# Originality revamped: Much ado about nothing?

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# Outline

- 1. What originality was (and still is?)
- 2. What originality is now
- 3. What the British judges think originality is now and how they apply it
- 4. Where are we now (what difference does it make) and what should we do?

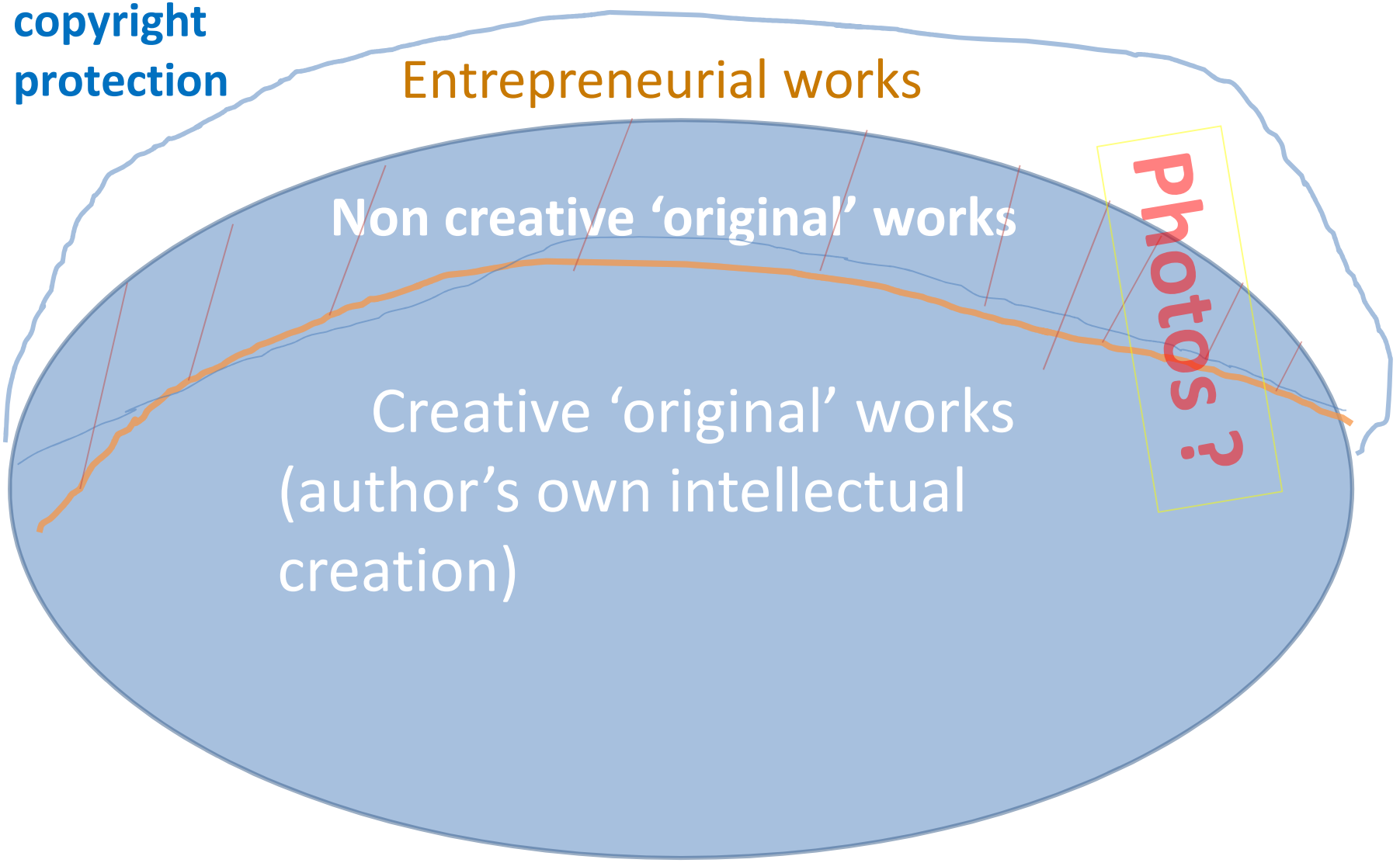
# 1. What originality was (and still is?)

- **Traditional UK standard:**
- Not copied + sufficient skill, judgment **and/or** labour
- Other words used by courts: work, capital, effort, industry, time, knowledge, taste, ingenuity, experience, expense, investment
- => encompasses equally creative works and works which required mere labour or capital or even skill which do not necessarily involve creativity (free and creative choices), so long as more than *de minimis*

# What originality was (and still is?)

- Originality depends on the facts of the case and is a question of degree in each case
- Cannot dissect SSJL in pre-expressive and expressive stages; both should be taken into account
- *Interlego* : application of the principles
  - skill and labour in copying does not count – but was obvious as per *Univ London Press* already
  - Material change of the right kind – simply again check if SSJL above previous work
  - Visual significance if a visual work
- Photos: unclear if original in UK or EU sense

# Originality - SSJL



# What originality was (and still is?)

- **Originality under the 3 directives:**
- British literature quasi unanimous that SSJL is lower than author's own intellectual creation
- Some argued that author's own intellectual creation is stricter in the term directive than in software and database directives ("personality" in rec 17)
- TP and the text of the Directive do not make clear whether the test for photos is the same as that for software
- But strange it would be as if it were, how confusing to choose the same terms to describe it!
- Originality only harmonised for 3 types of works as per TP but CJEU does not look at TP when interpreting directives...

# 2. What originality is now

- ***Infopaq***: LW: “words [...], considered in isolation, are not as such an intellectual creation of the author who employs them. It is only through the choice, sequence and combination of those words that the author may express his creativity in an original manner and achieve a result which is an intellectual creation.”
- ***BSA****:* “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. In that regard, that criterion cannot be met by components of the graphic user interface which are differentiated only by their technical function”.

# What originality is now

- ***FAPL:*** "[F]ootball matches, which are subject to rules of the game, leaving no room for creative freedom for the purposes of copyright."
- ***Painer:*** "an intellectual creation is an author's own if it reflects the author's personality. 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. ... By making those various choices, the author of a portrait photograph can stamp the work created with his 'personal touch'."

# What originality is now

- ***Football Dataco***: “that 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’”
- “that 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”
- “the fact that the setting up of the 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 [...], if that labour and that skill do not express any originality in the selection or arrangement of that data.”

# What originality is now

- ***SAS Institute**:* "[T]he 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 the author of the computer program.
- It is only through the choice, sequence and combination of those words, figures or mathematical concepts that the author may express his creativity in an original manner and achieve a result, namely the user manual for the computer program, which is an intellectual creation".

# What originality is now - summary

- No room for creative freedom because of technical considerations/function => no author's own intellectual creation possible (*BSA, FAPL, Football Dataco*)
- SSJL as such is not enough if there is no creativity
- Author's own intellectual creation ≠ for ≠ types of works? LW, GUI and computer programs no need of personal touch >< databases and photos? NO because choice or arrangement always necessary and this *leads* to personal touch
- => Claim that author's own intellectual creation is stricter for photos is now out

# What originality is now - reflections

- Do the CJEU rulings change UK law? Yes:
  - pure labour, pure skill and pure judgement-type originalities are out if don't show creativity (judgement will probably meet that criterion in most cases unless the choices are banal or not free)
  - pre-expressive stages don't count – only the result
- Do the CJEU rulings change UK law? Unclear*:*
  - *Interlego* still good law? Material change ok but should it be of the kind of the work in question? i.e. visually significant for visual works?
  - Any work so long as original must be protected i.e. categories are abolished? Unclear because of *BSA* and *FAPL*
  - Does originality still depend on the facts of the case and is it a question of degree in each case?

# What originality is now - reflections

- Do the CJEU rulings change UK law? No but problem:
- Are non-original photos still protected in the UK? Yes, *Temple Island Collections* does not change this as it dealt with an original photo. But it poses a problem because of the categorisation system. There is only one category in the current act...
- If the CJEU has indeed abolished categories, it shouldn't matter and unoriginal photos remain protected under SSJL. But for the sake of clarity, shouldn't we add that or even, that non-original photos are entrepreneurial works?

# What originality is now - reflections

- Rahmatian IIC 2013: “Originality means that a sufficient amount of skill, labour **and** judgement has gone into the work in such a way that through the choices, selection **and** arrangement in the making of the work the author gives the work a modicum of individuality and so renders it his/her own intellectual creation.”
- Must be wrong unless ‘and’ means ‘or’:
  - the CJEU does not require skill nor labour and requiring it in addition to creativity would breach the “no other criterion may be applied” formula in the directives
  - “choices, selection and arrangement”: it should read “or”.
  - **The key words are “free and creative choices”**

# 3. What the British judges think originality is now and how they apply it

- *Allen v Bloomsbury Publishing Plc and JK Rowling* (Kitchin)
- *Football Dataco v Britten Pools* (Floyd)
- *SAS v WPL* (Arnold)
- *NLA v Meltwater* (Proudman)
- *Football Dataco v Yahoo! UK* (CA per Jacob)
- *Future Publishing v Edge* (Proudman)
- *NLA v Meltwater* (CA per The Chancellor of The High Court)
- *Forensic Telecommunications services v The Chief Constable of West Yorkshire Police* (Arnold)
- *Temple Island Collections v New English Teas* (Birss)
- *Hodgson v Isaac* (Birss)
- *SAS v WPL* on remand (Arnold)

# What the British judges think originality is and how they apply it

- **Kitchin**: unaware
- **Floyd:** adds his own twist: “judgment, taste or discretion”
- **Proudman: inconsistent (*Meltwater >< Edge*)**
- **Chancellor of the High Court**: confidently and clearly equates the two
- **Arnold and Birss:** confused - equate the two implicitly, but Arnold in *SAS* on remand does not mention SSJL any longer
- **Jacob**: prudent - thinks that one is not the other but prefers to ask Q to CJEU

# What the British judges think originality is and how they apply it

- Where the new criterion made (or could have made) a difference: *Football Dataco, Forensic Telecom, Edge, SAS*
- So it is important to apply the correct test and not mix the old and the new
- Why are they (still) confused? Are barristers, authors of books on copyright in denial? Deferent to CA in *Meltwater*?

# What should we do?

- 1. Assume decisions are binding i.e. not *ultra vires*
- When clear (originality): don't mix/confuse, think carefully which precedents are still valid, don't assume they are
- When unclear (categories): What should British and Irish judges do if a work does not fall in the categories? Stay proceedings and ask a Q to CJEU to clarify the matter. Even if this is risky as it may annihilate the categories, it is for the sake of legal certainty of both authors and users. Also if we retain the categories, we protect UK works less well than their continental counterparts

# What should we do?

- 2. Assuming decisions are not binding – disobey?
- Risky as Commission could sue the UK? Fight it in court if Commission sues
- Alternative: UK to propose legislation at EU level to clarify case law

# Conclusion

- Much ado about nothing? No, about a little bit, which makes a difference in some cases.
- Whether the author's own intellectual creation is the continental test or not does not matter, what matters is that it is higher than SSJL
- How to choose between these options – what is best? UK judges have chosen to obey so far but parties and judges could be even more proactive to seek clarification from CJEU
- Future will tell...

# Thank you for your attention

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