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Creative, Performing Artists – Copyright for Performers?

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1. Introduction

Copyright protected material, such as books, films and music, has a major impact on pleasure and reflection in our societies, and is at the core of one of the most important and fastest growing industries viewed from an economic perspective.¹ The contributions of performers are fundamental to the content being made available for the public and are, in addition, decisive for *the quality* of the public's experience of a work.

Copyright has a fundamental impact in securing the remuneration of artists and in creating an incentive to continue to be creative.² In Europe, performers do not have copyright. According to the Norwegian Copyright Act 1961, a performer has protection for *his/her presentation of a work* in conjunction to a *related right structure*.³ This is a weaker protection than copyright, both in terms of time and scope.⁴ Performers are the right holder group in Europe with the lowest average income.⁵ In modern times there has been little research on the question of why performers do not have copyright. Hardly anything is written concerning this topic. The only literature touching the subject is an article by Michael Grünenberger,⁶ a PhD thesis from 2011 and one on theatre direction, which can be claimed to discuss some of these issues.⁷

In this article I present the grounds for why, in my opinion, performers fulfil the criteria for copyright, and I then undertake a discussion as to why they are not given copyright by Norwegian and European law. The article is based on my PhD.⁸ I surveyed whether performing artists could claim copyright through *their interpretations of a work*. I used an *ordinary legal method* in my thesis. I also interviewed artists – dancers, musicians, conductors, theatre directors and actors – about their working processes in connection with a performance.

By *interpreting the work* they are performing the artist makes several personal, creative choices as to *how the work can be understood and how to express this* interpretation. A performer's acquired technique correlates with the spectrum of choices from which the performer can select when choosing how to perform the interpretation. A dancer with great technique can express her interpretation of "Sleeping Beauty" in a more complex way than a dancer with less capability. The performer's *creative choices* are congruent with the core demand for "originality", which qualifies for copyright.⁹ This implies that performers can claim copyright. The Norwegian

¹ Anne-Britt Grand, Øyvind Torp and Marcus Gjems Theie, "Creative industry in Norway 2008-2014", Oslo 2016.

² Stephen Michael McJohn, *Copyright*, New York 2009.

³ Lov 12. mai. 1961 nr. 2 (in the following the Norwegian Copyright Act or NCA) § 2.

⁴ No imitation right and up to 140 years shorter protection.

⁵ Commission Staff Working Document, *Impact Assessment on the Legal and Economic Situation of Performers and Record Producers in the European Union*, SEC (2008) 2287.

⁶ Michael Grünenberger, "A duty to protect the rights of performers? Constitutional foundations of an intellectual property right", *Georgetown University Law Center*, vol. 24/617, New York 2006.

⁷ Simon Apel, *Der ausübende Musiker im Recht Deutschlands und der USA*, Bayreuth 2011. Anna Hammarén, *Teaterregi och upphovsrätt*, Stockholm 1997.

⁸ Irina Eidsvold Tøien, *Skapende, utøvende kunstnere - vurdering av beskyttelsen av utøvende kunstneres prestasjoner etter norsk rett*, Oslo 2015.

⁹ Cf. Case C-145/10, *Eva-Maria Painer v Standard VerlagsGmbH and Others*, Report of Cases 2011 I-12533 (in the following C-145/10, *Painer*) (premises 88, 89) and Case C-604/10, *Football Dataco Ltd and Others v Yahoo! UK Ltd and Others*, published in the electronic Report of Cases (Court Reports – general) (in the following C-604/10, *Football Dataco*) (premise 40).

Copyright Act (åvl. § 1) – like the EU law – gives an author copyright for creating an *original work*.¹⁰ To obtain copyright and fulfil the originality requirement one must give the work a personal touch,¹¹ which is achieved by making *free and creative choices*.¹²

Performers have copyright in both the USA and in Canada. The European Commission has expressed the political ambition of strengthening performers' positions and narrowing the economic gap between authors and performers.¹³ Copyright would give stronger protection than the rights performers have today. Such changes could therefore comply with the goal of the EU Commission. However, there are forces, more or less overtly stated, which are working against copyright for performers. One ambition of my PhD work¹⁴ was to open a discussion on the matter. A discussion could create a basis for facilitating the passing of a regulation of performers' rights, which would take into account enhanced cultural and judicial goals as a whole, rather than positioning performers on account of other right holder groups' economic interests, which seems to be the most significant reason for not giving copyright to performers initially.¹⁵

In the following chapters I will substantiate why performers fulfil the criteria for copyright (Chapter 3) and what the pros and cons of such a change might be (Chapters 4).

The main legal source for my thesis is the Norwegian Copyright Act (NCA). Because of Nordic legal conformity within the copyright field, the Nordic copyrights acts are within the scope of the findings in my doctoral thesis.¹⁶ The NCA complies, however, with the EU directives on copyright,¹⁷ which to a large degree harmonise the economic rights and other main copyright concepts within the EEA area.¹⁸ The impact of my work could, on that account, easily be seen as having a wider scope than national Norwegian law. In this paper I also discuss whether *copyright for performers* is in conflict with international law or conventions, such as the WIPO treaties, the EU treaty or other major international regulations.

2. Criteria for copyright

The origin of the regulation within the NCA is the Berne Convention.¹⁹ Norway was the first of the Nordic countries to sign the Convention in 1896.²⁰ According to the The Norwegian Copyright Act § 1, the individual who creates *a work* can achieve copyright. In the second paragraph of the statute, different types of work are

¹⁰ The European Court of Justice (ECJ) has confirmed the relevance of the originality criteria as being essential to obtain copyright, through several judgments in recent years.

¹¹ Case C-145/10, *Painer* (premise 92).

¹² Cf. C-145/10, *Painer* (premises 88, 89) and C-604/10, *Football Dataco* (premise 40).

¹³ Commission Staff Working Document, *Impact Assessment on the Legal and Economic Situation of Performers and Record Producers in the European Union*, SEC (2008) 2287 pp. 2 and 10.

¹⁴ I wrote a PhD on artists' performances, surveying whether performers fulfill the criteria for copyright: "*Creative, performing artists – a surveille on the legal position of performing artist's position according to Norwegian law*", (my translation), Oslo 2015.

¹⁵ In my research, I found that pressure from music publishers was the main reason for grouping performers outside copyright protection, cf. Eugen Ulmer, "The Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations", *The Copyright Society of the USA*, 1963 p. 90.

¹⁶ Ot.prp. nr. 26 (1959-1960) Om lov om opphavsrett til åndsverk.

¹⁷ Prop. 69 L (2014-2015) Endringer i åndsverkloven (gjennomføring av EUs hitteverkdirektiv og innføring av generell avtalelisens mv.).

¹⁸ Eleonora Rosati, *Originality In EU Copyright, Full Harmonisation through Case Law*, London 2013.

¹⁹ Birger Stuevold Lassen, *Internasjonal opphavsrett*, Oslo 1995 p. 149.

²⁰ *Ibid.*

listed in order to clarify what kind of products that are likely to fulfil the demands for being a *work*.²¹ The list is not exhaustive.²² “Adaptations” are listed among the examples (NCA § 1, second paragraph no. 13). An *adaptation* is explained in the preparatory work as being a new version of the work of origin; where the main features are retained, but the adaptor supplies her own original contribution.²³ Typical adaptations are where a composition is scored for additional instruments; a book is transformed into a film or is translated into another language.

According to Norwegian case law the criteria for copyright are fulfilled when someone creates something with *individual features* that express *originality*.²⁴ Examples from Norwegian /Nordic case law include a chair, a table, a boat, a house, small trolls etc. Music, film and books are the most common copyright protected goods. Through digitization and Internet distribution, the creative industry -- and within this industry, cultural goods protected by copyright -- is among the most significant industries in the Norwegian and European economy.²⁵

The Norwegian law complies with the EU’s regulation on copyright, due to the EEA-agreement between Norway and the EU.²⁶ The agreement establishes an obligation for Norway to comply with the EU law through the NCA and with concepts in the copyright directives that are not specifically excluded.²⁷ Among the concepts that are harmonised is the originality requirement.²⁸

2.1 Harmonisation of the demand for copyright through ECJ case law

The European Court of Justice (the ECJ) has specified the originality requirement in several judgments since 2008. In the case of *Infopaq International* the ECJ interpreted “originality” to be within the mandate of EU law,²⁹ even though the EU Commission had stated four years earlier that the threshold for copyright – originality – should be within the member state’s own area of competence. The implication of the change of direction could be seen as a reconsideration of the importance of copyright protected goods for the European economy. Equally it could be seen as an acknowledgement of the significance of a harmonised protection level in fulfilling one of the main goals for the confederation of achieving the realization of the *free movement of goods* and services in *one common market*.³⁰ The challenge of different protection levels was evident, for instance, in the *Football Dataco* case,³¹ where the football association Premier League had been granted copyright by a first instance court in England for the collection of information.³² According to the ECJ, copyright can be achieved only through originality in *how to structure* a database, not for the collection of information in itself. Leading

²¹ The Norwegian Copyright Act § 2 first paragraph.

²² Ot.prp. nr. 26 (1959-60) Om lov om opphavsrett til åndsverk.

²³ SOU 1956:25 Upphovsmannarätt till litterära och konstnärliga verk.

²⁴ Rt. 2007 s. 1329 (“Huldra i Kjosfossen”) (premise 43).

²⁵ Anne-Britt Grand, Øyvind Torp and Marcus Gjems Theie, “Creative industry in Norway 2008-2014”, Oslo 2016.

²⁶ Fredrik Sejersted, *EØS-rett*, Oslo 2011 cf. Ole-Andreas Rognstad, *Opphavsrett*, Oslo 2009.

²⁷ Case C-5/08, *Infopaq International A/S v Danske Dagblades Forening*, published in Report of Cases 2009 I-06569 (in the following C-5/08, *Infopaq International*) (premise 27) cf. Case C-201/13, *Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others* (not yet published in Report of Cases) (premise 14).

²⁸ Eleonora Rosati, *Originality In EU Copyright, Full Harmonisation through Case Law*, London 2013.

²⁹ C-5/08, *Infopaq International* (premise 27 etc.).

³⁰ Fredrik Sejersted, *EØS-rett*, Oslo 2011 cf. Ole-Andreas Rognstad, *Opphavsrett*, Oslo 2009 p. 86.

³¹ C-604/10, *Football Dataco*.

³² *Ibid.* (premise 22).

jurisprudence has characterized the decision as a farewell to the British “sweat of the brow doctrine” where one could achieve copyright for the toil of collecting data.³³ In this case, Yahoo had, without permission from the Football Association Premier League, disseminated information from the database on football matches. If the database had been protected by copyright, Yahoo could not have done that. One could interpret the judgment as stating that copyright protection aims to encourage *innovative and creative ways* to structure information, not to protect the collecting of information itself (that can be protected by other laws³⁴). Copyright protection rewards investment that is important from a cultural, artistic perspective.³⁵

Through the Infopaq International- and the BSA-decision³⁶ the ECJ clarified that the criteria for copyright are *the same* as in former technology directives.³⁷ By verifying the statement from Infopaq International premise 35, the concept of originality was held to be *EU-harmonised*.³⁸ In the Painer-decision the ECJ gave further directions for what “originality” implies and how to decide whether the demands are met.³⁹

As stated above, the ECJ expresses through these cases that the threshold for copyright is a requirement for there to be a *personal touch* in the work if it is to obtain copyright protection. When someone makes *free, creative choices* as to how something shall be expressed, the demands are fulfilled.⁴⁰ To give an example, the judge in the Painer case mentioned a photographer’s choice of *atmosphere* in a picture, *the framing*, the *amount of light* allowed through the lens, or the *technique* she chooses for the *development process*.⁴¹

Because of Norway’s obligation as an EEA member, the interpretation of the originality demand for copyright is relevant to our national copyright law, as for all member states in the EU.

3. Do performers fulfil the requirements for copyright?

3.1. Introduction

One can query how the EU copyright regulation affects a performer’s legal position and rights in Norway. As stated earlier, performers have protection for *their performances of a work* in conjunction with a related right structure under the NCA chapter 5.⁴² This is similarly regulated in the Infosoc Directive – the main copyright

³³ Eleonora Rosati, *Originality In EU Copyright, Full Harmonisation through Case Law*, London 2013. It will be interesting to see if there will be any consequences due to “Brexit” with regard to this issue.

³⁴ The laws of unfair competition.

³⁵ Eleonora Rosati, *Originality In EU Copyright, Full Harmonisation through Case Law*, London 2013.

³⁶ Case C-393/09, *Bezpečnostní softwarová asociace – Svaz softwarové ochrany v Ministerstvo kultury*, published in Report of Cases 2010 I-13971 (in the following C-393/09, *Bezpečnostní softwarová asociace* or *BSA*).

³⁷ Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, Directive 96/191/EC of the European parliament and the Council of 11 March 1996 on the legal protection of databases, Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights.

³⁸ C-5/08, *Infopaq International* (premises 27 etc.) cf. C-393/09, *Bezpečnostní softwarová asociace*. (premises 45 and 50). See also Eleonora Rosati, *Originality In EU Copyright, Full Harmonisation through Case Law*, London 2013.

³⁹ Cf. C-604/10, *Football Dataco* (premise 38), C-393/09, *Bezpečnostní softwarová asociace* (premise 50). C-145/10, *Painer* (premises 88, 89).

⁴⁰ C-145/10, *Painer* (premise 91).

⁴¹ C-145/10, *Painer* (premise 91).

⁴² The Norwegian Copyright Act § 42.

directive for copyright in the EU.⁴³ *Related rights* give a weaker protection than copyright, both in terms of time and scope.⁴⁴ Such protection is granted to producers and to others who do not fulfil the requirement for artistic contributions.⁴⁵

In my PhD work I explored whether performers fulfil the requirement for copyright.⁴⁶ If performers could achieve copyright it would strengthen their legal and economic position. It also could strengthen their artistic position. The protection will be based on *the originality of their interpretations*, not solely on their *performance of a work*. I will elaborate further on the consequences of a change of protection in a later chapter.

Performers are, from a legal definition of “performers” in the Rome Convention, “*actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, or otherwise perform literary or artistic works*”.⁴⁷ In my thesis I interviewed performers from five groups of artists: two dancers, several actors, two theatre directors, one conductor and one musician. They are all leading artists within their field – most of them also with an international career. The number of artists is not significant to fulfil the requirement for scientific sufficiency as interview objects. However, with support from aesthetic theory, I created a *factual basis* for the description of performers’ working processes: from when they receive the work to be performed until the public performance.⁴⁸

3.2 Interpretation as creativity

A *work* must be interpreted by a performer to be understood by an audience. If a work has the potential for being interpreted – i.e. understood in different ways at different times – it has the potential to become “classic”. It is also a premise for surviving the “teeth of time”. If it is too bound to its own time and references, it will only be relevant for a certain period. Joseph Kohler, who is considered the founder of copyright in Western Europe, states that a work is merely a “*tabula rasa*” – dependent on being interpreted to be complete.⁴⁹ Another aesthetic theorist expresses the view that: “The dramatic character given in a text is, in some sense, an incomplete human being; he does not represent a sensual human being but a sum of all that can be known about a human being through literature ... As a work of poetry the drama denotes a self-sustaining whole; with regard to the totality of the staged event it remains a symbol from which alone it ... cannot be logically developed”.⁵⁰

⁴³ Directive 2001/29/EC of the European Parliament and the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (Infosoc) Art. 1. No. 1 C.F.R., Art. 2 litra b and Art. 3 no. 2 litra a.

⁴⁴ No imitation right and up to 140 years shorter protection.

⁴⁵ The Norwegian Copyright Act § 45.

⁴⁶ Irina Eidsvold Tøien, *Skapende, utøvende kunstnere - vurdering av beskyttelsen av utøvende kunstneres prestasjoner etter norsk rett*, Oslo 2015. My PhD is later published as a book with a similar title: *Skapende, utøvende kunstnere. Beskyttelsen av utøvende kunstneres prestasjoner etter norsk rett*, Oslo 2016. When I later on in this article refer to my PhD, I refer to the book where my PhD is published.

⁴⁷ Rome Convention Art. 3 (a). The Norwegian definition is very similar, just adding directors and theatre directors, cf. lov 14. mai 1956 nr. 4 om avgift på offentlige framføring av utøvende kunstneres prestasjoner m.v. § 1.

⁴⁸ A “work” is the smallest element of copyright protected goods and a result of “originality” within a “work”. “Originality” is the minimum demand for copyright, and the criterion is fulfilled when “free, creative choices” are made.

⁴⁹ Joseph Kohler, *Autorschutz des reproduzierenden Künstlers. I. Vol. 20, 1909*.

⁵⁰ Erika Fischer-Lichte and Saskya Iris Jain, *The transformative power of performance: a new aesthetics*, London 2008.

A performer must therefore *interpret the material* she is performing. She must decide *the context* of the work, for instance determine the motivations for *why she moves* or *what she means* when *she says what she says*. A basic question is whether an interpretation is *a result of a performer's creativity* or findings of what *the author of the work* of origin really meant. The answer is of significance for my research question: whether performers are creative and can therefore claim copyright for their performances.

As I address in my thesis,⁵¹ there are several circumstances and arguments for the performer being the source and the creator of an interpretation, and for the work *being the frame* for an interpretation:

1. In European case law it is considered that *language* is a carrier of factual information, and that *reading* is all that is required to understand the factual information in a text. Language can also be a *medium for art* by giving context to a text, and then letting the parts expressed be influenced by such an overlay. That actors and musicians have such roles is stated in the judgment.⁵²

2. The reasoning behind copyright also favours that the interpretation is a result of *the performers' creativity*. The Hegelian justification for copyright was explained through seeing a work as being a result of a person's intellect, and the intellect as a part of someone's body. Furthermore, it held that "the fruits" of someone's body/person should belong to the person.

However, in order to make a work relevant for others the author needs to abstract the privacy in a work, i.e. create a distance *from private to general*, but still keep a personal touch in it. This is where the artistic dimension of a work lies. The abstraction gives a work space for interpretation and gives others room to *connect to the work* with new realities and references. The abstraction also represents a work's potential to become a classic.

3. In addition, aesthetic theories' categorisation of performer's activity as *a hermeneutic procedure* supports the perspective of interpretation being based on *the performer's creativity*.⁵³ A hermeneutic process means that achieving a thorough understanding of a complete work will give all small parts of the work the same context. To make it possible for an audience to relate to the context the context must be *genuine for the performer*, which therefore demands that the performer chooses references from *her own* experience or imagination.

4. In addition, the fact that a performer's technical ability is influencing the expression acts in favour of interpretations being a result of *a performer's creativity* rather than the author's. A performer's technique is decisive for the spectrum of choices a performer has to express her interpretation. The interpretation will therefore also be the result of a performer's technical abilities.

⁵¹ Irina Eidsvold Tøien, *Skapende, utøvende kunstnere. Beskyttelse av utøvende kunstneres prestasjoner etter norsk rett*, Oslo 2016 p. 191 ff..

⁵² Cf. GRUR 1981 s. 419 (Quizmaster).

⁵³ Hans-Georg Gadamer and Lars Holm-Hansen, *Sannhet og metode: grunntrekk i en filosofisk hermeneutikk*, Oslo 2012 p. 96.

I therefore conclude in my thesis that an interpretation is created through the imagination and technical abilities of a performer.⁵⁴

In addition to interpreting the work, a performer must *translate the symbols* in which the work is stored into a “language” the audience can understand. A book is stored in written symbols and needs to be *read* and then *spoken and played* in the actor’s context in order to be understood. A choreography must be translated from *laban*⁵⁵ – or another “language” for storing movements – *into dance*, notes into *tones* and a drama in writing has to be rendered into *an audio-visual stage performance* etc.

In the following pages I will elaborate this for each group of performers.

3.3 The performer’s contribution

To summarise, the criteria for copyright protection are fulfilled when someone, within the literary or artistic field, creates something that is the *author’s intellectual creation*.⁵⁶ This occurs when an expression has an *author’s personal touch*, because someone has made *free and creative choices* as to what form a work shall be given.⁵⁷ Relevant legal sources state that the demands for copyright should be *totally harmonised*, both horizontally⁵⁸ and with regard to the criteria for copyright protection.⁵⁹

I base my conclusions in my doctoral thesis mainly on classical performances, but presume that similar conclusions are applicable for more modern expressions.⁶⁰

In the following chapters I will present the reasoning in connection to five different artistic groups: actors, musicians, dancers, conductors and theatre directors. Both legal sources and aesthetic theory are relevant as arguments for my conclusions. This is also valid from a legal point of view, since facts (how the artists work) will always be a part of legal reasoning.

When I consider whether performers can achieve copyright it is the performers *own contribution* that is relevant for the evaluation. This is the same as for other derivative analyses, such as when considering whether *an adapter fulfils the requirement* for originality and copyright. This might be for instance when a writer makes *changes in a screenplay* of a manuscript for film, or a composer *rearranges music* for an orchestra or someone *translates a book* to another language.

As one sees from the previously mentioned case law from the ECJ that it is the *choice of the form* of expression which is relevant when considering whether something should achieve copyright or not. For a performer this

⁵⁴ Irina Eidsvold Tøien, *Skapende, utøvende kunstnere. Beskyttelsen av utøvende kunstneres prestasjoner etter norsk rett*, Oslo 2016 p. 198.

⁵⁵ A language for choreography.

⁵⁶ The Norwegian Copyright Act § 1 cf. C-5/08, *Infopaq International* (premise 35).

⁵⁷ C-145/10, *Painer* (premise 87-89).

⁵⁸ *Horizontal harmonisation* means that the same criteria is applicable for all kinds of work.

⁵⁹ Cf. C-5/08, *Infopaq International* (premise 34-37), C-393/09, *Bezpečnostní softwarová asociace* (premise 45) and C-604/10, *Football Dataco* (premise 38). The same is expressed in Eleonora Rosati, *Originality In EU Copyright, Full Harmonisation through Case Law*, London 2013.

⁶⁰ The Norwegian Copyright Act § 42.

means that a potential copyright shall be evaluated on the basis of the performer's decision as to *how the work shall be interpreted* and *how this shall be expressed*.

3.3.1 An actor's contribution

Konstantin Stanislavski⁶¹ and his acting theories are still central for actors and their performances at theatres today.⁶² His theories are therefore relevant for my examination of *what an actor does*, in order to evaluate actors' working processes to decide whether they fulfil the requirement for copyright.

Stanislavski wanted to reveal the *laws of nature* to be able to recreate them on stage.⁶³ The actions on stage (the root for "acting") are the actors' "language". The word "action" must be understood widely, encompassing inner actions. For instance, when an actor makes mental obstacles for himself by walking into a room with the mental attitude of wanting to leave it. It is essential to arrange *conflicts on stage* - either *between characters* or *within a person herself* - to give a performance tension and excitement. All actions on stage are connected to a psychological pattern.⁶⁴ The activity can be divided into three tasks: (1) The action must have a goal (What do I want to achieve?), (2) it must be given a psychophysical realisation (What do I do to achieve this?), (3) adjustments must be made (How do I achieve this?). For all tasks there are choices where the actor must decide *what to do*. The actor's choices will make an imprint on all moments on stage, expressed through space and time.

The reason we react in real life is our reaction to the environment. The actions can be expressed as *a thought* or *an action*. A great many "actions" on stage are without words. On stage, the "actions" *must be created* by the actor and/or the theatre director. Circumstances that trigger these actions are given in the drama ("suggested circumstances").⁶⁵ The theatre director translates these circumstances to fit into her own conception of the play. Within these circumstances the actor must choose actions that connect the events in the drama to a recognisable human totality.

An actor's imagination is of decisive importance for her choices: to create a scenic reality founded on her previous experiences and her sensuality. Released by an "if" during rehearsals of the play, the actor's improvisation starts. The scenic actions will always release a rhythm, either of the same kind as other characters or different. The rhythm will change every time the character chooses a new "action", often released by new circumstances in the manuscript.

One of the tools through which an actor can communicate his actions is by *talking*. When the words are translated to speech, and the drama is translated from literary to audio-visual work, the actor must choose what she will play (the interpretation) and how she will do this (the actions). In order to make the audience

⁶¹ Konstantin Stanislavski's knowledge of acting was written down in two books, although he never managed to finish the last one: *An Actor Prepares*, New York 1936 and *An Actor's Work on a Role*, 1925.

⁶² In my doctoral thesis, I refer to Irina Malochewskaja's book *Regiskolen*, 2011 (in English: "The school of directing"). The teaching of acting and theatre directing at the Norwegian Drama school (KHIO) in Oslo today is based on Irina Malochewskaja's theories. In her book, she states that she builds her theories on Meyerholt and Stanislavskij, cf. Irina Malochewskaja, *Regiskolen*, Oslo 2011.

⁶³ *Ibid.* p. 31.

⁶⁴ *Ibid.* p. 32.

⁶⁵ *Ibid.* p. 54.

understand the drama the actor must take a stand: “When we are communing with one another words do not suffice. If we want to put life into them, we must produce feelings. They fill out the blank left by words, they finish what has been left unsaid”.⁶⁶ The precision occurs through the actors’ scenic actions, underlining the lines and other actions on stage: Konstantin Stanislavski states: “A play writer brings forward *the text*, the actor creates *the meaning* of it. The play is not completed before an actor plays it on stage and makes it genuine by real, human emotions”.⁶⁷

The criteria for copyright in connection to acting

From EU case law, the criteria for copyright are determined to be requirements for the making of *free, creative choices* in order to give a work a *personal touch*.⁶⁸ An actor can obviously not achieve copyright for the lines she is expressing. An actor’s contribution is *her interpretation* and *the way she chooses to express her interpretation*. Even though she does not rearrange the words in the text, she *changes the meaning* through her interpretation. This activity can be seen as creating *a new version* of a work – an adaptation – where the originality of the expression is in the actions which the actor has chosen to “underlie” the text, and other aspects of her freely chosen activities on stage. Both in the Berne Convention,⁶⁹ in EU law, and in the NCA, it is stated that *adaptations can achieve copyright* as long as the requirement for originality is fulfilled. The adaptor must add her own intellectual creativity to the arrangement

Gadamer has classified the actor’s artistic contribution as being ways of *describing phenomena*.⁷⁰ The different ways in which authors (among them performers) fulfil the originality requirement depends on what kind of artists they are. Different artists express themselves through different tools of expression: composers through music (compositions), choreographers through movements (dance), authors through words (literature), artists through drawing, sculpting and painting (art) etc. The case law in copyright covers photographers, designers, writers and film directors’ activities.⁷¹

When one considers the creative contribution of an actor one must *subtract the personality* in the expression. Neither an actor’s voice, her looks or the way she walks (if it is peculiar) are expressions *created by* the actor. Such elements are tools through which the expression is communicated, and this has its own legal protection as “Right of personality” in Europe, being seen as natural rights.⁷² Such regulation will not be further considered in this paper, even though it undoubtedly contributes to how a performance appears.

⁶⁶ Konstantin Stanislavski, *An Actor Prepares*, New York 1936.

⁶⁷ *Ibid.*

⁶⁸ C-604/10, *Football Dataco* (premise 38) and C-145/10, *Painer* (premise 88).

⁶⁹ The Berne Convention for the Protection of Literary and Artistic Works of September 9th 1886 (last amended on September 28th 1979) Art. 2 no. 3: “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”.

⁷⁰ Hans Georg Gadamer, *Sannhet og metode*, Vol. 1, Oslo 2010 p. 104.

⁷¹ Case C-277/10, *Martin Luksan v Petrus van der let*, published in the electronic Report of Cases (Court Reports – general), C-5/08, *Infopaq International*, C-393/09, *Bezpečnostní softwarová asociace* and C-145/10, *Painer*.

⁷² Are Stenvik, “Rettsbeskyttelse av personlig særpreget”, *Tidsskrift for Rettsvitenskap* 05/2003: 42 2003 p. 602.

The degree of originality in acting

In the *Infopaq International*-case the ECJ stated how the demands for originality could be complied with in a sentence of 11 words.⁷³ In a full-length theatre performance there are several opportunities – and it is necessary for an actor to make many more *free and creative choices* than are the possibilities of combinations in a sequence of 11 words.⁷⁴

In legal theory it is stated that performers are less creative than authors of ordinary works.⁷⁵ I think the statement is far too general. It depends on what kind of performance and what kind of work of origin one is considering. In an adaptation, there will always be more given circumstances than in an original work created from scratch. But the length of a performance also gives plenty of opportunities to make creative choices. I also think that the subtlety of performing arts adds to the misconception of performers being less creative. It is simply more difficult to recognise the creative choices that are made. It will also vary between different kinds of performances; for instance, between a singer and an actor, or between different types of singers. When one hears Nina Simone perform “My way” it sounds quite different from the way Elvis Presley or Frank Sinatra sing the same song. The same differences in *degree of creativity* can be found among less distinguished works, for instance between a composition of music and a prefabricated house.⁷⁶

In a recent American case, copyright for acting was confirmed by the court, even resulting from a short acting sequence: «... an actor does far more than speak words on a page; he must ‘live his part inwardly, and then ... give to his experience an external embodiment’ ... That embodiment includes body language, facial expression and reactions to other actors and elements of a scene ... Otherwise, “every schmuck ... is an actor because everyone ... knows how to read”.⁷⁷ A legal scholar supports the decision by stating: “In 1998 Judi Dench won the Oscar for Best Supporting Actress for an eight minute performance in *Shakespeare in Love*. Twenty two years earlier, Beatrice Straight won the Oscar for Best Supporting Actress for her six minute performance in *Network*. Under one of the theories Google advances in this case, neither of these performances could rise to the level of authorship because each actress worked under a film director and “the creator of a work at another’s direction, without contributing intellectual modification, is not an author.” Google argues expressly that Ms. Garcia cannot be an author because she “had no creative control over the script or her performance”; in other words, that dramatic performers are puppets on strings. Neither the U.S. courts nor the Copyright Office takes such a narrow view of protectable original expression under U.S. copyright law. The fact that actors routinely consent to their work being owned ab initio as works made for hire in no way undermines the general principle that actors’ performances constitute original expressions that, when embodied in a work fixed in a tangible medium, attract copyright protection for that work”.

⁷³ C-5/08, *Infopaq International* (premise 48).

⁷⁴ With reference to C-145/10, *Painer* (premise 89).

⁷⁵ Birger Stuevold Lassen, “Kvaliteskrav som vern for utøvende kunstneres prestasjoner”, *Nordisk Immateriellt Rättsskydd* 1981/4 pp. 296-316 on p. 299.

⁷⁶ Norwegian Supreme Court has a recent decision giving copyright to a prefab house, cf. Rt. 2013 s. 822 (Ambassadeur).

⁷⁷ 9th Cir. 2014 case no. 12-57302 (*Garcia v. Google, Inc.*) p. 8.

3.3.2 *Other performers' contributions*

In the same way as for the actor I went through a descriptive and a subsumptive process for four other types of performing artists in my doctoral theses: the musician, the dancer, the conductor and the theatre director.

Due to limited space and time I will not explain my process in full detail for each group in this paper, but instead just provide a short summary.

The musician

As soon as a musician places a sheet of music in front of herself, she must make choices: what kind of tempo, how loudly or softly she should play, the strength of each tone, should the notes be played together or performed one at the time. Even when the composer has defined the volume, everything is relative. Both tempo and tone have many nuances.

Within the same score there are many choices available for a musician or a singer to express *her own interpretation* of the music. In an American decision from 2003 Dr. Oliver Wilson, an expert in music, stated: “[t]he contribution of the performer is often so great that s/he in fact provides as much musical content as the composer ... [T]he copyrighted score ... as is the custom in scores written in the jazz tradition, does not contain indications for all of the musical subtleties that it is assumed the performer-composer of the work will make in the work's performance. The function of the score is more mnemonic in intention than prescriptive”.⁷⁸ This is especially true for jazz music composers who do not write down the details in the music. The statement still covers *the potential* in a musician's contribution.

The artistic choices of a musician are taken during the rehearsal period when *the tones are transformed to music*. Musicians work differently and have different approaches to tackling the music. My interview subjects try to understand *the rhetoric* of the composers *by analysing* the composition and the background of the composer and the composition. *The style* of the music is also significant for the process. Pop and rock musicians will probably have more of an intuitive approach.

Through the analysis the musician gains a background enabling her to read more into the composition than without such knowledge. It gives her a wider material to select from when she chooses *her interpretation* of the composition. The choices will have consequences for how the music sounds. In my view it can be compared with the process of learning a new language, or the research a writer does before writing someone's biography. Through the information she gains and the choices she makes the musician *exercises her creativity*.

In aesthetic theory we find the following statement: “A composition is not what is written on a sheet... it is just some kind of suggestions for a performance... what we hear will never be identical to “the work” because there are several ways to realize a composition. All the different versions of a composition are realizations of the same work. The work remains the same, which we can dimly perceive through all the different versions of the composition”.⁷⁹

⁷⁸ 9th Cir. 2003 case no. 349 F 3d 591 (Newton v. Diamond).

⁷⁹ Ståle Wikshåland, *Fortolkningens århundre: essays om musikk og musikkforståelse*, Oslo 2009 p. 104.

As I see it, the same processes appears for all musicians. Sometimes the spectrum to choose from is narrower in a more commercial song. On the other hand, the freedom of expression is larger. For instance, Frank Sinatra's "My way"⁸⁰ has become a classic through his version of the song. The Sex Pistols' black metal version demonstrates the spectrum of choices also available for more modern, less complex music. The Sex Pistols' version is completely different from Sinatra's and demonstrates the significances of a musician's contributions.

As I see it, musicians fulfil the criteria of *free creative choices*, and can therefore justify achieving copyright.

Dancers and other performers

In the same way as for actors and musicians, I gathered information for the three remaining categories of artists: theatre directors, conductors and dancers.

All the performers have different ways of expressing themselves: the dancer does this through movements. Her interpretation lies in *every step* and *every move* she makes on stage. A prima ballerina from the Opera Ballet of Oslo explains how every move is attached to a thought or feeling she has chosen.⁸¹

One of the major theatre directors -- and a former manager of the National Theatre of Norway -- states that his choices of how to interpret a play change with time and his own development as a human.⁸² Theatre directors use *actors, scenography, music, lighting and other elements* as tools for expressing their interpretation when putting a play on stage. He talked about how Ingmar Bergman, one of Western Europe's most significant directors, had directed a play of Henrik Ibsen – Brand - just after the Second World War. His directing theme for the production was a warning against Nazism and fanatics. Bergman interpreted the same play in the seventies as a protest against the lack of rules and directions from the hippie movement.

Equally, conductors, among them a professor from the University of Music in Norway, described how conductors and musicians in Europe, *through their conducting* of music, have been the most important contributors to the development of the classical music field in the last century.⁸³ A conductor uses *her own body*, especially his arms, to express how she wants the music to be played. In addition, *the orchestra or other musicians* are decisive for a conductor's interpretation and performance.

I conclude in my thesis that these performers also fulfil the requirement for copyright.⁸⁴

3.3.3 Conclusions - do performers fulfil the requirements for copyright?

As I state in the above discussion, I determined in my doctoral thesis that all performers *clearly* give their performances a *personal touch* by choosing how a work shall be interpreted and how the interpretation shall be expressed. Performers therefore fulfil the requirement for *making free, creative choices* and the requirement for copyright.⁸⁵ Performers use different tools to express their artistic choices, but the work they perform is *not only*

⁸⁰ The text in "My Way" is by Paul Anka, the music was composed in 1967 by Claude Francois and Jacques Revaux.

⁸¹ Dancer Christina Thomassen.

⁸² Theatre director Kjetil Bang Hansen.

⁸³ Professor in conduction Ole Christian Ruud cfr. p. 104.

⁸⁴ Irina Eidsvold Tøien, *Skapende, utøvende kunstnere. Beskyttelsen av utøvende kunstneres prestasjoner etter norsk rett*, Oslo 2016, p. 225 (dance), p. 229 (conducting), p. 231 (theatre directing).

⁸⁵ *Ibid.* p. 199.

performed. It is also *adapted to become a new version* through their interpretations. As for other adaptations, the interpreter needs to obtain permission to perform the adaptation for an audience.⁸⁶ This is no different from the permission a performer would have to obtain in order *to perform* the work.⁸⁷ In order to communicate the work publicly, a performer needs to obtain permission, usually done by paying the author a reasonable remuneration.

4. Pros and cons of copyright for performers

4.1 Introduction

As I have expressed in the above, both the U.S. and Canada protect performers through a copyright structure. As I see it, Norwegian and European law can also be interpreted as being obliged to give performers copyright.

It strikes me as strange that the academic discussion around this topic is not louder. I also find it peculiar that in modern, democratic societies, operating according to fairness and human right perspectives, one can tolerate the situation of a large group of participants not being given the protection provided by the law, and for which they fulfil the criteria.

One can question whether international conventions create barriers to copyright for performers. I have surveyed this question, and I do not find any barriers in the international copyright treaties by which Norway and/or Europe are bound.⁸⁸ In addition, the previously mentioned protection of performers by copyright in the U.S. and Canada supports such a conclusion.

There are, however, objections towards granting copyright to performers. Arguments for and against a copyright regime for performers will be introduced below.

4.2 Arguments against copyright for performers

There are two types of objections against copyright for performers: arguments of a *legal technical kind* and *other consequence arguments*.

4.2.1 Legal policy arguments against copyright for performers

It is argued that even though performances *can be* stored, it is rare.⁸⁹ When one needs to divide “the performance” from “the work” it becomes difficult to segregate the different contributions, and therefore difficult to evaluate the originality in a performance. This could cause problems for making decisions in plagiarism cases.

First of all, almost all performances today are stored. Even at live theatres, the performances are continuously saved for archive reasons. All music and films in the commercial market are stored as digital files. This gives opportunities to evaluate the performance thoroughly if necessary.

⁸⁶ The Norwegian Copyright Act § 1 second paragraph no. 13.

⁸⁷ The Norwegian Copyright Act § 2. EU law has similar regulations.

⁸⁸ Irina Eidsvold Tøien, “Opphavsrett for utøvende kunstnere – internasjonale skranker?“, Harald Benestad Anderssen and Tore Bråthen, *Moderne Forretningsjuss III*, Oslo 2016 p. 379.

⁸⁹ Birger Stuevold Lassen, “Kvalitetskrav som vern for utøvende kunstneres prestasjoner”, *Nordisk Immateriell Rättsskydd* 1981/4 pp. 296-316.

Also, in principle, one should treat performances as other works in a less concrete form. The Norwegian copyright act as well as the Berne Convention, both give protection for other works in more mobile, floating forms. Both “speeches” and “scenic works” are mentioned as “works” in the regulations.⁹⁰

One can object that *the number* of such other works is very small in comparison to the number of performances. That is a valid argument.

4.2.2 Difficulties in plagiarism evaluations

Others state that it is *difficult to evaluate* a performer’s contribution; it is difficult to separate the work from what is the result of a performer’s contribution.

It is correct that such distinction is difficult and needs support from experts to make a correct evaluation. A similar process is, however, equally necessary in an ordinary copyright case when one needs to determine *the originality* in a work in order to conclude whether another work is violating the *protected structures* in a work.

I therefore do not find the counter arguments strong enough to hinder copyright protection for performers.

4.2.3 Succeeding interpretations

The most valid argument against copyright for performers, as I see it, is that interpretations can become *so many* that it can be an obstacle for other performers to find a new way to interpret the same work. Related right protection does not give performers protection against imitations. Another performer can do an interpretation quite similar to a previous one without violating the former performer’s rights. With copyright a performer gains protection against imitation.

Nonetheless, I do not see this as a weighty objection against copyright for performers. Performers need to project *genuine expressions*. Their interpretations always go through their intellectual, emotional and technical “system”. This is necessary to give the performance *a genuine embodiment*. Even if the performer “steals” elements from another performer’s interpretation, her own Ophelia will be different, since the succeeding actor’s experiences, emotional and intellectual equipment and her technical skills are different from that of the previous performer.

Case law – or lack of it – in the U.S. also supports the statement that copyright for performers does not cause large volumes of court cases between different performers claiming copyright and legal actions.

4.3. Arguments for copyright

Copyright protects creativity, the related right structure; *a performer’s distribution process*. Copyright also protects the performance for a longer time (up to 140 years more) and has greater scope for protection (covering both imitation and adaptation rights).

⁹⁰ The Bern Convention for the Protection of Literary and Artistic Works of September 9th 1886 (last amended on September 28th 1979) Art. 2 no. 1 states as “works” “books, pamphlets and other writings; *lectures, addresses, sermons and other works of the same nature; dramatic or musical works; choreographic works and entertainments in dumb show...*”. Works in italic are in same form as a performance.

Economic theory claims, through the *endowment effect*, that copyright gives an incentive to value your own work more.⁹¹ One can imagine the difference between *owning an expression* and *doing it*. From an ordinary human, psychological perspective, property and ownership seem to be among the strongest drivers for humans in a modern society. This supports an assumption of ownership also being of great importance for performers.

I think that being acknowledged as having ownership of their interpretations would strengthen performers' self-respect. This could then motivate performers to produce more original expressions and interpretations, and stimulate them to continue to practice in order to develop their technique. It may also inspire them to create performances of their own, rather than being dependent on others to create (entrepreneurship).

The EU Commission has promoted -- as an aim for development of the copyright field -- the strengthening of the performer's economic position and the narrowing of the economic gap between authors and performers. Performers are the economically weakest right holder group.⁹²

Copyright for performers will also *simplify the copyright system* by taking one category out of the structure and including it within a long established, already existing classification.

Hardly anything has been written concerning copyright and performers. The only literature touching the subject is an article by Michael Grünberger,⁹³ a PhD thesis from 2011 and one thesis on theatre direction.⁹⁴ I hope my thesis at least provides a background for initiating a discussion.

Conclusion:

The strongest argument for giving copyright to performers is the fact that *performers are creative*. One should protect *their creative, original contributions* instead of their *performance of a work*. This will highlight the performer's artistic achievement and emphasise their ownership of the expression in the performance.

Another argument for copyright for performers is the economic. If performers had copyright they would have income from their performances (for instance music recordings or films) for a longer period of time, which could narrow the income gap between right holder group as copyright holders, producers and performers. It will also give performers in general a stronger bargaining position, since they will no longer be at the lowest level of the artistic contribution hierarchy. As mentioned previously, *strengthening the economic position for performers* has been expressed as a goal for the European commission.⁹⁵ Moreover, a basic argument of fairness and equality supports such a conclusion.

⁹¹ The so called *endowment effect* in economic theory, cf. Gregory Klass and Kathryn Zeiler, "Against Endowment Theory: Experimental Economics and Legal Scholarship", *Georgetown University Law Center* 2013.

⁹² Commission Staff Working Document, *Impact Assessment on the Legal and Economic Situation of Performers and Record Producers in the European Union*, SEC (2008) 2287. Producers, performers and copyright holders are the three groups.

⁹³ Michael Grünberger, "A duty to protect the rights of performers? Constitutional foundations of an intellectual property right", *Cardozo Arts and Entertainment Law Journal*, vol. 24/617, New York 2006.

⁹⁴ Simon Apel, *Der ausübende Musiker im Recht Deutschlands und der USA*, Bayreuth 2011. Anna Hammarén, *Teaterregi och upphovsrätt*, Stockholm 1997.

⁹⁵ Commission Staff Working Document, *Impact Assessment on the Legal and Economic Situation of Performers and Record Producers in the European Union*, SEC (2008) 2287. Producers, performers and copyright holders are the three groups, pp. 2 and 10.

References:

(1956). SOU 1956:25 Upphovsmannarätt till litterära och konstnärliga verk.

(1960). Ot.prp. nr. 26 (1959-60) Om lov om opphavsrett til åndsverk.

(2014-2015). Prop. 69 L (2014-2015) Endringer i åndsverkloven (gjennomføring av EUs hitteverkdirektiv og innføring av generell avtalelisens mv.). Kulturdepartementet. Oslo.

Apel, Simon, *Der ausübende Musiker im Recht Deutschlands und der USA*, (Bayreuth 2011)

Eidsvold Tøien, Irina, "Originalkriteriet i EU-retten - ny kurs?", *Nordisk Immateriellt Rättsskydd* 2012/4 pp. 403-423.

Eidsvold Tøien, Irina, "Opphavsrett for utøvende kunstnere – internasjonale skranker? ", Harald Benestad Anderssen and Tore Bråthen, *Moderne forretningsjuss III*, (Oslo 2016).

Eidsvold Tøien, Irina, *Skapende, utøvende kunstnere. Beskyttelsen av utøvendes prestasjoner etter norsk rett* (Oslo 2016).

Fischer-Lichte, Erika and Saskaya Iris Jain, *The transformative power of performance: a new aesthetics* (London 2008).

Gadamer, Hans Georg and Lars Holm-Hansen, *Sannhet og metode: grunntrekk i en filosofisk hermeneutikk* (Oslo 2012).

Gadamer, Hans Georg, *Sannhet og metode* (Oslo 2010).

Hammarèn, Anna, *Teaterregi & opphovsrett: Særskilt om skillnaden mellom opphovsmän och utövande konstnärer* (Stockholm 1997)

Gran, Anne-Britt, Øyvind Torp and Marcus Gjems Theie, "Creative industry in Norway 2008-2014" (Oslo 2016).

Klass, Gregory and Kathryn Zeiler, *Against Endowment Theory: Experimental Economics and Legal Scholarship* (Georgetown 2013).

Kohler, Joseph, *Autorschutz des reproduzierenden Künstlers. I*, Vol. 20 (1909).

Lassen, Birger Stuevold, “Kvaliteskrav som vern for utøvende kunstneres prestasjoner”, *Nordisk Immaterielt Rättsskydd*, 1981/4 pp. 296-316.

Lassen, Birger Stuevold, *Internasjonal opphavsrett* (Oslo 1995).

Malochevskaja, Irina, *Regiskolen* (Oslo 2011).

Rognstad, Ole-Andreas, *Opphavsrett*, (Oslo 2009).

Rosati, Eleonora, *Originality In EU Copyright , Full Harmonisation through Case Law* (London 2013).

Sejersted, Fredrik, *EØS-rett* (Oslo 2011).

Stanislavski, Konstantin, *An actor prepares* (New York 1936).

Stenvik, Are, “Rettsbeskyttelse av personlig særpreg”, *Tidsskrift for Rettsvitenskap*, 05/2006 (Volum 116) pp. 601-647.

Ulmer, Eugen, “The Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations”, *The Copyright Society of the USA*, 1963 p. 90.

Wikshåland, Ståle, *Fortolkningens århundre: essays om musikk og musikkforståelse* (Oslo 2009).