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Rocky road to autonomous EU copyright law: Supreme Court of Lithuania v CJEU

Mindaugas Kiškis*

*Email: mkiskis@mruni.eu

Mindaugas Kiškis is Professor at Mykolas Romeris University, Lithuania, affiliated with the Faculty of Public Governance and Business and MRU Law School. His research focuses on intellectual property, artificial intelligence, and technology law, policy, and management.

Abstract

- European Union (EU) copyright law treats the concepts of 'work' and 'originality' as autonomous notions of EU law, intended to secure a uniform 'fair balance' across the Single Market. Lithuania is a revealing stress-test of that autonomy. Although the Lithuanian Copyright Law can be read in the EU law conforming way, the Supreme Court of Lithuania (Lietuvos Aukščiausiasis Teismas, LAT) has sustained a self-referential doctrine on protectable subject matter—an 'originality presumption', 'objective originality' as a lower threshold, category-based 'degrees of originality' and a methodological insistence on assessing originality by reference to the work 'as a whole'. These devices unduly expand protection for functional and normatively constrained documents, public education materials, etc.
- This article analyses the Lithuanian trajectory through the key LAT decisions, identifies the points of incompatibility with EU-autonomous concepts and explains their institutional persistence.
- Such divergences produce systematic over-protection, privatization of information and regulatory compliance content, distortion of competition, chilling effects on expression and business autonomy and fragmentation of the internal market. They support the case for further EU-level clarification of protectability and more effective remedies when courts of last instance deviate from EU law.

I. Introduction: autonomy of the EU copyright law and the Lithuanian divergence

The fundamental question 'Is this a copyright work?' is the decisive filter that determines whether exclusive rights protect a particular subject matter and, correspondingly, how much space remains for follow on creativity, competition, freedom of speech and access to information. The right way to answer this question focuses on finding a balance. It is impossible to answer the said fundamental question exhaustively, because creativity is about pushing the boundaries and always surprises with novel subject matter. Thus, the statutory law leaves the answer for the courts. Where the courts answer that question very broadly, copyright expands into informational and functional domains. Where they answer it narrowly, authors and industries face uncertainty.

Since *Infopaq*,[1] the Court of Justice of the European Union (CJEU) has singlehandedly launched autonomous European Union (EU) copyright law, including the concepts of a 'work' and 'originality', intended to be applied uniformly across Member States. Yet, a decade and a half after Infopaq, the uniformity has not been achieved.

This article discusses the interpretation of the fundamental concepts of copyright law practiced by Lithuanian courts in the context of CJEU guidance on the same concepts. Lithuania is a notable case study because it has been a member of the EU for more than two decades, broadly pro-EU and aligned with the European values. Yet legal nationalism persists. It is also notable that the divergence is entirely judicial rather than legislative. The Law on Copyright and Related Rights of the Republic of Lithuania, adopted in 1999,[2] defines a work as an original result of the author's own creative activity expressed in objective form, without recourse to any aesthetic or qualitative criteria (Article 4). That definition is broadly compatible with the EU baseline and can be interpreted in conformity with the CJEU practice. Yet Lithuanian case law on the 'copyright object' has diverged significantly in scope and in depth. As of 2026, it still relies on an 'originality presumption', a concept of 'objective originality' as a lower-level threshold, 'variable degrees of originality' for different types of copyrightable works, and a methodological preference for assessing originality by analysing the 'work as a whole' rather than

[1] *Infopaq International A/S v Danske Dagblades Forening*, Case C–5/08, ECLI:EU:C:2009:465 (Court of Justice of the European Union, 16 July 2009).

[2] Lietuvos Respublikos autorių teisių ir gretutinių teisių įstatymas, Law No VIII-1185 of 18 May 1999. Available at https://www.e-tar.lt/portal/lt/legalAct/TAR.551F0CDE5B64/asr (accessed 5 January 2026).

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by deconstructing the whole into constituent elements.[3] The domestic reactions have been uneven. Academic Lithuanian scholarship describes and partly validates the older national originality approach, while practitioner-oriented commentary tends to present the statutory originality requirement without confronting the EU-autonomy tension.[4]

These national interpretations matter most where the subject matter is constrained by externalities and creative freedom is non-existent or very limited, eg regulatory compliance documents, instructions, templates, educational materials determined by official school curricula and similar subject matter. Copyright internal limits (or internal delimitation) in this article mean the scope-defining constraints built into protectability and the definition of exclusive rights (eg originality and the idea/expression dichotomy), as distinct from statutory limitations and exceptions. In such contexts, EU copyright internal delimitation doctrines are designed to prevent the monopolization of information, rule-based content, standard elements, functional and technical solutions. By contrast, the Lithuanian line treats constrained wholes as protectable by default, reducing the role of constraint analysis and shifting the burden onto defendants to disprove originality.

The article revisits the Supreme Court of Lithuania's doctrinal journey by analysing the core Lietuvos Aukščiausiasis Teismas (LAT) decisions repeatedly invoked in Lithuanian practice. It analyses how and why this trajectory is incompatible with EU autonomous concepts. There is no point in discussing the CJEU's extensive originality case law for an English readership, since it is exhaustively elucidated in existing EU copyright law literature. Drawing on the Lithuanian experience, the article discusses broader implications for the EU copyright policy, arguing that such persistent divergences require further substantive and procedural harmonization at EU level, and more effective remedies for EU nationals when national courts depart from EU rules.

II. EU copyright law baseline: uniform concepts of 'work', 'originality' and internal delimitation

For the purposes of this article four baseline tenets capture the EU position and are sufficient to evaluate the Lithuanian line.

First, 'work' and 'originality' operate as EU-autonomous concepts where EU law uses those terms without referring back to national law. Member States cannot maintain divergent originality thresholds or subject-matter-specific standards.[5]

Second, the subject matter qualifies as a work where it reflects the author's personality through creative freedom (free and creative choices). Where expression is dictated by external constraints (technical function, rules, standards, regulatory requirements or inevitable genre elements), originality is not satisfied. No aesthetic or other subjective criteria are allowed for assessing originality.[6]

Third, EU copyright law relies on internal delimitation. It protects expression, not ideas, methods, facts or information as such. Where granting protection to the alleged expression would in substance monopolize the underlying idea, function or information, copyright protection is not available or is limited to the genuinely free and creative remainder.[7]

Fourth, the CJEU methodical guidance implicitly requires the deconstruction of 'work' in judicial analysis—identify the subject matter claimed, map constraints, exclude non-protectable elements (mandatory, standard, functional, informational), then assess originality and infringement by reference to what remains. A 'work-as-a-whole analysis' method that protects the whole and ignores individual elements is not compatible with EU copyright law. Such an approach risks granting protection to non-copyrightable matter and is overly non-specific.[8]

These baseline tenets do not prevent courts from recognizing that protection may be very limited, ie to a few original elements in constrained works. But limited protection is a matter of scope, not a matter of a lower degree of originality. That distinction is important to the analysis of the Lithuanian approach.

These tenets reflect the CJEU's settled line on originality and copyright protectable subject matter—from Infopaq, through BSA,[9] Painer,[10] Football Dataco,[11] Levola Hengelo,[12] Funke Medien,[13] Cofemel,[14] Brompton Bicycle[15] to Mio/konektra[16] decisions.

III. Lithuania's judicial trajectory

As the court of cassation, the Supreme Court of Lithuania (LAT) performs a systemic function—it reviews questions of law and aims to ensure uniform interpretation of statutes by the ordinary courts. In practice, its explanations on the 'copyright object' (Article 4 Par. 1 of the Law on Copyright and Related Rights of the Republic of Lithuania)

[3] For the originality presumption, see LAT 3 May 2006, civil case No 3K-3-311/2006, Section 50. For objective originality and lower degrees of originality, see LAT 20 December 2010, civil case No 3K-3-536/2010, Section 30. For work-type degrees and work-as-a-whole analysis, see LAT 26 March 2020, civil case No e3K-3-77-687/2020, Sections 29–32.

[4] See V Mizaras, Autorių teisė. I tomas (Justitia Vilnius 2008); R Birštonas et al, Intelektinės nuosavybės teisė (VĮ Registrų centras 2010); Ą Čekanavičius and LR Fishman, 'Comparing Concepts of Originality' in EU, Lithuanian, and US law' in MT Sundara Rajan (ed) *The Cambridge Handbook of Intellectual Property in Central and Eastern Europe* (Cambridge University Press Cambridge) 80–109; M Kiškis, 'Dissuasive outcomes for rightholders, examining recent Lithuanian copyright law cases under IPRED' (2023) 18 *Journal of Intellectual Property Law and Practice* 462–467. https://doi.org/10.1093/jiplp/jpad046

[5] See *Infopaq* (n 1) paras 33–37; *Levola Hengelo BV v Smilde Foods BV*, Case C–310/17, ECLI:EU:C:2018:899, paras 33–40; Cofemel, Case C–683/17, ECLI:EU:C:2019:721, paras 29–35; E Rosati, *Originality in EU Copyright* (Cheltenham, Northampton: Edward Elgar 2013); I Stamatoudi and P Torremans (eds), *EU Copyright Law. A Commentary* (2nd edn; Cheltenham, Northampton: Edward Elgar 2021).

[6] See *Painer v Standard VerlagsGmbH*, Case C–145/10, ECLI:EU:C:2011:798, paras 88–94; *Football Dataco Ltd v Yahoo! UK Ltd*, Case C–604/10, ECLI:EU:C:2012:115, paras 37–39; *Brompton Bicycle Ltd v Chedech/Get2Get*, Case C–833/18, ECLI:EU:C:2020:461, paras 22–38; S van Gompel, 'Creativity, Autonomy and Personal Touch' in M van Eechoud (ed.) *The Work of Authorship* (Amsterdam University Press Amsterdam 2014) 95–143; PB Hugenholtz and JP Quintais, 'Copyright and Artificial Creation, Does EU Copyright Law Protect AI-Assisted Output?' (2021) 52 IIC 1190–1216.

[7] See *Bezpečnostní softwarová asociace v Ministerstvo kultury*, Case C–393/09, ECLI:EU:C:2010:816, paras 44–46; *Funke Medien NRW GmbH v Bundesrepublik Deutschland*, Case C–469/17, ECLI:EU:C:2019:623, paras 23–25; C Geiger, The Future of Copyright in Europe (Council of Europe report 2009); D Inguanez, 'A Refined Approach to Originality in EU Copyright Law in Light of the ECJ's Recent Copyright/Design Cumulation Case Law' (2020) 51 IIC 797–822.

[8] See Football Dataco, Case C–604/10, ECLI:EU:C:2012:115, paras 38–42; Brompton Bicycle, Case C–833/18, ECLI:EU:C:2020:461, paras 25–38; Judgment of 4 December 2025, Mio and konektra, Joined Cases C–580/23 and C–795/23, ECLI:EU:C:2025:941; Stamatoudi and Torremans (eds) (n 5); L Bently et al, 'The Protection of Works of Applied Art under EU Copyright Law—Opinion of the European Copyright Society in Mio/konektra' (2025) 56 IIC 798–828.

[9] *Bezpečnostní softwarová asociace (BSA)* (n 7) (Court of Justice of the European Union, 22 December 2010).

[10] *Painer* (n 6) (Court of Justice of the European Union, 1 December 2011).

[11] *Football Dataco* (n 6) (Court of Justice of the European Union, 1 March 2012).

[12] *Levola* (n 5) (Court of Justice of the European Union, 13 November 2018).

[13] *Funke Medien* (n 7) (Court of Justice of the European Union, 29 July 2019).

[14] *Cofemel—Sociedade de Vestuário SA v G-Star Raw CV*, Case C–683/17, ECLI:EU:C:2019:721 (Court of Justice of the European Union, 12 September 2019).

[15] *Brompton Bicycle* (n 6) (Court of Justice of the European Union, 11 June 2020).

[16] Mio and konektra (n 8) (Court of Justice of the European Union, 4 December 2025).

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operate as precedential templates for lower courts and for would be litigants.

LAT anchors the concepts of 'work' and 'originality' in own domestic doctrines—rather than in the CJEU's autonomous jurisprudence. The resulting divergence is not episodic. LAT refuses to refer copyright law questions to the CJEU, maintains compliance where lower courts diverge and persistently recites own historic precedent. As a result, shortcuts harden into routine, and the incentives to trigger EU judicial dialogue through Article 267 of the Treaty on the Functioning of the European Union (TFEU) are practically excluded.

An examination of CJEU statistics shows that Lithuania stands out among other countries in that preliminary references to the CJEU are dominated by the highest national courts (LAT and High Administrative Court) (almost 80 per cent of all referrals), whereas lower-instance courts refer to the CJEU very rarely.[17] Lithuanian courts have never referred a copyright law question to the CJEU. This implies insufficient autonomy of the lower courts and a disproportionate influence of the highest national courts on the application of EU law. EU law has to pass through the filter of higher-court case law before it is applied directly by lower courts, which is certainly not optimal. This situation places an even greater responsibility on the LAT for the ignorance of the EU law.

The subsections below provide an analysis of the key LAT precedent pertinent to the national interpretation of the concepts of work and originality. These are selected cases, but not all cases that addressed these concepts.

A. The originality presumption in software piracy case (3K-3-311/2006)

In 3K-3-311/2006 (3 May 2006),[18] a software piracy dispute, the LAT postulated a core pillar of national copyright doctrine that persists to this day. Likely seeking to aid rightsholders in the fight against piracy, the court addressed the burden of proof in copyright disputes. The LAT argued that 'a computer program, as a specific copyright object, is assumed to be original and that the burden lies on the defendant to prove non-originality' (Section 50). This precedent has effectively established 'originality presumption' that becomes doctrinally pivotal.

An originality presumption is problematic in two distinct ways. Procedurally, it shifts litigation dynamics. Plaintiffs are relieved from articulating and proving the creative choices embodied in the alleged work. Substantively, it invites courts to treat copyright protection as automatic and to avoid any need to investigate the creative freedom or to deconstruct the work into protectable and non-protectable elements.

In classic piracy cases involving verbatim copying of substantial software code, the presumption may appear harmless. Yet in disputes involving the creative reuse of restricted elements, it is a major distortion. The defendant is forced to prove a negative (absence of originality) and faces a high and uncertain evidentiary bar to overcome the presumption. The overall effect of this presumption in Lithuanian case law is a default copyright protection for subject matter that EU law treats as potentially non-protectable precisely because of internal constraints.

The originality presumption should not be conflated with the presumption of authorship or ownership under the Article 5 of the Enforcement Directive 2004/48/EC. The former presumes that the subject matter is copyright protected, while the latter addresses the question of who is presumed to be the author or owner of the exclusive rights.

B. 'Degrees of originality' in contour maps case (3K-3-48/2007)

In 3K-3-48/2007 (11 April 2007),[19] a dispute over contour maps in public school exercise books, the LAT articulated an insight that would come close to the CJEU approach. The LAT acknowledged that 'where objective reality must be accurately depicted, different representations of the same objects will inevitably be similar or even identical. Such subject matter is inherently constrained, leaving limited creative freedom' (Section 33). The court held that the contours of the countries, water bodies, etc. in the contour map are not protected by copyright. Unfortunately, the decision bungled it up when it comes to additional elements of the map—map letter markings made according to the requirements of the school curriculum and the type of assignment.

The court ignored the clearly functional and externally constrained nature of said markings and instead found that originality may be present to a negligible degree, which in its view sufficed for protection. The evidence in this case did not establish direct copying and suggested only close similarity. The distinction between informational elements (elements representing objective reality) and functional elements (determined by alignment with school assignments and curriculum) is artificial and introduces huge uncertainty. The progressive arguments on representations of factual information were later nullified through argument on negligible degree of originality sufficient to confer copyright protection in functional elements, contributing to misalignment rather than convergence with the CJEU.

The key issue is not whether the originality threshold is low (it may be). The issue is the doctrinal interpretation of a low threshold. CJEU jurisprudence addresses constrained subject matter by excluding dictated elements and limiting protection to free and creative expression, not by inventing a category of 'minimal or lower originality' that nonetheless triggers full copyright entitlement. Once a court introduces different 'degrees of originality' and associates certain categories of works with a lower threshold, the discipline of constraint mapping for internal delimitation disappears and is replaced with entirely subjective evaluation.

Both this precedent and the 'originality presumption' precedent (3K-3-311/2006) have become cornerstones of the LAT's practice on the scope of copyright and persist well after Infopaq. These two precedents were extensively covered and relatively supported in select Lithuanian copyright scholarship[20] which led to them becoming sanctified and persistently recited in later precedent, along with the scholarship supporting the court's argument. This loop of self-recitation and relying on scholarship, which recites the same, as supposedly an additional independent pillar, has become a notable feature of later precedent.

[17] Statistics concerning the judicial activity of the Court of Justice—2024. Available at https://curia.europa.eu/site/upload/docs/application/pdf/2025-09/ra_en_statistiques_24_-b_statistiques-cour.pdf (accessed 5 January 2026).

[18] 3 May 2006 Ruling of the Supreme Court of Lithuania in the civil case No. 3K-3-311/2006. Available at https://liteko.teismai.lt/viesasprendimupaieska/tekstas.aspx?id = 1b821332–4182-4d11–8690-3f70e3f894e6 (accessed 29 December 2025).

[19] 11 April 2007 Ruling of the Supreme Court of Lithuania in the civil case No. 3K-3-48/2007. Available at https://liteko.teismai.lt/viesasprendimupaieska/tekstas.aspx?id = ce97dcd8-bb34-4ba2-8e9d-5a0598bde895 (accessed 29 December 2025).

[20] Mizaras (n 4) 172; Birštonas et al (n 4) 100–110; Čekanavičius and Fishman (n 4).

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C. Post-*Infopaq* 'objective originality' theory in architectural photography (3K-3-536/2010)

LAT precedent in 3K-3-536/2010 (20 December 2010)[21] is a crucial pivot. By the time of this decision, the EU baseline on originality had already moved decisively towards autonomy and uniformity, but 18 months after *Infopaq*, the court ignorantly claimed that 'international and EU instruments do not directly provide the concepts of copyright object' (sic) (Section 30) and predictably resorted to its own line outlined in two previous precedents. Also, adding reasoning based on national scholarly sources that were entirely based on the very same now-obsolete precedent, the court expanded the artificial differentiation of various types of works, arguing that functional subject matter inherently presents much lower originality than nevertheless is sufficient to confer copyright protection. This theory is identified as the theory of 'objective originality', where 'objective originality does not require the reflection of author's personality in the work' (sic) and 'objective originality condition, compared to classical, is of lower degree' (Section 30). The theory was cited along with the aforementioned 'originality presumption' precedent as a validation of the court and thus an extension of the 'originality presumption' post *Infopaq* in Lithuania. The objective originality (not requiring reflection of authors' personality) and classical originality (requiring reflection of author's personality) theories in Lithuania can be traced to the old sources in French literature. After *Infopaq*, reviving this dichotomy as a device to lower originality standards is unjustifiable.

The subject matter at issue in the case was functional architectural photography resulting from a poorly documented contractual relationship between the parties. Instead of deconstructing the works, the court simply ruled that the whole works were copyrightable without substantive examination based on said precedent of 'originality presumption' and 'objective originality theory'.

From the standpoint of EU law, this precedent is wrong in multiple ways. The absence of a single EU instrument directive definition of 'work' is precisely why the concept becomes autonomous and must be interpreted uniformly. A national court of last instance cannot treat this as a vacuum that invites national improvisation, particularly when it had every opportunity to refer to the CJEU and address any conflict with its prior precedent. Instead, LAT chose to displace EU sources with an internally self-validating loop. An equally significant deviation is the methodological move of reviving originality theories and the pre-*Infopaq* 'originality presumption', which avoid the deconstruction of the work and the need to delimit non-copyrightable elements.

D. Glimpses of light in medical device instructions (3K-3-140-611/2015)

In 3K-3-140-611/2015 (20 March 2015),[22] a case concerning the unauthorized Lithuanian translation and dissemination of instructions for in vitro diagnostic medical devices, the LAT surprisingly adopted a reasoning that is materially consistent with the CJEU constraint approach.

Paradoxically, the court again repeated that 'international and EU instruments do not directly provide the concepts of copyright object' (sic), and separately added that 'the law does not *expressis verbis* provide the concept of originality: it is subject to the interpretation by the courts and doctrine' (sic) (Section 51). Then the Court rejected the interpretation of the lower courts that such instructions cannot be copyrightable, but held that the specific instructions at issue did not meet the originality requirement because they were not the result of creative activity and instead provided information on composition, effects and usage that were mandated under applicable regulatory regime.

This decision has two important implications. First, it confirms that Lithuanian courts are capable of a disciplined internal delimitation analysis, as informational and legally mandated content may fall outside copyright. Second, the case seemingly supports the need for individual analysis of subject matter while sidestepping the originality presumption and objective originality theory (neither is mentioned by the court).

The paradox is that the court reached external constraints-based reasoning while citing 3K-3-536/2010 and recycling mostly the same domestic arguments (albeit being silent on originality presumption and objective originality theory) and completely ignoring the CJEU jurisprudence. The decisive factor in this particular case appeared to be the Austrian Supreme Court precedent (12 August 1998 decision in the case No. 4 Ob 2202/96v (Arzneimittel-Gebrauchsinformation) and 24 April 2001 decision in the case No. 4 Ob 94/01 (telering.at)) that ruled out copyright protection for drug information sheets and instructions for consumption due to a lack of creative freedom and hence originality, as also explicitly discussed in Lithuanian scholarship. The court cited both the said Austrian precedent and pertinent scholarship[23] (Section 52).

Unfortunately, this 2015 precedent did not become the new anchor. Later cases largely return to the earlier doctrine.

E. Back on the old rails in educational materials and GDPR documentation (3K-3-270-687/2017 and e3K-3-77-687/2020)

In 3K-3-270-687/2017 (15 June 2017),[24] involving unauthorized reproduction or educational material, rather than consolidating the 2015 constraint-sensitive approach, the LAT made a hard return to the 3K-3-536/2010 line of objective originality theory.

Educational and curricular materials are a high-risk domain for over-protection. They often draw on standard pedagogical structures, regulatory curriculum requirements and common informational content. Under a CJEU-adjudicated method, courts should separate what is inevitable (curriculum-driven structure, standard explanations and exercises, factual information, commonly used examples) from what is genuinely expressive (author's unique narrative choices, creative arrangement beyond constraints).[25] Where courts treat the material as a protected whole and encourage protection through 'low

[21] 20 December 2010 Ruling of the Supreme Court of Lithuania in the civil case No. 3K-3-536/2010. Available at https://liteko.teismai.lt/viesasprendimupaieska/tekstas.aspx?id = ec64488a-a426-4a94-8b4c-6db86cb89a86 (accessed 29 December 2025).

[22] 20 March 2015 Ruling of the Supreme Court of Lithuania in the civil case No. 3K-3-140-611/2015. Available at https://liteko.teismai.lt/viesasprendimupaieska/tekstas.aspx?id = f2bdc3be-a212-41d1-b2c2-9a65f5f8a0fa (accessed 29 December 2025).

[23] See Mizaras (n 4) 172; Birštonas et al (n 4) 100–110; Čekanavičius and Fishman (n 4).

[24] 15 June 2017 Ruling of the Supreme Court of Lithuania in the civil case No. 3K-3-270-687/2017. Available at https://liteko.teismai.lt/viesasprendimupaieska/tekstas.aspx?id = 9d7a2c8a-0d5c-4e6f-993d-95c3be7ebdc9 (accessed 29 December 2025).

[25] See Football Dataco (n 8); Brompton Bicycle (n 8); Mio and konektra (n 8); van Gompel (n 6).

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originality' rhetoric, the result is a monopoly over pedagogical methods and basic information, not over creative expression.

The significance of 3K-3-270-687/2017 for this article is therefore not its specific facts or doctrine but its role as a link in the doctrinal loop—it illustrates how the LAT continued to operate within the self-referential framework rather than adopting a stable EU-aligned deconstruction method.

Lastly, e3K-3-77-687/2020 (26 March 2020)[26] is the most telling example of the Lithuanian divergence. The subject matter was normatively constrained General Data Protection Regulation (GDPR) compliance documentation, which was recognized as copyright-protected works by the LAT. The court cited the aforementioned 3K-3-270-687/2017 obsolete Lithuanian scholarship and again reiterated the lack of EU law on the concepts of work and originality (NB: this was happening 10 years after *Infopaq*). Although the LAT referred to GDPR compliance documentation as 'functional works', it invoked the sufficiency of a low degree of originality, according to the 'objective originality theory' (Section 29), different originality degree requirements for different types of works (Section 31) and no need to deconstruct the work and assess originality of individual elements, while considering it only as a whole (Section 32).

It is clear that GDPR compliance templates are shaped by Regulation (EU) 2016/679, supervisory authority guidance and by a compliance logic that generates standard structures and rules (data processing clauses, information duties, records, policies). The law not only mandates such documentation, it also sets extensive requirements for their content and often dictates required information and sometimes even specific wording. The range of creative freedom options is essentially non-existent. Assuming that it is theoretically possible, under the CJEU-prescribed method, a court would deconstruct such documentation seeking to find that rare elements presenting the author's creative freedom. But nothing of the sort was done.

Granting protection to the compliance documentation as a whole reverses the method and casts complete uncertainty on the reusability of compliance documents, structures and standard clauses. If compliance templates are protected as works, compliance becomes proprietary, market entrants and SMEs may face threats for using standard legal language or adopting familiar compliance structures. Copyright becomes a barrier to lawful business conduct, not a reward for creative expression. This is precisely the type of overreach internal delimitation doctrines are designed to prevent.

Moreover, e3K-3-77-687/2020 demonstrates how the earlier doctrinal artefacts interact: an originality presumption extended through the objective originality theory, low originality degree rhetoric and focus on the work-as-a-whole only analysis make it easier to extend copyright to almost anything. The result is an extremely expansive copyright boundary that is the complete opposite of the CJEU direction.

IV. The road to hell is paved with good intentions?

To describe the Lithuanian situation as 'misapplication' is insufficient. The recurring patterns show a structural incompatibility between the LAT's approach and the CJEU. Four elements are particularly consequential.

First, the originality presumption (3K-3-311/2006) introduced as an aid to rightsholders in piracy cases inadvertently and materially changed the adjudicative posture. EU law requires a substantiated inquiry into whether the subject matter reflects free and creative choices, but a presumption allows courts to proceed as if the inquiry were redundant.

Second, objective originality theory as a low degree originality justification (associated with 3K-3-536/2010 and later) is conceptually wrong. EU law requires originality, as an objective and uniform standard, not as subjective and unpredictable scale. Objectivity is essential to the requirement that creative expression be identifiable and legally certain. It is not a door that can be subjectively opened for marginal subject matter. A low degree originality simply invites race to the bottom.

Third, the EU baseline is that the originality is unitary and horizontal for all works: differences across subject matter are handled by internal delimitation and scope, not by variable thresholds.

Fourth, the 'work as a whole' approach systematically undermines internal delimitation and methodological assessment of creative freedom. Constrained works require analytical separation of mandated and standard elements from creative remainder. By contrast, assessing originality at the level of the whole encourages courts to attribute originality to the combination of standard elements and to protect what must remain in the public domain.

These four elements also interact with local conjuncture. LAT precedent anchors include selective recitation of national scholarship published around 2008–2010. Some of it was published prior to *Infopaq*,[27] but other work has unjustifiably omitted *Infopaq*,[28] while claiming to be up to date for 1 January 2010. Subsequent cases cite these sources and earlier cases, producing a reality-distorting legal Möbius loop. When a supreme court repeatedly validates its own prior reasoning, and selectively recites supportive scholarship, lower courts follow, and the wrong path of national practice is reinforced.

Some Lithuanian scholarship[29] expressly cautioned against overprotection of functional works, essential idea-expression dichotomy, mandatory elements and functional limitations, and did not support the line adopted by the Lithuanian courts. It has not been cited in the case law to the same extent.

The divergence also raises a question of intra-EU judicial dialogue. Under Article 267 TFEU, courts of last instance have a special responsibility to ensure uniform interpretation of EU law. Where doubt exists, they are required to refer to the CJEU.[30] A persistent line of judgments that does not meaningfully engage with CJEU criteria in a harmonized area is not just a national eccentricity, it is a risk to the EU legal order. Sustained misapplication by a supreme court may also intersect with state liability and systemic rule-of-law concerns. Even without reaching those extremes, the Lithuanian trajectory is unhealthy and places the national court outside the common interpretive ground on a central EU-autonomous concept.

[26] 26 March 2020 Ruling of the Supreme Court of Lithuania in the civil case No. e3K-3-77-687/2020. Available at https://liteko.teismai.lt/viesasprendimupaieska/tekstas.aspx?id = 922925c9-46d7-41f9-8f46-e587f9889457 (accessed 29 December 2025).

[27] Mizaras (n 4).

[28] Birštonas et al (n 4) 100–110.

[29] M Kiškis, Teisės informatika ir informatikos teisė (MRU leidykla Vilnius 2006) 88; VJ Žilinskas et al, Intelektinė nuosavybė ir jos teisinė apsauga: vadovėlis aukštosioms mokykloms (Klaipėdos universiteto leidykla Klaipėda 2007) 196–197.

[30] M Bobek, 'Talking now? Preliminary rulings in and from the new member states' (2014) 21 *Maastricht Journal of European and Comparative Law* 782–789; RD Kelemen and T Pavone, 'The political geography of legal integration: Visualizing institutional change in the European Union' (2018) 70 *World Politics* 358–397. https://doi.org/10.1017/S0043887118000011

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Treating constrained subject matter as copyrightable works monopolizes information and restricts the public domain, limits competition, raises entry barriers and makes copyright unpredictable. When copyright is expanded into functional domains, it becomes an anti-competitive weapon. Disputes that are, in substance contractual, about unfair competition, protection of business investment or market behaviour are channelled into copyright, producing disproportionate leverage.[31]

If Lithuania applies copyright more broadly than other Member States, cross-border actors face uneven legal risk, while Lithuanian subjects are effectively discriminated by their own supreme court. That undermines the very purpose of harmonization.

Overbroad protectability in educational and informational materials can chill speech and knowledge dissemination. If standard explanations, examples, exercises or curriculum-driven content are treated as protected expression, educators may face very limited choice of pedagogical tools.

A low degree of originality lacks predictable boundaries. Parties cannot reliably determine what is public domain or other unprotectable subject matter. This increases transaction costs and drives defensive licencing even where EU law would treat the material as non-protectable.

More fundamentally, the Lithuanian situation suggests that 'harmonization through adjudication' has an enforcement gap. Where domestic doctrinal anchors solidify and judicial dialogue is weak, even outsize CJEU precedent may not mean much in practice. The result is a structural risk for EU copyright uniformity[32] and tangible practice consequences that extend beyond doctrinal debates. Persistent divergence by a supreme court weakens the credibility of EU-law primacy in national adjudication, with spillover effects beyond copyright.

V. Implications for EU copyright: the case for further harmonization and individual remedies

The Lithuanian line is a practical example of how harmonization through CJEU case law can be destabilized at national level, even without overt legislative resistance. The immediate question is therefore not only how Lithuanian courts might realign, but what it implies for the future of EU copyright harmonization and for the parties affected by divergent national adjudication.

EU copyright harmonization is often characterized as 'harmonization by directives, completed by case law'.[33] The legislature approximates economic rights and certain exceptions, while the CJEU supplies a unitary meaning to core concepts that the directives leave undefined. The concepts of 'work' and 'originality' are central to copyright's boundaries, but are not developed in statutory EU law. Lithuania illustrates that this model can fail in practice even when the CJEU's criteria are extensively settled. A court of last instance fixated on pre-existing national approach and self-referential citation makes doctrinal correction hard.

The preliminary reference mechanism is the EU's principal corrective mechanism for interpretive drift, but it is not self-activating. Scholarship has documented that references may be less frequent, less strategically used or more hesitant in certain Member States and periods, including in newer Member States and in less central jurisdictions.[34] Where a domestic approach continuously maintains recurring mismatch with EU law (as in Lithuania), the absence of references means that the 'error signal' does not reach Luxembourg, and Luxembourg's own clarifications do not readily translate into operative national level. Without set transmission mechanisms in national adjudication, it simply does not work, and the internal market becomes exposed to fragmentation that harmonization is supposed to prevent.[35]

If a decades-long divergence is possible on core EU law autonomous concepts, the simplest policy inference is that the EU may need to strengthen the harmonization *acquis*—bringing central elements of the CJEU's copyright case law into legislation, thereby reducing the space for national deviations.

A general originality rulebook may also carry risks. Article 14 of the DSM Directive shows that EU legislation can use the 'author's own intellectual creation' approach in a targeted way, yet originality still needs case-by-case adjudication as technologies and forms of expression change. Thus, the stronger case is for narrow targeted rules on constraints, presumptions and judicial method, rather than a precise rules of creativity.[36]

Substantively, the Lithuanian cases suggest that at least three points are worth codifying. First, the originality test is unitary, horizontal and cannot be replaced by work-specific 'originality degrees' or by 'objective originality theory'. Second, presumptions of originality are irreconcilable with the constraints of copyright subject matter. Third, the originality assessment methodology must proceed through internal delimitation and deconstruction of work—a court must identify and exclude the constrained elements and then test whether the remaining expression reflects free and creative choices.

Scholarship on abuse of rights and copyright misuse already argues that EU law is compatible with doctrines that prevent rightsholders from leveraging copyright to control non-protectable subject matter or to distort competition.[37] EU law could adopt the internal delimitation logic more explicitly by linking it to the obligation to preserve the public domain of ideas, educational information, functional and normative structures.[38]

The Lithuanian episode also highlights that over-protection can be enabled by evidentiary shortcuts—presumptions instead of evidence. This points to the value of procedural harmonization alongside substantive clarification. A targeted adjustment of the IP Enforcement

[31] A Kur, 'What to Protect, and How? Unfair Competition, Intellectual Property, or Protection Sui Generis' in N Lee et al (eds) *Intellectual Property, Unfair Competition and Publicity: Convergences and Development* (Cheltenham, Northampton: Edward Elgar 2014) 11–32.

[32] A Rahmatian, 'European copyright inside or outside the European Union: pluralism of copyright laws and the "Herderian paradox"' (2016) 47 *International Review of Intellectual Property and Competition Law* 912–940. DOI:10.1007/s40319-016-0531-4

[33] PB Hugenholtz, 'The Creeping Unification of copyright in Europe' in TE Synodinou (ed.) Pluralism or Universalism in International Copyright Law (Alphen aan den Rijn: Wolters Kluwer 2019) 77–95.

[34] Bobek, (n 30); Kelemen and Pavone (n 30); M Favale et al, 'Who is steering the jurisprudence of the European Court of Justice? The influence of Member State submissions on copyright law' (2020) 83 *Modern Law Review* 831–860. DOI:10.1111/1468-2230.12527

[35] van Gompel (n 6); also see Rahmatian (n 32).

[36] Directive (EU) 2019/790, Article 14; See also C Sganga, 'The past, present and future of EU copyright flexibilities' (2024) 55 IIC 5–36.

[37] C Sganga and S Scalzini, 'From abuse of right to European copyright misuse: A new doctrine for EU copyright law' (2017) 48 *IIC—International Review of Intellectual Property and Competition Law* 405–435. https://doi.org/10.1007/s40319-017-0584-z

[38] C Geiger, 'The future of copyright in Europe: Striking a fair balance between protection and access to information. Report for the Committee on Culture, Science and Education—Parliamentary Assembly, Council of Europe' (2009). Available at https://www.ceipi.edu/websites/ceipi/Documents/Communiques_de_presse_-_Declarations-_Etudes__y_compris_non_CEIPI_/Report_Future_of_Copyright_oct_2009.pdf (accessed 5 January 2026).

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Directive (Directive 2004/48/EC)[39] could require courts to verify protectability as a threshold matter before ruling on provisional measures. It could also require claimants to identify, with reasonable specificity, the allegedly protectable elements of the asserted work, and require courts to provide explicit reasoning on (i) which elements are protectable expression and (ii) which elements are excluded because they are functional, mandated or standard. To avoid overburdening litigation in piracy cases, an exemption for verbatim copying of the whole work can be provided.

The broader harmonization debate is not new. The case for harmonizing copyright subject matter and articulating clearer exclusionary rules has also been highlighted in recent scholarship.[40] Earlier academic codification projects, such as the Wittem Group's European Copyright Code,[41] were expressly framed as tools to promote transparency and consistency in European copyright law-making. The literature surrounding codification debates has likewise recognized that persistent diversity at the level of key concepts creates pressure for stronger harmonization, even if codification raises its own normative concerns.[42] On competence, scholarship emphasizes that the scope of EU action is broader than often assumed where fragmentation affects cross-border activity and legal certainty.[43] The Lithuanian cases add a factual basis and urgency to these debates.

The Lithuanian situation also raises a remedial question that is often ignored in copyright debates—what can an EU national realistically do when a Member State supreme court departs from EU autonomous law? In principle, EU law offers several pathways. Litigants can invoke primacy and consistent interpretation and can request a preliminary reference, but these are at the mercy of the national courts that may simply be reluctant to engage. It is notable that a preliminary reference in Lithuanian courts is usually a complicated matter that requires coordination with the head of the court and implies extra bureaucratic work for the judge, thus the courts are not excited to receive requests for preliminary reference. If these options do not help, the affected party can directly complain to the Commission and seek to trigger infringement proceedings. In exceptional cases, they may seek damages under state liability for sufficiently serious breaches, including by courts of last instance (*Köbler v Austria,* C–224/01,[44] and *Traghetti del Mediterraneo SpA v Italy*, C–173/03[45]). In practice, however, these pathways are rather ephemeral. Parties cannot compel a reference, Commission enforcement is discretionary and often very slow, and Köbler-type liability faces demanding doctrinal and practical thresholds.[46] As a result, individuals who face erroneous adjudication have no realistic, timely route to restore EU law-compliant justice.

Longer-term, the Lithuanian experience invites a deeper discussion of the EU institutional architecture. Since EU nationals have no direct route to the CJEU to challenge persistent judicial misapplication of Union law, they remain dependent on Commission discretion under Article 258 TFEU or on the willingness of the national courts to refer under Article 267 TFEU.[47] Where a court of last instance neither refers nor internalizes the CJEU rules, the individual is left without a Union-level backstop. A narrowly tailored right of individual petition to the CJEU available after exhaustion of national remedies would mirror, in procedural terms, the Strasbourg model of individual applications under Articles 34–35 ECHR, while the CJEU docket could be protected through strict admissibility filters, eg by allowing only questions with systemic significance.

Finally, the Lithuanian divergence illustrates how the functioning of the Single Market is eroded. The Draghi report on European competitiveness bluntly notes that the Union has left its Single Market fragmented for decades and that fragmentation has cascading effects on competitiveness.[48] Divergent national practices and lack of accountability are at the root of the problem. If we want a stronger and more unified EU, it must be addressed.

One additional avenue is louder doctrinal critique, and this article aims at exactly that.

VI. Conclusion

The Lithuanian precedent on the 'copyright object' shows how a court of last instance can construct and maintain a self-referential originality jurisprudence that is incompatible with the autonomous EU copyright law. The Supreme Court of Lithuania maintains an 'originality presumption', a theory of 'objective originality' as a low-level standard, work-type-based 'degrees of originality' and a methodological insistence on assessing the work 'as a whole' more than a decade after *Infopaq*. In combination, these devices expand copyright protection to constrained subject matter that EU-autonomous law would treat as unprotectable or, at most, protectable to a limited extent.

This is not a limited anomaly. It exposes a structural vulnerability in the EU copyright harmonization strategy. Autonomous concepts developed through CJEU adjudication do not, by themselves, secure uniform application where national courts remain anchored in domestic, pre-harmonization doctrines and where judicial dialogue with CJEU remains weak. The immediate consequence is systematic over-protection of constrained materials, with distortive and chilling effects. At a deeper level, such judicial divergence undermines the Single Market and authority of the EU law. The Draghi report on European competitiveness bluntly notes that the Union has left its Single Market fragmented for decades and that fragmentation has cascading effects on competitiveness. Divergent national thresholds for copyright 'works' are part of this problem.

[39] Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, OJ L 157, 30 April 2004, pp. 45–86.

[40] Sganga (n 36).

[41] Wittem Group, 'European Copyright Code' (2010). Available at https://www.ivir.nl/publicaties/download/Wittem_European_copyright_code_21_april_2010.pdf (accessed 5 January 2026).

[42] JC Ginsburg, '"European Copyright Code"—Back to first principles (with some additional detail)' (Columbia Public Law & Legal Theory Working Paper No. 11–261 2011). Available at https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=2675&context=faculty_scholarship (accessed 5 January 2026).

[43] A Ramalho, 'Copyright law-making in the EU: What lies under the "internal market" mask?' (2014) 9 *Journal of Intellectual Property Law & Practice* 208–224. https://doi.org/10.1093/jiplp/jpt242

[44] *Köbler v Austria*, Case C–224/01, ECLI:EU:C:2003:513 (Court of Justice of the European Union, 30 September 2003).

[45] *Traghetti del Mediterraneo SpA v Italy*, Case C–173/03, ECLI:EU:C:2006:391 (Court of Justice of the European Union, 13 June 2006).

[46] M Broberg and N Fenger, *Broberg and Fenger on Preliminary References to the European Court of Justice* (OUP Oxford 2021).

[47] CEELI Institute, 'Navigating the jurisdiction and landmark rulings of the European Court of Human Rights and the Court of Justice of the EU: A guide to protecting the rule of law in European courts amid democratic backsliding' (2024). Available at https://www.echr.coe.int/Documents/CEELI-2024-A_guide_to_protecting_the_rule_of_law_in_the_European_courts.pdf (accessed 5 January 2026).

[48] M Draghi, *The Future of European competitiveness: A Competitiveness Strategy for Europe (Part A)* (European Commission 2024). Available at https://commission.europa.eu/document/download/97e481fd-2dc3-412d-be4c-f152a8232961_en?filename=The%20future%20of%20European%20competitiveness%20_%20A%20competitiveness%20strategy%20for%20Europe.pdf (accessed 5 January 2026)

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The Lithuanian cases strengthen the argument for further EU-level substantive and procedural harmonization of copyright law. A revision of the Directive 2004/48/EC or a targeted instrument could codify the concept of a 'work' and internal delimitation requirements, making explicit that essential constraints narrow the scope of protection rather than lower the originality threshold, and requiring courts to methodically assess protectable and non-protectable elements.

The Lithuanian situation also highlights a remedial gap. EU nationals depend on national courts to access the CJEU and face high thresholds in Köbler-type state liability for judicial decisions. In practice, when a supreme court declines to refer and persists in a domestically anchored doctrine, the individual faces obvious injustice and discrimination, but has no EU-level backstop comparable to the ECHR. Addressing such divergence requires stronger party-facing remedies within ordinary litigation and, in the longer term, institutional reform that makes CJEU clarification more accessible.

Persistent judicial deviation from EU autonomous concepts undermines the credibility of EU law and erodes the Single Market's premise of equal rules for all. A stronger and more unified EU should be willing to voicefully call out such national malpractice. That also requires louder doctrinal critique, greater public scrutiny and more determined use of judicial, legislative and enforcement Union tools so that the autonomy of EU law is not just rhetoric.

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