

**Originality: concept, novelty, computer generated works, functional works, proof, fixation,
exhaustive list of works**

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The first part of the session examined 2 questions: the originality scope and the notions of hand and tool in copyright.

Originality scope

Originality is the first concept to analyse in order to decide if copyright is applicable. The status of the author is not supposed to be a factor. At the origins of copyright laws, the question was futile: paintings, music, novels ... were original. In fact copyright was shaped for the 19th century art. What happened with the symbiosis between romantic art and copyright laws?

Some authors have totally opened up the paradigm. Some examples:

- Marcel Duchamp, *Fontaine*
 - Is it original? Revolutionary?
 - Do art and copyright share the same criteria?
 - Dichotomy idea/expression
 - Novelty vs originality
- John Cage, *4,33*, a music composed with silence
- Augusto Boal and his invisible theatre
- Cheryl Sourkes photography from webcam images

Other type of creations expand the notion of work

- Is a Tweet protected?

- Is any photography original? Court decisions give different answers.
- Is perfume protected?
- Among others, are compilations of data, hiking routes, characters of specific font or functional work protected?

The hand and the tool

Copyright is based on a separation between the hand and the tools.

- The tool is used to create work and the author of the tool is not the author of the work. The tool producer (paint brushes for instance) is not the author of the work created with the tool.
- The hand person who uses a tool. That person is an author if he/she shows skill and judgment when using the tool.

What about software helping the creativity of an author? Does some software have a co-authorship function? New software tools (Final Cut or Photoshop, for instance) shape the expression of the work. You give the software some indications and a work is produced. Often, the software contributes to the expression of a work. Does that mean that it is a tool that has become a creative hand?

Lev Manovich, “New Media from Borges to HTML”, *The New Media Reader*, MIT Press, 2003: “Computer scientists who invented these technologies [the new audio and video editing software] are the important artists of our time – maybe the only artists who are truly important and who will be remembered from this historical period.”

What criteria should we use to determine authorship? Does the result have to be foreseeable by the software? If the choices were not foreseeable by the software programmers, the reasoning could go two ways:

- a “facts approach”, analysing the work, and finding all the creative contributors and considering that they are all co-authors. The software (its authors ...) would then be co-authors.
- an “intention approach” analysing the intention of all contributor and only keeping those who wanted to be authors. The software (its authors ...) would not be co-authors.

One of the conclusions could be that some software are bringing us into a collective work era. Some software is, perhaps, like creative hands reaching for other creative hands.

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The second part of the session was the presentations of the four panellists. Here are the abstract written by each of them.

Leonardo Pontes (Brazil)

The presentation will analyze the originality concept in *droit comparé*. Initially, studying the doctrines of *de minimis creativity* and *sweat of the brow* in *CCH Canadian Ltd. v. Law Society of Upper Canada*, judged by the *Canadian Supreme Court*, where we can see the idiosyncrasies of both doctrines. Soon after, the presentation will approach the idea of *de minimis creativity* in *Feist Publications, Inc., v. Rural Telephone Service Co.*, which represented a rupture of the North-American copyright with the doctrine of *sweat of the brow*. Later, the presentation will analyze the *effort créateur* and *originalité* concepts in the French *droit d'auteur*; *minima attività creativa* in Italian *diritto d'autore*; *kleine Munze* and *Gestaltungshöhe* in German copyright; and the notion of *mínima criatividade* in Brazilian copyright.

Shujie Feng (China)

Can Chinese characters of specific font be original work?

In the case in China *Founder v P&G and Carrefour*, the plaintiff claims its copyright on two Chinese characters of a font crated by it. These two Chinese characters are used as trademark on shampooing bottles by P&G and the products are on sales in Carrefour supermarkets. A Chinese character of a specific font, can it be an original work in the sense of copyright law?

Originality, of which the creativity level, is the key issue for the qualification of work in this case. The adoption of the American styled minimum level of originality makes the threshold of copyright protection so low that it's difficult to deny the existence of originality in general. The concern for public interest makes courts prudent in the application of the creativity level in work qualification. Between the calligraphy, which is original, and fonts in public domain, which is not, where shall the threshold be fixed?

Fonts in public domain: not original

Font at litige :  original?

Calligraphy:  www.shufami.com 书法网 www.shufami.com 书法网 original

Orlanda Gisela Graça (France)

My presentation will discuss the originality of functional creations and, more specifically, of software and electronic databases. These creations, whose main goal is to be used, have most often a form determined by the function they are intended to fill. Can this form be both functional and original? If we define the criterion of originality as the imprint of the personality of the author, only the utilitarian creations whose form stands out a little from the function can potentially leave room for the expression of personality in said form. In software and electronic databases that margin is zero or nearly so. Only an objectification of the criterion, the detaching of any reference to the personality of the author, has allowed their protection by author's right. Today, does the criterion of originality still work as a test of protection or is it reduced to a meaningless formula?

Ma présentation traitera de l'originalité des créations fonctionnelles et, plus spécialement, des logiciels et des bases de données électroniques. Celles-ci, dont le but principal est d'être utilisées, ont le plus souvent une forme déterminée par la fonction qu'elles visent remplir. Cette forme peut-elle être à la fois fonctionnelle et originale ? Si l'on définit le critère de l'originalité comme l'empreinte de la personnalité de l'auteur, seules les créations utilitaires dont la forme se détache un peu de la fonction laisseraient potentiellement une marge pour l'expression d'une personnalité dans ladite forme. Dans les logiciels et les bases de données électroniques cette marge est nulle ou presque. Seule une objectivation du critère, le détachant de toute référence à la personnalité de l'auteur, a permis leur protection par le droit d'auteur. Aujourd'hui, l'originalité fonctionne-t-elle encore comme un vrai critère de protection ou se réduit elle à une formule vide de sens ?

Kenan Dong (China)

The list of “works” in the Chinese copyright law

The Copyright Law of P.R.C. was adopted in 1990, and revised in 2001. There are eight forms of “works”. In the Implementing Regulations of the Copyright Law, there are thirteen forms of works and explanations of each work. Now the copyright law is being modified. In the exposure draft, some amendments are made concerning the list of works. Audiovisual works, works of applied arts, computer programs, and other forms of literature, art and science are added into the list of works. Given China's commitment under the Berne Convention, it is obliged to protect works of applied art. But until now there is no reference to 'works of applied art' in either the Copyright Law or the Patent Law, so the protection of works of applied arts has proved to be a challenge for the Courts. The judicial practice has been clarifying the nature and extent of both the available copyright protection and the patent protection, which may, in some situations, also be available. The draft shows that China may adopt the copyright law to protect the works of the applied arts.

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The third part of the session was an open discussion on the presentations and on comparative law. At the end of the session, a study case was presented. Using the Net Art Generator project of Cornelia Sollfrank (<http://nag.iap.de/?lang=en>) the debate was the following: is the result of the Net Art Generator protected by copyright and, if so, who would be the author(s)? Various options were discussed in a very animated debate.