UNIVERSITÀ DEGLI STUDI DI TRENTO
FACOLTÀ DI GIURISPRUDENZA
Dottorato in Studi Giuridici
Comparati ed Europei

Corso di Dottorato in studi Giuridici Comparati ed Europei

XXVII ciclo

Tesi di Dottorato

Plagiarism as an axiom of legal similarity: a critical and interdisciplinary study of the Italian author's right and the UK copyright systems on the moral right of attribution

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Anno accademico 2013 - 2014

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Indirizzo specialistico in Diritto privato, privato comparato e commerciale

XXVII ciclo

Esame finale: 17/03/2015

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Anticipatory plagiarism occurs when someone steals your original idea and publishes it a hundred years before you were born

Robert K. Merton

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ABSTRACT

Plagiarism may have accompanied acts of creation, either endorsing or contradicting them. Esteemed as a general rule of literature or censured as literary larceny, it embodies the disavowal of authorship in the intellectual works of others and thus breaches their right to be acknowledged as authors, while also feasibly deceiving the public and, in any case, contradicting the universal rule of creative imitation.

Historically entangled with the concepts of counterfeiting and piracy, it only later reached an autonomous collocation as a violation of the moral right of attribution. Placed in the broadest context of copyright law, it yet struggles against its confinement to a strict legal characterisation, given its colourful appearance and inherent inconsistency according to the type of works or field of knowledge to which it relates, thus refuting any unyielding interpretation.

In such a mutable context, the purpose of this research, which revolves around the systems of Italy and the United Kingdom, is to explore a view of plagiarism that appreciates the different instances in which a genuine borrowing or a deceitful practice appear, considering the dimension of copyright infringement, but also looking at other possible legal and non-legal means of construal. Given these premises, an accurate exploration of the phenomenon requires a preliminary consideration of the manifold literature on the subject, which increasingly progresses together with the development of technology and social practices.

Furthermore, its literal absence in statutory law does not impede finding a collocation in the context of the judiciary, which is analysed with reference to the legal systems of both Italy and the United Kingdom. This does not infer that courts deliver a flawless and unfailing interpretation of plagiarism. On the contrary, a careful reading of the ruling confirms that the narrow realm of copyright law is shrinking.

However, the unpredictability of the statutory and judicial approach towards plagiarism may also be welcomed as an attempt by the law to acknowledge the difficulty to appraise its complexity. Therefore, the present study openly adopts an interdisciplinary and comparative analysis that may help to describe its controversial legal breadth while also possibly unravelling any other principled range.

INTRODUCTION

The issue of plagiarism has been broadly examined in law, with valuable studies undertaken on its origins and further development. However, many of these studies nowadays seem inadequate to the task of explaining some of the present dynamics that typify the phenomenon, particularly following the digital revolution, after which many traditional concepts of copyright law need to be reconsidered in light of these changes.

Indeed, the pressure of technology has made it an even more interesting and intriguing subject to investigate in contemporary copyright law. In fact, plagiarism proves to be particularly open to the influence of unceasing social and technological transformations that characterise modern copyright and challenge its conventional rules and standards. Besides, previous studies have lacked in-depth analysis of the judicial approach to plagiarism that this research also aims to cover. Therefore, an accurate assessment of the phenomenon seems desirable, given that, besides the apparent casualness of the legislator, plagiarism is still a matter of judgement in court.

Surrounded by ambiguity and versatility, plagiarism appears to be hardly definable in firm and strict legal terms. A possible solution may be to portray plagiarism more neutrally, by referring to it as the practice of usurping an author's attribution of authorship in the work he/she has created or, in other words, the act of passing another person's work off as one's own. Besides, as will be illustrated, any conduct that may fall under the heading of plagiarism is indeed not strictly limited to the instances of simple non-attribution. Besides, if non-attribution is comprised in the broader category of misattribution, the latter may also entail acts that only partially undermine the author's right to be acknowledged as such.

The same reluctance of the law to confine it to a precise normative definition supports the assumption that its accurate understanding implies a more balanced and flexible interpretation that is not limited to statutory law, but engages with the variety of disciplines in which plagiarism takes place, which also increases interpreters' efforts to explain and regulate the phenomenon.

The aim of this research is therefore to illustrate the legal history and evolution of plagiarism, retracing its origins and drawing its further developments in terms of

statute law, as well as doctrinal and judicial interpretation, in both the civil and common law legal traditions of Italy and the United Kingdom.

In particular, before considering the exact legal dimension of authorship attribution, it has proved particularly valuable to venture upon non-strictly legal factors that unquestionably influence its treatment in both a statutory and judicial way. The first part of the study, therefore, is dedicated to the bygone and in-depth analysis of the concept of attribution of authorship, which represents the exact and most accurate means of interpreting plagiarism.

Chapter 1 therefore addresses the appraisal of authorship misattribution, with a considerable section devoted to its understanding in literature from ancient times to the late fifteenth century and to the exploration of the imitative canon, the relevance of authorship attribution and the significance of piratical or plagiarist conducts.

Chapter 2 continues such a "glimpse into the past" by recapping with the sixteenth century literature onwards, when the scrutiny of the individual and personal understanding of authorship will link the earlier approach to imitation with the modern concepts of creativity and originality. The second part of Chapter 2 focuses exactly on the meaning and scope of creativity and originality within the Italian and UK contexts, both recently and greatly influenced by the EU framework.

Both sections, indeed, represent the essential preamble for the following articulation of the study, establishing the basis for the mature discussion of the contemporary dimension of plagiarism in subsequent chapters. In fact, they provide a meaningful instrument with which to understand the actual treatment of plagiarism-related issues, on the one hand elucidating its wider social background – which is the main subject of Chapter 3 – and, on the other hand, clarifying the legal statutory and judicial assumptions that will be unfolded respectively in Chapter 4 and Chapter 5.

Accordingly, the analysis will be undertaken through an interdisciplinary approach that paints the complex picture of plagiarism, taking into considerable account the multifaceted dimension of the phenomenon. As we shall see, the resort to an interdisciplinary approach conveys an essential instrument for the interpreter who is aware of the difficulties of adopting a single and exclusive criterion to evaluate plagiarism. This difficulty, it is worth reiterating, is not only caused by its moveable and malleable objectification but it furthermore depends, as became apparent in the

preceding paragraphs, on the inherent difficulty of enucleating a definite and single connotation of just the reverse of plagiarism, which is articulated in the notion of creativity and originality.

Given these premises, as Chapter 3 will expound, through the lens of interdisciplinary analysis, the overall purpose of the study is to show that there are many different elements and instruments to consider when evaluating the controversies of plagiarism. These may not be limited to conventional legal remedies and sanctions, but may also take account of the informal rules and sanctions that fall under the term of social norms, as well as the technological means to avoid or limit the phenomenon.

The double face of technology, particularly digital, is essentially articulated in the capacity both to enhance the production of creative works of the mind and to exercise stringent protection of the same works. There seems to be sufficient grounds to argue that they facilitate any imitation, borrowing or appropriation of others' works, regardless of the positive or negative connotation that one may accord to these works. Focusing on misattribution, in particular, it is inevitable to notice how current digital practices are often accompanied by a deficiency of genuine attribution. Acknowledging authorship in an individual work that is copied or simply reused for the purpose of further creation seems not to be always accomplished. In this regard, the reaction of the author may vary.

In line with its contrasting nature, the law has always shown some conflicting interest in the subject: on one hand, the strong arms of the law have often reached the practice of misattribution, although with different means and outcomes according to the particular legal system considered. On the other hand, the attitude of the law has also been expressed in the careful omission of a statutory definition of plagiarism, leaving the judiciary with the heavy burden of unravelling the intricate claims of those who wish to secure their right of attribution.

Furthermore, the fact that the law does not either provide a clear definition of what is considered creative and original, for the purpose of the law itself, can be seen as having a double-layered effect. On the one hand, it may not help in terms of clarity and certainty (a principle that the law should always pursue); and on the other hand, the lack of a statutory definition may be a reflection of deliberate avoidance.

In addition, it will be argued that, despite the inaccuracy of the statutory language that, as Chapter 4 explains, is first exemplified by the lack of a designation, plagiarism has played a relevant role in copyright law and is still a current subject matter in court, as well as in ordinary life, although not always with its actual appellation, which appears, to some extent, to be even more taboo than speaking of counterfeiting and piracy.

However, this may not be understood without a proper background explaining how the courts' decisions reflect cultural, social and economic transformations, which clearly have important legal implications, as Chapter 5 aims to illustrate. At the same time, we have seen that servile imitation was almost never considered desirable, although this inference does not automatically imply that it should have been severely reprimanded. The delicate role of the judiciary lies also in this precise and crucial point, as it has to discern the hypothesis in which misattribution should find a legal response and those in which it should rather be left to the discretion of literature, the arts and other non-legal disciplines.

In general, many grey areas remain, which are in part due to the extreme variability of the phenomenon; however, in part they are also enhanced by a lack of clarity and certainty over the definition or regulation of misattribution. The same judiciary indeed also confirms such a difficulty.

Moreover, the methodology chosen also has a distinctive comparative attitude since the research essentially revolves around two legal systems respectively belonging to the civil and common law traditions. Focusing on the usurpation of the attribution of an intellectual work, there are fewer differences than one would expect. The right of being acknowledged as the author of the work, therefore, really represents an ideal object of comparison.

Noticeably, at the core of this project is the comparative analysis of the Italian author’s right and the UK copyright systems on plagiarism and the moral right of attribution. Although each of them belongs to different legal traditions, which have often been considered opposing poles in copyright law, they share some similarities and common features. In line with these considerations, it has been necessary to conduct part of the research in Italy and part in the United Kingdom, specifically at the universities of Bournemouth, Cambridge and Edinburgh.

The results of the research show how the two main systems involved in the comparison feature similar approaches to plagiarism, also in terms of judicial interpretations and expert opinions, notwithstanding the structural differences that characterised them, as they belong to dissimilar legal traditions in which the author's right/copyright has historically evolved in a different way. This outcome suggests a trend of similarity that may help each interpreter to reappraise plagiarism using a more considered approach that takes into account the peculiarities that emerge in both systems.

Likewise, considering the Italian and UK legal systems, it is easy to notice that the former expressly refers to the sole creativity in its statutory words, but then complements it with the notion of originality elaborated by its own judiciary. On the contrary, the latter requires by statute that the work must be original, but its courts appear to have blended this exact definition with creativity when they asked that the work must be the result of some creative effort. In any case, given the supposed convergence of their meaning, which is supported by their ordinary meaning and partly enhanced by the recent development of the EU jurisprudence, the two wordings may be used indifferently.

Finally, the case law survey delivered in the last chapter will focus on the interpretation of plagiarism in court, with an emphasis on the perspective of experts who participate in the judicial decisions. The purpose of such ultimate analysis, in fact, is to demonstrate how, and to what extent, the phenomenon of misattribution is influenced by several instances other than formal law. In addition, it aims to explain why plagiarism is still so critical to define and regulate without taking into account the contribution of other disciplines, thus proving once more the advantages, but also inevitability, of an interdisciplinary analysis to approaching the matter.

CHAPTER 1

THE NARRATIVES OF PLAGIARISM AND COPYRIGHT BETWEEN MYTHS AND HISTORY

1 Attribution of authorship in literary and legal discourses on intellectual property

The history of plagiarism is, to a certain extent, the history of humankind. Humans, for their innate nature, tend to imitate and observe what they witness in their natural surroundings. This assumption validates the idea that plagiarism may have gone along with acts of creation. Nonetheless, appearing as legitimate borrowing or as outright piracy that contradicts the principles of imitation, the act of copying from others' works has been both cherished and criticised, taking the shape either of a universal rule of literature or of an authentic theft.[1]

The literature on the subject has indeed confidently supported the idea that the practice of imitation and borrowing has traditionally characterised the production of knowledge and the creation of art.[2] To corroborate this broad statement, scholars have often recalled practices from the classical period and their intense revival in Renaissance times, but also the more contemporary dimension of the arts, where the creative process implies collaboration and continuous exchange of knowledge.

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[1] The Latin poet Martial offered a classical explanation of plagiarism as literary theft. In the background of the Flavian *De Plagiariis* law (D. 48, 15 C. 9, 20), his Epigram I, LII appears to put under the label of plagiarist who trades or steals a free man or someone else's slave, as well as who removes the name of the author from a work and adds his/her own: «To your charge I entrust, Quintianus, my works. If, after all, I can call those mine which that poet of yours recites. If they complain of their grievous servitude, come forward as their champion and give bail for them; and when that fellow calls himself their owner, say that they are mine, sent forth from my hand. If thrice and four times you shout this, you will shame the plagiarist». MARTIAL, *Epigrams. With an English translation by Walter C. A. Ker*, London: Heinemann, New York: Putnam, 1919, 62-63. However, as will soon be illustrated, complaints against alleged acts of stealing with regard to the usurpation of an author's attribution are found in several sources. Martial's epigram is perhaps the most renowned and surely mostly quoted by scholars, but it would be incorrect and imprecise to argue that he was the only ancient writer to expose the metaphor in his compositions.

[2] This articulated concept is well condensed in the words of Professor Steeves who, speaking to his student and future poet Allen Ginsberg exclaims: «There can be no creation before imitation». *Kill Your Darlings* (2013), directed by JOHN KROKIDAS, distributed by Sony Pictures Classics, USA. Script at: <http://www.dailyscript.com/scripts/Kill_Your_Darlings.pdf>.

The typical authors' drift to borrow others' works to create their own invention exemplifies how the creative process has been influenced by the imitation of early precursors' authority. Nevertheless, servile imitation ending in conduct that is mainly categorised in terms of counterfeiting, piracy and mere disavowal of authorship, which deceived the public and impudently took another individual's reward contradicting the universal rule of creative invention and refuting the encroachment of learning, were indeed all reproved.

At the same time, it is precisely such a contrasting appeal that demands an accurate analysis of the phenomenon and, while gathering the speculations of the past literature on the subject,[3] aims to provide a contemporary and original contribution to its legal and social assessment,[4] taking into account the most recent research on the topic

[3] Few early works offered an interesting picture of the historical evolution of plagiarism, but now they plausibly have more literary value than being an accurate and updated contribution to the legal analysis of the phenomenon. Among Italian works, see D. GIURIATI, *Il plagio. Furti letterari artistici musicali*, Milano: Hoepli, 1903, who, expanding the metaphor of plagiarism as literary theft, also provided a few instant examples of early judicial assessment; A. SANDULLI, *Plagio letterario e parodia*, Napoli: La Toga, 1928, who, distinguishing plagiarism from counterfeiting and other unlawful acts , focused his brief but pleasant study on plagiarism and parody, occasionally referring to various legal systems and mostly quoting what other scholars have argued on the topic. With regard to the English contributions, see H. O. WHITE, *Plagiarism and imitation during the English Renaissance, A study in critical distinctions*, Cambridge, Mass: Harvard University Press, 1935 (reprinted by Octagon Books, New York, 1965), in which the author's circular study first described the classical praise for imitation and its further development during the sixteenth century; W. A. EDWARDS, *Plagiarism: an essay on good and bad borrowing*, Cambridge: Fraser, 1933, who had the foresight to look into the artist's experience and also provided some hints on self-plagiarism (at 88 et seq.).

[4] Later, limiting the list to a couple of monographs, more structured studies were found in A. LINDEY, *Plagiarism and Originality*, New York: Harper & Brothers, 1952, who literally offered «a glimpse into the past» that reconnected the earlier analysis of sixteenth century with the modern epoch, also noting a worthy section on legal material that included a number of relevant case law in various branches of art (at 281-341); Z. O. ALGARDI, *La tutela dell'opera dell'ingegno e il plagio*, Padova: Cedam, 1978, who, in an attempt to provide a more legally focused approach, dedicated a relatively lengthy space to the exact violations that may be confined to plagiarism and their remedies. See also, of the same author, a previous monograph on the subject: Z. O. ALGARDI, *Il plagio letterario e il carattere creativo dell'opera*, Milano: Giuffrè, 1966.

applicable to the Italian and English contexts without forsaking a brief overview of other systems.[5]

With this in mind, this study aims to contribute to the larger debate, providing a new perspective to looking at plagiarism and confidently understanding why it may appear to be a legitimate copy of someone else's work, resulting from a mere exercise of creative imitation or having a vibrant veil of fraudulence that demises the original author and misleads his/her readership. It is a twofold look that requires a careful assessment of plagiarism and its multiple overlapping shapes and refutes strict and intransigent interpretation,[6] with regard not only to the issue of copying[7] but to also the broader concepts of authorship and attribution.[8]

This concern seems to be even more crucial when an interdisciplinary and comparative appraisal is sought. Since plagiarism does not have a univocal meaning in all given contexts, and it assumes manifold forms and degrees depending on the exact field of knowledge in which it occurs, it is probable that it may have a distinct relevance according to the given creative field. Similarly, it is plausible that various legal systems

[5] In particular, see R. POSNER, *The little book of plagiarism*, New York: Pantheon Books, 2007, who succinctly but with extreme lucidity guides the reader into the dynamic realm of contemporary plagiarism, exploring its most controversial aspects in the artistic and academic environments; T. J. MAZZEO (ed.), *Plagiarism and Literary Property in the Romantic Period*, Philadelphia: University of Pennsylvania Press, 2007, editing a collection of writing that discusses plagiarism, but also imitation and originality; R. CASO (ed.), *Plagio e creatività: un dialogo tra diritto e altri saperi*, Quaderni del Dipartimento di scienze giuridiche, Vol. 98, Trento: Università degli Studi di Trento, 2011, <http://eprints.biblio.unitn.it/2278>, who emphasises the extremely fleeting nature of the phenomenon and the determinant aid offered by various disciplines to the proper legal and social assessment; D. BONAMORE, *Il plagio del titolo delle «opere dell'ingegno» nella dogmatica del diritto d'autore*, Milano: Giuffrè, 2011, who has the value to provide an insightful illustration of the scholarly and judicial approach regarding plagiarism of works' titles, although ending with the controversial and hardly shareable conclusion that it represents a typical conduct of theft (at 140).

[6] Some suggest that the tendency to interpret the phenomenon with a strict and rigid attitude is due to the clear influence of the romantic view of the author as the sole creator of his/her works. See A. QUONDAM, *Note su imitazione, furto e plagio nel Classicismo*, in R. GIGLIUCCI (ed.), *Furto e Plagio nella letteratura del Classicismo*, Roma: Bulzoni, 1998, 373, who concisely defines plagiarism as an extreme practice of reutilisation.

[7] Cf. E. MILLER, J. FEIGENBAUM, *Taking the copy out of copyright*, in *Proceedings of the 1st ACM Workshop on Security and Privacy in Digital Rights Management (DRM), Lecture notes in computer science*, vol. 2320, Springer, Berlin, 2002, 233-244, who contest that the right to copy is still the most crucial element of copyright, especially after the digital revolution.

[8] See, in this respect, the studies of E. ADENEY, *Authorship and fixation in copyright law: a comparative comment*, in *Melb. Univ. L. Rev.*, Vol. 53, 2011, 677; D. SAUNDERS, *Authorship and copyright*, New York: Routledge, 1992, who precisely praises treating authorship according to its specific cultural context.

would not necessarily take the same approach to the subject. It may be differently labelled, or it may even raise only limited concerns for the law in force.[9]

In this respect, a probable pitfall may arise when comparative analysis takes the place of a more broad-spectrum narrative, especially with regard to the United Kingdom, where the exact term plagiarism is only occasionally mentioned, being the corresponding conduct rather described in terms of copyright infringement, which consists in substantial or verbatim copy of another person's work. In such instances, in order to comprise the attitude of both systems, it is then more accurate to provide a more detailed representation of the phenomenon in terms of a violation of the norms on the attribution of authorship;[10] that is to say, the occurrence of disavowing the entitlement of the author to be acknowledged as such, which can occur together with a violation of the economic rights in the work or exist independently from it.[11]

Likewise, it becomes essential to look at the subject as a chameleonic figure that transcends the law, deeply tangled by the specificities of various disciplines but not inescapably confined to any of them. Given these features, beyond symbolising the manifest frustration of the norms on the attribution of the work, it also demonstrates how the traditional discourse on the acknowledgment of authorship has evolved, likely providing a new understanding of the complex dynamics behind the creative process.

The outcomes of such a confident assessment clearly depend on the way that law looks at authorship attribution, which also varies according to the specific legal system under consideration. To this extent, considering the common law and the civil law legal traditions, it is not wide of the mark to maintain that the former has been more focused

[9] In line with these assumptions, for the purpose of the present research, the term plagiarism is often used in a wide-ranging sense and, according to its diffuse meaning and broad application in academic discourse and everyday language; it is knowingly intended to embrace all its multi-layered shades. In fact, a comprehensive view of the topic predictably involves few oversimplifications, including a common designation of all practices and conducts that may fall under the umbrella of plagiarism. However, additional distinctions will furthermore be made in order to differentiate more specific conducts that should rather be analysed separately.

[10] See, in particular, E. ADENEY, *The moral rights of authors and performers*, New York: Oxford University Press, 2006, who offers a broad but very detailed analysis of moral rights across different jurisdictions, including the United Kingdom, aimed at guiding the reader in the complicated statutory enactment of moral rights, including the right of attribution.

[11] The first and manifest important difference between the Italian and the UK systems is, in fact, the manifest independent relevance of a violation of the moral right of attribution (literally, *diritto morale di paternità*) concerning the former, and the usual recurrence of a simultaneous copyright infringement with regard to the latter, at least as far as copyright law is involved. However, as will be further explained, and particularly when other areas of the law are intertwined with the impairment of authorship attribution, the distance between the two becomes less rigorous.

on the economic facet of copyright-promoting incentives for the creation and advancement of learning,[12] while the latter has been mostly committed to protecting the personal interests of the creators.

However, in two different but complementary ways, both the copyright and the authors' right systems have revealed a proclivity to quiver this steady antagonism.[13] This is not to suggest that any convergence has occurred; neither is there any proof that a genuine harmonisation may ever take place, even within the limited boundaries of the European Union. On the contrary, what an accurate observation of the two traditions suggests in this regard is that, despite the obvious and intrinsic differences, their attitude towards authorship nonetheless shows interesting similarities in their approach to the violation of the norms on attribution and therefore on plagiarism.

In fact, when concerns about the explicit protection of the right to be acknowledged as the author of the work began to be taken more seriously by various theorists,[14] similarly something changed in the law. The former anxieties for the mere economic facets of the above-mentioned disrupting practices began to intensify and be aggravated by more delicate concerns for the personal interests of the author, which could be harmed by certain conducts other than the abusive exploitation of the work.[15]

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[12] This explicit endorsement has existed ever since the Statute of Anne of 1710. See, for a broad analysis of the copyright system, K. GARNETT, G. DAVIES, G. HARBOTTLE, *Copyinger and Skone James on Copyright*, Sweet & Maxwell, 2010.

[13] Cf. M. ROSE, *The Statute of Anne and Author's Rights: Pope v Curll (1741)*, in L. BENTLY, U. SUTHERSANEN, P. TORREMANS (eds.), *Global Copyright: Three Hundred Years Since the Statute of Anne, from 1709 to Cyberspac*e, Cheltenham, UK: Edward Elgar, 2010, 70-78, who attempts to make a cognisant assessment of the alleged contrast, revealing some stimulating similarities by analysing the case law, including *Pope v Curll*, *Millar v Taylor* and *Baigent and Leigh v The Random House Group Ltd*. As he concludes, it is still accurate to foresee the traditional divide between the two systems, but this needs to be better qualified, leaving room for some important likenesses.

[14] What is more, the concept of authorship appears to have arisen lately, and it is still provocatively recapped by Michel Foucault's interrogatives on the autonomous and distinct relevance of the work from the person of its author. M. FOUCAULT, *Qu'est-ce qu'un auteur*, *Dits et Écrits*, Vol I. (1969), Paris: Gallimard, 1994. See also D. SAUNDERS, *Authorship and copyright*, cit.; M. BIRIOTTI, N. MILLER (eds.), *What is an author?* Manchester and New York: Manchester University Press, 2003; S. BURKE, *The death and return of the author: criticism and subjectivity in Barthes, Foucault and Derrida*, Edinburgh: Edinburgh Univ. Press, 2004 (first ed. 1992). Some of these contributions will be discussed in detail in the following chapters.

[15] Besides, when plagiarism began to personify in the legal context what has since been fashioned as a fictional evil by literature, the law started looking at it as a potential target of stern regulation, either as a peculiar variation an unlawful use of the work or as a distinct and self-determining violation. On the definition of plagiarism as a «literary evil», see F. ROSCALLA, *Storie di plagi e di plagiari*, in F. ROSCALLA (ed.), *Attribuzioni, appropriazioni, aprocrifi nella Grecia antica*, Atti del Convegno internazionale (Pavia, 27-28 May 2005), Pisa: Edizioni ETS, 2006, 69.

Certainly, the dual attitude of the law is to some extent expanded by the different approaches followed in this respect by civil and common law jurisdictions.[16] The former began embracing a more personal view of the work and so explicitly granted protection to what are known as the moral rights of the author. The latter, instead, strictly relying on their copyright history of creative enticement,[17] carefully narrowed the legal shield to cases in which copyright economic rights were also impaired.[18]

However, such obvious pronounced distance is to be partly reduced by looking at the broader legal picture, taking into account the answers that the law provides against the violation of authorship attribution.[19] On the one hand, the seeming estrangement of the civil law tradition to the pure monetarist aspects of attribution appears to be contradicted by the fact that claimants, in the event of its violation, may seek remedies for both pecuniary and non-pecuniary damages. On the other hand, common law countries may have offered some relief against the violation of the right of attribution through other legal areas, such as the law of torts and contracts.

Although such statements may appear controversial and receive either consensus or disapproval, it is nevertheless reasonable to argue that from a watchful eye the two legal traditions show some awareness for authorship attribution, within the larger creative process, albeit with dissimilar hues. Given these premises, it seems significant to make a distinction between the acts of honest imitation by those who emulate others

[16] See, in particular, M. ROSE, *Authors and Owners. The Invention of Copyright*, Harvard University Press, 1993, who illustrates the concepts of property, originality, authorship and their complex entanglement.
For a recount of the distinct paths followed by the two traditions, but also on their possible intersections, see U. IZZO, *Alle origini del copyright e del diritto d'autore. Tecnologia, interessi e cambiamento giuridico*, Postfazione di Roberto Caso, Roma: Carocci, 2010. See also R. C. BIRD, C., S. C. JAIN, *The Global Challenge of Intellectual Property Rights*, Cheltenham, UK: Edward Elgar, 2009.

[17] From a common departure when the primary concern for both systems was to protect the pecuniary interests of publishers, by privilege first and by statute then, the two traditions have outwardly followed different paths. Regarding the latter, see M. ROSE, *The Statute of Anne and author's rights: Pope v Curll (1741)*, in L., LIONEL, U. SUTHERSANEN, P. TORREMANS (eds.), *Global Copyright: Three Hundred Years Since the Statute of Anne, from 1709 to Cyberspace*, cit., 70.

[18] Cf. W. CORNISH, D. LLEWELYN, *Intellectual Property: patents, copyright, trademarks and allied rights*, London: Sweet and Maxell, 2003, 452-467.

[19] The seeming leaning that the two countries share is in part showed through the judicial pronouncements on the topic, as will be further developed in the course of this dissertation.

to learn and foster the construction of new knowledge,[20] and the acts of those who attempt to pass off other persons' creations as their own.[21]

It is common knowledge that the practice of creation predictably comprises taking on the ideas of others who have preceded us, and often implies borrowing even the actual expression of those ideas that at that point become inspiring works.[22] This suggests that creation is indeed a story of concerted instead of individual efforts.[23] New works appear to be gaining from others' works and this assumption cannot be left aside in examining authorship attribution, and plagiarism-related discourses.[24] To such an extent, the contribution of humanist studies to the larger debate on the matter is undeniable,[25] as it helps to determine the most accurate framework by also appreciating the role that imitation has played, and still plays, in the process of creation.

1.1 Acknowledging imitation as an intrinsic feature of creation

The significance of imitative practices, and their link to the creations of the mind, was already present in Plato and Aristotle's thoughts on arts and aesthetics.[26] However, the two theorists offered a pointedly different appraisal of imitation: while Plato

[20] Such a distinction, however, is still far from being straightforward. In fact, it is hard to distinguish the former from the latter in several instances. The reason it may be problematic to draw a steady line between acceptable and unbearable behaviours is directly related to the core of the creative process. For a detailed analysis of this process, see C. BOHANNAN, H. HOVENKAMP, *Creation without Restraint. Promoting Liberty and Rivalry in Innovation*, New York: Oxford University Press, 2012.

[21] See P. DRAHOS, J. BRAITHWAITE, *Information Feudalism. Who Owns the Knowledge Economy?* London: Earthscan, 2002 (New York, N.Y.; London: New Press, 2007).

[22] Cf. N. GROOM, *Unoriginal genius: plagiarism and the construction of 'Romantic' authorship*, in L. BENTLY, J. DAVIS, J. C. GINSBURG (eds.), *Copyright and Piracy. An Interdisciplinary Critique*, New York: Cambridge University Press, 2010, 271.

[23] M. RIMMER, *Wikipedia, collective authorship and the politics of knowledge*, in C. ARUP, W. VAN CAENEGEM (eds.), *Intellectual Property Policy Reform. Fostering Innovation and Development*, Cheltenham, UK: Edward Elgar, 2009, 172.

[24] See I. ALEXANDER, *The genius and the labourer: authorship in eighteenth and nineteenth-century copyright law*, in L. BENTLY, J. DAVIS, J. C. GINSBURG (eds.), *Copyright and Piracy. An Interdisciplinary Critique*, cit., 300.

[25] For a comprehensive analysis of the entanglement of legal and literary studies, see, in particular, R. POSNER, *Law and literature*, Cambridge, Mass.: Harvard university press, 2009, who, despite acknowledging the essential differences that exist between law and literature according to their respective social function, believes in their capacity to illuminate one another. Cf. D. SAUNDERS, *Authorship and copyright*, cit.

[26] The analysis conducted in the instant paragraphs will be limited to the literary field, since such an area represents the perfect arena for a primary enucleating of plagiarism and related discourses, while the illustration of other disciplines will be provided in the following sections.

distinguished between good and negative imitation, openly discouraging the latter,[27] Aristotle emphasised the positive aspects of imitation as belonging to any form of art, simply considering it a good thing.[28]

Overall, the Aristotelian understanding of imitation as an intimate feature of art, and a natural aspiration for men who are pleased to create indeed represented the starting point for a mature exploration by other theorists. This was confirmed, in particular, by Isocrates, who encouraged exploring the various ways in which a subject matter can be told,[29] arguing that there is no unique manner in which to speak of it, although «one must not shun the subjects upon which others have spoken before, but must try to speak better than they».[30] Indeed, it is precisely the way one chooses to elaborate the theme that deserved appreciation and leads to advancement.[31]

Therefore, classical literary theory significantly boosted imitation, also by means of reinterpreting the subject matter that is common property. Nevertheless, the same theory predicted that imitation alone is not sufficient and called for some distinctiveness, which could emerge through a cautious choice and arrangement of the

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[27] E. BELFIORE, *A Theory of Imitation in Plato's Republic* in *T.A.Ph.A.*, Vol. 114, 1984, 121-146. Cf. G. PERON, A. ANDREOSE (eds.), *Contrafactum. Copia, imitazione, falso*, Atti del XXXII Convegno Interuniversitario. Bressanone/Brixen 8-11 luglio 2004: Esedra, 2004.

[28] P. SIMPSON, *Aristotle on Poetry and Imitation*, in *Hermes*, Vol. 116, No. 3, 1988, 279.

[29] Indeed, as further articulated, «if it were possible to present the same subject matter in one form and in no other, one might have reason to think it gratuitous to weary one's hearers by speaking again in the same manner as his predecessors; but since oratory is of such a nature that it is possible to discourse on the same subject matter in many different ways to represent the great as lowly or invest the little with grandeur, to recount the things of old in a new manner or set forth events of recent date in an old fashion». ISOCRATES, *Panegyricus* (Oration IV), § 7–10, with an English translation by G. Norlin, Loeb Classical Library 209, Cambridge, Mass.: Harvard University Press; London, UK: William Heinemann, 1980, Vol. I, 115, <http://www.loebclassics.com/view/isocrates-discourses_4_panegyricus/1928/pb_LCL209.115.xml> (subscription required).

[30] Consequently, he concluded that the development of art depended on the attitude of artists to first cherish the works of those who have proved exceptional skills, instead of admiring those who have just begun their artistry. Similarly, he expected poets to admire the exceptionality of telling an already known subject instead of those who pursue unexplored themes. ISOCRATES, *Panegyricus* (Oration IV), cit., 123-125.

[31] As Horace later reinforced, failure to transform the taken material motivates an early striving for originality, by also avoiding verbatim copy that prevents the imitator from making the common theme his/her own. An example of this is given by his warnings: «should you, advent'ring novelty, engage Some bold Original to walk the Stage, Preserve it well; continu'd as begun; True to itself in ev'ry scene, and one! Yet hard the task to touch on untried facts: Safer the Iliad to reduce to acts, Than be the first new regions to explore, And dwell on themes unknown, untold before. […] Quit but the vulgar, broad, and beaten round, The public field becomes your private ground […] Nor word for word too faithfully translate; Nor leap at once into a narrow strait, A copyist so close, that rule and line Curb your free march, and all your steps confine!». HORACE, *The Art Of Poetry. An Epistle To The Pisos (Epistola Ad Pisones. De Arte Poetica)*, Translated from Horace, with notes by G. Colman, London: T. Cadell, 1793, <http://www.gutenberg.org/cache/epub/9175/pg9175-images.html>.

borrowed material that demonstrate the personal effort of the imitator, who then becomes a creator. [32]

Moreover, accepting that ordinary subject matter is common property, it was established that any theme that another author had used could, with no repercussions, be reused by subsequent imitators. Such an instance is well uttered in the work of Seneca the Younger who acclaimed the reutilisation of fruitful subjects that «served [authors] all with happy results, and those who have gone before seem to me not have forestalled all that could be said, but merely to have opened the way».[33] This appeared to be an advantage for the artist and for the advancement of learning of all, thus not amounting to larceny insofar as some rules were respected.[34]

Acknowledging the importance of imitating the successful inventions of other authors, given that «it is a universal rule of life that we should wish to copy what we approve in others», so believed Quintilian who highlighted that imitation alone may not be enough to ensure actual development, when he specified that «imitation alone is not sufficient, if only for the reason that a sluggish nature is only too ready to rest content with the invention of others».[35] Of a similar attitude was Pliny the Younger who, despite acknowledging the likeness of remembering how a given author has successfully elaborated a given subject matter, pressured for the pursuit of a sort of artistic challenge in which one compares one's performance with that of the model and is willing to outshine the other for the advancement of learning of all.

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[32] Nonetheless, despite this early apprehension for honest borrowing, ancient Greek and Latin writers regularly practised imitation with less concern for originality, at least in the way this concept has been defined since modern times.

[33] As he further explained, it is one thing treating a subject that others have explored and maybe exhausted, and another thing altogether to approach an almost new theme. The novel subject, in fact, is capable of being further developed, since «what is already discovered does not hinder new discoveries». Indeed, in his view, who comes after is the one that benefits the most from imitation, since he/she might use subjects and figures that, despite already being used by others, are still capable of being transformed into something different and new. Therefore, in doing so, «he is not pilfering them, as if they belonged to someone else, when he uses them, for they are common property». L. A. SENECA, *Ad Lucilium epistulae morales*. LXXIX, § 6-7, with an English translation by R. M. Gummere, London, UK: London Heinemann, Cambridge, Mass.: Harvard University Press, 1917, Vol. II, 203-279, <https://archive.org/details/adluciliumepistu02seneuoft>.

[34] L. A. SENECA, *Ad Lucilium epistulae morales*, cit., 203–205, 281.

[35] In his words, «it is for this reason that boys copy the shapes of letters that they may learn to write, and that musicians take the voices of their teachers, painters the works of their predecessors, and peasants the principles of agriculture which have been proved in practice, as models for their imitation». QUINTILIAN, *Institutio Oratoria*, Book X, Ch. 2, § 2-4, 8. *The Institutio Oratoria of Quintilian*, with an English translation by H. E. Butler, Cambridge, Mass.: Harvard University Press; London, UK: William Heinemann, 1922, Vol. IV, 75–79, <https://openlibrary.org/books/OL23306618M/The_Institutio_oratoria_of_Quintilian>.

Classic literates accepted and endorsed the principle of copying as a crucial means to reaching perfection. Cassius Longinus, for instance, praised the emulous imitation of great ancient poets, which he firmly believes «[it] is not plagiarism, but resembles the process of copying from fair forms or statues or works of skilled labour»,[36] explaining how the gathering of the one's divine impulse from others' spirit functions as a medium that «leads to sublime heights».[37]

Likewise, Macrobius believed that taking from others' fortunate creations was a fundamental component of art and surely should have not been taxed with reprobation insofar as it was done with good judgement.[38] If this condition were fulfilled, the borrower could easily have replied to the accusations brought against his/her taking, such as he/she had taken too much, all for the sake of art, which was believed to be mostly advanced through the sharing and exchange of ideas and inventions.

Accordingly, those who borrow previously used material are yet expected to transform and, by personally re-interpreting it, make it their own intellectual product, in a way that, figuratively speaking, resembles the biological process of digestion, which is colourfully expressed through the metaphor of the bee that, after careful and laborious arrangement and labour, produces its honey from several flowers. Like bees, poets should then blend the material gathered from others or common property matter in order

[36] As he further explains, the advancement of literature, philosophy and generally any other art would never have occurred if artists had not engaged in the fruitful context with their models. LONGINUS, *On the Sublime* (*Perì Hypsous*), XIII, § 2-4, translated into English by H. L. Havell, with an introduction by Andrew Lang, London: Macmillan and co., 1890, 30, <http://www.gutenberg.org/files/17957/17957–h/17957-h.htm>. Greek text (with translation by W. Rhys Roberts, Cambridge: University Press, 1907, 79-81) at <https://archive.org/details/cu31924012529800>.

[37] Such an imitative process was, in his understanding, very similar to the one that characterised the divine impulse described by the goddess' priestess. The sublime geniality of the ancient predecessor would move from his soul to that of the imitator, who will breathe this divine flatus and be inspired by that until they all share the same «sublime enthusiasm». LONGINUS, *On the Sublime* (*Perì Hypsous*), cit.

[38] As he specifies, taking the side of comedian Afranius, who Menander accused of having taken too much: «thanks, furthermore, to the manner of his imitations and the good judgment he displayed in his borrowings, when we read another's material in his setting, we either prefer to think it actually his or marvel that it sounds better than it did in its original setting». MACROBIUS, *Saturnalia*, Book VI, I, Edited and translated by R. A. Kaster. Loeb Classical Library 510. Cambridge, MA: Harvard University Press, 2011, § 6, <http://www.loebclassics.com/view/macrobius-saturnalia/2011/pb_LCL512.1.xml> (subscription required).

to make their own product, which by this means becomes a new and unique intellectual syrup.[39]

Besides, even admitting that imitation knows multiple forms of expression, which may entail the copy of only a few lines or a larger amount of material, with or without alteration or adjustments, the source or origin of the taking must still be recognisable.[40] This is a point of particular importance, since it suggests that proper attribution of authorship was a significant concern for literature and art, even within the larger frame of imitation: the right of the former author to be acknowledged as such appears therefore to somehow confine the boundaries of imitative creation that at the outset appeared to be averse to any restraints.

Certainly, imitative practices that extended from the Middle Ages to the decades preceding the Renaissance strictly relied on their worship for authority, with almost no safeguard for any creative or original efforts, although the latter assumption is virtually accurate in relation to the early decades of the Middle Ages. As Lindey sustains, the fall of the Roman Empire brought away the prolific literary tradition that Classical theorists had established, and it was replaced by «a cloud of jargoners and compilers [that] darkened the face of learning».[41] This, however, does not mean that the entire epoch should be regarded as a thorough dwindling of culture.

Furthermore, the abundant transcription of early works by monkish artists who, during the ninth century, copied a large amount of compositions may, to some extent, have facilitated the usurpation of others' compositions by those who were eager for effortless glory wearing, and purposely did not acknowledge the authorship of their sources, seeking to pass these works off as their own.[42] Nevertheless, this conclusion seems to be too precipitate, especially when one considers the peculiar patterns that

[39] As Seneca articulated: «we also, I say, ought to copy these bees, and sift whatever we have gathered from a varied course of reading, for such things are better preserved if they are kept separate; then, by applying the supervising care with which our nature has endowed us, - in other words, our natural gifts, - we should so blend those several flavours into one delicious compound that, even though it betrays its origin, yet it nevertheless is clearly a different thing from that whence it came». L. A. SENECA, *Ad Lucilium epistulae morales*, cit., § 3-5, 277.

[40] Describing the imitative process, he explained that borrowings might comprise half lines or all verses; it may entail some variation or few additions; it may also insist on a deliberate misplacing of some passages, making it difficult to locate their actual source; it may indeed imply some adjustment without erasing the source, which may still be recognised. L. A. SENECA, *Ad Lucilium epistulae morales*, cit., § 7.

[41] A. LINDEY, *Plagiarism and Originality*, cit., 67.

[42] A. LINDEY, *Plagiarism and Originality*, cit., 68.

described that age of history.[43] In fact, the overall disregard for the genuine imitation proclaimed by Classic literates, and the disdain for the attribution of authorship, find their deep roots in the awareness of the most affordable and prompt way to spread the inherited knowledge of their predecessors.[44]

Moreover, writers of that time, which Constable described as scribes and compilers rather than authors, aimed at providing authority instead of acknowledging individual attribution.[45] Consequently, it did not matter whether the former author had been properly credited, although the copyist's interest might also extend to the enhancement of the copied text, either in the sense that it could be more easily and amusingly read or in a way that could increase its circulation among readers.[46]

Indeed, if the picture of the copyist lonely monks truly describes high medieval centuries, it however does not effectively apply to the late centuries. As Hobbins makes clear, beginning with the year 1000, in fact, numerous social vicissitudes determined the rise and spread of a cultural change that greatly transformed literature and writing practices, determining a prominent profusion of fabricated books, particularly during the fourteenth and fifteenth centuries, and allowing their distribution on a larger scale.[47]

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[43] See also H. MAUREL-INDART, *Plagiats, les coulisses de l'écriture*, Paris: Éditions de la Différence, 2007, 2-16, who puts an emphasis on the influence that the so-called *copiste-auteur* had on the establishment of the modern concept of authorship, suggesting him/her to be a co-author, given his/her proximity to the text and any intervention he/she might have made. Cf. (cited at 12, note 5) L. CANFORA, *Il copista come autore*, Palermo: Sellerio Editore, 2002, who argues that the true author is the copyist that has the closest relationship with the text.

[44] Therefore, in order to tie up the previous analysis with the subsequent paragraphs and then expound the theory that lies behind the concept of plagiarism as the counterpart of originality, which will be illustrated in Chapter 2, a detailed examination of the period that extends from the collapse of the Roman Empire to the sixteenth century is thereby (so forth) illustrated.

[45] G. CONSTABLE, *Forgery and Plagiarism in the Middle Ages*, in *ADipl*., Vol. 29, No. JG, 1983, 1, 2-3, 27-28, 38-39, who defies the prospect of even using the term plagiarism with reference to the Middle Ages, since writers, when discarding the accuracy of attribution, were primarily moved by social motives rather than being the result of «obscure personal motives».
Likewise, some suggest it not to be considered counterfeiting, but rather a «façon, un modelage». M. MEZGHANI-MANAL, *Source, façon et contrefaçon au Moyen Age*, *Actes du colloque de Tours 2001, Le plagiat littéraire*, Littérature et Nation, Vol. 27, Tours: Université de Tours, 2002, 49-70, cited by H. MAUREL-INDART, *Plagiats, les coulisses de l'écriture*, cit., at 14 note 10.

[46] P. KUNSTMANN, *Œcuménisme médiéval et auctoritates: art et liberté de la copie*, in C. VANDENDORPE (ed.), *Le plagiat*, Ottawa: Presses de l'Université d'Ottawa, 1992, 140-141, also cited by H. MAUREL-INDART, *Plagiats, les coulisses de l'écriture*, cit., 13.

[47] Diminishing the cost to produce manuscripts, but increasing the availability of new techniques, including the introduction of the use of paper, the diffusion of grammar schools and literateness, in the late medieval ages, people in fact witness a great demand for manuscripts that inevitably challenged the role of the copyist, who became even more mindful of their work. D. HOBBINS, *Authorship and publicity before print. Jean Gerson and the transformation of Late Medieval learnin*g, Philadelphia: University of Pennsylvania Press, 2009, 7-8.

The pronounced dissemination of the *Romance of the Rose* during 1200, for instance, is an exemplary demonstration of such abundance. Besides, some claim that the spread of vernacular allegory disclosed the prestigious status that such composition enjoyed, which began challenging the role of the authors and the same notion of authorship.[48] Moreover, the use of the fictional first-person narrative, interpolations, allusions and borrowing from others' works actually helped to define a new type of author, who, if not yet seen in his/her distinctiveness, is beginning again to perform some kind of originality.[49]

Nevertheless, the twelfth and thirteenth centuries indeed saw a change in the approach to writing, thanks to the prolific activity of exegetes and authoritative schoolmen with their glosses and commentaries, such as Thomas Aquinas and William Ockham who are understood as «valuable repositories of medieval theory of authorship».[50] The erudite scrutiny they conducted on scriptural texts appears to have had an impact on the concept of authorship, defining the role of the *auctor* and his *auctoritas*, which became particularly intense with the «shift from the divine to the human *auctor* of Scripture»,[51] even though this concept is still far from its contemporary meaning.

Yet, the most tangible change occurred after 1400, describing what has been defined as «a growing appetite for information».[52] Writers of that time, including the Italian Boccaccio and Petrarch, and the English Chaucer and Gower, showed a special affinity for ancient classic literature that bounced their approach to a distinctive

[48] S. A. KAMATH, G. VIERECK, *Authorship and first-person allegory in Late medieval France and England*, series Gallica, Vol. 26, Cambrige, UK: D.S. Brewer, 2012, 2-3.
[49] S. A. KAMATH, G. VIERECK, *Authorship and first-person allegory in Late medieval France and England*, cit., 5-10. Cf. C. WHITEHEAD, *Castles of the Mind: A Study of Medieval Architectural Allegory*. Cardiff: University of Wales Press, 2003, 260.
[50] A. J. MINNIS, *Medieval theory of authorship. Scholastic literary attitudes in the later Middle Ages*, London: Scolar Press, 1984, 1 et seq., who openly contests that scholastic literature lacked any interest in art. On the contrary, also considering the unavoidable influence of Aristotelian principles, they became increasingly interested in the artistic and literary aspects of writing, opening the way for the following humanist approach of the fourteenth century onwards.
[51] A. J. MINNIS, *Medieval theory of authorship*, cit., 2, 5.
[52] D. HOBBINS, *Authorship and publicity before print.*, cit., 10.

humanist writing, all the time engaging more with the reader,[53] but likewise showing a peculiar pattern of imitation, interpolation and borrowing.[54]

All these developments may arguably still be reconciled within the general framework of imitation,[55] claiming that the lack of exact authorship acknowledgement would not impede the conceptualisation of a deferential recollection of others' works, similarly to the attitude of those who praised unconditional borrowing in ancient times.

Sixteenth-century writing practices across and beyond continental Europe greatly appreciated imitation,[56] considering it a valuable instrument of learning through the reiteration of classical and traditional themes, especially in view of the fact that it promoted the gathering of derivative knowledge,[57] while understanding the critical importance of posing some boundaries. In other words, theorists maintained and strongly promoted the classical paradigm, but they did not renounce the benefit of collateral rules to endorse good imitation.

Among them,[58] the Italian Daniello recouped the classical paradigm of subject matter having a common property dimension where anybody can use any theme or idea, also with the aim of citing or improving the model, but again on the condition that it was reinterpreted and created something novel.[59] His insistence on the cautious collection and arrangement of others' material, indeed, was brought forward by many

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[53] D. HOBBINS, *Authorship and publicity before print.*, cit., 7, who furthermore suggests that they began caring for the aesthetic and creative value of their works, in the end becoming «the reader's respected friend».

[54] To such an extent, the alleged imitation by Boccaccio of Statius's *Thebaid* in his *Teseida* is considered an example of creative imitation that, also by means of analogical patterns, recalls the principles set by ancient theorists.

The imitative attitude of Boccaccio has been widely explored and researchers have demonstrated the occurrence of such conscious imitation with regard to several works, including Dante Alighieri's *Divina Commedia*. See, in this respect, V. KIRKHAM, M. SHERBERG, J. LEVARIE SMARR (eds.), *Boccaccio: a critical guide to the complete works*, Chicago: The University of Chicago Press, 2013, 81 et seq. Cf. D. ANDERSON, *Before the Knight's Tale: Imitation of Classical Epic in Boccaccio's Teseida*, Middle Ages Series, Pennsylvania: University of Pennsylvania, 1988. Likewise, scholars compare his imitative approach with that of Chaucer and, regarding his imitation of Dante's masterpiece, extensively analyse the motives of his drawing. See, for instance, P. BOITANI (ed.), *Chaucer and the Italian Trecento*, Cambridge, UK: Cambridge University press, 1985, particularly at 117 et seq.

[55] G. CONSTABLE, *Forgery and Plagiarism in the Middle Ages*, cit., 36-37. Cf. S. STEWARD, *Crimes of writing: problems in the containment of representation: problems in the containment of representation*, New York: Oxford University Press, 1991.

[56] On the writing practices of Italian and English artists during the sixteenth century, see, in particular, the accurate analysis of H. O. WHITE, *Plagiarism and imitation during the English Renaissance*, cit. 19-30.

[57] P. CHERCHI, *Plagio e/o riscrittura nel Secondo Cinquecento*, in R. GIGLIUCCI (ed.), *Furto e plagio nella letteratura del Classicismo*, cit., 55.

[58] For the purpose of the instant research, the analysis is limited to Italian and English theorisers.

[59] B. DANIELLO, *La Poetica di Bernardino Daniello Lucchese, Libro secondo*, Venezia: G. Antonio Nicolini da Sabbio, 1536, 74-75, <http://digital.onb.ac.at/OnbViewer/viewer.faces?doc=ABO_%2BZ169363103>.

artists of the epoch and yet reiterated the essential scheme of creative imitation that one has so far witnessed with regard to ancient classical literature.

For instance, Minturno recalled the metaphor of the bee that gathers material from flowers and, with its laborious intervention, transforms it into honey, to replicate Seneca's suggestion that poets should do the same.[60] Also critical of verbatim copying and what he called a slavery to imitation was Pontanus, who discussed the importance of avoiding the reproduction of the exact words of others' works, and instead suggested pursuing assimilation, once again recalling the metaphor of the bee: «apes imitari preacipit, quas videmus volitare per florea rura, & succos ad mellificandum idoneos quaerere».[61]

In that context, what appears repudiated is certainly not imitation in itself, but instead the servility of the conducts that contrast with the above-illustrated principles.[62] Endorsing some kind of judicious creation, writers believe that imitation and invention may very well coexist, especially when some effort in terms of organising the material is considered.[63] According to Tasso, in fact, poets are natural imitators who sew what is common property into their own invention, creating something new from the old to reach ultimate perfection.[64]

Similar contemplations are retrieved by English writers.[65] According to Hawes, a wise writer is expected to invent «upon auctoryte».[66] In this sense, imitation became a

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[60] A. S. MINTURNO, *L'Arte Poetica del Sig. Antonio Minturno, nella quale si contengono i precetti Heroici, Tragici, Comici, Satirici, e d'ogni altra Poesia*, Venetia: G. A. Valuassori, 1563, 445-446, <http://reader.digitale-sammlungen.de/de/fs1/object/display/bsb10163809_00005.html>.

[61] I. PONTANUS, *Poeticarum institutionum libri tres; Tyrocinium poeticum; Jacobi Pontani De Societate Iesv Poeticarvm Institvtionvm Libri Tres*, Ingolstadt: Sartorius, 1594, 12-16, 28-34 (quotation at 33). Full text: <http://lib.ugent.be/europeana/900000150046>. Cf. H. O. WHITE, *Plagiarism and imitation during the English Renaissance*, cit., 29-30.

[62] Cf. H. O. WHITE, *Plagiarism and imitation during the English Renaissance*, cit., 22-23, 25-26, who highlights how in this context reinterpretation entails some kind of personal touch.

[63] As White confirms, all fundamental aspects of classical literary doctrine are summarised in Tasso's work, particularly when he maintains: «the newness of a poem does not consist primarily in its dealing with a fabricated subject never heard of before, but in the organization and development of the plot». H. O. WHITE, *Plagiarism and imitation during the English Renaissance*, cit., 26, 28-29.

[64] T. TASSO, *Discorsi del signor Torquato Tasso. Dell'Arte Poetica*, Venetia: Vassalini, 1587, 25-27, 52-54, 65-76, 83, who literally claimed: *è il Poeta uno imitator sì fatto [che] tessendolo diversamente il faceva di commune proprio, e di vecchio, nuovo* (at 66), <https://archive.org/details/gri_discorsidels00tass>. See also the expanded edition of the work that was released a few years later: T. TASSO, *Discorsi del poema heroico del S. Torquato Tasso all'Illustriss.mo e Reverendo Signor Cardinale Aldobrandino*, Napoli: Paolo Venturini, 1594.

[65] See G. G. SMITH, *Elizabethan critical essays*, Oxford: Clarendon Press, 1904, Vol. II, 1-193, <https://archive.org/stream/elizabethancriti002smit#page/n3/mode/2up>.

meaningful instrument to invent or create, where *invention* in the words of Cox, «is wherby we shew that the signe whiche is brought agaīst vs: maketh for vs. As I wolde nat haue taryed to couer hym yf I had done the dede my selfe: but haue fled and shronke a syde into some other way for feare of takynge».[67]

As Wilson confirmed,[68] imitation seeks to resemble others' inventions without necessarily having to bring forward new things that nobody ever said, but rather following the example of the great authorities that populated the literary universe.[69] Lupset himself insisted on imitation but furthermore specified that novelty does not necessarily mean independent fabrication, but may also consist in judicious borrowing from notorious models.[70]

Like their Italian colleagues, English Renaissance writers did not attempt imitation *tout court* but equally opposed flattering conducts that sloppily resembled the process of genuine imitative creation.[71] One for all, Elyot praised imitation, but demanded some caution in borrowing others' material, thus suggesting it to be

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[66] As he colourfully described, «it was the guyse in old antiquyte. Of famous poets ryght ymaginatife, Fables to fayne by good auctorite; They were so wyse and so inventife, Theyr obscure reason, fayre and sugratife, Pronounced trouthe under cloudy figures. By the inventyon of theyr fatall scriptures». S. HAWES, *The Pastime of Pleasure: an allegorical poem*, London: Wynkyn de Worde, 1509, <http://reader.digitale-sammlungen.de/de/fs1/object/display/bsb10748152_00005.html> (reprinted from the 1555 edition, in *Early English poetry, ballads, and popular literature of the Middle Ages. Edited from the original manuscripts and scarce publications*, by T. Wright, Vol. XVIII, London: Percy Society, 1845, 29, 55).

[67] L. COX, *The Art or crafte of Rhetoryke*, London: Redman, 1524 (second ed. 1532). Full text (transcribed from the 1532 edition) at: <http://www.gutenberg.org/files/25612/25612-h/25612-h.htm>. See also the edited reprint (with introduction, notes and glossary index) by F. I. Carpenter, Chicago: University Press, 1899, at: <https://archive.org/stream/arteorcrafteofrh00coxl/arteorcrafteofrh00coxl_djvu.txt>.

[68] T. WILSON, *The arte of rhetorique, for the use of all suche as are studious of eloquence*, London: [s.n.], 1553. Full text (edited by G. H. Mair, *Wilson's Arte of rhetorique, 1560*, Oxford: Clarendon Press, 1909, 5-6) at <https://archive.org/stream/wilsonsarteofrhe00wilsuoft#page/n41/mode/2up>. See also the e-text transcribed by Judy Boss, Omaha, NE, 1998, <http://pages.uoregon.edu/rbear/arte/arte2.htm>.

[69] As he explained, «whofe doings as I can well like, and much commend them for the fame: ſo I would thinke them much more able to doe much better: If they either by learning followed a paterne, or els knewe the precepts which lead vs to right order. Rules were therefore giuen, and by much obſeruation gathered together, that thoſe which could not ſee Arte hid in an other mans doings, ſhould yet ſee the rules open, all in an order ſet together: and thereby iudge the rather of their doings, and by earneſt imitation, ſeeke to reſemble ſuch their inuention». T. WILSON, *The arte of rhetorique*, cit., 158-159.

[70] T. LUPSET, *An Exhortation to yonge men perswading them to walke in the pathe way that leadeth to honeste and goodnes: writen to a frend of his by Thomas Lupsete Londoner*, London: Berthelet, 1534 (1538). On T. Lupset biography and works see E. M. NUGENT (ed.), *The Thought and Culture of the English Renaissance. An Anthology of Tudor Prose 1481-1555*, Cambridge, UK: University Press, 79-88. On Lupset's theories, see also J. A. GEE, *The life and works of Thomas Lupset, with a critical text of the original treatises and the letter*, New Haven: Yale university press, 1928, 134-136, <http://babel.hathitrust.org/cgi/pt?id=mdp.39015002339805;view=1up;seq=11>, who quotes from Lupset: «where if these newe wryters speke any thynge well it is piked out of these aunciente bokes», at 262.

[71] Cf. H. O. WHITE, *Plagiarism and imitation during the English Renaissance*, cit., 39.

assembled according to the celebrated pattern of the laborious bee,[72] and Ascham, who praised the same careful approach with regard to the choice and use that the imitator made of the borrowed works.[73]

In the latter's view, it was essential to avoid poor judgement in imitation. but instead to pursue happy invention and slight allusion and to demonstrate judgement in imitation, all of which contributed to raising the imagination. A promoter of the classical pattern of imitation, Ascham encouraged imitative practices but appeared equally critical towards servile and superficial borrowing. Accordingly, imitation, which he described as «a facultie to expresse liuelie and perfitelie that example: which ye go about to folow», appeared to be not always sufficient; he also acclaimed those who created «some newe shape him selfe»,[74] it being essential to gather wisely, avoiding taking other's work word for word, and constantly bearing in mind the final purpose of enhancing knowledge.[75]

During the Renaissance, imitation was an essential component of creation and deference, for the great authority of predecessors justifies not only the borrowing of previously used themes and ideas, but also word-for-word copying. This is not even challenged by the practice of «invective or flyting poems», which indeed, according to

[72] He committed himself to the pattern, when he «assemble, out of the bokes of auncient poets and philosophers, mater as well apte to my purpose as also newe or at the lest waies infrequent, or seldome herde of them that haue nat radde very many autours in greke and latine». T. ELYOT, *The Boke named The Governour*, New York: Dutton, 1531, 235, <https://archive.org/details/bokenamedgouerno01elyouoft> (edited from the first edition of 1531 by H. H. S. Croft, London: K. Paul, Trench, 1883). In addition, as White says, while he practises borrowing, he still pursues «a degree of novelty […] following the example of the far-ranging bee, in a true classic style». H. O. WHITE, *Plagiarism and imitation during the English Renaissance*, cit., 40.

[73] Speaking of J. Milton, he recalled: «I have [likewiſe] endeavoured to ſhew how the Genius of the Poet ſhines by a happy Inention, a diſtant Alluſion, or a judicious Imitation; how he has copied or improved Homer or Virgil, and raiſed his own Imaginations by the uſe which he has made of ſeveral Poetical Paſſages in Scripture». R. ASCHAM, *Toxophilus: the schole of shootinge conteyned in two bookes*, London: Whytchurch, 1545. Full text (reprinted and edited by E. Arber, London: Murray, 1868, 152) at: <http://www.archerytoronto.ca/pdfs/Archery-Books-on-PDF-Toxophilus-1545.pdf>.
On this regard, it seems important to consider White's accounts on his attack against those, like Textor, who showed poor choice and use of material. H. O. WHITE, *Plagiarism and imitation during the English Renaissance*, cit., 40-41.

[74] R. ASCHAM, *The Scholemaster* or *Plaine and perfite way of teachyng children, to understand, write, and speake, the Latin tong*, London: Iohn Daye, 1570, 264-269, <http://www.gutenberg.org/cache/epub/1844/pg1844.html>.

[75] In other words, he believed it was good to imitate others, but not good enough, providing some relevant examples, such as the borrowing of Aeneide's *Homer* by Macrobius, of Bucolikes' *Theocritus* by Eobanus Hessus, of whom conduct was arguably moved by the fundamental purpose to serve the increase of learning. R. ASCHAM, *The Scholemaster*, cit., 267.

White, proves that «imitative composition enjoyed general and unquestioned acceptance».[76]

The similarities between the Italian and English approaches to the matter during the sixteenth century are well illustrated by Hoby and his translation of *The Book of the Courtier* by Castiglione,[77] in which he argued that, although there could be no good writing without imitation, there was indeed no requirement for following the source entirely. The importance of choosing the material to be reinterpreted is a critical aspect of the process, to the extent that it determines whether imitation is original, perhaps devoting special attention to the details that have not yet been elaborated by others; particularly when the ultimate aim of the artist it to surpass his/her model.[78]

Such conscious criticism towards servility and superficiality was to some extent linked to a growing interest and concern for some originality of compositions, partly compelled by the increase in published works and authors and perhaps by the renovated ethical motives of literates.[79]

In other words, if at first the classical principle of imitation was interpreted according to its strict and severe meaning, it was later perceived that a genuine imitative practice did not get along with fawning and shallow conduct. Moreover, forestalling what in modern times would be described as a cry for originality and creativity, it was also understood that borrowing should have rather entailed «individual adaptation, reinterpretation, and if possible improvement».[80]

Acknowledging imitation as an intrinsic feature of creation is, therefore, a first and essential step to comprehending the true nature of creativity and, accordingly, to explaining the complex mechanisms that lay behind plagiarism and misattribution

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[76] H. O. WHITE, *Plagiarism and imitation during the English Renaissance*, cit., 42-43, who provides some examples from the poems of William Dunbar and Walter Kennedy, or those of Thomas Smith and William Gray, all composed in the mid-1500s.

[77] B. CASTIGLIONE, *Il libro del Cortegiano del conte Baldesar Castiglione*, Venezia: Eredi di Aldo Manuzio il vecchio & Andrea Torresano il vecchio, 1528.

[78] T. HOBY, *The courtier of Count Baldessar Castilio*, London: Wolfe, 1561 (1577). Reprinted in W. Raleigh (ed.), *The Book of the Courtier from the Italian of count Baldassare Castiglione, The Tudor Translations*, Vol. XXIII, London: Nutt, 1900, 43-44, 66-71, 74-77, <https://archive.org/details/bookofcourtierf00castuoft>. As he recounted, «wee are so hardye nowadayes, that wee disdeigne to do as other good menne of auncient tyme have done: that is to saye, to take dylygente heede to folowinge, without the whiche I judge no man canne wryte well», at 66.

[79] On this point, see H. O. WHITE, *Plagiarism and imitation during the English Renaissance*, cit., 118-119, who illustrated how determinant in this sense was the increase in literary products but also the growing self-consciousness of writers.

[80] H. O. WHITE, *Plagiarism and imitation during the English Renaissance*, cit., 118-119.

practices. Moreover, a wary reading of the past certainly reveals many consistencies with the idea that taking the words of others has been a constant feature of the process of creation. However, in general, it should be clarified that since then this was accepted on the condition that imitation and reutilisation became themselves the instrument of further creation,[81] or as long as this would not entail a passing-off of these words as their own.

1.2 A tale of individual misattribution and public deception

History shows that borrowing has at all times been an accustomed practice in literature, as well as in art and other fields of knowledge. However, even though authors and, more generally, artists were entitled to use others' works to develop their own creations, there was still some obligation always to mention the first authors unless they wanted by ill chance to attract larcenous accusations. In other words, while accounting for the accepted resorting to imitation in the creative process, there has also been a constant leaning towards distinguishing dissimilar imitative acts.[82]

Deliberate misattribution of the original work brings a negative element to the enchanted tale thus far described. From whatever perspective we look at it, with only a few exceptions contingent to specific artistic movements and periods, authors have indeed relentlessly been devoted to properly acknowledging authorship. This postulation additionally explains the need to understand the various forms that violation of such a normative scheme may assume, from whole non-attribution, to the various forms of misattribution. Among all variations that plagiarism displays, the first and simplest is the act of disrupting the very core element of the author's credit; that is to say, not acknowledging his/her authorship despite it evidently not being the only aspect to consider.

[81] In line with these considerations, it is accurate to say that imitation and the act of copying others' works have sometimes merged into a whole, especially during medieval times, when the copy also served a practical purpose. See G. PERON, A. ANDREOSE (eds.), *Contrafactum. Copia, imitazione, falso*, cit., XV.

[82] If a personal and original reworking of previous ideas and knowledge may most probably go under the nomenclature of *imitatio bona*, there is a similar poise that slavish and trivial copying would result in the example of *imitatio mala*, which may then be avoided by properly acknowledging the source of the taking. G. LOMBARDI, *Traduzione, imitazione e plagio (Nicolosa Sanuti, Albrecht von Eyb, Niclas von Wyle)*, in R. GIGLIUCCI (ed.), *Furto e plagio nella letteratura del Classicismo*, cit., 138.

Likewise, the careful attitude towards a proper founding of attribution should accompany a cautious concern for the different looks that misattribution may assume, which is firmly related to the need to avoid an overly rigorous stance on the matter. Accordingly, it should not be taken for granted that every misattribution is irreparably condemned, especially when some adaptation occurs.[83] The powerful role of variations may then turn the act of copying into an entirely autonomous creation cherished by a creative imitation or inspiration, thus bringing into question whether discouraging such a practice appears justified only in the name of a rigorous defense of authorship attribution.

In essence, the practice of encroaching the right of authors to receive attribution or credit for their works, by suppressing their name or failing to acknowledge them accurately, either way being willing to pass those works off as their own, remains a very convoluted issue. It may be encapsulated by the limits already anticipated, with the echoing term of plagiarism, or more accurately described as the usurpation of the author's (or who is otherwise entitled) right of attribution.

In any case, similar conducts appear to contradict the true nature of creation that has persistently intended to pursue the result of some individual creative effort, if not, in its own words, original. Most of all, it certainly reveals some hints of treachery that, if not necessarily taken into full account by the law, still have a meaningful denotation in the realm of ethics and social norms.

As a result, a possible way out of this bewildering condition may be to isolate the conducts of those who go beyond creative imitation, instead deceitfully misattributing another person's work and making it as if it were a product of their creation, particularly when it is warily camouflaged.[84] Nonetheless, there is also an accepted belief that in some disciplines, in particular in the world of art, even a slavish copy is considered to have a distinct and significant value, even though this apparently

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[83] Cf. F. BENEDETTI, *Accusa e smascheramento del "furto" a metà Cinquecento: riflessioni sul plagio critico intorno alla polemica tra G.B. Pigna e G.B. Giraldi Cinzio*, in R. GIGLIUCCI (ed.), *Furto e plagio nella letteratura del Classicismo*, cit., 235, who recounts the importance of identifying some original contribution to the whole even in the act of taking others' ideas. In particular, Cinzio was a strong advocate of imitation per se and among those who did not even discuss the potential risks of servile imitation. See C. G. GIRALDI, *Discorsi di M. Giovambattista Giraldi Cinthio nobile ferrarese*, Venezia: Giolito, 1554, 151-152, <http://digital.onb.ac.at/OnbViewer/viewer.faces?doc=ABO_%2BZ17523350X>.

[84] Some refer to such conduct as being a clear example of hidden rewriting or furtive reutilisation. L. E. ROSSI, *Tipologia del non autentico nel mondo antico*, in R. GIGLIUCCI (ed.), *Furto e plagio nella letteratura del Classicismo*, cit., 15-18.

means refuting the paradigm of virtuous imitation that has been so extensively proclaimed.[85] As a consequence, there seems to be an additional need for the law to constantly have in mind the precious help that non legal disciplines bring to the discussion and so to potential legal claims.[86]

Above all, the first urge to sanction the conduct of plagiarism has been directly associated with the necessity to prohibit the unauthorised exploitation of the work, therefore with the first purpose to protect the interests of the publisher before even considering the author of the work itself. [87] For these reasons, it seems correct to argue that in both the Italian and the UK systems, from a strictly legal perspective, plagiarism first assumes the contours of counterfeiting and piracy,[88] the main concern of the law being towards the pecuniary interests in the work that ought to be fully protected.

Nevertheless, such an approach was to some extent also connected to a specific worry for the public interest, as it was soon understood that the public had a relevant interest in not being deceived by works with false or improper attribution.[89] This last aspect also represents an actual modern-day concern, and perhaps it might be a useful tool for a more mature appreciation of the phenomenon.

Focusing on the increasing relevance of misattribution practices and their aptness to harm the right of society not to be deceived by unattributed or misattributed

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[85] In other words, plagiarism could be referring to a particular and thoughtfully intended artistic strategy that undoubtedly forces one to reconsider the foregoing assessment of the phenomenon. Such reassessment may be valid for many other disciplines as well. Therefore, the law should take it into watchful consideration, especially when it comes to imposing steady sanctions for similar conducts.
See C. MASI, *L'iperestetica del plagio*, in A. A. (eds.) *Vero è falso. Plagi, cloni, campionamenti e simili*, Bertiolo: AAA Edizioni, 1998, 36, who suggests how, especially in the fields of architecture and fine arts, the idea of protecting the original from the copy, has become less relevant.

[86] These arguments will be further articulated in Chapter 3.

[87] This may be seen as a first indication of the common departure of the two traditions, which is also corroborated by the origins and historical evolution of copyright. For a comprehensive reconstruction of the origins of copyright, see L. BENTLY, U. SUTHERSANEN, P. TORREMANS (eds.), *Global copyright: Three hundred years since the Statute of Anne, from 1709 to cyberspace*, cit., especially at 7-13 in the introductory notes of Bently, who asks for caution in affirming that the Statute of Anne was the first world copyright act. This postulation in fact risks disregard for the previous system of regulation by privileges, to confound the right to control the work's copy with the personal rights of the authors, and to give excessive emphasis to the British influence while sidelining the contribution of other countries to the development of copyright law. See also R. DEAZLEY, *On the origin of the right to copy. Charting the movement of copyright law in eighteenth-century Britain (1695-1775)*, Oxford and Portland, Oregon: Hart Publishing, 2004; B. SHERMAN, L. BENTLY, *The Making of Modern Intellectual Property: The British Experience 1760-1911*, Cambridge University Press: Cambridge, 1999, in particular at 9-42.

[88] See, on this point, D. MCLEAN, *Piracy and authorship in contemporary art and the artistic commonwealth*, in L. BENTLY, J. DAVIS, J. C. GINSBURG (eds.), *Copyright and Piracy. An Interdisciplinary Critique*, cit., 311.

[89] Cf. Z. O. ALGARDI, *La tutela dell'opera dell'ingegno e il plagio*, cit., 308.

authorship, the concern for the public interest in this matter is likely to grow. However, there is no absolute proof that public interest is effectively safeguarded through the formal and strict sanctioning of such conduct, which may not indeed actually harm the public and could rather simply be confined to the realm of art and literature, and therefore regulated by the social norms that apply in a specific context and environment.

Even so, another issue has arisen in this already complex picture, which deserves a dedicated analysis but will here only be briefly anticipated. If an asserting plagiarism that has its deep roots in the very mutable nature of art has to be acknowledged, there is still some latitude to foresee the risk that a much-unregulated attitude towards authorship may mean a hazardous deception at the expense of the public. Justice Posner, who describes plagiarism as a deceptive copy that misleads the public, which instead relies on the outward accuracy of the attribution, has recently described this concern,[90] and yet it had already been articulated by earlier literates.

Among them, Vida focused specifically on the reader. Recommending his young audience to imitate the works and style of their predecessors, he truly believed in the power of adaptation, which, if done in a surreptitious way, risked misleading the reader. On the other hand, when the imitative conduct was unconcealed, he had enough confidence to believe that the reader him/herself has the ability to detect the borrowing, recognising the source from which the borrowed passage has been taken and thus understanding the real intention of the imitator to consciously allude to the model, perhaps in an effort to compete with it.[91]

Returning to present times, it appears more than plausible that the individual concerns of the authors are, to some extent, shared by the public. In particular, Litman discusses how the interest of the public is likely to intersect the author's interest in protecting the integrity of his/her work.[92] Borghi and Karapapa further develop such an

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[90] R. POSNER, *The little book of plagiarism*, cit., 25, who also specifies that misleading to be relevant must have led the public to make a different choice than it would otherwise have done.

[91] M. H. VIDA, *De arte poetica*, Lib. III, Roma: Ludovico degli Arrighi, 1527, <http://gallica.bnf.fr/ark:/12148/bpt6k59170m>. Translated into English, with commentary and with the text of c. 1517, by R. G. Williams, New York: Columbia University Press, 1976 (earlier Italian translation: *Dell'Arte Poetica di Marco Girolamo Vida*, by G. A. Barotti, Roma: Tipografia delle Belle Arti, 1838, 62-91). For a recount of Vida's artistic background, see G. P. NORTON (ed.), *The Cambridge History of Literary Criticism: Volume 3, The Renaissance*, Cambridge, UK: Cambridge University Press, 1999, 112-121) and V. LANCETTI, *Della vita e degli scritti di Marco Girolamo Vida Cremonese*, Milano: Crespi, 1931.

[92] J. LITMAN, *Digital Copyright*, Amherst, NY: Prometheus, 2006, 185, <http://works.bepress.com/cgi/viewcontent.cgi?article=1004&context=jessica_litman>.

argument, reaffirming the interest of the audience, especially in the digital environment, and suggesting foreseeing in the right to integrity «a powerful safeguard on the public sphere as such», which anyway must remain a chief concern for copyright law.[93]

Futhermore, if these arguments are acceptable with regard to the right of integrity, they seem even more significant when referring to the right of attribution. Here, in fact, the entitlement of the author to be properly acknowledged appears to overlap with the audience's right not to be deceived and thus receive the most accurate information pertaining to the work. This might be established with some degree of ease reading between the lines of ancient theorists, for instance, Terence, who intentionally addressed to the public his apprehension about being misjudged.

In conclusion, it is correct to say that many literates adopted the rule of invention without discussing it,[94] or without explicit concern for the public right to be appropriately informed of the works' authorship. However, invention and its expansion as independent fabrication shortly began to be taken into consideration,[95] and a more distinctive fence between the common property of subject matters and the private realm of individual creation has entered the scene,[96] suggesting furthermore the importance of avoiding any trickery at the expense of the public.

2. Legendary plagiarists in the allegory of piracy and literary theft

The praise for imitation, as previously explained, has relentlessly entailed a general respect for borrowing. However, originality-driven attacks that are quite similar to those foreseen nowadays were not lacking, mostly moved by jealous retorts or rigid analysis that compared borrowed materials with their alleged sources. This without showing any

[93] M. BORGHI, S. KARAPAPA, *Copyright and Mass Digitization*, Oxford: Oxford university press, 2013, 121.

[94] See, among others, G. MUZIO, *Rime Diverse: Tre libri di Arte* poetica, Venezia: Giolito, 1551, 68, <http://reader.digitale-sammlungen.de/de/fs1/object/display/bsb10189930_00003.html>; I. C. SCALIGERI, *Poetices libri septem*, Geneva: Crispinus, 1561, <http://reader.digitale-sammlungen.de/de/fs1/object/display/bsb10147388_00004.html>.

[95] On the call for a favourable proximity of imitation and independent fabrication, see I. DENORES, *Poetica di Iason Denores*, Padoua: Paulo Meietto, 1588, <http://gallica.bnf.fr/ark:/12148/bpt6k59187b/f2.image>; L. GIACOMINI, *Orationi e discorsi di Lorenzo Giacomini Tebalducci Malespini*, Fiorenza: Sermartelli, 1597, 66-70, 83, <http://digital.onb.ac.at/OnbViewer/viewer.faces?doc=ABO_%2BZ171242608>.

[96] As a result, they started showing increasing doubts towards fawning and shallow imitation.

further interest in the reasons behind the taking or redeeming of the kind of genuine and pondered imitation that has traditionally featured in art.[97]

In addition, the concept of labour, which, to some extent, anticipates what would later be known in modern times as the sweat of the brow doctrine, made its appearance within the larger debate on creation. One of its first advocates was the Italian Castelvetro, for whom labour, or *fatica*, became a central issue most likely influencing his scant hesitation to designate imitators as thieves who usurp the poet's credit by using the flamboyant epithet of «rubatori […] degni d'ogni grave punitione».[98]

The figure of theft also recurred in some English literates during the Renaissance. Cranmer, who proclaimed the need to handle the matter both with sincerity and faithfully, criticised the conduct of those who irresponsibly take what another had gathered with great labour, «[stealing] from him all his thank and glory, like unto Æsop's chough, which plumed himself with other birds' feathers».[99] The verbatim copying of others' works therefore represented the booty of stealing, especially when the taking was particularly extensive in length and focused on a single author's work.[100]

Accordingly, when the classical paradigm of imitation began to be demonstrated together with a demand for improvement, to some extent it became inherent that the borrower should imitate wisely – an apparently simple expectation that originates from

[97] On the contrary, some of these attacks radically condemned the lack of individual contribution and thus originality, with no seeming trouble evident in judging the imitator as copyist or thief.
For a more detailed analysis of the nature of such attacks, see the analysis of E. STEMPLINGER, *Das Plagiat in der griechischen Literatur*, Leipzig and Berlin: B.G. Teubner, 1912, 6-80, <https://archive.org/details/dasplagiatinderg00stemuoft>, also quoted by H. O. WHITE, *Plagiarism and imitation during the English Renaissance*, cit., 13 and 14.

[98] L. CASTELVETRO, *Poetica, vulgarizzata et sposta per Lodovico Castelvetro*, Vienna: G. Stainhofer, 1570, 76-82, 105, 120-121, <http://digital.onb.ac.at/OnbViewer/viewer.faces?doc=ABO_%2BZ175257709>. Of a similar view is one who foresees the tangible risk of confusing imitation and mere copying: Francesco Patritio**,** *Della Retorica. Dieci dialoghi di M. Francesco Patritio nelli quali si favella dell'arte Oratoria con ragioni repugnanti all'openione, che intorno a quella hebbero gli antichi scrittori*, Venetia: F. Senese, 1562, <http://gallica.bnf.fr/ark:/12148/bpt6k83308x>.

[99] Yet, he allowed some degree of unaccountable mistake if the source from which the borrower took the questionable material was a false copy. T. CRANMER, *An answer of the most reverend Father in God, unto a crafty and sophistical cavillation*, 1551 (1580), <https://archive.org/details/writingsanddispu01cranuoft> (reprinted in *Writings and disputations of Thomas Cranmer archbishop of Canterbury*, edited by J. E. Cox, Cambridge, UK: University Press, 1844, Vol. I, 163).

[100] As White summarises, what mostly concerns Cranmer it is not the borrowing of a few themes gathered from different sources, but instead the act of having taken the entire work of others. H. O. WHITE, *Plagiarism and imitation during the English Renaissance*, cit., 41.

the inference that artists imitate the wise to learn some wisdom.[101] In Wilson's thought, in particular, there was likewise confidence that a wise man would have not counterfeited another's work:

> For if they that walke much in the Sunne, and thinke not of it, are yet for the most part Sunne burnt, it can not be but that they which wittingly and willingly trauayle to counterfect other, must needes take some colour of them, and be like vnto them in some one thing or other, according to the Prouerbe, by companying with the wise, a man shall learne wisedome.[102]

The practice of misattributing others' works of the mind and passing them off as a new and original product of their own was widely known in fifth century Ancient Greek comedy. Poets were used to give-and-take contentions of plagiarism and, quite often, such accusations also had an element of public deception: the case is finely exemplified by Aristophanes, who endorsed the right practice of always delivering new and original concepts to the audience instead of purely reusing only prior and recurring ideas, thus inevitably implying a hint of treachery.[103]

Some degree of deceitfulness could then originate from the recycling of one's creation, which noticeably brings some additional complexity to the instant picture.[104] However, this specific aspect may likewise be correlated to the characteristic features of the Attic comedy, which entailed elements of competition, challenge and vexation: all aspects that contribute to explaining the firmness of Aristophanes' accusations.[105]

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[101] As he admonished that artists should first imitate their wise and erudite predecessors before seeking to create independently something of their own. T. WILSON, *The arte of rhetorique*, cit., Book I (e-text transcription by J. Boss).

[102] T. WILSON, *The arte of rhetorique*, cit., Book I.

[103] Quoting from the playwright's *The Clouds*: «[I] do not give myself airs, nor do I seek to deceive you by twice and thrice bringing forward the same pieces; but I am always clever at introducing new fashions, not at all resembling each other, and all of them clever; [instead] Eupolis craftily […] introduced his Maricas, having basely, base fellow, spoiled by altering my play of the Knights, having added to it, for the sake of the cordax, a drunken old woman, whom Phrynichus long ago poetized […] Whoever, therefore, laughs at these, let him not take pleasure in my attempts; but if you are delighted with me and my inventions, in times to come you will seem to be wise». ARISTOPHANES. *Clouds. The Comedies of Aristophanes* edited by William James Hickie, London - Bohn: 1853, lines 518-562.

[104] A careful reading of the famous playwright's verses also foresees a peculiar feature of plagiarism, namely what is often referred to as self-plagiarism, which still appears even more controversial but less acknowledged.

[105] On this point, see M. SONNINO, *L'accusa di plagio nella commedia attica antica*, in R. GIGLIUCCI (ed.), *Furto e plagio nella letteratura del Classicismo*, cit., 19-51.

The crying of Terence for the need to use his prologues to answer «malignant rumors» that jealously contended he blended others' works to construct his verses,[106] which he openly admitted, apparently contradicts this point. Terence's admittance of the borrowing, and the belief that such conduct does not constitute an offence, thus deferring himself to the judgement of his audience, indeed clearly recap the main patterns surrounding imitation.

However, as has been previously portrayed, shallow and secret taking, which may be assimilated to the phenomenon of piracy or plagiarism that otherwise belong to what have been termed «faulty types of imitating or borrowing», remain always reproached.[107] As a result, the discrepancy foreseen among pure invention, genuine imitation and a measly copy of someone else's work became the target of precise attacks. As Vitruvius recounted, a lack of originality was highly disheartening in poetics, and authors were explicitly condemned for the indolent taking of another poet's verses, which literally configured theft and thus deserved to be punished:

> [so] deserve our reproaches, who steal the writings of such men and publish them as their own; and those also, who depend in their writings, not on their own ideas, but who enviously do wrong to the works of others and boast of it, deserve not merely to be blamed, but to be sentenced to actual punishment for their wicked course of life.[108]

Classic literature offers several other examples of what has been described in terms of «plagiarism hunting».[109] As illustrated at the very beginning, one of the most notable is certainly offered by the reaction of Martial to the alleged piracy of his work, whose perpetrator he labeled as *plagiarius*.[110]

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[106] TERENCE, *The self-tormentor* [*Heautontimorumenos*], *Prologue*. (English translation) *From the Latin of Publius Terentius Afer, with more English Songs from Foreign Tongues*, by F. W. Ricord New York: Charles Scribner's Sons, 1885, 18-19, who so concluded: «wherein an old and envious poet makes pretence That Terence, all at once, himself to verse applied, And more on friendly aid than on himself relied. Your judgement shall be form'd; and be it what it may, It shall prevail; and all of you, I therefore pray». Full text at: <https://archive.org/stream/selftormentorhea00rico#page/n27/mode/2up>.

[107] H. O. WHITE, *Plagiarism and imitation during the English Renaissance*, cit., 15.

[108] M. POLLIO VITRUVIUS, *The Ten Books on Architecture*, Translated by M. H. Morgan, with illustrations and original designs prepared under the direction of H. Langford Warren. [Edited and translation completed by A. A. Howard], Cambridge: Harvard University Press; London: Humphrey Milford. Oxford University Press, 1914, Book VII, Introduction, s. 3.

[109] H. O. WHITE, *Plagiarism and imitation during the English Renaissance*, cit., 14-15.

[110] For additional accounts on the occurrence of plagiarism by Latin writers, see the recent contribution of S. MCGILL, *Plagiarism in Latin literature*, New York: Cambridge University Press, 2012.

Similarly was the antiphon on the dishonest conduct that, according to Donatus, was perpetrated to the detriment of Virgil's authorship. In more detail, the alleged laments of Virgil appeared to have provoked the famous and enigmatic *hos ego* motto, on which literates further developed their theories on the equivalent myth,[111] thus endorsing the ancillary metaphor of theft to describe the conduct of those who take the honour (thus the credit) for a work that they neither created, nor contributed to creating: «Hos ego versiculos feci, tulit alter honores. Sic vos non vobis nidificatis aves: Sic vos non vobis vellera fertis oves: Sic vos non vobis mellificatis apes: Sic vos non vobis fertis aratra boves».[112]

The *hos ego* paradigm was expressly linked to plagiarism by the British Hall, who also uses the exact term coined by Martial to allude to the practice of fraudulent borrowing.[113] Moreover, the usurpation of the author's authorship envisioned in the first half-line, where the author of the verses is not properly acknowledged as such and therefore defrauded of his reward, recalls the metaphor of the laborious bee in the way that it is indeed suggested in the third half-line. Some poets, therefore, may meet the same fate as Virgil's animals: they do not get credit for their labours, while someone else benefits, unjustly taking all the merit.

Also against servile copyists and pirates was Googe, who was particularly careful and sometimes even flamboyant in declaring others' authorship so avoiding

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[111] See, *in primis*, Puttenham, who thus described: «whereupon Virgill seing him self by his ouermuch modestie defrauded of the reward, that an impudent had gotten by abuse of his merit, came the next night, and fastened vpon the same place this halfe metre, foure times iterated. Thus. Sic vos non vobis Sic vos non vobis Sic vos non vobis Sic vos non vobis. And there it remained a great while because no man wist what it meant, till Virgill opened the whole fraude by this deuise. He wrote aboue the same halfe metres this whole verse Exameter. Hos ego versiculos feci tulit alter honores». G. PUTTENHAM, *Arte of English Poesie. Contriued into three Bookes: The first of Poets and Poesie, the second of Proportion, the third of Ornament*, London: Richard Field, 1589, Book I, Chapter XXVII. Cf. A. F. MAROTTI, M. D. BRISTOL, *Print, Manuscript, and Performance: The Changing Relations of the Media in Early Modern England*, Columbus: Ohio State University Press, 2000, 69-70, <http://www.gutenberg.org/cache/epub/16420/pg16420.html>.

[112] For an English translation of the original narration by Donatus, see: «I made these little verses, another took the honor. Thus do ye, not for yourselves, make nests, ye birds. Thus do ye, not for yourselves, render your fleece, ye sheep. Thus do ye, not for yourselves, make honey, ye bees. Thus do ye, not for yourselves, endure the plow, ye oxen». A. DONATUS, *Life of Virgil*, translated by David Scott Wilson-Okamura. 1996. Rev. 2005, 2008, <http://www.virgil.org/vitae/a-donatus.htm>.

[113] As he specified, «could neuer man worke thee a worser shame Then once to minge thy fathers odious name, Whose mention were alike to thee as leeue, As a Catch-pols fist vnto a Bankrupts sleeue; Or an, Hos ego, from old Petrarchs spright Vnto a Plagiarie sonnet-wright». G. PUTTENHAM, *Arte of English Poesie*, cit.,

being accused of «taking [someone else's] honour and glory of his travaile».[114] Furthermore, Hooper, describing those who violate the eighth commandment (*Thou shalt not steal*), who are punished as thief and robber, acknowledged that the stealing offence could also be perpetrated by taking the credit for someone's work by deceitfully attributing it to oneself.[115]

Recalling Aesop's fable of the *Vain Jackdaw* that borrowed the peacock's plumes to pass himself off but was soon discovered and revealed as a thief,[116] in addition to Virgil's piracy laments and Martial's plagiarism, Hooper foresaw actual theft,[117] in the conduct of misusing the public good for private purposes: «which is very theft […] so the diminution of any man's fame; as when for vain glory any man attribute unto himself the wit or learning that another brain hath brought forth, whereof many hath complained, as this of Virgil: *Hos ego versiculos feci, tulit alter honores*».[118]

To some extent more problematic appears the attitude of those who intentionally followed imitative patterns that look a lot like plagiarism. The English Gascoigne, for

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[114] According to White, Googe provides with scrupulous attention, also with excessive insistence, the name of the author, Conrad Heresbach, from whom he had translated: *Fovre bookes of hvsbandrie, collected by M. Conradvs Heresbachivs, 1577*. A caution that is confirmed by L. BLUNDESTON, in the *Preface* to B. GOOGE, *Eglogs, epytaphes and sonettes*. London: Colwell, 1563, 28-30, <https://archive.org/stream/eglogsepytaphes02googgoog#page/n32/mode/2up> (reprint edited by E. Arber, London: A. Constable, 1895). Cf. H. O. WHITE, *Plagiarism and imitation during the English Renaissance*, cit., 55-56.

[115] J. A. HOOPER, *A Declaration of the ten holy commaundementes of Allmygthye God*, Zurich: Augustin Fries, 1548. Full text (reprinted in *Early writings of John Hooper. Comprising The declaration of Christ and his office. Answer to Bishop Gardiner. Ten commandments. Sermons, on Jonas. Funeral sermon. Edited for the Parker Society by S. Cark*, Cambridge: University Press: 1843, 249 et seq.) at: <https://archive.org/stream/earlywritingsofj24hoopuoft#page/248/mode/2up>. As he further explained, «two manner of ways all injuries and wrongs are done: the one in' withholding another's right, and the other in taking away another's right», at 389.

[116] For an early translation into English, see *Æsop's Fables. Illustrated by Ernest Griset, with text based chiefly upon Croxall, La Fontaine, and L'Estrange*, revised and re-written by J. B. Rundell, London: Cassell, Fetter and Galfin, 1869, 57, <https://archive.org/details/aesopsfables00aesorich>. Phaedrus then took after the Greek storyteller fable. For an English version of the latter, see *The Fables of Phaedrus*, Translated into English verse by Christopher Smart, London: G. Bell and Sons, 1913, <http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.02.0119%3Abook%3D1%3Apoem%3D3>.
See also the analysis of M. SCHERMAIER, *Borrowed plumes and robbed freedmen: some aspects of plagiarism in Roman antiquity*, in A. RODGER OF EARLSFERRY, A. S. BURROWS; D. JOHNSTON; R. ZIMMERMANN (eds.), *Judge and jurist: essays in memory of Lord Rodger of Earlsferry*, Oxford, UK: Oxford University Press, 2013, 237–243, who explores beyond the intrinsic moral of the fable, the legal and social correlations.

[117] As he further explained, «the treasure of a commonwealth preserved and augmented as it is need, with the revenues that belong to the same; as receivers, auditors, treasurers, paymasters, with other; commit more than theft, if they use any part of the goods belonging to a commonwealth to a private use, Pandect. Lib. xlviii. Lex Jul». J. A. HOOPER, *A Declaration of the ten holy commaundementes*, cit., 393-394.

[118] J. A. HOOPER, *A Declaration of the ten holy commaundementes*, cit., 393, who added: «they make a fair shew with another bird's feathers, as Æsop's crow did. This offence Mart. iii. calleth plagium: *Imponens plagiario pudorem* speaking of him that stole his books». Cf. H. O. WHITE, *Plagiarism and imitation during the English Renaissance*, cit., 41.

instance, purposely gathers a good amount of his material from other authors. Nonetheless, he failed in some cases to properly attribute the authorship of his source,[119] therefore creating doubt about whether his works were «an outright piracy of (other's) works»[120] or the expedient for literary and artistic mystifications.[121]

Even more controversial are the examples of Kendall and Fleming, who seem to have consciously embraced a principle of authorship disavowal that turned into actual piracy, either fairly persuaded of the superfluity of attributing authorship or knowledgeably willing to let the text speak for itself.[122] In truth, particularly when such denial of authorship is deliberate, the alleged pilfering being mindful manifestation of an artistic array, it becomes very contentious to determine whether the conduct of the accused should be admonished or cherished.

Moreover, if there is no sufficient evidence that the assumed plagiarist had acted relying on the expectation that his/her taking would not be discovered or, on the

[119] The alleged misattribution included reference to another author or entire lack of ascription of authorship. His example is well portrayed by White, who explains how some of the poems contained in *A Hundreth Sundry Flowers bound up in one Small Posy* (1572) were later included in *The Posies of George Gascoigne, corrected, perfected, and augmented by the Author* (1575), but with some modifications on the authorship, where previous references (e.g. attribution to initials other that his) disappeared. H. O. WHITE, *Plagiarism and imitation during the English Renaissance*, cit., 49-53.

[120] H. O. WHITE, *Plagiarism and imitation during the English Renaissance*, cit., 51. Cf. G. WHETSTONE, *A Remembrance of the Well-Employed Life and Godly End of George Gascoigne Esquire*, English reprint edited by E. Arber, London: A. Murray & Son, 1868, 15-29, <https://archive.org/stream/certaynenotesofi00gascuoft#page/20/mode/2up>.

[121] Besides, the preference for the latter explanation appears to be supported by the documented reaction of Gascoigne against servility and piracy, in which he figuratively demonstrated unassimilated copying through the metaphor of the larcenist drone that steals the bee's precious honey from the hive: «but as the Drone, the hony hiue, dooth rob: with woorthy books, fo deales this idle lob». G. WHETSTONE, *A Remembrance of the Well-Employed Life and Godly End of George Gascoigne Esquire*, cit., 20-21.
Cf. White, who argues that the contradictory reference of authorship may be better explained by the intent of the author to use fictional devices, rather than an occurrence of piracy, basing his judgement also on the fact that no evidence of an actual author who corresponded to the initials was found. H. O. WHITE, *Plagiarism and imitation during the English Renaissance*, cit., 52-53, 54-55.

[122] In particular, Kendall's *Flowers of Epigrams, out of Sundry the Most Singular Authors Selected, as well Ancient as Late Writers* (1577) appears to have reproduced others' works verbatim to the point that, according to White, it resembles «the type of piracy for which Martial attacked Fidentinus». At the same time, since Kendall's sources were mostly translations, one may argue that he believed not to be obligated to provide the name of the original translators. Conversely, he might have purposely mixed his translations with those made by others. Either way, it seems easier to foresee in this specific case that deceptive conduct has occurred, which echoes the servile and superficial imitation repeatedly rebuked. H. O. WHITE, *Plagiarism and imitation during the English Renaissance*, cit., 56-57.

contrary, would certainly have been recognised by the reader,[123] the issue becomes even more contentious.

Furthermore, although the tendency to reprimand instances of «incorrect imitation, chiefly outright theft or piracy» attracted a degree of consensus,[124] it still did not refute the classical imitation doctrine. Certainly, some concerns, such as the principle that themes or ordinary subject matters belong to common property and creative imitation required personal interpretation, have been initially established. Nonetheless, for the most part the concept of originality as it is known in its contemporary meaning only originated in modern times, becoming increasingly prominent when it took the form of a more structured inventive array.

In conclusion, it may reasonably supported that «[instances of] piracy, and imitation marred by secrecy, perversity, servility, or superficiality [that] receive short shrift».[125] More established accounts of originality, however, were later found in Renaissance times, when plagiarism received further explicit disapproval, not only in noticeable circumstances of plundering others' works and perpetrating misattribution,[126] but also in cases of unpretentious translations that slavishly replicated the original text, refuting any original contribution or creative addition.[127]

Therefore, the previous, more permissive outlook, in large part linked to a much closer deference to the works of predecessors, had sooner been placed side by side with a different and less peaceful approach that unsurprisingly risks challenging the cumulative picture of creation thus far portrayed.[128]

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[123] See Fleming's alleged copying of Gascoigne's *The Tale of Hemetes the Hermit*, which was published only after his death, which White describes in terms of «a much more brazen act of piracy», suggesting he might have believed his theft would have been mostly undetected, or contrarily wished the work to be actually recognised as that of Gascoigne. H. O. WHITE, *Plagiarism and imitation during the English Renaissance*, cit., 57.

[124] H. O. WHITE, *Plagiarism and imitation during the English Renaissance*, cit., 58-59.

[125] H. O. WHITE, *Plagiarism and imitation during the English Renaissance*, cit., 19.

[126] B. DANIELLO, *Ladroneccio, Ladri che in piú maniere s'appropriano le fatiche degli altri studj altrui*, in *L'uomo di lettere, Parte seconda*, Brescia: Venturini, 1883, 83-98, who so described the conduct of heinous books weavers.

[127] L. BORSETTO, *Traduzione e furto nel Cinquecento. In margine ai volgarizzamenti dell'Eneide*, in R. GIGLIUCCI (ed.), *Furto e plagio nella letteratura del Classicismo*, cit., 69-101.

[128] In particular, see J. GIBSON, *Community Resources: Intellectual property, international trade and protection of traditional knowledge*, Burlington, VT: Ashgate Publishing Company, 2005.

In recent times, we have in fact witnessed the rising of a different legal attitude.[129] Either for practical and economic reasons that are essentially linked to copyright and related rights, or for apparently more sincere concerns for the intimate and personal interests of the authors of the works of the mind, the law clears its voice when it comes to prohibiting or inhibiting conduct that entails violation of the authors' right of attribution.

However, some important distinctions must be predicted, especially when different legal traditions are accounted. In particular, civil law countries such as Italy have conventionally sanctioned the conduct of usurping the author's attribution or paternity in the work he/she created on the grounds of expressly protecting the author's moral rights apart from any economic aspects that may be attached. On the contrary, common law systems such as that of the United Kingdom, have always ensured that the economic interests that move the wheels of creative incentives would come first,[130] at least when copyright is explicitly involved.[131]

Besides, if the bestowal of imitation and the legitimation of replicating previous ideas and formulae unquestionably prove to be a distinctive feature of our culture,[132] highlighting the significance of endowing certain literary practices that presumably could have been deemed undesirable instead, this corroborates the assumption that plagiarism has always been hesitant about rigid taxonomy and strict regulation. This aspect appears to be common to many jurisdictions and therefore crosses the boundaries and divergences of both legal systems here considered, together with the belief that misattribution still maintains the same convolutedness that it has had ever since it accompanied the metaphor of literary burglary.

Similar considerations may conclusively suggest that the law should, on the one hand, make every effort to consider the significant degree of changeability in which

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[129] By that, I refer to the era of stringent control and restriction that has nowadays characterised the attitude of the law towards the aforementioned practices.

[130] Cf. R. TOWSE, *Creativity, Incentive and Reward. An Economic Analysis of Copyright and Culture in the Information Age*, Cheltenham, UK: Edward Elgar, 2001.

[131] Nonetheless, as will soon be explained, with regard to copyright systems it has also been suggested that they may have granted some relief to attribution claims on other grounds, for example, through the law of torts.

[132] To such an extent, the imagination of the reader–writer scholar, who reads to write, reads while writing and writes while reading, is exemplarily described in A. PETRUCCI, *Le biblioteche antiche*, in *Letteratura italiana*, Vol. II, Produzione e consumo, Torino, 1983, 528. For a detailed account of this figure, see G. LOMBARDI, *Traduzione, imitazione e plagio (Nicolosa Sanuti, Albrecht von Eyb, Niclas von Wyle)*, in R. GIGLIUCCI (ed.), *Furto e plagio nella letteratura del Classicismo*, cit., 103-104.

plagiarism is articulated and, on the other, perhaps stand down to a more flexible and informal system of regulation and sanctioning, such as the one suggested by the doctrine of social norms. A feasible influential instrument that has some discernible chances of success, but that also shows some counter-indications.[133]

[133] This appears particularly true in consideration of the divergent trend that has for some time featured the law, where a resilient and severe regulation rather than a soft and flexible restraint seems to be preferred in dealing with copyright matters.

CHAPTER 2

THE PATTERNS OF CREATIVITY AND ORIGINALITY IN INTANGIBLE WORKS

1 Plagiarism as the counterpart of originality and creativity

The historical framework illustrated thus far has helped to reveal the ambiguities surrounding plagiarism, envisioning it as either an inescapable consequence of classical imitation or a reproachable example of literary larceny.[1] Indeed, the desire to embrace or stem the flow of all its potential implications has not automatically found an equivalent craving for a meticulous and steady definition. This is certainly true for literature and, in a broader sense, the arts, but it is even more accurate within the legal context.

Nevertheless, when the notions of originality and creativity became the leading grounds with which to justify protection of copyright work and plagiarism began to be perceived as the counterpart to such concepts, a more exacting regulation started to be craved and with it the demand for a feasible description of the phenomenon.[2]

As already validated, when the colour of art and other non-legal disciplines enter the sterner realm of the law, it may be necessary to provide a designation that, although never necessarily the only or the perfect one, avoids embracing one or another diverging interpretation. Such a definition seeks instead to portray plagiarism more neutrally, by referring to it as the practice of usurping an author's attribution of authorship in the work he/she has created or, in other words, the act of passing another person's work off as one's own. A definition that, in sum, neither condemns plagiarism wholeheartedly as

[1] The latter conclusion is particularly endorsed by its strict derivation. From an etymological standpoint, the term plagiarism plausibly originates from the Greek *plaghios*, which also means ambiguous and deceitful, and then merged into the Latin term *plagium*, keeping the same meaning and in some instances referring in figurative speech to the larceny of literary works. On this see Z. O. ALGARDI, *La tutela dell'opera dell'ingegno e il plagio*, cit., 367-368.

[2] Though there is still currently a lack of a shared notion of plagiarism, for quite some time there was no actual need to give a categorical and explicit connotation to the concept, as suggested also in Z. O. ALGARDI, *La tutela dell'opera dell'ingegno e il plagio*, cit., 341-343.

a despicable burglary offence nor unquestionably bestows the defilement of one's entitlement to be acknowledged as the author of a work.

At the same time, the notion provided above is undeniably linked to the broader sense of authorship and copyright.[3] In fact, as previously upheld, plagiarism was originally conceived as being strictly related to the violation of the exclusive right of the owner to make whatever use of the work he/she liked, which is why historically it has been associated with piracy and counterfeiting.[4]

However, when the idea-expression dichotomy found explicit representation, the irreproachability of plagiarism began to be confined to the circumstances in which it violated the right to proper attribution of authorship in the work, which at the same time must be the expression of the author's original mind. The strong bond between plagiarism and originality is unavoidable, even more so if one considers its definition to be an act that simulates the originality of someone else's work.[5]

The principle that only the expression of the idea, not the idea itself, receives copyright protection offers, therefore, a first foundation to evaluate any accusation of plagiarism. Evoking what is known to be the principle of protecting the manifestation of the idea, rather than the idea itself, summarised by the renowned idea-expression dichotomy, the literature on the issue has often made a distinction between a servile taking and a genuine borrowing, sometimes with firm poise and sometimes with less confidence.[6]

In fact, it is only on the condition that the work receives protection from the law that such a practice may be sanctioned, independently or contingently to the

[3] This particular linkage requires further clarification that will be expounded in the subsequent sections. However, although the notions of plagiarism and copyright infringement are not to be considered equivalent, it is nevertheless accurate to warn that they cannot either be deemed completely separate subjects.

[4] Even within the civil law tradition, in fact, where it was often found to conform to the act of forgery, only later did it carve out a separate and distinct place as a sharper moral rights' violation.
See, on this issue, E. ROSMINI, Legislazione e giurisprudenza sui diritti di autore, Milano: Hoepli, 1890; E. ROSMINI, Diritti di autore sulle opere dell'ingegno di scienze, lettere e delle arti, Milano: Società editrice libraria, 1896; D. GIURIATI, Il plagio. Furti letterari artistici musicali, cit. 107.

[5] See, on this respect, Z. O. ALGARDI, *La tutela dell'opera dell'ingegno e il plagio*, cit., 370, who insisted on the plagiarist's replicative attitude towards others' works, either entirely or limited to a few but still creative and protectable elements. In any case, these alleged plagiarised works must first be original in order to receive protection in the first place.

[6] Such ambivalence, indeed, may foster a narrow approach towards plagiarism in such a way that, generally speaking, only extensive and verbatim copy would be considered a harmful practice. A. SANDULLI, *Plagio letterario e parodia*, cit., 376, who consequently brought the interpreter's attention to the impairment of the most outward element of the work.

infringement of the economic rights on the work,[7] thus distinguishing the dual attitude of the law regarding whether or not to sanction the violation of the moral right of the author.[8]

Likewise, since there is no flawless designation of originality and creativity,[9] the typical vagueness of plagiarism increases even more at this point, thus corroborating the idea that plagiarism deserves unique consideration and a careful assessment that considers the extreme variability of its forms and the powdery context in which it occurs.[10]

The immediate association between plagiarism and originality finds its roots in earlier times and can easily be portrayed by recalling the imitative canon that has characterised the literary field ever since. As has been seen before, early literates have in fact traditionally praised genuine borrowing, which expressed itself in an imitation that entailed some personal effort in the sense of it being so it became creative. Moreover, the safeguard for originality that ancient literates proved to have established was destined to endure and, with the limits previously anticipated, it continued throughout the sixteenth century and onwards, if not even increased by a renovated claim for inventiveness.[11]

These assumptions bring back the earlier discourse on imitation that created the basis for a more comprehensive assessment of plagiarism from a historical perspective and now, Lindey permitting, demands a new "glimpse into the past".[12] Besides, the comparative analysis of the Italian and UK systems that is hereby sought cannot escape

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[7] Furthermore, when the sanctioning of misattribution depends on the occurrence that an infringement of the work's copyright had been established, the instances in which the right of attribution may be independently sheltered being rarer and limited in scope, the preliminary appraisal of the work's aptitude to be protected is made even stronger.

[8] Overall, with explicit regard to the Italian system, it is accurate to sustain that the tradition of moral rights has greeted lengthy deliberation on plagiarism. Purposefully defining it as an aggravated form of counterfeiting, it also differentiated the case in which there was simply non-attribution and the instance in which omitting the author's name was accompanied by the substitution of one's own. As emphasised by Messina in the early 1930s, the former could be labelled implicit plagiarism, while the latter described explicit plagiarism. S. MESSINA, *Le plagiat littéraire*, Parigi: Sirey, 1936, 131-132.

[9] Cf. L. LESSIG, *(Re)creativity: how creativity lives*, in H. PORSDAM, (ed.) *Copyright and Other Fairy Tales*, Cheltenham, UK: Edward Elgar, 2006, 15.

[10] As Posner recalls, in fact, only a critical and balanced approach may provide some valid answers to the typical ambiguity that surrounds it. R. POSNER, *The little book of plagiarism*, cit., 107-110.

[11] Cf. H. O. WHITE, *Plagiarism and imitation during the English Renaissance*, cit., 201-202, who explained how Englishmen from 1500 to 1625, although not having the same idea that people might have now about plagiarism, however, «restored, in its true form, the classical doctrine that originality of real worth is to be achieved only through creative imitation», at 202.

[12] Here retracing the analysis interrupted at Chapter 1.

a detailed recounting of its historical and literary depiction.[13] Greater space will indeed be given to English writers and dramatists,[14] in an attempt to demonstrate that explicit concern and related debates about authorship attribution and plagiarism were not exclusive to the Continent, but were also acknowledged elsewhere, at least in a non-legal context.[15]

1.1 The modern safeguard for creation and the idea–expression dichotomy

Across the sixteenth and seventeenth centuries, a man of theatre such as William Shakespeare demonstrated how historical, classic and legendary subjects could easily be served as a productive foundation for classic plays. Thanks to his extensive borrowing, he earned the heading of «prize exhibit of the source-hunters», taking on other artists' works' general design, plot and characters. Moreover, whether he may have copied verbatim or carefully paraphrased more than a few lines, it is bewildering to notice that many of the authors from which he borrowed may not have accomplished the same notoriety as he did.[16]

Similarly, the English playwright and poet Benjamin Jonson has been labelled as an artist that assimilated everything he had read. However, the peculiar incorporation that features in many of his works may have afforded him the label of an archetypal plagiarist that took more than he could, especially from the ancients, including Horace,

[13] While keeping in mind the warning of Lindey, who once said: «just as one swallow doesn't make a summer, so a lapse or two does not make an author. If we are to be instructed by history, we must not misread its precepts». A. LINDEY, *Plagiarism and originality*, cit., 94.

[14] Intentionally, many other good examples will be left aside, such as the proliferous contribution of French, German and US artists, who may be occasionally brought back to light when the single categories of intellectual works are examined (see *infra*, Chapter 5).

[15] However, this exact choice does not imply that the subsequent illustration is to be considered exhaustive. On the contrary, the following references to literary and artistic understanding are only exemplary of what characterises a non-legal interpretation of originality and creativity, which substantiates copyright protection.

[16] A. LINDEY, *Plagiarism and Originality*, cit., 73-75 (quotation at 73), who articulates his recalling that his works resemble the work of others, such as Holinshed for *Macbeth*, North and Plutarch for *Antony and Cleopatra*, A. Brooke for *Romeo and Juliet*, Cinthio for *Othello*, Boccaccio for *All's Well That Ends Well*, Chaucer for *Troilus and Cressida*, Gower for *Pericles*, and Kyd for *Hamlet*. As Lindey underlines, for instance, despite the fact that his Winter's Tale may have closely resembled the Pandosto by Greene, soon there was almost no trace of the latter.

the elder Seneca, Plutarch, Pliny the Younger and Plato.[17] In particular, such assimilation seemed to have become quite problematic, especially if no interest by the borrower to make any acknowledgment is proved.[18]

The aptitude to elude credit for authorship was often associated with the well-known Aesopian fable of the jackdaw, as it is with Milton who appeared, with his omnivorous appetite, through the picture of an author that «plucked feathers from the wings [of others]».[19] For that he received quite stern criticism, particularly from Hawker, who, discussing his art, claimed that, in his knowledge, «the false fame of that double-dyed thief of other mens brains […] one-half of whose lauded passages [were] felonies committed in the course of his reading on the property of others».[20]

What emerged from this fierce statement is the deliberate reference to the wrongdoing committed at the expense of other people's property. A picturesque notion of robbery that carried on during the seventeenth century, the beginning of the early modern era. Guilty of having made collages of previous works was, for instance, Bunyan,[21] who so replied to the attacks moved against him:

> Let this suffice To show why I my "Pilgrim" patronize. It came from mine own heart, so to my head, And thence into my fingers trickled; Then to my pen, from whence immediately On paper I did dribble it daintily. Manner and matter, too, was all

[17] Being described as having a sharp ear and memory, he appeared to have drawn for his tragedies much from Tacitus, Juvenal, Suetonius, Cicero and Seneca (such as *Sejanus and Catiline His Conspiracy*), and for his comedies much from Petronius, Lucian, Plautus, Horace and Ovid (such as *The Alchemist* and *Timber*). A. LINDEY, *Plagiarism and Originality*, cit., 78.

[18] This might be true in the case of Izaak Walton (1593-1683), whose *The Compleat Angler* takes the form of a miscellany of previously recognised anecdotes and precepts, but also includes characters that appeared in other authors' works. See A. LINDEY, *Plagiarism and Originality*, cit., 79, who also cites H. J. OLIVER, The Composition and Revisions of *The Compleat Angler*, [1947] *Modern Language Review* 295, which have explained how other writers later stole from Walton too. Besides, although he was accused of plagiarism later in the fifties, his practice was also armoured by those who indeed made a mockery of the matter. See *The Chicago Tribune*, 18 December 1956, 20, <http://archives.chicagotribune.com/1956/12/18/page/20/article/a-line-o-type-or-two>, which concluded that the column itself might have constituted a case of plagiarism since it referred to much of the story narrated by others.

[19] A. LINDEY, *Plagiarism and Originality*, cit., 75-76, who notices how source-hunters found many similarities, parallels and digressions in *Paradise Lost* or simple digressions, provoking a large debate on the paternity of the work that may never die.

[20] R. S. HAWKER, *The Life and Letters of R. S: Hawker (Sometime Vicar of Morwenstow)*, Reprint of 1924 edition, London: Forgotten Books, 2013, 232, who continues commenting that the plunder had still received royalties for his larcenies.

[21] His *The Pilgrim's Progress from This World to That Which Is to Come; Delivered under the Similitude of a Dream* of 1678, a spiritual allegory that became an English classic, was the main target of such accusations, comprising quite a few explicit references to others' works, including the *Holy Bible* and the *Isle of Man* by Bernard. A. LINDEY, *Plagiarism and Originality*, cit., 79.

> mine own, Nor was it unto any mortal known Till I had done it; nor did any then By books, by wits, by tongues, or hand, or pen, Add five words to it, or write half a line Thereof: the whole, and every whit is mine.[22]

Bunyan's heated reaction, contending that every word, subject and style were his own and nobody else's, depicts a clear apprehension for those allegations that is, to some extent, far from the unworried attitude of many aforementioned artists. The fervour he demonstrated in defending himself against insinuations of some kind of literary robbery may be a symptom of a more conscious feeling towards intellectual works of creation, which to some extent creates some distance from the idea that creation mostly has to satisfy a general and common interest of learning and advancement of the arts.[23]

On the contrary, other still believed in the full legitimate scope of their taking. One who plainly admitted borrowing was, for instance, Dryden who, upon being charged of a crime that nonetheless he considered irrelevant,[24] namely the stealing of all his plays, allowed to have validly used «the wit and languages of others».[25] As he explained, the foundation of the story is a less relevant aspect of property. Poets are expected to shape the story like a piece of jewellery to make a good poem.[26] What

[22] As he wrote in the *Advertisement To The Reader* of his *Holy War*, «some say the 'Pilgrim's Progress' is not mine, Insinuating as if I would shine In name and fame by the worth of another, Like some made rich by robbing of their brother». J. BUNYAN, *The Holy War Made By Shaddi Upon Diabolus For The Regaining Of The Metropolis Of The World Or The Losing And Taking Again Of The Town Of Mansoul*, London and Aylesbury: Hazell, Watson And Viney Ld., 1907, <http://www.gutenberg.org/files/395/395-h/395-h.htm>.

[23] Here instead, the author becomes increasingly individualistic and feels the need to justify his works and protect them against what he believes to be unjust accusations.

[24] In fact, he acknowledged himself to have said more than he actually wanted and, even more, should have, when he underlined: «I shall but laugh at them hereafter, who accuse me with so little reason; and withal contemn their dulness, who, if they could ruin that little reputation I have got, and which I value not, yet would want both wit and learning to establish their own; or to be remembered in after ages for any thing, but only that which makes them ridiculous in this». J. DREYEN, *An evening's love, or, The mock-astrologer*, in W. SCOTT (ed.), *The Works Of John Dryden, Now First Collected In Eighteen Volumes*. Illustrated with notes, historical, critical, and explanatory, and a life of the author, Vol. III, London: James Ballantyne and Co. Edinburgh, 1808, 231 <http://www.gutenberg.org/files/37645/37645-h/37645-h.htm#EVENINGS_LOVE>.

[25] J. DREYEN, *An evening's love, or, The mock-astrologer*, cit., 228. Cf. A. LINDEY, *Plagiarism and Originality*, cit., 79.

[26] Besides, since the range of characters is also limited, therefore any character may be used and reused, as the story varied and enlarged to the extent that it becomes new and original. J. DREYEN, *An evening's love, or, The mock-astrologer*, cit., 230-231.

matters is the labour and judgement of reshaping it, which give the story the *quid pluris* and make it art.[27]

An explicit defence of a judicious use of previously established subject matter is once again reaffirmed and, not mistakenly, it provides strong arguments in favour of the principle of protecting the expression resulting from a different and personal treatment of even mere unprotected ideas. With this in mind, accusations of plagiarism became highly and openly fierce across the seventeenth and eighteenth centuries, provoking contentious reactions of either blame or endorsement.

Pope, for instance, in his satire *Dunciad*, drew a scathing representation of plagiarists: «next o'er his books his eyes began to roll, In pleasing memory of all he stole; How here he sipp'd, how there he plunder'd snug, And suck'd all o'er like an industrious bug»,[28] although it has been suggested that he was an assiduous plunderer himself.[29] Johnson, instead, wrote explicitly in defence of the plagiarist,[30] warning against foolish allegations of piracy, when he explained that it is the task of the writer to make familiar things seem new, and new things familiar.[31] He went even further when he claimed that even a work that treats in a different manner something that has been already narrated is entitled to originality.[32]

Indeed, the interest in originality had increasingly become a matter of concern and, between the eighteenth and nineteenth centuries, the Romantic cultural wave brought a renovated focus on authorship, individual creativity and inventiveness.

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[27] Indeed, he found it easy to admit: «wherever I have liked any story in a romance, novel, or foreign play, I have made no difficulty, nor ever shall, to take the foundation of it, to build it up, and to make it proper for the English stage». J. DREYEN, *An evening's love, or, The mock-astrologer*, cit., 229.

[28] *Dunciad*, in G. GILFILLAN (ed.), *The Poetical Works Of Alexander Pope*. With memoir, critical dissertation, and explanatory notes, Vol. II, 1856, Book I, 127-130, <http://www.gutenberg.org/cache/epub/9601/pg9601.html>.

[29] A. LINDEY, *Plagiarism and Originality*, cit., 81 who recalls how *Dunciad* harks back to *Dryden* by Flecknoe, while *The Rape of the Lock* clearly reminds him of Tassoni's *Sacchia Rapita*.

[30] N. GROOM, *Unoriginal genius: plagiarism and the construction of 'Romantic' authorship*, in L. BENTLY, J. DAVIS, J. C. GINSBURG (eds.) *Copyright and Piracy. An Interdisciplinary Critique*, cit., 288.

[31] In other words, ordinary subject matter, which equates to the common theme, is relatively small, and therefore it is hard not to find similarities, and someone should not be accused of plagiarism simply because of this very simple rule of literature. See on this A. LINDEY, *Plagiarism and Originality*, cit., 82.

[32] Speaking of Pope he asked: «for what is there but the names of his agents which Pope has not invented? Has he not assigned them characters and operations never heard of before? Has he not, at least, given them their first poetical existence? If this is not sufficient to denominate his work original, nothing original ever can be written. In this work are exhibited in a very high degree the two most engaging powers of an author». S. JOHNSON, *Lives of the English Poets: Prior, Congreve, Blackmore, Pope*, London: Cassell & Company, 1891, 786-790 <http://www.gutenberg.org/dirs/etext04/lvpc10h.htm>.

Artists of that period reinterpreted the concept of imitation inherited by classics, highlighting the crucial role of employing labour and judgement.[33] Among them, Coleridge, dealing with the issue of common subject matter and what he called foundation, made clear that judicious borrowing,[34] described in terms of a «constant reply to authorities»,[35] should never be considered banned or even misunderstood. Furthermore, he remarked that what really counts and genuinely amounts to art is the interpretation that each author offers of the foundation, also claiming that the reader is not interested in absolute novelty, but in the *originality* of each individual reading.[36]

Judgement, together with labour, confers originality to the work despite the fact that it arose through imitation or even copying. Shelley greatly emphasised this point, explaining that imitative practice may sometimes be tempting, to the extent that he often felt allured «to throw over their perfect and glowing forms the grey veil of my own words».[37] At the same time, he also recalled how the best poetry was the result of much

[33] With regard to these Romantics' views, see also the comprehensive analysis of T. J. MAZZEO, *Plagiarism and Literary Property in the Romantic Period*, cit.

[34] In other instances, when borrowing lacks judgement it is likely to foster accusations of misbehaviour, which not all can handle. A. LINDEY, *Plagiarism and Originality*, cit., 85.
Lord George Gordon Byron (1788-1824), for example, appeared to have extensively copied Goethe's *Faust* in his *Manfred*, even if the latter reacted with surprising tolerance, implying he should have replied to the plagiarism accusation saying «what is there, is mine […] Whether I got it from a book or from life, is of no consequence, if I do but use it aright». As he further clarified, however, although copying could be legitimate, there were wise but also not judicious ways to do it. Others, on the contrary, were wiser borrowers: «Walter Scott used a scene from my Egmont, and he had a right to do so; I must praise him for the judicious manner in which he did it. He has also copied my Mignon, in one of his romances; but whether he was equally judicious there, is another question». *Specimens of Foreign Standard Literature. Edited By George Ripley. Vol. IV. Containing Conversations With Goethe, From The German Of Eckerman* [J.P. ECKERMANN, *Gespräche mit Goethe*, 1836], Boston: Billiard, Gray And Company, 1839, <https://archive.org/stream/conversationswit00goetiala#page/n7/mode/2up>, 128-129.
S. T. COLERIDGE, *Biographia Literaria: or, Biographical sketches of my literary life and opinions, and two lay sermons; 1. The statesman's manual, 2. Blessed are ye that sow beside all waters*. London: Bell and Daldy, 1898, Chapter 1, <http://www.gutenberg.org/files/6081/6081-h/6081-h.htm>.

[36] So he explained: «I laboured at a solid foundation, on which permanently to ground my opinions, in the component faculties of the human mind itself, and their comparative dignity and importance. According to the faculty or source, from which the pleasure given by any poem or passage was derived, I estimated the merit of such poem or passage». S. T. COLERIDGE, *Biographia Literaria*, cit., 11.
See also A. LINDEY, *Plagiarism and Originality*, cit., 84, according to whom, despite appearing to have copied from Schelling, he might even have outshined him with better results.

[37] *Letters To Leigh Hunt.* Florence November 1819, in R. H. Shepherd (ed.), *The prose works of Percy Bysshe Shelley from the original* editions, in two volumes, London: Chatto & Windus, 1888, Vol. 1, 381, 388–389, <https://archive.org/details/proseworksofperc01shelrich>, in which he also claimed that still in the case of a translation what he meant by original was the work behind it.

«by labour and study», while creativity entailed either creating something new or reproducing or re-arranging pre-existing material according to shared patterns.[38]

Inspiration from the classical canons is also shared by the literates of the Continent, such as the Italian Foscolo, who brought the classic theory together with the typical Romantics' ideals.[39] Literary criticism often discussed his imitative practices, which were indeed often considered acts of inspiration rather than copying.[40] In his works, in fact, it could always be detected some original autonomy and, beyond the borrowing of the subject matter, it was still possible to discern a peculiar and modern feeling.[41]

The novelist Manzoni also worked in praise of judicious imitation, refuting servile copying and rather pursuing any rimembranze to recall the greatness of ancients while taking the shape of true creations that did not diminish the beauty of those that were evoked, but yet strengthening and reviving their magnitude.[42] Such refusal of servile imitation typified the Romantic view, with the further clarification that, although originality was rigorously pursued, this did not mean that any imitation had to be banned.[43]

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[38] H. S. SALT (ed.), *Selected prose works of Shelley*. London: Watts & Co., 1915, 109-110, 111, <https://archive.org/stream/selectedprosewor00shelrich#page/110/mode/2up>. Cf. A. LINDEY, *Plagiarism and Originality*, cit., 75-76.

[39] In accordance with the classical theory of imitation, inspiration, or even explicit reference, has always been praised. Nonetheless, while some poets followed directly, others still imitate but with enough distinctiveness in their thoughts and expression to warrant being considered original. E. FLORI, *Il teatro di Ugo Foscolo*. Con prefazione di Michele Scherillo, Biella: G. Amosso, 1907, 43, 89, <https://archive.org/details/ilteatrodiugofos00floruoft>, 61.

[40] The clear reminder of Sofocle in his tragedy *Ajace* has been judged with suspicion, but at the same time considered, according to Marchese, «an imitation with much inspiration» [translation is mine]. G. MARCHESE, *La poesia del Foscolo: Sonetti, Odi, Sepolcri, Brani delle grazie, appendice critica*, Palermo: Ila Palma, 1990, 43.

[41] D. CAIAZZO, *Ugo Foscolo*, Volume 1, Roma: Libreria Ulpiano, 1950, 163.

[42] In other words, «you would rather speak of them as imitations rather than imitations; given that Manzoni was so good to include his very own thought in the ancient subject to the extent that his reshaping gives new life and beauty to the old one. As a consequence, he did not deprive Virgil of anything, but indeed Virgil has created something that later equate the beautiful work of Manzoni» [my translation]. *Delle poesie giovanili di Alessandro Manzoni; e quindi del suo modo di imitare gli Antichi*, in *Opere di Alessandro Manzoni milanese con aggiunte e osservazioni critiche*, Prima edizione completa, Firenze: Batelli e figli, 1829, Vol. 1, 610.

[43] What was missing, however, was a clear principle that explained in reasonable terms how exactly originality should have been reached. A. MANZONI, *Sul Romanticismo. Lettera al marchese Cesare D'Azeglio* (1823), in *Opere Varie*, Milano: Rechiedei, 1881, 583, 588, <https://archive.org/stream/operevarie00manzuoft#page/582/mode/2up>.

Besides, it appeared clear that if a reasonable imitation were allowed, the same could not be said of pure invention,[44] since the true and original creator could only be the one who found something that makes the subject, even a historical and reprocessed one, special and unique.[45] Accordingly, people could have the same idea about something and from that even create a similar or even identical work, assuming that ideas are simple and belong to nobody,[46] at least until they become something else and original, thanks to the artist's imitation, judgement and composition.[47]

The nineteenth century welcomed these principles of originality and judicious imitation so carefully praised,[48] but it also hosted several instances of more or less evident plundering.[49] Tennyson, in particular, placed pronounced emphasis on borrowing, to the extent that he was deemed as having re-clothed other artists' works.[50]

So far, the rules of literature allow the practice of what has been defined a genuine «indebtedness to other poets»;[51] on the contrary, the act of deliberately avoiding taking authorship credit was indeed rebuked and, with little difficulty, called

[44] Thus, as he accentuated, writing to his friend, «all the great monuments of poetry have as their basis events given by history, or, what comes down to the same thing, by what has once been regarded as history». A. MANZONI, *Letter to M, Chauvet on the Unity of Time and Place in Tragedy* [translation of *Lettre à monsieur Chauvet sur l'unité de temps et de lieu dans la tragédie* of 1820 by F. ROSEN, reprinted in A. MANZONI, *Opere Compete*, Paris, 1843, 257-260], in O. LEWINTER (ed.), *Shakespeare in Europe*, edited by Meridian books, Cleveland and New York: The world publishing company, 1963, 130-135, <https://archive.org/details/shakespeareineur007013mbp>.

[45] For that, he ascribed to Shakespeare «the highest originality». P. QUERNI (ed.), *La lettera di Alessandro Manzoni a m. Chauvet*, Firenze: G. P. Vieusseux, 1843, 77, 91-93.

[46] As he underlined, «to invent is fact means to find something, namely the idea or more ideas, which cannot be made because they already exist». A. MANZONI, *Dell'Invenzione. Dialogo,* in ID, *Opere Varie*, Milano: Rechiedei, 1881, 387, <https://archive.org/stream/operevarie00manzuoft#page/582/mode/2up>.

[47] A. MANZONI, *Dell'Invenzione*, cit., 369-373, 377. In this sense, he asked his interlocutor whether it was feasible that two different artists could invent (meaning create) the same thing independently or whether the fact that one author had created something precluded others from creating the same on their own and not necessarily with any difference at all. His answers were all affirmative.

[48] See also the meticulous analysis of R. MACFARLANE, *Original Copy. Plagiarism and Originality in Nineteenth-Century Literature*, Oxford: Oxford University Press, 2007.

[49] Charles Dickens (1812-70) was blamed for copying the works of others, sometimes *verbatim*, sometimes with few modifications. Similarly, Robert Bulwer-Lytton (1831-91) also known as Owen Meredith, was defined as «one of the most audacious plagiarists that ever lived», while renewed artist Oscar Wilde (1854-1900) was also unambiguously charged with the plagiarism of Milton, Keats and others. A. LINDEY, *Plagiarism and Originality*, cit., 86-87.

[50] In his defence, Tennyson denied having copied, instead claiming independent creation. A. LINDEY, *Plagiarism and Originality*, cit., 87-88.

[51] A. C. BRADLEY, *Commentary on Tennyson's "In Memoriam"*, New York: The Macmillan Company, 1907, 70, <https://archive.org/details/commentaryontenn00bradrich>.

plagiarism.[52] The fact that many parallels and similarities were found certainly attracted great debate about whether this borrowing was a deliberate reference, a reminiscence or a coincidence, or indeed the appropriation of someone else's property.[53]

Nevertheless, English playwright *Shaw* exposed himself to a different theory of originality when he stated:

> What the world calls originality is only an unaccustomed method of tickling […] Meyerbeer seemed prodigiously original to the Parisians when he first burst on them. Today, he is only the crow who followed Beethoven's plough. I am a crow who have followed many ploughs. No doubt I seem prodigiously clever to those who have never hopped, hungry and curious, across the fields of philosophy, politics and art. [54]

By providing this explanation of originality,[55] he declared himself to be lucky enough not to be deemed a plagiarist,[56] despite many describing him as «an extremely clever assimilator of other men's ideas [and] a thief».[57] In Italy, Pirandello also received explicit accusations of plagiarism, allegedly being guilty of having deliberately misappropriated others' works by means of insertions and adaptations.[58] However, he

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[52] Moving on from this, it has been noticed that sometimes similarity is deliberate, as the writer expects the reader to see it, but it can also be a mere coincidence or an unconscious replication of something that his/her mind has recovered. Last, it may be deliberate but with the further intention not to disclose the actual source, so purposely avoiding authorship acknowledgement. A. C. BRADLEY, *Commentary on Tennyson's "In Memoriam"*, cit., 70-71. Cf. A. LINDEY, *Plagiarism and Originality*, cit., 88.
For an explicit analysis of the concept of unconscious copy by the early UK case law, see *infra* Chapter 5.

[53] A. C. BRADLEY, *Commentary on Tennyson's "In Memoriam"*, cit., 73, 74, who also added that «when there can be little doubt that he had read the passage of an earlier poet in which the phrase occurs, it is more probable that he reproduced this phrase than that he invented it». By saying that he called into question the element that access makes plagiarism easier, as will be seen when discussing other copyright infringement controversies.

[54] G. B. SHAW, *Three Plays for Puritans*, Chicago and New York: H. S. Stone and company, 1900, xxxvii, <https://archive.org/stream/threeplaysforpur00shaw#page/n7/mode/2up>.

[55] In his *Caesar and Cleopatra* he continued saying that «originality gives a man an air of frankness, generosity, and magnanimity by enabling him to estimate the value of truth, money, or success in any particular instance quite independently of convention and moral generalization». G. B. SHAW, *Notes To Caesar And Cleopatra*, in ID, *Three Plays for Puritans*, cit., 216.

[56] G.B. SHAW, *Three Plays for Puritans*, cit., xxv.

[57] J. LUTZ, *Pitchman's Melody: Shaw about Shakespear*, Bucknell University Press, 1974, 141, 146.

[58] One of the most recalled accusations was moved by Luigi Capuana's widow, while Capuana himself was deemed of having replicated Zola's *Curée*, as it is briefly recounted in M. MANOTTA, *Luigi Pirandello*, Milano: B. Mondadori, 1998, 41. Cf. E. C. FUSARO, *Forme e figure dell'alterità: studi su De Amicis, Capuana e Camillo Boito*, Ravenna: Pozzi, 2009, 108
Besides, Pirandello's work *Suo marito* also attracted significant criticism, as noted also by R. DEAZLEY, *What's New About the Statute of Anne? or Six observations in search of an act*, in L. BENTLY, U.

was often unencumbered by stating that his typical and conscious inspiration had always permeated his work.[59]

In the twenties Woolf also wrote of originality, and was actually accused of being fanatical about it.[60] According to Bennet, originality of view was considered one of the good qualities of fiction, [61] but placing too much emphasis on cleverness, that is to say inventiveness, appeared to be useless. [62] In his view, Wool's mistake was to have exceeded in creativity, becoming «obsessed by details of originality and cleverness».[63]

Finally, the notion of originality was explicitly linked to technology with the work of Calvino who, refuting the notion of prodigious originality, addressed the issue of intellectual creation, providing a modern interpretation of it as being continuously challenged by technological changes and provokingly suggesting that automation and computing could take the place of the individual writer.[64] As a true believer in the power and potentialities of readers, he purported a new image of originality that really seems to be vested «in the ability to reorder the traditional elements of genre fiction to suit his own purposes; while other novelists feel that they are creative in their writings, Calvino knows that he is being re-creative, that is consciously offering variations of stories that have been told before».[65]

SUTHERSANEN, P. TORREMANS (eds.), *Global copyright: three hundred years since the Statute of Anne, from 1709 to cyberspace*, cit., 26, 27-28.

[59] C. O'RAWE, *Authorial Echoes: Textuality and Self-plagiarism in the Narrative of Luigi Pirandello*, Oxford: Legenda, 2003, 36, 107, 127.

[60] This point was particularly raised by Bennet, according to whom, although the essential elements of good poetry include «style counts; plot counts; invention counts; originality of outlook counts; wide information counts; wide sympathy counts; but none of these counts anything like so much as the convincingness of the characters. If the characters are real, the novel will have a chance; if they are not, oblivion will be its portion». A. BENNET, *Is The Novel Decaying?* in *Things That Have Interested Me*. Third Series. London: Chatto & Windus, 1926, 191, <http://www.gutenberg.ca/ebooks/bennett-things3/bennett-things3-00-h.html>.

[61] Cf. R. FERGUSON, *Criminal Law and the Modernist Novel: Experience on Trial*, Cambridge University Press, 2013, 40-43.

[62] She replied to Bennet's allegations wondering what exactly was to be considered reality and who was the judge of such reality. *Mr Bennet and Mrs Brown*, first published in 1923, London: The Hogart Press, 1924, 3-6, 10, <http://www.columbia.edu/~em36/MrBennettAndMrsBrown.pdf>.

[63] A. BENNET, *Is The Novel Decaying?*, cit., 193-194 .

[64] I. CALVINO, *Cibernetica e fantasmi (appunti sulla narrativa come processo combinatorio)*, 1967, in *Una pietra sopra*, Torino: Einaudi, 1980, 15. Cf. T. GABRIELE, *Italo Calvino: Eros and Language*, Madison, NJ: Fairleigh Dickinson University Press, 1994, 57-58.

[65] W. D. EVERMAN, *Who Says This?: The Authority of the Author, the Discourse, and the Reader*, Carbondale: Southern Illinois University Press, 1998, 119. Cf. also M. FOUCAULT, *The order of things: Archeology of the human sciences*, London: Routledge, 2001, 360 (English translation of *Les mots et les choses*, Paris: Editions Gallimard, 1966), who underlines how «it is always against a background of the already begun that man is able to reflect on what may serve for him as origin. For man, then, origin is by

This last designation of originality as a mechanism for the recreation and reshaping of existing themes and subject matters functions as a crucial juncture for the historical recounting of literature that has thus far been delineated. In essence, creativity appears to have been much more than independent fabrication, as it could also have been perfectly conveyed in the original composition or arrangement of previously established subjects. What matters, in particular, is that since then these practices have almost been the result of a personal and therefore creative effort of the author who completes or arranges unprotected common subjects.[66] A conclusion that does not really strike at all with the contemporary handling of creativity and originality, even in the dominion of law, as we will soon see in detail.

1.2 A plain and ordinary meaning of the creative and original act

The seventeenth century has paved the way for the concept of originality in its mature sense and its connection with the idea of virtuosity and uniqueness. Accordingly, this notion of creativity may have substituted the imitative creation that ancients first construed, but this is not necessarily accurate. What is indeed true is that the affirmation of a renovated principle of creative or original contribution has allowed a stronger relation between the work and its author to be construed, on which the subsequent theories on plagiarism and misattribution would then have been elaborated.

At the same time, the time lapse between the seventeenth and twentieth centuries has welcomed a fundamental evolution in the conceptualisation of creativity and originality. Increasingly, we assisted in the reclamation and rehabilitation of the initial claims of wise borrowing, which does not mean uniqueness but rather careful imitation that implies labour and judgment.[67]

However, any discourse around originality is far from being easily framed, and the most accurate conclusion, in such instances, is that we should always take into account what arts and literature have to say on this regard. In view of such composite

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no means the beginning – a sort of dawn of history from which his ulterior acquisitions would have accumulated».

[66] Z. O. ALGARDI, La tutela dell'opera dell'ingegno e il plagio, cit., 102-105.

[67] Here comes the full circle, we may say, recalling the ealier literary theorisations, especially in the pre-moden era.

representation, it is now conceivable and worthwhile to enucleate accordingly a definition of creativity and originality in more general and possibly a-contextual terms, which will then lead to a better and more confident depiction of their legal understanding and consequent regulation.

Reinterpretation of previously established themes has appeared indeed crucial from time to time, as it is the personal contribution of the borrower to the development of knowledge and increase of learning, which may be pursued by adding something of his/her own to the existing subject. Such personalisation is believed to serve the common interest in the development of the arts, which is why the expectation of borrowing serves the ultimate purpose of improving the arts and hopefully surpassing their predecessors, not simply taking the works of the latter with no advance of any kind.[68]

However, if these argumentations appear to be validated in general terms, it seems less immediate to argue that, on the one hand, the notion of originality we may have today is the same notion that the ancients had;[69] and on the other hand, that the artistic meaning of creativity and originality arts is the same as the legal one. Whether "true originality", according to the classical paradigm, is discernible from cautious imitation followed by personal interpretation and an intent to compare and beat the model,[70] nowadays it is not immediate to support the same inference.[71]

Furthermore, the precise usage of both terms of creativity and originality within the legal context is even more complicated. First, the two concepts share a similar etymology, suggesting the initial or primitive creation, but furthermore they have the same aptitude to define the subsistence of copyright and, consequently, delimit the

[68] This is exactly the reason why the adaptation of Greek works by Romans was regarded as having in itself some degree of novelty, that is to say in contemporary words, originality. H. O. WHITE, *Plagiarism and imitation during the English Renaissance*, cit., 11-13, who explained how both the first creator/inventor and the one who later adapted the former's work «deserved the "inventor's" crown of bays», at 13.

[69] Back then, in fact, the practice of choosing the subject - preferring those which had already been used and thus proved their suitability, carefully selecting the most valuable and fruitful aspects, interpreting them according to one's own personality, and hopefully improving itself with the resulting outcome - was unquestionably believed to amount to originality; on the contrary, servile imitation was mostly rebuked. Cf. H. O. WHITE, *Plagiarism and imitation during the English Renaissance*, cit., 7-8.

[70] H.O. WHITE, Plagiarism and imitation during the English Renaissance, cit., 30.

[71] The notions of creativity and originality have indeed greatly evolved, as has been discussed in the previous dedicated analysis of the literature from the seventeenth century onwards.

boundaries of infringement.[72] Second, the concept of neither creativity nor originality equates to that of novelty, and they should therefore not be seen as completely different concepts, it being more appropriate to consider them variables of the same attempt to delimit the spectrum of copyright protection in accordance with the idea–expression dichotomy.[73]

In addition, whether it is acknowledged that the meaning of creativity and originality in the non-legal and legal contexts differ, the lack of a clear and statutory definition of the two concepts, with the limited exceptions that will be discussed further, certainly complicate the issue, requiring essential and careful consideration of their judicial interpretation given by the courts. Before doing that, however, it seems advisable to recall what makes a work creative and original in the broader context of everyday language.

Looking at the etymology of creativity and originality that we may find in dictionaries and thesauri, creating indicates the act of making or producing, particularly something new, while creativity is what results from «producing or using original or unusual ideas»;[74] and whereas origin means «the beginning or cause of something», the meaning of original varies. It may refer to «something [that] existed from the beginning of a process or which is the first or earliest form of something [;] is first one made and is not a copy [or is] not the same as anything or anyone else and therefore special and interesting».[75]

At the same time, creativity means «the use of imagination or original ideas to create something»,[76] while originality defines «the ability to think independently and creatively [or] the quality of being novel or unusual».[77] Conversely, novelty appears to have a more qualifying denotation, what is «new and original being novel; not like anything seen before» and therefore having the «quality of being new or unusual».[78]

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[72] However, although a peculiar process of some convergence is foreseen, it would not be correct to argue that they should be considered synonymous, especially if one considers their diverse application in the different legal contexts of Italy and the United Kingdom.

[73] Cf. *infra*, Chapter 4, particularly in consideration of the unavoidable influence that EU law has brought to the matter.

[74] *Cambridge International Dictionary of English*, P. PROCTER (ed.) Cambridge, UK: Cambridge University Press, 1995, def. creation, creative, 321.

[75] Cambridge International Dictionary of English, cit., def. origin, original, 996.

[76] *Oxford Dictionary of English*, (third edition) A. STEVENSON (ed.), Oxford, UK: Oxford University Press, 2010, def. creativity.

[77] Oxford Dictionary of English, cit., def. originality.

[78] Cambridge International Dictionary of English, cit., def. novel, novelty, 965.

Nonetheless, it may be that in such a contextual environment, the terms creative, original and novel are often considered synonymous.[79] Yet, if this has to some extent been allowed within the literary field, it is instead explicitly disliked in the legal context.

Given all these premises, also recalling the previous analysis of literature has shown, it can be inferred that the legal understanding of creativity and originality has not been too different from that expressed by a first dictionary reading, with some exceptions in a more extended or limited latitude.[80]

Giving an exact and uniform meaning to the concept of creativity, however, is still far from being an easy task for the interpreter. Undeniably, the utmost challenge is to describe a phenomenon that, like its counterpart plagiarism, is everything but simple and stable. Cultural and social standards continually change, as it does technology, and all push for a continuous reshaping of what creative and original acts mean.[81]

In consideration of such an influence, there is an increasing demand for a new assessment of creativity in line with technological evolution; otherwise, there seems to be a plausible risk of depreciating the important role that creative contribution has in foreseeing the protection of intellectual works, thus denying entirely the evolution of arts in this regard. In simple terms, creativity amounts to the creative effort that shapes intellectual works. What is not clear, in legal terms, is the precise significance and scope of creativity and originality. This is therefore referred to as the legal interpreter whose

[79] See, for instance, *Oxford Paperback Thesaurus*, (fourth edition) M. WAITE (ed.), Oxford, UK: Oxford University Press, 2012, def. creative, creativity; novel, novelty; original, originality, 170, 561, 578.
[80] These different attitudes will be further explored in the following sections…
[81] Scholarly works concerning the impact of technology on creativity in the legal environment abound. See, among others, M. FABIANI, *Creatività e diritto d'autore* (Relazione alle Giornate di Studio della Proprietà Intellettuale promosse dalla Facoltà di Giurisprudenza dell'Università di Perugia, Montone, PG, 14-16 May 1998) [1998] *Dir. autore* 600; M. J. MADISON, *Where Does Creativity Come from? And Other Stories of Copyright* in *Case W. Res. L. Rev.*, Vol. 53, No. 747, 2003, <http://ssrn.com/abstract=517943>; D. L. BURK, I giochi elettronici: alcune problematiche giuridiche ed etiche con riferimento alla «proprietà» delle informazioni e dei contenuti generati dagli utenti, in G. ZICCARDI (ed.), *Nuove tecnologie e diritti di liberta nelle teorie nordamericane: open access, creative commons, software libero, DRM, terrorismo, contenuti generati dagli utenti, copyright*, Modena: Mucchi, 2007, 110-143; D. W. GALENSON, *Understanding Creativity* NBER Working Paper No. w16024 (May 2010), <http://ssrn.com/abstract=1613070>; S. GATTI, *Studi in tema di diritto d'autore*, Milano: Giuffrè, 2008, 196 et seq; E. SUBOTNIK, *Originality Proxies: Toward a Theory of Copyright and Creativity*, in *Bro LR*, Vol. 76, No. 4, 2011, <http://ssrn.com/abstract=1999456>; V. FALCE, *La modernizzazione del diritto d'autore*, Torino: Giappichelli, 2012, 9-26; G. F. FROSIO, *Rediscovering Cumulative Creativity from the Oral Formulaic Tradition to Digital Remix: Can I Get a Witness?* in *J. Marshall. Rev. Intell. Prop. L.*, Vol. 13, 2014, <http://ssrn.com/abstract=2199210>.

aim is to delineate the meaning and latitude of originality through the cooperative support of doctrine and judiciary.

2 «Thou shall be original» may say the law: the composite assessment of creativity

Focusing on the requirements prescribed by the law to afford copyright protection to intellectual works, as has already been anticipated, neither the Italian nor the UK copyright laws provide a firm definition of creativity or originality. A similar deficiency is found in the international law on the matter.

According to Article 2, Section 1 of the Berne Convention,[82] creations that fall under the broad category of literary and artistic works, that is to say any production of a literary, scientific and artistic nature, enjoy copyright protection,[83] regardless of their specific expression and fixation, which is indeed remitted to the discretion of each country. Similarly, with the Convention setting only minimum standards of protection, participating countries may indeed grant a greater shield,[84] a possibility that could also affect the actual meaning and scope of originality in their legal systems.

The same article does not mention the word creative or original, with the exception of Section 3, where it defines translations, adaptations and other alterations of existing works as «original», as the works on which they are based. Furthermore, Section 5 specifies that certain selections and arrangements of a collection of works are «intellectual creations» and for this reason they shall be protected.[85] Finally, the word original appears also in Article 14bis, Section 1 of the Convention, where cinematographic works are literally assimilated to original works.

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[82] *Berne Convention for the Protection of Literary and Artistic Works*, of September 9, 1886, completed in Paris on May 4, 1896, revised in Berlin on November 13, 1908, completed in Berne on March 20, 1914, revised in Rome on June 2, 1928, in Brussels on June 26, 1948, in Stockholm on July 14, 1967, in Paris on July 24, 1971, and amended on September 28, 1979, <http://www.wipo.int/treaties/en/text.jsp?file_id=283698#P85_10661>.

[83] The same provision describes a number of exemplary works that are likely to fall under the umbrella of protection but, as will be explained with reference to the Italian and UK provisions, such a list is to be considered only representative and thus not exhaustive, with the eventual limitations provided by each country.

[84] Article 19 of the Berne Convention, which completes the principle of allowing each participating state to define, within certain evident boundaries, their own rules regarding the matter, explicitly states this.

[85] At the same time, Section 8 of the Berne Convention clarifies that protection of news or mere facts is excluded.

Considered the international framework above succinctly illustrated, we may now focus on the two systems object of the instant research, Italy and the United Kingdom, which have both signed the Berne Convention.[86]

According to Article 1 of the Italian copyright law, hereinafter referred as LA 1941, «works of the mind having a creative character and belonging to literature, music, figurative arts, architecture, theater or cinematography, whatever their mode or form of expression, shall be protected in accordance with this Law».[87] Article 2 completes this statement by indicating a provisional list of works that,[88] as far as they satisfy the requirement of Article 1 and therefore are the result of a creative process, they shall be protected.

At the same time, there are few scattered mentions of the word "original",[89] which may lead to the conclusion that it must be to some extent considered synonymous with creativity or, more appropriately, to be understood in a more neutral way as non-derivative.[90]

What seems to be clear is that the law foresees two essential requirements of copyright protection. First, the work must belong to any of the artistic (here used in its broadest sense) contexts. Second, it is expected, however, to have a creative character, either as an original or derivative work and regardless of the distinct forms in which its creative expression is explicated. However, as has been delineated, the exact and textual

[86] The United Kingdom, which signed the Berne Convention on September 9, 1886, and ratified it on September 5, 1887, entering into force on December 5, 1997, exactly opted for enacting such a requirement. On the contrary, Italy, which signed and ratified the Convention at the same times, did not impose any condition of fixation, providing that no formality should have prevented creators from enjoying and exercising their rights.

[87] *Law No. 633 of April 22, 1941, for the Protection of Copyright and Neighbouring Rights* (unofficial translation), <http://portal.unesco.org/culture/en/files/30289/11419173013it_copyright_2003_en.pdf/it_copyright_2003_en.pdf>.

[88] It is worth noticing that the list is only exemplary and thus is likely to embrace any other works that the law may protect, precisely in consideration of the social, cultural and technological variations that bring to light new works that were omitted at the outset. Similarly to the Berne provisions, Italian statutory law in particularly specifies that copyright protected works belong to several disciplines and may be referred to the list thereby provided, which, however, is not to be considered exhaustive.

[89] For instance, Section 2 of Article 2 LA 1941 refers to «musical variations that themselves constitute original works»; while Article 3 clarifies that collective works «shall be protected as original works, independently of and without prejudice to any copyright subsisting in the constituent works or parts thereof».

[90] The latter explanation seems to be supported by the specification, in Article 2, Section 2, LA 1941, that protection is afforded to «computer programs, in whatever form they are expressed, provided that they are original and result from the author's own intellectual creation». Furthermore, according to Article 4, works of a creative character derived from any [original] work [although] do not constitute an original work, shall also be protected». Article 12 LA 1941, in fact, makes a clear distinction between «original» and «derivative» works.

reference to a creative character does not find any further statutory explanation in terms of the meaning that such a formula implies.

Similar countenance is found in Article 2575 of the Italian Civil Code, which provides that «copyright law protects any creative intellectual work in the scientific field, literature, music, figurative arts, architecture, theatre and cinema, in whatever form or expression». Right after, Article 2576 of the same Code, however, defines the «creation of the work» in terms of a peculiar expression of the intellectual work, also outlining that such a creation becomes the «original legal title» to the intellectual property.[91]

Nevertheless, despite a few more elements having been brought together from a coupled reading of the above-mentioned provisions, there is still insufficient latitude to define it in a clear and satisfying manner. Consequently, scholars and magistrates have come forward completing the picture with certain supplementary elements that help to better describe the significance and scope of creativity and place a few more boundaries on copyright protection.

The consistent appraisal of statutory provisions, judicial decisions and academic theories seeks to suggest an enhanced definition of the creative character that the work must have in order to be protected. Accordingly, another concept appears to be decisive to such an extent, which has been temporarily spared, although it finds explicit reference in the previously described articles of the law. This is the outward appearance of the work (form or mode of expression), which is to say the manifest objectification of the idea-expression dichotomy, since – through it – only the external expression or manifestation of the idea receives protection.[92]

Indeed, the notion of creativity has to be referred to the work in its actual expression, thus providing an initial edge of protection, but it would be improper to conclude that it may simply denote the aptness of the work to be the result of a mere act

[91] *The Italian Civil Code* (approved by Royal Decree No. 262 of March 16, 1942). [Translation is mine]. Noticeably, while the term original is here meant as initial and not derivative, thus originating from its creator, the inference of a creative intellectual work certainly has an additional and more qualifying meaning.

[92] This principle finds explicit confirmation in judicial decisions, with very limited exceptions. See, for instance, A. CIAURI, *Un caso limite del diritto d'autore: sulla tutelabilità giuridica dell'idea* (Nota a Pret. Roma 1 April 1993), in *Il Nuovo diritto*, 1993, 508, noticing how protection was afforded to the idea itself when it distinctively individuated the personality of the author in a given social context], still a very crucial aspect of Italian copyright law.

of creation. In fact, there seems to be something else behind its formula, which denotes the quality that an intellectual work must have in order to be protected.

At the same time, although it is clear that creativity must be established to deem the work protectable, it is still extremely controversial to define what would be the standard of the claimed creative character.[93] This makes the work of the interpreter quite challenging, especially when approaching the matter from the many distinct angles of all possibly involved subject matters.[94]

In brief, recounting the main theories that have been purported in this context, the work must be equipped with distinctiveness (*individualità rappresentativa*), which to some extent makes it unique and capable of being distinguished from other works.[95] In addition, while the concepts of creativity find express mention in the law, as well as large consensus in judicial pronouncements and scholarly works, the same cannot be said with reference to the other notion of novelty, which appears, at least with regard to copyright,[96] to be much more contentious.[97]

Nonetheless, despite this seemingly flawless approach, scholars and magistrates have long debated the precise range to give to the exact concept of creativity. Initially, sharing the worries that it could have been interpreted in terms of an absolute novelty, *creatività* was intended to denote the originating provenance of the work from the author's mind.[98] Afterwards, the role of the creator and the bond that connected him/her

[93] Furthermore, as will be explored with reference to the distinct types of copyright protected works, taking into account all the perplexities expressed by both magistrates and academics, all seem mostly to agree on the point that the quantum or quality of creativity and originality may be minimal. See, for instance with reference to commentaries, M. FABIANI, *Sul 'minimum' di creatività richiesto per la protezione di testi commentati* [1994] *Dir. autore* 599.

[94] Such considerations offer the perfect foundation for the quest of an interdisciplinary analysis, as will be further uttered in the next chapter.

[95] Furthermore, as has just been mentioned, its typical exteriority (*esteriorizzazione*) confirms the principle of protecting not the idea itself, but only its expression. To such an extent, it also became critical at some point to distinguish the outward form of the work (*forma esterna*) from its internal one (*forma interna*), in order to determine which one deserves protection. This may be better comprehended considering the judicial pronouncements on the matter. See *infra*, Chapter 5.

[96] On the contrary, it finds express mention in the law of patent.

[97] As has been articulated in the previous chapter, the word novel was sometimes used synonymously with creative and original, especially to sustain the theory of endorsing imitative compositions that add something new to the existing arts. However, the greatest problem with novelty is that it is not clear whether it has to be ascertained in a subjective manner, thus leaving more discretion to the interpreter, or instead whether it should be seen as an objective standard, with the likely consequence of being unfortunately confused with the standard required for patents.

[98] This appears much clearer in the preparatory works for the current legislation. See, on this exact point, Z. O. ALGARDI, *La tutela dell'opera dell'ingegno e il plagio*, cit., 101, who also recalled how previous Italian copyright statutes ante LA 1941 did not even mention the concept of creativity.

to the work became increasingly emphasised, with a proclivity for a higher degree of creativity when such a bond was stronger.[99]

However, with regard to the Italian legal system, it represents the one and only criterion to determine in the first place whether the work in question shall be protected or not by the law. No other formality, such as the requirements of fixation, deposit or registration, is required to such an extent, only counts of evidence and procedure being relevant.[100] On the contrary, the UK law, although it does not entail registration or other formal claims of copyright, indeed requires fixation, that is to say the recording of the work in a permanent and material form, or its manifestation in print, writing or any other form of expression.[101]

Predictably, the prerequisite of fixation is not the only difference between the two countries. To begin with, the threshold for copyright protection in the United Kingdom, in fact, to the letter involves the «originality» of the intellectual works that are meant to be protected. Yet, similarly to what has been inferred with regard to Italian law, UK statutory law lacks, with the exceptions that will be illustrated, a clear definition of originality.

Within Chapter I of the UK *Copyright, Designs and Patents Act 1988* (hereinafter CDPA 1988), which concerns the subsistence, ownership and duration of copyright, Section 1 articulates that copyright subsists in «original literary, dramatic, musical or artistic works»; «sound recordings, films or broadcasts»; and «typographical arrangement of published editions», which for this reason are called copyright works. However, it also specifies that subsistence be subject to fulfilment of the requirements set by the same Act.[102]

Copyright works are further described by Section 3 CDPA 1988, which initially provides very concise definitions of literary, dramatic and musical works; mostly

[99] Z. O. ALGARDI, *La tutela dell'opera dell'ingegno e il plagio*, cit., 32, who explicates this assumption by comparing copyright with patent, explaining how, contrary to what happens with inventions (whose value is easily distinguishable from its own inventor), with regard to creations it is in her view accurate to conclude that an actual separation of the created work from its creator is harder to make.
[100] Few exceptions apply, for instance, according to Article 2, Section 3, Law No. 633/1941, with regard to «choreographic works and works of dumb show, the form of which is fixed in writing or otherwise».
[101] See *infra*, Chapter 4.
[102] Including the qualification for copyright protection provided by Chapter IX.

alluding to few examples of what may be included in such definitions.[103] However, it also indulges in more details,[104] especially with regard to artistic works,[105] sound recordings, film and broadcasts.[106] Section 3, in fact, additionally postulates copyright subsistence to the recording of such works «in writing or otherwise», which entails the requirement of fixation, so providing a supplementary restraint to the given protection.

In this multifaceted picture, the word original is explicitly mentioned at the commencement of the Act to qualify works wishing to receive copyright protection, or it appears sporadically, even denoting derivative works, but it is not further explained in its actual meaning and scope. The only important exception concerns the database that is to be considered «original if, and only if, by reason of the selection or arrangement of the contents of the database the database constitutes the author's own intellectual creation».[107]

Departing from this statutory framework, the concept of originality, similarly to what has been alluded with regard to Italian law, has been filled out with meticulous and various connotations, both by the judiciary and academia. However, there were indeed statutory indications of originality before the CDPA 1988.[108] Even earlier case law, however, deliberately alluded to the concept, although essentially with the meaning

[103] The literary work is defined as «any work, other than a dramatic or musical work, which is written, spoken or sung, and accordingly includes a table or compilation, a computer program, a database». A dramatic work as including «a work of dance or mime», and a musical work as «a work consisting of music, exclusive of any words or action intended to be sung, spoken or performed with the music».

[104] Section 3A CDPA 1988, in particular, defines database as «a collection of independent works, data or other materials which are arranged in a systematic or methodical way, and are individually accessible by electronic or other means».

[105] Section 4 CDPA 1988, instead, refers to artistic work as «a graphic work, photograph, sculpture or collage, irrespective of artistic quality, a work of architecture being a building or a model for a building, or a work of artistic craftsmanship», further specifying each of the elements there listed.

[106] See Sections 5A, 5B and 6 CDPA 1988.

[107] Section 3A (2) CDPA 1988. The instant formulation includes another relevant element, namely the explicit prescription that such a peculiar work is the result of its author's intellectual creation, which is a manifest derivation of EU law and has been the subject of a larger debate that has also entered the field of judicial decisions. The analysis of the issue is therefore postponed to the next paragraph, when the treatment of the creativity and originality threshold by the Italian and the UK courts will be illustrated.

[108] *In primis*, The Copyright Act 1911, of December 16, 1911. An Act to amend and consolidate the law relating to copyright, but also The Fine Art Copyright Act 1862, 25 & 26 Vict, c. 68, although the latter only with specific reference to drawings, photographs and paintings. Cf. L. BENTLY, B. SHERMAN, *Intellectual Property Law*, Oxford, UK: Oxford University Press, 2014, 93.

of *labour, skill or (and) judgement* or slight variations of the same formula,[109] as we shall see in the next paragraphs.

In the same way early scholarly works on the subject also did so, seeing no difficulty in referring literally to original and originality in the above-mentioned sense. In particular, some spoke of originality as «an essential attribute of copyright [with the] most comprehensive meaning», being careful enough précising that the «work need not to be wholly original» given that the law did not protect the sole creator.[110]

At the same time, even before the enactment of the Statute on copyright, there was little doubt that originality did not in any case mean novelty.[111] The banning of novelty emerged in further rulings as well, with the consequence that originality had to be interpreted in terms of originating from the author and thus without any kind of inventive meaning.[112]

As a result, there were all the premises to assess a low standard of originality,[113] yet providing that what ought to be protected was the expression of the idea originating from someone who was then entitled to receive protection against someone else's

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[109] As noticed in L. BENTLY, B. SHERMAN, *Intellectual Property Law*, cit., 97, other words have been occasionally used, such as capital, effort, experience, industry, ingenuity, investment, knowledge, taste, time, and work.
Among relevant decisions on the matter, see *Lewis v Fullarton*, regarding the protection of a topographical dictionary, which was appraised by looking at the mode of composition, concluding for an extensive piracy that occurred when the other work was partially taken and altered. *Lewis v Fullarton*, 16 July 1839, Rolls Court [1839] 2 Beav 6, [1839] 48 ER 1080 (the judgment was also reported in *Courts of Great Britain (ed.), Reports of cases argued and determined in the several courts of law and equity in England, during the year 1839*, New York: Halsted and Voorhies, 1840, 127-128). See also *Walter v Lane*, which granted protection to the notes of public speeches transcribed by shorthand writers on the basis that someone's labour skill and capital had to be protected against the misappropriation of others. For this exact reason such case is also crucial for the issue of fixation. *Walter and another (on behalf of themselves and all other the proprietors of the business of publishing and carrying on the times newspaper) appellants; and Lane Respondent*, 9 November 1899, House of Lords, [1900] AC 539 (cf. *Walter and another v Lane*, 6 August 1900, Court of Appeal, [1899] 2 CH 749). Both cases will be further discussued in Chapter 5.

[110] E. S. DRONE, *A Treatise on the Law of Property in Intellectual Productions in Great Britain and the United States. Embracing Copyright in Works of Literature and Art, and Playright in Dramatic and Musical Compositions*, 1842 (Boston: Little, Brown and company, 1879), 198, 199-200, <https://archive.org/details/cu31924019216898>.

[111] On this particular point, see I. ALEXANDER, *Copyright Law and the Public Interest in the Nineteenth Century*, Oxford: Hart Publishing, 2010, 271.

[112] *University of London Press Ltd v University Tutorial Press Ltd*, 26 July 1916, Chancery, [1916] 2 Ch 601, [1916] 32 TLR 698, also famous for having said (in the words of Peterson J.): «there remains the rough practical test that what is worth copying is prima facie worth protecting», at 610. Cf. *Hollinrake v Truswell*, 8 August 1894, Court of Appeal, [1894] 3 Ch 420; [1894] 10 TLR 663. (before, *Hollinrake v Truswell*, 18 Mar 1893, Chancery, [1893] 2 Ch 377).

[113] With the exception of some rulings that appeared to have endorsed a standard much closer to inventiveness. Cf. *Dicks v Brooks*, 4 May 1880, Court of Appeal, [1880] 15 ChD 22, [1880] 13 ChD 652, denying the copyright on a book's title.

taking.[114] The following case law resulted in strengthening the idea–expression dichotomy,[115] requiring substantial input and forswearing originality when the amount of labour was deemed trivial.[116]

However, the threshold has not always been easy to define, either because it appears more difficult to discern the originality of some particular works, also in consideration of an ever-changing cultural, social and technological landscape, or simply because its meaning remains ambiguous.[117] Such difficulty in interpreting the applicable standard is made even harder by the new trend – in great part influenced by EU law on the matter – of foreseeing originality even in the *author's own creation*.[118]

2.1 Categorising creativity and originality into distinct intellectual works

The topic becomes even more intricate when single categories of works are considered.[119] In these instances, in fact, the inference of creativity and originality

[114] According to the *MacMillan* case, for instance, in order to be protected the work has to show some quality or character that sufficiently differentiated it from the mere and raw material on which it is based. *MacMillan and Co Ltd v K. & J. Cooper*, 1 January 1923, Privy Council, [1924] 40 TLR 186, [1923] 93 LJ PC 113.

[115] The *Football League* case of 1959, for instance, although it clarified that the amount of labour, skill and judgement had to the established case by case, also made it extremely clear that no copyright protection could be given to mere information or opinions. *Football League Limited v Littlewoods Pools*, 13 May 1959, Chancery, [1959] 1 Ch 637, [1959] 2 All ER 546, [1959] 3 WLR 42.
Cf. *Ladbroke (Football) Ltd v William Hill (Football) Ltd*, 21 January 1964, House of Lords, [1964] 1 WLR 273, [1964] 1 All ER 465; *British Northrop Ltd v Texteam Blackburn Ltd*, 1974, Chancery, [1974] RPC 57, [1973] FSR 241.

[116] This was true in the case, for instance, of a facial make-up that was not considered an artistic work to be protected by copyright. *Merchandising Corp. of America Inc. and others v. Harpbond Ltd and others*, 1983, Court of Appeal, [1983] FSR 32.
Cf. P. GROVES, *Sourcebook on intellectual property law*, London: Cavendish Publications: 1997, 345. Cf. L. BENTLY, B. SHERMAN, *Intellectual Property Law*, cit., 97.

[117] This has been explicitly exposed by S. RICKETSON, *The Concept of Originality in Anglo-Australian Copyright Law*, in *J. Copyright Soc'y U.S.A.*, Vol. 39, 1991-1992, 265.

[118] Cf. L. BENTLY, B. SHERMAN, *Intellectual Property Law*, cit., 93. On this aspect, particularly on the more recent assessment of the originality standard, we shall get into more detail in the following pages.

[119] For a more accurate analysis on this point, see J. PILA, *Copyright and its Categories of Original Works*, in *O.J.L.S.*, Vol. 30, No. 2, 2010, 229, <http://ssrn.com/abstract=1160176>. See also Z. O. ALGARDI, *La tutela dell'opera dell'ingegno e il plagio*, cit., 463 et seq., who also emphasises how the requirement of creativity varies according to the genre to which the works belong, thus showing a greater or thinner degree of intensity.

varies significantly and the first category that comes to mind is certainly the literary work,[120] in its written or oral form.[121]

In this particular field, the main applicable principle has been to look at the heart and most distinguishing element of the work, in other words its substantial or otherwise most important part, although not with easy and unanimous results. Similar considerations concern the protection of characters[122] and the practice of re-elaborating others' works.[123]

Such a principle, however, needs some specification with regard to certain works of literature that, although belonging to the broader genre of writing, have some peculiar features that require further attention. The protection of works of journalism, for instance, has gone along with the denial of protection to the mere news.[124] Express legal shield, on the contrary, may be given to the individual journalist's piece or the original composition of more pieces, even when creativity arises from the particular way of organising the pieces.[125]

In the musical field, creativity has mostly emerged from one particular element of the composition, namely the melody, which appears to be the kernel of the music,

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[120] J. PILA, JUSTINE, A. F. CHRISTIE, *The Literary Work within Copyright Law: An Analysis of its Present and Future Status*, in *I. Prop. J.*, Vol. 13, 1999, 133, <http://ssrn.com/abstract=886949>, who also offers an interesting study of the literary work according to Anglo-Australian copyright law.

[121] Despite this broad category also attracts software and databases, it seems more appropriate to dedicate a separate analysis to them.

[122] The emphasis Bennet put on characters appears brought back to life, particularly in the arguments of those who notice how their increasing centrality may sustain an independent protection regardless of the work to which they belong, although the requirement of fixation would seem to impede such a conclusion. Z. SAID, *Fixing Copyright in Characters: Literary Perspectives on a Legal Problem*, in *Cardozo L. Rev.*, Vol. 35, 2013, <http://ssrn.com/abstract=2246511>. Similarly, the life of a character assumes relevancy, for instance, within biographical works, but when no creativity at all is established, it seems more plausible to predict a *sui generis* protection like a database. M. FABIANI, *Biografie E Opera Biografica. Quale Protezione?* in *Dir. aut.*, 2008, 21.

[123] For example, a relatively large debate has attracted the idea that fans could write secondary works basing the theme on some peculiar elements of the original literary works. M. RICHARDSON, D. TAN, *The Art of Retelling: Harry Potter and Copyright in a Fan-Literature Era*, [2009] *MALR* 14, No. 1, <http://ssrn.com/abstract=1365657>.

[124] Cf. R. BRAUNEIS, *The Transformation of Originality in the Progressive-Era Debate over Copyright in News*, GWU Legal Studies Research Paper No. 463/2010), <http://ssrn.com/abstract=1365366>.

[125] See E. SANTORO, *Attività giornalistica e creatività: dati e spunti preliminari*, in *Dir. aut.*, 1974, 1, who so refers to *creatività organizzativa*.
Besides, considering the current development of journalism and the rise of those who are often called *amateurs* that also engage with blogging, the traditional image of the journalist may require redefinition. On this, see L. E. RIBSTEIN, *From Bricks to Pajamas: The Law and Economics of Amateur Journalism*, in *Wm. & Mary L. Rev.*, Vol. 48, 2006, 185, <http://ssrn.com/abstract=700961>.

while also allegedly the most remembered element of the so-called "lay listener",[126] although the emphasis may also regard other elements,[127] as it will better emerge analysing the case law on the matter.[128] In addition, when the contribution of more than one artist is to be evaluated to establish joint authorship, it has been determined that such a contribution shall also be original.[129]

Regarding dramatic works, including plays and dances, the creative effort has also been foreseen in the organisation of the subject and its externalisation, although making clear that it had to be ascertained only with full consideration, especially when establishing that protection may be made more difficult because of the particular nature of the work.[130] In any case, it is never with regard to the mere idea or inspiring theme.[131]

Moreover, in the context of films, the creativity or originality test, especially in its typical derivation of measuring substantiality, has been complicated by the fact that more than one medium is involved, often entailing a cross-sectional analysis.[132] This is certainly valid in the case of adapting novels into films. A similar complexity lies

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[126] J. LUND, *Fixing Music Copyright* (March 12, 2013), <http://ssrn.com/abstract=2231836>; who analyses the Lay Listener test and the substantiality criteria to establish copyright infringement, suggesting that it would be more appropriate to devise a test for fluent musicians who are more capable of discerning the features of musical composition.

[127] In the musical context, the search for creativity has also regarded the critical editions. See, for a brief reflection on that, O. FITTIPALDI, *Edizioni critiche di opere musicali e creatività nella disciplina del diritto d'autore* (Nota a Cass. 17 January 2001 n. 559), in *Corr. giur.*, 2001, 640.

[128] See *infra*, Chapter 5.

[129] However, this conclusion indeed appears to conflict with the nature of musical works, especially when arrangement, not just composition, is considered. L. MCDONAGH, *Rearranging the Roles of the Performer and the Composer in the Music Industry. The Potential Significance of Fisher v Brooker,* in *I.P.Q.*, Vol. 1, 2012, 64, <http://ssrn.com/abstract=2034899>, who also expresses the risk of confusing the role of performers and composers. On the issue of arrangement and the difficulty of distinguishing it from a creative variation, see, for instance, V. MADAU, *Elaborazione Creativa Di Una Monodia Tradizionale Sarda: Variazione Musicale Costituente Di Per Sé Opera Originale O Arrangiamento Musicale?* (Nota a Trib. Cagliari 15 January 2008, n. 119), in *Riv. giur. sarda*, 2010, 562.

[130] This is particularly true in the case of scenographic works. See on this M. FABIANI, *Sulla protezione Dell'opera di scenografia* (Nota a pret. Roma 9 luglio 1977), [1978] *Giurisprudenza di merito* 796.

[131] See M. RIMMER, *Heretic: Copyright Law and Dramatic Works*, in *QUTLJJ*, Vol. 2, No. 1, 2002, 131, <http://ssrn.com/abstract=600862>, who considers the role of the various contributors other than writers, in determining the original dimension of the work. For a broader analysis of the protection of works of theatre, see V. MAFFEI ALBERTI, *Opera Teatrale* [2009] *Contratto e impresa* 1037. In addition, some have recently expressed concern over the protection of experimental forms of music and dance beyond, concluding that it may rather be collocated before and beyond copyright. C. WAELDE, P. SCHLESINGER, *Music and dance: beyond copyright text?* [2011] *SCRIPT-ed* 8, No. 3, 257, <http://script-ed.org/?p=83>.

[132] See C. J. HUTCHISON, *Adapting Novel into Film & Copyright* (July 25, 2012), <http://ssrn.com/abstract=2117556>, which warns against oversimplifications and asks for a more accurate consideration of each medium's features, and is also very interesting for the interdisciplinary study pursued therein. Likewise, in the case of adapting a novel for the theatre. Cf. A. ALESII, *La tutela giuridica della riduzione teatrale di un'opera narrativa (Nota a Cass. sez. I civ. 10 March 1994, n. 2345)* in *Giust. civ.*, 1995, 1075.

behind broadcast, whose developments have been highly influenced by technology and digital transformations, which have clearly changed the landscape of copyright.[133]

Concerning artistic works, including figurative arts,[134] which have encompassed great transformations, especially during the twentieth century,[135] the recognition of some protection to the assembling and preliminary planning of the work has gone along with the traditional shield of protecting single pieces of art, at the same time suggesting a reconsideration of the copyright approach.[136]

With regard to photography,[137] either as having an artistic hint or not, the focus of the interpreter has been directed towards the choices that the photographer makes and, to some extent, to his/her individual and personal touch.[138] This indeed may be concluded by a specific and distinct approach to the subject that the photographer has chosen or in the exact moment in which he/she actually portrays it.[139]

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[133] On the re-elaboration of mere ideas in works of broadcasting, see the early analysis of M. BURNETT, *La protection des idees en materie d'emissions de radio et de television - La protezione delle idee in materia di emissioni radiotelevisive*, in *Dir. radiodiff.*, 1988, 412. See also T. JAIN, *Broadcaster's Right Under Copyright Law*, in *J. Intellect. Property Rights*, Vol. VII, No. 3, 2008, who provides an interesting view on the comparative approach to the protection of broadcast within a few legal systems, for example, the UK.

[134] Like journalism, art too has been challenged by the transformation of those who were at first only users into authors. See, for instance, A. NG, *When Users are Authors: Authorship in the Age of Digital Media*, in *Vand. J. Ent. & Tech. L.*, Vol. 12, No. 4, 2010, 853, <http://ssrn.com/abstract=1545005>. Cf. C. RIDOLFI, *Creatività e plagio nelle opere d'arte figurativa* (Nota a Pret. Pesaro 4 November 1993), in *Dir. autore*, 1996, 111.

[135] See D. W. GALENSON, *Conceptual Revolutions in Twentieth-Century Art*, NBER Working Paper No. 15073/2009, <http://ssrn.com/abstract=1418931>. Interesting forethoughts emerge from the analysis of what is called "appropriation art". See, for instance, G. SPEDICATO, *Opere dell'arte appropriativa e diritti d'autore* (Nota a ord. Trib. Milano sez. spec. P.I. 13 luglio 2011), in *Giur. comm.*, 2013, 118; J. B. ASTRACHAN, *The Case of the Appropriation Artist*, *The Daily Record*, September 2008, <http://ssrn.com/abstract=1621882>.

[136] See A. BARRON, *Copyright Law and the Claims of Art*. [2002] *I. P. Q.* 4, <http://ssrn.com/abstract=346361>, who explained the troubled relationship between the law and the arts. Yet, boundaries that are more definite have been suggested to confine the protection of advertising, in which it becomes essential to discern the value of the work from its material application. R. DE MEO, *Pubblicità, creatività e tutela del diritto d'autore* in Dir. inf., 2000, 460.

[137] C. H. FARLEY, *The Lingering Effects of Copyright's Response to the Invention of Photography*, in *Univ. Pittsburg L.R.*, 65, 2004, <http://ssrn.com/abstract=923411>, who explores the reflections of technological change in the legal treatment of photography, focusing particularly on the threshold of originality on the subject.

[138] For a comprehensive analysis on the standards of protecting photographic works, see P. CRUGNOLA, *Il requisito della creatività in materia di fotografia* [1994] *Dir. autore* 353.
Besides, it is worth noting that Italian law distinguishes artless photographs (fotografie semplici) from photographs that fall under the terms of artistic works (opera fotografiche). The latter enjoy greater protection, also with regard to the term of protection, the same that is granted to any other copyright works. The former, instead, are subject to the different and lower protection afforded to neighbouring rights.

[139] Cf. R. BOCCA, *La tutela della fotografia tra diritto d'autore, diritti connessi e nuove tecnologie* [2012] *AIDA* 375.

This last aspect, which may even appear somehow tantalising, has been particularly emphasised by the opinion of those who notice that most of today's photographs would not enjoy protection at all, with the further consequence that there might be different ways of protecting such a result.[140] In other words, even when the creative effort is proved, and often expressed in the choices of subject, composition, light, and so on, this seems to be insufficient to afford protection.[141]

Finally, the test of creativity and originality seems to have rapidly evolved with regard to other protected works, such as a database,[142] which, if not original, may enjoy a different *sui generis* protection,[143] and computer programs. With particular regard to the latter, the forcefulness of the idea-expression divide that has traditionally accompanied copyright appears unmistakably overshadowed. Additionally, the task of the interpreter seems centred on foreseeing some personal or simply autonomous contribution that, even with minimum results, would overcome the limits posed by dichotomy.[144]

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[140] This seems to be suggested by J. HUGHES, *The Photographer's Copyright. Photograph as Art, Photograph as Database*, Cardozo Legal Studies Research Paper No. 347/2011, <http://ssrn.com/abstract=1931220>, who compares photographs to databases, highlighting that mere copyright protection of photographs entails a dangerous strength of the criterion of originality, while many photographic works remain unprotected.

[141] This view is well summarised in T. BRUCE, *In the Language of Pictures: How Copyright Law Fails to Adequately Account for Photography* in *W. Va. L. Rev.*, Vol. 115, 2012, 93, who suggests how "straight photographs" receive inadequate protection, as the main standard to assess creativity remains influenced by pictorial theories, too often foreseeing factual rather than creative works.

[142] On the swinging of the theories on the protection of database, also considering the US sweat of the brow doctrine, see D. J. GERVAIS, *Feist Goes Global: A Comparative Analysis Of The Notion Of Originality In Copyright Law*, in *J. Copyright Soc'y U.S.A.*, Vol. 49, 2002, 949, <http://ssrn.com/abstract=733603>. On the renewed estrangement from the originality standards, instead, see A. TABREZ, D. SOURAV, *Comparative Analysis of Copyright Protection of Databases: The Path to Follow*, in *J.I.P.R.*, Vol. 17, No. 2, 2011, <http://ssrn.com/abstract=1839325>.

[143] For a summary review of this peculiar mechanism of protection, see also P. DAL POGGETTO, *La disciplina giuridica delle banche dati: obiettivi perseguiti e risultati ottenuti ad oltre un decennio dall'adozione della normativa comunitaria*, in *Informatica e dir.*, 2008, 73, who also reconstructs the implementation of the EU Database Directive.

[144] See, among others, M. G. JORI, *Diritto, nuove tecnologie e comunicazione digitale*, Milano: Giuffrè editore, 2013, 33 et seq; P. GUARDA, *Looking for a feasible form of software protection: copyright or patent, is that the question?* in *EIPR*, 2013, 4; V. FALCE, *La modernizzazione del diritto d'autore*, cit., 11-14; D. GERVAIS, E. DERCLAYE, *The scope of computer program protection after SAS: are we closer to answers?* in *EIPR*, 2012, 3-5; V. MOSCON, *Diritto D'autore E Protezione Del Software: L'irrisolta Questione Dell'originalità* (Nota a Cass. sez. I civ. 12 January 2007, n. 581), in *Dir. Internet*, 2007, 350. For a broad investigation of the protection of computer programs, see also an early study of E. DERCLAYE, *Software Copyright Law: Can Europe Learn from American Case Law?* in *EIPR*, 2010, <http://ssrn.com/abstract=1133638>, who also compares EU and US legislation on the matter.

2.2 Italy and the United Kingdom: are their courts balancing the threshold?

Regarding the multiple definitions that have been given to plagiarism and its innumerable variations, including its link to other concepts such as piracy and counterfeiting,[145] the need to discern hypotheses of minimal copy more dutiful to the classical canon of imitation relentlessly emerged. In this case, the act of copying has been deemed to being left to the wiser discretion of historians and literates instead of being subject to fiddly claims in court. Such assertiveness towards cases of minimal taking has also been applied to limited and partial instances of plagiarism, to be distinguished from the more troubling cases of taking the whole work, or its substantial kernel being plagiarised.[146]

On the contrary, more concerns seem to arise when the differences between the two elements are less prominent, particularly when the expression of the work hardly departs from the plain idea that it exemplifies. A good example of this is software, which by its nature fosters the merging of ideas and expressions.[147] The same could be said of all cases in which the nature of the work entails elements that, like ideas, are not considered to be protected.[148]

Departing from this very basic principle, forestalling some of the distinctions made by the Italian and UK judiciaries to such an extent, courts have been prone to acknowledging creativity and originality in various ways. Where the former demonstrates a clear sensibility for the pecuniary aspects of the issue, which is a typical

[145] An early use of the blended concept of plagiarism–counterfeiting has been found in some judgements made by Italian courts until very recently, as also anticipated in E. PIOLA CASELLI, *Del diritto di autore secondo la legge italiana comparata con le leggi straniere*, in P. FIORE (ed), *Il diritto civile italiano secondo la dottrina e la giurisprudenza*, IV, Napoli: Eugenio Marghieri, 1907, 623.

[146] Such a cautious approach appears to be consistent with the necessity to provide a cautious analysis of the phenomenon that, to some extent, may be more respectful of the idea–expression dichotomy. Accordingly, this assumption avails itself of disheartening the literal or substantial copy, but allows an aloof reproduction of the work or the mere replication of the idea, which rests on the work.

[147] On the topic, see D. BAINBRIDGE, *Software Copyright*, Pitman Publishing, London, 1992. See also L. STANLEY, *The Copyright Protection of Computer Software in the United Kingdom*, Oxford and Portland: Hart Publishing, 2000; E. HARISON, *Intellectual Property Rights, Innovation and Software Technologies. The Economics of Monopoly Rights and Knowledge Disclosure*, Cheltenham, UK: Edward Elgar, 2008, who also carefully explains the strict link between software development and the promotion of innovation.

[148] This happens, for instance, with regard to common themes or general plots in literature, but also trivial music schemes, all of which will be better illustrated when discussing the treatment of plagiarism by courts in detail.

UK feature,[149] the latter has yet shown some concern for guaranteeing a proper shield to the individual's works of the mind.[150]

In particular, even though the explicit Italian contemplation of plagiarism appears to confine it to the violation of the moral right of attribution this does not prevent courts from expressing the additional concern that such conduct may also violate the economic right of the author to exploit the work.[151]

Accordingly, anticipating the contents of some of the UK judgements that will be well examined, UK courts have been consistently persuaded to afford protection in the limited occurrences of either word-perfect replication or a substantial taking of someone else's work, yet on the condition that it may not endanger the public interest in drawing from others' unprotected ideas and seemingly common places that could still serve as an inspiration for further creations.[152]

Altogether, each system may have tried to be careful in acknowledging protection to the individual creation insofar as this would not diminish the entitlement of the broader society to enhance common knowledge and avoid the unnecessary protection of ideas and common subjects that may instead impede further creation. Unsurprisingly, this thoughtfulness echoes the classical rule of artistic imitation that has

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[149] See, for a clear resolution on this exact point, *Abba c Gotta*, 17 October 1963, Trib. Milano, [1964] Rep. Foro it. v. Dir. autore n.778; [1964] *Foro it.* I, 388; [1964] *Dir.Autore*, 55. *Donati Minelli c Panzeri*, 29 April 1976, Trib. Milano, [1977] Rep. Foro it. v. Dir. autore n. 680; [1977] *Riv. dir. ind.* 457.

[150] See *King Features Syndicate Inc v O and M Kleeman Ltd*, 1 January 1941, House of Lords, [1941] 1 AC 417, [1941] 2 All ER 403, [1941] UKHL J0527-2; (cf. *King Features Syndicate Inc v O and M Kleeman Ltd*, 1941, Court of Appeal, [1940] Ch 806, [1940] 3 All ER 484; *King Features Syndicate Inc v O and M Kleeman Ltd*, 1941, Chancery, [1940] Ch 523, [1940] 2 All ER 355); *Ludlow Music Inc v Williams and others*, 1 October 2000, Chancery, [2000] EWHC 456 (Ch), [2001] EMLR 155, [2001] FSR 271,<http://www.bailii.org/ew/cases/EWHC/Ch/2000/456.html>; *Designers Guild Limited v Russell Williams (Textiles) Limited (Trading as Washington Dc)*, 23 November 2000, House of Lords, [2000] 1 WLR 2416, [2001] 1 All ER 700, [2001] IP & T 277, [2001] FSR 11, [2001] ECDR 10, [2000] UKHL J1123-1, <http://www.bailii.org/uk/cases/UKHL/2000/58.html>; *Nova Productions Ltd v Mazooma Games Ltd and Others*, 14 March 2007, Court of Appeal, [2007] ECDR 6, [2007] BusLR 1032, [2007] EWCA Civ 219, [2007] RPC 25, [2007] EMLR 14, <http://www.bailii.org/ew/cases/EWCA/Civ/2007/219.html>.

[151] Early Italian decisions included *Comisso c Soc. Ponti de Laurentis*, 10 January 1958, Trib. Roma, [1959] Rep. Foro it. v. Dir. autore n. 691; [1959] *Rass dir. cinema* 17; *Ed. Antonelliana c Soc. ed. Il Rostro*, 28 January 1980, Trib. Torino, [1983] Rep. Foro it. v. Dir. autore n. 42; [1980] *Giur. dir. ind.* 191.

[152] See *Navitaire Inc v Easyjet Airline Co and Another*, 30 July 2004, Chancery, [2004] EWHC 1725 (Ch), [2005] ECDR 17, [2005] ECC 30, [2006] RPC 3, <http://www.bailii.org/ew/cases/EWHC/Ch/2004/1725.html>; *Navitaire Inc v Easyjet Airline Co and Another (No. 2)*, 11 March 2005, Chancery, [2005] EWHC 282 (Ch), [2005] EWHC 3487 (Ch); *Baigent and Leigh v The Random House Group Ltd*, 28 March 2007, Court of Appeal, [2007] EWCA Civ 247, [2008] EMLR 7, [2007] FSR 24, <http://www.bailii.org/ew/cases/EWCA/Civ/2007/247.html>; *Baigent and Leigh v The Random House Group Ltd*, 7 April 2006, Chancery, [2006] EWHC 719 (Ch), [2006] EWHC 1131 (Ch), [2006] EMLR 16, [2007] IP & T 90, [2006] FSR 893, [2006] FSR 44, <http://www.bailii.org/ew/cases/EWHC/Ch/2006/719.html>.

traditionally ruled their common history. The praise for genuine borrowing, not servile imitation, has in fact always been linked to the broader picture of knowledge.

Looking into some Italian pronouncements, the marginalisation of the plain idea, with the exception of some limited opposing instances,[153] has mostly led to ascertaining infringement in the replication of its creative expression or its core original and unique elements, or in their special assembly or coordination.[154] At the same time, there have been cases in which courts found it reasonable to establish a violation in the reproduction of a narrow fragment of the work, on the condition that such taking revealed actual emphasis and with no will to make any modifications to hide or diminish it.[155]

From a dangerous appropriation of the authors' own thoughts or works that endangers their literary property to the apocryphal annihilation of the works' identity, or the substantial reproduction of someone else's work, these practices essentially repudiate the principle of virtuous imitation, while also affecting the whole individuality of the creation in its outward appearance and substance.[156]

However, the approach of the judiciary has demonstrated further restraint towards a unique and stern description of the phenomenon, especially when it became manifest that not all cases in which such copying was alleged could be fittingly

[153] See, for instance, *Coscia c Soc. Cella*, 1 July 1955, App. Milano, [1955] Rep. Foro it. v. Dir. autore n. 693; [1955] *Riv. dir. ind*. II 303, [1955] *Dir. autore* 343; *Soc. Uti produz. associate c Universal City Studios inc.*, 7 March 1989, Trib. Roma, [1990] Rep. Foro it. v. Dir. autore n. 100; [1990] *Foro it.* I 2998.

[154] In particular, see *Grimaldi c Soc. Ponti de Laurentis*, 23 June 1954, Trib. Roma, [1955] Rep. Foro it. v. Dir. autore n. 695; [1955] *Rass. dir. cinem*. 93; *Perego c Ceramica Canova*, 24 August 1966, App. Venezia, [1966] Rep. Foro it. v. Dir. autore n. 751; [1966] *Corti Brescia Venezia e Trieste* 641; *Famous film c Soc. Stefano film*, 30 October 1980, Trib. Roma, [1981] Rep. Foro it. v. Dir. autore n. 70; [1980] *Riv. dir. ind*. II 287; *Soc. internaz. pubblicità c Soc. ed. Sanguinetti*, 10 May 1993, Cass. n. 5346, [1994] Rep. Foro it. v. Dir. autore n. 256; [1994] *Dir. aut.* 70, [1993] *Riv. dir. ind.* II 296, [1994] *Dir. inform.* 507.

[155] See *H.R. c D.G.R.*, 30 November 1988, Trib. Torino, [1992] Rep. Foro it. v. Dir. autore n. 90; [1992] *Impresa* 3021; *Soc. Gabric c Rotunno*, 10 October 1983, App. Roma, [1984] Rep. Foro it. v. Dir. autore n. 50; [1984] *Dir. aut.* 189; *Raccanelli v Touring Club It.*, 27 October 2005, Corte di Cassazione n. 20925, [2006] Rep. Foro it. v. Dir. autore n. 117; [2006] *Foro it.* I 2080, [2006] *Dir.ind.*, 290, [2007] *Annali it.dir.autore* 664.

[156] These elaborated descriptions reveal an established understanding of the complex phenomenon that was already present in the oldest Italian case law, before the enactment of the Copyright law No. 633/1941, on the matter. See, in particular, *Bemporad e Vecchi c Carozzi*, 30 June 1897, Trib. Milano, [1897] Rep. Foro it. v. Dir. autore n. 415; [1897] *Mon. trib*. 690; *Barsotti c Mannino*, 4 February 1924, App. Palermo, [1924] Rep. Foro it. v. Dir. autore n. 485; [1924] *Circ. Giur.* 21; *Gronda*, 5 April 1935, Cass. Regno, [1935] Rep. Foro it. v. Dir. autore n. 483; [1935] *Giust. pen*. 839, [1936] *Riv. pen*. 63.

adjudicated in court.[157] For instance, the necessity to isolate and discard instances of limited and off-the-cuff taking emerged, while a greater apprehension has been directed towards the reutilisation of elements and parts of the work that indeed were most representative and revealed the personality of its author.[158]

Similarly, apart from an explicit reference to the author's personal touch, UK courts proved that there had to be copying of a substantial part of the work, if not the whole work, to establish infringement, provided that copyright protection may regard the single elements of the works if considered original.[159] Moreover, even though the centrality of the substantial copy parameter is confirmed by several pronouncements, the issue still appears to be largely unresolved, especially when the substantiality requirement has to be applied in cases where it has actually copied only a trivial quantity of material.[160]

Indeed, the risk of frustrating the basic guidelines of protecting the expression of the idea is always present,[161] despite the abstract cogency of the principle that no copyright protection is granted to ideas, especially in the field of computer programs,

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[157] In sum, the significance of proving the occurrence of substantial and literary copy appears to be predominant within the Italian jurisdictional debate, although there have also been a number of cases in which the court found it reasonable to extend the line of defence to narrower and less distinctive reproduction. See, for instance, *Sarita Esquenazi c Rai-Tv*, 1 March 1991, Trib. Roma, [1994] Rep. Foro it. v. Dir. autore n. 258; [1992] *Annali it. dir. autore* 638.

[158] Such conclusions were the result of a comparison between the works involved in the given disputes, which often implied discarding a simple presence of shared particular elements that did not also amount to an identity of representation. See, among later Italian decisions, *Pagliai c Simoni*, 23 May 1947, App. Roma, [1947] Rep. Foro it. v. Dir. autore n. 409; [1947] *Foro it.* I 782; *Pietri c Fonzo*, 15 April 1932, App. Milano, [1932] Rep. Foro it. v. Dir. autore n. 435; [1932] *Temi lomb.* 756, [1933] *Riv. dir. ind*. 372, [1933] *Foro Lomb*. 12; *Branduardi c Soc. Buitoni Perugina*, 12 May 1993, Trib Roma, [1986] Rep. Foro it. v. Dir. autore n. 259; [1994] *Foro it.* I 2258; [1994] *Dir. inf.*, 305; [1994] *Dir.autore*, 459; *Soc. Bmg Ricordi c De Gregori*, 23 May 2002, Trib Roma, [2002] Rep. Foro it. v. Dir. autore n. 129; [2002] *Dir. aut.* 452.

[159] See *Regina v Gilhan*, 9 November 2009, Court of Appeal (Crim), [2010] Lloyd's Rep FC 89, [2009] EWCA Crim 2293, [2010] ECDR 5, <http://www.bailii.org/ew/cases/EWCA/Crim/2009/2293.html>.

[160] Likewise, there have been difficulties acknowledging the protection of headlines and thus their status as original literary works. See, in particular, *The Newspaper Licensing Agency Ltd and Others v Meltwater Holding BV and Others*, 26 November 2010, Chancery, [2010] EWHC 3099 (Ch), [2010] WLR (D) 303, <http://www.bailii.org/ew/cases/EWHC/Ch/2010/3099.html>, (cf. *The Newspaper Licensing Agency Ltd and Others v Meltwater Holding BV and Others*, 27 July 2011, Court of Appeal, [2012] Bus LR 53, [2011] EWCA Civ 890, [2011] WLR (D) 261, CA, <http://www.bailii.org/ew/cases/EWCA/Civ/2011/890.html>; *The Newspaper Licensing Agency Ltd and Others v Meltwater Holding BV and Others*, 17 April 2013, Supreme Court, [2013] 2 All ER 852, [2013] CN 584, SC (E)) favourable to protecting the headlines, unlawfully extracted by an online media monitoring service, that are the result of a creative process. Cf. further appeal.

[161] Similarly, express concern for the dichotomy emerging in *Navitaire Inc v Easyjet Airline Co and Another*, 30 July 2004, Chancery, cit., in which the Court warns about avoiding extensive copyright protection to purely functional effects that would result in a clear frustration of the dichotomy and impediment of software development.

where interfaces, programming language, or the mere functionality of a computer program do not enjoy any copyright shield if they do not result in the original or creative expression of ideas, namely if they do not constitute the intellectual creation of their author.[162] With explicit regard to computer generated works, it is also worth anticipating that the UK law expressly exclude them from moral rights protection, thus adding a further important element of distinction in the larger framework of protecting original works from authorship misattribution.

However, in general terms, it seems to be recognised that the status of originality, beyond assessing what constitutes an original work,[163] given that it has to fall fail within the copyright subject matters,[164] is afforded by the inference that it may be the result of an expenditure of skill, labour and judgement.

In other cases, originality has arguably been related to a creative contribution to the work,[165] which, however, is yet far from being a clarifying test. For instance, assessing the originality of a script inspired by another author's work - upon which assessment the granting of copyright protection depended - has been quite controversial.[166]

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[162] *SAS Institute Inc v World Programming Ltd (No. 2)*, 25 January 2013, Chancery, [2013] EWHC 69 (Ch), [2013] RPC 17, [2013] CN 119, <http://www.bailii.org/ew/cases/EWHC/Ch/2013/69.html> (appealed in *SAS Institute Inc v World Programming Ltd (No. 2)*, 21 November 2013, Court of Appeal, [2013] EWCA Civ 1482, [2013] CN 1769, CA), previously considered in *SAS Institute Inc v World Programming Ltd*, 23 July 2010, Chancery, [2010] EWHC 1829 (Ch), [2011] RPC 1, [2010] ECDR 15, <http://www.bailii.org/ew/cases/EWHC/Ch/2010/1829.html>, to which followed *SAS Institute Inc. v World Programming Ltd*, case C-406/10, 2 May 2012, CJEU.

[163] Accordingly, even a brief letter may be regarded as an original literary work and its unlawful copy amount to copyright infringement. On this, see *Cembrit Blunn Ltd and Another v Apex Roofing Services LLP and Another*, 5 February 2007, Chancery, [2007] EWHC 111 (Ch), <http://www.bailii.org/ew/cases/EWHC/Ch/2007/111.html>, which contested the fair dealing defence and additionally entailed breach of confidence.

[164] See *Lucasfilm Ltd and Others v Ainsworth and Another*, 16 December 2009, Court of Appeal, [2009] EWCA Civ 1328, [2010] ECDR 6, [2010] Ch 503, [2010] 3 WLR 333, (2010) 33(4) IPD 33021, [2010] 1 Ch 503, [2010] EMLR 12, [2010] Bus LR 904 [2009] EWCA Civ 1328, <http://www.bailii.org/ew/cases/EWCA/Civ/2009/1328.html>, which explored the difficulty of determining whether a prototypal product, such as a costume helmet of *Star Wars*, was an original work of sculpture within the meaning of Section 4 CDPA 1988, and thus deserved protection against copyright infringement.

[165] *Godfrey v Lees*, 21 March 1995, Chancery, [1995] EMLR 307, in which, however, the claimant, should have demonstrated that he actually contributed to the creation of the work in a significant and original way, but failed to assert his rights and therefore did not succeed in that claim. Unsuccessful also was *Brighton and Dubbeljoint v Jones*, 18 May 2004, Chancery, [2004] EWHC 1157 (Ch), [2004] EMLR 26, [2005] FSR 16. On the contrary, a similar claim was successful in *Bamgboye v Reed and Others*, 28 November 2002, Queen's Bench, [2002] EWHC 2922 (Qb), [2004] EMLR 5, [2002] All ER (D) 435.

[166] *Christoffer v Poseidon Film Distributors Ltd*, 6 October 1999, Chancery, [2000] ECDR 487, [1999] IP&T 118, which recognised the originality and thus entitlement to copyright protection to a script narrating a story that, considering its expressed form and details, although inspired by the legendary *Odyssey* by Homer, showed enough differences to be considered the result of creative effort.

At the same time and with the same controversial outcomes, some pronouncements have also dealt, by reflex, with the issue of authorship.[167] The link between matters of originality and attribution of authorship has indeed found dedicated analysis, for instance, with regard to whether the creation of a new edition of a pre-existing musical work is to be regarded as an original composition which copyright subsists, and whether this entitles its author to be identified as such.

Furthermore, attempts to define the scope of protection with reference to the elements or parts of the work that are the «author's own intellectual creation», for instance, headlines or excerpts from newspaper articles,[168] have also been to some extent related to the bond between the author and the original product of his/her mind.[169]

For the same reason, the protection of common design techniques has been excluded also on the grounds of independent creation,[170] which may not be sufficient, instead requiring some creative choice under the influence of EU jurisprudence. The criterion for originality assessment has been centred on measuring whether there has been an expenditure of a sufficient degree of effort, labour, skill and time that justifies

[167] See, for instance, *Fisher v Brooker and another*, 20 December 2006, Chancery, [2006] EWHC 3239 (Ch), <http://www.bailii.org/ew/cases/EWHC/Ch/2006/3239.html>, which investigated, among other aspects, the issue of joint authorship and the delicate question of lawful proper attribution. The instant judgement's later appeal was allowed, saving the granting of a co-authorship declaration, but limiting the first instance decision on the matter of licensing (*Fisher v Brooker and another*, 4 April 2008, Court of Appeal, [2008] Bus LR 1123, [2008] FSR 26, [2008] EWCA Civ 287, [2008] EMLR 13, [2009] Bus LR 95, <http://www.bailii.org/ew/cases/EWCA/Civ/2008/287.html>). See also *Fisher v Brooker and another*, 30 July 2009, House of Lords, [2009] UKHL 41, [2009] 1 WLR 1764.

[168] *The Newspaper Licensing Agency Ltd and Others v Meltwater Holding BV and Others*, 27 July 2011, Court of Appeal, cit., which also negates that the copied excerpt had to be substantial, it being appropriate only to assess that a substantial part of the copied author's work had been taken.
This instant ruling echoes the EU test of originality, which will be discussed more extensively in the following paragraphs. Indeed, it was later referred to the EU Court of Justice in *The Newspaper Licensing Agency Ltd and Others v Meltwater Holding BV and Others*, 17 April 2013, Supreme Court, cit.
See *Public Relations Consultants Association Ltd v Newspaper Licensing Agency Ltd and Others*, case C-360/13, 5 June 2014, CJEU, ECLI:EU:C:2014:1195, [2014] All ER (Comm) 657, [2014] 1 AC 1438, [2014] ALL ER (EC) 959, [2014] BUS LR 970, [2014] ECDR 22, [2014] EMLR 28, [2014] EUECJ C-360/13, [2014] WLR(D) 244, <http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=360/13&td=ALL>.

[169] See, for instance, *Sawkins v Hyperion Records Ltd*, 1 July 2004, Chancery, [2004] EWHC 1530 (Ch), [2004] All ER 418, [2005] RPC 4, [2004] EMLR 27, [2005] ECDR 10 (later appealed in *Sawkins v Hyperion Records Ltd*, 19 May 2005, Court of Appeal, [2005] 3 All ER 636, [2005] EWCA Civ 565, [2005] 1 WLR 3281, [2005] RPC 32, [2005] EMLR 29, <http://www.bailii.org/ew/cases/EWCA/Civ/2005/565.html>.

[170] *IPC Media Ltd v Highbury SPL Publishing Ltd*, 21 December 2004, Chancery, [2004] EWCH 283 (Ch), [2005] FSR 20, [2004] All ER (D) 342, regarding the protection of the design, subject matter, theme and presentational style (not the content), of a home design magazine.

copyright protection,[171] given that in any case the work in question should in abstract be considered a copyright subject matter according to the UK Copyright Act.[172]

Furthermore, the parameter of substantiality may apply, not only to the latitude of the copy,[173] but also to what is the object of the copy.[174] This aspect is of crucial importance for the purpose of ascertaining copyright infringement,[175] but it also matters in determining misattribution, confirming the idea-expression dichotomy, according to which the highest abstraction of a copyright work, similarly to mere ideas, is unlikely to be protected, especially when it does not form a substantial part of the work.

This concise illustration of Italian and UK case law served as a first indication of some similarities that emerge from the comparison of the two systems in their approaches to the subject, although they may indeed appear somewhat faint when matched against the divergences between the two systems.[176] Hence, the preview of the judicial approach to the matter has attempted to explain, in practical terms, the partition between the unshielded ideas embodied in the work and their protected expression, which is essential for a comprehensive and mature assessment of plagiarism.

Either in its objectification, as the individuation of creativeness in the work of the mind or as the establishment of skill, labour and judgement, the creativity or

[171] In *Sawkins v Hyperion*, cit., the Court foresaw sufficient originality in the composition a musical work within the meaning of the CDPA 1988, the claimant having created an original work although not completely new but from previous existing scores that justified copyright protection.

[172] However, this does not entail that the mere occurrence of skill, labour and judgement is in itself capable of making any work original and protected under copyright. *Interlego AG v Tyco Industries Inc*, 5 May 1988, Privy Council, [1988] RPC 343, [1988] UKPC 3, [1989] AC 217, [1988] 2 FTLR 133, [1988] 3 All ER 949, [1988] 3 WLR 678 <http://www.bailii.org/uk/cases/UKPC/1988/3.html>.

[173] See, in particular, *Baigent and Leigh v The Random House Group Ltd* (2006, Chancery), cit., which concerned non-textual copying and the alleged infringement by Dan Brown's famous *Da Vinci Code*. The Court nevertheless held that no substantial copying occurred. The appeal was also dismissed (*Baigent and Leigh v The Random House Group Ltd*, cit.)

[174] It appeared disputable whether the theme of a literary work received protection and whether it could be regarded as a substantial part of the work allegedly copied. However, as will be further discussed, infringement has been established even when a not exactly substantial, but yet important part was copied. *Ravenscroft v Herbert and New English Library Limited*, Chancery, 1 January 1980, Chancery, [1980] RPC 193.

[175] The topic will soon be recouped when the mechanism of infringements is analysed. See *infra*, Chapter 4.

[176] First, the more pronounced variability of the Italian case law is consistent with the quintessence of a civil law tradition, where the *stare decisis* doctrine is inapplicable. UK pronouncements are in fact considerably fewer in number in accordance with the principle of precedents. Second, they do not always contemplate attribution related matters from the angle of copyright, but quite often address such issues from different legal standpoints. Third, even if copyright applies, the applicable rules relating to the violation of the authors' right of attribution tend to differ.

originality tests in both Italy and the United Kingdom in theory require no evaluation in terms of artistic merit for the purpose of copyright protection.

In addition to the need to safeguard the idea–expression dichotomy, with the aforementioned limits, the work seeking to be protected seems today to be the necessary result of a creative or original effort.[177] This latest prompt inevitably requires careful pondering over the legal scope of creativity and originality amid the larger landscape of misattribution, and yet against the increasingly lively background of EU law. The considerations above, in fact, have found explicit grounds within the Court of Justice of the European Union in accordance with the European law on the matter.

2.3 The criterion of originality under EU law

Having explored the criteria of originality and creativity within the Italian and UK systems, it becomes essential to look at the meaning and operability of these issues under the UE legal framework, which undoubtedly has greatly influenced the evolution of the originality test in its Member States, including Italy and the United Kingdom.

In general terms, EU legislation does not provide a clear and univocal definition of these concepts, nor of copyright works, with the exceptions of photographs, databases and computer programs, which are all grouped by the specification that they enjoy protection on the condition that they represent the intellectual creation of the author.

In particular, some EU directives set forth the standards of originality. According to Article 1, Section 3 of the *Software* Directive, computer programs are to be considered original and thus entitled to be protected insofar as they belong to the «author's own intellectual creation».[178] Similar entitlement regards original

[177] At the same time, their conceptualisations evolved together with the development of technology, sometimes going along with it and sometimes being in open conflict with it. This inevitably provokes the concern that the law may take an excessive distance from the reality of art, despite the latter indeed being the object of its regulation and therefore requiring its full consideration.

[178] Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the Legal protection of computer programs, OJ L 111, 5 May 2009, 16-22, <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32009L0024> [repealing and replacing Directive 91/250/EEC of the European Parliament and of the Council of 14 May 1991 on the Legal protection of computer programs, OL 122, 17 May 1991, 42–46]. The instant section continues precising that «no other criteria shall be applied to determine its eligibility for protection».

photographs, that, under Article 6 of the 2006 *Term* Directive,[179] are «the author's own intellectual creation»,[180] with the further specification that such a definition reflects the «personality [of the author and] no other criteria such as merit or purpose being taken into account»,[181] all for the purpose of affording the highest protection to copyright.[182] Similarly, under the 2011 Term Directive, «the socially recognised importance of the creative contribution of performers should be reflected in a level of protection that acknowledges their creative and artistic contribution»,[183] at the same time acknowledging the collaborative nature of certain creations.[184]

Likewise, Article 3, Section 1 of the *Database* Directive and its Recitals 15 and 16 define the only applicable criteria to assess the originality of a database, which, «by reason of the selection or arrangement of their contents, constitute the author's own intellectual creation [and] shall be protected as such by copyright».[185] In addition, shortening the apparent distance with the UK labour skill and judgement test, the same

[179] 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, 11 October 2011, <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1420400285856&uri=CELEX:32011L0077>, has amended the 2006 Directive.

[180] Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006, OJ L 372, 27 December 2006, 12-18, <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32006L0116>, repealing and replacing Council Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights, OJ L 372, 27 December 2006, 12-18]. Again, no other criteria applies, but «Member States may provide for the protection of other photographs».

[181] Directive 2006/116/EC, Recital 16.

[182] As Recital 11 of the same Directive states, in fact, «the level of protection of copyright and related rights should be high, since those rights are fundamental to intellectual creation. Their protection ensures the maintenance and development of creativity in the interest of authors, cultural industries, consumers and society as a whole».

[183] Directive 2011/77 /EU, Recital 4.

[184] According to Recital 18 of the Directive 2011/77 /EU, this refers particularly to «musical genres such as jazz, rock and pop music, the creative process is often collaborative in nature».

[185] 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 March 1996, 20-28, <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:31996L0009>. Recital 16, in particular, provides that «no criterion other than originality in the sense of the author's intellectual creation should be applied to determine the eligibility of the database for copyright protection, and in particular no aesthetic or qualitative criteria should be applied». Recital 15 anticipates indeed that «the criteria used to determine whether a database should be protected by copyright should be defined to the fact that the selection or the arrangement of the contents of the database is the author's own intellectual creation; whereas such protection should cover the structure of the database».

Directive also alludes to the element of investment, which lies behind the creation of a database and is by reflex hindered also by misappropriation.[186]

Finally, the *Infosoc* Directive affords copyright protection in accordance with Recital 9 «to ensure the maintenance and development of creativity in the interests of authors, performers, producers, consumers, culture, industry and the public at large», while Recital 4 explicitly fosters «substantial investment in creativity and innovation».[187]

In essence, we may conclude that the current applicable threshold of originality under EU law is the test of *the author's own intellectual creation*, which seems to apply to any copyright subject matter, although not always with good and simple results. However, such a formula may likely be challenged by the concrete interpretation that Member States provide, especially in consideration of the range of various protections of each. To such an extent, one might wonder whether this test of originality as creative effort is capable of being the right point of convergence or whether it pursues actual harmonisation across the European Union.[188]

This is made even clearer by the judicial application of the instant standard and the further clarification of the rules' content, both within the EU judiciary and domestic courts, whether the latter have implemented the Directives in question or not, provided that the rules in question are compatible with their own legal systems. As a result, it is more than wise to investigate the assessment of originality and creativity from the perspective of the European judiciary, in particular the Court of Justice of the European Union (hereinafter CJEU).

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[186] According to Recital 39 of Directive 96/9/EC, «in addition to aiming to protect the copyright in the original selection or arrangement of the contents of a database, this Directive seeks to safeguard the position of makers of databases against misappropriation of the results of the financial and professional investment made in obtaining and collection the contents by protecting the whole or substantial parts of a database against certain acts by a user or competitor».

[187] 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, OJ L 167, 22 June 2001, 10-19, <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32001L0029>.

[188] On this point, see I. A. STAMATOUDI, P. TORREMANS (eds.), *EU copyright law: a commentary*, Cheltenham, UK: Edward Elgar Publishing, 2014, 1102 et seq; M. VAN EECHOUD (ed.), *The Work of Authorship*, Amsterdam: Amsterdam University Press, 2014, 16, <https://archive.org/details/WorkOfAuthorship>; and S. VAN GOMPEL, *Creativity, authonomy and personal touch. A critical appraisal of the CJEU's originality test for copyright*, in M. VAN EECHOUD (ed.), *The Work of Authorship*, cit., 95, 98-101; E. ROSATI, *Originality in EU Copyright: Full Harmonisation through Case Law*, Cheltenham, UK: Edward Elgar Publishing, 2013.

Among the Court decisions in the matter of copyright, *Infopaq International* remains the most significant case for the establishment of the new standard of originality. In it, the Strasbourg judges suggested that copyright applies in relation to any works that are the result of the author's intellectual creation, and hence original.[189] However, they come to this conclusion following an expected pathway. Recouping the provisions of the aforementioned Directives, and explicitly recalling the principle of EU harmonisation,[190] they extended the standard of originality enjoyed by computer programs, databases and photographs to any «subject-matter which is original in the sense that it is its author's own intellectual creation»,[191] outlining that both the whole work and its various parts or elements enjoy protection as long as they are also original.[192]

On such premises, the CJEU goes further, specifying that newspaper articles, which are intellectual creations in the sense provided, are original literary works, but their originality lays in «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».[193] Additionally, by indicating that the mere words composing the given piece are not elements or parts in the sense intended, and therefore not shielded, the Court constrained the protection.[194]

However, it is remitted to the discretion of national courts to determine whether, in the eventuality of a reproduction of an extract of the original work, such an excerpt entails an element or part of the work that «expresses the author's own intellectual creation».[195]

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[189] *Infopaq International A/S v Danske Dagblades Forening*, case C‑5/08, 16 July 2009, CJEU, 2009 I-06569, [2012] Bus LR 102, [2009] ECR-I-6569, [2010] FSR 495, ECJ, <http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=5/0&td=ALL&parties=Infopaq>.

[190] *Infopaq International* (C‑5/08), cit., which at Section 36, in fact, is reminded that «in establishing a harmonised legal framework for copyright, Directive 2001/29 is based on the same principle, as evidenced by recitals 4, 9 to 11 and 20 in the preamble thereto».

[191] *Infopaq International A/S v Danske Dagblades Forening*, case C‑5/08, cit., at 37.

[192] More precisely, it is stated that, with regard to the work's parts, these should not be treated in a different and diminishing way when they «share the originality of the whole work», which is to say, «they contain elements which are the expression of the intellectual creation of the author of the work». *Infopaq International A/S v Danske Dagblades Forening*, case C‑5/08, cit., at 38 and 39.

[193] *Infopaq International A/S v Danske Dagblades Forening*, case C‑5/08, cit., at 44 and 45.

[194] As it summarised, «words as such do not, therefore, constitute elements covered by the protection». *Infopaq International A/S v Danske Dagblades Forening*, case C‑5/08, cit., at 46.

[195] *Infopaq International A/S v Danske Dagblades Forening*, case C‑5/08, cit., at 48. The same concept is repeated in the ruling of the Court.

This is recouped in *Bezpečnostní softwarová* or *BSA*, according to which copyright subsists in all the works that are intellectual creations, including user interfaces, on the condition that they are original.[196] Interfaces, whose peculiarity consists in allowing users to interact with computer programs, indeed, represent a functional element of the program, but according to European law cannot be considered a computer program nor be protected as such.[197] However, in observance of the originality standard set in *Infopaq International*, a graphic user interface may indeed only be protected if it is the intellectual creation of its author, which is still a discretionary call to be made by the domestic court before a case of this matter is brought.[198]

This particular assessment of originality is thus remitted to the national court that, among other aspects, must consider the «specific arrangement or configuration of all the components which form part of the graphic user interface».[199] In particular, when the technicality and functionality of the components prevail,[200] the risk of merging the idea with its expression is tangible and as such must be refrained.[201]

In this context, the creativity of the author is extremely compressed and the attainment of an original result in terms of intellectual creation that enjoys copyright protection is debarred.[202] As the Court concluded, although graphic user interfaces do not represent a form of expression of the computer programs, and therefore do not themselves receive copyright protection like those programs, they can still be protected

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[196] *Bezpečnostní softwarová asociace - Svaz softwarové ochrany v Ministerstvo kultury*, case C-393/09, 22 December 2010, CJEU, 2010 I-13971, [2011] FSR 18, [2010] All ER (D) 309, [2011] ECDR 3, <http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=393/09&td=ALL>.

[197] *Bezpečnostní softwarová asociace - Svaz softwarové ochrany v Ministerstvo kultury*, case C-393/09, cit., at 40–42.

[198] *Bezpečnostní softwarová asociace - Svaz softwarové ochrany v Ministerstvo kultury*, case C-393/09, cit., at 44–47.

[199] *Bezpečnostní softwarová asociace - Svaz softwarové ochrany v Ministerstvo kultury*, case C-393/09, cit., at 48, which further specifies that such a «criterion cannot be met by components of the graphic user interface which are differentiated only by their technical function».

[200] Against the protection of mere functional elements have ruled also *SAS Institute Inc. v World Programming* Ltd, case C-406/102, May 2012, CJEU, ECLI:EU:C:2012:259, [2013] Bus LR 941, [2012] WLR (D), 131, ECJ, [2012] 3 CMLR 4, [2012] RPC 933, [2012] ECDR 22, <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-406/10>.

[201] *Bezpečnostní softwarová asociace - Svaz softwarové ochrany v Ministerstvo kultury*, case C-393/09, cit., at 49, which explains that «where the expression of those components is dictated by their technical function, the criterion of originality is not met, since the different methods of implementing an idea are so limited that the idea and the expression become indissociable». Cf. Advocate General's Opinion, at 75 and 76.

[202] *Bezpečnostní softwarová asociace - Svaz softwarové ochrany v Ministerstvo kultury*, case C-393/09, cit., at 50.

as copyright works on the condition that they can be defined as the author's own intellectual creation.[203]

A few years later, the identical principle of originality was replicated in the joined cases of *Football Association Premier League* and *Karen Murphy*, in which the European Court denied copyright protection to sports matches as such, on the grounds that they could not be considered copyright protectable works, being not «original in the sense that it is its author's own intellectual creation».[204]

This appeared clear to the CJEU with regard to any sporting event, but even more appropriate with football matches that, constrained by certain gaming rules, «[left] no room for creative freedom for the purposes of copyright».[205] The instant case, therefore, in addition to the main threshold of protection, further adds the element of *creative freedom*, which must be understood as referring to the absence of constraint from rules that may impede the qualification as original copyright work.

Nonetheless, the fact that European law does not grant copyright protection for the reasons thereby explained yet leaves Member States free to grant protection to sporting events, even though they are not protected under EU law. While acknowledging their uniqueness and their potential originality, the CJEU, however, did not foresee any chance of protection according to EU law, but at the same time conceded that, according to domestic laws, such potentiality may be converted in a worth-protected subject matter.[206]

The concept of *creative freedom* was soon resumed in the case of *Eva-Maria Painer*, which focused the attention of the CJEU on the application of the originality

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[203] *Bezpečnostní softwarová asociace - Svaz softwarové ochrany v Ministerstvo kultury*, case C-393/09, cit., at 51.

[204] *Football Association Premier League Ltd and Others v QC Leisure and Others* and *Karen Murphy v Media Protection Services Ltd*, joint cases C-403/08 and C-429/08, 4 October 2011, CJEU, 2011 I-09083, [2012] Bus LR 1321, [2012] All ER (EC) 629, [2011] WLR (D) 286, ECJ, <http://curia.europa.eu/juris/liste.jsf?num=C-403/08&language=en>. Sections 96 and 97.
Cf. *Football Association Premier League Ltd v QC Leisure & Ors*, 13 November 2008, Chancery, [2008] EWHC 2897 (Ch), [2009] 1 WLR 1603, Ch D (decided before the CJEU pronouncement) and following *Football Association Premier League Ltd v QC Leisure & Ors (No. 2)*, 3 February 2012, Chancery, [2012] EWHC 108 (Ch), [2012] FSR 366, later appealed in *Football Association Premier League Ltd v QC Leisure & Ors (No. 2)*, 20 December 2012, Court of Appeal, [2012] EWCA Civ 1708, [2013] BUS LR 866, [2012] WLR (D) 392, [2012] WLR (D) 392, <http://www.bailii.org/ew/cases/EWCA/Civ/2012/1708.html>.

[205] *Football Association Premier League Ltd* (C-403/08) *and Others v QC Leisure and Others* and *Karen Murphy* (C-429/08) *v Media Protection Services Ltd*, cit., at 98. Furthermore, at 99, the Court deliberately excluded that they could find protection in the EU law according to other fields of intellectual property.

[206] *Football Association Premier League Ltd (C-403/08) and Others v QC Leisure and Others and Karen Murphy (C-429/08) v Media Protection Services Ltd*, cit., at 100.

standard to the photographer.[207] As the Court noticed, the creativity of the latter emerged by his/her own personality, which is expressed, for instance, in the peculiar choice of the subject or the use of light.[208]

Retrieving once again the test for originality first delineated in *Infopaq International*, the Court reaffirmed the principle according to which «copyright is liable to apply only in relation to a subject-matter, such as a photograph, which is original in the sense that it is its author's own intellectual creation».[209] What is added, instead, is that the now well-known formula must be intended as a reflection of the author's, and thus the photographer's, personality,[210] which is expressed in the various «free and creative choices» he/she makes,[211] with the consequence that the resulting work certainly has his/her own «personal touch».[212] Given these premises, the creativity of the portrait photograph shall be neither inexistent nor lower,[213] but it will still be the decision of the domestic court to assess whether the photograph, case by case, has those illustrated features and is therefore entitled to copyright protection.[214]

Finally, to complete the circle, the most recent case, *Deckmyn v Vandersteen*, allows to bring into question the opportunity to apply the originality standard to parodies of works,[215] namely whether the exception of parody has to fulfill certain conditions.[216] Acknowledging the lack of a legal definition of parody in the EU framework, the Courts chose to consider it in its everyday use, and therefore in its

[207] In brief, the Luxembourg judges were asked to clarify whether realistic photographs such as a portrait photograph was likely to be protected by copyright, but also whether the level of protection had to be considered lower than the one applicable to other works, including photographic works. *Eva-Maria Painer v Standard VerlagsGmbH and others*, case C‑145/10, 12 April 2011, CJEU, 2011 I-12533, <http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=145/10&td=ALL>, 86.

[208] *Eva-Maria Painer v Standard VerlagsGmbH and others*, case C‑145/10, cit.

[209] *Eva-Maria Painer v Standard VerlagsGmbH and others*, case C‑145/10, cit., 87.

[210] *Eva-Maria Painer v Standard VerlagsGmbH and others*, case C‑145/10, cit., 88, referring to the contents of Recital 17 of Directive 93/98/EC.

[211] A freedom that was instead excluded in *Football Association Premier League Ltd (C-403/08) and Others v QC Leisure and Others and Karen Murphy (C-429/08) v Media Protection Services Ltd*, (C-429/08), cit. *Eva-Maria Painer v Standard VerlagsGmbH and others*, case C‑145/10, cit., at 89–90.

[212] *Eva-Maria Painer* (C‑145/10), cit., at 92. Possible choices include «the background, the subject's pose and the lighting […] the framing, the angle of view and the atmosphere created [but also the] developing techniques the one he wishes to adopt or, where appropriate, use computer software», as exemplified at 91.

[213] *Eva-Maria Painer v Standard VerlagsGmbH and others*, (C‑145/10), cit., particularly at 98 and 99.

[214] *Eva-Maria Painer v Standard VerlagsGmbH and others*, (C‑145/10), cit., at 93–94.

[215] *Deckmyn and another v Vandersteen and Others*, case C-201/13, 3 September 2014, CJEU, [2014] EUECJ C-201/13, <http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=201/13&td=ALL>.

[216] *Deckmyn and another v Vandersteen and Others*, (C-201/13), at 18.

aptness to «evoke an existing work while being noticeably different from it, and […] constitute an expression of humour or mockery»,[217] while considering the exact context and the scope of the regulation.[218] From that, the CJEU, however, discerns the additional feature that it should certainly have «an original character of its own», which it refuted.[219]

At the same time, the Court is concerned with its aim of preserving the necessary fair balance among the rights of the users and the entitlements of the rightholders, respectively with regard to the freedom of expression by the former and the interests in the highest protection of the work by the latter.[220] This is a balance that domestic courts are also expected to seek when they have to assess whether or not the parody exception preserves it, with the characteristics thus far illustrated.[221]

In conclusion, arguably the new common standard of originality attempts to indulge the convergence between the distinct standards of creativity as a reflection of a minimal personal contribution or effort, and that of minimum skill, labour and judgement inputs.[222] Differences between the two, of course, still exist and should not be disregarded,[223] but it is worth considering that, when examined in their careful

[217] *Deckmyn and another v Vandersteen and Others*, (C-201/13), at 20.

[218] *Deckmyn and another v Vandersteen and Others*, (C-201/13), at 19. Cf. *Diakité*, C‑285/12, at 27.

[219] *Deckmyn and another v Vandersteen and Others*, (C-201/13), at 21. In other words, as the Court stressed, «the concept of 'parody', within the meaning of that provision, is not subject to the conditions that the parody should display an original character of its own, other than that of displaying noticeable differences with respect to the original parodied work; that it could reasonably be attributed to a person other than the author of the original work itself; that it should relate to the original work itself or mention the source of the parodied work», at 33.

[220] *Deckmyn and another v Vandersteen and Others*, (C-201/13), at 27-28, 32 and 34-35.

[221] In its closing ruling, the Court of Justice held that the notion of parody is to be considered «an autonomous concept of EU law». However, it also made clear that its critical features are essentially to jog our memory with another work, from which the parodied work strikingly differs, also purporting an expression of humour or mockery with regard to the other work, which is the only one that needs to be ascertained as original.

[222] See E. F. JUDGE, D. GERVAIS, *Of silos and constellations: comparing notions of originality in copyright law*, in *Cardozo Arts & Ent. L.J.*, Vol. 27, No. 2, 2009, 375, <http://www.cardozoaelj.com/wp-content/uploads/Journal%20Issues/Volume%2027/Issue%202/Judge_and_Gervais.pdf>; R. C. NEWELL, *Discounting the Sweat of the Brow: Converging International Standards for Electronic Database Protection*, in *IPLB*, Vol. 15, 2011, 111, <http://ssrn.com/abstract=1709531>.

[223] This point is well expressed by L. BENTLY, B. SHERMAN, *Intellectual Property Law*, cit., 99, who notice how the previous British standard will still apply to prior protected works and, thus, «for many decades to come». Besides, as the authors suggest (at 108), there seems to be no impediment for the United Kingdom to afford protection, under copyright or other areas of law, even to non-original works - with the sole exception of database that is now regulated by the CDPA - according to the EU intellectual creation standard.

analysis, both standards actually reach the same results.[224] In the same way, the alleged coming together of the creativity and originality criteria makes one wonder whether a similar convergence may be appraised with explicit reference to authorship attribution. We shall soon see what the possible implications of this may be.

[224] Cf. L. BENTLY, B. SHERMAN, *Intellectual Property Law*, cit.,102, who emphasise the identity of results, although not of methods, of the allegedly higher EU standard and the lower UK one.

CHAPTER 3

THE QUEST FOR INTERDISCIPLINARITY TO ADDRESS AND EXPLAIN PLAGIARISM

1 Some insights from non-legal disciplines

Before approaching the subject from a more structured perspective, which seeks to draw a clearer line between the approaches of the Italian and UK systems to the right of attribution, it is desirable to pursue a more general and far-reaching contemplation of the topic. This may be reached by looking at the contribution that some disciplines other than the law provide, especially considering their skillful and targeted picturing of misattribution, which a purely legal approach seems unable to provide on occasion. In this regard, therefore, resorting to interdisciplinarity appears decisive.[1]

Indeed, it is acknowledged that the word "interdisciplinary" has a relatively wide-ranging denotation,[2] entailing the participation or simply consideration of more

[1] What is hereby suggested is the adoption of an exact interdisciplinary method to appraise the phenomenon of authorship attribution and the concepts of creativity and originality, which undoubtedly demand the broadest approach in order to be fully comprehended. Such an intention, as we shall see, does not, however, come without consequences or difficulties.

[2] At the same time, it is commonly known to be synonymous with multi-disciplinarity, trans-disciplinarity and the like. For the purpose of the present analysis, however, I will not linger on the exact definition of each.

Besides, it is worth mentioning that some suggest certain distinctions, in particular with regard to the concepts of inter-disciplinarity, intra-disciplinarity and meta-disciplinarity. In the first case, evaluation remains confined to each considered discipline; in the second, what it evaluated is their interaction, and in the third, all disciplines are evaluated and enhanced. See G. DEL RE, *Rapporto sul problema mente-corpo*, in L. Cuccurullo, E. Mariani, (eds), *Contesti e validità del discorso scientifico*, Roma: Armando Editore, 2005, 221, 253.

Others, instead, emphasise one or the other meaning according to the exact context in which they are used. See A. WERTH, *Unity in diversity: the virtues of a metadisciplinary perspective in liberal arts education*. (2003) *Journal of the National Collegiate Honors Council - Online Archive*, Paper No. 118, <digitalcommons.unl.edu/nchcjournal/118>; C. HARDING, A. WEINBERG, *Interdisciplinary teaching and collaboration in higher education: a concept whose time has come*, in *Wash. U. J.L. & Pol'y*, 2004, 14.

than one field of knowledge,[3] conceivably with the aim of ascertaining some kind of identity or unity, or of enabling a far-reaching analysis of phenomena that otherwise appear overlooked by single and isolated approaches.[4]

Despite the ambiguity of its terminology,[5] the appeal of interdisciplinarity encompasses all subjects that have something to learn from one another. This is also valid with regard to the discipline of law, although not necessarily with incontrovertible outcomes. In particular, some academics have wondered whether the other disciplines have profited more from the law's contribution than vice versa, leaving open the question of whether interdisciplinarity had actually contributed to the accumulation of legal knowledge (in terms of having more and better knowledge).[6]

Indeed, some convincing arguments in favour of interdisciplinarity in the context of legal academic thought have been advanced, among others, by Stancil, who suggests that effective interdisciplinarity needs scholars to engage in a mature dialogue or, by her own metaphor, to talk at the same table.[7]

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[3] In its concise meaning, interdisciplinary concerns the instance of «relating to more than one branch of knowledge», while interdisciplinarity refers to «the quality or fact of involving or drawing on two or more branches of knowledge». Oxford University Press, *English Dictionary (online)*, def. *interdisciplinary*, *interdisciplinarity*, <http://www.oxforddictionaries.com/definition/english>. Cf. *Cambridge International Dictionary of English*, cit., def. *interdisciplinary*, 741.

[4] See Treccani. *L'enciclopedia italiana (online)*, Vocabolario, def. *interdisciplinare*, *interdisciplinarmente*, <http://www.treccani.it/vocabolario/interdisciplinare/>. Furthermore, the term «interdisciplinarity» denotes the complementarity, interaction and integration of different subjects that may converge into some common principles and methods, or share some similarities, analogies and parallels that overtake the general fragmentation of knowledge. At the same time, it indicates the aptness of research to identify a common denominator among different fields of knowledge, while also nurturing the singularity and multiplicity of each one. Treccani, *L'enciclopedia italiana (online)*, cit., def. *interdisciplinarità*, <http://www.treccani.it/vocabolario/interdisciplinarita/>.

[5] J. MORAN, *Interdisciplinarity*, London and New York: Routledge, 2010, viii, 165-166, 180 (first ed., 2002), who defines it as a «buzzword» to be treated with particular caution, especially considering the entailed risk of fragmentation, but also acknowledges the advantages for researchers to adopt it, *in primis*, allowing the disciplines to gain new insights and perspectives on each area of research.

[6] Alluding to the fact that fragmentation characterises the legal disciplines, given that they all employ distinct methods and models, Samuel discusses the influence of interdisciplinarity on the discipline of law, also providing some historical examples of reciprocal contribution between law and humanism. G. SAMUEL, *Is legal knowledge cumulative?*, in *Leg. S.*, Vol. 32, No. 3, 2012, 448, 450-455, 471-472, 479.

[7] In her view (cf. T. S. ULEN, *The Impending Train Wreck in Current Legal Education: How We Might Teach Law as the Scientific Study of Social Governance*, in *U. St. Thomas L.J.*, Vol. 6, No. 2, 2009, 302,, <http://ir.stthomas.edu/ustlj/vol6/iss2/2/>), by looking outside its otherwise static environment, the law can only benefit from other disciplines' perspectives, which are embodied in the view of the different guests that occupy their metaphorical chairs and are expected to have «a good dinner conversation» by talking and listening to each other. P. J. STANCIL, *The Legal Academy as Dinner Party: A (Short) Manifesto on The Necessity of Inter-Interdisciplinary Legal Scholarship*, in U. Ill. L. Rev., No. 5, 2011, 1577, 1581 et seq., 1589-91, <http://illinoislawreview.org/wp-content/ilr-content/articles/2011/5/Stancil.pdf>.

In any case, its growing relevance, particularly but not limited to the academic environment,[8] predictably depends on the congeniality of the method, but also on the accuracy of its results. Deliberately referring to interdisciplinary legal research in terms of «legal research which incorporates insights from non-legal disciplines», it is also accurate to identify some principal disrupting elements. The latter can essentially become problems depending on the availability of data, especially if socio-empirical, but also on the accurate understanding and translating one another's equivalent concepts or theories, and integrating them respectively into their own contexts.[9]

However, despite the intensification of interdisciplinary focus in the legal field,[10] this does not in any way suggest that any incorporation will occur, or that the law should renounce its typical authoritative function.[11] In other words, it appears correct to predict that a cautious interdisciplinary analysis will not threaten the core of the legal discipline, especially if, in order to lessen or avoid the possible pitfalls to purse a genuine dialogue with non-legal science, actual collaboration with experts in the given field is pursued.

In this spirit, Samuel emphasises that the law is still largely motivated by authority rather than by a spirit of enquiry (as it is with social theory), with perhaps the exception of comparative law that facilitates an appreciation of both paradigms. The essential firmness and self-reference of the law as a doctrine would therefore sustain that it is not, at least in terms of rules, much affected by other disciplines, while on the

[8] For a broad and insightful reference to the academic and non-academic application of interdisciplinarity, see R. FRODEMAN, J. THOMPSON KLEIN, C. MITCHAM (eds.), *The Oxford Handbook of Interdisciplinarity*, Oxford: Oxford University Press, 2012 (first ed., 2010).

[9] On the complexities and problems that may arise in conducting interdisciplinary research, see the contribution of W. SCHRAMA, *How to carry out interdisciplinary legal research: Some experiences with an interdisciplinary research method*, in *Utrecht L. Rev.*, Vol. 7, No. 1, 2011, 147, 151 et seq., <http://www.utrechtlawreview.org/index.php/ulr/article/view/152/151>, who defines the basic patterns of an interdisciplinary methodology. See also B. M. J. VAN KLINK, H. S. TAEKEMA (eds.), *Law and Method. Interdisciplinary Research into Law*, Tübingen: Mohr Siebeck 2011.

[10] An example of such increasing interest for this methodology is found in the recent trend in legal studies of the "Critical Analysis of Law", sometimes simply referred to as CAL, which looks at law as one of many disciplines while not denying its intrinsic autonomy. M. D. DUBBER, *Critical Analysis of Law: Interdisciplinarity, Contextuality, and the Future of Legal Studies*, in *C.A.L.*, Vol 1, No 1, 2014 <http://ssrn.com/abstract=2385656>.

[11] Quite confident in this respect seems to be D. W. VICK, *Interdisciplinarity and the Discipline of Law*, in *J.Law & Soc.*, Vol. 31, No. 2, 2004, 163, 191-193.

other hand the latter seem not to be particularly convinced by an innovative contribution of the law.[12]

On the contrary, the insightful perspective that empirical research and approaches of diverse expertise may bring to the new understanding of the law,[13] particularly accentuating its affiliation with society and even expanding the involvement of a wider range of experts,[14] indeed has the merit of highlighting the law's uniqueness.

Either way, a variegate appraisal of different fields of knowledge is likely to be very profitable for the law, as it is with other disciplines.[15] This is particularly valid with regard to copyright law and intellectual property law in general. In such peculiar contexts, in fact, the interaction between the law and other disciplines becomes crucial, whether these belong to the social sciences or the humanities, or have their place in the natural sciences

On the one hand, these branches of the law are regularly investigated by a multitude of disciplinary angles; on the other hand, they deal directly with a multitude

[12] Cf. G. SAMUEL, *Interdisciplinarity and the Authority Paradigm: Should Law Be Taken Seriously by Scientists and Social Scientists?* in *J.Law & Soc.*, Vol. 36, No. 4, 2009, 431, 439-450, 458-459,
Cf. R. COTTERRELL, *Subverting Orthodoxy, Making Law Central: A View of Sociolegal Studies*, in *J.Law & Soc.*, Vol. 29, 2002, 632.

[13] For a broad analysis of the matter, among others, see B. TAMANAHA, *A General Jurisprudence of Law and Society*, Oxford, UK: Oxford University Press, 2001; M. HEISE, *The Importance of Being Empirical*, in *Pepp. L. Rev.*, Vol. 26, 1999, 807, 817.

[14] Cf. H. COLLINS, R. EVANS, *The Third Wave of Science Studies: Studies of Expertise and Experience*, in *Soc. Stud. Sci.* Vol.32, 2002, 235, 238-239, 244, 271, who suggest pursuing the Studies of Expertise and Experience (SEE) with the express aim to «widen participation in technical decision-making». To such an extent they promote collaboration with those who can be labelled "experience-based experts" (refuting the oxymoron of "lay expertise" that instead creates more confusion), but whose expertise has not been officially certified. At the same time, in consideration of the field of knowledge where experts might operate, they distinguish "contributory expertise" from "interactional expertise": the former is more appropriate in the scientific field, while the latter better suits the context of the arts. However, despite this enthusiastic broadening of expertise, the authors also warn against the superficial attribution of expertise, thus endorsing preliminary and meticulous analysis of such acknowledgement.
Cf. N. PRIAULX, M. WEINEL, *Behavior on a Beer Mat: Law, Interdisciplinarity & Expertise*, in *JTLP*, Vol. 2, 2014,<http://illinoisjltp.com/journal/wp-content/uploads/2014/02/Priaulx_Weinel_Behaviour-on-a-Beer-Mat_130214.pdf>, who, following the logics of such a theory of expertise, reiterate the advantages and the risks related to the use of interdisciplinary analysis in legal studies. At the same time, they underline the potentiality and the value of other types of interdisciplinary engagement, although limited to a precursory function to more mature interactional research, such as «simulation ('crash test') research».

[15] J. P. STANCIL speaks of this metaphorical bridge, *The Legal Academy as Dinner Party: A (Short) Manifesto on The Necessity of Inter-Interdisciplinary Legal Scholarship*, cit., 1580, who recalls that «legal study is inherently normative, dynamic and interdisciplinary». Cf. F. T. ARECCHI, *La complessità nella scienza*, in L. CUCCURULLO, E. MARIANI (eds), *Contesti e validità del discorso scientifico*, cit., 279. As he emphasised, «a fertile interdisciplinary approach among different scientific disciplines, each with its own ranges, restores a mutual respect of their description of reality, without the presumption of reducing them into one single description», at 285 [my translation].

of subjects that belong to different fields of knowledge. Therefore, the challenge of «building bridges between the legal discipline and other sciences» appears extremely real and tangible.[16]

The idea of interdisciplinary study as a lively dialogue and interactive relationship among various branches of knowledge, in other words, has a decisive impact on the way that scholars nowadays approach copyright law. Furthermore, as the interaction of the law with cultural and social theories is particularly emphasised,[17] so is its liaison with literature, although not always without clatters.[18] Finally, the particular affiliation with literature is also corroborated by the special interest that legal scholars have demonstrated for the penchant of using the figures, metaphors and language of literary studies to illustrate legal matters, even simply with the purpose of re-dressing their theories in new and more appealing clothes.[19]

At the same time, one must understand that "it is not all a bed of roses". In essence, the route to interdisciplinarity has its own glitches and perils and, as bizarre as this play on words might sound, it requires discipline.[20] The risk of a rushed use of interdisciplinarity – particularly when it takes the shape of «turning the sum of human knowledge into an undisciplined hotchpotch disseminated by a chaotic babble of

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[16] W. SCHRAMA, *How to carry out interdisciplinary legal research: Some experiences with an interdisciplinary research method*, cit., 161.

[17] See D. T. GOLDBERG, M. MUSHENO, L. C. BOWER (eds.), *Between law and culture: relocating legal studies*, Minneapolis, US: Univ. of Minnesota Press, 2001, whose primary purpose is to map and describe the link that exists between contemporary socio-legal and cultural studies, and thus between the law and culture in general. Besides, their initial question on the actual latitude of the intersections among law, culture and identity (Introduction, XV) stimulates the broader question of how the law indeed sees culture and art, but also how and to what extent the latter are influenced and shaped by the law.

[18] For an initial assessment of the topic, see, in particular, A. SANSONE, *Diritto e letteratura. Un'introduzione generale*, Milano: Giuffrè, 2001, 753 et seq.; J. B. BARON, (1999) *Law, Literature, and the Problems of Interdisciplinarity* 108 *Yale L.J.*, 1059, 1061. Cf. G. ROSSI (ed.), *Il diritto nella letteratura rinascimentale europea. Percorsi di ricerca interdisciplinare*, Padova: Cedam, 2004.

[19] The familiarity of law and literature is well described by I. WARD, *From literature to ethics. The strategies and ambitions of law and literature*, in *O.J.L.S.*, Vol. 14, No. 3, 1994, 389-390, who recalls the difference between the views of law as literature and law in literature. While the former considers legal texts as «pieces of literature», the latter suggests «the use of literary texts and narrative fiction as a supplement to […] 'legal' texts, to better facilitate jurisprudential discourse and understanding». Cf. S. LEVINSON, *Law as Literature*, in *Tex. L. Rev.*, Vol. 60, 1982, 273.

[20] See H GADLIN, L. M. BENNETT, *Interdisciplinarity without Borders*, in G. BAMMER (ed.), *Disciplining interdisciplinarity: integration and implementation sciences for researching complex real-world problems*, Australian National University, Acton: ANU E-Press, 2013, 417, <http://press.anu.edu.au?p=222171>, who also give praise for being «careful [enough] not to slip into the elitist assumption that those who know the most know the best», at 425.

contending voices with erratic levels of authority and expertise» - is real and even seems exacerbated by technological inputs.[21]

Additionally, when interdisciplinarity incidentally enters the courtroom, magistrates have indeed to evaluate expert findings and understand the actual meaning of different subjects' theories.[22] In this regard, it has been pointed out how expert technical and scientific knowledge has dramatically increased over recent decades and, conversely, the relevance of common knowledge that is expected to characterise the average person seems to have diminished.[23] For instance, there is a tangible risk of misinterpreting evidence, which places the emphasis on the need to be extremely careful with too much confidence in non-legal findings.[24] The idealisation of science can be as dangerous as its ignorance, but the same can be inferred with its misconstruction.[25]

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[21] J. MORAN, *Interdisciplinarity*, cit., Preface.

[22] See S. JASANOFF, *What Judges Should Know about the Sociology of Science* in *Jurimetrics J.*, Vol. 32, 1992, 345.

[23] Cf. B. RADOS, P. GIANNINI, *La consulenza tecnica nel processo civile*, Milano: Giuffrè, 2013, 37–38, who, referring particularly to the Italian system, wonder whether it is correct to say that the judge is still a «peritus peritorum» or rather a «servus peritorum». See also M. TARUFFO, V. ANSANELLI, *La prova nel processo civile*, Milano: Giuffrè, 2012, 1052-1055, who ponder over the reliability and accuracy of expert knowledge, especially within the civil law procedural system. Cf. V. ANSANELLI, *La consulenza tecnica nel processo civile: problemi e funzionalità*, Milano: Giuffrè, 2011.
On the role of expert witnesses, particularly with regard to the US system, see the earlier contribution of P. HUBER, *Galileo's Revenge: Junk Science in the Courtroom*, New York: Basic Books, 1993, who attempts to trace the origins of what he labels "junk science", namely the pseudo-science of compromised or faulty findings of which lawyers often take advantage and which courts, by reflex, incorporate in their judgements.

[24] See G. EDMOND, *Constructing Miscarriages of Justice*, in *O.J.L.S.*, 2002, Vol. 22, No. 1, 53, 69-70, who, despite focusing on the application of such caution in the context of criminal law, warns against the perilous extreme idealisation of natural science and consequently the handling of scientific evidence by magistrates. Similar conclusions are reached, again in the criminal law field, in J. DE KEIJSER, H. ELFFERS, *Understanding of forensic expert reports by judges, defence lawyers and forensic professionals*, in *P.C. & L.*, Vol. 18, 2012, 191.

[25] See E. MERTZ, *Undervaluing Indeterminacy: Legal Translations of Social Science*, in *DePaul L. Rev.*, Vol. 60, 2011, 397, <http://via.library.depaul.edu/cgi/viewcontent.cgi?article=1132&context=law-review>., who notes how vagueness remains a challenging issue for an efficient dialogue between law and other social sciences, particularly when the former is mistaken in understanding the peculiar intrinsic indeterminacy of the latter but has no difficulty in acknowledging its own. To validate her arguments, focusing on translation difficulties that arise from interdisciplinary approaches, she suggests paying greater attention to the specific linguistic patterns that characterise each discipline.
Cf. D. S. CAUDILL, *Ethnography and the Idealized Accounts of Science in Law*, in *San Diego L. Rev.*, Vol. 39, 2002, 269; H. M. COLLINS, *Researching spoonbending: concepts and practice of participatory fieldwork*, in C. BELL, H. ROBERTS (eds.), *Social Researching: Politics, Problems, Practice*, London: Routledge & Kegan Paul, 1984, 54-69.

1.1 An interdisciplinary approach to misattribution of authorship

All these premises serve well for the proposed aim of depicting and explaining authorship misattribution precisely from an interdisciplinary viewpoint. The controversial nature of plagiarism and the critical need for flexibility of approaches in fact appear to function as an additional trigger, insisting on a method of analysis that looks at more than one perspective, and suggesting new criteria of evaluation that are therefore required, and the interdisciplinary process appears to be not just appropriate but indispensable.

Consequently, the uncertainty of the concept and its related issues advocates the idea of embracing plagiarism as a very interdisciplinary phenomenon, as genuine or reproachable as it could be.[26] The salutation of a more conscious understanding of misattribution, in fact, on the one hand, welcomes an appropriate distinction among the many faces of imitation; on the other, it seems to convey a necessary distinctiveness between a copying conduct that solely affects the personal interest of proper authorship attribution and an act that additionally undermines the economic interests of the work.[27]

These apprehensions certainly concern the jurists, particularly when plagiarism goes to trial, but they also directly regard literates, artists and, more generally, experts of different disciplines, who are often involved in misattribution controversies, all united by the contrasting attitude of establishing the basis for the applicable sanctions or offering the foundation for relieving the misattributing conducts from all constraints.

There seems, in fact, to be adequate scope to appraise different instances of misattribution, which should not all be treated the same. As a result, it is conceivable that certain conduct may amount to an infringement of someone's rights that the law should protect, even only as a mere violation of the moral right in the work, as well as

[26] To such an extent, some have suggested linking all its possible expressions to the model of «contrafactum», which would then include any taking or mocking that at the same time deliberately endorses or rejects the liaison with the original work. G. PERON, A. ANDREOSE (eds.), *Contrafactum. Copia, imitazione, falso*, cit., X-XI.

[27] Those who strongly advocate an essential estrangement between plagiarism and counterfeiting certainly welcome this concluding recommendation, evidently as long as the conduct of either plagiarism or counterfeiting is directly and unmistakably identifiable as such. Nonetheless, the radical exclusion of any association between the two seems, however incorrect, will be better explained in Chapters 4 and 5.
Cf. Z. O. ALGARDI, *La tutela dell'opera dell'ingegno e il plagio*, cit., 368-370, and 424. According to the author, such an approach is not flawless, since it only applies to those circumstances in which the conduct is easily identifiable and straightforward.

entailing a violation of the economic rights. However, the same conducts may indeed refute any illicitness and rather consists in a dishonest and unethical behaviour.[28]

In other words, the interdisciplinary approach to plagiarism implies an understanding of the benefit that a wide-ranging and knowledge-based exploration of the issues related to attribution represents.[29] To such a degree, it appears pertinent to examine the estimations provided by the experts of each applicable field, with reference both to the theories that accurately apply to plagiarism in those specific areas and to what they conjecture with regard to the legal assessment of the subject.

Among all disciplines, contemporary art seems to be the perfect case in point; at least to the extent that it provides several examples in which attribution has either been celebrated or negated, providing the best environment for plagiarism conduct.[30] Regarding its celebration, starting from the view that it is vital to art, as well as to progress,[31] there is a fairly widespread impression that plagiarism may be considered one of the many creative exemplifications of art, if not even a way of actually appreciating the original art.[32]

The general considerations were previously made in relation to interdisciplinarity with respect to the artistic context.[33] The relationship between law

[28] On this last point, see also R. POSNER, *The little book of plagiarism*, cit., 17-21, and 37-43.

[29] Once more, similar confidence in the experts' analysis is in part due to the incidence that a mere legal consideration of whichever copyright issue has been evaluated risks ignoring its multidimensional sides. This is particularly true with misattribution, where the firm lens of the law is likely to take an unnecessary and perilous distance from the actual representation of art and creativity.

[30] The proclivity of art to justify and even proclaim misattribution may be summarised in the words of who believe that appropriation is the very basic artistic standard, to the point that reutilisation outreaches original creation and grants autonomous value to borrowed art. On this, see L. BLISSET, *P per plagio*, A.A. (eds.) *Vero è falso. Plagi, cloni, campionamenti e simili*, cit., 141. Cf. G. MARZIANI, *Contemporanea-mente poplagiaristi*, A.A (eds.) *Vero è falso. Plagi, cloni, campionamenti e simili*, cit., 39–40.

[31] As it was argued: «[…] le plagiat est nécessaire. Le progrès l'implique. Il serre de prés la phrase d'un auteur, se sert de ses expressions, efface une idée fausse, la remplace par l'idée juste». COMTE DE LAUTRÉAMONT, *Poésies II*, Paris: Librairie Gabrie, Balitout, Questroy et Cie, 1870, 6.

[32] The multiple expressions of misattribution extend to the notion of it as diversion, which in the fifties will become an actual artistic movement of a passionate proclamation of plagiarism, called *détournement*. See S. OUTPUT, *Plagiarismo, il mondo è nuovo*, cit., 125. Cf. D. GUY-ERNEST, G. J. WOLMAN. *Methods of Détournement* in *Les Lèvres Nues*, 8 May 1956. Translated by Ken Knabb.

[33] Cf. A. SARAT, *Crossing boundaries: from disciplinary perspectives to an integrated conception of legal scholarship*, in ID. (ed.), *Law in the Liberal Arts*, Ithaca, US: Cornell University Press, 2005, 84 et seq.

and art,[34] in fact, is a perfect example of how legal and non-legal disciplines interact with each other's rules and functioning, especially when their contrasting bond is brought before the court.[35] Despite their manifest and logical autonomy, they often overlap, when we consider either the way the law aims to regulate and shape art, or how art wishes to depict and represent the law.[36] Furthermore, eventually legal discourse on art may also enter the realm of ethics.[37] In this regard, despite the instances in which artists themselves declare "an art of misattribution", there are still some grounds to foresee certain boundaries, particularly when a creative selection of others' material takes the place of a verbatim reproduction of their works.[38]

Similar considerations apply to other fields of knowledge. Moving from the world of fine arts to musical works, for instance, things do not change much. Borrowing

[34] Such intertwining therefore reduces the seeming distance, which becomes explicit when typical legal issues such as copyright and related rights in the work are considered. For a review of scholarly works that have investigated the various intersections of law and the arts, see C. H. FARLEY, *Imaging the Law*, in A. SARAT, M. ANDERSON, C. O. FRANK (eds.), *Law and the Humanities: An Introduction*, Cambridge, UK: Cambridge University Press, 2010, 292–312.
These articulations of art and law's interaction are efficaciously illustrated in C. DOUZINAS, L. NEAD, *Law and the Image: The Authority of Art and the Aesthetics of Law*, Chicago: University of Chicago Press, 1999, where the former is labelled "law's art" and the latter "art's law", at 11. Cf., for an exemplification of such intertwining, A. YOUNG, *Judging the Image: Art, Value, Law*, London: Routledge, 2005.

[35] Besides, even beyond the courtroom, the role of experts seems particularly relevant when dealing with works of art. See R. D. SPENCER, *The expert versus the object: judging fakes and false attributions in the visual arts*, New York: Oxford University Press, 2004, which focuses on the process of authentication, namely attributing a certain work to an artist, a movement or an epoch.
Interesting contributions on the subject are not lacking. See, among the latest, B. BOESCH, M. STERPI (eds.), *The Art collecting legal handbook*, London: Thomson Reuters, 2013, with a manifest international perspective; J. B. PROWDA, *Visual Arts and the Law: A Handbook for Professionals*, London: Ashgate Publishing, 2013, for a narrower US perspective on visual art.

[36] See, among earlier works on the topic, S. J. DRUCKER, G. GUMPERT, *Museums without walls: property rights and reproduction in the world of cyberspace*, in S. W TIEFENBRUN, *Law and the arts*, Contributions in legal studies, no. 87, Westport, Connecticut: Greenwood Press, 1999, 47-66, which also offers an interesting view of digitalisation of art.

[37] This particular aspect will be better discussed in the next paragraphs. However, for a preliminary background, see, in particular, O. BEN-DOR, *Law and Art: Justice, Ethics and Aesthetics*, Abingdon, Oxon, UK; New York, US: Routledge-Cavendish, 2013 (first ed., 2011); J. H. MERRYMAN, A. E. ELSEN, *Law, ethics, and the visual arts*, London and New York: Kluwer Law International, 2002 (first ed., 1979), which also offers a dedicated analysis of the artist's moral rights at 305-382.

[38] S. HOME, *Nessuno osi chiamarlo plagiarismo*, A.A. (eds) *Vero è falso. Plagi, cloni, campionamenti e simili*, cit., 121-122. Besides, others claim that the true scope of creativity is to learn how to use and reproduce the creations of others. See, in this respect, C. MASI, *L'iperestetica del plagio*, cit., 36.

from others' notes and using the same tune may seem not only natural, given the extreme derivative nature of compositions, but also sometimes inevitable.[39]

Nevertheless, compared to the more malleable outlook of art, in the musical context misattribution attracts a larger portion of the blame, certainly exacerbated by the concerted worries of the more lucrative concerns of the music industry.[40] In addition, music allows a reconnection with the earlier discussed notions of the relationship that occurs between legal and non-legal approaches, where, in the end, their respective views may not collide. One example of this clash is foreseen in the dissimilar evaluation offered to music production, as well as the mechanisms of its protection, which seem to foster some theory of copyright unfairness.[41]

In particular, according to some, the law seems to have forgotten that intellectual products are largely the result of appropriation practices. This concept is well and interestingly explained by Frith's image of:

> An age of plunder in which music made in one place for one reason can be immediately appropriated in another place for quite another reason, but also that while music can be shaped

[39] Misattributing practices in the musical environment are in fact sometimes reconnected to psychological motives. For a first account of the issue, see R. BADER (ed.), *Musical Acoustics, Neurocognition and Psychology of Music - Musikalische Akustik, Neurokognition und Musikpsychologie. Current Research in Systematic Musicology at the Institute of Musicology, University of Hamburg - Aktuelle Forschung der Systematischen Musikwissenschaft am Institut für Musikwissenschaft, Universität Hamburg*, Frankfurt am Main, Berlin, Bern, Bruxelles, New York, Oxford, Wien: Lang, 2009.

[40] D. SUISMAN, *Selling sounds: the commercial revolution in American music*, Cambridge, Mass.; London: Harvard University Press, 2012 (first ed., 2009), who revisits the history of music commodities and the music industry as a whole in order to make light of their contemporary meaning and function.

[41] Such alleged unfairness may arise from the tendency to discourage certain methods of making music, such as improvisation, variation and sampling, or to foster disparity among musicians, especially between those who have greater commercial power. S. FRITH, L. MARSHALL, *Music and Copyright*, Hoboken: Taylor and Francis, 2013 (first ed., Edinburgh: Edinburgh University Press, 2004), 124, who also argue that the law has essentially privileged Western compositional music production rather than the non-Western traditional one.

On the contrary, there seems to be greater awareness to shield more carefully music in the context of traditional knowledge. See, in this regard, B. BOATENG, *The copyright thing doesn't work here: Adinkra and Kente cloth and intellectual property in Ghana*, First peoples: new directions in indigenous studies, Minneapolis: University of Minnesota Press, 2011. Cf. A. A. AGORDOH, *African music: traditional and contemporary*, New York: Nova Science Publishers, 2005; M. RILEY, *Indigenous intellectual property rights: legal obstacles and innovative solutions*, Contemporary Native American communities Vol. 10, Walnut Creek, Calif., USA: Altamira Press, 2004.

> by the people who first make and use it, as experience it has a life of its own».[42]

Undoubtedly, the creative process in itself, regardless of the specific work at issue, has evolved and much of its evolution is due to the prominent interference of technological changes, as well as a more or less conscious endorsement by society.[43]

However, authorship misattribution seems to receive a completely different type of attention from art and other intellectual disciplines than that which it receives from the law. This may also point towards the fact that if the law does not give proper account to the multiplicity of attitudes showed by other disciplines towards misattribution, there is a serious risk that, as happens with other subjects of copyright, an uncompromising approach would also facilitate the infringement of someone's rights.[44]

Consequently, the next coherent step would be pondering over the actual feasibility of consenting to an assorted approach to addressing authorship misattribution. In particular, the combination of expert guidelines and social norms, in addition to, or sometimes in place of, legal rules, appears to be a proper response, given that, on a larger scale, social norms for the acknowledgement of authorship support the moral expectation of artists that their works will be credited to them. In fact, as Ng suggests, «the goal of the copyright system ultimately is, and should be, about

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[42] S. FRITH, *Music and identity*, in S. HALL, P. DU GAY (eds.), *Questions of Cultural Identity*, London; Thousand Oaks, Calif.: Sage, 1996, 109, <http://faculty.georgetown.edu/irvinem/theory/Frith-Music-and-Identity-1996.pdf>. For an historical illustration on the controversial entanglement of music and law, see E. CUTLER, *A manual of musical copyright law: for the use of music-publishers and artists, and of the legal profession*, London: Simpkin, Marshall, Hamilton, Kent, 1905, <https://archive.org/details/manualofmusicalc00cutl>.

[43] See, in particular, S. GREENFIELD, G. OSBORN, *Law, music and the creative process*, in S. GREENFIELD, G. OSBORN (eds.), *Readings in Law and Popular Culture*, Routledge Studies in Law, Society and Popular Culture, London: Routledge, 2013, 310-324, who analyse the fundamental steps of such developments, also focusing on how new technologies (including digitisation) have increasingly altered not only the way people conceive and consume music products but also the manner in which the concept of authorship is understood.

Cf. R. TARUSKIN, *The danger of music and other anti-utopian essays*, Berkeley and Los Angeles; London: University of California Press, 2010 (first ed., 2008), who also scrutinise the influence of external factors, such as the role of critics, in contemporary composition and performance.

[44] Such a possibility, as we shall see, may not to be impeded by a more steady legal designation of plagiarism or any legal applicable rules. Nonetheless, a clearer stance of the law would be yet very welcome.

improving the social and educational conditions of individuals and society [thus] with strong moral and ethical undertones».[45]

2 Understanding plagiarism through social norms

Unquestionably, copyright and, more generally, intellectual property, play a significant role in society.[46] Ascribing a clear and explicit social drive to copyright thus strengthens the perception that many of its aspects deserve an assessment that exceeds a strictly legal viewpoint. As a consequence, there seems to be enough latitude, even with regard to misattribution practices, to demand an approach that escapes an excessively rigorous mesh of the law, but not to the extent that its involvement should be entirely denied.

In this regard, it is essential to understand the effect that social norms may have on copyright and in particular on misattribution. A proper estimation of social norms, in fact, seems to facilitate a more accurate understanding of people's behaviour in the copyright environment and accordingly guide the interpreter towards conducts of plagiarism.

To serve such purpose, it is first important to define the meaning and the scope of social norms in general and then see their specific connotation within the context of copyright and misattribution. A valuable definition of social norm, for instance, is provided by Posner who describes it as «a rule that distinguished desirable and undesirable behaviour and gives a third party the authority to punish a person who

[45] A. NG, *Copyright law and the progress of science and the useful arts*, Elgar Law, Technology and Society series, Cheltenham; Northampton, MA: Edward Elgar, 2011, 20, who underlines that these are the moral and ethical rules that define the acceptance or not of certain conducts.

[46] With an emphasis on the Italian system, this assumption is confirmed by an express ruling of the Constitutional Court, which affirmed that creative works of the mind have a constitutional status, and so their protection is of constitutional interest (*Soc. Emi it. c Soc. Cd Sound*, 6 April 1995, Const. Court. n. 108, [1995] Rep. Foro it. v. Dir. autore n. 81; [1995] *Annali it. dir. autore* 348, [1995] *Foro it*. I 1724, [1995] *Impresa* 758, [1995] *Cons. Stato* II 603, [1995] *Giust. civ*. I 1423, [1995] *Arch. civ*. 934, [1995] *Dir. ind*. 887, [1995] *Dir. inf*. 594, [1995] *Giur. costit*. 876, [1995] *Riv. dir. ind*. II 247, [1995] *Dir. autore* 421.). Cf., with regard to the constitutionality of Italian copyright law, V. CARIANELLO, *Profili di legittimità costituzionale della legge sul diritto di autore nelle sentenze della Corte Costituzionale*, *Dir. radiodiff. telecom*. 1988, 91, who analyses some of the most relevant case law on the subject.

engages in the undesirable behaviour», where the authority has a private and not public nature, as it is instead with the law.[47]

The topic is among the most complex, and the literature dealing with social norms is copious.[48] Preliminarily, leaving aside the theories that expressly deal with the dissimilar implication of choosing one or the other denomination,[49] for the purpose of the present analysis, the terms social norm and social rule will be treated as synonymous.[50]

Acknowledging the visible link between law and society,[51] and the configuration of social norms in terms of «foundations of social order»,[52] there is yet some latitude to foresee important distinctions and therefore to draw a few lines between legal and social

[47] E. A. POSNER, *Law and social norms*. Cambridge; London: Harvard University Press, 2000.

[48] For a broad and recent recap, see the collection of essays edited by M. XENITIDOU, B. EDMONDS, *The complexity of social norms*, Cham: Springer International Publishing, 2014. See also S. A. HETCHER (ed.), *Norms in a Wired World*, Cambridge Studies in Philosophy and Law series, Cambridge, UK: Cambridge University Press, 2004, 1, 149 et seq., who places particular attention on the proximity of social norms and customary law, on the condition that the social practice of custom is obligatory.

[49] Regardless of the abundant contribution to the issue, there is still little consensus on it. See, for instance, C. HORNE, *Sociological perspectives on the emergence of social norms*, in M. HECHTER, K. D. OPP (eds.), *Social Norms*, New York: Russell Sage Foundation, 2001. Beyond their distinctiveness, for instance, from categories of norms that have a moral or religious basis, they are often seen as interrelated. According to Sayre-McCord, for example, morality in particular has a strong influence on social conduct. G. SAYRE-G. MCCORD, *Normative Explanations*, in D. BRAYBROOKE (ed.), *Social Rules*, Boulder: Westview Press, 1996, 36.

[50] It is still important to acknowledge that there have been many attempts to give an exact meaning to the term norm as distinct from the term rule. On this, see P. ROBINSON, *The Rise of the Rule: Mode or Node?*, P. COLLETT (ed.), *Social Rules and Social Behaviour*, Oxford: Basil Blackwell, 1977, 74; R. LINDSAY, *Rules as a Bridge between Speech and Action*, P. COLLETT (ed.), *Social Rules and Social Behaviour*, cit., 159-173.

[51] See H. ROSS, *Law as a social institution*, Legal theory today series, Oxford: Hart, 2001, who retraces the fundamental passages of Weberian and Hartian theories, respectively in the *Sociology of Law* and the *Concept of Law*. See also M. BAIER, *Social and legal norms: towards a socio-legal understanding of normativity*, Farnham, Surrey: Burlington, VT: Ashgate, 2013.

[52] A. ETZIONI, *The monochrome society*, Princeton, N.J., USA: Princeton University Press, 2003 (first ed., 2001), 163-165, who underlines the importance of understanding social norms in general, particularly considering their aptitude to challenging the law's enactment and enforcement.
With a similar aim, others concluded that «sociology is supposed to recover the social link of law from the invisibility to which lawyers had relegated it by the development of positive law». K. A. ZIEGERT, *On Eugen Ehrlich, Fundamental principles of the sociology of law*, in A. J. TREVIÑO (ed.), *Classic writings in law and society*. Second edition reviewed and expanded, New Brunswick, N.J.: Transaction Publishers, 2011 (first ed., 2007), 123, 132, expressly referring to Ehrlich's theory that law is first a law of society and is appropriately enacted only when social patterns are known. Cf. E. EHRLICH, *Fundamental principles of the sociology of law*, translated by W. L. MOLL [orig. *Grundlegung der Soziologie des Rechts*, München: Duncker und Humblot, 1913], with an introduction by R. Pound, *Harvard studies in jurisprudence*, Vol. 5, Cambridge, Mass.: Harvard University Press, 1936.

regulation, considering that each should maintain its own autonomy.[53] In other words, interaction between the law and social norms is, to some degree, indisputable.[54] While the former influences or enforces the latter, the impact of social norms may also extend to their sway to foster the observation or violation of a given legal rule.[55]

Concisely, social norms, also described in terms of «informal social regularities that individuals feel obligated to follow because of an internalized sense of duty, because of fear of external non-legal sanctions, or both»,[56] certainly influence people's behaviour, and the established interest of scholars in the subject seems to confirm this assumption.[57]

In addition, they play a crucial role in designing behavioural rules, although there is less consensus on the appropriateness that they may substitute the law,[58] precisely when we move from single and relatively small communities to the larger concept of society as a whole. Accordingly, it can be maintained that such norms define the regular and informal conduct of individuals that respond to a natural sense of duty, which may also be triggered by the dread of being sanctioned when the rules in question are violated.[59]

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[53] This is well summarised by those who, although acknowledging the foundation of law in social practice, do not deny its normativity (89–90), thus mostly recalling the uniqueness of the law. See J. RAZ (ed.), *The authority of law: essays on law and morality*, Oxford, UK; New York, USA: Oxford University Press, 2009, 2012 (first ed., 1979), 115 et seq.

[54] As Ellickson emphasises, this inherent connection is also acknowledged by legal scholars who have for a long time barricaded themselves behind the self-referentiality of law. R. C. ELLICKSON, *The evolution of social norms: a perspective from the legal academy*, in M. HECHTER, K. D. OPP (eds.), *Social Norms*, New York: Russell Sage Foundation, 2001, 62. On this, see also V. POCAR, *Il diritto e le regole sociali. Lezioni di sociologia del diritto*. Milano: Guerrini scientifica, 1997.

[55] M. F. SCHULTZ, *Copynorms: Copyright and Social Norms*, P. K. YU (ed.), *Intellectual Property and Information Wealth: Issues and Practices in the Digital Age. Vol. 1: Copyright and Related Rights*, Westport: Praeger Publishers, 2007, pp. 8–9, 10–11.

[56] R. H. MCADAMS, *The origin, development, and regulation of norms*, in *Mich. L. Rev.*, Vol. 96, 1997, 338.

[57] See P. COLLETT, *Social Rules and Social Behaviour*. Oxford: Basil Blackwell, 1977, who offers a synthetic but valuable recapping of the main theorists who wrote on the subject, including Hume, Kant, Wittgenstein and Chomscky, Fillmore and Hymes. See also R. B. CIALDINI, C. A. KALLGREN, R. R. RENO, *A Focus Theory of Normative Conduct: A Theoretical Refinement and Reevaluation of the Role of Norms in Human Behavior*, in *Adv. Exp. Soc. Psychol.* Vol. 24, 1991, 201.

[58] The confident approach of Ellickson is, for instance, criticised by those who are more sceptical towards the theory that the law may not even be necessary to regulate individual conduct in society. See, for instance, J. BRIGHAM, *Order without Lawyers: Ellickson on How Neighbors Settle Disputes*, [reviewing] R. C. ELLICKSON, *Order without Law: How Neighbors Settle Disputes*, in *Law & Soc'y Rev.*, Vol. 27, 1993, 609.

[59] In line with these assumptions and Ellickson's definition of social norms in terms of «[the] rule governing an individual's behaviour that is diffusely enforced by third parties other than state agents by means of social sanctions», where social sanctions may consist, for instance, of negative hearsay,

However, in order for them to function properly, individuals need to accept them as binding, at least within the group or community to which they relate.[60] Furthermore, since their behaviour likely responds to other prompts that also depend on the consideration they have of others' conduct,[61] it is essential to look at the subjective latitude of a norm's acceptance and its affinity to any particular group of people, as well as their personal motivation to act in a certain way.[62]

The pronounced attention that society directs towards plagiarism seems to corroborate such an instance. In particular, we regularly witness the growing interest of the media in alleged cases of what it often labels literary stealing, which validates the assumption that misattribution has always had, and still has, a remarkable impact on public opinion.

Whether fictionalised, veiled by romance or improperly termed, plagiarism still represents an extremely fashionable issue,[63] as its historical roots demonstrate, which also know no territorial precincts.[64] It involves the various and disparate fields of

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ostracism or banishment. R. C. ELLICKSON, *The evolution of social norms: a perspective from the legal academy*, cit., 35.

[60] As Horne highlights, the acceptance of the norms in question also depends on the social status of their recipients and on the selection they operate among all available rules. C. HORNE, *Sociological perspectives on the emergence of social norms*, cit., 21-25. Furthermore, individual conduct also seems to be influenced by power and personal interests, which suggest an assessment of social norms from a social, economic and historical perspective. See, on this, D. BRAYBROOKE, *The Representation of Rules in Logic and Their Definition*, in ID. (ed.) *Social Rules*, cit., 11-13.

[61] Of particular interest, in this respect, are Ellickson's studies on the social dynamics that regulate the conduct of individuals within the agricultural community of Shasta County, California. He concludes that the members of this particular group were more prone to following social norms than legal prescriptions because they understood the former to be more efficient and influential on the conduct of the other members. R. C. ELLICKSON, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, in *S.L.R.*, Vol 38, 1986, 623. See also R. C. ELLICKSON, *Order without Law: How Neightbors Settle Disputes*. Cambridge: Harvard University Press, 1991.

[62] M. F. SCHULTZ, *Copynorms: Copyright and Social Norms*, cit., 12-17, who describes as the main influencial factors: Perceptions Regarding Peer Behaviour; The Number of People Perceived to Follow a Norm; Relevant Peer Groups; Self Interest; Reciprocity; Deterrent Strategies vs Normative Strategies.

[63] Among Italian daily reports that have expressly addressed the subject, see G. GAGLIARDI, *Il plagio da Beethoven a Zucchero. Quando le 7 note coincidono troppo*, in *La Repubblica.it*, 18 August 2006 <http://www.repubblica.it/2006/08/sezioni/spettacoli_e_ cultura/plagio/plagio/plagio.html?ref=search>; C. MORETTI, *Invictus sembra 'O sole mio. Gli editori della Siae: è plagio*, in *La Repubblica*, 9 April 2010: 63; E. TREVI, Da celan a littell la mania del plagio *La Repubblica*, 31 December 2011; A. OTTANI CAVINA, *Da David a Picasso quel sottile confine tra ispirazione e plagio*, in *La Repubblica*, 8 January 2012; S. TIBALDI, *Il valore creativo del plagio*, in *La Repubblica*, 25 May 2013.

[64] With regard to the UK overview, see E. WAGNER, «Plagiarism? No - it's called research», *The Times*, 27 November 2006; Z. STRIMPEL, «Sounds familiar: the perils of plagiarism», *The Times*, 7 April 2010; C. Kenny, «Examiner in plagiarism probe», *The Sunday Times*, 9 October 2011; O. KAMM, «Sometimes be grateful for a spot of plagiarism», *The Times*, 24 September 2013; C. MIDGLEY, *Nice letter, a pity it was copied from America*, in *The Times*, 19 July 2014.

knowledge and is often detected in musical works, movies, novels and other literary products, even politics. What's more, it seems that the inaccuracy of lexis, even by reporters, is in some measure explained by the strain of describing a subject that is by nature polychromatic.[65] The voice of journalists, however, speaks also for the ordinary person, so it is in some sense the voice of society.

It is worth saying that people seem to be less indulgent when misattribution affects literature and, in most cases, the predominant reaction is disapproval and condemnation towards an act that not only damages the work and its creative kernel but also directly harms the public and impairs culture.[66] Inversely, the typically tolerant answer to alleged musical or artistic plagiarism reveals a different attitude. Perhaps this also reflects the impression that in the field of literature it is more probable that a deliberate substantial and verbatim copy occurs, while in music and the fine arts there seems to be more space for imitation and tolerable borrowing.[67]

On the other hand, to describe the understanding of plagiarism by the average person, it may be useful to look at its definition in dictionaries, similarly to what has been done with regard to the concepts of creativity and originality, and interdisciplinarity. Very briefly, English dictionaries describe it as «the practice of taking someone else's work or ideas and passing them off as one's own»,[68] or using part of their work and pretending it is his/her own,[69] while regularly indicating it to be synonymous copying, infringement of copyright, piracy, theft, stealing, and

[65] Nonetheless, whether any inexactitude may to some extent be exempted, there is still a likelihood of enabling dangerous distortions that may instead result in hindering a proper understanding of the issue. However, despite this general trend of inaccuracy that features the attitude of reporters and more generally the media, there are also some diffused doubts as to whether the term plagiarism has been used in the proper way or received the right attention, as well as whether it should be a matter for the law at all. On this, see V. BERRUTI, *Ma il problema sono le regole: si può parlare di plagio?*, in *La Repubblica.it*, 4 September 2007; D. GALATERIA, *Furti d'autore la letteratura un immenso campo di grandi falsari*, in *La Repubblica.it*, 7 July 2010.

[66] See N. BOWERS, *Words for the Taking: the Hunt for a Plagiarist*. New York: London: W. W. Norton & Company, 1997, 26, 29, who explains how, rhetorically speaking, the issue of plagiarism does not seem to represent a serious threat, to the point at which it becomes concrete and practically affects the author, who, from that exact moment, will not welcome it anymore and perhaps would even deny that he/she had ever suggested that imitation is in the nature of culture.

[67] J. WALKER, *A. Copy This! A Historical Perspective on the Use of the Photocopier in Art*, in J. P. Lesko, *Plagiary: Cross-Disciplinary Studies in Plagiarism, Fabrication and Falsification*, Michigan, USA: University of Michigan, 2006, 22.

[68] Oxford University Press, *Oxford English Dictionary (online)*, cit., def. plagiarism, <http://www.oxforddictionaries.com/definition/english/plagiarism>

[69] *Cambridge International Dictionary of English*, cit., 1074, def. *plagiarize*.

appropriation. With analogous connotation in the Italian context, plagiarist conduct is recognised in «the publication or reproduction of others' works», but also in the usurpation of the paternity of the work or even a too-close imitation that is intended to attribute such paternity to him/her.[70]

Even so, there is a subtle awareness that, in consideration of the mutable nature of plagiarism, whichever measures the law may provide to regulate the phenomenon; these might not be sufficient or adequate to apprehend it.[71] This cognisance noticeably opens therefore the debate about the possibility that other measures may be used alongside the law.[72] In addition, the clash between forbearing and hostile attitudes is often transferred to the courtroom, where justices often find themselves enfolded in conflicting rulings, in which a severe deliberation of the subject alternates with a pliable response to the requests of the claimants.[73]

All these illustrated thoughts give the idea that uncertainty is the key word of plagiarism;[74] on the contrary, one of the main ambitions of the law is to provide certainty. As a consequence, alongside with a specific and needed legal response,[75] there is increasing receptiveness to welcoming more flexible responses to plagiarism, including recourse to a dedicated analysis by a single discipline in which misattribution

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[70] Treccani, *L'enciclopedia italiana (online)*, Vocabolario, cit., def. plagio, <http://www.treccani.it/vocabolario/plagio/>, <http://www.treccani.it/vocabolario/plagiare/>.

[71] These postulations additionally suggest pondering over the possibility that unconscious plagiarism may occur. In truth, it seems unlikely that the mind of the average person or an exceptionally talented artist would be prone to reproducing word-for-word another person's works automatically. Besides, the fact that art implicates imitation does not mean that imitation means reproduction by heart of the work of the mind that is the product of an usually conscious creative effort. See, on the latter reflection, M. BRANDER, *The Duty of Imitation, Gateways and other essays*, New York: C. Scribner's sons, 1912.

[72] The same worries indeed emerged from searching for an exact and unequivocal meaning of creativity and originality, which are the crucial parameters to evaluating misattribution. However, even within this cautious and apparently uniform approach there are contentious situations. In fact, depending on the case, there might be more or fewer reservations towards the detection of plagiarism, and there might be more or less exoneration.

[73] I. ALEXANDER, *Inspiration or Infringement: the plagiarist in court*, in L. BENTLY, J. DAVIS, J. C. GINSBURG (eds.), *Copyright and Piracy. An Interdisciplinary Critique*, cit., 3.
Furthermore, anticipating what will then be discussed in greater detail in Chapter 5, such a contrasting outlook of the court is, to some extent, prompted by the findings of expert witnesses, whether they are called to support the claims and defences of the parties or whether they are supposed to deliver an independent and unbiased report to the case in question.

[74] According to Bower, this peculiar uncertainty is worsened by the increasing fear of having unconsciously taken someone else's work. N. BOWERS, *Words for the Taking: the Hunt for a Plagiarist*. New York: London: W. W. Norton & Company, 1997, 103.

[75] See *infra*, Chapter 4.

occurs, but also resorting to social norms that may help to regulate it, in particular to those norms that are contextualised in copyright and commonly known as *copynorms*.[76]

2.1 The social (and moral?) expectancy of attribution

The value of copynorms consists precisely in their aptitude to embody the most effective and pertinent application of social rules into the realm of copyright, offering a new perspective on the conduct of those who engage with copyright matters. At the same time, this also suggests new responses to potential copyright infringement, other than those strictly prescribed by the law.[77] Nevertheless, although copynorms are less visible in comparison with copyright legal rules, being «the sea we swim in when we think about copyright law. We don't see them, except when they begin to break down or change»,[78] acknowledging their role in the broader field of intellectual property and their capacity to work alongside the law becomes crucial, especially to the instant analysis.

Their relevance seems even to grow when social norms are channelled towards the narrower discourse on ethics and morality. Indeed, looking at the Kelsenian

[76] The term originates from the stringent relationship that theorists have asserted between copyright and social norms. See M. F. SCHULTZ, *Copynorms: Copyright Law and Social Norms*, in P. K. YU (ed.), *Intellectual property and information wealth: issues and practices in the digital age*, cit., 203–225, who broadly explains what copynorms are and why they are so important «to understand and perhaps to resolve some of the biggest dilemmas in copyright law», at 224.
On this, see also D. LAMETTI, *The virtuous p(eer): reflections on the ethics of file sharing*, in A. LEVER (ed.), *New frontiers in the philosophy of intellectual property*, Cambridge, UK: Cambridge University Press, 2012, 284, 294-295, who advocates the "ethics of virtue", while at the same time emphasising the special normativity of informal rules as being even more powerful than formal law.

[77] Namely, «the informal social attitudes that create expectations about what is "okay" and what is socially unacceptable». L. B. SOLUM, *The Future of Copyright*, *Texas Law Review* 83 (2005), 1148 [reviewing] L. LESSIG, *Free Culture: How Big Media Uses Technologiey and The Law to Lock Down Culture and Control Creativity*, New York: The Penguin Press, 2004.

[78] L. B. SOLUM, *The Future of Copyright*, cit., 1164. However, although often understood as the opposite of legal rules, social norms interact with the law in various way and not always conflictingly. On the one hand, it seems feasible to establish informal attitudes that are compliant with the conducts the law prescribes, and on the other, social norms may eventually suggest divergent conducts that "normalise illegality".

distinction between legal and non-legal norms,[79] where the latter include both moral and social rules that adjust «the behavior of men to each other»,[80] it seems advisable to try sifting the topic of plagiarism through the lens of some social or moral expectancy of attribution.[81] Furthermore, even with the predictable scepticism that this conclusion may attract, social norms, whether they include or complement moral standards, within the copyright context are still deeply entangled with legal principles and detailed legal parameters.[82]

With exact reference to plagiarism, it seems pertinent to look at what Kwall has emphasised, explaining that a legal violation may be foreseen when a violation of copyright is found. Inversely, what could still emerge if no copyright infringement was established is the undisputable «concern for giving credit where credit is due», given that:

> Even within our current framework, attribution in particular exists as an authorship norm even if it is not explicitly codified in the copyright statute. Attribution violation in general and

[79] H. KELSEN, *Pure theory of law*. Translation from the second German edition [*Reine Rechtslehre: einleitung in die Rechtswissenschaftliche Problematik*, Leipzig; Wien: Franz Deuticke, 1934] by M. Knight, Berkeley; Calif., USA: University of California Press, 1967, 59, 60, who treated moral norms as social because even if they prescribe a behaviour for ourselves, they still affect or simply concern others, even indirectly.

[80] Besides, some have already attempted to drive copyright infringement precisely into the realm of morality, emphasising its counterbalancing role against anarchy. See, in particular, R. SPINELLO, *Beyond copyright: a moral investigation of intellectual property protection in cyberspace*, in R. J. CAVALIER, *The impact of the internet on our moral lives*, Albany, N.Y.: State University of New York Press, 2005, 27, 30-37, 45. Although acknowledging some limits of the current legal system, Spinello strongly utters that copyright law should not be considered unfair per se and therefore there is no reason why we should imagine a copyright-free world. This is exactly because the infringement of copyright is a legal violation and the law has «moral authority» to intervene.

[81] An interesting example of how these concepts find an explicit field is the operation of social norms in stand-up comedy. See on this D. OLIAR, C. SPRINGMAN, *Intellectual property norms in stand-up comedy*, in M. BIAGIOLI; P. JASZI, M. WOODMANSEE (eds.), *Making and unmaking intellectual property: creative production in legal and cultural perspective*, Chicago; London: University of Chicago Press, 2011, 385–398. See also D. OLIAR, C. SPRINGMAN, *There's no free laugh (anymore): The emergence of property rights norms and the transformation of stand-up comedy*, in *Va. L. Rev.*, Vol. 94, No. 8, 2008, 1787. Cf. H. E. Smith, *Does Equity Pass the Laugh Test? A Response to Oliar and Springman*, (2009) *Virginia Law Review* 95, <http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=4044&context=fss_papers>.

[82] Cf. D. LYONS, *Ethics and the rule of law*, Cambridge, UK; New York: Cambridge University Press, 1984, 5–7, 61 et seq., who, investigates the relationship between moral judgement and the law, explaining the reasons behind what he calls «moral scepticism», further noticing the uncertainty of how we morally judge law and in general human behaviour. At the same time, he explicitly questions whether, to such an extent, the law should be considered «just a matter of social fact» or having anything to do with morality.

> plagiarism in particular are viewed as moral wrongs in our society by both authors and audience.[83]

Particularly when inconsistencies between formal and informal conduct are identified, it yet imperative to understand what causes a similar discrepancy.[84] This postulation also implies an acceptance of the essential part played by social rules within the complex net of personal interactions that feature in the law of copyright.[85]

In addition, focusing on the conduct of users, the expectation of a given behaviour by others, which connotes social comportment in general, is significantly accentuated.[86] When such expectancy is frustrated, social sanctions apply and, although informal or conventional, they still react to the anticipated violation of the norm.[87] Whether infringement is deliberate or unwanted, a response of sanctioning may, but not necessarily, occur,[88] also depending on the instance that individuals know the rule in question.[89]

In brief, society has, in itself, the capacity to foist and eventually enforce the rules that affect the behaviour of its members, which is consistent with the idea that formal legal rules are not the only source of regulation.[90] Moreover, if the intervention

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[83] R. R. KWALL, *The soul of creativity: forging a moral rights law for the United States*, Stanford, Calif.: Stanford Law Books, 2010, 142, 143.
Cf. D. NIMMER, *The moral imperative of academic plagiarism (without a Moral Right against Reverse Passing Off)*, in *DePaul L. Rev.*, Vol. 54, No. 1, 2004, <http://via.library.depaul.edu/law-review/vol54/iss1/2>.

[84] As Pocar wisely recalls, this is even more accurate in the courtroom, where judicial interpretation should imply taking into account the potential clash between social and legal rules. V. POCAR, *Il diritto e le regole sociali. Lezioni di sociologia del diritto, cit.*, 33-34, 146.

[85] I here refer to the individual choices made by copyright holders, but also by users regarding copyright matters that are also driven by motivations that go beyond strictly economic or proprietorship-related grounds. Cf. E. A. POSNER, *Law and social norms*, cit., 342.
Understandably, the different motivations of copyright owners and users reflect the diverse position that each of them has in copyright, whereas it may be argued that the interests of the former have indeed received greater acknowledgment by the law. Cf. M. F. SCHULTZ, *Copynorms: Copyright and Social Norms*, cit., 6.

[86] V. POCAR, *Il diritto e le regole sociali. Lezioni di sociologia del diritto*, cit., 16–17.

[87] It seems useful to the point to recall the distinction that Ellickson operates among norm-makers and change agents, where the former make the rules and the latter amend them. Besides, he also discerns between actors, enforcers and members of the audience, where the first group simply follows or violates the rule, the second promotes its validation or sanctions its infringement, and the third observes and supports the conduct of one or the other group. R. C. ELLICKSON, *The evolution of social norms: a perspective from the legal academy*, cit., 37-40, and 46.

[88] See, on this, P. COLLETT, *Social Rules and Social Behaviour*, Oxford: Basil Blackwell, 1977, 8-13.

[89] C. SILVER, *Do We Know Enough About Legal Norms*, in D. BRAYBROOKE (ed.), *Social Rules*, cit., 141.

[90] R. COOTER, *Law From Order: Economic Development and the Jurisprudence of Social Norm*, in O. MANCUR, S. KAHKONEN (eds.), *A Not-so-dismal Science: A Broader, Brighter Approach to Economies and Societies*, a cura di. New York: Oxford University Press, 1998.

of the law is neither always necessary nor appropriate, this does not imply that the law is never welcome. Nonetheless, in cases where informal contrivances are more effective and efficient to ensure that certain rules are followed, there seems to be less necessity to advocate the intervention of the law. On the contrary, the law's inquisitive attitude may be needed when informal regulation is not capable of providing effectiveness and efficiency towards observance of the norms.[91]

With regard to the acknowledgement of authorship, which has its legal countenance in the right of attribution, the correspondent social rule is embodied by the social norm of attribution. First, this norm grants authors the social praise of being credited for their works of mind. Second, it allows other people to borrow someone else's works insofar as they always acknowledge authorship of the taken works to their original author.[92] However, while the former attitude of the norm seems to be of a more immediate understanding, the latter instead requires further specification. Embracing a connotation of copynorm as an instrument to moderate and integrate formal copyright, on the topic of plagiarism in particular it can be inferred that they may contribute to filling the current gaps in the law.

When such social expectancy is voided because there is disagreement about recognising the authorship of the proper author, a violation of the norm of attribution occurs taking the shape of plagiarism, which Schultz thoroughly defines as a serious breach of this exact norm.[93] Therefore, the favourable situation in which the norm is respected is a balanced one, since it embodies the standard behaviour for borrowing or copying someone else's work. Contrarily, such balance appears broken when the parties do not share the same endorsement or even interest in the norm and, overall, one of them infringes it, although not surprisingly for the very same reason that motivates the former: acknowledgement.[94]

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[91] R. COOTER, *Normative failure theory of law*, in *Cornell L. Rev.*,Vol. 82, 1997, 947, 948-950 and 978.
[92] S. P. GREEN, *Plagiarism, Norms, and the Limits of Theft Law: Some Observation on the Use of Criminal Sanctions in Enforcing Intellectual Property Rights*, in *Hastings L.J.*, Vol. 54, 2002, 171, 174-175.
[93] M. F. SCHULTZ, *Copynorms: Copyright and Social Norms*, cit., 19.
[94] S. P. GREEN, *Plagiarism, Norms, and the Limits of Theft Law*, cit., 171, 174-175.

2.2 The role of ethics and the hesitant close for right and wrong

As we have seen, the norm of attribution originates from the individual aspiration to be credited for the work he/she has created and therefore from his/her craving for reputation. With the careful attention that this requires, we may argue that both social and moral expectations support the ethical acknowledgement of authorship,[95] here assuming the meaning of ethical as referring to the relations that occur between individuals.[96]

In other words, individuals are encouraged to create because recognition functions as an incentive for creation. However, when the result of this process is hindered by conducts of misattribution, the marvel of creation indeed seems weakened and, regardless of any definite reference to the law, some thoughts and feelings may straight away enflame our sense of right and wrong.

Additionally, detailed enquiries on ethical issues in the milieu of copyright seem not to be lacking, especially in their explicit link to technology and electronic information.[97] Some have placed great emphasis on this exact argument, especially when one considers the million-dollar question of whether technology has actually

[95] In this sense, we may consider the reference to ethical as including broadly social and moral instances. Such conclusions, of course, necessarily simplify the complex relationship between ethics and morality, especially in their entanglement with the law, but for the purpose of the current research this cannot be further addressed. However, on this point it is worth mentioning the contribution of G. C. HAZARD, A. DONDI, *Legal ethics: a comparative study*, Stanford, Calif.: Stanford University Press, 2004, who explicitly address the ethical context, including judicial ethics, establishing a narrower boundary between the violation of established rules of ethics and the frustration of an individual's morals.

[96] J. E. PORTER, *Rhetorical ethics and internetworked writing*, New directions in computers and composition studies series, Greenwich, Conn.: Ablex Pub., 1998, xiv.

[97] For a broader analysis of copyright law and ethics, also with respect to different types of work, see S. W. HALPERN, *Copyright law and the challenge of digital technology*, in L. P. GROSS, J. S. KATZ, J. RUBY (eds.), *Image ethics in the digital age*, Minneapolis, MN; London: University of Minnesota Press, 2003, 143; J. CHOI, M. FREY, *Cine-ethics: ethical dimensions of film theory, practice and spectatorship*, Routledge advances in film studies series, Vol. 29, New York; London: Routledge, 2014, concerning the ethical implications of copyright infringement in films and other related media; A. D. GORDON, J. M. KITTROSS, J. C. MERRILL, W. BABCOCK, M. DORSHER, *Controversies in media ethics*, New York, NY: Routledge, 2011 (first ed., White Plains, N.Y.: Longman, 1996).

changed our moral perception, and thus social normativity, of what is right and wrong with regard to intellectual property and property rights in general.[98]

Indeed, the fear that morality may intentionally be abused to justify certain behaviour that otherwise would be reproached appears less remote and unrealistic.[99] Nevertheless, it appears equally logical to fear that the potential abuse may work the other way round. In fact, a cry for morality could also hide an equally abusive attempt to push copyright law to sanctioning conducts that would otherwise be acceptable.

Likewise, considering the slowness of the law to adapt to technological changes and its fallacy in responding to non-legal demands, in the meantime a settled expansion of ethics may be a possible next step forward, bringing back onto the scene some familiar concepts, such as that of imitation, which we have seen dominating the broader literary context. Genuine imitation, in fact, seems to virtually exclude any serious allegations of plagiarism or copyright infringement, but there could be instances in which the borrowing may still imply «an ethical loss of credibility».[100]

In this sense, plagiarism truly appears in its ethical apparel, particularly when one focuses on the values that appear to have been frustrated, which seems not to be limited to the individual sphere of the person that is allegedly plagiarised, but also

[98] This seems even more convincing when morality is beckoned to sustain typical legal arguments, and therefore when moral considerations are added to the legal ones, not necessarily in their substitution. See A. KEEN, *The cult of the amateur: how blogs, Myspace, YouTube and the rest of today's user-generated media are destroying our economy, our culture, and our values*, London Nicholas Brealey Publ., 2011, 145, who argues that «passing off others' writings as one's own is not only illegal, in most cases, but immoral».
Moreover, on what is generally known as computer ethics, see, in particular, D. A. SEALE, *Why do we do it if we know it's wrong? A structural model of software piracy*, in A. SALEHNIA (ed.), *Ethical issues of information systems*, Hershey, Pa.; London: IRM Press, 2002, 120, 135-136, who foresees social norms as a «predictor of pirating behavior», at the same time evaluating the different attitudes that people appear to show towards the "theft" of tangible or intellectual property. See also M. DURANTE, *Il futuro del web: etica, diritto, decentramento. Dalla sussidiarietà digitale all'economia dell'informazione in rete*, Torino: Giappichelli, 2007; and M. Warren, W. Hutchinson, *Cyberspace ethics and information warfare*, in A. SALEHNIA (ed.), *Ethical issues of information systems*, cit., 154, explaining why cyberspace poses new ethical dilemmas.
[99] See on this R. SPINELLO, *Beyond copyright: a moral investigation of intellectual property protection in cyberspace*, cit., 27, 28, who also believes that «moral norms send a much clearer signal that must be heard», at 44.
[100] J. E. PORTER, *Rhetorical ethics and internetworked writing*, cit., 122, who expressly demands «an ethic for electronic writing», at xiii. Besides, he also suggests (at 1-2) that the inadequacy of the law is due to the fact that the copyright system depends very much on assumptions that, since it was first created to regulate traditional print, there may be some inevitable difficulties in accomplishing futher digital instances.

looking at the overall interest of the public not to be deceived by misattributing practices.[101]

On similar grounds, there has been a diffused attempt to use the arguments illustrated above to support a connotation of plagiarism in terms of stealing. Indeed, beginning with the provocative assumption that plagiarism would take the shape of literary theft, the immediate and unavoidable question would then be, however, what exactly is stolen by this conduct. Among others, Green wonders if one can affirm that plagiaristic conduct fulfills the concept of theft in its strictly legal meaning or if instead it conceivably satisfies an ethical definition of burglary.[102]

Some have suggested that the object of stealing could be the consideration that people have of a certain author, namely the reputation that such an author has acquired through the work. Besides, even accepting its etymological affinity to theft, the latter should indeed merely be regarded as a metaphor, without broadening improperly its precise criminal meaning to the extent of plagiarism. This conclusion appears additionally supported by the fact that the law had many opportunities to punish it precisely as theft, but never did; possibly because it was indeed aware of the limits that its criminalisation would have entailed.[103]

Nevertheless, there is still a considerable inclination by the general public to regard plagiarism as criminal conduct, which is perhaps encouraged by the fictional outlawing of the act of copying that is narrated in novels, scripts and movies.[104] In many instances, in fact, plagiarism has indeed been labelled as a crime and the person who has

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[101] See J. SNAPPER, *The matter of plagiarism: what, why, and if*, in K. E. HIMMA, H. T. TAVANI (eds.), *The handbook of information and computer ethics*, Hoboken, N.J.: John Wiley & Sons, 2008, 533–534, who explicitly treats plagiarism as an ethical concept and also focuses on the issue of deception and the connected influence of computer technology.

[102] S. P. GREEN, *Plagiarism, Norms, and the Limits of Theft Law*, cit., 170.

[103] Staying with the metaphor, nonetheless, it seems even more problematic to understand what the exact scope of the alleged victim of plagiarism might be. Is it merely the personal revenge of having the plagiarist acknowledge his/her authorship or is it rather its public condemnation? This last aspect, in addition, prompts another query, which relates to the victim's possible intention to pursue the wider people's trial or a more circumscribed litigation, either way with the scope of obtaining some justice. These dynamics are well explained in N. BOWERS, *Words for the Taking: the Hunt for a Plagiarist*, cit., 56-71, who recounts his personal battle against plagiarism.

[104] One of the opening cues in the Hollywood movie *Secret Window*, for instance, is the recurrent statement «You stole my story!», initially suggesting plagiarism with such vivid expression, which in the end only revealed a psychological trick. *Secret Window* (2004), directed by D. Koepp and based on the novel *Secret Window, Secret Garden* by S. King, Columbia Pictures, USA.

copied someone else's work as the perpetrator of such offence.[105] Stuart P. Green, in particular, gives a detailed elucidation of the issue, explaining how the scope and defence of the archetype of theft with respect to misattribution are extremely limited.[106]

Even beyond the express details of his theory, a potential firm felonious sanctioning of the phenomenon still unquestionably demands certain clarifications, especially since it is placed in a criminal setting that by its nature would require extreme caution. Indeed, aside from the query of what precisely is appropriated, more doubts arise when we envision the possible legal consequences of foreseeing it as a criminal offence.[107]

At the same time, this does not infer that the notions of creativity and originality should always be sacrificed, or that any conduct may be deemed admissible.[108] On the contrary, it may be inferred that the promotion of learning, also through the protection of creative contribution, is precisely the reason that misattribution should be the object of a more cautious and mature assessment, which begins with the recognition of the relevant role played by social norms on this regard.

There are at least two main reasons why this is accurate. First, the informal network of copynorms encounters the legal boundaries, particularly when more than one system is considered. Second, the inherent element of the incentive process that traditionally features copyright systems can easily be stretched to reach the embrace of authors' rights systems, even if not necessarily with the exact same contours. The incentive, truthfully, may take the outline of the economic reward, but it may also have

[105] N. BOWERS, *Words for the Taking: the Hunt for a Plagiarist*, cit., 13. Moreover, the parallels between the person that plagiarises and the cleptomanic have also been pictured, highlighting the circumstance that it is somewhere understood that he/she will be caught and that maybe this is the actual reason why he/she steals. T. MALLON, *Stolen Words*, cit., p. 121.

[106] S. P. GREEN, *Plagiarism, Norms, and the Limits of Theft* Law, cit., 172.

[107] Besides, a considerable critical emphasis has been placed on the recent development of copyright, particularly in terms of the tendency to strengthen its power to exclusively protect the interests of copyright holders at the expense of users, and more generally the public. See, for instance, P. DECHERNEY, *Hollywood's Copyright Wars. From Edison to the Internet*, New York: Columbia University Press, 2012.

Analogous critique may follow when we consider the possibily that the law may protect also the interests of authors through severe and inflexible means.

[108] Even within the controversial debate on plagiarism, in fact, the centrality of creativity and original contribution to culture and art remains unvaried and still represents autonomous and indispensable value. See N. BOWERS, *Words for the Taking: the Hunt for a Plagiarist*, cit., 45.

a personal nature, with, consequently, its violation having certain moral consequences.[109]

Such a careful approach, indeed, is deliberately endorsed by the suggestion that plagiarism may be first seen as a social or ethical wrong, before being considered in its legal dimension. Informal norms, in fact, prescribe specific conducts and provide certain sanctions for their violation, which may conversely affect the reputation of the same infringer. According to Cooter, such sanctions include ostracism, banishment and contempt, but also condemnation and blame – all measures that may also become of interest for the court that will eventually be handling it.[110]

Indeed, it is not always a perfect and flawless picture, and informal sanctions may not be sufficient to solve the conflict, especially in cases of established indifference towards other peers' judgement or towards the possibility of receiving an informal punishment. The efficacy and efficiency of norms, which guarantee the full success of the norm itself,[111] moreover, seem to be strictly dependent on personal or social benefits. Therefore, if an individual has no interest in following it, the chances that the norm would reach its goal is apparently lower and, in such instances, the social norm will most likely, fail.[112]

As a result, one may wonder what happened when informal norms do not reach their potential efficacy and, in that case, whether there are other possible measures to take in order to protect the rights or the simple expectancies of creators. Above and beyond the legal dimension, a different response may be found in the realm of technology and its multifarious set-up of measures.

This resort, moreover, is particularly expected when one considers the range and influence of technological change that have increasingly either permitted or banned a number of acts that were previously unknown by copyright. Technological

[109] Accordingly, the incentive to create that is fostered by the expectation of authorship credit is obviously frustrated when such expectancy is voided. Hence, when a mere legal response is not practicable or perhaps not yet comtemplated, there have to be other ways to protect such reliance and thus shield the principle of creative incentive that appears so precious to any copyright setting.

[110] R. COOTER, *Normative failure theory of law*, cit., 968. On the potential consideration of informal sanctions within the judicial assessment of damages, see R. COOTER, P. ARIEL, *Should courts deduct nonlegal sanctions from damages?*, in *J. Legal Stud.*, Vol. 30, 2001, 401.

[111] According to «Cooter, effective sanctions lead to successful social norms, whereas ineffective sanctions cause norms to fail». R. COOTER, *Normative failure theory of law*, cit., 969.

[112] See E. A. POSNER, *Law, Economics and Inefficient Norms*, *University of Pensilvania Law Review* 144 (1996): 1697, 1701; R. COOTER, *Normative failure theory of law*, cit., 975.

transformation, in fact, increases the uncertainty that already features copyright and misattribution, urging a careful reassessment of the applicable setting. Therefore, a watchful assessment of technological inference on attribution and plagiarism, including the analysis of the interaction between ethics and technology, appears essential.

3 The impact of new technologies on the creative process

The interaction that exists between ethics and technology is mainly discussed in the analysis of what is summarised in the notion of cyber ethics, which characterise the conduct of users and their lively expenditure of technological instruments. More to the point, cyber ethics may integrate and sometimes even substitute the formal involvement of the law, but also take the place of a similar firm and rigid regulation through technology.[113] This, of course, does not imply that the ethical or the technological responses are the only possible answer. Indeed, it rather suggests that a responsible mix of all types of rules must be contemplated.[114]

Such reflections are even more compelling when one considers the extreme likelihood in which technology evolves, which clearly demands a constant reassessment of the rules envisioned to apply to it. This is also explained by observing how the conduct of individuals and users has changed over time.[115] Indeed, artists deliberately use technology as a powerful instrument of creation.[116] Moreover, the great expansion of technology seems to have shaped a new concept of creativity, which may not be confined to any traditional categorisation, but have been labelled artistic but can easily

[113] Cf. L. LESSIG, *The Law of the Horse: What Cyberlaw Might Teach*, *Harvard Law Review* 113 1999, 501, who offers a critical analysis of the arguments that have sustained the unnecessity of a special attention to cyberlaw, as was defended by F. H. EASTERBROOK, *Cyberspace and the Law of the Horse*, in *U. Chi. Legal F*., 1996, 207, <https://www.law.upenn.edu/law619/f2001/week15/easterbrook.pdf> (edited version). On this point, see also C. MAIOLI, C. ORTOLANI, *La cyberlaw non è la horse law. L'informatica giuridica nelle Facoltà di Giurisprudenza*, Bologna: Gedit, 2007.

[114] See, among others, M. ANDERSON, *Technology: the law of exploitation and transfer*, Butterworths, 1996.

[115] At first, users were extremely cautious towards the use of technology, while it can be argued that this is now far from true. Afterwards, the interaction with technology became more frequent and showed increasingly less concern for the potential infringement of either informal or formal rules.

[116] See, on this, K. BENESCH, *Romantic cyborgs: authorship and technology in the American Renaissance*, Amherst: University of Massachusetts Press, 2002, who provides interesting examples of artists such as Poe, Melville and Hawthorne, who were all greatly entangled with technology and in general with science, to the extent that they then became an actual «laboratory for new ideas», at 158.

also be linked to the particular way in which the artist uses a certain technique and technology.[117]

However, the possibilities offered by the new digital world, including the chance that a conventional and, to some extent, limited handling of the text could be substituted by a more personalised and unexpected use thereof are even likely to increase, to some extent suggesting that something like a revival of orality is taking place.[118] In particular, as Lessig suggests, orality is still an essential component of some cultures, where the rise and development of traditional knowledge are characterised by a continuous exchange of cultural information. In such a context, borrowing seems to be a predictable practice and the increasing use of digital instruments indeed appears to promote citation and the remix of creative works with separate and sometimes indistinguishable authorship.[119]

Consequently, an epoch of conscious misattribution could be foreseen, although not necessarily and always reproached. In this regard, the interaction between technology and society first, and between technology and law second, is undeniable.[120] Technology represents, in fact, one of the means through which society operates. Besides, it represents an instrument to pursue determinant goals but it could also be a powerful danger.[121]

Pushing for continuous transformations in terms of the informal and legal rules surrounding it, technology indisputably offers several opportunities to engage with the

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[117] R. GORDON, *Dying and creating: a search for meaning*, Library of analytical psychology series, London; New York: Karnac Books, 2000, 8, 129.

[118] According to Ong, for instance, «fully literary persons can only with great difficulty imagine what a primary oral culture is like, that is, a culture with no knowledge whatsoever of writing or even the possibility of writing». W. ONG, *Orality and Literacy*. London: Routledge, 1982.

[119] This view is very well explained in L. LESSIG, *Remix. Making Art and Commerce Thrive in the Hybrid Economy*. New York: The Penguin Press, 2009.

[120] See, among others, G. PASCUZZI, R. CASO (eds.), *I diritti sulle opere digitali. Copyright statunitense e diritto d'autore italiano*, Padova: Cedam, 2002, 170, who also explore these issues from a comparative perspective, looking at the Italian and US legal systems.

[121] On this, see U. SIEBER, *The Emergence of Information Law: Objects and Characteristics of a New Legal Area*, cit., 11 et seq.; E. M. KATSH, *Law in a Digital World*. New York: Oxford University Press, 1995, 99; R. CASO, *Digital Rights Management. Il commercio delle informazioni digitali tra contratto e diritto d'autore*, Padova: Cedam, 2004.

Accordingly, some accurately wonder whether «the 'piracy' message changed our culture so much that the legal presumption is now that any 'copyright-unbranded' works available online are all to be feared as potentially infringing copies [and so whether] to rebut a presumption of illegality do we now need to formally affirm our status as lawful proprietors of the copies». K. BOWREY, *Law and Internet cultures*, Cambridge, UK; New York, N.Y.: Cambridge University Press, 2005, 166.

cyberspace of information.[122] Similar considerations apply in the narrower field of plagiarism, which is certainly affected by this changed behaviour. The ease with which users can copy and paste other individuals' work is a symptom of the phenomenon. However, if what has been previously argued has any relevance herein, this does not necessarily entail that they are infringing the rule for good.

Besides, it can be assumed that the rules have also changed. In fact, there might be greater flexibility among users towards the usage of their works, which reminds of the previous postulation on the peculiar attitude towards misattribution by certain disciplines. However, until it is not clear whether individuals embolden the violation of the norms, or deliberately ban it, even on the mere grounds of morality or ethics alone, this should in any case drive the attention of the jurist to bearing in mind these trends.

3.1 A double-edged sword: the threats and benefits of technology in copyright law

Technological change has always driven the law and its development in certain directions, although the exact outcome of these is unclear.[123] It is commonplace that the discovery of writing, and then the printing revolution, had a prodigious influence on cultural practices and learning. Similar conclusions apply to the persistent evolution that digital technologies operate on information.

In particular, the standardisation of text and the possibility of obtaining multiple identical copies of the same text have determined considerable change, but it was only through the rise of informatics and digital devices that such an evolution took a different turn. The enhanced use of electronic and digital devices, in fact, has radically changed the way we interact with the work and greatly increased the chances of its alteration and reproduction.This is an indisputable assumption, especially in light of the flowing nature of both laws and technology,[124] which makes the role of the interpreter, who has

[122] W. N. NEIL, *Cyberspace Self-Governance: A Skeptical View from Liberal Democratic Theory*, in E. LEDERMAN, R. SHAPIRA (eds.), *Law, Information and Information Technology*, The Hague: Kluwer Law International, 2001, 173.
[123] R. SUSSKIND, *Transforming the Law. Essays on Technology, Justice and the Legal Marketplace*, New York: Oxford University Press, 2000, 88-95, 132-133. Cf. E. L. EISENSTEIN, *Le rivoluzioni del libro. L'invenzione della stampa e la nascita dell'età moderna*. Bologna: Il Mulino, 1983.
[124] E. M. KATSH, *Law in a Digital World*. cit., 3-6.

to give the correct assessment of such an interrelation, quite challenging. Nevertheless, although information continually changes, the law does not always follow.[125]

Such considerations appear to be perfectly applicable to copyright, where the technological handling of the information has a central relevance, and so to plagiarism, which represents one of the possible and, to some extent, undesirable outcomes of the digital usage of information. On similar grounds, we can observe these transformations with regard to the concepts of authorship and creativity, which have become both more advantageous and certainly more controversial than they were before such transformations occurred. A higher degree of versatility makes it easy to access, modify and use creations of the mind, which sometimes also imply omitting proper authorship credit.

Besides, the challenging nature of technology noticeably augmented in the digital era. In fact, as has been observed, «digital technology has been changing the rules of the game dramatically, and users are increasingly confronted with copyright restrictions, which are said to conflict with norms of behaviour and general conventions about acts that are lawful and acts that are not».[126] As one can imagine, here the gap between law and informal norms significantly increase.[127] The extreme potentiality offered by the digital world, in essence, fosters a unique opportunity for the creation of intellectual products, which can be of an individual or collaborative nature. At the same time, however, it seems also effectively to weaken "the expressive diversity" of

[125] Studies on the topic have frequently referred to the centrality of information, with special attention to its significance in both the legal and technological environments. See, in particular, U. SIEBER, *The Emergence of Information Law: Objects and Characteristics of a New Legal Area*, in *Law,* E. LEDERMAN, R. SHAPIRA (eds.), *Information and Information Technology*, cit., 3-11, who also differentiates between the theoretical and practical meaning of information, where the latter emphasises its economic, cultural, social and legal meanings.

[126] Z. EFRONI, *Access-right: the future of digital copyright law*, New York: Oxford University Press, 2011,
360. Cf. M. F. SCHULTZ, *Copynorms: Copyright and Social Norms*, cit., 332.

[127] See P. TSATSOU, *Internet studies: past, present and future directions*, Farnham, Surrey; Burlington, VT: Ashgate, 2014, 153, who confirms the existence of such a gap, particularly within the controversial context of Internet.

intellectual creations,[128] particularly when copyright enforcement is called into question.[129]

Besides, some may want to shield the creative technological chances of appropriation,[130] while others may instead judge them to be harmful and undesirable. The position of the latter is well pictured in the words of Keen, who argues that an undiscriminating use and re-use of others' works essentially fails to acknowledge that such works were «composed or written by someone from the sweat of their creative brow and disciplined use of their talent».[131] Recalling the metaphorical image of plagiarism as theft, in fact he utters:

> One can't blame digital technology alone for (the) explosion of plagiarism and illegal downloading. The Web 2.0 culture grew up celebrating file sharing; and now it has provided, on a mass scale, the tools that make cheating and stealing so much easier and so much more tempting. Addictive, almost. After all, as any shoplifter will tell you, it's a lot easier to steal if you don't have to look the shopkeeper in the eye.[132]

Furthermore, perhaps somehow unwittingly, his colourful articulations put the accent on whether plagiarism is indeed more than a mere consequence of undisciplined

[128] N. NETANEL, *Copyright's paradox*, New York; Oxford: Oxford University Press, 2010 (first ed., 2008), 37-38, 39, 42, who underlines the expressive function of copyright to "fuel" creation, which should be considered something different from similar phenomena found in other areas of property law.

[129] For a broader reflection on the consequences of copyright infringement, see in partcular I. A. STAMATOUDI, *Copyright enforcement and the Internet*, Information law series, Vol. 21. Alphen aan den Rijn Kluwer Law International, 2010.

[130] N. NETANEL, *Copyright's paradox*, cit., 42, who accords a positive meaning to appropriation, as being intrinsically related to free speech, noting (at 196) also how it is now «easy for so many people to appropriate the images, sounds, and texts of popular culture and then add their own creative». The problem, he thinks, is that copyright law should make full acknowledgment of this opportunity, also in terms of «upend[ing] traditional means and institutions for disseminating knowledge and culture», which means that it needs to «adapt more radically than ever before», at 80.

[131] A. KEEN, *The cult of the amateur: how blogs, Myspace, YouTube and the rest of today's user-generated media are destroying our economy, our culture, and our values*, cit., 144-145, who develops these arguments in open contrast with Lawrence Lessig's ideas that new forms of creation such as mash-ups and remix should be welcomed for the benefit of the whole of society.

[132] A. KEEN, *The cult of the amateur*, cit., 145.

technology, but rather the result of a more complex and robust phenomenon of our society, with much more distant historical origins.[133]

Given these premises, it becomes necessary to strike a proper balance between the enthusiastic attitude towards the many possibilities offered by technology and the inherent risks that such potentiality comprises.[134] Besides, there are many responses to any of these risks, which include the recourse to remedies that are typically designed and managed by private order.[135] Such measures may entail a different kind of remedy, of either a formal or informal nature, where the latter includes ethical rules and codes of conduct on the Internet, sometimes referred to as "netiquette".[136]

The recourse to informal remedies is indeed encouraged by the doubts of those who explicitly argue for an insufficient and perhaps inefficient role of formal regulation alone, advocating a more active interaction with informal remedies,[137] including those specially designed by technology.[138] In line with such doubts, there seems to be increasing concern that it may be more appropriate to regulate the conduct of

[133] In addition, if any blame must necessarily be established, this may be directed at the so-called "publish or perish pressure", which has indeed increasingly been aggravated by digital technologies. See M. A. RUNCO, *Creativity: research should be a social science*, in M. D. MUMFORD, S. T. HUNTER, K. E. BEDELL-AVERS (eds.), *Multi-level issues in creativity and innovation*, Research in multi-level issues, Vol. 7, Amsterdam; London: Elsevier JAI, 2008, 75, 77, 78 et seq., who focuses on the creativity complex.

[134] On the controversial discerning of misattribution in some digital practices such as news aggregation, see in particular R. XALABARDER, *Google News and Copyright*, in A. LÓPEZ-TARRUELLA MARTÍNEZ (ed.), *Google and the law: empirical approaches to legal aspects of knowledge-economy business models*, Information Technology & Law Series No. 22, The Hague: T.M.C.; Asser Press: Springer, 2012, 113, 133 et seq.

[135] One initial and relevant example is the articulate apparatus of protection provided by technology, which includes what are otherwise known as technological measures. For an earlier analysis on the topic, see C. J. MILLARD, *Legal protection of computer programs and data*, London: Sweet & Maxwell limited, 1985.

[136] See, in particular, U. SIEBER, *The Emergence of Information Law: Objects and Characteristics of a New Legal Area*, cit.; but also U. SIEBER, *Legal Regulation, Law Enforcement and Self-regulation: A New Alliance for Preventing Illegal and Harmful Contents in the Internet, Protecting our children on the internet: Towards a new culture of responsibility*, Washington DC: Brookings Institution Press, 2000.

[137] This belief originates from the salutation that cyberspace has its rules and consequently its own remedies to apply in the case that these rules are violated by users. Therefore, the intervention of the law is not always necessary, especially when the rules that belong to cyberspace are adjusted with the informal social rules that we have previously analysed. On this see, among others, C. REED, *Internet Law. Text and Materials*, London: Butterworks, 2000.

[138] N. ELKIN-KOREN, *Copyright in Cyberspace: The Rule of Law and the Rule of Code, Law*, in E. LEDERMAN, R. SHAPIRA (eds.), *Information and Information Technology*, cit., 131-137. On the importance of necessary interaction, see U. SIEBER, *The Emergence of Information Law: Objects and Characteristics of a New Legal Area*, cit., 21.

individuals who interrelate in cyberspace rather than interfering with the technological devices that may also become instruments to perpetrate such conducts.[139]

Furthermore, it seems incontestable that the traditional approach of the law in the pre-digital context may not fully operate in a much more multifaceted digital environment.[140] This assumption additionally validates the idea that other rules might be taken into consideration. The first thought goes to the norms that include the system of regulation by code,[141] which mostly refer to the self-regulating measures that are encompassed in technologies.[142]

Such measures, indeed, must be discerned from those offered by law and other private order contexts, although they still share some common features with them.[143] A first significant difference, for instance, is denoted in the specification that codes of conduct are designed to impede bad behaviour before it occurs, while generally the pursuit of law is more to match the infringement.[144] In any case, when a particular code of conduct seems not to be working, there is still the prospect that a counter code applies, often demonstrating greater effectiveness.[145]

Additionally, embracing a broader connotation of "regulation by code", it is possible to include any codes or system of rules that apply to the digital environment.[146] Therefore, instead of limiting these peculiar controls to the measures offered by the technological means, it could be also accurate to consider it as also including social

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[139] Cf. H. L. MACQUEEN, *Copyright and the Internet*, in L. EDWARDS, C. WAELDE (eds.), *Law and the Internet. A Framework for Electronic Commerce*, Oxford and Portland, Oregon: 2000, 181.

[140] H. L. MACQUEEN, *Appropriate for the Digital Age'? Copyright and the Internet: 2. Exceptions and Licensing*, in L. EDWARDS, C. WAELDE (eds.), *Law and the Internet*, Oxford and Portland, Oregon: Hart Publishing, 2009, 203.

[141] N. ELKIN-KOREN, *Copyright in Cyberspace: The Rule of Law and the Rule of Code*, *Law*, cit., 134-135.

[142] Similarly to what has been illustrated with reference to social norms, «constraints imposed by the natural and technological environment may […] effectively displace laws, and changes in technology can undercut a law's effectiveness even if the law's text remains unchanged». B. VAN SCHEWICK, *Internet architecture and innovation*, Cambridge, Mass.: The MIT Press, 2012 (first ed., 2010), 26.

[143] Precisely, it is here important to anticipate that the law may, on the one hand, uphold technical constraints by sanctioning, for instance, attempts to circumvent them, or, on the other hand, may also dwindle their effectiveness by prohibiting their usage. B. VAN SCHEWICK, *Internet architecture and innovation*, cit., 26.

[144] N. ELKIN-KOREN, *Copyright in Cyberspace: The Rule of Law and the Rule of Code*, *Law*, cit., 135.

[145] As Spinello highlights, «correcting technology with other technology has been far more effective» R. SPINELLO, *Cyberethics. Morality and Law in Cyberspace*. Sudbury, Massachusetts: Jones and Bartlett Publishers, 2000, 1.

[146] With regard to the meaning of "code", see also U. PAGALLO, *Teoria giuridica della complessità. Dalla "polis primitiva" di Socrate ai "mondi piccoli" dell'informatica. Un approccio evolutivo*. Torino: Giappichelli, 2006, 153.

norms, economic as well as legal rules.[147] At the same time, the express inclusion of social norms therein corroborates the earlier assumption that the role played by ethics is in this context one of a kind.[148]

3.2 A device to protect or violate attribution

Thinking of the technology factor, in particular, the first immediate concern relates to digital rights management (DRM),[149] which allows strict control over the work and is essentially designed to regulate the work's use, also by means of restricting, even impeding, access to it.[150] Nevertheless, despite the latent downside aspects emerging from this outcome, there is still potential for positive implications, as such measures were also designed to protect the interests of individuals that put all their efforts into the works to which these standards apply.

Indeed, looking strictly at the role they may have in protecting the authorship of the authors' works, it is inevitable to notice that they could effectively supply what the conventional systems of regulation are not providing. The latter postulation, in any case,

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[147] The power of self-regulation, which is inherent to the code to the extent that it can be considered the law itself, clearly encounters this issue.
On the persistence to include more factors in the debate, see L. LESSIG, *Code. Version 2.0*, in New York: Basic Books, 2006; L. LESSIG, *Free culture: «how big media uses technology and the law to lock down culture and control creativity»*, New York: the Penguin Press, 2004, 143-150.

[148] Understandably, the law applicable to cyberspace has an intrinsic uniqueness, but not to the extent that it should be treated as unrelated to other areas of the law or from other fields of knowledge. This puts forward the need to ponder over interdisciplinary, pursuing a wise consideration of social norms and other modes of regulation.
In particular, I here refer to the informal norms that appear particularly suitable for the digital world. Morever, concerning the subject of computer ethics, as has been already pointed out, many scholars have contributed to its development. See, among others, N. WIENER, *Cybernetics: or Control and Communication in the Animal and the Machine*. Cambridge, Massachusett: MIT Press, 1948, the first who elaborated a theory on the issue; and, among later contributions, D. JOHNSON, *Computer Ethics. Upper Saddle River*. New Jersey: Prentice-Hall, 1994.; L. LESSIG, *Code: and Other Laws of Cyberspace*, cit.; J. MOOR, *What is computer ethics?*, B. TERREL WARD (ed.), *Computer and Ethics*,. Malden, Massachusett: Blackwell, 1985; M. DURANTE, *Il futuro del web: etica, diritto, decentramento. Dalla sussidiarietà digitale all'economia dell'informazione in rete*, cit.

[149] R. CASO, *Digital Rights Management - Il commercio delle informazioni digitali tra contratto e diritto d'autore*, cit., 69-72, 75 et seq.

[150] T. APLIN, *Factoring the public interest into private enforcement of copyright: the role of TMs and exceptions in the EU*, di M. LILLÀ MONTAGNANI, M. BORGHI (eds.), *Proprietà digitale. Diritti d'autore, nuove tecnologie e digital rights management*, Milano: Egea, 2006, 166.

is valid insofar as such measures are not a substitute for the law or other types of socially shared norms.

In fact, the greater risk of endorsing a system of strict technical regulation is to promote what has been defined as *paracopyright*, in the sense that it has all the features of conventional copyright legal rules, but yet avoids its core and protective principles.[151] This risk plausibly also applies to misattribution, where the necessity of a proper balance between distinct and potentially opposing interests needs to be sought. As formerly explained, digital technologies allow a unique interactive relationship with the work, which is indeed very different from the one we used to have before digitalisation.[152] This involves contrasting attitudes towards it.

On the one hand, digital technologies allow new creative doings, such as, in the musical context, the act of sampling or mixing musical compositions, which imply an intervention of the work and often its alteration that may also have certain effects on the original way the author conceived it. On the other hand, the right of the author to be credited as such might be at stake, especially when there is no intention by the user who interacts with the original work to acknowledge authorship, or in the case that this acknowledgment is made extremely difficult by the very nature of the creative act.

It is indeed ascertained that digital work, either digitalised or born, can be the recurrent object of misattribution.[153] Technologies, in fact, together with the diffusion of the Internet, have brought new challenges for copyright.[154] These may affect the right of

[151]On this warning, see R. CASO, *Il Signore degli anelli nel ciberspazio*, cit., 146 et seq. Besides, as Elkin-Koren suggests, «Some level of free access to information is essential for further creation. Information is developed incrementally. Existing information stimulates the creation of more information, so extensive use of information may increase the likelihood of further innovation. That is because innovative developments are not necessarily tied to any financial resources. Some innovations may depend on intellectual capability, circumstances, level of cooperation and luck». N. ELKIN-KOREN, *Copyright in Cyberspace: The Rule of Law and the Rule of Code*, cit., 143. See also J. LITMAN, *The Public Domain*, *in Emory LJ*, Vol. 39, 1990, 965.

[152] See, on this, M. RICOLFI, *Gestione collettiva e gestione individuale in ambiente digitale*, in M. LILLÀ MONTAGNANI, M. BORGHI (eds.), *Proprietà digitale. Diritti d'autore, nuove tecnologie e digital rights management*, cit., 183-189.

[153] P. SAMUELSON, *Digital Media and the Changing Face of Intellectual Property Law*, in *RUT Computer & Tech LJ*, Vol. 16, 1990, 323.

[154] S. STOKES, *Digital Copyright: Law and Practice* (3rd edition). Oxford and Portland, Oregon: Hart Publishing, 2009, 10.

attribution, which appears infringed every time the reproduction of the work or any other uses thereof omit the identification of its author.[155]

In other words, the prospect of print and reproducing an infinite number of copies of a work is followed by the even more contentious likelihood that the works in question may easily be modified and reutilised. The former aspect, indeed, is not always encouraging and may have an adverse consequence instead, especially when the acknowledgement of credit is deliberately missing from the picture and the attribution norm has been consequently voided.

However, even when a violation of the norm in question is established this does not mean that the rule against misattribution is functioning properly, given that there might not be any consequence for the breach. On the contrary, the rule of attribution is effective when there is sufficient room to foresee the possibility that some sanctions, either formal or informal, may apply, especially when linked to the risk that people would otherwise find it costless to take other works and pass them off as their own instead of creating something new and original. However, before considering the specific sanctions that may apply, it appears necessary to understand the variability that characterises the many possible approaches to misattribution, which are a reflection of the many variable attitudes towards copyright matters in general.[156]

All these considerations seem to be in line with the growing relevance of specialist studies on authorship attribution, which also increase the significance of misattribution. Indeed, starting with the analysis of texts expressed in natural language,

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[155] S. STOKES, *Digital Copyright: Law and Practice (3rd edition)*, cit., 74-79.
Besides, the spread of multiplying information has made cases of misattribution even more frequent, even in the academic and education field. Cf. N. J. AUER, E. M. KRUPAR, *Mouse Click Plagiarism: The Role of Technology in Plagiarism and the Librarian's Role in Combating it*, in *Libr. Trends*, Vol. 49, No. 3, 2001, 415, <https://www.ideals.illinois.edu/bitstream/handle/2142/8353/librarytrendsv49i3d_opt.pdf>, who lists some factors that contribute to the occurrence of plagiarism. Such contributory factors include the lack of proper information, namely the ignorance of the norms of attribution; the desire to reach certain results without spending energy or time to create his/her own work; the lack of interest towards culture and learning in general; and, finally, the mutability of a given social and ethical environment.

[156] A critical aspect of such an issue can also be found again in the propensity of technologies to clash with one of the core elements of copyright, namely the idea-expression dichotomy, implying the inadequacy of the standard system of regulation and rather suggesting the adoption of different rules. Rules that, it must be recalled, should be a careful combination of all the factors that rotate around copyright, namely law, contracts, technology (or code) and social norms. On this last aspect, see R. CASO, *Il Signore degli anelli nel ciberspazio: controllo delle informazioni e Digital Rights Management*, in M. LILLÀ MONTAGNANI, M. BORGHI (eds.), *Proprietà digitale. Diritti d'autore, nuove tecnologie e digital rights management*, cit., 110-113.

these studies were soon shaped to meet the requirements of new technologies,[157] finding also detailed application in the broader field of copyright infringement.[158] Besides, the intensifying relevance of electronic texts seems to have greatly concentrated studies on authorship attribution, in the context of computer-based creations, where «a text is classified according to whether it was written by a specific author or not»,[159][160]

In brief, verbatim or literary reproduction is unquestionably made easier by digital technologies, especially if one considers the lenience of using copy and paste in digital creation. So far, there is not a great deal of concern insofar as authorship is acknowledged. On the contrary, when this does not happen, the reaction of authors and the public in general might be different, and contrasting claims may arise. Some appear to promote disheartening campaigns against the infringers, while others believe it is a one-way direction and simply overlook it. Still, when such a violation occurs, technology may itself provide certain measures against it, with all its controversial implications.

[157] V. P. BHATTATHIRIPAD, *Judiciary-friendly forensics of software copyright infringement*, Hershey PA: Information Science Reference (IGI Global), 2014, 112, who also guides the reader along the history of authorship analysis. Cf. D. H. CRAIG, A. F. KINNEY, *Shakespeare, computers, and the mystery of authorship*, New York: Cambridge University Press, 2012 (first ed., 2009); A. GALEY, *The Shakespearean archive: experiments in new media from the Renaissance to postmodernity*, Cambridge; New York: Cambridge University Press, 2014.

[158] On the specifics of computational analysis applied to authorship attribution, see K. LUYCKX, *Scalability issues in authorship attribution*, Brussel: ASA Publishers, 2010; P. Juola, *Authorship attribution*, Hanover, Mass.: Now Publishers, 2008 (first ed., 2006); J. BELZER, A. G. HOLZMAN, A. KENT (eds.), *Encyclopedia of computer science and technology*, New York; Basel: Marcel Dekker, 1975 (2002).

[159] See also E. LEOPOLD, M. MAY, G. PAAß, *Data mining and text mining for science and technology research*, in H. F. MOED, W. GLÄNZEL, U. SCHMOCH (eds.), *Handbook of quantitative science and technology research: the use of publication and patent statistics in studies of S&T systems*, Dordrecht: Kluwer Academic Publishers, 2004 (2012), 187, who speak of «special case of text classification», which entails various approaches, depending on the used technique, for example, statistics (at 205).

[160] See, in particular, S. M. HOCKEY, *Electronic texts in the humanities: principles and practice*, New York: Oxford University Press, 2014 (first ed., 2000), who provides a detailed analysis of attribution studies in line with the growing expansion of computing in humanities.
More specific on forensic applications are, among others, the contributions of S. LARNER, *Forensic authorship analysis and the world wide web*, Basingstoke: Palgrave Macmillan, 2014; C. T. LI, *Handbook of research on computational forensics, digital crime, and investigation: methods and solutions*, Hershey, PA: Information Science Reference, 2010.

Among the various instruments of such a technological response,[161] the most striking example is represented by software, which is purposively designed to address the conduct of plagiarism. Commonly known as a plagiarism detector or plagiarism detection system and initially used by schools and universities,[162] it now finds regular application in various contexts of digital media. Here, in fact, the inference that «among the most interesting opportunities to protect contents is emerging software that will enable editors to detect plagiarism and attribution issues quickly and easily» appears to be definitely fitting.[163]

However, although such a measure seems to have received welcoming acceptance, there are still many concerns regarding its actual feasibility to address and effectively regulate the phenomenon of plagiarism, particularly when new works pertaining to unconventional subject matters are involved.[164] In particular, the automatic functioning of software poses inevitable doubts about its practical capacity to correctly ascertain plagiarism.[165] Furthermore, how its evaluation should be concretely carried out by the court is another matter altogether.[166]

These conclusions also remain valid when the object of misattribution is a digitally born work. Among the numerous exemplifications of conduct that imply

[161] These may relate to search engines, systems of indexisation, and reverse engineering. On the last concept, in particular, and its inference with the concepts of creativity and originality, see W. WANG, *Reverse engineering: technology of reinvention*, Boca Raton, FL, USA: CRC Press, 2011, 11, who defines engineering design as «the process of devising a system, component or process to satisfy engineering challenges and desired needs [that] focuses on creativity and originality», while «reverse engineering focuses on assessment and analysis to reinvent original parts, complement realistic constraints with alternative engineering solutions».
Concerning the relevant literature on the issue, see U. GASSER, *Regulating Search Engines: Taking Stock and Looking Ahead*, in *Y.J.L.T.*, 2006, 201; J. GRIMMELMANN, *The Structure of Search Engine Law*, *in Iowa L. Rev.*, Vol. 93, 2007, 1; P. SAMUELSON, S. SCOTCHMER, *The Law and Economics of Reverse Engineering*, in *Yale L. J.*, 111, 2002, 1575.; S. VAIDHYANATHAN, *The Googlization of Everything and the Future of Copyright*, in *U.C. Davis L.Rev.*, Vol. 40, 2007, 1207; M. SAG, *Copyright and Copy-Reliant Technology*, in *NULR*, Vol. 103, 2009, 1608.

[162] For a recent survey on plagiarism detection software and citation-based similarity methodology to detect plagiarism, see B. GIPP, *Citation-based Plagiarism Detection Detecting Disguised and Cross-language Plagiarism using Citation Pattern Analysis*, Wiesbaden Springer Fachmedien Wiesbaden, 2014.

[163] J. V. PAVLIK, *Media in the digital age*, New York: Columbia University Press, 2008, 210, who considers the examples of «pattern-matching [or] content-identification systems» and, while questioning their actual reliability, counts on the development of future and more effective systems.

[164] On this, see S. MOSHER STUARD, W. J. CRONON, *How to Detect and Demonstrate Plagiarism*, in *Am. Hist. Rev.*, 2006, <http://www.historians.org/governance/pd/plagiarism.htm>.

[165] This appears to be properly summarised in the warning: «even electronic tools are no panacea for the problem of plagiarism». B. MURRAY, *Technological tools to detect dishonesty*, in *APA Monitor*, Vol 33, No. 2, 2002.

[166] Cf. C. GEYH, *What's Law Got to Do With It? : What Judges Do, Why They Do It, and What's at Stake*, Palo Alto: Stanford University Press, 2011, 126-137.

authorship misattribution in cyberspace, one could mention the reproduction of website content or blog posts. In such contexts, in fact, reproducing in full or in excerpts has become common practice, undoubtedly being facilitated by instant access to the Web and the natural resort to technological instruments that quickly duplicate them.

At first sight, it could be determined that what was discussed before with regard to the norm of attribution in general is logically also valid for these peculiar works of the mind. Therefore, it should follow that their authors are entitled to the same protection that conventional authors have enjoyed, such as those who write novels or compose symphonies.

However, the peculiar nature of these works is that they often originate from the arrangement and combination of other works,[167] in which authorship attribution may not have been acknowledged. The latter circumstance, indeed, clearly complicates the picture but also confirms the fundamental principle that, aside from the subject matter considered or the peculiarity of certain process of creation, the expectancy to follow the norm of attribution still has crucial relevance.[168]

In conclusion, considering the characteristic linkage of law, society and technology that has thus far been illustrated, it is also appropriate to acknowledge that the subject of copyright remains deeply intertwined with definite legal rules.[169] Therefore, it is time to bring to the foreground the analysis of misattribution within the Italian and UK legal systems. Nevertheless, this does not imply that the weapons of

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[167] L. LESSIG, *Remix. Making Art and Commerce Thrive in the Hybrid Economy*, cit., 35-36, and 46.

[168] Accordingly, other digital practices such as Internet *linking* and *framing* provoke contrasting reactions. On the one hand, while they pursue their specific aims, they also have positive social implications, as they enhance the communication and sharing of information. On the other hand, they may also implicate acts that could be ascribed to infringing conducts, especially when their misuse consists of the deliberate avoidance of a ban of linking or in the omission of the source. See R. SPINELLO, *Cyberethics. Morality and Law in Cyberspace*, cit., 90-92, and 98.
This particular attitude, indeed, is clearly reflected in the ambiguity regarding the way in which such activities are understood in common language, once again through the provocative lens of news reporters. Cf. C. S. KAPLAN, *Lawsuit May Determine Whether Framing Is Thieving*, in *N.Y. Times Cyber L. J.*, 29 May 1998, <http://partners.nytimes.com/library/tech/98/05/cyber/cyberlaw/29law.html>; A. DUNN, *Hey, You! Who You Pointin' At?*, in *N.Y. Times Cyber L. J.*, 21 May 1997, <http://partners.nytimes.com/library/cyber/week/060697totalnews.html>; M. RICHTEL, *Big News Media Companies Settle With Web Site in Suit on Linking*, in *N.Y. Times Cyber L. J.*, 6 June 1997, <http://partners.nytimes.com/library/cyber/surf/052197mind.html>.

[169] Cf. S. BALGANESH (ed.), *Intellectual Property and the Common Law*, New York: Cambridge University Press, 2013, in which this view is made explicit.

interdisciplinarity should or will be put away. On the contrary, they will be of a great help for the comparative exploration that follows.[170]

[170] As has been noticed, in fact, comparative law should concern not only other legal fields, but also other non-legal disciplines. See, on this, P. GILLES, *Aspetti metodologici e teorici dell'armonizzazione del diritto processuale* [traduzione dal Tedesco a cura di A. Verzì], in *Annali del Seminario giuridico dell'Università di Catania* (2005-6), Facoltà di Giurisprudenza, Milano: Giuffrè, 2007, 462. On this, see also D. S. CLARK, *Comparative law and society*, Cheltenham, UK; Northampton, Mass., USA: Edward Elgar, 2014 (first. ed., 2012).

CHAPTER 4

THE LEGAL FACADE OF AUTHORSHIP ATTRIBUTION IN ITALY AND THE UNITED KINGDOM

1 A brief overview of authorship and its contentious acknowledgment

Interdisciplinarity is a powerful instrument of analysis, but likewise it can be tricky when there is an actual risk of drifting the enquiry away from the law, particularly when the legal assessment is an essential feature of the study. Besides, despite the fabulous and socially driven envisioning of plagiarism, the act of misattributing attribution still has its exact roots in the law.

Authorship, meant as both the act of creating an intellectual work and the source or origin of such creation, has indisputably evolved over time. Retracing its historical development and recalling what has initially been illustrated regarding the expansion of the creative process,[1] it appears reasonable to assume that the story of authors, as originators of their own intellectual works, has been characterized by alternating periods of both selfhood and collectiveness. Sometimes their works were the result of virtuous originality, but most of the time they were the product of a mutualistic effort or the fruit of cumulative knowledge originating from previously established subjects.

Besides, with the spread of the Romantic ideals, the fervent figure of the solitary author conceivably reached its zenith, yet with some wariness that depends upon a careful reading of the actual literary and artistic practices of that unique epoch.[2] Nonetheless, such an idiosyncratic picture has often been greeted with disparagement, mainly with the aim of refuting the idea that authorship should be reduced to a front-

[1] We have seen how historical, cultural, social and technological changes have significantly affected copyright and, accordingly, the concepts that traditionally characterized it, such as creativity and originality. In a similar manner, all the above factors had a clear impact on authorship.

[2] It is commonly argued that the Romantic era vividly fashioned the author, as never seen before, like a sole or lone creator in his/her unique world. Regardless of the full accuracy of these arguments, it is, however, correct to notice that at that time the emphasis placed on the creative process was particularly resilient.

running figure.[3] At the same time, however, even such criticism ultimately resulted in confirmation of the authorship paradigm, either in terms of an allegorically «joint enterprise» between the author and the public,[4] or an actual shared authorship emerging from the collective creative nature of many contemporary works.

Studies on the attribution of authorship seem to have existed long before the invention of writing, even when the practice of passing on tales and melodies aloud was conveyed by the contextual transmission of their acknowledged authors.[5] However, it was with the engraved words and the need to archive them in durable repositories that those studies more formally began to address and eventually settle more or less controversial acknowledgments of authorship.[6]

At the same time, the subsequent evolution of these studies into a scholarly discipline is intrinsically related to the approach that both academia and society took towards plagiarism. In other words, «a growing cultural disapproval of plagiarism [had] important implications for the future of both authorship and attribution».[7] This apparently allow increasing endeavours to disentangle uncertain or controversial acknowledgements of authorship,[8] but at the same time fostering dangerous restraints on the autonomy of the creative process, especially when imposing restraints on collaborative or cumulative creation:

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[3] Against the idea of solitary authorship is, for instance, L. ZEMER, *The idea of authorship in copyright*, Applied legal philosophy series, Aldershot, UK: Ashgate, 2007, who describes it literally as a fiction and holds that «there is, as I argue, only one form of authorship: the joint authorship between public and authors» (at 97).

[4] Advocating the role of the public in the creation of intellectual products, Zemer suggests «a model of public authorship» and accordingly asks to rethink the way the copyright system allocates rights by acknowledging the public authorial role and emphasizing the strong dependence linking copyright and the public contribution to the creation of intellectual works. L. ZEMER, *The idea of authorship in copyright*, cit., 2-6.

[5] Cf. *supra*, Chapter 3.

Furthermore, it is worth repeating that the interest demonstrated by scholars towards questions of authorship attribution varies from literary to technical studies, such as the statistical application of language studies and computer-applied sciences. Similarly, it has been the subject of controversies, which have proved how acknowledging the authorship of intellectual works has often been problematic.

[6] H. LOVE, *Attributing authorship: an introduction*, Cambridge, UK: Cambridge University Press, 2010 (first ed. 2002), 14-26, who provides a detailed historical recount of attribution studies, explaining how writing has implied the need to give texts a certain identification, especially when they had to be stored in libraries, and how the meticulous work of librarians greatly contributes to their systematic development, together with the initial establishment of a methodology.

[7] H. LOVE, *Attributing authorship: an introduction*, cit., 28.

[8] Many of these concerns originated from attempts to clarify contested authorship, which often depend on the improper attribution to homonyms or anonymous works, or even false attribution that could, on the other hand, increase profits regardless of booksellers. H. LOVE, *Attributing authorship: an introduction*, cit., 18-20.

> In cases where an author makes extensive unacknowledged use of the words of other authors we have what is now called plagiarism (still a form of authorship, albeit a discreditable one) [but also] disarming acknowledgment of quasi-plagiarism [ascertained] in appropriation practices.[9]

As anticipated, solitary and exclusive authorship has been extensively demeaned as unfortunate and unrealistic. Nevertheless, even its denial seems to have proved, and even accentuated the real survival of the author, who died and resurged intermittently according to the fashions of commentators of the time.[10]

In his now classic study *The death and return of the author*, for instance, Burke [is] quite critical towards the seemingly linear portrayal of anti-authorial discourses, such as those emerging in the theories of Barthes, Foucault and Derrida, craving for greater caution towards the alleged fading or death of the writer, and rather implying that what was really at issue was the inconsistency of certain authorial categories.[11] Opening his study with an analysis of perhaps the most notorious essay of Barthes, *The Death of the author*,[12] which he describes as «the single most influential meditation on the question of authorship in modern times»,[13] Burke places the accent on the "birth of the reader", who lives and breathes in the factual realm of authorship.[14]

In other words, in his composition, Barthes is mostly concerned with the limitation that seems to be imposed on a text by a closing link to the author. Indeed,

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[9] H. LOVE, *Attributing authorship: an introduction*, cit., 32-34, 39-40 (quotation at 41), explaining how, on the one hand, authorship includes a number of activities that require collaboration more than a single individual author, and, on the other hand, a relatively large number of works are created under the influence, imitation and incorporation of other preceding works.

[10] S. BURKE, *The death and return of the author: criticism and subjectivity in Barthes, Foucault and Derrida*, cit., who explains how, similarly to the death of God, the theory of the author's disappearance instead hinders its exact vitality. See also, of the same author, a collection of essays on the subject of authorship from classic times to the twentieth century: S. BURKE (ed.), *Authorship: from Plato to The Postmodern: A Reader*, Edinburgh: Edinburgh University Press, 2000 (first ed. 1995).

[11] S. BURKE, *The death and return of the author*, cit., 8 et seq. While he acknowledges that those theorists brought anti-authorialism to its most extreme point, he also suggests the essentiality of a cautious reading and evaluation of their anti-authorial discourses (at 16-18).

[12] R. BARTHES, *The Death of the Author* [1967, 1968], in *Image, music, text.* Translated by S. Heath, London: Fontana Press, 1977.

[13] S. BURKE, *The death and return of the author: criticism and subjectivity in Barthes, Foucault and Derrida*, cit., 19.

[14] In fact, as he utters, «everywhere, under the auspices of its absence, the concept of the author remains active, the notion of the return of the author being simply a belated recognition of this critical blindness [so that the] direct resistance *to* the author demonstrates little so much as the resistance *of* the author» S. Burke, *The death and return of the author*, cit., 172.

rather than uttering that he completely refused the author, it seems more accurate to argue that he indeed refuted the oppressiveness of a rigid characterization of authorship on texts and, more generally, on culture. Give this purported dictatorship, what counts most is the reader, who is also the addressee of the text, while the author could mostly to be regarded as a «scriptor» rather than a «creator».[15]

Like authorship, the notion of the author has also changed over time,[16] particularly when his/her mission became inherently intertwined with a specialized and marketable profession that inevitably altered the nature and form of many creative works.[17] Such instances, furthermore, lead the concepts of authorship to intersect with topics that may, at this point, be quite familiar, such as the ethical and technological repercussions of new practices and various ways of engaging with copyright works.

To some extent, these difficulties are correlated to the problems that more broadly affect copyright, which are in large part caused by its misreading and the consequent fallacies of some arguments on its defence.[18] Indeed, the constant brawl to find a compromise between private instances and the public interest has often resulted in a firm advancement of the former at the expense of the latter.[19] An example of such an imbalance seems to be envisioned in the disavowal of the essential role that the

[15] R. BARTHES, *The Death of the Author*, cit., 142.
In this sense, the link that has traditionally fused authorship and authority appears to be extremely weakened, particularly to the extent that the former relies on the figure of a sole individual originator, which must be considered a mere invention in itself. Nevertheless, despite what the essay's title literally may suggest, it would be improper to conclude that Barthes' aim was to erase entirely the author from the picture, but rather to suggest that greater emphasis should be placed on the reader, as he/she had taken part in the construction of the text. On this, see also his other work: *The Pleasure of the Text* (1971).
[16] A. BENNETT, *The author*, London and New York: Routledge, 2005, who investigates and explores the origins and evolution of such a notion, considering its influence on literacy by also analysing the related concepts of authority, originality and ownership.
[17] See M. NEWBURY, *Figuring authorship in antebellum America*, Stanford, Calif.: Stanford Univ. Press, 1997, who explains how authorship changed, particularly during the nineteenth century, and how the new industrially driven establishment of culture influenced the creation of a new understanding of being an author.
D. O. DOWLING, explores the same topic in a later contribution*:Capital letters: authorship in the antebellum literary market*, Iowa City: University of Iowa Press, 2009, which additionally considers how technological change determined this alteration and how the figure of the (now professional) author started being pressured by the market but also by a more conscious and interactive readership.
[18] Cf. G. S. LUNNEY JR., *The Death of Copyright: Digital Technology, Private Copying, and the DMCA* in *Va. L. Rev.*, Vol. 87, 2001, 813.
D. NIMMER, *The End of Copyright*, (1995) *Vanderbilt Law Review* 48, 1385.
[19] L. ZEMER, *The idea of authorship in copyright*, cit., 96–97.

society or community plays in the creation of knowledge,[20] but also in respect to collaborative and joint authorship.[21]

Some wonder whether the answer is therefore to proclaim the end of copyright,[22] as Litman seems to suggest,[23] or whether there should be one or more other viable answers, such as a more effective interaction with the broader set of human rights[24] or the expansion of some public interest defences. On the one hand, this opens up possible ethical predicaments that may concern misattribution practices;[25] and on the other hand,

[20] According to Zemer, Foucault «informs us that an author is an ideological figure [eroding] the concept of the individual writer [and denying it] is the originator of a text [but rather] a social construction». L. ZEMER, *The idea of authorship in copyright*, cit., 144.
Alleging that copyright works are not an exclusive private property, but are first of all a social product, see S. SCAFIDI, *Intellectual Property and Cultural Products*, in *Bost ULR*, Vol. 81, 2001, 793. Of the same author, see also S. SCAFIDI, *Who owns culture? Appropriation and authenticity in American law*, Rutgers series on the public life of the arts, New Brunswick, N.J.: Rutgers University Press, 2005.
On the collaborative authorship dimension, see, in particular, M. WOODMANSEE, P. JASZI (eds.), *The construction of authorship: textual appropriation in law and literature, Post-contemporary interventions*, Durham: Duke University Press, 2006 (first ed. 1994).

[21] Looking at these particular instances, they have also directed some attention towards the requirement of intention; however, given that no explicit reference is made in the CDPA, some wonder whether it may be found elsewhere. L. ZEMER, *The idea of authorship in copyright*, cit., 203–204, who also cites the earlier case law of *Levy v Rutley*, circa 1871, Common Pleas, [1871] LR 6 CP 523, as well as the more recent *Stuart v Barrett*, circa 1994, Chancery, [1994] EMLR 448, in which the need for an actual contribution was, in any case, to be essentially required.
Cf. D. NIMMER, *Copyright in the Dead Sea Scrolls: authorship and originality*, in *Hous. L. Rev.*, Vol. 38, 2001, 1, <http://www.houstonlawreview.org/archive/downloads/38-1_pdf/HLR38P1.pdf>; M. WOODMANSEE, *Response to David Nimmer, 'Copyright in the Dead Sea Scrolls: Authorship and Originality'*, in *Hous. L. Rev.*, Vol. 38, 2001, 231, <http://scholarlycommons.law.case.edu/faculty_publications/234>.

[22] Zemer sustains that there is surely no necessity to proclaim the death of copyright. Accordingly, what should be pursued is not the refusal of all copyright theories, but instead the extreme individualism and disavowal of the social dimension. L. ZEMER, *The idea of authorship in copyright*, cit., preface and 7.

[23] J. LITMAN, *Digital Copyright*, New York: Prometheus, 2006 (first ed. 2001) <http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1000&context=books>.

[24] The idea of the public as joint author seems to support the need for rethinking copyright. Furthermore, if the answer is not to be found in disobeying copyright rules, there could be other options. One possibility is a better dialogue with the human rights community (P. DRAHOS, *Intellectual property and human rights*, in *I.P.Q.*, Vol. 3, 1999, 349, <https://www.anu.edu.au/fellows/pdrahos/articles/pdfs/1999iPandhumanrights.pdf>), which, according to Zemer, may effectively be an instrument to ensure compliance with the freedom of expression. L. ZEMER, *The idea of authorship in copyright*, cit., 221.
See also N. LEE, G. WESTKAMP, A. KUR, A. OHLY (eds.), *Intellectual property, unfair competition and publicity: convergences and development*, European Intellectual Property Institutes Network series, Cheltenham, UK; Northampton, Mass.: Edward Elgar, 2014 (first ed. 2013), 300.
Cf. H. LADDIE, *Copyright: over-strength, over-regulated, over-rated?* in *EIPR*, Vol. 18, No. 5, 1996, 253.

[25] Questions concerning authorship have taken the route of ethics, for instance, when the analysis of the composition process has comprised the investigation of ethical accountability towards authors and readers. See, in particular, a more recent work of Sean Burke who, following the traces left by his two contributions to the field, has added some interesting pieces to the scenery with the aim of developing a model of authorial ethics. S. BURKE, *The ethics of writing: authorship and legacy in Plato and Nietzsche*, Edinburgh: Edinburgh University Press, 2010 (first ed. 2008).

it investigates the impact of technology on the process of creation within the larger discourse of intellectual authorship and ownership.[26]

This last aspect, moreover, pushes for taking into full consideration all monetary and non-economic aspects of copyright. For instance, the issue of considering borrowing legitimately, or not, should not depend merely on the exclusive assessment of a right infringement; on the contrary, it deserves broader consideration that takes into account its cultural, social, economic and technological sways. The same is true of the concepts of copyright ownership and authorship, the appreciation of which ideally should always aim to strike a balance between private and public interests.[27]

All the arguments above imply a corroboration of what has previously been inferred with regard to the advantages of adopting an interdisciplinary approach to better appreciating the manifold shades of copyright and authorship attribution in particular.[28] This appears particularly true when resorting to a legal but comparative analysis, which appears even more advantageous taking into exact consideration the legal schemes of two seemingly very different countries, namely, Italy and the United Kingdom.

2 The contemporary latitude of moral rights in copyright law: a comparative line

It has been sustained that an interdisciplinary approach may help the interpreter to appraise the issue of authorship attribution, as well as that of copyright generally. However, interdisciplinarity is not the only instrument that deserves attention. Another relevant tool is in fact represented by comparative studies that forthrightly enter the

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For a broader analysis of moral predicaments, see H. E. MASON (ed.), *Moral dilemmas and moral theory*, New York: Oxford University Press, 1996, which explores the subject and tries to find a rational way out.

[26] E. HEMMUNGS WIRTÉN, *No trespassing: authorship, intellectual property rights, and the boundaries of globalization*, Studies in book and print culture, Toronto: University of Toronto Press, 2004, who also underlines the unique role of the translator and the delicate argument of protecting traditional knowledge.

[27] These arguments are particularly explicitly articulated in S. VAIDHYANATHAN, *Copyrights and copywrongs: the rise of intellectual property and how it threatens creativity: with a new afterword*, Media studies, Legal studies, New York [etc.]: New York University Press, 2003 (first ed. 2001), who is extremely critical towards the current approach of Western and particularly US copyright law. Moreover, he believes that its exceedingly punishing and restraining attitude undoubtedly frustrates the creative process and thus impedes the expected progress of arts and culture.

[28] Yet, as will be explained, many copyright issues remain (deliberately?) unsettled.

world of legal analysis. In particular, assuming that the study of copyright is an analysis of both the legal environment and the complex dynamics that regulate it, the role of the law in any case appears to be overriding.

In this way, however, if comparative law may be regarded, like interdisciplinarity, as another viable option to overcome the hitches arising from the characteristic involvedness of contemporary intellectual property, it should also be carefully considered whether it might be desirable to establish any boundaries. Consequently, there seems to be sufficient latitude to withstand the fact that an exact comparative legal approach deserves its own peculiar space in the debate.[29]

Even so, interdisciplinary and comparative law discourses are reciprocally intertwined.[30] Indeed, what seems to elevate comparative law even further from its recourse to interdisciplinarity is the fact that a fruitful assessment and estimation of other legal and non-legal disciplines may help it to overcome the perils of comparative research.[31] This may be of great aid for the comparatist, who – said with a metaphor – must put him/herself in the shoes of the other system, which nevertheless can be more rigid than expected.

Looking for a definition of comparative activity in general terms, this can be summarized in the act of estimating, measuring or examining a plurality of things,

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[29] This, however, may also imply a tendency to hide behind the firm fences of the law when it appears that no other option is practicable; or it may even signify a clear-cut choice to affirm the dominance of the law among all other disciplines that may eventually cross its path.
Some, for instance, have supported the recourse to common law – meant in its broadest sense – to overcome the difficulties that intellectual property nowadays presents, S. BALGANESH (ed.), *Intellectual Property and the Common Law*, cit. One of the conclusions that emerges from such a collection of essays is that «despite the degree of interdisciplinary specialization that the field today sees, intellectual property is fundamentally a creation of the law; therefore, the basic building blocks of the law can shed important light on what intellectual property can, should, and was perhaps meant to be» (at 12).

[30] See S. ROY, *Privileging (Some Forms of) Interdisciplinarity and Interpretation: Methods in Comparative Law*, in *Int'l J Const. L.*, No. 3, 2014,, <http://ssrn.com/abstract=2483289> (draft version), who explains how comparative law effectively engages with other disciplines, particularly within the social sciences, without having to renounce to the centrality of the law and its authority.
This reconnects with the related argument that the law should not be considered in inescapable isolation from other disciplines, although, at the same time, there seems equally to be the need for a cautious approach to the use of interdisciplinarity. Cf. R. BERCEA, *How to Use Philosophy When Being a (Comparative) Lawyer*, in *Procedia Soc. Behav. Sci.*, Vol. 71, 2013, 160, <http://www.sciencedirect.com/science/article/pii/S1877042813000232>.

[31] Cf. D. S. CLARK (ed.), *Comparative law and society*, cit., which provides a very interesting contribution to the subject, explaining the main conceptualizations and principles emerging from different disciplinary angles.
Indeed, the dangers that may be foreseen in comparative analysis will be illustrated in the following paragraphs.

primarily, but not limited to, establishing similarities and dissimilarities.[32] The significance of such activity in the region of the law is great and has both theoretical and practical implications.[33] In addition, focusing primarily on intellectual property law, it is difficult to refute that comparative studies have contributed to providing a better description of copyright, in particular within its contemplation in a global and international dimension,[34] although some pessimism about its current capacity to reach this goal has not either fallen short.[35]

Nonetheless, academics still need to wave their arms to explain why a civil law jurist, even within the narrower context of copyright, should look at the common law system, and vice versa.[36] Their arguments and theorizations indeed go back a long

[32] See, for instance, *Cambridge International Dictionary of English*, def. compare (v.), cit., 273.

[33] P. GILLES, *Aspetti metodologici e teorici dell'armonizzazione del diritto processuale*, cit., 459-450, 469, whose focus is comparative procedural law, but makes interesting references that apply to comparative law in general. As he explains, the importance of comparative studies, which attract the label of a «fundamental legal discipline» is also proven by the fact that, particularly alluding to its common meaning, the act of comparing phenomena is a particular mode of human action and human thought (at 456).

Cf. R. DAVID, *De l'importance d'études comparatives relatives a la procedure*, in *Estudios jurídicos en memoria de Eduardo J. Couture, Universidad de la República (Uruguay). Facultad de Derecho y Ciencias Sociales*, Montevideo: Martín Bianchi Altuna, 1957, 929 et seq.

[34] For a stimulating view of some of the most critical aspects concerning the development of intellectual property worldwide, see G. DUTFIELD, U. SUTHERSANEN (eds.), *Global Intellectual Property Law*, Cheltenham: Edward Elgar Publishing ltd, 2008 (first ed. 2005), with wide-ranging contributions to the subject and a particularly attentive concern for the comparison of several legal approaches and jurisdictions.

See also, albeit with explicit reference to the Japanese experience, P. GANEA, C. HEATH, S. HIROSHI *Japanese copyright law: writings in honour of Gerhard Schricker*, Max Planck series on Asian intellectual property law, 12, The Hague [etc.]: Kluwer Law International, 2005, especially with regard to the difficulty of striking a genuine balance between private and public interests and, particularly for the purpose of the current research, also with reference to moral rights.

[35] With the same cautions that have accompanied the analysis of the author's disappearance, there have been suggestions about declaring the death of comparative law. See, in particular, M. M. SIEMS, *The End of Comparative Law*, (2007) *The journal of comparative law*, Vol. 2, No. 2, 133, <http://ssrn.com/abstract=1066563>, who considers the symptoms of what may be the end of comparative law to be a discipline, after its initial success began during the early twenty-first century. At the same time, as even Siems seems to grant, there could be a chance for comparative law to experience a resurgence and return to its glorious times.

[36] See, among others, U. MATTEI, *Il modello di common law.* Con la collaborazione di E. ARIANO, Sistemi giuridici comparati, 2, Torino: G. Giappichelli, 2014 (first ed. 1996), who provides an insightful account of the Anglo-American system with a constant reference to the civil law model. Cf. J. H. LANGBEIN, R. LETTOW LERNER, B. P. SMITH (eds.), *History of the common law: the development of Anglo-American legal institutions*, Austin: Wolters Kluwer Law & Business; New York, NY: Aspen Publishers. 2009.

way,[37] but recent attempts to draw the state-of-the-art portrait of comparative legal studies are not lacking either,[38] thus suggesting innovative approaches but, at the same time, still providing a more general appraisal and review of the already established theories of comparative law.[39]

However, even these warm welcomes and praise are not without their hazards, similarly to what has been envisioned with the earlier description of interdisciplinarity.[40] Indeed, law comparatists must face additional challenges, such as being able to understand fully a different legal system, a problem that may relate to translation, but not necessarily limited to simple linguistic barriers.

In particular, it becomes essential to achieve an adequate bearing of the applicable methods to comparative analysis.[41] If methodology has an overriding place in any field of legal research,[42] it surely has a significant impact on comparative law, although its cognizance is sometimes simply taken for granted. However, the intrinsic

[37] See, in particular, the contribution of R. DAVID, *Les grands systèmes de droit contemporains: (droit comparé)*, Précis Dalloz series, Paris: Dalloz, 1964; A. GAMBARO, R. SACCO, *Sistemi giuridici comparati*, Trattato di diritto comparato, Torino: UTET giuridica, 2009 (first ed. 1996); R. SACCO, *Introduzione al diritto comparato*, Trattato di diritto comparato, Torino: Utet, 2002 (first ed. 1980).
See also the *Trento Manifesto on comparative law* that Sacco and other prominent Italian scholars signed in 1988, promoting the five theses that soon acquired worldwide diffusion.
As the first thesis sustains, in particular, «comparative law, understood as a science, necessarily aims at the better understanding of legal data. Further tasks such as the improvement of law or interpretation are worthy of the greatest consideration but nevertheless are only secondary ends of comparative research».
For further reading on the Trento thesis and the development of comparative law as a legal discipline, with particular reference to the Italian scholarly contributions, see E. GRANDE, *Development of comparative law in Italy*, in M. REIMANN; R. ZIMMER (eds.), *The Oxford Handbook of Comparative Law*, Oxford Handbooks in Law, Oxford: Oxford University Press, 2008, 107, 117.

[38] This attempt is expressly pursued by the collection of essays on the subject edited by P. G. MONATERI (ed.), *Methods of comparative law*, Research handbooks in comparative law series, Cheltenham, U.K.; Northampton, Mass.: Edward Elgar Pub., 2014 (first ed. 2012), which alternates both theoretical and empirical explorations on the topic related to the now very broad discipline of comparative law, including a dedicated analysis of judicial interpretation.

[39] See, for instance, the distinct survey of what has been defined as numerical comparative law, but also a relatively new trend of socio-legal approaches to the study of comparative law. M. M. SIEMS, *Comparative law*. The law in context series, Cambridge: Cambridge Univ. Press, 2014.

[40] P. GILLES, *Aspetti metodologici e teorici dell'armonizzazione del diritto processuale*, cit., 471-472, who also advises the interpreter or the comparatist to try not to look too much with his/her own eyes, possibly avoiding any cult of a particular legal tradition, either of common or civil law.

[41] In any case, the exact type of link between comparative law and interdisciplinarity must be ascertained on a case-by-case basis; and so it is with their respective methodologies.

[42] For a valuable in-depth examination of the methodology of legal research in general, see M. VAN HOECKE (ed.), *Methodologies of legal research: what kind of method for what kind of discipline*, European Academy of Legal Theory series, Vol. 9, Oxford, UK: Hart Publishing, 2013 (first ed. 2011), who, appraising several options in terms of applicable methods, still questions the practicability and extent of some approaches, including the comparative and interdisciplinary methods, at the same time wondering whether this would mean a firm constraint of the traditional legal doctrine or even its assimilation into non-legal disciplines.

complexity and extent of comparative studies, which in part depends on the variety of distinct subjects to which it extends, make it quite implausible to foresee a unitary methodology,[43] consequently leaving the problem of methods still open and exposed.[44]

Nonetheless, reconnecting with what has been argued in the preceding paragraphs, there seem to be sufficient grounds to focus the comparative analysis envisioned in the current chapter on the crucial role of the law.[45] It is in fact the law that from now on will escort us to the detailed enucleating of the legal facade of attribution, first looking at the moral rights standards and the applicable rules on copyright infringement and then considering the other possible alternatives that the law may offer to explain and regulate the attribution of authorship.

2.1 The Italian moral right of paternity: an unbreakable entitlement to authorship?

The rules pertaining to moral rights are first embodied in Section II of Chapter VI of the Italian copyright law (LA 1941),[46] which are expressly dedicated to the safeguarding of the personal interests of the author.[47] Within this setting, moral rights are distributed

[43] See M. ADAMS, D. HEIRBAUT, M. VAN HOECKE (eds.), *The method and culture of comparative law: essays in honour of Mark Van Hoecke*, Oxford, UK: Hart Publishing Ltd, 2014.

[44] This argument deserves further and dedicated analysis, which, however, cannot be addressed in the current research but will require a distinct appraisal elsewhere. On the importance of the methodology in comparative law theory, see S. GEOFFREY, *An Introduction to Comparative Law Theory and Method*, European Academy of Legal Theory, Oxford, UK: *Hart Publishing*, 2014.

[45] Cf. S. ROY, *Privileging (Some Forms of) Interdisciplinarity and Interpretation: Methods in Comparative Law*, cit.

[46] Moreover, as we shall see, aside from criminal provisions, in which misattribution matters as an aggravating element for punishing conducts that amount to a criminal offence, the law affords explicit civil defence to the moral rights of the author, and first to the right of attribution.

[47] For a brief historical account, the first Italian statute, before the unification, that considered the rights of authors was a 1801 law. Although it granted the author the economic rights to the work of the mind, the statute has represented a valuable preliminary safeguard of intellectual creations and defined them as the most precious and sacred property. Some years later, in 1840, the Austrian–Sardinian Convention was welcomed as a more comprehensive law on copyright matters and was the first to mention the conduct of counterfeiting. Indeed, it was only in 1925 that works of the mind received official recognition beyond economic rights, including the conduct of appropriating authorship of the work as an aggravating factor of counterfeiting.

See, in chronological order, the Law of 7 May 1801 (19 floral year IX), on the Exclusive right to sell the works of authors, musicians, painters and illustrators within the Cisalpine Republic; Austro-Sardinian Treaty for the Safeguarding of property rights with regard to the literary and artistic works (sealed in Vienna, on 22 May 1840 and entered into force on 14 July 1840; Law No. 2337 of 25 June 1865), on the Rights of the authors of intellectual works; Royal Decree-Law No. 1950 of November 1925, Norms on Copyright, converted into Law No. 562 of 18 March 1926.

across three essential types: the right to claim authorship,[48] the right to integrity and the right to have the work withdrawn from the market.[49]

The most contentious of these is certainly the last, for reasons that are easy to understand, especially when we consider the inherent economic dependency that has above all described copyright. However, since its very early history, the law itself concedes the peculiar nature of such a right by granting it more limited protection than that afforded to the first two moral rights. In particular, only they enjoy perpetuity and statute barring, inalienability and only these are *mortis causa* transmissible to the author's heirs.

The most distinguishing feature of the Italian system of moral rights is that they are perpetual, inalienable and cannot be waived.[50] These traits make them clearly distinguishable from the economic rights relating to the work, which instead have a definite term of protection. However, they are also a peculiarity of the civil law system, as will become even more noticeable when compared with the common law system of the UK.[51] Besides, before moving on to such analysis, it is preferable first to consider broadly the normative framework that applies to the right of attribution.[52]

The Italian copyright law dedicates Section II of Chapter III to the Protection of rights in the work in defence of the person of the author (into brackets, moral rights).[53] The first right considered is the entitlement of the author to claim authorship of his/her work, also considering that he/she may have chosen to be publicly identified with a pseudonym or remain anonymous. Such a prerogative, which operates regardless of the subsistence of any economic rights even otherwise allocated, is immediately followed

[48] In particular, according to this provision, authors have a moral right to be acknowledged as such by everyone.

[49] Such entitlement is granted on the condition that serious circumstances may harm the author's personality. In addition, considering the peculiarity of a right of this nature, the law prescribed certain formalities, especially when a plurality of authors is involved, including, but not limited to, the consent of each author in the case of joint authorship where the individual contribution cannot be distinguished.

[50] Other relevant provisions are, in fact, contained in the Italian Civil Code, cit., particularly articles 2575-2583.

[51] Unlike Italy, for instance, the UK does not protect the right to have the work withdrawn from the market.

[52] This aspect will be better explicated in (the following) Chapter 5.

[53] Chapter III LA 1941, on Content and duration of copyright, however, also includes Section I (Articles 12-19), which is dedicated to the Economic exploitation of the works.

by the right of integrity,[54] which gives the author the possibility to reject, anytime,[55] any alteration of the work[56] that may result in harming the author's honour or reputation:

> Independently of the exclusive rights of exploitation of the work […] and even after the transfer of such rights, the author shall retain the right to claim authorship of his work and to object to any distortion, mutilation or any other modification of, and other derogatory action in relation to, the work, which would be prejudicial to his honor or reputation.[57]

The right of the authors to have their authorship acknowledged extends to the liberty that they have to disclose anytime their identity despite a previous choice for anonymity or pseudonymity.[58] This last aspect, in line with the general rule of inalienability regarding moral rights under Italian law,[59] is strictly related to the very favourable provision that the author, or his/her heirs, may assert the right with no time limits.[60]

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[54] In this way, as the literary reading of the provision suggests, is it crucial to recognize the existence of a tangible or even potential prejudice to the honour or reputation of the author. Besides, an alteration of the work could also entail objectively positive changes that, however, result in some harm to the work's author.
E. SANTORO, *Onore e reputazione nell'articolo 20 della legge sul diritto d'autor*e in *Dir. radiodiff.*, 1980, 561, who emphasizes how the concepts of honour and reputation tend to converge, as both having the shared function to protect the integrity of the author's thought as a person and then as the creator of a work of the mind.

[55] This however finds some constraint to avoid abuse, for instance, in the pre-emption of refuting modifications to which the author had indeed consented.
Article 22 LA 1941, in particular, succinctly precises that «the rights referred to in the preceding Articles shall be inalienable. However, if the author was aware of and has accepted modifications to his work, he shall not be entitled to intervene to prevent the performance thereof or to demand its suppression».

[56] Any alteration of this kind that brings prejudice to the author's very personal interests is yet differentiated from the exclusive right to modify a work with the consent of the author that has transferred his/her economic rights..

[57] Article 20 LA 1941. The same Article, nevertheless, limits its latitude when prescribing that «in the case of works of architecture, the author may not oppose modifications deemed necessary in the course of construction. Further, he may not oppose other modifications which may be necessary in any such completed work. However, if the work is recognized by the competent State authority as having an important artistic character, the author shall be entrusted with the study and execution of such modifications».

[58] According to Section 1 of Article 21 LA 1941, «the author of an anonymous or pseudonymous work shall at all times have the right to reveal his identity and to have his position as author recognized by judicial procedure. Notwithstanding any prior agreement to the contrary, the successors in title of an author who has revealed his identity shall be required to indicate the name of the author in publications, reproductions, transcriptions, performances, recitations and broadcasts, or in any other form of manifestation or announcement to the public».

[59] In addition, other references to moral rights are variously disseminated in the LA 1941. Article 63 LA 1941 mentions that «the record or like device shall be made or utilized in such a manner that the moral rights of the author are respected within the terms of Articles 20 and 21 of this Law»; while Article 85 ter provides that «without prejudice to the author's moral rights, any person who, after the copyright

Besides, having anticipated that «copyright shall be acquired on the creation of a work that constitutes the particular expression of an intellectual effort»,[61] it is ascertained that the requirement of creativity is essentially relevant to determining copyright protection, given that copyright law explicitly safeguards moral rights.

However, evoking a well-known Foucalian work,[62] one may reasonably query who the author according to Italian copyright law is after all. In this way, the law identifies and distinguishes the holders of the rights, either of an economic or moral nature. The law explicitly presumes that, in the absence of contrary proof, the author of an intellectual work is the person that is shown or announced as such, even during any kind of performance,[63] and yet has chosen to reveal his/her identity, or has preferred to use a pseudonym or even to remain anonymity.[64]

Other, more specific provisions regulate the more complex condition of collective and derivative works, establishing that, with regard to collective works, the author is considered to be the person who organizes and leads their construction, while in the case of derivative works the author is the person that has, by his/her own effort, created that work from another work (the original one).[65] Furthermore, if the requirements of joint authorship are satisfied, the work will be regulated as common

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protection has expired, for the first time lawfully publishes or communicates to the public a work that has not been published previously shall enjoy the exploitation accorded by the provisions of Section I of Chapter III of Part I of this Law to the extent that those provisions are applicable». Article 85 quarter, finally, specifies that «without prejudice to the author's moral rights, any person who in any way or by any means publishes critical and scientific editions of works in the public domain shall enjoy exclusive exploitation rights in the work resulting from the critical and analytical assessment».

[60] Such favour is then expressed in detail by Article 23 LA 1941, according to which, «after the death of the author, the right referred to in Article 20 may be asserted, without limitation of time, by his spouse and children and, in the absence thereof, by his parents and other direct ascendants and descendants, and in the absence of such ascendants and descendants, by his brothers and sisters and their descendants. If the public interest should so require, such action may also be taken by the President of the Council of Ministers after hearing the competent professional association».

[61] Article 6 LA 1941, which has been already considered when analysing the concept of creativity. Cf. *supra*, Chapter 2.

[62] M. FOUCAULT, *Qu'est-ce qu'un auteur ? Dits et Écrits*, Vol I. (1969), Paris: Gallimard, 1994.

[63] Article 8 LA 1941, which further prescribes that «any pseudonym, professional name, initials or customary sign, well-known as being equivalent to a true name, shall be deemed to have the same value as such true name».

[64] Besides, following Article 9 LA 1941 regulates the situation in which «any person who has performed or published in any manner an anonymous or pseudonymous work shall be entitled to assert the rights of the author until such time as the author reveals his identity».

[65] Article 7 LA 1941.

property, with the additional inference that each contributor is entitled, as an author, to assert his/her moral rights at any time.[66]

Indeed, the work's authorship is one thing; its ownership is another altogether, a partition that emerges when the original owner, the author, transfers to someone else the exclusive economic or exploitation rights to the work. This general scheme, however, has certain limitations. A concluding provision of Chapter I LA 1941 is in fact dedicated to the parameters of allocating ownership of works that have been created and published under the public domain. A partition that, however, is limited to exploitation rights and not moral rights, which would still belong to the authors.[67]

With limited exceptions,[68] the bundle of economic and non-economic rights originally belongs to the author, alias the creator, of the intellectual work.[69] Indeed, in terms of exploitation rights, there may be transferred to others and, by doing so, a dissociation of authorship and ownership will occur. On the contrary, non-economic or moral rights will still belong to the original author, thus posing an important distinction between the Italian and the UK system of allocating copyrights. However, before considering this, or the related mechanisms of exploitation rights assignment, it is imperative to explore in greater detail the nature of moral rights and their historical

[66] As the law utters in detail, «if the work has been created by the indistinguishable and inseparable contributions of two or more persons, the copyright shall belong to all the joint authors in common. In the absence of proof of written agreement to the contrary, the indivisible shares shall be presumed to be of equal value. The provisions that regulate property owned in common shall be applicable. Furthermore, moral rights may be asserted at any time by any one joint author […]». Article 10 LA 1941.

[67] According to Article 11 LA 1941, in fact, «copyright in works created and published under the name and at the expense of the State, the provinces or the communes shall belong to them. In the absence of agreement to the contrary with the authors of the works published, the same right shall also belong to private legal entities of a non-profit-making character, as well as to academies [it. *accademie*] and other public cultural organizations, in respect of records of their proceedings and their publications».

[68] One is precisely the above-mentioned provision of Article 11 LA 1941 (to be read in conjunction with Article 29 LA 1941, concerning the consequent limitation of the term of protection for such peculiar case), which, for instance, affects scholarly works. On this specific aspect, see V. MOSCON, *Academic Freedom, Copyright, and Access to Scholarly Works: A Comparative Perspective*, in R. CASO, F. GIOVANELLA (eds.), *Balancing Copyright Law in the Digital Age: Comparative Perspectives*, Berlin: Berlin: Springer-Verlag, 2015, 99, 113.

[69] Conventionally, copyright (here referred to in its wider sense) comprises rights of an economic and non-economic nature. The former encompass the category of exploitation rights, while the latter are commonly defined as moral rights. This initial bipartition, however, is subsequently complemented by a third category of rights that are related and accessories to copyright, sometimes labelled as neighbouring rights. This tridimensional articulation of copyrights is well explicated in R. CASO, *Lineamenti normativi del copyright statunitense e del diritto d'autore italiano*, in G. PASCUZZI, R. CASO (eds.), *I diritti sulle opere digitali. Copyright statunitense e diritto d'autore italiano*, Padova: Cedam, 2002, 170

On the dual appraisal of economic versus non-economic rights in copyright law, see instead Z. O. ALGARDI, *La tutela dell'opera dell'ingegno e il plagio*, cit., 31-52.

development, starting from their acknowledgment in international law, and then proceeding with the systems of Italy and the United Kingdom.

Formal recognition of moral rights entered Italian legislation only after the revision of the Berne Convention in 1928 on the Rome Conference of 2 June 1928. Before that, as in other countries such as France and Germany, moral rights found however certain recognition through doctrinal and judicial practice.[70]

The Rome symposium was the perfect occasion to pursue a kind of homogenous attempt to protect the non-economic rights associated with the creation of intellectual works.[71] Besides, one of the reasons that motivated such efforts was linked to the dismay that excessive reliance on economic rights pertaining to intellectual creations would have overcome non-economic interests in the same works. Even more so considering the phantom of technology, already feared as a possible double-edged sword that could enhance the possibilities of creation, but also dramatically control and limit the power of creators over their intellectual products.[72] In this way, beyond the controversial debates and distinct positions that emerged during the Conference, the mutual interest to protect the universal intellectual inheritance evidently prevailed.[73]

Focusing on the resulting text of the Berne Convention after the Rome revision, the novel Article 6bis on moral rights resulted in the form we know today, as to the

[70] E. ADENEY, *The moral rights of authors and performers*, cit., 97, who recalls how particularly French, but also German, courts and scholars greatly contribute to elaboration of the fundamental basis of moral rights.

[71] The need for some regulation, or at least the establishment of basic standards of protection, was to a great extent shielded by the need to find for instance a proper solution to authorship misattribution in works that, created in one country, were then circulated and distributed in other territories. At the same time, it cannot be denied that there had been also great pressure from lobbies, such as the *Association littéraire et artistique internationale* (ALAI), which pursued the same systematic protection endorsed by the Inter-American Convention of Buenos Aires in 1920, later revised in 1928 in Havana. E. ADENEY, *The moral rights of authors and performers*, cit., 98-102.

[72] In particular, many reservations have been made with regard to the abuse of technology by publishers and, more generally, by those who held the economic rights to the work. E. ADENEY, *The moral rights of authors and performers*, cit., 106-107.

[73] E. ADENEY, *The moral rights of authors and performers*, cit., 108, who also cites the German delegate Osterrieth, who said: «we labour not solely for the individual authors who appear and disappear, but above all for the work which remains. We labour for the grandeur of literature and of art, which are immortal», in Union Internationale pour la Protection des Oeuvres Littéraires et Artistiques, *Actes de la conférence réunie à Berlin du 14 octobre au 14 November 1908*, Berne: Bureau de l'Union internationale littéraire et artistique, 1909 (1910), 172.
However, it is worth mentioning that not every country participating in the Rome Conference shared the same concern or, more precisely, the same degree of concern. As imaginable, civil law countries such as Italy were stronger supporters of what we might call "the moral problem", while common law countries such as the UK belittled its importance.

right to claim authorship and to object to certain modifications and other derogatory treatment that could impair the author's integrity,[74] which may endure even after the author's death but at least as long as copyright subsists.[75]

However, if finding some kind of agreement to acknowledge the right of authorship attribution appeared feasible,[76] certainly more problematic was reaching a compromise solution for the actual exercise of such rights, especially with regard to the term of its duration. Therefore, it is not surprising to learn of the very broad formula adopted by Sections 2 and 3 of Article 6bis of the Convention, which laconically refers it to the discretion of each national legislation.[77]

Furthermore, there is no mention of the right of the author to have the work eventually withdrawn after being published, an entitlement that, on the contrary, is expressly acknowledged by Italian copyright law. Understandably, this aspect appeared perhaps too complex to be addressed in the first instance by the whole international community, also given the intrinsic difficulty of defining unanimously the act of publication.[78] Similarly, the Berne Convention does not take an unequivocal position on

[74] According to the first section of Article 6bis Berne, in fact, «independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation».

[75] Section 2 of the same Article, instead, provides that «the rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the country where protection is claimed. However, those countries whose legislation, at the moment of their ratification of or accession to this Act, does not provide for the protection after the death of the author of all the rights set out in the preceding paragraph may provide that some of these rights may, after his death, cease to be maintained».

[76] As Adeney recounts, in fact, the Italian delegation pushed forward also because of the recent enactment of the 1925 legislation. E. ADENEY, *The moral rights of authors and performers*, cit., 116.

[77] The third section of Article 6bis of the Convention, in fact, provides that «the means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed». Cf. E. ADENEY, *The moral rights of authors and performers*, cit., 122-125.

[78] E. ADENEY, *The moral rights of authors and performers*, cit., 115. Cf. S. STRÖMHOLM, *Le droit moral de l'auteur* (vol. 1). Stockholm: Norstedte Söners Forlag, 1967, 86.

unpublished works,[79] on which, even with regard to Italian law, there has been some hesitancy.[80]

In any case, the centrality of authorship attribution found further confirmation in following international conventions and declarations,[81] which, by their very nature, have a tendency to be descriptive rather than prescriptive, as well as in the enactment of the national statutory that one after the other succeeded.[82] Generally speaking, the autonomy that moral rights enjoy from the other economic right lies precisely in the fact that neither a mere transfer of the physical work nor a legal assignment of the exclusive exploitation rights in the work imply a consequent alienation of the non-economic rights, or the faculty to add modification that may harm the integrity of the work.[83]

Concerning the described independence, arguably this allows moral rights to exercise some kind of balancing function against the otherwise preponderance of exclusive economic rights, but also to some extent against the risk of deceiving the public by providing improper information regarding authorship of the work. At the same time, it is also recognizable that there are some manifest hindrances to their full

[79] Article 24 LA 1941 indeed provides that «the right to publish unpublished works shall belong to the heirs of the author or to the legatees of such works, unless the author has expressly forbidden publication or has entrusted it to other persons. If the author has fixed a period of time to precede publication, unpublished works shall not be published before the expiration of such period. If more than one person is concerned by the first paragraph and there is disagreement between them, the matter shall be decided by judicial authority after hearing the public prosecutor. The wishes of the deceased person, when expressed in writing, shall in all cases be respected. The provisions of Part III, Chapter II, Section II, shall apply to such works».

[80] See L. C. UBERTAZZI (ed.), *Commentario breve alle leggi su proprietà intellettuale e concorrenza*, Breviaria iuris, Padova: Cedam, 2012 (fifth edition), Article 11 [LA 1941], 1370 et seq.

[81] Accordin to Article 11 of the 1946 Washington Inter-American Convention, «the author of any copyrighted work, in disposing of his copyright therein by sale, assignment, or otherwise, retains the right to claim the paternity of the work and to oppose any modification or use of it which is prejudicial to his reputation as an author, unless he has consented or consents, before, at the time, or after the modification or use is made, to dispose of or waive this right in accordance with the provisions of the law of the State where the contract is made». Inter-American Convention on the rights of the author in literary, scientific and artistic works, signed in Washington, on 22 June 1946, entered into force on 14 April 1947, 1438 UNTS 28, <https://treaties.un.org/doc/Publication/UNTS/Volume%201438/volume-1438-I-24373-English.pdf>.
Two years later, Article 27 of the Universal Declaration of Human Rights, provided that «everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author». Universal Declaration of Human Rights, General Assembly resolution No. 217A (III), U.N. Document A/810 at 71 (1948), <http://www.ohchr.org/EN/UDHR/Pages/Language.aspx?LangID=eng>.

[82] P. GOLDSTEIN, P. B. HUGENHOLTZ (eds), *International copyright: principles, law, and practice*, cit., 10, noticing how «copyright law remains essentially national law».

[83] R. CASO, *Lineamenti normativi del copyright statunitense e del diritto d'autore italiano*, cit., 189.

autonomous functioning, the first being the costs that may be hindered in their separate legal protection.[84]

As a consequence, the normative structure concerning the transfer of exploitation rights cannot be disregarded.[85] Besides, very often the author whose work has allegedly been plagiarized would bring legal action for a moral right violation together with allegations of copyright infringement. Furthermore, their obvious entanglement is after all reinforced by the letter of the LA 1941, which makes clear that, despite the autonomy of moral rights from economic ones, provisions concerning the latter will be applied wherever possible to the former. Besides, the law prescribes the mechanism according to which economic rights may be allocated,[86] additionally précising that generally the legal transfer of the rights to the work, which should be set out in writing,[87] is not implied in the act of transferring a physical copy of the work.[88]

However, although the current Italian copyright law represents the arrival point of a contentious normative route that included the debate over the prevalence of economic and non-economic interests embodied in the work, it still remains an obsolete law. The amendments and collateral detailed provisions that have flourished do not really challenge this. There is, therefore, growing praise for pursuing a genuine reform of the law, not just its mere redecoration, which would take into account better the social and technological transformations that have taken place since its enactment more than seven decades ago.[89]

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[84] R. CASO, *Lineamenti normativi del copyright statunitense e del diritto d'autore italiano*, cit., 192-193.
[85] Finding its main body of regulation in Chapter II of Part III LA 1941 on Common Provisions.
[86] According to Article 107 LA 1941, «the exploitation rights belonging to the authors of intellectual works, together with related rights of an economic character, may be acquired, sold or transferred in any manner or form allowed by law, subject to application of the provisions contained in this Chapter», while Article 108 provides that «an author who has reached the age of 16 shall be deemed capable of accomplishing all legal acts relating to works created by him and of instituting any action in respect of them».
[87] Article 110 LA 1941. As has been noticed, this may be a fine example of the limitations that are imposed over the freedom of the right-holder to exercise his/her own rights that arise from the intellectual work, but (I add) they might well function as a good balance against the possible abuses. See R. CASO, *Lineamenti normative del copyright statunitense e del diritto d'autore italiano*, cit., 182-183.
[88] Article 109 LA 1941 utters that «in the absence of agreement to the contrary, the transfer of one or more copies of the work shall not imply transfer of the exploitation rights afforded by this Law. However, the transfer of a mold, an engraved plate or any similar medium used to reproduce a work of art shall be deemed, in the absence of agreement to the contrary, to include the right to reproduce the work, provided such right belongs to the transferor».
[89] Although this may be deemed a general consideration, it also applies with exact regard to regulating authorship attribution.

Indeed, the Italian copyright law of 1941 has undergone several changes that occurred after various legislative interventions,[90] especially under the influence of European law,[91] some of which had a more consistent implication for moral rights.[92] However, it was never entirely and systematically reformed.[93]

Therefore, many have promoted the need for an adequate reform of copyright legislation that, in a more comprehensive and systematic way, could adapt the law's system of rules to the new and ever-changing needs of society and technology. This,

[90] See, among them, Law No. 866 of 22 November 1973, Ratification and implementation of the International Convention for the Protection of performers, signed in Rome, 26 October 1961; Law No. 93 of 5 February 1992, setting out Provisions for the benefit of phonographic companies and remuneration for private, non-profit-making reproduction (as amended up to Decree-Law No. 64 of 30 April 2010); Legislative Decree No. 685 of 16 November 1994, implementing the Council Directive 92/100/EEC of 19 November 1992, on Rental right and lending right and on certain rights related to copyright in the field of intellectual property; Legislative Decree No. 154 of 26 May 1997, implementing Council Directive No. 93/98/EC of 29 October 1993, Harmonizing the term of protection of copyright and certain related rights; Law No. 248 of 18 August 2000, New norms protecting authorship rights, amending Law No. 633 of 22 April 1941; Legislative Decree No. 68 of 9 April 2003, implementing 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 (as amended up to Decree-Law No. 7 of 31 January 2005); Law No. 109 of 25 June 2005, Conversion into Law, with amendments of the Decree-Law No. 63 of 26 April 2005, containing Urgent provisions for the development and territorial cohesion, as well as for the Protection of copyright provisions concerning the adoption of single texts on compulsory and supplementary insurance; Legislative Decree No. 118 of 13 February 2006, implementing Directive 2001/84/EC of the European Parliament and of the Council of 27 September 27, on the Resale right for the benefit of the author of an original work of art.

[91] For a first reasoning on the implementation of EU copyright law into the Italian system, see, among others, A. GRAZIANO, *Il diritto d'autore tra legge nazionale e principio del trattato CEE (art. 30 e 36) nella giurisprudenza della corte di giustizia. Spunti per una riflessione*, in *Riv. it. dir. pubbl. com.*, 1993, 261, who also considers the explicit judicial nature of the EU influence.

[92] See, in particular, Law No. 399 of 20 June 1978, Ratification and implementation of the Berne Convention on the Protection of literary and artistic works, of 9 September 1886, amended on 28 September 1979 (followed by Decree No. 19 of 8 January 1979 for its application), which introduced the protection of photographic works which certainly features among creative intellectual works.

Regarding the protection of computer programs, see the amendments introduced by Legislative Decree No. 518 of 29 December 1992, implementing the Council Directive 91/250/EEC of 14 May 1991, on the Legal protection of computer programs; Legislative Decree No. 205 of 15 March 1996, on Amendments to Legislative Decree No. 518 of 29 December 1992, concerning the Legal protection of computer programs.

On database, see Legislative Decree No. 169 of 6 May 1999, implementing EC Directive 96/9/EC of 11 March 1996, relating to the Legal protection of databases.

Concerning copyright enforcement, see instead Law No. 650 of 23 December 1996, amending the Decree-Law No. 545 of 23 October 1996, containing Urgent provisions for the exercise of radio and television broadcasting and communications, which aimed at promoting more stringent controls and focused on repression of infringing conducts. On this aspect, see also Decree-Law No. 72 of 2 March 2004, converted into Law No. 128 of 21 May 2004, relating to Interventions to oppose the illegal diffusion of audiovisual works, and to support movie and entertainment activities (as amended up to Decree-Law No. 7 of 31 January 2005); Legislative Decree No. 140 of 16 March 2006, implementing Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004, on the Enforcement of intellectual property rights.

[93] S. ERCOLANI, *Un inventario (provvisorio) delle modificazioni alla legge sul diritto d'autore*, in *Dir. autore*, 1997, 300.

additionally, is especially appreciated by the consideration of all supporting arguments in favour of a proper normative appraisal and regulation of practices that were unlikely envisioned by the original legislator of 1941.[94]

Given this articulated normative framework, the fierce antagonist of misattribution is essentially the observance of the right of attribution, because it is precisely the usurpation of such a right that puts into effect, yet in more flamboyant words, plagiarism. Indeed, it is accurate to notice that a non-observance of this kind may also encompass other moral rights – in the first place, the right of integrity. This could happen, for instance, when misattribution of authorship accompanies an alteration of the misattributed work that afflicts prejudice on its author's right of integrity.

More generally, moral rights identify the entitlement recognized to the authors of an intellectual work to protect their personal interests linked to the creation of an intellectual work. Besides, it is correct to say that the fullest enactment of moral rights is a typical prerogative of the Continent.[95] As we will see when considering the UK approach, in fact, moral rights still receive some protection, albeit in a more limited manner.[96]

In conclusion, for what concerns the Italian legal system of moral rights, at the very beginning of its historical development, even there copyright was essentially limited to the protection of economic interests, which directly depend upon the commercial dissemination of intellectual works. It was only afterwards that a more qualified relationship between the work and the author came into being within a wider conception of intellectual property, by emphasizing features that may abstract from pure monetary aspects, but instead are related to the essential nature of the work as a creation

[94] Some attempts to come to a systematic reform were made during the middle of 1970s. Cf. M. ROTONDI, *Un progetto di legge tipo per brevetti, modelli e marchi e proposta di una legge tipo in materia di diritto di autore,* in *Dir. autore*, 1977, 89; M. FABIANI, *Per una revisione della legge sul diritto di autore,* in *Dir. autore*, 1987, 1; M. FABIANI, *Quale revisione della legge sul diritto di autore?* in *Dir. autore*, 2006, 101. See also S. ERCOLANI, *Il diritto d'autore: la legge italiana e le linee di evoluzione nella società dell'informazione*, in *Dir. autore*, 2001, 19.; G. GALTIERI, *I quaranta anni della legge italiana sul diritto d'autore*, in *Dir. autore* 1982, 123.

[95] See, in particular, the French and German systems.

[96] Even lesser and much more limited protection is granted by the United States that only explicitly affords statutory moral rights to works of visual art.

of one's mind and a reflection of its creator's personality.[97] Therefore, while Italy confirmed and reinforced its favourable approach to moral rights in the copyright law in force, as we shall see in greater detail, the United Kingdom followed with cautious and sceptical footsteps in the CDPA of 1988.

2.2 A shady UK response to Berne enacting its moral rights legislation

Notwithstanding the previous considerations made in relation to the need to protect authorship attribution on the record by the international community, it is generally accepted that, at least concerning their autonomous and extensive protection, moral rights have traditionally been a privilege of civil law countries. Common law countries,

[97] Within these premises, a theory of "moral sovereignty" over the intellectual product of the mind has made inroads in a noisier manner. See U. IZZO, *Alle radici della diversità tra copyright e diritto d'autore*, in G. PASCUZZI, R. CASO (eds). *I diritti sulle opere digitali. Copyright statunitense e diritto d'autore italiano*, Padova: Cedam, 2002, 124-125, who (at 126) recalls R. SAVATIER, *Les métamorphoses économiques et sociales du droit privé d'aujourd'hui.* Paris, 1959, 12, as to the influence of French revolutionary instances to the inclusion of the author's immaterial patrimony precisely through the notion of personality, but also (at 125-126) J. M. PARDESSUS, *Cours de droit commercial*, Bruxells: Tarlier, 1836, as to the theorization that, beyond exclusive exploitation rights, other inalienable personal rights have contributed to affording greater protection to the work. Cf. C. A. RENOUARD, *Traité des droits d'auteurs, dans la littérature, les sciences et les beaux-arts*. Paris: Jules Renuard, 1839.
Of particular interest, indeed, is also the reference to the dual nature of economic and non-economic rights that will later develop into the dualistic (as opposed to monistic) theory. See, on this regard, A. MORILLOT, *De la protection accordée aux oeuvres d'art, aux photographies, aux dessins et modèle industriels et au brevets d'inventions dans l'empire d'Allemagne.* Paris: Cotillon, 1878, 95, also cited by U. IZZO, *Alle radici della diversità tra copyright e diritto d'auto*re, cit., 128-130.

on the contrary, remained tangled with the economic facets of copyright, cautiously refuting any sentimental involvement with personality in the creative process.[98]

The strong personalist significance that may be clinched in affording the unlimited and fullest protection to moral rights seems in fact to clash with the ultimate shield of exclusive exploitation rights, which is indeed cherished by many legislations and at EU level, particularly when the holder of the right is someone other than the author.

Nonetheless, it is likewise indisputable that a growing interest in moral rights has now also pervaded common law countries such as the United Kingdom.[99] The relevance of this fairly recent approach is expressed well by Adeney, who depicts it referring to the imagine of the creator of the work, the author, as a new player in the game of copyright, who has a number of additional prerogatives that appear distinct from economic interests, which are therefore worthy of consideration.[100]

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[98] Cf. E. ADENEY, *The moral rights of authors and performers*, cit., 1-2.
This appears confirmed also by the statutory setting that preceeded the CDPA 1988.
The Copyright Act 1801, 41 Geo. III, c. 107, An Act for the further encouragement of learning, in the United Kingdom of Great Britain and Ireland, by securing the copies and copyright of printed books to the authors of such books, or their assigns for the time herein mentioned; The Copyright Act 1842, 5 & 6 Vict, c. 45; The Fine Art Copyright Act 1862, cit., and the Bill for amending Law relating to Copyright in Works of Fine Art, 1862; The Copyright Act 1911, cit.; The Patents, Designs, Copyright and Trade Marks (Emergency) Act 1939, of September 21, 1939. An Act to make such special provision with respect to patents, registered designs, copyright and trade marks, as is expedient to meet any emergency which may arise as a result of war; The Copyright Act 1956, of 5th November 1956. An Act to make new provision in respect of copyright and related matters, in substitution for the provisions of the Copyright Act, 1911, and other enactments relating thereto; to amend the Registered Designs Act, 1949, with respect to designs related to artistic works in which copyright subsists, and to amend the Dramatic and Musical Performers' Protection Act, 1925; and for purposes connected with the matters aforesaid; The Copyright Act, 1956 (Transitional Extension), Order No. No. 103, 1959, of 19th January 1959; The Copyright (International Organisations), Order No. 1524, 1957, of August 23, 1957 (followed by later Amendments); The Copyright Royalty System (Records) (Amendment) Regulations 1973 No. 409; The Copyright Royalty (Records of Musical Works) (Inquiries Procedure) Regulations 1974 No. 2190; The Copyright (Customs) (Amendment) Regulations 1982 No. 766; The Copyright (Computer Software) (Extension to Territories) Order 1987 No. 2200.

[99] Over the years, many words have been spent on the doctrine of moral rights and its development, focusing on the peculiar relationship that links the author with the work he/she had created. See, in particular, with regard to their feasibility in the context of common law jurisdictions, E. J. DAMICH, *The Right of Personality: A Common Law Basis for the Protection of the Moral Rights of Authors*, in *Ga. L. Rev.*, Vol. 23, 1988, 1; G. DWORKIN, *The moral right of the author: moral rights and the common law countries*, in *Colum.-VLA J.L.& Arts*, Vol. 19, 1995, 229.; J. C. GINSBURG, *Moral Rights in a Common Law System*, in *UCLA Ent. L. Rev.*, Vol. 121, No. 4, 1990; L. ZEMER, *Moral rights: limited edition*, in *Bost ULR*, Vol. 91, No. 4, 2011, 1519.

[100] E. ADENEY, *The moral rights of authors and performers*, cit., 4.
Besides, the attention for the personal aspects of copyright is not yet clear and should not be equal to that reached by civil law countries such as Italy. However, it is correct to envision a new way of interpretative development, and perhaps even new normative opportunities.

Besides, the increasing curiosity towards moral rights seems, to some extent, to be linked to their capacity to exercise the same balancing function that has been envisioned within the Italian debate. Explaining accordingly this valuable role within the broader setting of copyright law may perhaps decrease the severe hostility that has been demonstrated towards their further development. This seems even more applicable in light of the tremendous changes that technology, particularly digital technology, has brought to the main framework, thus affecting many traditional concepts of copyright, including copyright ownership, authorship and originality.[101]

All this considered, some have suggested that a streamlined approach to moral rights may effectively help, to some extent, in redesigning copyright, especially in terms of its digital ramifications.[102] Furthermore, as already pointed out, the reasons behind a favourable position towards the protection of moral rights are attributable to the opportunity to contrast conduct that undermines authorship, which may be relevant not only on ethical grounds but also from an actual legal copyright perspective, especially when it collides with the general interest of society to identify the work with its author.

Therefore, the aims pursued appear not to be limited to the protection of the sole individuality or personality of the author, which is just one consequence of such an interpretation. Furthermore, there is even adequate space for envisioning pure economic reasons in such protection, which comes from the simple but significant presumption that the market itself may also benefit from a transparency of information.[103]

Moreover, the lack of a definition of plagiarism, which we have seen is also characteristic of the Italian system, does not in any way support the notion that there is no space for sanctioning misattribution in the law. Indeed, the lack of a precise

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[101] See, among others, P. PRESCOTT, H. LADDIE, M. VITORIA, A. SPECK, L. LANE (eds.), *Laddie, Prescott, and Vitoria: The Modern Law of Copyright and Designs*, LexisNexis, Butterworths Law, 2011 (first ed. 1980).

[102] M. T. SUNDARA RAJAN, *Moral rights: principles, practice and new technology*, Oxford; New York: Oxford University Press, 2011 (2010), who expressly calls for a necessary elucidation of what the legal status of moral rights should be, also adopting an expressly comparative perspective, taking into account the example of a few distinct jurisdictions.

On the many challenges that contemporary copyright law has faced, particularly after the digital revolution, thus requiring new viewpoints, see the essays edited by P. TORREMANS (ed.), *Copyright law: a handbook of contemporary research*, Research handbooks in intellectual property series, Cheltenham: Elgar, 2009 (first ed. 2007).

[103] E. ADENEY, *The moral rights of authors and performers*, cit., 50. This last consideration however, may be however easily contradicted by pointing out the practices of publishers and booksellers to accept and promote misattribution.

designation of the phenomenon finds its best explanation in the understandable fear of the legislators of both systems to confine it to strict and firm boundaries, but there seem to be scarce arguments that the law's intention is to renounce to any protection of the right.[104] Otherwise, there would not have been a statutory enactment of moral rights at all.[105]

Indeed, the customary absence of a robust moral rights doctrine in the framework of common law tradition has indeed clashed with the opposite craving within the international framework for careful consideration of non-economic interests.[106] The United Kingdom had initially expressed their perplexity towards the enactment of moral rights since Berne, but then ultimately found the compromise solution that the Convention's provisions on the matter would have remained general principles or standards and never an obligation.[107]

The belief that moral rights are «no more than entitlements guaranteed by the Berne Convention and certain domestic enactments»,[108] did not, in fact, impede the development of a different feeling towards them, which is expressed by those who praised their fullest enactment. Of course, it is one thing accomplishing the interest to acknowledge the intellectual origin of the work; it is another altogether leaving it boundless, something that the UK law expressly wants to avoid, as it emerges from the details of the provisions in force on the matter.

[104] This seeming confidence in the capacity of legislators may appear to many to be unrealistic. It would certainly be easier to remark upon the often hysterical attitude of the lawmaker, which has often accompanied the copyright path. However, let us for once believe in its cautiousness and judgement.
[105] Hiding behind the alleged pressure of the Berne Convention, moreover, appears equally unreasonable.
[106] However, even at Berne there is still some diffidence among common law countries. E. ADENEY, *The moral rights of authors and performers*, cit., 282.
[107] As we shall see, the UK choice to give authors the entitlement of having their authorship acknowledged was soon balanced by the possibility that they may waive such a right. E. ADENEY, *The moral rights of authors and performers*, cit., 280.
[108] E. ADENEY, *The moral rights of authors and performers*, cit., 281-282.

The prevalence of economic instances is indeed supported by the traditional resilient power that stationers have had in the English copyright system.[109] However, even before the enactment of the Statute of Anne, some endeavours to recognize the non-economic rights of the author have indeed found some grounds in preceding normative documents,[110] or in case law,[111] although in other instances the judiciary has conversely contradicted this conclusion by explicitly fading the relevance of moral rights.[112] Since then, many changes occurred and the law has tried to keep in step with

[109] The mechanism of privileges inevitably put authors in a feeble position, with the exception of few entitlements that mostly concerned the faculty to oppose acts that could have damaged their reputation and a more general opportunity to contest occasionally some alteration to the work. E. ADENEY, *The moral rights of authors and performers*, cit., 366-367.
For a primary reference on historical copyright in the UK, see W. A. COPINGER, *The law of copyright, in works of literature and art: including that of the drama, music, engraving, sculpture, painting, photography and ornamental and useful designs: together with international and foreign copyright, with the statutes relating thereto, and references to the English and American decisions*, with a new introduction and notes by R. Deazley, Clark, NJ: Lawbook Exchange, 2008, 2012, (first ed., Stevens and Haynes, 1870, <https://archive.org/details/lawcopyrightinw00copigoog>).

[110] The preliminary draft of the Statute of Anne, in particular, alluded to the «undoubted property» of the author over his/her work, although the definite version of the act preferred the more stony expression «sole right and liberty of printing» to feature copyright.
Furthermore, other erstwhile acts gave the impression that some protection to the author was pursued. See, for instance, the Engraving Act of 1735, which essentially protected the reputation of the artist, and the Fine Arts Copyright Act 1862, cit., which is considered the precursor of modern legislation in the matter of false attribution of authorship, a practice that was particularly persistent among publishers, but still has to be considered distinct from the conduct of non-attribution or improper attribution of authorship. Cf. E. ADENEY, *The moral rights of authors and performers*, cit., 368, 375.

[111] See *Pope v Curll*, 17 June 1741, Chancery, [1741] 2 Atk 342, 26 ER 608 (Ch). See also *Millar v Taylor*, 20 April 1769, King's Bench, [1769] EngR 44; [1769] 4 Burr 2303; [1769] 98 ER 201, and its description of «incorporeal right to print a set of intellectual ideas or modes of thinking» (at 2336), on the attempt to recognize a common law right of the author originating from the act of creation. However, the idea of privileges soon returned denying the idea of a common law copyright in *Donaldson v Becket*, 22 February 1774, House of Lords, [1774] 2 Bro PC 129; [1774] 1 ER 837, holding that copyright is a matter of statute and the right was held either by the author or by the person that otherwise had the economic rights in the work.
Cf. E. ADENEY, *The moral rights of authors and performers*, cit., 368-371

[112] See the discussion within the Gregory Committee, which stated how moral rights were «unknown to [the] jurisprudence» Copyright Committee of the Board of Trade. Report of the Copyright Committee (Chairman, HS Gregory), *Cmd 8662*. London: HMSO, 1952. Cited by E. ADENEY, *The moral rights of authors and performers*, cit., 375.

it, enacting the main body of legislation and subsequently intervening with amendments or more or less detailed reforms.[113]

Originally, the author is also generally the first owner of the copyright, with the fundamental exceptions of a work created in the course of an employment relationship or other peculiar instances.[114] Additionally, the peculiarity of the UK system of moral rights can be appreciated exactly in the hypotheses of an employment relationship, where the employer is considered the first owner of the work. Similar consideration affects the context of films, in which additionally it is also essential to notice the peculiar legislative choice of allocating authorship to the person of the producer or principal director, to whom the moral right of attribution is expressly granted.

[113] After the enactment of the CDPA 1988, in fact, there have been - similarly to the Italian LA 1941 – several changes, but still not yet a complete and systematic reform of the whole body of copyright law.
The Copyright (Recording for Archives of Designated Class of Broadcasts and Cable Programmes) (Designated Bodies) (No. 2) Orders 1989 No. 1011 and 2510; The Copyright (Librarians and Archivists) (Copying of Copyright Material) Regulations 1989 No. 1212; The Copyright (Material Open to Public Inspection) Orders 1989 No. 1098 and 1099; The Copyright (Copying by Librarians and Archivists) (Amendment) Regulations 1989 No. 1069; The Copyright (Educational Establishments) Order 1989 No. 1068; The Copyright (Application of Provisions relating to Educational Establishments to Teachers) Order 1989 No. 1067; The Copyright (Sub-titling of Broadcasts and Cable Programmes) (Designated Body) Order 1989 No. 1013; The Copyright (Recordings of Folksongs for Archives) (Designated Bodies) Order 1989 No. 1012; The Copyright (Copying by Librarians and Archivists) Regulations 1989 No. 1009; The Copyright and Rights in Performances (Notice of Seizure) Order 1989 No. 1006; The Copyright (International Conventions) (Amendment) Order 1989 No. 157; The Copyright (Material Open to Public Inspection) (Marking of Copies of Plans and Drawings) Order 1990 No. 1427; The Copyright Tribunal (Amendment) Rules 1991 No. 201 and 1992 No. 467; The Copyright (Computer Programs) Regulations 1992 No. 3233; The Copyright (EC Measures Relating to Pirated Goods and Abolition of Restrictions on the Import of Goods) Regulations 1995 No. 1445; The Copyright and Related Rights Regulations 1996 No. 2967; The Copyright and Rights in Databases Regulations 1997 No. 3032; Copyright, etc. and Trade Marks (Offences and Enforcement) Act 2002 c. 25; The Copyright and Rights in Databases (Amendment) Regulations 2003 No. 2501; The Copyright and Related Rights Regulations 2003 No. 2498; The European Communities (Definition of Treaties) (WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty) Order 2005 No. 3431; The Copyright (Educational Establishments) Order 2005 No. 223; The Copyright and Performances (Application to Other Countries) Order 2006 No. 316; The Copyright, Designs and Patents Act 1988 (Amendment) Regulations 2010 No. 2694; The Copyright Tribunal Rules 2010 No. 791; The Copyright and Duration of Rights in Performances Regulations 2013 No. 1782 and Amendment Regulations 2014 No. 434; The Copyright and Rights in Performances (Licensing of Orphan Works) Regulations 2014 No. 2863; The Copyright and Rights in Performances (Certain Permitted Uses of Orphan Works) Regulations 2014 No. 2861; The Copyright and Rights in Performances (Extended Collective Licensing) Regulations 2014 No. 2588; The Copyright and Rights in Performances (Personal Copies for Private Use) Regulations 2014 No. 2361; The Copyright and Rights in Performances (Quotation and Parody) Regulations 2014 No. 2356; The Copyright and Rights in Performances (Research, Education, Libraries and Archives) Regulations 2014 No. 1372; The Copyright (Regulation of Relevant Licensing Bodies) Regulations 2014 No. 898

[114] As the second part of Section 11 CDPA 1988 provides, «(2) where a literary, dramatic, musical or artistic work [F26, or a film,] is made by an employee in the course of his employment, his employer is the first owner of any copyright in the work subject to any agreement to the contrary. (3) This section does not apply to Crown copyright or Parliamentary copyright (see sections 163 and 165) or to copyright which subsists by virtue of section 168 (copyright of certain international organisations)».

The concepts of authorship and ownership of copyright find express regulation in Sections 9 CDPA 1988 onwards. Accordingly, the author of a work is, first, «the person who creates it». However, the law also introduces a clear legal fiction when it utters that «that person shall be taken to be», depending on the type of works listed in the same provision, «the producer, the principal director, the person making [the] broadcast, the publisher [or] the person by whom the arrangements necessary for the creation of the work are undertaken».[115] Furthermore, in the case of joint authorship, when «a work produced by the collaboration of two or more authors in which the contribution of each author is not distinct from that of the other author or authors», a common allocation is foreseen.[116]

In essence, in distinguishing the rights subsisting in copyright works, UK copyright law provides more limited protection to moral rights than it is with regard to economic rights, first confining the scope of protection to certain types of work while expressly excluding others, and then precisely defining the cases of who is entitled to claim the right in question.[117] Referring to what has been explicated with regard to copyright subsistence and recalling that the law also protects original works provided that they have been fixed,[118] it is worth repeating that UK copyright law establishes a

[115] Section 9 CDPA 1988. The same provision also covers cases of unknown authorship: «(4) For the purposes of this Part a work is of 'unknown authorship' if the identity of the author is unknown or, in the case of a work of joint authorship, if the identity of none of the authors is known. (5) For the purposes of this Part the identity of an author shall be regarded as unknown if it is not possible for a person to ascertain his identity by reasonable inquiry; but if his identity is once known it shall not subsequently be regarded as unknown».
In this way, there may be a general entitlement to have the author's identity appropriately individuated, which would additionally support the arguments in favour of a proper acknowledgment of authorship.

[116] Section 10 CDPA 1988.

[117] According to Section 2 CDPA 1988, «(1) The owner of the copyright in a work of any description has the exclusive right to do the acts specified in Chapter II as the acts restricted by the copyright in a work of that description. (2) In relation to certain descriptions of copyright work the following rights conferred by Chapter IV (moral rights) subsist in favour of the author, director or commissioner of the work, whether or not he is the owner of the copyright - (a) section 77 (right to be identified as author or director), (b) section 80 (right to object to derogatory treatment of work), and (c) section 85 (right to privacy of certain photographs and films)».

[118] Recalling the contents of Section 1 CDPA 1988, «(1) 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. (2) In this Part 'copyright work' means a work of any of those descriptions in which copyright subsists. (3) Copyright does not subsist in a work unless the requirements of this Part with respect to qualification for copyright protection are met (see section 153 and the provisions referred to there)».

number of limitations and qualification requirements,[119] which apply precisely to moral rights and the right of attribution in particular.[120] Therefore, and contrary to Italian law that affords moral rights protection to any creative original work protected by copyright, under UK law computer programs and computer-generated works are excluded from the range of protection, on the grounds that there seems to be no identifiable human author and therefore no reason to afford a right to claim either attribution or integrity.[121]

Chapter IV of the CDPA 1988 expressly regulates moral rights and the first right to consider is that of being identified as author (or director).[122] The right's content is so concisely articulated:

> The author of a copyright literary, dramatic, musical or artistic work, and the director of a copyright film, has the right to be identified as the author or director of the work in the circumstances mentioned in this section; but the right is not infringed unless it has been asserted in accordance with section 78.[123]

The immediate observation that should be made regards the centrality of the requirement of assertion, given that its absence eliminates any chance to action the right, since this would refute any allegation of infringement.[124]

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[119] On the qualifications requirement for, and the extent of, copyright protection, see Chapter IX, starting with Section 153 CDPA 1988.

[120] On the procedural side, presumptions apply in proceedings brought according to the provisions contained in Chapter VI CDPA 1988. In general terms, the name of the author appearing in the work is presumed to be true, it also being conceivable to suppose that the work whose author is dead or unlikely to be identified in his/her actual identity is an original work. See Section 104 CDPA 1988. See also Section 105 of the same Act, concerning the presumptions relevant to sound recordings and films.

[121] Cf. E. ADENEY, *The moral rights of authors and performers*, cit., 393.

[122] Despite the clarity of the provision, however, as will be explained, the law also indicates all the instances in which attribution will not be guaranteed.

[123] Section 11 Part 2 CDPA 1988.

[124] Before assessing in detail the significance of such a condition, it is necessary to consider the additional limitations that operate in the right's defence, with regard to the conduct in which the right to be identified may be infringed.
According to Section 77 CDPA 1988, the right is infringed, for instance, in the case of literary or dramatic works «whenever - (a) the work is published commercially, performed in public [or communicated to the public]; or (b) copies of a film or sound recording including the work are issued to the public»; in the case of musical works or a work to be sung or spoken with music, «(a) the work is published commercially; (b) copies of a sound recording of the work are issued to the public; or (c) a film of which the sound-track includes the work is shown in public or copies of such a film are issued to the public»; in the case of artistic works, «(a) the work is published commercially or exhibited in public, or a visual image of it is [communicated to the public]; (b) a film including a visual image of the work is shown in public or copies of such a film are issued to the public; or (c) in the case of a work of

The requirement of assertion noticeably attracts great attention. Besides, when asserting the right, the author (or director) may choose a pseudonym or any other reasonable form of identification, which is expected to be used afterwards.[125] The right has to be asserted in view of the requirements set forth by Section 78 CDPA 1988; thus, it may be asserted in a general manner or through a specific act, for instance, through a dedicated statement when assigning copyright in the work, or by any instrument in writing signed by the author or director.[126]

The importance of assertion as a fundamental prerequisite rests on the fact that upon it depends the possibility to seek redress in the case of an infringement deriving from the failure to attribute the work to the author (or director). Indeed, if it may be argued that the requirement of assertion leads back to the «claiming» to which the Berne Convention refers, at the same time it may sound much more like a formality, which the Convention on the contrary expressly bans.[127]

However, if such a requirement may easily be satisfied by the author of a literary work, for instance, by including the locution that "the moral right of the author has been asserted according to the Copyright, Designs and Patents Act 1988" on the title page of a book, it is also accurate to foresee that it could be less easy to assert the right in a different type of work, such as a musical work or its lyrics.

Just as important as Section 77 is Section 79 CDPA 1988, which contains detailed exceptions to the right to be identified as the author (or director) of the work. As has been anticipated with regard to computer programs and computer-generated

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architecture in the form of a building or a model for a building, a sculpture or a work of artistic craftsmanship, copies of a graphic work representing it, or of a photograph of it, are issued to the public». The provisions continue illustrating other illustrations of infringing acts. Neverheless, it is worth noticing that the same specification applies to the first three types of work, that is to say, «whenever any of those events occur in relation to an adaptation of the work as the author of the work from which the adaptation was made».

[125] Section 77 Part 8 CDPA 1988.

[126] With regard to publicly exhibited artistic works, the right may also be asserted «(a) by securing that when the author or other first owner of copyright parts with possession of the original, or of a copy made by him or under his direction or control, the author is identified on the original or copy, or on a frame, mount or other thing to which it is attached, or (b) by including in a licence by which the author or other first owner of copyright authorises the making of copies of the work a statement signed by or on behalf of the person granting the licence that the author asserts his right to be identified in the event of the public exhibition of a copy made in pursuance of the licence». Section 78 Part 3 CDPA 1988.
Despite the outward severity of the provision, however, the same provision holds that, when an action of infringement is brought before the court, the latter may also take into account any delay in asserting the right.

[127] E. ADENEY, *The moral rights of authors and performers*, cit., 398-401.

works, the design of a typeface is equally excluded from such protection. Similarly, the right does not subsist to works produced in the course of employment. Furthermore, the right is not infringed by conducts that under certain circumstances would not infringe copyright in the work. These instances are, for example, ascribable to fair dealing for certain purposes; to certain incidental insertions of works; to examination questions; and to parliamentary and judicial proceedings.[128] In any case, the applicability of the right is excluded with regard to works reporting current events, as well as certain publications with specific divulgating purposes,[129] or special works of a royal, legislative or similar nature.[130]

Given the presence of a detailed list of types of conduct that would be exempt from infringement and would consequently be discharged from the violation of the moral right of attribution, indeed there does not seem to be a general formula of exemption that would impede the bringing of any action for the infringement of the sole moral right in question. With the exception of the listed acts, therefore, the path of an autonomous legal action may still be foreseeable, even if, as in practice, actions against the infringement of economic rights have significantly prevailed.[131]

Such conclusions appear confirmed by the recent 2014 legislative amendments that have, among other aspects, addressed the parody copyright exception that allows a limited use of copyright protected material, regardless of the copyright holder's consent, insofar as such use is fair and proportionate.

The second moral right to be considered is the right to object to derogatory treatment of work, which finds its regulation in Section 80 CDPA 1988. Provided that the author (or director) is entitled «not to have his subjected to derogatory treatment», the provision in question specifies that for treatment is meant any addition to, deletion

[128] Section 79 CDPA 1988.

[129] In detail, «the right does not apply in relation to the publication in (a) a newspaper, magazine or similar periodical, or (b) an encyclopaedia, dictionary, yearbook or other collective work of reference, of a literary, dramatic, musical or artistic work made for the purposes of such publication or made available with the consent of the author for the purposes of such publication». Section 79 (6) CDPA 1988

[130] As Section 79 (7) CDPA 1988 continues, «the right does not apply in relation to - (a) a work in which Crown copyright or Parliamentary copyright subsists, or (b) a work in which copyright originally vested in an international organization by virtue of Section 168, unless the author or director has previously been identified as such in or on published copies of the work».

[131] A recent case in which the plaintiff brought a claim of breach of statutory duty together with infringement of copyright is, for instance, *Sullivan (aka Soloman) v Bristol Film Studios Ltd*, 3 May 2012, Court of Apeal, [2012] EWCA Civ 570; [2012] WLR (D) 145.

from or alteration to or adaptation of the work», with the exception of translations, arrangements (or transcriptions of a musical work involving no more than a change of key or register). The law also defines the meaning of derogatory, which is intended to discern the situation in which the treatment «amounts to distortion or mutilation of the work or is otherwise prejudicial to the honour or reputation of the author or director».[132]

As foretold, unlike Italian law, moral rights are not perpetual in the United Kingdom. On the contrary, their duration is limited to the duration of the general subsistence of copyright in the work.[133] In contrast with Italian law, moreover, UK moral rights may be waived. The waiver, according to Section 87 CDPA 1988, may befall «by instrument in writing signed by the person giving up the right», and being related to the generality of works or to a specific work, whether actually existing or forthcoming. At the same time, the instant provision concedes that the waiver may be conditional and also eventually be subject to revocation.[134] Furthermore, if the right-holder has given his/her consent to the act that otherwise would have infringed the right, such consent would impede the infringement of the right.[135]

The other moral right to consider within the UK copyright framework is the one regulated by Section 85 CDPA, which concerns the right to privacy of certain photographs and films. Very briefly, according to the instant provision, anyone who arranges the making of a film or photographs for personal and private use, as long as copyright subsists in the work in question, is entitled not to have the work distributed,

[132] Similarly to Section 77 CDPA 1988, Section 80 specifies the acts that may lead to infringement, while the following Section 81 considered the exceptions to right, and Section 82 the qualification of right in certain cases.
[133] Section 86 CDPA 1988.
[134] Even so, the law establishes that «if made in favour of the owner or prospective owner of the copyright in the work or works to which it relates, it shall be presumed to extend to his licensees and successors in title unless a contrary intention is expressed». In addition, it does not foresee any impediment for the operation of «the general law of contract or estoppel in relation to an informal waiver or other transaction in relation to any of the rights mentioned in subsection (1)». Section 87 CDPA 1988.
[135] In line with this, in the hypothesis of joint works, each author has the right to be identified and must him/herself assert the right. Similarly, each joint author may exercise his/her waiver without being affected by the other joint authors' possible waivers, and vice versa.
Section 88 CDPA 1988, which also relates to the application of other previous provisions to works of joint authorship, including the moral rights of integrity and privacy of certain photographs and films (Sections 80 and 85) and the right against false attribution (Section 84).

shown or otherwise communicated, unless he/she has consented to it or when the act is legitimated by other specific instances.[136]

Finally, another right that is arguably associated with authorship, but to be treated as a distinct issue, is the right against false attribution of authorship. Although the law does not expressly include it in Section 2, together with the other three provisions on moral rights, it does collocate it in the same chapter dedicated to the provisions regulating moral rights.[137] Leaving aside its exact denotation as a moral right in strict terms,[138] it is still possible to evaluate it in connection with the provisions thus far considered.[139] Regulated by Section 84, which gives anyone the right not to have a copyright work falsely attributed to him/her as author (or director), it counters the occurrence of any «false statement (express or implied) as to who is the author or director».[140]

Moreover, an important distinction regarding the different rights thus far considered is the applicability of the aforementioned provisions to the integral work or its parts. The law, in fact, clarifies that the right to be identified as author or director and the right to privacy of certain photographs and films may spread over «the whole or any

[136] According to Section 85 Part 2, CDPA 1988 in fact, «the right is not infringed by an act which by virtue of any of the following provisions would not infringe copyright in the work - (a) section 31 (incidental inclusion of work in an artistic work, film [or broadcast]); (b) section 45 (parliamentary and judicial proceedings); (c) section 46 (Royal Commissions and statutory inquiries); (d) section 50 (acts done under statutory authority); (e) [F3section 57 or 66A (acts permitted on assumptions as to expiry of copyright, &c.)]».

[137] The alleged but yet controversial collocation of the right against false attribution within the larger category of moral rights has also risen some perplexities in the Italian context. There, however, the right in question does not find place in any of the sections reserved to moral rights. For this simple reason, it has been omitted from being explictly considered in the preceeding paragraphs.

[138] See D. BAINBRIDGE (ed.), *Intellectual property*, Harlow: Longman, 2008 (2012), 129, who additionally notes how even the right of privacy to certain photographs and films is somewhat unfamiliar to the traditional conception of moral rights.

[139] In support of a distinct consideration the instance that it has an even more limited duration than copyright and moral rights may also operate. See Section 86 Part 2 CDPA 1988, according to which, «the right conferred by section 84 (false attribution) continues to subsist until 20 years after a person's death».

[140] Section 84 CDPA 1988, which also indicates the acts or conduct leading to its infringement.
Such a situation may also find regulation under the law of copyright, defamation or malicious falsehood, and passing off if other requisites (e.g. being an established author) coexist.
In the matter of false attribution of authorship, see in particular *Clark v Associated Newspapers Ltd*, 1 January 1998, Chancery, [1998] 1 WLR 1558, [1998] 1 All ER 959, [1998] RPC 261, [1998] 07 LS Gaz R 31, [1998] NLJR 157.
This serves as an additional element to consider against the attempt of the defendant to make use of the plaintiff's reputation to assist the defendant to market his/her own work. In *Samuelson v Producers' Distributing Co*, 15 October 1931, Court of Appeal, [1932] 1 Ch 201, [1931] 48 RPC 580, for instance, a playwright was able to prevent the maker of a film from advertising the film as having been based on the playwright's original theatre sketch.

substantial part of a work», while the right to object to derogatory treatment of work and the right against false attribution may concern «the whole or any part of a work».[141]

Another important limitation, in which the difference, especially when compared with the Italian system, is particularly striking, is the possibility for the right to be identifies as the author or director of the work to be subject to contractual relationships. In this way, the opportunity of a waiver, by which the author concretely gives up his/her right/s, is exemplary.

Yet, emphasizing the centrality of the freedom of contract, this option may be seen as a counterbalance for the possible disequilibrium that a greater protection of moral rights may provoke.[142] However, if the incentive of waiving converges into this potentially advantageous scheme, such an inducement may not be deliberate, as in the instance of subordinated position, where the surrendering of the right is indeed set *ab initio*. At the same time, while the waiver is symptomatic of the will of the UK legislator to underline the relevance and preponderance of economic copyright rights, it may also be an echo of the general fear of moral rights that seems to persist.

Nonetheless, it is worth anticipating that a violation of this kind, that is to say authorship misattribution, is arguably still dependent on the contextual violation of economic rights, given that most of the time, as also takes place in the Italian practice, moral rights are ultimately brought into the context of a legal action that seeks redress against copyright infringement. Furthermore, as it has been previously argued, even considering the lack of an explicit reference in the UK law to the possibility that moral rights find autonomous protection, there may still be a chance to foresee a distinct action.

3 Infringing the right of attribution: conditions and remedies

Despite the distinctions thus far illustrated between exclusive exploitation rights and moral rights in the work, the intellectual creation remains a product of the mind and it is

[141] Section 89 CDPA 1988.

[142] Furthermore, recognizing the possibility for the author to bargain any of his/her rights may further support such a consideration. The problem in supporting such conclusion could indeed rest on the probable unabalanced standing of the author in the typical copyright setting.

therefore indispensable to consider both sides of the coin, namely the typical shield of monetary interests in the work and the moral interest of who creates it and that indeed appears the most emblematic, and indeed pristine, feature of any copyright system. Therefore, in considering the elements of infringement and the apparatus of remedies that both the Italian and UK laws provide, adequate emphasis will be placed on the precise violation of the moral right of attribution, but also on the breach of norms first related to the economic rights in the work,[143] which most of the time will be addressed conjointly.

Considering the variability of the phenomenon of misattribution, from its abundant definitions to the eclectic conducts that may amount to it, it certainly results in a very convoluted subject for exploration. Besides, it should be maintained that it may occur not only in the integral or substantial reproduction of the original work, but also in its partial copy. The plagiarist's work, in addition, may also be entail variations or modifications with the aim of concealing the taking, or it could be turned into a completely different genre of work.[144]

Moreover, the conducts or acts that may lead to an infringement of copyright and/or moral rights are variable and spread over a number of cases. Among these, however, the conduct that most recurrently and effectively appears to infringe the right to be identified as the author of the work is copying. Therefore, greater attention will be given to this particular act.

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[143] Unquestionably, enucleating both the economic and moral sides of authorship misattribution, and focusing on the historical association of plagiarism, counterfeiting and piracy, plagiarism has often been seen as a first indicator of the infringement of economic rights in copyright works, particularly before, but also after, receiving distinct attention as a defilement of the right of the author to be acknowledged as such.

[144] All these instances will find better illustration in Chapter 5, where the case law on the issue will be considered.

Moreover, it seems significant to clarify that misattribution may encompass even more perplexing situations, for instance, when it involves unpublished works or works in the public domain, or even when it is confined to the narrower context of private use.

The last aspect seems to be particularly controversial and certainly requires closer examination. For the time being, it is sufficient to anticipate that even when misattribution does not cross the faint boundaries of private copy; it still urges consideration of whether there may still be a public concern for foreseeing a potential deception, and thus the need for the law to intervene in sanctioning the alleged violation. Z. O. ALGARDI, among others, has addressed the topic in *La tutela dell'opera dell'ingegno e il plagio*, cit., 451. For a more comprehensive and recent analysis of private copy, see S. KARAPAPA, *Private copying*, Routledge-Cavendish Research in Intellectual Property, London and New York: Routledge, 2012 (2014). Cf., of the same author, S. KARAPAPA, *A copyright exception for private copying in the United Kingdom*, (2013) *European Intellectual Property Review* 35, No. 3, 129.

In general, looking at the mechanisms of establishing infringement, it can be argued that copying may be literal or non-literal, elsewhere referred as textual and non-textual,[145] where the former essentially consist in an integral or verbatim reproduction and the latter generally implies a substantial copying. This concerns both the Italian and the UK systems, although with some noticeable distinctions. Furthermore, as we shall see, albeit that this sentence may sound confusing, there would be infringement when a substantial part of a given work were copied, even if the copying in itself were not substantial. In essence, what counts most is that the violation affects the kernel of the allegedly copied work.[146]

The concept of substantiality, however, raises several perplexities around its actual scope and meaning. It may be more difficult, for instance, to appraise the substantiality of certain works, such as musical works, particularly but not limited to the cases in which some kind of satire is made.[147] At the same time, the concept is also deeply entangled with the aforementioned idea–expression dichotomy, with the consequent considerations that have previously been envisioned and those that will emerge when approaching the case law on the matter.[148]

Either way, its appraisal is never easy, even in literary works, where there seems to be greater latitude for infringement and confidence to detect copying. Therefore, the role of expert evidence acquires particular emphasis, but even before this, a cautious

[145] In this way, it may be anticipated that similarities can be a pointer of copying, but not necessarily of infringement.

[146] However, there is little doubt that such an instance may be controversial. Besides, the risk of defying what has ever since been purported with regard to the idea-expression dichotomy could also be possibly appraised.
Looking at the UK case law on the matters, see for instance *Designers Guild Limited v Russell Williams (Textiles) Ltd (Trading as Washington Dc)*, 23 November 2000, House of Lords, cit., which addresses the thorny question of whether protection of the plot may be considered a substantial part of the work.

[147] Concerning the treatment of parody by the UK judiciary, see, in particular, *Glyn v Weston Feature Film Company*, 21 December 1915, Chancery, [1916] 1 Ch 261, 32 TLR 235; *Joy Music Ltd v Sunday Pictorial Newspapers (1920) Ltd*, 25 February 1960, Queen's Bench, [1960] 2 QB 60; *Schweppes Ltd and Others v Wellingtons Ltd*, circa 1984, High Court, [1984] FSR 210; *Williamson Music Ltd v The Pearson Partnership Ltd*, circa 1987, Chancery Division, [1987] FSR 97; *Newspaper Licensing Agency Ltd v Marks and Spencer Plc*, 12 July 2001, House of Lords, cit.; *Newspaper Licensing Agency Ltd v Marks and Spencer Plc*, 26 May 2000, Court of Appeal, cit.
On scholars' contribution, see M. SPENCE, *Intellectual Property and the Problem of Parody*, in *L.Q.R.*, 114, 1998, 594.; Cf. A. BRIDY, *Sheep in Goats' Clothing: Satire and Fair Use After Campbell v. Acuff Rose Music, Inc*., (2004) *Journal of the Copyright Society of the U.S.A.* 51, No. 2, 257, <http://ssrn.com/abstract=1071056>.

[148] Cf. *supra*, Chapter 5.

and scrupulous reading of the works or texts in question by the interpreter, including but not limited to the judge, is crucial.[149]

To further complicate the picture, in relation to copyright infringement, the role of digital technologies is brought back into question. In such a context, already controversial by nature, the concern that technology may significantly enhance infringing conducts has in fact attracted even greater attention.[150]

Additionally, particularly within the unique framework of the Internet, many practices have acquired a different weight than they had in the pre-digital age and, in turn, this portrays copyright infringement as more or less dreadful, depending on the actual refuting or welcoming of those practices.[151] These concerns raise important questions such as whether, and to what extent, the strength of technology should be used towards or against the enforcement of rights, and whether this may indeed risk inflicting a more severe and troublesome burden on the public interest.[152]

In essence, the law reacts in different ways to a violation or infringement of the rights that are shielded by copyright. Among them, plagiarism functions as the manifest violation of the remarkable right of the author to claim his/her attribution on the work and its protection has found manifest space at the international level since the Berne Convention, which both Italy and the United Kingdom have signed.

However, the exact nature of the mechanisms of protection and the related remedies established by the law, to contrast the phenomenon depend on the sovereignty of the single legislation. As has been anticipated, despite the common international milieu, each country has set its own system of preventive and corrective measures, which may be limited to the civil dome or even involve, yet with very contentious and likely disappointing consequences, the criminal arena.

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[149] A. DURANT, *'Substantial similarity of expression' in copyright infringement actions: a linguistic perspective*, in L. BENTLY, J. DAVIS, J. C. GINSBURG (eds.), *Copyright and Piracy. An Interdisciplinary Critique*, cit., 147, 166, who suggests seeking some help from linguistic description, but at the same time warns against excessive reliance on it, which may indeed be exaggerated, as may also happen with regard to an absolute confidence in the expertise contribution, given that the latter may eventually even conflict with the role of the court, which must always maintain its independence and capacity of reasoning regardless of the experts' findings.

[150] I. A. STAMATOUDI, *Copyright enforcement and the internet*, cit., who wonders whether private interests are superseding the limitations posed by the law, especially placing emphasis on piracy in the digital environment.

[151] On the double-edged function of technology, see *supra*, Chapter 3.

[152] Cf. J. GRIFFITHS, *Copyright Law After Ashdown. Time to Deal Fairly with the Public*, in *I.P.Q.*, Vol. 3, 2002, 240;

3.1 Italy

The Italian copyright law system of protection considers therefore both a civil and criminal set of norms, which, taken as a whole, aims to determine, execute and even prevent the continuation of the infringement. Among them, there are norms that will be applicable to moral rights, including, and particularly for the purpose of this research, the right to claim authorship, in addition to those provided to regulate exploitation rights.

Looking at the apparatus of legal remedies, indeed, its provisions relating to infringement of the rights flow into both civil and criminal penalties,[153] with the distinctions that we shall soon see. On the civil side in particular, the legal actions brought against infringement have a preventive or corrective basis,[154] where the latter extends to the entitlement of the right-holder to request not only the termination of the infringing act but also the removal or destruction of the work, as well as the payment of damages arising from the infringement.[155]

Besides, the sanction of eliminating the object of violation deserves some additional considerations.[156] In fact, it is important to notice that the removal or destruction of the work will be considered only if no other option is achievable, for instance, with express reference to the moral right of attribution, by remedying the violation of the right in question by adding or modifying the information regarding authorship.[157] Moreover, the power of the judicial authority includes the possibility to order records, assessment by experts, and seizure of what amounts to the infringement

[153] See Chapter III of Section I of the LA 1941, together with the provisions provided by the Italian Civil code and the Code of civil procedure.
[154] Article 156 LA 1941 provides that «any person having reason to fear the infringement of an exploitation right belonging to him under this Law or who seeks to prevent the continuation or repetition of an infringement which has already occurred, may institute legal proceedings to ensure that his right be recognized and the infringement forbidden. The proceedings shall be governed by the provisions of this Section and by the provisions of the Code of Civil Procedure».
[155] Articles 158 LA 1941. Additional information is provided by following Articles 159 and 160 LA 1941, which also determine the terms for the exercise of such rights.
[156] It is worth noticing that it may be otherwise conferred to the person whose right has been violated as accounted for damages.
Articles 158 and 159 LA 1941. Cf. Z. O. ALGARDI, *La tutela dell'opera dell'ingegno e il plagio*, cit., 315, 321.
[157] This purpose may also be reached through targeted publicity, as with publication of the judgement. Z. O. ALGARDI, *La tutela dell'opera dell'ingegno e il plagio*, cit., 316-317.

(or its related profits),[158] which can also have a precautionary purpose, as with the possibility to place a restraining order on the alleged violating activity.[159]

The first set of civil provisions, which applies to all copyrights, either economic or moral, concludes with paragraph § 1 bringing into the Italian context the formula of assertion that, contrary to what we have seen with regard to the UK system that prescribes it as a prerequisite to exercising moral rights in the work, is here referred to as the possibility that anyone who is legitimately entitled to economic rights may assert them.[160] The subsequent paragraph § 2, instead, opens the set of provisions that are specifically craved for proceedings involving the infringement of moral rights.

As stated beforehand, insofar as the nature of moral rights consents to it and with the limits provided onwards, moral rights may be protected also by reference to the preceding provisions established for the infringement of economic rights.[161] Such parallelism, indeed, is albeit subject to some limitations. In particular, with exact reference to the right of attribution, the remedy of removal or destruction of the infringing work may be provided if no other remedies reach the same result of redress.[162]

Moreover, apart from civil sanctions, the law also explicitly affords penal remedies and penalties against the infringement of copyright, which are illustrated in Section II of Chapter III of the LA 1941. Its opening provision, Article 171, lists in detail all the different types of infringement conduct that have a criminal consequence and are therefore sanctioned by apposite penalties. The spectrum of such conduct includes the reproduction, transcription, recital, dissemination, also through

[158] Article 161 LA 1941.
[159] Article 162 LA 1941, which is complemented by the provisions of the Code of civil procedure.
[160] As Article 167 LA 1941 utters, «the exploitation rights afforded by this Law may also be asserted in law by any person legitimately entitled to such rights».
[161] Article 168 LA 1941.
[162] According to Article 169 LA 1941, «actions in defense of the rights relating to the authorship of a work shall give rise to removal or destruction only if the damage cannot be remedied by means of the addition or suppression of notices on the work which refer to its authorship or by other means of publicity». In addition, Article 170 provides that «actions in defense of the rights relating to the integrity of a work shall give rise to removal or destruction of the deformed, mutilated or otherwise modified copy of the work only when it is not possible to restore such copy to its original form at the expense of the party wishing to avoid removal or destruction».

performance, selling, as well as any other commercial distribution, and disclosure of an unpublished work or diffusion contrary to Italian law of copies produced abroad.[163]

The law prescribes a range of fines for such violations, but the related penalty may additionally lead to imprisonment when the perpetration of such acts includes some additional undesirable elements. In particular, the second part of Article 171 LA 1941 imposes harsher treatment when:

> The acts referred to above are committed in relation to a work of another person which is not intended for public disclosure or by usurpation of the authorship of the work or with deformation, mutilation or other modification of the work and such acts constitute an offense against the honor or reputation of the author.[164]

More generally, in the eye of the law, certain unlawful acts may be regarded as particularly serious, if committed with a concurrent violation of, for instance, the right of attribution in the work, and consequently are deemed to deserve a harsher penalty, in addition to the application of a proportionate fine.[165] Criminal sanctions, in conclusion, apply to instances in which the violation of exploitation rights that amounts to a criminal offence is perpetrated together with a concomitant violation of moral rights.

Nonetheless, contrary to the civil systems of provision, where moral rights have an explicit autonomous existence for the law, this cannot be said with regard to the criminal penalties, given that, in order for them to apply, a felony must be perpetrated. The criminal relevance of an infringement of the moral right of attribution, therefore,

[163] Such acts may also be committed «by means of any form of transformation» and their unlawfulness may be exceeding what is consented by the right-holder, and thus not radically unlawful, by also using specific devices.
[164] Article 171 Part 2 LA 1941.
[165] See, for further specifications, Articles 171 bis, 171 ter, 171 quarter, 171 quinquies, 171 septies LA 1941. Besides, Article 171 novies LA 1941 allows a reduction of the penalties in the case of a spontaneous report or other collaboration by the offender prior to the charges brought against him/her.
Nevertheless, as a general principle of criminal law, all the above provisions apply insofar as the infringing conduct does not lay the basis for a more serious offence. See Article 173 LA 1941, which refers to the provisions of the Italian Criminal code or other special laws.

will be pertinent only if, contextually, there has been a criminal offence such as, but not limited to, the conduct of unlawful copying.[166]

3.2 The United Kingdom

Similar to the Italian system, the UK law provides remedies of a different nature against copyright infringement and, by reflex, the violation of the right of attribution. The right-holder may in fact seek redress by requesting injunctive relief, seeking damages or other pertinent remedies. Concerning the system of rules there envisioned for copyright infringement, while civil and criminal provisions apply to the breach of economic rights, no reference is made in UK law, contrary to the Italian approach, to criminal penalties for a violation of the moral right of attribution.

Looking at the UK set of rules provided against infringement, as previously anticipated, some prerequisites of copyright protection need to be established before even considering allegations of any rights' breach, such as the one that relates to the subsistence of copyright.[167]

Besides, on the grounds of essential prerequisites, UK law still poses additional limitations to the explicit enforcement of moral rights, given that the right of attribution must be asserted in order for it to be actionable.[168] We have seen how such a mandatory element, however, risks clashing with the banning of the Berne Convention to impose formalities. Moreover, it sounds perplexingly uneven when one considers that, on the

[166] This was already envisioned in the Law of 1925 (Royal Decree-Law No. 1950 of November 1925, cit.), which at Article 61 considered usurpation of the work's paternity to be an aggravated element of the offence of abusive reproduction or diffusion. On this, see also Z. O. ALGARDI, *La tutela dell'opera dell'ingegno e il plagio*, cit., 326.

[167] It follows that such requisite must be accomplished also to the extent of detecting, punishing and remedying the infringement of any rights shielded by the copyright law.

[168] On this, see C. COLSTON, *Principles of intellectual property law*. Principles of law series, London: Cavendish, 1999, 264.

contrary, there is no such requirement with regard to the enforcement of exclusive exploitation rights.[169]

In view of this, the first provision to consider is Section 17 CDPA 1988, which illustrates the various types of conduct of copyright infringement. The first act that may lead to a breach of rights of the copyright owner is essentially represented by copying the work, which is defined as «an act restricted by the copyright in every description of copyright work» and is meant by the law as the conduct of:

> Reproducing the work in any material form [including] storing the work in any medium by electronic means [;] the making of a copy in [multiple] dimensions [;] making a photograph of the whole or any substantial part of any image forming part of the film [or broadcast] [;] making a facsimile copy of [a typographical] arrangement [and] making of copies which are transient or are incidental to some other use of the work.[170]

Beyond copying, which is arguably perhaps the most recurrent conduct in copyright infringement, but especially the most probable to involve a violation of the right of attribution, other infringing conducts entail issuing copies of the work to the public,[171] by renting or lending of work to the public;[172] performing, showing or playing of the work in public;[173] communicating it to the public;[174] and making an adaptation or doing acts in relation to adaptation.[175] All conducts that are likely to conflict with the exclusive rights of the copyright holder.

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[169] Additionally, the other limitations that apply clearly curb at length the latitude of moral rights' violations. Within the boundaries envisioned by applicable provisions, some acts that are reckoned not to infringe copyright would not infringe the moral right of attribution either.
See, in particular, Section 79 CDPA 1988. Cf. E. ADENEY, *The moral rights of authors and performers*, cit., 401.

[170] Section 17 CDPA 1988.

[171] According to Section 18 CDPA 1988, such conduct includes «(a) the act of putting into circulation in the EEA copies not previously put into circulation in the EEA by or with the consent of the copyright owner, or (b) the act of putting into circulation outside the EEA copies not previously put into circulation in the EEA or elsewhere», but not «(a) any subsequent distribution, sale, hiring or loan of copies previously put into circulation (but see section 18A: infringement by rental or lending), or (b) any subsequent importation of such copies into the United Kingdom or another EEA state».

[172] Section 18A CDPA 1988.

[173] Section 19 CDPA 1988.

[174] Section 20 CDPA 1988

[175] Section 21 CDPA 1988

Henceforth, the law sets forth a set of provisions that acknowledge and protect the entitlement of the right-holder to seek remedies for infringement. Similar to what he/she is entitled to seek in the case of a violation of any other property right, the owner may find redress «by way of damages, injunctions, accounts or otherwise».[176]

Moreover, some of these provisions regulate the single mechanism of relief, for instance with regard to damages, which also gives an idea of how the court exercises its control in actions of infringement.[177] Its authority extends to the possibility to grant an order for delivery up such that «the infringing copy or article be delivered up to him or to such other person as the court may direct», and yet does not inhibit any other power of the court,[178] which may extend also to the seizure of the infringing work.[179]

Coming to the criminal provisions that are applicable to copyright infringement, Section 107 CDPA 1988 in particular articulates criminal liability that may arise from making or dealing with infringing works, without the licence of whoever owns the copyright, for example by selling or hiring, importing, possessing in the course of business with the aim to infringe copyright, exhibiting in public or distributing an «article which is, and which he knows or has reason to believe is, an infringing copy of a copyright work».[180]

[176] Section 96 CDPA 1988.

[177] According to Section 97 CDPA 1988, «(1)Where in an action for infringement of copyright it is shown that at the time of the infringement the defendant did not know, and had no reason to believe, that copyright subsisted in the work to which the action relates, the plaintiff is not entitled to damages against him, but without prejudice to any other remedy. (2) The court may in an action for infringement of copyright having regard to all the circumstances, and in particular to - (a) the flagrancy of the infringement, and (b) any benefit accruing to the defendant by reason of the infringement, award such additional damages as the justice of the case may require».

[178] Section 99 CDPA 1988 provides that «(1) Where a person (a) has an infringing copy of a work in his possession, custody or control in the course of a business, or (b) has in his possession, custody or control an article specifically designed or adapted for making copies of a particular copyright work, knowing or having reason to believe that it has been or is to be used to make infringing copies […] (2) An application shall not be made after the end of the period specified in section 113 (period after which remedy of delivery up not available); and no order shall be made unless the court also makes, or it appears to the court that there are grounds for making, an order under section 114 (order as to disposal of infringing copy or other article)».

[179] In line with Section 100 CDPA 1988, the right to seize and detain is exercisable subject to the conditions that are set forward.
Furthermore, see Section 114 concerning the order to dispose of the infringing work.

[180] Section 107 et seq. CDPA 1988.

The penalties applicable to such offences include imprisonment, application of a fine, or both.[181] Furthermore, just as with civil proceedings, criminal proceedings include the prospect of application for orders for delivery up,[182] as for the disposal or forfeiture of the infringing work.[183] Besides, as further explained echoing the caution in the Italian law with regard to the choice of the best possible remedy, «in considering what order (if any) should be made, the court shall consider whether other remedies available in an action for infringement of copyright would be adequate to compensate the copyright owner and to protect his interests».[184]

4 Beyond the copyright dimension, the law of contracts, torts and other defences

After having illustrated the different sets of rules that Italy and the United Kingdom provide against copyright infringement and, when applicable, moral rights violation, we can now recap with the legal thread of authorship acknowledgment. Attribution appears to have a clear relevant role in the process of creating an incentive, since it aims to reward the author, providing credit for his/her work. This assumption is perceptibly agreed by civil law jurisdictions, although it is certainly true with respect to common law systems.[185]

[181] Section 107 CDPA 1988, according to which an offence is also committed when a person «(a) makes an article specifically designed or adapted for making copies of a particular copyright work, or (b) has such an article in his possession, knowing or having reason to believe that it is to be used to make infringing copies for sale or hire or for use in the course of a business».
Criminal liability also arises when a person «infringes copyright in a work by communicating the work to the public - (a) in the course of a business, or (b) otherwise than in the course of a business to such an extent as to affect prejudicially the owner of the copyright, commits an offence if he knows or has reason to believe that, by doing so, he is infringing copyright in that work» and «where copyright is infringed (otherwise than by reception of a [communication to the public]) - (a) by the public performance of a literary, dramatic or musical work, or (b) by the playing or showing in public of a sound recording or film, any person who caused the work to be so performed, played or shown is guilty of an offence if he knew or had reason to believe that copyright would be infringed».
[182] Section 108 CDPA 1988.
[183] Sections 114, 114A and 114B CDPA 1988.
[184] Section 114 Part 2 CDPA 1988.
[185] Explicit to this extent is Kwall, who suggests that what intimately connects copyright and the right of attribution is their theoretical aim to provide certain and obvious incentives for authors. R. R. KWALL, *The Attribution Right in the United States: Caught in the Crossfire Between Copyright and Section 43 (A)*, in *Wash. L. Rev.*, Vol.77, 2002, 989.

Despite the differences between the two traditions, it can indeed be said that they share a related intention to protect the tie between the author and the work.[186] Besides, it has also been suggested that such intention, for what concerns common law jurisdictions may be related to the indisputable emphasis that appears to be placed on the intention of authors to be associated with their work but also not to be associated with it.[187]

Furthermore, as we have seen in previous paragraphs, particularly from a cultural, but also social and ethical standpoint, the acknowledgement of authorship is likely to be indisputable,[188] while the same cannot be said of its translation into conclusive and formal legal brackets. Nevertheless, technological change praises reconsideration of authorship and ownership, which supports the argument in favour of a more definite legal and non-legal perspective, in line with a distinctive interdisciplinary approach.[189]

In particular, concerning the latter approach, social norms, but also specific contextual knowledge applicable to a particular type of work, appear to be indisputably valuable. Regarding the former, instead it seems worthwhile to look at the other dimensions of contract law, torts and other legal stances on which different defences against misattribution may be based.

In any case, even beyond this confident representation, there may also be some drawbacks.[190] Focusing on the resort to social norms, for instance, Tushnet identifies the

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[186] In this way, it appears also helpful to look at the Israeli hybrid approach, with the recent enactment of a statutory attribution right under the heading of personality rights, which has been integrated by the judiciary description of the work as the author's child. Besides, this peculiar system portrays a clear preference for a limited (existing until copyright duration) and more flexible right (non-transferable, but waivable), which resembles the UK model. On the contrary, although it does not also require assertion, and thus avoids putting further burden on the authors to act against the rights' violation. M. F. MAKEEN, G. ORON, *The Right of Paternity under the Copyright Laws of Egypt and Israel*, in *EIPR*, Vol. 33, No. 1, 2011, 26.

[187] However, once the author has deliberately distanced him/herself from the work it is perhaps plausible that any further contrasting claim would not be allowed. M. F. MAKEEN, G. ORON, *The Right of Paternity under the Copyright Laws of Egypt and Israel*, cit. 26.

[188] See, among others, J. C. GINSBURG, *The Right to Claim Authorship in the U.S. Copyright and Trademarks Law*, in *Hous. L. Rev.*, Vol. 41, No. 2, 2004, 263; R. TUSHNET, *Payment in Credit: Copyright Law and Subcultural Creativity*, in *Law & Contemp. Probs.*, Vol. 70, 2007, 135.

[189] See M. KRETSCHMER, L. BENTLY, R. DEAZLEY, *The History of Copyright History (revisited)*, in *W.I.P.O. J.*, Vol. 5, No. 1, 2013, 35., concisely retracing the history of copyright, also recalling their previous work on the subject, R. DEAZLEY, M. KRETSCHMER, L. BENTLY (eds.), *Privilege and Property: Essays on the History of Copyright*, Cambridge, U.K., OpenBook (2010).

[190] Cf. infra, Chapter 3.

main difficulties related to the mechanism of translating social and ethical rules into legal provisions.[191] First, it seems difficult to determine which subject matter should benefit from attribution rights, given that not all types of work appear to justify general protection.[192] Second, even when feasible, proper attribution is not guaranteed, also calling into question the practicability of legal enforcement. Finally, the inevitably different perception of attribution by the public implies enquiring about the different attitudes of the public towards a possible deception that would derive from misattribution, especially when the picture is complicated by the author's preferences for anonymity or pseudonyms.[193]

On the other hand, considering other potential schemes of relief against the breach of the right to be identified as the author of a work, which still belong to the legal facade of attribution but exceed the limited context of copyright, these are principally ascribable to contracts, tort (although the latter is evidently confined to the UK context), and other defences related, for instance, to some way of protecting the public interest against the potential deceptive consequences of misattributing conducts.[194]

Focusing in particular on the UK framework, before the CDPA 1988 was enacted, moral rights appeared to have received some protection through what has been called «an amalgam of the law of contract and tort».[195] In particular, contracts have always played a central role in copyright and this reasonably extents to the potentiality of granting some degree of protection to moral rights. To prove this point, Stamatoudi emphasizes the proclivity of contracts efficiently to satisfy the interests of individuals and the distinctive propensity of UK courts to shield the parties' rights and obligations.

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[191] Therefore, there may be less confidence that the incorporation of an independent right of attribution in the current copyright environment would not end up in a hazardous solution that overshadows the rewarding latitude of authorship credit, even resulting in an unclear legal representation of authors' interests. R. TUSHNET, *Naming Rights: Attribution and the Law*, in *Utah L. Rev.*, 2007, 795-816.

[192] Besides, in some cases, it could be even more difficult to follow attribution rules, for example, joint authorship, which would require a case-by-case approach that implies a dangerous and discretionary application of the rules.

[193] R. TUSHNET, *Naming Rights: Attribution and the Law*, cit., 816 et seq.

[194] Focusing on the latter it is also reasonably accepted that attribution may provide consumers with valuable information and thus serve the general public interest. On the inference between attribution and consumer protection, see J. K. WINN (ed.), *Consumer Protection in the Age of the 'Information Economy'*, Aldershot: Ashgate, 2006.

[195] I. A. STAMATOUDI, *Moral Rights of Authors in England: the missing emphasis on the role of creators*, in *I.P.Q.*, 1997, 478. Cf. R. DWORKIN, *The moral right of the author: moral rights and the common law countries*, cit., 251.

However, as she makes clear, «contract works better, as long as it enhances the moral right protection already afforded to authors by law and not as a substitute for moral right».[196] Here conclusions appear so far shareable and applicable also to the Italian context, where – although with more limited scope, essentially due to the fact that moral rights are not transferable and not waivable – the role played by contracts in copyright is undeniable.

In addition, attempts to justify shielding the right of attribution have also run across the potential recognition of a general interest by society to receive proper information regarding identity and authorship in intellectual creations, to be understood as having a general and broad-spectrum approach,[197] or be convulsed to the more explicit and articulated common law defence.[198]

The latter, which is indeed a peculiarity of common law jurisdiction, is an independent defence and is not limited to a copyright application. It essentially gives courts «a wider interpretative space where codified law cannot solve specific situations».[199] According to Zemer, it represents «an escape clause»,[200] which some

[196] I. A. STAMATOUI, *Moral Rights of Authors in England: the missing emphasis on the role of creators*, cit., 488.

[197] On this point, it urges proper consideration of the different interests involved. With regard to the complex relationships between private individual interests and general public interest, see M. BORGHI, *Il diritto d'autore tra regime proprietario e "interesse pubblico"*, in M. LILLÀ MONTAGNANI, M. BORGHI (eds.), *Proprietà digitale. Diritti d'autore, nuove tecnologie e digital rights management*, cit., 1-3, 16-18, who also emphasises how the concept of public interest in copyright is yet highly vague.
The issue of public interest, in particular, which has been the subject of extensive literature (see, for instance, J. C. GINSBURG, *Essay - How Copyright Got a Bad Name For Itself*, in *Colum.-VLA J.L.& Arts*, 2002, 26.; and P. AUTERI, *Il paradigma tradizionale del diritto d'autore e le nuove tecnologie*, in M. LILLÀ MONTAGNANI, M. BORGHI (eds.), *Proprietà digitale. Diritti d'autore, nuove tecnologie e digital rights management*, cit., 23-25) also emerges in the context of plagiarism.

[198] See *infra*, Chapter 5.

[199] L. ZEMER, *The idea of authorship in copyright*, cit., 69, who recalls how in any case this defence has a very limited scope, citing the relevant case law and particularly *Ashdown v Telegraph Group Ltd*, 18 July 2001, Court of Appeal, [2001] EWCA Civ 1142, [2002] Ch 149, [2001] 3 WLR 1368, [2001] 4 All ER 666, [2001] 2 All ER 370, [2002] RPC 5, [2001] EMLR 44, <http://www.bailii.org/ew/cases/EWCA/Civ/2001/1142.html>; *Ashdown v Telegraph Group Ltd*, 11 January 2001, Chancery, [2001] Ch 685, [2001] 2 WLR 967, [2001] RPC 34, [2001] EMLR 20; *Hyde Park Residence Ltd v Yelland and others*, 10 February 2000, Court of Appeal, [2000] EWCA Civ J0210-2, [2001] Ch 143, [2000] 3 WLR 215, [2000] RPC 604, [2000] EMLR 363, [1999] RPC 655, [1999] EMLR 654.

[200] L. ZEMER, *The idea of authorship in copyright*, cit., 221. Cf. P. JOHNSON, *The public interest: is it still a defence to copyright infringement?* ? in *UCLA Ent. L. R.*, Vol. 16, 2005, 1.

courts have expressly discouraged,[201] while others foresaw it as a chance to overcome incompatibility between copyright and freedom of expression.[202]

With regard to the Italian system, indeed, such defence can only foresee in wider terms as suggesting that an accurate and proper attribution of authorship in intellectual works would certainly satisfy the general interest of the public to receive truthful information.[203]

Recapping with the UK system, another factor that is a peculiarity of common law jurisdiction is the possibility of resorting to torts, in particular, the tort of passing off, and its form of "reverse passing off", to approach misattribution of authorship. Related to the conduct of misrepresentation that damages someone else's goodwill, it often applies to unregistered trademarks and unmistakably it has a stringent commercial substance.[204]

The applicability of such tort to plagiarism, indeed, finds fairly recent but controversial support from commentators.[205] According to Isabel Alexander, who expressly defines it as «a possible legal avenue for the plagiarized author», a conceivable benefit of this defence is that it takes into account the reputational element, even if in terms of goodwill, of the fabricated and deceitful misattribution of the original authorship. The utilization of such claims, in fact, appears to pursue illegitimate revenue, since he/she takes advantage of the labour of the real author.[206]

Even more, given its limited and only abstract applicability, there seems not to be enough evidence to support its extension to cover the violation of authorship credit, especially when extracted from its typical commercial denotation, since it is purposely

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[201] *Beloff v Pressdram Ltd*, circa 1973, Chancery, [1973] 1 All ER 241, [1973] FSR 33, [1973] RPC 765. *Hyde Park Residence Ltd v Yelland and others*, cit., in which the Courts consider the basis of such a defence within an action for infringement of copyright as different from its application outside copyright. *Douglas & Ors v Hello! Ltd and others*, 11 April 2003, Chancery, [2003] EWHC 786 (Ch), [2003] 3 All ER 996, <http://www.bailii.org/ew/cases/EWHC/Ch/2003/786.html>; *Douglas & Ors v Hello! Ltd and others*, 11 May 2005, Court of Appeal, [2005] EWCA Civ 595, [2006] QB 125, [2005] 3 WLR 881, [2005] 4 All ER 128, [2005] EMLR 28.

[202] *Ashdown v Telegraph Group Ltd* (CA 2001), cit. Cf. L. ZEMER, *The idea of authorship in copyright*, cit., 221.

[203] This argument, therefore, appears here only sustainable in a very general and perhaps abstract sense. However, there seems to be some potential in engaging in a further in-dept analysis that includes different areas of the law, which however cannot be pursued in the instant research.

[204] Besides, in the United Kingdom it is a product of the judiciary and not of statutory enactment, while in the USA it finds an express statutory enactment in the Lanham (Trademark) Act (15 U.S.C.).

[205] On the complexity of applying such tort in instances of misappropriation of intangibles, see M. SPENCE, *Passing off and the misappropriation of valuable intangibles*, in *L.Q.R.*, 1996, 1.

[206] I. ALEXANDER, *Inspiration or Infringement: the plagiarist in court*, cit., 3, 11, 12.

regard trademark and not copyright. Therefore, for now it seems more practicable to regard the mentioned definition of plagiarism, as the act of passing someonelse's work off as one's own, as having an ordinary meaning. Otherwise, there could be the actual risk of narrowing too much the scope of a legal protection against misattribution. The moral rights framework, therefore, remains the preferential route.[207]

In any case, given the complexity of the picture thus far illustrated, there might be sufficient arguments to consider the necessity of a modification in the law, which would take into consideration, among other things, the changes in the arts as well as in technology that day-by-day allow greater engagement with the work. This in order to find some clearer guidelines to treat those particular violations that may not amount to existing legal sanctions, but still harm the author's rights. At the same time, however, there is also a chance that this may lead to new perils and abuses, even considering the growing fear that works will eventually escape the control of their own author or owner, which is why – again – a more definite approach of the law is needed.

Either way, in order to establish the recurrence of any conduct that may refer to plagiarism as a violation of the norm of attribution, it is still unclear whether we can use the same unique parameter to assess it on legal and non-legal grounds. Similar doubts concern the feasibility of a unique test of copyright infringement in the case of exclusive protection rights. Therefore, we should be very careful about what we wish for, but above all, we should be careful to understand how to do it, merely resorting to the law, which could even fall outside copyright, or with the aid of other disciplines that seem to better explain the complex dynamics of plagiarism.

In fact, from whatever perspective we look at plagiarism, it is difficult to appraise and define it in strict terms. Consequently – and this is valid for both the Italian and the UK interpreter – we could wait for legislators to get involved with statutory provisions that would differently affect misattributing practices, or make peace with the ambiguity that has always surrounded it and has thus far entrusted it to the hands of the judiciary.

[207] At the same time, it still seems worth investigating further the actual feasibility of such an alternative approach and, at least in theory, consider the possibility of applying a similar interpretation even in the Italian context, albeit with a very extreme caution. Such an experiment, however, deserves a better and more dedicated analysis, which may be pursued in a separate research.

We – civil and common law interpreters – may also wish to find peace with our reciprocal ghosts. Moral rights and economic rights should not be seen as enemies, whether the former is not the ultimate annihilator of the latter, or vice versa. Indeed, they should be able to coexist peacefully and rather support one another, particularly when the infringing practices go before the court, where, as we shall soon see, the fight of the author is often a skirmish for both personal credit and monetary takings, which seems not to have ineludibly national colours.

CHAPTER 5

PLAGIARISM BEFORE THE COURT: EXPLORING JUDICIAL APPROACHES

1 Applying legal categories for non-legal concepts: a mystifying task

The substance of all concepts thus far recounted in relation to the complex and multifaceted context of authorship and its misattribution is undeniably one of a kind. Delineating what the expressions creative, original, essential or substantial mean is just one example of the challenging task that occupies the interpreter.[1] Early commentators, who on many occasions found it difficult to distinguish a copy from the original, already envisioned this complexity.[2] Recalling what White illustrated with regard to the idea of originality over time, for instance, we may agree that what has actually changed is essentially the type of creative effort.[3]

Either way, it is worth repeating that it is precisely with an indulgent attention to the significance and scope of all applicable, although fleeting, concepts that any mature consideration of authorship misattribution may take place. Furthermore, in order to reach this aim, neither their historical development nor the non-legal contextualisation that refers to the different types of works in which they may apply should be disregarded.[4] Likewise, since plagiarism mirrors the opposite image of creativity and

[1] See, on this, A. RAHMATIAN, *Copyright and Creativity. The Making of Property Rights in Creative Works*, Cheltenham, UK: Edward Elgar, 2011, 35, 53-54.

[2] L. A. SENECA, *Ad Lucilium epistulae morales*, cit., who explains: «I think that sometimes it is impossible for it to be seen who is being imitated, if the copy is a true one, for a true copy stamps its own form upon all the features which it has drawn from what we may call the original, in such a way that they are combined into a unity» (at 281).

[3] Referring to the early nineteenth century, White noticed: «the ancients were as eager for originality in their way as writers of today [although] the type of originality desired by classical writers is different, that's all» (at 7). Besides, if the particular combination of old and new material through the process of selection and reinterpretation may have founded originality, this was soon accompanied by the need to improve what had indeed paved the way. H. O. WHITE, *Plagiarism and imitation during the English Renaissance*, cit., 11-12.

[4] D. LANZA, *L'autore e l'opera*, F. ROSCALLA (ed.) *Attribuzioni, appropriazioni, aprocrifi nella Grecia antica*, cit. 11.

originality, its historical depiction and further progression is of countless bearing.[5] This inference appears to be proved by the precise concern that the judiciary has had for it, as exemplified since older case law, also considering the considerable attention that it has reserved too many of the concepts typically forged by the arts and literature.[6]

In line with these considerations, the lack of an explicit reference to the word "plagiarism" does not impede its explicit consideration, as it has previously argued, by the ordinary language, by specialised fields of knowledge and, finally, by the wiles of the judiciary.[7] This is not to suggest that any of them provide a clear and consistent interpretation of misattribution, but this demonstrates that the subject may be of a great interest also for the law, either with the aim to sanctioning it or discouraging its legal treatment. In addition, the missing consistency of related theories and of judicial decisions on the matter should not be frightening.

The lack of a clear intention to promote a definite system of rules and sanctions to be exactly applied to the phenomenon explains the difficulty in appraising its complexity in full; however, it does not either imply renouncement of its definition and regulation. On the contrary, the lack of a strict definition may be seen as an opportunity for the judiciary, allowing it to fill in the gaps in the statutory framework, but also to find a more balanced solution to misattribution practices, especially insofar as the legislator does not take a clearer position on the matter.

If praise for genuine imitation against the broader background of originality has characterised the literary debates, indeed this has cautiously extended to the courtroom. Departing from the very basic but fundamental principle, hardly contested, that

[5] Even if, for practical reasons, it has been so far given preference to the analysis of literary works , which must indeed be regarded as an exemplifying illustration. Cf. Chapters 1 and 2.

[6] Cf. R. TERRY, *The plagiarism allegation in English literature from Butler to Sterne*, Basingstoke, UK: Palgrave Macmillan, 2010. P. KEWES, *Plagiarism in Early Modern England*, Basingstoke, UK: Palgrave Macmillan, 2003.

[7] As we have seen, its exact denotation does not appear explicitly in any provision of statutory law, either in Italy or in the United Kingdom. However, briefly recapping with what has been illustrated in Chapter 4, the Italian Copyright law mentions the conduct of usurping authorship attribution over an original work of the mind (*usurpazione di paternità*), particularly as an aggravated element to the principal conduct of copyright infringement. The UK Act, instead, simply acknowledges the right to attribution and the possibility that it may be infringed, under certain circumstances, following specific requirements and allowing a number of exceptions. Furthermore, without an express reference in the Act to such an occurrence, it essentially refers to the general rules that apply to the infringement of copyright.

copyright implies the entitlement of the author to reap the profits of his/her labour,[8] while ideas are not protected,[9] the tendency to reproach and sanction servility and outright piracy that clash with the canons of creative imitation has greatly diffused.[10]

Given these premises, a constant reference to both the above-illustrated patterns and to their explicit treatment by the arts and literature should not be overlooked, particularly in the areas of copyright, which is by its very nature extremely convoluted, requiring miscellaneous knowledge and a high degree of erudition by those who exercise judicial power. Yet, such an expectation is often moderated by the aid of experts who are asked to filter certain intricate and highly specialist (or professional,[11] as some courts have uttered) matters.

As will be addressed, the courts may in fact rely on the findings of the latter or support some of their theories and discard others; however, they may also elaborate their own principles solely based on their learned understanding of the subject. Certainly, many of these outcomes depend on the type of subject matter, which by its nature may be easier or more difficult to apprehend without the mediation of an expert. Literary and dramatic works, in which most of the judges have confidence, normally exemplify the latter case, while artistic and musical works represent a typical example of the former.[12]

Even before late 1800s, departing from which the analysis that follows has been necessarily restricted, there have been several cases dealing with the borrowing or taking of intellectual creations, so it is improbable that the law had considered the phenomenon as unutterably legitimate and lawful. However, as it is with any cultural

[8] See, in particular, *Millar v Taylor*, 20 April 1769, King Bench, cit.; *Donaldson v Beckett*, 22 February 1774, House of Lords, [1774] 2 Bro PC 129, [1774] 1 ER 837, in practice an appeal of *Millar v Taylor*, which, however, refused to recognise the existence of a common law copyright beyond the terms provided by the statute.

[9] *Hollinrake v Truswell*, 8 August 1894, Court of Appeal, cit., (on appeal of *Hollinrake v Truswell*, 18 March 1893, Chancery, cit.).

[10] H. O. WHITE, *Plagiarism and imitation during the English Renaissance*, cit., 201-202, who provides many examples from Classic and Renaissance literature to prove this point.

[11] See *Francis Day & Hunter Ltd and another v Bron and another*, 25 February 1963, Court of Appeal, [1963] Ch 587, [1963] 2 WLR 868, [1963] 2 All ER 16, in which Justice Wilberforce explained that some points of evaluation may be described as «'professionals'' points and one must resist the temptation, which I think some of the defendants' witnesses did not fully resist, to atomise what is a living phrase. One must not lose sight of the musical character and the aural appeal of the sentence as a whole».

[12] Despite this obvious difference, the tests for infringement appear to be the same. There may be, therefore, some latitude to foresee a different regulation on the matter. Such an argument is undoubtedly interesting and is currently being considered in further detail as the basis for a subsequent research project. For the purpose of the present analysis, however, it will necessarily be treated succinctly.

and broadly social concept that is viewed through the eyes of the law, there have always been grey areas, in which it has been particularly debatable to establish whether or not a violation of the right has occurred, and such a controversial aspect is clearly accentuated by the lack of a definite legislative guide.[13]

What the courts have to face is nothing less than challenging and it becomes even more difficult when one considers the significant influence of technology and the variable functioning of social norms,[14] particularly in their operation as an incentive for protecting attribution and reputation.[15] However, some help may come from a general understanding of the phenomenon of misattribution and all the concepts that surround it against the general and ordinary background.[16] One pertinent application of this possible orientation is set in the criteria of both evaluating legal phenomena according to the average person's standards and by referral to the skilful knowledge of experts that are called to help the judge define his/her ruling.

Still, as the Lord Chancellor in *D'Almaine v Boosey* said, «where material is borrowed from a previous work, it is a nice question, depending on circumstances, whether there is a plagiarism».[17] There could be no better formula to explain the arduous task of the courts, thus the following paragraphs will be dedicated entirely to

[13] However, this should not imply that a severe and harsh approach is the only viable option, particularly considering what literature and arts may have thus far suggested when illustrating the historical dimension of literary imitative practices. In particular, recalling the metaphor of the laborious bee that we encountered in the first part of the study (cf. Chapters 1 and 2), there have certainly been instances in which the conduct has rather found a collocation in the realm of genuine imitation. These were, to use an expression that has already been used, among others, by E. PIOLA CASELLI, «Iarcines imperceptibles» in *Del diritto di autore secondo la legge italiana comparata con le leggi straniere*, cit., 531.

[14] In addition to the considerations illustrated in Chapter 3, see also S. OUTPUT, *Plagiarismo, il mondo è nuovo*, Various Authors (eds.) *Vero è falso. Plagi, cloni, campionamenti e simili*, cit., 125, who emphasise how technology, particularly when culture was passed down through manuscripts, made clear that the act of copy has restricted the opportunity to blame the appropriation of others' words.

[15] On normative and social change, see, in particular, V. POCAR, *Il diritto e le regole sociali. Lezioni di sociologia del diritto*, cit., 41-42, who underlines the effectiveness of social norms according to their inclination to influence individual behaviour; R. H. MCADAMS, *The origin, development, and regulation of norms*, cit., 338; L. A. KORNHAUSER, *Notes on the Logic of Legal Change*, in D. BRAYBROOKE (ed.) *Social Rules*, cit., 169-170, 178; C. HORNE, *Sociological perspectives on the emergence of social norms*, cit., 19, according to whom informal sanctions undoubtedly play a determinant role as an incentive for the observation of the norm.

[16] Referring to common language in order to understand the concept of originality, as we have seen in Chapter 2, may have its advantages. Sometimes, however, even the common language may entail some very specialist hint, so offering a more limited aid. See, for instance, the French scholar Larousse, describing *originalité* as the main and most important artistic quality. P. LAROUSSE, *Grand dictionnaire universel du XIXe siècle*, Vol. 11, 1866, 1471, <https://archive.org/stream/LarousGrdictionnXIX11bnf#page/n1473/mode/2up>, also cited by M. RANDALL, *Pragmatic Plagiarism: Authorship, Profit, and Power*, Toronto: University of Toronto Press, 2001, 51.

[17] *D'Almaine v Boosey*, 3 March 1835, Exchequer, [1835] 160 ER 117, [1835] 1 Y & C Ex 288.

look at the attempt of the Italian and the UK judiciaries to provide the best possible answers to such a nice circumstantial question.

1.1 The average person vs expert standards, with the learned judge in the middle

The need for the courts to consider copyright-related issues, such as misattribution of authorship, from as many angles as possible and particularly according to specialised fields of knowledge, extends to the consideration of their significance according to the common language and, in turn, according to the perception that the average person may have of copyright issues.

As we shall see, courts find themselves right in the middle. On the one hand, they need to account for how society understands and interprets such concepts, particularly when the statutory law does not provide specific definitions or reference. On the other hand, they inevitably become the spokesperson of a very specialist understanding, which arises directly and indirectly from the exact involvement of experts in judicial decisions.[18]

As some have observed, the concept of the average or ordinary person in copyright began to receive greater attention when the rise and development of technology forced right-holders to take into better account the interests of the public, which may be endangered or extremely limited in the traditional private-based structure of copyright engagements.[19]

However, for the purpose of the present analysis, the concept of the average person generally is intended to reflect both the typical or expected conduct of an ordinary individual who engages with copyright and the perception that an average

[18] However, their roles should not merely take one side or the other. Judges are in fact expected to deliver knowledgeable rulings.

[19] See, in particular, G. LASTOWKA, *Virtual Justice: The New Laws of Online Worlds*, Yale University Press, 2010.

Traditionally, the construct of reasonable person had defined the predictable conduct of any ordinary person in certain circumstances. Subsequently, its recurring use in criminal law, torts and contract law to help determining negligence has then found a broader application in law, including copyright. More generally, it refers to the standard behaviour that society assumes should occur in a given situation, as well as the expected consequences that certain events have on the average person's sensitivity, which respectively also echoes other conventional notions such as the Latin paradigm of *bonus pater familias* and the French figure of l'*homme moyen sensuel*.

person may have of copyright-related issues. This formula, which, among several definitions, has been written off as the behaviour of the ordinary, average (Joe/Jane, John Doe or Smith) person, but also simply of the man on the street, attempts to encompass the typical behaviour of the public in copyright matters including copyright infringement.

To add some complexity to the picture, such a concept is likely to apply to any average player on the copyright scene. In fact, it may describe the conduct not only of the copyright user but also the copyright holder, especially when the court that has to balance their potentially conflicting interests. Either way, regardless of the angle from which one looks at it, the average or ordinary person formula helps to explain a particular conduct or view of copyright, including authorship attribution and plagiarism.[20]

Having this in mind, also explicated in some rulings, there could be instances in which a simple reference to the ordinary person criterion is not sufficient. Therefore, when the complexity of evidence requires it, judges will often seek the help of experts in a given field, although this aid should never be used as a substitute for their independent judgement.[21]

Some legal fields, in particular, such as expressly copyright law, may require the aid of an expert approach more than others, given the envelopment of the various disciplines that convolute it. Experts, in fact, may lead the judge to conclusions that, based only on his/her own experience or a mere legal training, he/she would not otherwise have reached.[22] Besides, the court itself may stretch the scope of certain specialist concepts to the extent that they become, in turn, ordinary.

Such considerations apply to both the Italian and English courts. Focusing on the latter, in *Wood v Boosey*, for instance, in his concurring opinion Justice Bramwell

[20] In fact, courts often refer to this special construct to develop their reasoning, particularly when they take into account the typical demeanour of the ordinary user in order to illustrate the functioning of copyright dynamics, but also when they expressly adopt the canon of the average person's opinion as their own and so validate their holding.

[21] The useful and sometimes essential aid of a given expertise, however, should not take precedence over legal reasoning, but rather reasonably assist the court in the difficult task it has to face bringing into the picture, and so into the legal process, those opinions and considerations that will help the magistrate to evaluate the pieces of evidence brought before its bench, without consequently implying the superseding of its fundamental juridical establishment.

[22] This is of course true for many other fields of law but when limited to the context of intellectual property law, and copyright in particular, it appears even more accurate than ever.

describes the concept of opera to explain that, when one considers the part written for instruments such as the pianoforte, the role of the arranger is essential, and this is a very basic principle that anyone having a basic knowledge of orchestra may know.[23]

Besides, he goes even further. The work of who arranges the music is to be considered distinct from the work of who composes the music. In fact, the judge believes that the pianoforte arrangement or accompaniment resumes in a process that is not purely mechanical. At the same time, while recognising that any person familiar with the art of music or an experienced composer could do it, it cannot be denied that such an arrangement results in a "work of great merit and skill", as it surely was with great musicians such as Mozart and Mazzinghi.[24] This inference, in his view, is something that anyone playing an instrument should discern. Hence, as he further considered, «anybody who plays any musical instrument knows it is a very common expression to say, such a piece is very well arranged, such a piece is very ill arranged; this is a very difficult arrangement; that is an easy arrangement».[25]

In line with these considerations, it is worth recalling the metaphorical image of the eye that becomes the real evaluator of many creative phenomena and in this way impersonates the judge:

> Now, in the case of those things as to which the merit of the invention lies in the drawing, or in forms that can be copied, the appeal is to the eye, and the eye alone is the judge of the identity

[23] In detail, he emphasises: «anybody who knows anything of the orchestral score and of the pianoforte arrangement, would know that. It is a physical impossibility that fingers could play upon the pianoforte every note as it is written in the orchestral core. For example, where there is a tremolando in the music - that is when the violins play the same notes backwards and forwards continually, of course that cannot be done on the piano, and sometimes for a substitute an octave is played with the thumb and finger». *Wood v Boosey and another*, 4 February 1868, Exchequer, [1868] 3 LR QB 223 (on appeal of *Wood v Boosey and another*, 12 January 1867, Queen's Bench, [1867] LR 2 QB 340).

[24] A work like that therefore receives copyright protection and if pirated its infringer would be consequently liable. Besides, this music example well explains the extreme specificity and convolutedness of the subject that rotates around copyright, which is also expressed in the current case by the definition the judge provided of piano arrangement: «But what is the pianoforte arrangement? It is an arrangement of the whole of the music of this opera for the pianoforte, a part of which is the ordinary pianoforte accompaniment, the bass and the treble played with both hands, and which is independent of the melody. There may be, as it appears, the line of music for one voice, or two or three voices, as the case may be; and there are separate and distinct lines for the accompaniment for the pianoforte; and, no doubt, here and there throughout this accompaniment, and by going line by line through the score of the original opera, there may be found the same notes; but there are other parts of the accompaniment which are merely the pianoforte accompaniment, the notes forming which are nowhere to be found in the score at all». *Wood v Boosey and another*, 4 February 1868, Exchequer, cit.

[25] *Wood v Boosey and another*, 4 February 1868, cit.

> of the two things. Whether, therefore, there be piracy or not is referred at once to an unerring judge, namely, the eye, which takes the one figure and the other figure, and ascertains whether they are or are not the same.[26]

This precious eye often takes the shape of an ear when it comes to musical works, where it often needs, maintaining the metaphor, an external device that is mostly provided by expert witnesses who technically analyse the evidence for the judge.[27]

In the *Francis Day* musical case, in particular, their role is undisputed in the examination of the songs that were brought before the court. Additionally, the strain of «put[ting] into words what is ultimately a matter for the ear»[28] was acknowledged, which could also depend on the different approaches taken by each individual witness who analysed the tunes.[29]

Nonetheless, what seems to be hardly disputable in the context of musical works is the resemblance of many tunes. Subject to the emphasis on the considerable or minimal degree of likeness that may be established, the attention of the court will be directed to the similarities or differences that exist between the songs under scrutiny. Therefore, witnesses called to the stand may likely take the side of one or the other litigant, unless they are independent experts chosen by both parties.[30]

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[26] *William J. Holdsworth And Others Plaintiffs In Error; And Henry C. M'crea Defendant In Error*, 25 June 1867, House of Lords, [1865] 2 LR HL 380, concerning an infringement of design drawings.

[27] Cf. *D'Almaine v Boosey*, 3 March 1835, Exchequer, cit., in which Lord Chief Baron explained: «substantially the piracy is where the appropriated music, though adapted to a different purpose from that of the original, may still be recognized by the ear», at 302.

[28] *Francis Day & Hunter Ltd and another v Bron and another*, 25 February 1963, Court of Appeal, cit. In addition to the circulation of printed copies of the allegedly infringing chorus (reproduction of the first eight bars of the chorus), during the hearing musical experts gave evidence, performing the songs vocally and by pianoforte. Moreover, recordings of various versions of the tunes were also played to the court.

[29] Following the scrutiny of the witnesses, Justice Wilberforce provided a very detailed analysis of each work, occasionally underlining the source of his convincement (especially when he was unsure of some aspects). On the whole, he believed that he had given a fair description and comparison of the songs (what is not clear, however, is whether he actually and fully understood such a description), also allowing himself to give personal evaluations such as: «after a final version of the theme, the song ends with quite a different movement, mainly in crotchets, which I hope I may be forgiven for saying was of a somewhat lame character». The trial judge, in fact, tried to compare and contrast the two tunes himself. *Francis Day & Hunter Ltd and another v Bron and another*, 25 February 1963, Court of Appeal, cit.

[30] As recalled in the judgement, expert witness Leslie Gordon Murchie seems to have taken the following oath: «I swear by Almighty God that I will, to the best of my ability, skill and knowledge, well and truly interpret and illustrate to the court the music and all such matters and questions as may be required of me». *Francis Day & Hunter Ltd and another v Bron and another*, 25 February 1963, Court of Appeal, cit.

The appellate court in *Francis Day v Byron*, indeed, acknowledged the great importance of hearing directly, or "at first hand", the illustration of technical evidence from the musical experts who delivered meticulous vocal and instrumental examples. This is particularly true when the case to be decided is essentially a matter of facts, as it was in the case in question. However, when such direct engagement is not possible, the court still has a chance to form its conviction observing also other works that may be brought for comparison.[31]

This resort to other compositions, in particular, has made possible the inference that in both considered tunes the opening phrase is developed using the same and commonest tricks of composition of «repetition followed by a pause, followed again by further repetition with a slight variation [that exactly] produces the degree of similarity between the two compositions [and therefore should not] be taken as in any sense proof of copying. There is at least an equal probability that his choice of these devices was the result of coincidence».[32]

At the same time, the judiciary warns about being particularly careful in the interpretation of statutory law, especially when even the desire for a precise consideration of specialist and contextualised fields of knowledge risks to misunderstand or even ignore what the statute exactly regulates and what it does not (perhaps not yet) consider. An example of this is foreseen in the alerted concern towards new mechanisms of copying brought by novel technologies, and possibly already established in the arts, but not expressly envisioned by the statutory norms.[33]

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[31] As Lord Justice Willmer explains: «I have already referred to the fact that the six quavers which form the opening bar of "Spanish Town" are, as the judge observed, a commonplace series to be found in other previous musical compositions. Our attention was drawn, for instance, to an Austrian dance tune composed in the early nineteenth century by Von Lichnowsky, the opening bar of which is identical with that of "Spanish Town". The same sequence of notes is also to be found in a song entitled "Let Us Sing Merrily", although in this case there is a difference of tempo. In these circumstances, the fact that "Why" begins with an opening bar containing a similar, though not identical, phrase is of no special significance». *Francis Day & Hunter Ltd and another v Bron and another*, 25 February 1963, Court of Appeal, cit.

[32]For this reason, Willmer L.J. is of the opinion that the trial judge reached the correct decision and thus avails the dismissal of the appeal. *Francis Day & Hunter Ltd and another v Bron and another*, 25 February 1963, Court of Appeal, cit.

[33] This was the case in *Graves v Ashford and another*, 5 February 1867, Exchequer, [1865] LR 2 CP 410, where the Exchequer Chamber, in the opinion of Kelly J., affirmed that «in order to determine whether a copy obtained by means of photography is within those acts, we must look at their particular words; for, however clearly we can see that it is within the mischief those acts were designed to remedy, unless the words which the legislature has used point to copies thus effected, we should not be at liberty to extend their operation for the purpose of including them».

However, and here the letter of the norm may also clash with the letter of general language,[34] it was soon foreseen that the reference to an open clause such as "or otherwise or in any other manner copy" implied that «the legislature had contemplated that there might be some other hitherto undiscovered mode of copying works of art which they were unable at the time to describe in apt words», without necessarily inferring that any subsequently discovered mode of reproducing had to be automatically considered applicable.[35]

Besides, «the ordinary sense of the word» is sometimes explicitly advocated by the judiciary, as it was in *Dicks v Brooks* when Justice James L., referring to the allegedly piratical imitation of engravings, specified that, even «without going into any etymological definition of the word 'copy,' and using the word in the ordinary sense of mankind as applied to the subject matter, the question is, Is this a copy, is it a piracy, is it a piratical imitation of the engraving [?] The alleged copy is not a thing intended as a print in the ordinary sense of the word».[36]

Therefore, he excluded the possibility that, regardless of any similarity, it can be inferred that, in any sense of the word, it is a piratical copy whereby there is «the attempt not to reproduce the print, but to produce something which has some distant resemblance to the print [and accordingly,] nobody would ever take it to be the print, nobody would ever buy it instead of the print, nobody would ever suppose that it was [especially when] it is a work of a different class, intended for a different purpose».[37]

Furthermore, recapping the issue of expertise, especially with regard to literary works, a more autonomous role of the judge must be allowed. The court admits the implication of its own crucial and definite contribution in *Pike v Nicholas*, when Sir W. M. James V. C. so elucidated:

> In endeavouring to reach an approach which is neither too superficial nor unduly academic or technical, I think I must to

[34] Indeed, as it was questioned, «upon what reasonable ground can it be contended that a photographic copy of a print, which presents to the eye a complete and accurate copy of the original, does not fall within these general words 'or otherwise or in any other manner copy?' Unless the ordinary rules for the interpretation of language are to be disregarded, I can come to no other conclusion than that this is a 'copy' within that statute». *Graves v Ashford and another*, 5 February 1867, Exchequer, cit.
[35] *Graves v Ashford and another*, 5 February 1867, Exchequer, cit.
[36] *Dicks v Brooks*, 4 May 1880, Court of Appeal, cit.
[37] *Dicks v Brooks*, 4 May 1880, Court of Appeal, cit.

> some extent rely on my own aural judgment, instructed as it has been by these various experts. As it was put by Professor Nieman, "The public has a purer approach to music than the critics." That, of course, does not mean that one must discount the help that the critics can give, but I think I must rely on the ear as well as on the eye, and on the spoken words of the witnesses.[38]

Besides, as the defendant seems to advance, any similarity that may occur is essentially owing to the nature of the common subject and the treated topics, «which such an object would suggest to any persons who had followed the course of modern historical criticism, and of ethnological and anthropological research and speculation, and the like obviousness of the authorities which such persons would refer to and quote».[39]

The opportunity for the judge to compare the works at first hand is of essential relevance, particularly when the court is expected to consider the evidence of independent creation that would allow sparing accusations of infringement. In any circumstances, as has previously been anticipated, it is mostly with a certain kind of works that an extensive and careful examination would be conducted by the court independently, as in the case of comparing a book with a film script. A different approach, instead, seems to be more probably sought in dealing with the category of works that by their nature require the aid of a dedicated expertise, as it is usually with music compositions and paintings.

Either way, in pursuing the examination, some common details, such as one or more characters of their stories, may easily attract the attention of the interpreter. Similarities, however, even if they may be striking and thus initially support a prima facie copyright violation, can still be justified by the existence of a common source,

[38] Something that Sir W. M. James, V.C. had the chance to do, construing his convincement from the meticulous reading of the contended books, by reaching the ultimate conclusion that some parts of the book of the defendant were «a palpable crib from the Plaintiff's, transposed, altered, and […]. I would add, skilful in appropriative the labours of another, and in disguising, by literary artifices, the appropriation». *Pike v Nicholas*, 24 November 1869, Court of Appeal, [1869] LR 5 Ch App 251.

[39] However, as Sir James emphasised, he felt that he could still make his own evaluations in the matter, after carefully reading of the notes, being «bound by [his] own judicial oath to well and truly try the issue joined between the parties, and a true verdict give according to the evidence: that is to say, according as I, weighing all the evidence by all the lights I can get, and as best I may, find the testimony credible or incredible, trustworthy or the reverse. The law which admitted the testimony of the parties and of interested persons was passed in full reliance on the Judges and on juries that they would carefully scrutinize such testimony, and would give it such weight as it deserved and no more, or no weight at all». *Pike v Nicholas*, 24 November 1869, Court of Appeal, cit.

which could even explain the omissions and/or alterations between the two works under consideration,[40] or indulge the inference of independent conception.[41]

Moreover, with recurring references to the aid of experts, which also seem to be justified by the intent not to allow an abuse of infringement claims, it cannot either be disregarded that, beyond the help that a specialist reading of the facts may bring to the case, it is still necessary to assess the exact bearing of a given work by a non-expert. As emerged in *Dorling v Honnor Marine*, for instance, «the courts are well used to matters depending on the evidence of experts, whose opinion can thus be readily obtained, even if they are not often in agreement. But how is the impact of the appearance of an object on a non-expert (perhaps 'the man on the Clapham' bus' be) to be ascertained?»[42]

As a final consideration, going into evidence, courts generally acknowledge the difficulty of approaching a subject that, albeit arising from the appraisal of copyright protection, belongs to very distinct and specialist fields. This may in fact bring the risk for the court «to sit as a tribunal of literary criticism», an instance that should be mostly rebuked, even considered the specificity of some works over others.[43]

Another issue that is greatly influenced by the emphasis that one may place on the capacity of the judiciary to make its own evaluations in matters that are extremely

[40] *Harman Pictures, N. V. v Osborne and others*, 20 March 1967, Chancery, [1967] 1 WLR 723, [1967] 2 All ER 324. As here the Court in fact notices, «all l I have to determine at this stage is whether the plaintiffs have made out a prima facie case […] all I have is a bare assertion that he did not base the script upon the book».

[41] Therefore, in the case of musical works, the court will consider in the broadest sense the influences that may have determined the similarities. In the aforementioned case of *Francis Day v Hunter*, in particular, it was alleged by the defendant that he had been mainly influenced by the music of Puccini, Ravel and Debussy, but radically denied having ever heard the (sic!) well-known tune of the plaintiff.
Francis Day & Hunter Ltd and another v Bron and another, 25 February 1963, Court of Appeal, cit.

[42] *Dorling v Honnor Marine Ltd*, 10 April 1963, Chancery, [1964] Ch 560, [1963] 3 WLR 397, [1963] 2 All ER 495, [1963] 1 Lloyd's Rep 377; *Dorling v Honnor Marine Ltd*, 13 December 1963, Court of Appeal, [1965] Ch 1, [1964] 2 WLR 195, [1964] 2 All ER 241, [1963] 2 Lloyd's Rep 455.
The case in question concerned the drawings of boat plans and yet the judge admitted knowing nothing about boats. However, as he concluded, «that some of the parts – sufficient together to constitute a substantial part of the whole boat – would have appeared to a non-expert, who did not know that they were in fact based on the plans, to be reproductions of the corresponding drawings on the plans, but that he would not have felt any strong conviction that the completed boat was a three-dimensional version of the plans».
Dorling v Honnor Marine Ltd, 13 December 1963, Court of Appeal, cit.

[43] *Wood v Chart. Wood v Wood*, 29 April 1870, Equity, [1865] LR 10 Eq 193, which affirmed that undoubtedly «much depends upon the nature of the work. A mathematical treatise would probably have to be translated literally; a political history less accurately, but still closely; a romance more freely; the main object being to make the foreign work intelligible. Poetry, as we know from the instances of Pope's 'Homer,' and Dryden's 'Virgil,' is allowed a still wider range, and a drama, it is submitted, may be rendered with still greater latitude when the meaning is addressed to the eye, and the scenic effect is one of the main elements».

and specifically knowledge-based, is substantiality, which, as we shall see in the following sections, is a crucial element in assessing copyright infringement. As the Court of Appeal clarified in *Designers Guild*, the judge may be in good position to form a view on substantiality, which is a question of judgment.[44]

Moving from these considerations, in the same case the House of Lords gave its own elucidation and Lord Hoffman, in particular, examined in detail the reasoning of the appellate judges. Among other aspects, he conceded that substantiality is a question of impression:

> When judges say that a question is one of impression, they generally mean that it involves taking into account a number of factors of varying degrees of importance and deciding whether they are sufficient to bring the whole within some legal description. It is often difficult to give precise reasons for arriving at a conclusion one way or the other (apart from an enumeration of the relevant factors) and there are borderline cases over which reasonable minds may differ.[45]

However, if one focuses exclusively on the impression, there will be always some margins of error, alias fallacies, in the evaluation of the judge,[46] which may also imply

[44] As a result, there was little difficulty, in the Court's view, that it was in the natural position to make certain evaluations, which would be summarised in the following points: visual comparison between the works to assess whether one of them was seemingly the copy of a substantial part of the other; and dissection, or the analysis of the component parts of the design, for example, the layout or effects that may be considered a substantial part of the work. More generally, the court believed it could easily discern the expression of the work from its idea, which is in itself not entitled to any monopoly.
Designers Guild Limited v Russell Williams (Textiles) Limited, 14 January 1998, Chancery, [1998] EWHC Patents 349, [1998] FSR 275, [1998] FSR 803, <http://www.bailii.org/ew/cases/EWHC/Patents/1998/349.html>; *Designers Guild Limited v Russell Williams (Textiles) Limited*, 26 March 1999, Court of Appeal, [1999] IP & T Digest 4, [2000] FSR 121.

[45] *Designers Guild Limited v Russell Williams (Textiles) Limited (Trading as Washington Dc)*, 23 November 2000, House of Lords, cit.

[46] In particular, His Lordship also warned that there might be a risk of sidetracking from the actual significance of the query of substantiality, whether of impression or otherwise, when, once the similarities of the works at issue are secluded, such a query is simply referred to the previously explored test of similarity. The issue of substantiality, in fact, goes one-step further, consisting of assessing whether the act of copying (contingent to the similarities) has concerned a substantial part of the protected original work. *Designers Guild Limited v Russell Williams (Textiles) Limited (Trading as Washington Dc)*, 23 November 2000, House of Lords, cit.

overlooking certain aspects and dodging others, even under the direct influence of the witnesses on the stand.[47]

Therefore, in Lord Hoffman's view, it seemed more accurate to consider the question of substantiality as «one of mixed law and fact», which requires the application of legal standards to facts. Hence, beyond being an issue of mere impression that implies an overall evaluation of the works, but often too estranged from any legal basis, should be rather conceived as a composite criterion of factual and legal elements, also in order to avoid dangerous oversimplification.[48]

The last aspect additionally brings back for consideration the notion of whether such examination, especially in the artistic field, but likewise extended to other disciplines, should be made by an expert in the field who has in-depth knowledge of the field in question, or whether a fleeting view of the whole may indeed be sufficient, which is normally expected from the average or ordinary person, who may also sometimes be the potential buyer of the artefact. The problem of what should be the criterion of assessment is therefore particularly stringent.[49]

Controversies of artistic plagiarism, for instance, have mainly regarded figurative arts and photographic works. In such a field, the analysis of the court appeared to be greatly focused on the analytic and comparative scrutiny of the works, taking into account all the possible elements of evaluation, comparing not only the works as a whole, but also all the elements that compose each of them. The analysis of such elements, considered within the context in which they belong and particularly when there is the possibility of a partial copy, appears even more conceivable.[50]

Moving into the realm of music, the timeworn *Gramophone* case held that music does not exist if not for the hearing and it is thanks to conventional signs that musicians

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[47] The exercise of dissection, in fact, should imply careful consideration of any individual parts allegedly similar, but also their cumulative effect. *Designers Guild Limited v Russell Williams (Textiles) Limited (Trading as Washington Dc)*, 23 November 2000, House of Lords, cit.

[48] In any case, as Lord Hoffman concluded, the Court of Appeal should not have reversed the trial judge's finding when it appeared that there was indeed no error in principle.
Designers Guild Limited v. Russell Williams (Textiles) Limited (Trading as Washington Dc), 23 November 2000, House of Lords, cit.

[49] *Perego c Soc. Ceramica Canova*, 27 November 1963, Trib. Padova, [1964] Rep. Foro it. v. Dir. autore n. 778; [1963] *Riv. dir. ind*. II 213.

[50] In other instances, however, courts have preferred first to sort a comprehensive analysis and only thereafter proceed with the analytical examination. *Perego c Soc. Ceramica Canova*, 27 November 1963, Trib. Padova, cit.

can materially translate their own conceptions, reveal their thoughts and communicate them to others, in this way translating into sound the typical signs of the scores.[51]

At the same time, it may be sustained that virtually any judgement on musical copyright infringement should be better conducted through the help of experts, given the extreme specialisation that such fields require. In fact, this may unmistakably help the court to have a broader and possibly more objective view than that offered by the parameter of the ordinary person or of an imprecise audience, also admitting the difficulty of proving how exactly a song is assimilated by the public.

Indeed, it has been also soon considered that some tunes tend to impose on the public the feeling of being a product of immediate enjoyment, which may particularly depend on the power of its melodic element that is often the most simple and catchy element to memorise.[52] Moreover, it has been acknowledged on the contrary that the ordinary person may instead more easily recall the rhythm, which would be more straightforward to identify.[53]

However, there is no uniformity of thought even on this aspect. In particular, it could additionally be observed that the ordinary person may actually be capable of recognising the most distinctive element of a song and so contribute to determining its originality, even without the interaction with music experts, especially when the featuring element of the piece is widely used.[54] According to the Court of Appeal in *Rossi c Fiorello*, such capacity indeed belongs to the communal experience of anyone who has a certain degree of education and has read, in school or for his/her own

[51] *Gramophone company limited c Ricordi*, 5 December 1908, Cass. Torino, [1909] Rep. Foro it. v. Dir. autore n. 332; [1909] *Foro it.* I 603.
[52] *Soc. Sony Music Entertainment Italy c Carrisi*, 18 December 1997, Trib. Milano, [1999] Rep. Foro it. v. Dir. autore n. 171; [1999] *Dir. aut.* 132, [1998] *Annali it. dir. autore* 713, [1998] *Annali it. dir. autore* 718.
This aspect, indeed, is of critical relevance, but it seems yet debatable to conclude with any certainty that only resorting to experts would guarantee objectivity.
[53] *Carrisi c Jackson*, 24 November 1999, App. Milano, [2000] Rep. Foro it. v. Dir. autore n. 152; [2000] *Giur. it.* 777, [2000] *Dir. aut.* 127.
[54] *Branduardi c Soc. Buitoni Perugina*, 12 May 1993, Trib. Roma, cit.

personal enjoyment, poetic works.[55]

Besides, in cases in which it appears less immediate to formulate a judgement of non-originality, for instance, when the trifle of the song is not that manifest, expert evidence may be unavoidably required.[56] Resorting to expert standards, in fact, re-emerges in cases that are particularly complex or perhaps only driven by the media, such as the *Carrisi c Jackson* saga,[57] where several expert witnesses offered a wide range of case records, citing numerous songs of different genres, all of which showed coincidences and distinctions when compared to the songs of the claimants.[58]

Furthermore, the occurrence of copyright infringement in the arts requires further consideration. First, there are cases in which the boundary between plagiarism and genuine imitation is particularly narrow and hurried conclusions should be avoided. Therefore, the help of expertise here is even more necessary and yet the judge should be particularly careful when approaching the matter to base the judgement only on his/her knowledge of the field. In addition, given the extreme development of arts', which is also enhanced by technological evolution, courts may have to face a considerable variety of hypotheses and possible violations.[59]

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[55] Indeed, when the court finds the absolute triviality of a work, such as inspirational themes, which does not even require further assessment, it may consider the recourse to expertise knowledge to be useless, resorting to the notions of experience belonging to any average person of ordinary knowledge, which thus appear being sufficient. See *Rossi c Fiorello*, 1 June 2004, App. Milano, [2005] Rep. Foro it. v. Dir. autore n. 12; [2004] *Annali it. dir. autore* 891.
In this particular case, however, the standard to which the Court refers may not be that ordinary, but it has a specific connotation that elevates it to a higher degree of knowledge or experience (when it alludes to a not better defined "certain degree of education"), which seems instead to be closer to an expert rather than average standard.

[56] *M.P. c Fornaciari*, 16 January 2006, Trib. Milano, [2006] Rep. Foro it. v. Dir. autore n. 179; [2006] *Dir. aut.* 254, which concerned the alleged insertion of a poetical theme in a song.

[57] *Carrisi c Jackson*, 24 November 1999, App. Milano, cit.

[58] The songs *I cigni di Balaka* and *Will you be there* were analysed in detail and even small variants in rhythm and melody were fully considered. It is worth noticing that, in the first instance, the Praetor ruled in favour of Carrisi, but without taking into consideration any technical elements, which were indeed considered on the subsequent grounds.

[59] This included artistic rough sketches that gave a distinct imprint to the intellectual creation, therefore requiring a relatively modest degree of creativity, which, however, still protected it from the occurrence that others could appropriate it (*Mauzan c Magagnoli*, 18 July 1925, Trib. Milano, [1925] Rep. Foro it. v. Dir. autore n. 470; [1925] *Temi lomb*. 609); the traits of the comic-strip writer (*Watterson c Sama Diffusioni s.r.l.*, 21 January 2008, Trib. Milano, [2009] Rep. Foro it. v. Dir. autore n. 91; [2009] *Riv. dir. ind.* II 117); artistic project included in a mock-up (*Valente*, 4 November 1993, Pret. Pesaro, [1996] Rep. Foro it. v. Dir. autore n. 138; [1996] *Dir. aut.* 109); jewellery with a certain artistic value (*Gerosa c Marconi*, 18 February 1929, Trib. Milano, [1929] Rep. Foro it. v. Dir. autore n. 380; [1929] *Riv. dir. comm*. 308, [1929] *Mon. trib.* 830); paintings transposed into books (*F. Haufstaengel c Soc. Ed. Modernissima*, 13 November 1922, Trib. Milano, [1923] Rep. Foro it. v. Dir. autore n. 324, 325; [1923] *Riv. dir. comm*. 266, [1923] *Studi dir. ind*. 252, [1923] *Riv. dir. comm*. 266).

Particularly disputed are those instances in which the artistic work may also have an industrial application. In this case, it becomes essential to discern the artistic element from the product in which it is then infused; it is in fact the former that must be creative and original regardless of its industrial or artisanal application.[60]

2 Plagiarists on trial. A survey of the case law in Italy and the United Kingdom

It has been lengthily argued that the violation of the right to attribution greatly depends on the proper appraisal of the concepts of creativity and originality. Besides, it has also been explained that before even considering any allegation of a breach of such right, it is essential to ascertain whether the work that is allegedly plagiarised is worth protecting under the law of copyright.[61]

Likewise, we had the chance to explain the importance of considering the role of the judiciary in reaching a mature assessment of plagiarism-related issues, on the one hand filling the openings of statutory law, while on the other hand aiming at guaranteeing a better balance among the interests of the various subjects involved, which may in one way or another be affected by the judgement. Apart from the obvious resort to the judiciary with regard to the United Kingdom, which, like other common law countries has a preeminent case law approach, the interest in looking at the judicial context almost naturally extends to the Italian counterpart, even being regarded as a purely civil system where the legal precedents are not binding.

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[60] See *Tagliapietra c Soc. Componenti Donà*, 21 April 2000, Trib. Venezia, [2001] Rep. Foro it. v. Dir. autore n. 164; [2001] *Foro it.* I 1404, [2000] *Annali it. dir. autore* 980, regarding glass gondolas, in which what counted was the form in itself, the form being the expression of the work's originality. The most complete protection shall be afforded to right-holders with reference to both the economic and moral right dimension, against counterfeiting and usurpation of paternity.
Cf. *Bonanomi c Gemma di Cereda*, 20 April 1984, Trib. Lecco, [1986] Rep. Foro it. v. 1510 n. 113; [1984] *Giur. dir. ind.* 445, where nuptial panels were deemed original, since originality qualified not merely the artistic form or expression, but also the capacity to individuate and discern the work from others.

[61] This inference was soon accepted by courts that had to appraise on preliminary grounds whether the work in question deserved legal protection at all, the first essential question that the court needs to pose being whether the work was original or not. Ideally, it is only once this issue is appraised that the court may proceed further and spend its time and energy assessing whether there has been, in point of fact and of law, a breach of the asserted right/s.

Indeed, the contribution of the Italian courts has had a very influential and determinant impact in the matter of copyright law, particularly with reference to the misattribution of authorship.[62] Any cognisant analysis of its related matter therefore seems to benefit from following this pattern. However, even within the Italian system, magistrates have been swinging, particularly in their judgements on authorship misattribution, in line with the difficulties of providing a clear definition of the phenomenon. Besides, it is hard to conclude that a definite and indisputable structure and mechanism of regulation has been found, but this should only encourage a further judicial analysis of this kind.

As anticipated, plagiarism-related discourses have been traditionally and more historically entangled with the concepts of counterfeiting and piracy. This peculiar linkage emerges particularly in the judicial context, especially in the earliest period hereby considered (from late 1800 to early 1950), but is occasionally found even in more recent decisions.[63]

Likewise, it is also accurate to argue that, for what concern the Italian framework, courts have not been always prone to affording the same protection to moral rights to any type of intellectual creation.[64] This helps to demonstrate that even within the Italian context there has not always been unanimity of thought in terms of what concerns the moral right protection of authors, which to some extent apparently clashes with the recurrent idea that moral rights have always been absolutely protected in the Continent. It is instead worth considering that it has not always been such a flawless picture, but has rather gone through some evolution that has in part aligned with the similar development of creativity.

Moreover, and this is again a mutual observation that concerns both systems considered, the explicit resort to the interpretation of the matter by magistrates, which is particularly evident in the wary and, most important, first-hand reading of the decision,

[62] Being determinant, especially with regard to the last aspect, the fact that, as has often been recalled, the law does not offer much ground to address the issue explicitly and clearly.
[63] This has also received attention by commentators such as P. DECHERNEY, *Hollywood's copyright wars: from Edison to the internet*, New York: Columbia University Press, 2012, who, focusing on the US cinematographic field, explores some of the most well-known legal disputes on copyright infringement, including the early controversies on piracy, also providing an interesting view of its social self-regulating response.
[64] This concerned, in particular, photographic works, which, unlike other works, as we have anticipated, only later received equal protection.

allows to take into account some aspects that one would not perhaps consider if the analysis had been limited to a mere theoretical conception.[65] Finally, as the analysis of a crucial case that follows will depict, there seems to be a constant round of patterns hiding behind the process of creation that the judiciary often and deliberately recall.[66]

Furthermore, as also established in the previous paragraph, the resort to some old cases allows a valuable and perhaps even new perspective, although this to some may appear paradoxical, in addition to the natural resort to the authorities to which courts give their imprimatur. Furthermore, their careful reading shows how certain issues and problematic aspects of copyright law were known and beckoned by the judiciary long before today.

A good example of this last inference is represented by the anomaly that, according to the House of Lords, emerged, for instance, when «the composer who, at the keyboard, composes an unforgettable melody, the poet who creates an inspired poem and the orator who produces a memorable speech do not obtain copyright protection […] unless the melody, poem or speech are reduced to writing or other material form». Despite signalling the glitch, the House clarified that any change in this concern should be made by the "rational legislator". Yet, there seems to be sufficient latitude to appreciate the role of the judiciary in also signalling copyright statutory anomalies,[67] thus explicating their typical balancing function.

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[65] It may be reasonably argued that there may be discrepancy in terms of a number of decisions, particularly with a preponderance on the Italian side, being the UK decisions generally more limited in number, in part according to the principle of *stare decisis* and in part in consideration of the fewer instances in which moral rights have been considered by its courts. However, bearing in mind this possible misbalance, the choice of limiting the consideration of Italian case law to a few cases, deemed the most relevant, hopefully aims to find a trade-off. Besides, it should also be recalled that, in any case, several Italian cases on the specific matter hereby analysed are, largely, repetitive, the ruling sometimes being a mere replica of another court's ruling.

[66] It may be useful to recall the circle referred to by White who, defining the imitative literary practices over the time, said, «the study has completed a circle. It began with the enunciation of a classical ideal; it concludes with the triumphant application of that ideal by Englishmen», so proving that the patterns of genuine imitation have been recurrently repeated age by age. H. O. WHITE, *Plagiarism and imitation during the English Renaissance*, cit., 201. See *supra*, Chapters 1 and 2.

[67] The same indication seems to arise today with regard to the likely ambiguous requirement of fixation, which may also go along with actual doubts about the rationality of the legislation.
British Leyland Motor Corporation Ltd. and another Respondents and Armstrong Patents Co. Ltd. and another Appellants, 27 February 1986, House Of Lords, [1986] AC 577, [1986] 2 WLR 400, [1986] 1 All ER 850, [1986] UKHL J0227–1; *British Leyland Motor Corporation Ltd. and another Respondents and Armstrong Patents Co. Ltd. and another Appellants*, 27 February 1986, Court of Appeal, [1984] 3 CMLR 102, [1984] FSR 591.

2.1 Italian case law from late 1800 to early 1950

The fact that the legislator avoided a definition of plagiarism does not mean that the law had no interest in the subject. On the contrary, it can be inferred that it is particularly because of the dearth of a clear denotation of the phenomenon, which has always had a tangible social extrication, that the judiciary has proved its duty to consider the claims of those who held being prejudiced by the infringing conduct of others who had allegedly copied their work by usurping their authorship.

Concerning the Italian context, one of the earliest cases in which Italian courts considered the usurpation of someone else's work is *Mascagni Sonzogno c Verga*,[68] which established that anyone who appropriates another's works, even adding or varying something of his/her own, but without surpassing the original work, violates the right of the author in the intellectual creation that is essentially reflected in the infringing work.[69] Indeed, the case in question defined such conduct only in terms of *contraffazione*, which has, for a long time, gone along with the concept of piracy and plagiarism,[70] while in other instances the latter found its autonomous collocation.[71]

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[68] *Mascagni Sonzogno c Verga*, 16 June 1891, App. Milano, [1892] Rep. Foro it. v. Dir. autore n. 388; [1892] *Foro it*. I 41.

[69] This conclusion clearly reminds the established literary canons of imitation that have been illustrated in Chapters 1 and 2.

[70] Cf., among other earlier judgements, *Angelelli c Ditta Paravia e Terrigi*, 2 December 1876, App. Ancona, [1877] *Giur. it*. I 2 15; *Fallo c Morando*, 23 October 1880, Cass. Torino, [1881] Rep. Foro it. v. Dir. autore n. 420; [1881] *Mon. trib. Mil.* 92; *Regina Gabriele*, 24 May 1889, Cass. Napoli, [1889] Rep. Foro it. v. Dir. autore n. 335; [1889] *Dir. giur*. 106; *Invernardi c Trevisini e Paravia*, 7 February 1895, App. Roma, [1895] Rep. Foro it. v. Dir. autore n. 399; [1895] *Bett*. 220; *Annoscia*, 16 May 1898, App. Trani, [1898] Rep. Foro it. v. Dir. autore n. 429; [1898] *Rass. giur. Bari*, 188, [1899] *Mon. trib*. 34; *Porcu*, 3 March 1903, Trib. Sassari, [1903] *Foro sardo* 236, [1903] Rep. Foro it. v. Dir. autore n. 334; [1903] *Riv. prat*. 599, [1903] Foro sardo 236.

[71] Some courts of that epoque, in fact, seemed indeed to have a clearer vision of plagiarism as an independent infringement. See *Casa musicale Sonzogno c Castelli*, 6 April 1932, Cass. Regno, [1932] Rep. Foro it. v. Dir. autore n. 434; [1932] *Mon. trib*. 324, [1932] *Giur. it.* 561, [1932] *Riv. dir. comm.* 277, [1932] *Sett. cass.* 728; *Dominici c Vecchio*, 7 November 1932, App. Torino, [1933] Rep. Foro it. v. Dir. autore n. 369; [1933] *Giur. Tor*. 234, [1933] *Mon. trib*. 511; *Cordovado*, 30 June 1934, Cass. Regno, [1935] Rep. Foro it. v. Dir. autore n. 483; [1935] *Giur. it*. 98, [1935] *Giust. pen*. III 222, [1935] *Mon. Trib*. 357, [1935] *Dir. aut.* 88; *Gronda*, 5 April 1935, Cass. Regno, cit.; *Mosco c Soc. Metro Goldwin Mayer*, 4 June 1937, Trib. Roma, [1937] Rep. Foro it. v. Dir. autore n. 475; [1937] *Foro it*. I 948; *Traldi c Ditta Uniformi fasciste*, 27 January 1941, Cass. Regno, [.] Rep. Foro it. v. Dir. autore n. [1941] *Dir. aut.* 27, [1941] *Mon. trib*. 520, [1941] *Riv. dir. comm*. II 445; *Salgari c Soc. App.V.E*., 3 August 1942, Trib. Roma, [1942] Rep. Foro it. v. Dir. autore n. 401; [1942] *Dir. aut.* 278; *Pagliai c Simoni*, 23 May 1947, App. Roma, cit.; *Campanile c Zavatini*, 31 March 1952, Pret. Roma, [1952] Rep. Foro it. v. Dir. autore n. 705-706; [1952] *Foro it.* I 673; *Grimaldi c Soc. Ponti de Laurentis*, 23 June 1954, Trib. Roma, cit; *Pertici c*

In fact, plagiarism was soon to receive explicit mention in a number of cases since late 1800, which also distinguished the hypothesis of reproachable and legally sanctionable plagiarism from those instances considered tolerable.[72] Both plagiarism and counterfeiting were denied, for instance, in *Scarpetta*,[73] provided that a foreign work, which was adapted to the Italian stage and also translated into an Italian dialect, with additional modifications, could eventually only amount to a non-authorised representation of a copyright play.[74]

Some courts were particularly careful to differentiate between conduct that could amount to plagiarism, counterfeiting or simple imitation. In this way, they demonstrate particular attention to the literary and artistic patterns of creative imitation, whose relevance has marked, in particular, the first part of the research. In line with the mechanisms illustrated therein, they attempt to distinguish the instances in which the conduct of appropriation was hidden by some modifications or alterations that nonetheless did not amount to any infringement (*plagio* or *contraffazione mascherato/a*). On the contrary, other courts who foresee little distinction between plagiarism and counterfeiting focused on their shared elements, such as the intention of the perpetrator to copy the work of someone else for his/her own benefit and at the expense of the other person.[75]

Looking at one of the earliest theories elaborated by the judiciary and concurrently expounded by scholarly works, three main elements seemed to stand out in a claim of that sort: first, the monetary prejudice that the genuine author of the allegedly

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Flora film, 1 September 1954, Trib. Roma, [1955] Rep. Foro it. v. Dir. autore n. 690; [1955] *Temi rom*. 143; *Innocenzi c Borello*, 21 February 1955, Pret. Roma, [1955] Rep. Foro it. v. Dir. autore n. 695; [1955] *Foro pad*. I 1366.

[72] Nonetheless, the contingent link between plagiarism and counterfeiting has not been limited to the earliest case law, but occasionally re-emerged in more recent disputes, in which the presence of the latter has never completely left the side of the former. This aspect – if it is to some extent influenced by the recurrent practice of bringing an action before the court for both an alleged infringement of the works' economic rights of exploitation and a breach of the moral right of attribution – is still very controversial and may lead to missing the point that the two dimensions should rather remain distinct.

[73] *Scarpetta*, 16 August 1892, App. Napoli, [1892] Rep. Foro it. v. Dir. autore n. 388; [1892] *Gazz. proc*. 281, [1893] *Mon. trib.* 17, [1893] *Riv. pen*. XXXVII 67.

[74] Other cases that individuated the instances in which plagiarism was considered unlawful. See *Carrara e Rechiedei c Bernardi*, 4 November 1896, App. Parma, [1897] Rep. Foro it. v. Dir. autore n. 415; [1897] *Foro it.* I 180; *Bemporad e Vecchi c. Carozzi*, 30 June 1897, Trib. Milano, [1897] *Mon. trib. Mil.* 690; *Benelli c. Savoia film*, 17 giugno 1914, Trib. Torino, [1915] *Mon. trib. Mil.* 113.

[75] See, for instance, *Soc. Poligrafica ed. sacre c Soc. Salvo e Bagni*, 1 March 1939, App. Brescia, [1939] Rep. Foro it. v. Dir. autore n. 476; [1939] *Foro it.* I 1644.

infringed work had suffered;[76] second, the awareness that the illegitimate nature of the conduct of copying has often been accompanied by various alterations aimed at concealing the infringement; and, third, the criterion of the considerable or otherwise substantial entity of the copy.[77]

Yet, such a theory has several inadequacies and limitations. First, the automatic inference that an economic suffering had to be established clearly clashed with the idea that the right of the author to be acknowledged as such shall be protected regardless of any economic damages. Then, the conscious intention to deceive, which often assumed the forms of *animus nocendi*, could easily be rebuked by the consideration that the infringer might indeed not have any intention to cause prejudice to the other person, also because this is often difficult to prove. Finally, the reference to a considerable quantity of copying someone else's work remained too vague or narrow, depending on how one understood it, and so implying excessive discretion by the judiciary.[78]

In *P.M. c Grimaldi*, which concerned the issue of the alleged plagiarism of an ecclesiastical legal textbook into a subsequent similar work, the copying had allegedly regarded the identity of the subject's order, choice and title of paragraphs, and the actual insertion of numerous passages from the earlier book.[79] In both instances, the trial judge and appellate court were for the dismissal of the case, since the allegedly infringing book was deemed a mere synthesis of the other, even though the reproduction of some exact passages was brought in as evidence. The main point held was indeed that to have actual infringement in terms of counterfeiting there had to be complete and accurate reproduction in the substance and form of the other work.[80]

Besides, another fundamental concern for the court was to assess whether the

[76] Indeed this immediately brings our attention to the inevitable association with the economical dimension of copyright.
[77] See E. PIOLA CASELLI, *Del diritto di autore secondo la legge italiana comparata con le leggi straniere*, cit., 533.
[78] E. PIOLA CASELLI, *Del diritto di autore secondo la legge italiana comparata con le leggi straniere*, cit., 533-534.
[79] *Grimaldi*, 17 September 1898, Cass. Roma, [1899] Rep. Foro it. v. Dir. autore n. 404; [1898] *Foro it.* II 17.
[80] Besides, in *Pietri c Fonzo* the discriminating criterion seemed to reside in the unlawful appropriation, which occurs when the copied piece has the extension and importance to be considered a clear substantial and material reproduction of the intellectual work of others. *Pietri c Fonzo*, 15 April 1932, App. Milano, cit., in which it was held that facts, feelings and ideas are the common material of art, and therefore anybody can use them. It is a recurrent practice that every author, whether consciously or not, uses expressions or phrases used by others, to a greater or lesser degree, so that one may see a mere fleeting reminiscence or, on the contrary, an actual medley of others' pieces extracted from their own works.

allegedly plagiarised work deserved any copyright protection. In *Angelelli c Paravia*, although anticipating that the logic of numbers is common to those who understand the science of numbers, a table of report on arithmetic calculation was considered an intellectual creation that deserved protection,[81] given that certain calculations require some intellectual effort.[82]

Within the artistic field, instead, protection has been afforded to chromolithographic works, as having the form of works of art, on the condition that their extrication in the outer world could be appreciated by senses, and thus the express creativity from whom they originated. The counterfeiting of chromolithography that reproduced paintings was yet considered illicit when reproduced, even with slight but possibly malicious variations.[83]

Moreover, recalling what has previously been argued with regard to the recognition of certain types of works, the protection of photographs has not indeed been automatic. The development of technology, in fact, has for some time raised doubts about whether photography was entitled to be protected as an artistic form like others or whether it was instead a simple mechanical and chemical reproduction. However, even when the former opinion prevailed, it still remained still the problem of deciding whether the evaluation about whether a photograph had to be considered original and only then protected had to be ascertained by experts or could be evaluated, according to

[81] *Angelelli c Ditta Paravia e Terrigi*, 2 December 1876, App. Ancona [1877] *Giur. it.* I 2 15.

[82] No protection was granted to expressions that belong to the common language, such as the poetical verse "è già domani", which was found to be indeed subject to a recurrent exploitation in *Corsale c Soc. Snia Viscosa*, 18 October 1974, App. Milano, [1975] Rep. Foro it. v. Dir. autore n. 710; [1975] *Giur. it.* I 2 477, [1975] *Giur. Merito* I 444, [1975] *Dir. aut.* 387. Cf. *Baratta c Opera Parrocchiale S. Quintino e Morgari*,23 November 1925, App. Bologna, [1925] Rep. Foro it. v. Dir. autore n. 469; [1925] *Foro it.* I 1033, in which the Court held, confirming the lower judgements, that the Dannunzian poem had been illicitly taken and obviously transposed in a hackneyed way into the work of the infringer, without any intellectual effort, by merely reproducing its content and yet spoiling its original beauty and richness of forms.

[83] See *Istituto di Bergamo c May Söhne*, 31 December 1900, App. Torino, [1901] Rep. Foro it. v. Dir. autore n. 409; [1901] *Foro it.* I 1294, which ascertained that inspiration from paintings, not mere copy, given that novelty (*rectius* originality) could result in an even better expression of the figures there depicted, a better arrangement and drawing of the details in the picture, a more harmonic combination of colours, and more intensity of shades.

the ordinary person criterion, by anyone.[84]

In *Lessiak c Ditta Naya*, the Supreme Court made it clear how it was likely that photographic works could be entitled to protection,[85] but it was a matter for the judiciary to distinguish, after having evaluated all the circumstances and the evidence brought, between protectable and non-protectable works.[86] In the other earlier judgement of *Pandimiglio* the court held that, by virtue of his artistic ability and *intuition*,[87] the photographer deserved protection of his economic and moral rights in the works, and foremost that the work had been properly attributed. The few alterations made to hide the plagiarism were not sufficient to deny this simple fact.[88]

In art, as with other fields, the subject of the work does not have to be new or absolutely novel,[89] and it may indeed already be used many times. Moreover, even the fact that the subject itself is a commonplace element of art, or belongs to the public domain, does not in itself suffice to exclude protection. One should instead focus on the originality of its expression and representation.[90]

In *Soc. Poligrafica c Salvo*, a case of works representing sacred images, there

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[84] See *Huesch*, 18 January 1901, Trib. Napoli [1901] Rep. Foro it. v. Dir. autore n. 409; [1901] *Filangieri* 504, where it was ascertained that the work of the photographer is a work of patience that can be executed with certain instruments. The main requirement, however, remained that the work had to have a minimum degree of creativity.
Cf. *Mauri c Confalone*, 21 May 1906, Trib. Napoli, [1907] Rep. Foro it. v. Dir. autore n. 390; [1907] *Filangieri* 310, [1907] *R. universale* 441, according to which photographic drawings could be the result of a certain thought, spirit, artistic taste and intelligence of their maker.

[85] *Lessiak c Ditta Naya*, 12 March 1891, Cass. Roma, [1891] Rep. Foro it. v. Dir. autore n. 374; [1891] *Foro it.* II 198.

[86] At the same time, it was also understood that leaving this evaluation to the court could result in potential abuse, since there was the possible risk of leaving such an important evaluation to the discretionary power of a judge who could simply but wrongly take into account only the artistic value of the work. *Mauri c Confalone*, 21 May 1906, Trib. Napoli, cit.

[87] The protection thus afforded to photographs derived from the ability of the photographer to choose, assemble and describe the photos, for instance, inserted in a catalogue of modern art, which was reckoned to be compiled with care and love, intelligence and patience. *Visentini, Rubinato, Garbisa*, 15 December 1897, App. Venezia, [1898] Rep. Foro it. v. Dir. autore n. 428; [1898] *Filangieri* 132, [1898] *Temi ven.* 25, [1898] *Mon. trib.* 147, [1898] *Bett.* 82, [1898] *Annali* 25, [1898] *Legge* I 92.

[88] *Pandimiglio*, 28 May 1928, App. Roma, [1928] *Foro it.* II 233. Summarising the facts of the dispute, the photographer Pandimiglio appeared to have found a negative of his colleague Ferri, picturing Mussolini on a horse, and, having put his name on it instead, sold it by also inserting the caption "all rights reserved".

[89] As it emerged in *Mauri c Confalone*, 21 May 1906, cit., what indeed counts is that the work must be a product of the mind that originates from the artist, and therefore an original creation. It does not matter that the work is a new work, a reproduction, a copy of the previous artefact.

[90] Here we come back to the consideration that we have previously made with regard to literature (Chapters 1 and 2). What is most significant is that there has to be an individual or personal imprint of the author in that subject.

seemed to be sufficient latitude to foresee some degree of originality. Even if the theme were known, they were presented in a new and original manner.[91] Besides, works of art may also have a didactic feature in addition to their creative primary function. In this case, the opportunity to insert some extracts of previous works has to be considered licit insofar as the rights in the original work are protected, which is first guaranteed by acknowledging their source.[92]

2.2 UK case law from late 1800 to early 1950

Apart from the subsistence of copyright and therefore from the necessary evaluation of whether the work allegedly copied receives protection in the first place, both Italian and UK courts have, since the beginning, faced the question of what constitutes infringement of the rights in the protected work, but also the exact latitude of such a potential infringement. For instance, one of the first problems considered was the definition of the degree or amount of copy of others' works that would have led to infringement.

In particular, with reference to the UK case law, the interrogation of the court is divided into two main sub-questions, which may be summarised as follows: Has the defendant copied or taken the plaintiff's work? If he/she has allegedly copied only part of the plaintiff's creation, is such part of a material or substantial nature?

Besides, even considering these instances, the court appears always to be in a position to see whether the similarities between the works in question indeed refer to common places. No piracy seems to be easily ascertained when the works share the same common sources.[93] In particular, the fact that a common subject is foreseen in a

[91] *Soc. Poligrafica ed. sacre c Soc. Salvo e Bagni*, 1 March 1939, App. Brescia, cit.
The Court of Appeal indeed refers to a minimum of novelty and originality, but without attributing to it absolute significance. The images of Jesus were in their concrete form completely different from other works that still deal with the same subject. What the court found to be copied was the central graphic group, which was to be understood as the main and essential substantial kernel of the work and which could be seen even by a mere look and comparison between the two works, such that a simple inspiration had to be conclusively excluded.
[92] *Hoepli c Mancini*, 24 November 1905, App. Milano, [1906] Rep. Foro it. v. Dir. autore n. 342; [1905] *Foro it.* I 244.
[93] *Morris v Ashbee*, 10 November 1868, Equity, [1865] LR 7 Eq 34, which considered the case of a plaintiff, who, despite the labour and expense to conceive the work, had yet suffered some prejudice by

work always seems to ring a bell and possibly help the interpreter not to over-assess similarities that may arise from a straightforward comparison of the works.

In fact, particularly in this case, one should first wonder whether the instant likenesses are, to some extent, explicable by the implication that both intellectual creations share, on the one hand, the same subject and, on the other hand, the same sources, all of which considered consent to conclude that there has not been a "slavish copying".[94] In such cases, in fact, magistrates have always been extremely cautious to afford protection to the work. This point is well expressed in *Chatterton v Cave*, which considered dramatic works by Justice Grove, who contested that there could be an infringement of copyright in the case of the repetition of mere common forms.

As he further explains, the purpose of copyright protection is to shield the "original merit" in the work; it would have meant, «going too far», protecting a «common-place expedient of scenic art to the end of a version of a drama». Referring to the case in question, he thus articulated:

> A very striking stage situation or important novel scenic effect might very well be, under some circumstances, the subject of dramatic copyright. But I see nothing of the sort here. The effect was an ordinary stage effect, such as every one familiar with melodramatic pieces constantly sees […] the two versions being substantially independent, can it be said because in the last scene an expedient is adopted which is identical with that adopted by the plaintiffs' drama, but which may be said to be 'common form' in all such plays.[95]

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someone else's appropriation of his work, so plainly frustrating the principle that «no one has a right to take the results of the labour and expense incurred by another for the purposes of a rival publication, and thereby save himself the expense and labour of working».
Cf. *Kelly v Morris*, 8 March 1866, Equity, [1866] LR 1 Eq 697; *Lewis v Fullarton*, 16 July 1839, Chancery, cit.

[94] *Pike v Nicholas*, 24 November 1869, Court of Appeal, cit.
As Lord Hatherley noticed, «a case of alleged piracy like this was obviously very difficult to determine when the authors took a common subject and depended upon authors open to both of them, and when portions of the one work, which were said to resemble portions of the other work, might be then from those common authors to which each was at liberty to resort». On the contrary, although the judge of first instance focused too much on similarities, «there was a common subject propounded, a common mode of treating that subject which was open to both. With regard to all the various passages, with the exception of Retzius, the Defendant had been to the common source, had worked out of that common source, had laboured there, and had produced something of his own in addition».

[95] *Chatterton and another v Cave*, 26 May 1875, Divisional Court, [1875] LR 10 CP 572 (later discussed in *Chatterton and another v Cave*, 30 November 1876, Court of Appeal, [1876] 2 CPD 42).

Yet, it is exactly availing that the principle of sole quantity cannot be determinant to assess infringement that their Lordships punctuate how, in any case, regardless of the instance that both works were taken from a common source, «it was the original adaptation that constituted authorship, and that was not to be imitated and plagiarised».[96]

Especially in consideration of this concluding phrase, the case in question becomes particularly relevant, not only for the fact that it posits, even in the first instance, the very basic principle that copyright should only protect original works, but also because, in the words of the House of Lords, we can see an earlier application of the term plagiarism and its direct inference with the concept of authorship. Likewise, in *Wood v Boosey* the court admitted that, although not inventing the tune or the harmony, it was still possible to foresee some kind of invention in the adaptation of another work, even simply referred to the minimal effort in the adaptation of orchestra work for the piano, which conceded authorship.[97]

Authorship, on the other hand, may still be an ingenuous act,[98] and the recurrence of common subjects appears to some extent to confirm this.[99]

This case was later considered before the House of Lords, which again had to reconsider explicitly the significance of materiality or substantiality of the allegedly copied works. According to the appellants, in particular, the Divisional Court overlooked the facts and failed to consider that «the scenes, or 'points,' as they were called, were material, valuable, and striking points, and affected considerably the attractiveness of the drama, and no one doubted that they had been copied from the Plaintiff's production». *Chatterton and another v Cave*, 28 March 1878, House of Lords, [1878] 3 AppCas 483, which found how, although it could be said that the drama of the defendant was taken from the plaintiffs, these parts were not of a material or substantial character.

The case also referred to a number of other authorities, including *Planche v Braham*, 7 November 1837, Common Pleas, [1837] 173 ER 402, [1837] 8 Car & P 68, [1837] 4 Bing NC 17; *Bramwell v Halcom*, 1836, Chancery, [1836] 3 My & Cr 737; [1836] 40 ER 1110, in which Lord Cottenham had stated that «it is not quantity, but value, that is to be looked to».

[96] *Frederick B. Chatterton and Benjamin Webster, Appellants; and Joseph Arnold Cave, Respondent*, 28 March 1878, House of Lords, [1875] 3 App Cas 483.

Cf. *D'Almaine v Boosey*, 3 March 1835, Exchequer, cit.; *Leader and Cock v Purday*, 11 January 1849, Common Pleas, [1849] 7 CB 4, [1849] 137 ER 2; *Lover v Davidson*, 6 November 1856, Common Pleas, and Exchequer [1856] 1 CB NS 182, 140 ER 77; *Chappell v Sheard*, 3 August 1855, Chancery, [1855] 2 K & J 117, [1855] 69 ER 717; *Chappell and others v Davidson*, 5 May 1856, Common Pleas, and Exchequer, [1856] 18 CB 194, [1856] 139 ER 1341.

[97] A conclusion that was yet contested by the plaintiff, who insisted for declaring that «still [the defendant] is not the author; he has shewn no inventive power, he has not created a single melody», so claiming that musical arrangement was «purely mechanical [did] not require much skill, therefore the arranger was not in any sense to be considered author, given that he did not create anything new that would entitle to claim authorship, but he simply copied for the piano what the original composer did for the whole orchestra». *Wood v Boosey and another*, 4 February 1868, cit.

[98] *Toole v Young*, 26 May 1874, Queen's Bench, [1865] LR 9 QB 523, in which Justice Blackburn, acknowledging the entitlement of the author of the drama, and so his assignees, to restrain the piracy of

On similar grounds, *Tate v Fullbrook*, regarding dramatic works, further corroborated this point, when Justice Kennedy observed how:

> I do not say that, for the purpose of judging whether one dramatic piece is a plagiarism from another, where words of pieces deal with more or less similar subject-matters, it is not legitimate to look at dramatic situations and scenic effects, in order to see whether, taking them in conjunction with the words, they do not help to shew that there has been a borrowing of an idea or of an expression of an idea from another piece [but] a jury might properly be directed that they might consider such things, is not that they could by themselves form an infringement, but that they might be considered as some evidence of the substantial identity of the two productions.[100]

At the same time, it has also occasionally emerged that, in order to prove that an infringement has occurred and needs to be punished, some trace of misbehaviour, such as the so-called *animus furandi*, which would also contradict an honest or fair treatment of others' works, must be established. As cleared out in *Kelly v Morris*,[101] in fact, one

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the work, admitted: «I do not see any reason why both Mr. Hollingshead and Mr. Grattan are not to be considered as authors to the extent to which they have exercised their ingenuity in turning the novel into a drama».

[99] *Toole v Young*, 26 May 1874, Queen's Bench, [1865] LR 9 QB 523, concerning two works that dramatised the same novel (of which the plaintiff was also the author), although in different form. Accordingly, Cockburn, C.J found them independent of each other and the defendant did not have any knowledge of a previous dramatisation. To reach this conclusion, he also referred to the authority of other cases, *in primis*, *Reade v Conquest*, 19 January 1861 and 17 January 1862, Common Pleas, [1861] 9 CB (NS) 755, [1861] 142 ER 297, [1862] 142 ER 883, [1862] 11 CB NS 479, according to which «an author has a right to convert a novel written by another person into a drama without infringing the copyright existing in the novel. It follows that two persons may dramatise the same novel, for that is common property. […] When an author has once given his novel to the world, he cannot take away from other persons the right to dramatise it by himself transforming it into a drama, subject to this, that they must not borrow from his drama but only from his novel. The author of a drama is not protected by the common law, and what the defendant has done is not forbidden by any statute».

[100] *Tate v Fullbrook*, 14 February 1908, Court of Appeal, [1908] 1 KB 821. In his view, Kennedy J., also referring to *Chatterton and another v Cave*, 28 March 1878, House of Lords, [1878] 3 AppCas 483, to some extent being very critical towards the reading of the trial judge, believed «that the learned judge, so to speak, viewed those facts through the wrong spectacles for the purpose of determining whether there had been an infringement by the defendant of the plaintiff's copyright. He treated the make-up and gestures of particular actors and such things as being matters which, quite apart from the words, might constitute the subject of infringement, because they had occurred in the representation of the plaintiff's piece».
Furthermore, as he additionally uttered, «The question is whether an expression of a thought or design has been made the subject of plagiarism».

[101] *Kelly v Morris*, 8 March 1866, Equity, [1866] LR 1 Eq 697, which regarded the piracy of a directory or guide-book (following *Lewis v Fullarton*, 16 July 1839, Chancery, cit.) and where Sir W. Page Wood,

should not be mistaken in assuming that he/she may freely and unlimitedly deal with the labour and property of others.[102]

Besides, even allowing a fair use of another's work, there seemed not to be any doubt that taking without proper acknowledgment does not amount to any fairness, but may only suggest an intention to profit – here in the broadest meaning – from someone else's labour hidden by a declaimed purpose of enhancing learning and knowledge.[103]

Therefore, even considering the applicability of the *animus furandi* criterion, when the source is acknowledged there seem to be limited grounds to foresee any concealment. Even so, if the defendant's work has indeed been appropriated a substantial part of the plaintiff's work, «by the mere use of paste and scissors, and without the exercise of any of that labour [since] the mere honest intention on the part of the appropriator will not suffice, as the Court can only look at the result, and not at the intention in the man's mind».[104]

The concept of copy is expressly considered in *Graves v Ashford*, in which Justice Mellor, having to decide whether statutory law prohibited copying also by means of photography, said that «the notion of piracy can hardly attach to that which is not a deceptive imitation: it means the taking advantage of another man's labour. It cannot be said that every sort of imitation would be within these acts; for instance, a

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V.C. explained: «what [the defendant] has done has been just to copy the Plaintiff's book and then to send out canvassers to see if the information so copied was correct. The work of the Defendant has clearly not been compiled by the legitimate application of independent personal labour, and there must be an injunction to restrain the publication of any copy of the [infringing] Defendant's work [at least in consideration of the parts] he shall have expunged from such portions all matter copied from the Plaintiff's work».

[102] *Scott v Stanford*, 7 February 1867, Equity, [1865] 3 LR Eq 718.
However, as further articulated in a similar case, in which the court considered appropriate granting an injunction against the appropriation of the plaintiff's work, if there were «no doubt these cases sometimes present extremely nice and difficult questions as to what is a fair commentary or a fair use for scientific purposes of the labours of another man», this should be confined to the cases in which the taking is followed by a distinct exercise of labour that would produce itself an original result.

[103] *Cary v. Kearsley*, 11 June 1801, High Court, [1801] 170 ER 679, [1801] 4 Esp 168, in which he quotes what Lord Ellenborough affirmed: «That part of the work of one author is found in another is not of itself piracy, or sufficient to support an action: a man may fairly adopt part of the work of another; he may so make use of another's labours for the promotion of science and the benefit of the public; but having done so, the question will be, was the matter so taken used fairly with that view, and without what I may term the animus furandi? […] While I shall think myself bound to secure every man in the enjoyment of his copyright, one must not put manacles upon science». *Kelly v Morris*, 8 March 1866, Equity, [1866] LR 1 Eq 697. *Campbell v Scott*, 8 February 1842, Chancery, [1842] 11 Sim 31, [1842] 59 ER 784; *D'Almaine v Boosey*, 3 March 1835, Exchequer, cit.; *Lewis v Fullarton*, 16 July 1839, Chancery, cit.

[104] *Scott v Stanford*, 7 February 1867, Equity, [1865] 3 LR Eq 718.

photograph an inch square of a large picture. No one could mistake the one for the other».[105]

The case in question adds another element to the picture, when it underlines the relevance of a deceptive intention and the actual aptitude of the infringing work to ingenerate consequent confusion. However, this factor does not actually find unanimous consideration by the judiciary; therefore, it should be evaluated case by case and only incidentally.

Moving to another level of analysis, when dealing with the legal aspect of attribution, another relevant point to consider is the linkage that has typically existed between authorship and formalities. In fact, when some critical formalities are not met, the UK law has always been categorically reluctant to afford any protection at all.[106] This was made clear in *Wood v Boosey*, when Justice Kelly C.B. regretfully considered that, although it seemed clear that «the merits of the case [were] with the plaintiff [,] the proprietor of the work», the fact that he did not register his right properly impeded any further consideration of its shield.[107]

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[105] Copying there meant imitating in whole or in part any other work. According to the Court, therefore, «the piracy of a picture or engraving by the process of photography, or by any other process, mechanical or otherwise, whereby copies may be indefinitely multiplied» could not be foreseeable. *Graves v Ashford and another*, 5 February 1867, Exchequer, cit. Cf. *West v Francis*, 15 May 1822, King's Bench, [1822] 5 B & A 737, [1822] 106 ER 1361, where copy is defined by «that which comes so near to the original as to give to every person seeing it the idea created by the original».

[106] Like the current case, other controversies were decided precisely because of whether the required formalities had been correctly followed.
Apart from consideration of procedural elements regarding cases that had an international dimension, it seems here sufficient to notice that «the question, whether a work [was] an imitation or a piracy, shall in all cases be decided by the Courts of justice of the respective countries according to the laws in force in each» (*Wood v Chart. Wood v Wood*, 29 April 1870, Equity, cit.), similarly to what the CJEU now précises regarding the need to give actual meaning to the concepts of creativity and originality.

[107] *Wood v Boosey and another*, 4 February 1868, Exchequer, cit., in which it was recounted that N. composed and published an opera in full score in Germany and, after his death, B. arranged the same score for the sole pianoforte, which was registered in England with only the name of N. as composer. In particular, the plaintiff failed to record the correct description of the piano arrangement with the name of its actual author, inserting instead the name of the composer of the opera for which the arrangement was made, given that the two works in question must be considered separately as two distinct creations.
These elements were clearly articulated in the concurring opinion of Justice Bramwell, who said: «I repeat, therefore, that if, instead of this music being called a 'pianoforte score,' it had been called 'an arrangement for the pianoforte and voices,' it would have been manifest that the name of the author of that was not Otto Nicolai but Brissler, who made this arrangement; and it might be a prudent thing, for aught I know, to state that the author of the opera was Otto Nicolai, and the arranger or the adapter was Brissler».
It is worth noticing, in this particular case, that the formalities were those of the International Copyright Act of 1844, 7 & 8 Vict., c.12, which afford protection to foreign authors.

Indeed, ascertained the respect of formalities, a case of express plagiarism, or «literary piracy», was well pictured in *Pike v Nicholas*.[108] Appealing against the first judgement that granted the plaintiff an injunction for the defendant having taken «a material and substantial portion of his work», it also considered the issue of whether there was an explicit duty to acknowledge the source from which one has borrowed or copied, depending on the perspective from which such conduct was seen.

Besides, it was explicitly considered whether such acknowledgment however had to be fair and open, with the further consequence that if proper credit had been made there would not have been the need to go before the court.[109] In fact, as Vice-Chancellor James explained:

> Plagiarism does not necessarily amount to a legal invasion of copyright. A man publishing a work gives it to the world, and, so far as it adds to the world's knowledge, adds to the materials which any other author has a right to use, and may even be bound not to neglect. The question, then is between a legitimate and a piratical use of an author's work.[110]

At the same time, it was soon understood that there were controversial cases that lied «on the border land between piracy and no piracy».[111] The *Bradsbury* case consents precisely to restating the foremost principle that «where one man for his own profit puts into his work an essential part of another man's work, from which that other may still derive profit, or from which, but for the act of the first, he might have derived profit, there is evidence of a piracy».[112]

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[108] Both works were on the same subject and the plaintiff brought a claim of piracy and unfair use of his work, arguing that the defendant's creation was not an original work. The defendant, on the contrary, contested all allegations, claiming that he had fairly acknowledged his sources, including the plaintiff, who was one of many. *Pike v Nicholas*, 24 November 1869, Court of Appeal, cit.

[109] However, even that inference did not appear to be sufficient to dismiss the claim. In fact, despite open acknowledgment and allowing that «there is no monopoly in the main theory», this does not still necessarily imply the welcoming of any unlawful taking. *Pike v Nicholas*, 24 November 1869, Court of Appeal, cit.

[110] *Pike v Nicholas*, 24 November 1869, Court of Appeal, cit.

[111] *Bradbury and others v Hotten*, 14 November 1872, Exchequer, [1872] LR 8 Exch 1, concerning the copy of a substantial part of the plaintiff's work, cartoons and images of a periodical transposed into caricatures in a different work, which was treated as a clear case of infringement.

[112] As Judge Pigott explained**,** «the question is, whether a substantial part of the plaintiffs' publication has been appropriated, and I cannot doubt that it has. The pictures are a vital part of Punch; they are the result of labour, originality, and expenditure, and from their great merit are of permanent value. That being so, the defendant has reproduced nine pictures, and with the same object as the plaintiffs had in their original

Moreover, even when infringement was proved and established, the next difficult question concerned the definition of what amounts to infringement. As it was, for instance, stated in *Chatterton v Cave*, to establish infringement, for example in dramatic copyright, «a material and substantial part of the plaintiff's dramatic production must be pirated. Though an appreciable part be taken, it does not follow as a consequence of law that the plaintiff's right is infringed, if such part be of a very unessential nature, or very unimportant and trifling in relation to the effect of the whole composition».[113]

Likewise, since a part of a work, rather than the whole, might be copied, it was soon deemed that such part or section of the work must have been considered «a material and substantial part».[114] The issue of quantity has been relatively well explored by many authorities,[115] which suggest the applicability of the criteria of quantity, value and the like, all converged in the shared concept of substantiality, otherwise in terms of materiality or essentiality. However, it was also, acknowledged that a general and univocal rule could not be simply defined, but the issue was likely to be ascertained case by case.[116]

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publication. That appears to me to amount to a piracy». *Bradbury and others v Hotten*, 14 November 1872, Exchequer, [1872] LR 8 Exch 1.
Cf. *Bogue v Houlston*, 23 February 1852, Chancery, [1852] 64 ER 1111, [1852] 5 De G & Sm 267.

[113] *Chatterton and another v Cave*, 26 May 1875, Divisional Court, [1875] LR 10 CP 572.
More precisely, according to Justice Brett, «the question, therefore, that arises is, what is the proper definition of an infringement of dramatic copyright? When there is a taking of what must be admitted to be appreciable parts of the plaintiff's drama, is the plaintiff necessarily entitled to a verdict in point of law? Or if the jury may properly find, and have found, that the parts so taken, though appreciable, are in point of quantity or quality not material or substantial, is the result that there is no infringement of copyright? It seems to me that unless there is a taking of a material and substantial part there is no infringement of copyright».

[114] *Chatterton and another v Cave*, 26 May 1875, Divisional Court, [1875] LR 10 CP 572.

[115] See, in particular, *Bramwell v Halcomb*, circa 1836, Chancery, [1836] 3 My & Cr 737, [1836] 40 ER 1110, in which this aspect was so discussed: «it is not only quantity, but value, that is always looked to. It is useless to refer to any particular cases as to quantity. He, therefore, says that though the quantity copied may be small, it may be so material as to be a substantial part; but this obviously shews that the question of the value and quantity of the part is to be considered». Cf. also *Pike v Nicholas*, 24 November 1869, Court of Appeal, cit.
See also *Jarrold v Houlston*, 9 July 1857, Chancery, [1857] 69 ER 1294, [1857] 3 K & J 708, providing that in an action for infringement of copyright it was necessary to prove at least that some essential part of the work was copied.

[116] In other words, the taking of an infinitesimal part would not be sufficient. So in *Bradbury and others v Hotten*, 14 November 1872, Exchequer, [1872] LR 8 Exch 1, which, however, cleared out that «it is said that to copy a single picture, at all events, could not be an infringement of the plaintiff's copyright, but it is impossible to lay that down as a general rule. I can easily conceive a case where such an act would not be piracy».

Moreover, it is precisely with regard to such a controversial issue that the previous discourses on the standards of the ordinary person and those of the expert return.[117] Again, in the *Chatterton* case, Lord Coleridge held that two points or situations in particular were imitated, but «the extent to which the one was taken from the other was so slight, and the effect upon the total composition was so small, that there was no substantial and material taking of any one portion of the defendant's drama from any portion of the plaintiffs'», concluding that it had to be «a question of fact and of common sense whether the part taken is of such a substance and value, or used in such a way, as to amount to an infringement of the plaintiffs' right».[118]

The so-defined principle of substantiality was later confirmed on appeal, when it was restated that the plaintiff, in order to prove the occurrence of piracy, needed to show that a material and substantial part of his/her work had been taken. Besides, as Court Justice Cockburn considered, given that no taking is reproached or sanctioned by the law, it is, however, still not clear from the language of the statute what exactly the material or substantial quantity should be. As he recalls, «the Act must receive a reasonable construction; and, whilst we are anxious to protect the property of authors, we must be careful not to withdraw from the common stock of literature or art that which is of no substantial value».[119]

Furthermore, regarding the definition of material taking, even the type of work appeared to have been taken into some consideration, although this did not extend to the resort to different tests for each type's infringement,[120] thus leaving the principle open

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[117] Besides, as Justice Brett, believing that a jury should be instructed to take into explicit account whether the part taken was material or substantial, however, poses another important doubt: «the question, then, that remains in the present case is, whether a jury could properly find that the parts copied were not material or substantial», especially when – as in the case under consideration – the language of the work is a foreign tongue. *Chatterton and another v Cave*, 26 May 1875, Divisional Court, [1875] LR 10 CP 572.

[118] Although it could not be said that the defendant's work was entirely independent, «the points taken are not sufficiently substantial to make it necessarily result, as a matter of law, that there was an infringement of copyright, and therefore the rule will be discharged». *Chatterton and another v Cave*, 26 May 1875, Divisional Court, [1875] LR 10 CP 572.

[119] *Chatterton and another v Cave*, 30 November 1876, Court of Appeal, [1876] 2 CPD 42, affirming the judgement of the Court of Common Pleas. The case was later considered in *Frederick B. Chatterton and Benjamin Webster, Appellants; and Joseph Arnold Cave, Respondent*, 28 March 1878, House of Lords, [1875] 3 App Cas 483.

[120] As Lord Hatherley noticed, «there is indeed one obvious difference between the copyright in books and that in dramatic performances. Books are published with an expectation, if not a desire, that they will be criticised in reviews [etc.] It is not, perhaps, exactly the same with dramatic performances. They are not intended to be repeated by others or to be used in such a way as a book may be used, but still the

to evaluation on a case-by-case basis: «the question as to its materiality being left to be decided by the consideration of its quantity and value, which must vary indefinitely in various circumstances».[121]

The reflection upon the differences existing among different types of intellectual creation also suggested considering whether infringement may occur between two works of a different kind. An interesting case of alleged copyright infringement involving an oil painting, a chromolithograph and a photography, was *Lucas v Cooke*.[122] The case also consented to affirm, in general terms, the principle according to which all original works deserve the same equal treatment before the law:

> The spirit and the policy of the copyright Acts are clear and beyond all doubt. It is for the public benefit that the authors of all literary works should have the exclusive enjoyment and profit of their labours [in] all productions which assume a literary form from works of the highest genius in poetry, science or art, down to the humblest productions of intellectual industry; all are placed upon the same footing, and in the eye of the law are entitled to equal protection.[123]

On similar grounds, engravings were deemed to be works that merited protection.[124] Upon these premises, in *Dicks v Yates*, Lord Justice James held that literary property could essentially be invaded in three ways: open piracy; literary larceny, which occurred when a «man pretending to be the author of a book illegitimately appropriates the fruit

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principle de minimis non curat lex applies to a supposed wrong in taking a part of dramatic works, as well as in reproducing a part of a book». *Frederick B. Chatterton and Benjamin Webster, Appellants; and Joseph Arnold Cave, Respondent*, 28 March 1878, House of Lords, [1875] 3 App Cas 483.

[121] *Frederick B. Chatterton and Benjamin Webster, Appellants; and Joseph Arnold Cave, Respondent*, 28 March 1878, House of Lords, [1875] 3 App Cas 483. L. O'HAGAN.

[122] *Lucas v Cooke*, 25 February 1880, Chancery, [1880] 13 ChD 872. For the Court, it was evident, even from a simple look or inspection of the works, that no infringement had occurred.

[123] *Lucas v Cooke*, 25 February 1880, Chancery, [1880] 13 ChD 872.

[124] *Dicks v Brooks*, 4 May 1880, Court of Appeal, cit., in which Lord Justice James affirmed: «the art of the engraver is often of the very highest character, as in the print before me. It is difficult to conceive any skill or art much higher than that which has by a wonderful combination of lines and touches reproduced the very texture and softness of the hair, the very texture and softness of the dress, and the expression of love and admiration in the eyes of the lady looking up at her lover. That art or skill was the thing which, as I believe, was intended to be protected by the Acts of Parliament».

of a previous author's literary labour»;[125] and passing-off, where the first two directly involve copyright law, while the third did not, being in fact a common law fraud.[126]

Moreover, what counts is the substance of the infringement and not the form that the copy assumes in infringing the original work, as already explained in *Warne v Seebohm.*[127] With reference to the possibility that infringement may also occur when the work is only partially taken, focusing on dramatic works, attention must be drawn to the most relevant elements of the work, which in a sense may connote the work in its individuality and originality, with the further consequence that «accessorial matters, such as scenic effects, make-up of actors [and the like]» are not protected.[128]

In *Tate v Fullbrook*,[129] it emerged that the scenes of a work could be protected «as part of a whole [but] in order to obtain protection there must be matter capable of being printed and published, and the plagiarist must copy a material part thereof».[130] Recalling Lord Farwell's words, which clearly seems to put plagiarism and copyright infringement on the same plate:

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[125] What appeared to be most relevant was the distinction made between the concept of literary larceny, which, with very little doubt, appears to be plagiarism, and open piracy. *Dicks v Yates*, 24 May 1881, Court of Appeal, [1881] 18 ChD 76.

[126] As he indeed further specified in that regard, «where a man sells a work under the name or title of another man or another man's work, that is not an invasion of copyright, it is Common Law fraud, and can be redressed by ordinary Common Law remedies, wholly irrespective of any of the conditions or restrictions imposed by the Copyright Acts». *Dicks v Yates*, 24 May 1881, Court of Appeal, [1881] 18 ChD 76.

[127] *Warne & Co. v Seebohm*, circa 1888, Chancery, [1888] 39 Ch D 73, [1888] 57 LJ Ch 689, [1888] 36 WR 686, [1888] 58 LT 928, [1888] 4 TLR 535, in which Justice Stirling explained: «I have satisfied myself by actual comparison, that very considerable passages in the play have been extracted almost verbatim from the novel. Thus, in the first act there are 674 lines, of which forty-seven consist of stage directions. Deducting them, there are 627, of which 125 (or about one-fourth) are taken from the novel. Some of the passages so extracted are prominent and striking parts of the dialogue contained in the novel».

[128] In fact, «each of the pieces, which were termed 'dramatic sketches' and were of a very slight character, intended for performance in music-halls, consisted of a dialogue between persons, accompanied by comic 'business,' in the one case taking place round a motor car, and in the other in connection with a telescope». *Tate v Fullbrook*, 14 February 1908, Court of Appeal, [1908] 1 KB 821.

[129] *Tate v Fullbrook*, 14 February 1908, Court of Appeal, [1908] 1 KB 821. Furthermore, the case allows one to extend briefly the discussion about what constitutes authorship of a work of the mind. On a preliminary ground, it assessed whether the plaintiff could be considered the author of a dramatic piece based on the evidence brought at trial.

CF *Chatterton and another v Cave*, 30 November 1876, Court of Appeal, [1876] 2 CPD 42.

[130] *Tate v Fullbrook*, 14 February 1908, Court of Appeal, [1908] 1 KB 821, in which Lord Justice Farwell also believed that the learned judge who first tried the case confused passing-off with a case of copyright infringement.

> I am far, however, from saying that, in dealing with the question of infringement of copyright in the case of two pieces, the words of which are more or less alike, similarity of scenic effects and the make-up of the actors, and such like matters, may not be regarded, though not by themselves subjects of protection under the Act, as being evidence of an *animus furandi* on the part of the defendant; which, though it is not a necessary element in such cases, may have an important bearing on the view taken by a Court on the question whether the defendant has been guilty of plagiarism and has thereby infringed the rights of the plaintiff.[131]

Furthermore, recapping the true intention of copyright «to protect original merit», *Tate v Fullbrook* showed the absurdity of protecting «the application of a commonplace expedient of scenic art to the end of a version of a drama». Such conclusions, in the court's view, could be reached upon the mere impression of the pieces, which, «upon being read, appear to be so materially different that the defendant's piece cannot be said to be a plagiarism of the plaintiff's [so] we are in as good a position as the learned judge below for the purpose of forming a judgment whether one of these documents is a plagiarism from the other».[132]

Taking into account the intersection of different genres, for instance, in the case of the reproduction of a novel by a cinematograph film, consideration was also given to whether it mattered that the works at issue were, on the one hand, a serious work and, on the other hand, a burlesque work. Indeed, saying that «a genuine burlesque can never be an infringement of the copyright in a serious work» appeared to the Court in *Glyn v Weston* to be too wide a proposition.[133] In fact, the most relevant element for

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[131] *Tate v Fullbrook*, 14 February 1908, Court of Appeal, [1908] 1 KB 821.
A the same time, he does not deny that, in theory, some scenic effects may find protection as being part of the whole dramatic work, protected as part and parcel of the drama […]. It is essential, however, to such protection that there should be something in the nature of a dramatic entertainment, for a mere spectacle standing alone is no more within the Act than a singer who sings in character costume is within it». Cf. *Fuller v Blackpool Winter Gardens and Pavilion Company*, circa 1895, Court of Appeal, [1895] 2 QB 429, [1895] 11 TLR 513.

[132] *Tate v Fullbrook*, 14 February 1908, Court of Appeal, [1908] 1 KB 821.

[133] In delivering the judgement, Justice Youger, after careful analysis of all the work's essential parts and viewing of the film under scrutiny, held that «similarity of incident those of the film are so altered in effect and feeling and surrounding as to reproduce no element of any situation described in the novel [concluding] that the film does not constitute any infringement of the plaintiff's copyright in the novel». *Glyn v Weston Feature Film Company*, 21 December 1915, Chancery, [1916] 1 Ch 261, [1916] 32 TLR 235.
Moreover, according to the defendant, who focused on the intention, which he believed to be the true test for infringement, a burlesque work would never infringe a serious work's form precisely «if the intention

consideration is still whether the work of the defendant has taken a substantial part of the plaintiff's creation, regardless of «the framework on which the representation is built, and the purpose for which the framework is taken is immaterial».[134]

Furthermore, an explicit reference to plagiarism is also found also in *Toole v Young*, dealing with common subjects, when Justice Blackburn observed that, even if some parts of a novel were taken and put in another's drama, this would not necessarily amount to an illicit appropriation of the work.[135] As he further articulates, «if [the plaintiff's] drama had been plagiarised the defendant would have been liable to an action»; however, it being a dramatic work, a jury could only ascertain the alleged plagiarism if the work were indeed represented. Since this appeared not to be the case, the defendant did not indeed plagiarise.[136]

2.3 Italian case law from early 1950 onwards

Focusing on the limits of the notions of substantial, material and so on, similarly to their British cousins, Italian courts have often dealt with the problem of defining what could be considered a "considerable quantity of copying" for the purpose of establishing infringement, and so with the discretional appeal that such concepts may imply.

Converging on the work's form of representation indeed appeared to satisfy the exigency of the most. What counted in the end were not the contents themselves (or the

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was to produce a mere caricature or burlesque» (cf. Hanfstaengl v Empire Palace, 17 December 1894, Court of Appeal, [1894] 2 Ch 1, [1894] 10 TLR 299). Glyn v Weston Feature Film Company, 21 December 1915, Chancery, [1916] 1 Ch 261, [1916] 32 TLR 235), while the plaintiff insisted: «the defendant has not only stolen but besmirched the original».

[134] *Glyn v Weston Feature Film Company*, 21 December 1915, Chancery, [1916] 1 Ch 261, [1916] 32 TLR 235.

[135] Concerning dramatic works, some have emphasised that the UK law of copyright in dramatic works was greatly influenced by Charles Reade's direct and often personal involvement in legal suits that led directly to affording them protection. B. LAURIAT, *Charles Reade's Roles in the Drama of Victorian Dramatic Copyright*, Oxford Legal Studies Research Paper No. 05/2010 (December 8, 2009), [2009] *Columbia Journal of Law & the Arts* 33, No. 1, <http://ssrn.com/abstract=1520332>.

[136] *Toole v Young*, 26 May 1874, Queen's Bench, [1865] LR 9 QB 523.

ideas there embodied) but the forms in which these contents found expression.[137] Moving on from this point, the judiciary later supported the stricter rule or theory of the identity of representation.[138]

However, before considering the scrutiny of the single elements of the work, it has always been critical to determine whether the work that is allegedly plagiarised was in itself original. On preliminary grounds, in fact, the court needed and still need to assess whether the work in question is creative and therefore deserving of copyright protection at all.[139] Such an inquiry over the merits of protection seems to have played a

[137] See, among others, *Amedeo c De Filippo*, 19 January 1976, App. Roma, [1976] Rep. Foro it. v. Dir. autore n.764; [1976] *Foro pad.* I 24; [1976] *Giust. civ.* I 1848.
It is worth noticing, however, that there have been cases in which this criterion has been disregarded. On some occasions, in fact, Italian courts have deliberately held that protection may also extend to the substance of the work, for instance, in consideration of all the precise elements that compose the stories narrated within (*Marino c. Soc. Ponti De Laurentis*, 8 June 1959, App. Roma, [1960] Rep. Foro it. v. Dir. autore n. 735; [1960] *Rass. dir. cinem.* 61), or by referring to the very controversial double figures of the internal and external forms of representation (see *De Angelis c Soc. cinem. Milanese Ariel*, 11 June 1957, Trib. Milano, [1957] Rep. Foro it. v. Dir. autore n. 766; [1957] *Foro pad.* I 859, [1957] *Dir. aut.* 526; *Cutolo e Pozzi c Napolitano*, in *Dir. aut.*, 9 March 1979, Cass. n. 1472, [1979] Rep. Foro it. v. Dir. autore n. 654; [1980] *Dir. autore* 425; *Salvagno c Soc. Finarco*, 25 February 1969, Pret. Roma, [1969] Rep. Foro it. v. Dir. autore n. 768; [1969] *Rass. dir. cinem*. 163).
In these cases, the main difficulty lies in the complexity of establishing a clear edge between what can be considered internal and external in the form of representation. Therefore, it soon seems more advisable to focus simply on the form, which embodies the expression of the idea.
[138] Namely, *individualità rappresentativa* or *forma individuale di rappresentazione*.
Such a theory has essentially considered that the two works under consideration are extremely similar, to the point that they appear to entail a unique representation; all considered their unfolding of facts, value of the creation, and type of contents, originality of form and expression and peculiarity of characters. This has often implied a consideration of what it meant to look at the work in its complex and essential gist, according to which the whole structure of the work had to lead the analysis on the similarities between the works. See, in particular, *Basso c Soc. Orsa Maggiore cinem.*, 28 November 1986, Trib. Napoli, [1924] Rep. Foro it. v. Dir. autore n. 103; [1987] *Dir. aut.* 522; [1987] *Giur. merito* 35; *Vasile c Soc. N.i.n.b.o film*, 30 June 1961, Pret. Roma, [1961] Rep. Foro it. v. Dir. autore n. 740; [1961] *Rass. dir. cinem.* 131; *Soc. Michel Arthur productions c. Soc. Rofima*, 5 June 1975, Trib. Milano, [1976] Rep. Foro it. v. Dir. autore n. 765; [1976] *Mon. Trib.* 202, [1976] *Dir. aut.* 462.
[139] See also *Saglietto c Soc. Ri-Fi Record*, 13 April 1971, Trib. Milano, [1971] Rep. Foro it. v. Dir. autore n. 822; [1971] *Mon. trib*. 776, which also held that the more a work was considered original the more strict the criteria had to be in order to assess whether the work in question was plagiarised.

prominent role in cases of plagiarism and copyright infringement in general,[140] often entailing a specification of what might, in principle, be protected and what, instead, did not deserve such protection.[141]

Another element for consideration has been the possible modification and alterations made to the original work. These have also received a contrasting response from the judiciary. Sometimes they have been evaluated as minimal, and therefore with no or scarce incidence of the actual copy of the work.[142] Nonetheless, the difficulty of the judiciary's task lies precisely in providing the most comprehensive analysis of the work, which would take into account all of its elements, with the ultimate aim of establishing with reasonable confidence that the work in question has been plagiarised, that is to say that the authorship of its author has been misattributed.

However, beyond the form of expression or representation described earlier,

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[140] *M.P. c Fornaciari*, 16 January 2006, Trib. Milano, cit.; *Carrisi c Jackson*, 24 November 1999, App. Milano, cit.; *Casile c Soc. Rti*, 26 May 1994, Trib. Monza, [1995] Rep. Foro it. v. Dir. autore n. 107, 108, 109; [1995] *Dir. aut*. 263, [1995] *Riv. dir. ind*. II 211, [1994] *Annali it. dir. autore* 595..
Besides, it is worth remembering that in some limited instances the courts have also considered novelty to be a criterion for protection. (See *Bacalov c Endrigo*, 23 November 2005 n. 24594, Corte Cass., [2006] Rep. Foro it. v. Dir. autore n. 101; [2006] *Dir. aut.* 213, [2006] *Nuova giur. civ. comm.* I 1146; *Sarita Esquenazi c Rai-Tv*, 1 March 1991, Trib. Roma, cit.; *Fugazza c Moietta*, 27 November 1958, Cass. n. 3791, [1959] Rep. Foro it. v. Dir. autore n. 685; [1959] *Rass. dir. cinem.* 66, [1959] *Dir. aut.* 229). For the most part, however, magistrates have been more prone towards evaluation of the creativity and originality of the work's expression, which would therefore refute absolute novelty (see, in particular, *Gambarini c Pisano*, 19 November 1964, Trib. Milano, [1965] Rep. Foro it. v. Dir. autore n. 818; [1965] *Mon. Trib*. 1024).

[141] This does not seem to be contested by the exclusion of protection of commonplace elements, inspirational themes (see *Grieco c Soc. Mediaset*, 29 January 1996, Trib. Milano, [1998] Rep. Foro it. v. Dir. autore n. 172; [1997] *Annali it. dir. autore* 695; *Soc. Morgan c Soc. Cecchi Gori Group Tiger cinem*., 7 January 1994, Trib. Roma, [1994] Rep. Foro it. v. Dir. autore n. 257; [1994] *Foro it*. I 2541, [1994] *Nuovo dir*. 175; *Scovuzzo c Soc. Italian International Film*, 20 July 1989, Trib. Roma, [1990] Rep. Foro it. v. Dir. autore n. 99; [1992] *Dir. aut.* 284, [1990] *Foro it.* I 2997; *Montanelli c Arbore e Mattone*, 22 August 1985, Pret. Roma, [1987] Rep. Foro it. v. Dir. autore n. 106; [1986] *Dir. radiodiff.* 120) or recurrent expressions of common language, or even poetic verses that amount to a very common expression and thus could not reach any creative status (*Corsale c Soc. Snia Viscosa*, 18 October 1974, App. Milano, cit.).
The same is true of methods such as the methodical illustration of a psychological test (*Soc. organizz. Speciali c Soc. Mondadori*, 1 February 1962, Cass. n. 190, [1962] Rep. Foro it. v. Dir. autore n. 823; [1962] Foro it. I 1127, [1962] *Giust. civ.* I 897, [1962] *Dir. aut.* 219, [1962] Sett. Cass. 148, [1962] *Riv. dir. Comm*. II 314), but also information and facts belonging to the public domain (*Paternostro c Vides*, 1 February 1960, Pret. Roma, [1961] Rep. Foro it. v. Dir. autore n. 736; [1961] *Dir. aut.* 377, [1961] *Rass. dir. cinem.* 37).

[142] *Masino c Colonnello*, 29 July 1968, Trib. Milano, [1969] Rep. Foro it. v. Dir. autore n.765; [1968] *Rass. propr. ind.* 246, for which copying the translation of a work, even with some alteration, leads to infringement. Cf. *Soc. internaz. pubblicità c Soc. ed. Sanguinetti*, 10 May 1993, Cass. n. 5346, cit. See also *Rossi c Fiorello*, 1 June 2004, App. Milano, cit.; *Masala*, 29 April 1999, Pret. Modena, [1999] Rep. Foro it. v. Dir. autore n. 176; [1999] *Dir. inf.* 954, which both held that camouflage plagiarism may occur when the copying is disguised by variations that, however, do not challenge the lack of originality.

Italian courts have also focused on the expressive completeness of the work, which to some extent prays on its prompt aptitude to provoke some feeling in the audience, but also lies in the expressive solutions, choice and organisation of some material that amounts to a creative result.[143] The structure of the work as a whole, however, remains a central issue, and so, although with limited extension, the purpose of the work, according to which, in case the works have a different structure and targeted audience, the mere fact that some ideas are shared is not sufficient to assess plagiarism.[144]

At the same time, a broad view of the work cannot escape a careful and peculiar scrutiny of the single and most critical essential elements that compose it, but the mere similarity of some single elements, were not considered, among others, to be sufficient to establish infringement.[145]

Moreover, the kernel or *parte saliente* of the work has a fundamental role to play. The mere and simple recurrence of same incidents or phrases may not amount to an infringement when, on the contrary, it is not followed by a transposition of the substantial core of the work. This was well explained in *Ciossani c Tamaro*.[146] Besides, when the single and individual elements are analysed,[147] it becomes crucial to see whether these show any particular creative effort that ultimately concurs to differentiate them from other works.[148]

As it has been earlier explored, the first and preliminary assessment that jurists have to make in matters of plagiarism was – and still is – that the work in question

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[143] *Soc. ed. Briciola musicali c Soc. nuova Soc. ed. Briciola musicali c Soc. nuova Fonit Cetra*, 9 May 1997, Trib. Bologna, [1998] Rep. Foro it. v. Dir. autore n. 170; [1997] *Annali it. dir. autore* 931, [1997] *Dir. aut.* 510; *Perrera c Min. fin*., 27 October 1977, Cass. n. 4625, [1978] Rep. Foro it. v. Dir. autore n. 644; [1978] *Giust. civ*. I 500, [1978] *Giur. it*. I 1 2375, [1978] *Dir. aut.* 561; *Paternostro c Vides*, 1 February 1960, Pret. Roma, cit.; *Passarelli c Rosa film*, 3 March 1956, Pret. Roma, [1956] Rep. Foro it. v. Dir. autore n. 824; [1956] *Rass. dir. cinem.* 47, [1956] *Temi rom.*124.

[144] *Arrigo c Soc. Rcs libri*, 2 April 2003, Trib. Milano, [2005] Rep. Foro it. v. Dir. autore n. 183; [2004] *Annali it. dir. autore* 720.

[145] *Pagliai c. Simoni*, 23 May 1947, App. Roma, cit.; *Casa musicale Crispoli c Ediz. Music. Maurice*, 25 January 1968, Cass., [1968] Rep. Foro it. v. Dir. autore n. 716; [1968] *Rass. dir. cinem.* 111; *Chiesa c Casa ed. Ballerini*, 24 January 1941, Cass. [1941] Rep. Foro it. v. Dir. autore n. 406; [1941] *Dir. aut.* 53, [1941] *Mon. trib*. 496.

[146] *Ciossani c Tamaro*, 11 June 2001, Trib. Milano, [2001] Rep. Foro it. v. Dir. autore n.132; [2001] *Giur. it.* 2089, [2002] *Dir. aut.* 323.

Cf. *Ferilli c Carella*, 21 October 2002, Trib. Milano, [2003] Rep. Foro it. v. Dir. autore n. 134; [2003] *Dir. aut.* 478; *Soc. Bmg Ricordi c De Gregori*, 23 May 2002, Trib. Roma, cit.

[147] The tribunal held that a simple transposition of a few lines (although integrally reproduced) could not be considered determinant for the purpose of plagiarism-counterfeiting. *Ciossani c Tamaro*, 11 June 001, Trib. Milano, cit.

[148] *Valente*, 4 November 1993, Pret. Pesaro, cit.

received actual protection under copyright law. Such a simple but often controversial premise, which was already known by earlier courts, has increasingly become a leitmotiv for any contemporary judge facing issues of copyright infringement and plagiarism.

In the field of literary works, it soon emerged that any elements composing the work that could be confined to the realm of commonplace and public domain hardly received protection, unless such elements had been transformed into original expressions themselves.[149]

As the *Sarita Esquenazy* case proves, the inspiring idea of a novel shall not in itself constitute an element to which protection shall be afforded.[150] On the other hand, if the simple identity of phrases would not with any certainty conclude for infringement, a careful analysis of the works, even via a simple and not specialist reading, may display that, despite resorting to the same sources and factual information, these were reproduced following the same order and schemes and, therefore, were likely copied from the other work.[151]

In general, with particular regard to novels, a different representation of themes or plots may contribute to excluding the violation,[152] and the same could be said when similarities occurred but insisted in mere elements of common language that could be used by anyone,[153] or even with regard to the exact resort to certain rhetorical figures.[154] In *Ciossani c Tamaro*, in fact, the attention of the Tribunal was also directed towards the analysis of the onomatopoeic word that was allegedly appropriated by the defendant,

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[149] For what concerns historical works, the creativity required in the works seeking to be protected may even consist in the search, selection of sources or material and their connection according to a logical order that would provide a personal or expressive reconstruction of the events and facts considered, provided that elements belonging to the universal knowledge would not themselves receive protection. *Arrigo c Soc. Rcs libri*, cit.; *Villanova c Mazza*, 18 December 2007, Trib. Napoli, [2008] Rep. Foro it. v. Dir. autore n. 165; [2008] *Foro it.* I 2041; *Pisani c Giardini*, 19 November 2001, Trib. Milano, [2004] Rep. Foro it. v. Dir. autore n. 137; [2003] *Annali it. dir. autore* 737.

[150] *Sarita Esquenazi c. Rai-Tv*, 1 March 1991, Trib. Roma, cit.

[151] *Arrigo c Soc. Rcs libri*, 2 April 2003, Trib. Milano, cit. Some similarities may clearly be only clues of infringement, but it is then the accurate and contextualised analysis of the work in its entirety that will help to define whether there has been a violation. See *De Giorgio c Hajek*, 10 March 1994, Cass. n. 2345, [1994] Rep. Foro it. v. Dir. autore n. 255; [1995] *Dir. aut.* 153, [1994] *Foro it.* I 2415, [1994] *Impresa* 2154, [1994] *Corr. giur*. 862.

[152] *Sanzò c Preti*, 2 April 1975, Pret. Roma, [1975] Rep. Foro it. v. Dir. autore n. 709; [1975] *Foro it.* I 2831, [1975] *Dir. aut.* 419, which concerned the story of a young Hebrew man refuting fascist ideology, which both works shared, but each with a different contextualisation and articulation of happenings.

[153] *Corsale c Soc. Snia Viscosa*, 18 October 1974, App. Milano, cit.

[154] *Ciossani c Tamaro*, 11 June 2001, Trib. Milano, cit.

but which could not be considered an original element of a given work, considering its function as a mechanism of describing in synthesis sounds originating from the outer world.[155] Likewise, evidence of the same ideas is not sufficient to demonstrate a violation, and what indeed should eventually be proved is that what makes the work unique in the sense of original has indeed been taken.[156]

Focusing on literary works belonging to the scientific or academic fields, it has been suggested that such works may constitute objects of copyright protection only if they represent knowledge that can also be represented in a different manner, thus excluding, for instance, mathematical formulas.[157] In fact, the main element for evaluation of originality of scientific thought is the quality of the outcome, thus what its author personally adds by creating the work, making it individual and exclusive, from the outline of how he/she develops such thought, of how concepts are presented, and of the criteria used to gather, classify and coordinate ideas according to a systematic order, in other words in the imprint of his/her creativity.[158]

Similarly, in *Castellaneta c Falcone*, with regards to the alleged copying of a legal monograph, the court was expected to find the exact criteria to assess whether a given work unlawfully took elements and features from other intellectual creations.[159] Indeed, although references to the past are allowed, this does not imply that anyone may attain or plunder someone else's work, which would clearly contravene the copyright exceptions of Article 70 LA 1941, which are expressly allowed on the condition that the

[155] The same conclusions apply to historical characters that have been used repeatedly, as ruled in *Edgar Rice Burroughs inc. c Soc. Candygum*, 12 November 1976, App. Milano, [1978] Rep. Foro it. v. Dir. autore n. 645; [1976] *Giur. dir. ind.* V 733, where the name of a main character of a literary work was to be considered a separate element of the work, but not to the extent that it should have been protected in itself from being used in other contexts.

[156] *Ciossani c Tamaro*, 11 June 2001, Trib. Milano, cit. Cf. *XX1e XX2 c. Alfa Ed.*, 9 February 2006, Trib. Bologna, [2008] Rep. Foro it. v. Dir. autore n. 166; [2008] Dir. autore 79.

[157] *X.Y.*, 11 January 2004, Trib. Roma, [2006] Rep. Foro it. v. Dir. autore n. 178; [2005] Cass. pen. 3527, [2005] *Dir. aut.* 402.

[158] X.Y., 11 January 2004, Trib. Roma, cit.

[159] *Castellaneta M. c Falcone M.*, 9 December 2005, Trib. Bari, [2006] Rep. Foro it. v. Dir. autore n. 133; [2007] *Annali it. dir. autore* 738, [2006] *Corr. mer.* 199, which concerned legal academic works. Here the plaintiff claimed that the essential and substantial part of her work had been illicitly taken by the defendant and this could be proved even through a simple but meticulous reading of the two works. After careful analysis of the two works, some elements and circumstances allowed affirmation of the subsistence of counterfeiting-plagiarism of the plaintiff's monograph.

moral right of attribution is respected.[160] Such principle, indeed, appears to replicate the considerations made by the UK judiciary on the matter.

Furthermore, the large category of literary creation comprises several types of work, as the variety of claims considered by Italian courts proves. Among them, one of the most interesting examples is represented by *Ghirardini*, which concerned the claim of protecting culinary or cookery books.[161] In brief, there emerged the principle that what counts is not the recipe in itself, which seems not to receive protection, but the creative expression in which the recipe may find explication.[162] Within this narrow and specialist context, the object of protection is represented by the literary arrangement of the whole work, of its contained recipes and the eventual divagations or short stories, while the didactic content, thus the actual advice on culinary art, although in a broader sense original and useful, does not receive any protection, as it must remain available to everybody.[163]

The fact that culinary recipes are not protected, however, does not extend to the inference that not even is ever shielded from their creative or original assembling.[164] In line with the *Ghirardini* decision,[165] the insertion, in a cookery book, of recipes of a different work does not constitute plagiarism when the former text has its own individual originality, which originates from the whole allocation of the matter and the peculiar literary manner in which all is assembled.[166] This specific point further

[160] This point was also expressly dealt with in *Arrigo c Soc. Rcs libri*, 2 April 2003, Trib. Milano, [2004] cit., where the court underlined how, in order to respect the provision, the work whose use is allowed must be, in any case, properly cited, with the indication of title, work and publisher, and with a clear indication of the exact collocation of the parts that have been quoted.

[161] *Ghirardini*, 24 April 1969, Pret. Venezia, [1970] Rep. Foro it. v. Dir. autore n. 656; [1970] *Giur. it.* II 146.

[162] As the Court held, in fact, what should be pointed out is the way in which the author expresses the concepts and the arguments that allow consideration of the resulting work among the works that receive copyright protection. *Ghirardini*, 24 April 1969, Pret. Venezia, cit.

[163] In other words, the originality of a didactic work on culinary techniques must be established having regard for the form of expression, not for the novelty of the recipes, given that culinary inventions do not as such receive copyright protection.

[164] In this case, the court considered the originality of not only the alleged infringed work, but also the one that had supposedly infrined the former.

[165] *Ghirardini*, 24 April 1969, Pret. Venezia, cit.

[166] Yet, what is still clear is that the idea, the chef's contrivance suggested by taste and artisan experience, to combine certain ingredients, even with some particular expedients, shall not be protected. Even if the recipes in the two works are exactly the same (and yet were taken from a third source, anonymous), the way in which such recipes are organised and coordinated may be sufficient to grant protection, given that the text used and the manner sensibly diversify. This would, in the view of the judge, clearly have excluded an instance of plagiarism. *Ghirardini*, 24 April 1969, Pret. Venezia, cit.

demonstrates how the relevant criterion in copyright is not absolute novelty, which instead belongs to patents, but rather originality and creativity.

At the same time, as it has been appraised with regard to the UK context, the matter becomes even more complex when one considers the involvement of different types of work. Here the considerations thus far made are possibly complicated by the fact that different types of work intersect and originate the phenomenon described as cross-plagiarism (*plagio trasversale*), for instance, when a novel is plagiarised by a cinematographic work.

Photography is indeed the perfect example to address the issue of considering more than one type of work involvement of a not-homogenous plagiarism. In the *Davoli* case in particular, the judge, concerning the alleged copying of photographic works into oil paintings, concluded that it did not matter whether the image was fixed in a certain manner or form; what really counted was that there had been a slavish reproduction of one creative and original work into another, therefore defining the case in favour of the plaintiff, since all the constituent elements of the protected work had been taken.[167]

Even so, if the crucial principle to consider remains the necessary and preliminary assessment of the originality of the work one wishes to protect, the court would need to focus precisely on this point, before even considering the alleged infringement. This, regardless of the instance that works of a dissimilar sort are involved in the dispute.[168]

Considering the intersection of sculpture and broadcast, one of the most notorious Italian cases remains the mouse with human appearance, *Topo Gigio*, extremely popular in the days when the court was called upon to decide whether the defendant's sculpture, *Topino* (literally, little mouse), was, among other things, the plagiarism-counterfeiting of T.G. After a careful comparative examination, the tribunal opted for denying it on the basis of total unlikeness between the works in question, which itself could only deny the alleged infringement. Moreover, it was held that both

[167] *M. Davoli c G. Muscio*, 27 December 2006, Trib. Milano, [2007] Provv. urgenza v.5340; [2007] *Dir. aut.* 264, [2007] *Foro. it*. 619.

[168] See *Sarita Esquenazi c. Rai-Tv*, 1 March 1991, Trib. Roma, cit., which concerned a film for broadcasting that was allegedly taken from a novel; the trial judge concluded that the plaintiff, the author of the novel, could only boast of the mere storyline (*idea-trama*) that is recurrently found in women's literature. The fact that some elements were actually similar, with regard to both the plot and the main characters, did not indeed prove any illicit appropriation, especially considering the fact that the idea inspiring the novel was not at all original and instead was a typical literary *topos*.

works were clearly inspired by the Disney *Mickey Mouse*, which corroborated the decision of not affording any protection to *Topo Gigio*.[169]

Concerning the musical field, if the main principle has to be that the author deserves protection because of his/her original creation, this seems not always to be the case. By its very nature, in fact, music is characterised by citations and continuous inspirations. Therefore, perhaps even more so than in other contexts, the borrowing and appropriation may not be as relevant as to determine infringement. Inspirations were found, for instance, in *Rossi c Fiorello*, in which the Court of Appeal considered that the kernel of the poem was a mere inspirational theme, the love feeling, which is absolutely recurrent in poetry and cannot be considered as having originality in itself,[170] especially when it can be also traced in other well-known pamphlets or arias of famous operas are considered.[171] In brief, as the case suggests, in music in particular, another issue altogether is when musical borrowing or homage become plagiarism.

As stated previously with regard to other types of work, any judgement of plagiarism must be carried out by preliminarily accessing whether or not the work requiring protection is original and thus deserving of being shielded. Although this is the order that should ideally be followed, the courts may choose first to appraise the subsistence of plagiarism and then to consider whether the work or both works are original.[172]

In particular, such an originality assessment concerns careful scrutiny of the elements that compose a musical work. The first element that has traditionally been considered is melody. Its centrality, in fact, which is found in several pronouncements, is mainly explained by the easiness in which the average or ordinary listener would recall it. Defined by the court in terms of a succession of notes that acquires the typical

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[169] *Perego c Soc. Ceramica Canova*, 27 November 1963, Trib. Padova, cit.
The plaintiff, however, had better luck with further claims, obtaining protection for the puppet against the defendant's works, which were deemed an almost exact reproduction of the external form of the plaintiff's work, despite all considered marginal modifications in *Perego c Ditta Conti & Soffientini*, 26 June 1963, Trib. Milano, [1963] *Riv. dir. ind.* 213; and *Soc. Cremona c Broggini*, 2 June 1963, Trib. Varese, [1964] Rep. Foro it. v. Dir. autore n. 777; [1963] *Riv. dir. ind*. II 214.

[170] *Rossi c Fiorello*, 1 June 2004, App. Milano, cit.

[171] In such cases, moreover, the practicability of transversal plagiarism between a musical and a literary work can be observed.

[172] This second option was followed in *Minelli Donati c Panzeri*, 29 April 1976, Trib. Milano, [1977] Rep. Foro it. v. Dir. autore n. 680; [1977] *Riv. dir. ind*. II 457. Cf. *Bacalov c Endrigo*, 23 November 2005 n. 24594, Corte Cass., cit., for which the creativity to be assessed must concern, in particular, the work that is allegedly plagiarised, but it could also extend to the other work as well.

physiognomy and coordinates with the memory of the listener, it is often distinguished from other elements such as harmony and rhythm, where the latter is a particular accentuation that characterises the musical period or phrase, yet seems alone insufficient to distinguish the originality of the song.[173]

Such centrality is certainly true with particular regard to popular music, in which melody seems to better express immediately and incisively the creative kernel of the piece or song, which then allows individuation and discernment thereof from any other.[174] However, when melody essentially turns into an element that is commonplace and recurring, its appropriation seems generally insufficient to endorse a claim of plagiarism, since the identity of melodic structure may simply consist of a trivial element that is unworthy of protection.[175]

However, the melody was not the only element for consideration to emerge on a few occasions, when the courts noticed how it could not be considered the sole factor to appraise the originality of a song.[176] Indeed, to some extent it may be accurate repeating conclusively that the melody, especially in popular music, is the individualising element of the work since it absorbs its creative kernel, and so it is the main element for individuating and recognising a song, which any ordinary listener immediately

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[173] The centrality of the melody, however, does not imply that any note of which it consists is equally important, but there are indeed certain notes in which the melodic accent falls, and these are to be considered as the pivots on which melody is articulated. *Minelli Donati c Panzeri*, 29 April 1976, Trib. Milano, cit.

[174] Therefore, the judgement on musical plagiarism should follow exactly this process, according to *Soc. Sony Music Entertainment Italy c Carrisi*, 18 December 1997, Trib. Milano, cit.

[175] *Branduardi c Soc. Buitoni Perugina*, 12 May 1993, Trib. Roma, cit., which speaks of «melodico».
Cf. *Soc. Sony Music Entertainment Italy c Carrisi*, 18 December 1997, Trib. Milano, cit., which found that the central question is that both songs share the same theme with several other songs.
See also *M.P. c Fornaciari*, 16 January 2006, Trib. Milano, cit., where the rhyme line "estati dimenticate" could not be considered protected, but indeed absolutely commonplace and universal.
This was the case in *Soc. ed. Briciola musicali c Soc. nuova Fonit Cetra*, 9 May 1997, Trib. Bologna, cit., when the melodic scheme was featured by the use of stylistic elements and formulas taken from other popular music composers. The songs were carefully composed and analysed by experts and, isolating their respective central theme, harmonic schemes, it was then concluded that these were extensively used in other compositions.
In other words, the melodic and harmonic stylistic elements belonging to the universal heritage of music appear to be excluded in general terms from protection. *Bilotta c De Angelis, R.A.I. e S.I.A.E.*, 12 April 1986, Trib. Roma, [1988] Rep. Foro it. v. Dir. autore n. 105; [1987] *Dir. aut.* 521, [1986] *Dir. radiodiff.* 121.

[176] *Carrisi c Jackson*, 24 November 1999, App. Milano, cit., according to which every melody contains in itself the seed of harmonisation, and so melody may easily influence the harmonic bent. Furthermore, it cannot be denied that rhythm has any relevance, especially in popular music, where the time that bursts from the notes in succession is in itself a constituent element; nor that the perception of a rhythmic assonance may also help the listener to identify the notes.

perceives.[177]

Indeed, it is precisely when a trivial melody is found in other songs, without also being characterised by specific and autonomous creativity that the work will likely receive no protection. This does not infer that any reference to other previous works or the musical repertory is banned but rather that its finding may lead to consider the work as not protectable.[178] Likewise, this does not imply that a new creative effort may not be based on the same common melody, insofar as the composition is elaborated or integrated by variations that are in themselves protected. Besides, any variations inserted would receive protection on the condition that it does not merely consist in a fawning reproduction of another song's theme.[179]

In addition, the fact that the works under consideration belong to distinct fields or genres does not automatically exclude infringement.[180] Moreover, the diversity of the musical genre cannot be considered determinant in a claim for infringement,[181] although it could be argued that it may be considered a symptom of distinctiveness. The fact that the audience for which the works are created is different, or the works' concrete form or the way they are performed differ, does not seem to matter either.[182]

In conclusion, the parameter of similarity may regard any element of the musical composition, including melody, harmony and rhythm, which could all be regarded as possible elements of evaluation in the case of an alleged infringement. Indeed, the most striking example may be the almost literal reproduction of the main motive of the work, which could occur by copying even a few but significant number of bars that indeed identify the kernel of the song, namely what makes the song original, like but not

[177] *Carrisi c Jackson*, 24 November 1999, App. Milano, cit.
[178] *M.P. c Fornaciari*, 16 January 2006, Trib. Milano, cit.
[179] *Bacalov c Endrigo*, 23 November 2005 n. 24594, Corte Cass., cit.
Besides, similarly to what happens with literary works, the remembrance of music assonances does not launch "substantial identity", which may also be excluded when the correspondence of musical bars is only marginal. In fact, when comparing musical works, in order to assess the protection of songs from appropriation, the analysis cannot be limited to just a few scores, but the interpreter must be oriented towards the whole significance of the musical text, at least towards its periods or phrases. *Minelli Donati c Panzeri*, 29 April 1976, Trib. Milano, cit.
[180] In *Sony c Carrisi*, for instance, the judge considered how the lack of originality of Carrisi's song could also be demonstrated by the similarities with other songs, even belonging to different genres, based on the theory that contacts and interferences with other genres or culture are frequent and undeniable. On the one hand, they represent innovation, while on the other hand they may however also foster abuse. *Soc. Sony Music Entertainment Italy c Carrisi*, 18 December 1997, Trib. Milano, cit.
[181] *Bilotta c De Angelis, R.A.I. e S.I.A.E.*, 12 April 1986, Trib. Roma, cit.
[182] *Bacalov c Endrigo*, 23 November 2005 n. 24594, Corte Cass., cit., which considered not influential the fact that one work was a commercial song and the other the soundtrack for a movie.

limited to, its refrain.[183] What matters, in the end, is not the quantity of the taking,[184] but the substantiality thereof, which in itself has the capacity to evoke the song and conceivably distinguish it from others.[185]

2.4 UK case law from early 1950 onwards

Refocusing on the UK case law, the reference to the word plagiarism appeared like a flashback during the late 1980s, in the *British Leyland v Armstrong* case, which referred to the following principle:

> It is common ground that all two- and three-dimensional objects can today be described in literary form. Thus, whether one considers the Mona Lisa, a cubist drawing, a carburettor or drawing of an exhaust system, if such common ground is taken as a springboard for the contention that reproduction does not give rise to the infringement of an artistic work when only literary information is taken and used, the consequence would be that plagiarism of all forms of artistic works will become permissible.[186]

[183] *Bacalov c Endrigo*, 23 November 2005 n. 24594, Corte Cass., cit.
Cf. *Soc. ed. musicali Emi Song c Rcs libri*, 28 October 2002, Trib. Milano, [2003] Rep. Foro it. v. Dir. autore n. 135, [2003] *Dir. aut.* 486, which defines it referring to an unequivocal similarity.
See also *Pietri c Fonzo*, 15 April 1932, App. Milano, cit., which ascertained the illicit appropriation of the refrain of a song in a different operetta when there was no mention of the author or the source.

[184] Another aspect to take into necessary account is, in fact, the possibility that plagiarism subsists only with regard to a part of the work (*plagio parziale*). See, among others, *Traldi c Ditta Uniformi fasciste*, 27 January 1941, Cass. Regno, cit., where, however, the Supreme Court made it clear that if such part allegedly taken is not in any case creative or original, there will not be any subsistence for protection.
Cf. *De Marco*, 4 luglio 1958, Trib. Milano, [1959] Rep. Foro it. v. Dir. autore n. 686; [1959] *Foro it.* II 218, [1959] *Riv. it. dir. proc. pen.* 227, holding that the mere similarity of some single elements could not be considered as sufficient to establish infringement.

[185] Other elements may be recalled by the ordinary listener other than the melody although, as it was held in *Soc. Bmg Ricordi c De Gregori*, 23 May 2002, Trib. Roma, cit., it is the most noteworthy featuring element of a song (*parte caratterizzante*), consistent even in just a few verses or lines, which is protected from being appropriated by others, and generally allows the audience to remember the song (and possibly the author and/or performer).

[186] *British Leyland Motor Corporation Ltd. and another Respondents and Armstrong Patents Co. Ltd. and another Appellants*, 27 February 1986, House Of Lords, cit.

The case, which dealt with the reproduction of engineering drawing, also allows for exploration of the subject of indirect infringement.[187] Once it reached the House of Lords, it was there remarked upon about the principle that the infringement of copyright in works that have been substantially reproduced in others' work[188] is not diminished by the inference that «the process of copying has been achieved in a form or forms which do not themselves constitute artistic works [provided that] the essence of protection be the value of the product of the work, the essence of infringement is the reaping of a benefit without doing that work, whatever the process».[189]

The same conclusions, as emphasised by the House of Lords, are applicable in the case of musical works.[190] However, it is also a clear and shared principle that «the original maker ought not to have an exclusive right to prevent the use of the idea or system in or underlying the work, nor a right to a monopoly in its subject matter».[191]

When a mere copying is found, therefore, such copying is rebuked in whatever form it is expressed, thus even indirectly. The case, finally, offers the chance to ponder over the concept of indirect copying with regard any type of intellectual work.[192] As

[187] The plaintiffs alleged that the defendants had infringed the copyright in their original drawings by indirect copying. In the first instance, however, it was held that the defendants' works appeared to be an evident copy of the plaintiffs' drawings, given that in those, considered artistic works, copyright subsisted and therefore they were entitled to receive the protection of the law. Once the case was appealed, the Court of Appeal maintained that decision. *British Leyland Motor Corporation Ltd. and another Respondents and Armstrong Patents Co. Ltd. and another Appellants*, 27 February 1986, House Of Lords, cit.

[188] See also *Francis Day & Hunter Ltd and another v Bron and another*, 25 February 1963, Court of Appeal, cit., regarding the need for a causal connection between the protected work and the work that has allegedly infringed it.

[189] *Hanfstaengl v Baines & Co.*, 17 December 1894, House of Lords [1895] AC 20, [1895] 11 TLR 131.

[190] As the House of Lords explains, in fact, suggesting the analogy, «suppose an opera by Offenbach of which within weeks there are arrangements, say, for piano alone or piano and voice or for some other instrument. Suppose that some person procures a copy of the piano arrangement and makes out of it a new operetta but using the original tunes. Such indirect copying constitutes infringement». *British Leyland Motor Corporation Ltd. and another Respondents and Armstrong Patents Co. Ltd. and another Appellants*, 27 February 1986, House Of Lords, cit.
Cf. *Boosey v Fairlie*, 14 December 1877, Court of Appeal, [1877] 7 ChD 301; *Boosey v Fairlie*, 28 July 1879, House of Lords, [1877] 4 AppCas 711.

[191] On the contrary, as the House of Lords further articulates, «the right he should have is to prevent the skill and labour in the original work being pirated without his consent. That right is "to stop third parties from helping themselves to too liberal a portion of another man's skill and labour for their own exploitation», so citing the authority of Whitford J. in *LB (Plastics) Ltd. v Swish Products Ltd*, Chancery, [1977] FSR 87; *LB (Plastics) Ltd. v Swish Products Ltd*, Court of Appeal, [1978] FSR 32; *LB (Plastics) Ltd. v Swish Products Ltd*, House of Lords, [1979] RPC 551, [1979] FSR 145.

[192] As their Lordships reminded, «the concept of indirect copying was first introduced into artistic copyright fully justified its use for it was necessary to protect the value of the artists' work from piracy by means of copies of intermediate works». *British Leyland Motor Corporation Ltd. and another*

older case law established, in fact, «when the subject of a picture is copied, it is of no consequence whether that is done directly from the picture itself or through intervening copies; if in the result that which is copied be an imitation of the picture, then it is immaterial whether that be arrived at directly or by intermediate steps».[193]

The idea–expression dichotomy, which we have seen dominating the scene of a large portion of scholarly works in the field, returns with great intensity in some of the most recent UK decisions. In the *Designers Guild* case, in particular, Lord Hoffmann, examining the findings of the previous judgements, recalled that, besides a number of authorities possibly being applicable to regulating the case, it is still necessary to clarify what one means by ideas.[194] Yet, as he explained, «every element in the expression of an artistic work (unless it got there by accident or compulsion) is the expression of an idea on the part of the author [which] is protected, both as a cumulative whole and also to the extent to which they form a "substantial part" of the work».[195]

At the same time, the intent of his Lordship is to recall that substantiality does not have to be intended as having quantitative significance, at least in the sense that it is limited to identifying some parts of the plaintiff's work that can be said quantitatively relevant. Besides, neither seems correct to conclude that a qualitative test alone should be applied.[196]

Considering the various authorities that have since the beginning focused on the concepts of substantiality and the single parts of the work, it has been correctly emphasised that «the 'part' which is regarded as substantial can be a feature or

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Respondents and Armstrong Patents Co. Ltd. and another Appellants, 27 February 1986, House Of Lords, cit.

[193] *Ex parte Beal*, 23 April 1868, Queen's Bench, [1868] LR 3 QB 387.

[194] As his Lordship additionally observes, «plainly there can be no copyright in an idea which is merely in the head, which has not been expressed in copyrightable form, as a literary, dramatic, musical or artistic work. But the distinction between ideas and expression cannot mean anything so trivial as that». *Designers Guild Limited v Russell Williams (Textiles) Limited (Trading as Washington Dc)*, 23 November 2000, House of Lords, cit.

[195] *Designers Guild Limited v Russell Williams (Textiles) Limited (Trading as Washington Dc)*, 23 November 2000, House of Lords, cit.

[196] As Lord Hoffman further explains, «although the term 'substantial part' might suggest a quantitative test, or at least the ability to identify some discrete part which, on quantitative or qualitative grounds, can be regarded as substantial, it is clear upon the authorities that neither is the correct test». Cf. *Ladbroke (Football) Ltd. v William Hill (Football) Ltd.*, 21 January 1964, House of Lords, cit., which when clarified establishes that substantiality should concern the qualitative rather than quantitative aspect. *Designers Guild Limited v Russell Williams (Textiles) Limited (Trading as Washington Dc)*, 23 November 2000, House of Lords, cit.

combination of features of the work, abstracted from it rather than forming a discrete part [or] the original elements in the plot of a play or novel may be a substantial part, so that copyright may be infringed by a work which does not reproduce a single sentence of the original».[197]

Such an argument is greatly influenced by the functioning of the idea–expression dichotomy. Provided that ideas are not protected, and this even though they have a literary, dramatic or artistic nature, insofar as they are not original, similar conclusions apply to commonplace elements that may not upsurge as a substantial part of the work.[198] Besides, courts also face the difficulty of ascertaining whether there had to be any difference in the appraisal of substantiality depending on the type of work involved. Concerning the arts, in particular, but with a description that is likely to apply to many other contexts, it has once been concluded that «the more abstract and simple the copied idea, the less likely it is to constitute a substantial part», especially when it turns into the breadth of banality.[199]

In the spirit of such wide-ranging considerations, staying with artistic works, the UK Supreme Court in *Lucasfilm v Ainsworth* more recently faced the challenge of applying the above-illustrated principles in works that may even cross the border of a single type of intellectual creation. Furthermore, the case in question allows pondering over the difficulties of dealing with the possible clashes, not only among the different legal interpretation of certain copyright phenomena that may require the involvement of some expertise to facilitate the judge's own evaluation, but also between the legal understanding of some copyright concepts and their general language interpretation.[200]

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[197] *Designers Guild Limited v Russell Williams (Textiles) Limited (Trading as Washington Dc)*, 23 November 2000, House of Lords, cit.

[198] As he better clarifies, «it is on this ground that the mere notion of combining stripes and flowers would not have amounted to a substantial part of the plaintiff's work. At that level of abstraction, the idea, though expressed in the design, would not have represented sufficient of the author's skill and labour as to attract copyright protection». *Designers Guild Limited v Russell Williams (Textiles) Limited (Trading as Washington Dc)*, 23 November 2000, House of Lords, cit.

[199] Indeed, this seems also exemplified by the metaphorical expression that «copyright law protects foxes better than hedgehogs. In this case, however, the elements which the judge found to have been copied went well beyond the banal and I think that the judge was amply justified in deciding that they formed a substantial part of the originality of the work». *Designers Guild Limited v Russell Williams (Textiles) Limited (Trading as Washington Dc)*, 23 November 2000, House of Lords, cit.

[200] *Lucasfilm Ltd and others v Ainsworth and another*, 27 July 2011, Supreme Court, cit.
Lucasfilm Ltd and Others v Ainsworth and Another, 16 December 2009, Court of Appeal, cit.

The Supreme Court, in particular, carefully handled the meaning of sculpture, for which it also looked at its ordinary and common sense, and its reconciliation with objects that are created for a particular scope that is indeed not artistic, but according to a broad scope of copyright law may conflate into the category of original works of art.[201]

Furthermore, talking about the concept of reproduction of an artistic work, which in the judge's view remains, first of all, a matter of fact that often requires some expertise to be evaluated, in *Dorling v Honnor* it was instead held that «each drawing of a part was an object within the subsection and that it would appear to him as a non-expert that these parts when made were a reproduction of the corresponding plan, each drawing in the plan having […] artistic copyright», accepting that reproduction may have more than a single dimension.[202]

Francis Day v Bron, additionally, offers the occasion to reflect upon the peculiarity of a musical work's infringement and, at the same time, considers the possibility of copyright infringement by unconscious or subconscious copying, which, however, was in the case in question denied, both by the trial judge and on appeal.[203] Justice Wilberforce, in fact, considering the similarity of the songs, focused on the kernel of the plaintiff's song, its first eight bars, explaining how: «they imprint themselves on the mind, [t]hey give it its character and its memorability, [which becomes] relevant when one has to consider the question of copying or coincidence».[204]

At the same time, his Lordship considered that much of the theme contains many conventions or *clichés*, which usually make it more difficult and sometimes unbearable

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[201] In this way, the Supreme Court notices how «the argument has centred on the right approach to three-dimensional objects that have both an artistic purpose (of some sort) and a utilitarian function (of some sort). These issues are addressed in the rest of the judge's guidelines». However, the fact that claimants brought to the bench some world-famous examples of sculptures was not decisive.
Lucasfilm Ltd and others v Ainsworth and another, 27 July 2011, Supreme Court, cit.

[202] *Dorling v Honnor Marine Ltd*, 10 April 1963, Chancery, cit.

[203] The plaintiff complained that his song, *In a Little Spanish Town*, had been substantially reproduced, in its first eight bars of the chorus, by the defendant's piece, *Why*, either consciously or unconsciously. However, the evidence was not sufficiently conclusive to prove that conscious copying had occurred. Futhermore, even if there were still some degree of similarity between the songs, it was not sufficiently demonstrated that alleged unconscious copying had taken place, to the extent that the defendant had «sufficient knowledge or memory of 'Spanish Town' to justify the conclusion that in composing 'Why' he had unconsciously copied [it]». *Francis Day & Hunter Ltd and another v Bron and another*, 25 February 1963, Court of Appeal, cit. Wilberforce.

[204] *Francis Day & Hunter Ltd and another v Bron and another*, 25 February 1963, Court of Appeal, cit. Wilberforce

to establish infringement,[205] similarly to what had been purported by some Italian courts.

In particular, although acknowledging that reproduction might not necessarily be identical so as to amount to infringement, especially since «in music was not a question of note for note comparison but depended upon whether the alleged infringing work was substantially the same as the original work», any evidence on the similarity between the works, as well as the actual chance to access the original, could simply result in a prima facie case of infringement.[206] Such a presumption, however, may be anyway and anytime excluded when evidence to the contrary is given.

In the case of music copyright infringement, similarly to that which the Italian magistrates have observed, the emphasis has primarily been placed on the melody, for instance, by inferring that «there is a noticeable correspondence between the two songs. It is not note for note, nor at any point do more than five consecutive notes coincide, but the correspondence exists».[207]

Furthermore, it may not even be sufficient to establish the complete identification of notes and, consequently, one cannot infer that any difference or variation is insignificant. In other words, melody is not the only criterion to consider and other elements of composition, such as harmony, time and rhythm may indeed have their own relevance, but insofar as they prove to be significant and conceivably not when they are mere ordinary or commonplace.[208]

This already multifaceted representation becomes even more convoluted when the issue of unconscious copying is added. Extremely difficult to define, where its actual and accurate understanding seems to require the aid of experts who should know

[205] Nevertheless, this is not to conclude that clichés or any musical conventions do not matter at all, it being acknowledged: «the device of repetition, of resting for two bars on a long note and of repetition in sequence, are the commonest tricks of composition. But many writers of great music (from classical to popular music) have used clichés to produce masterpieces; indeed, some of them have found in the commonplace character of their basic phrase, their stimulus». *Francis Day & Hunter Ltd and another v Bron and another*, 25 February 1963, Court of Appeal, cit.

[206] *Francis Day & Hunter Ltd and another v Bron and another*, 25 February 1963, Court of Appeal, cit.

[207] *Francis Day & Hunter Ltd and another v Bron and another*, 25 February 1963, Court of Appeal, cit.

[208] The Court, indeed, did not radically deny that subconscious copying could ever subsist, but some causal connection with the work of the plaintiff had to be proved, and that the defendant had some acquaintance with the former's creation. Besides, all that could only be seen as factual matter, as to «whether the degree of objective similarity proved was sufficient to warrant the inference that there was a causal connection between the two works», which the appellate Court (particularly Justice Wilberforce) believed the trial judge correctly established, and for this affirming his decision. *Francis Day & Hunter Ltd and another v Bron and another*, 25 February 1963, Court of Appeal, cit.

not just the work of a given discipline or science, but even more the human mind, such a concept indeed appears to be absolutely slippery and even those who have supported it admit that «strictly speaking, it is a contradiction in terms».[209]

Even in the legitimate effort to ensure the fullest protection to copyright, it appears too much to argue that: «if it were possible for a person merely to alter a tune slightly and then avoid liability by denying that he had looked at the original, it would open the way to blatant plagiarism [while] in musical copyright the rule should be that once the two tunes are shown to be substantially similar, and the possibility of access is proved, the defendant will be held liable for infringement unless he can prove affirmatively that he did not have access».[210]

There is little doubt, however, that it may be useful to support the arguments of those who fear being usurped of their work in one way or another, and yet also by means of tunes that can allegedly be reproduced without even thinking of it, but indeed, it seems to be going too far.[211]

[209] As suggested in *Francis Day*, unconscious copying «means reproduction amounting to an infringement. It means that a person has reproduced a substantial part of a copyright work, not because he looked at it, or thought of the original, but because it was at the back of his mind, or on his subconscious mind, from having heard it on the radio or elsewhere. *Francis Day & Hunter Ltd and another v Bron and another*, 25 February 1963, Court of Appeal, cit.

[210] *Francis Day & Hunter Ltd and another v Bron and another*, 25 February 1963, Court of Appeal, cit.

[211] A submission of this kind, in part, echoes the desperate cries of Richard Spinello's appeal to guard against the daunting technology that threatens the nights of many copyright holders who fear the chance of an escalation of appropriations and misattributions that would shrink their works and fatigue. Cf. *supra*, Chapter 3.

CONCLUSIONS

The concrete application of the concepts thus far illustrated has helped to complete the theoretical analysis of plagiarism and attribution of authorship from different angles. The perspective on copyright infringement provided by the judiciary, therefore, has hopefully better explained the most contentious aspects of the subject.

Indeed, depending on the exact legal context, case law may directly or only incidentally consider the failure to acknowledge authorship in the work. Most of the time, the first concern of the plaintiff will be the violation of his/her exclusive exploitation right in the work, and only after there may be explicit or implicit consideration of a violation of his/her right to be identified as the author of the work. However, if the development of literature has proved something, it is certainly that – with the limits already discussed – proper acknowledgment of sources, personal assimilation of authorities' works and wise imitation has always mattered.

These general considerations apply to the legal contexts of both Italy and the United Kingdom, although with some immediate distinctions, which have already been underlined. First, the former afforded protection to the moral right of attribution long before the latter. Second, according to the Italian LA 1941, such a right undoubtedly receives autonomous protection, even if in practice this is nearly always accompanied by claims of economic rights' violation. Third, it is also correct to say that the Italian judiciary would more often and explicitly refer to the concept of plagiarism, even if – as in the case of the UK – the law does not expressly mention it.

Furthermore, the circumstance that the UK law grants a more limited shield to moral rights does not indisputably imply that, once the Copyright Act has expressly introduced moral right provision, claimants are impeded from bringing an action before the court for a breach of statutory duty under CDPA 1988.

It is, however, accurate to say that it is more likely, given the aforementioned features of UK moral rights provisions, claimants would rather focus on bringing an action for copyright infringement, for all the reasons previously discussed, but this is recurrently shared by a jurisdiction such as Italy, in which moral rights have received

the highest protection. Moreover, Italian courts have long struggled with the absence of a clear definition of plagiarism and, consequently, they have often relied on the double concept of plagiarism-counterfeiting, which clearly keeps a strong bond with the exclusive exploitation rights.

While acknowledging the dissimilarities that have been from the beginning discussed, especially in terms of the traditional UK approach to confining misattribution to instances of copyright infringement and the typical Continental choice of affording independent protection to the moral right of attribution, there is still enough leeway to identify a certain degree of likeness between the two.

Focusing all the attention on the UK case law, even before the enactment of a statutory moral right protection, there have been some instances in which courts have explored the issue of plagiarism, mostly considering it to be assimilated to the concept of piracy, occasionally defining it as a literary larceny that could yet infringe copyright, and finally disclosing its existence beyond the copyright dimension. Therefore, it is exactly with the analysis of the judiciary that the greatest distances between the two systems tend somehow to diminish, thus proving the inference that the method of examining case law is an indispensable instrument for comparative legal studies.

Even if we fear the word plagiarism, rather referring to it in terms of lack of authorship acknowledgement or, more broadly, authorship misattribution, we cannot ignore the fact that it exists for the law, even if not literally in statutory terms. This reflection also allows for broader consideration of the relevance of protecting moral rights in copyright law.

In the opinion of the author, in fact, it is time to make peace with the circumstance that the legislator has chosen to protect moral rights. Whether we like it or not, the moral right of the author to be identified as such (even with all the limitations that have been imposed) remains a clear choice of the legislator, even granting the influence of the international dimension, which is not an imposition but still a choice that has been made by the rational (sic!) legislator. Furthermore, recognising the role of the norm of attribution as a proper incentive to creation not only leads to a better understanding of plagiarism and its dynamics, but also helps to further reconcile the two legal systems that are the object of the instant research.

On the contrary, even allowing for the criticism of the introduction or the

defensibility of moral rights protection, if we want to challenge this, it seems that the only option would be to eradicate the provisions or otherwise intervene with a more stringent regulation, which would clearly pose the boundaries of infringement and provide a clear definition of the phenomenon.

This, however, does not imply that a harsher regulation is expected – a conclusion that appears to be supported by the arguments thus far articulated by the chosen interdisciplinary approach to this controversial subject. Careful consideration of contextualised knowledge fields, such as arts and literature, and of the ethical and social regulations, indeed, may help the pursuit of a different direction, which does not have to be the same in both legal systems here considered, but rather imply some common contemplations.

In terms of the Italian law, the usurpation of authorship could find a different collocation in the LA 1941. First, it might find a distinct dimension, which would even better honour the independence of moral rights. It is true that the copyright law, affording civil protection to moral rights, considers applicable the norms provided against the breach of economic rights. However, the bond between these two often blurs and yet a cleared distinction would be rather welcome.

By doing so, the autonomy of the moral right of attribution should be cherished, and with a similar purpose, the same may be purported with regard to the other moral rights, although this would require a further close examination that is not possible at this time. In any case, providing a clearer collocation to attribution within the framework of copyright law seems to represent a good chance of also discerning the applicable sanctions and attemptable remedies.

Clearly, the typical affiliation of plagiarism and counterfeiting does not help. Yet, this may be another reason why it should better clarify when a certain conduct is likely to amount to a mere infringement of the moral right of attribution and, in such a case, what the exact answer of the law, if any, would be.

Furthermore, providing that a justification of misattribution *tout court* is unlikely and, to some extent, it is unreasonable for it to be apprehended, rather the range of applicable actions and remedies should be qualified, which aim at protecting the right of attribution in its actual moral dimension. This may be reached, first allowing authors to bring an action via a swifter and more thorough procedure that is designed not simply to

establish and punish the infringement, but rather, and most importantly, to effectively ensure that the attribution is acknowledged. This could be achieved, for instance, by adding the name of the actual author to the work in question, similarly to the mechanism that consents to make public the judgement that affirms the infringement.

Second, the most complex aspect concerns its criminal dimension as an aggravated element to evaluate one of the possible felonies considered in the concurrent infringement of exclusive economic rights, envisioned by Section 2 of Article 171, which, it is worth recalling, is the only place in which the LA 1941 expressly mentions the usurpation of paternity.

In essence, plagiarism should be radically excluded from a criminal dimension, even when only considered in an escalating function, and rather be left exclusively to the civil dimension, which undoubtedly seems to be the only accurate place in which the said usurpation should eventually apply. This inference, indeed, derives from the consideration that misattribution of authorship has nothing to do with criminal conduct, even though its connection with the concurrent occurrence of conduct may have both civil and criminal consequences. As previously concluded, furthermore, there is nothing in the conduct of not acknowledging authorship of the author that may bring us to infer that we could reasonably face a criminal offence.

Contrary to what could be argued, in particular, by recalling the etymological origins of the term plagiarism that mirrors the offence of theft, none of the essential elements required by the law to establish such an offence are foreseen. One option, therefore, could be to reformulate the instant Article 171 LA 1941, avoiding any mention of the right of attribution, in order to refute conclusively any possible and dangerous association with the criminal setting.

This particular aspect appears to be guaranteed by UK law, which does not confuse the two dimensions, civil and criminal. In the CDPA 1988, in fact, the criminal provisions only consider conduct that may amount to an infringement of exploitation rights, which saves the legislator from the hindrance. However, this does not exempt it from any criticism of the UK statutory framework.

Regarding the United Kingdom, it is true that the CDPA 1988 places several limitations on the protection of moral rights, including the right to be identified as the author (or director) of the work. However, a more accurate consideration of the

consequences of violating such a right, which would clearly amount to a breach of statutory duty, would be more than welcome.

Leaving the provision as it is may even pave the way for the possible personal backsliding that the UK has often and openly avoided, also in respect to its typical preference for the protection of exclusive exploitation rights. On the contrary, a clear and express definition of what may expressly amount to a violation of the right in question, and additionally a specific set of norms regarding the possible remedies that may apply in the case of its sole breach, regardless of the infringement of economic rights, would prevent that eventuality.

The fact that, generally speaking, the claims that have thus far been brought have concerned almost exclusively the sole economic dimension does not make it sufficient to argue that a claim for a violation of moral rights, which would action a breach of statutory duty, will never be brought. Consequently, a possible option may be to amend the CDPA 1988 to expressly include and thoughtfully regulate such an eventuality.

That moral right receives a more limited protection does not make it sufficient to conclude that an infringement of the moral right of attribution necessarily deserves less of a shield. In the opinion of the author, it should be better defined whether the legislator's aim to sanction exclusively the instances in which violation of the author or director's right to be identified as such is accompanied by an infringement of his/her exclusive economic rights, or whether there can reasonably be a dedicated space to foresee some protection for the moral right of attribution alone, of course with all the limitations that the Statute provides.

Furthermore, should the law wish to maintain the latter, as would most likely be the case unless the only reason for moral rights to be introduced were to make the law look good, without any actual and genuine interest to give it life, the sections of the CDPA 1988 dedicated to moral rights would not be considered a *litera morta.* Similarly to what has been sustained with regard to the possible options left to the Italian legislator, there seems to be sufficient latitude to think of a different range of remedies, which would lucidly take into account the differences between the two situations and hopefully better appreciate the actual prejudice, without necessarily leaving the right exposed. Otherwise, there seems to be no reason to protect moral rights at all.

Additionally, the recent attempts of the UK legislature to bring some necessary

updates to the Statute do not completely satisfy. Concerning the 2014 amendments to the private copying exceptions and, in particular, the requirement that any allowed quotation of another person's copyright work must be accompanied by a sufficient acknowledgement, unless impossible, does not completely fulfil and, above all, does not impede a further clarification that probably only a more comprehensive reform could meet.

Besides, the aforementioned exception actually confirms the assumption that there is no reason to believe that authorship acknowledgement is not to be protected by law. However, it still does not provide all the instruments for the interpreter. In any case, the amendments having just been made, we will probably need to wait until this provision is brought before the court to see its actual strength. Consequently, there seems to be even more evidence to support the inference that a clearer stance of the law on this convoluted issue is needed.

In the meantime and, more generally, with the broader aim of looking at the wider strengths of moral rights, extirpating from the law the notion of the moral right of attribution is not, in the opinion of the author, a viable and reasonable option. This is not only in consideration of the historical incidence of moral rights within the Italian legislation, but also acknowledging the wider and undeniable social expectancy of protecting authorship attribution that the analysis of social norms applied to copyright has revealed. Similarly, although on different grounds, the same expectation is shared by the United Kingdom, even allowing the limits that the UK law has placed on its protection.

Recapping what has so far been considered, it can be concluded that if the law has chosen to protect a certain entitlement, as with the moral right of attribution, despite any international commitment or hypothetical moral conspiracy, the best possible regulation is expected.

Of course, there is no proof that clearer guidelines will actually guarantee the most confident safeguards. The fact that a notion of plagiarism has not thus far reached statutory width may be a symptom of that, but this is not to be considered a decisive factor, especially since it finds some, yet controversial, space in the case law. Therefore, there certainly seems to be an obligation by the legislation to aim at the most accurate depiction and consequent regulation of the phenomenon.

At the same time, a cleared position of the legislation would make possible a distinction of the different instances in which the lack of acknowledgement may occur. This supports the idea that there might be cases in which misattribution could be sanctioned and cases in which it should not be considered actionable at all. Here we may refer to the instances that could better find remedy in ethical or social norms, but also in literary and artistic criticism, instead of going before the court.

However, assuming that the reutilisation of others' creations depends entirely on the rule that authorship cannot be misattributed, there seems to be a definite social expectancy of credit or acknowledgement. This is a recognition that, indeed, may not only have only an informal foundation, especially if taken to the public sphere; in fact, in this latter context such an expectation likely assumes the shades of a formal requirement, which would then support the inference that the law may need to approach the subject with more clarity and certainty.

The task of the law is not to indiscriminately comfort the author for any breach of his/her right in the work, nor is it the aim of the magistrates to let their role be substituted by experts in different fields, in the arts and literature as in other disciplines or sciences. Besides, although we may easily understand the importunate choice of establishing literary or artistic tribunals, we cannot deny the relevance of the auxiliary aid of experts, whom the metaphorical "eye or hear of the court" has often better seen or heard.

Yet, despite the careful analysis of scholars who have frequently commented on the cases from time to time considered, we may still not have the clearest idea of what plagiarism means, as does neither legislator nor judiciary. However, it is essentially the latter that cannot avoid considering the matter, given that when a claim is brought to its attention, the court shall not refute to give a ruling. Based on these premises, there seems little alternative but for the judge to decide the case and, acknowledging the specialty of the matter under consideration, he/she may need to resort to the help of experts, who hopefully have a clearer view of its complex and convoluted mechanisms.

In addition, the quest for expert appraisal of the subject certainly needs to be taken into consideration. The peculiar nature of intellectual creations seems to necessarily imply a meticulous scrutiny of how non-legal subjects need to be appraised with the eye of the law, especially within the judicial dimension, where the direct

involvement of a certain expertise, or referral to a professional audience, is considered.

Indeed, it is when taking into account the essential and remarkable contribution of these multiple dimensions that the role of the court is most appreciated. The ultimate word, when one enters the courtroom, is left to the hopefully learned and wise discretion of the judiciary. Nevertheless, there are instances in which the court itself should not even be involved, and this may be reached only through a better approach of the legislation on the matter.

Similar consideration could also be made with regard to the possible abuse of claims involving instances of copyright infringement that consist in the violation of the economic rights in the works. In any case, sustaining that such economic bearing would allow and justify any judicial expedient does not seem reasonable either. More generally, the reaction against copyright violations should not imply the operation of double standards, where, on the one hand, claims on economic grounds find unlimited upholding, while, on the other hand, claims essentially based on non-economic grounds should never be allowed. There should rather be a balance of interests to be sought in both cases.

It is also true that the contractual route still represents a possible way of expenditure. However, as has been maintained, the fragile and weak bargaining position in which authors often find themselves may not lead to the consideration of contracts as the only viable option for protecting the right of attribution. This consideration applies not only in contexts where the right to be identified as the author of the work can be waived, as in the United Kingdom, but more generally also in contexts where the right is, in principle, inalienable and everlasting, but yet cannot be sufficiently and adequately protected by mere contractual means.

The same concerns, indeed, may also regard the other potential routes of protection, either remaining in the legal boundaries or moving into the realm of social and community norms. With a particular focus on the former, in fact, when one takes into account the area of torts or other common law mechanisms of protection, such as the peculiar public interest defence, as a possible way of shielding the right of attribution, it is imaginable to see the limits of such protection.

In the first place, they are not expressly conceived for this purpose, but are only eventually and sometimes virtually applicable to misattribution instances. Second, they

may still be inadequate and thus leave the author with unsatisfied claims. Concerning the latter option, instead, if in some cases the resort to non-legal discipline facilitates appraisal of the phenomenon and perhaps offers new tools for regulation and rulings to legislators and magistrates, it may not be sufficient to ensure nourishing protection. In addition, there may be instances in which this is feasible, and others in which it is not. More likely, there could be cases in which the social norms and their informal sanction properly address the issue and avoid resorting to the legal scheme, but there may also be situations in which this informal settlement is not sufficient.

What has thus far been envisioned is that both these approaches, legal and non-legal, may effectively provide a good device for understanding the phenomenon of plagiarism and all the possible shades in which the misattribution of authorship may occur, and in some circumstances may also provide themselves with the mechanism of protection and the consequent remedies. However, in all the instances in which this may not be possible, their aid is still of essential use for the lawyer and, above all, for the judges that happen to consider the dues of the unsatisfied claimant who laments the breach of his/her rights.

The interdisciplinary approach is to be seen exactly from this perspective, and for this reason a large part of the analysis has been dedicated to the survey of the evolution of the concepts of attribution and plagiarism, but also of creativity and originality, according to the interpretation of other non-legal disciplines, before considering their exact legal collocation. Without a broader view on these subject matters, in fact, it appears difficult to understand many of the principles that the judiciary later explained in the case law on the matter, which have been, and increasingly will be, highly specialist. Such approach is a potentially treasured aid for the law that seeks to regulate the phenomenon in the best possible way, considering its practical and social dimensions, and also taking into account the expectations of the public and affording protection to its general interest.

A similar awareness has characterised recourse to the comparative method, which had the unmistakeable value of better appraising the criticality of one's system by referring to another, especially when it belongs to a very different legal tradition. The fundamental purpose of considering the approaches of Italy and the United Kingdom towards the right of attribution has, since the beginning, been to better see the variable

and most controversial elements of misattribution, while also hopefully foreseeing some indications and possible suggestions by which each individual system may learn something from the other.

Many considerations, indeed, remain applicable to both systems, when otherwise a more distinguishing approach is demanded. In particular, it seems accurate to argue that any abuse of judgements should always be refuted. The powerful but fragile mechanism of the law should in fact be on the move when there are good reasons to praise it.

The next thought goes immediately to the procedural structure that each legal system may establish in order to reach this goal effectively, but this necessarily needs to be omitted at this stage. For the purpose of the present dissertation, it may be sufficient to notice that this is one of several aspects of copyright law that require further legislative clarification. The Italian and UK systems, despite some recent amendments, are, to use an expression that is certainly etched in our memory, “substantially” stuck in the 1940s and 1990s.

As with other aspects of copyright law, the existence of a grey area, even granted that the same grey may have innumerable gradations and shades, requires a conscious and mature acknowledgment by both the legislature and the judiciary. Where the latter may provide a better statutory regulation, the former may clarify the remaining vagueness. The time for a comprehensive and systematic reform will come and, perhaps, some of the questions and doubts surrounding the misattribution of authorship will find answers.

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The Newspaper Licensing Agency Ltd and Others v Meltwater Holding BV and Others, 27 July 2011, Court of Appeal, [2012] Bus LR 53, [2011] EWCA Civ 890, [2011] WLR (D) 261, CA, <http://www.bailii.org/ew/cases/EWCA/Civ/2011/890.html>.

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Toole v Young, 26 May 1874, Queen's Bench, [1865] LR 9 QB 523.

University of London Press Ltd v University Tutorial Press Ltd, 26 July 1916, Chancery, [1916] 2 Ch 601, [1916] 32 TLR 698.

Walter and another (on behalf of themselves and all other the proprietors of the business of publishing and carrying on the times newspaper) appellants; and Lane Respondent, 9 November 1899, House of Lords, [1900] AC 539.

Walter and another v Lane, 6 August 1900, Court of Appeal, [1899] 2 CH 749.

Warne & Co. v Seebohm, circa 1888, Chancery, [1888] 39 Ch D 73, [1888] 57 LJ Ch 689, [1888] 36 WR 686, [1888] 58 LT 928, [1888] 4 TLR 535.

West v Francis, circa 1822, King's Bench, [1822] 5 B & A 737, [1822] 106 ER 1361, [1822] 1 Dow & Ry KB 400.

William J. Holdsworth And Others Plaintiffs In Error; And Henry C. M'crea Defendant In Error, 25 June 1867, House of Lords, [1865] 2 LR HL 380.

Williamson Music Ltd v The Pearson Partnership Ltd, circa 1987, Chancery, [1987] FSR 97.

Wood v Boosey and another, 12 January 1867, Queen's Bench, [1867] LR 2 QB 340.

Wood v Boosey and another, 4 February 1868, Exchequer, [1868] LR 3 QB 223.

Wood v Chart. Wood v Wood, 29 April 1870, Equity, [1865] LR 10 Eq 193.

Abbreviations

(Reports and Journals)

Italy. Reports

(Unofficial)

Rep. Foro it.	Repertorio del Foro italiano
Rep. Giur. it.	Repertorio della Giurisprudenza Italiana
Giust. civ.	Giustizia civile - Repertorio generale annuale di legislazione, bibliografia, giurisprudenza

The United Kingdom. Reports

The Law Report Series (Official reports)

AC; A.C.; App.; App.Cas.; AppCas	Law Reports, Appeal Cases
Ch; Ch.; L.R.Ch.; Law Rep.Ch.	Law Reports, Chancery Division
QB; L.R.Q.B.; Law Rep.Q.B.; Q.B.	Law Reports, Queen's Bench
KB; K.B.; L.R.K.B.	Law Reports, King's Bench
Fam; Fam.	Law Reports, Family Division
P; P.; L.R.P.; Law Rep.P.; Prob.	Law Reports, Probate

Other commercial series

All ER ; A.E.L.R. ; A.E.R. ; All E.R. ; All Eng.	All England Law Reports
B.M.; Bur.; Bur.M.; Burr.t.M	Burrow's King's Bench Reports tempore Mansfield
BCLC; B.C.L.C.	Butterworths Company Law Cases

Bro.Parl.Cas.; Bro.P.C.	J.Brown's Cases in Parliament
Bus.LR	The Business Law Reports
CMLR; C.M.L.R.; CML Rev.	Common Market Law Reports
Cr. App. R	Criminal Appeal Reports
Cr. App. R (S)	Criminal Appeal Reports Sentencing
Crim.L.R.; C.L.R.; Crim LR; Crim.L.Rev.	Criminal Law Review
E.M.L.R. ; EMLR	Entertainment and Media Law Reports
ER; Eng.Rep.; Eng.Rep.R.; Eng.Rep.Re.; ER	English Reports
EWCA Civ	Court of Appeal (Civil Division)
EWHC; EWHC (Ch)	England & Wales High Court (Chancery Division) [Neutral Citation]
FSR; F.S.R.	Fleet Street Reports
I.P.& T.; IP & T	Intellectual Property and Technology
ICR; I.C.R.	Industrial Cases Reports
IRLR; I.R.L.R.	Industrial Relations Law Reports
L.R.Eq.; Eq.; L.R.Rep.Eq.	Law Reports, Equity Cases
Lloyd's LR FC; Lloyd's Rep FC	Lloyd's Law Reports Financial Crime
Lloyd's Rep.; Ll.L.L.R.; Ll.L.R.; Ll.List.L.R.; Ll.Rep.; Lloyd L.R.; Lloyd's List L.R.	Lloyd's List Law Reports
P & CR; P.& C.R.; Prop.& Comp.R.; Plan.& Comp.	Property, Planning & Compensation Reports
R.P.C.; Cut.Pat.Cas.; Cutler; R.Pat.Cas.; Rep.Pat.Cas. ; Rep.Pat.Des.& Tr.Cas.; RPC	Reports of Patent, Design and Trade Mark Cases
UKHL	United Kingdom House of Lords [Neutral Citation]
WLR; W.L.R.; Week.L.R.; Weekly L.R.	Weekly Law Reports

Journals

ADipl.	Archiv für Diplomatik, Schriftgeschichte, Siegel- und Wappenkunde
Adv. Exp. Soc. Psychol.	Advances in Experimental Social Psychology
Am. Hist. Rev.	American Historical Association website
Annali it. dir. autore	AIDA - Annali italiani del diritto d'autore
APA Monitor	American Psychological Association Monitor on Psychology
Bost. U. L. Rev.	Boston University Law Review
Bro L. Rev.	Brooklyn Law Review
C.A.L.	Critical Analysis of Law: An International & Interdisciplinary Law Review
Cardozo Arts & Ent. L.J.	Cardozo Arts & Entertainment Law Journal
Cardozo L. Rev.	Cardozo Law Review
Case W. Res. L. Rev.	Case Western Reserve Law Review
Circ. giur.	Circolo giuridico (Il). Rivista di legislazione e giurisprudenza
Colum.-VLA J.L.& Arts	Columbia VLA Journal of Law & the Arts
Cornell L. Rev.	Cornell Law Review
Corr. giur.	Corriere giuridico (Il) Mensile di attualità, critica, opinione
Corr. mer.	Corriere del merito (Il)
DePaul L. Rev.	DePaul Law Review
Dir. aut.	Diritto d'autore (Il)
Dir. giur.	Diritto e giurisprudenza. Rassegna di dottrina e di giurisprudenza civile
Dir. inf.	Diritto dell'informazione e

	dell'informatica
Dir. inf.	Diritto dell'informazione e dell'informatica
Dir. Internet	Diritto dell'Internet
Dir. radiodiff.	Diritto delle radiodiffusioni e delle telecomunicazioni
E.I.P.R.	European Intellectual Property Review
Emory L. J.	Emory Law Journal
Foro it.	Il Foro italiano
Foro pad.	Foro padano (Il). Rivista di giurisprudenza e di dottrina
Foro pen.	Foro Penale
Foro sic.	Foro siciliano (Il)
Ga. L. Rev.	Georgia Law Review
Gazz. giur. it.	Gazzetta giuridica italiana
Giur. comm.	Giurisprudenza commerciale
Giur. it.	La Giurisprudenza italiana
Giur. merito	Giurisprudenza di merito
Giust. pen.	Giustizia penale (La)
Hastings L.J.	Hastings Law Journal
Hermes	Hermes: Zeitschrift für klassische Philologie
Hous. L. Rev.	Houston Law Review
I. Prop. J.	Intellectual Property Journal
I.P.L.B.	Intellectual Property Law Bulletin (University of San Francisco School of Law)
I.P.Q.	Intellectual Property Quarterly
Impresa	Consulente dell'impresa (Il)
Informatica e dir.	Informatica e diritto
Int'l J Const. L.	International Journal of Constitutional Law

Iowa L. Rev.	Iowa Law Review
J. Copyright Soc'y U.S.A.	Journal of the Copyright Society of the U.S.A.
J. Copyright Soc'y U.S.A..	Journal of Copyright Society of U.S.A.
J. Intellect. Property Rights	Institute of Chartered Financial Analysts of India (ICFAI) University Journal of Intellectual Property Rights
J. Legal Stud.	The Journal of Legal Studies
J. Marshall. Rev. Intell. Prop. L.	John Marshall Review of Intellectual Property Law
J.I.P.R.	Journal of Intellectual Property Rights
J.Law & Soc.	Journal of Law and Society
J.T.L.P.	Journal of Law, Technology and Policy
Jurimetrics J.	Jurimetrics Journal of Law, Science and Technology
L.Q.R.	Law Quarterly Review
Law & Contemp. Probs.	Law & Contemporary Problems
Law & Soc'y Rev.	Law & Society Review
Leg. S.	Legal Studies
Libr. Trends	Library Trends
MALR	
Melb. Univ. L. Rev.	Melbourne university law review
Mich. L. Rev.	Michigan Law Review
Mon. trib.	Monitore dei tribunali
N.U. L. Rev.	Northwestern University Law Review
N.Y. Times Cyber L. J.	New York Times Cyber Law Journal
Nuova giur. civ. comm.	Nuova giurisprudenza civile commentata (La)
Nuovo dir.	Nuovo diritto (Il) - Rassegna giuridica pratica
O.J.L.S.	Oxford journal of legal studies
P.C. & L.	Psychology, Crime and Law

Pepp. L. Rev.	Pepperdine Law Review
Procedia Soc. Behav. Sci.	Procedia Social and Behavioral Sciences
Q.U.T.L.J.J.	Queensland University of Technology Law and Justice Journal
R.I.D.A.	Revue internationale du droit d'auteur
Rass. dir. cinem.	Rassegna di diritto cinematografico, teatrale e della radiotelevisione
Riv. dir. comm.	Rivista del diritto commerciale e del diritto generale delle obbligazioni
Riv. dir. ind.	Rivista di diritto industriale
Riv. giur. sarda	Rivista giuridica sarda
Riv. it. dir. proc. pen.	Rivista italiana di diritto e procedura penale
Riv. it. dir. pubbl. com.	Rivista italiana di diritto pubblico comunitario
Riv. pen.	Rivista penale
RUT Computer & Tech L. J.	Rutgers Computer and Technology Law Journal
S.L.R.	Stanford Law Review
San Diego L. Rev.	San Diego Law Review
Sett. Cass.	Settimana della Cassazione
Soc. Stud. Sci.	Social Studies of science
Studi dir. ind.	Studi diritto industriale
T.A.Ph.A.	Transactions of the American Philological Association
Temi rom.	Temi romana
Tex. L. Rev.	Texas Law Review
U. Chi. Legal F.	University of Chicago Legal Forum
U. Ill. L. Rev.	University of Illinois Law Review
U. St. Thomas L.J.	University of St. Thomas Law Journal
U.C. Davis L.Rev.	University of California Davis Law Review

UCLA Ent. L. Rev.	University of California, Los Angeles Entertainment Law Review
Univ. Pittsburg L.R.	University of Pittsburgh Law Review
Utah L. Rev.	Utah Law Review
Utrecht L. Rev.	Utrecht Law Review
Va. L. Rev.	Virginia Law Review
Vand. J. Ent. & Tech. L.	Vanderbilt Journal of Entertainment & Technology Law
W. Va. L. Rev.	West Virginia Law Review
Wash. L. Rev.	Washington Law Review
Wash. U. J.L. & Pol'y	Washington University Journal of Law & Policy
WIPO J.	World Intellectual Property Organization Journal
Wm. & Mary L. Rev.	William and Mary Law Review
Y.J.L.T.	Yale Journal of Law and Technology
Yale L. J.	Yale Law Journal