Copyright for performers—an obligation under international law

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1. Introduction

Performers' performances are protected through a so-called neighbouring rights structure,[1] which is in some respects weaker than copyright. Most importantly, performers' performances have a shorter term of protection than works of authorship and are not protected against imitations. Nor is the protection conditional upon the performance taking a particular form; the protection conferred on a professional, outstanding artistic performance is the same as that conferred on a reading by a child.[2]

It has long been debated whether performing artists, in addition to or instead of neighbouring rights, can claim copyright over their performances as adaptations of the performed work. Copyright would, in addition to a longer term of protection and protection against imitation, shift the perspective of the assessment of the performance from the fact that a work of authorship is being performed to the manner in which the performer performs such work. It would change the object of protection from what is essentially a personality right—a right to control the use of the performer's personal expression—to the protection of the artistic performance. Such protection would be based on the performer's cultural contribution and might serve to put the performance on a par with other creative works, such as the painter's expression of how they see and wish to convey a landscape or the translator's recreation of a literary work

Abstract

- Performers' performances are protected through a so-called neighbouring rights structure, which is in some respects weaker than the copyright proper. Most importantly, performers' performances have a shorter term of protection than works of authorship and are not protected against imitations. Nor is the protection conditional upon the performance taking a particular form; the protection conferred on a professional, outstanding artistic performance is the same as that conferred on a reading by a child.
- It has long been debated whether performing artists, in addition to or instead of neighbouring rights, can claim copyright to their performances as adaptations of the performed work. Such protection would be based on the performer's cultural contribution and might serve to put the performance on a par with other creative works, such as the painter's expression of how she sees and wishes to convey a landscape or the translator's recreation of a literary work in another language.
- In the article, we conclude that neither international treaties nor European Union law (EU- Law) prevents the granting of copyright to performers' original performances in national law and EU law. On the contrary, the uniform meaning of the term 'work of authorship' in EU law probably implies that Member States are required to grant copyright protection in performers' performances that fulfil the originality requirement.

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1 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (InfoSoc), art 2(b): reproduction right, and art 3(2)(a): right of making available to the public.

2 Norwegian Supreme Court judgment, *Norsk Retstidende* (2010) 366 (Mauseth), para 33.

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in another language. Equal treatment of performances and other works is intuitively merited by the fact that performing artists engage in similarly creative processes as painters, translators and other artists and authors who enjoy copyright protection. A performing artist colours the work and the performance from the palette of their own inner landscape of intellect, emotion, technique and experience. The performer's understanding of the work is conveyed by means of their talent and craftsmanship.

We are of the view—and we assume for purposes of this article—that performers' performances in most cases fulfil the general requirements for copyright protection, which are that a person through individual creative intellectual work produces something original.[3] These requirements are fulfilled by making free, creative choices about what to express and how to express it.[4] For example, the actor chooses their understanding of the situations depicted by the author in the script to be performed. In addition, they make choices about how to express the situations and relationships. The lines and situations are understood from the performer's chosen context (interpretation). Whereas the painter chooses which colours to use and what composition to adopt (the arrangement of the visual elements on the canvas), the performer makes choices about how to express the interpretation they have chosen.

Let us envisage an actor who, in performing the role of Ophelia in Shakespeare's play *Hamlet*, has made independent creative choices by acting on the understanding, as one of the several examples, that Hamlet rejects her in order to spare her in the showdown scene with Hamlet. This is their reading (interpretation) of Shakespeare's text.[5] It can be understood in many other ways (illustrating that the expression is subject to a range of options).[6] The actor's subtext[7] in the scene is that they understand Hamlet's good intention, but they want to persuade him (through the words Shakespeare has put in her mouth) to nonetheless not reject her and to instead let her stand by his side to fight 'the rottenness of Denmark'. The interpretation colours their utterance of the words but is also highlighted by the choices they make about how they move on stage, which is another way of expressing the subtext. The interpretation and the choices about how to express these are determined in the performance rehearsal period, which in Norway is usually about 8 weeks.[8] The actor's choices are made in collaboration with the director, who is responsible for the overall presentation of the play and who decides, in collaboration with their artistic staff, how to express their direction through the dramatic means of theatre—which includes the actors' performances.[9] When the actors' performance(s) meet the audience, the chosen expression and the way in which the actor wishes to convey such choice are communicated, but the choices have been made and established long before these are communicated. Hence, it is not the literary work as such that is performed by the actor, but the performer's interpretation thereof.[10]

The choices are expressed during each performance, and the aim is for these to be repeated in a live manner, in that the actor seeks not to force expression of the incorporated subtext and instead trusts that the pattern they have painstakingly established during rehearsals will 'flow through them' during the performance. This lived element also includes the audience's response, which inspires/influences the actor during the performance.

All that said, it has been a widely held view in certain countries that the performers' performances are only protected by the neighbouring rights rules and do not enjoy copyright protection. Such view has in some cases been based on the understanding that copyright protection for performing artists would not be compatible with international treaty obligations. In this article, we examine the international treaties and assess whether these constitute a barrier to copyright for performers.

The international obligations that could potentially represent barriers are the copyright and performers' rights treaties (WIPO's Copyright Treaty [WCT],[11] the

3 Norwegian Supreme Court judgment, *Norsk Retstidende* (2007) 1329 (Huldra), para 43.

4 See, inter alia, Case C-145/10 *Eva-Maria Painer v Standard VerlagsGmbH (Painer)* (2011) EU:C:2011:798, para 87.

5 The reference is assumed to be generally known but pertains to William Shakespeare's play *The Tragedy of Hamlet, Prince of Denmark* (1601).

6 An alternative understanding would be, for example, that he does not love her and that he is just bored at the castle and has had no one to talk to but Ophelia. That would give a completely different subtext.

7 Subtext means the *context of what is being said*. A text becomes unclear if the performer has not adopted a stance on such text; see C Stanislavsky, *An Actor Prepares* (Geoffrey Bles, 1936). Similar observations have been made by others; see HG Gadamer, *Sannhet og Metode Grunntrekk i en filosofisk hermeneutikk* (Bokklubben, 2010) 257.

8 The duration of the rehearsal period may vary. An orchestra may have only a few days with the conductor before the concert, and independent theatre groups may have longer or shorter rehearsal periods. The point is that the choices are made during the rehearsal periods. The performance reflects those choices.

9 Other aspects of dramatic language are music, lighting, visuals (scenography), etc.

10 E Fischer-Lichte et al, *The Transformative Power of Performance: A New Aesthetics* (2008) 79.

11 WCT (adopted in Geneva, 20 December 1996).

WIPO Performances and Phonograms Treaty [WPPT],[12] the Beijing Treaty,[13] the Rome Convention [RC][14] and Berne Convention [BC][15]), along with EU law and the European Economic Area (EEA) Agreement.[16]

The international legal framework applicable to Norway is essentially the same as it applies to EU Member States. The EEA States, including Norway, have—in the same way as the EU Member States—acceded to the relevant treaties in this field and are under the EEA Agreement required to implement EU secondary legislation and to apply it uniformly.[17] It is therefore not necessary to distinguish between EEA States and EU Member States in the discussion later.

2. Performers' protection and copyright regulation in international treaties

2.1 Introduction

As detailed, the most important *copyright treaties* for the purpose of our topic are the BC and the WCT. The most important *performer treaties* are the RC, the WPPT and the Beijing Treaty. Additionally, the TRIPS Agreement regulates both copyright and performers' rights issues. The EU has acceded to the treaties and the Court of Justice of the European Union (CJEU) has in several judgments held that EU law complies with the treaty requirements.[18]

All of the treaties will be discussed later.

12 WPPT (adopted in Geneva, 20 December 1996).

13 Beijing Treaty on Audiovisual Performances (adopted in Beijing, 24 June 2012).

14 International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (RC), 1961.

15 Berne Convention for the Protection of Literary and Artistic Works (BC), 9 September 1886.

16 The EEA Agreement is implemented in Norwegian law through the EEA Act (LOV-27 November 1992-109). The above-mentioned WIPO treaties are protocols to the BC and RC and aim to modernize the original conventions in order to adapt the legal framework to the *digital age*. The protocols have been implemented in EU law through the InfoSoc Directive (2001/29/EC), which has been transposed into Norwegian law.

17 Act relating to the implementation in Norwegian law of the main part of the Agreement on the EEA, etc. (the EEA Act), LOV-27 November 1992-109, art 6, cf art 3.

18 Judgment in *Società Consortile Fonografici v Marco Del Corso (Marco del Corso)*, C-135/10, EU:C:2012:140, paras 38 and 53; judgment in *Infopaq International A/S v Danske Dagblades Forening (Infopaq)*, C-5/08, EU:C:2009:465, para 32. The RC has not been signed by the EU and is not formally part of EU law (paras 41 and 42). Nevertheless, according to the CJEU, the RC has an indirect effect as the WPPT requires that the WPPT shall not stand in the way of Member States' obligations under the RC (para 50) and as the WPPT has been ratified and acceded to by the EU. The Beijing Treaty has been signed but not ratified by the EU. The CJEU did also in judgment in *Recorded Artists Actors Performers Ltd (RAAP) v Phonographic Performance (Ireland) Ltd, Minister for Jobs, Enterprise and Innovation (RAAP)*, C-265/19, EU:C:2020:677 invoke the WPPT to determine the specific scope of the EU's obligations under the Rental Directive (RAAP, recital 50ff.)

2.2 The BC

2.2.1 Main objective and structure

The main objective of the BC is to ensure that authors from other Union states have the same rights as are conferred on a Union state's own citizens. This is referred to as the principle of national treatment (BC Art. 5(1)).[19] Citizens of non-Union states may also obtain protection for their works if they live in a Union state or publish their works there.[20] The second main purpose of the treaty is to establish a minimum level of protection that Union states must provide in their national legislation. The BC is thus a treaty that sets minimum standards.[21]

BC Art. 2 states what works of authorship are protected: 'The expression "literary and artistic works" shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression', supplemented by a non-exhaustive list of different types of works: '…such as books, pamphlets and other writings; lectures, addresses, sermons…[t]ranslations, adaptations, arrangements of music…'.[22] The treaty's definition of works is completely open and contains nothing to exclude artistic performances. 'Sermons and other works of the same nature',[23] for example, are a type of performance act, which may include oral elements and which is ephemeral in nature, and 'translations'[24] are a form of adaptation that, from a copyright perspective, a performer's performance will in most cases be. The wording suggests that all types of artistic creation are encompassed.

Although the Diplomatic Conference identified a number of rights to works of authorship, it never identified who the author is.[25] Instead, it regulated what kind of productions were to be protected. In other words,

19 *The principle of national treatment* also applies to nationals of non-Union states, provided they publish the work in a Union country first or simultaneously (within 30 days) with publication outside the Union (BC art 3(1)(b) (*principle of domicile*). The Union was formed by the signatory countries.

20 *The country of publication principle* encompassed both having its first publication in a Union country and simultaneous publication outside the Union; see BC art 3(1)(b). 'Simultaneously' meant publishing the work in a Union country within 30 days of its first publication outside the Union states (art 3(4)).

21 BC art 19: 'The provisions of this Convention shall not preclude the making of a claim to the benefit of any greater protection which may be granted by legislation in a country of the Union'.

22 SP Ladas, *The International Protection of Literary and Artistic Property. International Copyright and Inter-American Copyright* (vol. 1 Maximillian 1938) 366ff. This follows from 'as such' in the wording of BC arts 2(1) and 2(2).

23 Bern Convention, art 2(1).

24 ibid, art 2(3).

25 S Ricketson and J Ginsburg *International Copyright and Neighbouring Rights the Bern Convention and Beyond* (vol. 1 OUP 2006) 358 and 362. A few proposals for a definition of the author were put forward, but the conference attendees were unable to reach a consensus.

an object-oriented perspective rather than a subject-oriented perspective was adopted.

Today, the harmonization of the term 'work' in EU law[26] has led to the harmonization of the term 'author'. The creator of a work of authorship is its author, so that the term 'author' is subordinated to the definition of a work of authorship. Hence, the term 'author' does not in itself prevent a performer from being considered an author, provided that such performer fulfils the copyright requirements.

2.2.2 Discussions on the status of performers' performances up to 1948

At the time of the adoption of the BC in 1886, recording media had not been developed to any substantial extent. The question of whether performers who performed works could be considered 'authors' of the performance—and thus fall within the scope of the Convention—did not become prominent until recording and playback equipment became more widespread. Only then did unauthorized re-use and re-exploitation of the performance become a potential threat to the performers' control over the performance. The issue of protection against unauthorized re-exploitation of performers' performances was raised by delegates at the conference, along with the question of whether performers could be categorized as authors of their performances of works.[27]

The issue of copyright for performers was brought up regularly during the periodic treaty revisions—in connection with various proposals to extend and clarify the scope of protection conferred by it.[28] The issue of potential copyright for performers often arose in connection with the invention of new technology. Copyright has, as a general observation, been referred to as 'technology's child from the start', as clearly illustrated by the issues relating to performers' performances.[29]

The starting point for the debate was a statement in a protocol[30] from the 1886 Conference of Delegates to the effect that instruments for the mechanical reproduction of a composition (work) were not considered an infringement of the reproduction right of the composer: 'It is understood that the manufacture and sale of instruments for the mechanical reproduction of musical airs which are copyrighted, shall not be considered as constituting an infringement of musical copyright.'[31] The conflict of interest between composers and the music industry (instrument sellers and manufacturers) led to a demand for revision of the provision during the Paris Conference of 1896.[32] Composers demanded that their exclusive right should include all storage of the composition on 'discs, plates, cylinders, bands and similar parts of instruments for the mechanical rendering of pieces of music'.[33] It was argued that the statement in the protocol, as interpreted, represented an erosion of composers' adaptation rights and of composers' right to communicate these, as transfer to the storage media enabled a subsequent performance of the music.[34] However, it was clarified that the protocol was not to be interpreted as pertaining to the subsequent reproduction of performers' performances.[35] This meant that the potential protection of performers' performances was off the agenda although it had been noted as an additional issue.

The next time the issue was brought up was during the Berlin Conference of 1908, in the context of how to interpret the provision on 'adaptations' in BC Art. 13.[36] Should it be interpreted to mean that the fixation of a music performance gave rise to copyright? This question was answered in the negative by the majority of Union state delegates. Fixation of the music was not an

26 Infopaq, paras 34–37, judgment EU Bezpečnostní softwarová asociace—*Svaz softwarové ochrany v Ministerstvo kultury (BSA)*, C-393/09, EU:C:2010:816, para 45, judgment *Football Dataco Ltd, Football Association Premier League Ltd et al v Yahoo! UK Ltd et al (Football Dataco)*, C-393/09, EU:C:2010:816, para 38. E Rosati. *Originality In EU Copyright, Full Harmonisation through Case Law* (Edward Elgar Publishing 2012), 99. Ricketson points out that multi-author works are defined differently in different BC Union states; see Ricketson (2006), 363. Fully harmonized implies harmonization across types of works and that neither stricter nor less strict requirements can be applied.

27 Ladas (1938), 429. It was proposed at the Rome Conference (1928) that performers could be considered authors of a sound recording: 'Without prejudice to the rights of the author of an original work, perforated rolls and the other instruments by means of which the sounds are reproduced mechanically shall be protected as original works.' The proposal was voted down by, inter alia, France.

28 S Ricketson, *The Berne Convention for the Protection of Literary and Artistic works: 1886–1986* (Klüver 1987) 866.

29 P Goldstein, *Copyright's Highway—From the Printing Press to the Cloud* (2nd edn Stanford University Press 2019) 17.

30 Protocols are decisions adopted during a treaty process. In the case of the BC, the protocols were often adopted by a group of delegates from different Union states, which were not always the same at the various conferences held over a period of about 100 years. Although the core—the major Union states—were always represented, some countries in Europe, Africa and other continents were represented on a more irregular basis. The value of such protocols as a source of law is to some extent questioned in the present article. During the BC process, the protocol contents pointed in different directions regarding this article's main issue: whether performers should be protected under BC.

31 Protocol to the BC of 1886; *Protocole de Clôtyre*, s 3; see Ladas (n 22) 412. It is noted that it is uncertain whether the protocol was intended to regulate any subsequent public performance of the recording. It is in any event evident from the source that the delegates did not generally understand the scope of the protocol.

32 A Bogsch, *Berne Convention, for the Protection of Literary and Artistic Works from 1886 to 1986, Reports of the Various Diplomatic Conferences* (International Bureau of Intellectual Property 1986) 141, cf Ladas (n 22) 419.

33 Ladas (n 22) 418.

34 As stated in BC art 2(3).

35 Ladas (n 22) 413.

36 Ricketson (1987), s. 867.

adaptation of the music, but a true reproduction.[37] Both Norway and the UK objected to this conclusion, and it was argued at the 1928 Rome Conference that the fixation of a music performance could constitute an original performance on the part of the performer: 'The reproduction by mechanical instruments of the execution of a musical work should be protected as an original work. This would leave it to the legislation in each country to determine whether the manufacturer or the performing artist should have the copyright.'[38] The proposal was voted down by France and the revision proposal was not adopted. The reason given was that the treaty only protected authors' rights and could not be extended to protect performing artists. The following is noted in the treaty commentary: 'This seems a very thin ground, especially since artists must be deemed to be 'authors' of the creation … No agreement was reached, although the intention of the Conference was clearly indicated—that executing artists should receive protection.'[39]

Another approach to the same issue was taken at the 1928 BC revision conference in Rome. Here the question of whether performers' performances could fall within the scope of the BC was raised as an issue of interpretation of the term 'author'. It was argued in the conference discussions that a recording under BC Art. 13 encompasses more than a fixation of the composition; it also includes the performer's performance, which may be individual and original. Could this mean that the performer qualified as an author of the adaptation that was fixed?

When this issue was raised, singers had copyright in the recording of their performances under both German and Swiss law.[40] The UK and Austria also had comparable national protection for performing musicians.[41] Under the domestic law of these countries, the singer had adaptation rights to the composition. An adaptation is a transformation of the work, which is precisely what a singer was presumed to engage in under this regulation.[42] Another argument put forward was that the commercial value of the recording would largely depend on the performance of the performer, and it would therefore be reasonable for them to share in the benefits of the recording. It was argued that allowing protection only if the performance was mechanically fixed would overcome the challenge presented by the ephemeral nature of such performances, which could make it difficult to assess the contents of the performance.[43]

A treaty revision proposal was presented: 'When a musical work is adapted to mechanical instruments with *the aid of performing artists*, the protection which this adaptation enjoys benefits *the latter also*' (emphasis added).[44] A number of countries endorsed the proposal, but France was against it, arguing that performers could not be authors. However, the view that performers could be authors was also expressed in contemporary writing: 'artists must be deemed to be "authors" of the creation, consisting in the original and individual execution of a work.'[45]

The next approach to the issue of performers' protection—also at the Rome revision conference—arose in connection to the invention of radio technology and transmission.[46] Prior to the conference, the international copyright community had set up a committee to assess the impact of radio transmission on authors and performers. The Italian programme committee put forward a proposal to the effect that broadcasting was a form of making available to the public that could not be engaged in without the consent of authors and performers.[47] At the Diplomatic Conference in Rome, proposed regulations in Art. 11bis were put forward, which would also include exclusive broadcasting rights for performers.[48] However, there was disagreement as to whether broadcasting rights should be covered by copyright at all. Countries such as Norway, New Zealand and Australia held the view that such broadcasts were of so major cultural and social value to the public that they did not want to restrict them through exclusive rights.[49] Other countries were in favour. When Art. 11bis was adopted, it included an exclusive right of making available to the public for authors.[50] Performers, on the other hand, were excluded from the regulation and denied broadcasting rights on varying grounds. France maintained the view that the treaty only protected authors and that performers' performances fell outside the scope thereof.[51] France argued

37 Ricketson (2006), 99.
38 Norway's proposed revision of the BC at the 1928 Rome Conference; see Ladas (n 22) 426.
39 Ladas (n 22) 428.
40 G Davies, *Copyright and the Public Interest* (Sweet & Maxwell 2002) 196, Bogsch (1986), 297, Ricketson (2006), 92, Ladas (n 22) 427.
41 Ricketson (1987), 868.
42 Davies (2002), 196, Bogsch (n 40) 297.
43 The fixation of performers' performances as a requirement for copyright protection is representative of the regulation established by the USA, which grants copyright to performers' performances in a recording. See RA Gorman and J Ginsburg, *Copyright*. (Foundation Press 2006), 269.
44 Ladas (n 22) 428.
45 Ladas (n 22) 428ff.
46 Ricketson (2006), 108.
47 Ladas (n 22) 476.
48 Ricketson (2006), 109.
49 Bogsch (n 40), 297.
50 Art 11bis: 'the communication of their works to the public by the telegraph or telephone with or without wire or by any other analogues means serving to transmit sounds or pictures.'
51 Ricketson (2006), 109(3.29).

that a performer's interpretation did not fulfil the requirement for an act of creation but was merely a performance of someone's work: 'The interpreter of a musical work does not create anything, since he merely executes the work created by another.'[52] Other countries' representatives argued that the performer created the derivative work (the adaptation) and also made an important contribution to the value of a performance and that the interest should be protected regardless. The conference adopted a protocol ('væu') calling on Union state governments to grant protection to performing artists: 'The Conference expresses the hope that the Governments which participated in the work of the Conference will consider the possibility of measures to safeguard the rights of performers.'[53]

The issue re-emerged later in the conference, during the discussion of artists' broadcasting rights. This time some countries (notably France and the UK) reversed their position that the broadcasting rights of performers should be protected by the treaty. A resolution was adopted, stating that it was inappropriate to equate the protection of performers with the protection of authors, as had previously been claimed. An alternative solution was proposed:

> The Congress expresses the wish: A. That through the medium of a general convention the governments shall at any rate bind themselves to adopt the measures of protection which follow: 1. The operators of radio broadcasting, stage, and rebroadcasting stations shall apply a fair extra fee on behalf of the artist whose performances are broadcast or otherwise utilized. 2. The states shall adopt all proper measures for deciding the differences arising between operators and artists in a fair and speedy manner. 3. Each State shall take care that the broadcasting of artistic performances shall be made as well as it is technically possible. B. That the aforementioned provisions shall be adopted by the national legislatures as far as possible in a uniform manner.[54]

According to the BC preparatory work, the resolution was adopted because some delegates (mainly the French and Italian ones in this case) claimed that performers were not creators.[55] Furthermore, it was argued that performances were generally not of a personal nature although it was recognized that such would be the case for some performers' performances. If performers' performances were to be treated as creative works, it would have to be as derivative works, subordinate to the works being performed. This could entail practical challenges, it was further argued. The new technology, through phonograms, broadcasting and film, had turned the performer's performance into an object (res), which had thereby rendered the existence of the performance visible. Through contracts between technology owners and performers, remuneration of performers was to be ensured, by means of a reasonable markup to be paid to the artists used in the programme.[56] The protection of such interests would be based on other grounds than copyright, it was further stated.

In our view, the Diplomatic Conference in Rome thereby reneged on previous statements and acknowledgements. It 're-categorized' performers' protection to the protection of a work effort to be rewarded as labour remuneration—to be protected, if applicable, by agreements—rather than the protection of rights originating from an individual creative effort. This line was, in our view, followed up in the RC.[57]

As noted previously, the issue of the nature of performers' performances and how these should be protected was a point of contention between the delegates at the diplomatic conferences during the BC development process.[58] In particular, France (and to some extent Italy) was opposed to granting copyright to performers.[59] The so-called pie theory was also widespread at the time.[60] This theory suggested that if more people were granted rights, the 'pie' would have to be shared between more people, thus making each person's slice of the pie smaller: 'It appears, however, that the objections of author's societies, while allegedly based on theoretical considerations, proceed really from a very selfish motive. It is feared that the fee of royalty to be claimed by performing artists will compete with the author's royalties.'[61] The pie theory has subsequently been refuted by inter alia legal economists.[62]

52 Ladas (n 22) 494.

53 Actes de la Conférence réunie à Rome, 1928, 350. The original wording of Væu *v* is as follows: 'La Conférence émet la vœu que les Gouvernements qui ont participé aux travaux de la Conférence envisagent la possibilité de mesures destinées à sauvegarder les droits des artistes exécutants.'

54 Ladas (n 22) 496.

55 Performers were not creators; it was argued by, inter alia, the Vice-Minister of the Rome Conference, who also sat on the Supreme Court of Italy.

56 Ladas (n 22) 496.

57 Ricketson (2006), 1213.

58 Ricketson (1987), 866.

59 Ladas (n 22) 629.

60 Ricketson (2006), 1221.

61 Ladas (n 22) 630.

62 ILO/WIPO/UNESCO/ICR/SCI/IMP/5 in [1979], Ricketson (2006), 1221 (19.19). Paul Goldstein has an interesting theory as to why the neighbouring rights model has been chosen for performers' performances and sound recordings. He argues that European countries could thereby avoid paying US artists (and producers) by adopting remuneration rules that only applied to *their own citizens*; see P Goldstein, 128, because the BC imposes royalty rights for such performances. We do not fully concur with his argument. The USA could have secured for its own artists and producers the right to remuneration for broadcasting in other signatory countries if the USA had signed the RC. The USA refrained from doing so in order to avoid granting broadcasting rights to its own artists. It is therefore the USA's own conduct that is the primary reason for the

The revision conference in Rome was subsequently described as unsuccessful in terms of the progression of rights for authors in general and for performers in particular.[63] It also revealed, to a greater extent than before, the diversity of opinion in the international copyright community with regard to the issues under discussion. When it comes to considering performers' performances as creative endeavours, the Rome conference must be said to represent a regressive step.

The last BC revision conference before the adoption of the RC in 1961[64] was the Diplomatic Conference in Brussels in 1948. It was during this conference decided to extend the treaty to cinematographic works and adaptations, television broadcasts, rebroadcasts and communication to the public through loudspeakers, as well as the reproduction thereof (Art. 11bis and Art. 14).[65] Yet again, no agreement was reached to bring performers' performances within the scope of protection, but the issue was raised and discussed also this time.[66]

As noted previously, it was an active choice by leading delegates at the diplomatic conferences to exclude performers' performances from BC protection, for slightly different reasons. The theoretical explanation was the lack of creative effort on the part of performers, the ephemeral nature of performances and the derivative nature of performances. At the same time, the various diplomatic conferences from the 1880s to 1948 have found scope for protecting other derivative works, such as translations and cinematographic works, and other ephemeral works, such as lectures and improvisations.

Arguably, the real reason why performers were excluded from copyright protection and the treaty was the assumed financial impact on other rightholders of granting them equivalent protection.[67] As pointed out by numerous commentators, the said assumption is supported neither by factual evidence, nor, in many ways, by rational argument.[68] A performer's brilliant performance may increase the value of a performance by increasing demand, also for the benefit of the author.

In any event, the BC must be understood as not to *require* signatory states to grant copyright to performers. That said, the discussion uncovers the considerable amount of *controversy that was associated* with the issue, while at the same time uncovering the *reasons* given for denying treaty protection to performers' performances.

2.2.3 Current interpretation of the BC

Although performers' performances were never expressly recognized by the BC revisions, one may wonder whether the treaty entails, through *dynamic interpretation*, an obligation for signatory countries to confer—or at least does not preclude them from conferring—copyright protection on original performers' performances now. Similar analyses have been conducted in legal theory for databases and computer programmes.[69]

We do not consider the issue to be whether there are grounds for *stronger protection* of performers, but whether there are grounds for a *different type of protection*, namely copyright protection.[70] Our perspective is *whether the actions carried out by the performer*, through interpretation of a work or folklore, *falls within the scope of the productions* on which protection may be conferred under the BC. The issue is *whether the BC allows for signatory countries to confer copyright protection on original performers' performances*.

Traditionally, international treaties have been categorized into two main types: *legislative treaties* (establishing rules of law, applicable between multiple states) and the so-called *contractual treaties* (between two states).[71] According to traditional theory, the treaty type would have implications for how to interpret the treaty.[72] While legislative treaties were to be interpreted more in line with their purpose and more liberally in relation to their wording, contractual treaties were to be interpreted more strictly and more closely based on their wording.[73] Modern legal theory abandons this distinction and concludes that the Vienna Convention on the Law of Treaties (VC)[74] should be applied to both treaty types.[75]

unfairness. Nor does the USA pay European artists when recordings are broadcast in the USA.

63 Ricketson (1987), 101.

64 International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Rome, 26 October 1961.

65 Ricketson (1987), 111.

66 Ricketson (2006), 119, cf The Berne Convention for the Protection of Literary and Artistic Works from 1886 to 1986 (1986), 176ff, Ricketson (1987), 113. A prominent US legal scholar argues that BC art 14, which was also adopted in 1948, intends to also grant film actors *co-authorship rights in the film*. See J Hughes, 'Actors as Authors' (2019) 51 *CLR* 8.

67 Ricketson (2006), 1221.

68 Ricketson (2006), 1221. T Riis, *Ophavsrett og rettsøkonomi* (GadJura 1996) 191.

69 J Ginsburg, *People or Machines* (Springer 2018) 132.

70 The same observation is made in the BC commentary, where Ladas states that this was also the view of the delegates when they were to address the question of whether performing artists could be encompassed by the BC; see Ladas (n 22) 495ff.

71 E Bjørge, *Evolutionary Interpretation of Treaties* (Ph.D. Faculty of Law University of Oslo 2013) 45.

72 Bjørge (2013), 46.

73 Bjørge (2013), 46.

74 VC, done at Vienna on 23 May 1969.

75 Bjørge (2013), 46.

The VC establishes certain standards for the interpretation of international treaties.[76] Although this treaty is more recent than the BC, it is presumed, to a certain extent, to codify common law interpretation standards for treaties.[77] The interpretation principles laid down in VC Section 3 are presumed to be of general application.

VC Art. 31 states that in determining the content of a treaty, emphasis shall be placed on the ordinary meaning of its wording.[79] The protection under Art. 2 encompasses '*every production in the literary, scientific and artistic domain*, whatever may be the mode or form of its expression, such as … (emphasis added).

Performers' performances are 'productions' within the 'artistic' domain, so this requirement is fulfilled. The list in BC Art. 2 is not exhaustive (cf 'such as'), which means that the non-inclusion of 'performances' in such list does not in itself exclude these. Furthermore, 'adaptations' are listed as one of the examples in BC Art. 2(2), which in the ordinary meaning of that term includes performers' performances.[80]

A provisional conclusion is that the performer's interpretation of the work or folklore falls within the scope of the productions covered by the BC according to its wording.

It may, on the other hand, be claimed that statements in the BC preparatory work[81] indicate that some delegates expressed the view that performers' performances should not be covered by the treaty on the basis of, inter alia, an assertion that performers were not creative. A further argument was that their inclusion would undermine the financial position of authors[82] in that 'more people would share the pie'.[83] These two arguments are different in nature. The first argument is of a descriptive nature and loses its weight if the understanding of reality changes. The second argument is of a normative nature, thereby retaining its weight, even though the persuasive value of such argument may change.

In our view, the position that performers are not creative is questionable today. That assertion has been comprehensively refuted in legal theory.[84] Performing artists will generally, through their interpretation, imbue the performance with their personality. In EU law, this is presumed to be the case when the performer makes free and creative choices for the performance.[85] The free and creative choices made by a performer are reflected in the chosen interpretation of the work or folklore to be performed and the manner in which such interpretation is to be expressed.

Furthermore, the so-called 'pie theory' has also been refuted, in our view.[86] Counter-arguments include that a performer's performance will always be a prerequisite for the existence of any 'pie' at all and that the size of such 'pie' will often depend on the quality of said performance.[87] It may thus be argued that the performer is the cause of the existence of the pie and of decisive importance to its value.[88] Performers must therefore be considered to have a reasonable claim to a slice of the pie. Moreover, special interests advocated in a diplomatic conference should not be decisive for the interpretation of the treaty. Such a financial argument in favour of one rightholder group would in any case only be an argument and not decisive for the conclusion.[89]

In our reading of the diplomatic conference minutes, there is no uniform position on these issues either, with a range of different opinions expressed.[90] Furthermore, the VC implies that one may not have recourse to the preparatory work of international treaties if relying on such work would lead to absurd or unreasonable interpretations of the treaty.[91] If claims that performers are not creators are accorded weight in determining the substance of the BC—with the result that performers' performances are not encompassed by the treaty, thereby not allowing for performers to be granted copyright even when they create original interpretations—the result will, in our assessment, be unreasonable and incorrect. We therefore consider it appropriate not to accord any significant weight to

76 The interpretation and application of the Vienna Convention are thoroughly discussed in a plenary judgment of the Norwegian Supreme Court judgment, *HR-2023-491-P* (also available in English).

77 Ricketson (2006), 189.

79 VC art 31(1).

80 The originality requirement applicable to works of authorship protected under the BC is only indicated indirectly through the examples of works listed in the provision: 'Translations, 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' (BC art 2(3)).

81 We refer to the conference minutes as preparatory work although it is doubtful that these should be accorded that status. However, these are the only documentation of the processes behind the BC wording, so we deem it appropriate to refer to these as preparatory work.

82 Often composer representatives from the major CISAC societies (CISAC is the International Confederation of Societies of Authors and Composers); see Ricketson (2006), 1220ff.

83 Ricketson (2006), 1221.

84 R Arnold, *Performers Rights* (Sweet & Maxwell 2015) 6, Ricketson (2006), 1208, Lassen (1981), 300, Eidsvold-Tøien (2016), 283.

85 C-10/145 (Painer), paras 87–89.

86 Ricketson (2006), 1221, cf Riis (1996), 191.

87 Ricketson (2006), 1221, Ladas (n 22) 494ff.

88 Ladas (n 22) 494. That performers were also one of the causes of the *value of the performance of the work* also constituted the background to one of the resolutions adopted at the 1928 Rome Conference, according to Ladas.

89 Ricketson (2006), 1223, cf Riis (1996), 191.

90 Ladas (n 22) 494ff.

91 VC art 32(1)(b).

such assertions for purposes of determining the meaning of the wording.[92]

Another argument in favour of not according greater weight to the preparatory work than to the wording is that access to the minutes is virtually non-existent for the general public. For many years, the minutes were only available in French, and these are still only available to persons with extensive copyright source search experience. Hence, the legitimacy of the preparatory work is in any case low.

The VC further stipulates that the interpretation shall also take into account any subsequent agreements between the parties that may be of significance to the interpretation of the parent treaty.[93] It may in this context be asked whether WIPO's adoption of the RC in the wake of the BC can be said to substantiate that performers' performances are not to be protected by the BC, which might imply that this is an obstacle to copyright for performers today.

The RC provides that Union states shall, as a minimum,[94] grant performers the right to authorize or prohibit the fixation of their performances of works, the broadcasting and other communication to the public of such fixation and the right of reproduction of such fixation.[95] It is also evident that the RC initiative was launched during the 1928 Berne Convention Conference, where a number of delegate countries advocated that performers should be given copyright protection and thereby protection under the BC.[96] However, we have shown previously how such suggestions were rejected, with delegate countries at the 1928 Rome Conference being encouraged to establish protection for performers outside the BC.[97] Nevertheless, it was not stated in the wording of the resolution that performers' performances could not be copyrighted. It merely called for the establishment of a broadcasting remuneration right for their benefit.

Moreover, numerous resolutions were passed during the BC development process, and the contents of such resolutions varied greatly: 'A large number of resolutions were also passed by the Conference concerning matters on which international consensus still seemed unattainable… This included… the recognition of performers rights.'[98] In any event, a resolution—which is not included in the treaty wording—is not binding, and its weight as a source of law must be assessed on a case-by-case basis.[99]

The question is whether a resolution that suggests a different regulation of performer's performances in broadcasting should alter our provisional conclusion that original performers' performances fall within the scope of the BC? It is our assessment that no significant weight should be accorded to such resolution. Said resolution cannot justify an interpretation that deviates from the natural reading of the treaty's own wording, which suggests that performers' performances that fulfil the originality requirement fall within the scope of the treaty.

The legislation of a number of European countries did at the time provide for copyright protection for performers. This also suggests that the RC was intended to supplement copyright protection, not to replace it.

In our view, the adoption of the RC does not prevent original performers' performances from falling within the scope of the BC. Hypothetically, the requirements for adaptation copyright for original performers' performances were already fulfilled when the RC was established in 1961. Art. 21 of the RC stipulates that it shall not prejudice any rights established under other treaties, which would include any copyright under the BC.[100]

Furthermore, it is clear from the VC wording that it is only in the case of agreements between the same parties that have concluded both agreements that any different, subsequent regulation is of relevance to the interpretation.[101] The RC does not have nearly the same number of signatory countries as the BC, and these signatory countries are not the same, thus implying that the RC cannot, in any event, be considered such a subsequent agreement.

The position that the BC can be interpreted to encompass works previously thought to be outside the scope of copyright is supported by the fact that computer programmes are claimed by some states to fall within the scope of the treaty, despite obviously not being encompassed thereby when the treaty was established.[102]

The fact that performers have copyright under US law could also be invoked as an argument in favour of the BC not preventing copyright for performers. Original 'sound recordings' stored on a 'tangible medium' are considered works of authorship under US law.[103] The rights of performers are admittedly limited in the USA (as no broadcasting rights are acknowledged), but this does not

92 VC art 32(1).
93 VC art 31(3)(a).
94 The RC is a treaty that sets minimum standards; see RC art 7, which states this explicitly.
95 RC art 7(a), (b).
96 Ladas (n 22) 427.
97 The resolution read is quoted on pp. 10 in this article.
98 Reinbothe (2006), 110.
99 Reinbothe (2006), s 5.40, 203ff.
100 Performers' performances that do not meet the originality requirement will still need neighbouring rights protection.
101 VC art 31 (3), cf Ricketson (2006), 192.
102 Robert Merges et al., *Intellectual Property in the New Technology Age* (Clause 8 Publishing 2021) 911. See also Reinbothe (2006), 516.
103 Gorman (2006), 269.

affect the underlying principle that performers are considered creators and suggests that the BC at the very least does not prevent such regulation. Performers' rights in sound recordings were codified in 1971[104] and subsequently consolidated in the 1976 Act.[105] Legal theory suggests that this also applies to actors' performances: '[T]he Berne Convention leaves open the possibility that actors might be joint authors of a film under a national law.…'[106] Nor did the preparatory work for the implementation of the BC in the USA,[107] which identified possible legal obstacles to the application of the treaty in US law, identify the fact that performers have copyright under US law as a potential barrier.[108]

Likewise, Canada has copyright for performers.[109] Part II of the Canadian Copyright Act extends copyright to 'performers' performances'.[110] Canada is a signatory to the BC,[111] which makes this another argument in favour of the treaty at least not being a barrier to copyright for performers.

Legal theory on treaty interpretation accords considerable weight to the intention behind a treaty.[112] Again, it is unclear whether this gives rise to an argument in favour of excluding performers' performances from the scope of the treaty or whether, on the contrary, it is an argument in favour of including such performances. The main intention behind the BC is to protect authors' rights. Since creative performers are 'authors' of their interpretation, it can be argued that such creativity is at the core of what the treaty was intended to protect.

Our conclusion is that there is much to suggest that performers' performances that fulfil the originality requirement fall within the scope of the BC and that the treaty does in any event not prevent signatory states from granting such protection.

104 Enactment of Public Law 92–140.

105 Robert Merges (2021), 555.

106 Hughes (2019), 16.

107 Berne Convention Implementation Act of 6 May 1988. Committed to the Committee of the Whole House on the State of the Union and ordered to be printed.

108 Merges (2021), 909. Hughes (2019), 16.

109 Copyright Act R.S.C., 1985, c. C-42, pt II, s 15(2): 'a performer has a copyright in the performer's performance, consisting of the sole right to do the following in relation to the performer's performance or any substantial part thereof.…'

110 Copyright Act R.S.C., 1985, c. C-42, pt II, Copyright in Performers' Performances, Sound Recordings and Communication Signals and Moral Rights in Performers' Performances.

111 April 1928; see WIPO. Available at the page for WIPO-Administered Treaties https://wipolex.wipo.int/en/treaties/parties/remarks/CA/15 (accessed February 2023).

112 Bjørge (2013), 123ff.

2.3 The WCT

The WCT is a 'special agreement within the meaning of Article 20 of the Berne Convention',[113] in which WIPO extends the protection under the BC to include *use by digital technology* (WCT Art. 1(1), emphasis added).[114] Being a special agreement, it is also clear from BC Art. 20 that subsequent agreements cannot grant less extensive rights than those laid down in the BC.[115] Hence, the WCT can only grant more extensive rights to authors, not less extensive.

There is nothing in the WCT that addresses performers' performances. The treaty subordination clause emphasizes that the WCT does not derogate from obligations states have taken on under the BC: 'Nothing in this Treaty shall derogate from existing obligations that Contracting Parties have to each other under the Berne Convention for the Protection of Literary and Artistic Works.'[116] The same is stated with regard to any other treaty obligations a country may have.[117]

Since we find that the BC at least does not prevent the establishment of copyright protection for original performers' performances, we do not consider the WCT to be a barrier to copyright for performers' performances under Norwegian law. It either underpins and strengthens the rights under the BC, or it does not pertain to the issue.

2.4 EU law as a potential barrier to copyright for performers' performances

2.4.1 Introduction

The CJEU has in recent years delivered a number of judgments on the requirements for copyright protection.[118] In interpreting the term 'work', the CJEU has referred to the BC's provision on 'intellectual creations'.[119] The CJEU has furthermore concluded, under reference to other copyright directives, that only original works are protected and that this requires the intellectual creation to be one's own.[120] The creation is original when it is its author's own

113 WCT art 1(1).

114 J Reinbothe and S Lewinski, *The WIPO treaties on copyright* (OUP 2015) 607.

115 Ricketson (2006), 186.

116 WCT art 1(2).

117 WCT art 1(1): '…This Treaty shall not have any connection with treaties other than the Berne Convention, nor shall it prejudice any rights and obligations under any other treaties.'

118 Including C-5/08, EU:C:2009:465 (Infopaq), C-393/09, EU:C:2010:816 (BSA), C-145/10, EU:C:2011:798 (Painer), C-310/17, EU:C:2018:899 (Levola Hengelo), C-406/10, EU:C:2012:259 (SAS). See also E Rosati, Copyright in the Digital Single Market (OUP 2021) 4.

119 C-5/08, EU:C:2009:465, para 34.

120 C-5/08, EU:C:2009:465 paras 35 and 37. The further details of what is the basic requirement for 'work', and that 'originality' means something more

intellectual creation, states the CJEU, ie when the creation reflects their personality.[121] Furthermore, a creation expresses one's personality when the author has expressed their abilities in the production of the work, by making free and creative choices.[122]

We now address the issue of whether EU law is a barrier to copyright for original performers' performances. There are (at least) two aspects to this issue: the first is whether original performers' performances fall within the scope of the EU law term 'work'. The second is whether the neighbouring rights regime under the copyright directives should in itself be considered an obstacle to copyright protection.

2.4.2 The term 'work' in EU law

The CJEU has confirmed in several cases that EU copyright law is production oriented. In *Infopaq*, the CJEU set out the requirements for protected works of authorship on the basis of the BC: 'It is … apparent from the general scheme of the Berne Convention, in particular Article 2(5) and (8), that the protection of certain subject-matters as artistic or literary works presupposes that they are *intellectual creations*'[123] (emphasis added).

There is nothing in the CJEU rulings to suggest that copyright is reserved for a specific group of authors or specific types of works of authorship. The originality requirement applies to all types of creations[124] and encompasses a wide range of productions.[125] The pattern set by the CJEU in these cases shows that copyright may be claimed in any expression that exhibits originality caused by the author's own intellectual creation, with the nature of an *original contribution* that can be identified.

In *Infopaq*, the background dispute concerned extracts from newspaper articles.[126] In that case, the CJEU established a correlation between the EU InfoSoc Directive and the reproduction right under the directive and the threshold for copyright protection in the BC.[127] The Court stated that even parts of works in which the originality is represented could claim protection and that as little as an extract comprising 11 words could be sufficient.[128] In *Painer*, the CJEU ruled that personal portraits could be protected by copyright if the originality requirement is fulfilled.[129] The Court also specified at which levels in a creative process the artistic choices could be made.[130] It furthermore specified that the originality requirement could be fulfilled by making creative and free choices for the expression,[131] which in turn was an expression of the author's personality.[132]

In *BSA*, the CJEU held that a graphic user interface can also be protected by copyright if the visuals exhibit originality: 'Consequently, the graphic user interface can, as a work, be protected by copyright if it is its author's own intellectual creation.'[133] That copyright can be claimed for a computer program that fulfils the requirements for the author's own intellectual originality is evident from the Software Directive.[134] In *FAPL*,[135] the CJEU held that a football match in itself would not be protected by copyright because the expression would not be original.[136] The movements of the football players do not take place on the basis of each individual's creative and free choices but because of the rules of football. Hence, the CJEU did

than that it originates from the author's hand, are not spelled out to any significant extent in the legal text of the BC. The term 'originals' is used twice in the provision on the basic condition for protection (art 2) but then rather as a reference to the work 'originating from' the author and not being copied from others. The term 'intellectual creations' is taken from the description of anthologies, etc., in BC art 2(5), which states that only when collections constitute 'intellectual creations' copyright is granted.

121 C-145/10, ECLI:EU:C:2011:798 (Painer), para 88 cf Football Dataco, para 38.

122 C-145/10, ECLI:EU:C:2011:798 (Painer), para 89. Here, it can be said that legal systems over time—and also in this CJEU ruling—embed, in the requirements of originality/one's own creation, the requirement that it must be a literary or artistic work. After all, *not everything that originates from oneself* is granted copyright protection since a creative element is required, with it being implied that this must somehow be of an aesthetic nature. In this way, legal systems embed the overarching principle—that *literary and artistic works are protected* (art 2(1)—in the basic condition for protection.

123 C-5/08, EU:C:2009:465 (Infopaq), paras 32–34.

124 The CJEU's conclusion in C-393/09, EU:C:2010:816 (BSA) that the definition of 'intellection creations' in the Infopaq case can also be applied to a *graphic user interface* means that the term is fully harmonized. See Rosati (2013), 123ff.

125 Literary works (C-5/08, EU:C:2009:465 (Infopaq)), databases (C-393/09, EU:C:2010:816 (Football Dataco)), photographs (C-145/10, ECLI:EU:C:2011:798 (Painer)) and football matches (*Football Association Premier League Ltd etc. v QC Leisure*, C-403/08 og C-429/08, EU:C:2011:631 (FAPL)).

126 C-5/08, EU:C:2009:465 (Infopaq).

127 C-5/08, EU:C:2009:465 (Infopaq), paras 44, 45. The correlation of the BC with EU law is already evident from the fact that the EU has signed the WCT, in which the signatory states undertake to comply with the obligations under BC art 1–21 (WCT art 1(4)). The same is evident from the previously cited CJEU observations in, inter alia, the C-5/08, EU:C:2009:465 (Infopaq) (para 34).

128 C-5/08, EU:C:2009:465 (Infopaq), para 48.

129 C-145/10, ECLI:EU:C:2011:798 (Painer), para 90.

130 C-145/10, ECLI:EU:C:2011:798 (Painer), paras 90–91.

131 C-145/10, ECLI:EU:C:2011:798 (Painer), para 89.

132 C-145/10, ECLI:EU:C:2011:798 (Painer), para 88.

133 C-393/09, EU:C:2010:816 (BSA), para 46.

134 C-393/09, EU:C:2010:816 (BSA), para 31, cf *Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs,* art 1, replaced by *Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs.*

135 Joined cases C-403/08 and C-429/08, ECLI:EU:C:2011:631 (FAPL).

136 Joined cases C-403/08 and C-429/08, ECLI:EU:C:2011:631 (FAPL), para 98: 'However, sporting events cannot be regarded as intellectual creations classifiable as works within the meaning of the Copyright Directive. That applies in particular to football matches, which are subject to rules of the game, leaving no room for creative freedom for the purposes of copyright.'

not dismiss the case because of the type of expression (moving image) but because of the lack of originality.[137]

In *Levola*, the issue was whether copyright protection could be claimed for an original taste.[138] In that case, the CJEU referred to the BC's requirements for copyright protection and again did not dismiss the case because it concerned food, which is not at all listed among the examples of possible works in BC Art. 2.[139] The claimant, Levola Hengelo, argued that another dip (cream cheese) infringed its copyright in the taste of its dip 'Heksenkaas'. The question before the CJEU was whether copyright in a taste could be claimed under EU law.[140] The claimant referred inter alia to a judgment in which the Supreme Court of the Netherlands had supported, as a matter of principle, a claim that copyright protection could be claimed for a smell.[141]

In *Levola*, the CJEU emphasized that the term 'work' is fully harmonized in EU law, thus implying that it is not within the jurisdiction of domestic law to determine the scope of copyright in the EU.[142] Furthermore, the Court held that taste can be protected by copyright, provided that the taste is a work within the meaning of the directive: 'It follows that the taste of a food product can be protected by copyright under Directive 2001/29 only if such a taste can be classified as a "work" within the meaning of the directive.'[143] The CJEU thereafter listed two copyright requirements: that the work is original in the sense of being its author's own intellectual creation[144] and that the subject matter of protection is precisely and objectively identifiable.[145] Otherwise, it was observedthat neither the scope of copyright protection nor the right of others to creative room for manoeuvre could be defined.

2.4.2.1 Performers' performances As repeatedly stated earlier, the discussion in the present article is based on the premise that the performer's performance is original. The question therefore becomes whether performers' performances can also fulfil the second requirement for copyright protection, that is that the subject matter of protection is identifiable with sufficient precision and objectivity.[146]

Different groups of performers use different forms of expression in their performances.[147] The main action and the common feature of performers' performances as defined in the RC[148] is that they interpret works of authorship.[149] The actor interprets a literary work, making subjective, creative choices about how to interpret the text contextually and how to present that interpretation on stage. Through their own body and voice, the actor conveys the chosen interpretations and expressions. The dancer uses movement and steps, translating the choreographic work into dance, which is another way of expressing what an interpretation can express. The movements are given a value of their own through the overall determination of what is being expressed. In a research study on performers' performances, one dancer stated that there is not a single movement on stage that is not rooted in her feelings or thoughts, which she has pre-selected and which she repeats during the performance.[150] Similar interpretations are made by other performing artists, such as vocalists, musicians or conductors, using their voice, various instruments or the conductor's baton and their body, respectively, as a means of expression.

It is not difficult for an expert to distinguish the work from the performer's performance, to identify the various options for expression and to identify the creative choices made by the performer.[151] In our view, it is generally no more difficult to identify, precisely and objectively, the protected content of performers' performances than it is to identify the protected content of other adaptations.

The conclusion is therefore that performers' performances can fulfil the general copyright requirements, as set out in CJEU case law.

137 Joined cases C-403/08 and C-429/08, ECLI:EU:C:2011:631 (FAPL), para 98.

138 C-310/17, EU:C:2008:573 (Levola), para 32.

139 BC art 2.

140 C-310/17, EU:C:2008:573 (Levola), para 26.

141 Lancôme/Kecofa; Nep-parfum, HR 16 juni 2006, NJ 2006, 585 (ECLI:NL:HR:2006:AU8940), cf C-310/17, EU:C:2008:573 (Levola), para 22.

142 C-310/17, EU:C:2008:573 (Levola), para 33: 'The directive makes no express reference to the laws of the Member States for the purpose of determining the meaning and scope of the concept of a "work". Accordingly, in view of the need for a uniform application of EU law and the principle of equality, that concept must normally be given an autonomous and uniform interpretation throughout the European Union.'

143 C-310/17, EU:C:2008:573 (Levola), para 34.

144 C-310/17, EU:C:2008:573 (Levola), para 36.

145 C-310/17, EU:C:2008:573 (Levola), para 40.

146 C-310/17, EU:C:2008:573 (Levola), para 40ff.

147 Eidsvold-Tøien (2016), 37ff.

148 RC art 3(a): '"performers" means actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, or otherwise perform literary or artistic works.'

149 J Kohler, *Autorschütz der reproduduzierenden Künstler* (GRUR 1909) 2. M Grünberger, *Das Interpretenrecht* ['Performers' Rights'], (Carl Heymanns 2006) 58. Grünberger refers to German law, under which the right to interpretations is held by the performing artist expressing such interpretation Eidsvold-Tøien, NIR 2/2017, 135. There are nonetheless performing artists who create their own work and then perform it, such as circus artists and improvisation artists.

150 Eidsvold-Tøien (2016), 61.

151 The Norwegian Bar Association proposed copyright for performers in Norway. In its reasoning, it stated that it is *no more difficult* to identify the creative choices of a performer than to locate the original contribution of an author. See Norwegian Legislative Proposition 104 (2016–2017), 76.

2.4.3 Is the existence of a neighbouring rights structure a barrier to copyright for performers?

As we have argued previously, we do not find that the international copyright and performers' protection treaties are a barrier to granting copyright to performers' performances. This leaves the question of whether the existence of performers' protection in EU law is in itself a barrier to copyright. That is, whether such performers' protection displaces, within its scope, the more general copyright rules.

One possible approach to this question is to ask whether the neighbouring rights rules take precedence as *lex specialis*. The rationale behind this principle is that the specialized rule is presumed to be more tailored than the general rule, and the former is thus presumed to be better suited to regulating issues in the relevant field than is the latter.

We are of the view that there is no conflict between copyright and performer's protection, in the sense that the neighbouring rights structure better meets the protection needs of performers' performances. These two sets of rules can be applied alongside each other because they provide protection for different aspects of an expression. On the one hand, performers' protection can be considered an aspect of personality rights protection rather than the protection of an original, creative expression.[152] The original, creative expression in a performance, on the other hand, is very similar to other categories of creative works and should be protected by copyright in the same way as these when the basic copyright requirement is met.[153] It is difficult to see any valid argument in favour of treating original, creative performers' performances differently from other categories of original, creative works.[154]

Even if there is no conflict between the sets of rules, one may ask whether the significant degree of overlap suggests that copyright protection should be excluded. However, overlapping protection regimes are well known and fairly common in IP law. This means, generally speaking, that one is not forced to rely on one form of protection only, as the same creation may enjoy several forms of protection (if the conditions are met) for the various characteristics of such creation. An obvious example is photographs, which are protected by specific photographic rights with their own term of protection provisions, as well as by copyright if the photograph fulfils the general copyright requirements. The EU Copyright Term Directive stipulates that each EU Member States may decide whether to introduce national rules to protect photographs that are not works of authorship.[155] This will result in different levels of protection for the same type of creation and different regulations in different Member States. Norway has chosen to have such rules. Section 23 of the Norwegian Copyright Act protects photographs that do not qualify as works of authorship, granting these a 15-year term of protection. It is, however, optional for Member States to introduce such rules. Another example of creations that may enjoy cumulative and alternative protection are databases, which are protected both as 'works of authorship' under EU law, while also enjoying sui generis protection when the originality requirement is not met.[156] The principle of cumulation (several types of protection for the same creation) is also laid down in the EU Designs Directive,[157] which states that: '… it is important to establish the *principle of cumulation* of protection under specific registered design protection law and under copyright law' (emphasis added).

When EU law provides for cumulative protection, it is often because different forms of protection protect different aspects of a contribution. A work of authorship—embodied in, for example, a chair—can be given both copyright protection for the design of the chair and patent protection for the technical solutions of the chair.[158] Likewise, a ringtone may, by being an original combination of different tones, trigger both copyright protection as a work of authorship (composition) and trade mark rights as a sound identifier of a company or product.

Although the CJEU has not considered the issue of copyright for performers' performances, CJEU case law on the term 'works of authorship' and the copyright criteria may provide guidance on how the CJEU will assess

152 Eidsvold-Tøien (2016), 120, Lassen (1981), 304. The person must perform literary or artistic works or expressions of folklore.

153 Ricketson (2006), 1207.

154 The incentive reasoning is cited in the copyright regulations of both civil law and common law jurisdictions. See eg Goldman (2019), 111.

155 *Directive* 2006/116/EC of *the European Parliament and of the Council of* 12 December 2006 *on the term of protection of copyright and certain related rights*, art 6, cf recital 16. The wording of the provision does not make it mandatory for Member States to introduce protection for photographs that are not IP, but the provision *allows* for Member States to grant double protection—ie to also protect photographs on the basis of a neighbouring rights structure. This shows that double protection is both known and recognized.

156 *Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases*, art 3 (copyright) and art 7 (sui generis right).

157 *Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs* (Designs Directive), art 16 and 17.

158 This example refers to the Tripp Trapp chair, which the Norwegian Supreme Court found, in 2012, to enjoy copyright protection against the imitation 'Oliver' chair. See HR-2012-01325-A (Tripp Trapp), para 4, where it is noted that the chair has had patent rights in the past. Tripp Trapp, para 5: 'The chair that grows with the child.'

the issue.[159] A clear feature of existing case law is that the copyright criteria are formulated uniformly and generally, regardless of the type of work of authorship. See the above-mentioned discussion on this.[160] The CJEU's general and uniform approach to the copyright criteria can be considered a reflection of an equal treatment principle. The equal treatment of applied art and fine art may also be mentioned here. In *Donner* and *Peek & Cloppenburg*, EU law in the field of the InfoSoc Directive was applied to cases outside the digital arena, in relation to art pieces and articles of daily use.[161] Furthermore, the CJEU stated in *Flos* that the Design Directive[162] had to be supplemented by the InfoSoc Directive.[163] Moreover, it is observed in *Painer* that all types of works enjoy the same protection.[164] This gives rise to an expectation that the CJEU will extend equal treatment to performers' performances and grant these copyright by applying the same criteria as have been established for other types of works.

Besides, the fact that the CJEU relies so heavily on international treaties to determine the scope of EU copyright[165] suggests that EU law would not prevent copyright in performers' performances unless the WPPT, the RC, the Beijing Treaty, the WCT or the BC prevented it. The latter is addressed earlier in this article.

3. Summary and conclusions

The discussion has shown that neither international treaties nor EU law prevents the granting of copyright to performers' original performances in national law and EU law. On the contrary, the uniform meaning of the term 'work of authorship' in EU law probably implies that Member States are required to grant copyright protection in performers' performances that fulfil the originality requirement.

Our conclusion primarily stems from our analyses and assessments of the emergence of the BC having shown that the basis for excluding performers' original performances from the scope of the BC was partly a factually incorrect assertion (that performers are not creators) and partly the result of special interests of other stakeholders (the 'pie theory'). Our conclusion is thus that the BC is not a barrier to granting copyright protection for performers' original performances.

Furthermore, EU case law in this field demonstrates that the requirements for copyright protection have been harmonized. The CJEU has observed that the assessment should attach weight to the nature and making of the creation, and not to the medium through which it is expressed, when determining whether or not a creation can be protected by copyright. It has also observed that the principles and underlying premises of international treaties remain a key source for the CJEU's assessments and conclusions in the field of copyright law. This brings us back to the important findings we have made regarding the development of the BC, which we have explained previously.

With regard to how a potential copyright for performers should be applied, it is clear—in our view—that if performers can claim copyright for their performance, they cannot at the same time claim neighbouring right protection for such performance. They are adequately protected by having, as the author of an adaptation of a work, an exclusive right—including a performance right—to such adaptation. Copyright protection replaces the neighbouring rights protection for original performances. It is also consistent with how such copyright 'double protection' is established for other types of creations; if the production qualifies for photographic work protection or for copyright database protection, the substance and scope of the rights are determined on that basis. A copyright-protected performer's performance may nevertheless enjoy protection through personality rights protection not only when a performer is performing a work or folklore as in a neighbouring rights structure but generally.[166] This is in our view a supplementary protection. However, these issues will not be addressed further in this context although there are important caveats.

In sum, we are of the view that our interpretation of applicable EU copyright law is not only supported by relevant sources of law but that it also is fair and appropriate. We will, however, leave that subject for future research work.

159 C-5/08, EU:C:2009:465 (Infopaq), paras 33–37, cf C-145/10, ECLI:EU:C:2011:798 (Painer), para 87, and C-393/09,EU:C:2010:816 (BSA), para 50.

160 See s 4.4.2 of the article on the total harmonization of the copyright requirements, which apply to all types of works.

161 *Peek & Cloppenburg KG v Cassina SpA* (Peek & Cloppenburg), C-456/06, EU:C:2008:232 and Titus Alexander Jochen Donner (Donner), C-5/11 EU:C:2012:370.

162 *Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs (Designs Directive).*

163 *Flos SpA v Semeraro Casa e Famiglia SpA (Flos)*, C-168/09, EU:C:2011:29, para 34: 'However, it is conceivable that copyright protection for works which may be unregistered designs could arise under other directives concerning copyright, in particular Directive 2001/29, if the conditions for that directive's application are met, a matter which falls to be determined by the national court.'

164 C-145/10, ECLI:EU:C:2011:798 (Painer), paras 97 and 98.

165 C-5/08, EU:C:2009:465 (Infopaq), para 32; C-265/19,EU:C:2020:677 (RAAP), paras 51 and 52.

166 Personality rights protection has its origin in the right to respect for private and family life, ECHR art 8, and encompasses, inter alia, the right to one's own image, etc.