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Authorship matters! Authorship in the EU with a focus on film[1]

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ABSTRACT

The term author, although at the center of copyright, is not defined in EU law. This lack of an EU wide definition leads to problems in the internal market and unequal treatment of authors due to differing laws on the topic of authorship in EU Member States.

The author of this article argues that there should be a definition for authorship in EU law to achieve a well-functioning Single Market and to create fair conditions for creatives in the EU. Two definitions are proposed, one relating to authors in general, and another one more specific for the area of film.

1. INTRODUCTION

In copyright, the focus is on the authors as they are usually the ones who are initially granted economic and moral rights.[2] The term 'author' is neither defined in international law, such as the Berne Convention[3], nor in EU law. At first sight, this might not be considered a problem because it seems clear that an author is 'the one who creates a work'.

But such a definition inevitably leads to the question of the exact meaning of the term 'create'– in the literal and legal sense. First, looking at the literal sense, the following definitions can be found in the Cambridge Dictionary: *'to cause something to exist or to make something new or imaginative'*.[4] The first definition just means that there is a causal connection between the creator and his work. The second meaning adds a qualitative dimension, the aspect of creativity.

Viewing these definitions from a legal perspective, Daniela Simone sees them reflected in case law by two dimensions of authorship: *'a factual causative dimension (an author is an originator) and a normative one (what copyright should protect)'*.[5] These two definitions complement each other. The Court of Justice of the European Union (CJEU) has not yet defined the notion of authorship but it has published some decisions that resulted in a de-facto harmonization of the subject matter of copyright, thereby providing guidance on who can be an author. While many people can contribute to a work – and therefore be an originator in a broad sense – only few can be considered authors. Decisions of the CJEU have made it clear that contributions to a work need to fulfill certain criteria in order to entitle someone to authorship status.

2. THE COPYRIGHT LEGAL FRAMEWORK – INTERNATIONAL AND EU LAW ON AUTHORSHIP

2.1 International law

In 1886, the Berne Convention, the oldest international treaty on copyright, was adopted.[6] The Convention is based on the principle of national treatment and a minimum level of protection to be given in all signatory countries of the agreement. The Berne Convention is important to the legislative framework of the EU as all EU Member States are parties to the Convention. Under the Berne Convention copyright protection must be given to 'every production in the literary, scientific and artistic domain, whatever the mode or form of its expression' (Article 2(1) BC). In Article 2, the Berne Convention explicitly states cinematographic works as protectable by copyright law.

The Berne Convention does not contain any definition of the term author, it simply states that an author is whoever claims to be the author by putting their name on the work (Article 15.1 Berne Convention). According to the newest WIPO Guide to the Copyright and Related Rights Treaties[7] though, the words 'author' and 'work' are used in a context which makes it clear that only intellectual creations can be protected by copyright. The Guide also explains that a work must fulfill the requirement of originality in the sense that it must be an *'individual creation reflecting the personality of the author'*[8] and that this is the only condition for a work to be protected.

The WIPO Guide elaborates on the term 'author' with reference to Article 2 para 6 of the Berne Convention that only natural persons *'whose intellectual creative activity brings such works into existence'*[9] can be considered authors.

Later conventions, such as the TRIPS Agreement[10] and the WIPO Copyright Treaty (WCT)[11] refer to the Berne Convention. Main aims of the TRIPS Agreement were the modernization of copyright rules and the introduction of effective enforcement measures for intellectual property rights. The WCT introduced three – then new - exclusive rights, namely the right of distribution, right of rental for cinematographic works and the right of communication to the public, the latter covering for the first time on-demand consumption and other internet applications.[12] The topic of authorship has not received any more clarification.

2.2 EU law - the lack of a definition of authorship and the resulting problems

Copyright plays an important role in the establishment and the functioning of the Single Market with freedom of goods, services, capital and persons at the core of the European Union. In its Single Market Strategy in 2015, the European Commission declared the removal of regulatory and non-regulatory barriers in the Single Market a priority.[13] The European Commission acknowledges that the harmonization of copyright law is crucial for the proper functioning of the internal market as copyright-intensive sectors, including the audiovisual industry, are important from an economic and cultural point of view.[14] According to a report from the European Patent Office and the European Union Intellectual Property Office, copyright-intensive industries generated 6.9% of total economic activity (GDP) in the EU, with a value of € 1 trillion and provided 5.5% of all jobs in the EU during the years 2014 to 2016.[15]

The lack of an EU-wide conceptual definition of the term 'author' leads to problems when it comes to the functioning of the internal market. Directive 2001/29/EC (InfoSoc Directive)[16], which was adopted to implement the WIPO Copyright Treaty and further harmonize the copyright laws on EU level, refers in Recital 1 to the establishment of the internal market. It states that the harmonization of the national copyright laws contributes to the proper functioning of the internal market. However, a study for the European Parliament concerning the implementation of the InfoSoc Directive came to the conclusion that the Directive did not achieve a number of its declared goals, among those also the creation of a fully integrated internal market.[17] The study pointed out that the InfoSoc Directive contributed significantly to the coherence of EU copyright law, but also identified gaps which represented a problem for the internal market. One of these gaps was the absence of common definitions for basic concepts of copyright, such as a definition for authorship, leading to legal uncertainty, fragmentation and a lack of effectiveness of the EU copyright legislation.[18]

Another study in 2013 on the application of the InfoSoc Directive also commented on the topic of authorship in copyrighted works and pointed out that there are divided opinions concerning Article 5.2 of the Berne Convention which establishes the so-called *lex loci protectionis*.[19] The rule states that for the enjoyment and exercise of rights, the applicable law is the law of the country for which protection is sought. But it is disputed that this provision is also applicable to the determination of authorship. Applying the *lex loci protectionis* to determine authorship would mean that different people could claim copyright protection, depending on where protection is sought. In some cases, this would mean that a person is an author in the country of origin of a work but might not be given authorship status in another country due to the applicable national law. The renowned intellectual property professors Jane Ginsburg and Sam Ricketson[20] point out that this leads to legal uncertainty for initial authors and consumers as well as *'[...] it could mean, for example, with respect to joint works, that different persons would be adjudged authors of the same work in different countries, depending on each country's standard for demonstrating authorship'*.[21]

1 This article is based on the Master thesis of the author of this article in the LL.M Program in European Intellectual Property Law at Stockholm University. The article is limited to economic rights and does not cover moral rights.

2 This does not apply to cases where a work-for-hire doctrine is applicable which gives the employer ownership in the work produced under an employment contract, for example in Ireland (Section 23(1)(a) of the Copyright and Related Rights Act).

3 Berne Convention for the Protection of Literary and Artistic Works Paris Act of July 24, 1971, as amended on September 28, 1979.

4 Cambridge English Dictionary online CREATE | meaning in the Cambridge English Dictionary, last accessed 29 November 2021.

5 Daniela Simone, *Copyright and Collective Authorship* (Cambridge University Press 2019) 37. Daniela Simone is a Senior Lecturer at Macquarie University in Sydney, Australia, and a Honorary Lecturer at University College London, UK.

6 Berne Convention for the Protection of Literary and Artistic Works Paris Act of July 24, 1971, as amended on September 28, 1979.

7 World Intellectual Property Organization, WIPO Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms, WIPO Publication No. 891(E), 2003, BC-2.3.

8 Ibid, BC-2.8.

9 Ibid, BC-2.60.

10 TRIPS Agreement is Annex 1C to the World Trade Organization (WTO) Agreement.

11 WIPO Copyright Treaty, 20 December 1996, S. Treaty Doc. No. 105-17 (1997); 2186 U.N.T.S. 121; 36 I.L.M. 65 (1997).

12 Francisco Javier Cabrera Blázquez, Maja Cappello, Gilles Fontaine, Julio Talavera Milla, Sophie Valais, *Copyright licensing rules in the EU* (IRIS Plus, European Audiovisual Observatory 2020).

13 Communication from the Commission to the European Parliament, the Council, the European and Social Committee and the Committee of the Regions 'Upgrading the Single Market: more opportunities for people and business', COM (2015) 550 final 28 October 2015.

14 Ibid; Study of the European Parliamentary Research Service, 'Review of the EU copyright framework. The implementation, application and effects of the ''InfoSoc'' Directive (2001/29/EC) and of its related instruments' (2015) 9.

15 European Patent Office, European Union Intellectual Property Office, 'IPR-intensive industries and economic performance in the European Union. Industry-Level Analysis Report' (Executive Summary, 2019) 9.

16 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L 167/10.

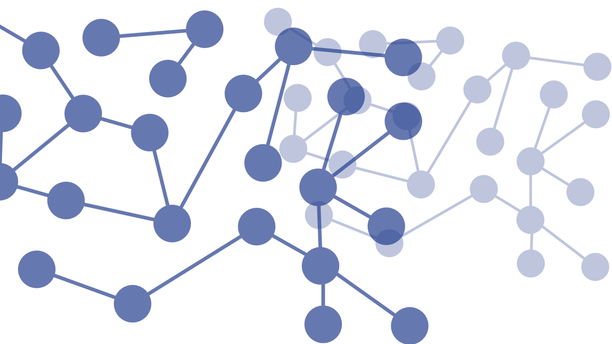
17 Study of the European Parliamentary Research Service, 'Review of the EU copyright framework. The imple- mentation, application and effects of the ''InfoSoc'' Directive (2001/29/EC) and of its related instruments' (2015) 13.

18 Ibid 13.

19 Jean-Paul Triaille (ed), *Study on the Application of Directive 2001/29/EC on Copyright and Related Rights in the Information Society* (the 'InfoSoc Directive') (De Wolf & Partners 2013).

20 Jane Ginsburg is faculty director of Columbia's Kernochan Center for Law, Media, and the Arts and has published a large number of books and articles in the area of intellectual property law. Sam Ricketson is an Emeritus Professor in the Melbourne Law School who has written books and articles in all areas of intellectual property (IP) law.

21 Jane Ginsburg, Sam Ricketson, International Copyright and neighboring rights (Oxford University Press 2006 vol 1) 376.



The same problem arises from the EU Rome II Regulation[22], which also does not indicate whether determination of authorship and first ownership has to be based on the law of the country for which protection is claimed or if the *lex loci originis* is applicable.[23] In the latter case, the author is determined based on the law of the country of origin of the work. The above-mentioned study therefore concluded that the different rules concerning authorship affect legal certainty when it comes to rights clearance and in the case of infringement.[24]

2.3 Why a common definition is becoming more important – the DSM Directive (EU) 2019/790

Admittedly, legal disputes concerning authorship are limited because contractual arrangements are usually made concerning the production and subsequent exploitation of a work. But the limited number of disputes is also a sign of the imbalanced bargaining powers between authors on the one hand, and publishers and producers on the other hand.[25] As the transfer and licensing of rights from authors to publishers and producers are usually subject to individual negotiations, the weaker position of authors often leads to contracts that are disadvantageous for them and deprive them of receiving appropriate remuneration. Authors might refrain from demanding higher remuneration because of their dependence on exploiters. With the development of new means of exploitation, especially the internet, this problem has become even more significant. A copyright protected work may generate income over a very long period of time and this is often not reflected in the remuneration for authors. Very often authors get a lump sum payment for their rights and are precluded from any further revenues from the exploitation. This is the consequence of a rather complex and unharmonized system of authorship allocation, ownership of rights and transfer of rights.[26] The European Commission has taken note of these problems and introduced some provisions in the DSM Directive to protect authors.

Articles 18-22 of the DSM Directive aim to ensure a high level of protection by introducing a principle of *'appropriate and proportionate'* remuneration for authors (Article 18(1)), a contract adjusting mechanism (Article 20) and a right of revocation in the case of a lack of exploitation (Article 22). In a comment concerning the implementation of Articles 18-22 the European Copyright Society (ECS) pointed out that studies show how imbalanced the income situation for different creatives is. On the one hand there are *'winners-take-all star authors and performers'* and on the other hand there are a great number of creators who cannot live off their work, with an income below the minimum level. Therefore, it highly welcomed the initiative of the EC to establish rules to counterbalance the obvious imbalance of powers.[27]

These provisions specifically refer to the term 'authors'. If someone is not acknowledged as an author by national law, they cannot base any claims on the regulations contained in the Directive. A uniform definition for authorship in the EU is therefore crucial to assure equal treatment and protection of creatives in all Member States.

3. PARAMETERS FOR A DEFINITION OF AUTHORSHIP

3.1 National laws

What can national copyright laws contribute to finding a definition for the notion of 'author'? Well, not much. The German Author's Right Act, for example, states: *'The author is the creator of the work'*.[28] The French Intellectual Property Code (IPC) sets out that authorship shall belong to *'the natural person or persons who carry out the intellectual creation of such work'*[29], the Irish Copyright and Related Rights Act also defines the author as the person who creates a work.[30] Similar wordings are found in a number of copyright laws in EU Member States.[31]

Regarding the normative dimension, the different

[22] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L 199/40.

[23] Annette Kur, Ulf Maunsbach, *'Choice of Law and Intellectual Property Rights'* (2019) 6(1) Oslo Law Review 43.

[24] Jean-Paul Triaille (ed), *Study on the Application of Directive 2001/29/EC on Copyright and Related Rights in the Information Society* (the 'InfoSoc Directive') (De Wolf & Partners 2013) 150.

[25] See e.g. Recital 72 of Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L 130/17.

[26] Raquel Xalabarder, *AV Remuneration Study. International Legal Study on Implementing an unwaivable right of audiovisual authors to obtain equitable remuneration for the exploitation of their works* (CISAC Confédération internationale des sociétés d'auteurs et compositeurs, 2018) 3.

[27] The European Copyright Society, *'Comment of the European Copyright Society Addressing Selected Aspects of the Implementation of Articles 18 to 22 of the Directive (EU) 2019/790 on Copyright in the Digital Single Market'* (2020) 11 Journal of Intellectual Property, Information Technology and E-Commerce Law 133.

[28] Urheberrechtsgesetz vom 9. September 1965 (BGBl. I S. 1273), das zuletzt durch Artikel 4 des Gesetzes vom 26. November 2020 (BGBl. I S. 2568) geändert worden ist.

[29] Loi n° 92-597 du 1er juillet 1992 relative au code de la propriété intellectuelle JORF n°0153 du 3 juillet 1992 Articles L 113-7 and L 113-8.

[30] Copyright and Related Rights Act 2000.

[31] Further examples can be found in *'Copyright Law in the EU. Salient Features of copyright law across the EU Member States'* available at

copyright traditions - the civil law countries focusing on the authors and the common law countries approaching copyright from an entrepreneurial perspective – result in different assessments as to what should be protected by copyright. The countries with common law traditions follow (or followed at least before the harmonization by the CJEU) a 'sweat of the brow' doctrine, granting protection whenever significant labor, skills and effort have been put into a work by the creator. For countries of the civil law tradition, the decisive element for copyright protection is the presence of a creative element.[32] From a European perspective, this means that copyright rewards different contributors as authors in the various EU Member States. These diverging standards have now been approached by decisions of the CJEU giving guidance on what can be protected by copyright by clarifying the definition of 'work' as an original subject matter.

3.2 Coming to the rescue – the CJEU

Up to now the CJEU has not provided a definition of authorship in its case law but as the terms 'author' and 'work' are inextricably connected, looking at CJEU case law that clarifies the definition 'work' in connection with copyrightable works contributes to finding a definition for authorship.

In *Levola Hengelo,*[33] the CJEU explained that the concept of 'work' encompasses two requirements: there needs to be an original subject matter and it needs to be expressed in an identifiable manner.[34]

The key case concerning the concept of originality is *Infopaq*[35] where the CJEU explained that copyright applies *'in relation to a subject-matter which is original in the sense that it is its author's own intellectual creation'*.[36] This standard of originality had already been introduced in several directives, for example Directive 2009/24/EC (Software Directive) (Art 1(3))[37] or Directive 96/9/EC (Database Directive)[38] (Art 3(1)). Directive 2011/77/EU (Term Directive)[39] referred to *'the author's own intellectual creation*' in connection with copyright protection for photographs (Art 6) as well. In *Infopaq* the CJEU stated that words as such are not protected by copyright as they are not an intellectual creation of the author. It went on to explain that *'[I]t is only through the choice, (sequence and combination of those words that the author may express his creativity in an original manner and achieves a result which is an intellectual creation.'*[40]

This originality criterion was further developed in subsequent decisions of the CJEU. In *Painer*[41], the Court of Justice emphasized that even a portrait picture can meet the standard of originality and be protected by copyright as a work, if creative choices have been made by its author, the photographer. The Court stated that photographers can for example choose the lighting, the background, the pose of the subject and various other things, thereby putting their 'personal stamp' on the picture. In *Football Dataco*[42], the CJEU held that more than *'significant labour and skill of its author'* is necessary to reach the required level of originality for copyright protection, thereby clearly rejecting the approach predominant in common law countries.

Merit, quality, aesthetic character and purpose do not play a role when deciding if a subject matter is protected by copyright. This approach follows from the directives that introduced the originality criterion and which stated that no aesthetic or qualitative criteria and no other criteria such as merit or purpose are to be considered for the assessment of originality.[43] The success or failure of a work, or whether it is of high or low quality, does not influence the possibility of protection by copyright and this should not be judged in court. But it is also clear that judges necessarily have to apply some qualitative criteria when deciding whether the choices taken by the creator are too trivial to be considered creative choices, thus not fulfilling the originality criterion.[44] The assessment of originality does not happen in a vacuum, those deciding are influenced by their own view of what should be protected by copyright. This is also emphasized by Advocate General Mengozzi in his opinion in *Football Dataco and Others*:

> *Clearly, it is not possible to define, once and for all and in general terms, what constitutes an 'intellectual creation'. That depends on an assessment [...]. In any event, if ever that assessment is required, it is for the national courts to undertake it on the basis of the circumstances of each individual case.*[45]

<https://www.europarl.europa.eu/thinktank/> en/search.html?word=salient+features, last accessed 31 October 2021.

32 Opinion of Advocate General Paolo Mengozzi in *Football Dataco and Others*, C-604/10, EU:C:2011:848 para 36.

33 Judgment of 13 November 2018, *Levola Hengelo*, C-310/17, EU:C:2018:899 paras 35 to 40.

34 This part of the judgment refers to the Levola Hengelo Case. Judgment of 13 November 2018, *Levola Hengelo*, C-310/17, EU:C:2018:899 para 40.

35 Judgment of 16 July 2009, *Infopaq*, C-5/08, EU:C:2009:465.

36 Ibid para 37.

37 Directive 2009/24/EC of the European Parliament and of the Council of April 23 2009 on the legal protection of computer programs (Codified version) [2009] OJ L 111/16.

38 Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases [1996] OJ L 77/20.

39 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 [2011] OJ L 265/1.

40 Judgment of 16 July 2009, *Infopaq*, C-5/08, EU:C:2009:465 para 45.

41 Judgment of 1 December 2011, *Painer*, C-145/10, EU:C:2011:798 para 87.

42 Judgment of 1 March 2012, *Football Dataco*, C-604/10, EU:C:2012:115 para 42.

43 Compare for example Software Directive, the Database Directive and the Term Directive.

44 Stef van Gompel and Erlend Lavik, *'Quality, merit, aesthetics and purpose: An inquiry into EU copyright law's eschewal of other criteria than originality'* (2013) 236 Revue Internationale du Droit d'Auteur 100.

45 Opinion of Advocate General Paolo Mengozzi in *Football Dataco and Others*, C-604/10, EU:C:2011:8 para 38.

The criterion of originality, although intended to harmonize the copyright laws of EU Member States, will still experience different interpretations by courts, as it is a concept that is 'dynamic, that is, bound by time, place, and local use'.[46] Court decisions on originality might also be influenced by policy considerations related to unjust enrichment and unfair competition.[47]

There are examples that illustrate clearly what is not enough to be copyrightable, such as substituting pronouns, like 'she' and 'her' for 'he' and 'his' in a preexisting work of authorship, or an act of editing that merely consists of spelling and grammatical corrections.[48] But it is a lot more complicated to determine when the necessary level of originality is actually reached.

The second criterion regarding the notion of 'work' is that of 'expression' and has been emphasized by the CJEU in *Painer* and other decisions.[49] In *Painer*, the CJEU stated that the author must *'express his creative abilities in the production of the work by making free and creative choices'*. The term 'express' can be seen as a reflection of the idea-expression dichotomy as stated in Article 2 of the WIPO Copyright Treaty and Article 9(2) of the TRIPS Agreement. This means that only expressions of ideas but not ideas themselves are protected by copyright. This principle serves to counterbalance the rights of authors in their work and the public interest in order to allow unrestricted access and exchange of ideas. In EU law, this principle is also explicitly stated in the Software Directive and the CJEU has emphasized it in some decisions. For example, in the SAS case, where it stated that *'to accept that the functionality of a computer program can be protected by copyright would amount to making it possible to monopolise ideas'*.[50] In paragraph 33 of the judgment, the CJEU points out that ideas, procedures, methods of operation or mathematical concepts as such cannot be protected by copyright.

Another example in case law concerning the criterion of identifiable expression, is the aforementioned *Levola Hengelo* case which was on the possibility of protecting the taste of cheese by copyright. The CJEU denied copyright protection based on the argument that taste lacks identifiability. In paragraph 42, the Court of Justice points out that contrary to taste *'a literary, pictorial, cinematographic or musical work, [...] is a precise and objective form of expression'*. As Jani MacCutcheon puts it in an article on this judgment: *'claiming property in the nebulous "herby, cheesy" taste of Levola's product is analogous to appropriating the broad idea of writing a novel about aliens invading from Mars.'*[51]

4. ADDING COMPLEXITY – THE PROBLEM OF AUTHORSHIP IN WORKS WITH MULTIPLE CREATORS

Copyright aims to protect the interests of the authors as creators of a work. This personality-centered approach is reflected in the criterion of originality which makes protection by copyright dependent on authors and their original, creative choices. Such an assessment of originality and personal stamp becomes very difficult in the case of collaborative works. The topic of works created by more than one person has not been given much attention in international and European law. The Berne Convention mentions joint works but does not offer a definition of the concept, and neither do other international and European sources.

4.1 Categories of works created by more than one person

One point to address in connection with works created by more than one person is the categorization of such works. The Term Directive differentiates between collective works and joint works without defining the two categories but the categorization influences the length of copyright protection. While the term of protection for collective works is 70 years after they have been lawfully made available to the public,[52] in case of works of joint authorship this term is calculated from the death of the last surviving author.[53] This means that in the case of a joint work, the term of protection depends on the lifetime of the authors. As the concept of author as well as the categorization of works created by more than one person are defined by

[46] Mireille van Eechoud, P. Bernt Hugenholtz, Stef van Gompel, Lucie Guibault, Natali Helberger, *Harmonizing European Copyright Law: The Challenges of Better Lawmaking* (Information Law Series 19, Amsterdam Law School Research Paper No. 2012-07, Kluwer Law International 2012) 42.

[47] Stef van Gompel, *'Creativity, Autonomy and Personal Touch'* in Mireille van Eechoud (ed), The Work of Authorship (Amsterdam University Press 2014).

[48] This is an example taken from the United States Copyright Office, Compendium of U.S. Copyright Offices Practices (14 January 2021), 3rd edn, available at https://copyright.gov/comp3/docs/compendium.pdf, last accessed 31 October 2021.

[49] Judgment of 1 December 2011, *Painer*, C-145/10, EU:C:2011:798 para 89; compare also: Judgment of 16 July 2009, *Infopaq*, C-5/08, EU:C:2009:465 para 45; Judgment of 22 December 2010, *Bezpečnostní softwarová asociace - Svaz softwarové ochrany v Ministerstvo kultury*, C-393/09, EU:C:2010:816 para 50.

[50] Judgment of 2 May 2012, *SAS Institute v. World Programming*, C-406/10, EU:C:2012:259 para 40.

[51] Jani MacCutcheon, *'Levola Hengelo BV v Smilde Foods BV: The Hard Work of Defining a Copyright Work'* (2019) 82(5) Modern Law Review 936.

[52] Term Directive Art 1(4).

[53] Ibid Art 1(2).

[54] Urheberrechtsgesetz vom 9. September 1965 (BGBl. I S. 1273), das zuletzt durch Artikel 4 des Gesetzes vom 26. November 2020 (BGBl. I S. 2568) geändert worden ist.

[55] Drucksache IV/270 Deutscher Bundestag 4. Wahlperiode, *'Entwurf eines Gesetzes über Urheberrecht und verwandte Schutzrechte (Urheberrechtsgesetz) mit Begründung'* (1962). Available for download here: https://www.urheberrecht.org/law/normen/urhg/1965-09-09/materialien/ds_IV_270_A_01_00.php, last accessed 29 October 2021.

[56] Pascal Kamina, *Film Copyright in the European Union* (Cambridge University Press 2016) 170.

[57] Deutsches Urheberrechtsgesetz § 8(2).

national law, this affects the efficacy of harmonized EU provisions. Assuming that this would also apply to the area of film, the following situation would arise: as in Ireland only the principal director and the producer count as authors of a film, they would be the only ones that have to be taken into consideration when determining the term of protection. Looking at France on the other hand, the list of authors can include five or more people whose lifetime determines the length of protection. This would not only lead to potentially big differences in the length of the protection but also would make it a lot more complicated to calculate the protection where a large number of contributors are considered co-authors. Regarding film, the EU legislators therefore decided to avoid this problem by explicitly enumerating the people who need to be taken into consideration for determining the term of protection. Article 2(2) of the Term Directive states that cinematographic or audiovisual works are protected for 70 years after the death of the last of the following: the principal director, the author of the screenplay, the author of the dialogue and the composer of music specifically created for use in the cinematographic or audiovisual work. This provision provides a clear solution, so it is not necessary for every Member State to classify cinematographic works under the same category of works. Not all countries categorize works by more than one author as either 'joint works' or 'collective works' and if they do, the definition of the categories are not entirely identical. This can already be seen from the three countries examined in this article, which is an indicator that an even greater variety of regulations exists on the pan-European level.

Germany: § 8(1) of the German Author's Right Act (Deutsches Urheberrechtsgesetz) states that joint authorship ('Miturheberschaft') arises when works were created by more than one person and the contributions cannot be exploited separately.[54] According to the explanations accompanying the proposal for the German law, what counts is the separate exploitability and not the divisibility of the contributions. Even if it is possible to identify the contribution of a single author, the work might still be a joint work, if the contribution is interdependent and cannot be commercialized separately.[55] Under these rules, musical works, scripts and other literary works do not constitute joint authorship.[56] The exploitation of joint works is only possible by uniform decision of all the joint authors.[57]

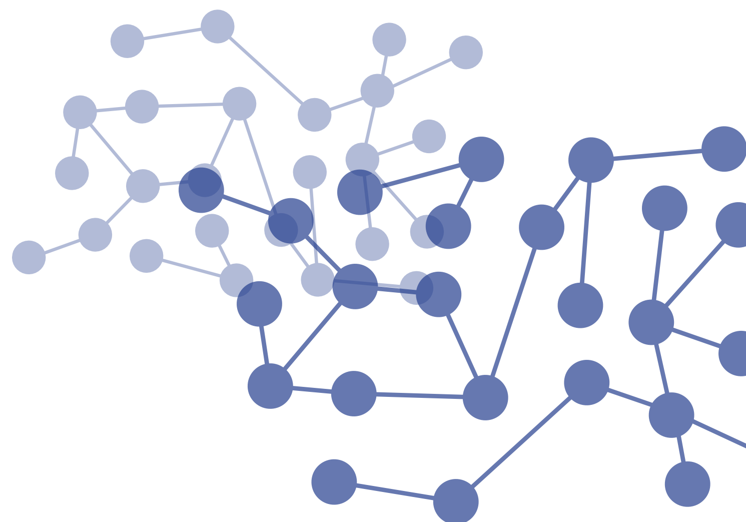
The other category of works created by more than one person mentioned in the German Author's Right Act are collective works ('verbundene Werke' - § 9 of the German Author's Right Act). They are characterized by the fact that autonomous works are combined for joint exploitation. All authors involved can claim the consent of the others to the publication, exploitation or alteration of the work if their consent can reasonably be expected in good faith.

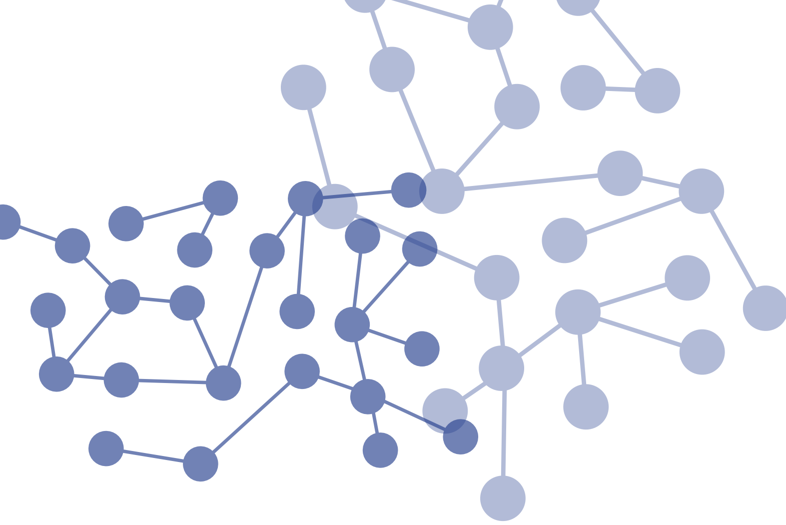
France: Article L113-2 distinguishes between three kinds of works if more than one person has participated in their creation: works of collaboration ('joint works'), composite works and collective works. The legal consequences concerning the exploitation are different for each category. The first category, works of collaboration, is simply defined as works that have been created by more than one person. Works of collaboration constitute joint ownership of the authors, they all have to agree to the transfer/licensing of the rights (L113-3). The second category, composite works, are described as creations where preexisting works have been included without participation of the author of the original work. Ownership of a composite work belongs to the author who has produced it but the underlying rights remain untouched (L113-4). The last category are collective works which are defined by two characteristics: firstly, they are works that have been initiated by a natural or legal person who edits, publishes and discloses it under his direction and name. Secondly, the contributions of the individual authors have been made particularly for a certain work and are merged into this work, making it impossible to attribute a separate right to the work created. Collective works are the property of the natural or legal person under whose name they have been disclosed (unless proven otherwise), this person holds the author's rights (L113-5).

Ireland: The Irish Copyright and Related Rights Act only contains provisions for joint works. They are defined as works that are the result of collaboration between two or more authors and where the contributions are not distinct (Article 22(1)). Article 23(1) states that the first owner of the copyright is the author, therefore joint authors are joint owners of copyright. The Irish Law contains no special provisions concerning exercise of rights in joint works, they are subject to the general rules that economic rights can be transferred by assignment, testament or by law and the joint authors are free to divide the rights between them within the margins of contractual freedom.

4.2 The personal stamp in collaborative works

When looking for a definition of the concept of author, the above mentioned CJEU decisions have to be taken into consideration: for copyright to arise, works need to bear the personal stamp of the author, and copyright only covers original contributions. In line with these decisions, the author is a key element of the originality criterion.





As pointed out above, the assessment of originality is difficult and needs to be executed on a case-to-case basis. Identifying the personal stamp in works created by more than one person is even more challenging. In line with the CJEU decisions, the threshold which needs to be reached for copyright to arise is quite low. This means that the personal stamp is often not easily recognized in a work and cannot be equated to *'an easily detectible "signature" or personal "style" of a creator'*.[58] In the case of collaborative works, one can distinguish two different kinds of works: firstly, there are works with an identifiable creative leader whose personal imprint is reflected in the work. Such a person can with great certainty be considered an author.[59] In the case of a film these are, in most cases, the directors, which is the reason the EU Member States could agree on them being an author.

The author of this article considers this approach unsatisfying as it would ignore other creative contributors, even if they have made creative choices. Concerning audiovisual productions it is not only the directors who influence the overall appearance of a film and make creative decisions. Although the principal film directors often exert some degree of control, there is no reason to believe that other contributors do not reach the quite low originality criterion as set out by the CJEU decisions. Considering the 'ultimate arbiter'[60], the person who has control over the creative process and who can ultimately accept or reject input or changes to the work, as the sole author is to be rejected. It would mean that authorship would be concentrated in the hands of a few who have the most power, ignoring all the individuals who have made original contributions to the work. Such an approach would unduly prejudice a lot of creators and discourage cooperation.

The second category are works where such a creative leader cannot be identified and which get their individualistic character through the collaboration of individuals. The stamp of the individual author may not be easily recognized in such cases and each claim for authorship needs to be evaluated individually, based on the CJEU decisions on originality. But the question remains, on how to determine whose contribution reaches the threshold to be considered co-authors. In connection with the UK joint authorship test included in the UK Copyright and Designs and Patents Act of 1988 (CDPA)[61], UK case law has established the criterion of 'significant contribution' for joint authorship to arise. Referring to that test, Daniela Simone argues that a contribution should be considered significant if it is *'meaningful/valuable in the particular context'*.[62] Some positions in filmmaking may be described as making a film 'appealing to the audience' or helping to 'convey the atmosphere' or 'creating the feel of a film' and therefore be considered valuable in the context of the film. Although such a criterion is meant to further refine the notion of joint authorship, it seems vague and subjective, involving a case-to-case assessment which will be influenced by the personal tastes and experiences of judges in case of a dispute and the possible outcome on that matter is unpredictable. Hence, the practical applicability and benefit of looking for those who have contributed something meaningful to the film to determine whether they are co-authors is limited.

5. A SPECIAL CASE - AUTHORSHIP IN FILMS

A film is a complex work made up of interdependent artistic, financial and organizational contributions that are very often spread out over a long period of time and can occur anytime from the preparation, for example when writing a script, to the very last moment of production, for example at the editing stage. Some works might already exist before the production process has even started, such as novels on which a film may be based. Film is also special because different subject matters, often protected by different rights, are merged into one work.

5.1 The emergence of two different copyright systems for films

If we were to identify the most important invention with regard to film, then it is surely the 'Cinématographe' which was patented by the Lumière brothers in 1895. Initially, the new works shown with this invention, called photo-plays, cinematograph works or cinematograph films, just served as an attraction and were not considered art. At the beginning, the question of authorship did not seem of major importance as the writer and producer were usually one and the same person. With the big success of the 'Cinématographe' throughout Europe it became more and more important to adopt laws to regulate these new works.[63] Even though France was very dominant in the film industry before World War I and had already put emphasis on protecting authors and producers of films, French courts initially refused copyright protection for films as they were only seen as use of a mechanical device.[64]

At the beginning of the 20th century the division between copyright and authors' right countries started which can in part be explained by the fact that films started to be recognized as a form of art and as an expression of the author's personality in some countries.[65] In the 1950s the 'auteur-theory' emerged in some authors' right countries, influenced among others by French director, scriptwriter and film critic François Truffaut. This theory idealized the directors, called 'auteurs'. It considered them the central figure of the filmmaking process, defining them as the ones who make a film a piece of art worthy of copyright protection. Focusing on a single person, film contributed to the perception of films as a piece of art rather than purely technical works.[66]

This brought a particular focus on creative authorship,

moral rights and the protection of the author in authors' right countries. As opposed to this view of the importance of the author and his intellectual creation which was predominant in continental Europe, the UK and other common law countries took another approach and focused on the protection of the producer, the natural or legal person investing in the production (copyright system). These differences can still be seen today: In countries following the copyright system, like Ireland, the main subject-matter for film protection is the recording (first fixation) of a film, whereas in authors' right jurisdictions, the subject-matter is the original work of expression, and the recording is protected by a related right in the first fixation of the film.

5.2 International law – the Berne Convention

The Berne Convention distinguishes between the cinematographic work as an original work and pre-existing works, such as a novel, which have been included in the film or have been specifically adapted for the film (Article 14bis BC). The Convention was revised several times between 1896 and 1971. The concept of authorship in relation to film was particularly discussed at the 1967 Stockholm revision conference for the Berne Convention because of the different national systems that had to be brought into alignment to facilitate international circulation of films. A new Article 14bis(1) was introduced which states that *'[t]he owner of copyright in a cinematographic work shall enjoy the same rights as the author of an original work.'* This gives the signatories the freedom to determine who should be defined as author and in whom they vest the copyright.

While there is no definition of 'author' in the Convention, it is widely accepted that it is a natural person.[67] In contrast to that, Pascal Kamina argues that the compromise introduced by Article 14bis(1) can be interpreted in such a way that also a producer, irrespective of whether it is a natural or legal person, employer or commissioner, could receive authorship status in the area of films.[68] The Convention does not interfere regarding the definition of 'author' on a national level, giving the countries the freedom of also designating legal persons as authors. The Irish Copyright Act for example determines that in the case of a film, the producer, who might also be a legal person, and the director are joint authors.[69]

5.3 EU law

At the EU level, before the adoption of the Rental and Lending Rights Directive (Directive 2006/115/EC), some EU countries, such as the UK and Ireland considered the producer to be the only author. In the other Member States the main director had already been accorded authorship status. The proposal of the European Commission for the Directive did not include any harmonization of the concept of 'author', the idea to bindingly designate the principal director as an author was suggested by the European Parliament's Committee on Culture. The suggestion was heavily disputed in the Council of the EU but was finally accepted.[70]

The EU Directives are mainly influenced by the continental approach and differentiate between the authors of a film and the producer of the first fixation of the film who is protected by a related right (neighboring right).[71] Film production companies usually bear the overall responsibility and the financial risk and need to have an appropriate financial incentive to do so. Therefore, the appropriate balance between protecting the individual creators and those bearing the financial risk, in this case the film producer, needs to be found. EU law takes these two positions into consideration by providing 'double protection' for films – for the audiovisual work as such, and for the first fixation of a film by means of a neighboring right. It is important to point out that the right in the first fixation does not require any originality. Accordingly, the scope of protection is limited to direct copying. This means that the copyright concerning the first fixation is not infringed even if a film is re-shot scene-by-scene or performed as a play.[72] This requirement of a 'double protection'[73] on a European level is reflected in the EU Directives in the field of film copyright, for example in the Rental and Lending Rights and the Term Directives that distinguish between authors' rights and related rights of the producer.

[58] Stef van Gompel, *'Creativity, Autonomy and Personal Touch'* in Mireille van Eechoud (ed), The Work of Authorship (Amsterdam University Press 2014).

[59] Ibid.

[60] This term was used by Hacon J in the UK case Kogan v Martin [2020] FSR 3, [2019] EWCA Civ 1645.

[61] Section 10(1) CDPA. The other elements are: collaboration, authorship, a contribution which is not distinct.

[62] Daniela Simone, *Copyright and Collective Authorship* (Cambridge University Press 2019) 38.

[63] Pascal Kamina, *Film Copyright in the European Union* (Cambridge University Press 2016) 7-8.

[64] Ibid 12-13.

[65] Ibid 18.

[66] Daniela Simone, *Copyright and Collective Authorship* (Cambridge University Press 2019) 167.

[67] See for example World Intellectual Property Organization, WIPO Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms, WIPO Publication No. 891(E), 2003, BC-2.60.

[68] Pascal Kamina, *Film Copyright in the European Union* (Cambridge University Press 2016) 142.

[69] Section 21(b) of the Copyright and Related Rights Act 2000.

[70] Report from the Commission to the Council, the European Parliament and the Economic and Social Committee on the question of authorship of cinematographic or audiovisual works in the Community, COM(2002) 691 final 6 December 2002.

[71] Pascal Kamina, *Film Copyright in the European Union* (Cambridge University Press 2016) 65.

[72] Daniela Simone, *Copyright and Collective Authorship* (Cambridge University Press 2019) 177.

[73] Ibid 67.

A number of directives talk about authorship in films:

The Satellite and Cable Directive obliges all Member States to acknowledge at least the principal director as author of a cinematographic work but they are free to add other co-authors (Article 1(5)).

The InfoSoc Directive does not give a definition of 'author' in connection with films, it uses the term 'authors' and the general term 'rightsholders'. This is because the Directive also covers related rights, such as the right of film producers in the first fixation of a film, and the rights of broadcasters and phonogram producers.

The Rental and Lending Rights Directive in Chapter 1 Article 2 (2) sets forth that the principal director needs to be regarded as an author, but the Member States are again free to include other authors. Recital 13 points out that *'the question of authorship in the whole or in part of a work is a question of fact which the national courts may have to decide.'* This means that Member States are in principle free to include even non-artistic contributors like the film producer, be it a natural or a legal person.[74]

The Term Directive also states that the principal director of a cinematographic work is the author or one of the authors (Article 2(1)). Interesting in connection with authorship is Article 2(2) of the Directive which specifies the term of protection of a cinematographic or audiovisual work and states that it *'shall expire 70 years after the death of the last of the following persons to survive, whether or not these persons are designated as co-authors: the principal director, the author of the screenplay, the author of the dialogue and the composer of music specifically created for use in the cinematographic or audiovisual work'*.

The calculation of the term of protection of copyright is usually connected with the lifetime of the author (his lifetime plus a number of years thereafter). The provision in the Term Directive therefore seems to indicate that in addition to the principal director, who has already been acknowledged by EU law as an author, also the author of the screenplay and the dialogue, as well as the composer of film music (if specifically created for the film) are considered to be co-authors by the EU-legislator. But it is left to the discretion of the Member States if they officially recognize them as such. Despite this freedom to only consider the director of a film as author in their national laws the term of protection is bindingly connected to the lifetime of all the creatives enumerated in this provision.

5.4 Authorship in films in national laws of EU Member States

Following the implementation of the various above-mentioned directives, all Member States now consider the principal director as an author, but national laws have different approaches when it comes to determining additional authors of a film. A layer of complexity is added by the fact that film usually includes various artistic contributions that may be covered as literary, artistic, dramatic or musical works or may be *sui generis* elements that are in some countries separately protectable by copyright, while this is not the case in others. Germany, France and Ireland are used to illustrate how national laws diverge on who they consider a joint author of a film. Germany and France have been included because of their importance in the audiovisual field. In 2019, 240 national films were produced in France, and 237 in Germany, representing 24.77% of the overall EU film production. Ireland is an example of a country following the copyright tradition and is therefore used to illustrate the difference to the countries with an authors' right approach.

Germany: Films are typically considered joint works in the sense of § 8 German Author's Right Act.[75] The law does not explicitly indicate who the authors of a film are, the rule is that everyone who has made a creative contribution can be a joint author of a film. According to the official justification concerning the German Author's Right Act, in addition to the principal director, cinematographers are usually considered joint authors if their name and function are featured in the usual way in the starting or end-credits of a film.[76] The justification explicitly also refers to film editors (cutters) as possible joint authors and explains that, in exceptional cases, also actors can be joint authors.[77] As the German Author's Right Act refers to the separate exploitability, script and other literary works as well as film music do not give rise to co-authorship. Costumes and set-designs are protected not as part of the film but as pre-existing works of art.

France: Concerning film, Article L113-7 states that authorship is vested in all persons who have 'carried out the intellectual creation' of the film, films are considered joint works.[78] The French Law explicitly states a number of people who are presumed to be joint authors of a film unless proven otherwise: the author of the scenario, the author of the adaptation, the author of the dialogue, the author of the musical composition made for the film and the principal director. This does not represent an exhaustive list but facilitates acknowledgment of authorship for the parties mentioned as it establishes a reversal of evidence. But anyone who provides an authorial input can be a joint author. If the film is based on an underlying work, its author is also considered an author with regard to the film.[79] Even though the French law enumerates several people as presumptive authors of an audiovisual work, this presumption can be rebutted when they merely follow precise instructions without making their own creative choices.

Ireland: The Irish law limits authorship status in films to the principal director, as predetermined by EU legislation, and the producer.[80] Article 22(2) stipulates that films are works of joint authorship unless the producer and the principal director are one person. Irish copyright protects the first fixation of the film and not the 'cinematographic work' as the creative product of the filmmaking process. This means that producers, who finance and oversee the whole production process, are acknowledged as authors even though they do not give authorial input. This approach finds support in Section 18(1) of the Irish Copyright and Related Rights Act 2000 which states that copyright only protects literary, dramatic or musical works if they have been recorded in writing or some other way.

The legal provision in Irish law which only recognizes the principal director and the producer as authors of a film creates a stable legal situation. At the same time, it is problematic in the light of the above-mentioned CJEU

cases as creatives might be excluded from authorship status even though they have made creative choices as set out by the CJEU.

For the purpose of giving a more complete picture of the existing varieties of rules in Member States it is worth pointing out that there are also countries which provide an exhaustive list of authors in the case of film, such as Spain, Italy and Portugal. These lists include the director, the authors of underlying works of literature (like script, scenario, dialogue, adaptation) and the authors of film music.[81]

6. CONCLUSIONS AND RECOMMENDATIONS

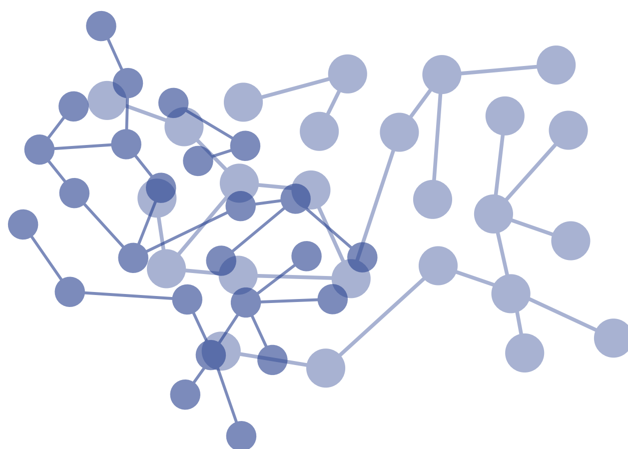
6.1 Proposal for an EU-definition of authorship

In an article on authorship in comparative law, Jane Ginsburg concluded that *'[...] in copyright law, an author is (or should be) a human creator who, notwithstanding the constraints of her task, succeeds in exercising minimal personal autonomy in her fashioning of the work'*.[82] This is also the road taken by the CJEU in its decisions concerning copyright and the originality criterion. The conclusion from these decisions is that only someone who has made at least a minimum of creative choices can be an author. The problem still remains on how to assess which contributions are considered authorial and therefore create entitlement to authorship. The personal stamp of individual contributors is often not obvious in highly collaborative works and there are no generally applicable parameters defined by CJEU case law, despite the harmonization of the concept of originality. Leaving such a determination to a case-to-case assessment leads to diverging decisions, probably not only between different Member States but also between different judges in the same country.

As the decisions on the merit of the cases referred to the CJEU are taken by the Member States, looking at these decisions might help to clarify these terms by establishing a kind of catalogue of works that have been considered original enough to be copyright protected. From this, conclusions can be drawn as to when the standard of originality is reached to trigger copyright protection. Although it would be preferable to have a definition that leaves no room for interpretation, the conclusions drawn from the decisions of the CJEU as well as the examination of scholarly literature make it clear that there is no straight-forward test to establish when the creative choices taken suffice to constitute authorship.

Before proposing a definition for the term author, it seems appropriate to address another aspect of the above definition which receives more and more attention from legal scholars: Does an author have to be a human? As Artificial Intelligence (AI) is becoming increasingly widespread and popular, there are new challenges and new questions in the legal field that need to be addressed. One of the fundamental questions in the area of copyright is whether AI can be an author and/or an owner of copyright. The more elaborate AI gets, the more difficult it will be to clearly distinguish between works that can be ascribed to humans and where AI is only used as a tool on the one hand, and computer-generated works where human authorship is absent on the other hand.

Arguments have been brought forward by scholars for and against AI authorship. Carys Craig and Ian Kerr call the idea of AI authorship *'oxymoronic'* and argue that AI should not be given authorship status, irrespective of the level of sophistication of machines.[83] Their argument is that *'human communication is the very point of authorship [...]. We do not think we are being at all romantic[84] when we say: authorship is properly the preserve of the human.' Other authors support the idea that machines can be matched to natural persons, such as Nick Bostrom who states: 'Machines capable of independent initiative and of making their own plans [...] are perhaps more appropriately viewed as persons than machines.'*[85]



[74] Pascal Kamina, *Film Copyright in the European Union* (Cambridge University Press 2016) 141–189.

[75] Jürgen Oechsler, *Skript zum Urheberrecht* (Uni Mainz 2020) 26.

[76] Drucksache IV/270 Deutscher Bundestag 4. Wahlperiode, *Entwurf eines Gesetzes über Urheberrecht und verwandte Schutzrechte (Urheberrechtsgesetz) mit Begründung* (1962). Available for download here: https://www.urheberrecht.org/law/normen/urhg/1965-09-09/materialien/ds_IV_270_A_01_00.php, last accessed 29 October 2021.

[77] Ibid 98.

[78] Pascal Kamina, *Film Copyright in the European Union* (Cambridge University Press 2016) 171.

[79] Loi n° 92-597 du 1er juillet 1992 relative au code de la propriété intellectuelle JORF n°0153 du 3 juillet 1992 Article L113-7.

[80] Section 21(b) of the Copyright and Related Rights Act 2000.

[81] Report from the Commission to the Council, the European Parliament and the Economic and Social Committee on the question of authorship of cinematographic or audiovisual works in the Community, COM(2002) 691 final 6 December 2002 8.

[82] Ibid.

[83] Carys Craig, Ian Kerr, *'The Death of the AI Author'* (2019) Osgoode Legal Studies Research Paper available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3374951, last accessed 31 October 2021.

[84] Here they refer to the notion of the 'romantic author'.

[85] Nick Bostrom, *'Superintelligence: Paths, Dangers, Strategies'* (Oxford University Press 2014).

The European Commission published a Proposal for a Regulation for harmonized rules on Artificial Intelligence in April 2021[86] which addresses the risks of AI, suggesting a legal framework that respects EU values and fundamental rights and encourages trust in AI.[87] The discussions concerning authorship and copyright ownership are just beginning and at this point it is impossible to predict what EU legislation will look like.

For the time being, a possible definition for authorship in copyright law could be based on the aforementioned definition by Jane Ginsburg and CJEU decisions and could read as follows:

> *'An author is a human who takes a minimum of creative choices in the making of a work'.*

6.2 A definition for authorship in films

A film is the result of artistic, financial, and organizational contributions. There is no doubt that both, producers and creative contributors, need incentives and rewards for their work. For producers, this incentive is their right in the first fixation of a film, authorship should be reserved to those who take creative decisions in the making of audiovisual productions. As the level of freedom accorded to contributors in the course of filmmaking, and collaborative works in general, varies from project to project, the suggested option is to formulate a proposal for a definition of authorship in film in the form of a rebuttable presumption, thereby establishing a priori authorship status for some contributors involved in the filmmaking.

The proposal draws inspiration from the EU Term Directive. As stated above, Art 2(2) of the Directive connects the term of protection for audiovisual works to the following people: the principal director, the author of the screenplay, the author of the dialogue and the composer of music specifically created for use in the cinematographic or audiovisual work. This provision can be used as a basis to establish a presumption in EU law concerning authorship in films.

In the light of the above-mentioned CJEU decisions, it is proposed that such a presumption should be extended to other creative contributors who typically make creative choices. Looking at the national laws examined in this article, the examples of France and Germany illustrate that in both countries the cinematographer and the film editor can be joint authors of a film, provided that they had at least some creative freedom in the making of the film. In the case of Germany, the justification for the German Author's Act specifically stated these two as possible co-authors. Although the French courts seem rather reluctant to grant authorship status to other contributors than those explicitly stated under the statutory presumption,[88] French law provides an open list and could include the cinematographer and the editor of a film, again, under the presumption they did not just execute strict orders in the course of their work. The author of this article suggests that a list of presumptive joint authors should be drawn up based on the general job descriptions of the people contributing to a film and the categories of film awards in collaboration with the film industry. It would be important to look at the factual work of those working in a film production and draw conclusions from several practical examples. The number of co-authors can be limited by covering certain creative contributions by separate rights. It is assumed that such a list would at least include the cinematographer and the editor because their work typically is considered to entail creative decision making and their contributions cannot be exploited separately, so there is no other way for them to be granted authorship status and copyright protection in their work than via the film itself. It is suggested to protect costumes, production design, hair and make-up as separate works that do not lead to authorship in the film itself.

The following definition for authorship in films is suggested:

[86] Proposal for a Regulation of the European Parliament and of the Council COM(2021) 206 final of April 21 2021 laying down harmonised rules on artificial intelligence (artificial Intelligence Act) and amending certain Union legislative acts.

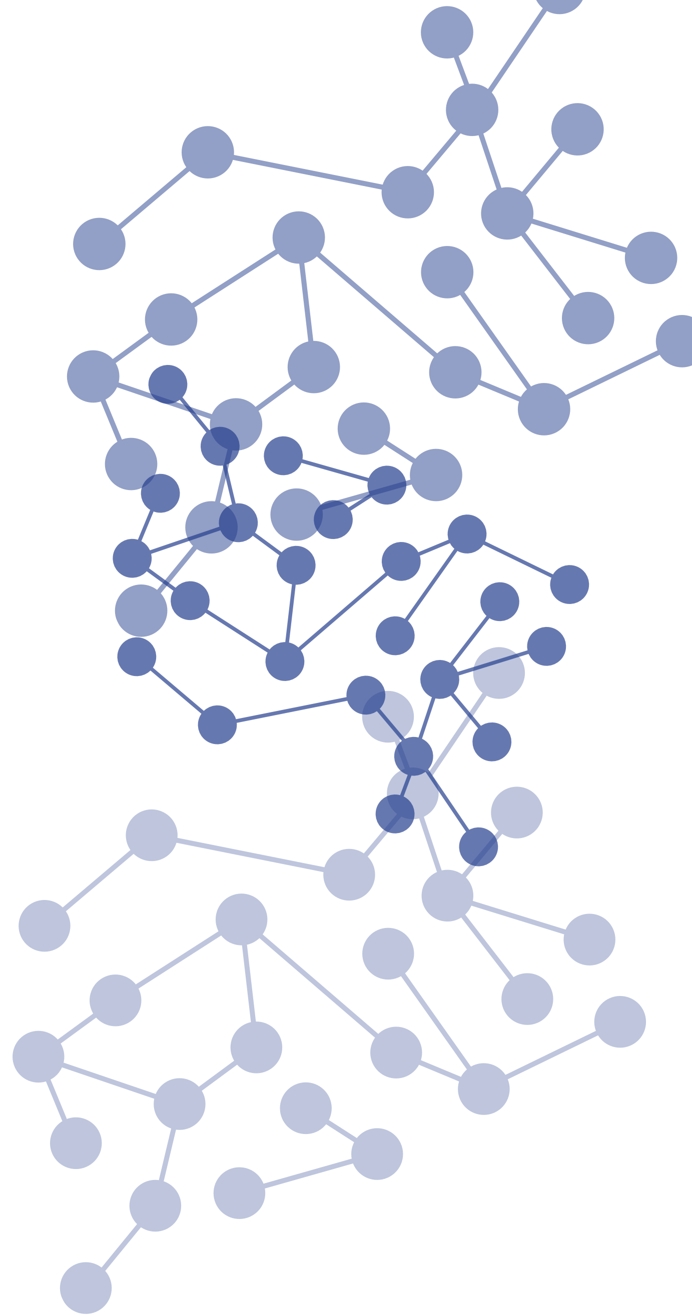
[87] Compare Recitals 4 and 5 of the Proposal.

[88] Pascal Kamina, *Film Copyright in the European Union* (Cambridge University Press 2016) 173.

'An author is a human who makes a minimum of creative choices in the production of a work. The following people shall be presumed joint authors of a cinematographic or audiovisual work unless proven otherwise: the principal director, the author of the screenplay, the author of the dialogue, the composer of music specifically created for use in the cinematographic or audiovisual work, the cinematographer and the film editor. Member States remain free to designate other co-authors.'

The EU Member States would have to agree on the list of presumed authors, which could encompass more people based on general job-descriptions and in accordance with film industry practice. Such a concerted list of presumed co-authors should be binding for all Member States. This definition would be flexible enough to accommodate different models of film production with varying degrees of creative freedom as it is phrased as a rebuttable presumption. In addition, Member States would be free to add co-authors if they have made authorial input. Although such an approach does not mean that every EU Member State recognizes the same people as co-authors of a film, it would lead to a certain level of harmonization among Member States and put at least some creatives in a better position by acknowledging them a priori as authors of a film in all EU countries. This would contribute to a better functioning of the single Market and fairer conditions for market participants.

The European Union is dedicated to offering a high level of protection for authors and to creating a well-functioning and fair marketplace for copyright. A harmonised definition of authorship is essential to make sure that copyright fulfills its purpose of incentivizing creation.



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