedom to make creative choices during the production of a work. Only in this way he can give his work a "personal touch" which is also required in order to grant a copyright protection to the particular type of work.

The rulings of the ECJ showed that the definition of work should be the same for all categories of work. It was also a huge step towards the further harmonization of the European copyright law.

Five year after the decision in the "Infopaq" case the full harmonization has not been achieved, but the common originality concept has found a reflection in the jurisprudence of the national courts. Because of the limited volume of this paper, it was not possible to present the rulings from all Member States. However, the above mentioned examples evidence that the standard of "own intellectual criterion" is taken into consideration by the courts of the continental copyright tradition as well as the Anglo-Saxon tradition. What is more, the rulings of the ECJ has influenced to the some extent the criteria which were used by the national courts by assessment of the protection eligibility of some categories of work.

It has to be pointed out, that the process of the harmonization in the field of the European copyright law is still waiting to be completed. For instance by the EU-regulation which will be in force in all Member States. However, the role of the ECJ who decided to take control over such an important part of the copyright as a term of a work, cannot be underestimated.