AUB DREPT

DOI: https://www.doi.org/10.31178/AUBD-FJ.2026.1.19

Forum Juridic nr. 1 / 2026

ANALELE UNIVERSITĂȚII DIN BUCUREȘTI - SERIA DREPT

Originality in Thin Spaces: What a Critical Edition Teaches Copyright Law in the Age of Generative AI (Institutul G. Călinescu - CJEU, C-649/23)[1]

Assoc. Prof. Ph.D. Vladimir Diaconiță
Faculty of Law, University of Bucharest

Abstract: This article analyses the Court of Justice of the European Union's judgment of 19 March 2026 in Case C-649/23, Institutul de Istorie și Teorie Literară "G. Călinescu" and Fundația Națională pentru Știință și Artă v HK and Others, the first preliminary ruling to apply the Court's originality framework to a critical edition of a public-domain work. The article extracts three lessons whose relevance extends well beyond the specific case. First, the author's personal imprint can be identified even in the most improbably narrow creative space, that in which the author sets out, deliberately and methodologically, to render as faithfully as possible the personality of another. Second, the narrowness of the available creative space does not diminish the protection: the originality threshold is binary, not graded, and EU law admits no second-rank copyright for works born under maximum constraint. Third, the protection of derivative works extends only to the original contribution of the second author, but the originality and infringement analyses must include a holistic dimension; an exclusively granular analysis is structurally incomplete. The article advances a unifying thesis (i.e., that European copyright law is equipped with a coherent theory of creativity in thin spaces) and applies it to AI-generated content, where the seat of human originality migrates from the component element to selection, refinement, and architectural choice.

Keywords: EU copyright law; originality; thin creative spaces; free and creative choices; critical edition; derivative works; originality analysis; holistic analysis; selection and arrangement; human–AI hybrid works; Directive 2001/29/EC; Institutul G. Călinescu (Case C-649/23).

Originalitatea în spații înguste. Ce putem învăța, în materia drepturilor de autor, de la o ediție critică în era inteligenței artificiale generative (CJUE, Cauza Institutul G. Călinescu, C-649/23)

Rezumat: Articolul analizează hotărârea Curții de Justiție a Uniunii Europene din 19 martie 2026, pronunțată în cauza C-649/23, Institutul de Istorie și Teorie Literară „G. Călinescu" și Fundația Națională pentru Știință și Artă împotriva HK și alții, prima decizie preliminară în care Curtea aplică cadrul său de analiză a originalității asupra unei ediții critice

[1] The present study elaborates, in substantially expanded form, ideas first advanced by the author in Romanian in „Originalitatea în spații înguste. Trei lecții de proprietate intelectuală pe care le putem extrage din Hotărârea CJUE din 19 martie 2026 pronunțată în Cauza Institutul G. Călinescu (C-649/23)", published on juridice.ro available at https://www.juridice.ro/823227/originalitatea-in-spatii-inguste-trei-lectii-de-proprietate-intelectuala-pe-care-le-putem-extrage-din-hotararea-cjue-din-19-martie-2026-pronuntata-in-cauza-institutul-g-calinescu-c-649-23.html (last accessed 3 June 2026).

a unei opere aflate în domeniul public. Articolul desprinde trei concluzii a căror relevanță depășește cu mult particularitățile speței. În primul rând, amprenta personală a autorului poate fi identificată chiar și în cel mai improbabil de restrâns spațiu creativ: acela în care autorul urmărește, în mod deliberat și metodic, să redea cât mai fidel personalitatea altuia. În al doilea rând, caracterul restrâns al spațiului creativ disponibil nu diminuează protecția: pragul originalității este binar, iar nu gradual, iar dreptul Uniunii Europene nu admite un drept de autor de rang secund pentru operele create în condiții de constrângere maximă. În al treilea rând, protecția operelor derivate se extinde numai asupra contribuției originale a celui de-al doilea autor, însă analiza originalității și analiza contrafacerii trebuie să includă o dimensiune holistică; o analiză exclusiv granulară este structural incompletă. Articolul propune o teză unificatoare (i.e. aceea că drepturile de autor în cadrul Uniunii Europene dispun de o teorie coerentă a creativității în spații creative înguste) și o aplică asupra conținutului generat cu ajutorul inteligenței artificiale, domeniu în care sediul originalității umane migrează de la elementul component către selecție, rafinare și alegerea arhitecturală.

Cuvinte-cheie: Drepturile de autor în cadrul Uniunii Europene; originalitate; spații creative înguste; alegeri libere și creative; ediție critică; opere derivate; analiză a originalității; analiză holistică; selecție și aranjament; opere hibride om–inteligență artificială; Directiva 2001/29/CE; Institutul G. Călinescu (Cauza C-649/23).

SECTION 1. INTRODUCTION. WHY ORIGINALITY MATTERS WITHIN NARROW MARGINS

Where, in the legal cartography of creativity, must we now look for originality? The question is not rhetorical. The traditional places (the sentence, the melodic phrase, the visual composition and so on) are being progressively crowded out by forces whose pace has outrun what doctrine had time to absorb. Three such forces, in particular, contract the space within which a human author can still claim that what she has expressed is original.

The first is the simple accumulation of prior works. Every contemporary creation now inscribes itself within an ever-denser landscape of expression, and the distance between what an author can produce and what others have already produced narrows with each addition. The second is the rise of generative artificial intelligence. Its output is, for the most part, itself unprotected, but it is not, for that reason, inert. By its mere availability, AI-generated content anticipates and pre-empts forms of expression that subsequent human authors might otherwise have claimed as their own. More troublingly, the genuinely original human contributions absorbed into algorithmic productions circulate without external markings, leaving third parties unable to distinguish, from the outside, what is protectable from what is not. The third is functional compression: in utilitarian works (e.g., in computer programs), most authorial choices simultaneously serve a technical end, making the boundary between protectable expression and unprotectable function particularly resistant to confident drawing.

Across all three settings, originality does not disappear, however, it polarises. It migrates either inward, into the smallest recesses of expression (a couple of words retained, a stylistic retouch, one variant preferred to its neighbour) or upward, into ever higher levels of abstraction (selection, arrangement, the overall architecture of the work). What changes, thus, is not the substance of originality, but the tier upon which the analyst must locate it. We are required to look, simultaneously, lower and higher than we used to — and, in both

directions, to examine with greater care both whether a given work crosses the threshold of protection and, if it does, what perimeter that protection occupies.

It is against this background that the Judgment of the Court of Justice of 19 March 2026 in Case C-649/23, *Institutul de Istorie și Teorie Literară „G. Călinescu" and Fundația Națională pentru Știință și Artă v HK and Others*[2], offers guidance whose relevance is, on first inspection, paradoxical: a case concerning the most faithful reconstruction of a Latin manuscript drafted by Prince Dimitrie Cantemir at the beginning of the eighteenth century should not, by any obvious logic, illuminate the originality of works composed under the pressures of the twenty-first century. The paradox is, however, only apparent. The condition of the critical editor, whose declared and methodological aim is the suppression of his own personality in favour of another's, is the ultimate stress-test for creation in narrow spaces. If originality can survive here, it can survive anywhere; and the reasoning that lets it survive is reasoning of immediately broader use.

The contribution of this article is not to retrace the originality threshold under EU copyright law, a task already performed with thoroughness by the doctrine that has charted the harmonisation of the concept since *Infopaq*[3]. The article advances, instead, an affirmative thesis, which is that the case law of the Court of Justice can be reconstructed, in the light of *Institutul G. Călinescu*, as a coherent theory of creativity in thin spaces. To this theory, *Institutul G. Călinescu* contributes three load-bearing propositions, presented here as three lessons.

The first lesson is that the author's personal imprint can be identified even in the most improbably narrow creative space. Second: the narrowness of the available creative space does not diminish the protection, in the sense that the eligibility threshold is binary, and EU law admits no second-rank copyright for works born under maximum constraint. The third lesson is that the protection of derivative works extends only to the original contribution of the second author, but the originality and infringement analyses must include a holistic dimension — an exclusively granular analysis is, by construction, incomplete.

Each of these three propositions applies, we will argue, with full coherence to the contemporary contexts of compressed creation and, most consequentially, to works in which human originality is exercised over content generated by artificial intelligence tools.

SECTION 2. THE CONTEXT OF THE CASE

2.1 The Facts of the Dispute

Professor Dan Slușanschi is the author of a critical edition of the Latin work *Incrementorum et decrementorum Aulae Othman[n]icae sive Aliothma[n]icae historiae a*

[2] Judgment of 19 March 2026, *Institutul G. Călinescu*, C-649/23, ECLI:EU:C:2026:213.

[3] See, in particular, *E. Rosati*, Originality in EU Copyright. Full Harmonization through Case Law, Ed. Edward Elgar, 2013; *T. Margoni*, The Harmonisation of EU Copyright Law: The Originality Standard in Global Governance of Intellectual Property in the 21st Century (ed. *M. Perry*), Ed. Springer, 2016, p. 85; *L. Bently, B. Sherman, D. Gangjee, P. Johnson*, Intellectual Property Law, 5th edition, Ed. Oxford University Press, Oxford, 2018, p. 92 *et seqq*. *V. Roș, A. Livădariu, C.-R. Romițan*, Dreptul proprietății intelectuale. Dreptul de autor și drepturile conexe și drepturile de proprietate industrială, Ed. C.H. Beck, București, 2025, p. 114 *et seqq*. The displacement traced in this article is consistent with the harmonised threshold these authors describe; it does not seek to revise it but to map its operation across constrained creative spaces.

prima gentis origine ad nostra usque tempora deductae libri tres ("The History of the Growth and Decline of the Othoman[n]ic or Aliothman[n]ic Court from the First Origin of the Nation, Brought Down to Our Times, in Three Books"), drafted by Prince Dimitrie Cantemir at the beginning of the eighteenth century[4]. The original work now belongs to the public domain.

The critical edition was produced on the basis of a Latin manuscript by Dimitrie Cantemir, identified in 1984 at Harvard University (United States), which has owned the manuscript since 1901[5]. Professor Slușanschi used, for the first critical edition, the facsimile of this manuscript published in Romania in 1999 and, for the second edition, photographic copies of the manuscript made available to him by the owner of the work[6]. The first critical edition was published in 2001 by the Amarcord publishing house in Timișoara; a second edition, revised and corrected, appeared in 2008 from the Paideia publishing house in Bucharest and was reprinted in 2010 and 2012[7].

The Slușanschi critical edition was not a mere transcription of the manuscript, but a reconstitution thereof. The undertaking involved bringing the original work to a complete, intelligible form as close as possible to the author's intention, while respecting the style and linguistic expression of Cantemir[8]. The edition was accompanied by critical notes, commentaries, and explanations for any corrections, word replacements, or additions necessary for the intelligibility of the text contained in the manuscript[9]. The critical apparatus itself required, in turn, extremely laborious and long-term research effort[10].

In 2013, Professor Slușanschi passed away. His heirs, TB and VP, concluded a convention with Institutul de Istorie și Teorie Literară "G. Călinescu" (hereinafter "**the Călinescu Institute**") granting it the right to use Professor Slușanschi's transcriptions and translations for several texts from the work of Dimitrie Cantemir, with a view to a publishing a complete edition of Dimitrie Cantemir's works. The Călinescu Institute made the works available to Fundația Națională pentru Știință și Artă (hereinafter "**FNSA**")[11].

In 2015, FNSA published the work entitled *Dimitrie Cantemir – Istoria măririi și decăderii Curții othomane*, a bilingual Latin-Romanian edition in two volumes, which included the Latin text of the work together with critical notes prepared by the researchers within FNSA. The 2015 FNSA edition reproduced the text of the 2001 Slușanschi critical edition[12]. It emerges from the findings of the national courts that the Slușanschi critical edition had been reproduced in its entirety in the FNSA edition, including the unpublished corrections and amendments that Professor Slușanschi had made to his own edition and intended to use in the future; references to Professor Slușanschi were made only in footnotes[13].

[4] Judgment of *Institutul G. Călinescu*, cited *supra*, para. 20.
[5] *Ibidem*, para. 21.
[6] *Ibidem*, para. 22.
[7] *Ibidem*, para. 20.
[8] *Ibidem*, para. 36 read in conjunction with para. 57.
[9] *Ibidem*, paras. 36, 58.
[10] *Ibidem*, para. 38 *in fine*.
[11] *Ibidem*, para. 23.
[12] *Ibidem*, para. 24.
[13] *Ibidem*, para. 26.

2.2. Domestic Procedural History

On 8 December 2015, the heirs of Professor Slușanschi brought an action before the Regional Court of Bucharest for infringement of copyright concerning the Slușanschi critical edition[14].

By its judgment of 21 December 2017, the Regional Court held that the critical edition had been reproduced in its entirety in the FNSA edition and found that the Călinescu Institute and FNSA had infringed Professor Slușanschi's moral right to be recognised as the author of the critical edition, as well as the economic rights belonging to his heirs. The defendants were ordered to pay damages for moral and material harm[15].

The Călinescu Institute and FNSA lodged an appeal before Bucharest Court of Appeal. By decision of 7 April 2021, the Court considered that the Slușanschi critical edition constituted a derivative work within the meaning of Law no. 8/1996 on copyright and related rights, on the ground that it had required creative effort and was the fruit of the intellectual activity of its author. The appellate court confirmed the copyright infringement, while reducing the amount of moral damages[16].

The Călinescu Institute and FNSA brought an appeal before the High Court of Cassation and Justice of Romania, which is the referring court[17]. They contested, in essence, the Court of Appeal's finding regarding the status of the critical edition as a protected work, criticising the court for failing to apply the criteria derived from CJEU case law for assessing the copyright protection of a critical edition[18]. In support of their appeal, the Călinescu Institute and FNSA advanced several arguments that foreshadow the doctrinal tension addressed by the CJEU in the judgment analysed in this study: (i) the degree of freedom of the author of a critical edition would be extremely limited or even non-existent in the case of a scholarly work written in a language that has fallen out of use, such as Latin, which has precise rules of syntax and word order[19]; (ii) free and creative choices would be excluded, the sole purpose being to use one's professional skill to identify, where the intention of the author of the original work does not emerge clearly from the manuscripts used, the textual variants closest to the original author's intention, but never to substitute it with that of the critical editor[20]; (iii) the possibility of choosing among several translations with regard to the words or expressions used would not mean that the author of the critical edition made a creative and original contribution, so that it could not be maintained that the edition reflects the personality of its author[21].

[14] *Ibidem*, para. 25.
[15] *Ibidem*, para. 26.
[16] *Ibidem*, para. 27–28.
[17] *Ibidem*, para. 29.
[18] *Ibidem*, para. 30.
[19] *Ibidem*, para. 31.
[20] *Ibidem*, para. 32.
[21] *Ibidem*, para. 33.

2.3. The Preliminary Question and Its Stakes

The High Court of Cassation and Justice of Romania decided to stay the proceedings and to refer the following question to the European Union Court of Justice for a preliminary ruling:

"Must Article 2(a) of Directive [2001/29] be interpreted as meaning that a critical edition of a work, the purpose of which is to restore the text of an original work by consulting the manuscript, accompanying it with comments and the requisite critical apparatus, may be regarded as a work protected by copyright?"[22]

The stakes of the question, which go significantly beyond the case at hand, concern how originality is to be assessed in order to recognise protection in the case of derivative works and, more complicatedly still, in the case of a derivative work in which the very purpose of the author's endeavour was to express, as faithfully as possible, not his own personality but that of another – that is, the most extreme case of constraint on creative freedom.

SECTION 3. LESSON 1. THE AUTHOR'S PERSONAL IMPRINT CAN BE FOUND EVEN IN THE MOST IMPROBABLY NARROW SPACE – THAT IN WHICH THE AUTHOR SETS OUT TO RENDER AS FAITHFULLY AS POSSIBLE THE PERSONALITY OF ANOTHER

3.1. The Analytical Framework. The Conditions for Copyright Protection of Works

The notion of "work" within the meaning of Article 2(a) of Directive 2001/29 constitutes, as is apparent from the settled case law of the Court, an autonomous concept of EU law which must be interpreted and applied uniformly, independently of any reference to the law of the Member States[23]. This notion requires the fulfilment of three cumulative conditions[24].

The first condition requires that the subject matter at issue be original, in the sense that it constitutes its author's own intellectual creation. For subject matter to be considered original, it is necessary and at the same time sufficient for it to reflect the personality of its author, manifesting his free and creative choices[25][26]. Thus, where the production of a subject matter was determined by technical considerations, rules, or other constraints, which left no

[22] *Ibidem*, para. 45.

[23] E.g., Judgment of 13 November 2018, *Levola Hengelo*, C-310/17, ECLI:EU:C:2018:899, para. 33 and the case law cited; Judgment *Institutul G. Călinescu*, cited *supra*, para. 47.

[24] Judgment *Institutul G. Călinescu*, cited *supra*, para. 49; Judgment of 12 September 2019, *Cofemel*, C-683/17, ECLI:EU:C:2019:721, para. 29 and the case law cited.

[25] On the operationalisation of the originality test as a two-stage inquiry, see *J. Pila, P. Torremans*, European Intellectual Property Law, 2nd edn, Ed. Oxford University Press, 2019, pp. 84, 85: assessing originality requires deciding (i) whether the type of subject matter leaves scope for free and creative choices, and (ii) the extent to which that scope was actually exploited by the alleged author so that the work bears his personal mark. See also *E. Rosati*, Copyright in the Digital Single Market: Article-by-Article Commentary to the Provisions of Directive 2019/790 Ed. Oxford University Press, 2021, p. 48.

[26] Judgment *Institutul G. Călinescu*, cited *supra*, para. 50; Judgment *Cofemel*, cited *supra*, para. 30; Judgment of 16 July 2009, *Infopaq International*, C-5/08, ECLI:EU:C:2009:465, para. 45.

room for the exercise of any creative freedom[27], that subject matter cannot be regarded as possessing the originality necessary to constitute a work[28].

The second condition: qualification as a "work" is reserved to the elements which are the expression of such an intellectual creation[29][30].

The third condition requires the existence of a subject matter identifiable with sufficient precision and objectivity[31][32].

The framework was established by the Court in *Infopaq*[33] and systematised in *Cofemel*[34], and its uniform application has been confirmed in subsequent judgments concerning subject matter of very different nature – from the taste of a food product (*Levola Hengelo*)[35] to the shape of a folding bicycle (*Brompton Bicycle*)[36] and objects of applied art such as furniture (*Mio/Konektra*)[37].

In Case *Institutul G. Călinescu*, the three-condition framework outlined above was applied for the first time, to our knowledge, to a critical edition of a pre-existing public domain work – and, through this, directly to a derivative work as the subject of protection, not merely as an element of an infringement analysis[38].

---

[27] These external limits have been systematised as four families of constraints – rule-based, technical, functional, and informational – each of which compresses the author's margin of free choice and, when total, falls below the originality threshold: see *O. Bulayenko, J.P. Quintais, D. Gervais, J. Poort*, AI Music Outputs: Challenges to the Copyright Legal Framework, reCreating Europe report, 2022, pp. 32, 33. The Court's case law confirms the same logic across heterogeneous contexts, including sporting events, where the rules of the game leave "no room for creative freedom for the purpose of copyright": Judgement of 4 October 2011, *Football Association Premier League and Murphy,* Joined Cases C-403/08 and C-429/08, ECLI:EU:C:2011:631, para. 98.

[28] Judgment *Institutul G. Călinescu*, cited *supra*, para. 50 *in fine*; Judgment *Cofemel*, cited *supra*, paras. 30, 31.

[29] The expression-element requirement reflects the WIPO Guide to the Berne Convention's understanding that the protected object must have "emerged from the mind of a person, left the sphere of the mind and become realised", a notion that "coincides with the term «expression»": see *E. Rosati*, Copyright and the Court of Justice of the European Union, Ed. Oxford University Press, 2019, pp. 91-92. The two-stage articulation of the originality requirement was given canonical form in Judgement of 13 November 2018, *Levola Hengelo*, Case C-310/17, ECLI:EU:C:2018:899, paras. 33, 35–37.

[30] Judgment *Cofemel*, cited *supra*, para. 29.

[31] The condition was first articulated in the Judgement *Levola Hengelo*, cited *supra*, by analogy with the graphic-representation requirement that the Court had established for trade marks in Judgement of 12 December 2002, *Sieckmann*, Case C-273/00, ECLI:EU:C:2002:748, para. 55: see *E. Rosati*, Copyright and the Court of Justice of the European Union (cited *supra* n 29), p. 92. The Court has insisted that "[t]here should be no element of subjectivity – given that it is detrimental to legal certainty – in the process of identifying the protected subject matter": Judgement *Levola Hengelo*, cited *supra*, para. 41; see also *E. Rosati*, Copyright in the Digital Single Market (cited *supra* n 25), p. 245. The same logic excludes any aesthetic-merit threshold under domestic law, as the Court confirmed in *Cofemel*: *E. Rosati*, "CJEU rules that copyright protection for designs only requires sufficient originality: Cofemel", in [2019] JIPLP.

[32] Judgment *Institutul G. Călinescu*, cited *supra*, para. 60; Judgment *Levola Hengelo*, cited *supra*, para. 40; Judgment *Cofemel*, cited *supra*, paras. 32, 33.

[33] Judgment *Infopaq International*, cited *supra*, paras. 37, 45.

[34] Judgment *Cofemel*, cited *supra*, paras. 29–35.

[35] Judgment *Levola Hengelo*, cited *supra*, paras. 41, 42 (the taste of a cream cheese spread with herbs).

[36] Judgment of 11 June 2020, *Brompton Bicycle*, C-833/18, ECLI:EU:C:2020:461, paras. 25, 26.

[37] Judgment of 4 December 2025, *Mio/Konektra*, C-580/23 and C-795/23, ECLI:EU:C:2025:941 para. 72.

[38] Prior to Judgement *Institutul G. Călinescu*, cited *supra*, the closest analogues concerned the reproduction of public-domain works of visual art, where the Court's logic was already established: any material resulting from the reproduction of a public-domain work is protected only if it is itself a work, that is, original in the sense of being the author's own intellectual creation – see *E. Rosati*, Copyright in the Digital Single Market (cited *supra* n 25), p. 243. In the Common Law tradition, the closest precedent is the contested judgment in *Sawkins v Hyperion*

3.2. Difficulties in Applying the Originality Criterion in Case Institutul G. Călinescu

The application of the first criterion (originality) to a critical edition raises a difficulty that does not arise, at least not with the same intensity, in the case of other categories of subject matter previously examined by the Court. In the case of applied art (*Cofemel*, *Brompton Bicycle*, *Mio/Konektra*) as well as computer programs[39], the constraints that compress the creative space are external to the author: technical, ergonomic, functional requirements, industrial standards, genre conventions, algorithms, and the like. The author aspires to originality but encounters limits imposed from the outside. The space is narrow, but the objective remains the author's own expression.

In the case of the critical edition, the constraint is of a different nature. It does not come from the outside – it is inherent in the very purpose of the endeavour. The author of the critical edition does not aspire to express his own personality; he aspires, avowedly and methodologically, to the most faithful reconstitution of the personality of another. The purpose of the Slușanschi critical edition, as is apparent from the request for a preliminary ruling, was to bring Dimitrie Cantemir's work to "a complete, comprehensible form that was as close as possible to the intention of its author, Dimitrie Cantemir"[40]. This is a constraint more profound than any technical or functional constraint. It is more than an obstacle to originality, in the sense that it appears, at first sight, to be an abdication from originality altogether.

3.3. How The CJUE Overcomes These Difficulties. Where Does the Originality of the Critical Edition Reside?

The Court's reasoning operates a dissociation that the judgment constructs in three successive tiers, each tier expanding the perimeter within which originality may be identified.

The *first tier* concerns choices at the textual level – grammatical, lexical, literary, and stylistic. The Court does not deny that these choices may be influenced by the author's experience and philological expertise, by his knowledge of the period in which the original work was drafted, by his familiarity with the style and linguistic expression of the original author, and by his interpretation of what he perceives to be the original author's intention[41]. Expertise, in other words, intervenes. But the Court – adopting the demonstration of

Records Ltd [2005] EWCA Civ 565, where the Court of Appeal of England and Wales held that the skill and labour exerted by a musicologist in reconstructing the music of a Baroque composer sufficed to attract authorship – a case described as illustrating "a certain tension between what one may call a «pedestrian» approach to originality in copyright law and a «creativity» approach": *E. Rosati*, Originality in EU Copyright. Full Harmonization through Case Law, Ed. Edward Elgar, 2013, p. 124, citing *A Rahmatian*, "The concepts of «musical work» and «originality» in UK copyright law – Sawkins v Hyperion as a test case", in (2009) 40 IIC 560. For a survey of the UK position that copying must usually involve "some element of material alteration or embellishment" and that "the quality of the alteration is likely to be more important than the quantity", see *Copinger and Skone James on Copyright*, Second Cumulative Supplement to the 18th Edition Ed. Sweet & Maxwell, 2023, pp. 67, 68.

[39] Subject to a different regime (Art. 73 *et seqq.* of Law No. 8/1996), which nevertheless contains the originality condition, assessed on the same terms.

[40] Judgment *Institutul G. Călinescu*, cited *supra*, para. 57; see also para. 36.

[41] *Ibidem*, paras. 54, 55.

Advocate General Spielmann at point 63 of his Opinion – refuses to equate expertise with the absence of originality. Choices probably determined or at least influenced by philological know-how are not, merely by that fact, devoid of creative character[42]. What is essential is whether the author had a margin of maneuver, however narrow, and whether it was actually exercised.

This delimitation is consonant with CJEU case law[43]: originality does not reside in words considered separately, but in "the choice, sequence and combination of the words by which the author expressed his creativity in an original manner and achieved a result which is an intellectual creation"[44][45]. Correlatively, the know-how invested in that creation is irrelevant[46]. Thus, for instance, the fact that the choice of one Latin word over another was guided by philological knowledge does not make it any less "free and creative" within the meaning of copyright law, so long as the author had several options and chose one of them on the basis of his own assessment.

The *second tier* shifts the focus from the textual level to the structural level. The Court, adopting the demonstration of Advocate General at point 65 of his Opinion, holds that originality may equally be assessed by reference to the composition of the critical edition, the structure given to the work, the determination of its form, and the arrangement of the original text in relation to the commentaries and critical apparatus[47]. This step in the reasoning plays an important role, as it draws attention to the fact that the locus of originality is not confined to each individual component element but extends to the overall architecture[48]. Even if each textual choice, taken individually, could be considered "dictated" by philological knowledge, the manner in which the critical editor organises the whole (what it is commented upon, in what order, how the critical apparatus was structured, what weight was given to the reconstituted text relative to the explanatory notes) may itself, distinctly, reflect the author's personality.

The *third tier* concerns the critical apparatus itself. It emerges from the request for preliminary ruling that the critical apparatus and commentaries featured in the Slușanschi

---

[42] *Idem*.

[43] E.g., Judgement *Infopaq*, cited *supra*.

[44] The *locus classicus* is Judgement *Infopaq*, cited *supra*, para. 45; reaffirmed in the Judgement of 22 December 2020, *Bezpečnostní softwarová asociace*, Case C-393/09, ECLI:EU:C:2010:816, para. 50 and in the Judgement of May 2012, *SAS Institute v World Programming*, Case C-406/10, ECLI:EU:C:2012:259, para. 67. The Court has consistently required the author "to express [his] creative abilities in the production of the work by making free and creative choices" so that he "can stamp the work created with his «personal touch»": Judgement of 1 December 2011, *Painer*, Case C-145/10, ECLI:EU:C:2011:798, paras. 89, 92. For analysis, see *E. Rosati*, Copyright in the Digital Single Market (cited *supra* n 25), p. 48.

[45] Judgment *Institutul G. Călinescu*, cited *supra*, para. 54, referring to Judgment *Infopaq International*, cited *supra*, paras. 45, 46, and Judgment of 29 July 2019, *Funke Medien NRW*, C-469/17, ECLI:EU:C:2019:623, para. 23.

[46] *Ibidem*, para. 54 *in fine*.

[47] *Ibidem*, para. 56 (adopting the Opinion of Advocate General Spielmann, point 65).

[48] The General Court has applied the same principle to harmonised technical standards adopted by the European Committee for Standardisation, observing that even where the authors had to take account of legislative requirements, "the length of the texts implied that the authors had to make a number of choices, including in the structuring of the documents": Judgement of 14 July 2021, *Public.Resource.Org Inc v European Commission,* Case T-185/19, ECLI:EU:T:2021:445, paras. 48, 59. Domestic case law has likewise recognised that copyright may subsist "in the selection, structure and arrangement of events and the forms of expression of events": *Pasternak v Prescott* [2022] EWHC 2695 (Ch), [142]. For a synthesis, see *Copinger and Skone James*, op. cit., p. 55.

critical edition – relating to corrections, word replacements, and additions that may be necessary for understanding the manuscript of Cantemir's work, as well as the various word or expression variants that may have been omitted – are likewise the result of Professor Slușanschi's intellectual creation[49]. It is at this tier that the presence of originality is least controversial: critical commentaries are inherently the expression of a personal evaluation – they do not reconstitute another's text but interpret and explain it.

The three tiers – textual choices, structure, critical apparatus – operate cumulatively. In a critical edition, they combine to form a complex subject matter in which the critical editor's original contribution manifests itself on multiple planes simultaneously.

3.4. The Limit of the Protection. Purely Technical Constraints Remain Excluded

The Court's conclusion is accompanied by a reservation – unsurprising but welcome – that defines its limits. The conclusion regarding the possible fulfilment of the originality criterion is formulated with a reservation: "unless the drafting of the Slușanschi critical edition was dictated by purely technical considerations, rules or constraints with no creative freedom" – a matter whose assessment is for the referring court[50].

This reservation reiterates the classical boundary of the originality test[51][52]: where there is no margin for choice, where the result is entirely determined by constraints external to the author's will, the subject matter cannot constitute a protectable work. But the boundary is not to be drawn between "wide" and "narrow" domains of creativity, nor between categories of works presumed to be more or less creative. It is drawn, in each specific case across every level of abstraction within the analysis, between the existence of a discretionary choice and the total absence of any possibility of choice.

Applied to the critical edition, this principle implies the following: if, in a given passage, the Latin language, the rules of philology, and the state of the manuscript leave the author no option, that passage cannot be considered original. But if the author had a choice among several plausible variants and opted for one on the basis of his own judgment – even if that judgment was guided by expertise – the choice is, in principle, free and creative within the meaning of copyright law.

---

[49] *Ibidem*, para. 58.
[50] *Ibidem*, para. 59.
[51] See *Cofemel*, cited *supra*, paras. 30, 31; *Brompton Bicycle*, cited *supra*, para. 23; *Funke Medien*, cited *supra* para. 19; The Court has consistently underscored, in the field of photography, that "free and creative choices" can intervene at multiple stages of the production process – preparation, taking of the photograph, and selection of the snapshot – each capable of leaving a "personal touch": Judgement *Painer*, cited *supra*, esp. paras. 89–92; for commentary on a national case subsequent to *Painer*, *E. Rosati*, "Not sufficiently «transformative» appropriation of a photograph held infringing by French court", in (2018) 13(7) JIPLP 526.
[52] E.g., Judgment *Cofemel*, cited *supra*, paras. 30, 31; Judgement of 11 June 2020, *SI* and *Brompton Bicycle Ltd v Chedech / Get2Get*, Case C-833/18, ECLI:EU:C:2020:461, para. 63.

SECTION 4. LESSON 2. THE NARROWNESS OF THE SPACE DOES NOT DIMINISH PROTECTION

4.1. The Binary Principle: Work or Non-Work, Intermediate Situations Being Excluded

Lesson 2 concerns the consequence of the finding established above, namely that originality can be found even in narrow spaces: once the originality threshold is crossed, what level of protection does the work receive?

The Court's answer is unambiguous. At paragraph 66 of the judgment, the Court holds that, "where a critical edition has the characteristics set out in paragraph 49 of the present judgment and therefore constitutes a work, it must, as such, qualify for copyright protection, in accordance with Directive 2001/29, and it must be added that the extent of that protection does not depend on the degree of creative freedom exercised by its author, and that that protection is therefore not inferior to that to which any work falling within the scope of that directive is entitled"[53].

The formulation is remarkable for what it excludes. It prohibits any modulation of the degree of protection according to the extent of the creative space available to the author. There is no such thing in EU law as first-rank protection for works in which the author enjoyed a vast creative space and second-rank protection for those in which the space was compressed. Protection either exists – and it is thus full – or it does not exist at all.

The Court anchors this holding in *Cofemel*, paragraph 35, where it had already been stated that the extent of copyright protection does not depend on the degree of creative freedom enjoyed by the author[54]. But the formulation in *Institutul G. Călinescu* goes further, in the sense that it does not merely reiterate the abstract principle but applies it specifically to a work born under conditions of maximum constraint – a critical edition whose constitutive purpose is fidelity to another. If the principle holds here, it holds *a fortiori* in any other context.

The practical consequence is that the court before which the question of originality of a subject matter is brought must answer a single question – whether the subject matter reflects the personality of the author through the expression of free and creative choices. If the answer is affirmative, the subject matter is a work and enjoys full protection. The court cannot subsequently calibrate the extent of protection according to its assessment of "how creative" the author's endeavour was, nor reduce the perimeter of protection on the ground that the available creative space was limited. Any methodological approach that adjusts the extent of protection according to the category of works or the perception of the "simplicity" of the creative endeavour falls outside the framework established by the Court.

4.2. The Relevance of the Principle Beyond the Critical Edition

The binary principle of protection set out above is not a rule created for critical editions; it is a general principle of EU copyright law. Nevertheless, the *Institutul G. Călinescu* case lends this principle particular force, precisely because it addresses a limiting situation. If protection is full for a work whose creative space is compressed by fidelity to the text of

[53] Judgment *Institutul G. Călinescu*, cited *supra*, para. 66.

[54] Judgment *Cofemel*, cited *supra*, para. 35.

another, then the same rule governs – without possibility of distinction – any other category of works created under conditions of constraint.

The judgment in *Mio/Konektra*, delivered by the same First Chamber on 4 December 2025, had already provided confirmation in the field of applied art: the originality of objects of applied art must be assessed according to the same requirements as that of other types of subject matter[55], and a utilitarian object may benefit from copyright protection even where its production was determined by technical considerations, provided that this does not prevent the author from reflecting his personality in that object through the expression of free and creative choices[56]. The Court explicitly rejected, in *Mio/Konektra*, the existence of a rule–exception relationship between the protection of designs or models and copyright protection, which would have entailed the application of stricter originality requirements for works of applied art[57].

The convergence between the two judgments is significant, since both unequivocally refuse the idea of differentiated protection according to the nature of the subject matter or the intensity of the constraints. In *Mio/Konektra*, the constraints are technical and ergonomic; in *Institutul G. Călinescu*, the constraint is fidelity to the pre-existing work. In both, the Court reaches the same conclusion, namely that the constraint compresses the space in which originality can manifest itself, but does not diminish the protection once originality is established.

The principle has implications for other contexts where creativity manifests within narrow margins. Regarding computer programs, where each design decision simultaneously fulfils a technical function, the binary nature of protection means that a program whose creative space has been compressed by functional constraints does not enjoy "lesser" protection than a program conceived in conditions of full architectural freedom – provided that the originality threshold is met. In the field of databases, where originality resides in the selection or arrangement of the content, the same rule forbids modulating the intensity of protection in relation to the scope of the selection options available. And ultimately, in the emerging context of creations in which human intervention reaches a high level of abstraction – such as the selection, refinement, and arrangement of content generated by AI tools – the binary principle implies that, if these operations of selection and arrangement reflect free and creative choices of the human author, the resulting work enjoys the full protection of copyright.

To conclude on this point, Lesson 2 must be read and applied carefully. The binary character of the protection operates at the level of *eligibility*; it does not entail an undifferentiated monopoly. Three analytical tiers must be distinguished, otherwise the second lesson appears to contradict the third, to be presented below. First, the *threshold* of protection is binary in nature (either the originality criterion is met, or it is not) and the Court forecloses any modulation of that threshold by reference to the breadth of the available creative space. Second, the *perimeter* of protection is variable in extension, in the sense that it is co-extensive with, and limited to, the elements which express the author's free and creative choices. This explains why the protection of a derivative work cannot absorb the public-domain substrate. The narrower the creative space, the more contracted the

[55] Judgment *Mio/Konektra*, cited *supra*, para. 57.
[56] *Ibidem*, para. 63.
[57] *Ibidem*, paras 56, 58.

perimeter, for the elementary reason that there is less original expression upon which the perimeter can be drawn. Third, the *intensity* of the remedies is uniform: no diminished injunction, no reduced quantum of damages, no shorter term of protection is reserved for works of constrained creation. The apparent tension between Lessons 2 and 3 thus dissolves once they are recognised as addressing different tiers of the same protective architecture: Lesson 2 refers to the threshold and the intensity of the remedies; Lesson 3, read together with the holistic methodology articulated at paragraph 64, governs the perimeter. To affirm that a work born in a narrow space enjoys full protection is, accordingly, not to affirm that the right-holder may oppose any use of the substrate upon which the original contribution is laid; it is to affirm only that the right itself, within its proper perimeter, suffers no abatement on account of the narrowness of the space in which it was born.

SECTION 5. LESSON 3. IN THE CASE OF DERIVATIVE WORKS, PROTECTION EXTENDS ONLY TO THE ORIGINAL CONTRIBUTION OF THE SECOND AUTHOR, BUT THE ANALYSIS CANNOT BE MERELY GRANULAR

Lesson 3 concerns the problem of how the subject matter of protection is to be delineated in the case of derivative works and how a potential infringement is to be analysed.

5.1. The Derivative Author Does Not Appropriate the Original Creation

The copyright protection of a critical edition does not grant its author an exclusive right over the pre-existing work[58]. Affording copyright protection for Professor Slușanschi's critical edition cannot result in a work – that of Dimitrie Cantemir – which belongs to the public domain to enter the private domain[59]. This is not a limit specific to critical editions, but the direct application of the principle according to which the protection of derivative works does not prejudice the rights of the author of the original work, enshrined in Article 2(3) of the Berne Convention[60].

Correlatively, the status of a "work" is reserved to the elements which are the expression of an intellectual creation of the author's own[61]. Consequently, where a critical edition constitutes a work, the protection covers only the original contribution of the critical editor – that is, those elements in which his free and creative choices are manifested – and not the parts of the work that reproduce, without creative addition, the pre-existing text of Cantemir.

Up to this point, the reasoning is familiar and uncontroversial. The difficulty arises in the next step is how to identify this original contribution in a derivative work that overlaps structurally with the pre-existing work?

---

[58] Judgment *Institutul G. Călinescu*, cited *supra*, para. 68.
[59] *Idem*.
[60] See Art. 2(3) of the Berne Convention: "[t]ranslations, adaptations, arrangements of music and other alterations of a literary or artistic work shall be protected as original works without prejudice to the copyright in the original work"; see also Judgment *Institutul G. Călinescu*, cited *supra*, para. 40.
[61] Judgment *Cofemel*, cited *supra*, para. 29.

5.2. The Identifiable Subject Matter and the Refusal to Limit the Analysis to a Dissection of the Derivative Work

The answer to this difficulty passes through another condition of protection, namely the existence of a subject matter identifiable with sufficient precision and objectivity. The Court specified that the notion of "work" envisaged by Directive 2001/29 necessarily presupposes that there be an expression that makes it identifiable with sufficient precision and objectivity, in relation to the parts corresponding to the original work[62].

The referring court did not exclude the possibility that the Slușanschi critical edition might be confused with the manuscript of Cantemir's work, insofar as its purpose was to render the text of that pre-existing work. However, the same court recognised that the author of a critical edition may make adaptations or additions to a work in order to render the original meaning of the manuscript, so that the critical edition could fulfil the third condition of protection (a subject matter determined with sufficient precision)[63]. The European Court, adopting the demonstration of Advocate General at point 70 of his Opinion, confirmed that the critical edition of an original work may present itself, in its entirety, as a subject matter identifiable with sufficient precision and objectivity[64].

Essential, however, is the holding at paragraph 64 of the judgment: "It is not necessary to draw a distinction between the parts corresponding to the original work, which may have been the subject of textual amendments, and the comments, critical notes or explanations accompanying them in order, where appropriate, to identify those parts which are capable of falling within the scope of copyright protection. Such an approach would run the risk of breaking up a work which is only meaningful as a whole, in particular where such comments, notes or explanations supplement or relate to a specific part of the text of the original work which they are commenting on or restoring"[65].

The formulation deserves careful examination, because it produces two distinct consequences.

The first consequence concerns the manner of applying the criterion of the identifiable character of the subject matter. The Court refuses to require a preliminary dissection of the derivative work into layers (the "taken" layer versus the "added" layer). The derivative work is identified *as a whole*, not by residue after the elimination of pre-existing elements. This does not mean that protection extends to the pre-existing elements (paragraph 68 remains applicable), but rather that the *operation of identifying* the protected subject matter does not pass through the atomisation of the work. More briefly and practically: the mere fact that the derivative work embeds within it the original work does not mean that the subject matter of protection, concerning the derivative work, fails to meet the requirement of identifiable character.

The second consequence – and the one with the most profound implications – concerns the manner in which the originality analysis and, correspondingly, the infringement analysis must be conducted. The derivative work has meaning "only as a whole", which means that in proceedings concerning the infringement of rights over the derivative work, the

[62] Judgment *Institutul G. Călinescu*, cited *supra*, para. 62, referring to Judgment *Levola Hengelo*, cited *supra*, para. 40.

[63] *Ibidem*, para. 61.

[64] *Ibidem*, para. 63 (adopting Opinion of Advocate General Spielmann, point 70).

[65] *Ibidem*, para. 64.

comparative analysis must address not only the individual component fragments but also the work as a whole. We will address this question in the following section.

5.3. The Necessary Holistic Analysis

The ruling at paragraph 64 of the judgment reaffirms the principle according whereby the selection and arrangement of individually unprotectable elements may themselves constitute protectable original expression.

The principle draws its substance from multiple sources. We note merely that, at the conventional level, the principle is anchored in Article 2(5) of the Berne Convention, which protects "collections of literary or artistic works such as encyclopaedias and anthologies which, by reason of the selection and arrangement of their contents, constitute intellectual creations", as well as in Article 10 (2) of the TRIPS Agreement, which extends the same principle to compilations of data. Under EU law, the Court confirmed and applied the principle in *Football Dataco*, holding that the originality criterion is satisfied where, "through the selection or arrangement of the data which it contains, the author expresses his creative ability in an original manner by making free and creative choices [...] and thus stamps his personal touch[66]"[67].

The judgment in *Institutul G. Călinescu* gives this principle additional resonance. Through its refusal to confine the analysis to a dissection of the derivative work (paragraph 64) and its confirmation that the originality of the critical edition may reside in its composition, structuring, and form (paragraph 56), the Court establishes the idea that a work may be original through its architecture even where the constituent components – the words, the reconstituted passages, the individual notes – could each be considered, taken separately, unprotectable.

In other words, the originality analysis cannot be undertaken exclusively element by element, verifying whether each one, in isolation, is original. It must also include an examination of the work as a whole, to verify whether the manner in which the author

[66] The principle is anchored, in conventional sources, in art. 2(5) of the Berne Convention and art. 10(2) of TRIPS. Judgement of 1 March 2012, *Football Dataco*, Case C-604/10, ECLI:EU:C:2012:115, para. 38 is its operationalisation in EU law. The same logic has been recognised under US copyright law in *Satava v Lowry*, 323 F.3d 805 (9th Cir 2003), where the Court of Appeals for the Ninth Circuit held that "a combination of unprotectable elements is eligible for copyright protection only if those elements are numerous enough and their selection and arrangement original enough that their combination constitutes an original work of authorship" – for a brief analysis in the EU/US comparative context, see *E. Rosati*, "Why originality in copyright is not and should not be a meaningless requirement", in (2018) 13(8) JIPLP 597. Domestic transpositions of the principle, post-*Cofemel*, include the Italian Supreme Court's recognition that an interior-design plan reflecting "a unitary project that adopts a well-defined and visually relevant scheme" qualifies as an architectural work: see *E. Rosati*, "Italian Supreme Court applies CJEU Cofemel decision to make-up store layout", in (2020) 15(7) JIPLP 502. The classical Common Law articulation is Lord Reid's in *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273, 277–278: "A wrong result can easily be reached if one begins by dissecting the plaintiffs' work and asking, could section A be the subject of copyright if it stood by itself … it does not follow that, because the fragments taken separately would not be copyright, therefore the whole cannot be", extracted in *T. Aplin, J. Davis*, Intellectual Property Law: Text, Cases, and Materials, 4th edition, Ed. Oxford University Press, 2022, p. 110.

[67] Judgment *Football Dataco*, cited *supra*, para. 38.

selected, combined, and integrated the component elements itself constitutes original expression[68].

The same logic applies, *mutatis mutandis*, to the infringement analysis. Paragraph 67 of the judgment recalls that copyright infringement does not necessarily entail the reproduction of the work in its entirety but may consist of partial reproduction, provided that it contains "elements which are the expression of the author's own intellectual creation"[69]. The Court anchors this reasoning in *Infopaq*, paragraph 39, to the effect that the various parts of a work enjoy protection provided they contain elements which are the expression of the author's own intellectual creation. Read in the light of paragraph 64, this principle means that the "elements which are the expression of the author's own intellectual creation" may include not only textual fragments, situated at the lowest tier of abstraction, but also structure, selection, and arrangement – that is, precisely those aspects which an exclusively granular analysis is, by its construction, incapable of capturing.

5.4. The Relevance of the Holistic Analysis Beyond Case Institutul G. Călinescu

The holistic principle described in paragraph 64 of *Institutul G. Călinescu* formulates a methodological rule according to which, in the case of any complex work in which the author's original contribution resides not (or not only) in the individual component elements but in the manner in which they are selected, combined, and integrated into a coherent whole, the originality analysis and the infringement analysis must include a holistic dimension. An analysis limited to the granular examination of each element, however meticulous, is structurally incomplete if it does not also evaluate the whole.

The applicability of this rule may be illustrated through several categories of works in which originality resides predominantly at the structural level.

Audiovisual works and video games are complex works comprising multiple creative layers – source code, graphics, sound, narrative, interface architecture, ludic design – each of which may independently meet the originality criterion[70]. The Court held in *Nintendo v PC Box* that the graphic and sound elements of a video game "are protected, <u>together with the entire work</u>, by copyright in the context of the system established by Directive 2001/29"[71]. The

---

[68] Beyond the four illustrations developed in section 5.4 below, the courts have, over time, recognised free and creative choices in: (a) newspaper articles ("the form, the manner in which the subject is presented, and the linguistic expression"); (b) graphic user interfaces (the "specific arrangement or configuration of all the components"); (c) portrait photographs (background, pose, lighting, framing, angle, atmosphere, developing technique); (d) user manuals for computer programs (the "choice, sequence and combination" of the words, figures or mathematical concepts); (e) databases (selection or arrangement of the contents). For a synthesis, see *Copinger and Skone James*, op. cit., paras. 53–55.

[69] Judgment *Institutul G. Călinescu*, cited *supra*, para. 67, referring to Judgment *Infopaq International*, cited *supra*, para. 39.

[70] See Judgment of 23 January 2014, *Nintendo Co. Ltd and Others v PC Box Srl and 9Net Srl*, C-355/12, ECLI:EU:C:2014:25, para. 23.

[71] Judgement *Nintendo v PC Box*, cited *supra*, para. 23. As the Court noted, video games are "much more than the computer programs that drive them" because they include other subject matter – graphic and sound elements – which "have a unique creative value which cannot be reduced" to their underlying program: see *J. Pila, P. Torremans*, op. cit., p. 84. Such complex subject matter does not fall within the Software Directive, *lex specialis* being limited to the program-as-such; rather, "[i]nsofar as the parts of such complex subject matter are part of its originality, they are protected, together with the entire work, by copyright in the context of the system established by the InfoSoc Directive 2001/29": *E. Rosati*, Copyright in the Digital Single Market (cited *supra* n

formulation “together with the entire work’ implies that the analysis cannot be confined to isolated components; it must also include their integration into the whole. A comparative analysis that examines each graphic element, each ludic mechanism, each sound sequence in isolation, without evaluating whether the specific manner in which they are selected, combined, and articulated into a sequence itself constitutes protectable original expression, risks overlooking precisely the most frequent form of copying, namely the reproduction of the original and expressive overall architecture beneath a superficially different visual surface[72].

Compilations and original databases represent the paradigmatic case of originality through selection and arrangement, in the sense that the component elements (the raw data) are not, individually, necessarily protectable, but the manner in which they are selected and organised may constitute an intellectual creation[73]. A methodology that examines each piece of information populating the database individually, finds that it is not protectable, and deduces from this the absence of any protection, ignores precisely what is protected – the choice and arrangement.

Computer programs, in which design choices simultaneously fulfil a technical function, raise a specific difficulty: at the granular level, each element (a function, a data structure, an algorithm) may be functionally justified and, therefore, a candidate for exclusion from the protection. However, the overall architecture of the program – the manner in which functions are organised, modules structured, and interfaces conceived – most often reflects creative choices that go beyond mere functional necessity[74]. Here too, an exclusively granular analysis risks systematically filtering the component elements without asking whether their integration itself constitutes original expression.

Creations in which the human contribution is situated at a high level of abstraction – (paradigmatically, the selection, refinement, and arrangement of content generated by AI tools) constitute, perhaps, the contemporary setting in which the holistic dimension presents its greatest practical relevance. The conditions of compression that bear upon human authorship in this setting are sufficiently distinctive that the section that follows is devoted to their treatment in full. It suffices, at this point, to record the underlying principle: where each component element of a work was generated algorithmically, an analysis confined to the

---

25), p. 86; WIPO’s comparative survey describes video games as “an amalgamation of individual elements that can each individually be copyrighted … if they achieve a certain level of originality and creativity”: *A. Ramos, L. López, A. Rodríguez, T. Meng, S. Abrams*, The Legal Status of Video Games: Comparative Analysis in National Approaches, WIPO, Geneva, 2013, p. 7. For the operation of the idea/expression dichotomy in the same field, see *E. Rosati*, US District Court explains the idea/expression dichotomy in videogames, in (2012) 7(10) JIPLP 714, discussing the *Tetris* case.

[72] The same logic applies to other complex authorial works: see *Copinger and Skone James,* op. cit., paras. 53–55 for screenplay (free and creative choices in plot, dialogue, and characterisation of central characters) and the well-known character Del Boy from *Only Fools and Horses*, where “[e]ven if one or more ingredients of his character, taken in isolation, might be said to be unoriginal, their particular combination was distinctive”. On the relationship between “work” and “parts of a work” after *Infopaq* – every part receives the same protection as the whole insofar as it shares its originality – see idem, para. 100; *J. Pila, P. Torremans*, op. cit., p. 93.

[73] Judgment *Football Dataco*, cited *supra*, para. 38.

[74] On the structural distinction between functionality (excluded from copyright protection) and architectural expression (protectable), see Judgement *SAS Institute Inc v World Programming Ltd*, cited *supra*, esp paras. 29–40, 67; for synthesis, *J. Pila, P. Torremans*, op. cit., p. 83, observing that the Court’s exclusion of “functionality, language, and data files” from copyright protection of a program leaves intact the program’s eligibility as an authorial work in its own right.

granular level systematically omits the tier (i.e., selection, refinement, architectural arrangement) at which the human contribution can, and must, be located[75].

SECTION 6. FROM THE CRITICAL EDITOR TO THE HUMAN AUTHOR WORKING WITH GENERATIVE TOOLS

The relevance of *Institutul G. Călinescu* to the AI question runs deep. As anticipated in Section 1, generative tools compress the creative space in which human authors operate, and the compression operates on two distinct planes simultaneously. On the granular plane, AI output saturates the lowest tiers of the originality hierarchy (single phrasings, individual choices, isolated motifs) and erodes the prospect that a human author may credibly claim originality in expressive units of small scale. On the architectural plane, the same output furnishes raw material for higher-order human composition. The first effect is corrosive of originality at the level of the component element; the second, properly understood, *displaces* the seat of originality upward, toward selection, refinement, and arrangement. In this author's view, this displacement is not a doctrinal innovation, but rather the direct application of the multi-tier reasoning developed in *Institutul G. Călinescu* to a new factual setting.

The transposition requires, however, an honest acknowledgement. The critical editor *generates*, by his own intellectual operation, the textual choices that constitute the work; the human author working with generative tools *selects, refines, and arranges* outputs produced by an algorithm. The locus of human intervention differs in modality: direct production in the first case, curation and architectural intervention in the second. The Court's reasoning, however, applies with full coherence in both settings, because what is decisive is not the modality of the intervention but the existence of a margin of choice and its actual exercise. The author's expertise, whether philological or technical, no more deprives that exercise of its creative character in the AI setting than it does in the critical-edition setting[76]. What is original is the choice, not the means by which it is implemented.

The analytical model recently proposed[77] for AI-generated outputs (distinguishing the iterative stages of *conception*, *execution*, and *redaction*) is in line to the tiers of *Institutul G. Călinescu*. Conception, as the design of the work's overall plan, maps onto the meta-textual tier of architecture and scope; execution, as the substantive composition of components, maps onto the structural tier; and redaction, as the refinement of individual choices to their

[75] On the calibration of the originality threshold under EU law for AI-related outputs, see *O. Bulayenko, J.P. Quintais, D. Gervais, J. Poort*, op. cit., p. 32, observing that the CJEU's test produces a somewhat low threshold for originality, which enables the protection of a broad array of subject matter, possibly including that resulting from any minimally original selection and arrangement. The same authors propose an analytical model – adapted from *Painer* – that distinguishes three iterative stages of the creative process: (i) *conception* (designing the plan of the work); (ii) *execution* (converting the plan into rough drafts); and (iii) *redaction* (processing draft versions into a finalised cultural product); a finding of free and creative choices at any one of these stages may suffice to ground originality in the output (idem, p. 37). For a comparative observation under UK law, where the 1988 Act treats the person "by whom the arrangements necessary for the creation of the work were undertaken" as the author of computer-generated works, see *Copinger and Skone James*, op. cit., para. 33.

[76] This is in line with the central holding of *Painer* when applied to compressed creative spaces: the photographer's technical expertise (choices of framing, lighting, developing technique) does not deprive those choices of their creative character so long as they remain choices. See Judgement *Painer*, cited *supra*, paras 89, 92; for a parallel application in the field of computer programs, where technical expertise informs every design decision, Judgement *Bezpečnostní softwarová asociace*, cited *supra*, para. 50.

[77] *O. Bulayenko, J.P. Quintais, D. Gervais, J. Poort*, op. cit., p. 37.

finalised form, maps onto the textual tier. Both models respond to the same underlying problem of locating originality across multiple levels of authorial intervention. A finding of free and creative choices at any of the three stages may suffice to ground originality in the AI-hybrid output, just as a finding of choices at any of the *Institutul G. Călinescu* tiers may sustain the protection of the critical edition[78].

Three questions thereby become essential for the assessment of any human–AI hybrid work. The first is at which of tier does the human author claim that originality manifests? The second: was the discretionary choice in fact exercised by the human author, rather than determined by the tool, by external constraints, or by the absence of any plausible alternative? The third: does the resulting work reflect the author's personal touch *as a whole*, even where its component elements, taken in isolation, are unprotectable? *Institutul G. Călinescu* contributes to each, by confirming that the tiers operate cumulatively, that expertise does not displace creativity, and that the identification of a protectable subject matter does not require the atomisation of its components.

What *Institutul G. Călinescu* does not resolve (and what, in this author's opinion, no CJUE judgment to date has resolved yet with precision) is the calibration of sufficient architectural intervention. If the human contribution to a hybrid work consists merely in selecting one of two algorithmically generated alternatives, or in arranging a small number of unprotectable components in a routine sequence, the originality threshold may not be met even though a discretionary choice was, formally, exercised. The boundary between trivial and substantive architectural intervention is the next question that European copyright law must answer. *Institutul G. Călinescu* does not draw it; but it equips the case law that will.

CONCLUSIONS

The Judgment of the Court of Justice of 19 March 2026 in *Institutul G. Călinescu* (C-649/23) arises from an apparently marginal dispute (a quarrel over the critical edition of an eighteenth-century Latin manuscript) yet contributes three important propositions to what we have argued can be reconstructed as a coherent EU doctrine of creativity in thin spaces.

The first lesson concerns the location of originality in contexts of constrained creation. The author's personal imprint can survive even the most improbably narrow creative space, i.e. that in which the author sets out, deliberately and methodologically, to render the personality of another. Multiple cumulative tiers might carry that imprint, and professional expertise does not displace the creative character of the choices it informs. The decisive line runs not between wide and narrow domains of creativity, but between being *guided* by knowledge and being *determined* by constraints that leave no room for any choice.

The second lesson concerns the consequence of crossing the originality threshold. EU copyright recognises no second-rank protection for works born in narrow creative spaces, and the strength of the entitlement does not vary with the breadth of the available margin. The qualification, however, lies elsewhere: the perimeter within which the right may be enforced

[78] For the wider conceptual debate on AI-generated outputs and the originality threshold, see also *P.B. Hugenholtz J.P. Quintais*, Copyright and Artificial Creation: Does EU Copyright Law Protect AI-Assisted Output?, in IIC (2021) 52:1190–1216; *J. Ginsburg, L.A. Budiardjo*, "Authors and Machines", in 34 *Berkeley Tech LJ* 343 (2019). The compatibility of the Bulayenko et al. model with *Institutul G. Călinescu*'s tier reasoning is a contribution of the present article.

is co-extensive with the elements that express the author's free and creative choices, and the surface on which that perimeter is drawn is, by construction, smaller when the creative space is narrower. What contracts as the space contracts is the extension of the perimeter, not the intensity of the protection.

The third lesson concerns the perimeter of the derivative author's protection and the methodology by which originality and infringement are analysed. That perimeter extends only to the original contributions of the derivative author, not to the pre-existing work. The Court refuses, however, to perform that delineation by atomising the derivative work into "taken" and "added" fragments. This approach would dismember a work whose meaning emerges only as a whole. The analysis must therefore include a holistic dimension, since selection and arrangement may themselves constitute protectable original expression. The methodology carries its own boundary, which subsequent case law will need to articulate: the Court did not precisely specify, in negative form, which architectural choices are too commonplace or too genre-dictated to qualify as the expression of free and creative choices.

The three lessons converge into the proposition that today originality polarises, migrating from the component element to architecture, selection, and arrangement. *Institutul G. Călinescu* confirms that European copyright law is equipped to follow this migration. The law does not penalise the narrowness of the creative space; it penalises only the absence of choice. Where choice exists, the protection (within its proper perimeter) is full.

It is the paradox of this case that a scholar who dedicated his life to the most faithful reconstruction of the past has provided European copyright law with one of the most consequential frameworks for assessing originality in the creative spaces of the future.