

# **The Author-Performer Divide in Intellectual Property Law:**

***A Comparative Analysis of the American, Australian,  
British and French Legal Frameworks***

Volume I of II

Submitted by Mathilde Goizane Alice Pavis, to the University of Exeter as a thesis for the degree of Doctor of Philosophy in Law, March 2016.

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# Thesis Abstract

Western intellectual property frameworks have at least one feature in common: performers are less protected than authors. This situation knows many justifications, although all but one have been dismissed by the literature: performers are simply less creative than authors. As a result, the legal protection covering their work has been proportionally reduced compared to that of their authorial peers. This thesis investigates this phenomenon that it calls the 'author-performer divide'. It uncovers the culturally-rooted principles and legal reasoning that policy-makers and judges of Australia, France, the United Kingdom and the United States have developed to create in the legal narrative a hierarchy between authors and performers. It reveals that those intellectual property systems, though continuously reformed, still contain outdated conceptions of creativity based on the belief in ex nihilo creation and over-intellectualised representations of the creative process. Those two precepts combined have led legal discourse to portray performers as their authors' puppets, thus underserving of authorship themselves. This thesis reviews arguments raised against improving the performers' regime to challenge the preconception of performers as uncreative agents and questions the divide it supports. To this end, it seeks to update the representations of creativity currently conveyed in the law by drawing on the findings of other academic disciplines such as creativity research, performance theories as well as music, theatre and dance studies. This comparative inter-disciplinary study aims to move current legal debates on performers' rights away from the recurring themes and repeated arguments in the scholarship such as issues of fixation or of competing claims, all of which have made conversations stagnate. By including disciplines beyond the law, this analysis seeks to advance the legal literature on the question of performers' intellectual property protection and shift thinking about performative forms of creativity.

# Table of Content

## Volume I

|   |     |
|---|-----|
| TITLE AND DECLARATION .....   | 1   |
| ACKNOWLEDGEMENTS.....   | 2   |
| THESIS ABSTRACT .....   | 3   |
| TABLE OF CONTENT .....  | 4   |
| TABLE OF FIGURES .....  | 10  |
| INTRODUCTION.....   | 11  |
| I. RESEARCH PROJECT .....   | 12  |
| II. METHODOLOGY.....  | 17  |
| A. <i>Interdisciplinary research</i> .....  | 17  |
| B. <i>Qualitative Comparative analysis</i> .....                                  | 19  |
| 1. Defining 'legal narratives' .....  | 19  |
| 2. Data collection.....   | 19  |
| a) Selection of jurisdictions .....   | 20  |
| b) Selection of cases.....  | 22  |
| c) Selection of policy documents.....   | 25  |
| CHAPTER ONE: IDENTIFIED OBSTACLES TO PERFORMERS' PROTECTION .....                 | 27  |
| I. SHARING THE COPYRIGHT CAKE .....   | 28  |
| II. LEGAL UNCERTAINTIES .....   | 30  |
| A. <i>Definition anxiety</i> .....  | 31  |
| B. <i>Fearing "legal millefeuilles"</i> .....                                     | 36  |
| C. <i>Fixating on fixation</i> .....  | 45  |
| D. <i>Property orthodoxy</i> .....  | 62  |
| III. LAW AS CULTURAL PRODUCT: FROM SOCIAL TO LEGAL SEGREGATION OF PERFORMERS..... | 75  |
| CHAPTER TWO: THE AUTHOR-PERFORMER DIVIDE .....                                    | 78  |
| I. WRITING THE DIVIDE: THE PART OF LEGISLATORS .....                              | 78  |
| A. <i>The divide in law</i> .....   | 79  |
| 1. Segregating nomenclature of rights .....                                       | 79  |
| a) <i>Joining the neighbourhood</i> .....   | 81  |
| b) <i>Name calling</i> .....  | 85  |
| c) <i>Neighbours beyond copyright</i> .....                                       | 89  |
| 2. A gap in substance, a substantial gap.....                                     | 89  |
| a) <i>Economic rights</i> .....   | 90  |
| i. <i>Forms and scopes of consent</i> .....                                       | 93  |
| ii. <i>Filling gaps with analogies</i> .....                                      | 100 |
| b) <i>Moral rights</i> .....  | 101 |
| 3. Discrepancies in the duration of rights.....                                   | 103 |
| B. <i>Intended differences</i> .....  | 105 |
| II. PERFORMING THE DIVIDE: THE PART OF JUDGES .....                               | 110 |
| A. <i>Interpreting the divide</i> .....   | 111 |
| B. <i>An untenable divide</i> .....   | 114 |
| 1. Artificial lines .....   | 114 |
| 2. Perpetuating power patterns .....  | 119 |
| 3. Blurred lines .....  | 122 |
| C. <i>Judicial dissidence</i> .....   | 125 |
| 1. Revisiting the French revolution.....  | 125 |
| 2. An environment open to original interpretations.....                           | 129 |
| 3. British rebellion.....   | 135 |

|  |            |
|--|------------|
| 4. An American echo.....   | 136        |
| III. CONTEXTUALISING THE DIVIDE .....  | <b>142</b> |
| A. <i>From Heaven to Earth</i> .....   | <b>144</b> |
| B. <i>From humanism to ‘author-worship’</i> .....                                    | <b>148</b> |
| 1. A humanist turn.....  | 148        |
| 2. Embracing intellectual authorship.....  | 151        |
| 3. Re-cycled divide .....  | 155        |
| 4. Paroxysm of Romanticism .....   | 156        |
| 5. Thinking performances.....  | 158        |
| C. <i>Accommodating technological revolutions</i> .....                              | <b>160</b> |
| D. <i>Missing the ‘performative turn’</i> .....                                      | <b>164</b> |
| E. <i>The “Death of the Author”, the death of the divide?</i> .....                  | <b>167</b> |
| CHAPTER THREE: THE DOCTRINE OF EX NIHILO CREATION .....                              | <b>174</b> |
| I. ECHOES OF THE EX NIHILO CREATION DOCTRINE IN CONTEMPORARY INTELLECTUAL PROPERTY   |            |
| NARRATIVES.....  | <b>176</b> |
| A. <i>Creation from nothing</i> .....  | <b>176</b> |
| 1. Coming from <i>nothing</i> but the author .....                                   | 177        |
| a) <i>Originality as origination, the author as ‘originator’</i> .....               | 177        |
| b) <i>Originality as independent creation</i> .....                                  | 179        |
| c) <i>Who is the father author?</i> .....  | 181        |
| B. <i>Enabling the origination paradigm</i> .....                                    | <b>185</b> |
| C. <i>Creation fettered by nothing</i> .....   | <b>187</b> |
| 1. Refusing protection to shapes driven by technical constraints .....               | 187        |
| a) <i>Technical functions</i> .....  | 187        |
| b) <i>Material constraints</i> .....   | 189        |
| c) <i>Rejecting the protection of trivial derivations</i> .....                      | 191        |
| 2. <i>Craftsmanship and/in creation</i> .....  | 194        |
| a) <i>Savoir faire and originality</i> .....   | 194        |
| b) <i>Craft in creativity</i> .....  | 195        |
| II. THE LIMITS OF THE EX NIHILO DOCTRINE .....                                       | <b>198</b> |
| A. <i>Allowing Intertextuality : ‘there is nothing new under the sun’</i> .....      | <b>198</b> |
| 1. The idea/expression dichotomy.....  | 198        |
| a) <i>Ideas, facts and Information</i> .....   | 199        |
| b) <i>Inspiration and influence</i> .....  | 201        |
| 2. <i>Insubstantial and unconscious copying</i> .....                                | 205        |
| a) <i>The threshold of substantial similarities</i> .....                            | 205        |
| b) <i>Unconscious copying and independent creation</i> .....                         | 207        |
| 3. <i>Copyrighting derivative works</i> .....  | 209        |
| a) <i>Media and derivative works</i> .....   | 209        |
| b) <i>Artistic versus legal derivative works</i> .....                               | 209        |
| B. <i>Creating un-natural authorships</i> .....                                      | <b>212</b> |
| 1. <i>Verbatim works: authoring faithful transcripts</i> .....                       | 213        |
| a) <i>Transcripts of words</i> .....   | 213        |
| b) <i>Transcript of music</i> .....  | 214        |
| 2. <i>Useful versus slavish copying</i> .....  | 215        |
| 3. <i>Exceptions proving the rule</i> .....  | 216        |
| a) <i>Limited limitations</i> .....  | 216        |
| b) <i>Singling out</i> .....   | 219        |
| c) <i>Reinforcing fictions</i> .....   | 220        |
| d) <i>Fitting the law</i> .....  | 221        |
| III. IMPLICATIONS OF THE DOCTRINE FOR PERFORMING ARTISTS.....                        | <b>222</b> |
| A. <i>No authors in performers</i> .....   | <b>222</b> |
| 1. <i>Opposing creation versus interpretation, authoring versus performing</i> ..... | 223        |
| 2. <i>The opposition in the narrative of policy makers</i> .....                     | 224        |
| 3. <i>The opposition in judicial narratives</i> .....                                | 226        |
| B. <i>No performers without authors</i> .....  | <b>229</b> |
| 1. <i>The presence of authorial work as a defining element of performances</i> ..... | 229        |
| a) <i>Sport games</i> .....  | 229        |
| b) <i>Reality television</i> .....   | 231        |

|   |           |
|---|-----------|
| c) <i>Catwalking</i> .....  | 232       |
| 2. <b>Quid de improvisations?</b> .....   | 235       |
| <b>TITLE PAGE</b> .....   | <b>1</b>  |
| <b>CHAPTER FOUR: THE INTELLECTUALISATION OF CREATIVITY</b> .....                  | <b>2</b>  |
| <b>I. THE INTELLECTUALISATION OF LEGAL AUTHORSHIP</b> .....                       | <b>4</b>  |
| <b>A. <i>The modernisation of copyright</i></b> .....                             | <b>4</b>  |
| <b>B. <i>The dematerialisation of copyright</i></b> .....                         | <b>7</b>  |
| <b>C. <i>The intellectualisation of copyright</i></b> .....                       | <b>11</b> |
| <b>II. PROTECTION OF INTELLECTUAL CREATIVITY</b> .....                            | <b>12</b> |
| <b>A. <i>Authors as intellectuals</i></b> .....                                   | <b>13</b> |
| <b>B. <i>Copyright work as works of the intellect</i></b> .....                   | <b>15</b> |
| 1. <b>Works of the mind</b> .....   | 16        |
| a) <i>The mind at the heart of copyright</i> .....                                | 16        |
| b) <i>Works for the minds</i> .....   | 18        |
| 2. <b>Intellectual creations</b> .....  | 20        |
| a) <i>Embracing intellectuality at policy levels</i> .....                        | 20        |
| i. <i>International Consensus in Brussels</i> .....                               | 20        |
| ii. <i>The European trigger</i> .....   | 21        |
| b) <i>Cascading in case law</i> .....   | 23        |
| <b>C. <i>Originality as an intellectual endeavour</i></b> .....                   | <b>28</b> |
| 1. <b>From mental labour to intellectual input</b> .....                          | 28        |
| a) <i>Labours of the mind</i> .....   | 29        |
| b) <i>Intellectual effort</i> .....   | 31        |
| i. <i>Original intellectual effort</i> .....                                      | 32        |
| ii. <i>Filtering up and down</i> .....  | 35        |
| c) <i>Intellectual input</i> .....  | 37        |
| 2. <b>Creative sparks</b> .....   | 39        |
| a) <i>Creative instants</i> .....   | 40        |
| b) <i>Sparking processes</i> .....  | 42        |
| <b>III. REJECTION OF THE LABOURS OF THE BODY</b> .....                            | <b>44</b> |
| <b>A. <i>Opposing labours of the mind to labours of the body</i></b> .....        | <b>44</b> |
| 1. <b>An analogy</b> .....  | 45        |
| 2. <b>An opposition</b> .....   | 47        |
| a) <i>No craft of the hand</i> .....  | 47        |
| b) <i>No sweat of the brow</i> .....  | 50        |
| <b>B. <i>Lending one's body</i></b> .....   | <b>52</b> |
| 1. <b>Mindless bodies</b> .....   | 52        |
| 2. <b>Mindful performances</b> .....  | 57        |
| a) <i>Intellectualisation of performances</i> .....                               | 58        |
| b) <i>Patterns of intellectualisation</i> .....                                   | 60        |
| c) <i>Theories of intellectualisation: Diderot's "tears of the brain"</i> .....   | 62        |
| 3. <b>Embodied exceptions to the intellectualisation of performances</b> .....    | 64        |
| <b>C. <i>Joining the mind to the body</i></b> .....                               | <b>67</b> |
| 1. <b>Building a bridge: personality</b> .....                                    | 67        |
| 2. <b>Personality as definition of the originality condition</b> .....            | 68        |
| a) <i>The French doctrine of 'imprint of personality'</i> .....                   | 68        |
| b) <i>A European take on the 'expression of ones' personality'</i> .....          | 72        |
| c) <i>The expression of personality as originality in the United States</i> ..... | 76        |
| 3. <b>Personality as the subject-matter protected by performers' rights</b> ..... | 77        |
| a) <i>Performer's imprint of personality</i> .....                                | 77        |
| b) <i>The shadows of personality rights</i> .....                                 | 79        |
| <b>CHAPTER FIVE: THE DISEMBODIMENT OF PERFORMANCES</b> .....                      | <b>83</b> |
| <b>I. SIMPLIFYING PERFORMANCES</b> .....  | <b>84</b> |
| <b>A. <i>Conflating authors</i></b> .....   | <b>85</b> |
| 1. <b>Deferring to creative geniuses</b> .....                                    | 86        |
| a) <i>Canonising legendary authors</i> .....                                      | 86        |
| b) <i>Sanctifying authorial works</i> .....                                       | 88        |

|  |  |            |
|--|--|------------|
| 2.   | <b>Depicting foreseeing geniuses</b> .....                           | 94         |
| a)   | <i>Omniscient authors</i> .....                                      | 94         |
| b)   | <i>Omnipotent works</i> .....  | 96         |
| i.   | <i>The myth of the musical work</i> .....                            | 97         |
| ii.  | <i>Doubting the scores</i> .....                                     | 100        |
| c)   | <i>Passive audiences</i> .....                                       | 100        |
| <b>B.</b>                                  | <b>Standardising performers</b> .....                                | <b>102</b> |
| 1.   | <b>Authors' puppets</b> .....  | 102        |
| a)   | <i>Performers as malleable mannequins</i> .....                      | 103        |
| b)   | <i>Performers as interchangeable marionettes</i> .....               | 105        |
| c)   | <i>Performing bodies as instruments</i> .....                        | 107        |
| 2.   | <b>Ingenious puppets</b> .....                                       | 110        |
| 3.   | <b>Disruptive puppets</b> .....                                      | 112        |
| <b>C.</b>                                  | <b>Streamlining performances</b> .....                               | <b>114</b> |
| <b>II.</b>                                 | <b>REINSTATING PERFORMANCES</b> .....                                | <b>116</b> |
| <b>A.</b>                                  | <b>Acknowledging embodiment</b> .....                                | <b>116</b> |
| 1.   | <b>Works as complex ménage à trois</b> .....                         | 117        |
| a)   | <i>Re-embodiment performances</i> .....                              | 117        |
| b)   | <i>The breakthrough of embodiment</i> .....                          | 119        |
| 2.   | <b>Varying performing body</b> .....                                 | 122        |
| a)   | <i>Positive and explicit judicial affirmation</i> .....              | 123        |
| b)   | <i>Negative and implicit judicial affirmation</i> .....              | 124        |
| <b>B.</b>                                  | <b>Evidencing embodiment</b> .....                                   | <b>126</b> |
| 1.   | <b>Expressing the ineffable</b> .....                                | 126        |
| a)   | <i>Wording the ineffable</i> .....                                   | 127        |
| b)   | <i>Measuring the ineffable</i> .....                                 | 129        |
| 2.   | <b>Making the invisible visible</b> .....                            | 132        |
| a)   | <i>Wording the invisible</i> .....                                   | 132        |
| b)   | <i>Performing the invisible</i> .....                                | 134        |
| <b>C.</b>                                  | <b>Defining embodiment</b> .....                                     | <b>138</b> |
| <b>CHAPTER SIX: SHIFTING DIVIDES</b> ..... | <b>144</b>   |            |
| <b>I.</b>                                  | <b>REVISING INTERNAL DIVIDES</b> .....                               | <b>145</b> |
| <b>A.</b>                                  | <b>Deleting the divide between audio and visual performers</b> ..... | <b>146</b> |
| 1.   | <b>Remnants of the horizontal internal divide</b> .....              | 146        |
| 2.   | <b>Echoes of the horizontal internal divide</b> .....                | 148        |
| 3.   | <b>Discrimination or tailoring?</b> .....                            | 151        |
| <b>B.</b>                                  | <b>Vertical internal divides</b> .....                               | <b>154</b> |
| <b>II.</b>                                 | <b>DROPPING THE AUTHOR-PERFORMER DIVIDE</b> .....                    | <b>156</b> |
| <b>A.</b>                                  | <b>Opening the circle of authors</b> .....                           | <b>157</b> |
| 1.   | <b>Leading by (comparative) example</b> .....                        | 157        |
| 2.   | <b>Ownership does not make authorship – or does it?</b> .....        | 158        |
| 3.   | <b>(Mis)reading the Constitution</b> .....                           | 160        |
| <b>B.</b>                                  | <b>Opening the categories of protectable works</b> .....             | <b>161</b> |
| 1.   | <b>A familiar process</b> .....                                      | 161        |
| 2.   | <b>The 'performative work'</b> .....                                 | 162        |
| 3.   | <b>European (ir)relevance</b> .....                                  | 164        |
| <b>C.</b>                                  | <b>Opening (up to) originality</b> .....                             | <b>165</b> |
| 1.   | <b>De-intellectualising originality</b> .....                        | 166        |
| a)   | <i>A literal de-intellectualisation of originality</i> .....         | 166        |
| b)   | <i>Persona-lising originality</i> .....                              | 167        |
| c)   | <i>Re-embodiment originality: including embodiment</i> .....         | 167        |
| 2.   | <b>Inviting a new repertoire</b> .....                               | 168        |
| a)   | <b>sensitising gatekeepers</b> .....                                 | 168        |
| i.   | <i>Opening the gate to new references</i> .....                      | 169        |
| ii.  | <i>Side-stepping old references</i> .....                            | 170        |
| iii.                                       | <i>Stepping in improvisation</i> .....                               | 172        |
| b)   | <b>Advising gatekeepers</b> .....                                    | 173        |
| i.   | <i>Inviting expert witnesses</i> .....                               | 173        |
| ii.  | <i>Relying on professional conventions and customary rules</i> ..... | 176        |

|  |            |
|--|------------|
| <b>III. MANAGING WITHOUT DIVIDES .....</b>   | <b>178</b> |
| <b>A. Creation of rights .....</b>   | <b>179</b> |
| <b>B. Infringement of rights .....</b>   | <b>181</b> |
| 1. Unwanted flattery .....   | 182        |
| 2. Disentangling original inputs .....   | 184        |
| <b>C. Management of rights .....</b>   | <b>186</b> |
| 1. More rights, no more protection .....   | 186        |
| 2. More rights, less protection .....  | 188        |
| a) Coping with flooding and dilution .....   | 189        |
| i. Performers: a disappearing legal species.....   | 189        |
| ii. Categorising performers .....  | 190        |
| iii. No flooding abroad .....  | 191        |
| b) Relieving pressure .....  | 192        |
| i. Contracts.....  | 192        |
| ii. Compulsory licences .....  | 193        |
| iii. Collecting societies.....   | 194        |
| <b>CONCLUSION .....</b>  | <b>198</b> |
| <b>I. RESEARCH QUESTIONS AND FINDINGS .....</b>  | <b>198</b> |
| <b>A. How &amp; where in the law .....</b>   | <b>199</b> |
| <b>B. Written by whom .....</b>  | <b>200</b> |
| <b>C. When.....</b>  | <b>201</b> |
| <b>D. Why.....</b>   | <b>202</b> |
| <b>II. THEORETICAL AND PRACTICAL IMPLICATIONS .....</b>  | <b>203</b> |
| <b>III. FUTURE RESEARCH.....</b>   | <b>204</b> |
| <b>IV. ORIGINAL CONTRIBUTION OF THE RESEARCH .....</b>   | <b>206</b> |
| <b>ANNEX 1 .....</b>   | <b>209</b> |
| <b>ANNEX 2.....</b>  | <b>211</b> |
| <b>ANNEX 3.....</b>  | <b>214</b> |
| <b>ANNEX 4.....</b>  | <b>215</b> |
| <b>ANNEX 5.....</b>  | <b>216</b> |
| <b>ANNEX 6.....</b>  | <b>218</b> |
| <b>ANNEX 7.....</b>  | <b>219</b> |
| <b>APPENDIX 1: ORIGINAL TEXT IN FRENCH LANGUAGE .....</b>  | <b>221</b> |
| <b>APPENDIX 3: CLARK'S FIGURES .....</b>   | <b>231</b> |
| <b>APPENDIX 3: CROW'S NOTATION.....</b>  | <b>234</b> |
| <b>BIBLIOGRAPHY.....</b>   | <b>235</b> |
| <b>PRIMARY SOURCES .....</b>   | <b>235</b> |
| <b>Table of Legislation .....</b>  | <b>235</b> |
| National legislation .....   | 235        |
| Australia .....  | 235        |
| France .....   | 235        |
| United Kingdom.....  | 235        |
| United States .....  | 236        |
| European level .....   | 236        |
| International level .....  | 237        |
| <b>Table of cases and opinions*.....</b>   | <b>237</b> |
| Australia (alphabetical order) .....   | 237        |
| Court of the European Union/European Communities and European Court of Human Rights (alphabetical order) ..... | 240        |
| European Court of Human Rights.....  | 240        |
| Court of Justice of the European Union.....  | 241        |
| France (per court and in chronological order) .....  | 243        |



|   |            |
|---|------------|
| <i>Cour de cassation – Court of Cassation (Civil Supreme Court)</i> ..... | 243        |
| <i>Cour d'Appel - Civil Courts of Appeal</i> .....                        | 246        |
| <i>First Instance</i> .....   | 248        |
| <i>Conseil d'Etat (Administrative Supreme Court)</i> .....                | 249        |
| United Kingdom (alphabetical order).....                                  | 249        |
| United States (per jurisdiction and alphabetical order).....              | 254        |
| <i>United States Supreme Court</i> .....                                  | 254        |
| <i>Court of Appeal of the Seventh Circuit</i> .....                       | 254        |
| <i>Court of Appeal of the Ninth Circuit</i> .....                         | 258        |
| <i>Other jurisdictions in the United States</i> .....                     | 259        |
| <b>Amici Curiae</b> .....   | <b>260</b> |
| <b>Reports and Parliamentary debates</b> .....                            | <b>260</b> |
| <b>Australia</b> .....  | 260        |
| <b>France</b> .....   | 260        |
| <b>European Union</b> .....   | 261        |
| <b>United Kingdom</b> .....   | 261        |
| <i>Reports</i> .....  | 261        |
| <i>Parliamentary Debates</i> .....  | 261        |
| <b>United States</b> .....  | 262        |
| <i>Reports</i> .....  | 262        |
| <i>US government official documents</i> .....                             | 262        |
| <b>Other</b> .....  | 262        |
| <b>SECONDARY SOURCES</b> .....  | <b>262</b> |
| <b>Books</b> .....  | <b>262</b> |
| <b>Chapters in Books</b> .....  | <b>273</b> |
| <b>Journal articles</b> .....   | <b>275</b> |
| <b>Online publications and webpages</b> .....                             | <b>306</b> |
| <b>Lectures</b> .....   | <b>310</b> |
| <b>THESIS DOCUMENTATION</b> .....   | <b>311</b> |

# Table of Figures

## Volume I

|  |     |
|--|-----|
| Figure 1: Unitary representation of copyright.....                                     | 38  |
| Figure 2: Shared ownership.....  | 40  |
| Figure 3: Composite and derivative works.....  | 41  |
| Figure 4: Subrights and divided claims.....  | 43  |
| Figure 5: The Author-Performer Divide As Enforced in Australia .....                   | 140 |
| Figure 6: The Author-Performer Divide As Enforced in France .....                      | 140 |
| Figure 7: The Author-Performer Divide As Enforced in the UK .....                      | 141 |
| Figure 8: The Author-Performer Divide As Enforced in the US .....                      | 141 |
| Figure 9: Creativity and Authorship from the Second to the Fifteenth Century (AD)..... | 148 |
| Figure 10: Creativity and Authorship by the 16th Century .....                         | 151 |
| Figure 11: Creativity and Authorship by the 18th Century .....                         | 154 |
| Figure 12: Creativity and Authorship by the 20th Century .....                         | 167 |

## Volume II

|   |     |
|---|-----|
| Figure 13: "Sample performance data (in milliseconds) for two performances of a simple rhythmic pattern" .....    | 231 |
| Figure 14: "Raw timing data for two performances of a simple rhythmic pattern" .....                              | 231 |
| Figure 15: "Normalised timing data for performances of a simple rhythmic pattern" .....                           | 232 |
| Figure 16: "Timing Data in terms of momentary tempo (in quaver beats per minute)" .....                           | 232 |
| Figure 17: "Tempo and dynamic data from expert performances of the Chopin Prelude in E minor, Op. 28 no. 4" ..... | 233 |
| Figure 18: Crow's Notation .....  | 234 |

# Introduction

*I write opinions to be published in textbooks.*<sup>1</sup>

– Alex Kozinski J, 2015

The title of this thesis could have been ‘Why Justice Kozinski was right in *Garcia v Google*’, when the American judge granted full copyright protection to an actress who had ‘*only*’ performed in a short video clip.<sup>2</sup> Indeed, the present work sides with Kozinski J<sup>3</sup> despite the array of criticism his position triggered amongst practitioners and scholars in 2014,<sup>4</sup> and again in 2015.<sup>5</sup> This analysis unfolds the socio-cultural phenomena at play behind the jurisprudence of the ninth circuit court of appeal. It argues that Kozinski J did make good law with “bad facts” unlike what current legal scholarship holds,<sup>6</sup> and that the impression of error in judgement is in fact the result of long-standing biases towards particular understandings of creativity which should no longer be guiding contemporary models of intellectual property law.

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<sup>1</sup> Alex Kozinski, Judge of the Ninth Circuit Court of Appeal of the United States, ‘IP and Advocacy’ (The Sir Hugh Laddie Lecture given at the UCL Institute for Brand and Innovation Law, London, 24 June 2015).

<sup>2</sup> *Garcia v Google Inc*, 743 F 3d 1258 (9<sup>th</sup> Cir 2014) 1263.

<sup>3</sup> *Garcia v Google Inc*, 743 F 3d 1258 (9<sup>th</sup> Cir 2014).

<sup>4</sup> See the reaction of the scholarship: Christopher Newman, Christopher Sprigman and Jennifer Granick, Brief of Amici Curiae Professors of Intellectual Property Law in Support of Google, Inc. and Youtube, LLC in *Garcia v Google, Inc and Youtube, LLC* before the ninth circuit court of appeal Case No. CV-12-8315-MWF (April 14, 2014) ; Venkat Balasubramani and Erik Goldman, Brief of Amici Curiae Internet Law Professors in Support Of Appellees Google, Inc. and Youtube, Llc, No xx, in *Garcia v Google, Inc and Youtube, LLC* before the ninth circuit court of appeal Case No. CV-12-8315-MWF (November 25, 2014). See also, Paul Heald, ‘Ninth Circuit Screws up Copyright Law to Save a Fatwa-Endangered Plaintiff’ (*Copyright for Authors blog*) <<http://copyrightforauthors.wordpress.com/2014/04/28/ninth-circuit-screws-up-copyright-law-to-save-a-fatwa-endangered-plaintiff/>> accessed 10 March 2016; Jacob Victor, ‘Garcia v Google and a “Related Rights” Alternative to Copyright in Acting Performances’ [2014] *The Yale Law Journal Forum* 80, 81; Rebecca Tushnet, ‘Performance Anxiety: Copyright Embodied and Disembodied’ (2013) 60 *Journal Copyright Society of the USA* 209, 238; Rebecca Tushnet, ‘My Long, Sad Garcia v Google Post’ (*Rebecca Tushnet’s 43(B)log*) <<http://tushnet.blogspot.co.uk/2014/03/my-long-sad-garcia-v-google-post.html>> accessed 10 March 2016. See also, for a contradicting opinion coming from a neighbour circuit: *Conrad v AM Community Credit Union*, 750 F3d 634 (7<sup>th</sup> Cir 2014).

<sup>5</sup> See the majority decision in *Garcia v Google Inc*, 786 F3d 733 (9<sup>th</sup> Cir 2015) 743.

<sup>6</sup> n 4 ; Carr McClellan, ‘Ninth Circuit Makes Bad Copyright Law from Bad Facts’ (*Carr McClelland Law Blog*, 2014) <<http://www.carrmcclellan.com/ninth-circuit-makes-bad-copyright-law-from-bad-facts/>> accessed 10 March 2016.

Similar prejudices towards originality, authorship and performances have also influenced the framework of other national systems, this is why this discussion extends its scope beyond the perimeters of the United States (US) to include the jurisdictions of Australia, France and the United Kingdom (UK). The following introduction outlines the skeleton argument of this thesis and details the methodology used.

## **I. Research project**

Performers are perceived as less creative than authors and have consequently received less legal protection than their authorial counterparts. The correlation between lack of creativity and lack of protection affecting performing artists has been, and still is, underlying many western intellectual property frameworks. Conscious or not, explicit or not, it has contributed to building a divide between authors and performers, whereby the latter shall not be rewarded with the same rights as former for they fail to display the modicum of creativity with which authors' rights<sup>7</sup> are concerned.

The divide anchored in and by the law resisted decades of reforms of intellectual property rights and centuries of socio-economic, cultural and technological changes. Scholars and practitioners who have dedicated their work to studying or engaging with performative practices have called for a rehabilitation of performances as a valuable component of western cultural narratives, equal to authors' input. Although this consensus was reached across all performance-oriented disciplines since the

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<sup>7</sup> Understood broadly as encompassing both authors' rights (*droit d'auteur*) and copyright.

1960s,<sup>8</sup> the laws of Australia, France, the UK and the US are yet to update their standards as far as their protection of performing artists is concerned.

In light of these factors, this thesis questions why the body of law set to support innovation and creativity holds on to a divide regarded as archaic by those working in the very same fields the regulatory framework is designed to stimulate. What justifies not only the existence but also the keeping alive of the author-performer divide in current western intellectual property frameworks? Are legal frameworks incapable of conceiving a paradigm where both groups of artists receive equal protection? Is the divide a reflection of deeper cultural beliefs embedded in western understandings of creativity, authorship or performership? If so, what are they and to what extent have they stamped their mark policy-makers' or judges' reasoning?

Performers' rights have received little attention from the legal scholarship in comparison to copyright or authors' rights. Fundamental and theoretical critical thinking is what this field of intellectual property law lacks most cruelly. The majority of the scholarship on the question focuses on detailing the complex web of rights performers are eligible for or affected by,<sup>9</sup> but few of those discussions centre on explaining the legal gap separating authors from performers<sup>10</sup> or what the societal

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<sup>8</sup> An aesthetical shift later labelled the 'performative turn' occurred in the sixties. Such "turn" recognised the value of performance for itself, independent from the underlying work's meaning and quality. This point is further discussed in Chapter 2 text to note 483.

<sup>9</sup> See for example, Richard Arnold, *Performers' Rights* (4th edn, Sweet and Maxwell 2008) 240-266; Owen Morgan, *International Protection of Performers' Rights* (Hart Publishing 2002); Michel Vivant, Nathalie Mallet-Poujol and Jean-Michel Brugière, *Quels Droits Pour Les Artistes Du Spectacle* (Daloz; 2009); Sam Ricketson and Jane C. Ginsburg, *International Copyright and Neighbouring Rights - The Berne Convention and Beyond (volume I)* (Oxford University Press 2006).

<sup>10</sup> See for instance, Arnold (n 9) 241 para 9.03; Robert Homburg, *Le Droit d'Interprétation Des Acteurs et Des Artistes Exécutants* (Receuil Sirey 1930) 9-15 ; Paul Olganier, *Le Droit Des Artistes Interprètes et Exécutants* (Librairie Générale de Droit et de Jurisprudence 1937) 9-22.

and cultural changes driving their legal protection were.<sup>11</sup> This thesis aims to fill this gap.

This is not to say that research dedicated to authors' rights is irrelevant to this discussion. To the contrary, it is contended that studies on the historical evolution of performers' rights have much to learn from academic work undertaken in the context of copyright understood broadly. Many of the arguments made in the present analysis draw on critiques emerging from this particular literature such as postmodern deconstructions of authorship, to explore their full potential.<sup>12</sup> As a result, beside the task of completing the state of legal scholarship in performers' rights, this thesis aims to reconnect the underlying theory of this area of intellectual property with its sister discipline: copyright law.<sup>13</sup>

Building on previous research, this thesis uncovers three culturally-rooted principles which have been used in various declinations to ground the author-performer divide in legal discourses formed by case law and policies. The first one identifies the influence of the *ex nihilo* creation doctrine on the perceptions of performers as lesser artists. The second stresses the process of intellectualisation of the subject-matter protected by authors' rights which by way of automatic reflex lead to the disembodiment of performances, a phenomenon which forms the third theoretical pillar of the author-performer divide.

Each one of those grounding principles is further explored in one of the six chapters composing this thesis. Chapter One contextualises the present discussion within the current literature and policy-making of Australia, France, the UK and the United

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<sup>11</sup> Arnold (n 9) 3-5.

<sup>12</sup> This point is further discussed in text to note 496, Chapter 2.

<sup>13</sup> The phrase 'copyright laws' is understood broadly as including civil forms of protection for authors often referred to as authors' rights and not copyright.

States. It reviews the arguments opposed to improving performers' protection that keep coming around when envisaging the reform of their rights. This preliminary chapter concludes by dismissing them all but one: performers' perceived lack of creativity. This statement thus becomes the thread running through this thesis as well as the premise it aims to challenge. Chapter Two defines the boundaries of the author-performer divide in its various declinations under the above listed national laws as well as international and regional agreements. The next three consecutive chapters are then dedicated to explaining the existence and maintaining of the divide through reforms, social and technological evolutions. Beginning with the concept of ex nihilo creation, Chapter Three focuses on the impact such doctrine had on legal narratives and points to places where the belief that true creativity, thus creativity worthy of legal authorship, occurs from nothing was key in refusing copyright protection to performers. Chapter Four underlines the fact that legal narrative has heavily intellectualised the type of creativity protected by copyright which by the same token excluded the work of performers who are portrayed as artists using their body rather than their mind. Chapter Five builds on the fourth chapter by stressing the inherent 'disembodiment' of performances operated by the courts in order to reassert the logic and legitimacy of the author-performer divide. This chapter draws on the findings of other disciplines to set the socio-cultural context in which the law performs.<sup>14</sup> This interdisciplinary approach also highlights discrepancies between current and contemporary understandings of creativity, authorship and performership and the outdated model pursued by legal discourses. Finally, Chapter Six concludes this analysis by suggesting various ways in which current national frameworks could be amended in order to improve the protection of performing artists, and thereby

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<sup>14</sup> Arnold (n 9) 5.

erase, or at least soften, the author-performer divide. The Conclusion briefly reviews the areas where more research could be undertaken in order to better or further the present investigation.

It is important to note at this point that this analysis excludes improvisations from its study of performers' protection. Improvising performers form a particular sub-category of performers which tend to have been more easily accepted in the class of authors than their non-improvising peers.<sup>15</sup> Indeed, the act of improvisation is a concept which has been at times regarded as akin to authorial composition unlike 'plain' performances.<sup>16</sup> This is because the absence of underlying material to interpret has facilitated the application of the *ex nihilo* doctrine.<sup>17</sup> To an extent, the special treatment received by improvisations from judges or policy-makers had a negative influence on the regime applicable to regular performances. Indeed, legal narratives masked their bias against performers and thereby reinforced the illusionary relevance of its paradigm by emphasising, in the process of improvising, the presence of characteristics traditionally associated with authoring. For this reason, improvisations have been left out of the scope of this work. This is not to say that their mention and understanding by judges and policy-makers will not feature in this argumentation but that their reference will be limited to the hypotheses where they were used to reassert the grounding principles of the author-divide. This is notably the case of the doctrine of *ex nihilo* creation discussed in Chapter Three.<sup>18</sup>

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<sup>15</sup> text to n 281, Chapter 3.

<sup>16</sup> *ibid.*

<sup>17</sup> text to n 280, Chapter 3.

<sup>18</sup> *ibid.*



Furthermore, this thesis is not by any means a plea for the implementation of more intellectual property rights, nor will it engage with this particular discussion. Subsequent contentions holding that performers deserve to receive full copyright protection are motivated by the wish to see the author-performer divide disappear rather than the belief that more intellectual property rights are necessary. Whether this result is achieved by adding performers to the list of recipients of copyright, or lowering authors' legal protection for it to match that of performers is considered equally suitable for the purpose of this analysis. This discussion only focuses on raising performers' regimes rather than levelling down that of authors. This option seems to be more realistic than the alternative given the evolution of copyright laws, and it is also the only hypothesis the literature, policy-makers and judges have envisaged thus far.

## **II. Methodology**

This thesis pursued two different methodological approaches to build its argumentation: interdisciplinary perspectives and the qualitative comparative analysis of statutory framework and statutes. Both routes shall be explained in turn.

### **A. Interdisciplinary research**

Theoretical bridges between performers and authors' rights are not the only connections the thesis wishes to build. Its critical approach has been much informed and influenced by interdisciplinary perspectives inviting disciplines beyond the law to discuss key concepts of its argumentation such as creativity, authorship and the role of performances or performers. To this end, the fields of theatre, drama and music

studies, performance theories as well as creativity research have come into play to construct a multi-faceted image of contemporary understandings of those concepts, as accurately as possible. This list of disciplines does not pretend to be exhaustive, nor could this analysis capture the full depth of their position on creativity, authorship or performership. Authors and examples were selected for their relevance to the present discussion as well as their accessibility by lay-audiences such as the legal readership. The overall aim of this interdisciplinary approach was to compare the mutation of those concepts within relevant fields to the ones conveyed in legal narratives. Eventually, through this process gaps and/or patterns would be identified across two sets of discourses which should talk to one another: cultural and legal.<sup>19</sup>

Undertaking interdisciplinary work for the purpose of completing a doctoral thesis in law was a challenging but fruitful experience.<sup>20</sup> Whilst interdisciplinary work raised questions with regard to supervision, time constraints, scope of research, and publication platforms it certainly allowed this work to question aspects of the intellectual property paradigms which seems to have gone unchallenged, if not unnoticed, until now. In order to ensure the correct use of each discipline's literature, the findings of this thesis were presented to different specialist audiences at conferences in each field so as to collect feedback from relevant experts.<sup>21</sup>

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<sup>19</sup> One could argue that legal narratives are part of cultural discourses, but for the purpose of explaining the methodology followed by this analysis, the two are separated.

<sup>20</sup> This methodology was very much motivated by the author's involvement with the InVisible Difference project which intersects the fields of dance, law and disability studies. The project is funded by the British Arts and Humanities Research Council - grant number: AH/J006491/1. For more details on the project, see its official website: <[www.invisibledifference.org.uk](http://www.invisibledifference.org.uk)> accessed 10 March 2016.

<sup>21</sup> The only field the author is yet to engage with on this level is creativity research. However, this gap was bridged by the fact that work intersecting this field with intellectual property law has already been done by creativity scholars. See notably the work of Keith Sawyer, Keith Sawyer, 'Western Cultural Model of Creativity: Its Influence on Intellectual Property Law, The Symposium: Creativity and the Law' (2011) 86 *Notre Dame L Rev* 2027.

## **B. Qualitative Comparative analysis**

The presence of the author-performer divide and the principles supporting it were uncovered thanks to a comparative qualitative analysis of the legal narratives. The subsequent paragraphs detail the process followed and the ways jurisdictions were elected in the scope of this investigation.

### **1. Defining 'legal narratives'**

The phrase 'legal narrative' and 'legal discourse' refer to the corpus of writing formed by the combination of judicial decisions, statutory dispositions and parliamentary debates. The selection of these sources was driven by the wish to feature discourses stemming from the judiciary as well as executive and parliamentary authors. Judicial references primarily gathered decisions, reported or not, and occasionally opinions published separately. Sources coming from executive and parliamentary branches are mainly composed of past and current intellectual property statutes, the relevant regional and international conventions, parliamentary debates and reports commissioned by governments or the international community. The phrases of 'legal narratives' or 'legal discourses' thus defined for the purpose of this thesis do not include the legal literature and scholarship though they were included in this thesis on other accounts.

### **2. Data collection**

The thesis included in its scope of investigation the jurisdictions of Australia, France, the United Kingdom (UK) and the United States.<sup>22</sup> It also refers to the regulatory instruments emanating from the international community and the European Union (EU) in so much as they have shaped domestic frameworks.

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<sup>22</sup> The jurisdictions are listed in an alphabetical order every time; no other order prevails.

### a) Selection of jurisdictions

The above listed countries were selected with the objective of representing western intellectual property systems as fairly as possible within the time and word constraints placed upon the research by the format of doctoral theses. All countries are regarded as belonging to western societies and were added to this comparative study for different reasons.

Australia was selected in order to include a jurisdiction located in the southern hemisphere though bearing strong ties to the British copyright framework due to its colonial history with the UK. Australia was also picked because it is described by experts as a jurisdiction at the crossroads between the UK, the US as well as the EU.<sup>23</sup> It seemed relevant to study which elements of each one of those foreign systems Australian laws decided to retain in its own framework, whose independence from the UK is still fairly recent.<sup>24</sup>

France was included in the scope of this analysis for its 'civilist' tradition and take on the protection of authors (*droit d'auteur*) and performers (*droit des artistes interprètes*). The French intellectual property system in many ways differs from its common-law counterparts. Those differences are both methodological, as the French legislator introduced a code dedicated to intellectual property law, and substantial. Indeed, the courts and governments of the hexagon have developed doctrines applicable to authors and performers which remain unique to its national

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<sup>23</sup> Mark Davison, Ann Monotti and Leanne Wiseman, *Australian Intellectual Property Law* (Cambridge University Press 2012) 4, 16-7. Davidson points to the fact that although the European Union's regulation of intellectual property influences the development of Australian law to a degree, the former's impact on British law is a factor which now increases differences between copyright laws of the United Kingdom and Australia despite their strong historical connection.

<sup>24</sup> Although the first Australian copyright statute was enacted in 1905, the country remained under the authority of the British copyright system until 1968 as it became part of the British imperial copyright system in 1912. Indeed, the 1912 Australian Copyright Act adopted at the federal level the 1911 British Copyright Act which continued to apply until the introduction of the 1968 Australian Copyright Act. See, Davison et al (n 23) 191.

laws.<sup>25</sup> Although often set apart from its common-law equivalents, the continental jurisdiction is far from functioning in a closed environment. To the contrary, this thesis shall point to places where regional copyright laws were in part shaped by the doctrines emanating from French intellectual property laws, in areas essential to its argumentation.<sup>26</sup> In order to facilitate the reader's access to key French resources, extracts of relevant cases and documentation have been translated into English language. All translations are the author's own, except for the dispositions of the Intellectual Property Law Code whose official translation into English is supplied by the French parliament.<sup>27</sup>

The primary research of this thesis was undertaken in the UK (University of Exeter) and funded by the British Arts and Humanities Research Council, two practical elements which justified the inclusion of the jurisdiction in its scope. Beside these factors, it seemed relevant to have feature in the study of so-called western intellectual property framework another European jurisdiction from a non-civil law background.

Finally, the research extensively engages with the American federal system of intellectual property law provided under Title 17 of the US Constitution. This jurisdiction was included in the perimeter of this project for at least two reasons. First, the weight carried by its creative industries on a global scale increases the stakes involved in its intellectual property protection. Considering this, it seemed essential to include the US in this analysis given that its primary aim was to paint an

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<sup>25</sup> See for example the depth of the French moral right doctrine protecting authors, the quasi-absence of fixation condition, categorisation requirement for copyright works and the existence of a legal categorisation of performers enforced by the Courts. All those aspects are detailed in subsequent developments.

<sup>26</sup> See for instance the doctrine of imprint of the author's personality which permeated through the European jurisprudence starting with the *Infopaq* decision. See text to n 234, Chapter 4.

<sup>27</sup> Translated versions of the French Intellectual Property Code can be found here : <<http://www.wipo.int/wipolex/en/details.jsp?id=14082>> accessed 10 March 2016.

accurate portrayal of performers' protection from a western legal stand point. Excluding this jurisdiction would have somewhat crippled its findings given the importance the US hold on the international scene both commercially and legally. Second, shortly after this research project began, two contradicting cases were litigated by the ninth and seventh circuit courts of appeal on the very question of performers' protection. The decisions, respectively the *Garcia*<sup>28</sup> and *Banana Lady*<sup>29</sup> cases, brought back the status of performers within the wider web of intellectual property rights to the centre stage of legal debates. The combination of those reasons justified the inclusion of the US in this analysis.

*b) Selection of cases*

Cases in each jurisdiction were selected to create a sample of decisions representative of the jurisdiction's stance in intellectual property law within a specific timeframe. A total of six hundred and forty nine cases were included in this qualitative analysis. This breakdown of cases per jurisdiction was done as follows: ninety three Australian cases, one hundred and eighty nine French decisions, one hundred and forty seven British cases, one hundred and sixty nine American decisions, and forty nine cases coming from the Court of Justice of the European Union including its jurisprudence as the Court of Justice of the European Communities.<sup>30</sup> The number of cases per country varies significantly for various reasons. The slightly lower number of Australian cases reflects the difficulty the author experienced in accessing these resources from the UK (University of Exeter)

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<sup>28</sup> *Garcia v Google* (2014) (n 3) ; *Garcia v Google* (2015) (n 5).

<sup>29</sup> *Conrad v AM Community Credit Union* (n 4).

<sup>30</sup> This analysis uses the abbreviation CoJ to refer to both the Court of Justice of the European Union and to the Court of the European Communities. It must be noted that two cases from the European Court of Human Rights (ECtHR) were included in this analysis even though the institution sits outside the jurisdiction of the European Union which form the perimeter of the research at the regional level. Those additions are the result of frequent references in British cases and scholarship to those two decisions. The jurisprudence of the ECtHR has otherwise not been embedded in the present argumentation.

during the stage of her primary research. This pitfall was later accommodated by accession to online databases during fieldwork undertaken at the British Institute of Advanced Studies and later at the US Library of Congress.

The jurisdiction of France is represented by a larger number of cases due to the structure of its judicial system and decision reporting methods. Cases are significantly shorter than the decisions published by the other common-law courts included in this analysis. The shortest decision listed in this thesis is nine-lines long<sup>31</sup> whilst the longest reaches two pages. As the aim of gathering cases was to study the narrative emanating from courts on questions of creativity, authorship and performership, increasing the number of cases was necessary to mitigate the shortness of French cases. A large portion of the selected cases are located between 1980 and 2015. This was caused by the fact that the digitalisation of cases was only made more consistent towards the beginning of the 1980s by publishers. Before then, only key cases were reported and later made available online.

American decisions form the largest volume of case law because of geo-political structure of the country and its jurisdictional system. Only federal courts decisions were included in the scope of this analysis because it focused on federal American copyright law, as opposed to state copyright laws. More precisely, three courts were selected: the US Supreme Court, the seventh and the ninth circuit courts of appeal. The last two courts were picked for their recent jurisprudence performers' protection.<sup>32</sup> The analysis included, on rare occasions, decisions from other circuits, notably the court of appeal of the second circuit. Those decisions were included in

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<sup>31</sup> Cass, 1ère civ, 12 juillet 2001, n° 99-16.180: Bulletin 2001 I N° 221 p. 139.

<sup>32</sup> *Garcia v Google* (2014) (n 3); *Conrad v AM Community Credit Union* (n 4).

this analysis whenever they formed a precedent often cited in the jurisprudence of the seventh and ninth circuit in decisions discussing performers' legal privileges.

Setting aside the US, each jurisdiction is represented by decisions from first, second and last instances courts.<sup>33</sup> The proportion of cases belonging to each tier was conditioned by questions of thematic and temporal relevance. The analysis concentrated on case law reported from the 1960s until nowadays. 1960 was picked as departure point for this data collection because the first international convention introducing performers' rights was introduced shortly after in 1961.<sup>34</sup> Moreover this period also coincided with the 'performative turn' which occurred across disciplines studying performative practices and art forms.<sup>35</sup> Finally, fifty years' worth of jurisprudence provided enough material to undertake a sound qualitative analysis.

Decisions located outside of this bracket were included if they were reported as authorities in the field of copyright or performers' rights, and/or if they have been cited by key cases or by more than five decisions situated within the specified timeline. Due to time constraints, not all decisions published since 1960 were included in this data set. The list was narrowed down by selecting cases dealing with relevant themes and points of law and/or referenced in the literature as having been cited by subsequent decisions.<sup>36</sup> Experience proved that judges seemed more inclined to engage with questions of creativity, authorship and performership in cases where they were asked to stretch the traditional scope of intellectual property laws by parties. This often occurred in cases involving issues of co-authorship as well as the protection of unconventional items requiring judges to re-assess

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<sup>33</sup> Except for the United States as the analysis focused on federal intellectual property laws.

<sup>34</sup> 1961 Rome Convention, Art. 7.

<sup>35</sup> The 'performative turn' is later discussed in more details in text to n 483, Chapter 2.

<sup>36</sup> As for American decisions, no ninth and seventh circuit court of appeal decisions reported registering less than four hundred and fifty citations - subsequent decisions and publications combined - due to the volume of case law produced by those courts.



preceding authorities and the requirements of originality, fixation and categorisation from new angles.

*c) Selection of policy documents*

In addition to cases, this analysis included past and current statutory regulations, reports commissioned by governments and parliamentary debates, a list of which is provided in the bibliography.

### **3. Data Analysis**

As mentioned in previous paragraphs, the legal narrative thus collected was examined on a qualitative basis. The aim of this study was to analyse the ways in which policy-makers and judges perceived the work of authors and performers, what they understood as pertaining to authoring and performing, and why one could not or should not be taken for the other. This work is by no mean quantitative. Although it did involve a large data set, its objective was purely qualitative and mostly exploratory. To this end, the data composed of legal decisions, statutes and policy documents was processed through the piece of software program 'Nvivo' which facilitated the highlighting of trends and patterns within the set. *Nvivo* is most commonly known for its support of interview analysis, but was equally useful in examining case law since this thesis's agenda remained in line with what *Nvivo* is designed to achieve: studying discourses.

Qualitative methodologies bear pitfalls<sup>37</sup> which are ultimately transferred to findings uncovered by them, and to which the present research is no exception. The main inevitable shortcoming of this method is the risk of subjectivity and bias in the

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<sup>37</sup> Hennie Boeije, *Analysis in Qualitative Research* (Sage Publications 2010) 150-3; Carol Grbich, *Qualitative Data Analysis: An Introduction* (2nd edn, Sage Publications 2013) 26.

selection and interpretation of narratives used to shape arguments.<sup>38</sup> This risk increases whenever the data collection is performed by only one analysis as it is the case with this work. To address this issue, numerous quotes of the primary sources used were inserted in the body of this thesis to allow the reader to confirm the veracity of the arguments and interpretation by his/herself.

Though imperfect, this methodology proved nevertheless very effective in highlighting the existence of underlying patterns in the decision-making of judges and policy-makers within the scope of this research. It is also submitted that no other methods (e.g. economic analyses, quantitative approaches) would have been able to fulfil this particular goal.<sup>39</sup> For this reason, it is contended that the risk of subjectivity involved in qualitative studies of discourses is an inevitable cost incurred by scholarly work pursuing this methodology but does not negate its relevance or value.<sup>40</sup>

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<sup>38</sup> Boeije (n 37) 26.

<sup>39</sup> Boeije (n 37) 32-3.

<sup>40</sup> *ibid*, 167-175.

# Chapter One

## Identified obstacles to performers' protection

*Players, buffoons, musicians, opera-singers, opera-dancers [...] [their work] perishes in the instant of its production [...].*<sup>1</sup>

Adam Smith, 1776

The gap in protection between authors and performers<sup>2</sup> has many tentative justifications. All have been dismissed by the literature<sup>3</sup> but one: performers are not worthy of the same level of protection because they are not as creative as authors.<sup>4</sup> As mentioned in introductory comments, this thesis aims to analyse but most importantly challenge both the divide and the premise which supports it. Before doing so, it seems essential to first evaluate succinctly the other reasons behind performers' lesser protection as they form the context in which our main discussion sits.

Arguments against the improvement of performers' legal protection can be divided into three theoretical categories: economic, legal and cultural. This classification is more permeable than it presents itself as many of the points considered below are interdependent. However this approach offers clarity in a discussion which has been

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<sup>1</sup> Adam Smith, *The Wealth of the Nations* (first published 1776, edn Haynes Barton Press - The Originals, 1776) 221.

<sup>2</sup> The divide between authors and performers is further discussed in Chapter 2.

<sup>3</sup> Richard Arnold, *Performers' Rights* (4th edn, Sweet and Maxwell 2008) 8-11.

<sup>4</sup> This situation was also considered to be a simple 'historical anachronism' in Judy Kim, 'The Performers' Plight in Sound Recordings - Unique to the US: A Comparative Study of the Development of Performers' Rights in the United States, England, and France' (1986) 10 Columbia VLA Journal of Law and the Arts 453, at 461.

complicated by the number of threads pulled into it by stakeholders and commentators.<sup>5</sup>

## I. Sharing the copyright cake

For many, reforms in favour of performers' rights have been largely stalled because of the potential negative economic impact those new prerogatives could have on existing rights such as copyright.<sup>6</sup> According to this reasoning, granting performers an additional claim on the same creative product will increase its costs of production and commercialisation thereby diminishing financial returns of other right holders. Having to cater for a greater number of recipients, the 'copyright cake' would have to be divided into small pieces.<sup>7</sup> This is how and why copyright holders' fear would have driven authors', producers', publishers' and broadcasters' lobby to weaken performers' position in law.<sup>8</sup> The same economic concerns were relayed in reports commissioned by policy-makers to inform reforms of intellectual property law.<sup>9</sup> In his report to the Senate, the French Member of Parliament Charles Jolibois commented:

[N]eighbouring's rights [here performers' rights] would undeniably harm the interests protected by authors' rights. This would be unacceptable. Very

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<sup>5</sup> Some have commented that the reason behind performers' protection remains "unclear", Kim (n 4) 459; Kimberlee Weatherall, "Pretend-y Rights" On the Insanely Complicated New Regime for Performers' Rights in Australia, and How Australian Performers Got Gyped', *New Directions In Copyright Law, Vol. III* (Edward Elgar Press 2005) 172.

<sup>6</sup> Arnold (n 3) 8; Kim (n 4) 462.

<sup>7</sup> Charles Jolibois, 'Rapport No 212 Fait Au Nom de La Commission Spéciale Sur Le Projet de Loi Adopté Par l'Assemblée National Relatif Aux Droits D'auteur et Aux Droits Des Artistes-Interprètes, Des Producteurs de Phonogrammes et de Vidéogrammes et Des Entreprises de Communication Audiovisuelle', vol Tome I (1985) 23. The report is later referred to as the Jolibois Report No 212.

<sup>8</sup> 'Documents de La Conférence de Bruxelles 5-26 Juin 1948' (1951) 293-4, 309, 505. See also, Arnold (n 3) 9; Kim (n 4) 461-3, later referred to as the Brussels Conference Documents.

<sup>9</sup> See the findings of the Australian Federal Bureau of Transport and Communications in Economic Effects of Extended Performers' Rights – Paper prepared for the Department of Communications and the Arts (Canberra: Department of Communications and the Arts, 1996) cited in 'Performers' Rights: A Discussion Paper' [2001] Ministry of Economic Development (New Zealand) 32. See for France, the comments of the Member of Parliament Charles Jolibois in the Jolibois Report No 212 (n 7) 28. See for the UK, the Gregory Report, Cmnd 8662, para 176. See for the US, the Ruttenberg Report (n 13).

concretely, this danger will be materialised every time the use of a work will require the payment of an additional fee pursuant to the introduction of performers' rights. This will naturally result in diminishing the remuneration of the author at stake or in a general decrease of the volume of creative works used, impacting then the remuneration of all authors.<sup>10</sup>

Approximately forty years before him, the delegates of the 1948 Brussels Conference held similar contentions when they concluded that “[i]n all honesty, it is thus impossible to contend that performers' rights would not impact the returns received by authors so long that it is proven that the fee owed to performers can be included in the price paid by buyers”.<sup>11</sup>

This representation of the market knows as many critics as it has supporters.<sup>12</sup> An independent report commissioned by the US Copyright Office led the 1978 Hearings on the Performance Rights in Sound records<sup>13</sup> to conclude that “on the basis of statistical analysis, the payment of royalties [to performers] is unlikely to cause serious disruption within the broadcasting industry”.<sup>14</sup> It goes on explaining that “there are arguments aplenty to the contrary, but there is no hard evidence to support them”,<sup>15</sup> reiterating that “[t]here is no hard economic evidence in the record to support arguments that a performance royalty would disrupt the broadcasting industry, adversely affect programming, and drive marginal stations out of

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<sup>10</sup> Jolibois Report No 212 (n 7) 28. Author's translation, see Appendix 1 for original text.

<sup>11</sup> Brussels Conference Documents (n 8) 309. Author's translation, see Appendix 1 for original text.

<sup>12</sup> Arnold (n 3) 9.

<sup>13</sup> S Werner, 'An Economic Impact Analysis of a Proposed Change in the Copyright Law' (1977) also known as the Ruttenberg Report, Commissioned by the US Copyright Office, it was reprinted and cited in the Report of the Register on Performance Rights in Sound records held before the subcommittee of the Courts on civil liberties, and the administration of justice of the committee on the judiciary of the House of Representatives, Congress, 95<sup>th</sup> Congress, March 1978, No 24, 118.

<sup>14</sup> *ibid.*

<sup>15</sup> *ibid.*

business”.<sup>16</sup> The report acknowledged that “[this question] has been the single most difficult issue to assess accurately, because the arguments have consisted of polemics rather than facts.”<sup>17</sup> A large part of the more recent scholarship concurs with this position and contends that the market is elastic enough to accommodate for the implementation of increased performers’ rights.<sup>18</sup>

Economic arguments scored equal points on each side, for and against the introduction or improvement of performers’ legal protection. Therefore, it seems pertinent to explore the other grounds covered by sceptics arguing against performers’ augmented rights.<sup>19</sup>

## II. Legal uncertainties

A number of objections to performers’ protection have emerged in the legal scholarship. Each one will be considered in turn, however it must be noted that objections specific to the legal structures of jurisdictions under study have not been included in this overview.<sup>20</sup> The aim of this chapter is to underscore shared patterns

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<sup>16</sup> Report of the Register on Performance Rights (n 13) 118.

<sup>17</sup> *ibid.*

<sup>18</sup> Sam Ricketson and Jane Ginsburg, *International Copyright and Neighbouring Rights - The Berne Convention and Beyond* (Oxford University Press 2006) para 19.19-20 citing the report of the Inter-governmental committee of the Rome Convention 1979 at para 28; “In practice, it seems likely that the market is more elastic than this, for no evidence has ever been found that authors’ remuneration has fallen as a result of the granting of rights to performers” in Arnold (n 3) 8; “It is impossible to predict with certainty at this point whether or not the broadcasters can pass on the additional costs” in Kim (n 4) 463.

<sup>19</sup> Additional arguments standing on the ground of anti-competition or putting forward that performers benefit from their work being copied as exposure increases the reputations have been made and equally dismissed by the literature. This was the position held by the majority of the Australian Copyright Law Review Committee (ACLRC) in its Reports on Performers’ Protection (Australian Government Publishing Services, 1987) para 115. See Arnold (n 3) 5, 9-10; Kim (n 4) 461-470.

<sup>20</sup> For example, one of the notable legal issues faced by the introduction of performers’ rights at the federal level in the US lies within the authority of the Constitution. See for example, *Sinatra v The Goodyear Tire & Rubber co* 435 F2d 711 (9<sup>th</sup> Cir 1970) 714 HN1. See Kim (n 4) 470-3. Arguments pertinent to the lack of registration are also excluded. See, *Capitol Records, Inc, v, Mercury Records Corporation*, 221 F2d 657 (2<sup>nd</sup> Cir 1955) 665.

in law-makers' reluctance to adopt performers' rights across the selected national frameworks. To this end, systemic singularities have been set aside.

### A. Definition anxiety

Concerns regarding the definition of performers and performances are legitimate. Reading the literature of performance studies on the question, one might get somewhat anxious at the idea of applying intellectual property rights to “a performing mode of behaviour that may characterise any activity”.<sup>21</sup> This rather vague definition of the term ‘performance’ acknowledges the fact that the term is “inclusive”<sup>22</sup> so much so that it becomes “extremely difficult [...] to define”,<sup>23</sup> even for the specialist scholarship. Described as an event<sup>24</sup> consisting of the “bodily co-presence of actors and spectators”<sup>25</sup> by some, others have referred to performances as the “ritualised behaviour conditioned/permeated by play”<sup>26</sup> or the “activity done by an individual or a group in the presence of or for another individual or group [excluding] some activities legitimately called play, games, sports and rituals”.<sup>27</sup> Despite the difficulty in grasping

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<sup>21</sup> Erving Goffman, *the Presentation of Self in Everyday Life* (1959) cited in Richard Schechner, *Performance Theory* (Routledge 2003) 22. Schechner explains: “From one point of view – clearly stated by *Erving Goffman in the Presentation of Self in Everyday Life* (1959) - performing can be defined as “a performing mode of behaviour that may characterise any activity. Thus performance is a “quality” that occurs in any situation rather than a fenced-off genre” (22).

<sup>22</sup> Schechner (n 21) xvii.

<sup>23</sup> *ibid* 22.

<sup>24</sup> Erika Fischer-Lichte, *The Routledge Introduction to Theatre and Performance Studies* (Routledge 2014) 41

<sup>25</sup> Erika Fischer-Lichte, *The Transformative Power of Performance - A New Aesthetics* (Routledge 2008) 32; Fischer-Lichte *The Routledge Introduction* (n 24) 19.

<sup>26</sup> Schechner (n 21) 99. Schechner carries on commenting: “The more ‘freely’ a species plays, the more likely performance, theatre, scripts, and drama are to emerge in connection with ritualized behaviour. Some animals, such as bees and ants, are rich in ritualized behaviour but absolutely bereft of play.” (99) “[I]t is only in the primates that play and ritual coincide, mix, combine; it is only in humans and closely related species that the aesthetic sense is consciously developed. Art may be considered a specific coordination of play and ritual.”(99-100).

<sup>27</sup> Schechner (n 21) 22. Little relief to a lawyer’s man would be brought by the theorist’s ‘narrow’ definition of the term: “[P]erforming can be defined as “a performing mode of behaviour that may characterise any activity. [...] However, in this writing I mean something more limited: a performance is an activity done by an individual or a group in the presence of or for another individual or group. I recognise that some activities legitimately called play, games, sports and rituals would be excluded from my definition. My definition is further

the malleable contour of performances, performers' rights have been introduced into our intellectual property frameworks as early, or late, as 1961 with the Rome Convention.<sup>28</sup> Therefore, it seems as though western jurisdictions have somehow managed to tackle the issue of definition and overcome this first obstacle.

Both 'performers' themselves and 'performances' are now subject to legal definitions.<sup>29</sup> The latter vary in their wording but were harmonised in their substance.<sup>30</sup> In the Rome Convention, the international community agreed that 'performers' would refer to "actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, or otherwise perform literary or artistic works".<sup>31</sup> The Convention's disposition found an unhidden echo in the French legislation which characterises performers as the "persons who act, sing, deliver, declaim, play in or otherwise perform literary or artistic works, variety, circus or puppet acts."<sup>32</sup> Tackling terminological issues on both fronts, the Australian 1968 Copyright Act<sup>33</sup> offers a definition of performance as well as performers. The Act

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complicated by the fact that game theory applies both to performance and non-performance activities. However [...] I thought it best to centre my definition of performance on certain acknowledged qualities of live theatre, the most stable being the audience-performer interaction. Even where audiences do not exist as such – some happenings, rituals and play- the function of the audience persists: part of the performing group watches – is meant to watch – other parts of the performing group; or, as in some rituals, the implied audience is God, or some transcendent Other(s)."

<sup>28</sup> 1961 Rome Convention, Art. 4 and 7.

<sup>29</sup> Though not without complexity, on this see Michel Vivant, Nathalie Mallet-Poujol and Jean-Michel Brugière, *Quels Droits Pour Les Artistes Du Spectacle* (Daloz 2009) 7-8.

<sup>30</sup> This harmonisation may know slight variation. Whilst Australia and France regard the musical conductor, the question is yet to be clarified by the Courts in the UK and the US. See Section 191B of the Australian Copyright Act 1968 as for Australia, and TGI Paris, 10 janvier 1990, n° [XTGIP100190X]: D. 1991, 206, note Edelman; Dalloz 1991, somm. Comm. 99, obs Colombet; RIDA, juillet 1990,368.

<sup>31</sup> 1961 Rome Convention, Art. 3.

<sup>32</sup> Code de la Propriété Intellectuelle, Intellectual Property Code later referred to as IPC (France), Article L121-1, (official translation). The disposition opens with one limit to the definition of the performers: by naming auxiliary performers as non-performers. The full definition of performers therefore reads as "[s]ave ancillary performers, considered such by professional practice, performers shall be those persons who act, sing, deliver, declaim, play in or otherwise perform literary or artistic works, variety, circus or puppet acts" (official translation). The classification of performing artists into sub-categories is discussed further in Chapter 2, see text to note 282.

<sup>33</sup> As Amended by Act No 31, 2014.



provides that “performance consists of sounds”<sup>34</sup> and that a live performance is “a performance (including improvisation) of a dramatic work, or part of such a work, including such a performance given with the use of the puppets, [...] of a musical work [...], the reading, recitation or delivery of a literary work [...] or the recitation or delivery of an improvised literary work, or a performance of dance, or a performance of a circus act or a variety act or any act or any similar presentation or show, a performance of an expression of folklore; being a live performance whether in the presence of an audience or otherwise”.<sup>35</sup> Under the same statute, Australian law considers performers to be the “person[s] who contributed to the sounds of the performance”.<sup>36</sup> More conservative in its approach, the British Parliament opted for a less ambitious definition mirroring the dispositions applicable to authors when it specified that the word “performance” was to be defined as “a dramatic performance (which includes dance and mime), a musical performance, a reading or recitation of a literary work and a performance of a variety act or any similar presentation”.<sup>37</sup> American federal intellectual property laws do not offer any specific terminology for the words ‘performances’ or ‘performers’ in the context of performers’ rights as the country does not provide federal protection for those artists.<sup>38</sup>

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<sup>34</sup> 1968 Copyright Act (Australia), s. 189.

<sup>35</sup> 1968 Copyright Act (Australia), s. 22(7), see also s. 248. The act expressly excludes the following acts from the scope of performances eligible to performers’ rights: “(a) certain performances by teachers and students in the course of educational instruction; (b) a reading, recital or delivery of any item of news and information; (c) a performance of a sporting activity; (d) a participation in a performance as a member of an audience.” (s. 248(2)).

<sup>36</sup> The 1968 Copyright Act (Australia) the definition of performer in time and space by adding a second prong to the definition: “performer in a performance (a) means person who contributed to the sounds of the performance; and (b) in relation to a performance that occurs outside Australia, does not include a person who is not a qualified person at the time of the performance. The Australia 1968 Copyright Act also specifies that the conductor is regarded as a performer as per Section 191B which reads as “If a performance of a musical work is conducted by a conductor, then the sounds of the performance are to be treated as having been made by the conductor (as well as by the persons who actually made those sounds).”

<sup>37</sup> Copyright, Designs and Patent Acts of 1988, Section 180 (2) (a) to (d). The Act will be later referred as CDDPA 1988.

<sup>38</sup> Title 17 of the US Code only provides right for the unauthorised fixation of live performances and the trafficking of their musical and video recordings following the implementation of the Uruguay Round of Multilateral Trade Negotiations. This change was enacted in 1994 by the Public Law 103-465 of December 8.

Despite the narrow and knit definitions of ‘performances’ adopted by legal frameworks, one may still worry that its application in practice will not be as clear-cut as it is presented on paper. Consequently, one may fear that the courts would be left flooded with claims foreign to the objectives of intellectual property laws, driven by parties interested in benefitting from their valuable protection.<sup>39</sup> The following have been placed in this category of undesirable claimants: athletes,<sup>40</sup> TV presenters,<sup>41</sup> members of parliaments,<sup>42</sup> victims of revenge porn and sex tapes,<sup>43</sup> weathermen,<sup>44</sup>

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There are no performers’ rights at the federal level in this country, the judicial development of non-intellectual property rights and remedies at the state are the closest legal instruments to performers’ rights American artists can rely on. The US are signatory to the more recent Beijing Treaty 2012 but it is yet to be ratified. Arnold (n 3) 352.

In the US, performers’ protection is achieved through non-intellectual property law mechanisms, see also, Sheldon Halpern and Phillip Johnson, *Harmonising Copyright Law and Dealing with Dissonance - A Framework for Convergence of US and EU Law* (Edward Elgar 2014) 163. This point is discussed further in Chapter 2 text to note 1 and 20.

For sake of completeness, it must be noted that the American constitutional Copyright Clause does envisage the definition of the word “performance” but only in its application to copyright. The concept of public performances is indeed dealt with as one of the alternative ways to publish or display a work in public. In this context, Paragraph 101, Title 17 of the US Copyright Code specifies that “To perform or display the work “publicly” means (1) to perform or display it at a place open to the public or at any place; or (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

<sup>39</sup> Arnold refers to this argument as the “floodgates argument” according to which allowing performers to obtain rights on the ground of intellectual property will allow all sorts of claims on the same basis which are foreign to the core of this field of law. Arnold (n 3) 10-1.

<sup>40</sup> Arnold uses the example of athletes to illustrate the ‘floodgate’ arguments against the protection of performers. On this points he wonders whether “it would be such a bad thing if sportsmen were to be protected in the same way” as performers. Arnold (n 3) 11. The US and Australia are the jurisdictions presenting the largest volume of case law on this question involving athletes or equivalent. This can be explained by the fact that performers’ protection is achieved through the implementation of a patchwork of rights relying notably on tort and the right of publicity or protection of personality, which is too available to sportsmen. This muddling up is thus not applicable to their intellectual property of performers but to the availability of protective mechanisms also shared with other categories of professionals and individuals. US: *Baltimore Orioles, Inc v Major League Baseball Players Ass’n* 805 F2d 663(7th Cir 1986); 61 Rad Reg 2d (P & F) 543 (7th Cir 1986); 55 USLW 2250 (7th Cir 1986); 231 USPQ 673 (7th Cir 1986); 1986 Corp L Dec P 26,024 (7th Cir 1986); 13 Media L Rep 1625 (7th Cir 1986); In *re NCAA Student-Athlete Name & Likeness v Electronic Arts Inc*, 724 F3d 1268 ((9th Cir 2013); Australia: *Henderson v Radio Corporation Pty Ltd* (1958) 1a IPR 620. This case concerned a couple of ball room dancers. It must be noted that since then, performers’ rights have been introduced in Australia, although not with the clarity one would hope for. See Weatherall (n 5) 172.

<sup>41</sup> France: Paris, 10 février 2010, *Samourai films SARL c/ Even Media SA*, n° 08/02748: inédit; US: *White v Samsung Electronics America, Inc*, 971 F 2d 1395 (9th Cir 1992); 989 F 2d 1512 (9th Cir 1993 - Dissenting opinion).

<sup>42</sup> See comments made by MP Graham Page in HC Deb., 5<sup>th</sup> Series, Vol 679 (1963) col. 896, 897.

<sup>43</sup> Rebecca Tushnet, ‘Performance Anxiety: Copyright Embodied and Disembodied’ (2013) 60 *Journal Copyright Society of the USA* 209, 238-9.

<sup>44</sup> See comments made by MP Leslie Hale in in HC Deb., 5<sup>th</sup> Series, Vol 679 (1963) col. 896, 898.

journalists as well as individuals appearing in documentaries<sup>45</sup> or participants of TV reality shows<sup>46</sup> - to only name a few.<sup>47</sup> Questions were also raised in relation to artists such as orchestra conductors<sup>48</sup> or musicians using computers to perform.<sup>49</sup> Although their practices are close to the core of intellectual property law, they remain on the outskirts of traditional definitions of performances. This concern can be addressed by referring to the fact that the point raised a rather small volume of litigation in Australia, France, the United Kingdom (UK) and the United States (US).<sup>50</sup> The number of disputes on the issue is by far surpassed by the quantity of claims dedicated to defining the subject-matter protected by copyright laws. If not greater, an equal degree of difficulty was faced by the courts on this front,<sup>51</sup> yet this issue has not prevented the scope of copyright protection from growing continuously.<sup>52</sup> This

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<sup>45</sup> France: Cass, 1ère civ, 13 novembre 2008, n° 06-16.278, « Etre et avoir »: JCP 2009, N 25, 30 §3 obs. Caron (the central character filmed at work for the purpose of a documentary cannot be considered a performer as he does play a role but executes his professional function); US: *Zacchini v Scripps-Howard Broadcasting Co*, 433 US 562 (Supreme Court 1977). In this last case, the claim from the circus artist was accepted, his performance had been inserted a news clip reporting on the event.

<sup>46</sup> France: Cass, 1ère civ, 24 avril 2013, n° 11-19.901: Bull. 2013, I, n° 83. Participants in the French remake of the TV show ‘Temptation Island’ argued in court that they acted as performers in the show. The Supreme Court rejected this position arguing that their duties on the set did not involve interpreting a role at any point, that on the contrary, the participants had received the instructions to be and stay themselves and react to situation as they normally would. This activity cannot be regarded as performing a literary or artistic work, or improvising.

<sup>47</sup> See comments made by LJ Mancroft in HL Deb 05 February 1963 vol 246 cc 512, 515. To this list the Australian Copyright Act adds teachers, students and members of the audience intervening during a performance (see n 35).

<sup>48</sup> In France, the orchestra conductor is regarded as a performer even though he does not directly contribute to the performance by playing an instrument, see TGI Paris, 10 janvier 1990, n° [XTGIP100190X]: D. 1991, 206, note Edelman; Dalloz 1991, somm. Comm. 99, obs Colombet; RIDA, juillet 1990,368. In Australia, Section 191B of the 1968 Copyright Act explicitly includes the conductor in the category of protected performers.

<sup>49</sup> France: Paris, 3 mai 2006, n° 05/01400, « Ph. Chany »: D. 2007 jurispr. P 2653 note Edelman et Levinas; RTCom. 2007, 104 obs. Paullaud-Dullian.

<sup>50</sup> Arnold (n 3) 11. This point was confirmed by the qualitative analysis of case law involving basis this research. See, Introduction text to note 28. For a list of the cases included this analysis see the Table of Cases. The jurisdiction of France would be the only exception to this rule but its particular situation can be explained by the fact that the law enforces subcategories within the definition of performers with different sets attributed to each. As a result, French Courts witness a larger volume of litigation over the classification within the categories of performers which combines both intellectual property law and employment law. This point is further discussed in Chapter 2 text to note 282.

<sup>51</sup> It is argued that less harmonisation is present between the subject-matter protected in the context of copyright than in the context of performers’ rights. The attempt of the CoJ to bring into line the national copyright on the questions of originality and potentially categorisation has left courts and commentators perplex as to its effective impact. For more on the lack of harmonisation between national and EU copyright laws see text to Annex 1.

<sup>52</sup> The scope and duration of copyright has been continuously extended amongst all jurisdictions since the early twentieth century. The scope of copyright was progressively extended to include literary, artistic, dramatic works, as well as films, broadcasts (France: Acts dated of the 13<sup>th</sup> and 19<sup>th</sup> of January 1791, of the 19<sup>th</sup> and 24<sup>th</sup>

second objection to performers' legal protection caused by anxiety of unclear definitions is thus rationally unjustified.

### **B. Fearing “legal millefeuilles”<sup>53</sup>**

One of the most common legal objections to the introduction of additional performers' rights is the fear that such changes will create an overly complicated layering of rights over the same creative production. Orchestras are the most common illustration of this problem.<sup>54</sup> If every performer involved in a fifty-piece ensemble was able to control the future uses of their performance in addition to the rights already placed in the hands of composers, sound recorders and broadcasters, “copyright would explode”.<sup>55</sup> More recently, the ninth circuit court of appeal affirmed that “[t]reating every acting performance as an independent work would not only be a logistical and financial nightmare, it would turn cast of thousands into a new mantra: copyright of thousands” when commenting on cinematographic works.<sup>56</sup>

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1793, of the 11<sup>th</sup> March 1957 No 57-298, of the 10<sup>th</sup> May 1994 No 94-361; UK: 1911, 1956 and 1988 Copyright Acts; in Australia: 1912 Copyright Act, 1968 and 2006 Copyright Amendment Acts; In the US: 1909 and 1976 US Copyright Act ). The duration increased from 14 years running from the registration of the work with the competent authority to the lifetime of the author plus seventy years throughout the course of the same period of time (the Council directive No 93/98/ECC was implemented in 1996 and 1997 in the UK and in France respectively, bringing the protection to seventy years after the death of the author; similar changes were introduced in Australia by the 2006 Copyright Amendment Act and in the US by the 1998 Sonny Bono Copyright Term Extension Act). See, Robert Homburg, *Le Droit d'Interprétation Des Acteurs et Des Artistes Exécutants* (Receuil Sirey 1930) 4.

<sup>53</sup> The term “legal millefeuilles” was first used in the context of copyright by Laddie J. in *IPC Media Ltd v Highbury Leisure Publishing Ltd* [2004] EWHC 1967 (Ch) at 22: “That copyright is not a legal millefeuilles with layers of different artistic copyrights. There is only one artistic copyright asserted for each cover and article, namely that in the cover or article as a whole.” This concept was re-used by Blackburne J. in *Coffey v Warner Chappell Music Ltd and others* [2005] All ER (D) 329 [2005] EWHC 449 (Ch) at 10.

<sup>54</sup> Arnold (n 3) 9.

<sup>55</sup> In *Janky v Lake County Convention and Visitors Bureau*, 576 F3d 356 (7th Cir 2011) 363. In this case, the Bench commented on joint-authorship claims.

<sup>56</sup> *Garcia v Google Inc*, 786 F 3d 733 (9<sup>th</sup> Cir 2015) 743.

This argument suggests that existing and newly added rights would be emptied of their substance because of the “legal morass”<sup>57</sup> such a large volume of claims would generate, making “Swiss cheese of copyrights”.<sup>58</sup> Clashes of interests would lead to poor management of the work and defeat the aim of intellectual property laws. As a result, for the sake of the good administration of intellectual property rights, policy-makers ought to limit the number of legitimate claims attached to one work.<sup>59</sup>

In the *Blackmail* case,<sup>60</sup> McCardie J clearly explained that this fear was the implicit reason behind the British Parliament’s refusal to protect performers with a civil cause for action:

Upon considering the Act, I come to the conclusion that the Legislature did not, by any inadvertence, omit to give a right of property to the performers, but that they deliberately so worded the Act as to preclude any notion that a right of property was conferred. Nothing would have been easier than to create a right of property if such was the wish of Parliament. The Act, however, is most significant alike in its wording and in its omissions. I can see good reason for not giving performers a right of property. It happens that here the orchestra was 20 in number, of whom the performers whom I named were five. But often an orchestra (e.g., at the Albert Hall or Queen’s Hall) consists of over 100 performers. If the plaintiffs here are correct in saying that each of the five performers had a right of property in his performance, it would follow that the same right would exist if the orchestra was over 100. I am satisfied that Parliament foresaw what I have just stated, and intended that it should not, be permitted that 100 performers or more should in the position to bring 100 High Court actions. Moreover, if rights of property had been given by the Act of 1925 it might be difficult to reconcile such rights with those of owners of the copyright of a piece performed. It seems clear that Parliament was aware of the difficulties of the matter, and that it therefore intentionally and for good cause ensured that the wording of the Act should give no property to the performers.<sup>61</sup>

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<sup>57</sup> *Garcia v Google Inc*, 786 F 3d 733 (9<sup>th</sup> Cir 2015), 742.

<sup>58</sup> *ibid.* See also, Brad Sherman and Lionel Bently, ‘Performers’ Rights: Options for Reform’ (Report to the Interdepartmental Committee 1995) 6.

<sup>59</sup> *Garcia v Google Inc*, 786 F 3d 733 (9<sup>th</sup> Cir 2015) 743: “filming group scenes like a public parade, or the 1963 March on Washington, would pose a huge burden if each of the thousands of marchers could claim an independent copyright”.

<sup>60</sup> *Musical Performers’ Protection Association Ltd v British International Pictures Ltd* (1930) 46 TLR 485.

<sup>61</sup> *ibid.*, 488. Also cited in see for example, *Apple Corps Ltd. and Others v Lingasong Ltd. and Another* [1977] FSR 345, 349.

Although this objection seems fair, it has been considered an exaggeration of the reality<sup>62</sup> and could also be criticised for ignoring the equally complex ‘layering of rights’<sup>63</sup> currently enforced by copyright laws.<sup>64</sup> Indeed, the dispositions applicable to copyright in all the jurisdictions under study, without exception, allow for prerogatives in the nature of copyright to overlap one another and collide with each other. This layering of rights is embedded at the core of all copyright frameworks, yet has never challenged their legitimacy.

The theoretical mental picture that one would like to take of copyright depicts the author’s property interest in his work very simply: one author creates one work, giving rise to one copyright. As a result, one work is covered by one right owned by one person (the author).<sup>65</sup> It can be visually summarised as follows:



Figure 1: Unitary representation of copyright

<sup>62</sup> This argument was dismissed in the Gregory Report, see Henri Gregory, ‘Report of the Copyright Committee’ (1952) 61, para 172. See also, Richard Arnold, *Performers’ Rights* (4th edn, Sweet and Maxwell 2008) 9; options to manage the introduction of new rights without emptying the substance of existing ones have been enforced and can be sought. See for example, the work of Sherman and Bently in *Performers’ Rights* (n 58) 6. One of those solutions has been the collective management of rights, see Arnold (n 3) 9, 121-8. See also, comments made in Chapter 6, text note 175.

<sup>63</sup> The phrase ‘layering of rights’ refers to the co-existence of at least two potentially competing interests over the same object (creative product) within the connection between authors and their works, also broadly defined as the chain of copyright titles. In *Moran v London Records Ltd*, Manion J refers to the ‘chain of titles’ to reject Moran’s (the performer) copyright claim over the contested work. *Moran v London Records Ltd*, 827 F2d 180 (7th Cir 1987) at 182, para 2.

<sup>64</sup> Commenting on Australian copyright law, Sherman and Bently describe it as a “labyrinth of regulations” in Sherman and Bently in *Performers’ Rights* (n 58) 6.

<sup>65</sup> Paul Olganier points to the individualistic nature of authors’ rights as an obstacle to performers’ equal protection in *Le Droit Des Artistes Interprètes et Exécutants* (Librairie Générale de Droit et de Jurisprudence 1937) 57-8, 134-5.

This representation is the one implicitly described by McCardie J in the *Blackmail* case<sup>66</sup> when he bases the layering of rights as the reason behind refusing performers' property right. This simplistic representation of the chain of copyright title is inaccurate on all three levels: the author, the work and the right itself.

First, a multiplicity of claims already occurs every time that more than one artist is involved in the creative process to the extent of being considered co-authors of the piece. Although copyright laws tend to limit this possibility to very specific types of collaboration,<sup>67</sup> they all provide for the possibility of joint-authorship and ownership<sup>68</sup> of the work. By the same token, the core of the copyright system finds itself affected by duplicated rights and potentially competing interests. In this hypothesis, the law needs now to deal with at least two authors managing one right over one work.<sup>69</sup>

This first level of layering of rights can be graphically represented as follows:

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<sup>66</sup> *Musical Performers' Protection Association Ltd v British International Pictures Ltd* (1930) 46 TLR 485, 488

<sup>67</sup> See text to Annex 2.

<sup>68</sup> Australia: Copyright Act 1968, Division 9 s. 78 to 83 (b); France: IPC, Art. L 113-1 to L 113-3, joint work is translated as "oeuvre de collaboration"; UK: CDPA 1988, s. 9(4) and s. 10(1) to 10 (3); US: US Code, Title 17 Para 101.

<sup>69</sup> Australia: Copyright Act 1968, Division 9 s. 78 to 83 (b); France: IPC, Art. L 113-1 to L 113-3, joint work is translated as "oeuvre de collaboration"; UK: CDPA 1988, s. 9(4) and s. 10(1) to 10 (3); US: US Code, Title 17 Para 101. See for a critique of joint ownership and ownership in the context of copyright: Joseph Taubman, 'Joint Authorship and Co-Ownership in American Copyright Law' (1956) 31 *New York University Law Review* 1246; Scott Brophy, 'Joint Authorship Under the Copyright Law' (1994) 16 *Hastings Comm/Ent L. J.* 451; Melissa Doblin, 'Joint Authorship and Collaborative Artwork Created through Social Media' (2011) 39 *AIPLA Q. J.* 535.

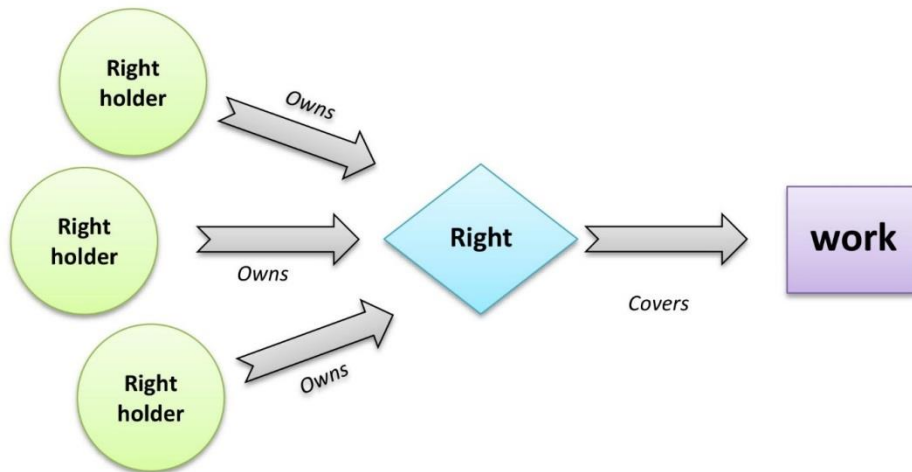


Figure 2: Shared ownership

Second, multiple claims can rise from the creation of derivative works,<sup>70</sup> collective works<sup>71</sup> or complex creative productions whose component can be independently copyrighted.<sup>72</sup> Despite the fact that judges strive to avoid the construction of “legal millefeuilles”<sup>73</sup> in copyright, the phenomenon of layering precedes their efforts. Taking the example of derivative works, their authors enjoy an independent copyright

<sup>70</sup> The term ‘derivative work’ refers to the same type of creative productions in each jurisdiction under study but has not received the same care in terms of definition from all legislators. Whilst the French IPC and American Copyright Act both specify in their provisions that derivative works are “work[s] based upon pre-existing works” (US Code, Title 17 para 101; IPC, Art. L 113-2), the Australian and British Copyright Acts offer no definition. The jurisprudence does recognise their existence but the courts seem to have refrained from using the terminology. Only, on rare occasions has the phrase been used. See for example, in Australia: *CBS Records Australia Ltd v Telmak Teleproducts (Aust) Ltd* 27 [1987]; Bently L and Sherman B, *Intellectual Property Law* (4th edn, Oxford University Press 2014) 112. See also, text to Annex 3 for the regulation of derivative works for each jurisdiction.

<sup>71</sup> See Annex 4 for the statutory definition of collective works for each jurisdiction.

<sup>72</sup> The copyright protection of sound recordings, broadcasts and films bring at the core of the copyrightable subject-matter the notion of layering as the multiplicity of copyright works embedded in one creative venture is inherent to the nature of those works. See also, France: Cass, 1ère civ, 6 mai 1997, n° 95-11.284: Bull. 1997 I N 145, p. 97; RIDA 1997 N 174, p. 231 Obs. Kéréver; D. 1998, p. 80 (the character of a cartoon may receive an independent copyright protection separate from the rest of the comic book; it is held that whenever the creation of cartoon character is not the fruit of a joint-work, its creator may use the character in other productions without obtaining the consent of his collaborators); UK: *Redwood Music Ltd v B Feldman & Co Ltd* [1981] RPC 337, 338 (the music and the lyrics of a song may obtain separate copyrights); *Hayes v Phonogram Ltd and others* [2002] EWHC 2062 (Ch) para 60 (the rap lyrics and music of a song are distinct works protected independently, despite the rhythmic influence the lyrics may have on the music).

<sup>73</sup> Laddie J. in *IPC Media Ltd v Highbury Leisure Publishing Ltd* [2004] EWHC 1967 (Ch) 22: “That copyright is not a legal millefeuilles with layers of different artistic copyrights. There is only one artistic copyright asserted for each cover and article, namely that in the cover or article as a whole.” This concept was re-used by Blackburne J. in *Coffey v Warner Chappell Music Ltd* [2005] All ER (D) 329 [2005] EWHC 449 (Ch) at 10.



protection whilst remaining bound by the rights protecting the author whose piece is being re-used. Although the second (derivative) work is copyrightable, it may still be found infringing the copyright of the protected work it revisits. The jurisprudence of Australia, France, the UK and the US could not be clearer on this point of law.<sup>74</sup>

This second level of layering can be visually modelled as follows:

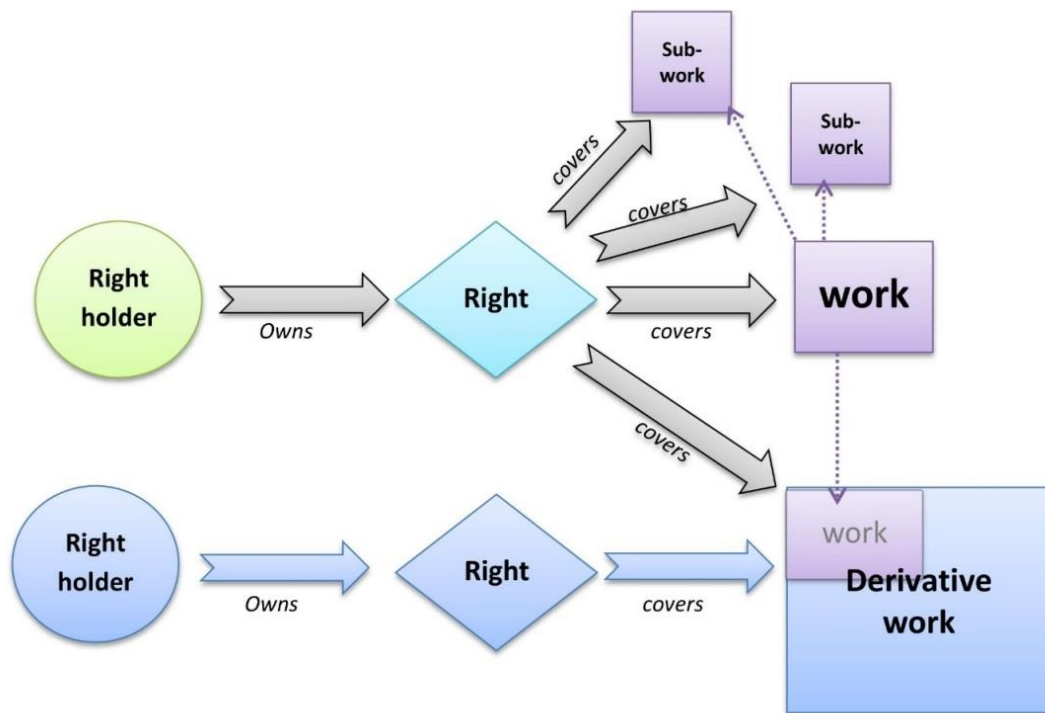


Figure 3: Composite and derivative works

Finally, a third level of layering occurs at the very core of the copyright system. Going back to the statutory definition of ‘copyright’, the law describes the term as referring to a bundle of rights. Even though the word is used in the singular, copyright is constituted of a myriad of sub-rights.<sup>75</sup> Gathered under the umbrella term

<sup>74</sup> See text to Annex 5 for jurisprudence confirming the original author’s claim over derivative works.

<sup>75</sup> Australia: 1968 Copyright Act, s. 31 counts no less than seven sub-rights covered by the copyright vested in literary, dramatic and musical works (s. 31(1) (a) (c) and (d)) and three in the context of artistic works (s. 31 (1) (b)), excluding the dispositions on moral rights provided under s. 499 (paternity) and 503 (integrity).

of copyright are the rights to copy the work, to communicate the work in public, to lend a copy of the work; to perform the work in public; or again to make an adaptation of the work, to only name a few. Commenting on rental rights, the Court of Justice (CoJ) negatively referred to this phenomenon as a ‘mosaic of problems’ to which it was asked to add a further piece.<sup>76</sup>

Each one of those sub-rights can be transferred separately.<sup>77</sup> In the hypothesis where an artist, or copyright-holder, wishes to assign their various rights to different individuals on their own terms, the chain of titles granted would behave exactly as would the hundred proprietary rights granted to the hundred musicians playing in McCardie J’s orchestra at the Albert Hall.<sup>78</sup> Indeed, this last, but not least, layer of competing copyright claims bears the same flaws identified by the British judge in the context of performers’ right. This situation can be visually represented as follows:

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France: IPC, Art. L 122-1 to L 122-4, Art. L 122-6 (specific to computer programs). The rights generally cover the right of performance and reproduction (Art. L 122-1) which comprises a non-exhaustive list of over ten sub rights. In addition to those, the IPC grants four moral rights to authors under Art. L121-1 to L 121-4. UK: CDPA 1988, s. 16 (1) to (4). Similarly to Australia, these dispositions count at least six sub-rights for copyrightable works, in addition to moral rights (s. 77, 80 and 85). US: US Code, Title 17 para 16 (1) to (6). Moral rights of a much more limited scope than in the other jurisdictions are provided under para 106 A.

<sup>76</sup> C-61/97 *Foreningen af Danske Videogramdistributører v Laserdisken* [1999] 1 C.M.L.R. 1297: “This Court has thus been asked by the national court to add a further piece to the mosaic of problems surrounding rental right—understood as the right to make a creative work incorporated in a material object available for use for a limited period of time—which is one of the rights conferred on any copyright holder”.

<sup>77</sup> Australia: Copyright Act 1968, s. 196 (1) to (4) “Copyright is a personal property and, subject to this section, is transmissible by assignment, by will and by devolution by operation of law”.

France: IPC, Art. L 131-1 to L 131-3, Art L 131-4 reads: “Assignment by the author of the rights in his work may be total or partial.” UK: CDPA 1988, s. 90 (1) to 44), s. 90 (1) reads: Copyright is transmissible by assignment, by testamentary disposition or by operation of law, as personal or moveable property. US: US Code, Title 17 para 201 (d) (1) and (2) provides that “ the ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law, and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession”.

<sup>78</sup> *Musical Performers’ Protection Association Ltd v British International Pictures Ltd* (1930) 46 TLR 485, 488.

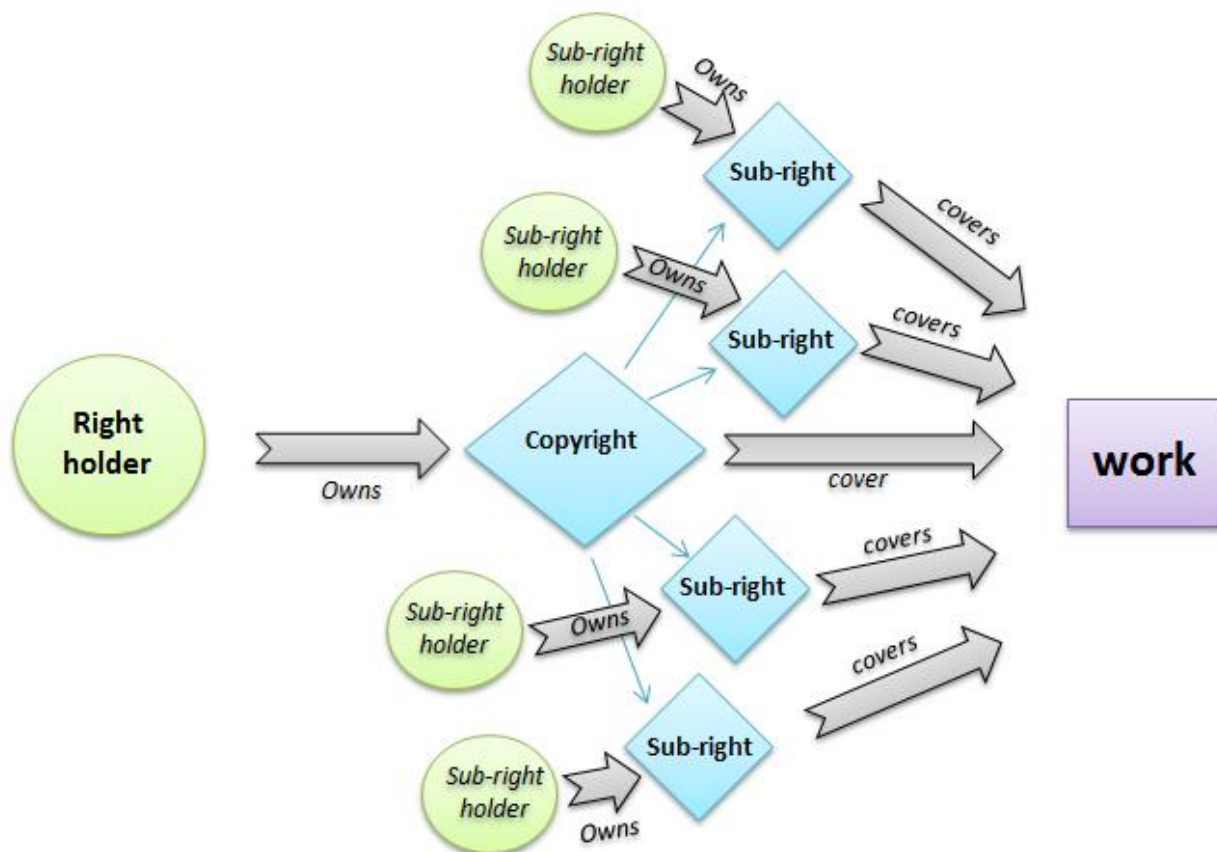


Figure 4: Subrights and divided claims

This third level of layering gains in complexity when the French doctrine of moral rights is factored into the equation. Whilst the author is free to transfer any of the sub-rights she owns to the recipients of her choice, she remains eternally entitled to control certain aspects of the work by virtue of her portfolio of *droit moraux* (moral rights).<sup>79</sup> Consequently, the transfer of her proprietary prerogatives to third parties,

<sup>79</sup> In France, the doctrine comprises four different rights: the right of paternity, integrity, disclosure and withdrawal. IPC, Art L 121-1 to L 121-2.

In the Australia and the UK, only two rights of this doctrine have been introduced in their domestic copyright framework: the right of paternity and integrity. Australia: 1968 Copyright Act, s. 499 and s. 503 (respectively); UK: CDPA 1988, s. 77 and 80 (respectively). The US offer the most limited implementation of the doctrine of the jurisdictions under study as only visual artists can claim damages on the grounds of the moral rights of integrity and paternity, see US Code Title 17, para 106A (dispositions introduced by the Visual Artists Rights Act of 1990 (title VI of the Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089, 5128, enacted December 1, 1990). The Courts are indeed careful for other concepts of the copyright law not to be converted in the disguised moral rights: *Weinstein v University of Illinois* 811 F2d 1091 (7th Cir 1987) FN3. On the doctrine of moral rights see, Gillian Davies and Kevin Garnett, *Moral Rights* (Sweet and Maxwell 2010) 41,

does not entirely extinguish her entitlement over the work. Instead of replacing one claimant by another, such transfer multiplies the number of claimants as the moral rights attached to the work continues to rest with the author.<sup>80</sup>

To conclude on this point it must be noted that further layering of rights takes place beyond the realm of copyright. Indeed, in all jurisdictions the possibility of combining copyright protection with other rights pertinent to intellectual property is available. The presence of authors' rights does not exclude the bestowal of trade mark, patent<sup>81</sup> and design rights<sup>82</sup> when the same object meets their criteria.<sup>83</sup>

In light of these observations, it is submitted that the web of claims that copyright dispositions have created is no less complex or layered than provisions protective of

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67, 79, 365, 637, 857; Elizabeth Adeney, *The Moral Rights of Authors and Performers: An International and Comparative Analysis* (Oxford University Press 2006) 104, 165, 285-7, 389, 475, 569. Maree Sainsbury, *Moral Rights and Their Application in Australia* (The Federation Press 2003) 68-94.

<sup>80</sup> French law has made moral rights unassignable, see IPC, Art L. 121-4. The civil country has adopted a dualistic view of the doctrine allow for economic rights and moral rights to be managed independently from one another. This considerably strengthen the enforcement of the doctrine as authors are able retain their moral claims on the moral whilst monetising the work by transferring their economic prerogatives. A monist take on the doctrine prescribes that economic and moral rights should not be separated in order to safeguard the interest of the author as his economic rights are serves the same personal and intellectual gains as moral rights do. This position has been the framework underlying moral rights in German. On this see Davies and Garnett (n 79) 24-7. Andreas Rahmatian, *Copyright and Creativity The Making of Property Rights in Creative Works* (Edward Elgar 2011) 66-7.

When introducing moral rights in their system, Australia, the UK and the US have not opted for this solution preferring those rights to be transferable and limited to duration of economic rights. See, Australia: 1968 Copyright Act, s. 499 and s. 503; UK: CDPA 1988, s. 77 and 80; US Code Title 17, para 106A.

<sup>81</sup> France: Paris, 25 janvier 2006, n° 04/18300: D. 2006 jurispr. P 580 obs. Daleau; JCP E 2006, 1386 note Caron (the fact that perfumes may be patented is no obstacle to its protection by copyright). If rights can be cumulated, remedies for the same infringement cannot: TGI Paris, 4 juin 2008, n° 05/06811 (Mia Frye case: a performer cannot claim damages on the basis of both performers' rights and right to one's image); US: *American Dental Ass'n v Delta Dental Plans Ass'n*, 126 F3d 977 (7th Cir 1997) 980. In this case, the Court stated "[a]n article with intertwined artistic and utilitarian ingredients may be eligible for a design patent, or the artistic elements may be trade dress protected by the Lanham Act or state law".

<sup>82</sup> The Recital 8 to the European Directive 98/71/EC explicitly states that "in the absence of harmonisation of copyright law, it is important to establish the principle of cumulation of protection under specific registered design protection law and under copyright law, whilst leaving Member States free to establish the extent of copyright protection and the conditions under which such protection is conferred". This was confirmed by the Court of Justice in *C-168/09 Flos SpA v Semeraro Casa e Famiglia SpA* [2011] ECDR 8, [2011] RPC 10, [2011] EUECJ C-168/09 para 8 and 66. In this case the court ruled that: "the legal protection of designs must be interpreted as precluding legislation of a Member State which excludes from copyright protection in that Member State designs which were protected by a design right registered in or in respect of a Member State and which entered the public domain before the date of entry into force of that legislation, although they meet all the requirements to be eligible for copyright protection".

<sup>83</sup> The analysis limits itself to illustrations pertinent to copyright laws as this particular sphere of intellectual property is relevant to its argument. See developments on the author-performer divide in text to note 332, Chapter 2.

performers' interests. The multiplicity of titles and the risk of competing rights were embedded at the core of the legal concept of authorship the moment legislators opted for a copyright covering all future uses of the work and allowed the assignment of those sub-rights independently from one another. Therefore, it seems somewhat short-sighted or hypocritical for law-makers or commentators to oppose the 'legal millefeuille' argument to performing artists, when no effort has been made to disentangle the current web of copyrights which continues to grow.<sup>84</sup>

### C. Fixating on fixation

A third range of legal arguments centre on the necessity for protected works to be fixed to enter the territory of intellectual property laws.<sup>85</sup> Performances' lack of materiality is one of the main arguments against their protection by intellectual property law.<sup>86</sup> By emphasising the embodied<sup>87</sup> and event-like nature of performances,<sup>88</sup> modern theories have made them all the more resistant to the idea of fixation. Performances are described as events, ephemeral and transient in essence, thus unable to be captured.<sup>89</sup> This logic refuses the assimilation of performances to 'works of art' or artistic 'artefacts' with fixed contours.<sup>90</sup> As a framework essentially turned towards the material and the fixed, this lack of tangibility was considered to be one of the reasons why the legal narrative was, and

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<sup>84</sup> n 52.

<sup>85</sup> The fixation issue is at the crossroads of both economic and legal considerations on the work of performers. Adam Smith considered that performances' lack of materiality rendered their value nil. He writes: "players, buffoons, musicians, opera-singers, opera-dancers [...] [whose work] perishes in the instant of its production", in Smith (n 1) 221.

<sup>86</sup> Arnold (n 3) 9.

<sup>87</sup> See Chapter 5 for more details on the embodied nature of performances, text to 147.

<sup>88</sup> *ibid.*

<sup>89</sup> Fischer-Lichte, *The Transformative Power* (n 25) 75; Fischer-Lichte *Introduction to Theatre and Performance Studies* (n 24) 22-6.

<sup>90</sup> Fischer-Lichte, *The Transformative Power* (n 25) 75.

still is, reluctant to protect performances. This approach gave birth to many derivative arguments which will be considered in turn.

(1) Protecting performers should not be dismissed on the basis that performance specialists themselves reject the analogy between performance and 'work of art'.<sup>91</sup> It may be beguiling to summarise copyright frameworks as the bodies of law regulating the dissemination of works of arts, but this representation would be as deceitful as it is outdated.

Although the analogy between 'copyright work' and 'work of art' was made by some legislators in earlier copyright legislation, this narrow view of the protected subject-matter has since been widened. In *Mazer v Stein*,<sup>92</sup> Reed J reminds us that:

The successive acts, the legislative history of the 1909 Act and the practice of the Copyright Office unite to show that "works of art" and "reproductions of works of art" are terms that were intended by Congress to include the authority to copyright these statuettes. Individual perception of the beautiful is too varied a power to permit a narrow or rigid concept of art. As a standard we can hardly do better than the words of the present Regulation, § 202.8, supra, naming the things that appertain to the arts. They must be original, that is, the author's tangible expression of his ideas [...]. Such expression, whether meticulously delineating the model or mental image or conveying the meaning by modernistic form or color, is copyrightable. What cases there are confirm this coverage of the statute.<sup>93</sup>

Indeed, the notions of 'works of art' and 'protectable works' are not, or no longer are, synonymous, far from it.<sup>94</sup> If all traditional works of art are generally protectable under copyright laws, not all works protectable by law are works of art. For instance,

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<sup>91</sup> Fischer-Lichte, *The Transformative Power* (n 25) 75.

<sup>92</sup> 347 US 201 (Supreme Court 1954).

<sup>93</sup> *ibid*, 213-4, citations omitted.

<sup>94</sup> Although it seems that sometimes the term does creep in judges' narrative: LJ Walker and Collins states that "[i]t would not accord with the normal use of language to apply the term "sculpture" to a 20th century military helmet used in the making of a film, whether it was the real thing or a replica made in different material, however great its contribution to the artistic effect of the finished film. The argument for applying the term to an Imperial Stormtrooper helmet is stronger, because of the imagination that went into the concept of the sinister cloned soldiers dressed in uniform white armour. But it was the Star Wars film that was the work of art that Mr Lucas and his companies created. The helmet was utilitarian in the sense that it was an element in the process of production of the film", in *Lucasfilm Ltd & Ors v Ainsworth & Anor* [2011] UKSC 39, para 44.

databases and computer software<sup>95</sup> are eligible to copyright protection on par with paintings, books, dramatic or choreographic works are. The legal concept of 'protectable work' is a more malleable notion than the concept of 'work of art'. The category of protectable works is flexible enough to be extended to creative products policy-makers adjudge necessary to protect even though they cannot be assimilated to the traditional definition of creative artefacts. Thus the lack of semantic between 'performances' and 'works of art' should not preclude the association of the former with the concept of protectable material.

**(2)** Copyright laws have been criticised for favouring the protection of products over that of creative processes; various elements composing current copyright frameworks would support this claim of product-centrism.<sup>96</sup> Such bias is another factor fuelling the fixation anxiety underlying the debate on performers' rights. It is also consistent with the western cultural belief<sup>97</sup> according to which creativity resides entirely in the finished product, being the embodiment of the artist's creative idea, and not in the making process.<sup>98</sup>

Although the phrase of 'work'<sup>99</sup> or 'work of the mind',<sup>100</sup> could refer to both products and processes, the statutory definitions and lists of protectable works provided by

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<sup>95</sup> Commenting on computer software, Canby J admitted that the court "recognize[s] that "some works are closer to the core of intended copyright protection than others." *Campbell v Acuff-Rose Music Inc*, 510 US 569, 586, 114 S Ct 1164, 127 L Ed 2d 500 (1994)." in *Sony Computer Entertainment v Connectix Corp*, 203 F 3d 596 (9th Cir 2000) 603.

<sup>96</sup> Such bias mainly manifests itself during the assessment of originality of a work candidate to copyright protection. It has been the main criticism of legal feminist scholars who blame the lack of protection of traditional women's work (i.e. food recipes, needlework) on this particular trait of the copyright system. See for example Emily Chaloner, 'A Story of Her Own: A Feminist Critique of Copyright Law' (2010) 6 *A Journal of Law and Policy for the information society* 221, 226.

<sup>97</sup> This point is further discussed in Chapter 4, text to note 9.

<sup>98</sup> This point crystallises the opposition between Idealist and Action theorists, see Keith Sawyer, 'Western Cultural Model of Creativity: Its Influence on Intellectual Property Law, The Symposium: Creativity and the Law' (2011) 86 *Notre Dame L. Rev* 2027, 2030-1; Keith Sawyer, *Explaining Creativity The Science of Human Innovation* (2nd edn, Oxford University Press 2012) 86-90.

<sup>99</sup> Australia: 1968 Copyright Act (Australia), s. 10 and s. 31(1); UK: CDPA 1988, s. 1(1); US: US Code, Title 17 para 101-3; Berne Convention, Art. 2.

<sup>100</sup> IPC, Art. L 111-1 refers to « œuvre de l'esprit ».

copyright laws clearly target products rather than processes.<sup>101</sup> Sherman and Bently identify the 1911 Act as the tipping point where the British<sup>102</sup> copyright framework moved away from considering the creative process when assessing the scope of copyright protection, to only focus on the work.<sup>103</sup> Nowadays, the same logic transpires through the modern mutations of this piece of legislation dating back to the early twentieth century. Indeed, no matter how creative a process may be, the courts will only take into consideration the originality embodied in the work. This position resulted in refusing to grant copyright protection to artists who practice the art of “creative copying”<sup>104</sup> also known as “extreme copying”<sup>105</sup> and to individuals who employed their skills to restoring pieces of art.<sup>106</sup> Because these practices result in replicating a product which has already been designed, these efforts are regarded as unoriginal for copyright purposes, and are thus left unprotected. No matter how skilful and ingenious the process may be, the product remains the non-copyrightable copy of an existing piece.<sup>107</sup>

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<sup>101</sup> Australia: 1968 Copyright Act, s. 10 and s. 31(1); France: IPC, Art. L 111-1 refers to « œuvre de l’esprit »; UK: CDPA 1988, s. 1(1); US: US Code, Title 17 para 101-3; Berne Convention, Art. 2.

<sup>102</sup> By way of ricochet, the same comments also apply to Australia. Before the 1968 Copyright Act, Australian copyright law was a direct transplant from the British legal framework. The 1912 Copyright Act formally enacted in Australia the substance of the British 1911 Copyright Act. See, Mark Davison, Ann Monotti and Leanne Wiseman, *Australian Intellectual Property Law* (Cambridge University Press 2012) 191-2.

<sup>103</sup> The legislator introduced this change to put an end to the “glorious muddle” casuistic and responsive approaches to copyrightable works had brought in the field. By the same token, considerations for the creative process vanished and the modern era of copyright began with the ‘work’ as its centre piece. Brad Sherman and Lionel Bently, *The Making of Modern Intellectual Property - The British Experience 1760-1911* (Cambridge University Press 1999)2-3, 48, 134.

<sup>104</sup> Ann Bartow, ‘Copyrights and Creative Copying’ (2003) 1 U. Ottawa L. & Tech. J. 75.

<sup>105</sup> Burton Ong, ‘Originality from Copying: Fitting Recreative Works into the Copyright Universe’ (2010) 2 Intellectual Property Quarterly 165.

<sup>106</sup> See on the question of ‘creative copying’, Bartow (n 104); Michael Carroll, ‘Copyright’s Creative Hierarchy in the Performing Arts’ (2012) 14 Vand. J. Ent. & Tech. L. 797. Burt Ong refers to this practice as “extreme copying” in ‘Originality from Copying: Fitting Recreative Works into the Copyright Universe’ (2010) 2 Intellectual Property Quarterly 165, 167.

<sup>107</sup> To mitigate this, it must be noted that copyright protection was granted to artists whose worked mainly focused on restoring pre-existing pieces. See for example, *Hyperion Records Ltd v Sawkins* [2005] EWCA Civ 565. The *Dead Sea Scroll case* heard by the Israeli Supreme Court is another famous example of restorative works receiving full copyright protection. On this see notably, David Nimmer, ‘Copyright in the Dead Sea Scrolls: Authorship and Originality’ (2001) 38 Hous. L. Rev 1.



These remarks highlight how the copyright legal framework gradually closed the door to the protection of creative processes. This position might explain legislators' reluctance to envisage the listing of performances as protectable works since their essence cannot be easily aligned with the product-centrism displayed by copyright narratives since 1911. Modern understandings of performances would concur with this position as they too, stress the fact that performances are events (processes) rather than artefacts (products).<sup>108</sup> If copyright only protects tangible products, copyrighting performances would be a gross misunderstanding of the latter's nature. It is thus submitted that performers' rights could not be levelled up to substance of copyright without re-thinking and re-writing its narrative surrounding creativity and originality.

**(3)** Beyond the question of nomenclature separating 'performances' from 'works of art' and 'creative processes' from 'creative products', one more legal obstacle is opposed to performers: the fixation condition. The lack of tangible contours ultimately triggers a lack of fixation. Judges and policy-makers<sup>109</sup> considered interpretations too "fleeting"<sup>110</sup> or "ethereal"<sup>111</sup> to be considered as copyright works.

Not only are performances naturally intangible but their essence resists the notion of fixation, for reasons explained above.<sup>112</sup> Placing itself on the other end of that spectrum, the law requires steady definitions of subject-matter, claims and claimants to function. Accepting to legally protect performances for what they are, ever-

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<sup>108</sup> Fischer-Lichte, *The Transformative Power* (n 25) 75-6.

<sup>109</sup> See comments made by the Spicer committee and Gregory Report to this effect in J.A. Spicer, 'Spicer Report to Consider What Alterations Are Desirable in The Copyright Law of the Commonwealth' (1959) 282, and Gregory (n 62).

<sup>110</sup> *Island Records Ltd v Corkindale Court of Appeal* [1978] Ch. 122, 132; *Garcia v Google Inc*, 786 F 3d 733 (9<sup>th</sup> Cir 2015) 737.

<sup>111</sup> *Island Records Ltd v Corkindale Court of Appeal* [1978] Ch 122, 132.

<sup>112</sup> see text to note 25.

evolving experiences,<sup>113</sup> would require the possibility for rights to slide along with the undetermined contours of an object whose substance is constantly re-invented.<sup>114</sup> This would end in the precarious situation where stakeholders and judges would be incapable of clearly distinguishing what is protected from what is left available for the public to access and use, or so goes the argument. It is true that a similar risk of uncertainty was present in the context of authorial works but that such issue was resolved by requiring authors to fix their work to obtain protection.<sup>115</sup> This solution was easily met by artists whose creative process already involved the making of a material object, as acts of creation and fixation would coincide.<sup>116</sup> Performing however, does not result in any tangible production. Commentators saw in this resistance to materiality an irremediable flaw of performers' practice since the fixation condition is implemented to ensure the sound functioning and management of the intellectual property rights.<sup>117</sup> Ironically perhaps, nearly everything surrounding

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<sup>113</sup> Fischer-Lichte, *The Transformative Power* (n 25) 75-7.

<sup>114</sup> In this regard, it could be argued that performances behave in a manner not dissimilar to computer programs which require continuous updates to evolve with technologies and yet remain eligible to copyright protection.

<sup>115</sup> Australia: 1968 Copyright Act, s. 22(1)-(2), s. 32; UK: CDPA 1988, s. 3; US: US Code, Title 17 para 101. See Elizabeth Adeney, 'Authorship and Fixation in Copyright Law: A Comparative Comment' (2011) 35 Melbourne Law Review 677. France does not require the work to be fixed to obtain copyright protection (see IPC, Art. L 111-2 and L 112-1). An exception is made however for choreographic works which must be fixed in writing or otherwise to be protected (see IPC, Art. L 112-2-4). This lack of uniformity between countries on the question of fixation is a result of the Berne Convention authorising national governments to opt for it or not (Art. 1.2).

<sup>116</sup> This is the case notably for books, drawings, sculptures, paintings, computer software. Dramatic, choreographic and musical works will have to be written, notated, translated into scores or videotaped to be protected. Notation and records are common practice in the field of music.

<sup>117</sup> This point is discussed in great length in the American literature, see for example: Gregory Donat, 'Fixing Fixation: A Copyright with Teeth for Improvisational Performers' (1997) 97 Columbia Law Review 1363; Kim (n 4) 470-1. Performances' lack of fixation was the legal justification grounding the dissenting opinion in *Garcia v Google* (2014). Smith J (diss.) explains that "Garcia did not write the script; she followed it. Garcia did not add words or thoughts to the film. She lent her voice to the words and her body to the scene. Her creativity came in the form of facial expression, body movement, and voice. Similarly, a singer's voice is her personal mobilization of words and musical notes to a fluid sound. Inflection, intonation, pronunciation, and pitch are the vocalist's creative contributions. Yet, this circuit has determined that such, though perhaps creative, is too personal to be fixed", in *Garcia v Google Inc*, 766 F 3d 929 (9th Cir 2013) 1273-5.

The same fixation obsession transpires in disputes over the distribution of rights between collaborators. It has become clear throughout all the jurisdictions under study that one's involvement in the fixation of the expression of the work plays a crucial role in obtain copyright. Although it is not the sole criteria, it seems a strong evidentiary point to underscore before the judges in case of litigation. This emphasis on fixation in this regard has led the jurisprudence to draw a rather artificial sometimes awkward line between authorial and 'mere' performative input. See for instance, the Australian case *Prior v Sheldon* [2000] FCA 0438, (2000) 48

the performance can be subject to copyright but not the performance itself. Decors,<sup>118</sup> make-up items,<sup>119</sup> costumes<sup>120</sup> and other accessories<sup>121</sup> used for the production of performance are all elements fully protectable by law.

The fixation issue becomes less convincing now that video and audio technologies allow a form of fixation of performative pieces at low cost.<sup>122</sup> Against that argument, some have argued that recording technologies remain unable to fix or replicate the perfect image of performances since the latter are unable to be materialised without losing their event-based character. It is true that no record of a performance will be able to recreate it in its entirety to the public who has not experienced it live. Their

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IPR 301, 316-7 which does not seem to perfectly match the reasoning of the British court in *Hadley v Kemp* [1999] All ER (D) 450; [1999] EMLR 58.

<sup>118</sup> France: Paris, 1<sup>ere</sup> ch., pole 5, 21 octobre 2009, n° 08/09096 Fresnay: propr. Intell. 2010N 34 p. 614 obs. Lucas (stage sets are eligible to authors' rights); Paris, 1<sup>ere</sup> ch., 11 mai 1965, Dali c/ Théâtre royal de la monnaie de Bruxelles et al.: D. 1968, 382 (idem).

<sup>119</sup> *Billy bob teeth Inc v Novelty Inc*, 329 F3d 586 (7th Cir 2003) (make up prosthetics are copyrightable).

<sup>120</sup> In *Conrad v Am Community Credit Union*, Posner commented: "Conrad has copyrights, which we'll assume are valid, on photographs and sculptures of her in her banana costume. She has also registered a copyright on the costume itself, but there is doubt (not necessary for us to resolve) about the validity of that copyright because banana costumes quite similar to hers are, we are surprised to discover, a common consumer product", 750 F3d 634 (7th Cir 2014) 638.

<sup>121</sup> *Lucasfilm Ltd v Ainsworth* [2011] UKSC 39 (the troopers' helmets designed for the production of the film Star wars are subject to an extensive international intellectual property protection).

<sup>122</sup> Arnold J. comments: "[t]he argument [performances lacking fixation] has been fallacious ever since it became possible to record and reproduce performances." Arnold (n 3) 9.

The courts seem to have accepted the possibility to protect performances once recorded. In France, the performance in the Louvres of the artist Sorbelli was considered as protectable once photographed by the Paris Court of Appeal in Paris, 3 décembre 2004, *Sorbelli c/ Yoshida*, n° 04/06726: D. 2005, juris, p. 1237 [lexbase=A0681DGC], JCP E 2005, No1863 para 3. A similar position is held by the American court of appeal of the 7<sup>th</sup> circuit, however, the performance is regarded as being encapsulated video record so much so that it becomes an integral part of it and cannot receive an independent protection, in *Baltimore Orioles Inc v Major League Baseball Players Assn*, 805 F2d 663(7th Cir 1986) 675. In this case, Eschbach J. comments: "It is, of course, true that unrecorded performances per se are not fixed in tangible form. Among the many such works not fixed in tangible form are "choreography that has never been filmed or notated, an extemporaneous speech, 'original works of authorship' communicated solely through conversations or live broadcasts, and a dramatic sketch or musical composition improvised or developed from memory and without being recorded or written down." [...] Nonetheless, once a performance is reduced to tangible form, there is no distinction between the performance and the recording of the performance for the purpose of preemption under § 301(a). [...] By virtue of being videotaped, however, the Players' performances are fixed in tangible form, and any rights of publicity in their performances that are equivalent to the rights contained in the copyright of the telecast are preempted"(citation omitted).

transient nature prevent their capture no matter how advanced the technology may be.<sup>123</sup>

In response to this point, one may suggest that fixation for the purpose of copyright and fixation for creative purposes are two means with different objectives. Therefore, the expectations of the law would not be as high those of artists' when considering the degree with which the essence of their work ought to be faithfully captured. Indeed, intellectual property laws do not necessitate the essence of works to be fixed in their entirety to function. The requirement of fixation is a practical condition aiming to ease litigation procedures and the management of evidence in case of dispute. Therefore, the law would not seek the perfect material copy of a performance but the existence of an object which judges, parties and juries would be able to reference during proceedings or negotiations. Copyright laws would only expect such fixation to record the performance's substantial elements such as the tone, musicality or rhythm of the vocalist, the body movements, voice and overall embodiment of the actor. It is not disputed that most recording methods would certainly struggle to convey the other facets of performances such as their three-dimensional aspect or their effect on the audience. They would be equally unable to re-create the 'feedback loop' between performers and the audience, another central feature of the performing arts.<sup>124</sup> Yet it is submitted that encapsulating the main components of the performance, as suggested above, would suffice to identify performers' creative input in the work they interpret, and in turn, ascertain where the originality of the written material ends and theirs begins. This approach to fixation is purely instrumentalist but does accommodate the possibility for performances to be protected by

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<sup>123</sup> Performing studies have found ways to walk around this issue in order to carry out performance analysis. See on this, Fischer-Lichte (n 24) 49-58.

<sup>124</sup> Fischer-Lichte, *The Transformative Power* (n 25) 38-9.

intellectual property law without being held back by their apparent lack of tangibility.<sup>125</sup>

In light of these remarks, the opposition between tangible authorial works and intangible performances begins to appear as more of a theoretical illusion than a reality of intellectual property frameworks. The subsequent paragraphs further challenge the superficial opposition between material copyright works and immaterial performances. Various elements and historical evolutions of intellectual property laws have made authorial works less tangible than portrayed so far.

First of all, not all copyright frameworks require a high level of tangibility to confer protection. In France for instance, copyright works only need to be perceptible to meet the legal standard of fixation.<sup>126</sup> Perfumes are thus protectable even though their substance is highly immaterial.<sup>127</sup> Furthermore, even in jurisdictions where the fixation condition holds a higher threshold, judges have been prone to grant copyright protection to intangible elements such as electric impulses.

In the Australian case of *Apple Computer Inc v Computer Edge Pty Ltd*,<sup>128</sup> Fox J explains that the protected subject-matter is the sequences of electrical impulses contained in the silicon chips (also referred to as ROMs) and not the silicon chips

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<sup>125</sup> Imperfect or partial fixation was admitted by French judges as a suitable level of materiality in the Sorbelli case. See Paris, 3 décembre 2004, *Sorbelli c/ Yoshida*, n° 04/06726: D. 2005, juris, p. 1237 [lexbase=A0681DGC], JCP E 2005, No1863 para 3. Partial fixation was also accepted in the context of other works such as perfumes, see on this text to notes 126 and 127. Conversely, partial fixation of choreographic works by way of photographing live performances was admitted as a form of infringement of the copyright vested in the dance. The Court of Appeal judge considered that the still photograph of a choreographic pause suggests far more of the work than what is represented to the spectator who has recently seen a performance of the piece. See, *Horgan v Macmillan Inc*, 789 F 2d 157 (2<sup>nd</sup> cir 1986) 163.

<sup>126</sup> French intellectual property law does not enforce a fixation requirement, see Paris, 4<sup>ème</sup> ch., 14 février 2007, n° 06/09813, *Beauté Prestige...*: JCP G 2007, I, 176 N 4 obs. Caron.

<sup>127</sup> In the case of perfumes, the Courts seem to have introduced a slightly higher threshold of originality, requiring fragrances to more than just the result of a combination of perfumers or chemists. See, Cass, 1<sup>ère</sup> civ, 13 juin 2006, n° 02-44.718: Bull. Civ 2006 I N° 307 p. 267; D. 2006, act. P 1741 note Daleau; pan. p. 2993 obs. Sirinelli.

<sup>128</sup> 53 ALR 225.

themselves, when commenting on source codes in computer programs.<sup>129</sup> As a result, silicon chips made of a different shape and structure but commanding the same sequences of electric impulses as a previous copyrighted source code are infringing copies of that code. He states:

In my opinion, the programs contained in the Wombat ROMs and EPROM are reproductions of the programs contained in the Apple II ROMs, namely, Applesoft Object and Autostart Object. [...] The Wombat ROMs and EPROM embody the same arrangements of electrical impulses as the Applesoft's programs in object code. The code is constituted by the arrangement of impulses. The silicon chips represent the material form in which the codes are embodied. The code may be ascertained from the chips by having their contents (ie the programs) reproduced by the computer in a written form. Whichever means of storage is adopted, each is in a material form. Hence the Wombat ROMs and EPROM constitute a reproduction in a material form of both Applesoft Object and Autostart Object. As the object codes in the Applesoft ROMs have been reproduced in the Wombat ROMs and EPROM, there has been a reproduction of the adaptations of the two programs in source code.<sup>130</sup>

It is clear that what is protected by the law is not the chip itself but the arrangement of electric impulses it generates. The chip happens to be a form of fixation of the code or of the impulse but is neither its perfect nor its only material image.

Similarly, in *Wihitol v Wells*,<sup>131</sup> the American court recognised that “out of the arts, music [was] perhaps the least tangible”,<sup>132</sup> yet the immaterial essence of musical

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<sup>129</sup> *Apple Computer Inc v Computer Edge Pty Ltd* (1984) 53 ALR 225, 232: “Programs in source code must therefore be converted into sequences of electrical impulses. This is achieved by the use of a computer (a PROM programmer) which is equipped with an “assembler” or “compilation program”. A source program’s mnemonics are typed into the computer. Each keystroke generates a series of electrical impulses which the assembler will recognize and convert into impulses which detail each step of the program. The sequences so produced are said to express the program in “object” or “machine readable code”. Assembler programs operate in a relatively standard manner, so that programs in a particular source code (eg Applesoft Basic) comprising the same terms will produce object codes made up of the same sequences. Both “Applesoft” and “Autostart” were converted into object code in this way. Initially, representations of these sequences of electrical impulses were stored on a magnetic disc or tape. Later, they were regenerated, transferred to silicon chips contained in the ROMs, and stored or retained there.”

<sup>130</sup> *ibid*, 263-4.

<sup>131</sup> 231 F2d 550 (7th Cir 1956); 109 U.S.P.Q. 200 (7th Cir 1956).

<sup>132</sup> *Wihitol v Wells*, 231 F2d 550 (7th Cir 1956) 552. Full citation: “Of all the arts, music is perhaps the least tangible. Music is expressed by tonal and rhythmic effects. People can enjoy music without a technical understanding or education, but to make music available, someone must write it. To make a song available, someone must bring the notes and words together.” Before that, the American Supreme Court had also pointed

works did not prevent its coverage by copyright law.<sup>133</sup>

This acceptance of the work's intangible essence is in line with the principle that the subject-matter protected by copyright and designated as being the 'copyright work' is not limited by the boundaries of its fixed version.<sup>134</sup> First of all, it is commonly accepted that the copyright work exists before it is reduced to a tangible material form.<sup>135</sup> In *Norowzian v Arks Ltd*,<sup>136</sup> Rattee J commented:

In my judgment a film per se cannot be a dramatic work within the meaning of the 1988 Act. It can, on the other hand, be a recording of a dramatic work for the purpose of section 3(2) of the 1988 Act. The dramatic work is something that exists apart from the film, even if the film is the only form in which it is recorded.<sup>137</sup>

A similar position was held by the court in *Hadley v Kemp*:<sup>138</sup>

[T]he proposition that copyright does not exist in a musical work until it is first reduced to a material form does not mean that the musical work does not exist until it is first reduced to a material form. Quite the contrary: the Act assumes that a work may exist before it is reduced to material form.<sup>139</sup>

It can be concluded that although copyright protection requires fixation, the existence of the work does not.<sup>140</sup> Authorial works exist before the fixation occurs despite the fact their substance is intangible. Once the work is fixed, copyright rises and protects it retrospectively.

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to ways of coping with the protection of intangible matters such as music. See, *White-Smith Music Publishing Co v Apollo Co*, 209 US 1 (Supreme Court 1908) 11, 17.

<sup>133</sup> Musical works are a category of protectable musical works in all the jurisdictions under study in this analysis. Australia: 1968 Copyright Act, s. 10; France: IPC, Art L 112-2; UK: CDPA 1988, s. 1(1)(a); US: US Code Title 17 para 101.

<sup>134</sup> In *Millar v Taylor*, the Court emphasised the intangible nature of the subject-matter protected. See, *Millar v Taylor* (1769) 4 Burrow 2303, 2361-2. The case was later cited and the principle reaffirmed by the American Supreme Court in *Wheaton and Donaldson v Peters and Grigg*. See *Wheaton and Donaldson v Peters and Grigg*, 33 US 591 (Supreme Court 1834) 672-3. In *Emi Songs Australia Pty Ltd v Larrikin Music Publishing Pty Ltd*, the Australian court suggests that intellectual property rights have protected intangible elements since the Romans. See, *Emi Songs Australia Pty Ltd And Another v Larrikin Music Publishing Pty Ltd* [2011] FCAFC 47, para 31.

<sup>135</sup> Sherman, 'What Is Copyright Work?' (2011) 12 *Theoretical inquiries in Law* 99, 108-110.

<sup>136</sup> *Norowzian v Arks Ltd* [1998] EWHC 315 (Ch).

<sup>137</sup> *ibid.*

<sup>138</sup> *Hadley and others v Kemp* [1999] All ER (D) 450; [1999] EMLR 58.

<sup>139</sup> *ibid* (i) under para N2.

<sup>140</sup> Sherman (135) 108-10.

In *Hadley v Kemp*,<sup>141</sup> the court went even further by holding that that the work exists in the author's mind before it is made perceptible by the outside world:

In my judgment a song devised by Mr Kemp and worked up by him in his own mind to the developed stage at which he presented it to the band was already a musical work. Further, at that stage he was undoubtedly the sole author of it.<sup>142</sup>

A comparable position was held in Australia by Wilcox J when litigating a dispute over images contained in a video game:

The visual images depicted in these video games did exist before the game was played. They existed in the minds of their creators and the drawings and models they made.<sup>143</sup>

Here, the Court goes a step further in dematerialising the work as they acknowledge its (legal) existence before it is even perceptible by senses and the outside world. It seems as though common law copyright accepts the mere thought of the work as being the work itself. Even in France, where the fixation condition is not a requirement for the copyright protection nor for the existence of the work, the courts demand authors' 'works of the mind' to be at least perceptible by the senses – sight, hearing, smell – to attract intellectual property rights.<sup>144</sup> Compared to the standard of materiality displayed in those decisions, performances' intangibility can hardly be considered an obstacle to their protection by intellectual property laws.

Going further, the law also recognises that the work, and the rights attached to it, survive the disappearance of its fixed version. In the British case *Metix (UK) Limited*

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<sup>141</sup> *Hadley and others v Kemp* [1999] All ER (D) 450; [1999] EMLR 58.

<sup>142</sup> *ibid* (i) under para N2.

<sup>143</sup> *Galaxy Electronics Pty Ltd v Sega Enterprises Ltd* (1997) 37 IPR 462, 469.

<sup>144</sup> In the case of the Prince Igor, although Borodine's input was only preserved in the memory of a small audience, this mode of fixation was enough to grant him full legal ownership of the opera. See Cass, 1ère civ, 14 novembre 1973, « affaire du Prince Igor et opéra de Borodine » n° 71-14.709: Bull civ I, p.390, RIDA avril 1974, p.66. For more on this case see text to note 150.



*v GH Maughan (Plastics) Limited*,<sup>145</sup> Laddie J received the argument according to which “[a] sculpture made from ice is no less a sculpture because it may melt as soon as the temperature rises”.<sup>146</sup> The judge thereby confirmed that the fixation condition is not one of permanence. This also suggests that the work can be ephemerally fixed and yet protected by the law, the rights conferred to the creative piece surviving the loss of its material form.<sup>147</sup>

Tying this point back to earlier comments on the need of materiality for litigation purposes, it seems as though the courts were able to cope with the absence of original tangible works to rely on during infringement proceedings. Confirming this contention, in *Lucas v Williams & Sons*<sup>148</sup> the British Court heard an infringement case even though the original of the painting at stake in the dispute could not be produced in evidence by the claimant. Instead, a replica in the form of an engraving was registered as evidence and admitted by the bench despite the protest of the defending counsel. Collins J reported:

The plaintiff did not produce the original painting by Mr. Marcus Stone, but he produced an engraving of it belonging to himself, which he said was made by a well-known engraver under Mr. Marcus Stone's immediate supervision, and was an exact copy of the original painting. He also produced the photograph sold by the, defendants, and said that it was a bad photograph taken direct from the engraving. [...]

Objection was taken by the defendants' counsel to the admissibility of this evidence, and Collins, J., ruled that it was admissible.<sup>149</sup>

In France, a similar position was held by the Court of Cassation a century later in a dispute opposing Alexander Glazunov's wife to the famous theatre 'Le Grand

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<sup>145</sup> *Metix (UK) Limited and Another v G.H. Maughan (Plastics) Limited* [1997] FSR 718. Justice Laddie accepts the argument according to which “[a] sculpture made from ice is no less a sculpture because it may melt as soon as the temperature rises” (721).

<sup>146</sup> *Metix (UK) Limited and Another v G.H. Maughan (Plastics) Limited and Another* [1997] FSR 718,721.

<sup>147</sup> see text to note 150.

<sup>148</sup> [1892] 2 QB 113.

<sup>149</sup> *ibid*, 114.

Theatre des Champs Elysées'.<sup>150</sup> Borodine had composed and orchestrated the opera *Prince Igor* but died before completing the piece. After his death, Rimsky-Korsakov and Glazunov undertook to edit and finish Borodine's work. No musical scores or material rendition of Borodine's work were available to Guslanov and Rimsky-Korsakov when they produced the opera. Nevertheless, the two composers had the opportunity to encounter Borodine's creation when it was played to them during private performances organised by the late musician. The question asked to the Court was whether the edited and completed opera was a joint work composed by Rimsky-Korsakov, Glazunov and Borodine or whether Borodine's creative mark on the overall piece was such that it should any claims of co-ownership. Even though there was no objective evidence available to the Bench to assess the substantial similarity between the disputed segments of the opera to Borodine's earlier compositions, the judges litigated the case in favour of the second claim, i.e. Borodine's sole-authorship. They concluded that "Rimsky-Korsakov and Glazunov integrated in their work without modification musical compositions Borodine had performed in front of a small group of listeners who had kept those segments safe and intact in their memory, so much so his work did come into being".<sup>151</sup> The Court based this evidence on Rimsky-Korsakov's diary published under the title *Diary of my life*:

But, considering that, the Court of Appeal admitted on the basis of the evidence presented in 'The Diary of my Life' written by Rimsk-Korsakov that 'Glory to the beautiful Sun, 'Dance of the Polovtsian Maidens', 'No sleep, no rest for my tormented soul', the recital of Vladimir's song, and Kontschkovna and Vladimir's leitmotivs, as well as the final chorus had been completed and orchestrated by Borodine and that Rinsky-Korsakov and Glazunov had later

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<sup>150</sup> Cass, 1ère civ, 14 novembre 1973, « affaire du Prince Igor et opéra de Borodine » n° 71-14.709: Bull civ I, p.390, RIDA avril 1974, p.66.

<sup>151</sup> *ibid*, author's translation, see original text in Appendix 1. This decision is not without echoing Park J.'s vision of fixation in the context of musical works where he sees such work being « fixed in [their authors'] musical consciousness ». See, *Hadley v Kemp* [1999] All ER (D) 450, para N3.

decided to achieve his musical work to make its publication possible.<sup>152</sup>

Finally, the scope of copyright infringement also confirms the intangibility of authorial works. Since the early ages of copyright, it was agreed that the legal protection conferred to authors went beyond the physical boundaries of the work so that uses of the work which would not otherwise amount to literal copying would still be prohibited. As a result, individuals would neither be allowed to copy the physical pages of a copyrighted book nor the style and expression in which the book describes the adventures and characters it contains - without the writer's consent. For instance, translations, adaptations,<sup>153</sup> imitations or re-creations of works without their authors' consent were counted in this category of non-literal infringing acts.<sup>154</sup> Authors' rights thus protect the material form of the work as well as its immaterial content.<sup>155</sup>

Many illustrations of this position can be found in the jurisprudence of all the jurisdictions under study. Indirect copying has been regarded as infringing the work it imitates<sup>156</sup> even when the medium of expression has changed<sup>157</sup> or the result was

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<sup>152</sup> Cass, 1ère civ, 14 novembre 1973, « affaire du Prince Igor et opéra de Borodine » n° 71-14.709: Bull civ I, p.390, RIDA avril 1974, p.66. Author's translation, see original text in Appendix 1.

<sup>153</sup> n 70.

<sup>154</sup> Lionel Bently, 'Authorship in Popular Music in UK Copyright Law' (2009) 12 Information, Communication and Society 179, 183.

<sup>155</sup> *ibid.*

<sup>156</sup> France: Cass, 1re civ 4 février 1992, n° 90-21.630: Bull. 1992 I N° 42 p. 31; D. 1992. p.182 (The novel (La Bicyclette Bleue) infringed the Margaret's Mitchell famous novel "Gone with the Wind" by re-using storylines, key scenes and character in its modern adaptation); UK: Temple Island Collections Ltd v New English Teas Ltd & Anor [2012] EWPC 1, [2012] FSR 9; [2012] All ER (D) 49; [2012] ECDR 11.

<sup>157</sup> France: Paris, 1ère ch., 11 mai 1965, *Dali c/ Théâtre royal de la monnaie de Bruxelles et a.*: D. 1968, 382 (the painter who draws the sketches for the purpose of making costumes, also own the rights in the costumes themselves); Cass, 1ère civ, 12 juin 2001, n° 98-22.591: Bull civ 2001 I N° 171 p. 111 (Le Petit Prince case, the owner of a literary work also controls its conversion into a cartoon); UK: *Bauman v Fussell* [1978] RPC 485 (18 May 1953); US: *Pickett v Prince*, 207 F3d 402 (7th Cir 2000) 405, 406 (the adaptation of a the two-dimensional symbol into a three dimensional object infringes the copyright vested in the symbol), *Entertainment Research v Genesis Creative Group*, 122 F 3d 1211 (9th Cir 1997) (on costumes infringing the copyright in two-dimensional cartoon characters).

achieved through reverse engineering.<sup>158</sup> This extension of protection to the intangible profile of the copyright work also explains why creative or extreme copying is considered a form of infringement.<sup>159</sup> This confirms that the rights conferred by copyright are attached to an intangible substance even though the rights themselves require some level of fixation throughout the life of the work to arise.

Jonathan Griffiths argues that the lack of intangibility of the copyright work is the result of a dematerialisation movement affecting contemporary copyright law. Building on Sherman and Bently's theory developed in *The Making Modern of Intellectual Property*,<sup>160</sup> Griffiths holds that the narrative of European copyright law has progressively moved away from concrete understandings of the concepts of 'works' and 'originality' to adopt standards more and more dematerialised.<sup>161</sup> The recent *Infopaq* jurisprudence<sup>162</sup> is described to have stepped away from a materialised and categorised approach to copyrightable matters by targeting the

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<sup>158</sup> Australia: *Compagnie Industrielle de Precontrainte et D'Equipeement des Constructions SA v First Melbourne Securities Pty Ltd* [1999] FCA 660,[62]: "indirect copying of a drawing by reverse engineering of an object made in accordance with the drawing is a well-recognised means of copyright infringement: *LB (Plastics) Ltd v Swish Products Ltd* [1976] RPC 551 (HL); *Edwards Hot Water Systems*."; *Apple Computer Inc v Computer Edge Pty Ltd* (1984) 53 ALR 225, 263-4.; France: Paris, 4eme ch., 12 décembre 1997: D. 1998, inF Rap. p. 38. In the US, legitimate reverse engineering has been considered a fair use of protected material. Often the features of a work copied through reverse engineering will be merely functional so left unprotected by copyright. See *Altera Corp v Clear Logic Inc*, 424 F 3d 1079 (9th Cir 2005) 1083-85. A similar position was held in the UK, rejecting the language code and function of a computer program as protectable material: *SAS Institute Inc v World Programming Ltd* [2013] EWHC 69 (Ch); [2013] RPC 17. In France, Art L 122-6-1 specifies the cases of legitimate reverse engineering. In Europe, legitimate reverse engineering exception were mainly driven by the dispositions of Article 82 of EC Treaty, 25 March 1957.

<sup>159</sup> n 106.

<sup>160</sup> Sherman and Bently *The Making of Modern IP* (n 103).

<sup>161</sup> Jonathan Griffiths, 'Dematerialization, Pragmatism and the European Copyright Revolution' (2013) 33 *Oxford J Legal Studies* 767.

<sup>162</sup> The jurisprudence was based on Art. 6 of the Council Directive 93/98/EEC of 29 October 1993 (OJ 1993 L 290, p. 9) See the following cases, C-5/08 *Infopaq International A S v Danske Dagblades Forening* [2009] EUECJ C-5/08\_O; C-393/09 *Bezpečnostní softwarová asociace Svaz softwarové ochrany v Ministerstvo kultury* [ 2010] EUECJ C-393/09, EU:C:2010:816, ECLI:EU:C:2010:816, [2011] FSR 18, [2011] ECDR 3; C-604/10 *Joined cases C-403/08 and C-429/08 Football Association Premier League & Ors v QC Leisure and Others, and Karen Murphy v Media Protection Services Ltd* [2011] EUECJ C-403/08\_O, [2012] WLR (D) 57; C-145/10; C-406/10 *SAS Institute Inc v World Programming Ltd* [2012] WLR(D) 131, [2012] EUECJ C-406/10, [2013] BUS LR 941 *Eva-Maria Painer v Standard VerlagsGmbH and Others* [2011] EUECJ C-145/10, EU:C:2011:798, ECLI:EU:C:2011:798.

protection of the ‘author’s own intellectual input’<sup>163</sup> and the ‘author’s own intellectual creation’<sup>164</sup> rather than material renderings of creativity.<sup>165</sup>

Comparing this ‘dematerialised’ approach to the patterns identified in early copyright law by Bently and Sherman,<sup>166</sup> it seems as though the CoJ went back to the model of copyright implemented by the British intellectual property framework before the introduction of the 1911 Copyright Act.<sup>167</sup> Prior to 1911,<sup>168</sup> the courts designed an *ad hoc* protection of works targeting the ‘mental labour’ embodied in the work produced by the individuals.<sup>169</sup> The act of creation was conceived as a process triggered and controlled by the author’s mind.<sup>170</sup> During this pre-modern era, the protected subject-matter included intangible processes, and the scope of copyright was defined on a case-by-case basis.<sup>171</sup> The codification of intellectual property law introduced by the 1911 Copyright Act<sup>172</sup> rationalised this casuistic approach and came to focus on the work rather than the process. This new era enforced a renewed model of copyright turned towards one material aspect of creativity: the creative work. The law no longer protects the creative process which leads to the production of a tangible object, but focuses on the tangible object itself, as the full and absolute embodiment of the author’s creativity. During this evolution, the law lost track of the performative aspect of creation to only focus on the characteristics of the work.<sup>173</sup> The modern model moved from an abstract and dynamic approach to copyright works to adopt a static

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<sup>163</sup> C-5/08 *Infopaq International A S v Danske Dagblades Forening* [2009] EUECJ C-5/08\_O, para 33-7, 48.

<sup>164</sup> C-393/09 *BSA* (n 162) para 45-6; Joined cases C-403/08 and C-429/08 (n 162) para 80-1; C-604/10 *Football Dataco and Others v Yahoo! UK Ltd And Others* [2012] WLR (D) 57, para 15.

<sup>165</sup> Sherman (n 135) 104.

<sup>166</sup> Sherman and Bently, *The Making of Modern IP* (n 103) 44-6.

<sup>167</sup> *ibid*, 2-3, 44-6.

<sup>168</sup> *ibid*, 2.

<sup>169</sup> *ibid*, 73-4.

<sup>170</sup> *ibid*, 2-3, 15, 27.

<sup>171</sup> Sherman and Bently, *The Making of Modern IP* (n 103) 3.

<sup>172</sup> For a reference of the 1911 Act as the first codification of copyright in the UK, see Sherman and Bently, *The Making of Modern IP* (n 103) 2.

<sup>173</sup> Sherman and Bently, *The Making of Modern IP* (n 103) 49.

and material conception.<sup>174</sup> With the *Infopaq* jurisprudence, the CoJ might have gone back to an earlier model of copyright as known in the UK by reviving an open-ended take on the definition of the protectable subject-matter which depends on the way creative decisions were made by the author rather than on the sole assessment of the work itself.<sup>175</sup>

#### D. Property orthodoxy

Authors' and related rights are economically driven and largely modelled on and around the concept of property.<sup>176</sup> Copyright laws have achieved the feat of making intangible creations tangible by utilising the concept of property rights.<sup>177</sup> The analogy of property interests and the legal bond connecting the author to his work enabled the transfer of intellectual creations like traditional goods.<sup>178</sup> Consequently, copyright has been rightfully described as an act of "propertisation"<sup>179</sup> and "commodification".<sup>180</sup>

For this reason, extending the scope of intellectual property to new subject-matters automatically triggers a form of reification to which performances would be no

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<sup>174</sup> Sherman and Bently, *The Making of Modern IP* (n 103), 48.

<sup>175</sup> text to note 161.

<sup>176</sup> This includes the continental doctrine of authors' rights. Despite their moral component, French authors' rights still bear a strong economic and proprietary element. See French IPC, Art L 111-1 and the dispositions under Chapter II. Those provisions refer to authorial rights as rights in the nature of property (*droit patrimoniaux*).

<sup>177</sup> The CoJ reminds us of the words of the 2001 *Infosoc* Directive which declares that "Intellectual Property has therefore been recognised as an integral part of property" in C-5/08 *Infopaq International A S v Danske Dagblades Forening* [2009] EUECJ C-5/08\_O, para 4 quoting Recital 9 of the *Parliament and Council Directive 2001/29 of May 22, 2001 on the harmonisation of certain aspects of copyright and related rights in the information society*, [2001] OJ L167 10.

<sup>178</sup> Rahmatian *Copyright and Creativity* (n 80) 12-77.

<sup>179</sup> *ibid*, 55.

<sup>180</sup> *ibid*, 53; Andreas Rahmatian, 'Copyright and Commodification' (2005) 27 *European Intellectual Property Review* 371; Pamela Samuelson, 'Copyright, Commodification, and Censorship: Past as Prologue – but to What Future?' [2002] *The Hague: Kluwer Law International* 63; Debora Halbert, 'Feminist Interpretations of Intellectual Property' (2006) 14 *Am. U. J. Gender Soc. Pol'y & Law* 431, 439, 443, 446; Malla Pollack, 'Towards a Feminist Theory of the Public Domain or Rejecting the Gendered Scope of US Copyrightable and Patentable Subject-matter' (2006) 12 *William & Mary Journal Woman & Law* 603, 622.

exception. The performance itself lies in the acting, singing, delivery, declaiming, playing, recitating, and so forth, of an underlying work.<sup>181</sup> This activity is communicated through the performer's body which thereby becomes an integral part of the performance, directly or indirectly contributing to its substance.<sup>182</sup> As a result, performances could not be protected by full property rights without indirectly reifying performing bodies. The question is whether the performing body can be subject to property claims like any other items referenced in the portfolio of intellectual property laws. Are there any legal principles resisting its commodification?

This issue is the least discussed of all the obstacles erected against performers' intellectual property protection.<sup>183</sup> Despite the number of disputes involving the legal property of performances, there is no straightforward answer to be found in the jurisprudence of Australia, France, the UK or the US. When approached, the question was barely touched upon and rather confusingly handled. Instead, it was either bypassed or muddled with discussions on fixation<sup>184</sup> and originality conditions<sup>185</sup> pertinent to copyright laws. Unfortunately, the legal scholarship is equally silent on the question.<sup>186</sup>

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<sup>181</sup> This definition does not include improvised performances. Although improvisations may be counted as performances, for the purpose of the analysis carried out in this thesis they are set aside. For more on this, see Introduction, text to note 15.

<sup>182</sup> This embodied approach to performances is discussed further in Chapter 5, see text to note 147.

<sup>183</sup> No mention of the question can be found in Richard Arnold, *Performers' Rights* (4th edn, Sweet and Maxwell 2008) 8-11.

<sup>184</sup> See *Conrad v Am Community Credit Union*, 750 F3d 634 (7th Cir 2014) 638; Smith J.'s dissenting opinion in *Garcia v Google Inc*, 743 F 3d 1258 (9th Cir 2014); *Baltimore Orioles, Inc v Major League Baseball Players Ass'n* 805 F2d 663(7th Cir 1986) 675.

<sup>185</sup> Smith J's dissenting opinion in *Garcia v Google Inc*, 743 F3d 1258 (9th Cir 2014).

<sup>186</sup> No mention of the question can be found in Arnold (n 3), nor can it be in did Adeney in *The Moral Rights of authors and Performers* (n 79), or in Owen Morgan, *International Protection of Performers' Rights* (Hart Publishing 2002).

Roberta Kwal engages with the question of commodification of celebrities in the American situation in 'Fame' (1997) 73 *Indiana Law Journal* 1,25-6. Meredith Render generally discusses the question of the commodification of the body but not in the context of performers in 'The Law of the Body' (2013) 62 *Emory Law Journal* 549, 569-604. This question is absent from Rebecca Tushnet's analysis although envisaging contemporary issues in the context of performances, see note 43.

The *Garcia* case<sup>187</sup> is one of the few decisions flirting with the issue. Dissenting in the decision, Smith J argued that copyright protection could never be granted to performers because their input is limited to the lending of their body, face or voice:

Her creativity came in the form of facial expression, body movement, and voice. Similarly, a singer's voice is her personal mobilization of words and musical notes to a fluid sound. Inflection, intonation, pronunciation, and pitch are the vocalist's creative contributions. Yet, this circuit has determined that such, though perhaps creative, is too personal to be fixed.<sup>188</sup>

According to Smith J, performances cannot be protected because their creativity essentially lies within their body, making them too 'personal':

Garcia does not clearly have a copyright interest in her acting performance, because her acting performance is not a work, she is not an author, and her acting performance is too personal to be fixed.<sup>189</sup>

The dissenting opinion makes direct references to the earlier landmark case of *Midler v Ford* which also concluded that performers could not be granted full property rights because the essence of their work was too 'personal' to be subject to intellectual property rights. In this case, the Court held that:

Copyright protects original works of authorship fixed in any tangible medium of expression. A voice is not copyrightable. The sounds are not "fixed." What is put forward as protectible here is more personal than any work of authorship.<sup>190</sup>

One can only regret the vagueness of the argument developed by the ninth circuit judges.<sup>191</sup> It offers no guidance, neither practical nor theoretical, in understanding why the performing body is too 'personal' to be protected by property rights.<sup>192</sup>

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<sup>187</sup> *Garcia v Google Inc*, 743 F3d 1258 (9th Cir 2014).

<sup>188</sup> *ibid*, 939 (citation omitted).

<sup>189</sup> *ibid*, 930 (citation omitted).

<sup>190</sup> *Midler v Ford* 1988 849 F2d 460 (9th Cir 1988) 466.

<sup>191</sup> The appeal decision given in 2015 by the formation en banc of the court of appeal did not engage with this question. See, *Garcia v Google Inc* (n 187).

<sup>192</sup> This chapter does not engage with issues of commodification rising in the context of medical law with regard to human bodies, corpses and body parts as the issue is located outside the ambit of this analysis. The question



An alternative interpretation of this phrase would argue that the courts were not objecting to the commodification of performances – a *consequence* of its copyrightability - but underlined their lack of originality – a *condition* of its copyrightability. According to this logic, the body would be too ‘personal’ to be considered original because it is a biological given.<sup>193</sup> Unlike the clay in the sculptor’s hand, the performing body is not moulded or shaped by the performer. The human body seems to be treated like facts and information<sup>194</sup> are in copyright, i.e. not original enough to be protected.<sup>195</sup>

Nevertheless, other areas of law may provide useful insights regarding the possibility of legally reifying the body in the context of performances. These threads would widen the scope of this investigation on different counts. One of those threads is concerned with rights attached to the performing body but explores legal prerogatives situated outside the field of intellectual property law (1). The other thread returns to intellectual property rights but departs from the performing body, to focus on the human body involved in creative works more generally (2). Despite the slight side steps these two new lines of investigation take, their interaction with either the performing body or intellectual property frameworks makes them research avenues worth delving into.

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regarding the possibility to own one’s body or body parts is unclear. Despite the fact that the human body may be regarded as *nullius in bonis* in principle, this theory knows many exceptions. For more on this see, Harmon S, ‘A Penny for Your Thoughts, A Pound for Your Flesh: Implications of Recognizing Property Rights in Our Own Excised Body Parts’ (2006) 7 *Medical Law International* 329, 332-5.

<sup>193</sup> A similar argument is expressed by Bently in *Authorship in Popular Music* (154) 187. See also, Simon Frith, *Performing Rites: Evaluating Popular Music* (Oxford University Press 1993) 191.

<sup>194</sup> On the eligibility of facts to copyright protection see Michael Green, ‘Copyright Facts’ (2003) 78 *Indiana Law Journal* 919; Robert Denicola, ‘Copyright in Collections of Facts: A Theory for the Protection of Nonfiction Literary Works’ (1981) 81 *Colum. L. Rev* 516; Wendy Gordon, ‘Reality as Artefact: From Feist to Fair Use’ (1992) 55 *Law and Contemporary Problems* 93; Jane Ginsburg, ‘Sabotaging and Reconstructing History: A Comment on the Scope of Copyright Protection in the Works of History after *Heohling v University City Studios*’ (1982) 29 *Journal Copyright Society of the USA* 647.

<sup>195</sup> See for decisions adopting this position, *Toney v L’Oreal USA, Inc.*, 406 F3d 905 (7th Cir 2005) para 6-7; *Coffey v Warner Chappell Music Ltd* [2005] All ER (D) 329, para 4-5.

(1) Instruments protective of performers located outside the field of intellectual property laws have already introduced a degree of commodification of the performing body. The right to one's name,<sup>196</sup> image,<sup>197</sup> likeness,<sup>198</sup> personality or persona,<sup>199</sup> publicity<sup>200</sup> as well as the protection against voice misappropriation<sup>201</sup> or passing off<sup>202</sup> have all been successful mechanisms available to artists to control the use of their performance once materialised. This patchwork-like protection confirms that elements of the performing body can be reified on specific occasions.

Although those rights are not intellectual property rights per se, they certainly behave like ones as far as the propertisation of the subject-matter is concerned. In *Zacchini v Scripps-Howard Broadcasting*,<sup>203</sup> the US Supreme Court went as far as to align the aim of publicity rights with those of copyright, granting the performer involved in the case, as petitioner, the same privilege copyright would:

The broadcast of a film of petitioner's entire act poses a substantial threat to the economic value of that performance. As the Ohio court recognized, this act is the product of petitioner's own talents and energy, the end result of much time, effort, and expense. Much of its economic value lies in the "right of exclusive control over the publicity given to his performance"; if the public can see the act free on television, it will be less willing to pay to see it at the fair.

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<sup>196</sup> Australia: *Hogan & Anor v Koala Dundee Pty Ltd* [1988] FCA 540 23 (relying on passing off).

<sup>197</sup> See for jurisprudence on this right, text to Annex 6.

<sup>198</sup> US: *Wendt v Host Intern Inc*, 125 F 3d 806 (9th Cir 1997); *Astaire v Best Film & Video Corp*, 116 F3d 1297 (9th Cir 1997).

<sup>199</sup> US: *Astaire v Best Film & Video Corp*, 116 F 3d 1297 (9th Cir 1997); *Toney v L'Oreal USA Inc*, 406 F3d 905 (7th Cir 2005).

<sup>200</sup> US: *Toney v L'Oreal USA Inc*, 406 F3d 905 (7th Cir 2005). However not all aspects of performers' practice can be protected, see *Booth v Colgate-Palmolive Company*, 362 FSupp 343 (Dist Court, SD New York 1973).

<sup>201</sup> UK: *Sim v Heinz Co Ltd* [1959] 1 WLR 313 (there is no case granting an explicit protection for performers against sounds alike although Arnold J. cannot see any legal obstacle to it if appropriate evidence was brought to trial in Arnold (n 3) 301; US: *Waits v Frito-Lay Inc* 978 F2d 1093 (9th Cir 1992), although not always see: *Midler v Ford* 1988 849 F2d 460 (9th Cir 1988) or *Laws v Sony Music Entertainment Inc*, 448 F 3d 1134 (9th Cir 2006).

<sup>202</sup> France: (concurrency déloyale) Paris, 5e ch., 28 avril 1898, *Leclerc v Bruant*: D. 1898,2, 504. See, Michel Vivant, Nathalie Mallet-Poujol and Jean-Michel Brugière, *Quels Droits Pour Les Artistes Du Spectacle* (Daloz 2009) 7-16; Australia: *Musidor Bv v Tansing* (1994) 29 IPR 203; *Hogan & Anor v Koala Dundee Pty Ltd & Ors* [1998] FCA 540 23 (23 September 1988); *Henderson v Radio Corporation Pty Ltd* (1958) 1a IPR 620; UK: *Hines v Winnick* (1947) 64 RPC 113; *Sutherland v V2 Music Ltd* [2002] EWCH 14, EMLR 28 but performers' claims are not always successful see *Merchandising Corporation of America Inc v Harpbond Ltd* [1983] FS.R. 32; *Lyngstad v Anabas Products Ltd* [1977] FSR 62; see Arnold (n 3) 294-300.

<sup>203</sup> 433 US 562 (Supreme Court 1977).

The effect of a public broadcast of the performance is similar to preventing petitioner from charging an admission fee. The rationale for [protecting the right of publicity] is the straightforward one of preventing unjust enrichment by the theft of good will. No social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay. Moreover, the broadcast of petitioner's entire performance, unlike the unauthorized use of another's name for purposes of trade or the incidental use of a name or picture by the press, goes to the heart of petitioner's ability to earn a living as an entertainer.<sup>204</sup>

The court referred to the need to protect performers' financial returns for the "time, effort and expense"<sup>205</sup> they have invested in their work as being the "strongest case for a right of publicity".<sup>206</sup> The association between such right and the protection of the performer's skills and labour invested in the performance bears a striking resemblance with the objectives of authors' rights.<sup>207</sup> Even though references to full property claims are absent, this narrative still reifies the body by suggesting that both ranges of rights achieve the same result for the same purpose.

In France too, the same phenomenon of commodification of the performing body has been implemented by similar legal instruments found outside the circle of intellectual property rights. This allowance of reification is all the more surprising that the

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<sup>204</sup> *Zacchini v Scripps-Howard Broadcasting* 433 US 562 (Supreme Court 1977) 575-6, citation omitted.

<sup>205</sup> *ibid*, 575.

<sup>206</sup> *ibid*, 576.

<sup>207</sup> To only refer to a few cases associating to artists' skills, effort and investment as the base for copyright protection: Australia: *IceTV Pty Ltd v Nine Network Australia Pty Ltd* [2009] HCA 14 (unreported BC200902942); *Dennison Manufacturing Co v Alfred Holt & Co Ltd* (1987) 10 IPR 612, at iv; *Apple Computer Inc v Computer Edge Pty Ltd* (1984) 53 ALR 225, 234-5; *Kalamazoo (Aust) Pty Ltd v Compact Business Systems Pty Ltd And Others* (1985) 5 IPR 213, at (i); *S W Hart & Co Pty Ltd v Edwards Hot Water Systems* [1985] HCA (unreported BC8501068) (Wilson J.); France: Paris, 4ème ch., 5 décembre 2007, n° 06/15937, SIPA Press: D. 2008 jurispr. P. 461 note Bruguière; RTDCom. 2008 p. 300 obs. Pollaud-Dullian (photographs must be the result of the photographer's 'personal efforts' to be protected by copyright); Cass, 1ère civ, 2 décembre 1997, n° 95-16.653; Bull.1997 I N° 348 p. 236; RIDA 1998 N 176, p. 409 (joint authorship can only be granted to works which are the work of 'joint creative effort' and 'collaboration labour'); UK: *Walter v Lane* [1900] AC 539; *SAS Institute Inc v World Programming Ltd* [2013] EWCA Civ 1482; [2014] RPC 8; [2014] IP & T 312; *Sawkins v Hyperion Records Ltd* [2004] EWHC 1530 (Ch) [2004] 4 All ER 418; *Temple Island Collections Ltd v New English Teas Ltd & Anor* [2012] EWPC 1; US: *Wheaton and Donaldson v Peters and Grigg*, 33 US 591 (Supreme Court 1834) 669-70; *Burrow-Giles Lithographic Co v Sarony* 11 US 53 (Supreme Court 1884).

continental jurisprudence is known for religiously protecting the sanctity of the human body from commercial agendas.<sup>208</sup>

Yet, the civil judges made it clear that the rationale behind the enforcement of those alternative rights protecting performers was economic. In 2008, the Court of Cassation reaffirmed that the right to one's image was a proprietary right ('droit patrimonial').<sup>209</sup> The Court held that the appeal judges had rightfully concluded that "a model owns an economic right in her image, which is the exclusive right to profit from its value and to control the circumstances of its commercialisation".<sup>210</sup> The Bench carried on explaining that "if such right can be legally be assigned by contract, the subject-matter assigned must be accurately identified so that the exploitation of the rights transferred is precisely defined with regard to its duration and geographical exploitation."<sup>211</sup> Here, the Court was careful not to amalgamate *accurately* identified and *narrowly* identified. Indeed, the contract which authorises the commercialisation of one's image in "any form, manner, for any purposes, anywhere in the world for a renewable period of fifteen years"<sup>212</sup> complies with this requirement of accuracy. The scope of transfer can be both broad and accurately delineated, thereby leaving

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<sup>208</sup> See for example: Paris, 30 avril 2009, n° 09/09315, « Our Body, à corps ouvert »: D. 2009 p 2019 (the scientific exhibition « our body » was prohibited by the court); Cass, 1ère civ, 13 septembre 2013, No 12-18315: Bull. 2013, I, n° 176.

<sup>209</sup> Cass, 1ère civ, 11 décembre 2008, n° 07-19.494: Bull. 2008, I, n° 282. In France the right to one's image derives from the protection granted by the right of privacy. See French Civil Code, Art. 9.

The 'droit patrimonial', literally 'patrimonial right' is a right which can be assigned and monetarily quantified. It is opposed to the 'droit extra-patrimonial', literally 'extra-patrimonial right' or 'non-patrimonial right' which cannot be transferred or waived. Even though breaching this right can lead to the grant financial damages, the 'non-patrimonial right' cannot be financially quantified. Patrimonial rights behave like property rights but they do not have all the characteristics of French rights of property - 'droit de propriété'.

<sup>210</sup> Cass, 1ère civ, 11 décembre 2008, n° 07-19.494: Bull. 2008, I, n° 282. Author's translation. The original text reads: « qu'un mannequin dispose sur son image d'un droit patrimonial, qui est le droit exclusif de tirer profit de la valeur de celle-ci et de contrôler les conditions de son exploitation ». The Court refers to « droit patrimonial » to qualify the nature of the right to one's image. Such qualification expresses the possibility for the holder of such right to commercially exploit the subject-matter covered by the titled as well as transfer it. This qualification indicates that the right at stake behaves like a property right, even though it does not have all the aspects of the right of property (droit de propriété) as understood by the French doctrine.

<sup>211</sup> Cass, 1ère civ, 11 décembre 2008, n° 07-19.494: Bull. 2008, I, n° 282. Author's translation, see in Appendix 1 for the original text.

<sup>212</sup> Cass, 1ère civ, 11 décembre 2008, n° 07-19.494: Bull. 2008, I, n° 282. Author's translation, see in Appendix 1 for the original text.

performers carte blanche to assign elements in their persona to third parties for commercial purposes.

Furthering this phenomenon of reification, French judges also rely on independent experts to estimate the value of performers' body parts in order to determine the fairness of their remuneration. This was notably the case in the *Uncle Ben's* dispute brought before the Versailles Court of Appeal in 2008.<sup>213</sup> In this case, the actor who had lent his voice to the character 'Uncle Ben' for the production of a short advertising video clip, filed proceedings for his commission to be re-assessed proportionally to the economic value of his input, i.e. his voice. Relying on the expert's evaluation, the Court sided with the actor:

According to the expert's report (preliminary report dated 30 November 2005) the basic daily commission rate of an actor hired to record his voice for the purpose of an advertising video clip was in the region of 4,500 francs (686,02 euros) in 1992; this sum includes the rights to use the voice for a period of one year starting from the first communication of the record to the public, but can also be raised whenever the popularity of the performer or specific aspects of the voice increases its value. The expert, who adjudged that the voice of [the claimant] was stereotypical and flattering, so much so that the public could be sensitive to it, concluded that such an increase would apply with a multiplying factor ranging from 1.5 to 4.<sup>214</sup>

From these observations, it is clear that the performing body can be subject to commercialisation as any other ordinary good so much so that, like them, its value can be objectively assessed. There is no doubt that those legal vehicles enforced to protect performers' interests outside the boundaries of intellectual property law have permitted the commodification of the performing body.<sup>215</sup>

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<sup>213</sup> Versailles, 9 octobre 2008, *Randall G. c/ Ste First Media*, n° 06/03959.

<sup>214</sup> *ibid.* Author's translation, see Appendix 1 for the original text.

<sup>215</sup> One could even argue that the degree of control one has on its body may be greater than the prerogatives he may own over ordinary goods. In France for instance, whilst individuals, performers or not, are legally able to control the commercialisation and use of their image, the proprietor of an ordinary good cannot. The plenary

(1) If intellectual property narratives remain silent on the question of reifying the *performing* body in particular, vivid debates took place discussing the legality of copyrighting works displayed on the human body more generally. This discussion was triggered by the litigation involving tattoos which blossomed across jurisdictions in the last three decades. However, the involvement of the human body in the cases of tattoos and performances is different. With the former, the human body fulfils the more passive role of canvass for artist whilst it is an integral composing element of the latter. Moreover, whilst the work of tattoo artists is often fixed on other individuals' skin, performances always involve the artist's own body. Even though, the human body executes two different functions in those scenarii, the legal issues rising from the art of tattooing remains relevant. Indeed, the litigation of those cases places the discussion in the relevant area of law, intellectual property law, applied to the relevant subject-matter, the human body. This line of investigation reveals a series of expectable collisions between the consequences of intellectual property laws and the moral values formalised by human rights' frameworks, inter alia.

Regardless of any artistic context, the human body cannot be reduced to a consumable commodity because it is no ordinary object. This moral value finds its echo in the legal principle of inalienability of the human body and right to physical integrity.<sup>216</sup> In 1972, the French Court of Cassation regarded the contract by which

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assembly of the French Supreme Court clarified in 2004 the traditional right of property does not include the exclusive right to control the good's image (Cass, Ass. plénière, 7 mai 2004, n° 02-10.450; Bull. civ 2004 A. P. N° 10 p. 21) 215. The human body finds itself in the rather paradoxical position of being further reified than traditional goods themselves. This situation can be explained by the wish for the French legislator to protect individuals' body from being used without their consent. This protection took the form of the enactment of extensive rights gathered under the umbrella of the right to one's image in France, itself deriving from the more general right to privacy. See other mechanisms of legal protection against the commodification of the body, Marie Fox and Therese Murphy, 'The Body, Bodies and Embodiment: Feminist Legal Engagement with Health' in Margaret Davies and Vanessa Munro (eds), *The Ashgate Research Companion in Feminist Legal Theory* (Ashgate 2013) 257.

<sup>216</sup> Articles 6 to 8 of the 1966 International Covenant on Civil and Political Rights brings an international base to the concept of physical integrity under specific circumstances. Various geometries of the right have been enforced by national jurisdictions. At the European level, Article 8 ECHR enforces similar dispositions on the

an underage actress was required to be tattooed a representation of the Eiffel tower on her posterior for the purpose of a film as “immoral and illegal”.<sup>217</sup> The contract had also required the actress to have the tattoo surgically removed and for it to be auctioned afterwards.

Despite its fundamental nature, the principle has been encroached by various legal mechanisms in the context of artistic productions.<sup>218</sup> To only refer to those relevant to intellectual-property-related matters, the above discussed rights to one’s image, to control one’s likeness, of personality or persona, to protection against voice appropriation are all instruments enforced by the law which allow the body to be reified and made profitable by their biological ‘holders’ or owners, for want of a better word.<sup>219</sup>

Besides this conflict with the principle of physical integrity, copyrighting elements of the human body face another fundamental contradiction with the freedom of movement and right to self-determination this time. Indeed, intellectual property rights allow artists to control the use, commercial exploitation and integrity of their work. If those were to be applied to human bodies, the fundamental rights of the individuals who lend their skin to the expression of those artists would likely clash

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right of physical integrity of individuals. Australia: Elements of physical integrity is regulated through privacy law in Australia. See Carolyn Doyle and Mirko Bagaric, *Privacy Law in Australia* (The Federation Press 2005) 109-10. In the context of patent, cautious decisions seem to move towards a residual degree of propertisation of the body in: *PQ v Australian Red Cross Society* [1992] 1 VR 19, 40-2; *E v Australian Red Cross Society and Others* (1991) 99 ALR 601 esp at 645-6. France: French Civil Code, Art. 16, see also Paris, 30 avril 2009, n° 09/09315, « Our Body, à corps ouvert »: D. 2009 p 2019 (the scientific exhibition « our body » was prohibited by the court); Cass, 1ère civ, 13 septembre 2013, No 12-18315: Bulletin 2013, I, n° 176. UK: the body is considered as ‘inviolable’, see *Collins v Willcock*, [1984] 1 WLR 1172; US: *Moore v Regents of the University of California*, 793 P.2d 479 (Cal. 1990); *Washington University v Catalona*, 409 F3d 667 (8th Cir 2007). However, this principle has many exceptions. See Harmon (n 192) 332-335.

<sup>217</sup> Cass, 1ère civ, 23 février 1972, n° 70-12.490: Bull civ 1 N. 61 p. 54. Author’s translation

<sup>218</sup> This analysis only envisages the exceptions to the principle of physical integrity relevant to the question of regulating the performing body.

<sup>219</sup> See text to note 196.

with such property interests. This conflict of rights is the crux of the copyright litigation on tattoos.<sup>220</sup>

The problem presents itself as follows: if a tattoo artist was to receive copyright for the tattoo she drew on her client's skin, her client would have to respect the rights the artist owns over the work he carries on his own skin. In practice, this would prevent the client from taking pictures of himself whenever the photographs would reveal the tattoo designed by the artist, without her consent. Similarly, any actions taken to modify or remove the tattoo from his skin could be prohibited by the artist.<sup>221</sup>

In this scenario, the conflict between the authors' rights and the client's freedom of movement and right to self-determination is evident.<sup>222</sup> Commenting on this, Nimmer writes: "[h]opefully, any court presented with such an obscene claim would dismiss it summarily, if on no other basis than the constitutional prohibition on involuntary servitude and other badges of slavery".<sup>223</sup>

To mitigate Nimmer's position, it must be noted that such collision between authors' and individuals' interests would not occur systematically. Indeed, every time the artist would use her own body as platform for her work, the clash between copyright and human rights vanishes as authors' and subjects' interests line up. Alternatively, every time the client has the copyright of his tattoo transferred to him, such clash also

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<sup>220</sup> Matthew Beasley, 'Notes Who Owns Your Skin: Intellectual Property Law and Norms among Tattoo Artists' (2012) 85 Southern California Law review 1137; Meredith Hatic, 'Who Owns Your Body Art?: The Copyright and Constitutional Implications of Tattoos' (2013) 23 Fordham Intell. Prop. Media & Ent. L.J. 396; Angela Cotter, 'Written on the Body: Intellectual Property Rights in Tattoos, Makeup, and Other Body Art' (2002) 10 UCLA Ent. L. Rev 97; Christine Lesicko, 'Tattoos as Visual Art: How Body Art Fits into the Visual Artists Rights Act' (2013) 53 IDEA 39; Timothy Bradley, 'The Copyright Implications of Tattoos: Why Getting Inked Can Get You into Court' (2011) 1 Entertainment and Sport Law Review 27; Christopher Harkins, 'Tattoos and Copyright Infringement: Celebrities, Marketers, and Businesses Beware of the Ink' (2006) 10 Lewis & Clark L. Rev 313; David Cummings, 'Creative Expression and the Human Canvas: Intellectual Property Rights in Tattoos, Makeup and Other Body Art' (2003) 10 U. Ill. L. Rev 279.

<sup>221</sup> As for the right to protect one's work integrity, see note 79. As for the right to control the adaptations of one's work see note 70 and accompanying text.

<sup>222</sup> Cummings (n 220) 308-312.

<sup>223</sup> David Nimmer, 'Copyright in the Dead Sea Scrolls: Authorship and Originality' (2001) 38 Hous. L. Rev 101, 130.



disappears.<sup>224</sup> Finally, the opportunities of litigation could be limited to commercial uses so that the incidental reproduction of the tattoo by the client or other third parties would not amount to copyright infringement.

This last option was the solution adopted by the Paris Tribunal in a decision dating back to 1996.<sup>225</sup> The dispute opposed the author (Jean-Phillipe Daures) of a tattoo designed for the famous Belgian singer Johnny Halliday and the companies who had reproduced it on merchandising (Polygram and Western Passion). The artist filed for copyright infringement for the reproduction of the design of his tattoo. The Court sided with the claimant and adjudged his tattoo eligible to copyright protection even though it was only materialised on Johnny Halliday's body at the time:<sup>226</sup>

Considering that both parties conclude that Jean-Phillippe Daures is the author of the design tattooed on the arm of the artist Johnny Halliday in September 1992;

Considering that this design inspired from the Native American culture embodies the head of an eagle above a feather crossing the design horizontally and bearing a coin engraved with the stylised image of a bird;

Considering that the design is a work of the mind whose originality is not challenged;

Considering that Jean-Phillippe Daures is entitled to act on the grounds of this authors' rights; [...]<sup>227</sup>

This decision was confirmed on appeal two years later.<sup>228</sup> It emphasised the distinction between cases of infringing reproductions and reproductions of secondary importance:

Considering that the design of Jean-Phillip Daures tattooed on the right arm of Johnny Halliday can be regarded as an attribute of the singer's personality

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<sup>224</sup> This was the precaution taken by the celebrity athlete Dennis Rodman. See, *Dennis Rodman v Fanatix Apparel, Inc*, cas No 96-2103 (US District Court of New Jersey).

<sup>225</sup> TGI Paris, 3ème ch., 27 septembre 1996, *Daures c/ Sté Western Passion et a.*, n° 13957/95.

<sup>226</sup> The tattoo's design was registered with the INPI (French Intellectual Property Office) as a design after the infringement took place.

<sup>227</sup> TGI Paris, 3ème ch., 27 septembre 1996, *Daures c/ Sté Western Passion et a.*, n° 13957/95. Author's translation, see original text in Appendix 1.

<sup>228</sup> Paris, 3 juillet 1998 in Laurent Carrière, 'Tatouage, Droit D'auteur et Marque de Commerce: Quelques Reflexions' [2008] ROBIC 1, 8-9 <<http://www.robic.ca/admin/pdf/879/383F-LC-2008.pdf>> (accessed 12 January 2016).

and as such be freely commercialised by [the defendant], as previously indicated by the judges, the photograph of Johnny Halliday from which the tattoo would be “necessarily visible but remained of a secondary importance”; However, considering that this is not so in the case presented before us as [the defendants] did not reproduce a photograph of the singer from which the tattoo would be visible but the design of the tattoo Jean-Phillip Daures created as author and onto which the singer has no right.<sup>229</sup>

Those decisions confirm the possibility for the body to become artists’ medium of expression as far as France is concerned. In the US, on the occasion of the more recent case of *Whitmill and Warner Bros*,<sup>230</sup> US district Judge Perry also welcomed the possibility to copyright one’s tattooed skin:

[the claimant had] a strong likelihood of success in his claim. [...] and that] [o]f course tattoos can be copyrighted. I don't think there is any reasonable dispute about that.<sup>231</sup>

Make-up designs are the closest types of work to tattoos British Courts litigated in.<sup>232</sup> In *Merchandising Corporation of America v Harpbond*,<sup>233</sup> also known as the *Adam Ant* case, the Court refused to grant copyright protection to the makeup drawn on the musician’s face, on the basis that it did not satisfy the fixation condition:

A painting must be on a surface. If there were a painting in this case it must be the make-up marks plus the second plaintiff's face. If the marks were taken off the face, there could not be a painting.<sup>234</sup> [...] I had mentioned to Mr. Wilson in the course of argument that a painting must be on a surface of some kind. The surface upon which the startling make-up was put was Mr. Goddard's face and, if there were a painting, it must be the marks plus Mr. Goddard's face.<sup>235</sup>

Once again, the fixation requirement was used to by-pass assessing the legality of reifying the human body.

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<sup>229</sup> Paris, 3 juillet 1998 in *Carrière* (n 228); Author’s translation, see original text in Appendix 1.

<sup>230</sup> *Whitmill v Warner Bros Entm’t, Inc*, 2011WL 2038147 (2011). The lawsuit was settled off court: Joint Motion for Dismissal, *Whitmill v Warner Bros Entm’t Inc*, No. 4:11-cv-752 (ED Mo June 21, 2011), Cummings (n 220) 280.

<sup>231</sup> comments reported by Dave McNary in “Judge OKs Release of ‘Hangover 2’” *Variety* (May 24, 2011) <<http://www.variety.com/article/VR1118037530>> (accessed 12 January 2016) (internal quotation marks omitted), also quoted in Cummings (n 220) 281.

<sup>232</sup> The author is unaware of cases involving the copyright protection of tattoos litigated in Australia or the Court of Justice of the European Union.

<sup>233</sup> [1983] FSR 32.

<sup>234</sup> *Merchandising Corporation of America v Harpbond* [1983] FSR 32, 33.

<sup>235</sup> *ibid*, 46.

In light of those remarks, it is concluded that the human body, although generally cast aside proprietary rights for public policy purposes,<sup>236</sup> has been subject to commodification by both intellectual property and non-intellectual property mechanisms when involved in artistic practices, performative or not. This conclusion thus removes the last legal obstacle placed between performers and full proprietary rights.

### **III. Law as cultural product: from social to legal segregation of performers**

For neither courts nor policy-makers have acknowledged the presence of other factors or rational arguments legitimizing the author-performer divide beyond those already ruled out in this chapter, this analysis is forced to look for a justification somewhere else.<sup>237</sup> Since all economic and legal arguments against performers' augmented rights have been dismissed, only one logical impediment remains: the cultural belief according to which performers are less creative than authors, and therefore less deserving, or worthy, of protection.

This line of investigation inevitably ties the discussion with the historical and sociological developments of the notions of creativity, authorship and performership. To an extent, this was acknowledged by Arnold J in his introductory comments to

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<sup>236</sup> Debra Mortimer, 'Proprietary Rights in Body Parts: The Relevance of Moore's Case in Australia' (1993) 19 Monash University law review 217.

<sup>237</sup> The direct connections the analysis establishes between intellectual property frameworks and cultural beliefs around authorship, creativity and authorship do not account for the influence of other undisclosed or unreported factors such as institutional politics or lobbying pressures which may have swayed policy-makers when designing the author-performer divide. Because those external factors cannot be corroborated with tangible evidence, this thesis focuses on the arguments that courts and legislative bodies did adopt when writing the divide in statutes, reports or judicial decisions.

*Performer's Rights*<sup>238</sup> where he stresses that 'law is cultural product'.<sup>239</sup> The British judge underscores the reflection of the changes in the social and economic status of performers in the law protecting them.<sup>240</sup> After briefly retracing the history of performers' position within western societies from the Ancient Greece to modern times, he notes that the introduction of performer-oriented measures, though weak, coincided with the rise of the star-system.<sup>241</sup>

In many ways, the present research furthers this thinking and aims to identify the deeper cultural rationale underlying performers' diminished legal status in the jurisdictions of Australia, France, the UK and the US. It contends that deeper cultural underpinnings continue to bar the advancement of their rights and full completion of their legal protection. Those deeper reasons will be referred to as 'cultural beliefs', a terminology<sup>242</sup> used by specialists of creativity research.<sup>243</sup> It is argued that those beliefs are integral to the conception of creativity and authorship western narratives have construed and later enforced through their respective intellectual property laws. Indeed, intellectual property laws have enforced, consciously or not, a scale dividing the range of artists into various categories. The next chapter is dedicated to drawing the lines of this categorisation which places authors at its top and performers at its bottom. This sliding scale of rights moves from author-geniuses<sup>244</sup> down to craftsmen

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<sup>238</sup> Arnold (n 3) 3.

<sup>239</sup> *ibid.*, 3.

<sup>240</sup> *ibid.*, 3-5.

<sup>241</sup> *ibid.*, 4-5. This point is further discussed in Chapter 2, see text to note 332.

<sup>242</sup> Sawyer *Explaining Creativity* (n 98) 12; Keith Sawyer *Western Cultural Model of Creativity* (n 98) 2027.

<sup>243</sup> Creativity research is now an established academic field which grew out of the wish to rationally explain creativity. It was first driven by scientists and psychologists before embracing an interdisciplinary approach. Sawyer *Explaining Creativity* (n 98) 3-4; Keith Sawyer, 'The Interdisciplinary Study of Creativity in Performance' (1998) 11 *Creativity Research Journal* 11.

<sup>244</sup> The phrase 'author-genius' was coined by the scholarship who challenged the romantic aesthetics relayed by intellectual property law. See for instance: Martha Woodmansee, 'The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the "Author"' (1984) 17 *Eighteenth Century Studies* 425; Isabelle Alexander, 'The Genius and the Labourer: Authorship in Eighteenth- and Nineteenth- Century Copyright Law' in Lionel Bently, Jennifer Davis and Jane C Ginsburg (eds), *Copyright and Piracy - interdisciplinary critique*

to finally consider performers. It is submitted that this 'hierarchisation' reflects the value and creativity legal narratives perceived in the various artistic practices which form our culture.<sup>245</sup>

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(Cambridge University Press 2010); Brent Salter, 'Taming the Trojan Horse: An Australian Perspective of Dramatic Authorship' (2009) 56 Copyright Society USA 789,794; Ruth Towse, 'The Singer or the Song? Developments in Performers' Rights from the Perspective of a Cultural Economist' (2004) 3 Review of Law and Economics 745,746. Rahmatian mitigates the validity of associating the figure of the author-genius with romantic aesthetic in the context of copyright see Rahmatian, *Copyright and Creativity* (n 80) 156.

<sup>245</sup> Except for the caveat stressed in note 237.

# Chapter Two

## The author-performer divide

*But if thought corrupts language, language can also corrupt thought*<sup>1</sup>

George Orwell, 1968

National and international intellectual property laws have at least one feature in common: performers receive fewer rights than authors. This phenomenon is referred to as the author-performer divide. Introduced by policy-makers, the divide went on to be faithfully complied with, if not furthered, by the courts who refused to read in author-oriented dispositions the possibility to protect performing artists with equal rights. Although the divide appears to be deeply entrenched in the judicial narrative, the latter seems to have poked holes in this legal wall separating authors from performers over time.

### I. Writing the divide: the part of legislators

This section defines the boundaries and depth of the divide opposing authors to performers. It concludes by emphasising that such distinction was enforced as a result of careful thinking on policy-makers' part.

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<sup>1</sup> George Orwell, 'Politics and the English Language' in Sonia Orwell and Ian Angus (eds), *The collected essays, journalism and letters of George Orwell* (vol 4, 1st edn Harcourt, Brace, Javanovich 1968) 137

## A. The divide in law

National, regional and international legislators wrote a divide impacting both the form and the substance of performers' rights. The whole regime applicable to performing artists was designed to be of a lesser nature than their authorial equivalents, an agenda which also tainted the terminology employed in describing performers' rights.

### 1. Segregating nomenclature of rights

The divide is first performed by a careful nomenclature of rights designed to segregate performers from authors. This formal separation was applied on different levels. Initially, performers' protection was absent from intellectual property frameworks. Until the 1960s, performing artists could only rely on non-intellectual property mechanisms to protect their name, image, likeness, personality or persona, publicity as well their voice against misappropriation or passing off.<sup>2</sup> In France, similar provisions were used by performing artists, but early case law focused on building up protection in relation to employment law<sup>3</sup> rather than tort or intellectual property.<sup>4</sup>

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<sup>2</sup> text to note 196, Chapter 1.

<sup>3</sup> Cass. civ, 29 juin 1922: DP 1922, 1, 125.

<sup>4</sup> The study of French jurisprudence revealed that performers dominantly rely on mechanisms pertinent to intellectual property and employment laws to protect their interests. Very rarely, would cases be primarily based on alternative instruments such as unfair competition or right to one's privacy. See for some of the rare examples, TGI Paris, 4 juin 2008, n° 05/06811 (In this case the Court awards the dancer damages for breach of the right of image but rejected her claim based on performers' rights declaring that the two protection cannot be cumulated); Cass, 1ère civ, 24 septembre 2009, n° 08-11.112 « Jacky Boy Music »: Bull. 2009, I, n° 184; D. 2009 act. Jurispr. P2486, note Dalleau (the French supreme court held that the use of a performer's image on the cover of a record when neither the use of the photograph nor that of the record was authorised breaches the artist's right to image which bears its own economic value). Even in those two decisions, the right to one's image was not the main claim, both plaintiffs had based their pretention on performers' rights as well. Later, the moral right doctrine was extended to cover performers' professional reputation as well as their performances. See, Paris, 4ème Ch, 18 décembre 1989: D. 1991. p100 (in order to estimate whether the performers' right of integrity was breached, the judge examined whether the diffusion of the cinematographic work at stake in the form of a television program instead of film was harmful to the comedians' professional reputation and career). On that basis, was judged to be harmful to one's reputation the unauthorised distribution of poor quality audio records as well as the broadcasting of a television programme where the lighting and make-up of the presenter had been neglected. Cass, 1ère civ, 24 septembre 2009, n° 08-11.112 « Jacky Boy Music »: Bull. 2009, I, n° 184; D. 2009 act. Jurispr. P2486, note Dalleau; Paris, 10 février 2010, *Samourai films SARL c/ Even Media SA*,

Although diverse, this patchwork-like protection was not tailored to protect performers' interests in their interpretations in the same manner intellectual property rights shelter authorial works. This portfolio of rights left, and still leaves, loopholes in performers' protection whenever the use of the performance or performers' image did not coincide within a common field of business,<sup>5</sup> did not misrepresent the consumers on the products' or services' origins,<sup>6</sup> or whenever it did not invade a proprietary right or goodwill materialised in the performance or performer's image.<sup>7</sup> This array of non-intellectual property rights would also fail to protect performances when they were used without encroaching one's right to privacy.<sup>8</sup>

In the US, judges were careful that common-law and tort law mechanisms were not diverted from their original purpose to simulate proprietary interests in performers'

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n° 08/02748 : inédit. See also, Charles Jolibois, 'Rapport No 212 Fait Au Nom de La Commission Spéciale Sur Le Projet de Loi Adopté Par l'Assemblée Nationale Relatif Aux Droits D'auteur et Aux Droits Des Artistes-Interprètes, Des Producteurs de Phonogrammes et de Vidéogrammes et Des Entreprises de Communication audiovisuelle', vol Tome I (1985) 29, later referred to as the 'Jolibois Report No 2012'.

<sup>5</sup> Australia : This condition was loosened to accept 'remote' commonality of activities in *Henderson v Radio Corporation Pty* in order to cover performers' interests, see *Henderson v Radio Corporation Pty Ltd* (1958) 1a IPR 620,627-8 (passing off admitted by the court, there must be a common line of business even remote): at 628: There must be a common field of activity. There must be use of the plaintiff's name in relation to some matter within that field in such fashion as to give rise to risk of confusion with respect to the plaintiff's connection with the goods in question. There must be an invasion of the proprietary right of the plaintiff and a tangible and real risk of damage ensuing therefrom. UK: *McVulloh v Lewis A May* (Produce Distributors) Ltd (1947) 65 RPC 68 (use of a performer's name, Uncle Mac, for breakfast cereals); *Wombles Ltd v Wombles Skips Ltd* [1975] FSR 488; *Lyngstad v Anabas Products Ltd* [1977] FSR 62; *Metix (UK) Limited and Another v G.H. Maughan* (Plastics) Limited and Another [1997] FSR 718; *Stringfellow v McCain Foods (GB) Ltd* [1984] RPC 501.

<sup>6</sup> *ibid.* Without a common line of business, consumers are unlikely to be under the impression that the products or services are associated with the performer. Richard Arnold, *Performers' Rights* (4th edn, Sweet and Maxwell 2008) 295-6.

<sup>7</sup> Those three conditions are the main conditions for passing off proceedings in the UK and Australia. Australia has loosened condition of common business activities for this mechanism to be extended to performers more easily, however the other conditions still hold. For instance, without evidence of fraud, no damages can be awarded only injunctions, which constitute a marked difference between this remedy and what copyright offers to authors. See, *Hogan & Anor v Koala Dundee Pty Ltd & Ors* [1998] FCA 540 23. English Courts have now come close to the Australian doctrine on passing off to protect performers but the law has not changed on this point. See, *Mirage Studios v Counter-Feat Clothing Co Ltd* [1991] FSR 145.

<sup>8</sup> In all its declinations (i.e. right to one's image, persona, publicity, name and so forth) UK: *Campbell v MGV Ltd* [2004] UKHL 22, [2004] 3 A.C. 457; US: *Laws v Sony Music Entertainment Inc*, 448 F 3d 1134 (9th Cir 2006). Only under very specific and limited circumstances, will a claim based on the right to one's right to image be successful, see for instance : *Toney v L'Oreal USA Inc*, 406 F3d 905 (7th Cir 2005), 2005 Copr L Dec P 28, 984 (7th Cir 2005).



work.<sup>9</sup> Similarly, the British Courts made clear that parties were not to read a civil cause for action in the criminal provisions<sup>10</sup> sanctioning the bootleg of unauthorised recorded performances, at a time when the latter were the only form of protection available to performers.<sup>11</sup>

Those rights never granted performing artists with complete proprietary interests in their interpretations and left them without a full control over their work both before and after its materialisation.

a) *Joining the neighbourhood*

It is only during the 1960s that performers' rights entered the realm of intellectual property laws as neighbours of copyright. Internationally, the Rome Convention was the first instrument of this reform but remained a rather timid step in the right direction. Indeed, whilst all the key players of the international music and film industries were signatory to the Convention, its introduction triggered little improvement for performers at the national level. The UK judged that the criminal

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<sup>9</sup> Even when conditions of non-intellectual property law mechanisms are verified, those mechanisms can still be defeated by the author's copyright. See in the US, an example of the pre-emption doctrine: *Sinatra v The Goodyear Tire & Rubber Co* 435 F2d 711 (9<sup>th</sup> Cir 1970) 721; *Midler v Ford* 1988 849 F2d 460 (9<sup>th</sup> Cir 1988); *Laws v Sony Music Entertainment Inc*, 448 F 3d 1134 (9<sup>th</sup> Cir 2006). For a description of similar situations in Australia and the UK respectively, see Kimberlee Weatherall, "'Pretend-Y Rights' On the Insanely Complicated New Regime for Performers' Rights in Australia, and How Australian Performers Got Gyped', *New Directions in Copyright Law, Vol. II* (Edward Elgar Press 2005) 176-7; Arnold (n 6) 294-307.

<sup>10</sup> See the 1925 Dramatic and Musical Performers' Protection Act, the 1958 Dramatic and Musical Performers' Protection Act (6 & 7 Eliz 2 Ch 44) and later the 1963 and 1972 Performers' Protection Acts (respectively, c.53 and c. 32); Arnold (n 6) 17-8, 20,24-6.

<sup>11</sup> The particular point was subject to a saga of judicial decisions in the UK. See: *Musical Performers' Protection Association Ltd v British International Pictures Ltd* (1930) 46 TLR 485 (refusing to recognise a civil cause for action under the 1925 Act); *Apple Corps Ltd and Others v Lingasong Ltd and Another* [1977] FSR 345 (idem under the 1958-72 Acts); *Island Records Ltd v Corkindale Court of Appeal* [1978] Ch 122 (a civil cause of action is recognised on the basis of the breach on the statutory provisions protecting performers); *Lonrho Ltd v Shell Petroleum Co Ltd* (No.2) [1982] AC 173 (rejects the idea that a civil cause of action is available to performers on the basis on the criminal provisions); *Warner Bros. Records Inc and Others v Parr* [1982] FSR 383 (confirms the Island records decisions); *RCA Corporation and Another v Pollard* [1982] 1 WLR 979; [1982] 2 All ER 468 (sides with the position held in the Lonrho case); *Ekland v Scripflow Limited* [1982] FSR 431 (accepts the performers' civil cause for action); *Silly Wizard Ltd v Shaughnessy, El Fakir, Perkins, Lefevre, Goldberg & Co Ltd* [1983] S.L.T. 367 (idem); *RCA Corporation and RCA Limited v Pollard* [1983] Ch 135 (idem, overturns the first instance's decision); *Shelley v Cunane* [1983] FSR 390 (idem). See also, Arnold (n 6) 26-35.

protection it enforced at the time met the international standard set by the Convention, so no further rights were introduced.<sup>12</sup> In France, it took over twenty years for the government to ratify the international agreement. Long parliamentary debates<sup>13</sup> resulted in the voting of the Act of the 3<sup>rd</sup> of July 1985.<sup>14</sup> The Act introduced both economic and moral rights for performers, articulating also their position at the crossroads between intellectual property and employment laws.<sup>15</sup> Soon after the Law of 1985, British policies caught up with the continental jurisdiction with the introduction of the Copyright, Patents and Designs Act in 1988.<sup>16</sup> The 1988 Act introduced for the first time in the UK civil remedies for the breach of performers' rights, despite the reluctance of the Whitford Committee.<sup>17</sup>

At the same time, the situation of performers caught the attention of the Commission of the European Communities who formulated their concerns in the Green Paper on *Copyright and the Challenge of Technology*.<sup>18</sup> The legal base for protection known in France and the UK was confirmed and reinforced during the following decade under

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<sup>12</sup> At the time, Australia was still under the control of British intellectual property laws. It is only in 1969 that performers in Australia will receive their first protective instrument as far as intellectual property is concerned. This change in law was enacted by the Copyright Amendment Act 1989 (Cth), which introduced Part XIA into the Copyright Act 1968 (Cth).

<sup>13</sup> Jolibois Report No 212 (n 4) 25. Before then, performers' protection was driven by the courts. The first legislative move to protect performers was made on the grounds of employment law and took the form of the Law of December 26, 1969 No 69-1185 (JORF p 17371), now codified under Art L 762-1 and L 762-2 of the French Employment Law Code (code du travail). Again, this reform was prompted by a judicial construction of performing artists' right from the angle of labour law. See, Cass. civ, 29 juin 1922 : DP 1922, 1, 125.

<sup>14</sup> Act No 85-660 on the protection of authors, performing artists, phonograms and film producers and enterprises of audio-visual communication. Author's translation - the original title reads : « Loi 85-660 relative aux droits d'auteur et aux droits des artistes-interprètes, des producteurs de phonogrammes et de vidéogrammes et des entreprises de communication audiovisuelle ».

<sup>15</sup> Since 1969, performers are presumed to producers' employees whenever they sign a performing contract. See, Employment Law Code, Art 762-1 and L 7121-3 (Code du travail). See Law of December 26, 1969 No 69-1186, JO30 dec 1969 p 12732. JCP 1970 III 22 ; Michel Vivant, Nathalie Mallet-Poujol and Jean-Michel Brugière, *Quels Droits Pour Les Artistes Du Spectacle* (Daloz 2009) 20-1.

<sup>16</sup> Later referred to as CDPA 1988.

<sup>17</sup> The report was opposed to granting performers copyright in their performance but was inclined to make available to them civil remedies such as injunctions or damages. John Whitford, 'Report on Copyright and Designs Law' (1977) Cmdn 6723, para 409 and 412, later referred to as the 'Whitford Report'. Patricia Leopold, 'The Whitford Committee Report on Copyrights and Designs Law' (2011) 8 Modern Law Review 685, 690; Arnold (n 6) 35.

<sup>18</sup> 'Green Paper on Copyright and the Challenge of the New', vol COM (1988) para 2.5.2, later referred to as the '1988 Green Paper'.

the authority of the European Commission who aimed, inter alia, at harmonising performers' rights across European territories. The Commission's efforts resulted in the introduction of a series of directives which started with the Rental and Lending Rights Directive in 1992.<sup>19</sup>

Despite numerous attempts, this change in the European legislation was not paralleled in the American federal framework.<sup>20</sup> The US never introduced performers' rights at the federal level judging that the Congress was not granted those powers by the Constitution as its authority was constrained its authority to authors' rights.<sup>21</sup> It limited itself to prohibiting the making of unauthorised records of live performances as a result of the 1994 Uruguay Round of multilateral trade negotiations.<sup>22</sup>

At the international level, the World Trade Organisation<sup>23</sup> made the next most significant contribution to performers' protection since the Rome Convention.<sup>24</sup> It took the form of the Agreement on Trade-Related Aspects of Intellectual Property Rights

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<sup>19</sup> Council Directive 92/100/EEC of November 19, 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, [1992] OJ L77 20PO). It was followed by the Satellite Broadcasting Directive (Council Directive 93/83/EEC of September 27, 1993 on the co-ordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable transmission, [1993] OJ L248.15), the Term Directive (Council Directive 93/98/EEC) of October 29, 1993 harmonising the term of protection of copyrights and certain related rights, [1993] OJ L290 9) and finally the Information Society Directive (Parliament and Council Directive 2001/29 of May 22, 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, [2001] OJ L167 10).

<sup>20</sup> 'Performance Rights in Sound Recordings (95th Congress, 2d Session Committee Print No 15)' (1978) 31-2, later referred to as the '1978 Committee Report'.

<sup>21</sup> Most of the debate focused on the argument that the Congress intends to protect with copyright works fixed 'in writings' and that performances cannot be regarded as such. Although this reasoning is hardly tenable now with the development of recording technologies and the accession of sound recorders to copyright (see *Goldstein v California*), the position still holds. Judith Kim, 'The Performers' Plight in Sound Recordings - Unique to the US: A Comparative Study of the Development of Performers' Rights in the US, England, and France' (1986) 10 Columbia VLA Journal of Law and the Arts 453, 470-3; *Goldstein v California*, 412 US 546 (Supreme Court 1973). Weatherall contends that musical performances involved in the making of sound recording share ownership over the record with the sound record but does not support this claim with evidence based on either case law or statutes, in Weatherall (n 9) 196. This position does not seem to be shared by the American scholarship, see for instance, Mary LaFrance, 'Authorship and Termination Rights in Sound Recordings' (2002) 75 Cal. L. Rev 375, 392.

<sup>22</sup> US Code, Title 17 s.1101 amended by the Public Law 103-465 of December 8, 1994: A of An Act To Implement the Results of the Uruguay Round of Multilateral Trade Negotiations (Title V, subtitle A).

<sup>23</sup> Later referred to as WTO.

<sup>24</sup> Arnold (n 6) 41.

of 1994 (TRIPS) which were annexed to the Marrakesh Agreement<sup>25</sup> forming the base of the organisation. The TRIPS agreements reiterated the modest substance of the Rome Convention<sup>26</sup> limiting its contribution to enlarging the number of signatory states. Indeed, the TRIPS agreements counted one hundred and twenty four contracting parties on the day of its publication in 1994, a number which still surpasses the contracting parties to the Rome Convention to this day.<sup>27</sup>

It is only very recently that the international community levelled up performers' protection to the standard conferred in France and the UK. The 2012 Beijing Treaty on Audio-visual Performances bridged the gap the 1996 WIPO Performance and Phonograms Treaty<sup>28</sup> (WPPT) had left between audio-visual performers and aural performers, or performers involved in sound recordings.<sup>29</sup> The WPPT had only focused on rights for the second category of performing artists. Twenty years later, the Beijing Treaty was thus dedicated to extend the same international rights to audio-visual performers. However, the 2012 Treaty is yet to come into force and has only been ratified by eleven countries as of today, none of them holding influential positions in the entertainment industries.<sup>30</sup>

Compared to the evolution of authors' rights, the development of performers' protection is a slow and late phenomenon. It took over sixty years for performers'

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<sup>25</sup> Agreement Establishing The World Trade Organisation of April, 14 1994.

<sup>26</sup> At this point, states are only binding themselves to the obligation to provide "the possibility of preventing" performers' rights infringement which does not equate to prohibiting such actions. See TRIPS, Art 14(1) borrowing the wording of the Rome Convention Art. 7 (1).

<sup>27</sup> At the time of writing (March 2016), the TRIPS agreements counted one hundred and sixty one contracting parties whilst the Rome Convention counts ninety one.

<sup>28</sup> Although the WIPO Treaty was signed on the 20<sup>th</sup> of December 1996, it was only entered into force on the 20<sup>th</sup> of May 2002.

<sup>29</sup> 1996 WPPT, Art 5 and 6.

<sup>30</sup> At the time of writing (March 2016), the contracting parties having ratified the Treaty were: Botswana, China, Japan, Slovakia, Syria, the United Arab Emirates, Russia, Chile, Qatar, Moldova and Slovakia. On February 10, 2016, the President of the United States sent a proposal to Congress with the view to ratify the Treaty. See, Message from the President of the United States Transmitting the Beijing Treaty on Audiovisual Performances, done at Beijing on June 24, 2012' 114<sup>th</sup> Congress, 2<sup>nd</sup> session, US Government Publishing Office, 59-118 (Washington 2016). Given the current political context, it seems unlikely that a bill will be passed before the end of the US President's time in office in January 2017.

protection to take the form of intellectual property rights<sup>31</sup> and more than fifty years on the top of that to be completed at the international level.<sup>32</sup>

*b) Name calling*

Despite the various reforms increasing the scope, substance and length of performers' rights, their label as neighbours of copyright never faded.<sup>33</sup> The expression literally translates the lesser substance of those rights, and although the phrase is present in the legal narrative of all jurisdictions under study including the international framework, its use was not consistent.

The expression was first employed during the 1948 Brussels Conference for the revision of the Berne Convention, and was then formalised in its table of 'wishes'.<sup>34</sup> The international event being held in French language, 'droit voisins' were the exact words used by the Congress in its list of 'voeux' (wishes), quoting the Italian jurist Piola Caselli.<sup>35</sup> This first formal outing of the phrase 'neighbouring right' as referring to performers' rights, remained its only use in the legislative narrative until the introduction of the French Intellectual Property Code (IPC) in 1992.<sup>36</sup> The expression, although mentioned in the second title of the French code, was never mentioned in the Law of July 1985.<sup>37</sup> The phrase does not appear in any of the cited

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<sup>31</sup> With the introduction of the 1961 Rome Convention and taking the development of the music and film industries in the 1900's as a starting point.

<sup>32</sup> With the signature of the 2012 Beijing Treaty, yet to come into force.

<sup>33</sup> The exact expression being 'neighbouring rights'.

<sup>34</sup> 'Documents de La Conférence de Bruxelles 5-26 Juin 1948' (1951) 493 (under the provisions of Article 11, quarter nouveau), later referred to as the Brussels Conference Documents.

<sup>35</sup> *ibid.*

<sup>36</sup> IPC, Livre II : Droits voisins du droit d'auteur. The various acts composing French intellectual property law were codified by the Law of July, 1 1992 (no 92-597). (Loi relative au code de la propriété intellectuelle du 1er juillet 1992 no 92-597). Although it must be noted that the phrase 'neighbouring right' was used before that by the Spicer committee in their report to refer to performers' rights. See, JA Spicer, 'Spicer Report to Consider What Alterations Are Desirable in The Copyright Law of the Commonwealth' (1959) para 285, later referred to as the 'Spicer Report'.

<sup>37</sup> The expression was however used in the parliamentary debates and the reports which informed the passing of the Act. See, Charles Jolibois, 'Rapport No 350 Fait Au Nom de La Commission Spéciale Sur Le Projet de Loi Adopté Par l'Assemblée National Relatif Aux Droits D'auteur et Aux Droits Des Artistes-Interprètes, Des

International conventions, European Directives or other domestic legislation.<sup>38</sup> The Rome Convention referred to ‘performers’ rights<sup>39</sup> once, but otherwise used the more generic expression of ‘performers’ protection’.<sup>40</sup> The European narrative seems to have preferred it the term of ‘related right’ to copyright,<sup>41</sup> a formulation which is also present in the TRIPS agreements.<sup>42</sup>

However, mentions of the phrase transpire in those documents. This suggests that the expression did underlie their provisions even though it was not explicitly embedded in the body of regulatory frameworks. In 1980, the World Intellectual Property Office fully integrated the expression into the narrative of intellectual property laws when publishing its glossary “of Terms of the Law of Copyright and Neighbouring Rights” which included performers’ rights.<sup>43</sup> More subtle references to the phrase appeared in the 1996 and 2012 WIPO-administered treaties, either in footnote<sup>44</sup> or in the preamble.<sup>45</sup> At the European level, the 1988 Green Paper<sup>46</sup> used the phrase to designate performers’ rights without detour, but the commission

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Producteurs de Phonogrammes et de Vidéogrammes et Des Entreprises de Communication Audiovisuelle’ (1985) 24, later referred to as the ‘Jolibois Report No 350’.

<sup>38</sup> selected in this analysis.

<sup>39</sup> Rome Convention 1961, Article 19. The British Parliament will also employ the phrase ‘performers; rights’ in the body of the CDPA 1988.

<sup>40</sup> 1968 Copyright Act, Part XIA. The 1959 Spicer Committee did refer to performers’ rights as neighbouring rights in inverted coma in its report. See Spicer (n 36) para 285, and 473.

<sup>41</sup> See for instance, Council Directive 92/100/EEC of 19 November 1992 OJL 346, p 28-35; Parliament and Council Directive 2001/29/EC 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167 p 10-19; Parliament and Council Directive 2006/116/EC of 12 December 2006 on the term of protection of copyright and certain related rights, OJ L 372 p 12-18. Arnold (n 6) 13.

<sup>42</sup> 1994 TRIPS, s. 1.

<sup>43</sup> ‘WIPO Glossary of Terms of the Law of Copyright and Neighbouring Rights’ (1980). The WIPO glossary was referenced by the European 1995 Green Paper. ‘Green Paper Copyright and Related Rights in the Information Society’ (1995).

<sup>44</sup> The title of the WPPT references the ‘WIPO Diplomatic Conference on Certain Copyright and *Neighboring* Rights Questions’. Emphasis added. WIPO Performance and Phonograms Treaty 1996, p 13.

<sup>45</sup> The preamble of the 2012 Beijing Treaty on the Protection of Audio-visual Performances refers to the “Resolution concerning Audiovisual Performances adopted by the Diplomatic Conference on Certain Copyright and *Neighboring* Rights Questions on December 20, 1996”. Emphasis added.

<sup>46</sup> 1988 Green Paper (n 18) 10, 17, 104 Cmdn 1.5.11

dropped the expression by the time of its second edition in 1995.<sup>47</sup> Finally, the Council Directive 93/83/EEC<sup>48</sup> was also nicknamed the ‘Copyright and Neighbouring Rights Directive’.<sup>49</sup>

It appears from those documents that the intent behind referring to performers’ rights as ‘neighbouring rights’ was to make sure that the latter’s rationale and substance was not to be confused with *real* authors’ rights. Performers’ rights are ‘related’ or ‘neighbouring’ but shall be taken for true copyright.<sup>50</sup> Despite the terminological wall erected between performers’ and authors’ rights by policy-makers, the courts have shown less rigidity in their use of the lexicon.

In the case of *Hadley v Kemp*, Park J refers to the “copyright in the performance” when listing the various protectable elements of a song.<sup>51</sup> Although this might be a slip of the tongue, his comments clearly associate performers’ work (the performance) to copyright:

[U]nder provisions of the copyright legislation which I will describe in Part N below, the self-same event of the band making the master recording brings into existence both kinds of copyright: the copyright in the performance of the song, which would vest in all the performers except that they have almost certainly contracted for it to be vested in the record company, and the copyrights (literary and musical) in the work consisting of the song, which vest in the composer (or the company which employs him).<sup>52</sup>

Confusion also rises from the permuting of the following phrases: ‘performers’ rights’, ‘performing rights’ and ‘performance rights’. ‘Performer’s rights’ has been named

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<sup>47</sup> By then, the 1995 Green paper only referred to the ‘WIPO Glossary of Terms of the Law of Copyright and *Neighbouring Rights*’. Emphasis added.

<sup>48</sup> Council Directive 93/83/EEC of September 27, 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission

<sup>49</sup> See footer of the electronic version of the Directive published by the WIPO Database of Intellectual Property Legislative Texts. < [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=126891](http://www.wipo.int/wipolex/en/text.jsp?file_id=126891) > accessed 10 March 2016.

<sup>50</sup> Section 22 of the Australian Copyright Act makes one exception to this premise by granting performers involved in the sound recording of their live interpretations co-ownership over the record. The provision makes them ‘makers’ of the sound recording, therefore co-owner of its copyright. This exception to the author-performer divide is only applicable to musical performers of live performers as define by the Act. See text to note 81. A similar situation has been enforced in Canada, see Canadian Copyright Act 1985, Part II, s. 15-17.

<sup>51</sup> *Hadley and others v Kemp and another* [1999] All ER (D) 450 para E2.2.

<sup>52</sup> *ibid.*

'performers' copyright',<sup>53</sup> sub-rights of copyright have been referred to as 'performance rights'<sup>54</sup> or 'performing rights' whilst 'performance rights' has also been associated with 'performers' rights'.<sup>55</sup> This sentence in itself conveys the muddle caused by the inter-exchangeable uses of those phrases. In all jurisdictions under study, 'performers' rights' refers to performing artists' prerogatives granted by intellectual property law.<sup>56</sup> Those prerogatives have rarely been confused with a copyright in the performance.<sup>57</sup> Performing right almost always refers to the right to perform the work in public or communicate the work publicly.<sup>58</sup> Being a sub-right of copyright, performing rights are therefore not to be confused with performer's rights. Misunderstanding occurs when the phrase 'performance right' is alternatively used to designate performers' rights or performing rights (i.e. sub-right of copyright). Replacing the use of those expressions back into their national context might clarify the situation. In the US, the phrase seems to be employed to refer to copyright prerogatives<sup>59</sup> whilst in the UK it has been used to designate performers' protection.<sup>60</sup>

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<sup>53</sup> *Hadley and others v Kemp and another* [1999] All ER (D) 450 para E2.2.

<sup>54</sup> *Baltimore Orioles Inc v Major League Baseball Players Assn* 805 F2d 663 (7th Cir 1986) 675.

<sup>55</sup> *Experience Hendrix Llc v Times Newspapers Ltd* [2010] EWHC 1986 (Ch) para 3 and 18.

<sup>56</sup> Australia: The 1968 Copyright Act refers to performers' protection, there is no mention of expression 'performers' right' in the text; France: there is no terminology issue in the continental jurisdiction due to the significant difference between the wording of performer's and author's rights (respectively "droit de l'artiste-interprète" and droit d'auteur"); European Union: C-92/92 *Collins v Imtrat Handelsgesellschaft mbH* [1993] 3 CMLR 773, 788; UK: *Henderson v All Around the World Recordings Ltd & Anor* [2013] EWPC 7, 48; *Redwood Music Ltd v Chappell & Co Ltd* [1982] RPC 109, 121; US: *Sinatra v The Goodyear Tire & Rubber Co* 435 F2d 711 (9<sup>th</sup> Cir 1970) HN 1.

<sup>57</sup> *Hadley and others v Kemp and another* [1999] All ER (D) 450 para E2.2.

<sup>58</sup> Australia: *Australasian Performing Right Association Ltd v Commonwealth Bank Of Australia* (1992) 111 ALR 671, 683, see also 1968 Copyright Act, s. 246; European Union: C- 262/81 81 *Coditel SA v Cine Vog Films SA* [1983] 1 CMLR 49,50; UK: *Performing Rights Society Ltd v London Theatre of Varieties Ltd* [1924] A.C. 1., 17, see also, CDPA 1988, s. 28(1); US: In the US 'performing right societies' refer to societies collecting copyright royalties for the public performances of protected work. If the phrase is understood as such, it does not seem to be used in the legal narrative beyond that.

<sup>59</sup> *Baltimore Orioles Inc v Major League Baseball Players Assn* 805 F2d 663 (7th Cir 1986) 675; The phrase is also present in the legal jargon used by policy-makers, see the failed attempt to amend the US Code in 1979 entitled: "Sound Recording Performance Rights Amendment," S. 1552 and H.R. 997, 96th Cong., 1st Sess. (1979), cited in *Baltimore Orioles Inc v Major League Baseball Players Assn* 805 F2d 663 (7th Cir 1986) 675.

<sup>60</sup> *Experience Hendrix Llc & Anor v Times Newspapers Ltd* [2010] EWHC 1986 (Ch) para 3 and 18.



c) *Neighbours beyond copyright*

Copyright is not the only neighbour performers' rights share a fence with. The Court of Justice (CoJ) pushed the boundaries of performers' neighbourhood to reach trade mark law in *Collins v Imtrat Handelsgesellschaft mbH*.<sup>61</sup> According to the European judges, a performers' right to consent to the fixation and commercialisation of their performances goes to the quality and origin of their work very much like a trade mark would function. The CoJ stated that:

Performers' rights also play a role in the field of consumer protection: the consumer doubtless assumes that recordings made by well-known, living performers are not released without the performer's authorisation and that such persons would not jeopardise their reputation by authorising the distribution of low-quality recordings; that limited guarantee of quality is lost entirely if recordings may be distributed without the performer's consent. It may thus be seen that performers' rights operate in much the same way as trade marks, the economic significance of which was recognised by the Court in the *Hag II* case.<sup>62</sup>

This position suggests that performers' rights serve a hybrid purpose at the intersection between copyright and trade mark laws, yet without being fully integrated into any of those two areas.

## **2. A gap in substance, a substantial gap**

The divide separating authors from performers goes beyond mere questions of rhetoric. It has created a gap in the substance of their rights, impacting both the scope and the duration of performers' protection.<sup>63</sup>

One should not be fooled by the resemblance between the wording used to describe authors' and performers' rights as their content remains starkly different.<sup>64</sup> Some

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<sup>61</sup> C-92/92 *Collins v Imtrat Handelsgesellschaft mbH* [1993] 3 CMLR 773.

<sup>62</sup> *ibid*, 788 - footnotes omitted.

<sup>63</sup> The subsequent paragraphs will only be concerned with the gap in substance existing between authors' and performers' rights in the context of intellectual property and will not engage with the comparison between copyright and non-intellectual property protection granted by common law or tort law remedies.

scholars<sup>65</sup> have commented that the introduction of performers' moral rights at the international level by the WPPT was a reform of great significance which equated to bringing their legal status equal to authors'. Others see in the evolution of performers' protection a progressive assimilation of performers' rights as full copyright.<sup>66</sup> Yet again on both sides, economic and moral, performers' rights remain of a lesser substance and narrower scope than authorial rights. The subsequent paragraphs envisage the gap between authors and performers from the perspective of economic rights first, before moving to examining moral rights. Although the divide has been anchored in the law, its boundaries have been slightly blurred in places, softening its otherwise clear-cut edges.

#### a) *Economic rights*

As previously mentioned, authors' rights regulate the right to reproduce the work, communicate it to the public, to limit unauthorised modifications of its content and control the association of their name when disseminated.<sup>67</sup> Similarly, performances are protected against unauthorised fixation,<sup>68</sup> communication to the public<sup>69</sup> and

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<sup>64</sup> Charlotte Waelde and others, *Contemporary Intellectual Property* (3rd edn, Oxford University Press 2013) 229

<sup>65</sup> Mira Sundara Rajan, 'Center Stage: Performers and Their Moral Rights in the WPPT Law, Technology and the Arts Symposium: The WIPO Copyright Treaties: 10 Years Later' (2006) 57 Case W. Res. L. Rev 767; Ruth Towse, 'The Singer or the Song? Developments in Performers' Rights from the Perspective of a Cultural Economist' (2007) 3 Review of Law and Economics 745, 746.

<sup>66</sup> Nicholas Caddick, Gillian Davies and Gwylm Harbottle, *Copinger and Skone James on Copyright* (16th edn, Sweet and Maxwell 2010), para 12.04; Luke McDonagh, 'Rearranging the Roles of the Performer and the Composer in the Music Industry – the Potential Significance of Fisher v Brooker' (2012) 1 Intellectual Property Quarterly 64.

<sup>67</sup> Australia: 1968 Copyright Act, s. 31 counts no less than seven sub-rights covered by the copyright vested in literary, dramatic and musical works (s. 31(1) (a) (c) and (d)) and three in the context of artistic works (s. 31 (1) (b)), excluding the dispositions on moral rights provided under s. 499 (paternity) and 503 (integrity). France: IPC, Art. L 122-1 to L 122-4, Art. L 122-6 (specific to computer programs). The rights generally cover the right of performance and reproduction (Art. L 122-1) which comprises a non-exhaustive list of over ten sub rights. In addition to those, the IPC grants four moral rights to authors under Art. L121-1 to L 121-4. UK: CDPA 1988, s. 16 (1) to (4). Similarly to Australia, these dispositions count at least six sub-rights for copyrightable works, in addition to moral rights (s. 77, 80 and 85). US: US Code, Title 17 para 16 (1) to (6). Moral rights of a much more limited scope than in the other jurisdictions are provided under para 106 A.

<sup>68</sup> Internationally: Rome Convention, Art 7 (b), WPPT, Art 6(ii), Beijing Treaty, Art. 6(ii); Australia: 1968 Copyright Act, s. 248G (1)(a); France: IPC, Art. L 212-3; UK: CDPA 1988, s. 182 (1) (a) and (c); US: a non-

mutilations denigrating their integrity.<sup>70</sup> The use of performers' name in relation to their work is also subject to legal protection.<sup>71</sup> Although authors' and performers' rights encompass akin prerogatives, using synonymous vocabulary, noticeable differences still persist. For instance, national legislators have not specified the sub-rights forming performers' protection with the same detail that they have for their authorial equivalent. Indeed, whilst copyright provisions non-exhaustively list at least six sub-rights deriving from copyright,<sup>72</sup> performers' protection is limited to the two pre-cited economic rights of protection against unauthorised fixation and communication to the public.<sup>73</sup> It could be argued that those sub-rights, though not explicitly mentioned, remain covered by performers' rights, was it not for the presence of other indicators weighting against this interpretation.

Despite the layout of international and national instruments which project the illusion that authors' and performers' rights achieve a fairly similar standard of protection, the author-performer divide reveals its contours more clearly when one studies the substance protected by each set of rights. As explained in previous developments,<sup>74</sup> it was agreed since the early ages of copyright that the legal protection conferred to authors was not limited to the physical boundaries of their work. As a result, authors' rights can be actionable beyond the narrow hypothesis of literal copying.<sup>75</sup> In the

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intellectual property right extended to operate in a similar fashion for similar purposes, *Zacchini v Scripps-Howard Broadcasting Co.*, 433 US 562 (Supreme Court 1977).

<sup>69</sup> Internationally: Rome Convention: Art 7 (a) and (c), WPPT, Art. 6 (i), Beijing Treaty, Art 6(i); Australia: 1968 Copyright Act, s. 248 G (1) (b); France: IPC, Art. L 212-3; UK: CDPA 1988, s. 182 (b); US: US Code, Title 17 para 1101.

<sup>70</sup> Internationally: WPPT, Art 5 (1), Beijing Treaty, Art 5(a) (ii); Australia: 1968 Copyright Act, s. 195 ALA (1) and (2); France: IPC, Art L 212-2; UK: CDPA 1988, s. 205F; US: no such moral right are granted to performers by federal intellectual property law, see Title 17 para 16 (1) to (6).

<sup>71</sup> Internationally: WPPT, Art 5 (1), Beijing Treaty, Art 5(a) (i); Australia: S 195 ABA (1); France: IPC, Art L 212-2; UK: CDPA 1988, s. 205C; US: no such moral right are granted to performers by federal intellectual property law, see Title 17 para 16 (1) to (6).

<sup>72</sup> text to note 75, Chapter 1.

<sup>73</sup> n 68 and n 69.

<sup>74</sup> text to note 152, Chapter 1.

<sup>75</sup> without the writer's consent or qualifying for exemption to copyright protection.

category of non-literal infringing acts translations, adaptations,<sup>76</sup> imitations or re-creations of works without the author's consent were included.<sup>77</sup> Authors' rights thus protect the material form of the work as well as its immaterial content.<sup>78</sup>

The situation with performers' rights is different. If artists' consent to record or use the recording of their interpretations is required, the performance embodied in the record itself is not covered by those rights. The use of the *record* is protected by performers' rights, but the *performance* it conveys is not. Consequently, permission must be obtained from the performer (and sound recorder) for an audio or video tape of her interpretation to be used, but the re-acting or mimicking of her interpretation itself may be done freely.<sup>79</sup> Intonation, gestures and all aspects of the embodiment process which compose the performance are left unprotected, whether or not it is fixed in recording. The protection of performances by intellectual property law is therefore reduced and limited to the protection of its material fixed version, the record, unlike authors' rights which are extended to cover both the physical object and its intangible content. Only material elements of the performance may enter the realm of authors' rights such as the set, costumes, photographs, the choreography 'behind' the performance or the written stage directions.<sup>80</sup>

Contemporary Australian copyright laws seem to be the only exception to what would otherwise be a linear and well-entrenched divide, as far as economic rights are concerned. Indeed, the 1968 Copyright Act, as amended, provides under Section

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<sup>76</sup> text to note 153, Chapter 1.

<sup>77</sup> Lionel Bently, 'Authorship in Popular Music in UK Copyright Law' (2009) 12 *Information, Communication and Society* 179, 183.

<sup>78</sup> Bently *Authorship in Popular Music* (n 77) 183.

<sup>79</sup> *ibid*; Arnold (n 6) 240; Stephen Skopelja, 'The Boundaries of Authorship and Performance in Musical Copyright' (2015) 15 *UNSWLJ* 13; Mathilde Pavis, 'Is There Any-Body on Stage? A Legal (mis)Understanding of Performances' (2014) 8 *Platform: Journal of Theatre and Performing Arts* 12, 30.

<sup>80</sup> Text to note 118 in Chapter 1.

22(3A) that the “performer who contributed to the performance fixed in sound recording”<sup>81</sup> is the co-owner of the copyright in the sound recording, as “maker” of the record. This ownership is shared with the sound recorder, is only applicable in the cases of the live musical performances<sup>82</sup> whenever their work has not been commissioned.<sup>83</sup> Such limitations narrow down the scope of the provision and leaves the situation of other performers unchanged.

*i. Forms and scopes of consent*

Section 22(3A) of the Australian 1968 Copyright Act is not the only twist in the author-performer divide that legal frameworks and their narratives have introduced. The rules on authors’ and performers’ consent to authorise the use of their work also offer an interesting change of dynamic within the divide.

Neither the use of protected authorial works nor the fixation and communication of performances can be done without the artists’ consent. The legislation of all jurisdictions under study is very clear on this point.<sup>84</sup> Copyright law in every jurisdiction requires authors to put their consent to assign their rights in writing,<sup>85</sup> including moral rights.<sup>86</sup> Commenting on this condition, Kozinski J concluded that this requirement was guided by common sense; he writes:

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<sup>81</sup> 1968 Copyright Act (Australia), s 22(3A)

<sup>82</sup> The Act defines the “sound recording of a live performance” as the “sound recording, made at the time of the live performance, consisting of, or including, the sounds of the performance.” 1968 Copyright Act (Australia), s 22.

<sup>83</sup> 1968 Copyright Act (Australia), s 97(3).

<sup>84</sup> *On authors’ rights* - Australia: 1968 Copyright Act, s. 31; France: IPC, Art. L 122-1 to L 122-4, Art. L 122-6 (specific to computer programs); UK: CDPA 1988, s. 16; US: US Code, Title 17, Section 204. *On performers’ right* - Australia: 1968 Copyright Act, s. 248G; France: IPC, Art. L 212-3; UK: CDPA 1988, s. 182.

<sup>85</sup> Australia: 1968 Copyright Act, s. 196(4); France: IPC, Art. L 131-3-1 and IPC, Art. L 132-7 (applicable to publication contracts); UK: CDPA 1988, s. 90(3); US: US Code, Title 17, Section 204.

<sup>86</sup> There is a requirement of written consent for moral rights to be assigned or waived; Australia: 1968 Copyright Act, s. 195AW (1), s. 195 AWA (2); UK: CDPA 1988, s. 87(1)(2). In France, authors’ moral rights cannot be waived nor transferred. IPC, Art. L. 121-1.

Common sense tells us that agreements should routinely be put in writing. This simple practice prevents misunderstandings by spelling out the terms of a deal in black and white, forces parties to clarify their thinking and consider problems that could potentially arise, and encourages them to take their promises seriously because it's harder to backtrack on a written contract than on an oral one.<sup>87</sup>

Responding to the argument according to which “[m]oviemakers do lunch, not contracts”,<sup>88</sup> the ninth circuit judge added that “it doesn't have to be the Magna Charta; a one-line pro forma statement will do”.<sup>89</sup>

In France, the IPC goes further by requiring that written agreements concerned with the transfer of copyright must specify the sub-rights assigned mentioned separately, and so must the field of exploitation of the assignment, its scope, purpose, place and duration.<sup>90</sup> British law and case law appear to be less demanding than their continental counterpart.<sup>91</sup> The 1988 CDPA does not require any of those specifications beyond the condition of consent in writing. This led the courts to consider the possibility of implied assignment in recording contracts.<sup>92</sup> Nevertheless, for a contract to be interpreted as an implied assignment of copyright the House of Lords identified two rather strict cumulative conditions. First, it must be obvious to both parties (i.e. the assignors and recording company) that the rights in the protected work were being transferred, and second, that such assignment formed

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<sup>87</sup> *Effects Associates Inc v Cohen*, 908 F 2d 555 (9th Cir 1990) 557.

<sup>88</sup> *ibid* 556.

<sup>89</sup> *ibid* 557.

<sup>90</sup> IPC, Art L 131-3-1. However, in the context of recording contracts, the transfer of rights to the publisher or producer will be assumed. See IPC L Art 131-19.

<sup>91</sup> UK copyright law allows the transfer of future rights, or rights to be acquired. See, *Performing Right Society Ltd v B4u Network (Europe) Ltd* [2012] EWHC 3010 (Ch) para 55 to 69.

<sup>92</sup> *Fisher v Brooker* [2009] UKHL 41, para 50.

the basis of the commercial relationship between the two parties so much so that it could not have functioned without it.<sup>93</sup>

At the European level, the CoJ specified that *express* consent was required for the commercialisation of any physical medium embodying a copyrighted work.<sup>94</sup> A decade later, in *Metronome Musik GmbH v Music Point Hokamp GmbH* the same court indicated that if the copyright holder's express consent was required for the communication of any physical rendering of the protected work, such authorisation was not necessary whenever the use at stake was the repetition of the same economic operation. Thus the "subsequent sales of the same medium even without the express consent of the right holder"<sup>95</sup> would be lawful but not "any different form of economic exploitation of the work such as rental of the physical medium purchased."<sup>96</sup>

Turning now to the provisions dedicated to performers' protection, it seems has though the same common sense did not necessarily apply to their regime. Neither British<sup>97</sup> nor American<sup>98</sup> Copyright Acts provide any guidance with regard to the form performers' authorisation must take to be legally enforceable by third parties. The courts of both jurisdictions concluded that an implied consent to the recording of one's performance could be inferred from the artist's presence in recording studios<sup>99</sup> or bearing recording devices. In *Henderson v All Around the World Recordings*

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<sup>93</sup> In the same case the House of Lords envisages the legality of implied assignments; the Court considered that the two conditions were not met by the facts presented before them. No implied assignment was recognised by the Courts.

<sup>94</sup> C-158/86 *Warner Brothers Inc v Christiansen* [1988] EUECJ R-158/86, [1990] 3 CMLR 684 para 15; followed by C-200/96 *Metronome Musik GmbH v Music Point Hokamp GmbH* [1998] 3 CMLR 919, [1999] FSR 576, [1999] EMLR 93, [2000] ECDR 11, [1998] EUECJ C-200/96, [1998] ECR I-1953, para 13.

<sup>95</sup> C-200/96 *Metronome Musik GmbH v Music Point Hokamp GmbH* [1998] 3 CMLR 919, [1999] FSR 576, [1999] EMLR 93, [2000] ECDR 11, [1998] EUECJ C-200/96, [1998] ECR I-1953, para 13

<sup>96</sup> *ibid.*

<sup>97</sup> CDPA 1988, s. 180.

<sup>98</sup> US Code, Title 17, para 1101 (a) (1) to (3).

<sup>99</sup> UK: *Mad Hat Music Limited and Another v Pulse 8 Records Limited* [1993] E.M.L.R. 172, 173; *Henderson v All Around the World Recordings Ltd & Anor* [2013] EWPC 7, para 42; US: *Conrad v Bendewald*, 500 Fed Appx 526 (7th Cir 2013) 527.

*Ltd*,<sup>100</sup> Birss J accepted that performers' consent could be given "in relation to a specific performance, a specific description of performances, performances generally and may relate to past and future performances."<sup>101</sup> He agrees that "although written consents are routinely obtained from performers in the music industry, there is nothing in the law which provides that the consent of performers has to be in writing".<sup>102</sup> Indeed, "[i]n principle consent could be express or implied".<sup>103</sup> Agreeing with Kozinzki J,<sup>104</sup> the British judge reminds the parties that if obtaining consent in writing "makes good common sense" it is yet not required by law.<sup>105</sup>

In Australia and France, the situation is slightly different and, in fact, diametrically opposed to one another. Unlike British and American copyright laws, the Australian statute positively allows for performers' permission to take any form.<sup>106</sup> On the other side of the spectrum, the French legislator opted for a requirement of consent made in writing.<sup>107</sup> Despite the protectionism displayed by the French provisions on this point, a dent in this legal shield was made in the context of audio-visual performances to favour producers' interests.<sup>108</sup> In this particular context, the

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<sup>100</sup> *Henderson v All Around the World Recordings Ltd & Anor* [2013] EWPC 7.

<sup>101</sup> *ibid*, para 41.

<sup>102</sup> *ibid*, para 42.

<sup>103</sup> *ibid*.

<sup>104</sup> *Effects Associates Inc v Cohen*, 908 F 2d 555 (9th Cir 1990) 556-7.

<sup>105</sup> *Henderson v All Around the World Recordings Ltd & Anor* [2013] EWPC 7, para 42.

<sup>106</sup> Australia: s. 113B.

<sup>107</sup> IPC, Art. L 212-3. The Courts specified what constituted consent given in writing and what did not. For instance, the authorisation given in writing by an event organiser to broadcast a performer's interpretation does not hold (see Paris, 16 juin 1993, n° [XP160693X] : D. 194 p 218 Edelman; D. somm. com. p. 277). The recording contract agreed between a producer and an event organiser authorising the reproduction of performances cannot amount to a legally authorised transfer of performers' rights if the latter were not party to the contract (Cass, 1ère civ, 16 juillet 1992, n° 90-19.207 : Bull. 1992 civ i p 234; RIDA 1993, n 155, 177 obs. Kéréver). Although, implied consent to the use of the record seems to have been accepted by the Court in the following case: Paris, 18 janvier 2012, *Société Civile De Perception Et De Distribution Des Droits Des Artistes Intepretes De La Musique Et De La Danse c/ L'institut National De L'audiovisuel*, n° 09/29162 : inédit.

<sup>108</sup> Art L 212-4 reads "The signature of a contract between the performer and a producer for the making of an audio-visual work shall imply the authorization to fix, reproduce and communicate to the public the performance of the performer. Such contract shall lay down separate remuneration for each mode of exploitation of the work." IPC, Art. L 212-4. Official translation. See also, Cass, soc, 10 février 1998, n° 95-43.510: Légipresse 1998, No 153,III,101, note Veyssièr Bull. 1998 v N° 82 p. 59.



recording contract binding the performer to her producer implies the former's consent for her performers to be fixed and distributed for the duration of their agreement.<sup>109</sup>

Focusing now on the scope of performing artists' consent rather than on its form, a slight discord has divided British judges on this point. The question presented itself as follows. Does consenting to the fixation of one's performance equate to authorising the communication of such record to the public? Did legislators intend to grant performing artists with one or two rights distinguishing between recording their interpretations and distributing such record? In the *Mad Hat case*,<sup>110</sup> Davies J sided with the first option and considered that performers' consent had to be obtained for the making of a recording (i.e. recording the performance) but not for the making of a record (i.e. use of the recorded performance in a record). He stated:

[The plaintiff's counsel] said that consents already given were referable to recordings already embedded in tape or elsewhere; so that further consents are necessary if records are to be made in future from such tapes. It is not clear to me that such further consents are necessary. To make a record is not to make a recording. It is the making of a recording, not a record, that may not be made without the consent of the performer: see section 182(1).<sup>111</sup>

In *Bassey v Icon Entertainment Plc*,<sup>112</sup> Vinelott J plainly rejected Davies's distinction between record and recording to side with the second solution:

While I differ from a judge with the experience of Mervyn Davies J in the field of copyright with great reluctance, I do not myself consider that the distinction between a recording and a record can be justified. Section 182 contains a

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<sup>109</sup> n 108. This may be a remnant in the French narrative of the longstanding distinction the international community maintained between musical and audio-visual performers<sup>109</sup> recently revived by the 2011 European Term Directive. European Parliament and Council Directive 2011/77/EU of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights, OJ L 265. This point is further discussed in text to note 28 and 82.

<sup>110</sup> *Mad Hat Music Limited and Another v Pulse 8 Records Limited* [1993] EMLR 172.

<sup>111</sup> *ibid*, 179.

<sup>112</sup> *Bassey and Another v Icon Entertainment Plc and Another* [1995] EMLR 596.

definition of recording as meaning in relation to performance a sound recording (a) made directly from the live performance or (c) made directly or indirectly from another recording of the performance. As the authors of Laddie, Prescott and Vitoria point out, Mervyn Davies J seems not to have been referred to that definition, and it is impossible in the light of it, it seems to me, to distinguish (as he does) between a record and a recording for the purposes of the Act. It may be that in everyday parlance a distinction is drawn between a recording as the first reduction to a permanent form of an evanescent performance and records made from the recording. However, for the purposes of the Act recording is given a wide meaning which covers both.<sup>113</sup>

He carries on arguing that “Davies J's decision may be justified on the basis that the performer who gives his consent to the making of a studio recording impliedly consents to the making of records from it for a subsequent issue to the public”.<sup>114</sup> However, “in the absence of any such authority, whether express or implied, the making of a record to my mind clearly infringes a performer's rights.”<sup>115</sup> He bases his argumentation on the fact that adjudicating otherwise would “largely defeat the rights conferred by the Act on a performer if, having once consented to the making of a recording, albeit on terms that records were not to be released unless the performer was satisfied with the recording, the recording could be exploited by the making of records from it and by the sale of the records by a third party into whose hands the recording had come and who could not be restrained by any contractual right from the exploitation of it”.<sup>116</sup>

In the *Henderson case*,<sup>117</sup> Birss J attributes the judges' dissenting decisions to the diverging facts presented before them.<sup>118</sup> Siding with the outcome of *Bassey v Icon*

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<sup>113</sup> *Bassey and Another v Icon Entertainment Plc and Another* [1995] EMLR 596, 606.

<sup>114</sup> *ibid.*

<sup>115</sup> *ibid.*

<sup>116</sup> *ibid.*

<sup>117</sup> *Henderson v All Around the World Recordings Ltd & Anor* [2013] EWPC 7.

<sup>118</sup> *ibid.*, para 46 and 47.

*Entertainment Plc*,<sup>119</sup> he admitted that the performer had consented to the fixation of her performance as evidenced by her presence on recording premises but that such conclusion remains “a long way from a finding that this consent was sufficient to permit [third parties] to remix or release that recording without [the performer]’s specific consent at a later date”.<sup>120</sup> The same judge decided that “in the absence of financial terms of some kind, the existence of conscious consent would be unlikely”.<sup>121</sup> The presence or absence of financial terms is not to be understood as a principle of law but is associated with, once again, plain “common sense” according to the court.<sup>122</sup> Similar outcomes were reached by the courts in the US<sup>123</sup> and France.<sup>124</sup>

This issue was finally settled by the courts of each jurisdiction who reached a harmonised position. One more question was yet to be answered: does consenting to the issue the record of a performance to the public allow all future uses of such record? In other words, must performers consent to the re-use of their materialised interpretation or does their right vanish after being exercised once?

In France, the answer is yes, performers’ consent must be sought every time the record of their performance is used for the purpose of an artistic production distinct from the one agreed on initially. This guiding principle is not explicitly pointed out by the courts, but case law seems to follow this pattern consistently. Abiding by this reasoning, the courts concluded that the making of a television programme by the same producers, out of recorded performances originally designed to compose a

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<sup>119</sup> *Bassey and Another v Icon Entertainment Plc and Another* [1995] EMLR 596.

<sup>120</sup> *Henderson v All Around the World Recordings Ltd & Anor* [2013] EWPC 7, para 65.

<sup>121</sup> *ibid*, para 44.

<sup>122</sup> *ibid*.

<sup>123</sup> See for instance, *Conrad v Bendewald*, 500 Fed Appx 526 (7th Cir 2013) 527.

<sup>124</sup> Taking part in a recording session does not amount to consenting to the reproduction of the recorded performances or to its communication to the public (Paris, 1re Ch, 2 avril 1993: JurisData No 1993-021385). Neither does the performer’s signature to the attendance register of a recording session mentioning on sheet the authorisation to fixation (Paris, 4eme Ch 10 mai 1995, inédit).

cinematographic work required the actors' consent a second time.<sup>125</sup> The Court held that the two productions pursued different aesthetic purposes, although economically and legally comparable.<sup>126</sup> The same outcome was reached with regard to the creation and commercialisation of a musical phonograms made out of the performances recorded for the purpose of a film soundtrack.<sup>127</sup> For the latter to be commercialised separately from the film, performers' consent must be sought by the producers before their issue to the public. Conversely, the online distribution of phonograms previously commercialised on the compact disk or audio-tape markets does not require performers' additional consent since the destination of the performances was left unchanged, only their mode of dissemination was updated.<sup>128</sup>

#### *ii. Filling gaps with analogies*

Apart from French authorities, no decision has litigated the question at the European, British, Australian or American level to this date. However, one might find in decisions pertinent to author's rights, clues as to the outcome one should expect. British courts have validated the use of analogies and comparisons between the substance of authors' and performers' rights whenever the latter lacked clarity. In *Henderson v All Around the World Recordings Ltd*,<sup>129</sup> Birss J explained:

[Defendant's counsel] also submitted that the principles in *Redwood v Chappell* [1982] RPC 109 relating to inferred or implied consent, which were

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<sup>125</sup> Paris, 4eme Ch, 18 décembre 1989 : D. 1991. p100.

<sup>126</sup> In both productions, a cinematographic work was created. The only difference resided in their destination. One was intended to be distributed in cinemas and the other on television. Because their destination impacts performers' reputation and professional career, their consent must be sought by producers.

<sup>127</sup> Paris, 4e Ch, 27 février 1990 : D. 1991. p.300; Paris, 1re Ch, 2 octobre 1991 : JurisData No 1991-024178

<sup>128</sup> TGI PARIS, (3ème Ch.) 15 janvier 2010, *SPEDIDAM c/ Sté Virgin Mega et a.*, n° 06/04534 : Prop. Intell. 2010, No 35, p 713, obs. Bruguière. A different outcome was reached in the context of authors. In 2000, the Paris Court of Appeal held that the right to publish journalists' articles had been exhausted after the paper edition of the newspaper so much so that any distribution online via the creation of online database for readers to access those articles on demand is subject to the consent and payment of the authors. See, Paris, 1ère Ch, sect. A, 10 mai 2000, *S.A. Gestion du Figaro c/ Syndicat National des Journalistes et autres* : LEGICOM 1/2000 (N° 21-22), p. 190-191.

<sup>129</sup> *Henderson v All Around the World Recordings Ltd & Anor* [2013] EWPC 7.

formulated in the context of copyright, must apply by analogy to performer's rights. I agree.<sup>130</sup>

Applying this methodology to the conclusions drawn by the European case *Metronom Musik GmbH v Music Point Hokamp GmbH*,<sup>131</sup> one could suppose that within jurisdictions under the authority of the CoJ, performers' consent will be required every time the economic use of the recorded performances depart from the one authorised initially.<sup>132</sup>

If the CoJ was to rule so, the position of the French jurisprudence might have to be revised to respect the European doctrine. Indeed, whilst the French doctrine follows a principle of 'unity of artistic production', the CoJ opted for a principle of 'unity of economic use'. One may imagine many hypotheses where the two positions do not quite overlap each other depending on the CoJ's understanding of economic use. For instance, could the selling of recorded performances in the form of DVDs or audio-CDs be considered as two different economic uses of the same records?

#### *b) Moral rights*

As explained before,<sup>133</sup> the arrival of performers' moral rights on the scene of international intellectual property was referred to as the last piece needed to bridge the gap separating authors from performers.<sup>134</sup> Nonetheless, it is submitted that even on the grounds of moral rights, international and national regimes still fall short in levelling the two sets of rights.

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<sup>130</sup> *Henderson v All Around the World Recordings Ltd & Anor* [2013] EWPC 7, para 48.

<sup>131</sup> C-200/96 *Metronome Musik GmbH v Music Point Hokamp GmbH* [1998] 3 CMLR 919, [1999] FSR 576, [1999] EMLR 93, [2000] ECDR 11, [1998] EUECJ C-200/96, [1998] ECR I-1953.

<sup>132</sup> text to note 94.

<sup>133</sup> text to note 65.

<sup>134</sup> 1996 WIPO Performances and Phonograms Treaty, Art. 5; Sundara Rajan (n 65); Towse (n 65).

As previously explained,<sup>135</sup> authors are conferred two to four moral rights, offering a right of paternity,<sup>136</sup> integrity,<sup>137</sup> of first publication<sup>138</sup> and of withdrawal.<sup>139</sup> Out of those four rights which compose the continental moral right doctrine,<sup>140</sup> only the first two<sup>141</sup> were enacted on common-law soils<sup>142</sup> under the effect of international agreements.<sup>143</sup> Performers' and authors' moral rights have indeed been harmonised, as far as common-law jurisdictions are concerned. This alignment is however diminished by the fact that authors' moral rights are rather weakly protected in those countries in the first place.

In France, where authors may benefit from a stronger protection, the author-performer divide is maintained because the same two moral rights of integrity and paternity remain the only prerogatives accessible to performing artists. There is no right of withdrawal nor is there a right of first publication available to them.<sup>144</sup> To

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<sup>135</sup> text to note 79.

<sup>136</sup> IPC, Art L 121-1.

<sup>137</sup> *ibid.*

<sup>138</sup> IPC, Art L 121-2.

<sup>139</sup> IPC, Art L 121-4.

<sup>140</sup> Many refer to France as the 'mother jurisdiction' of the moral right doctrine. Elizabeth Adeney, *The Moral Rights of Authors and Performers: An International and Comparative Analysis* (Oxford University Press 2006) 13; Gillian Davies and Kevin Garnett, *Moral Rights* (Sweet and Maxwell 2010) 3; Rahmatian (n 140) 48-52; Maxwell Winston, 'Moral Rights Clauses after Barbelivien' (2004) 15 *Entertainment Law Review* 121, 122.

However, rights of a similar substance were also enforced by the Courts prior to the *Donaldson v Becket* jurisprudence. This would argue that different avatars of the same doctrine emerged the common-jurisdiction of the UK, softening the common-law/continental law opposition one often comes across when reading on the question of moral rights. On this, see Susan Liemer, 'How We Lost Our Moral Rights and the Door Closed on Non-Economic Values in Copyright' (2005) 5 *The John Marshall Review of Intellectual Property Law* 1, 27. See also, Jane Ginsburg, 'Moral Rights in a Common Law System' (1990) 1 *Entertainment Law Review* 121; Maree Sainsbury, *Moral Rights and Their Application in Australia* (The Federation Press 2003).

See, *Donaldson v Becket* (1774) 2 *Brown's Parl Cases* (2d ed.) 129, 1 ER 837; 4 *Burr* 2408; 98 ER 257; 17 *Cobbett's Parl Hist.* 953 (1813).

<sup>141</sup> The right to be identified as the author of the work, and the right against false attribution are counted as forming one right: the right of paternity.

<sup>142</sup> Australia: 1968 Copyright Act, s. 499 and 503; UK: CDPA 1988, s. 77, 80, 85; US: US Code, Title 17 para 16 (1) to (6). Moral rights of a much more limited scope than in the other jurisdictions are provided under para 106 A.

<sup>143</sup> At the international level: on authors' rights – Berne Convention for the Protection of Literary and Artistic Works, Article 6bis; on performers' moral rights - Internationally: WPPT, Art 5 (1), Beijing Treaty, Art 5(a) (ii).

<sup>144</sup> Cass, 1ère civ, 27 novembre 2008, n° 07-14.035: JCP 2009, No 25,30, para 15 obs. Caron; RIDA 2009, 220 p. 405, obs. Sirinelli; RTD com. 2009, 318, obs. Pollaud-Dullian Cass, 1ère civ, 11 décembre 2008, n° 07-19.494 : Bull. 2008, I, n° 282 (neither performers nor their heirs can assert a moral right of first publication). Even though the jurisprudence barred the possibility of formally claiming the protection of a right to first disclosure of performances, the doctrine is inclined to believe that the portfolio of other rights granted to

mitigate this point, it must be noted that the moral prerogatives authors' and performers' do have in common, do not perfectly match. Indeed, Article L 212-2 specifies that performers' moral right protect the integrity of their name, capacity and performance.<sup>145</sup> Unlike authors', performers' moral right of integrity is explicitly oriented towards the protection of the artist's name and reputation, benefiting from a greater scope than their authorial equivalents. Where many authors' claims have failed to argue in court that the right of integrity to one's work includes the protection of the artists' reputation,<sup>146</sup> the same pretensions on the basis of performers' right would be successful. On this count, the protection granted to performers seems more generous than the one offered to authors. Yet, the former's remains limited to two and not four moral rights.<sup>147</sup>

### 3. Discrepancies in the duration of rights

Not only is the scope of performers' protection less substantial than authors' rights but its duration is also shorter. Whilst authors receive copyright lasting their lifetime plus seventy years after their death, performers' rights only cover fifty years from the end of year the performance took place,<sup>148</sup> was communicated to the public<sup>149</sup> or

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performers has led to create an ersatz of the moral right *in concreto*. See, 'Pas de Droit de Divulgateion Pour L'artiste-Interprète - Court of Cassation 27 November 2008 No 07-12.109 - Case Summary' [2009] *Recueil Dalloz* 18; Vinant A, 'Le Danceur, Inteprete Et/ou Auteur?' (2014) 2 *Recherches en danse* 1, para 10.

<sup>145</sup> Official translation. The original text reads: "L'artiste-interprète à le droit au respect de son nom, de sa qualité et de son interprétation ».

<sup>146</sup> Cass, 1ère civ, 10 mars 1993, « affaire Association la Fraternité Blanche Universelle » n° 91-15.915 : D. 1994 p 78 note Françon (the French Supreme Court confirms that the author's moral right only protect the integrity of the work and that of the author only to the extent of his connection to the work. The authorial right of integrity cannot protect the author's reputation beyond those boundaries).

<sup>147</sup> Jolibois Report No 212 (n 4) 27 ; Vivant and others (n 15) 50.

<sup>148</sup> UK: CDPA 1988, s. 191; Australia: 1968 Copyright Act, s 248A. Australian laws currently enforce a different regime between performances captures by sound recording and those fixed by cinematographic film. The first categories if protected for a period of fifty years running the following year the performance was "given", whilst audio-visual performances are only protected for a duration of twenty years. This gap should be bridged as a result of the ratification of the Beijing Treaty granting the same duration of protection for audio-visual performers. See, Beijing Treaty, Art 14.

<sup>149</sup> France: IPC, Art. L. 211-4-1; Law of July 3, 1985, Art. 30; European Union: EC Term Directive 93/98/EEC, Art 3 (Council Directive No 93/98/EEC harmonising the term of protection of copyright and certain related rights, [1993] OJ L290 9).

fixed.<sup>150</sup> Nevertheless, if within this first bracket of fifty years, a recording of the performance is released to the public, an additional term of fifty years starts the year following the date of the release.<sup>151</sup> In 2011, the European Term Directive<sup>152</sup> added another twenty years to this second term of protection for the benefit of performances fixed in sound recordings,<sup>153</sup> amongst other additional privileges.<sup>154</sup> In effect, those performances can be controlled by their right-holders for up one hundred and twenty years<sup>155</sup> less two days by combining the two terms.<sup>156</sup> The duration of protection for other performers remains unchanged.<sup>157</sup>

The 2012 Beijing Treaty is the latest international reform which further extended the term of performers' rights. Although, most jurisdictions were already enforcing a fifty-year protection without discriminating between performances, there was no international obligation on states party to the Rome Convention, TRIPS agreements or WPPT to grant such protection to audio-visual performers. Article 14 of the Rome Convention had only required its contracting members to offer a minimum protection of twenty years. Later, the 1996 WPPT extended this term to fifty years but only with regard to live aural performances and performances fixed in phonograms.<sup>158</sup> It has

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<sup>150</sup> International Conventions: Rome Convention, Art 14; WPPT, Art 17(1); TRIPs, Art 14(5); Beijing Treaty, Art 14.

<sup>151</sup> France: IPC L 211-4-1 to 2; UK: CDPA 1988, s. 191 (2) (a) and (b).

<sup>152</sup> European Parliament and Council Directive 2011/77/EU of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights, OJ L 265/1.

<sup>153</sup> European Parliament and Council Directive 2011/77/EU, Art 1(2); introduced into national legislations under IPC, Art L211-4 1 in France and CDPA 1988, s. 191(1) and (2) in the UK.

<sup>154</sup> The same directive introduced a 'use it or lose it' provision in favour of performers whereby musical performers who have assigned their rights over to recording companies can claim them back if the latter failed to commercially release their performances in sufficient quantity within the extended twenty-year period. Additionally, a 'twenty per cent fund' will be formed for companies to reverse twenty per cent of revenues earned during the twenty year extension. Once collected, these revenues will then be distributed in the form of annual supplement to performers who had transferred or assigned their right to equitable remuneration in exchange of a one-off payment. See European Parliament and Council Directive 2011/77/EU, Art 1(2)(c).

<sup>155</sup> One hundred and twenty years in the case of performance fixed in a sound recording.

<sup>156</sup> Arnold (n 6) 83-84.

<sup>157</sup> France: IPC Art. L 211-4-2; UK: CDPA 1988, s. 191 (2).

<sup>158</sup> 1996 WPPT, Art 17.



taken no less than sixteen years for the international community to level the legal regimes for all performances granting audio-visual performing artists the same duration of fifty years. The Treaty is yet to be ratified by signatory legislators like Australia who is still distinguishing between those artists.<sup>159</sup>

Even though this change in law made a step in the right direction by increasing the duration of performers' rights, the international community did not take this opportunity of reform to line-up the regime of performers with that of authors. The foundations of the author-performer divide remain unshaken, despite numerous successive reforms at the national, regional and international levels.

## **B. Intended differences**

The substantial gap established between authors' and performers' rights was no inadvertent move on the legislators' part. On the contrary, it is the result of the careful expression of their intention. The reforms were informed by a series of reluctant reports which advocated for the divide to be not only introduced but maintained.<sup>160</sup> The relegation of performers' rights to non-intellectual property titles in the first place, and later, to a claim of a lesser substance was motivated by the fear

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<sup>159</sup> Australia: 1968 Copyright Act, s 248A. Australian laws currently enforce a different regime between performances captured by sound recording and those fixed by cinematographic film. The first categories are protected for a period of fifty years running from the year the performance was "given", whilst audio-visual performances are only protected for a duration of twenty years. This gap should be bridged as a result of the ratification of the Beijing Treaty granting the same duration of protection for audio-visual performers. See, Beijing Treaty, Art 14.

<sup>160</sup> Australia: Spicer Report (n 36) 89, para 480 and following; France : Jolibois Report No 350 (n 37) 24; UK: Henri Gregory, 'Report of the Copyright Committee' (1952), cmnd 8662 para 172,180,176 – later referred to as the 'Gregory Report'.

of diminishing authors' legal protection. Explicit statements to this effect were reported during the deliberations of national and international projects of reform.<sup>161</sup>

At the international Brussel conference held in 1948 to update the terms of the Berne Convention, the national representatives agreed that if performances ought to be protected, it could not be done within the parameters of the 1886 Convention. This discussion took place on and about the insertion of Article 11 quarter (nouveau).<sup>162</sup> The project of Article 11 quarter had been driven by the acknowledgement that performers required a minimum level of protection.<sup>163</sup> It subsequently failed for lack of consensus on such level of protection should be. France refused the remote idea of embedding any form of performers' rights in the Berne Convention, fearing that it would assimilate performing artists with authors, the *true* creators, which they are not. The French representatives stated that:

The French Government continues to believe that performing artists are not creators of works of the mind and that the international protection they are owed cannot take place in the Berne Convention which is dedicated to protecting the works of creators of literary and artistic works.<sup>164</sup>

After shifting sides during the negotiations, the UK was also party to the debate and held a similar position.<sup>165</sup> Initially, the British delegation had put forward a proposal providing that “[w]ithout affecting authors' rights, the performing artist will be protected, in the country where the performance took place, against any unauthorised making of records or any other similar instruments used to reproduce the sounds by means of which his performance of a musical or dramatic work can be

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<sup>161</sup> Robert Homburg, *Le Droit d'Interprétation Des Acteurs et Des Artistes Exécutants* (Recueil Sirey 1930) 32-42.

<sup>162</sup> Brussels Conference Document (n 34) 308-13.

<sup>163</sup> *ibid*, 308.

<sup>164</sup> Brussels Conference Document (n 34) 310. Author's translation, see original text in Appendix 1.

<sup>165</sup> *ibid*, 310-3. Author's translation, see original text in Appendix 1.

reproduced, whether or not such work has fallen into the public domain”.<sup>166</sup> This proposition was going beyond the provisions submitted by the conference which had Article 11 quarter (nouveau) suggesting, with less ambition, that:

The interpretation of a work is protected according to the conditions set by the national laws of each Country members of the Union, disregarding whether such work has fallen in the public domain or not<sup>167</sup>

However, by the end of the Conference, the British delegation had withdrawn their proposal judging its own suggestion as “too vague” and “going too far”.<sup>168</sup> No amendment under Article 11 quarter (nouveau) was passed but a wish to work towards the enactment of performers’ rights<sup>169</sup> was voted in its place, a vote from which the British representatives abstained.<sup>170</sup>

The UK kept a reserved approach towards the enforcement of performers’ protection until the reforms prompted by the European directives.<sup>171</sup> The Parliament was adamant that criminal sanctions to performers’ right infringement satisfied the level of protection required by the Rome Convention. The public declarations of un-initiated speakers<sup>172</sup> reveal that the gap in the nature and substance of right between authors’ and performers was a conscious decision. In the House of Commons, Member of Parliament Ronald Bell explained that:

We mainly rely on the Copyright Act, 1956, for the regulation of copyright, a system under which we give to the author or producer of a work of art a kind of industrial property in his production. Performers, as distinct from authors,

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<sup>166</sup> Brussels Conference Document (n 34) 310-1. Author’s translation. See original text in Appendix 1.

<sup>167</sup> *ibid*, 309. Author’s translation. See original text in Appendix 1.

<sup>168</sup> Brussels Conference Document (n 34) 313.

<sup>169</sup> Brussels Conference Document (n 34), 428, wish VIII (vœu VIII).

<sup>170</sup> Indeed, whilst the majority of the General Commission concluded to the artistic nature of performers’ work and therefore justified the creation of a separate instrument for them, the UK expressed that their inspiration to offer protection for those artists drew on concerns raised by international labour organisations. Brussels Conference Document (n 34) 428.

<sup>171</sup> text to note 19.

<sup>172</sup> At various points both Members of the House of Commons and House of Lords refer to their lack of expertise in intellectual property, a field otherwise complex. See HC Deb., 5<sup>th</sup> Series, Vol 679 (1963) col. 896, and HL Deb., 5<sup>th</sup> Series, Vol. 246 (1963), cols 517-8.

are not protected in that way by the grant of a property right or copyright but by an Act known as the Dramatic and Musical Performers Protection Act, 1958, which makes it a criminal offence to record or broadcast a performance of a performer without his written consent.

The performer does not have a copy-right, but it is made a criminal offence to pirate his performance, and that, of course, puts him in a bargaining position in relation to broadcasting organisations or gramophone record makers so that he can strike his bargain by contract with them. Unless they get his consent by contract, they would be guilty of a criminal offence if they pirated his performance.<sup>173</sup>

Those concerns repeated the contentions of the authors of the Gregory Report published ten years earlier.<sup>174</sup>

In France, similar reservations on the introduction of performers' rights were also present in legislative debates. In the preparation of what became the Law of July 4, 1985, the enthusiasm of the French government was hindered by the Senate. Senator Charles Jolibois, head of the commission working on the elaboration of the bill, was highly critical of the Assembly's wish to extend performers' protection to moral rights, which were not required by the international conventions at the time. He commented:

The ambition of the French project [of reform] is all the greater that it grants performers with moral rights, what the Rome Convention does not require. In short, the current bill goes way beyond what is needed to ratify the Rome Convention and the Government wishes to enforce the most sophisticated piece of legislation on the question of authors' rights and neighbouring rights.<sup>175</sup>

Many of the working commission's reports stressed the need for performers' protection not to be implemented at the expense of authors' rights, emphasising the necessity to keep performing artists' rights at bay from copyright.<sup>176</sup> Jolibois's reports

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<sup>173</sup> HC Deb., 5<sup>th</sup> Series, Vol 679 (1963) col. 897.

<sup>174</sup> Henri Gregory, 'Report of the Copyright Committee' (1952) 63, para 176.

<sup>175</sup> Jolibois Report No 212 (n 4) 27. Author's translation, see original text in Appendix 1.

<sup>176</sup> Jolibois Report No 350 (n 37) 24; Jolibois Report No 212 (n 4) 23.

mentioned that performers' protection "ought not to be built on the ruins of authors' rights".<sup>177</sup> The French senator warned the Parliament that the "sleeping pill"<sup>178</sup> administered by the Rome Convention under its first Article was a mere "tranquilizer"<sup>179</sup> the government repeated in the bill. Article 1 of the Rome Convention entitled "Safeguard of Copyright Proper" stipulated that the "[p]rotection granted under this Convention shall leave intact and shall in no way affect the protection of copyright in literary and artistic works. Consequently, no provision of this Convention may be interpreted as prejudicing such protection."<sup>180</sup> A near verbatim quote of the article was introduced in the 1985 Act<sup>181</sup> and later codified under Article L 211-1.

In the US, although performers currently benefit from a rather narrow protection at the federal level, their interests were passionately defended by Congress Members since the early 1930's.<sup>182</sup> Very few of those debates resulted in actual legal reforms but innovative solutions were presented before the federal legislators as early as 1936. At the time, Representative Daly introduced a revision which granted performers with full copyright, acknowledging the full creative input those artists had in the record.<sup>183</sup> Daly's bill proposed to introduce the following disposition:

[T]he works for which copyright may be secured under this Act shall include all the writings of an author, whatever the mode or form of their expression, and all renditions and interpretations of a performer and/or an interpreter of

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<sup>177</sup> Citing Desbois in Jolibois Report No 350 (n 37) 24, and Jolibois Report No 212 (n 4) 23. See, Desbois H, *Le Droit D'Auteur en France* (Daloz 1978) 232. This concern was also reported in Brad Sherman and Lionel Bently, 'Performers' Rights: Options for Reform' (Report to the Interdepartmental Committee 1995) 28, para 4.3.

<sup>178</sup> Jolibois Report No 212 (n 4) 27.

<sup>179</sup> *ibid.*

<sup>180</sup> Rome Convention, Art. 1.

<sup>181</sup> Law of July 4, 1985 No 85-660, Art 15.

<sup>182</sup> It seems as though, Daly would have found some support from French scholars at the time. See, Robert Homburg (n 161) 1-18, and Paul Olganier, *Le Droit Des Artistes Interprètes et Exécutants* (Librairie Générale de Droit et de Jurisprudence 1937) 24-7.

<sup>183</sup> Committee Report (n 20) 31-2.

any musical, literary, dramatic work, or other compositions, whatever the mode or form of such renditions, performances, or interpretations.<sup>184</sup>

Performances were expected to be protected once fixed<sup>185</sup> and registered.<sup>186</sup> Yet, even at a time where performing artists enjoyed what was probably the greatest support they would ever receive from their national governing representatives, the advancement of their legal situation was shortly shadowed by concerns for authors' interests. Indeed, no later than a month after its presentation before the Congress, Representative Sirovich amended Daly's proposal offering to make performers' copyright contingent on authors' approval as well as to constrain the opportunity to musical performances.<sup>187</sup>

This episode illustrates that any step taken by policy-makers to improve performers' protections is simultaneously hindered by the necessity to maintain the authority of authors' rights over the realm of intellectual property laws.

## **II. Performing the divide: the part of judges**

The divide between authors and performers was a result intended by legislators, and the courts made sure that their intention was respected. At times, this quest led judges to reach conclusions on the basis of either obscure or questionable logical grounds as the artificial distinction placed between authors and performers became more and more difficult to draw and maintain.

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<sup>184</sup> H.R. 10632, 74th Cong., 2d sess. (1936) sec 3; 1978 Committee Report (n 20) 31.

<sup>185</sup> HR 10632, 74<sup>th</sup> Cong, 2d sess (1936) s.5(n) reads : The interpretations, renditions, readings, and performances of any work, when mechanically reproduced by phonograph records, disks, sound-track tapes, or any and all other substances and means, containing thereon or conveying a reproduction of such interpretations, renditions, readings, and performances.

<sup>186</sup> 1978 Committee Report (n 20) 31-2.

<sup>187</sup> HR. 11420, 74th Cong. 2d sess. (1936). This was reported by Ringer B, 'Study No 26 "The Unauthorized Duplication of Sound Recordings"' Prepared for the Subcommittee on Patents, Trademarks and Copyrights of the Committee on the Judiciary' (1961) 21-9.

## A. Interpreting the divide

In the American judicial narrative, the intention of the Congress is often cited to justify the impossibility for performing artists to obtain copyright protection over their interpretations. In *Sinatra v The Goodyear Tyre & Rubber*,<sup>188</sup> the ninth circuit court of appeal reminded the plaintiffs that “[t]he power to provide copyright protection for a limited time to the “Writings and Discoveries” of authors and inventors is one of the enumerated powers of Congress. [...] Thus the author or composer was accorded copy protection, but no provision has yet been made in the Act for a performer's right, per se.”<sup>189</sup> More recently, in *Conrad v AM Community Credit Union*,<sup>190</sup> Posner J too rejected the possibility for performances to be copyrighted or copyrightable, directly quoting the Constitution.<sup>191</sup>

In 1986, the seventh circuit explained that the impact of the legislative intent a little further by noting that if voted laws have to be respected, failed attempts to amend them should not be taken into consideration in any way, in *Baltimore Orioles v Major League Baseball Association*.<sup>192</sup> After taking a rather tortuous logical pathway, the Court concluded that performances were not copyrightable *per se*.<sup>193</sup> In the case, Eschbach J had first noted that even though the Congress rejected the proposition of the ‘Sound Recording Performance Rights Amendments’<sup>194</sup> to grant performances copyright protection, this missed attempt is no indication that performances are not

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<sup>188</sup> *Sinatra v The Goodyear Tire & Rubber co*, 435 F2d 711 (9<sup>th</sup> Cir 1970).

<sup>189</sup> *ibid*, 714.

<sup>190</sup> *Conrad v AM Community Credit Union*, 750 F3d 634 (7<sup>th</sup> Cir 2014).

<sup>191</sup> For lacking fixation, see *Conrad v AM Community Credit Union*, 750 F3d 634 (7<sup>th</sup> Cir 2014) 636.

<sup>192</sup> *Baltimore Orioles Inc v Major League Baseball Players Assn* 805 F2d 663 (7<sup>th</sup> Cir 1986) 675.

<sup>193</sup> *ibid*.

<sup>194</sup> H.R. 997, 96<sup>th</sup> Cong., 1<sup>st</sup> Sess. (1979), s. 1552, cited in *Baltimore Orioles Inc v Major League Baseball Players Assn* 805 F2d 663 (7<sup>th</sup> Cir 1986) 675.

copyrightable.<sup>195</sup> Indeed, to judge to this issue, the Court must examine the positive expression of legislative intent as expressed in the law, and enforced at the time of the dispute. Therefore, the bench turned to the provisions of Title 17 of the US Code and reached the conclusion that performances could not be copyrighted because they failed the fixation requirement. When fixed, Eshbach J stated that the performance fell under the scope of the copyright of their records since “there is no distinction between the performance and the recording of the performance”.<sup>196</sup> Consequently, although there is no positive exclusion of performances from the scope of copyright protection, the careful application of its various requirements and principles rule them out as distinct copyright material.

In *Garcia v Google*,<sup>197</sup> Smith J’s based his dissenting opinion on the Congress’s implied but express intent not to include performances in the category of protectable works. He reminds the majority that:

[The Act] differentiates a work from the performance of it. It defines “perform a ‘work’” to mean “to recite, render, play, dance or act it”. Given this provision, it is difficult to understand how Congress intended to extend copyright protection to this acting performance. While Congress distinguishes the performance from the work itself, the majority blurs this line. Its position contemplates something very different from amalgamating independently copyrightable interests into a derivative work.<sup>198</sup>

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<sup>195</sup> Replying to the parties’ argument, the Court stated that: “To support their argument that their performances cannot be copyrighted, the Players refer to the “Sound Recording Performance Rights Amendment,” S. 1552 and H.R. 997, 96th Cong., 1st Sess. (1979), an unsuccessful attempt to amend the Copyright Act to grant certain performance rights to sound recording artists. Nevertheless, that a Congress, for a reason that we cannot discern, has not enacted an amendment has little or no bearing on the construction of a statute enacted by an earlier Congress. *CFBenson v Allphin*, 786 F2d 268, 275 n. 15 (7th Cir 1986) (discussing difficulty of construing congressional acquiescence in judicial decisions). In this case, the failure to enact the “Sound Recording Performance Rights Amendment” does not establish that the contributions of recording artists (and, by analogy, the performances of the Players) cannot presently be copyrighted. If anything, it suggests merely that recording artists are not entitled to royalties from the compulsory licensing of sound recordings.” (footnotes omitted) in *Baltimore Orioles Inc v Major League Baseball Players Assn* 805 F2d 663 (7th Cir 1986) 675.

<sup>196</sup> The full sentence reads: “Nonetheless, once a performance is reduced to tangible form, there is no distinction between the performance and the recording of the performance for the purpose of preemption under § 301(a).”

<sup>197</sup> *Garcia v Google Inc*, 743 F 3d 1258 (9th Cir 2014).

<sup>198</sup> *ibid*, 1270 - citations omitted.



Legislative intentions were too the crux of the saga of jurisprudence<sup>199</sup> dividing British courts on the existence of a civil cause for action deriving from the criminal dispositions prohibiting the bootlegging of recorded performances.<sup>200</sup> In *Musical Performers' Protection Association v British International Pictures*,<sup>201</sup> *Apple Corps v Lingasong*<sup>202</sup> and *RCA Corporation v Pollard*<sup>203</sup> the Courts were adamant that the law ought to be interpreted *stricto sensu* so as to respect the Parliament's repeated refusal<sup>204</sup> to introduce civil remedies for performers or their recording companies. In the first case, McCardie J reinforced such position stating that "[n]owhere in the [1925 Musical and Dramatic Performers' Act is there] any indication of an intention to give the performers any "right of property" in the performance of works".<sup>205</sup> Concurring with this interpretation of the law, Megarry J held in the second case that "there was no civil remedy under the [1925] Act and the omission of any reference to a civil action in the 1963 [Performers' Protection] Act indicated that the intention of Parliament was that the sole protection under the Acts was to be afforded by criminal prosecution".<sup>206</sup>

Not dissimilarly, in France, the courts frequently reaffirm that neither parties nor judges have the authority to attribute authorship, only the law does, and by extension the Parliament. As a result, collaborators cannot attribute themselves authorship of a work if they have not met the requirements set by the law in the first place. Following the same principle, the ownership of the work can only be transferred by whoever is

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<sup>199</sup> Arnold (n 6) 18-25.

<sup>200</sup> text to note 16 and 305.

<sup>201</sup> *Musical Performers' Protection Association Ltd v British International Pictures Ltd* (1930) 46 TLR 485.

<sup>202</sup> *Apple Corps Ltd and Others v Lingasong Ltd and Another* [1977] FSR 345.

<sup>203</sup> *RCA Corporation and Another v Pollard* [1982] 1 WLR 979; [1982] 2 All ER 468. The decision was reversed in Appeal : *RCA Limited v Pollard* [1983] Ch 135.

<sup>204</sup> The British Parliament envisaged and rejected this option on several occasions, notably when drafting the 1925 and 1958 Musical and Dramatic Performers Acts and the 1963 and 1972 Performers' Protection Acts.

<sup>205</sup> *Musical Performers' Protection Association Ltd v British International Pictures Ltd* (1930) 46 TLR, 488.

<sup>206</sup> *Apple Corps Ltd and Others v Lingasong Ltd and Another* [1977] FSR 345.

legally regarded as its author. Consequently, performers could be assigned by contract the ownership of a work but could never be made author by way of agreement.<sup>207</sup> Nevertheless, the role of the courts in the construction of the performers' protection when no legislative actions was taken, painted the French bench as sympathetic to the cause of performers, as well as eager to re-shape the author-performer divide whenever the circumstances requested it. This point is further discussed in subsequent developments.<sup>208</sup>

## **B. An untenable divide**

The divide is less easily followed in practice. This often put the judge in the position of deciding what pertains to authoring or performing,<sup>209</sup> drawing thereby a somewhat artificial line between collaborating artists.

### **1. Artificial lines**

In the UK, *Hadley v Kemp*<sup>210</sup> presents itself as the landmark case on the matter. No clearer boundaries could have been drawn by the courts when distinguishing between copyrightable and non-copyrightable inputs as the one instated by Park J. He adjudicated that the contributions of a musician “however significant and skilful [...] need to be to the creation of the musical works, not to the performance or interpretation of them”.<sup>211</sup> The judge proceeded to explain that:

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<sup>207</sup> However, if a performer meets the requirement to obtain copyright, Courts have been prone to grant it to them despite the existence of a separate regime for performing artists codified in the French Intellectual Property Code.

<sup>208</sup> text to note 260.

<sup>209</sup> *Bently Authorship in Popular Music* (n 77) 185-7; Skopelja (n 79) 11.

<sup>210</sup> *Hadley and others v Kemp and another* [1999] All ER (D) 450.

<sup>211</sup> *ibid*, para N4.

[T]here is a vital distinction between composition or creation of a musical work on the one hand and performance or interpretation of it on the other. The [expert witness's] evidence frequently stressed this point. It is certainly true that the members of the band sang or played in their own ways (and, in so far as I am able to judge, did so excellently). But these are matters of performance, not matters which go to the creation of a new musical work.<sup>212</sup>

Here, the Court positioned itself in line with the narratives expressed through the British regulatory framework since the introduction of performers' protection in 1925 by giving the author-performer divide a practical dimension. Until then, the divide remained theoretical and a mere implicit suggestion from policy-makers.<sup>213</sup>

The same 'divide-compliant' principle was later followed by Williamson J in *Bangboye v Reed*,<sup>214</sup> when she reinforced that "the contribution must be to the creation of the musical work, not to its performance or interpretation". Similarly, *Coffey v Warner Chappell Music*<sup>215</sup> also concluded that vocal performances could not be taken for copyrightable musical performances as their contributions are the fruit of interpretation rather than creation. In her singing, the performer had identified three elements of her input in the musical work she claims had been infringed: the 'voice expression', the 'timbre' and the 'syncopation of or around words'.<sup>216</sup> All three of them were considered to "appertain to interpretation or performance characteristics by the performer [...] rather than to composition" which is the "legitimate subject of copyright protection".<sup>217</sup> Therefore, unlike musical works, musical performances are free to be copied.<sup>218</sup> The opposition found in legislators'

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<sup>212</sup> *Hadley and others v Kemp and another* [1999] All ER (D) 450, para N4. See also, *Island Records Ltd v Corkindale* [1978] Ch 122, 132.

<sup>213</sup> text to note 63.

<sup>214</sup> *Bangboye v Reed* [2002] EWHC 2922 (QB) [2004] EMLR 5, [2002] EWHC 2922.

<sup>215</sup> *Coffey v Warner Chappell Music Ltd* [2005] All ER (D) 329.

<sup>216</sup> *ibid*, para 5.

<sup>217</sup> *Coffey v Warner Chappell Music Ltd* [2005] All ER (D) 329, para 6.

<sup>218</sup> *ibid*, para 6 and 7.

commentaries between creation and interpretation as mutually exclusive concepts<sup>219</sup> clearly resonates in the narrative produced by the courts.<sup>220</sup>

The American judicial narrative does not appear to have been as prone to engage with the dichotomy opposing creation and interpretation as much as British courts have.<sup>221</sup> This rationale was never expressed by American judges in the context of a dispute involving performing artists, as far as the cases envisaged by this qualitative analysis are concerned.<sup>222</sup> However, in a case related to glass blowing sculpting techniques, the seventh circuit did find itself drawing parallels between the parties' creative venture and the collaboration between authors and performers to strengthen its reasoning.<sup>223</sup> The dispute concerned two sculptors, one having drawn a design with elements to be executed by the second, a glass-blowing expert. The expert later claimed that he was the joint-author of the sculpture for the elements he had created from the design. He contended that the "change of form – here from drawing to glass – create[d] intellectual property rights"<sup>224</sup> in the finished piece. Commenting on this argument, the judge responded rather vividly that the "[d]efendants may as well say that the typesetter owns a book's copyright or that the members of an orchestra who play a composition using their own interpretations of the scores become the music's

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<sup>219</sup> Jolibois Report No 350 (n 37) 23-4, 29; Brussels Conference Document (n 34) 309. This opposition is further discussed in Chapter 3, text to note 223.

<sup>220</sup> See for more example in the British jurisprudence: *Beckingham v Hodgins* [2002] All ER (D) para 4; *Hyperion Records Ltd v Sawkins* [2005] EWCA Civ 565, para 42.

<sup>221</sup> According to the author's qualitative analysis.

<sup>222</sup> The case *Newton v Diamond* does envisage the difference between the creativity lying in the composition in opposition to the one lying in the interpretation but the case does not oppose the two, in fact it surprisingly sides with the argument that the interpretation is more creative than the composition. See, *Newton v Diamond*, 349 F 3d 591 (9th Cir 2003) further discussed in text to note 253.

<sup>223</sup> *Neri v Monroe*, 726 F3d 989 (7th Cir 2013).

<sup>224</sup> *ibid*, 992.

authors”.<sup>225</sup> The role and input of the performer is clearly undermined by this comparison with penmanship being opposed to authorship.<sup>226</sup>

That is not to suggest that American courts have not performed the author-performer divide, but that circuit judges have referred to other justifications than the creation/interpretation dichotomy to ground their position. As if the judges of the ninth circuit were stating the obvious in *Midler v Ford*,<sup>227</sup> the American court rejected performances’ protection against copyright infringement without going into the expense of sharing the reasoning behind its conclusion. Treating the author-performer divide as a given which does not require justifications beside an earlier reference to the freedom of speech, the judges stated that:

Moreover, federal copyright law preempts [sic] much of the area. Mere imitation of a recorded performance would not constitute a copyright infringement even where one performer deliberately sets out to simulate another's performance as exactly as possible. It is in the context of these First Amendment and federal copyright distinctions that we address the present appeal.<sup>228</sup>

In Smith J’s dissenting opinion, performances are described to fail all the conditions of copyright protection. He stated that the [performer] “does not clearly have a copyright interest in her acting performance, because her acting performance is not a work, she is not an author, and her acting performance is too personal to be fixed.”<sup>229</sup> Later the same year, in the seventh circuit Posner J confirmed Smith’s position but limited his argumentation to performances’ lack of fixation to refuse performing artists the benefits of authors’ rights, in the *Banana Lady* case.<sup>230</sup> Finally,

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<sup>225</sup> *Neri v Monroe*, 726 F3d 989 (7th Cir 2013) 992.

<sup>226</sup> Text to note 61, Chapter 1.

<sup>227</sup> *Midler v Ford*, 849 F2d 460 (9th Cir 1988).

<sup>228</sup> *ibid*, HN1-2.

<sup>229</sup> *Garcia v Google Inc*, 743 F 3d 1258 (9th Cir 2014) 1270 - references and citations omitted.

<sup>230</sup> *Conrad v AM Community Credit Union*, 750 F3d 634 (7th Cir 2014) 636.

the formation en banc of the ninth circuit court sided with Smith J in the 2015 appeal of the decision.<sup>231</sup>

In France, the divide between authors and performers seems to have gone beyond creating a divide to establish a hierarchy placing authors above performers. In *Lindon v Boussagol*,<sup>232</sup> the Paris Tribunal held that female performers were not allowed to perform the lead characters of *Waiting for Godot* as the Irish playwright had expressed before his passing that he never wanted women to embody the roles. Here the Court accepted the estate's claim according to which the writer's eternal right of integrity had been breached by the staging of female comedians as Vladimir and Estragon. Even though the roles themselves were performed by the two actresses in their original gender, without modifying the play nor the stage directions left by the Irish playwright, the production was banned from continuing its tour. Despite the fact that the actresses' performances were acclaimed by their peers, the integrity of *Waiting for Godot*, as envisioned by Beckett, was still regarded as having been breached. This reveals that the moral right doctrine not only contributes to the shaping of the author-performer divide<sup>233</sup> but it also establishes a hierarchy between the two sets of artists, allowing the former to control the creativity of the latter to the extent of dictating who shall or shall not convey their work to the public.<sup>234</sup> In this case, the performers' creativity was trumped by the author's right to control the fruit

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<sup>231</sup> *Garcia v Google Inc*, 786 F 3d 733 (9<sup>th</sup> Cir 2015) 742-4.

<sup>232</sup> TGI Paris 15 octobre 1992, *Lindon et Sacd c/ La Compagnie Brut de Béton et Boussagol* : inédit, RTD com. 1993. p 98 note Françon; RIDA janvier 1993 p. 225; David Smith, Imogen Carter and Ali Carwath, 'In Godot We Trust' *The Observer* (March 2009) <<http://www.theguardian.com/culture/2009/mar/08/samuel-beckett-waiting-for-godot>> accessed 10 March 2016.

<sup>233</sup> on the contribution of the moral right doctrine to the author-performer divide, see text to note 133.

<sup>234</sup> In Italy, the exact same facts received a different treatment by the court who litigated in favour of the performers' freedom of expression. See, Barbara McMahon, 'Beckett Estate Fails to Stop Women Waiting for Godot' *The Guardian* (Rome, 2006) <<http://www.theguardian.com/world/2006/feb/04/arts.italy>>; Similarly, in the Netherlands, the author's claim was rejected by the court. See, Alice Jones, 'Waiting for Godot: Samuel Beckett in Baseball Caps' *The Independent* (7 May 2014) <<http://www.independent.co.uk/arts-entertainment/comedy/waiting-for-godot-samuel-beckett-with-baseball-caps-9334277.html>> accessed 10 March 2016. See also, André Françon, 'Droit Au Respect Sur Une Oeuvre Théâtrale. Metteur En Scène' [1993] RTD Com. 98

of his labour. The jurisprudence is in line with the rationale behind authors' moral rights which were introduced to curb performative practices taking what was considered as too much liberty with the works artists interpreted on stage.<sup>235</sup>

## 2. Perpetuating power patterns

In drawing such lines between collaborators, the legal narrative seems to have been influenced, and in return has reinforced, power struggles<sup>236</sup> occurring in the working relationship shared by authors, directors and performers.<sup>237</sup> This had the perverse effect of relaying through legal channels negative power patterns scholars as well as practitioners of theatre, performance and music studies attempt to abolish or at least recalibrate.<sup>238</sup>

This phenomenon manifested itself very clearly in *Erikson v Trinity Theatre*.<sup>239</sup> In this decision, the judges relied on what status parties *felt* they were holding, and what input they *believed* they had as evidentiary elements to deny their contribution in the work as authors. The court notably referred to the parties' social status to evidence

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<sup>235</sup> Article 201 of the Dance Regulation (Reglement de la Danse) applicable to the Opera signed in 1821 by Marquis de Lauriston provided that "No artist, except in the case of debut, has the right to insert in a ballet or a numero additional steps or steps new to work being staged". Author's translation. The original text reads: Aucun artiste, sauf le cas de debuts, n'a le droit d'introduire dans un ballet ou dans un divertissement un pas nouveau ou étranger à l'ouvrage que l'on represente". Cited in Olagnier (n 182) 46-7.

<sup>236</sup> See for a perspective on copyright informed by theatre studies, Luke McDonagh, 'Plays, Performances and Power Struggles - Examining Copyright's "Integrity" in the Field of Theatre' (2014) 77 *Modern Law Review* 533.

<sup>237</sup> Until the end of the seventeenth century, the performer was considered the authors' collaborators and on many occasions performing companies would share credits with playwrights upon the publication of their work. See, Olagnier (n 182) 9-13.

<sup>238</sup> See in the context of music, Stascheit, 'From Territories to Transformation: Anton Webern's Piano Variations as a Case-Study for Research in-and-through Musical Practice' in Paulo de Assis, Brooks William and Kathleen Coessens (eds), *Sounds and Scores: Essays on Sound, Score and Notation* (Orpheus In, Leuven University Press) 59; more generally on the relationship between performances and the scores, Daniel Leech-Wilkinson, 'Compositions, Scores, Performances, Meanings' (2012) 18 *Society for Music Theory* <<http://www.mtosmt.org/issues/mto.12.18.1/mto.12.18.1.leech-wilkinson.php>> accessed 10 March 2016; Daniel Leech-Wilkinson, 'Classic Music: Utopia or Police State?' [2014] Paper at the conference 'Performing under Pressure - International and Interdisciplinary Symposium: 46th Annual ASP Conference & Art in Motion; Leech-Wilkinson D, 'The Changing Sound of Music: Approaches to Studying Recorded Musical Performances' [2009] *CHARM* <<http://www.charm.kcl.ac.uk/studies/chapters/chap2.html>>. accessed 10 March 2016.

<sup>239</sup> *Erikson v Trinity Theatre Inc et al*, 13 F3d 1061 (7th Cir 1994), 1994 US App LEXIS 177 (7th Cir 1994); 19 USPQ 2D (BNA) 1347 (7th Cir 1994); Copy L Rep (CCH) P27,197 (7th Cir 1994).

their absence of intent to co-author the plays at stake in the dispute.<sup>240</sup> It was held that:

The actors did not consider themselves to be joint authors with Ms. Erickson, and there is no evidence that Ms. Erickson considered the actors as co-authors of the script. Because Trinity cannot establish the requisite intent for *Much Ado* or *Prairie Voices*, the actors cannot be considered joint authors for the purposes of copyright protection.<sup>241</sup>

Less explicitly, the same phenomenon occurred in *Hadley v Kemp*<sup>242</sup> as the judge took into consideration the social position of the lead singer, Gary Kemp, within his group to determine his sole authorship on most of the musical works at stake in the dispute. From the start of the decision, the judge established that:

The case is about the income which flowed to him (or more exactly to his company, Reformation) by virtue of his having been the composer. So far as public perception was concerned the band did not have a leader, but internally Gary Kemp was the most influential member.<sup>243</sup>

The Paris Court of Appeal appears to have been affected by the bias of similar social influences in the *Cocteau* case of 1960.<sup>244</sup> A dispute regarding the rights over the ballet 'Le Jeune Homme et la Mort' rose between Roger Eudes and Jean Cocteau. The ballet had been written by Cocteau and choreographed by Roland Petit under the writer's supervision. Eudes claimed that he was co-author of the ballet, being the artistic director of 'ballets des Champs Elysées' which collaborated in the production of the piece.

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<sup>240</sup> Intent to create is a condition of joint-authorship under American federal copyright law. See, US Code, Title 17 para 101 (7).

<sup>241</sup> *Erikson v Trinity Theatre Inc et al*, 13 F3d 1061 (7th Cir 1994) 1072.

<sup>242</sup> *Hadley and others v Kemp and another* [1999] All ER (D) 450.

<sup>243</sup> *ibid*, para B(4).

<sup>244</sup> Paris, 1<sup>re</sup> Ch, 8 juin 1960, *Eudes c/ Jean Cocteau* : JCP G 1960, II, 11710. In first instance see, Trib. Seine, 2 juillet 1959, *Eudes c/ Gutman, Cocteau et autres* : Le Droit d'Auteur 1959, vol 72 No 5 p. 93.



The bench agreed with the conclusions of the General Advocate who began his argumentation by recognising the collaborative nature of ballets, often leading to co-authorships, yet concluded in favour of conferring all rights to Cocteau. He explained that:

Granted, ballets can be, and generally are, collaborative works. However, in this case, except for the musical composition, Jean Cocteau appears to be the sole author. His universal genius in literature and arts (and notably in theatre, cinema and choreography to only name a few) allowed for this rather exceptional tour de force to occur.<sup>245</sup>

Impressed by the talents and career of the famous French writer, the General Advocate argued for his sole authorship, which included the choreographic work. His reasoning was partly based on the choreographer's deference to Cocteau:

If there was to be an owner of the choreography, it would be Mr Roland Petit, and not Mr Eudes [the plaintiff]. But Mr Roland Petit has not claimed anything and rightly so, he very correctly realised that his role was one of a technical consultant, Jean Cocteau had selected him specifically for his ability to listen and translate his [Cocteau's] work in the language of dance.<sup>246</sup>

If this case remains an exception in the French jurisprudence on joint and co-authorship, both *Erickson v Trinity Theatre*<sup>247</sup> and *Hadley v Kemp*<sup>248</sup> have been referred to as authorities<sup>249</sup> on this particular point, continuing in the legal narrative the bias on which they are based.

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<sup>245</sup> Paris, 1<sup>re</sup> Ch, 8 juin 1960, Eudes c/ Jean Cocteau : JCP G 1960, II, 11710 conclusions de l'avocat général Combaldieu. Confirming the decision in first instance : Trib. Seine, 2 juillet 1959, *Eudes c/ Gutman, Cocteau et autres* : Le Droit d'Auteur 1959, vol 72 No 5 p. 93. Author's translation, see original text in Appendix 1.

<sup>246</sup> Paris, 1<sup>re</sup> Ch, 8 juin 1960, Eudes c/ Jean Cocteau : JCP G 1960, II, 11710 conclusions de l'avocat général Combaldieu. Confirming the decision in first instance : Trib. Seine, 2 juillet 1959, *Eudes c/ Gutman, Cocteau et autres* : Le Droit d'Auteur 1959, vol 72 No 5 p. 93. Author's translation, see original text in Appendix 1.

<sup>247</sup> *Erikson v Trinity Theatre Inc et al*, 13 F3d 1061 (7th Cir 1994).

<sup>248</sup> *Hadley and others v Kemp and another* [1999] All ER (D) 450.

<sup>249</sup> See for *Erikson v Trinity Theatre Inc: Seshadri v Kasraian*, 130 F3d 798 (7th Cir 1997); *Gaiman v McFarlane*, 360 F3d 644 (7th Cir 2004) 649; *Wildlife Exp Corp v Carol Wright Sales Inc*, 18 F3d 502 (7th Cir 1994) 507. See for *Hadley v Kemp: Barrett v Universal-Island Records Ltd* [2006] EWHC 1009 (Ch) [2006]

The discretion of judges in interpreting the divide and repeating undesirable power struggles is reinforced by the fact that the finding of authorship is considered to be a point of fact and not of law, in both civil<sup>250</sup> and common law jurisdictions.<sup>251</sup> This rather small detail bears significant consequences on the outcome of cases because it makes its finding ineligible for appeal before higher courts, depending on domestic procedural rules.

### 3. Blurred lines

The Courts appear to have faithfully followed the author-performer divide as drawn by their respective statutory framework. Their doing so has not always resulted in desirable outcomes. The performance of such divide led to reaching complicated decisions<sup>252</sup> with convoluted reasoning in order to maintain a semblance of legitimacy.

*Newton v Diamond*<sup>253</sup> is a good illustration of this issue. James Newton is a flute jazz performer whose recorded performance had been incorporated by way of musical sampling into a derivative work composed by the Beastie Boys. Newton had composed the musical work he interpreted on the record. The Beastie Boys had obtained Newton's authorisation to use his performance, but the latter argued that he

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EMLR 567; *Hyperion Records Ltd v Sawkins* [2005] EWCA Civ 565; [2005] 1 WLR 3281; [2005] IP & T 60; *Sadler v Reynolds* [2005] EWHC 309 (QB); *Brown v Mcasso Music Production Ltd* [2005] EWCC 1 (Cpwt) [2005] FSR 40; *Brighton v Jones* [2004] EWHC 1157 (Ch); [2004] E.M.L.R. 26; [2005] FSR 16; (2004) 27(7) I.P.D. 27073; *Beckingham v Hodgins* [2002] All ER (D); *Bamgboye & Anor v Reed* [2002] EWHC 2922 (QB) [2004] EMLR 5; [2002] EWHC 2922; *Experience Hendrix LLC v PPX Enterprises Inc* [2002] EWHC 1353 (QB); Daily Telegraph, July 18, 2002.

<sup>250</sup> France : Cass, 1ère civ, 14 novembre 1973, « affaire du Prince Igor et opéra de Borodine » n° 71-14.709 : Bull civ I, p.390, RIDA avril 1974, p.66; Cass, crim, 5 février 2007, No 07-81.387 : Bulletin criminel 2008 N° 28 p. 109.

<sup>251</sup> See for example, Australia: *CBS Records Australia Ltd v Guy Gross* (1989) 15 IPR 385, 392; UK: *Beckingham v Hodgins* [2002] All ER (D) 45, [49]; *Stuart v Barrett* [1994] EMLR 448, 463; *The Newspaper Licensing Agency Ltd & Ors v Meltwater Holding BV & Ors* [2010] EWHC 3099 (Ch) para 83. See also, Skopelja (n 79) 12.

<sup>252</sup> In *Stuart v Barrett*, the Court admitted the task of drawing the lines of authorship between musicians to be a difficult one. See, *Stuart v Barrett and Others* [1994] EMLR 448, 458; *Hadley v Kemp* [1999] All ER (D) 450, para N3 and N4.

<sup>253</sup> *Newton v Diamond*, 349 F 3d 591 (9th Cir 2003).

had never transferred the copyright he held in the composition so much so that its sampling infringed those rights. Both the district and the appeal courts held that what made the record valuable was the performance of the composition but not the composition itself because it was too basic a succession of chords. They concluded that the composition was not copyrightable and that only the performance was covered with intellectual property rights. In the same manner Park J heavily relied on expert opinions to litigate the dispute before him in *Hadley v Kemp*,<sup>254</sup> the American judges based their decision on the various, sometimes contradicting, musicologists' testimonies to come to the conclusion that:

In filtering out the unique performance elements from consideration, and separating them from those found in the composition, we find substantial assistance in the testimony of Newton's own experts. His experts reveal the extent to which the sound recording of "Choir" is the product of Newton's highly developed performance techniques, rather than the result of a generic rendition of the composition.<sup>255</sup>

There not being any copyright in the composition, the flautist could not stop the sampling of his record because he had already licensed his rights in the performance. Therefore, Newton found himself having assigned the most valuable element of his creation, his performance, without being aware of it. In light the provisions of the Copyright Act<sup>256</sup> and the case law which has consistently rejected the possibility for performers to copyright their performances, the flautist had probably made the reasonable assumption that his interests were better protected by retaining the rights as author rather than as performer. Unlike many performing artists, Newton was in the more advantageous position of being the composer of his own performance, a rare opportunity where performers can cumulate both authors'

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<sup>254</sup> *Hadley v Kemp* [1999] All ER (D) 450, para. See for a critique of his reliance on expert witnesses' report, Bently *Authorship in Popular Music* (n 77) 192-3; Skopelja (n 79) 11.

<sup>255</sup> *Newton v Diamond*, 349 F 3d 591 (9th Cir 2003) 595.

<sup>256</sup> Codified in the US Code under Title 17.

and performers' rights. Little did he know that what he assumed would be his most valuable asset, the copyright in his composition, would be judged worthless by the courts and that his real asset lied in his performer's right. Although the decision is to be welcome for its acknowledgement of performers' creativity, its outcome is contestable to the extent that it worsened the legal condition of author-performer who thought it wise to licence their copyright rather than their performers' right according to previous authorities. The majority decision in the *Newton case*<sup>257</sup> achieves the rather paradoxical feat of erasing the author-performer divide by favouring the protection of performance without serving the performer's interests.

In his dissenting opinion, Graber J held that the court was mistaken in concluding that the performance was not the rendition of an original musical composition, and he reinforced the compositional input in the performances. In doing so, he challenges the majority's reading of the musicologists' testimonies:

The majority is simply mistaken in its assertion that Newton's experts did not present evidence of the qualitative value of the compositional elements of the sampled material sufficient to survive summary judgment. The majority is similarly mistaken when it says that Newton's experts failed to distinguish between the sound recording and the composition. To the contrary, Newton presented considerable expert evidence that the composition *alone* is distinctive and recognizable. [...] [One of the expert witnesses] concludes that the score clearly indicates that the performer will simultaneously sing and finger specific pitches, gives a sense of the rhythm of the piece, and also provides the general structure of this section of the piece. Hence, in my opinion, the digital sample of the performance ... is clearly a realization of the musical score filed with the copyright office.<sup>258</sup>

Because of this disjointed reading of the law and of musicologists' opinions, the jazzman's cause would have been better protected if the court had sided with a more conservative approach to copyright, as per Graber J's dissenting opinion.

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<sup>257</sup> *Newton v Diamond*, 349 F 3d 591 (9th Cir 2003).

<sup>258</sup> *ibid*, 599.

## C. Judicial dissidence

As suggested in the *Newton* case,<sup>259</sup> the Courts came to pierce the veil dropped by the copyright framework between authors and performers.

### 1. Revisiting the French revolution

In France, the protection of performers was a construction of the jurisprudence which preceded the intervention of the government in 1985. As early as 1937,<sup>260</sup> the French judiciary acknowledged the need for performers to be granted protection even though they were not eligible to authorial prerogatives. The Seine Tribunal stated that:

Considering that, indeed, even though dramatic or cinematographic cannot generally speaking benefit from a right over the dramatic work or film as a whole, apart from some exceptions, it seems fair however to grant them, as one would for any other artists, painters, sculptors, engravers or architects, a 'right' over their personal creations, i.e. in this case, over their interpretation of the parts they are given which forms the sole embodiment of their art, perceptible by the sense or published<sup>261</sup>

This decision envisaged a full harmonisation of the regime protecting authors and performers. It carried on explaining that performances could only be eligible to protection if they met the conditions of "personality" and "originality".<sup>262</sup> The judge supported the view that performances were indeed to be considered as 'creations' and pointed to the practice of performers' names featuring in films' credits as evidence that a manifestation of this implicit right already existed.<sup>263</sup> However, the same year, the same tribunal refused to extend such protections to sound

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<sup>259</sup> *Newton v Diamond*, 349 F 3d 591 (9th Cir 2003).

<sup>260</sup> Trib Seine, 23 avril 1937, *Rigault dit Marnay c. Chaperot et Copelier* : Le Droit d'Auteur, No 11 p 129, 130.

<sup>261</sup> Trib Seine, 23 avril 1937, *Rigault dit Marnay c. Chaperot et Copelier* : Le Droit d'Auteur, No 11 p 129, 130. Author's translation, see original text in Appendix 1.

<sup>262</sup> *ibid.*

<sup>263</sup> *ibid.*

synchronisers, rejecting the analogy between authors and performers.<sup>264</sup> The Court of Cassation reaffirmed the jurisprudential construction of performers' rights in France in the *Furtwängler* case after a series of hesitant decisions swinging between civil remedies and intellectual property principles.<sup>265</sup> Although the case did not expressly repeal the author-performer divide, it asserted the merit of performing artists in obtaining the same rights as authors, reaching thereby the same *de facto* outcome. Throughout the subsequent decades, the jurisprudence of the following decades continued building up performers' protection without clearly identifying the source of such rights. In this norme-creating process, judges borrowed principles pertinent to civil, intellectual property and employment laws.<sup>266</sup>

It is only later that the veil separating performers from authors was effectively lifted by the French courts. In the *Sorbelli* case,<sup>267</sup> the artist-performer Sorbelli was awarded the co-authorship of the record of his performance. The artist's interpretation was materialised in photographs taken by Yoshida. The photographer took pictures of Sorbelli "performing" in front of the Mona Lisa in the Louvres museum in Paris. His interpretation consisted in posing dressed as a prostitute by the famous painting. Yoshida later exhibited and then sold the photographs. Claiming co-authorship over the photographic works before the Paris Tribunal, Sorbelli lost his case in the first instance on the basis that the photographs could not evidence the performers' input in the work. The decision was overturned by the

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<sup>264</sup> Trib Seine, 9 novembre 1937, *Marcilly et Union des artistes dramatiques c. Gorochoff, Société des artistes associés et Cie Radioélectrique du Poste parisien*. : Le droit d'Auteur oct. 1940, No 10 p 118; Frank Gotzen, 'Etude de Droit Compare Sur Les Pouvoirs de L'artiste Executant Face a L'utilisation et a La Reutilisation de Sa Prestation Par Autrui Avec Des Propositions Pour Une Action Communautaire' (1977) 21, 33-4.

<sup>265</sup> Cass, 1<sup>ere</sup> civ, 4 janv 1964, "Furtwängler": *D.* 1964. jur. 321, note Ph. Pluyette (the conductor of an orchestra was awarded civil damages for the use of a record of its performances under the authority of the third Reich during the Second World War); See, Frédéric Pollaud-Dulian – *RTD com.* 2009. 318.

<sup>266</sup> Vivant and others (n 15) 7-21.

<sup>267</sup> Paris, 3 décembre 2004, *Sorbelli c/ Yoshida*, n° 04/06726: *D.* 2005, juris, p. 1237 [lexbase=A0681DGC], *JCP E* 2005, No1863 para 3.

Court of Appeal who agreed with the artist's contention that his role had not been that of a passive model. The Court held that "the facts presented before us reveal that M. Sorbelli was not just a subject photographed by Miss Yoshida, passive subject which would have taken poses dictated by the photographer, but was an active subject".<sup>268</sup> The bench carried on explaining that it was "upon Sorbelli's initiative and because of the existence of his creation that the photographer had captured elements of his creation since the shooting consisting photographing his portrait 'in situation'".<sup>269</sup> Nevertheless, the Court did not regard the photographs as being the sole fruit of the performers' input so much so that co-authorship was granted to each artist in lieu of sole authorship to the performer.<sup>270</sup>

Improvising performers were natural candidates to copyright protection as French intellectual property law does not enforce a fixation condition to obtain authors' rights.<sup>271</sup> In 1995, the Court of Cassation confirmed that the jazz performer whose performances had been incorporated into the record of a song was the author of his musical performance.<sup>272</sup> The bench held so despite the fact that the performer had been given the structure of the song within which he was expected to improvise his solo. Additionally, the musician had received the directive to execute his solo "in the style of Louis Armstrong".<sup>273</sup> Nevertheless, the improvised rendition of these

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<sup>268</sup> Paris, 3 décembre 2004, *Sorbelli c/ Yoshida*, n° 04/06726: D. 2005, juris, p. 1237 [lexbase=A0681DGC], JCP E 2005, No1863 para 3. Author's translation, see original text in Appendix 1.

<sup>269</sup> *ibid.*

<sup>270</sup> Paris, 3 décembre 2004, *Sorbelli c/ Yoshida*, n° 04/06726: D. 2005, juris, p. 1237 [lexbase=A0681DGC], JCP E 2005, No1863 para 3. Author's translation, see original text in Appendix 1, para 3.

<sup>271</sup> On the fixation requirement in France, see text to note 117 and 126, Chapter 1.

<sup>272</sup> Cass, crim. 13 décembre 1995 : Bull. crim., 1995 N° 379 p 1110; D. 1997. p.196.

<sup>273</sup> *ibid.*, author's translation, see original text in Appendix 1.

instructions was regarded as personal and original, a position confirmed two years later by the Paris Court of Appeal<sup>274</sup> who adjudged that:

[u]pon the consideration of the expert-witness's report [...] [the performer] Pierre Dutour must receive the status of author of an original personal creation, protectable and bearing the mark of his originality as well as of his own style<sup>275</sup>

Performers can thus be considered as authors in the context of their performing practice, and the reverse is also true: authors can be regarded as performers during the composing process. In 2006, the Court of Appeal granted the status of performer to the composer who had created his works on computerised instruments and acted as artistic director whenever involved in acoustic recording sessions.<sup>276</sup> In this case, the television producer 'France 2' had used original musical works co-composed by Philip Chany in the production of various shows, including jingles he had been commissioned to create for different television programs. If France 2 did not challenge his co-authorship of the listed works, the television production denied his status as performer since his compositions were created and simultaneously performed on a computer. The production company contended that the various musical compositions "were produced via the use of computer software so much so that no interpretation occurred, the choice of sounds and of their characteristics were generated at the click of a mouse, whereas, [...] a performing musician in the meaning of Article L 212-1 of the Intellectual Property Code, can only be understood as the person who performs or plays musical scores using an musical instrument of any sort and cannot be a person who limited his contribution to giving instructions to

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<sup>274</sup> Paris, 5 février 1997, n° 96 02074.

<sup>275</sup> *ibid.* Author's translation, see original text in Appendix 1.

<sup>276</sup> Paris, 3 mai 2006, n° 05/01400, « Ph. Chany » : D. 2007 jurispr. P 2653 note Edelman et Levinas; RTCom. 2007, 104 obs. Pollaud-Dullian.



a computer for it process pre-recorded audio data.”<sup>277</sup> In its response, the French Court blurred the lines between the compositional, performing and supervisory inputs of the musician. The judges regarded the artist as both author and performer even though his performance did not involve traditional instruments and might have been was closer to the work of conductor than that of an instrument player:

Philippe Chany contends that, like any other composer-performer of his generation who writes for the television market, he is both the author of his music, the craftsman of their interpretations which he supervise both as orchestra conductor and performing musician as he plays on various instruments (keyboards) and synthesizer

One cannot dismiss, a priori, the input of computer technologies neither in the field of creation as nor of performance, so much so that [...] it appears that compositions were made out of pre-existing musical material the elaboration of a sophisticated structure by the composer, structure the latter had musicians played under his direction, whenever he did not do so himself. In any case, no matter how advanced the computer may be, it cannot replace the composer’s creative musical thought as it only brings a technical support to the works of the mind placed under the sole control of the composer, performing musician and artistic director throughout their making process.<sup>278</sup>

## **2. An environment open to original interpretations**

This softening the author-performer divide was facilitated by various parameters of French intellectual property law. First, it was eased by the open-ended approach to copyrightable material the Intellectual Property Code adopted.<sup>279</sup> Although the same code provides a list of protectable works, the latter is non-exhaustive and serves as mere guidance for the courts.<sup>280</sup> This approach coupled with the absence of fixation

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<sup>277</sup> Paris, 3 mai 2006, n° 05/01400, « Ph. Chany » : D. 2007 jurispr. P 2653 note Edelman et Levinas; RTCom. 2007, 104 obs. Pollaud-Dullian. Author’s translation, see original text in Appendix 1.

<sup>278</sup> *ibid.* Author’s translation, see original text in Appendix 1.

<sup>279</sup> IPC, Art L 112-1.

<sup>280</sup> IPC, Art L 112-2.

requirement<sup>281</sup> allowed judges to consider performances as authorial works so long that the imprint of the performer's, now author's, personality marked her work.

Second, the courts could rely on other dispositions pertinent to performers' rights so that their re-interpretation of the author-performer divide would be limited to a small group of performing artists thereby avoiding any 'floodgate' phenomenon.<sup>282</sup> Indeed, in France the legislator differentiates between three types of performing artists: 'artistes-interprètes' (performers), 'artistes de complément' (auxiliary performers) and 'mannequins' (models). All of those artists are granted a protection stemming from the French Employment Law Code.<sup>283</sup> The Code provides that performing artists, whether full-fledged performers, auxiliary or model are presumed to be employees whenever they sign a contract with a producer, entrepreneur, or agency.<sup>284</sup> The performance of the contract, notably its conditions of remuneration, will be governed by employment laws which tend to be more protective of working individuals than contract law or intellectual property dispositions. Although performers are here assimilated to employees, the Code preserves the specificities of their position as artists. Because they cannot be regarded as traditional employees, the law reaffirms that performing artists retain their creative freedom in the exercise of their art despite their status of employees.<sup>285</sup>

For models, employment law-oriented rights are the only protective mechanisms available to them. They receive the weaker form of protection since their input is seen as the most residual one of all, being constrained to the lending of one's image

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<sup>281</sup> IPC, Art L 112-1. See also, text to note 126.

<sup>282</sup> On this, see text to note 39.

<sup>283</sup> Employment Law Code, Art 762-1 and L 7121-3 (Code du travail).

<sup>284</sup> *ibid.*

<sup>285</sup> Employment Law Code, Art L 7123-4 (performing artists), Art L 7121-4 (models).

and the representations of products, situations or marketing messages.<sup>286</sup> The Employment Law Code defines models as to any individual who 'is charged of (1) other presenting to the public, directly or indirectly by way of reproduction of his/her image on any visual or audio-visual medium, a product, a service or an advertising message; (2) or of posing as model, with or without later use of his/her image'.<sup>287</sup> The regime of models also includes provisions regulating the relationship of artists with their agencies. One may legitimately wonder if the recent confirmation of fashion show as copyrightable works by the European Court of Human Rights, will lead French judges to consider models involved in runway walks as performers or auxiliary performers.<sup>288</sup> To this date, there is no decision hinting towards this position.

Similarly, auxiliary performers only benefit from the legal regime derived from the Employment Law Code.<sup>289</sup> Intellectual property laws have explicitly excluded them from performers' rights or any other rights within the scope of the IPC. This category of performing artists is not defined by any statutory definitions despite its mention in two different areas of law. By default, the IPC defines auxiliary performers as the performing artists *not* regarded as 'regular' performers (*artistes-interprètes*) by the dispositions of Article L 212-1.<sup>290</sup> This article refers to professional conventions and usages to determine the distinction between performers and auxiliary performers so that each field, *id est* theatre, cinema, music and so forth, may benefit, and may tailor the law to their needs and traditions. This solution offers great flexibility and shows a welcome sense of pragmatism, yet it assumed that each field had concrete

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<sup>286</sup> Conseil d'Etat 23 février 1998: Lebon 1998. The highest administrative court here reminds that the artist acting as performer does more than what a mannequin which is 'limited to the sole exploitation of his/her image'. Author's translation, see original text in Appendix 1.

<sup>287</sup> Employment Law Code, Art L 7123-2. Author's translation, see original text in Appendix 1.

<sup>288</sup> *Ashby Donal and Others v France* [2013] ECHR 28.

<sup>289</sup> Employment Law Code, Art L L7121-2-7.

<sup>290</sup> IPC, Art. L 212-1.

and accurate definitions for what constituted a performer and what did not. Unfortunately, this was not the case at the time of the reform and still is not now.<sup>291</sup> As a result, the courts were left in charge of drawing the line between performers and auxiliary performers whenever those professional conventions fell short of providing the necessary guidance.<sup>292</sup>

Judges relied on various professional conventions and reports in this task. The national collective convention applicable to performers involved in television productions,<sup>293</sup> later extended to artists partaking in audio-visual productions in general,<sup>294</sup> considered that the category of auxiliary performers included “artists who collectively recite or sing a text, extras (individuals who for staging purposes have to come back in camera range), [...] lighting stand-ins”.<sup>295</sup> The 1985 Jolibois Report referred to a declaration of the minister of culture who, at the time, explained that the notions of auxiliary artists (*artistes de complément*) and extras had merged to become one in the fields of theatre and cinema.<sup>296</sup> The Minister proceeded to explain that any parts involving the roles of less than thirteen lines would qualify as the part of an auxiliary performer.<sup>297</sup> In the same report, auxiliary performers were described as those “artists whose part has an anonymous nature because they are ‘lost in the crowd’ and their role is quite secondary”.<sup>298</sup>

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<sup>291</sup> Vivant and others (n 15) 25-6.

<sup>292</sup> *ibid.*, 26-7. See for example, Paris, 18eme Ch, 18 février 1993, n° [XP180293X]: D. 1993, p 397 note Weksteinbeg (the Court recognised that the conventions applicable in the context of cinema actors were not relevant to dancers). See also, Paris, 4ème Ch, 4 juillet 2008, n° 06/21406, *Universal Music...*: RTDCom. 2008, 745, obs. Pollaud-Dullian (conventions in the context of cinema or theatre acting does not apply in the context of musicians).

<sup>293</sup> See for example, *Convention collective nationale des artistes- interprètes du 30 décembre 1992*, JO 4 février 1994, No 3278. See also, Cass, 1ère civ, 24 avril 2013, n° 11-19.901: Bull. 2013, I, n° 83.

<sup>294</sup> The convention was extended in January 1994, see JO 4 février 1994, No 3278 Vivant and others (n 15) 26.

<sup>295</sup> Paris, 18eme Ch, 18 février 1993, n° [XP180293X]: D. 1993, p 397 note Weksteinbeg. Author’s translation, see original text in Appendix 1.

<sup>296</sup> Jolibois Report No 212 (n 4) 85.

<sup>297</sup> *ibid.*, 85.

<sup>298</sup> Jolibois Report No 212 (n 4) 83. Authors’ translation see original text in Appendix 1.

Working from this basis, the French judicature identified three main elements to take into consideration when examining the auxiliary nature of a performance. First, the importance of the part may suggest whether the artist is a performer or an auxiliary performer. If interpreting a supporting act does not necessarily deprive the artist of her status as performer,<sup>299</sup> bit players and extras will be considered as auxiliary artists. Second, judges took into account the inter-exchangeability of the performer and the anonymity of her performance.<sup>300</sup> This element is linked to the third factor which concerns the amount of personality, or personal input, injected by the artist in her performances. The following paragraph further details this last point.

The definition of performers (*artistes-interprètes*), sole recipients of intellectual property rights, is closely linked to the understanding of auxiliary performers. As mentioned in previous developments,<sup>301</sup> the IPC vaguely defines performers as the performing or executing artist “who act, sing, deliver, declaim, play in or otherwise perform literary or artistic works, variety, circus or puppet acts” to the exclusion of auxiliary performers.<sup>302</sup> In this category was included lyrical, dramatic, choreographic artists, artists involved in variety shows, musicians, cabaret performers, orchestra conductors, directing conductors and staging artistic directors by the Employment Law Code.<sup>303</sup> As far as intellectual property provisions are concerned, the courts

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<sup>299</sup> Cass, 1ère civ, 6 juillet 1999, n° 97-40.572: Bull. 1999 I N° 230 p. 148; D. 2000, cah. AfF p 209; Grands arrêts de la propriété intellectuelle, Dalloz 2003, N 15 (the actor involved in the making of a video clip can pretend to performers’ rights despite the fact that he does not interpret one of the main characters).

<sup>300</sup> Paris, 18ème Ch, 18 février 1993, n° [XP180293X]: D. 1993, p 397 note Weksteinbeg (in this case the performing artist who claimed the status of performer, *artiste-interprète*, is a dancer involved in an advertising clip; the court held that his performance was not eligible to performers’ rights because he embodies one of three wolves which performs the exact same movements and are not distinguishable from one another). See also, Paris, 4ème Ch, 4 juillet 2008, n° 06/21406, *Universal Music...*: RTDCom. 2008, 745, obs. Pollaud-Dullian (one of the lead voices of the choir ‘Era’ was granted the status of performers for his interpretation on a variety of musical track composing the group’s album; his voice was considered as ‘identifiable’ amongst others but even more so, as non-interexchangeable as if the voice was to be replaced, the coloration of the musical work would change).

<sup>301</sup> text to note 32, Chapter 1.

<sup>302</sup> IPC, Art L 212-1. Official translation.

<sup>303</sup> Employment Law Code, Art L 7121-2.

considered that any interpretations which were original for they evidenced the input of their artists' personality qualified as the work of performers (artistes-interprètes). Performers (artistes-interprètes) is thus the only category out of the three set out by the law to receive performers' rights in addition to the protection rising from employment-law measures.

The jurisprudence later came to allow a portion of artists belonging to this last category to access authorship, creating thereby a fourth class of performing artists. The categorisation would now read as follows: author-performer, performer ('artistes-interprètes'), auxiliary performer ('artistes de complément') and models. The existence of four and not three groups of performers remains unclear because the jurisprudence relied on the same criterion (i.e. the imprint of personality) to justify the upgrade of artists from performers (artistes-interprètes) to authors, it used to differentiate between performers (artistes-interprètes) and auxiliary performers (artistes de complément). This begs the question whether the category of performers (artistes-interprètes) still exists, and if so which artists or performances would qualify for this residual category that is more than auxiliary but less than authorial. Indeed, if an auxiliary artists makes an original interpretation of her role by injecting her personality insomuch that she turns into a 'regular' performer, and that a performer who makes an original rendition of a work by injecting here again elements of her personality becomes an author protected by copyright, the distinction between 'performers' and 'author-performer' becomes difficult to grasp. The two categories collapse as the originality tests distinguishing performers from auxiliary performers, and authors from performers are essentially the same: evidencing the artist's print of personality in the performance. Does it mean that all performers (artistes-interprètes) are authors so long that they cannot be considered auxiliary? Is there a portion of

performing artists which could satisfy the first originality test separating performers from auxiliary but yet fail the second one distinguishing between performers and author-performer? Those interrogations remain unanswered by either the French legislator or the courts. It is unclear whether the problem has been noticed at all.<sup>304</sup>

### 3. British rebellion

British Courts also showed some resistance against the Parliament's consistent refusal to improve performers' protection. It started with allowing civil actions to be taken by performers or their recording companies on the basis of the criminal dispositions of the Musical and Dramatic Performers Acts.<sup>305</sup> As mentioned in previous paragraphs,<sup>306</sup> although a number of courts rejected this enlargement of the law protecting performers, a majority of judicial decisions in its favour preceded the reform introduced by the 1988 CDPA.<sup>307</sup>

Going further in developing performers' protection, judges also came to acknowledge that particular creative practices, such as jamming sessions, might lead to redefining the author-performer divide to the extent of granting copyright to performers' contribution. In *Stuart v Barrett*,<sup>308</sup> the Court concluded, not without difficulty,<sup>309</sup> that:

Whilst the first defendant may well have composed 'bits and pieces' of the music before revealing what he had done, the group themselves played a significant and creative role in bringing the music of a song to its final form. The first defendant did not orchestrate his pieces; he did not write the notes down. Whilst he may have had the original idea, in the sense of an opening

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<sup>304</sup> There is no mention of this issue in the legal scholarship that the author is aware of.

<sup>305</sup> Dramatic and Musical Performers' Protection Act of 1925 (15 & 16 Geo. 5 c.46) and Dramatic and Musical Performers' Protection Act of 1958 (6 & 7 Eliz.2 c.44); text to note 171.

<sup>306</sup> text to note 199.

<sup>307</sup> *Island Records Ltd v Corkindale* [1978] Ch 122; *Warner Bros Records Inc v Parr* [1982] FSR 383; *Ekland v Scripghow Limited* [1982] FSR 431; *Silly Wizard Ltd v Shaughnessy, El Fakir, Perkins, Lefevre, Goldberg & Co Ltd* [1983] S.L.T. 367 (idem); *RCA Corporation and RCA Limited v Pollard* [1983] Ch 135; *Shelley v Cumane* [1983] FSR 390. See on this point, Arnold (n 6) 26-35.

<sup>308</sup> *Stuart v Barrett* [1994] EMLR 448

<sup>309</sup> Before delivering his conclusion, the Morison J notes that "I have not found the authorship issue an easy one to follow", in *Stuart v Barrett* [1994] EMLR 448, 458.

phrase or of a series of notes in his head which ultimately provided the theme, the other members of the group themselves made important original contributions to the work.<sup>310</sup>

In this decision, Morison J attributes this outcome to the fact that the works were composed during jamming sessions, which she describes as follow:

Someone started to play and the rest joined in and improvised and improved the original idea. The final piece was indeed the product of the joint compositional skills of the members of the group present at the time.<sup>311</sup>

*Torry v Pink Floyd*<sup>312</sup> might be the British case which upsets the divide the most. In this case, the High Court sided with Clare Torry, the singer, in her claim of co-authorship over the Pink Floyds' song 'The Great Gig in the Sky', a claim filed thirty-one years after it was recorded. Torry argued that her vocal technique of 'wailing' contributed to the original composition of the song, to which the judge agreed granting the singer half of the rights over the former hit.<sup>313</sup>

#### 4. An American echo

A similar position was held recently in the American case *Garcia v Google*.<sup>314</sup> In this decision, Kozinski J affirmed without detour that performances are eligible to copyright protection. He ruled out previous authorities on this issue, such as *Midler v Ford*,<sup>315</sup> on the basis that those cases were never concerned with copyright but with rights of publicity, not attached to performances but to the bodily elements involved

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<sup>310</sup> *Stuart v Barrett* [1994] EMLR 448, 458.

<sup>311</sup> *ibid.*

<sup>312</sup> *Torry v Pink Floyd* [2005] unreported, cited in *Bently Authorship in Popular Music* (n 77) 186.

<sup>313</sup> *Bently Authorship in Popular Music* (n 77) 186-7. A similar position was held in France in Paris, 4ème Ch, 4 juillet 2008, n° 06/21406, *Universal Music...: RTDCom.* 2008, 745, obs. Pollaud-Dullian. This decision is further discussed in text to note 446, Chapter 4.

<sup>314</sup> *Garcia v Google Inc*, 743 F 3d 1258 (9th Cir 2014).

<sup>315</sup> *Midler v Ford*, 849 F2d 460 (9th Cir 1988).



in them, such as a singer's voice.<sup>316</sup> The ninth circuit judge found the actress's performance original in the basis that:

[A]n 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 shmuck is an actor because everyone knows how to read.<sup>317</sup>

The majority decision therefore concludes that "[a]n actor's performance, when fixed, is copyrightable".<sup>318</sup>

It must be noted that nearly forty years before the majority decision of the *Garcia* case, a judge from the second circuit had reached the same conclusion in his dissenting opinion.<sup>319</sup> Though not referenced in the recent decision, Hand J too, sided with the argument that recording technologies had made possible the fixation of performers' creative input in the musical record so much so that there was no obstacle barring them from obtaining copyright protection and its associated authorial status. Kozinski's predecessor referred to the skills it requires to perform even when there are scores available to the performer. He stated:

Musical notes are composed of a "fundamental note" with harmonics and overtones which do not appear on the score. There may indeed be instruments — e. g. percussive — which do not allow any latitude, though I doubt even that; but in the vast number of renditions, the performer has a wide choice, depending upon his gifts, and this makes his rendition pro tanto quite as original a "composition" as an "arrangement" or "adaptation" of the score itself, which § 1(b) makes copyrightable. Now that it has become possible to capture these contributions of the individual performer upon a physical object that can be made to reproduce them, there should be no doubt that this is within the Copyright Clause of the Constitution.<sup>320</sup>

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<sup>316</sup> *Garcia v Google Inc.*, 743 F.3d 1258 (9th Cir. 2014) 1264.

<sup>317</sup> *ibid.*, 1263, citations and references omitted.

<sup>318</sup> *ibid.*

<sup>319</sup> *Capitol Records Inc. v. Mercury Records Corporation*, 221 F.2d 657 (2<sup>nd</sup> Cir. 1955).

<sup>320</sup> *ibid.*, 664.

The facts and outcomes of the *Garcia* case strikingly resemble those of a previous case heard by the Seine Tribunal in France fifty years before the 2014 decision.<sup>321</sup> This earlier case was also concerned with the dubbing of cinematographic interpretations not performed by the actor featuring on screen and added *ex post facto*. In the French decision, the comedian had complained that another actor had been hired to dub over his silent performance. In *Garcia*,<sup>322</sup> the actress also complained about her performance being dubbed over by somebody else's voice but was motivated by considerations going beyond professional or aesthetic concerns. Without her knowledge or consent, Garcia's performance had been made part of the production of an anti-islamic video clip entitled the 'Innocence of Muslims'. Following its online distribution, a fatwa<sup>323</sup> calling for the execution of the performer was issued by members of the Islamic cleric. Regardless of this difference the two decisions remain strikingly similar as far as facts, law and legal context are concerned. Indeed, both cases were amongst the first judicial decisions of their respective jurisdiction to make an explicit connection between authors and performers to the extent of granted the latter the rights traditionally attributed to the former.

Despite the resonance of the *Garcia* case with earlier dissenting opinions and judgements from other jurisdictions, the decision remains a small pocket of dissidence in the sea of consensus formed by other authorities which are still inclined to maintain the author-performer divide. Shortly after the publication of the decision, Posner J in a neighbour circuit decided against the *Garcia* case in *Conrad v AM Credit Union*.<sup>324</sup> Although the latter decision did not formally repeal the former,

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<sup>321</sup> Trib Seine, 23 avril 1937, *Rigault dit Marnay c. Chaperot et Copelier* : Le Droit d'Auteur, No 11 p 129.

<sup>322</sup> *Garcia v Google Inc*, 743 F 3d 1258 (9th Cir 2014).

<sup>323</sup> Opinion on a point of Islamic law.

<sup>324</sup> *Conrad v AM Community Credit Union*, 750 F3d 634 (7th Cir 2014). Interestingly the same happened in France with the Seine Tribunal. See, Trib Seine, 9 novembre 1937, *Marcilly et Union des artistes dramatiques*

it evidences that Kozinski's views on the creativity of performers are not shared by the *doxa*. The decision had been highly criticised for flirting with judicial activism.<sup>325</sup> As previously mentioned,<sup>326</sup> in 2015 the *García* decision was overturned in appeal, though Kozinski J firmly maintained his position in his dissenting opinion.<sup>327</sup>

Before the recent intervention of ninth circuit, the US' Supreme Court had shown sympathy for performing artists and granted them a standard of protection nearly identical to that of authors by the means of the right of publicity in the *Zacchini* case.<sup>328</sup> However, this departure from the Congress's legislative intent was corrected in 1976 by the enactment of the 301 pre-emption provision,<sup>329</sup> after which the courts faithfully followed their new marching orders.<sup>330</sup>

The following figures give a graphic representation of the author-performer divide in each jurisdiction. They emphasise the difference in its contours as between each country.

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*c. Gorochoff, Société des artistes associés et Cie Radioélectrique du Poste parisien.* : Le droit d'Auteur oct. 1940, No 10 p 118.

<sup>325</sup> see n 4 in Introduction and accompanying text.

<sup>326</sup> n 5 in Introduction and accompanying text.

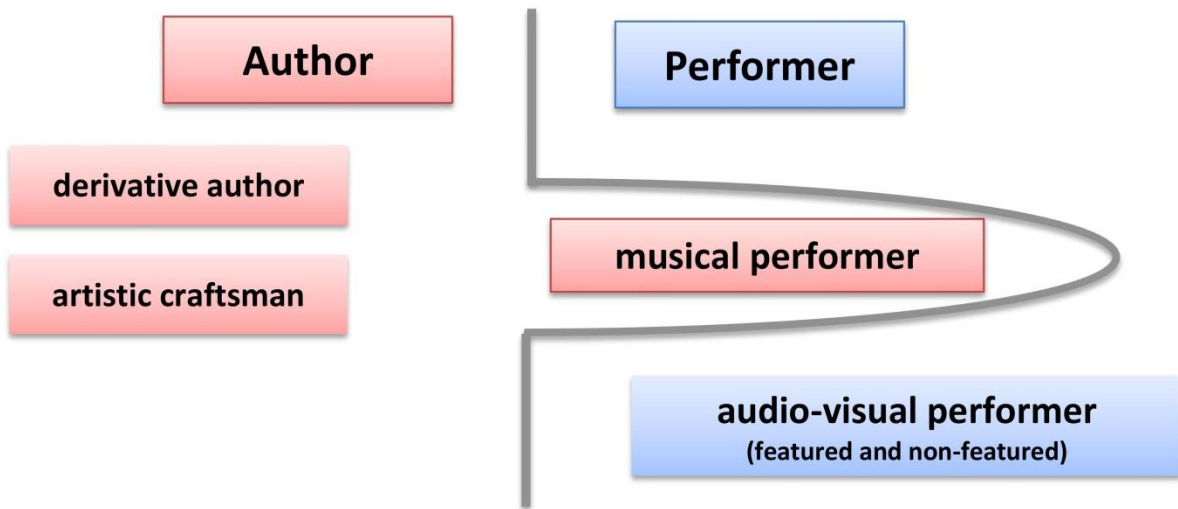
<sup>327</sup> *García v Google Inc*, 786 F 3d 733 (9<sup>th</sup> Cir 2015) 749.

<sup>328</sup> *Zacchini v Scripps-Howard Broadcasting Co.*, 433 US 562 (Supreme Court 1977).

<sup>329</sup> US Code, Title 17 para 301. This amendment of the Code was introduced by the Public Law 94-553, made effective as of 1978. See also, 'Performance Rights in Sound Recordings (95th Congress, 2d Session Committee Print No 15)' (1978) 4

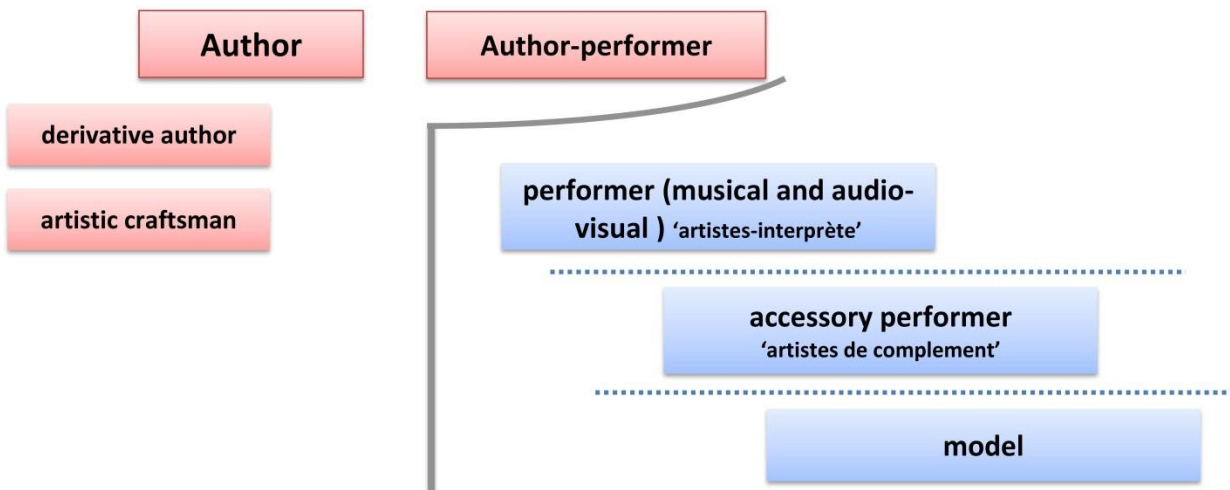
<sup>330</sup> For example, *Sinatra v The Goodyear Tire & Rubber Co* 435 F2d 711 (9<sup>th</sup> Cir 1970) 721; *Midler v Ford* 1988 849 F2d 460 (9<sup>th</sup> Cir 1988); *Laws v Sony Music Entertainment Inc*, 448 F 3d 1134 (9<sup>th</sup> Cir 2006).

Figure 5: The Author-Performer Divide As Enforced in Australia



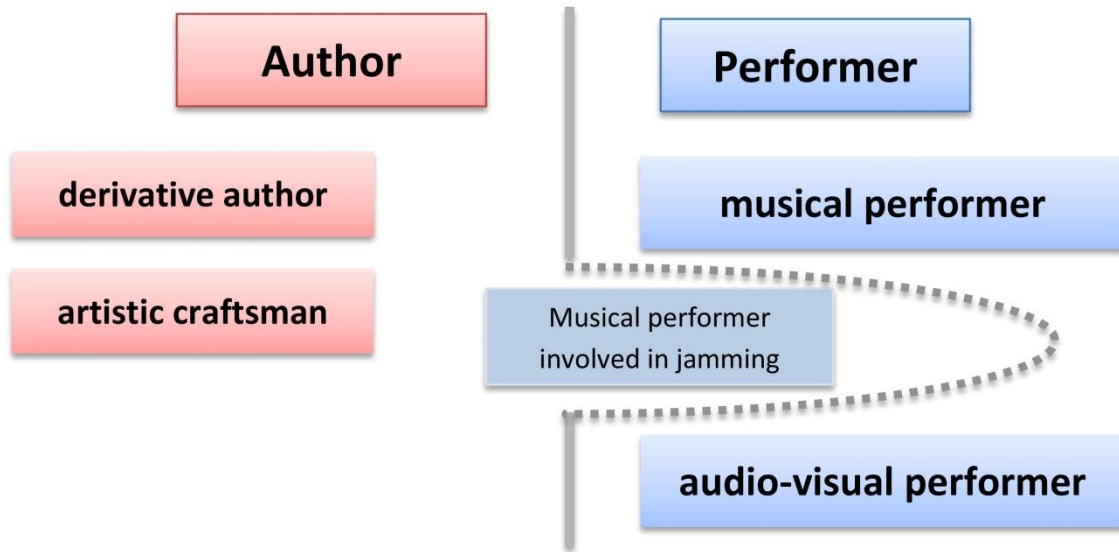
In Australia, authors receive more protection from intellectual property law than performers do. However, as previously mentioned, co-ownership of sound recording for musical performers involved in its making has been introduced, slightly twisting the divide between authors and performing artists.

Figure 6: The Author-Performer Divide As Enforced in France



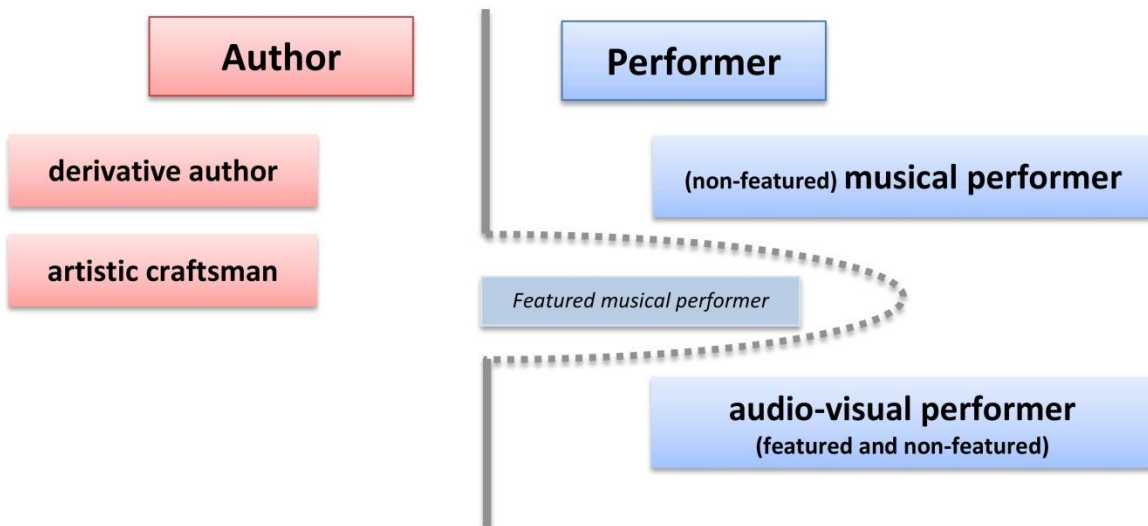
In France, the divide between authors and performing artists has taken a different shape than in other jurisdictions. As explained in previous developments, the courts abolished the distinction between 'authoring' and performing artists under certain circumstances. The French legislator and the courts have implemented a sophisticated three-tier categorisation of performers, decreasing progressively their protection proportionally to the estimated degree of creativity of their input.

Figure 7: The Author-Performer Divide As Enforced in the UK



British copyright law enforces a conservative approach to the author-performer divide with an almost clear-straight boundary between the two groups of artists. As previously explained, the jurisprudence seems to have made an exception in the context of musical performers involved in jamming session, whereby those artists may be considered as co-composers of the work they took part in playing.

Figure 8: The Author-Performer Divide As Enforced in the US



Like in the UK, the US does not provide copyright protection for performers. There is a slight uncertainty as to the possibility for featured musical performers to obtain copyright over the sound recording but no clear consensus stems from the jurisprudence on this point.<sup>331</sup>

<sup>331</sup> Weatherhall (n 9) page 193,196. ; see comments made in the context of Australia on this point in Sherman and Bentley *Performers' Rights* (n 177) 25 para [4.10].

### III. Contextualising the divide

Laws do not occur in a vacuum and intellectual property laws are no exception.<sup>332</sup>

The subsequent developments review some of the major cultural changes which may have contributed to shaping the author-performer divide, besides the events which occurred in courtrooms, parliamentary chambers and lobbying meetings. Although it may not be possible to account for all influences, dominant patterns of thinking regarding creativity and authorship may prove useful in contextualising the intellectual environment in which legal frameworks were designed.

Creativity and authorship have a co-dependent relationship in western cultures, arising from an interwoven historical path.<sup>333</sup> Corresponding legal narratives explicitly relayed the correlation between the two concepts. The encouragement of creativity was made the rationale motivating the enforcement of intellectual property laws,<sup>334</sup> at least on paper.<sup>335</sup> Legal authorship was then introduced as an instrument to this purpose.<sup>336</sup> Authorial works became protectable, on the condition of being

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<sup>332</sup> Arnold (n 6) 3.

<sup>333</sup> Rahmatian (n 140) 160.

<sup>334</sup> Australia: Spicer Report (n 36) 8-9; France: Jolibois Report No 212 (n 4) 9-11. In France the introduction of authors' rights was essentially driven by the wish to protect the authors' creation, the objectives seemed more individualist; UK: 1709 Statute of Ann "An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned" (8 Ann c.21); US: US Constitution, Article I, Section 8; European Union: Parliament and Council Directive 2001/29 of May 22, 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, [2001] OJ L167 10, Recital (4).

<sup>335</sup> The Statute of Ann is often described as having been enforced to protect the interests of book traders, see Ronan Deazley, 'Re-Reading Donaldson (1774) in the Twenty-First Century and Why It Matters' (2003) 25 European Intellectual Property Review 270.

<sup>336</sup> See for example, Australia: *Apple Computer Inc v Computer Edge Pty Ltd* (1984) 53 ALR 225, 258; *Australasian Performing Right Association Ltd v Commonwealth Bank Of Australia* (1992) 111 ALR 671, 674; *Hamm v Middleton* [1999] FCA 0777, (1999) 44 IPR 656,658 ; US: *Sony Corporation of America et al v Universal City Studios Inc et al* , 464 US 417 (Supreme Court 1984) 432; *Kelly v Arriba Soft Corp*, 336 F 3d 811 (9th Cir 2003) 817; *Dr Seuss Enterprises, LP v Penguin Books*, 109 F 3d 1394 (9th Cir 1997) 1399; *Omega SA v Costco Wholesale Corp*, 541 F3d 982 (9th Cir 2015) 985-7; *Rockford Map Publishers Inc v Directory Service Co of Colorado Inc*, 768 F2d 145(7th Cir 1985) 148; *Publications Intern. Ltd v Meredith Corp*, 88 F3d 473 (7th Cir 1996), 477-8; European Union: C-5/08 *Infopaq International A S v Danske Dagblades Forening* [2009] EUECJ C-5/08\_O, para 11.

‘original’,<sup>337</sup> i.e. of expressing a modicum of creativity.<sup>338</sup> Intellectual property laws made of authorship and creativity, the instruments and conditions underlying each other’s existence. Authorship was introduced to support creativity and creativity (originality) was to substantiate authorship.

Courts often acknowledge the close connection between the two concepts, although it is usually expressed via the intermediary of ‘originality’. In their logic, “the word ‘original’ connotes ‘authorship’”<sup>339</sup> and their correlation is “an obvious fact” grounded in the law itself.<sup>340</sup>

The historical development of each concept in western cultures also reflects the intrinsic bond which ties the two notions together. The following paragraphs succinctly retrace this evolution to draw parallels between cultural and legal narratives whenever relevant. This review reveals that the law crystallised various

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<sup>337</sup> Australia: 1968 Copyright Act, s. 32(1)-(3); France: IPC, Art. L. 112-4; UK: CDPA 1988, s. 1(1)(a); US: US Code, Title 17, para 102(a).

<sup>338</sup> Copyright laws enforce a low threshold of originality. See, Australia: *Telstra Corporation Ltd v Desktop Marketing Systems Pty Ltd* [2001] FCA 0612, (2001) 181 ALR 134,154 (citing British and American authorities); France: Cass, 1ère civ, 11 février 1997, n° 95,11.605 : Bull. 1997 I N° 56 p. 36; D. 1998 juris. P 290; JCP G 1997, II 22973; RIDA 1997 N 173, p. 279 (the work does not have to be novel to be protected by authors’ rights); UK: *Hyperion Records Ltd v Sawkins* [2005] EWCA Civ 565, para [31]; US: *Feist Publications Inc v Rural Telephone Service Co Inc*, 499 US 340 (Supreme Court 1991) 345; *Wihtol v Wells*, 231 F2d 550 (7th Cir 1956) 553.

Yet in France, some cases apply a surprisingly high threshold of originality: Cass, 1ère civ, 16 avril 1991, n° 89-21.071: Bull. 1991 I N° 139 p. 92; D 1992, somm. 13, oibs Colombet (the Supreme court defines the condition of originality in the context of computer software as “the synthesis of novelty and the creator’s inventive spirit”; author’s translation); Cass, 1ère civ, 2 mars 1999, n° 97-10.179 : inédit au bulletin, Légifrance available at : <<http://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007400026>> accessed 10 March 2016 (the synopsis of TV programs for children failed to evidence originality because they were not “particularly imaginative nor the result of a personal creative effort”; author’s translation); Cass, som., 17 mars 2009, *Société d’importation Leclerc c/ SONODINA*, n° 07-21.517: Légifrance available at <<http://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000020422868>> accessed 10 March 2016 (the court held in this case that although novelty may contribute to make a work original it is nevertheless not enough to evidence the author’s print of personality in the work).

<sup>339</sup> *Sands And Mcdougall Pty Ltd v Robinson* [1917] HCA (unreported BC1700041).

<sup>340</sup> Australia: *Telstra Corporation Ltd v Phone Directories Co Pty Ltd* (2010) 264 ALR 617,625 para [21]; *Seafolly Pty Ltd v Fewstone Pty Ltd* (2014) 106 IPR 85, 120-1 para [239] and [244] ; Issac J stated that “[the previous argument] overlooks the obvious fact that in copyright law the two expressions, “author” and “original work,” have always been correlative; the one connotes the other, and there is no indication in the Act that the Legislature intended to depart from the accepted signification of the words as applied to the subject-matter. Indeed, the circumstance of reciprocal connotation is the key to the meaning of the enactment.” in *Sands And Mcdougall Pty Ltd v Robinson* [1917] HCA (unreported BC1700041); US: *Scott v WKJG Inc*, 376 F2d 467 (7<sup>th</sup> Cir 1967) 469, citing *Wihtol v Wells*, 231 F2d 550 (7th Cir 1956); 109 U.S.P.Q. 200 (7th Cir 1956). See also, *Primary Health Care Ltd v Commissioner Of Taxation* [2010] FCA 419 (2010) para 35.

elements of the developmental stages through which these concepts evolved. This analysis does not aim to offer an exhaustive account of the doctrines which framed the development of 'creativity' and 'authorship' in western cultures. Its objective is considerably more modest and the historical path taken has been edited to only retain periods and milestones which seemed most relevant to intellectual property laws. It largely follows the routes signposted by legal and creativity scholars who have dedicated parts of their research to similar lines of investigations, namely Richard Arnold,<sup>341</sup> Andreas Rahmatian<sup>342</sup> and Keith Sawyer.<sup>343</sup> This analysis also ties in the development of 'creativity' and 'authorship' to the evolution of performers' status within western societies to highlight the parallelism between the roots of our understanding of 'authorship' and 'performances' as mutually exclusive concepts. It suggests that the author-performer divide is the product of a sliding scale of creativity which began by opposing mankind to God without any particular consideration for performers. The following paragraphs describe how such scale changed over time to finally settle the partition of its creative/uncreative dichotomy between authors and performing artists.

### **A. From Heaven to Earth**

'Creativity' has been the centre of many philosophical, theological and scientific debates.<sup>344</sup> Before leading to the emergence of its own field of research,<sup>345</sup>

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<sup>341</sup> Arnold (n 6).

<sup>342</sup> Rahmatian (n 140).

<sup>343</sup> Keith Sawyer, *Explaining Creativity The Science of Human Innovation* (2nd edn, Oxford University Press 2012).

<sup>344</sup> Milton Nahm, 'The Theological Background of the Theory of the Artist as Creator' (1947) 8 *Journal of the History of Ideas* 363.

<sup>345</sup> The field of creativity research is now mainly composed of psychologists, scientists and sociologists. See Erik Shiu, *Creativity Research : An Inter-Disciplinary and Multi-Disciplinary Research Handbook* (Routledge 2014) 71 ; Sawyer (n 343) 4-5; Kerry Thomas and Janet Chan, *Handbook of Research Creativity* (Edward Elgar 2013);



'creativity' was first a matter of philosophy and religion. Although nowadays creativity is often described as the "highest level of human performance",<sup>346</sup> there was a time when western cultures thought it inaccessible to human beings.

Towards the end of the second century, a distinction emerged between *creare* and *facere* under the influence of the Christian thought.<sup>347</sup> Among the different types of creative making, *creare* referred to 'true creation', a creation which would occur *ex nihilo*, i.e. out of nothing.<sup>348</sup> 'True creation' was understood as the making of something from dust. Conversely, *facere* was described as the labour of technical skills employed in the making of an object out of already existing elements and materials. For centuries, true creation was therefore attributed to God, being the only intellect thought able to create *ex nihilo*.<sup>349</sup> Anything that men would 'do' or 'create' would only be an imitation of what the divine had previously conceived and made available to them. If men could reach *creare*, they would be equal to god, an untenable contention in the Christian thought.<sup>350</sup> In this logic, men were bound to be God's craftsmen and imitate his creation through a lower type of artistic material rendering. Since human '*creare*' was impossible, there could be no authorship attributable to men beyond that of god. The first divide was born.

This conception of creativity, distinguishing between *creare* and *facere*, moved away from previous or competing models. From the Ancient Greek to the Stoa, earlier

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<sup>346</sup> Sawyer (n 343) 3.

<sup>347</sup> During the second half of the second century, the distinction between *creare* and *facere* was articulated by St Augustine, see Andreas Rahmatian, *Copyright and Creativity: The Making of Property Rights in Creative Works* (Edward Elgar 2011) 163; Nahm (n 344) 363; Generally, Milton Nahm, *The Artist as Creator* (John Hopkins Press 1956); Paul Kristeller, "Creativity" and "Tradition" (1983) 44 *Journal of the History of Ideas* 105, 106-7.

<sup>348</sup> The doctrine of *ex nihilo* creation played a central part in the development of the western understanding of creativity. Its impact on intellectual property narrative is further discussed in Chapter 3.

<sup>349</sup> Sawyer (n 343) 19-23.

<sup>350</sup> Gerard May, *Creatio Ex Nihilo: The Doctrine of 'Creation out of Nothing' in Early Christian Thought* (Bloomsbury Publishing 1994) 140-1, 160. The Christian position was first articulated by Theophilus of Antioch, in opposition to Plato's conception. See also, Rahmatian (n 140) 162.

narratives never envisaged ex nihilo creation as such.<sup>351</sup> According to Platonic<sup>352</sup> and Jewish<sup>353</sup> thinking, the divine was depicted as having ordered chaotic existing matter in order to create a coherent and balanced universe, but not as having created it from nothing.

Disseminated and preached by Christian teachings throughout the second century, the ex nihilo creation doctrine formed the base of the western culture and conception of authorship.<sup>354</sup> It influenced the western history of arts from the Middle Ages to the beginning of the sixteenth century, a period during which artists were regarded as mere craftsmen rather than creators, and were therefore unable to pretend to authorship which could only be divine. This left many artefacts made during this period unsigned.<sup>355</sup>

The end of the second century was also witness to a change in the social position of performative arts. At the time, performances associated with light entertainment such as mime were overshadowed by the development of more literate theatre destined to private readings rather than public performances, and written by educated men such as Seneca.<sup>356</sup> However, this enthusiasm for literate theatre was short-lived as Roman drama developed a taste for pantomime and games.<sup>357</sup> With lower forms of entertainment blossoming, the social status of actors worsened.<sup>358</sup> The profession

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<sup>351</sup> Rahmatian (n 140) 161-162.

<sup>352</sup> Kristeller (n 345) 106.

<sup>353</sup> May (n 350) 3-4; Rahmatian (n 140) 161.

<sup>354</sup> Rahmatian (n 140) 162.

<sup>355</sup> Sawyer (n 343) 20.

<sup>356</sup> Even before that, the Roman era is also often depicted as having set back the art of theatre in inherited from Ancient Greece by having replaced open-air theatre by more primitive staged entertainment such as gladiating. See on this, William Tydeman, *The Theatre in the Middle Ages: Western European Stage Conditions (c.800-1576)* (Cambridge University Press 1978) 22-5.

<sup>357</sup> *ibid.* For this reason, the period is often held responsible for having set back the quality of western stage theatre.

<sup>358</sup> Richard DeVoe, *Christianity and the Roman Games: The Paganization of Christians by Gladiators, Charioteers, Actors and Actresses from the First through to the Fifth Centuries A.D.* (Xlibris 2002) 57 ; though

became synonymous to poor morality and in the case of female artists, prostitution was assumed.<sup>359</sup>

The rise of Christianity in the Europe of the third and fourth century fostered legislation stigmatising performers<sup>360</sup> and forbidding Christians from joining the profession.<sup>361</sup> The Church adopted a distrust of theatre which was once that of Ancient Greek philosophers who feared that mimetic arts such as acting would lead performers and audiences to replicate dangerous passions.<sup>362</sup> Later, this thought evolved into thinking of performing as either sensual<sup>363</sup> or simply useless by puritans who dreaded idleness.<sup>364</sup> Giving in to social pressures,<sup>365</sup> the Church came to change its position during the tenth century to utilise theatre to preach and teach the Christian thought through liturgical drama.<sup>366</sup> At this point in time, no artists could pretend to authorship regardless of the art they practiced, but performers particularly struggled to recover their social status. The scale of creativity was understood as follows:

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they were exceptions, not all actors or actresses were considered immoral members of the society. On the contrary, some could receive the highest honours and attract nobility under exceptional circumstances. 56

<sup>359</sup> Towse (n 65) 747.

<sup>360</sup> DeVoe (n 358) 136-8.

<sup>361</sup> Professional actors were excommunicated, refused sacraments and performers lost social respectability. In France, this practice was maintained long after the sixteenth century which is often referred to as the golden of theatre in Europe. See for instance, Marvin Carlson, *Voltaire and the Theatre of the Eighteenth Century* (Greenwood Publishing 1998) 129, 133. *As an illustration of the perception of performers' poor morality carrying on through to the eighteenth century, Denis Diderot wrote "an actor who is a man of honor, an actress who is a woman of virtue, are such rare phenomena" in The Paradox of Acting* (Kessinger Publishing 1883) 67.

<sup>362</sup> The starting point of the movement is often pinpointed to Plato's distrust of mimetic art and theatre in particular as actors and audiences risk becoming the characters they imitate or see. Todd Johnson and Dale Savidge, *Performing the Sacred: Theology and Theatre in Dialogue* (Baker Academic 2009)32

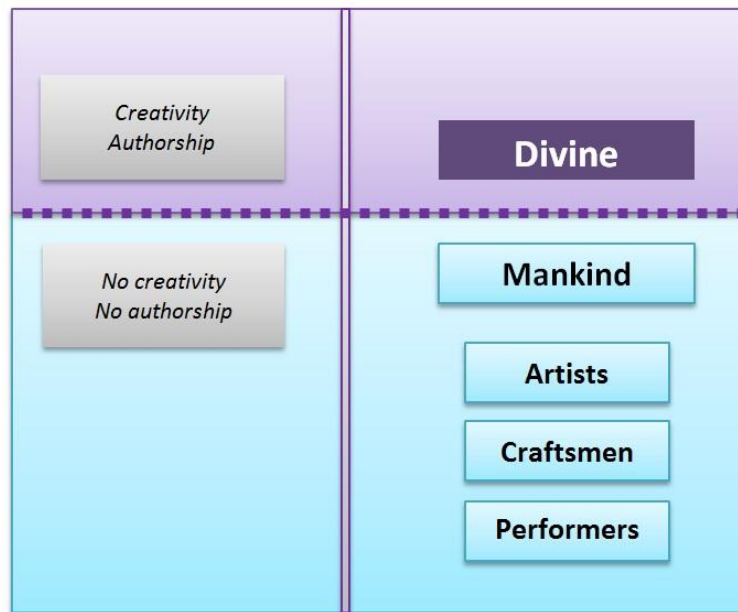
<sup>363</sup> Todd Johnson and Dale Savidge, *Performing the Sacred: Theology and Theatre in Dialogue* (Baker Academic 2009) 32.

<sup>364</sup> Those arguments combined formed the basis of what was later named the 'anti-theatrical prejudice' by Jonas Barish, 'The Antitheatrical Prejudice' (University of California Press).

<sup>365</sup> Some have attributed this change of position to the need for state to satisfy the population's wishes. See, DeVoe (n 358)138-9.

<sup>366</sup> Church theatre stayed very much alive throughout the Middle Ages though strictly regulated. Johnson and Savidge (n 363) 19; Tydeman (n 356) 22-5. 184-221.

Figure 9: Creativity and Authorship from the Second to the Fifteenth Century (AD)



*From the second century onwards, true creativity is sought as an activity exclusively divine.*

## **B. From humanism to ‘author-worship’<sup>367</sup>**

Towards the end of the sixteenth century, the Renaissance movement triggered the decline of this divine conception of creativity which coincided with the rise of secular drama. Those changes brought to light a renewed divide between creating and authoring.

### **1. A humanist turn**

The Enlightenment humanism was the period where the conception of men as “intentional creators” broke through.<sup>368</sup> Artists moved from being inspired by God to being compared to the divine figure.<sup>369</sup> George Puttenham is said to be the first

<sup>367</sup> Peter Jaszi, ‘Is There Such a Thing as Postmodern Copyright?’ (2009) 12 *Tulane Journal of Technology and Intellectual Property* 105, 116.

<sup>368</sup> Sawyer (n 343) 21.

<sup>369</sup> Only the greatest visual artists or poets like Dante, Michelangelo or Leonardo Da Vinci were compared to God. See, Rahmatian (n 140) 163.

writer to use the word “create” to compare human – poetic – creation to divine creation in 1589.<sup>370</sup> Artists gained independence and slowly stepped away from the representation of being God’s animated puppets.<sup>371</sup> The end of the Renaissance movement saw the first of claims of authorship, distinct from any divine intervention. A new hierarchy of creative minds was endorsed.

Artists who then became authors in their own right were still very much compared to craftsmen.<sup>372</sup> The creative process was understood as a blend of skills pertaining to both *creare* and *facere* types of creativity.<sup>373</sup> Both the creative process and the creative thought were considered as elements contributing equally to the creation of arts. Creativity was thought to be both intellectual and physical.

The same period reinstated secular performative arts with the development of the *commedia dell’arte* in Italy, the Confrérie de la Passion in France and the Elizabethan theatre in England.<sup>374</sup> Although performers remained social or religious outcasts, the profession of actors and later musicians started to make its way back in western societies.

In the England of the early seventeenth century, performers as group obtained the same credit for their performances as writers for their plays on some occasions. For instance, it was not unusual for acting companies to feature on the cover of the publication of a play with or in lieu of the author.<sup>375</sup> This was notably the case for

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<sup>370</sup> Robert Weiner, *Creativity and Beyond: Cultures, Values, and Change* (State University of New York 2000) 55. See also, Sawyer (n 343) 21.

<sup>371</sup> Rahmatian (n 140)162.

<sup>372</sup> Rahmatian (n 140) 164-5.

<sup>373</sup> Rahmatian (n 140) 164-6.

<sup>374</sup> Arnold (n 6) 4.

<sup>375</sup> In France, a similar pattern of shared ownership was established between authors and performing companies. See, Olganier (n 182) 9-13.

William Shakespeare and some of his now most famous pieces such as *Richard II*<sup>376</sup> or *Thomas Lord Cromwell*.<sup>377</sup> At the time, the cover of plays would read “[Richard II] as it hath beene publikely acted by the right Honourable the Lord Chamberlaine his Servants” without even mentioning the playwright, William Shakespeare (1597).<sup>378</sup> A little later, in 1602, *William Lord Cromwell* is published under both the company’s and the author’s names, reading:

[William Lord Cromwell] as it hath been sundrie times pubklikely acted by the Right Honorable the Lord Chamberlaine his Servaunts.

Written by W.S.<sup>379</sup>

It is only after this period that performing companies were dropped from the front page cover and that authors were the sole names left on their publications.<sup>380</sup> As printing developed the position of authors or publishers became more prominent and gradually wrote performers’ credits off the plays. This change was endorsed in the legal narrative by the 1710 Statute of Ann which ignored performers’ contributions to literary works including theatre.<sup>381</sup> This shift marked the beginning of a new divide which is not dissimilar current patterns<sup>382</sup> of our legal frameworks:

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<sup>376</sup> Joseph Loewenstein, *Ben Jonson and Possessive Authorship* (Cambridge University Press 2002) 59-63, quoted in Rahmatian (n 140) 163-4.

<sup>377</sup> Loewenstein (n 376) 63.

<sup>378</sup> For the 1597 edition of *Richard II*, William Shakespear did not deny his authorship as the same play would mention his name on the cover of the 1598 edition. See Andreas Rahmatian (n 140) 164 and Joseph Loewenstein (n 376) 59-63.

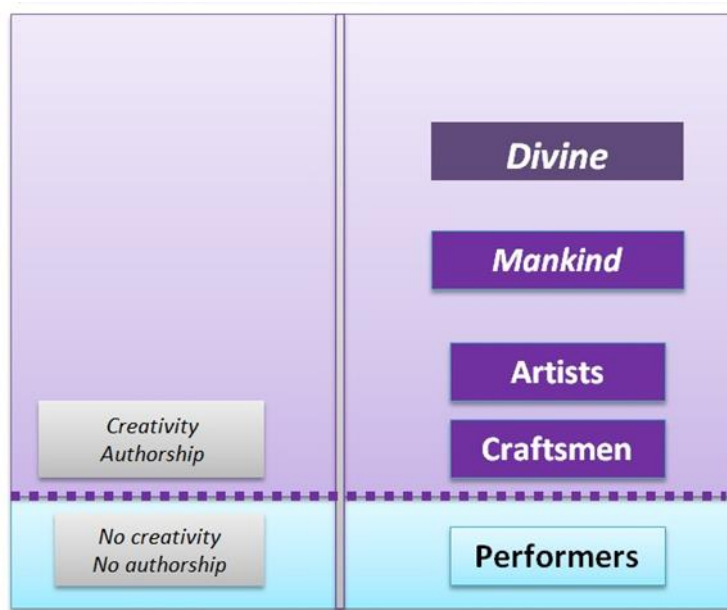
<sup>379</sup> Loewenstein (n 376) 63.

<sup>380</sup> Rahmatian (n 140) 164.

<sup>381</sup> Statute of Ann, 1710 (n 334). The Act makes no reference to performers nor does grant performing artists with any protection for their practice or input.

<sup>382</sup> Compae Figure 10 to Figure 12, see text to note 490.

Figure 10: Creativity and Authorship by the 16th Century



By the 16<sup>th</sup> century, men are regarded as intentional creators alongside god. At this point, there is no clear distinction between the creative artist and craftsman.

## 2. Embracing intellectual authorship

During the eighteenth century, artists started to distance themselves from craftsmen.<sup>383</sup> While intellectuals saw themselves as able to create without technical limitations, craftsmen were depicted as less creative because they were entangled by the limits of their craft.<sup>384</sup> For craftsmen worked from a set range of aesthetical tools, conventions and technical skills, their work did not amount to creative authorship. This logic opposed the intellectual artists, the author, to the manual worker, the craftsman. This demarcation was evidenced by the emergence of the notion of “Fine Arts” which brought together music,<sup>385</sup> poetry and the visual arts, leaving aside mechanical arts.<sup>386</sup> By that point, the fine line between creativity worthy

<sup>383</sup> Sawyer (n 343) 21.

<sup>384</sup> *ibid*, 23, 28-9.

<sup>385</sup> Musical works were late to join the category of ‘High’ or fine arts. See Rahmatian (n 140) 164-5.

<sup>386</sup> See on this, Brussels Conference Documents (n 34) 140-2; Marcel Plaisant, ‘Records of the Conference Convened in Brussels June 5 to 26, 1948’ (1896) 257. See also, Sawyer (n 343) 21; Kristeller (n 347) 106.

of authorship and creation underserving of such title was drawn to exclude craftsmen from the class of authors.

Some have identified the eighteenth century as the period during which the figure of the author understood as a solitary intellectual genius emerged.<sup>387</sup> At the same time one of the first legislative instruments of intellectual property law is enacted in England.<sup>388</sup> Both the pre-modern and modern models of copyright<sup>389</sup> were based on the idea that authorial work did not emerge from manual labour but intellectual effort.<sup>390</sup> Authoring was considered as the 'labour of the mind' as opposed to that of the body.<sup>391</sup> The legal framework refused to confuse authors and craftsmen. Fine arts entered the scope of intellectual property law as early as 1714 in France<sup>392</sup> and 1862 in England.<sup>393</sup> Craftsmanship on the other hand, had to wait until the 1911 Copyright Act to be made copyrightable.<sup>394</sup>

Contemporary intellectual property frameworks still bear the remnant of this author-craftsman divide, three centuries later. Craftsmen must satisfy an additional condition to be rewarded with rights authors receive, which thereby limits their accession to copyright protection.<sup>395</sup> Unlike their authorial equivalents, works of

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<sup>387</sup> Woodmansee M and Jaszi P (eds), *The Construction of Authorship: Textual Appropriation in Law and Literature* (Duke University Press 1994) 8-10; Rahmatian vividly criticises this dating. See, Rahmatian (n 140) 165.

<sup>388</sup> Statute of Ann of 1710 (n 334).

<sup>389</sup> On the modern and pre-modern models of copyright, see text to note 168, Chapter 1.

<sup>390</sup> Sherman and Bently *The Making of Modern IP* (n 390) 2,44-6

<sup>391</sup> See, *Millar v Taylor* (1769) 98 ER 201, 231; Sherman and Bently *The Making of Modern IP* (n 390) 2- 5, 9, 15, 25-7, 48-9, 134. This point is further discussed in Chapter 4, text to note 289.

<sup>392</sup> 1714 Decree on Fine Arts, see *Primary Sources on Copyright (1450-1900)*, eds L. Bently and M. Kretschmer, <[www.copyrighthistory.org](http://www.copyrighthistory.org)> accessed 10 March 2016.

<sup>393</sup> Fine Art Copyright Act 1862 (25 & 26 Vict., c. 45), see Bently and Kretschmer (n 392). See also, Marcel Plaisant, 'Records of the Conference Convened in Brussels June 5 to 26, 1948' (1896) 257.

<sup>394</sup> Nevertheless, forms of craftsmanship such as clothing design was protected with rights related to copyright since 1787. See, An Act for the Encouragement of the Arts of designing and printing Linens, Cottons, Calicoes, and Muslins, by vesting the Properties thereof, in the Designers, Printers and Proprietors, for a limited time, 1787, 27 Geo.III, c.38 (1787) ; Bently and Kretschmer (n 392).

<sup>395</sup> Although enforced in appeal, those additional condition were quashed by the Court of Cassation in the context of applied arts. See, Cass, 1ère civ, 9 novembre 1993, n° 91-17.061: Bull. 1993 I N° 318 p. 221



craftsmanship must be 'artistic' to be copyrighted.<sup>396</sup> This additional criterion which is not required of other copyrightable items suggests that not all forms of craftsmanship are considered worthy of protection, i.e worthy of authorship. The courts delved into rather complex aesthetic interrogations themselves in order to enforce the 'artistic craftsmanship' doctrine in practice.<sup>397</sup> Long developments on the question of what constitutes an 'artistic' piece of craft and what does not have taken place before judges,<sup>398</sup> leading the Bench to endorse the role of art critic,<sup>399</sup> they are otherwise reluctant to hold.<sup>400</sup> In Australia, the judicature commented that "[t]he law as to what is a work of artistic craftsmanship is not in a very satisfactory state".<sup>401</sup> The Act leaves it to the courts "to throw light incrementally upon the meaning and operation of that statutory expression"<sup>402</sup> since the expression of 'artistic craftsmanship'

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<sup>396</sup> Australia: 1968 Copyright Act, s. 10 and 35 combined; France: IPC, Art. L. 112-2-10; UK: CDPA 1988, s. 4(1)(c); US: US Code, Title 17, para 101.

<sup>397</sup> In *Sheldon v Metrokane* (Australia), the Court acknowledges the need for judges to complete the work started by the legislator on the question of artist craftsmanship. *Sheldon And Hammond Pty Ltd v Metrokane Inc* [2004] FCA 0019, (2004) 61 IPR 1, 21

<sup>398</sup> Australia: *Cuisenaire v Reed* [1963] VR 719; *Coogi Australia Pty Ltd v Hysport International Pty Ltd* (1998) 41 IPR 593, 602; France: Paris, 21 novembre 2008, *SARL LADO c/ SARL L'ONKEL*, n° 08/01060 (clothing pieces are protectable whenever original enough, there is no condition of artistic quality in France); Paris, 2eme Ch, pole 5, 12 novembre 2010, n° 09/13664, *Christian Dior...* : PIBD 2011, 931, III, 21 (the patterns formed by sewing seams and the shapes of sleeves although original and contributing to the fashion designer's style cannot be protected by copyright as they change form in every garment lacking the permanence works must evidence to be copyrighted); UK: *George Hensher Ltd v Restawile Upholstery (Lancs) Ltd* [1974] 2 All ER 420; US: *Mazer v Stein*, 347 US 201 (Supreme Court 1954).

<sup>399</sup> See for example, in Australia, *Cuisenaire v Reed* [1963] VR 719, 727-8; *Sheldon And Hammond Pty Ltd v Metrokane Inc* [2004] FCA 0019, (2004) 61 IPR 1, 21; France: Cass, 1ère civ, 13 juin 2006, n° 02-44.718: Bull. Civ 2006 I N° 307 p. 267; D. 2006, act. P 1741 note Daleau; pan. p. 2993 obs. Sirinelli. (In the case of perfumes, the Courts seem to have introduced a slightly higher threshold of originality, requiring fragrances to more than just the result of a combination of perfumers or chemists); US: *Mazer v Stein*, 347 US 201 (Supreme Court 1954).

<sup>400</sup> Australia: *Schott Musik International GmbH & Co v Colossal Records Of Australia Pty Ltd* (1997) 145 ALR 483,486 "I emphasised, in the context of sales tax, that courts were inappropriate fora for the making of aesthetic judgments" (Hill J); France;; UK: *George Hensher Ltd v Restawile Upholstery (Lancs) Ltd* - [1974] 2 All ER 420, 423 : (Reid J.) "There is a trend of authority with which I agree that a court ought not to be called on to make an aesthetic judgment."; US: *Bleistein v Donaldson Lithographing Co*, 188 US 239 (Supreme Court 1903) 251: (Holmes J) "It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits."; *Gracen v Bradford Exchange*, 698 F2d 300 (7th Cir 1983) 304: (Posner J.) "Miss Gracen reminds us that judges can make fools of themselves pronouncing on aesthetic matters".

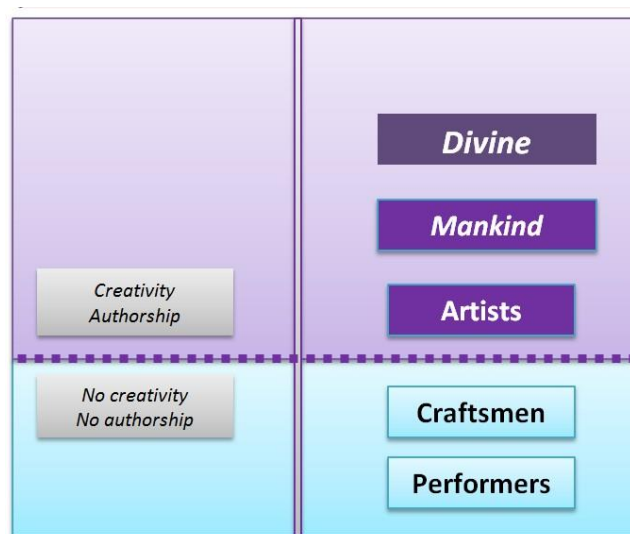
<sup>401</sup> *Coogi Australia Pty Ltd v Hysport International Pty Ltd* (1998) 41 IPR 593, 602. References omitted

<sup>402</sup> *Sheldon And Hammond Pty Ltd v Metrokane Inc* [2004] FCA 0019, (2004) 61 IPR 1, 21

knows no statutory definition.<sup>403</sup> In *Coogi Australia Pty Ltd v Hysport International Pty Ltd*,<sup>404</sup> Drummon J lists ten propositions which contributed to defining the substance of artistic craftsmanship.<sup>405</sup> The judge considered the “intent of the creator” as well as the “manifestation of pride in sound workmanship” as elements contributing to evidence the artistic quality of the craftsman’s work.<sup>406</sup>

Fifteen centuries later, the aesthetic narratives on creativity and authorship appear to have circled back to opposing *creare* to *facere*, ex nihilo intellectual making to manually produced labour. Yet the bar separating the two seems to have dropped down another level.<sup>407</sup> The distinction no longer opposes divine to mankind but one type of human creative activity to another. The same beliefs seem to underlay the same divide with the difference that it has now become secular:

Figure 11: Creativity and Authorship by the 18th Century



*In the 18<sup>th</sup> century, aesthetic and legal narratives begin to emphasise the work of the intellectual artist so much so that craftsmen started to be relegated to the rank of uncreative individuals.*

<sup>403</sup> *ibid.*

<sup>404</sup> *Coogi Australia Pty Ltd v Hysport International Pty Ltd* (1998) 41 IPR 593.

<sup>405</sup> *ibid.*, 602.

<sup>406</sup> *ibid.*

<sup>407</sup> See Figure 9 text to note 366.

### 3. Re-cycled divide

What was formerly regarded as godlike is now associated with the artist author represented as the genial intellect. Modern judicial narratives which associate contemporary legal authorship to the concepts of 'origination' seem to confirm that the divide has indeed slid from opposing divine to humane, to endorse an equivalent profane dichotomy distinguishing between authorship and craftsmanship. The modern author is taken for an 'originator' borrowing thereby godlike characteristics. In *Walter v Lane*,<sup>408</sup> the Court held that:

In the Oxford English Dictionary an "author" is defined as "the person who originates or gives existence to anything:" "an inventor, constructor, or founder;" "the composer or writer of a treatise or book." The Copyright Act does not define "author," but in a literary statute the Legislature should have the credit of being supposed to use words in a literary not a commercial sense.<sup>409</sup>

Although the concept of origination was not explicitly linked to authorship in this case, the expression got more traction in the judicial narrative of the US and Australia than in the UK.<sup>410</sup> In the US, the vision of the author as 'originator' of the work was given constitutional authority by the judicature in *Burrow-Giles Lithographic Co v Sarony*.<sup>411</sup>

An author in that sense is "he to whom anything owes its origin; originator; maker; one who completes a work of science or literature"<sup>412</sup>

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<sup>408</sup> *Walter v Lane* [1900] AC 539.

<sup>409</sup> *ibid*, 543.

<sup>410</sup> Though glimpses of the theory can be found in the British jurisprudence. See, *Donoghue v Allied Newspapers, Limited* [1938] Ch 106, 108 ("[he] who originates the story"); *Football Dataco Ltd v Britten Pools Ltd* [2010] EWHC 841 (Ch) para 53 ("it must originate with the author").

<sup>411</sup> *Burrow-Giles Lithographic Co v Sarony*, 11 U.S. 53 (Supreme Court 1884).

<sup>412</sup> *ibid*, 58.

The definition made precedent and is now prevailing over contemporary cases<sup>413</sup> and landmark decisions on the question of originality.<sup>414</sup>

In Australia, the courts merged the British<sup>415</sup> and American<sup>416</sup> positions to form their own doctrine of 'origination'. To be 'original' as per Australian copyright law, the work "must originate with the author".<sup>417</sup> The judges refer to the artist's creative process as the 'process of origination' without detour.<sup>418</sup> Designating the making process of an original piece, the judge held that "[t]he trial judge was entitled to find either that the drawings were the product of a process of origination".<sup>419</sup>

#### 4. Paroxysm of Romanticism

As mentioned above, the eighteenth century was identified as the starting point of the creation of the romantic author-genius as dominant figure in literature as well as the legal narrative.<sup>420</sup> This has been the contention of an academic movement which developed in 1990s in the North-American intellectual property literature.<sup>421</sup> This

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<sup>413</sup> US Supreme Court: *Harper & Row Publishers Inc v Nation Enterprises*, 471 US 539 (Supreme Court 1985) 565; Court of Appeal of the Seventh Circuit: *Wildlife Exp. Corp v Carol Wright Sales Inc*, 18 F3d 502 (7th Cir 1994) 508; Court of Appeal of the ninth circuit: *Aalmuhammed v Lee*, 202 F 3d 1227 (9th Cir 2000) 1232.

<sup>414</sup> *Goldstein v California*, 412 US 546 (Supreme Court 1973) 561; *Feist Publications Inc v Rural Telephone Service Co Inc*, 499 US 340 (Supreme Court 1991) 346.

<sup>415</sup> *Desktop Marketing Systems Pty Ltd v Telstra Corporation Ltd* [2002] FCA 0112, (2002) 55 IPR 1, 26 para [86].

<sup>416</sup> *ibid*, para [25].

<sup>417</sup> *Victoria Park Racing & Recreation Grounds Co Lts v Taylor* (1937) ALR 597, 511. Cited in *Kalamazoo (Aust) Pty Ltd v Compact Business Systems Pty Ltd And Others* (1985) 5 IPR 213, 234; *Telstra Corporation Ltd v Desktop Marketing Systems Pty Ltd* [2001] FCA 0612, (2001) 181 ALR 134, 159; *Desktop Marketing Systems Pty Ltd v Telstra Corporation Ltd* [2002] FCA 0112, (2002) 55 IPR 1, 10 para [25].

<sup>418</sup> *Digga Australia Pty Ltd v Norm Engineering Pty Ltd* [2008] FCAFC 33, (2008) 75 IPR 251; *Norm Engineering v Digga Australia* [2007] FCA 761, (2007) 72 IPR 332, 356 ; *Kalamazoo (Aust) Pty Ltd v Compact Business Systems Pty Ltd And Others* (1985) 5 IPR 213, 225.

<sup>419</sup> *Digga Australia Pty Ltd v Norm Engineering Pty Ltd* [2008] FCAFC 33, (2008) 75 IPR 251.

<sup>420</sup> Woodmansee and Jaszi *The Construction of Authorship* (n 387); Martha Woodmansee, 'The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the "Author"' (1984) 17 *Eighteenth Century Studies* 425; Martha Woodmansee, *The Author, Art, and the Market - Reading the History of Aesthetics* (Columbia University Press 1994); James Boyle, *Shamans, Software, and Spleens: Law and the Construction of the Information Society* (Harvard University Press 1996); David Saunders, *Authorship and Copyright* (Routledge 1992); Mark Rose, *Authors and Owners* (Harvard University Press 1993).

<sup>421</sup> See also the contributions of Jim Swan, Rosemary Coombe, Thomas Pfau, Alfred Chen, Peter Lindenbaum, John Feather, Marlon Ross, Gerhard Joseph, N. M. Feltes, Margreta de Grazia, Thomas Streeter, Marvin D'Lugo, David Sanjek, Jeffrey Masten, Anne Ruggles Gere, Max Thomas, Andrea Lunsford and Lisa Ede, and finally, Monroe Price and Malla Pollack in Woodmansee and Jaszi *The Construction of Authorship* (n 387). See

school of thought is later referred to as the romantic authorship discourse or the author-genius critique.

According to this movement, the author has been idealised as a lonely artist working in the solitude of a deteriorating environment, who is solely dedicated to the expression of his art. His work would be the fruit of his genius, his intellect would have created from nothing. This discourse criticised the copyright framework for seeing the author as “man who brings out of nothingness, some child of his thought, has rights therein which cannot belong to any other sort of property”.<sup>422</sup> In this logic, the artist has a special bond with his work for he has ‘fathered it’<sup>423</sup> by investing of his personality in it, which in turn falsely justified the attribution of exclusive property rights in the form of copyright.<sup>424</sup>

Building on the work of Barthes<sup>425</sup> and Foucault,<sup>426</sup> this narrative<sup>427</sup> was led by Martha Woodmansee<sup>428</sup> and Peter Jaszi,<sup>429</sup> amongst others.<sup>430</sup> Their critique and has now rallied to its cause a significant number of scholars in the legal literature.<sup>431</sup>

Nevertheless, not all the contentions of the author-genius discourse have reached a

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also, Michael Birnhack, ‘The Dead Sea Scrolls Case: Who Is an Author’ (2001) 23 EIPR 128; Michael Birnhack, ‘The Idea of Progress in Copyright Law’ (2015) 1 Buffalo Intellectual Property Law Journal 3; James Griffin, ‘The Evolution of Authorship under Technology: Implications for Copyright Law’ (2005) 2 Intellectual Property Quarterly 135, 140-1.

<sup>422</sup> Nathaniel Shaler, Harvard geologist, in 1878 quoted in Thorvald Solberg, ‘Copyright Reform : Legislation and International Copyright’ (1939) 14 Notre Dame Law Review 343, 358-9, also cited in Zacharia Chafee Jr, ‘Reflections on the Law of Copyright; I’ (1945) 45 Columbia Law Review 503, 506-7.

<sup>423</sup> Rose (n 420) 38-9.

<sup>424</sup> *ibid*, 114.

<sup>425</sup> Roland Barthes, ‘The Death of the Author’, *Image - Music - Text* (Fontana Press 1977).

<sup>426</sup> Michel Foucault, *What Is an Author* (P Rabinow ed, London: Penguin 1984) ; Rahmatian (n 140) 153.

<sup>427</sup> For a critical analysis of the movement see, Rahmatian (n 140)150-166

<sup>428</sup> Woodmansee The Genius and the Copyright (n 420); Martha Woodmansee, ‘On the Author Effect: Recovering Collectivity’ (1992) 10 Cardozo Arts & Ent. L.J.; Woodmansee, *The Author, Art, and the Market* (n 420).

<sup>429</sup> Peter Jaszi, ‘Toward a Theory of Copyright: The Metamorphoses of “Authorship”’ (1991) 1991 Duke Law Journal 455; Peter Jaszi, ‘On the Author Effect: Contemporary Copyright and Collective Creativity’ (1992) 10 Cardozo Arts & Ent. L.J. 293; Woodmansee M and Peter Jaszi, ‘The Law of Texts: Copyright In the Academy’ (1995) 57 College English 769; Peter Jaszi and Martha Woodmansee, ‘Copyright in Transition’ in Carl Kasetle and Janice Radways (eds), *In Print in Motion: The Expansion of Publishing and Reading in the US, 1880-1940* (Chapel Hill: American Antiquarian Society an University of North Caroline Press 2009).

<sup>430</sup> Boyle (n 420); Rose (n 420); Saunders (n 420).

<sup>431</sup> n 420, n 421.

consensus in the field.<sup>432</sup> Rahmatian, for instance, vividly challenges the critique; in particular with regard to its time reference he considers “irritatingly myopic”<sup>433</sup> of the aesthetics developments of the eighteenth and nineteenth century.<sup>434</sup> He argues that the theoretical construction built by the Woodmansee-Jaszi tandem<sup>435</sup> would not survive a closer study of the history of art and aesthetic of the period they identified as being the rise of the romantic author.<sup>436</sup>

## 5. Thinking performances

Shortly after the author-figure is said to have risen, analyses of the nature of performances saw light. In the nineteenth century, Diderot is one of the first philosophers to attempt to unravel actors’ performing process.<sup>437</sup> Although the art of performing had been under study<sup>438</sup> since the Ancient Greece,<sup>439</sup> the focus of the discussion was placed on the impact performances had on the community rather than on the relationship tying the performer to the author’s work.<sup>440</sup>

According to the French writer, performers are to be regarded as sophisticated gymnasts<sup>441</sup> or human pasteboards<sup>442</sup> who train their bodies to express the work of

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<sup>432</sup> Rahmatian (n 140) 150.

<sup>433</sup> *ibid*, 156-9.

<sup>434</sup> *ibid*, 156-9, 166.

<sup>435</sup> Woodmansee and Jaszi *The Construction of Authorship* (n 387); Biagoli M, Jaszi P and Woodmansee M (eds), *Making and Unmaking Intellectual Property: Creative Production in Legal and Cultural Perspectives* (University of Chicago Press 2011).

<sup>436</sup> Rahmatian (n 140) 159. Rahmatian is not the only one to have criticised the contention of the author-genius discourse. See for similar criticism, Mark Lemley M, ‘Romantic Authorship and the Rhetoric of Property’ 75 *Texas Law Review* 873, 876-7, 879-95; Oren Bracha, ‘The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright’ (2008) 118 *The Yale Law Journal* 186, 192-2; Lionel Bently, ‘Review Article: Copyright and the Death of the Author in Literature and Law’ (1994) 57 *The Modern Law Review* 973, 977.

<sup>437</sup> Diderot *The Paradox* (n 437); Denis Diderot, ‘Letter on the Deaf and the Dum’, *Diderot’s Early Philosophical Works* (Open Court Publishing 1916).

<sup>438</sup> Understood in its broadest sense.

<sup>439</sup> See for instance, Aristotle (Trans. George Whalley., *Aristotle’s Poetics* (McGill-Queen University Press 1997); Anastasia-Erasmia Peponi, *Performance and Culture in Plato’s Laws* (Cambridge University Press 2013); Jean-Jacques Rousseau (Trans. A. Bloom ., *Letter to M. D’Alembert and Writings for the Theatre, The Collected Writings of Rousseau* (CE Butterworth and C Kelly eds, University Press of New England 2004).

<sup>440</sup> This latter connection is at the heart of the author-performer divide which is why previous works on the societal position of performances were overlooked.

<sup>441</sup> Diderot *The Paradox* (n 437) 16.

authors. Their work is assimilated to that of translators, converting the dialogues of a page into a live rendition without participating in the construction of the meaning conveyed.<sup>443</sup> It is clear from his writing that beyond the execution of complicated skills,<sup>444</sup> the work of performers is not creative because it is limited to channelling the author's work through their body. In this logic, neither a *creare* nor a *facere* form of creativity takes place. Instead, a third type of artistic activity occurs, somewhere below craftsmanship yet above sportsmanship.<sup>445</sup>

It is interesting to note that at the same time in France, the meaning of the word 'artist' (artiste) began to only refer to performers. Before then, the term was used to designate both authors (including craftsmen) and performers. From the 1780s onwards, the French language ceased to refer to authors as 'artist-authors' (artistes-auteurs) to only be attached to performers, becoming 'performing artists' or 'artist-performer' (artistes-interprètes).<sup>446</sup> Reaching a linguistic dimension, the author-performer divide was rooted in deep cultural grounds. Throughout the eighteenth century, neither performers nor craftsmen were seen as deserving authorial credentials for their work.<sup>447</sup>

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<sup>442</sup> Diderot *The Paradox* (n 437) 61.

<sup>443</sup> Vivant and others (n 15) 20; Diderot *The Paradox* (n 437) 62 ; Alain Rey (ed), *Dictionnaire Historique de La Langue Francaise* (Le Robert 1992) 1043.

<sup>444</sup> Diderot *The Paradox* (n 437) 62.

<sup>445</sup> Although performing is seen as an intellectual exercise, the raw material involved is composed of the artist's thoughts but of his or her body. See, Diderot *The Paradox* (n 437) 16, 62.

<sup>446</sup> Rey (n 443) 123 ; Vivant and others (n 15) 19-20.

<sup>447</sup> See figure 11 text to note 407.

### C. Accommodating technological revolutions

This situation changed with the industrial revolution which transformed the notions of mechanical arts and craftsmanship and narratives framing the arts,<sup>448</sup> changes shortly followed by the law. Practices born out of industrial techniques, such as photography, came to be established art forms.<sup>449</sup> The photographer grew from being a craftsman to become an artist in his own right. The law followed this evolution by extending legal authorship to those craft-oriented practices. In the UK, photographs were admitted by the court as copyrightable subject-matter as early as 1869, even when they reproduced an existing work.<sup>450</sup> Similarly, in 1884<sup>451</sup> the US Supreme Court held that:

Unless, therefore, photographs can be distinguished in the classification on this point from the maps, charts, designs, engravings, etchings, cuts, and other prints, it is difficult to see why Congress cannot make them the subject of copyright as well as the others<sup>452</sup>

The same case also reflects the resistance to regard mechanical techniques as original works of authorship:

[A]n engraving, a painting, a print, does embody the intellectual conception of its author, in which there is novelty, invention, originality, and therefore comes within the purpose of the Constitution in securing its exclusive use or sale to its author, while the photograph is the mere mechanical reproduction of the physical features or outlines of some object animate or inanimate, and involves no originality of thought or any novelty in the intellectual operation connected with its visible reproduction in shape of a picture. [...] [T]he process is merely mechanical, with no place for novelty, invention or originality. It is simply the manual operation, by the use of these instruments and

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<sup>448</sup> Sawyer (n 343) 28-9.

<sup>449</sup> Brussels Conference Documents (n 34) 140.

<sup>450</sup> *Graves' case* 1869 (1869) L.R. 4 Q.B. 715. In this case, the photographs of engravings are considered as holding their own separate copyright. Both sets of copyright, the photographs and engravings are detained by the same person as he was both owner of the engravings and commissioner of the photographs.

<sup>451</sup> *Burrow-Giles Lithographic Co v Sarony* 11 U.S. 53 (Supreme Court 1884).

<sup>452</sup> *ibid*, 57.



preparations, of transferring to the plate the visible representation of some existing object, the accuracy of this representation being its highest merit.<sup>453</sup>

The Court refused to neither deny nor endorse this description of photography:

This may be true in regard to the ordinary production of a photograph, and, further, that in such case a copyright is no protection. On the question as thus stated we decide nothing.<sup>454</sup>

Until the 1985 reform of French intellectual property law,<sup>455</sup> copyright laws continued to exclude certain types of photographs judged to be lacking artistry. They required of photographers to evidence the artistic or documentary quality of their work for it to be protectable.<sup>456</sup> Those artists had to prove that their work were not the mere result of a mechanical action<sup>457</sup> where “the situations [they shoot] present themselves to [their] camera” and which are “the mere result of chance”.<sup>458</sup> This initial defiance towards photographs’ originality still transpires in contemporary decisions. French courts still refuse to grant protection to photographs which are the mere mechanical result of the trigger<sup>459</sup> and not the fruit of conscious creative decision-making.<sup>460</sup>

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<sup>453</sup> *Burrow-Giles Lithographic Co v Sarony* 11 U.S. 53 (Supreme Court 1884), 58-9.

<sup>454</sup> *ibid*, 59.

<sup>455</sup> Law of July 3, 1985, No 85-660.

<sup>456</sup> Article 3 of the Law of March 11, 1957 No. 57-298 stated that were protected the photographic work « which presented documentary or artistic qualities ». Author’s translation – original text reads: « les œuvres photographiques à caractère artistique ou documentaire ».

<sup>457</sup> Law of March 11, 1957, No n°57-298, art 3.

<sup>458</sup> Paris, 1ere Ch, pole5, 14 novembre 2012, *SARL Acces Photo c/ Tours FC*, n° 11/03286 : inédit. Author’s translation, for the original text see Appendix 1. For more on this point, see Annex 7.

<sup>459</sup> Paris, 4ème Ch, 5 décembre 2007, n° 06/15937, SIPA Press : D. 2008 jurispr. P. 461 note Bruguière; RTDCom. 2008 p. 300 obs. Pollaud-Dullian (the work of a paparazzi is not eligible to copyright protection); Paris, 1ere Ch, pole5, 14 novembre 2012, *SARL Acces Photo c/ Tours FC*, n° 11/03286: inédit (the photographs of a football game does not amount to copyright protection as the photographer cannot control the movement of the players he shoots in bursts, his input in merely technical; equally, promotional team pictures are not protectable by copyright for they are too banal). For more on this point, see Annex 7.

<sup>460</sup> Paris, 17 décembre 2008, n° 07/15882 (infringes the copyright vested in the photographs of planes the newspaper which uses it without the consent of the photographer); Paris, 4ème Ch, 5 décembre 2007, n° 06/15937, SIPA Press: D. 2008 jurispr. P. 461 note Bruguière; RTDCom. 2008 p. 300 obs. Pollaud-Dullian (the work of a paparazzi is not eligible to copyright protection); Paris, 1ere Ch, pole5, 14 novembre 2012, *SARL Acces Photo c/ Tours FC* (football game pictures and team shots are not protectable by authors’ rights when

Despite this long-lasting reluctance, photographic works<sup>461</sup> alongside films,<sup>462</sup> phonograms<sup>463</sup> and broadcasts<sup>464</sup> became protected by and rewarded with authors' rights in the same manner paintings, sculptures or literary works were. More recently, the crafts of computer programming<sup>465</sup> and creating video games<sup>466</sup> joined the ranks of authorial practices, despite their industrial nature.

Those recent arrivals in copyright laws – computer programs, video games, broadcasts, databases – have been regarded as entrepreneurial or media works<sup>467</sup> rather than artistic works. Although media and entrepreneurial works contribute to loosening the divide author-craftsman divide, or perhaps the author-entrepreneur divide, it is unlikely that such effect motivated the reforms. It is equally unlikely that

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they are the result of mechanical actions or of traditional portrait conventions). For a brief analysis of French jurisprudence on the originality condition in photographic works see text to Annex 7.

<sup>461</sup> See Australia: 1968 Copyright Act, s. 10 and 35 combined; France: IPC, Art L 112-2-9; Cass, 1ère civ, 17 décembre 1991, n° 89-22.035: Bull Civ I N 360; D. 1992 in F rap. p. 18; JCP G 1992, IV 68 (photographic works are covered with moral rights like any other works); UK: CDPA 1988, s. 4(1)(a). See also, *Temple Island Collections Ltd v New English Teas Ltd & Anor* [2012] EWPC 1; [2012] FSR 9; [2012] All ER (D) 49; [2012] ECDR 11; US: US Code, Title 17 para 101. See also, *Burrow-Giles Lithographic Co v Sarony* 11 U.S. 53 (Supreme Court 1884); European Union: C-145/10 *Eva-Maria Painer v Standard VerlagsGmbH and Others* [2011] EUECJ C-145/10, EU:C:2011:798, ECLI:EU:C:2011:798; International : Berne Convention, Art 7(4) leaves the protection of photographs for national laws to decide.

<sup>462</sup> See Australia: 1968 Copyright Act, s.10 and 86 combined; France: IPC, Art. L. 112-2-6; UK: s. 1(b); US: US Code, Title 17 para 101; International: Berne Convention, Art 14bis

<sup>463</sup> See Australia: 1968 Copyright Act, s. 85; France: phonograms are not protected by a copyright in France but by a neighbouring right, IPC, Art L 311-1; UK: CDPA 1988, s. 1(b); US: US Code, Title 17 para 101 ; International: WIPO Performance and Phonograms Treaty, Chapter III

<sup>464</sup> Australia: 1968 Copyright Act, s. 87; France: IPC, Art L 122-2-1 and 2; UK: CDPA 1988, s 1(1)(b); US: US Code, Title 17 para 111; European Union: Council Directive 93/83/EEC of September 27, 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission.

<sup>465</sup> Australia: 1968 Copyright Act, s 10 and 32(1) combined; France: IPC, Art L 112-2-13; UK: CDPA 1988, s. 3 (1)(b); US: US Code, Title, para 101 and 109. Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs, codifying Directive 91/250EEC, L 111/16, Art. 1(1).; International: TRIPS Agreements, Art. 10(1)

<sup>466</sup> Australia: *Milwell Pty Ltd v Olympic Amusements Pty Ltd* [1999] FCA 0063, (1999) 161 ALR 302; *Galaxy Electronics Pty Ltd v Sega Enterprises Ltd And Another* (1997) 37 IPR 462; UK: *Nova Productions Ltd v Mazooma Games Ltd & Ors* [2007] EWCA Civ 219; US: *Lewis Galoob Toys Inc v Nintendo of America Inc*, 964 F 2d 965 (9th Cir 1992); *Sega Enterprises Ltd v Accolade Inc*, 977 F 2d 1510 (9th Cir 1992). The legal protection of video games in France is uncertain. See, JB Auroux and S Matakovic, 'La Musique Des Jeux Video: Source de Dissonances Juridiques' 2065 RLDI 24.

<sup>467</sup> Charlotte Waelde and others, *Contemporary Intellectual Property* (3rd edn, Oxford University Press 2013) 55-6

policy-makers were driven by the desire to renew modern aesthetic narratives.<sup>468</sup> On the contrary, it has been contended that those works have gained protection on the basis of their economic weight rather than their artistic value.<sup>469</sup> Legal reforms illustrate a shift in thinking about our economies and not a wish to endorse the renewed essence of contemporary cultural expressions. Nevertheless, those changes in the law indirectly affected the sanctity of legal authorship by loosening its exclusive association with traditional arts or 'high-culture'. It certainly reshaped the divide by re-extending authorship to selected works of craftsmanship, restoring thereby some of its former prestige.<sup>470</sup>

With the development of new technologies such as sound and film recording, also came the advent of new economic sectors which heavily relied on performers' works.<sup>471</sup> The emergence of the music and film industries boosted the social status of actors and musicians to give rise to the star-system.<sup>472</sup> Performances are reaching mass audiences and the economic weight of the most famous artists increased their bargaining power to, sometimes, cast into shadow the authors they interpret on stage or in front of the camera<sup>473</sup> for the first time since the sixteenth century.<sup>474</sup> This new economic context forced legislators to consider the legal protection of performers whose work were then able to generate profits beyond the revenues

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<sup>468</sup> See for instance, *George Hensher Ltd v Restawile Upholstery (Lancs) Ltd* [1974] 2 All ER 420, 424; *Bleistein v Donaldson Lithographing Co*, 188 US 239 (Supreme Court 1903) 251. ; See, Lionel Bently's comments on the fact that there is little evidence that copyright law developments was driven by any form of endorsement of postmodern aesthetics. See, Bently *Copyright and the Death of the Author* (n 436) 977, 984.

<sup>469</sup> Andreas Rahmatian explained how the propertisation by copyright of entrepreneurial works occurs because their high economic value compensate their low artistic value Rahmatian (n 140) 59.

<sup>470</sup> Figure 12, text to note 490.

<sup>471</sup> The Seine Tribunal justifies the award of legal protection to performers by pointing to the changes technologies have brought to their profession. See, Trib Seine, 23 avril 1937, *Rigault dit Marnay c. Chaperot et Copelier* : Le Droit d'Auteur, No 11 p 129. See also Homburg (n 161) 1-5 and Olagnier (n 182) 17-8.

<sup>472</sup> Arnold (n 6) 4-5.

<sup>473</sup> *ibid*, 4 para 1.10.

<sup>474</sup> text to note 372.

obtained from ticket sales of live performances.<sup>475</sup> However, as described in previous developments, reforms to protect performing artists were slow to be enacted and improved.<sup>476</sup> Never did they reach a full harmonisation of the regimes applicable to authors and performers so much so that, unlike craftsmen, performers have never been able to erase the divide separating them from authors.<sup>477</sup>

#### **D. Missing the ‘performative turn’**

At the same time performers’ social status rose, Georg Simmel considered shifting the boundaries separating authorship from performances.<sup>478</sup> Although his work on the matter went unnoticed during his lifetime,<sup>479</sup> the philosopher is regarded as the first writer<sup>480</sup> to envisage the intrinsic creativity of performances independently from the authorial works they may convey.<sup>481</sup> The German theorist moved away from Diderot’s classical conception despite conventions still favouring the latter at the time. For Simmel, acting had nothing to do with the ability of a sophisticated gymnast<sup>482</sup> or a human canvas onto which the author can paint her play to the spectators. He described a complex ‘ménage a trois’ between the character depicted by the author in writing, its understanding by the performer, and the performer’s own personality and physicality. In his theory, an actor’s performance was the result of a subtle fusion of the three.

Furthering Simmel’s work, an aesthetical shift was more clearly made in the 1960s. This movement was later labelled by Erika Fischer-Lichte as the “performative

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<sup>475</sup> Arnold (n 6) 6-7, para 1.16.

<sup>476</sup> text to note 30.

<sup>477</sup> Figure 11, text to note 490.

<sup>478</sup> Georg Simmel, *La philosophie du comédien* (Circe 2001).

<sup>479</sup> *ibid*, Simmel’s work was published after his death.

<sup>480</sup> Erika Fischer-Lichte, *The Transformative Power of Performance - A New Aesthetics* (Routledge 2008) 79

<sup>481</sup> Relatively shortly thereafter, the same argument was formulated in the legal literature, see Olagnier (n 182) 6, 25-6; and Homburg (n 161).

<sup>482</sup> A view supported by Diderot in *The Paradox* (n 437) 16.

turn”.<sup>483</sup> This “turn” recognised the value of performance for itself, as a separate event distinct from the author’s written text whose dominant position in the creative process had been over-estimated for too long.<sup>484</sup> It opened new ways of thinking about performances which became independent creative productions carrying their own meaning and value.<sup>485</sup> This renewed approach to the performing stage was the result of progressive changes in the theatre landscape which in turn, highlighted performances’ ‘contextful’ nature.

Paradoxically perhaps, it is the advent of stakeholders other than performers which triggered the re-evaluation of performances as an essential element in the creation of meaning initiated by the theatrical written text. Indeed, in the opening years of the twentieth century, stage directors rose as prominent figures in the field of theatre. Their input and role revealed that the feedback loop at play between the written text, actors and the audience during the performance could be influenced by the careful setting of the stage.<sup>486</sup> The growing awareness of stage directions’ impact on performances and on the feedback loop fostered the view that the performing process would outgrow the underlying work. The performance began to be given a life of its own, emancipated from the underlying work it conveys.

The arrival of directors thus shifted focus onto the audience’s contribution to the moment of performance.<sup>487</sup> Spectators became to be understood as both a pre-condition and a protagonist of the performing event which is itself born out of the feedback loop created between them and the performers, and facilitated by stage

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<sup>483</sup> Fischer-Lichte (n 480) 34.

<sup>484</sup> Fischer-Lichte brilliantly summarized the evolution of these theories in a piece of academic writing accessible to non-specialist in Fischer-Lichte (n 480) 30.

<sup>485</sup> *ibid.*, 30.

<sup>486</sup> Fischer-Lichte (n 480) 39.

<sup>487</sup> *ibid.*

directions.<sup>488</sup> Since then, performances have been conceived as an open-ended process whose outcome is unpredictable, ever-changing and yet keeps to a structure in an autopoietic fashion.<sup>489</sup> This understanding of performances crystallised by the performative turn in the 1960s is now well settled in the performing arts, though the degree to which audience can be enabled to contribute to the performing process is continuously challenged.<sup>490</sup>

The legal narrative appears to have missed this 'performative turn' embraced in the performing arts. As described in previous developments,<sup>491</sup> the divide separating authors from performers was prescribed at the heart of performers' rights which were first introduced at the international level in 1961, at the same time the performative revolution took place in theatre and performance scholarship.<sup>492</sup> Legislators did not take this opportunity of reform, nor any other coming after that, to convey the thinking of the most recent research in the field.<sup>493</sup> Similarly, apart from isolated exceptions,<sup>494</sup> the courts maintained a definition of performance and conception of creativity pertaining to philosophies dating back to the eighteenth century.<sup>495</sup> The same archaic understandings of creativity once used to preclude men from authorship, and later craftsmen, now maintain this glass ceiling over performers:

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<sup>488</sup> Fischer-Lichte (n 480) 39-40.

<sup>489</sup> Fischer-Lichte (n 480) 39-40.

<sup>490</sup> Fischer-Lichte (n 480) 49.

<sup>491</sup> text to n 60.

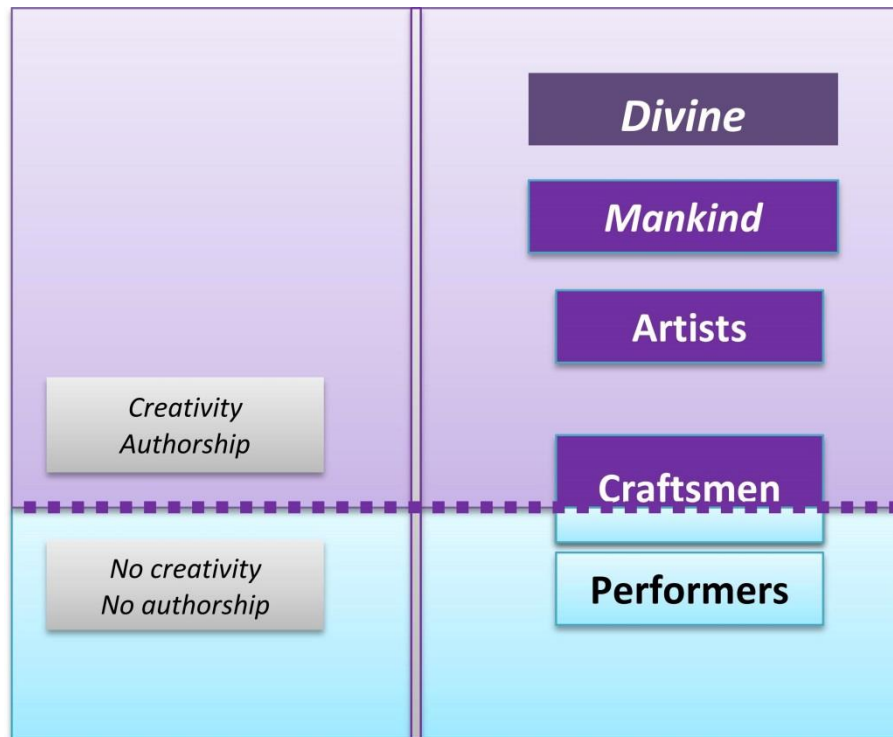
<sup>492</sup> The Rome Convention introducing rights for live and aural performers was signed in 196, see n 31.

<sup>493</sup> text to notes 33 and 159.

<sup>494</sup> text to notes 80 and 259.

<sup>495</sup> text to note 437.

Figure 12: Creativity and Authorship by the 20th Century



By the 20<sup>th</sup> century, many forms of craftsmanship have joined the group of authors, aesthetically and legally speaking. Only performers and a small portion of craftsmen are left as uncreative artists unworthy of authorship.

### E. The “Death of the Author”, the death of the divide?

A decade after the performative turn took place in the performing art literature, unrelated efforts to take down conflated representations of the author were made in literary theory. Barthes and Foucault addressed in their work classic understandings of the authorial figure by reinforcing the performative nature of authorship<sup>496</sup> and readership.<sup>497</sup> The authors of the ‘*Death of the Author*’<sup>498</sup> and ‘*What is an author?*’<sup>499</sup> formed the postmodern take on the authorial figure. Their work served as the critical

<sup>496</sup> Michel Foucault, ‘What Is an Author?’ in James Faubion (ed), *Aesthetics, Method, and Epistemology* (Essential, The New Press 1998) 210-6.

<sup>497</sup> Barthes *The Death of the Author* (n 425) 148.

<sup>498</sup> *ibid.*

<sup>499</sup> Foucault (n 496).

base for the critique of the romantic author later developed in the legal scholarship.<sup>500</sup>

Barthes challenged the authority of the author by reinstating readers' input in the process of creating meaning.<sup>501</sup> Similarly, Foucault refused to see the author as the sole source of meaning. He described authorship as the mere function by which our culture limits the free re-creation of information and fiction.<sup>502</sup> It is interesting to note that none of those explorations of the authorial figure seem to have envisaged the impact such theory could have on traditional understandings of performances. There is no mention in their work of performers' relationship to the text or study of their role towards the creation of meaning.<sup>503</sup> Their model was solely focused on the author in its interaction with the reader. To this extent, their postmodernist theories failed to provide a holistic critique of classical narratives on the author-figure which would have included considerations on performers.

A number of reasons could account for this absence. First, both Foucault and Barthes were situated within the discipline of literary theory rather than performing art studies.<sup>504</sup> Their intervention was later exported to this field by performance scholars.<sup>505</sup> The latter explained that the role of the dramatist had already been diminished by the rise of new authoritative figures like producers, directors, and to an

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<sup>500</sup> Woodmansee and Jaszi *The Construction of Authorship* (n 387) 9; Jaszi *On the Author Effect* (n 429) 29. See for comments on the author-genius discourse: Rahmatian (n 140) 166-7.

<sup>501</sup> Barthes *The Death of the Author* (n 425) 148.

<sup>502</sup> Foucault (n 496) 211.

<sup>503</sup> Although Barthes did apply his semiotic theories to theatre, his study did not focus on the actor and the play of the actor. In *Critical Essays*, he reviews philosophies of theatre which have, at times, mentioned the role of the performer and how it was perceived by writers such as Baudelaire (a prostitute) or Brecht (an impassionate imitator) but has not engaged or applied his theories to this class of actor. His analysis is focused on the readers' response to 'signifiers' only. His scrutiny ignores the position of performers. See, Roland Barthes, *Essais Critiques* (1964-1971. Seuil 1991) 56.

<sup>504</sup> As confirms their extensive studies in handbook on literary theory. See for example, Gregory Castle, *The Blackwell Guide to Literary Theory* (Blackwell Publishing 2007) 219-20.

<sup>505</sup> See for example, Elaine Aston and George Savona, *Theatre as Sign-System: A Semiotics of Text and Performance* (Routledge 1991) 100; Michelene Wandor, *The Art of Writing Drama: Theory and Practice* (Bloomsbury Methuen 2015) 50-1.



extent, performers, prior to the performative turn.<sup>506</sup> Those theorists ultimately dismissed the depth of the impact Barthes' and Foucault's work had on the performing arts as their models did not challenge anything about the written text or the audience that the performative turn had not already questioned.<sup>507</sup>

Alternative interpretations of Barthes' theory would argue that performers were, in fact, present under the umbrella position of the 'reader' as posited by Umberto Eco.<sup>508</sup> As tempting as it may be, this analysis is problematic because it by-passes the particulars of performers' position at the junction between the authors and the audience. Thus it is submitted that such interpretations could only bring theoretical flaws to the Barthesian and Foucauldian models because it negates the differences in the position each group held and holds within western culture. The socio-cultural evolution of status performers went through is evidence of the fact that their role in western societies cannot be equated to readership. If readers may have also been discriminated against, regulated and stigmatised in the past, the reasons driving such policies and their timing were different than those affecting performing artists. This signals that the two groups cannot be merged into one conceptual entity.<sup>509</sup>

A third possible explanation for Barthes' and Foucault's silence on performers' role in the creation of meaning would suggest that the French authors simply did not explore the full potential of their theories.<sup>510</sup> Even though Barthes did apply his semiotic arguments the creation and interpretation of 'signifiers' to theatre, his study

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<sup>506</sup> Aston and Savona (n 505) 100; Wandor *The Art of Writing Drama* (n 505) 50-1. Wandor concludes in her review of the influence of Barthesian and Foucauldian thinking had little to do with any shift in thinking in the context of performances. See comments on the fourth wall and its failure to break it down.

<sup>507</sup> Wandor *The Art of Writing Drama* (n 505) 50.

<sup>508</sup> This thesis seems supported by Umberto Eco among others, in *The Role of the Reader: Explorations in the Semiotics of Texts* (Bloomington: Indiana University Press, 1984 1984) 62 ; see also, Castle (n 504) 176.

<sup>509</sup> This is not to claim that performers are not readers themselves or that readers cannot be performers, but simply that amalgamating the two without careful considerations of the conceptual and historical cuts such position entails seems unwise.

<sup>510</sup> Wandor *The Art of Writing Drama* (n 505) 50; Aston and Savona (n 505) 9, 99-100, 120.

of the role of the performer in this context is very limited and the latter is described as accessory to directors' inputs.<sup>511</sup>

If performers' absence from the postmodernist discourse can find justifications, the fact that the legal scholarship on the romantic authorship repeated this flaw is difficult to legitimise.<sup>512</sup> Unlike literary philosophy, the field of intellectual property law functions with a more limited number of fundamental concepts and stakeholders which includes performances and performers. It is clear from the writing of scholars supporting the author-genius discourse that their understanding of the concept of 'reader' does not encompass performers, and rightly so. The literary notion of 'reader' has been translated as 'user' or 'end-consumer', understood as the consumer of protected works. This definition cannot be equated to the legal understanding of performers as expressed in statutes and case law,<sup>513</sup> by any stretch of the imagination. Interestingly, performing artists are not included either in their plea for contemporary copyright to recognise collective or joint authorship as models truer to aesthetics 'reality'.<sup>514</sup>

Unlike literary theorists, copyright scholars cannot find justification in disciplines' boundaries to exclude performers from their analysis without facing criticisms of incompleteness.<sup>515</sup> This is because copyright law protects more than just literary

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<sup>511</sup> Barthes *Essais Critiques* (n 503) 56.

<sup>512</sup> The author-genius discourse never applied the consequences of their theory explaining the copyright framework to the legal condition of performers. Some authors did come close to considering performances or performative practices, but never addressed the topic. See for instance, Dotan Oliar and Christopher Sprigman, 'Intellectual Property in Stand-Up Comedy' in Mario Biagioli, Peter Jaszi and Martha Woodmansee (eds), *Making and Unmaking Intellectual Property* (University of Chicago Press 2011). The authors focus on the 'authorial' elements of stand-up comedy but not the performative aspect of it, or the input of artists as performers but as writers.

<sup>513</sup> Text to note 29 in Chapter 1.

<sup>514</sup> Woodmansee *On the Author Effect* (n 428); Jaszi *On the Author Effect* (n 429); Jaszi *Postmodern Copyright* (n 367).

<sup>515</sup> Or at least not without acknowledging that this is a deliberate and justifiable decision.

works and written texts.<sup>516</sup> Copyright laws encompass in its scope dramatic, musical and choreographic works, all of which rely on performers to travel from the author's mind to the audience, if one is inclined to couch artistic creation in those terms. Omitting such an essential link in the communication chain of the work is hard to justify. Their absence becomes even more bearing on this narrative when one considers that copyright laws were purposefully designed to foster the dissemination of creative works. How can such agenda be achieved if the key players in the dissemination of dramatic, musical and choreographic works are left out of the equation? Conversely, how can discourses critical of the copyright framework leave performers out of their analysis?

The origin of the doctrine of moral right is perhaps the *coup de grace* to the author-genius critique on this point. Indeed, moral rights epitomises everything the legal discourse criticises as being an ill-suited reflection of a romanticised authorship in the law.<sup>517</sup> Often will the birth place of this doctrine be located in France. Little do those writers – seem to – know that the French doctrine was enacted in reaction to performers' habits to modify texts, scores and choreographies in their interpretations.<sup>518</sup> The very core of what supports the author-genius critique is thus intrinsically linked to performances, and the performative dimension of the protected text. In a way, it could be argued that this side of legal – romantic – authorship was in fact built in reaction to performances, bringing the latter at the core of what constructs the legitimacy of this title.

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<sup>516</sup> Literary works have been eligible to copyright protection since 1709 in England (1709 Statute of Ann, n 334) and 1777 in France (decree of 1777). Performance-based texts such as dramatic works the scope of copyright in 1833 in England with the enactment of the Dramatic Literary Property Act, and in 1780 in France. Composers joined the group of copyright owners in 1786 in France, 1882 in England and 1831 in the United States. Choreographers received the privilege of copyright protection much later with the introduction of the 1911 Copyright Act in England, but had to wait until 1976 in the United States to be granted the same right. See, Bently and Kretschmer (n 392).

<sup>517</sup> Saunders (n 420) 75-105; Bently *Copyright and the Death of the Author* (n 436), 982.

<sup>518</sup> Olganier (n 182) 47.

For those reasons, the indulgence extended to Foucault and Barthes can hardly be offered to their proselytes in the legal community. This suggests that the author-genius critique and its translation of the postmodernist model of authorship is yet to reach its full potential as performers have not been included in their interpretation.

Like Barthesian and Foucauldian theories before them,<sup>519</sup> the romantic authorship discourse may be, in effect, furthering the ‘author-worship’ they swore to challenge.<sup>520</sup> Their lack of awareness of other creative protagonists evolving around and outside the bipolar relationship linking copyright holders to users confirms the centrality of the author within their logic. Their efforts to deconstruct authors’ pedestal created a blind spot on the need for other artists like performers to be reinstated within western intellectual property frameworks as equal to their authorial peers. It is thus not surprising that the author-performer divide was neither critically nor theoretically challenged by those contemporary or postmodernist doctrines. Unfortunately for intellectual property scholars, there was no other neighbour discipline to complete their critique in the way performance theorists furthered Barthes and Foucault’s work.

This is not to say that the critical thinking initiated by the author-genius discourse is not helpful. On the contrary, it offers valuable indicators as to what forms the cultural basis of socio-legal authorship.<sup>521</sup> Working *a contrario* from the image of the author drawn by the romantic authorship narrative enables this analysis to delineate the contours of how performers are perceived from a legal perspective. Discourses on the author-genius revealed that authorship has been associated with intellectual

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<sup>519</sup> Rahmatian (n 140) 167, 169. Michelene Wandor, *The Author Is Not Dead Yet Merely Somewhere Else: Creative Writing Reconceived* (Palgrave MacMillan 2008).

<sup>520</sup> Bently *Copyright and the Death of the Author* (n 468) 986.

<sup>521</sup> Though it could be argued that the law does not necessarily follow those shifts in narratives on authorship consistently. See on this, Bently *Copyright and the Death of the Author* (n 436) 977, 984.

creativity exercised in isolation from the world so as to ease forms of *true ex nihilo* creation.<sup>522</sup> This pattern led legislators and courts to depict an image of performers as the almost exact negative of this representation of authorship: performing artists are not intellectuals and they do not creating from nothing. The subsequent chapters further unfold those arguments and assess the extent to which they were relayed in legal narratives, starting with the doctrine of *ex nihilo* creation.

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<sup>522</sup> Both of those points are further discussed in Chapter 3 and 4.

# Chapter Three

## The doctrine of ex nihilo creation

*There is nothing new except what has been forgotten.*<sup>1</sup>

Marie-Antoinette, 1770-1793

Previous developments briefly retraced the changing understanding of creativity and authorship over time.<sup>2</sup> Creativity was, and still is,<sup>3</sup> associated with the concept of *creare*, creation out of nothing, also referred to as ex nihilo creation. Exclusively divine to begin with, it was opposed to *facere* which was linked to other types of makings involving the repetition of esthetical or technical conventions in the shaping of existing matter. As humanism developed, artists and craftsmen progressively became able of ex nihilo creation and reached the status of authorship. This phenomenon blended the concepts of *creare* and *facere*.<sup>4</sup> However, by the beginning of the eighteenth century, the distinction between *creare* and *facere* re-emerged and came to separate artists from craftsmen. Because craftsmen were regarded as limited by the convention of their craft and bound to reproduce preexisting patterns for the purpose of their practice, they were considered as unable to achieve true creation, i.e creation out of nothing. Authorship was thus associated

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<sup>1</sup> William Walsh, *The International Encyclopedia of Prose and Poetical Quotations from the Literature of the World* (John C Winston Company 1908) 539.

<sup>2</sup> text to note 333, Chapter 2.

<sup>3</sup> Keith Sawyer, *Explaining Creativity The Science of Human Innovation* (2nd edn, Oxford University Press 2012) 406; Keith Sawyer, 'Western Cultural Model of Creativity: Its Influence on Intellectual Property Law, The Symposium: Creativity and the Law' (2011) 86 *Notre Dame L. Rev.* 2027, 2033; Andreas Rahmatian, *Copyright and Creativity: The Making of Property Rights in Creative Works* (Edward Elgar 2011) 185-6.

<sup>4</sup> text to note 347 ; see also, David Nimmer, 'Copyright in the Dead Sea Scrolls: Authorship and Originality' (2001) 38 *Hous. L. Rev.* 1, 10 ; Rahmatian (n 3) 185-6.

with the work of intellectual artists whose contribution went beyond the expression of a particular craft or handiwork.

This dichotomy between artist-authors and craftsmen, based on the distinction between *creare* and *facere*, has been maintained during the subsequent centuries to the extent of reaching the narrative framing intellectual property laws. Although the divide was made more permeable as a result of cultural and technological evolutions, it is argued that the western cultural belief according to which true creation and therefore authorship, can only rise from *ex nihilo* making still informs the functioning of intellectual property laws. This chapter is dedicated to highlighting the various elements of the law which illustrate the influence of the doctrine of *ex nihilo* creation. It is claimed that the doctrine is the first of three theoretical pillars basing the author-performer divide and hindering performers' accession to authorship. For performances are understood as the interpretation on stage of pre-existing authorial works, authors' creativity trumps that of performing artists, relegating the latter to a lesser legal division. Interpretations are thus perceived as a second-hand form of creation.<sup>5</sup> The last paragraphs of this chapter close its analysis by focusing on unfolding the distinction between creation and interpretation which led to oppose authoring to performing. It is submitted that such opposition is the direct by-product of the imprint of the *ex nihilo* creation doctrine over the selected western legal frameworks.

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<sup>5</sup> Robert Homburg, *Le Droit d'Interprétation Des Acteurs et Des Artistes Exécutants* (Recueil Sirey 1930) 83.

## I. Echoes of the ex nihilo creation doctrine in contemporary intellectual property narratives

The doctrine of ex nihilo creation seems to have developed on the basis of two cumulative premises which both affected the narratives forming copyright and performers' rights. The first one opposes authorship to the use of pre-existing material. To be regarded as the sole originator of her making, the author must not copy creative elements already available. The second premise of the doctrine refuses to regard as true creation any product which is the result of technical constraints and not that of the author's free creative decision-making. The "authored" work must be the fruit of the artist's conscious creative choices and not be substantially shaped by the state of the art, its function as a product or any other technical elements. Failing to evidence such creative freedom, the artist's work risks becoming the product of *facere* making, for her work would be conditioned by existing aesthetical or technical conventions. The subsequent paragraphs articulate how those two facets of the exnihilo creation doctrine are indeed present in contemporary intellectual property laws.

### A. Creation from nothing

The author is considered as the 'originator' of the work. The vision of authors as the source of meaning was criticised by Foucault<sup>6</sup> and Barthes<sup>7</sup> who underlined the

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<sup>6</sup> Michel Foucault, 'What Is an Author?' in James Faubion (ed), *Aesthetics, Method, and Epistemology* (Essential, The New Press 1998) 211; see also, text to note 501, Chapter 2.

<sup>7</sup> Roland Barthes, 'From Work to Text' in Josue v Harari (ed), *Textual Strategies: perspectives on post structuralist criticism* (1979); see also, text to note 501, Chapter 2. Barthes' criticism and association between the author-figure to God is challenged by Nimmer for it would be based on a simplistic interpretation of fundamental Christian writings, see Nimmer (n 4) 78.



inherent and necessary intertextuality existing between cultural narratives.<sup>8</sup> Despite the postmodern critique, such depiction of authors did not leave copyright narratives.<sup>9</sup> In law, the author is the father of the work, sole and only individual responsible for its existence. This paradigm faced some complications as the class of protectable works expanded. The author-oriented doctrine somewhat struggled to articulate workable solutions as soon as the influence of pre-existing material made itself more pronounced, such as verbatim works or three dimensional translation of two-dimensional works for example. Those occasions were not taken as opportunities to re-assess and soften the doctrine of ex nihilo creation. On the contrary, convoluted decisions were reached to reaffirm the expression of the theory. Interestingly, the latter was actually strengthened as the award of copyright protection was facilitated.

### **1. Coming from *nothing* but the author**

Two doctrines were developed to assist the enforcement of the originality requirement: the doctrines of origination and of independent creation. Both convey elements of 'creation out of nothing' at the heart of the originality condition, cornerstone of copyright law.

#### *a) Originality as origination, the author as 'originator'*

As explained, the author is understood as the 'originator' of the work by American, Australian and British juridical narratives.<sup>10</sup> In this context, the author's intellect is regarded as the source from which the work comes into being so much so that the

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<sup>8</sup> Legal literature adopted a similar position during the 1930's. See for instance, Paul Olgner, *Le Droit Des Artistes Interprètes et Exécutants* (Librairie Générale de Droit et de Jurisprudence 1937) 21-2.

<sup>9</sup> Lionel Bently, 'Copyright and the Death of the Author in Literature and Law' (1994) 57 *The Modern Law Review* 973, 977, 984.

<sup>10</sup> text to note 408, Chapter 2 ; Nimmer (n 4) 11-3.

artist has been described as the person “to whom anything owes its origin, originator, maker, one who completes a work of science or literature”.<sup>11</sup> The author is seen as the father of the work,<sup>12</sup> an analogy which was criticised by holders of feminist<sup>13</sup> or postmodern<sup>14</sup> perspectives on copyright laws.

The doctrine of origination was developed by the courts to give a practical understanding of the ‘originality’ condition since aesthetic considerations or concepts of novelty were rejected early on in the development of copyright law.<sup>15</sup> Consequently, to be considered original thus worthy of authorship, the work must have originated with the author. This way, the law ensures that the work does not rely on pre-existing (protected) material but only on the author’s thoughts and creative drive. In *Wheaton and Donaldson v Peters and Grigg*,<sup>16</sup> the American

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<sup>11</sup> *Burrow-Giles Lithographic Co v Sarony* 11 U.S. 53 (Supreme Court 1884) 58.

<sup>12</sup> “[the work] must be a composition of the author, something which has grown up in his mind” in *Desktop Marketing Systems Pty Ltd v Telstra Corporation Ltd* [2002] FCA 0112, (2002) 55 IPR 1, 20 para 46, citing *Walter v Lane* [1900] AC 539.

<sup>13</sup> See for example: Shelley Wright, ‘A Feminist Exploration of the Legal Protection of Art’ (1994) 7 Canadian Journal of Women and the Law/Revue Femmes et Droit 59, 78-80.

<sup>14</sup> Barthes (n 7) 78; Elton Fukumoto, ‘The Author Effect After the “Death of the Author”: Copyright in a Postmodern Age’ (1997) 72 Washington Law Review 903, 914.

<sup>15</sup> The originality requirement does not demand that the author add “novelty” to the work. It only requires that the plans “display something irreducible, which is one man's alone, not that the work be novel in comparison with the works of others.” In *Eales v Environmental Lifestyles Inc*, 958 F 2d 876 (9th Cir 1992) 880, quoting, inter alia, *Bleistein v Donaldson Lithographing Co*, 188 US 239, 250, 23 S Ct 298, 300, 47 L.Ed. 460 (1903)).

The same position was held in all the other jurisdictions. See, Australia: *IceTV Pty Ltd v Nine Network Australia Pty Ltd* [2009] HCA 14, para 33; France: Cass, 1ère civ, 11 février 1997, n° 95-13.176: Bull. 1997 I N° 55 p. 35 (the Supreme Court quashed the court of appeal decision which required of a button to be ‘novel’ to be protected by copyright), Cass, 1ère civ, 7 novembre 2006, n° 05-16.843: Bull. 2006, I, n° 464, p. 400 (arrangements and editing of a book need not to be novel or unprecedented to be protected by authors’ rights); UK: *Ladbroke (Football) v William Hill (Football) Ltd* [1964] 1 All ER 465, 469. Yet it seems as though the French jurisdiction did, at times, add an element of ‘novelty’ to its understanding of the originality condition. See for instance, Cass, 1ère civ, 16 avril 1991, n° 89-21.071: Bull. 1991 I N° 139 p. 92; D 1992, somm. 13, obs Colombet (in this decision the French Supreme Court confirms the court of appeal decision which assessed the ‘creative spirit’, ‘inventiveness’ and ‘novelty’ of a computer programme to consider its protection by authors’ rights). See also, Cass, 1ère civ, 13 novembre 2008, n° 06-16.278, « Etre et avoir » : JCP 2009, N 25, 30 §3 obs. Caron (teaching exercises or methods lacking novelty are ineligible to authors’ rights.) or Cass, 1ère civ, 2 mars 1999, n° 97-10.179 : inédit au bulletin, Legifrance available at : <<http://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007400026>> (synopsis of television programmes lacking imaginativeness lack novelty and therefore fail the originality condition).

The concept of aesthetic quality was also rejected. See, Australia: *Desktop Marketing Systems Pty Ltd v Telstra Corporation Ltd* [2002] FCA 0112, (2002) 55 IPR 1, 3; France: Cass, 1ère civ, 11 février 1997, n° 95-13.176: Bull. 1997 I N° 55 p. 35 (see above); UK: *Walter v Lane* [1900] AC 539, 552; US: *Bleistein v Donaldson Lithographing Co*, 188 US 239 (Supreme Court 1903) 251.

<sup>16</sup> *Wheaton and Donaldson v Peters and Grigg*, 33 US 591 (Supreme Court 1834).

Supreme Court described the author as “a man [who has produced an original work] by the exertion of his rational power”.<sup>17</sup>

*b) Originality as independent creation*

This theoretical understanding of the author figure is also enabled by the ideal that the work was produced by way of independent creation. To be regarded as authors, artists must evidence that their work was the result of their independent creation to pass the originality test. In *Walter v Lane*,<sup>18</sup> contentions based on principles of both *ex nihilo* and independent creations transpired in the argument proposed by the parties who held that “[c]opyright has never been allowed in cases where no independent labour has existed”<sup>19</sup> because “[p]roduction not reproduction is what is meant to be protected” in order to encourage creativity and learning.<sup>20</sup> More recently, British judges appear to have followed a similar reasoning influenced by the bias of *ex nihilo* creation in *Beckingham v Hodgens*.<sup>21</sup> In the case, the Court enquired about the origin of parts of the work in order to assess their eligibility to copyright separately.<sup>22</sup> Commenting on violin compositions, the Bench asked:

The critical question is this: where did the violin part come from? Was it as Mr Valentino suggests arrived at by reversing the country lick, drawing sub-consciously on Mr Mike? Or did Mr Hodgens play it to him, having composed it himself independently earlier?<sup>23</sup>

This passage suggests that to be regarded as the author of this particular violin passage, the musician must have composed the piece independently from his

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<sup>17</sup> *Wheaton and Donaldson v Peters and Grigg*, 33 US 591 (Supreme Court 1834) 670.

<sup>18</sup> *Walter v Lane* [1900] AC 539.

<sup>19</sup> *ibid*, 543 (counsels’ comments).

<sup>20</sup> *ibid*, 543.

<sup>21</sup> *Beckingham v Hodgens* [2002] All ER (D).

<sup>22</sup> *ibid*, para 37.

<sup>23</sup> *ibid*.

collaborator's influence, ideas or suggestions.<sup>24</sup> The doctrine of independent creation as evidence of authorship was dominantly developed in the British system as a defence against infringement proceedings rather than as a tool of establishment of right.<sup>25</sup> This angle is further discussed in subsequent paragraphs.<sup>26</sup>

The American judicial narrative employed references to 'independent creation' both for the purpose of establishing copyright and as a defence in infringement proceedings.<sup>27</sup> In *Baltimore Orioles Inc v Major League Baseball Players Association*,<sup>28</sup> the Court explicitly defined the concept of 'originality' as being synonymous to independent creation, when the circuit judges asserted that:

It is important to distinguish among three separate concepts—originality, creativity, and novelty. A work is original if it is the independent creation of its author. Although the requirements of independent creation and intellectual labor both flow from the constitutional prerequisite of authorship and the statutory reference to original works of authorship, courts often engender confusion by referring to both concepts by the term "originality".<sup>29</sup>

A variety of decisions confirm this understanding of originality as being the result of independent creation.<sup>30</sup> The American Supreme Court reinforced this ex nihilo-oriented approach to originality in *Feist Publications Inc v Rural Telephone Service Co*<sup>31</sup> where it held that:

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<sup>24</sup> In this case the court concluded that the violinist was the author of his part as rejecting the evidence brought by the opposing party. *Beckingham v Hodgens* [2002] All ER (D) para 37 to 40.

<sup>25</sup> See for instance, *Temple Island Collections Ltd v New English Teas Ltd* [2012] EWPC 1 para 36. See also, *Taylor v Maguire* [2013] EWHC 3804 (IPEC) para 20.

<sup>26</sup> text to note 169.

<sup>27</sup> See for example, *Three Boys Music Corp v Bolton*, 212 F 3d 477 (9th Cir 2000) 486.

<sup>28</sup> 805 F2d 663(7th Cir 1986); for an earlier decision criticised by the defendant for adopting such position on originality, *Burrow-Giles Lithographic Co v Sarony* 11 US 53 (Supreme Court 1884) 346.

<sup>29</sup> *Baltimore Orioles Inc. v Major League Baseball Players Association*, 805 F 2d 663(7th Cir 1986) 668.

<sup>30</sup> To only cite a few, *Eales v Environmental Lifestyles Inc*, 958 F2d 876 (9th Cir 1992) 880; *Apple Computer, Inc v Microsoft Corp*, 24 IPR 225 (9th Cir 1994) 225; *Three Boys Music Corp v Bolton*, 212 F 3d 477 (9th Cir 2000) 486 (in defence).

<sup>31</sup> *Feist Publications Inc v Rural Telephone Service Co Inc*, 499 US 340 (Supreme Court 1991).

Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity.<sup>32</sup>

In Australia, Finkelstein J held in the 2001 *Telstra* decision<sup>33</sup> that although “[t]here is debate as to the meaning of "originality" in copyright law”,<sup>34</sup> “[e]veryone agrees that for a work to be "original" it must be independently created by the author”.<sup>35</sup>

In light of the above cited decisions, the judicial narrative seems to have fully endorsed a conception of originality, and seemingly creativity, informed by the doctrine of ex nihilo creation. Courts do appear to convey the belief according to which creativity occurs the vacuum formed by the author’s intellect and the exertion of her “rational powers”.<sup>36</sup>

c) *Who is the father author?*

As communication, artistic and technical practices developed, the theories of origination and independent creation became difficult to sustain. Instead of softening its interpretation of the doctrine, the legal narrative produced convoluted reasonings to confirm its legitimacy.

This was notably the case in the context of adaptations from two-dimensional representations to three-dimensional productions of the same object. The question was whether the making in a different medium of an existing two-dimensional work should be considered as created from nothing, and be separately eligible to copyright protection. In each jurisdiction, the courts have regarded the three-dimensional execution of a two-dimensional work as an extension of the former and

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<sup>32</sup> *Feist Publications Inc v Rural Telephone Service Co Inc*, 499 US 340 (Supreme Court 1991), 345-6; references omitted.

<sup>33</sup> *Telstra Corporation Ltd v Desktop Marketing Systems Pty Ltd* (2001) 181 ALR 134.

<sup>34</sup> *ibid*, 137 para 8.

<sup>35</sup> *ibid*.

<sup>36</sup> *Wheaton and Donaldson v Peters and Grigg*, 33 US 591 (Supreme Court 1834) 670.

not an independent ex nihilo creation in its own right.<sup>37</sup> Judges confirmed that ‘[t]here can be no doubt now that copyright in a work in two dimensions may be infringed by the production and sale of an article in three dimensions’.<sup>38</sup>

In *Nero v Monroe*,<sup>39</sup> the seventh circuit judge compared the work of the artist converting a two-dimensional work into a three-dimensional object to that of the “typesetter”<sup>40</sup> of a book. In this case, the plaintiff, a sculptor, had asked a glass blower to create pieces the former had designed on paper for them to be later integrated into his work. The defendants submitted that this made the glass-blower the joint-author of Neri’s sculpture. The Court categorically rejected this argument by undermining the input of the glass-blower. In its conclusion, the latter opposes “true” authorship to what was “only a change of form [...] from drawings to glass”.<sup>41</sup> The judge proceeded to state that one “might as well say that the typesetter owns a book’s copyright”<sup>42</sup> if the conversion of a work from a two-dimensional to three-dimensional medium is to be worthy of authorship. Although there is no explicit reference to the doctrine of ex nihilo creation, its influence clearly underlies the reasoning of this decision. The principle is fairly straightforward: artists cannot be

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<sup>37</sup> See for example, Australia: *Cuisenaire v Reed* [1963] VR 719; *S W Hart & Co Pty Ltd v Edwards Hot Water Systems* [1985] HCA (unreported BC8501068); *CBS Records Australia Ltd v Guy Gross* (1989) 15 IPR 385; France: Paris, 1ère ch., 11 mai 1965, *Dali c/ Théâtre royal de la monnaie de Bruxelles et a.* : D. 1968, 382 (the legal author of sketches also owns the costumes designed on their basis); UK: *Interlego A.G v Tyco Industries Inc & Ors* (Hong Kong) [1988] UKPC 3; US: *Neri v Monroe*, 726 F 3d 989 (7th Cir 2013), 2013 Corp L Dec P 30,471 (7th Cir 2013), 107 U.S.P.Q.2d 1799 (7th Cir 2013); *Pickett v Prince*, 207 F3 d 402 (7th Cir 2000), 2000 Corp L Dec P 28,044 (7th Cir 2000), 54 USPQ 2d 1081 (7th Cir 2000); *Entertainment Research v Genesis Creative Group*, 122 F 3d 1211 (9th Cir 1997).

In the US, the judges distinguish between the test for copyright infringement in the context of derivative works and the test applicable in the context of 2D to 3d adaptation. See for example, *Entertainment Research v Genesis Creative Group*, 122 F 3d 1211 (9th Cir 1997) 1219.

<sup>38</sup> *Cuisenaire v Reed* [1963] VR 719,733.

<sup>39</sup> *Neri v Monroe*, 726 F 3d 989 (7th Cir 2013), 2013 Copr L Dec P 30, 471 (7th Cir 2013), 107 USPQ 2d 1799 (7th Cir 2013)

<sup>40</sup> *Neri v Monroe*, 726 F 3d 989,992

<sup>41</sup> *ibid.*

<sup>42</sup> *ibid.*

regarded as “true author[s]”<sup>43</sup> if they limit their input to the conversion, translation or adaptation of somebody else’s pre-existing work.

Exceptions to this principle mitigate this strict, yet implicit, application of the ex nihilo creation doctrine. The courts accepted that if there is no visible similarity to be noted between the two works, the second would not be regarded as infringing its predecessor and could itself claim copyright protection. So held the Supreme Court of Victoria in *Cuisenaire v Reed*<sup>44</sup> where tables conveying dimensions were used to produce three-dimensional objects. The Court affirmed that:

Though literary copyright subsisted in [...] in the tables or compilations, there would be no infringement unless what was produced was in itself in the nature of tables or compilations, whether in two or three dimensions, [...] and since on the facts there was no physical resemblance between the rods produced by the defendants and the tables or compilations produced by the plaintiff, there had been no infringement of the plaintiff’s copyright in the tables or compilations.<sup>45</sup>

This exception was later narrowed down by subsequent decisions which stressed the fact that the resemblance must be visible to the layman and not the expert.<sup>46</sup> An ordinary reasonable observer must be able to see the similarity between the two-dimensional and three-dimensional works for it to be considered an infringing copy. As a result, three-dimensional constructions of complex plans or drawings are likely to be regarded as ex nihilo creations in the eyes of the Court whenever the genealogy between the two works is obscured by overly technical graphic representations.<sup>47</sup> This solution was supported by the Gregory Report<sup>48</sup> in which it

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<sup>43</sup> *Neri v Monroe*, 726 F 3d 989 (7th Cir 2013) 992.

<sup>44</sup> *Cuisenaire v Reed* [1963] VR 719.

<sup>45</sup> *ibid.*

<sup>46</sup> *S W Hart & Co Pty Ltd v Edwards Hot Water Systems* [1985] HCA para 13.

<sup>47</sup> See for example, *S W Hart & Co Pty Ltd v Edwards Hot Water Systems* [1985] HCA (unreported BC8501068) stating that: “In form, the [...] test is a negative one: the object would *not* appear to non-experts to be a reproduction of the artistic work.”

<sup>48</sup> Henri Gregory, ‘Report of the Copyright Committee’ (1952), later referred to as the ‘Gregory Report’.

was recommended that the appropriate test of originality would have “an ordinary man” assess “whether [a] building or other reproduction can be recognised in another material or on a different scale to what has been drawn”.<sup>49</sup>

In *Interlego A G v Tyco Industries Inc*,<sup>50</sup> LJ Oliver slightly reversed the principle without, however, repealing the rule. He asserted that “there is no more reason for denying originality to the depiction of a three dimensional prototype than there is for denying originality to the depiction in two dimensional form of any other physical object”.<sup>51</sup> Yet, the rule of law supported by the Gregory Report still prevails as the British judge then specified that:

[i]t by no means follows, however, that that which is an exact and literal reproduction in two dimensional form of an existing two dimensional work becomes an original work simply because the process of copying it involves the application of skill and labour. There must in addition be some element of material alteration or embellishment which suffices to make the totality of the work an original work.<sup>52</sup>

Much like what American copyright law protects is “production and not reproduction”,<sup>53</sup> the British Court held in the same decision that “copying, per se, however much skill or labour may be devoted to the process, cannot make an original work. A well-executed tracing is the result of much labour and skill but remains what it is, a tracing”.<sup>54</sup> Lacking the quality of ex nihilo creation, the tracing, copying or reproduction in a different medium of a pre-existing work falls short of originality and therefore of legal authorship.

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<sup>49</sup> Gregory Report (n 48), Cmd 8662, para 258, p. 94-5.

<sup>50</sup> *Interlego A G v Tyco Industries Inc & Ors* (Hong Kong) [1989] AC 217.

<sup>51</sup> *ibid*, 263.

<sup>52</sup> *ibid*.

<sup>53</sup> *Walter v Lane* [1900] AC 539, 543.

<sup>54</sup> *Interlego A.G v Tyco Industries Inc & Ors* (Hong Kong) [1989] AC 217 AC at 263). This position was upheld in subsequent decisions, see for example, in Australia: *CBS Records Australia Ltd v Guy Gross* (1989) 15 IPR 385, 392-3; in the UK: *Cala homes v McAlpine* 1996 [1995] FSR 818, 828-9.



## B. Enabling the origination paradigm

Various aspects of the intellectual property framework foster the grasp of the ex nihilo creation doctrine over the legal narrative. One of them lies in the fact that authorship is cheap, i.e the conditions to obtain copyright are low. The theory of ex nihilo creation will be all the stronger that the conditions to obtain copyright protection are made easier. Indeed, the lower the threshold of authorship is set in the first place, the more likely original creations will receive protection and make subsequent works unoriginal.

This was notably the case in the French *Borodine* decision,<sup>55</sup> discussed in previous developments.<sup>56</sup> Two composers, Rimsky-Korsakov and Glazunov, had completed Borodine's opera 'Prince Igor' after the latter's death. No musical scores were available to them, so much so the two musicians re-created the opera from what they could remember of Borodine's compositions when they were played to them during informal private gatherings. This creative process was captured by Rimsky-Korsakov in his diary. Relying on such evidence, the French Supreme Court ruled that the completed opera was a collective work embedding Borodine's musical creations, even though the latter had only been fixed in the mind and memory of few spectators. 'Prince Igor' was neither regarded as an independent work inspired by Borodine's earlier unfinished compositions, nor was it considered to be a joint-work whereby all musicians' contributions would have merged. In the eyes of the civil judges, Borodine's work pre-existed the completed opera so much so that any subsequent work re-used elements of the late composer derived from his authorship and no other. His composition was the true ex nihilo creation, any musical work after

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<sup>55</sup> Cass, 1<sup>ère</sup> civ, 14 novembre 1973, « affaire du Prince Igor et opéra de Borodine » n° 71-14.709 : Bull civ. I, p.390, RIDA avril 1974, p.66.

<sup>56</sup> text to note 150, Chapter 1.

that would copy or add their imprint to its pre-existing, copyrighted substance. This theoretical representation of authorship has the practical effect of binding future composers to Borodine's will and wishes or that of his heirs.

This rather strict enforcement of the doctrine of *ex nihilo* creation is facilitated, if not supported, by the fact that French Intellectual Property Code does not require creative works to be fixed to be protected, at least in theory.<sup>57</sup> As a result, any work which satisfies the originality condition and its *ex nihilo* premise, will be protected the second it is expressed and thereby make liable for infringement any future uses of those unfixed works.

Would the *Borodine* case have received the same outcome in a common-law jurisdiction where copyright law requires the work to be fixed to be protected? In theory, this hypothesis cannot and should not be ruled out. As explained in previous developments, American, Australian and British copyright laws confer authors with a protection which applies retrospectively from the moment of fixation.<sup>58</sup> Indeed, so long that fixation intervenes at some point during the life of the work, copyright protection will apply retrospectively to protect the work from the day of its creation. The existence of the protected work is effectively acknowledged as being the day of its creation even though the latter is not fixed yet.<sup>59</sup> The moment of fixation marks the beginning of the legal protection of the work but not of its legal existence.<sup>60</sup> As a result, even if it was only stored in the memory of its spectators until the completion

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<sup>57</sup> text to note 114, Chapter 1. Although the French IPC imposes no condition of fixation, any claims of a sum superior to 1,500 euros would does require evidence in writing as per civil procedural rules, to which copyright is to no exception. See, French Civil Code, Art L 1341. The amount was fixed by the decret of August 20, 2004 (Décret No 2004-836 du 20 août 2004).

<sup>58</sup> text to note 140, Chapter 1.

<sup>59</sup> *ibid.*

<sup>60</sup> *ibid.*

of the opera by Rimsky-Korsakov and Glazunov, Borodine's estate could have claimed his legal authorship beyond the French borders.<sup>61</sup>

### **C. Creation fettered by *nothing***

True *ex nihilo* creation would also require artists to work free from technical constraints. If the shapes of the work were to be the result of mechanical conventions or technical functions, the author would not be regarded as having created it out of nothing. The condition of originality in contemporary intellectual property narratives bears marks of this conception of creativity, as they too, exclude technical and mechanical features from the scope of original material worthy of authors' rights.

#### **1. Refusing protection to shapes driven by technical constraints**

The hand of the artist can be forced by two ranges of technical issues. The first one conditions the work because of its function or destination, whilst the second is shaped by the choice of material or technique employed to create the work. Either way, the creative product risks failing the originality test because its author's creativity has not truly occurred *ex nihilo* but was pre-empted by material or technical considerations.

##### *a) Technical functions*

As the function of the work precedes and dictates its creation, any making which would heavily draw on such function without adding other features would fall short of displaying the necessary degree of creativity to obtain authorship. The function of the

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<sup>61</sup> The use by Rimsky-Korsakov and Glazunov of Borodine's work had been reported in the Korsakov's diary. This evidence was judged as enough proof of Borodine's *ex nihilo* creation, basing his authorship. See text to note 150, Chapter 1.

work would hinder its accessibility to authorship in the same way pre-existing material would, according to the first tier of *ex nihilo* doctrine.<sup>62</sup>

The Court of Justice (CoJ) was very clear when it excluded technical functions of creative works as contributing to their originality. In *BSA*<sup>63</sup> the European judges held that whenever the expression of works eligible to authors' rights "is dictated by their technical function, the criterion of originality is not met, since the different methods of implementing an idea are so limited that the idea and the expression become unseparable".<sup>64</sup> The dominant presence of the function in the expression of the work prevents the manifestations of the "author's own intellectual creation"<sup>65</sup> which are evidenced by the exercise of "free creative choices".<sup>66</sup> The decision confirmed principles pertinent to the idea/expression dichotomy already present in the domestic narrative of member states.<sup>67</sup>

Similarly, American courts grant limited protection to works which are considered as "largely functional" and none at all to features which are entirely governed by the product's functionality. In *Sega Enterprise Ltd v Accolade*,<sup>68</sup> the court of appeal of the ninth circuit unequivocally held that "while the work may not be largely functional, it incorporates functional elements which do not merit protection. This result is neither unfair nor unfortunate. It is the means by which copyright advances the

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<sup>62</sup> text to note 6.

<sup>63</sup> C-393/09 *Bezpečnostni softwarova asociace Svaz softwarové ochrany v Ministerstvo kultury* [2010] EUECJ.

<sup>64</sup> *ibid*, para 49. This position was reiterated by the Court of Justice shortly after in C-604/10 *Football Dataco and Others v Yahoo! UK Ltd* [2012] WL R(D) 57, para 19 and 39.

<sup>65</sup> C-393/09 *Bezpečnostni softwarova asociace Svaz softwarové ochrany v Ministerstvo kultury* [2010] EUECJ, para 51.

<sup>66</sup> C-145/10 *Eva-Maria Painer v Standard VerlagsGmbH* [2011] EUECJ C-145/10, para 89 citing Joined cases C-403/08 and C-429/08 *Football Association Premier League & Ors v QC Leisure, and Karen Murphy v Media Protection Services Ltd* [2011] EUECJ C-403/08\_O, para 98.

<sup>67</sup> See for example in France: Cass com, 23 juin 1987: Bull civ IV p 156; JCP G 1987, IV, 304 ; Paris, 4eme ch., 19 novembre 2008, Gastronomie Distribution: PIBD 2009,889, III, 801; in the UK: *Nova Productions Ltd v Mazooma Games Ltd* [2007] EWCA Civ 219, para 38 and 41. See for a similar decision on the uncopyrightability of the functions of a video games in the US, *Incredible Technologies Inc v Virtual Technologies Golf*, 400 F3d 1007 (7th Cir 2005).

<sup>68</sup> *Sega Enterprises Ltd. v Accolade Inc*, 977 F 2d 1510 (9th Cir 1992) citing *Feist Publications Inc v Rural Telephone Service Co Inc*, 499 US 340 (Supreme Court 1991) 350.

progress of science and art". The refusal to protect functional features is not limited to computer programs or such like works. The same doctrine was applied to other artistic works such as costumes,<sup>69</sup> musical instruments,<sup>70</sup> architectural works,<sup>71</sup> taxonomical codes,<sup>72</sup> lamps,<sup>73</sup> or cooking recipes<sup>74</sup> to only name a few.

*Altera Corp v Clear Logic Inc*<sup>75</sup> exemplifies the subjectivity in assessing what pertains to the function of the work and what does not. In the decision, the Court was unable to rely on expert evidence as the witnesses "differed with each and occasionally with themselves"<sup>76</sup> when examining the issue with regard to a design. This demonstrates that although the principle makes consensus across jurisdictions, its enforcement in practice does not necessarily follow the same course.

#### *b) Material constraints*

Functional elements are not the only aspects artists must stay clear of when creating with in mind the ambition to obtain legal authorship. Constraints stemming from the material they use for the making of their work may also prejudice their eligibility to copyright protection. Whenever the shapes of the work are regarded as being moulded by the natural features of the matter it is composed of, candidates to authorship too will fall short in expressing the required amount of originality.

In France, a television show director involving game playing was denied authorship over his programs because his input was entirely dictated by the nature, structure

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<sup>69</sup> *Entertainment Research v Genesis Creative Group*, 122 F 3d 1211 (9th Cir 1997) 1221.

<sup>70</sup> *Pickett v Prince*, 207 F 3d 402 (7th Cir 2000) 405.

<sup>71</sup> *Eales v Environmental Lifestyles Inc*, 958 F 2d 876 (9th Cir 1992) 879.

<sup>72</sup> *American Dental Assn v Delta Dental Plans Assn*, 126 F 3d 977 (7th Cir 1997).

<sup>73</sup> *ibid*, 980.

<sup>74</sup> *Publications Intern Ltd v Meredith Corp*, 88 F3d 473 (7th Cir 1996) 480.

<sup>75</sup> *Altera Corp v Clear Logic Inc*, 424 F 3d 1079 (9th Cir 2005).

<sup>76</sup> *ibid*, 1092-3, brackets omitted.

and rules of the game so much so that his work was the mere translation of those conditions. The Paris Tribunal held that:

In the present case, concerning the record of television games, the ‘director’ is limited in his interventions as the later are constrained by the format and the rules of the above mentioned games.<sup>77</sup>

In Australia, the writing of patient records was not considered the fruit of independent (i.e. ex nihilo) intellectual effort because the originality of such records derived from the medical knowledge employed by the practitioner rather than targeting its original expression. The communication of the information was the bare result of the writer’s knowledge rather the expression of his creative thoughts.<sup>78</sup> The writer’s expression was here shaped by his diagnosis, to which he concluded on the basis of this medical knowledge itself ineligible to copyright.<sup>79</sup>

In the US, gardeners or landscape designers cannot be regarded as authors either because they cannot control the colours, shape and smell of their work (when the latter is not represented on paper via drawings or plans).<sup>80</sup> Seeds, flowers, trees and other vegetation are not “authored” by garden artists but found by them; “they originate in nature, and natural forces, not the intellect of the gardener”.<sup>81</sup>

Similarly, the seventh circuit court of appeal property regarded title property commitments as not original enough to amount to authorship.<sup>82</sup> The judges considered the expression employed in the legal forms to be a “mechanical language” which did not stem from the writer and thereby failed the originality

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<sup>77</sup> TGI Paris, 11 juillet 2007, n° 05/08920. Author’s translation, see Appendix 1 for original translation.

<sup>78</sup> *Primary Health Care Ltd v Commissioner of Taxation* [2010] FCA 419 (2010) 267 ALR 648, 659 para 38.

<sup>79</sup> *ibid.*

<sup>80</sup> *Kelley v Chicago Park Dist.*, 635 F 3d 290 (7th Cir 2011) 304-5

<sup>81</sup> *ibid.* Their arrangement of them will also fail copyright protection unless they manage to meet the fixation requirement.

A similar comment was made by a British Court a year later in *Temple Island Collections Ltd v New English Teas Ltd & Anor* [2012] EWPC, para 20.

<sup>82</sup> *Mid America Title Co v Kirk*, 991 F 2d417 (7th Cir 1993) 420.

condition.<sup>83</sup> The Court emphasised the fact that the composition of such titles is “too mechanical or routine as to require no creativity whatsoever”.<sup>84</sup>

c) *Rejecting the protection of trivial derivations*

Building on the same reasoning, the courts also came to deny authorship to trivial variations composing alleged derivative works. Variations added to a pre-existing work too small to evidence the original input of the author in her (derivative) work will fail to conjure authorship. The bulk of this litigation concerned modifications triggered by the change of format or of material used in the re-creation of the work. No matter the aspect of the underlying work the edits amend, such modifications will not suffice to bend the rules of the ex nihilo creation doctrine.

Changes in colours and other small modifications of a graphic work were placed in this category. In *Sands and Mcdougall Pty Ltd v Robinson*,<sup>85</sup> the Australian judge Isaac J affirmed that:

It is true that the appellants changed the colours of the political divisions, corrected the Balkan boundaries, introduced some places that had then acquired recent prominence, and cut out some places that were interfered with by some further features of arrangement of their own map. Their map was not a mere copy in the ordinary sense of the term, but it was clearly a reproduction of a substantial part of the respondent's map in a material form, which necessarily violated the respondent's copyright if his work be protected by the Act.<sup>86</sup>

In *Interlego AG v Tyco Industries Inc*,<sup>87</sup> LJ Oliver held that changing the size of a work by way of enlargement would not qualify for authorship as a derivative work despite the skills and efforts which may go into the process.<sup>88</sup>

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<sup>83</sup> *Mid America Title Co v Kirk*, 991 F 2d417 (7th Cir 1993) 420, 419.

<sup>84</sup> *ibid*, 420, citation omitted.

<sup>85</sup> *Sands And Mcdougall Pty Ltd v Robinson* [1917] HCA (unreported BC1700041).

<sup>86</sup> *ibid*, para 3.

<sup>87</sup> *Interlego A.G v Tyco Industries Inc* (Hong Kong) [1988] UKPC 3.

<sup>88</sup> *Interlego A.G v Tyco Industries Inc* (Hong Kong) [1988] UKPC 3: It takes great skill, judgment and labour to produce a good copy by painting or to produce an enlarged photograph from a positive print, but no one would

Differences in dimensions and texture are too insufficient to obtain an independent copyright. In *Entertainment Research v Genesis Creative Group*,<sup>89</sup> the Court emphasised that such variations are all the less likely to be considered as original inputs when they are driven by functional requirements.<sup>90</sup>

In *Lee v ART Co*,<sup>91</sup> the judges refused to qualify as derivative work the re-production of painted cards on tiles. The change of medium onto which the work was displayed did not make of its re-use a creative work worthy of copyright protection as derivative work. The seventh circuit declared that:

Yet the copyrighted note cards and lithographs were not “transformed” in the slightest. The art was bonded to a slab of ceramic, but it was not changed in the process. It still depicts exactly what it depicted when it left [the author]’s studio.<sup>92</sup>

The same was held in *Pickett v Prince*<sup>93</sup> where a design on paper had been reproduced in the shape of a guitar. The presence of strings, frets and other elements of the instrument could not amount to authorship as they were dictated by the necessity for the guitar to “sound right right” and no other creative decision making.<sup>94</sup> As in *Entertainment Research v Genesis Creative Group*, this case blends together the issue of function and underlying material. Indeed, both aspects can be considered as having shaped the derivative work.

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reasonably contend that the copy painting or enlargement was an "original" artistic work in which the copier is entitled to claim copyright (para 74).

<sup>89</sup> *Entertainment Research v Genesis Creative Group*, 122 F 3d 1211 (9th Cir 1997).

<sup>90</sup> *ibid*, 1223.

<sup>91</sup> *Lee v ART Co*, 125 F 3d 580 (7th Cir 1997).

<sup>92</sup> *ibid*, 582.

<sup>93</sup> *Pickett v Prince*, 207 F 3d 402 (7th Cir 2000).

<sup>94</sup> *ibid*, 404.



Changing the speed of a recorded musical work does not lead to the creation of a derivative work. The copyright in the pre-existing piece will still cover the accelerated version.<sup>95</sup>

In *Gracen v Bradford Exchange*,<sup>96</sup> the Court held that the painted portrait made on the basis of a photograph did not display enough original differences to qualify for a separate copyright title as derivative work. Drawing parallels with previous cases, the Court confirmed the decision reached in first instance:

We agree with the district court that under the test of *Batlin* Miss Gracen's painting, whatever its artistic merit, is not an original derivative work within the meaning of the Copyright Act. Admittedly this is a harder case than *Durham Industries, Inc. v Tomy Corp.*, *supra*, heavily relied on by the defendants. The underlying works in that case were Mickey Mouse and other Walt Disney cartoon characters, and the derivative works were plastic reproductions of them. Since the cartoon characters are extremely simple drawings, the reproductions were exact, differing only in the medium. The plastic Mickey and its cartoon original look more alike than Judy Garland's Dorothy and Miss Gracen's painting. But we do not think the difference is enough to allow her to copyright her painting even if, as we very much doubt, she was authorized by Bradford to do so.<sup>97</sup>

In this case, it seems as though the painting was held to higher standard of originality<sup>98</sup> because the circumstances of its creation process stressed its lack of ex nihilo creation. Two renderings of the same scene can receive of separate and independent copyright protection. However, two renderings of the same portrait with one being based on the other leads to infringement of the second work over the other. This is so even though their likeness most certainly derives from the common intent to achieve the greatest realism possible. A very similar position was held in the

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<sup>95</sup> *Midway Mfg Co v Artic International Inc*, 704 F 2d1009 (7th Cir 1983) 1014 citing *Shapiro, Bernstein & Co v Jerry Vogel Music Co.*, 73 F Supp 165, 167 (SDNY 1947): "The change in time of the added chorus, and the slight variation in the base of the accompaniment, there being no change in the tune or lyrics, would not be 'new work' ". However, the same case held that a speeded-up version of a video game lead to the birth of a derivative work as it takes creativity in achieving the result.

<sup>96</sup> *Gracen v Bradford Exchange* 698 F 2d 300 (7th Cir 1983).

<sup>97</sup> *ibid*, 305.

<sup>98</sup> Jane Ginsburg, 'The Concept of Authorship in Comparative Copyright Law' (2003) 52 DePaul Law Review 1063, 1082.

British case of *Bauman v Fussell*<sup>99</sup> where a painting reproducing the unusual position of birds photographed during a cock fight was found to infringe the copyright covering the photograph.

## 2. Craftsmanship and/in creation

The ex nihilo creation doctrine contributed to the distinction between authorship and craftsmanship throughout the eighteenth century.<sup>100</sup> Whilst artists were seen as the masters of their art and liberated from conventions and techniques, craftsmen were depicted as constrained by them.

### a) *Savoir faire and originality*

In France, this logic still transpires in the context of perfumes. Fragrances are protectable by authors' rights<sup>101</sup> on the condition that they are not the mere result of 'savoir faire'. The court explicitly opposed originality in the legal sense to savoir faire which boils down to the expression of mere craftsmanship. The French bench held:

But considering that the fragrance of a perfume which expresses the mere execution of savoir faire, does not equate the creation of a form qualifying for legal protection as work of the mind by authors' rights, according to [the intellectual property code]<sup>102</sup>

In this jurisdiction, such notion of craftsmanship or 'savoir faire' is unique to the jurisprudence on fragrant works.<sup>103</sup> This seems to suggest that perfumes might be applied a slightly different threshold of originality, possibly higher than other types of

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<sup>99</sup> *Bauman v Fussell* [1978] RPC 485 (18 May 1953).

<sup>100</sup> text to note 126, Chapter 1.

<sup>101</sup> *ibid*; see on this, Paris, 4ème ch., 14 février 2007, n° 06/09813, *Beaute Prestige...*: JCP G 2007, I, 176 N 4 obs. Caron.

<sup>102</sup> Cass, 1ère civ, 13 juin 2006, n° 02-44.718: Bull. Civ. 2006 I N° 307 p. 267; D. 2006, act. P 1741 note Daleau ; pan. p. 2993 obs. Sirinelli. Author's translation, see Appendix 1 for original text.

<sup>103</sup> According to the case law analysis carried out by the author.

works, unless of course, the same rule for other works went unnoticed. This second interpretation seems somewhat unlikely as the Paris Court of Appeal did underline that the making of other protectable original works involved some level of craftsmanship:

Considering that the fixation of the work is not a requirement of legal protection so long that the work is perceptible; that a fragrance whose olfactory composition is determinable satisfies this condition, no matter whether the composition can be experienced differently by different individuals unlike literary, graphic or musical works which, too, demand the execution of *savoir-faire*".<sup>104</sup>

#### *b) Craft in creativity*

It would be inaccurate to summarise the law as categorically refusing to see originality in craftsmanship. As mentioned in the above civil decisions, various cases have emphasised the craftsmanship producing original creative works requires.

In *Walter v Lane*,<sup>105</sup> the Court clearly emphasised the craft involved in the short-hand writing technique executed by the journalist. The House of Lords contended that:

Now, what is it that a reporter does? Is he a mere scribe? Does he produce original matter or does he produce the something I have mentioned which entitles him to be regarded as an "author" within the Act? I think that from a general point of view a reporter's art represents more than mere transcribing or writing from dictation. To follow so as to take down the words of an ordinary speaker, and certainly of a rapid speaker, is an art requiring considerable training, and does not come within the knowledge of ordinary persons. Even amongst professional reporters many different degrees of skill exist. Some reporters can take down the words of a speaker however rapidly he speaks; others less practised or proficient cannot, as the term is, keep up with the rapid speaker. Apart from the dealing with the rapidity of speech, there are some reporters whose ears and thoughts and hands never fail them, and who therefore produce reports of complete accuracy.<sup>106</sup>

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<sup>104</sup> Paris, 4ème ch., 14 février 2007, n° 06/09813, *Beauté Prestige...* : JCP G 2007, I, 176 N 4 obs. Caron. Author's translation, see Appendix 1 for original translation.

<sup>105</sup> *Walter v Lane* [1900] AC 539.

<sup>106</sup> *ibid*, 554.

Such skill was deemed enough to generate authors' rights over the derivative creation.

More recently, the original input of photographers received the same reward for the the craft they deployed in taking photographs though not particularly creative. In *Antiquesportfolio.com plc v Rodney Fitch & Co*,<sup>107</sup> the Court held that the photographs of antique objects made for the purpose of a catalogue were original enough to be protected by copyright because the artist has displayed "some degree of skill was involved in the lighting, angling and judging the positioning".<sup>108</sup> The same was held in France<sup>109</sup> and later by the CoJ.<sup>110</sup> This type of originality is clearly pertinent to craft rather than intellectual creativity or 'creative spark' as other jurisdictions have referred to.<sup>111</sup>

British judges paid the same credit to the fiddly work involved in the making of popular music in *Bamgboye v Reed*.<sup>112</sup> In this case, the Bench referred to the careful "tweaking" of compositions during recording sessions involving the collaboration of composers and sound engineers.<sup>113</sup> In the context of paper cutting, Carke J recognised the skills involved in the craft of the plaintiff to evidence her originality.<sup>114</sup>

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<sup>107</sup> *Antiquesportfolio.com plc v Rodney Fitch & Co* [2000] Masons CLR 51.

<sup>108</sup> *ibid*, 59 para 35.

<sup>109</sup> Paris, 4eme ch, 26 mars 1992: D. 1993, p. 84 obs. Colombet ; Prop. Intell.Cmmu N. 8 p. 298 (the photograph must be the result of photographic choices involving skills for it to be copyrighted but for the person to be regarded as its author) ; CA Dijon, 7 mai 1996 ; D. 1998, somm. 189, obs. Colombet (taking photographs of paintings and drawings requires skills and originality in the choice of material and lighting).

<sup>110</sup> In the *Painer* decision, the CoJ held that the originality condition can be met so long that the work is the product of the author's own intellectual input understood in the context of photographic portraits as the conscious choices of light, angle and positioning of the subject. All those elements may be considered as the expression of the photograph's craft, yet they actively contribute to building the photographer's authorship of her work from a legal perspective. See, C-145/10 *Eva-Maria Painer v Standard VerlagsGmbH* [2011] EUECJ C-145/10, para 91.

<sup>111</sup> For decisions mentioning the 'creative spark' as a point of reference for creativity, see *Mid America Title Co v Kirk*, 991 F 2d417 (7th Cir 1993) 423; *Mid America Title Co v Kirk*, 59 F 3d 719 (7th Cir 1995) 723; *Kelley v Chicago Park Dist*, 635 F 3d 290 (7th Cir 2011) 303; *Ets-Hokin v Skyy Spirits Inc* , 225 F 3d 1068 (9th Cir 2000) 1077. For more on this point, see text to note 262, Chapter 4.

<sup>112</sup> *Bamgboye v Reed* [2002] EWHC 2922 (QB) [2004] EMLR 5.

<sup>113</sup> *ibid*, para 21-2.

<sup>114</sup> *Taylor v Maguire* [2013] EWHC 3804.

The case finds in the fine “hollowing” and “flicking” of paper the creative signature and copyrightable input of the artist.<sup>115</sup>

Similarly, in France, the making of theatre or film sets was considered a complex craft worthy of copyright protection despite the managerial and technical duties the role involves. In 2009, the Paris Court of Appeal held that:

[The maker of theatre] sets does not just design the decors but also ensure the supervision of their construction and setting. He is responsible for its production on time (the set must be ready for the last rehearsal) and of its budget before the theatre company.

It stems from this point that the theatre set maker is indeed forced to abide by those duties of supervision, and of budget and time management, yet he remains able to imagine, create and bring to life the set of the play in collaboration with the director; for this reason, and depending on circumstances which must be appreciated on a case per case basis, his work bears the mark of his personal sensitivity.<sup>116</sup>

The representation by legal narratives of the authorial figure as distant from craft, handicraft or laborious processes is one of the many facets for which this ‘author-genius’ paradigm was criticised by the scholarship.<sup>117</sup>

Many aspects of intellectual property law contribute to embracing the view that creativity occurs *ex nihilo*, and that only such types of creations are worthy authorship. Yet this endorsement of the *ex nihilo* creation doctrine is not linear. On various accounts, the law has limited its grasp over authors’ and performers’ rights.

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<sup>115</sup> *Taylor v Maguire* [2013] EWHC 3804, 4 para 17.

<sup>116</sup> Paris, 1ere ch., pole 5, 21 octobre 2009, n° 08/09096 Fresnay... : propr. Intell. 2010N 34 p. 614 obs. Lucas. Author’s translation, see appendix 1 for original text. Here the test for originality seems to have slipped from the mark of the author’s personality to the mark of “his personal sensitivity”.

<sup>117</sup> Martha Woodmansee, ‘Response to David Nimmer’ (2002) 38 Hous. L. Rev. 231, 232-3. The same criticism was made by Rahmatian, himself critical of Woodmansee’s position : Rahmatian (n 3) 184-5.

## **II. The limits of the ex nihilo doctrine**

Various elements building the conditions and exceptions of copyright protection have contributed to soften the enforcement of the doctrine in the legal framework. The law has allowed for a degree of intertextuality to occur between works. In addition, public policies have also motivated the bestowal of authorship where ex nihilo creation had not occurred but where the public good commanded it.

### **A. Allowing Intertextuality : ‘there is nothing new under the sun’**

The law allows for a very minimal degree of intertextuality<sup>118</sup> by refusing to grant protection to particular elements of works so that future authors are not deprived of the raw materials they need to create. Doing so, the legal narrative implicitly refuted the idea of pure ex nihilo creation. This allowance of intertextuality between works is reflected on different levels: the enforcement of the idea/expression dichotomy, the doctrine of subconscious copying and insubstantial similarities, and finally the existence of derivative works.

#### **1. The idea/expression dichotomy**

The idea/expression dichotomy is a well-established principle of copyright law which has been much discussed in both the literature<sup>119</sup> and case law. The following

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<sup>118</sup> In *From Work to Text*, Barthes defines intertextuality as the phenomenon which allows and acknowledges the fact that “[e]very text [is] itself the intertext of another text, [and] belongs to the intertextual”. He urges us to abandon any “myths of filiation” which would search in vain the sources or origins of a text. “The quotations from which a text is constructed are anonymous, irrevocable, and yet *already read*: they are quotations without quotation marks.” See, Barthes (n 7) 77.

<sup>119</sup> See for example and to only cite a few, Stephen Ang, ‘The Idea-Expression Dichotomy and Merger Doctrine in the Copyright Laws of the U.S. and the U.K.’ (1994) 2 *International Journal of Law and Information Technology* 111; Brendan Brown, ‘The Idea/expression Dichotomy and the Games That People Play’ (1995) 17 *European Intellectual Property Review* 259; Patrick Masiyakurima, ‘The Futility of the Idea/expression Dichotomy in UK Copyright Law’ (2007) 38 *International Review of Intellectual Property and Competition*

comments do not aim to repeat those arguments but to point to the declination of the theory into three sub-strands which all contribute to mitigating the idea that the author works away from external influence and existing material. Indeed, the courts have identified as deriving from the idea/expression dichotomy the principles according to which references to facts, inspiration or influences are unoriginal and therefore not protectable. This hypothesis would be considered an expectable occurrence when two works are created within a similar cultural environment. To this extent, the law does not blindly perpetuate the idea that individuals, like the divine, brought into life creative products out of nothing. On the contrary, it acknowledges the fact that specific creative aspects are bound to be shared and ought not to be protected in order to preserve the freedom of expression of forthcoming authors.

a) *Ideas, facts and Information*

Ideas and facts cannot be covered by copyright because they are described as forming the building blocks<sup>120</sup> of creative works.<sup>121</sup> In order to protect individuals' freedom of expression, no one is to own facts, abstract concepts or ideas otherwise copyright would allow some level of ownership of thoughts. Copyright strives to limit its grasp to the product of such thought, its expression, denominated as the copyright work within the framework of intellectual property. To this end, the

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Law 549; Lior Zemer, 'What Copyright Is: Time to Remember the Basics' (2007) 4 Buffalo Intellectual Property Law Journal 54,59-61.

<sup>120</sup> The legal narratives have referred quite regularly to ideas and facts as blocks onto which authors build their work. This metaphor is particularly present in the American judicial discourse, see for example, *Feist Publications Inc v Rural Telephone Service Co Inc*, 499 US 340 (Supreme Court 1991) 350, 350 ; *Nash v CBS*, 899 F2d 1537 (7th Cir 1990) 1540; *Sega Enterprises Ltd. v Accolade Inc*, 977 F 2d1510 (9th Cir 1992) 1527

<sup>121</sup> See for example, Australia: *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 1A IPR 308,302 ; *IceTV Pty Ltd v Nine Network Australia Pty Ltd* [2009] HCA 14, para 26, 28 ; France: Paris, 14 juin 1966: ann. 66, 182; Paris, 9 mars 1967: D. 67,664 note Greffe; Cass 1ere civ., 5 juillet 2006, Zidi: JCP E 2007, 1263, note Singh et Dietrie; RIDA 2006 No 210 p. 361, obs Sirinelli ; Cass com. 9 nov. 1960: Bull civ. IV No 389, RTD Com. 1961, 607, obs. Desbois ; UK: *Designers Guild Ltd v Russell Williams (Textiles) Ltd (trading as Washington DC)* [2000] 1 WLR 2416, 2420, 2422-23 ; US: *Baker v Selden*, 101 US 99 (Supreme Court 1880) 103; *Harper & Row Publishers Inc v Nation Enterprises*, 471 US 539 (Supreme Court 1985) 547-8; *Feist Publications Inc v Rural Telephone Service Co Inc*, 499 US 340 (Supreme Court 1991) 350.

legal narrative opposes idea to expression, one eligible to copyright and not the other. The author re-using previously expressed ideas without replicating the expression itself will stay clear from infringement. Such result has been considered as “neither unfair nor unfortunate” for it is “the means by which copyright advances the progress of science and art.”<sup>122</sup>

The British Supreme Court reminded us that “it all depends on what you mean by ‘ideas’”.<sup>123</sup> Indeed, a controversy rose in the academic arena as to the actual existence of facts and information as raw material floating around ready to be harvested by individuals. This vision of knowledge, separating information or facts from expression was regarded as artificial by some<sup>124</sup> or even fallacious by others.<sup>125</sup> Despite this criticism, the courts continue to abide by such dichotomy in order to maintain the semblance of a balance between freedom of expression and copyright interests.<sup>126</sup>

The argument once expressed by British judges that “[t]his at any rate is clear beyond all question, that there is no copyright in an idea, or in ideas”<sup>127</sup> still stands. The court then further clarified that “[a] person may have a brilliant idea for a story, or for a picture, or for a play, and one which appears to him to be original; but if he communicates that idea to an author or an artist or a playwright, the production which is the result of the communication of the idea to the author or the artist or the playwright is the copyright of the person who has clothed the idea in form, whether

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<sup>122</sup> *Feist Publications Inc v Rural Telephone Service Co Inc*, 499 US 340 (Supreme Court 1991) 350.

<sup>123</sup> *Designers Guild Ltd v Russell Williams (Textiles) Ltd (trading as Washington DC)*[2000] 1 WLR 2416, 2422 citing *St Marylebone said in LB (Plastics) Ltd v Swish Products Ltd* [1979] RPC 551, 629.

<sup>124</sup> Wendy Gordon, ‘Reality as Artefact: From Feist to Fair Use’ (1992) 55 *Law and Contemporary Problems* 93, 93-5; Jane Ginsburg, ‘Sabotaging and Reconstructing History: A Comment on the Scope of Copyright Protection in the Works of History after *Heohling v University City Studios*’ (1982) 29 *Journal Copyright Society of the USA* 647, 657-8.

<sup>125</sup> Michael Green, ‘Copyrighting Facts’ (2003) 78 *Indiana Law Journal* 919, 949.

<sup>126</sup> See for a recent enforcement of the idea/expression dichotomy by the Court despite its theoretical flaws: *Seng-Tiong Ho v Taflove*, 648 F 3d 489 (7th Cir 2011) 497-8.

<sup>127</sup> *Donoghue v Allied Newspapers, Limited* [1938] Ch 106, 110.



by means of a picture, a play, or a book, and the owner of the idea has no rights in that product.”<sup>128</sup>

*b) Inspiration and influence*

The idea/expression dichotomy led to the exclusion of inspiration or creative influences from the scope of copyright. Works stemming from the same artistic inspiration will not be regarded as infringing one another so long that their expressive depiction of it remains different.<sup>129</sup> This trait of the copyright framework mitigates the enforcement of the ex nihilo doctrine because the very fact of refusing protection to inspirational elements and external influences acknowledges the presence of pre-existing building blocks. It confirms that legal narratives do not entirely believe in creation as occurring in a vacuum. Such confirmation indirectly softens the edges of this model of creativity which views authors as creators cut-off from their cultural environment.

Various cases rejected the idea that works would fail the originality test merely because their inspiration draws on pre-existing works. In France, the Paris Court of Appeal reminded the parties that the pre-existence of similar magical tricks involving a playing flying piano did not rule out the possibility for the artist to obtain protection over an advanced version of a near identical performance:

[O]riginality is composed of the author’s own artistic input in the creation, disregarding the fact that he himself was inspired by pre-existing works belonging to the same genre [...].<sup>130</sup>

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<sup>128</sup> *Donoghue v Allied Newspapers, Limited* [1938] Ch 106, 110.

<sup>129</sup> Or alternative, the work must be the fruit of independent creation. On this see text to note 167.

<sup>130</sup> Paris, 17 décembre 2003, n° [XP171203X] : D. 2004 jurisp. P 1588 note Fleury ; D. 2005 pan. P 1485, obs. Sirinelli. This decision reaffirms a long standing principle expressed in previous decision such as Paris, 1ère ch., 11 mai 1965, *Dali c/ Théâtre royal de la monnaie de Bruxelles et a.* : D. 1968, 382 (in this case, the creation of additional costumes inspired from the initial drawings executed by Dali were considered as no infringement of the famous painter’s rights in his sketches). Author’s translation, see Appendix 1 for original text.

Rather pragmatically, the British Supreme Court reaffirmed that inspiration from other cultural artistic influences were bound to occur for “there is nothing new under the sun”.<sup>131</sup> Without detour, the highest court confirmed that inspiration emerging from previous works was no obstacle to copyright protection:

That is not to say that the plaintiff drew no inspiration from elsewhere [...]. But the design was sufficiently original to earn copyright protection.<sup>132</sup>

The same holding motivated the conclusion of Laddie J in *IPC Media Ltd v Highbury-Leisure Publishing Ltd*.<sup>133</sup> The alleged infringement of a magazine cover was requalified as mere inspiration in the eye of the High Court as the work was described to be the result of the “blending together [of] known design features.”<sup>134</sup> In this decision, the judge explicitly articulated the link between the notion of inspiration and the idea/expression dichotomy. He explained:

The need to prove copying involves showing a design nexus between the defendant’s and the claimant’s works. However it is a mistake to believe that any nexus will do. The law of copyright has never gone as far as to protect general themes, styles or ideas. Monet, like those before him, acquired no right to prevent others from painting flowers or even water lilies or, to take an example referred to by Mr Howe, Georges Seurat would not have obtained, through copyright, the right to prevent others from painting in a pointillist style. Even someone who is inspired by Monet to paint water lilies or by Seurat to paint using coloured dots would not infringe copyright.<sup>135</sup>

Laddie J proceeded to referring to an American case from the second circuit,<sup>136</sup> a rather rare occurrence in the British judicial narrative of intellectual property

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<sup>131</sup> *Designers Guild Ltd v Russell Williams (Textiles) Ltd (trading as Washington DC)* [2000] 1 WLR 2416, 2418. Same conclusion was later reached in *IPC Media Ltd v Highbury-Leisure Publishing Ltd* [2004] EWHC 2985 (Ch); [2005] EWHC 283 (Ch) ; [2005] FSR 20 ; [2004] All ER (D) 342 (Dec).

<sup>132</sup> *Designers Guild Ltd v Russell Williams (Textiles) Ltd (trading as Washington DC)* [2000] 1 WLR 2416.

<sup>133</sup> *IPC Media Ltd v Highbury-Leisure Publishing Ltd* [2004] EWHC 2985 (Ch).

<sup>134</sup> *ibid*, para 12.

<sup>135</sup> *ibid*, para 13.

<sup>136</sup> *Nichols v Universal Pictures Co* 45 F 2nd 119 (2nd Cir 1930).

law.<sup>137</sup> He recognised that although the line between idea and expressions, inspiration and expression might be arbitrarily drawn at times, it remained essential to constrain authors' monopolies in this way.<sup>138</sup>

Based on this general principle, judges also concluded that the confessed borrowing of a previous work's "quirkiness and [...] atmosphere", "rhythm", "pace and mood" was not sufficient to amount to infringement in *Norowzian v Arks Ltd*.<sup>139</sup> The same outcome was reached in the context of musical work in *Hayes v Phonogram Ltd*<sup>140</sup> where Blackburne J held that:

[t]he fact that [...] the rap version may have influenced or inspired the production [...] of the non-rap version [...] does not, in my view, give [the] joint author of the rap lyrics any kind of interest in the musical work to be found in the non-rap versions.<sup>141</sup>

Similar holdings were later transposed to other types of works such as video games.<sup>142</sup>

British judges were equally careful to exclude from copyright considerations the divine inspiration of human authors. Automatic writings allegedly generated by the communication of spirits channelled through the body of living writers were considered to be owned by the latter rather than the influencing intellects residing

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<sup>137</sup> The qualitative analysis of case law basing this research revealed that British and American courts very rarely make references to foreign jurisdictions, unlike Australian judges who frequently draw upon the jurisprudence of parent or neighbour countries to inform their decisions.

<sup>138</sup> *IPC Media Ltd v Highbury-Leisure Publishing Ltd* [2004] EWHC 2985 (Ch), para 13. Here, the judge refers to the elephant test to make the distinction between ideas and expressions or inspiration and expression (para 14). Such test operates on the premise that the distinction will appear clearly to the observer when he/she sees it as one 'knows it when one sees it'.

<sup>139</sup> *Norowzian v Arks Ltd* [1998] EWHC 315 (Ch).

<sup>140</sup> *Hayes v Phonogram Ltd* [2002] EWHC 2062 (Ch) para 61.

<sup>141</sup> *ibid*, para 61.

<sup>142</sup> *Nova Productions Ltd v Mazooma Games Ltd* [2007] EWCA Civ 219, para 8, 9(1), 9(4), 9(8), 12.

beyond the River Lethe.<sup>143</sup> In *Cummins v Bond*<sup>144</sup> the Bench asserted that “the Court is not concerned with the question of the inspiration of the work by any psychic agency, but with the question who is the owner of the copyright.”<sup>145</sup>

By referring directly to American authorities,<sup>146</sup> the British case of *IPC Media Ltd v Highbury-Leisure Publishing Ltd*<sup>147</sup> confirms the same interpretation of the idea/expression dichotomy is found in the US. Indeed, the court of appeal of the ninth circuit reminded the parties involved in *Satava v Lowry*<sup>148</sup> that the copying of similar inspirations, in this case jelly fish, could not be considered as an infringement even if it lead to the production of similar artistic expressions.<sup>149</sup> Because Satava was inspired by jelly fish to create his glass sculptures, he could not prevent other artists to do the same without claiming copyright over the idea of sculpting jellyfish in glass material.<sup>150</sup> As in the UK, the same principles are frequently applied to musical works.<sup>151</sup>

In parallel, the seventh circuit reasserted the importance of making previous works available for the creation of new ones. Recently, the circuit court of appeal noted the strong presence of intertextuality between creative products in *Klinger v Conan Doyle Estate Ltd*.<sup>152</sup> The circuit judges stated:

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<sup>143</sup> *Cummins v Bond* [1927] 1 Ch 167, [1926 C 1059]; *Leah v Two Worlds Publishing Co LD* [1951] Ch 393; (1951) 1 TLR 298.

<sup>144</sup> *Cummins v Bond* [1927] 1 Ch 167.

<sup>145</sup> *ibid*, 171.

<sup>146</sup> *IPC Media Ltd v Highbury-Leisure Publishing Ltd* [2004] EWHC 2985 (Ch) para 13.

<sup>147</sup> *IPC Media Ltd v Highbury-Leisure Publishing Ltd* [2004] EWHC 2985 (Ch).

<sup>148</sup> *Satava v Lowry*, 323 F 3d 805 (9th Cir 2003) 808.

<sup>149</sup> *Satava v Lowry*, 323 F 3d 805 (9th Cir 2003), 808-10.

<sup>150</sup> *ibid*, 810.

<sup>151</sup> See for instance, *Peters v West*, 692 F 3d 629 (7th Cir 2012). Here, the court considered that the re-use of Nietzsche’s phrase ‘what does not kill you makes you stronger’ in a rap composition could not amount to infringement). See also, *Hobbs v John*, 722 F 3d 1089 (7th Cir 2013). In this decision the court refused to consider the record of a love song referring to a Russian woman during the cold war as an infringement of a song on a similar theme.

<sup>152</sup> *Klinger v Conan Doyle Estate Ltd* 755 F 3d 496 (7th Cir 2014).

Most copyrighted works include some, and often a great deal of, public domain material—words, phrases, data, entire sentences, quoted material, and so forth. The smaller the public domain, the more work is involved in the creation of a new work.<sup>153</sup>

The cultural context and bond between previous and recent works had already been underlined by the Court half a century before that in *Wihtol v Wells*.<sup>154</sup> In 1956, the same jurisdiction had reaffirmed that:

[t]he Copyright Act specifically provides for protection of the work of a composer growing out of creations of those who came before.<sup>155</sup>

In another one of his colourful dissenting opinions, Kozinski J reminded the ninth circuit court that intertextuality was essential to creativity which remains what intellectual property laws were sworn in to encourage.<sup>156</sup> Commenting on *White v Samsung Electronics America, Inc*, he wrote:

All creators draw in part on the work of those who came before, referring to it, building on it, poking fun at it; we call this creativity, not piracy.<sup>157</sup>

## **2. Insubstantial and unconscious copying**

Defences to infringement also contribute to mitigating the influence of ex nihilo creation theories. Indeed, both insubstantial and unconscious copying can be argued to justify the borrowing of previous works without bearing the consequences of infringement or hampering one's accession to legal authorship.

### *a) The threshold of substantial similarities*

A substantial amount of what constitutes the work's originality must be copied for any subsequent creations to be regarded as infringing their predecessor.<sup>158</sup> If authors

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<sup>153</sup> *Klinger v Conan Doyle Estate Ltd* 755 F 3d 496 (7th Cir 2014), 501.

<sup>154</sup> *Wihtol v Wells*, 231 F 2d550 (7th Cir 1956).

<sup>155</sup> *ibid*, 554.

<sup>156</sup> *White v Samsung Electronics America Inc*, 989 F 2d 1512 (9th Cir 1993 - Dissenting opinion) 1514-5. See for the majority decision: *White v Samsung Electronics America Inc*, 971 F 2d1395 (9th Cir 1992).

<sup>157</sup> *White v Samsung Electronics America Inc*, 989 F 2d1512 (9th Cir 1993 - Dissenting opinion) 1515.

<sup>158</sup> Australia: Australian cases make direct references to British authorities on the question of substantial similarities. See for example, *Vella v Cummins* [2001] QSC 246, (2001) 53 IPR 538.

refrain themselves from copying those specific elements, nothing prevents them from obtaining full authorship for a work using already existing pieces. In this regard, a work made of already available parts, therefore not created entirely ex nihilo, may still be covered by copyright authorship so long that it satisfies the conditions of categorisation, fixation and originality.<sup>159</sup>

This principle led the British bench to conclude that although similarities in the details of the expression may suggest copying or copyright infringement, the test does not stop there. Indeed, “no-one would say that those details alone meant that a substantial part of the copyright work had been taken – they are the starting point for a finding of infringement, not the end point.”<sup>160</sup> This suggests that not all copying will lead to infringement; artists may obtain authorship for non-ex nihilo creations which would borrow the unimportant details of expressions existing in previous works, alongside with the themes, ideas, information or expression they convey.<sup>161</sup>

In addition to being expressive of the substantial similarity of protected works, any borrowing from previous pieces must be visible. Invisible connections between two works will result in claims of infringement being dismissed.<sup>162</sup> Although derivative

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UK: *Designers Guild Ltd v Russell Williams (Textiles) Ltd (trading as Washington DC)* [2000] 1 WLR 2416.

US: The US circuit courts developed a variety of different sub-tests to define what constituted substantial similarities or ‘striking similarities’. The seventh and ninth circuits are described as following different tests in this task. Whilst the former pursues the ‘general observer test’ (*Selle v Gibb*, 741 F 2d896 (7th Cir 1984) 900-01), the ninth implements the complicated test of intrinsic/extrinsic similarities (*Runge v Lee*, 441 F 2d579 (9<sup>th</sup> Cir 1971) 582). See on this, Katherine Lippman, ‘The Beginning of the End: Preliminary Results of an Empirical Study of Copyright Substantial Similarity Opinions in the US Circuit Courts’ [2013] Michigan State Law Review 513, 522-33. The French intellectual Property framework does not implement any such like test for infringement. Infringement is assessed on a case per case basis, once the eligibility of the work allegedly copied is confirmed.

<sup>159</sup> Depending on the jurisdictions we are placed, there might only one to two conditions, originality and fixation. See on this, text to note 57.

<sup>160</sup> *Nova Productions Ltd v Mazooma Games Ltd* [2007] EWCA Civ 219, para 16.

<sup>161</sup> See previous paragraphs on the non-copyrightability of ideas, facts and information. On this, see text to 57 and text to note 114, Chapter 1.

<sup>162</sup> In *Norowzian v Arks Ltd* [1999] EMLR 67, Rattee J stated that “[i]n particular the production of Miss Hinkley of a long list of alleged similarities between the two films, some of which were only a fraction of a second in length, and some so short that they could only be perceived by means of a video recorder set to show the films in very slow motion, so that they would have been invisible to anyone watching the films at normal

works need not to be perfect replicas of previous protected items to infringe their copyright,<sup>163</sup> if the genealogy between the two works is barely visible, infringement will be unlikely, whether the connection is confessed or not. Three dimensional items reproducing numbers, sizes, tables or other calculations will not be regarded as infringing the expression of the same information on paper in the form of literary works.<sup>164</sup> However, the work's immaterial scope of copyright protection may survive if the similarity between the two works is traceable<sup>165</sup> despite the fact that "work of the pirate is so cleverly done that no identity of language can be found in the two works."<sup>166</sup> For the visibility of the connection to disappear, the variation in the work must go beyond changing the medium through which the work is expressed.<sup>167</sup>

*b) Unconscious copying and independent creation*

Even where substantial similarities are found, the *ex nihilo* creation doctrine faces another potential obstacle. This last impediment is paradoxically both infirming and confirming of the doctrine. Alleged infringing parties may resort to the theory of independent creation to justify the resemblance between two works and escape liability. Wherever they can prove that their work was produced independently from the previous creation, no liability for infringement will be actionable and its own claim to copyright protection will remain intact. The law thus recognises the possibility for two substantially similar works to be created independently from one another by two different authors.

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viewing speed, was of no assistance to the court. (at 81) This sort of approach amounts, in my opinion, to analysing the real effect of the film out of existence." This decision was confirmed in appeal see, *Norowzian v Arks Ltd* [1999] EWCA Civ 3018; 11/11/1999 Times Law Reports.

<sup>163</sup> text to note 153, Chapter 1.

<sup>164</sup> Australia: *Cuisenaire v Reed* [1963] VR 719 ; UK: *Brigid Foley v Elliott* [1982] RPC 433 ; *Anacon Corporation Ltd v Environmental Research Technology Ltd* [1994] FSR 659 ; *Electronic Techniques (Anglia) Ltd v Crichtley Components Ltd* [1997] FSR 401 ; *Sandman v Panasonic UK Ltd* [1988] FSR 651.

<sup>165</sup> text to note 46.

<sup>166</sup> *Runge v Lee*, 441 F 2d579 (9<sup>th</sup> Cir 1971) 582 citing *Universal Pictures Co Inc, v Harold Lloyd Corporation* (9 Cir 1947) 162 F 2d354. The American Supreme Court confirmed this position in *Harper & Row Publishers Inc v Nation Enterprises*, 471 US 539 (Supreme Court 1985) 544.

<sup>167</sup> text to note 37.

This led the courts of Australia,<sup>168</sup> the UK<sup>169</sup> and the US<sup>170</sup> to conclude that “a work may be original even though it closely resembles other works so long as the similarity is fortuitous, i.e. not the result of copying.”<sup>171</sup> If “two poets, each ignorant of the other, compose identical poems, neither work is novel, yet both are original and, hence, copyrightable.”<sup>172</sup> To put it differently, “[a]s a general rule, the greater the similarities between the alleged infringement and the copyright work, the greater the prospect of copying being inferred. However, similarities do not necessarily indicate copying. The author and the defendant may have worked quite independently from common sources, in similar environments, to achieve similar objectives and made use of similar common design techniques so as to produce works which have a degree of visual similarity.”<sup>173</sup>

Similarly, authors may subconsciously copy previous works as the latter become more and more integrated within one’s cultural or professional landscape.<sup>174</sup> Creators in such positions may argue the defence of ‘unconscious copying’ against allegations of infringement. However such hypothesis remains highly “unusual”<sup>175</sup> and so would be the occasions where the argument would succeed before the

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<sup>168</sup> See for example, *Dennison Manufacturing Co v Alfred Holt & Co Ltd* (1987) 10 IPR 612, 613 ; *Compagnie Industrielle de Precontrainte et D’Equiment des Constructions SA v First Melbourne Securities Pty Ltd* [1999] FCA 660, para 52; *Eagle Homes Pty Ltd v Austec Homes Pty Ltd* [1999] FCA 138, para 86 (this case refer to ‘accidental and independent reproduction’); *S W Hart & Co Pty Ltd v Edwards Hot Water Systems* [1985] HCA para 4.

<sup>169</sup> See for example, *Ladbroke (Football) v William Hill (Football) Ltd* [1964] 1 WLR 273, 276; *IPC Media Ltd v Highbury-Leisure Publishing Ltd* [2004] EWHC 2985 (Ch) para 10; *S W Hart & Co Pty Ltd v Edwards Hot Water Systems* [1985] HCA para 4.

<sup>170</sup> See for example, *Feist Publications Inc v Rural Telephone Service Co Inc* , 499 US 340 (Supreme Court 1991) 345-6; *Selle v Gibb*, 741 F 2d896 (7th Cir 1984) 900-1; *Peters v West*, 692 F 3d 629 (7th Cir 2012) 635; *Three Boys Music Corp v Bolton*, 212 F 3d 477 (9th Cir 2000) 486.

<sup>171</sup> *Feist Publications Inc v Rural Telephone Service Co Inc*, 499 US 340 (Supreme Court 1991) 345.

<sup>172</sup> *Feist Publications Inc v Rural Telephone Service Co Inc*, 499 US 340 (Supreme Court 1991) 346 citing *Sheldon v Metro-Goldwyn Pictures Corp*, 81 F 2d49, 54 (CA2 1936). There is no similar doctrine or defence to be found in France.

<sup>173</sup> *IPC Media Ltd v Highbury-Leisure Publishing Ltd* [2004] EWHC 2985 (Ch) para 10.

<sup>174</sup> *Francis Day & Hunter Ltd v Bron* [1963] Ch 587, 620; *Henley Arch Pty And Another v Clarendon Homes* (1998) 41 IPR 443, 459; *Beckingham v Hodgens* [2002] All ER (D) para 37.

<sup>175</sup> *Barrett Property Group Pty Ltd v Dennis Family Homes Pty Ltd* [2011] FCA 246, para 572-3.



court<sup>176</sup> because the evidentiary burden rests heavily on the defenders' shoulders.<sup>177</sup> Nonetheless, the Court did not rule out this possibility hoping for future medical discoveries to ease alleged infringers from the onus of proof weighing on them.<sup>178</sup>

### **3. Copyrighting derivative works**

Derivative works form one last component of the intellectual property narrative contributing to diminishing the stance of the ex nihilo creation doctrine in law.

#### *a) Media and derivative works*

Whether they are understood as derivative works, media works, translations, arrangements or adaptations, the very essence of this class of product contradicts the bond between legal authorship and creation out of nothing. By definition, these works depend on previous creations to exist, yet their coming into being is rewarded by full copyright.<sup>179</sup> Although they do form a dent in the straight-forward enforcement of the ex nihilo creation doctrine by the law, the fact that the derivative authors' rights remain slightly diminished in comparison to the primary author keeps the ex nihilo theory alive in the legal narrative. This issue further discussed in subsequent paragraphs.

#### *b) Artistic versus legal derivative works*

Jurisdictions with more stringent copyright conditions will allow the reuse of more creative works as a smaller share of those will be granted copyright protection. In this context, whenever a creative work does not qualify for copyright protection, any derivative uses made by its authors or other individuals will be regarded as created out of nothing legally, even though artistically it might not be the case.

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<sup>176</sup> See for an example of failing to prove unconsciousness of copying: *Barrett Property Group Pty Ltd v Dennis Family Homes Pty Ltd* [2011] FCA, para 573.

<sup>177</sup> *Francis Day & Hunter Ltd v Bron* [1963] Ch 587, 620.

<sup>178</sup> *ibid*, 620-21.

<sup>179</sup> text to note 70, Chapter 1.

This hypothesis was at play in *Creation Records Ltd v News Group Newspapers Ltd*<sup>180</sup> also known as the *Oasis* case. For the purpose of making the cover of their music record, the band had directed the making of an installation in and around a hotel's swimming pool. An unauthorised picture of the artwork was taken and then sold in the newspapers.<sup>181</sup> The claim for copyright infringement filed by the music band and its recording company failed before the Court who refused to identify the installation as a dramatic work, a work of artistic craftsmanship, a sculpture work or a collage.<sup>182</sup> For the work did not fit in one of those categories and lacked fixation, Oasis's installation was not regarded as a copyright work in the first place, so much so that its derivative product - the photograph - was both non-infringing and separately copyrightable.

Similarly, the re-use of an entire segment of traditional patterns will not necessarily make the new work a derivative piece, or diminish its legal protection. Full authorship may still be granted to creators who heavily draw on artistic phrases composing the convention of their craft or folkloric cultural environment, or so it was held both in France and in the US. To start with the civil jurisdiction, the highest court quashed the appeal decision which had denied a sculptor full authorship over his work on the basis that the latter had limited his input to the reproduction of sculptural 'scène à faire'. The Court of Cassation rejected this test for originality and specified that the Court ought to have examined whether the artist had stamped such reuse of sculptural common places with the mark of his personality. The absence of *ex nihilo* creation in the sculptural references displayed by the creator is irrelevant to the

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<sup>180</sup> *Creation Records Ltd v News Group Newspapers Ltd* [1997] EWHC Ch 370, para 1, 4.

<sup>181</sup> *ibid*, para 3-4.

<sup>182</sup> *ibid*, para 7-8, 13.

originality test so long that his expression bears his own personal input. The Court asserted that:

Considering that by adjudicating so, although it was not contested that the sculptures at stake had been made by the hand of Mr X, the court of appeal failed to determine whether such personal execution itself was enough to confer original qualities to the work, and thereby rendered its decision legally unfounded.<sup>183</sup>

In the context of musical works, the American court of appeal of the seventh circuit reached the same conclusion in *Wihtol v Wells*.<sup>184</sup> The defendant argued against the infringement claim brought by the plaintiff by putting forward that the musical works he had re-used were merely the repetition of folkloric tunes the plaintiff could not own for precisely that reason. Although evidence testifying to the fact that the song was indeed substantially drawing from Italian, Latvian and Russian traditional music was accepted by the district court,<sup>185</sup> this did not prevent the judges from siding with the plaintiff in granting him full copyright over the work. The bench confirmed this position in appeal when it candidly compares the claimant to a singing Sicilian sailor:

In that case a Sicilian sailor sang and played his guitar on a long voyage. Sicilian folk songs he had heard and forgotten came back to his memory. He could not read music and such parts of the words and music as he could remember he sang and played by ear. What he could not remember he improvised. In this way he 'learned' a song which he claimed as his own composition. This product differed in words and music from any version of the original which was proved, though the theme was the same and the music quite similar. The court said: 'There must have been something which Citorello [the sailor] added which brought the old song back into popularity with his own people in this country, and sufficient, I think, to support his claim of copyright.' The Italian sailor may be said to have done something creative or original in improvising portions of the words and music.<sup>186</sup>

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<sup>183</sup> Cass, 1ère civ, 9 novembre 1993, n° 91-17.061: Bull. 1993 I N° 318 p. 221. Author's translation, see Appendix I for original text.

<sup>184</sup> *Wihtol v Wells*, 231 F 2d550 (7th Cir 1956).

<sup>185</sup> *ibid*, 552.

<sup>186</sup> *ibid*, 554.

On that basis they concluded to the validity of the claimant's copyright despite the lack of ex nihilo creation artistically speaking.<sup>187</sup>

The previous paragraphs revealed how copyright law has somehow allowed for a degree of intertextuality to play a role within the intellectual property framework. Doing so, it softened the grip of the ex nihilo doctrine over western copyright laws. The courts also came to play a part in mitigating the ex nihilo theory whenever public policy interests urged them to do so. This will be the discussion of the next paragraphs.

## **B. Creating un-natural authorships**

Courts frequently reassert the fact that the copyright framework has been designed to serve specific public policies.<sup>188</sup> To this end, un-natural authorships were created. Those authorships are regarded as 'un-natural' for their holders have failed to meet traditional cultural understanding of creativity. In most cases, they have failed to satisfy the requirement of ex nihilo creation, or any other ersatz doctrines expressed in courtrooms. Those un-natural authorships had to find their legitimacy elsewhere. The effort invested by the author in the production of her work coupled with in the public interest resurrected her claim for copyright protection. The current state of the jurisprudence thus relies on the subtle blend of those two reasons to avoid the

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<sup>187</sup> *Wihtol v Wells*, 231 F 2d550 (7th Cir 1956), 553.

<sup>188</sup> The term 'public policy' is other directly used in arguments or references are made to the general public interest or of the people when identifying new forms of legal authorship. See for example, Australia: *Desktop Marketing Systems Pty Ltd v Telstra Corporation Ltd* (2002) 55 IPR 1, 83 para 339; UK: *Lauri v Renad* [1892] 3 Ch 402; 141-5; *Hyperion Records Ltd v Sawkins* [2005] EWCA Civ 565 para 39 and 40.

criticism which struck the sweat of the brow doctrine expressed over the last two decades.<sup>189</sup>

### 1. Verbatim works: authoring faithful transcripts

By definition, verbatim works are the 'word per word' reproductions of previous narratives, whether those are speeches, interviews or other oral works. The question asked to the courts was whether such replicas would qualify for copyright protection. The crux of the matter lied in passing the originality condition given that the work candidate to authors' rights is intrinsically the reproduction of pre-existing material. By no means, its author can be considered as having created the work independently or out of nothing. He may have physically and materially brought the reproduction into being but not its immaterial content. A strict enforcement of the ex nihilo creation doctrine would deny any authorial quality, legal or not, to this type of production. Yet the courts came to accept as such, though not without insisting on particular conditions and on the peculiar nature of the circumstances.

#### a) *Transcripts of words*

In *Walter v Lane*,<sup>190</sup> the House of Lords held that "an 'author' may come into existence without producing any original matter of his own"<sup>191</sup> and proceeded to state that "[m]any instances of the claim to authorship without the production of original matter have been given at the bar".<sup>192</sup> This case concerned a speech which had been transcribed by a reporter and later published. Although there was no question

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<sup>189</sup> See the comments of the US Supreme Court on the development of the doctrine in American legal narrative in *Feist Publications Inc v Rural Telephone Service Co Inc*, 499 US 340 (Supreme Court 1991) : "Making matters worse, these courts developed a new theory to justify the protection of factual compilations. Known alternatively as "sweat of the brow" or "industrious collection," the underlying notion was that copyright was a reward for the hard work that went into compiling facts." (at 352) ; "Without a doubt, the "sweat of the brow" doctrine flouted basic copyright principles." (at 354). See on this point, Ginsburg (n 98) 1078-81.

<sup>190</sup> *Walter v Lane* [1900] AC 539.

<sup>191</sup> *ibid*, 554.

<sup>192</sup> *ibid*, 554.

as to the speaker's authorship over his speech, the process of shorthand notating the event so as to reproduce a faithful record for it to be published was considered as displaying the relevant amount of skills, effort of labour to regard the written rendition as original despite its lack of ex nihilo creativity. The dissenting opinions of LJ Halsbury and Robertson confirm that the conclusion reached by the Court in this case was nothing short of a revolution in conceptualising originality in copyright laws precisely because of its unorthodox take on the doctrine of ex nihilo creation.<sup>193</sup>

*b) Transcript of music*

In the US, a similar position was reached in the context of music. In *Wihtol v Wells*,<sup>194</sup> the seventh circuit asserted that:

Of all the arts, music is perhaps the least tangible. Music is expressed by tonal and rhythmic [sic] effects. People can enjoy music without a technical understanding or education, but to make music available, someone must write it. To make a song available, someone must bring the notes and words together.<sup>195</sup>

As in *Walter v Lane*, the American circuit court of appeal emphasised the public interest in having fixed embodiment of previous works made available. Like the speech in the British case, without their embedding in Wihtol's songs, the folkloric tunes would not be otherwise available to the commons, or so goes the argument. Although none of those two authors can be considered as having created their work purely ex nihilo, their creations remain useful to their society and for that reason should be incentivised by way of copyright. The exact same reasoning was followed by the British Supreme Court in *Hyperion Records Ltd v Sawkins*.<sup>196</sup> The creation of

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<sup>193</sup> *ibid*, 545-550, 561-2. LJ Roberstom wrote: "Now I recognise the skill of the stenographer, I find that, for the reasons which I have mentioned, an educated man is the better qualified to be a faithful reporter. But I fail entirely to see how, in the widest sense of the term "author," we are in the region of authorship." (561-2)

<sup>194</sup> *Wihtol v Wells*, 231 F 2d550 (7th Cir 1956).

<sup>195</sup> *ibid*, 552.

<sup>196</sup> *Hyperion Records Ltd v Sawkins* [2005] EWCA Civ 565.

modern performing scores of Lallande's baroque composition which had fallen in the public domain was judged to be eligible to copyright despite, once again, its lack of ex nihilo creativity. The Supreme Court relied on the finding of *Walter v Lane* to ground its reasoning to declare that "whilst it is trite that mere servile copying (for instance tracing or photocopying) does not amount to originality, there are clearly forms of "copying" which do – the shorthand writer's copyright is a paradigm example which has stood since *Walter v Lane*".<sup>197</sup> This interpretation crossed both the Atlantic and the Channel as it reached the continental jurisdiction of France at the same time. In 2005, The Tribunal de Grande Instance of Nanterre too concluded to the musical editor's authorship despite the absence of ex nihilo creative input.<sup>198</sup>

## 2. Useful versus slavish copying

In addition to their reference to 'public policies', courts have also relied on the distinction between useful and slavish<sup>199</sup> or servile copying<sup>200</sup> to explain their complaisance towards certain types of non-ex nihilo forms of creations over others. Hinging on British authorities,<sup>201</sup> the Federal Court of Australia held in *Henley Arch*

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<sup>197</sup> *Hyperion Records Ltd v Sawkins* [2005] EWCA Civ 565, para 78.

<sup>198</sup> TGI Nanterre, 1re Ch., 19 janvier 2005 : RIDA i/2006. Full English translation available at « France: Intellectual Property Code – 'Sawkins v Harmonia Mundi » International Review of Intellectual Property and Competition Law 37, no 1 (2006): 116-119. This decision fits in a rather inconsistent jurisprudence on restoration work. On various occasions, French courts have been faced with restorative works over which authorship was claimed. Although the fact that the work is restorative did not bar its executor from being considered an author so long that such restoration showed the expression of imprint of personality. Failing this condition, the restorative work cannot claim protection by authors' rights as it would be the mere repetition of existing work. See for example of decisions accepting restorative work as pieces protectable with legal authorship: TGI Paris, 28 mai 1997: RIDA 329 (1998) (the reconstitution of a statues in the gardens of Versailles is work of an author under intellectual property law). ] For decisions denying authorship but acknowledging the craft involved in the execution of the restoration see: CA Nimes, 15 juillet 1997: Juris-Data 0304467 (this decision concerned the restoration of a fountain) ; Cass 4e ch. 15 octobre 1994, Cts Champreux c. Antoine Latreille : D 1994, 53-56 note Edelman (the restoration of motion pictures was in this case considered unoriginal). See also, Ginsburg (n 98) 1082-4. See also on the question of copyright and works of restoration, Nimmer (n 4).

<sup>199</sup> Australia: *Henley Arch Pty and Another v Clarendon Homes* (1998) 41 IPR 443, 452.; US: *Schrock v Learning Curve International Inc* , 586 F 3d 513 (7th Cir 2009) 519.

<sup>200</sup> *Hyperion Records Ltd v Sawkins* [2005] EWCA Civ 565, para 78.

<sup>201</sup> Were cited *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273, 276 and *Interlego AG v Croner Trading Pty Ltd* (1992) 39 FCR 348, 378-80.

*Pty v Clarendon Homes*<sup>202</sup> that “[c]learly copyright does not subsist in a slavish copy but an artistic work which derives from an earlier work may be a work in which copyright exists, if by reason of additions or changes it is a new or original work rather than a mere copy”.<sup>203</sup> Whilst slavish or servile copying would lead to infringement, useful copying may lead its perpetuator all the way to authorship.

### **3. Exceptions proving the rule**

There is a number of exceptions to the enforcement of the ex nihilo creation doctrine in the legal narrative their scope remains limited. Moreover, each exception underlined in previous paragraphs have also served to prove the rule of ex nihilo creation.

#### *a) Limited limitations*

Limits placed on the reach of the ex nihilo creation doctrine in the legal narrative are themselves limited. Starting with the idea-expression dichotomy, the courts have already pointed to the difficulty of applying its principles objectively.<sup>204</sup> The British case of *Temple Island Collections Ltd v New English Teas Ltd*<sup>205</sup> illustrates this point particularly well. In the decision, the court declared that the creative decision of photographing a red bus in colour driving across the typical skyline of London city centre shown in black and white was found copyrightable in itself. The repetition of this theme featuring the two colour pattern, the bus and the traditional London background was regarded as the expression of one’s idea intellectual input, or creative idea, rather than an idea in itself. From this perspective, as the grounds of

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<sup>202</sup> *Henley Arch Pty and Another v Clarendon Homes* (1998) 41 IPR 443.

<sup>203</sup> *ibid*, 452, citation omitted.

<sup>204</sup> *Designers Guild Ltd. v Russell Williams (Textiles) Ltd.* (trading as Washington D.C.). [2000] 1 WLR 2416, 2422 citing *St. Marylebone said in L.B. (Plastics) Ltd v Swish Products Ltd.* [1979] R.P.C. 551 , 629.

<sup>205</sup> *Temple Island Collections Ltd v New English Teas Ltd & Anor* [2012] EWPC 1; [2012] FSR 9 ; [2012] All ER (D) 49 ; [2012] ECDR 11.



copyright ownership invade abstract forms of expressions such as this one, the possibility of legal authorship to allow for intertextuality between creative works diminishes. Simultaneously, the difficulty grows for individuals to create out of nothing.

Similarly, in France, the apposition above a public toilets' door of golden letters forming the word 'paradise' were considered as constituting a protectable work of the mind. As a result, the defendant who had subsequently photographed the door was found in breach of the artist's author's rights despite the highly abstract and conceptual nature of his creation.<sup>206</sup>

Additionally, the lines between creative expression and inspiration has been somewhat blurred by the jurisprudence. The American case *Wihtol v Wells*<sup>207</sup> and 1993 decision of the French Court of Cassation<sup>208</sup> discussed in the above paragraphs<sup>209</sup> are excellent examples where folkloric or traditional influences did not preclude the obtaining of copyright over the works which would have otherwise been regarded as derivative by the man of the trade.

Another feature of the copyright framework enabling intertextuality is the possibility to copy unsubstantial amounts of previous work, or infringe protected works unconsciously. However, both of these exceptions are envisaged very narrowly by judges. It is now accepted by the courts of all jurisdictions under study that the test for infringement is to be understood as a primarily qualitative test and not quantitative test.<sup>210</sup> As result, borrowing a small portion of a protected work could

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<sup>206</sup> Cass, 1ère civ, 13 novembre 2008, n° 06-19.021 « affaire Paradis » : D. 2008 act, p. 2933 obs. Daleau ; JCP 2008 II, 10204 note Loiseau.

<sup>207</sup> *Wihtol v Wells*, 231 F 2d 550 (7th Cir 1956) 552-4.

<sup>208</sup> Cass, 1ère civ, 9 novembre 1993, n° 91-17.061: Bull. 1993 I N° 318 p. 221.

<sup>209</sup> text to note 184.

<sup>210</sup> Australia: *Barrett Property Group Pty Ltd v Dennis Family Homes Pty Ltd* [2011] FCA 246 para 111; European Union: In its *Infopaq* decision, the CoJ affirmed that copyright may cover extracts of articles as short

suffice to amount to a breach of copyright if such segment represents a substantial part of what makes the work original. The quantitative test only comes into play after this first qualitative assessment, and is only to be applied to the original elements of the work and not the work in its entirety. This interpretation increases the likelihood for substantial borrowings as the whole to which it is compared diminishes in size.

In parallel, the defence against infringement residing in the notion of ‘unconscious copying’ has only been granted in rare occasions because of the expected difficulty to provide tangible evidence of one’s mindset or creative consciousness at the time of creation.<sup>211</sup>

What was presented thus far as the most significant obstacle to the ex nihilo doctrine, i.e. the presence of derivative works, is also limited in its impact. Intellectual property laws have not gone as far as placing derivative and non-derivative work on an equal footing with other, one might say ‘true’, creators. Indeed, whilst the latter receive the standard monopoly granted by copyright, derivative authors remain subject to their predecessor’s consent to use their own derivative work.<sup>212</sup> The existence of derivative copyrights for those artists does not sever their ties with previous creations, and does certainly not rebut the copyright titles protecting the portion of underlying work being recycled. As a result, derivative works both counteracts and confirms the ex nihilo creation doctrine.

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as eleven words so long that such segments express the intellectual creation of their author. This position suggests that the test is indeed qualitative rather than quantitative at the European level. *C-5/08 Infopaq International A S v Danske Dagblades Forening* [2009] EUECJ C-5/08\_O, para 48; *C-604/10 Football Dataco and Others v Yahoo! UK Ltd* [2012] WLR (D) 57, para 16. On the European jurisprudence, see Eleonora Rosati, ‘Originality in a Work, or a Work of Originality: The Effects of the Infopaq Decision’ (2011) 58 *Journal Copyright Society of the USA* 795, 806-7. UK: *Designers Guild Ltd v Russell Williams (Textiles) Ltd. (trading as Washington DC)*. [2000] 1 WLR 2416, 2431; *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273, 293 ; US: circuit courts have developed alternative tests combining both approaches, see Lipman (n 158) 524-5.

<sup>211</sup> See for example, *Francis Day & Hunter Ltd v Bron* [1963] Ch 587, 620; text to note 168.

<sup>212</sup> text to note 71, Chapter 1; see also, Annex 3.

b) *Singling out*

The fact of distinguishing traditional derivative works from traditional authorial works reinforces the presence and hierarchy of one over the other. The very existence of derivative works in opposition to, or as a by-product of what one might call 'regular' works strengthens the doctrine of ex nihilo creation by placing derivative authorship as a default or secondary option. In *Redwood Music Ltd v B Feldman & Co Ltd*,<sup>213</sup> the Court stated that "it is not an unreasonable view that there is no need to give the same protection to the products of what is after all a secondary talent which consists in the gathering together of the fruits of the originality of other gifted minds."<sup>214</sup> Dispositions related to those secondary works truly behave as exceptions which prove the rule.

This singling out of non-ex-nihilo creative works also occurred in the context of unconventional authorships mentioned in previous paragraphs.<sup>215</sup> The lack of apparent ex nihilo creativity did not make of those works obvious candidates for copyright protection so much so that it necessitated the proactive intervention of the courts or of the legislator<sup>216</sup> to include those products into the scope of copyright ownership. This approach was reflected in the Australian case *Sands And Mcdougall Pty Ltd v Robinson*<sup>217</sup> where Isaac J commented on the outcome of *Walter v Lane*<sup>218</sup>

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<sup>213</sup> *Redwood Music Ltd v B Feldman & Co Ltd* [1979] RPC 385. The decision was overturned in appeal which corrected the decision's definition of collective work, see *Redwood Music Ltd v B Feldman & Co Ltd* [1981] RPC 33.

<sup>214</sup> *Redwood Music Ltd v B Feldman & Co Ltd* [1979] RPC 385, 402.

<sup>215</sup> text to note 188.

<sup>216</sup> Both cases and statutes made it explicitly clear that some compilations were protected as literary works even though, per se, they cannot be regarded as ex nihilo creations. Australia: 1968 Copyright Act, s. 10, *Desktop Marketing Systems Pty Ltd v Telstra Corporation Ltd* [2002] FCA 0112, (2002) 55 IPR 1,3 ; France: IPC, Art L 112-3 modified in 1996 by the Act No. 96-1106 of 18 December 1996 Art. 1 Official Journal of 19 December 1996, see also Cass 1re civ, 20 janvier 2004, Sté le serveur administrative: D. 2004, act. P. 503, JCP E 2004, chron. 1099, para 3 obs. Vivant ; UK: CDPA 1988 3(a); *Walter v Lane* [1900] AC 539, 552; US: US Code Title 17, para 101, 103; *Harper & Row, Publishers Inc v Nation Enterprises*, 471 US 539 (Supreme Court 1985) 547; *Feist Publications Inc v Rural Telephone Service Co Inc*, 499 US 340 (Supreme Court 1991) 348.

<sup>217</sup> *Sands and Mcdougall Pty Ltd v Robinson* (1917) 23 CLR 49.

<sup>218</sup> *Walter v Lane* [1900] AC 539 ; 16 TLR 551 ; [1900-3] All ER Rep Ext 1666.

in light of previous jurisprudence and understanding of authorship. The judge noted the revolutionary nature of considering non-ex nihilo creations as worthy of authorial rights:

“author” has always connoted some amount of originality in the sense used in the older cases, the express use of the word "original" must carry with it some additional meaning, which, having regard to the case of *Walter v Lane*, (1900) AC 539, must necessarily, and in all cases be inventive originality. It is said that *Walter v Lane* decides that originality in an inventive sense was not in any case necessary in the then existing state of the law, and that it was sufficient for a person to be an "author" with whatever originality that word includes. The change suggested would be revolutionary.<sup>219</sup>

This statement emphasises the stark step away from the primary originality doctrine aligned with ex nihilo theories on creativity.

c) *Reinforcing fictions*

In *Sands*, the Australian judge was not quite at the stage of explicitly embracing the idea of authorship growing out of blatant non-ex nihilo creations which were, and still are, regarded as a form of copying rather creating. This might be why the appraisal of the outcome of *Walter v Lane* was shortly followed by a statement which attempting to disguise the incongruence of the reporter's authorship:

I shall first consider the matter apart from the language of the Convention. In *Walter v Lane* (*above*) it certainly was there held that originality in respect of the ideas expressed, or in the composition recorded in the report, which was the subject of their Lordships' consideration, was not necessary to constitute the reporter the "author" of his report. But, on the other hand, the personal skill of the reporter, as well as his labour and expense, were considered to be material considerations, and as these resulted in the production of a material and visible representation of what had been said, I think it can be collected from the case that that representation was regarded itself as an original production. The reporter was certainly decided to be an "author" as to the report; and as no such thing existed previously he created, that is "originated," the report.<sup>220</sup>

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<sup>219</sup> *Sands and Mcdougall Pty Ltd v Robinson* (1917) 23 CLR 49. 53

<sup>220</sup> *ibid*, 54

If the beginning of this argument merely repeats the nuances introduced by *Walter v Lane*, its end appears to force the doctrine of ‘origination’<sup>221</sup> on what is quintessentially *not* a form of ex nihilo creation. The reporter transcribing a public speech, is not the ex nihilo creator of the transcript as the content and form of his transcript is conditioned in its substance and part of its form by the speaker’s performance. That is not to suggest that the journalist should not be rewarded with authorship for his work. His work may well be worthy of copyright. However, it is argued that ex nihilo justifications and other related doctrines deployed to justify such protection should be dropped in order to avoid convoluted or illogical reasoning in the copyright jurisprudence.

*d) Fitting the law*

Conceptualising the work as the product of nothing else but the intellect of one individual presents practical advantages from a legal perspective. Indeed, such take on both creativity and authorship justifies granting full copyright to one person in lieu of many. By refusing the idea that authors owe part of their creation to individuals coming before them, the ex nihilo doctrine offers a theoretical base to simplify the distribution of rights. As explained in previous comments, legal frameworks strive to avoid implementing a complicated web of rights where legal claims and titles would be either shared or overlapping.<sup>222</sup> Allowing for intertextuality would irremediably force copyright paradigms to design networks of rights where authorship is split amongst several right holders to reflect the cultural debt they owe their predecessors or the commons. If so, the question yet to be answered is whether the law relied on this vision of ex nihilo creation to justify simplifying the distribution of rights, or

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<sup>221</sup> text to note 10.

<sup>222</sup> text to note 53, Chapter 1.

whether the distribution of rights was rationalised because policy-makers did believe in ex nihilo creativity.

### **III. Implications of the doctrine for performing artists**

This last section explores the impact of the ex nihilo creation doctrine on performers' protection. It is argued that concept of ex nihilo creativity, dominant in western cultures, contributes to conceiving performers as uncreative, thus underserving of authorship. The subsequent developments point to various aspects of the legal framework which fuelled the understanding of performers as interpreting authorial works rather than contributing to them. This view point led intellectual property laws to deny performers authorship, but also made the existence of performances contingent to the presence of authorial works. Thereby, the task of performing is both excluded from and depending on creative processes judged to be authorial rather than performative.

#### **A. No authors in performers**

It is now clear that performers are not authors, and that performances are not work in the sense of copyright.<sup>223</sup> Despite recent but rare challenges<sup>224</sup> to the author-performer divide, the latter remains well-entrenched in the legal frameworks of Australia, France, the UK, the US and of the European Union.<sup>225</sup> It bases itself on the premise that interpreting is not creating and that, therefore, performing is not

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<sup>223</sup> text to note 160, Chapter 2 ; Robert Plaisant, *Le Droit Des Auteurs et Des Artistes Exécuteurs* (Delmas et Cie 1970) 183-4.

<sup>224</sup> text to note 259, Chapter 2 ; Richard Arnold, *Performers' Rights* (4th edn, Sweet and Maxwell 2008) 279.

<sup>225</sup> text to note 160 and 188, Chapter 2.

authoring. This understanding of authorship and performance was relayed by both policy-makers and the judiciary.

### 1. Opposing creation versus interpretation, authoring versus performing

Creating must occur out of nothing to be considered as such. *The New Oxford Dictionary* defines 'creation' as "[t]he action or process of bringing something into existence".<sup>226</sup> As per this definition, the link the legal narrative made between authorship and creation was justified and particularly well illustrated by the 'origination' doctrine.<sup>227</sup>

On the other hand, the notion of 'interpretation', often taken for the synonym of 'performance',<sup>228</sup> is by definition an activity intervening after an action of creation since the former aims to make sense, convey or embody already existing material.<sup>229</sup> As a consequence, interpretations cannot but be a non- ex nihilo creative process. The opposition between creation and interpretation operates on the premise of the dichotomy between ex nihilo and non ex nihilo creation of meaning. The distinction naturally slid towards separating authoring from performing where interpreting becomes a second-hand form of creative expression.<sup>230</sup>

Legal narratives have not explicitly made the connection between ex nihilo creation theories and the creation-interpretation dichotomy they observe.<sup>231</sup> However, the latter is openly mentioned by other policy makers or judges to justify the setting aside

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<sup>226</sup> Judy Pearsall and Patrick Hanks (eds), *The New Oxford Dictionary* (Oxford University Press 1999) 430.

<sup>227</sup> text to note 10.

<sup>228</sup> See for example, Gregory Report (n 49) 60 cmd 165; Charles Jolibois, 'Rapport No 212 Fait Au Nom de La Commission Spéciale Sur Le Projet de Loi Adopté Par l'Assemblée National Relatif Aux Droits D'auteur et Aux Droits Des Artistes-Interprètes, Des Producteurs de Phonogrammes et de Vidéogrammes et Des Entreprises de Communication audiovisuelle', vol Tome I (1985) 29, later referred to as the 'Jolibois Report No 212'.

<sup>229</sup> *The New Oxford dictionary* reads: "Interpretation: the action of explaining the meaning of something" in Pearsall and Hanks (n 226) 955.

<sup>230</sup> Homburg (n 5) 83.

<sup>231</sup> The French legal literature briefly touched upon this point in the 1930's, see Homburg (n 5) 64 and Olganier (n 8) 18-9.

of performers. The message is clear: interpreting is not creating. More importantly, it is not of the standard of creating, so why should performers receive authorship for this task?

## 2. The opposition in the narrative of policy makers

This argument is exactly what Charles Jolibois, member of Parliament, put forward to constrain the scope of performers' rights to a minimum during the debates preceding the 1985 reform in France.<sup>232</sup> The French senator explained in his report to the General Assembly:

**[Performers] come into play after the work is completed. Therefore, performances cannot be considered as works of collaboration nor derivative works** – because the interpretation cannot be separated from the original work. Even though, it is sometimes referred to as a work, the use of this terminology does not justify in itself the attribution of authors' rights to performers. It might be form the base of an **intellectual right** but one of a different nature than authors' rights.<sup>233</sup>

The same opposition between creation on the one hand and the work of performers on the other had already been voiced by the French and Hungarian delegations during the international negotiations at the 1948 Brussels conference in charge of updating the Berne Convention. It was reported that “[t]he French government continues to believe that performers and auxiliary performing artists are not creators”.<sup>234</sup> This statement was supported by the Hungarian delegates who, too, refused to assimilate creation and interpretation:

The Hungarian government approves, in principle, of protecting performers' interpretations. It is nevertheless undeniable that performers are not original authors [...]

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<sup>232</sup> For more information about those particular parliamentary debates see text to note 174.

<sup>233</sup> Jolibois Report No 212 (n 288) 29. Author's translation, original emphasis. see Appendix 1 for original text.

<sup>234</sup> 'Documents de La Conférence de Bruxelles 5-26 Juin 1948' (1951) 310. Author's translation, see Appendix 1 for original text.



One could read in the phrase ‘original authors’ a subtle reference to the fact that authors are creators in the sense of being originators of their work whilst performers ‘only’ interpret such works, and therefore neither create nor originate new material.

One may wonder whether the same philosophy led European policy-makers to open the 2001 Information Society Directive<sup>235</sup> with the opposition between authors and performers conveyed by the phrase “authors and performers”. The eleventh recital of the directive reads:

A rigorous, effective system for the protection of copyright and related rights is one of the main ways of ensuring that European cultural creativity and production receive the necessary resources and of safeguarding the independence and dignity of artistic creators and performers.

Although one should rejoice that performing artists have been included in this agenda promoting of culture and intellectual property rights, this choice of words begs the question whether “artistic creators and performers” consciously intend to leave performing artists out of the class of ‘creators’. This reference to authors as creators separated from performers is the only occurrence in the European narrative;<sup>236</sup> yet interrogations remain as to whether the phrase was a slip of the tongue, abuse of language or whether it is representative of the mind set of policy-makers towards performing artists.

Additionally, implicit references to creation-versus-interpretation argument could be read whenever reports advised against the creation of performers’ rights as they would be additional or supplemental to copyright.<sup>237</sup> Even though, there is no direct mention of the fact that performers interpret existing works, the act of referring to the

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<sup>235</sup> Information Society Directive (Parliament and Council Directive 2001/29 of May 22,2001 on the harmonisation of certain aspects of copyright and related rights in the information society, [2001] OJ L167 10.

<sup>236</sup> There is no other use of the expression found in the rest of European directives included in this analysis.

<sup>237</sup> See for example, Gregory Report (n 49) 61, 63 cmd 166 and cmd 176; Brad Sherman and Lionel Bently, ‘Performers’ Rights: Options for Reform’ (Report to the Interdepartmental Committee 1995) 28. For more illustrations of this argument in policy-makers or judicial narratives see text to note 53, Chapter 1.

overlapping of rights hints towards such understanding of performances. It presupposes that, in essence, performances will come after and on the top of the creation of authorial works and so would any rights attributed to performing artists.

### 3. The opposition in judicial narratives

Judges too involved themselves in separating creating from interpreting, and authoring from performing. In England, Park J held in *Hadley v Kemp*<sup>238</sup> that “there is a vital distinction between composition or creation of a musical work on the one hand and performance or interpretation of it on the other.”<sup>239</sup> This reasoning led the court to deny authorship to the performers of the band over songs they had contributed to develop after a rough draft of the works had been presented to them by the lead singer.

In France, the Paris Court of Appeal<sup>240</sup> opposed the ‘field of creation’ from the ‘field of interpretation’ when it considered computers as equivalent of instruments, i.e. tools of performance:

The [defendant] cannot distort the connection between the fields of creation and interpretation by qualifying the input of the computerised instrument as they did since the [plaintiff] engages with both fields, and as he indicated, this tool is a mere instrument like other more traditional ones allowing the performance of work created before hand<sup>241</sup>

The same opposition was also voiced by American courts. In *Neri v Monroe*,<sup>242</sup> the seventh circuit categorically rejected the idea that “the members of an orchestra who

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<sup>238</sup> *Hadley and others v Kemp and another* [1999] All ER (D) 450.

<sup>239</sup> *ibid*, para N5.

<sup>240</sup> Paris, 3 mai 2006, n° 05/01400, « Ph. Chany » : D. 2007 jurispr. P 2653 note Edelman et Levinas ; RTCom. 2007, 104 obs. Paullaud-Dullian.

<sup>241</sup> Paris, 3 mai 2006, n° 05/01400, « Ph. Chany » : D. 2007 jurispr. P 2653 note Edelman et Levinas ; RTCom. 2007, 104 obs. Paullaud-Dullian Author’s translation, see Appendix 1 for original translation.

<sup>242</sup> *Neri v Monroe*, 726 F 3d 989 (7th Cir 2013).

play a new composition using their own interpretations of the score become the music's authors".<sup>243</sup>

The minority opinion in the 2014 *Garcia* case<sup>244</sup> emphasised the lack of ex nihilo input in performers' work. Smith J argued that the practice of an actress does not involve the type of creation rewarded with authorship for the simple reason that performers do not create, they interpret, or as he suggested, they lend their body:

An actress like Garcia makes a creative contribution to a film much like a vocalist's addition to a musical recording. Garcia did not write the script; she followed it. Garcia did not add words or thoughts to the film. She lent her voice to the words and her body to the scene.<sup>245</sup>

Here transpires another specificity of performances which bar them from accessing the status of ex nihilo creation: their body. Performers' body presents itself as an obstacle for performances to gain legal protection<sup>246</sup> because it can never be regarded as anything but a biological given they are unable to author, mould or sculpt.<sup>247</sup> In *Toney v L'Oreal USA*,<sup>248</sup> the judges made their position on this point very clear when the circuit court of appeal affirmed that "there is no work of authorship"<sup>249</sup> in the person's physical appearance. "A person's likeness – her persona – is not authored".<sup>250</sup> Because the performer's input comes "in the form of facial expression, body movement, and voice"<sup>251</sup> it can never amount to ex nihilo creation, especially when creation variations in the performances are thought to be

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<sup>243</sup> *Neri v Monroe*, 726 F 3d 989 (7th Cir 2013), 992.

<sup>244</sup> *Garcia v Google Inc*, 743 F 3d 1258 (9th Cir 2014). The minority opinion was confirmed by the majority decision on appeal, though the panel did not develop this particular argument to ground their decision. See, *Garcia v Google Inc*, 786 F 3d 733 (9th Cir 2015).

<sup>245</sup> *Garcia v Google Inc*, 743 F 3d 1258 (9th Cir 2014) 1274.

<sup>246</sup> text to note 176, Chapter 1.

<sup>247</sup> Lionel Bently, 'Authorship in Popular Music in UK Copyright Law' (2009) 12 *Information, Communication and Society* 179, 191.

<sup>248</sup> *Toney v L'Oreal USA Inc*, 406 F 3d 905 (7th Cir 2005). Here the court was referring to one's right of publicity.

<sup>249</sup> *ibid*, 910.

<sup>250</sup> *ibid*.

<sup>251</sup> *Garcia v Google Inc*, 743 F 3d 1258 (9th Cir 2014) 1274.

caused by the artists' lack of range or skills.<sup>252</sup> This logic does not fall from what the judges expressed in *Kelley v Chicago Park Dist*, where gardens were refused copyright protection because their designers could not be regarded as 'authoring' the vegetation they arrange.<sup>253</sup>

Taking this argument on board, it appears that performers suffer from a double impediment when attempting to satisfy the requirement of creation out of nothing: presence of the underlying work and that of their body.<sup>254</sup> Yet, those two features are fundamental and defining characteristics of the activity of performing, so much so, that performing can be regarded as fundamentally incompatible with the notion of ex nihilo creation which has informed the concept of authorship since the second century.<sup>255</sup>

The above comments detailed how legal narratives have opposed creation to interpretation on the implicit grounds of the ex nihilo creation doctrine. Intellectual property frameworks went a step further in subordinating 'performanceship' to authorship by precluding the protection of performances whenever the latter do not occur as the renditions of underlying authorial works as per the definition of the law. As a result, not only is it impossible for performers to be (legal) authors, but neither can there be (legal) performers without (legal) authors.

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<sup>252</sup> *CBS Records Australia Ltd v Guy Gross* (1989) 15 IPR 385, 392.

<sup>253</sup> *Kelley v Chicago Park Dist*, 635 F 3d 290 (7th Cir 2011) 304-5.

<sup>254</sup> Performers, or artists portrayed as performers by the court, seem to be more likely to access authorship when there is no underlying work involved before their interpretation takes place. See for example, *Stuart v Barrett* [1994] EMLR 448, 452; *Hyperion Records Ltd v Sawkins* [2005] EWCA Civ 565, para 53; Paris, 3 décembre 2004, *Sorbelli c/ Yoshida*, n° 04/06726: D. 2005, juris, p. 1237 [lexbase=A0681DGC], JCP E 2005, No1863.

<sup>255</sup> text to note 347, Chapter 2.

## **B. No performers without authors**

The legal narrative went further in embedding performances' lack of ex nihilo creativity in the framework of copyright. For interpretations to be protected as performances under the regime of performers' rights, some jurisdictions require the pre-existence of an underlying copyright work. This condition both illustrates and fuels the perception of performances as non-ex-nihilo types of creation. This logic also supported a distinction between interpretation and improvisation which would seat half-way between performances and authorial making. For this reason, the subsequent paragraphs develop the extent to which the notion of improvised performance was used to further the ex nihilo creation doctrine against the valuation of performers' input.<sup>256</sup>

### **1. The presence of authorial work as a defining element of performances**

Performance cannot escape the lack of ex nihilo creation because without underlying works they would fall out of the intellectual property framework and its scope of protection altogether. Consequently, performers cannot legally exist without the presence of authors. They become entirely dependent on a prior act of authorship.

#### *a) Sport games*

This point was made very clear in the decision of the Paris Court of Appeal of December 14, 2007.<sup>257</sup> In this decision, the civil judges refused to grant athletes' performers' rights for the purpose of their sport performances. Their reasoning was based on the fact that sportsmen's performances could not be associated with the concept of performative interpretations protected by law because their activity was

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<sup>256</sup> text to note 15, Introduction.

<sup>257</sup> Paris, 4e ch. B, 14 déc. 2007, Delhaye et Guerrib c Sté Européenne de magazines : Propr. intell. avr. 2008. 225, obs. Bruguère.

not based on a pre-existing authorial work. Their activity could not be considered as choreographed or dramatized so as to award them the status of performances legally speaking.

Similarly, the Australian Court too refused to consider sport events as copyrightable dramatic works in *Australian Olympic Committee Inc v Big Fights Inc*<sup>258</sup> though the decision did not engage with the question of performers' rights. Neither did the British and European judges when they rejected the argument that football games were eligible to copyright.<sup>259</sup>

In the US, the seventh circuit reached the same conclusion but did compare the performance football players to that of more traditional forms of art<sup>260</sup> in *Baltimore Orioles Inc v Major League Baseball Players Association*.<sup>261</sup> Because the comparison was made in the context of rights of publicity and not copyright it is uncertain whether analogy drawn between football games and choreographic works referred to the actual legal categories of copyright works.

Staying in the US, it must be noted that if the presence of an underlying authorial work is necessary for a performance to be legally protected, it suffices for such work to be copyrightable as opposed to effectively 'copyrighted'. In *Newton v Diamond*<sup>262</sup> the Court acknowledged the existence of performers' rights covering the musician's interpretation of the scores but denied copyright protection over the composition itself for they considered it too generic to satisfy the originality test.<sup>263</sup> Although the musical work interpreted by the flautist was copyrightable, it was not copyrighted.

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<sup>258</sup> *Australian Olympic Committee Inc v Big Fights Inc* (1999) 46 IPR 53, 67 para 42-3.

<sup>259</sup> *Football Association Premier League Ltd v QC Leisure* [2008] EWHC 1411 (Ch) ; [2008] 3 CMLR 12 ; Joined cases C-403/08 and C-429/08 *Football Association Premier League v QC Leisure, and Karen Murphy v Media Protection Services Ltd* [2011] EUECJ C-403/08\_O

<sup>260</sup> *Baltimore Orioles Inc v Major League Baseball Players Ass'n* 805 F 2d 663(7th Cir 1986) 675-6.

<sup>261</sup> *Baltimore Orioles Inc v Major League Baseball Players Ass'n* 805 F 2d 663(7th Cir 1986).

<sup>262</sup> *Newton v Diamond*, 349 F 3d 591 (9th Cir 2003) 595.

<sup>263</sup> *ibid.*

This difference was no obstacle to trigger performers' rights over the interpretation independently from the musical work's copyright.

*b) Reality television*

In France, the Court of Cassation has consistently excluded from the scope of performances covered by the intellectual property code the participation in reality TV shows.<sup>264</sup> According to the civil court, TV participants cannot be regarded as actors because their intervention is not scripted and their performance limited to being themselves without playing a role. The French bench held:

Considering that it is without contradiction that the Court of Appeal duly noted that the participants of the show were not given any part to play or text to recite, that they were only required to be themselves and express their own reactions when confronted to various situations and considering that the artificial element of those situations of their chronology does not amount to grant them the status of actors; the court of appeal was legally founded to deny them the quality of performers on the basis of such evidence [...].<sup>265</sup>

French courts have thus refused to grant casts of reality TV productions the status of performers because they regard the "profession of acting [as being the task of] interpreting a character other than oneself".<sup>266</sup>

In 2008, the Court of Cassation followed the same logic in the context of cinematographic documentaries.<sup>267</sup> The dispute concerned a documentary investigating the situation of primary schools which had filmed a teacher and ten of his pupils throughout the course of their academic year. The documentary was produced so as to be shown and commercialised in theatres as any other blockbusters. Shortly after its first viewings, the film was a commercial success so

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<sup>264</sup> Cass, 1ère civ, 24 avril 2013, n° 11-19.901: Bull. 2013, I, n° 83. This decision joined seventy-seven appeal decisions together.

<sup>265</sup> *ibid.* Author's translation, see Appendix 1 for original translation.

<sup>266</sup> Author's translation, see Appendix 1 for original text.

<sup>267</sup> Cass, 1ère civ, 13 novembre 2008, n° 06-16.278, « Etre et avoir » : JCP 2009, N 25, 30 §3 obs. Caron.

much so that the teacher, main character of the documentary, claimed a variety of intellectual property rights over the production, including the status of performer. The Court rejected the latter contention on the basis that his involvement in the film lacked interpretation, a necessary feature for performances protected as such by the law:

Considering that the decision noted that Mr Y [the teacher] has been filmed throughout the documentary during the course of his profession as school teacher, and that the short scene narrating the disappearance of a child is embedded in the routine of the classroom; noting also that the school teacher appeared in the documentary exclusively in the context of the reality of the his profession, without acting out a part for the purpose of the creative work being made other than his own, the Court of Appeal was legally justified to deny him the quality of performer, given that the production of a documentary excludes, per se, any interpretation.<sup>268</sup>

### c) *Catwalking*

With the French Supreme Court ruling in the *Ashby* case<sup>269</sup> that fashion shows are works of authorship protected by copyright law, one might wonder whether models walking down the runway should soon expect to be extended the privileges of performers' rights. Since French courts require a pre-existing material for performances to be regarded as protected interpretations, does it mean that any interpretations of any work eligible to copyright protection because material covered by performers' rights? Could models be seen as 'performing' according to the Court of Cassation's definition of the term? National laws had denied models performers' protection because the latter were not seen as interpreting any role or message but commercial ones.<sup>270</sup> Should such understanding change now that runway shows

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<sup>268</sup> Cass, 1ère civ, 13 novembre 2008, n° 06-16.278, « Etre et avoir » : JCP 2009, N 25, 30 §3 obs. Caron. Author's translation, see Appendix 1 for original text.

<sup>269</sup> Cass, crim., 5 février 2008, X c/ *Gaulme, Kenzo et Lacroix*, n° 07-81.387: Bull. crim. 2008 N° 28 p. 109; D. 2008 act. P. 611 ; JCP E 2008, 1456. The decision was confirmed by the European Court of Human Rights in 2013, see *Ashby Donald and Others v France* [2013] ECHR 28.

<sup>270</sup> text to note 285, Chapter 2.



have become authorial works in their own right? This uncertainty highlights the shaky grounds on to which the jurisprudence built its principles. The lack of a holistic approach to both copyright and performers' rights had them fail to anticipate all the implications of the *Ashby* theory.

What those questions essentially ask is how determining a factor the presence of underlying copyright works is, in the French definition of performances. Although national and international provisions or agreements make no express mention of the fact that the interpreted work ought to be eligible to copyright protection for the performance itself to be protected, the presence of underlying works certainly is often mentioned in their definitions.<sup>271</sup> Performances are often described as the interpretation of a *work*, whether oral, dramatic, musical or choreographic.<sup>272</sup> Given that the very own concept of 'work' presupposes its eligibility to protection under copyright law, should we understand that those dispositions implicitly referred to underlying works as works eligible to copyright? Whilst it may be a stretch to reach conclusion, the latter only assumes of policy-makers a rigorous attention for details and consistency in drafting.

That said, civil courts could easily prevent any attempt to enlarge the category of performers following the *Ashby* jurisprudence – should they wish to. Indeed, the originality test they devised to distinguish between performers, auxiliary performers and models could be used to such end<sup>273</sup> as its lack of clarity makes it a flexible tool at judges' disposal.

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<sup>271</sup> text to note 29, Chapter 1.

<sup>272</sup> *ibid*; Australia: 1968 Copyright Act, s. 189; France: IPC, Art. L 121-1; UK: CDPA 1988, s. 180 (2) (a) to (d); Rome Convention of 1961, Art 3.

<sup>273</sup> text to note 282, Chapter 1.

With the European Court of Human Rights confirming the Court of Cassation's decision in the *Ashby* case,<sup>274</sup> scholars asked whether a similar application of the law could ever reach the jurisdictions of Australia, the UK, or the US.<sup>275</sup> The outcome of the decision was enabled by the open-ended approach to the copyright subject-matter adopted by the French Intellectual Property Code (IPC).<sup>276</sup> As no such approach is enforced in the above mentioned common-law countries, their courts are unlikely to import the *Ashby* jurisprudence. However, some have contended that runway shows could possibly be fitted in the category of choreographic works.<sup>277</sup> If so, would common-law copyright framework be more inclined to grant the status of performers to runway models?<sup>278</sup> Only time will tell. As those jurisdictions do not implement any form of categorisation of performers, Courts would have to either welcome models as performers or develop clearer definitions of the substance protected by performers' rights to prevent such extension.

Those conjunctures highlight the full implications of extending the scope of copyright to new practices involving performative elements such as fashion shows. It also underlines the correlative relationship between authors' and performers' rights and how extending one may directly impact the other. Yet again, this angle of the problem, and of the *Ashby* jurisprudence, has not neither been considered nor

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<sup>274</sup> *Ashby Donald and Others v France* [2013] ECHR 28

<sup>275</sup> Estelle Derclaye, 'French Supreme Court Rules Fashion Shows Protected by Copyright – What about the UK?' (2008) 3 *Journal of Intellectual Property Law & Practice* 286; Paul Torremans, 'Ashby Donald and Others v France', Application 36769/08, EctHR, 5th Section Judgment of 10 January 2013' (2014) 4 *Queen Mary Journal of Intellectual Property* 95; Teodore Chirvase, 'Copyright and the Right to Freedom of Expression in the Knowledge Society' (2013) 10 *J Intell Prop L* 324, 335; Dirk Voorhoof and Inger Høedt-Rasmussen, 'ECHR: Copyright vs. Freedom of Expression' [2013] *Kluwer Copyright Blog* <<http://kluwercopyrightblog.com/2013/01/25/echr-copyright-vs-freedom-of-expression/>> accessed 10 March 2016.

<sup>276</sup> It is interesting to note that outside the context of fashion, the undirected individual who has an active role in the direction of his own portrayal may be regarded as the author or co-author of the photographs taken. See the *Sorbelli* case: Paris, 3 décembre 2004, *Sorbelli c/ Yoshida*, n° 04/06726: D. 2005, juris, p. 1237 [lexbase=A0681DGC], *JCP E* 2005, No1863 para 3.

<sup>277</sup> Derclaye (n 275) 287.

<sup>278</sup> Where performers' rights are available.

discussed. The literature<sup>279</sup> focused on the often discussed tug-of-war between authors' and users' interests, and it overlooked other stakeholders involved in the creative loop: performers, or in this case, models.

## **2. *Quid de improvisations?***

Not all performers are concerned with underlying works. Improvising artists do not interpret pre-existing material. As a result, the obstacle formed by the ex nihilo creation doctrine should vanish. Like authors, improvising performers are regarded and accepted as creating from nothing. Improvising is described as creating and performing "spontaneously or without preparation".<sup>280</sup> For this reason, those artists receive full authors' rights in France, to protect and control the fruit of their creative process. Although the IPC does not explicitly require courts to side with improvising performers, the lack of a formal fixation condition coupled with an open-ended approach to the types of protected subject-matter enabled civil judges to grant this particular category of performers' authorship.<sup>281</sup> So it was held in the context of music<sup>282</sup> and dramatic works.<sup>283</sup>

However, given the jurisprudence on participants of reality television and documentaries, the mere absence of underlying work does not suffice to obtain either authorship or performership. Although the supreme court acknowledged that such individuals were not following any particular script during the production process, the absence of a role playing element rendered their input ineligible to

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<sup>279</sup> See for example, Derclaye (n 275); Torremans, (n 275) 95; Chirvase (n 275) 335 ; Dirk Voorhoof and Inger Høedt-Rasmussen (n 275).

<sup>280</sup> Pearsall and Hanks (n 226) 920.

<sup>281</sup> Plaisant (n 223) 183-2.

<sup>282</sup> Cass, crim. 13 décembre 1995 : Bull. crim., 1995 N° 379 p 1110 ; D. 1997. p.196.

<sup>283</sup> Paris, 3 décembre 2004, *Sorbelli c/ Yoshida*, n° 04/06726: D. 2005, juris, p. 1237 [lexbase=A0681DGC], JCP E 2005, No1863 para 3.

intellectual property protection altogether, even as improvisers.<sup>284</sup> The French bench seems reluctant to extend the reach of intellectual property rights beyond the boundaries of traditional performances.

Under Australian, British and American<sup>285</sup> copyright laws, improvising performers may too reach legal authorship whenever their performances are recorded since audio records have now been accepted as an eligible form of fixation for copyright purposes.<sup>286</sup> In such case, both the record and the fixed content would receive copyright protection. Once fixed, improvised performances would then be categorised into the various types of copyrightable work and protected accordingly. A fixed musical improvisation would be considered the combination of a musical composition, its simultaneous performance by the musician and its record. Nevertheless, this situation is awaiting a confirmation by the courts as no statutory provisions require improvising performers to be granted copyright over their work.<sup>287</sup> Although, nothing prevents those artists from being regarded as performing composers, the courts are yet to be asked this exact question. Consequently, neither statutory nor judicial narratives have been as assertive in affirming improvising performers' authorship over their *ex nihilo* creation as much as they have in the context of composers or playwright - except for France.

On a side note and unfortunately for performers, improvising is not *just* a source of authorship; it may also be a trigger for liability. Recently, the Paris Tribunal de

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<sup>284</sup> text to note 264.

<sup>285</sup> In the context of American copyright, a limited portion of improvised performers (music performers mainly) receive protection against unauthorised third party recording at the federal level. On this, see Gregory Donat, 'Fixing Fixation: A Copyright with Teeth for Improvisational Performers' (1997) 97 *Columbia Law Review* 1363. On the limited scope of performers' rights at the federal level see previous developments in text to note 20, Chapter 2.

<sup>286</sup> Arnold (n 224) 291. See for an early acceptance of audio records as acceptable method of fixation in the US: *Capitol Records Inc v Mercury Records Corporation*, 221 F 2d 657 (2<sup>nd</sup> Cir 1955) 660.

<sup>287</sup> Under Australian copyright law, co-ownership of the record is possible as improvisations are included in the definition of live performances as per s. 84 of the 1968 Copyright Act. On the question of performers' co-ownership of sound recordings. On this see text to note 81, Chapter 2.

Grande Instance sided with the composer of a song who had considered its performance by a singer who had inserted improvised segment in her interpretation as a breach of his moral right of integrity.<sup>288</sup>

## **Summary**

This chapter introduced the first theoretical leg supporting the author-performer divide: the doctrine of ex nihilo creation. It pointed to places where the influence of the doctrine on the intellectual property frameworks of Australia, France, the UK and the US was most acute. It then closed its analysis by to describing the negative effect such theory had on the valuation of performers' input by policy-makers seating either in courts or legislative chambers.

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<sup>288</sup> TGI Paris, 21 février 2013, *Fernandez (Nilda Fernandez) c/ Sonnery (Arielle Dombasle)* n° 11/15192 : inédit.



# **The Author-Performer Divide in Intellectual Property Law:**

*A Comparative Analysis of the American, Australian,  
British and French Legal Frameworks*

Volume II of II

# Chapter Four

## The intellectualisation of creativity

*[T]he noises made by the performers, and heard by the audience, are not the music at all; they are only means by which [one] can reconstruct [...] the imaginary tune that existed in the composer's head.<sup>1</sup>*

Robin C. Collingwood, 1973

Western culture has a long-standing history of depicting creativity as an intellectual endeavour. Once the concept was emancipated from divine making,<sup>2</sup> the creative being never ceased to be 'intellectual' in expression and form.<sup>3</sup> At the beginning of the twentieth century, aesthetics theorists Benedetto Croce and Robin Collingwood formulated in their definitions of creativity and of the 'work of art' centred on their intellectual nature,<sup>4</sup> building on Kant's depiction of the artist as an independent agent.<sup>5</sup> They became the leaders of a school of thought on creativity known as 'idealism' which was later contradicted by 'action theorists'.<sup>6</sup> Whilst the latter believed that the process in itself is creative and valuable,<sup>7</sup> the idealist theory supports the view that the creative essence of a work is entirely encapsulated in the artist's initial idea<sup>8</sup> also described as a "moment of insight" or intuition.<sup>9</sup> According to the latter's

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<sup>1</sup> Robin Collingwood, 'Art as Expression' in M Rader (ed), *A Modern Book of Esthetics* (4th edn, Holt, Rinehart & Winston 1973) 91.

<sup>2</sup> Sushil Kumar Saxena, *Art and Philosophy: Seven Aestheticians* (New Dehli, Indian Council of Philosophical Research 1994) 35-6.

<sup>3</sup> Carl Haussman and Douglas Anderson, 'Philosophical Approaches to Creativity' in Mark Runco (ed), *The Creativity Research Handbook Vol II* (Hampton Press 2012) 82-84.

<sup>4</sup> Antoon Van den Braembussche, *Thinking Art: An Introduction to Philosophy of Art* (4th edn, Springer 2009) 43-56. Kumar Saxena (n 2) 6-7, 35-6; David Boucher and Andrew Vincent, *British Idealism: A Guide for the Perplexed* (Continuum 2012) 66-7.

<sup>5</sup> Haussman and Anderson (n 3) 83.

<sup>6</sup> Keith Sawyer, *Explaining Creativity The Science of Human Innovation* (2nd edn, Oxford University Press 2012) 87.

<sup>7</sup> *ibid.*

<sup>8</sup> Braembussche (n 4) 43-56. Kumar Saxena (n 2) 6-7, 35-6; Boucher and Vincent (n 5) 66-7.



logic, the making process of a piece is deprived of creative value for it is the mere technical realisation of the overarching intellectual concept.<sup>10</sup> The production process can thus be delegated to other individuals without them having any input in the creativity in the work.<sup>11</sup>

Creativity scholar Keith Sawyer posits that the idealist position still dominates what he named the “western cultural model of creativity”.<sup>12</sup> He also identified elements of similarities between his model and aspects of American intellectual property law.<sup>13</sup> This chapter furthers the scope and depth of his comparison. It extends it to the jurisdictions of Australia, France and the UK, and highlights the correlation between adopting such intellectualised views of creativity, and depreciating the work of performers.<sup>14</sup>

This analysis illustrates how western legal narratives have shaped intellectual property laws so as to intellectualise the subject-matter protected. It evidences the intellectualisation of the material copyright laws cover never decreased despite the slew of reforms they went through. It is clear from the narrative framing contemporary authors’ rights that the system still shows a relatively strong deference to intellectual creativity rather than bodily or physical creativity. The definitions of author, copyright and originality bear the marks of such bias. This led the narrative to oppose mental to physical labour, one being deserving of authorship but not the other. This analysis underscores the connection between emphasising the

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<sup>9</sup> Also known as “intuition” in Croce’s narrative. Kumar Saxena (n 2) 6; Sawyer *Explaining Creativity* (n 6) 87

<sup>10</sup> Kumar Saxena (n 2) 6; Sawyer *Explaining Creativity* (n 6) 88.

<sup>11</sup> Sawyer *Explaining Creativity* (n 6) 88.

<sup>12</sup> Composed of ten beliefs, his model summarises the understanding and conception of the creativity western cultures have formed throughout the centuries. Two central premises of the model emphasise the intellectual nature of creativity. According to those, creativity is believed to be a “moment of insight”<sup>12</sup> “mysteriously [emerging] from the unconscious” in Sawyer *Explaining Creativity* (n 6) 107; Keith Sawyer, ‘Western Cultural Model of Creativity: Its Influence on Intellectual Property Law, The Symposium: Creativity and the Law’ (2011) 86 *Notre Dame L. Rev.* 2027, 2030, 2033.

<sup>13</sup> Sawyer *Western Model Cultural Model* (n 12).

<sup>14</sup> Sawyer *Explaining Creativity* (n 6) 368.

intellectual nature of creativity and denying value to creative processes relying on the body such as performing. It is contended that such mind-oriented representation of creativity has negatively impacted performers' protection. Indeed, legal discourses appear to have associated performing with the work of the body as opposed to the work of the mind, denying it thereby any authorial qualities. As artists using their body to create (or perform), performers are refused the qualification of intellectuals, and by the same token become unworthy of authorship.

## **I. The Intellectualisation of legal authorship**

Even though intellectual property narratives moved back and forth between considerations of 'creativity', utilitarian and economic approaches to justify the protection of artistic expression, the target of intellectual property rights never ceased to be intellectualised. Despite the evolution of copyright from one model to the other, the subject-matter it covered was always and still is intellectual. The following paragraphs refer to this phenomenon as the intellectualisation of legal authorship.

### **A. The modernisation of copyright**

As mentioned in previous chapters,<sup>15</sup> Bently and Sherman uncovered a shift in approaching creativity and originality which materialised the evolution from a pre-modern model to a modern copyright framework.<sup>16</sup> This shift occurred in response to one central issue: extending property theories to intangible products like human

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<sup>15</sup> text to note 166, Chapter 1.

<sup>16</sup> Brad Sherman and Lionel Bently, *The Making of Modern Intellectual Property - The British Experience 1760-1911* (Cambridge University Press 1999) 44, 46.

creations. The scholars' theory narrates the "British experience"<sup>17</sup> of copyright before the 1911 Copyright Act. It is argued that although the models they depict are specific to the jurisdiction of the UK, their findings remain relevant to this comparative study as the copyright system of at least two other jurisdictions included in this analysis, namely Australia and the US, find their historical roots in the European jurisdiction.<sup>18</sup>

During the pre-modern era which covers decisions from 1760 to 1911,<sup>19</sup> the courts designed an *ad hoc* protection of creative works targeting the 'mental labour' encapsulated in the work. Creating was conceived as a process triggered and controlled by the author's mind.<sup>20</sup> Despite the inclusion of the process into the scope of originality covered by the law, cases were already opposing physical to 'mental labour'.<sup>21</sup> Creativity remained an intangible process influenced by the author's intellect.<sup>22</sup>

The codification of copyright law introduced by the 1911 Copyright Act<sup>23</sup> maintained this stress on the intellectuality of 'true' creation but came to focus on the work rather than the process. The Act began the modern era of intellectual property which witnessed the end of casuistic approaches to protecting intangibles. The responsive methodology followed by the courts was replaced by an *in abstracto* conception of

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<sup>17</sup> Sherman and Bently *The Making of Modern IP* (n 16).

<sup>18</sup> See for the history tying the copyright framework of the US to that of the UK: Abrams H, 'The Historic Foundation of American Copyright Law: Exploding the Myth of Common Law Copyright' 29 *Wayne Law Review* 1119, 1171-4; Before the 1968 Copyright Act, Australian copyright law was a direct transplant from the British legal framework. The 1912 Copyright Act formally enacted in Australia the substance of the British 1911 Copyright Act. Mark Davison, Ann Monotti and Leanne Wiseman, *Australian Intellectual Property Law* (Cambridge University Press 2012) 191-2.

<sup>19</sup> Sherman and Bently *The Making of Modern IP* (n 16) 2.

<sup>20</sup> *ibid* 2-3, 15, 27.

<sup>21</sup> According to the King's bench in 1769, "the labours of the mind and productions of the brain are as justly intitled to the benefit and emoluments that may arise from them, as the labours of the body are" in *Millar v Taylor* (1769) 4 *Burrow* 2303, 2359.

<sup>22</sup> Sherman and Bently *The Making of Modern IP* (n 16) 3.

<sup>23</sup> For a reference of the 1911 Act as the first codification of copyright in the UK. See Sherman and Bently *The Making of Modern IP* (n 16) 2.

the subject-matter protected which formally became the copyright 'work'.<sup>24</sup> The aim of the statute was to put an end to the 'glorious muddle'<sup>25</sup> created by judge-made copyright law so as to rationalise it. To this end, it implemented an abstract and open-ended definition of protectable works. This era enforced a renewed model of creativity turned towards the material aspect of creating: the work.

In this modernised framework, the intellectual nature of the copyright work was maintained. The essential difference between the pre-modern and modern models of copyright lies in the ability of the material object to fully encompass the author's creative input. The law no longer protects the creative process which leads to the production of a tangible object, but focuses on the tangible object itself, as the full and absolute embodiment of its author's creativity. In doing so, the law lost track of the performative aspect of creation to only focus on the characteristics of the work.<sup>26</sup> The modern model moved from an abstract and dynamic approach to creativity to adopt a more static and material conception of it.<sup>27</sup>

This logic still transpires in the provisions of the British and Australian copyright statutes, and is also an approach the American and French frameworks came to adopt. Indeed, the entire focus of the statutory provisions is on the work.<sup>28</sup> Only the

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<sup>24</sup> Sherman and Bently *The Making of Modern IP* (n 16) 3, 48. See also, on the notion of 'works' in copyright law: Brad Sherman, 'What Is Copyright Work?' (2011) 12 *Theoretical inquiries in Law* 99.

<sup>25</sup> Sherman and Bently *The Making of Modern IP* (n 16) 134.

<sup>26</sup> *ibid*, 49.

<sup>27</sup> *ibid*, 48.

<sup>28</sup> The work only dictates the eligibility of the author to be recognised as such. The only subtle reference to the creative process is made in relation to the identification of the author once rights have already been generated. See, Australia: 1968, 1968 Copyright Act, s. 31-2; France: IPC, Art L 111-1; UK: CDPA 1988 Sections 1, 3-6; US: US Code, Title 17 para 102-3. Very rarely would the author be mentioned. See for instance Copyright Act 1968, s 10: "author, in relation to a photograph, means the person who took the photograph"; s 22: "the maker of the cinematograph film is the person by whom the arrangements necessary for the making of the film were undertaken"; CDPA 1988 Section 9 and 9(3): The statute states: "In this Part "author", in relation to a work, means the person who creates it. [...] In the case of a literary, dramatic, musical or artistic work which is computer-generated, the author shall be taken to be the person by whom the arrangements necessary for the creation of the work are undertaken".

work dictates the eligibility of its author to be recognised as such. The notion of process is absent from the copyright systems under study.<sup>29</sup>

By the nineteenth century, as the discourse on creativity became more uniform,<sup>30</sup> it soon disappeared to be substituted by the language of political economy.<sup>31</sup> Naturalist needs to protect creativity were quickly replaced by the urge to secure the economic value of authorial works. In doing so, intellectual property law lost sight of creativity.<sup>32</sup> However, despite this attempt to move towards legal sciences<sup>33</sup> and obliterate concerns about the essence of creation,<sup>34</sup> the latter kept reemerging under different guises such as the originality requirement.<sup>35</sup> Subsequent developments of this chapter highlight how such resurgences were, and remain, largely intellectualised whenever they come up in the legal narratives.<sup>36</sup>

## **B. The dematerialisation of copyright**

As mentioned in above paragraphs, the material and static modern model of copyright identified by Sherman and Bently is still endorsed by the current British framework, and that traces of a similar approaches in the other jurisdictions are noticeable.<sup>37</sup>

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<sup>29</sup> Charlotte Waelde, Sarah Whatley and Mathilde Pavis, 'Let's Dance! But Who Owns It?' (2014) 36 *European Intellectual Property Law Review* 217, 226.

<sup>30</sup> Sherman and Bently *The Making of Modern IP* (n 16) 44.

<sup>31</sup> *ibid*, 173-5.

<sup>32</sup> *ibid*, 43, 202.

<sup>33</sup> *ibid*, 176.

<sup>34</sup> See the comments made by T. Scrutton in T. Scrutton, *The Laws of Copyright: An Examination of the Principles Which Regulate Literary and Artistic Property in England and Other Countries* (London: John Murray 1883) 2-3, also cited in Sherman and Bently *The Making of Modern IP* (n 16) 175.

<sup>35</sup> Australia: 1968 Copyright Act, s. 31-2; France: IPC, Art L 112-4; UK: CDPA Section 1 (1) a ; US: US Code, Title 17 para 101 (a). See Sherman and Bently *The Making of Modern IP* (n 16).

<sup>36</sup> text to note 67.

<sup>37</sup> note 28.

According to the scholarship,<sup>38</sup> this model was recently threatened by the jurisprudence of the European Court of Justice (CoJ). The *Infopaq* jurisprudence<sup>39</sup> was interpreted as erasing all the criteria defining the copyright work but one: the originality condition. In its decision, the Court defined the originality test as the requirement to evidence that the work is its “author’s own intellectual creation”<sup>40</sup> bearing the print of its intellectual input. This position made little, if no difference in France as the Intellectual Property Code (IPC) never enforced any other conditions to copyright protection than originality.<sup>41</sup> This is, or was, not the case in the UK. Traditionally, British copyright law required eligible works to fit in prescribed categories and to be fixed in addition to be original. Therefore, the European jurisprudence was read as sweeping away the conditions of categorisation<sup>42</sup> and fixation by remodelling condition of originality as the sole requirement.<sup>43</sup>

Before *Infopaq*,<sup>44</sup> British authorities had concluded that originality could be evidenced by displaying the relevant type and amount of skills, judgment and effort in the creation of the work.<sup>45</sup> According to Griffiths, this approach to originality allowed the legal narrative to stay focused on the concrete materiality of author’s creative input in the work.<sup>46</sup> By urging national courts to replace their originality test with a standard examining the ‘intellectual input’ of the creator, the CoJ is described

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<sup>38</sup> See Jonathan Griffiths’s argument in ‘Dematerialization, Pragmatism and the European Copyright Revolution’ (2013) 33 Oxford J Legal Studies 767.

<sup>39</sup> C-5/08 *Infopaq International A S v Danske Dagblades Forening* [2009] EUECJ C-5/08\_O; C-393/09 *Bezpečnostní softwarová asociace Svaz softwarové ochrany v Ministerstvo kultury* [2010] EUECJ C-393/09, EU:C:2010:816, ECLI:EU:C:2010:816, [2011] FSR 18, [2011] ECDR 3; C-604/10 *Football Dataco and Others v Yahoo! UK Ltd And Others* [2012] WLR(D) 57, [2012] Bus LR 1753, [2012] EUECJ C-604/10, [2012] WLR (D) 57; C-145/10 *Eva-Maria Painer v Standard VerlagsGmbH and Others* [2011] EUECJ C-145/10, EU:C:2011:798, ECLI:EU:C:2011:798

<sup>40</sup> C-5/08 *Infopaq International A S v Danske Dagblades Forening* [2009] EUECJ C-5/08\_O para 44,48.

<sup>41</sup> IPC, Art L 112-1 and 4.

<sup>42</sup> CDPA 1988, s 1.

<sup>43</sup> CDPA Section 1(1) a ; See, Eleonora Rosati, ‘Originality in a Work, or a Work of Originality: The Effects of the Infopaq Decision’ (2011) 58 Journal Copyright Society of the USA 795, 803-807.

<sup>44</sup> C-5/08 *Infopaq International A S v Danske Dagblades Forening* [2009] EUECJ C-5/08\_O.

<sup>45</sup> *University of London Press Ltd v University Tutorial Press, Ltd* [1916] 2 Ch 601, 611.

<sup>46</sup> Griffiths *Dematerialization, Pragmatism and the European Copyright* (n 38) 772-5.

as forcing British judges to endorse a doctrine resembling the anti-thesis of what constitutes the national pattern of their copyright law.<sup>47</sup> The originality embedded in copyright works will no longer be assessed on the basis of concrete and material elements present in the product but according to the dematerialised test of the print one's 'intellectual input' which could potentially include analyses of the process.<sup>48</sup> Griffiths labels this shift triggered by the CoJ the 'dematerialisation' of copyright law.<sup>49</sup>

Though criticised,<sup>50</sup> the full impact of the decision on domestic jurisdictions is yet to be assessed.<sup>51</sup> Griffiths suggests that the influence was only subtle<sup>52</sup> and relatively recent cases such as *The Newspaper Licensing Agency Ltd v Meltwater Holding BV*<sup>53</sup> or *Taylor v Macquire*<sup>54</sup> litigated in the High Court tend to confirm this position. In those decisions, three panels of judges concluded that the British test for originality and definition of copyright work had not been radically transformed by the European decision. In the first instance decision of *The Newspaper Licensing Agency Ltd v Meltwater Holding BV*,<sup>55</sup> Proudman J affirmed that the qualitative test for originality

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<sup>47</sup> Griffiths *Dematerialization, Pragmatism and the European Copyright* (n 38) 775.

<sup>48</sup> See for instance, C-145/10 *Eva-Maria Painer v Standard VerlagsGmbH and Others* [2011] EUECJ C-145/10, EU:C:2011:798, ECLI:EU:C:2011:798. In this decision, the court took into consideration the creative choices involved in the making of the portrait to confirm Painer's claim of authorship, even though the result itself was rather common place from an artistic perspective. See para 91.

<sup>49</sup> Griffiths *Dematerialization, Pragmatism and the European Copyright* (n 38).

<sup>50</sup> Jonathan Griffiths, 'Dematerialization, Pragmatism and the European Copyright Revolution' (2013) 33 *Oxford J Legal Studies* 767, 775-7. Griffiths argues that the concept of creativity and the originality requirement was an aspect left out by the Directive to the discretion of domestic laws.

<sup>51</sup> Rosati (n 43) 808-9.

<sup>52</sup> Griffiths *Dematerialization, Pragmatism and the European Copyright* (n 38) 778-9. The scholar refers to the *Meltwater* case for an illustration of this point: *Newspaper Licensing Agency v Meltwater Holding BV* [2010] EWHC 3099 (Ch); [2011] EWCA Civ 890 Confirmed in appeal. Other scholars predict that the full extent of the *Infopaq* jurisprudence on the British copyright framework are yet to be enforced and that deeper changes are to come. See for example, Rosati (n 43) 808-9.

<sup>53</sup> *The Newspaper Licensing Agency Ltd v Meltwater Holding BV* [2011] EWCA Civ 890 ; [2012] Bus LR 53; see first instance case, *The Newspaper Licensing Agency Ltd v Meltwater Holding BV* [2010] EWHC 3099 (Ch) ; (2011) Ent LR 22 (3) 101. Griffiths refers to the *Meltwater* cases to illustrate this point in Griffiths *Dematerialization, Pragmatism and the European Copyright* (n 38) 780.

<sup>54</sup> *Taylor v Maguire* [2013] EWHC 3804 (IPEC); [2014] ECDR 4.

<sup>55</sup> *The Newspaper Licensing Agency Ltd v Meltwater Holding BV* [2010] EWHC 3099 (Ch); (2011) Ent LR 22 (3) 101.

“has been re-stated but for present purposes not significantly altered by *Infopaq*.”<sup>56</sup> This reading of the European jurisprudence was praised by the Court of Appeal who confirmed the first instance decision and regarded it to be a “clear, careful and comprehensive judgment”.<sup>57</sup> As in the *Meltwater* cases,<sup>58</sup> the High Court did refer to the newly introduced originality test of intellectual creation in *Taylor v Macquire*.<sup>59</sup> Yet, in her assessment of the work’s originality District Judge Clarke mentioned the expression of ‘intellectual effort’ in creation as one possible way of evidencing originality but refrained from expressly ruling out preceding national doctrines on the question.<sup>60</sup>

In France, the European decisions have had little if no sway at all on the outcomes of copyright disputes. The courts of the hexagon continue to enforce the same standard of originality they did before the passing of the *Infopaq* decision.<sup>61</sup> The French bench may employ the language used by the CoJ in describing the originality test but its substance has certainly not changed and remains of a slightly higher threshold than its European counterpart. The recent *Jimi Hendrix* decision<sup>62</sup> given by the Paris Tribunal de Grande Instance is representative of this lack of harmonisation.<sup>63</sup> In this case, the French Tribunal denied copyright protection to the musician’s portrait for it failed the originality condition. The Court did follow the test laid out by the CoJ in the *Painer* decision<sup>64</sup> yet reached what appears to be a divergent conclusion. Indeed,

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<sup>56</sup> *The Newspaper Licensing Agency Ltd v Meltwater Holding BV* [2010] EWHC 3099 (Ch) para 81.

<sup>57</sup> *ibid*, para 48. See also, Rosati (n 43) 807-8.

<sup>58</sup> *The Newspaper Licensing Agency Ltd v Meltwater Holding BV* [2010] EWHC 3099 (Ch); *The Newspaper Licensing Agency Ltd v Meltwater Holding BV* [2011] EWCA Civ 890.

<sup>59</sup> *Taylor v Maguire* [2013] EWHC 3804 (IPEC); [2014] ECDR 4. This point is further discussed in subsequent paragraphs see text to note 142.

<sup>60</sup> *Taylor v Maguire* [2013] EWHC 3804 (IPEC) para 6.

<sup>61</sup> C-5/08 *Infopaq International A S v Danske Dagblades Forening* [2009] EUECJ C-5/08\_O

<sup>62</sup> TGI Paris, 3eme Ch, 21 mai 2015, Société Bowstir Ltd, G. M. c/ Egotrade SARL : Legalis available at : <[http://www.legalis.net/spip.php?page=jurisprudence-decision&id\\_article=4612](http://www.legalis.net/spip.php?page=jurisprudence-decision&id_article=4612)> accessed 10 March 2016.

<sup>63</sup> *Taylor v Maguire* [2013] EWHC 3804 (IPEC) para 6.

<sup>64</sup> C-145/10 *Eva-Maria Painer v Standard VerlagsGmbH and Others* [2011] EUECJ C-145/10, EU:C:2011:798, ECLI:EU:C:2011:798



whilst the European panel found the conservative head-to-shoulder portrait of a child with a sky-blue background as displaying the relevant amount of intellectual input and personality, the black and white shot of the rock star standing and smoking in front of the camera did not make the cut according to French standards.<sup>65</sup> This decision illustrates the leeway left to domestic courts in assessing originality and attributing authorship despite the European attempt to level out the field. A consistent harmonisation is all the more difficult to implement since the finding of authorship is fact-sensitive and assessed by first instance judges as such.<sup>66</sup> This was confirmed and reaffirmed by the CoJ which consistently reminds the parties that the task of assessing the originality of materials candidate to copyright is only for national judges.<sup>67</sup>

### **C. The intellectualisation of copyright**

Even though the European decisions confirmed, if not accelerated, a process of dematerialisation of copyright, fundamental aspects of its model have not changed. The mutation of the frameworks from dynamic to static and casuistic to abstract has only made clearer at least one of its central characteristics: the intellectualisation of the subject-matter protected.

The recent dematerialisation of copyright did not soften or decrease its intellectualisation. If anything, the movement uncovered by Griffiths strengthened it. The European jurisprudence did not replace creativity in its physical context but

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<sup>65</sup> For more on the French jurisprudence in relation to photographic works see Annex 7.

<sup>66</sup> See for a case where the first instance judge analyses the photographic works involved in the dispute one at the time, TGI Paris, 27 novembre 2007, n° 07/10531. See for an equivalent position being enforced in the UK, *Stuart v Barrett and Others* [1994] EMLR 448, 463 ; *Hadley v Kemp* [1999] EMLR 589,642 ; Lionel Bently, 'Authorship in Popular Music in UK Copyright Law' (2009) 12 *Information Communication and Society* 179, 192.

<sup>67</sup> See for instance, *C-406/10 SAS Institute Inc v World Programming Ltd* [2012] WLR (D) 131, para 89.

reinforced intellectualised biases.<sup>68</sup> Subsequent developments further discuss this point.<sup>69</sup>

From the pre-modern to the European legal understanding of creativity, the substance covered by copyright excludes the body to privilege the ‘work of the mind’, “the mental labour”,<sup>70</sup> the “genuine offspring of the mind”,<sup>71</sup> “the author’s own intellectual creation”,<sup>72</sup> the “sweat of the brain rather than of the body”.<sup>73</sup> This heavily intellectualised approach to creativity, and to the authorial work, is the one constant trait of all the models envisaged by the courts under both British and European copyright law. It is contended that the same approach underpins the narratives of the American and Australian frameworks. The following section details the extent to which such mind-oriented favouritism has infiltrated the narrative framing and describing authorship, authorial works and authorial-like types of creativity.

## **II. Protection of intellectual creativity**

Creativity starts and ends in the mind. Creating is the labour of the mind. Originality is intellectual and so are authors. Those statements are assumptions which underlay western legal understandings of creativity, originality and authorship. As a result, what constitutes an original work deserving of copyright protection has been shaped and defined by those precepts. It is argued that this perception of creativity and

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<sup>68</sup> Unless we link the European jurisprudence to the French and via the use of the term “personality” the gap between mind and body is bridged, see text to note 399.

<sup>69</sup> text to note 123.

<sup>70</sup> Sherman and Bently *The Making of Modern IP* (n 16) 2-3.

<sup>71</sup> *ibid* 144.

<sup>72</sup> C-393/09 *Bezpečnostni softwarova asociace Svaz softwarové ochrany v Ministerstvo kultury* [ 2010] EUECJ, para 46.

<sup>73</sup> Sherman and Bently *The Making of Modern IP* (n 16) 141.

authorship contributed to excluding performing artists from the realm of copyright and to maintaining their status at bay from authors' rights.<sup>74</sup> It is also contended that this bias towards intellectualised representations of creativity has reached every level of copyright discourses to the extent of shaping the definitions of the author, the work and the originality condition.

### A. Authors as intellectuals

Park J once wrote “[w]e have all seen imaginative sketches of the great classical composers of the past sitting at their desks in what one imagines might be an attic, quill pens in hand and sheafs of musical paper before them, writing out their compositions by hand”.<sup>75</sup> This common depiction of the authorial figure has been long criticised and loudly so by the romantic authorship discourse.<sup>76</sup> Woodmansee rejects the idea that creativity does not involve any “cutting and pasting” for it is an entirely intellectual exercise which resides in the mind of the author and does not involve the latter in any physical labour or handiwork.<sup>77</sup> Rahmatian too joins her in this argument,<sup>78</sup> though he is himself rather critical of the paradigm developed by the author-genius critic.<sup>79</sup> This conception of the author as the solitary intellectual genius is outdated, inaccurate and has been disproved by a long-standing body of empirical

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<sup>74</sup> This can be linked to Sawyer's observations regarding performers' creativity being neglected because of the over-emphasis on other, more intellectualised, forms of creative expression. See Sawyer *Explaining Creativity* (n 6) 368.

<sup>75</sup> The British judge criticised this representation of authorship for not matching the creative processes of popular music, though he reasserted similar preconceptions on creativity later in his judgement. See, *Hadley v Kemp* [1999] All ER (D) 450, para N3.

<sup>76</sup> See for example, Martha Woodmansee, 'Response to David Nimmer' (2002) 38 Hous. L. Rev. 231, 232-3. See also, text to note 420, Chapter 2.

<sup>77</sup> *ibid.* This representation of the creative process assumes that the latter is always entirely predictable, a depiction dismissed by creativity research. See on this, Sawyer *Explaining Creativity* (n 6) 367.

<sup>78</sup> Andreas Rahmatian *Copyright and Creativity: The Making of Property Rights in Creative Works* (Edward Elgar 2011) 184-5.

<sup>79</sup> *ibid.*, 159. See also, text to note 436, Chapter 2.

research in creativity.<sup>80</sup> Yet, the legal narrative framing contemporary copyright still embraces it.

At the same time as the pre-modern era came to an end in the UK, the vision of the author as an intellectual moved into swing in the narrative of the American Supreme Court. Creative ideas were depicted as emanating from the “author’s mind”<sup>81</sup> and works were, and still are, understood as “the production of [the man]’s own genius or intellect”.<sup>82</sup> With its *Burrow-Giles Lithographic Co v Sarony* decision, the Supreme Court directly drew upon British authorities to endorse and enshrine in the American discourse the intellectual character of authors, of authorship and originality.<sup>83</sup> This case served as the base for subsequent decisions<sup>84</sup> to fully deploy the intellectualisation of the authorial figure in the transatlantic framework. This process culminated in *Aalmuhammed v Lee*<sup>85</sup> where the author was described as being “the inventive or mastermind [who] creates, or gives effect to the idea”<sup>86</sup> by the ninth circuit.

The idea of author as the intellectual genius or inventive master mind found similar resonances in contemporary British copyright discourses. As early cases depicted the author as the person who “must think the thoughts”,<sup>87</sup> composers were later

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<sup>80</sup> Sawyer *Explaining Creativity* (n 6) 134-140; Woodmansee *Response to David Nimmer* (n 76) 232; Rahmatian (n 78) 185.

<sup>81</sup> *Baker v Selden*, 101 US 99 (Supreme Court 1880) 103.

<sup>82</sup> *Burrow-Giles Lithographic Co v Sarony* 11 U.S. 53 (Supreme Court 1884) 58.

<sup>83</sup> At the same time in England too similar representations of the author are portrayed in equivalent narratives. See for example *Walter v Lane* in which the author is referred to as the person who “think[s] the thoughts”. See *Walter v Lane* [1900] AC 539, 543.

<sup>84</sup> See for example, *Feist Publications, Inc v Rural Telephone Service Co, Inc*, 499 US 340 (Supreme Court 1991) 346; *Publications International Ltd v Meredith Corp*, 88 F 3d 473 (7th Cir 1996) 479, para 6; *JCW Investments Inc v Novelty Inc*, 482 F3d 910 (7th Cir 2007) 914; *Aalmuhammed v Lee*, 202 F. 3d 1227 (9th Cir 2000) 1234.

<sup>85</sup> *Aalmuhammed v Lee*, 202 F. 3d 1227 (9th Cir 2000).

<sup>86</sup> *ibid*, 1234-5.

<sup>87</sup> *Walter v Lane* [1900] AC 539, 543.

portrayed as artists who “composed in [their] mind and [their] memory”<sup>88</sup> “developed and fixed [their work] in [their] musical consciousness”.<sup>89</sup> Indeed, according to British judges:

[A] composer can ‘hear’ the sound of his composition in his mind before he ever hears it played. Beethoven could hear his music in this sense even when he was deaf.<sup>90</sup>

In *White-Smith Music Publishing Corporation v Apollo Corporation*,<sup>91</sup> the American Supreme Court too represented the composer as an intellectual artist when the bench held that “a musical composition is an intellectual creation which first exists in the mind of the composer; he may play it for the first time upon an instrument” .<sup>92</sup>

The Australian and French frameworks were influenced by intellectualised representation of the author but their bias toward the creativity of the mind was made more evident in the context of defining the copyright work and the condition of originality. Those two points are the subjects of the following sections.

## **B. Copyright work as works of the intellect**

Since true creativity is perceived to be intellectual, the work worthy of authorship must share this characteristic. The copyright work must rise from the mind to be deserving protection. Recent developments in copyright advanced by the CoJ reinforced the idea that the copyright work is an intellectual product. The subsequent paragraphs highlight how this logic was present in the narrative of the member states

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<sup>88</sup> *Hadley v Kemp* [1999] All ER (D) 450, para N5.

<sup>89</sup> *ibid*, para N3

<sup>90</sup> *ibid*.

<sup>91</sup> *White-Smith Music Publishing Co v Apollo Co*, 209 US 1 (Supreme Court 1908).

<sup>92</sup> *ibid*, 17.

before the intervention of the court and how the same ideal also penetrated the discourse of jurisdictions beyond the borders of the European Union.

## **1. Works of the mind**

The copyright work is no exception to the intellectualisation of the law. Some jurisdictions go as far as referring to it as the work of the mind, and requiring that both the author's and the audience's intellects be engaged in and by the work for it to be worthy of protection. To put it simply, the authorial work must rise from, reside and end in the mind.

### *a) The mind at the heart of copyright*

Even though French intellectual property narratives do not directly portray authors as intellectuals as the American and British judges do in their decisions, the IPC places intellectual creativity at the core of its framework when it expressly names the copyright work 'oeuvre de l'esprit', reading in English 'work of the mind' or 'work of the intellect'.<sup>93</sup> Policy-makers could hardly be clearer in defining the type of creativity rewarded with authors' rights. It is that of the mind, springing from the author's consciousness or sub-consciousness, and no other.

The same expression was used in the preamble of the 1952 Universal Copyright Convention.<sup>94</sup> In the introductory comments of the instrument, the signatory countries, which include all the jurisdictions under study in this analysis,<sup>95</sup> declare having been "[p]ersuaded that such a universal copyright system will facilitate a wider dissemination of works of the human mind", subject-matter targeted by the

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<sup>93</sup> IPC, Art. L 111-1.

<sup>94</sup> Universal Copyright Convention signed at Geneva on September, 6 1952.

<sup>95</sup> Australia ratified the Convention on May 1, 1969; France did so on October 14, 1955, the UK on June 27, 1957 and the US on December 6, 1954.

Convention. The French ‘work of mind’ found a direct equivalent on the international stage in the expression “works of the *human* mind”.<sup>96</sup>

The European Court of Human Rights (ECHR) appears to have adopted this synonym for copyright work in the 2013 *Ashby case*.<sup>97</sup> Examining a decision delivered by the Court of Cassation, the ECHR referred to the French expression of “oeuvre de l’esprit” and indicated its national and statutory origin by inserting vertical commas.<sup>98</sup> By the end of the decision, the same term is completely embedded in the narrative of the Court who dropped the commas and presented the expression as a legitimate equivalent to the term ‘copyright work’.<sup>99</sup>

Although this analogy between the copyright work and the work of mind was not directly introduced in the statutory dispositions of Australia, UK or the US, references to similar representations were made by the national judges of those countries. In *Millar v Taylor*,<sup>100</sup> the Court described creations as residing the author’s mind since “[t]heir whole existence is in the mind alone”.<sup>101</sup> This very expression was reused by the US Supreme Court in *Holmes v Hurst*<sup>102</sup> where the court directly referred to the British decision *Jefferys v Boosey*.<sup>103</sup> In Australia too, reference to the artist’s engagement of the mind in the work was necessary for the latter to be eligible to copyright. Judges have relied on this particular criterion to distinguish between the work of craftsman worthy of legal authorship and the work of pedestrian craft. In *Coogi Australia Pty Ltd v Hysport International Pty Ltd*<sup>104</sup> and *Sheldon and*

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<sup>96</sup> IPC, Art. L 111-1; emphasis added.

<sup>97</sup> *Ashby Donal v France* [2013] ECHR 28.

<sup>98</sup> *ibid*, para 13.

<sup>99</sup> *ibid*, para 33, 36, 38(i).

<sup>100</sup> *Millar v Taylor* (1769) 4 Burrow 2303, 98 ER, 201.

<sup>101</sup> *ibid*, 2361-2.

<sup>102</sup> *Holmes v Hurst*, 174 US 82 (Supreme Court 1899).

<sup>103</sup> *ibid*, 86 citing *Jefferys v.Boosey*, 4 H.L.C. 815.

<sup>104</sup> *Coogi Australia Pty Ltd v Hysport International Pty Ltd* (1998) 41 IPR 593.

*Hammond Pty Ltd v Metrokane Inc*<sup>105</sup> the Court held that for works of craftsmanship to be eligible to copyright protection “the mind of a craftsman must be engaged during the act of production”.<sup>106</sup>

Combining these observations with the comments made in the above paragraphs,<sup>107</sup> the work emerges from and is located in the author’s mind in the American, Australian and British copyright discourses. Therefore, one could reasonably draw parallels between the French and the common law countries’ approaches to conclude that they all regard the copyright work as a ‘work of mind’ although the latter jurisdictions do not refer to it as explicitly and consistently as their civil counterpart does.

*b) Works for the minds*

The civil judges explored the full extent of this mind-oriented approach to the copyright work when they involved the audience’s intellectual activity triggered when engaging with the work as a defining characteristic. In 2007, the Paris Court of Appeal was asked whether a museum exhibition could be considered a work of the mind as per the dispositions of the IPC, a question to which the bench answered by the affirmative.<sup>108</sup> Because the exhibition at stake was its “author’s original creation appealing to the visitors’ intellectual qualities and sensibility” it qualified as a work of the mind covered by authors’ rights.<sup>109</sup> The lack of ex nihilo creation of the exhibition was no obstacle to protection since its strong intellectual appeal seems to have outweighed this flaw.

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<sup>105</sup> *Sheldon And Hammond Pty Ltd v Metrokane Inc* [2004] FCA 0019, (2004) 61 IPR 1.

<sup>106</sup> *Coogi Australia Pty Ltd v Hysport International Pty Ltd* (1998) 41 IPR 593, 608; *Sheldon And Hammond Pty Ltd v Metrokane Inc* [2004] FCA 0019, (2004) 61 IPR 1, para 73.

<sup>107</sup> text to note 75.

<sup>108</sup> Paris, 1ere ch, 2 octobre 1997 : D. 1998, p. 312 note Edelman ; RIDA 1998 n 176, p. 422

<sup>109</sup> Paris, 1ere ch, 2 octobre 1997: D. 1998, p. 312 note Edelman; RIDA 1998 n 176, p. 422. Author’s translation. See Appendix 1 for the original text.



Similar positions were held by British and American courts. In *Hyperion v Sawkins*,<sup>110</sup> the House of Lords concluded that the kind of musical works protected by copyright was in part defined by its appeal to the listeners' intellect:

In the absence of a special statutory definition of music, ordinary usage assists: as indicated in the dictionaries, the essence of music is combining sounds for listening to. Music is not the same as mere noise. The sound of music is intended to produce effects of some kind on the listener's emotions and intellect.<sup>111</sup>

Equivalent contentions were expressed in the decision *Miller v Civil City of South Bend*<sup>112</sup> by the court of appeal of the seventh circuit, though the litigation did not take place on intellectual property grounds. Easterbrook J dissented from the majority's opinion which placed strip-teasing within the scope of expression protected by constitutional rights. The judge considered that dancing for the mere purpose of entertainment could not be compared to higher forms of arts such as ballet because there was no appeal to the audience's intellect.<sup>113</sup>

In light of those decisions, the copyright work has become a work of the mind created by the mind of the author and destined to the minds of the audience. In this respect, the legal narrative seems to endorse, consciously or not, Collingwood's vision of the artwork which entirely resides in the author's intellect and can only be revealed by appealing the audience's mind.<sup>114</sup>

All those elements in which an intellectual quality has been identified contribute to composing the authorial work and reinforce the degree with which the whole copyright framework has been progressively intellectualised.

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<sup>110</sup> *Hyperion Records Ltd v Sawkins* [2005] EWCA Civ 565

<sup>111</sup> *ibid*, para 53.

<sup>112</sup> *Miller v Civil City of South Bend*, 904 F.2d 1081 (7th Cir 1990)

<sup>113</sup> *ibid*, 1086, 1124.

<sup>114</sup> Collingwood (n 1) 91; Kumar Saxena (n 2) 37-8.

## 2. Intellectual creations

Although not all jurisdictions explicitly employ the phrase of ‘work of the mind’ to refer to the copyright work, the expression ‘intellectual creation’ has dominated a number of regulatory pieces as well as decisions, at the European level and beyond.

### *a) Embracing intellectuality at policy levels*

At the international and European level, policy-makers associated copyright works with intellectual creations without detour.

#### *i. International Consensus in Brussels*

The 1886 Berne Convention was the first international agreement to employ the phrase ‘intellectual creation’ to refer to copyright works in the body of its regulatory dispositions.<sup>115</sup> Later, on the occasion of the 1948 Brussels Conference, the question of choosing the expression ‘intellectual creation’ to refer to copyright works was again discussed.<sup>116</sup> On this point, the majority agreed that the use of the phrase in the body of regulatory instruments was not necessary since it was obvious to all delegates that such meaning was assumed and implied in the term ‘work’. Marcel Plaisant reported:

[The delegates] have not considered it necessary to specify that those works constitute intellectual creations because, as the Delegate of Hungary pointed out, if we are speaking of literary and artistic works, we are already using a term which means that we are talking about personal creation or about an intellectual creation within the sphere of letters and the arts.<sup>117</sup>

Considering the specific case of anthologies and collective works appearing under Article 2(3), the delegations also agreed that:

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<sup>115</sup> 1886 Berne Convention, art. 5.

<sup>116</sup> The conference gathered the members of the Berne Convention with the agenda to revise the international instrument.

<sup>117</sup> Marcel Plaisant, ‘Records of the Conference Convened in Brussels June 5 to 26, 1948’ (1896) 257.

The discussion on them served to make it clear that protection was assured whenever the selection and arrangement of the contents of the works had the character of an intellectual creation.<sup>118</sup>

The documentation of the conference<sup>119</sup> narrating the same exchanges also reflects the interchangeable use of the terms ‘copyright work’ ‘subject-matter’ and ‘intellectual creations’.<sup>120</sup> When the delegates debated on the possible arrival of new works such as films, photographic works, works of applied arts or even performances, their respective legitimacy to enter the “supreme rank”<sup>121</sup> of copyright work was assessed on the basis of their conceptual proximity to “intellectual creations”.<sup>122</sup> According to the delegates, the general protection granted by authors’ rights could only cover the “products of intellectual creation” and “human intelligence”.<sup>123</sup>

*ii. The European trigger*

The European Union embedded the notion of ‘intellectual creations’ at the heart of European copyright law when it inserted the phrase under Article 1(3) of the 1991 Directive on the legal protection of computer programs.<sup>124</sup> The Article reads:

A computer program shall be protected if it is original in the sense that it is the author’s own intellectual creation. No other criteria shall be applied to determine its eligibility for protection.

Two years later, a similar disposition was introduced in the 1993 Term Directive<sup>125</sup> with regard to photographic works. This time the regulations affirmed that:

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<sup>118</sup> Plaisant (n 117) 257.

<sup>119</sup> ‘Documents de La Conférence de Bruxelles 5-26 Juin 1948’ (1951) later referred to as ‘Brussels Conference Documents’.

<sup>120</sup> *ibid*, 140-1.

<sup>121</sup> Plaisant (n 117) 257.

<sup>122</sup> Brussels Conference Documents (n 118) 140-1, 310-1.

<sup>123</sup> *ibid*, 140 ; author’s translation, see Appendix 1 for original text.

<sup>124</sup> Council Directive of 14 May 1991 on the legal protection of computer programs (91/250/EEC).

Photographs which are original in the sense that they are the author's own intellectual creation shall be protected in accordance with Article 1.<sup>126</sup>

The 1993 Directive made direct references to the Berne Convention<sup>127</sup> and the 1991 Green Paper<sup>128</sup> in the recitals which recycled the expression. This repetition indicates that its use was no inadvertent move on the part of the European Parliament.

In 1996, the European body expressly extended the same vocabulary to databases. Article 3(1) of the 1996 Directive on the legal protection of databases<sup>129</sup> bears an obvious resemblance with the wording of its 1993 predecessor:

In accordance with this Directive, databases which, by reason of the selection or arrangement of their contents, constitute the author's own intellectual creation shall be protected as such by copyright. No other criteria shall be applied to determine their eligibility for that protection.

Again, the same phrase of the 'author's own intellectual creation' as synonym to protected work is repeated in two of recitals of the same directive.<sup>130</sup> Its ninth recital, like the 1991 Green paper before it, generally associates protected subject-matter with 'intellectual creations' and does not narrow the expression down to specific products like collections, photographic works or databases as previous instruments did. It reads:

Any harmonisation of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation.<sup>131</sup>

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<sup>125</sup> Council Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights.

<sup>126</sup> *ibid*, art. 6.

<sup>127</sup> *ibid*, Recitals 12 (referring to collections) and 17 (referring to photographic works).

<sup>128</sup> *ibid*, Recital 10.

<sup>129</sup> Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, OJ No L 77/20.

<sup>130</sup> *ibid*, Recitals 15 and 16.

<sup>131</sup> Recital 15 and 16 in Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, OJ No L 77/20, Recital 9.

This recital was repeated in the 2001 Directive on the Information in the Society<sup>132</sup> and again in the 2006 Directive on the term of protection of copyright and certain related rights.<sup>133</sup>

*b) Cascading in case law*

This body of directives formed the narrative basis the CoJ stood on to deliver its decisions. This was notably the case in the landmark decisions of *Infopaq*,<sup>134</sup> *BSA*,<sup>135</sup> *Football Dataco*,<sup>136</sup> *Painer*<sup>137</sup> but also in *British Horseracing v William Hill*,<sup>138</sup> *Fixtures Marketing*<sup>139</sup> and *Apis Hristovich*<sup>140</sup> to only name a few.<sup>141</sup>

*Infopaq*<sup>142</sup> anchored the expression of the ‘author’s own intellectual creation’, synonymous to original copyright work, at the centre of the European framework. Basing its decision on the previously cited dispositions of the Berne Convention<sup>143</sup> and of 1991,<sup>144</sup> 1996,<sup>145</sup> 2001<sup>146</sup> and 2006<sup>147</sup> directives, the CoJ concluded:

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<sup>132</sup> Parliament and Council Directive 2001/29/EC 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167/10-19, Recital 9.

<sup>133</sup> Parliament and Council Directive 2006/116/EC of 12 December 2006 on the term of protection of copyright and certain related rights, OJ L 372/12-18, Recital 11.

<sup>134</sup> C-5/08 *Infopaq International A S v Danske Dagblades Forening* [2009] EUECJ C-5/08\_O, para 4,6-8,11.

<sup>135</sup> C-393/09 *Bezpečnostní softwarová asociace Svaz softwarové ochrany v Ministerstvo kultury* [2011] ECDR 3, para 6, 88.

<sup>136</sup> C-604/10 *Football Dataco and Others v Yahoo! UK Ltd And Others* [2012] WLR (D) 57, para 15.

<sup>137</sup> C-145/10 *Eva-Maria Painer v Standard VerlagsGmbH and Others* [2011] EUECJ C-145/10, para 15, 17, 87.

<sup>138</sup> C-203/02 *British Horseracing Board & Ors v William Hill Organization Ltd* [2005] 1 CMLR 15, para 4.

<sup>139</sup> C-46/02 *Fixtures Marketing v Oy Veikkaus Ab* [2004] ECR I-10365, para 4.

<sup>140</sup> C-545/07 *Apis-Hristovich EOOD v Lakorda AD* [2009] ECDR 13, para 7.

<sup>141</sup> See also for example, C-277-10 *Luksan v Petrus van der Let* [2012] EUECJ C-277/10, para 8 ; C-406/10 *SAS Institute Inc v World Programming Ltd* [2012] WLR(D) 131, para 6, 55, 60, 65, 67; Joined cases C-403/08 and C-429/08 *Football Association Premier League & Ors v QC Leisure and Others, and Karen Murphy v Media Protection Services Ltd* [2011] EUECJ C-403/08\_O, para 81; C-162/10 *Phonographic Performance (Ireland) Limited v Ireland* [2012] EUECJ C-162/10, para 11.

<sup>142</sup> C-5/08 *Infopaq International A S v Danske Dagblades Forening* [2009] EUECJ C-5/08\_O

<sup>143</sup> *ibid*, para 4.

<sup>144</sup> *ibid*, para 6.

<sup>145</sup> C-5/08 *Infopaq International A S v Danske Dagblades Forening* [2009] EUECJ C-5/08\_O, para 7

<sup>146</sup> *ibid*, para 8.

<sup>147</sup> *ibid*, para 11.

It is, moreover, 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.<sup>148</sup>

The European judges then proceeded to confirm that:

In those circumstances, copyright within the meaning of Article 2(a) of Directive 2001/29 is liable to apply only in relation to a subject-matter which is original in the sense that it is its author's own intellectual creation.<sup>149</sup>

Such reference to the 'author's own intellectual creation' as representation of the subject-matter protected by copyright is clearly deliberate as indicated by the twelve repetitions of the phrase throughout the judgement.<sup>150</sup> This intention to reshape the copyright lexicon was duly noted by subsequent European and national cases who repeated the intellectually-oriented lexicon.<sup>151</sup>

In France, the intellectuality surrounding the copyright work was always present, the latter being named after this particular feature, i.e. work of the mind.<sup>152</sup> Although some cases do directly refer to the European jurisprudence when describing the conditions to meet to gain protection,<sup>153</sup> the terminology used by the civil judges to describe original works has otherwise not been as rigorously aligned with that of the

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<sup>148</sup> C-5/08 *Infopaq International A S v Danske Dagblades Forening* [2009] EUECJ C-5/08\_O, para 34.

<sup>149</sup> *ibid*, para 35.

<sup>150</sup> *ibid*, para 34-5, 37, 39, 44-5, 47-8, 50-1, 76(1). The expression is mentioned another five times when quoting dispositions of the current legal framework, see para 4, 6-8, 11.

<sup>151</sup> See for example at the European level, C-145/10 *Eva-Maria Painer v Standard VerlagsGmbH and Others* [2011] EUECJ C-145/10, para 15, 17, 87 ; C-203/02 *British Horseracing Board & Ors v William Hill Organization Ltd* [2005] 1 CMLR 15, para 4 ; C-46/02 *Fixtures Marketing v Oy Veikkaus Ab* [2004] ECR I-10365, para 4 ; C-545/07 *Apis-Hristovich EOOD v Lakorda AD* [2009] ECDR 13, para 7. See in France: Cass, 1ère civ, 13 juin 2006, n° 02-44.718: Bull. Civ. 2006 I N° 307 p. 267; D. 2006, act. P 1741 note Daleau ; pan. p. 2993 obs. Sirinelli ; TGI Paris, 3ème Ch, 21 mai 2015, *Société Bowstir Ltd, G. M. c/ Egotrade SARL* : Legalis available at : <[http://www.legalis.net/spip.php?page=jurisprudence-decision&id\\_article=4612](http://www.legalis.net/spip.php?page=jurisprudence-decision&id_article=4612)> accessed 10 March 2016. See in the UK: *Temple Island Collections Ltd v New English Teas Ltd & Anor* [2012] EWPC 1, para 18-9; *SAS Institute Inc v World Programming Ltd* [2013] EWCA Civ 1482, para 29.

On this, see also, Eleonora Rosati, *Originality In EU Copyright - Full Harmonisation through Case Law* (Edward Elgar 2013) 189-206.

<sup>152</sup> text to note 93.

<sup>153</sup> See for a recent example the *Jimi Hendrix* case TGI Paris, 3ème Ch, 21 mai 2015, *Société Bowstir Ltd, G. M. c/ Egotrade SARL* : Legalis available at : <[http://www.legalis.net/spip.php?page=jurisprudence-decision&id\\_article=4612](http://www.legalis.net/spip.php?page=jurisprudence-decision&id_article=4612)> accessed 10 March 2016. See also, for a reference to the copyright as an 'intellectual creation' Cass, 1ère civ, 13 juin 2006, n° 02-44.718: Bull. Civ. 2006 I N° 307 p. 267; D. 2006, act. P 1741 note Daleau ; pan. p. 2993 obs. Sirinelli ; TGI Paris, 3ème Ch, 21 mai 2015, *Société Bowstir Ltd, G. M. c/ Egotrade SARL* : Legalis available at : <[http://www.legalis.net/spip.php?page=jurisprudence-decision&id\\_article=4612](http://www.legalis.net/spip.php?page=jurisprudence-decision&id_article=4612)> accessed 10 March 2016.

CoJ. Although most expressions do focus on the intellectual nature of the copyright work, the French bench has not consistently adopted the phrasing of the ‘author’s own intellectual creation’. The courts rely on a variety of expressions to describe a similarly intellectualised creativity such as “intellectual construction”<sup>154</sup> or “powerful intellectual production”.<sup>155</sup>

Before *Infopaq*,<sup>156</sup> British courts were already referring to copyright works as intellectual entities. Copyright laws were described as being only concerned with subject-matters equating “the expression of thought”<sup>157</sup> and the work as the embodiment of “one’s own thought”.<sup>158</sup> In *Redwood Music Ltd v B Feldman & Co Ltd*<sup>159</sup> authorial works were depicted as “the fruits of [...] gifted minds”.<sup>160</sup> Bringing the British discourse closer to what became the European narrative a decade later, the subject-matter “protected as an original literary work is anything that can be [...] any tangible product of intellectual endeavour”<sup>161</sup> according to the Court in *Exxon Corporation v Exxon Insurance Consultants International Ltd*.<sup>162</sup>

Unlike their French counterpart, British courts seem to have been more inclined to adopt the wording suggested by the CoJ. Ten years after the *Infopaq* decision, its new vocabulary seems to have been more consistently embedded in national decisions.<sup>163</sup>

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<sup>154</sup> TGI Paris, 27 novembre 2007, n° 07/10531. Author’s translation. Original text reads : « construction intellectuelle » (the Court assessed the originality of a series of the photographs reproduced in a book)

<sup>155</sup> TGI Tarascon, 21 septembre 2012, n° 09/02027 : RLDI Octobre 2013 N 97 Comm. 3213 p 18 note Amine. Author’s translation, see Appendix 1 for original text.

<sup>156</sup> C-5/08 *Infopaq International A S v Danske Dagblades Forening* [2009] EUECJ C-5/08\_O.

<sup>157</sup> *University of London Press Ltd v University Tutorial Press, Ltd* [1916] 2 Ch 601,608.

<sup>158</sup> *Walter v Lane* [1900] AC 539, 562. See also, *Millar v Taylor* (1769) 4 Burrow 2303, 2361-2; 98 E.R. 201, 233.

<sup>159</sup> *Redwood Music Ltd v B Feldman & Co Ltd* [1979] R.P.C. 385.

<sup>160</sup> *ibid*, 402.

<sup>161</sup> *Exxon Corpn and others v Exxon Insurance Consultants International Ltd* [1981] 3 All ER 241, 245.

<sup>162</sup> *Exxon Corpn and others v Exxon Insurance Consultants International Ltd* [1981] 3 All ER 241.

<sup>163</sup> See for instance, *SAS Institute Inc v World Programming Ltd* [2010] EWHC 1829 (Ch), para 319; *SAS Institute Inc v World Programming Ltd* [2013] EWCA Civ 1482 para 50 ; *Newspaper Licensing Agency Ltd v*

This standardisation of vocabulary does not necessarily equate to harmonisation of its substance. It is debatable and debated<sup>164</sup> whether the definition of the copyright and its associated test for originality has actually been effectively harmonised by the CoJ or not. As explained in previous developments, France has maintained its own principles. In the UK, it seems as though the national and European definitions of works and tests for originality cohabit. Taking for example the decisions *Newspaper Licensing Agency Ltd v Marks & Spencer Plc*<sup>165</sup> and *Taylor v Maguire*<sup>166</sup> both sets definitions of copyright work are combined and used in reasoning of the Court, one has not replaced the other.<sup>167</sup> This point is further discussed in subsequent paragraphs describing the influence of the European jurisprudence on the originality condition.<sup>168</sup>

The depiction of the copyright work as intellectual creation is not limited to the copyright frameworks of European Union member states. This paradigm reached too the jurisdictions of Australia and the US.

To begin with Australia, the copyright work was referred to as ‘intellectual work’<sup>169</sup> by judges who also affirmed that “to be the subject of copyright the matter must be a composition of the author, something which has grown up in his mind”.<sup>170</sup> The wording of the Berne Convention which employs the expression of “intellectual

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*Marks & Spencer Plc* [2000] EWCA Civ 179,89-90; *Temple Island Collections Ltd v New English Teas Ltd & Anor* [2012] EWPCC 1, para 19. See also, *Taylor v Maguire* [2013] EWHC 3804 (IPEC); [2014] ECDR 4.

<sup>164</sup> See for example, Stephen Vousden, ‘Infopaq and the Europeanisation of Copyright Law’ (2010) 1 *The WIPO Journal*; Rosati (n 43); Griffiths *Dematerialization, Pragmatism and the European Copyright* (n 38) 780-790.

<sup>165</sup> *Newspaper Licensing Agency Ltd v Marks & Spencer Plc* [2000] EWCA Civ 179.

<sup>166</sup> *Taylor v Maguire* [2013] EWHC 3804 (IPEC); [2014] ECDR 4.

<sup>167</sup> *Newspaper Licensing Agency Ltd v Marks & Spencer Plc* [2000] EWCA Civ 179, para 85, 89-90 and *Taylor v Maguire* [2013] EWHC 3804 (IPEC); [2014] ECDR 4, para 6.

<sup>168</sup> text to note 234.

<sup>169</sup> *Skybase Nominees Pty Ltd v Fortuity Pty Ltd* [1996] Federal Court of Australia Western Australia District Registry General Division (BC9606576) 4.

<sup>170</sup> *Desktop Marketing Systems Pty Ltd v Telstra Corporation Ltd* [2002] FCA 0112, (2002) 55 IPR 1.



creation” was noted and discussed in *IceTV Pty Ltd v Nine Network Australia Pty Ltd*.<sup>171</sup>

In the US, the Supreme Court defined the subject-matter protected by copyright as “mental creations or conceptions”<sup>172</sup> and that such should only be extended to “the tangible results of mental conception”.<sup>173</sup> Referring to common law copyright, the Supreme Court justices noted that the copyright work was understood as being the author’s “intellectual creation”.<sup>174</sup> The same intellectuality was confirmed by the landmark case of *Feist Publications v Rural Telephone Service Co*<sup>175</sup> where the court concluded that authorial works were the “original intellectual conceptions of the author”<sup>176</sup> citing another American authority in the field of copyright: *Burrow-Giles Lithographic Co v Sarony*.<sup>177</sup> Doing so, the highest court of the US confirmed in 1991 the intellectualised conception of the authorial work the framework expressly adopted towards the end of the nineteenth century.

Such intellectualised understandings of the authorial work filtered down to the circuit courts. The seventh circuit abides by the jurisprudence set by *Burrow-Giles Lithographic Co v Sarony* in a variety of decisions directly refer to the authority<sup>178</sup> or employ verbatim expressions. In *JCW Investments v Novelty*, the circuit judges required the presence of ‘intellectual production, of thought, and conception’ to grant

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<sup>171</sup> *IceTV Pty Ltd v Nine Network Australia Pty Ltd* [2009] HCA 14 (unreported BC200902942) para 73.

<sup>172</sup> *White-Smith Music Publishing Co v Apollo Co*, 209 US 1 (Supreme Court 1908) 11.

<sup>173</sup> *ibid.*

<sup>174</sup> *Harper & Row, Publishers, Inc v Nation Enterprises*, 471 US 539 (Supreme Court 1985) 551, citing *American Tobacco Co v Werckmeister*, 207 U. S. 284, 299 (1907) at 299.

<sup>175</sup> *Feist Publications, Inc v Rural Telephone Service Co, Inc*, 499 US 340 (Supreme Court 1991).

<sup>176</sup> *ibid.*, 346-7.

<sup>177</sup> *Burrow-Giles Lithographic Co v Sarony*, 11 U.S. 53 (Supreme Court 1884)58. According to this decision Copyright works are ‘intellectual productions’.

<sup>178</sup> See for example, *Publications International Ltd v Meredith Corp*, 88 F 3d 473 (7th Cir 1996) 479; *JCW Investments Inc v Novelty Inc*, 482 F3d 910 (7th Cir 2007) 914, para HN2.

copyright protection to any creative item.<sup>179</sup> In *Harold Lloyd Corp v Witwer*, the same circuit commented that:

The theory is (however difficult may be its application at times) 'that the protection accorded the owner of copyright is of the intellectual product of the author.'<sup>180</sup>

Those cases stress the fact that the representation of the work as an intellectual production is not exclusive to the European copyright paradigm. Before the intervention of the *Infopaq* judgement, French and British judges were already envisaging authorial works according to similar intellectualised concepts. Similarly, Australia and the US followed an analogous theoretical path in describing the essence of the protected subject-matter. In both cases, the starting point of this intellectualised vision of the work found its roots in British jurisprudence which may explain the harmony existing across the jurisdictions on this particular point.

### **C. Originality as an intellectual endeavour**

Previous developments evidenced that both the author and the authorial work are associated with intellectual understandings of creativity. The subsequent paragraphs submit that the same phenomenon of intellectualisation affected the originality condition, which is often regarded as the cornerstone of copyright protection.

#### **1. From mental labour to intellectual input**

The narrative framing the requirement of originality bears evident marks of intellectuality. As the modernisation of the condition was harmonised throughout the

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<sup>179</sup> *JCW Investments Inc v Novelty Inc*, 482 F.3d 910 (7th Cir 2007) 914, para HN2.

<sup>180</sup> *Harold Lloyd Corp v Witwer*, 65 F.2d 1 (9th Cir 1933) 12. Citation omitted.

jurisdictions, the language deployed to express it was intellectualised by the judiciary.<sup>181</sup> This modernisation process had originality evolve from mental labour to intellectual effort. The influence of the CoJ finally stabilised on the notion of intellectual effort or input. In jurisdictions beyond the latter's authority, traces of a similar shift from terminologies of 'mental labour' to 'intellectual effort' are also noticeable and can be attributed to the historical ties existing between the copyright systems of the UK, Australia and the US.

a) *Labours of the mind*

Towards the end of the nineteenth and the beginning of the twenty first century, the notion of labour of the mind or intellectual labour was consistently present in the judicial narratives describing both originality and the types of creativity works worthy of legal protection. In *Walter v Lane*,<sup>182</sup> British judges referred to "the intellectual labour constituting authorship".<sup>183</sup> The process of creating original works worthy of authorship, also referred to as "productions of the brain",<sup>184</sup> is described as being the fruit of the "labours of the mind" in *Millar v Taylor*.<sup>185</sup> Similarly, when handling the question of non ex nihilo creations<sup>186</sup> such as abridgements in *Macmillan v Cooper*,<sup>187</sup> the Court considered that its author evidenced the type of originality targeted by copyright protection since "to make such an abridgement requires the exercise of mind, labour, skill and judgement brought into play".<sup>188</sup>

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<sup>181</sup> Rahmatian refers to the terms used to define originality as "insipid and enigmatic". Although the author agrees with this contention, it is contended that this has not undermined their progressive intellectualisation; Rahmatian (n 78) 58.

<sup>182</sup> *Walter v Lane* [1900] AC 539

<sup>183</sup> *ibid*, 548.

<sup>184</sup> *Millar v Taylor* (1769) 4 Burrow 2303,2359; 98 E.R. 201, 231

<sup>185</sup> *ibid*.

<sup>186</sup> text to note 188, Chapter 3.

<sup>187</sup> *MacMillan & Co Ltd v Cooper* (1924) 26 BOMLR 292.

<sup>188</sup> *MacMillan & Co Ltd v Cooper* (1924) 26 BOMLR 292, para 12.

The same notion of mental labour influenced the narrative of the American Supreme Court during the nineteenth century. In *Wheaton and Donaldson v Peters and Grigg*,<sup>189</sup> the Court compared the “mental vigour” of different works as a “result of their [authors’] labours”<sup>190</sup> during which “the mind has been intensely engaged”.<sup>191</sup> The creative process was evidently perceived as intellectual and remained so under the authority of *Burrow-Giles Lithographic Co v Sarony*<sup>192</sup> which associated it with an “intellectual operation”<sup>193</sup> requiring “intellectual conception”<sup>194</sup> drawing from the author’s “own mental” capacities.<sup>195</sup> A similar vocabulary was used by the Australian court in *Sands and Mcdougall Pty Ltd v Robinson*<sup>196</sup> where the courts described as “authorship [as] a mental operation deserving the character of an original work”.<sup>197</sup>

The notion of intellectual labour or labour of the mind remained present in the American narrative<sup>198</sup> slightly longer than it did in the British discourse, and even appeared briefly in Australia in *Coogi Australia Pty Ltd v Hysport International Pty Ltd*.<sup>199</sup>

With the modernisation of copyright, the test of originality progressively evolved towards the doctrine of ‘skills, judgement and effort’<sup>200</sup> the intellectualised conception of the condition was kept alive in the British discourse to read the Court depict the creative act as “the mental process of the artist”<sup>201</sup> utilising “mental material”<sup>202</sup> in

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<sup>189</sup> *Wheaton and Donaldson v Peters and Grigg*, 33 US 591 (Supreme Court 1834).

<sup>190</sup> *ibid*, 657-8.

<sup>191</sup> *ibid*, 657.

<sup>192</sup> *Burrow-Giles Lithographic Co v Sarony* 11 U.S. 53 (Supreme Court 1884).

<sup>193</sup> *ibid*, 59.

<sup>194</sup> *ibid*.

<sup>195</sup> *ibid*, 54-5.

<sup>196</sup> *Sands and Mcdougall Pty Ltd v Robinson* (1917) 23 CLR 49.

<sup>197</sup> *ibid*, 56 citing *Wilkins v Aikins* (1818) 17 Ves., 422, at p. 426.

<sup>198</sup> See for example, for a more recent use of the terminology, *Baltimore Orioles Inc v Major League Baseball Players Association* 805 F.2d 663 (7th Cir 1986) 668 para FN6.

<sup>199</sup> *Coogi Australia Pty Ltd v Hysport International Pty Ltd* (1998) 41 IPR 593, 604.

<sup>200</sup> *University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch 601, 611.

<sup>201</sup> *Leah v Two Worlds Publishing Co LD* [1951] Ch 393,398-9.

<sup>202</sup> *ibid*.

1951. This suggests that even though there was no direct reference to the intellectual nature of the effort creators had to display in order to obtain authors' rights in the doctrine *per se*, a degree of intellectuality has always underpinned judges' approach to the originality requirement.

*b) Intellectual effort*

Going back to Australia, judges referred consistently to the notion of 'independent intellectual effort' as early as 1917 when assessing the question of the originality of a work candidate to copyright protection.<sup>203</sup> This approach to the originality condition as 'intellectual effort' was then embedded in Australian jurisprudence on the issue.<sup>204</sup> Notions of intellectual "concentration"<sup>205</sup> and "mental exertion"<sup>206</sup> were at times added to clarify the meaning of independent intellectual effort.

Australian decisions often refer to the jurisprudence of the UK when developing the meaning and context of the 'independent intellectual effort' doctrine.<sup>207</sup> This appears to confirm the argument that the British narrative too is to be read as endorsing an intellectual approach to originality despite explicit references to the supposedly more material<sup>208</sup> 'judgement, skills and effort' doctrine'.<sup>209</sup>

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<sup>203</sup> *Sands and Mcdougall Pty Ltd v Robinson* (1917) 23 CLR 49, 56.

<sup>204</sup> See for instance, *Galaxy Electronics Pty Ltd v Sega Enterprises Ltd* (1997) 37 IPR 462, 469 ; *Compagnie Industrielle de Precontrainte et D'Equipment des Constructions SA v First Melbourne Securities Pty Ltd* [1999] FCA 660 (unreported BC9902637) para 87 ; *Telstra Corporation Ltd v Desktop Marketing Systems Pty Ltd* [2001] FCA 0612, (2001) 181 ALR 134, para 8,86,102 ; *Desktop Marketing Systems Pty Ltd v Telstra Corporation Ltd* [2002] FCA 0112, (2002) 55 IPR 1, 8 para 18; *IceTV Pty Ltd v Nine Network Australia Pty Ltd* [2009] HCA 14 (unreported BC200902942) para 33; *Australasian Performing Right Assn Ltd v Australasian Mechanical Copyright Owners Society Ltd* [2009] ACOPYT 2 (unreported BC200912021) para 30; *Telstra Corporation Ltd v Phone Directories Company Pty Ltd* [2010] FCAFC 149, (2010) 273 ALR 725, para 21; *Sports Data Pty Ltd v Prozone Sports Australia Pty Ltd* (2014) 107 IPR 1,13 para 74.

<sup>205</sup> *Kalamazoo (Aust) Pty Ltd v Compact Business Systems Pty Ltd* (1985) 5 IPR 213, 213 citing the British case *Exxon Corpn and others v Exxon Insurance Consultants International Ltd* [1981] 1 WLR 624.

<sup>206</sup> *Sports Data Pty Ltd v Prozone Sports Australia Pty Ltd* (2014) 107 IPR 1,13 para 74.

<sup>207</sup> n 205.

<sup>208</sup> See for a study of the materiality of the English definition of originality before the *Infopaq* jurisprudence. Griffiths *Dematerialization, Pragmatism and the European Copyright* (n 38).

<sup>209</sup> *University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch 601, 611.

In *Telstra Corporation Ltd v Desktop Marketing Systems Pty Ltd*,<sup>210</sup> the Court noted that although many cases debated the originality of compilations due to their lack of ex nihilo creation,<sup>211</sup> those cases came to agreement as far as the necessity for the original work to have been the product of ‘intellectual effort’ was concerned.<sup>212</sup> In another decision of the Telstra saga,<sup>213</sup> the Australian judicature specified that evidencing intellectual effort on its own is not sufficient. Such effort must have been “directed to the incarnation of the material form”<sup>214</sup> of the work for it to be regarded as original and its author’s own. According to the Court, “care must [be] taken to ensure that the efforts of that person can be seen as being directed to the reduction of a work into a material form”.<sup>215</sup>

*i. Original intellectual effort*

The notion of intellectual effort as evidence of originality also emerged in the narrative of the CoJ. Similar to the Australian jurisprudence, in the joined cases *Musik-Vertrieb Membran GmbH v Gesellschaft für Musikalische Aufführungs- und Mechanische Vervielfältigungsrechte*, the Court referred to authors’ works as the fruit of their “[their] intellectual or artistic effort”.<sup>216</sup> Yet, the mere display of intellectual effort is not enough to confer the quality of intellectual creation to a work. The CoJ made clear in *Football Dataco v Yahoo! UK Ltd*<sup>217</sup> when the expression of ‘intellectual effort and skills’ appeared in the question of the British Court of

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<sup>210</sup> *Telstra Corporation Ltd v Desktop Marketing Systems Pty Ltd* (2001) 181 ALR 134.

<sup>211</sup> see note 216 and text to note 188, both in Chapter 3.

<sup>212</sup> *Telstra Corporation Ltd v Desktop Marketing Systems Pty Ltd* (2001) 181 ALR 134, 137 para 8, 158 para 86.

<sup>213</sup> Telstra corporation was involved in a number of copyright disputes, see *Australasian Performing Right Association Ltd v Telstra Corporation Ltd* [1995] Federal Court of Australia; *Desktop Marketing Systems Pty Ltd v Telstra Corporation Ltd* (2002) 55 IPR 1; *Telstra Corporation Ltd v Desktop Marketing Systems Pty Ltd* (2001) 181 ALR 134; *Telstra Corporation Ltd v Phone Directories Co Pty Ltd* [2010] FCA 44 (2010) 264 ALR 617; *Telstra Corporation Ltd v Phone Directories Company Pty Ltd* (2010) 273 ALR 725.

<sup>214</sup> *Telstra Corporation Ltd v Phone Directories Company Pty Ltd* (2010) 273 ALR 725, 759.

<sup>215</sup> *ibid*, 759.

<sup>216</sup> Joined Cases C- 55/80 and 57/80 *Musik-Vertrieb Membran GmbH v Gesellschaft für Musikalische Aufführungs- und Mechanische Vervielfältigungsrechte (GEMA)* [1981] 2 C.M.L.R. 44,65 para 16.

<sup>217</sup> C-604/10 *Football Dataco and Others v Yahoo! UK Ltd* [2012] WLR (D) 57.

appeal.<sup>218</sup> As works candidate to protection are required to be their author's own intellectual creation according to *Infopaq*,<sup>219</sup> the British bench legitimately wondered whether displaying 'intellectual effort and skill' in producing such work would suffice to meet this newly harmonised and relatively vague threshold of originality. To this, the European Court responded in the negative:

[T]he intellectual effort and skill of creating that data are not relevant in order to assess the eligibility of that database for protection by that right;

[T]he significant labour and skill required for setting up that database cannot as such justify such a protection if they do not express any originality in the selection or arrangement of the data which that database contains.<sup>220</sup>

This decision suggests that it takes a little more than mere 'intellectual effort and skills' to evidence the right amount of originality as per European standards.

The notion of 'intellectual effort' was short-lived in the European narrative describing the originality condition. Although the phrase seemed to be a logical and somewhat promising linguistic choice since the copyright work itself has been consistently branded as 'intellectual creation', the CoJ soon preferred it the concepts of "formative freedom",<sup>221</sup> "personal touch"<sup>222</sup> and "free and creative choices".<sup>223</sup>

To be protected, eligible works must "stem from a specific choice made by the author".<sup>224</sup> Such choices must be both "free and creative"<sup>225</sup> so as to express the

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<sup>218</sup> *ibid*, para 24.

<sup>219</sup> C-5/08 *Infopaq International A S v Danske Dagblades Forening* [2009] EUECJ C-5/08\_O.

<sup>220</sup> C-604/10 *Football Dataco and Others v Yahoo! UK Ltd And Others* [2012] WLR (D) 57, para 53.

<sup>221</sup> C-145/10 *Eva-Maria Painer v Standard VerlagsGmbH and Others* [2011] EUECJ C-145/10, para 42.

<sup>222</sup> *ibid* para 92; C-604/10 *Football Dataco and Others v Yahoo! UK Ltd* [2012] WLR(D) 57, para 38.

<sup>223</sup> *ibid*; C-145/10 *Eva-Maria Painer v Standard VerlagsGmbH and Others* [2011] EUECJ C-145/10, para 90,92,94,99,150, 150(1).

<sup>224</sup> Joined cases C-403/08 and C-429/08 *Football Association Premier League v QC Leisure, and Karen Murphy v Media Protection Services Ltd* [2011] EUECJ C-403/08\_O, para 79.

<sup>225</sup> C-604/10 *Football Dataco and Others v Yahoo! UK Ltd* [2012] WLR(D) 57, para 38 ; citing "by analogy" C-5/08 *Infopaq International A S v Danske Dagblades Forening* [2009] EUECJ C-5/08\_O, 45 and C-393/09 *Bezpečnostní softwarová asociace Svaz softwarové ochrany v Ministerstvo kultury* [2011] ECDR 3, 50.

“personal touch”<sup>226</sup> and stamp of “personality”<sup>227</sup> of the author “to set [her] work apart from that of the authors”.<sup>228</sup> Skills<sup>229</sup> and “creative effort”<sup>230</sup> may come into play to evidence creative freedom, personal touch or creative choices but they have not become standards of originality *per se*. Indeed, any skills or ability must be exercised “in an original manner”<sup>231</sup> to be rewarded by copyright. This appears to place the threshold of originality slightly higher than mere ‘intellectual effort’. The effort remains intellectual as the paradigm of the ‘author’s own intellectual creation’ prevails but such effort must be original. In a nutshell, European copyright law rewards original intellectual effort.

The substance of the copyright work and of the originality condition in the European narrative entertain an ambiguous relationship. The distinction between the two concepts collapsed as the CoJ read in the Union’s regulatory framework that they were meant to form one and only notional entity. The Court understands the definition of the copyright work and of the originality condition to be identical, i.e. the ‘author’s own intellectual creation’. The same phrase substantiates both notions of copyright work and originality. Citing a series of previous cases,<sup>232</sup> the European judges explained in *Football Dataco v Yahoo! UK Ltd* that:

[It] is apparent from recital 16 of Directive 96/9 [that] the notion of the author's own intellectual creation refers to the criterion of originality<sup>233</sup>

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<sup>226</sup> C-145/10 *Eva-Maria Painer v Standard VerlagsGmbH* [2011] EUECJ C-145/10, para 92; C-604/10 *Football Dataco v Yahoo! UK Ltd* [2012] WLR (D) 57, para 38.

<sup>227</sup> C-145/10 *Eva-Maria Painer v Standard VerlagsGmbH and Others* [2011] EUECJ C-145/10, para 151(1).

<sup>228</sup> C-406/10 *SAS Institute Inc v World Programming Ltd* [2012] WLR (D) 131, para 48.

<sup>229</sup> *ibid*, para 120; C-604/10 *Football Dataco v Yahoo! UK Ltd* [2012] WLR (D) 57, para 38 refers to “creative ability”.

<sup>230</sup> C-145/10 *Eva-Maria Painer v Standard VerlagsGmbH and Others* [2011] EUECJ C-145/10, para 42.

<sup>231</sup> C-604/10 *Football Dataco v Yahoo! UK Ltd* [2012] WLR (D) 57, para 38.

<sup>232</sup> C-5/08 *Infopaq International AS v Danske Dagblades Forening* [2009] EUECJ C-5/08\_O, para 35, 37-8. C-393/09 *Bezpečnostní softwarová asociace Svaz softwarové ochrany v Ministerstvo kultury* [2011] ECDR 3, para 45; Joined cases C-403/08 and C-429/08 *Football Association Premier League v QC Leisure and Karen Murphy v Media Protection Services Ltd* [2011] EUECJ C-403/08\_O, para 97; C-145/10 *Eva-Maria Painer v Standard VerlagsGmbH and Others* [2011] EUECJ C-145/10, para 87.

<sup>233</sup> C-604/10 *Football Dataco v Yahoo! UK Ltd* [2012] WLR (D) 57, para 37.



ii. *Filtering up and down*

Previous developments indicated that the effect of the *Infopaq* jurisprudence<sup>234</sup> on British jurisprudence was only subtle.<sup>235</sup> The categorisation condition seems to have remained, and so did the fixation requirement.<sup>236</sup> The question is first whether the notion of original intellectual effort is consistent with the doctrine of ‘judgement, skills and effort’,<sup>237</sup> and second, if not, whether national judges have modified their approach to originality. The British judiciary seems to have opted for the compromise of making the two originality thresholds coexist with one another. In *The Newspaper Licensing Agency Ltd v Meltwater Holding BV*,<sup>238</sup> Proudman J discussed the impact on the British understanding of the originality condition to conclude that the European jurisprudence had not deeply affected the substance of the test already known and enforced by the national courts.<sup>239</sup> Her position suggested that the changes introduced by the CoJ were merely cosmetic, replacing one terminology to describe the originality condition and the copyright work by another.<sup>240</sup> In her reasoning, Proudman J embedded this renewed vocabulary in the British copyright framework by combining the enforcement of the European ‘intellectual creation’ doctrine and its British equivalent focusing on skills:

The effect of *Infopaq* is that even a very small part of the original may be protected by copyright if it demonstrates the stamp of individuality reflective of the creation of the author or authors of the article. [...] It is often a matter of

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<sup>234</sup> C-5/08 *Infopaq International A S v Danske Dagblades Forening* [2009] EUECJ C-5/08\_O.

<sup>235</sup> text to note 52.

<sup>236</sup> See for instance the legal analyses in *The Newspaper Licensing Agency Ltd v Meltwater Holding BV* [2011] EWCA Civ 890 ; [2012] Bus LR 53; or in *Taylor v Maguire* [2013] EWHC 3804 (IPEC) ; [2014] ECDR 4.

<sup>237</sup> *University of London Press Ltd v University Tutorial Press, Ltd* [1916] 2 Ch 601, 611

<sup>238</sup> *The Newspaper Licensing Agency v Meltwater Holding* [2010] EWHC 3099 (Ch).

<sup>239</sup> *ibid*, para 81. This was confirmed in appeal, *The Newspaper Licensing Agency Ltd v Meltwater Holding BV* [2011] EWCA Civ 890, para 48.

<sup>240</sup> This interpretation was confirmed by the comments of Birss J. in *Temple Island Collections Ltd v New English Teas Ltd* [2012] EWPC 1, para 20.

impression whether use has been made of those features of the article which, by reason of the skill and labour employed in its production, constitute it an original copyright work.<sup>241</sup>

Similarly, *Taylor v Maguire*<sup>242</sup> referred to both tests but does not make any reference to neither the European cases nor directives. In this case, the High Court judge refers to the standard of ‘skill and labour’ as defined by the British authority *Designers Guild Ltd v Russell Williams (Textiles) Ltd*.<sup>243</sup> Yet it opens the decision by stating that “[a]n “original artistic work” is a work in which the author/artist has made an original contribution in creating it – for example by applying intellectual effort in its creation”<sup>244</sup> basing her affirmation on national statutory dispositions.<sup>245</sup>

In light of those decisions, one could argue that the notion of intellectual effort in creation, foreign to the British discourse before *Infopaq*, has filtered down from the European concept of the ‘author’s own intellectual creation’.

As mentioned in the previous developments,<sup>246</sup> the *Infopaq* decision renewed definition of work and standard of originality has had little if no effect on redefining the requirement in France. The most consistent definition of originality enforcement in the French narrative has the condition defined as the expression of the author’s personality in the work,<sup>247</sup> defining as an automatic reflex what constitutes a

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<sup>241</sup> *The Newspaper Licensing Agency Ltd v Meltwater Holding BV* [2010] EWHC 3099 (Ch) para 83.

<sup>242</sup> *Taylor v Maguire* [2013] EWHC 3804 (IPEC) ; [2014] ECDR 4.

<sup>243</sup> *Taylor v Maguire* [2013] EWHC 3804 (IPEC), para 12 citing *Designers Guild Ltd v Russell Williams (Textiles) Ltd (trading as Washington D.C.)*. [2000] 1 W.L.R. 2416.

<sup>244</sup> *Taylor v Maguire* [2013] EWHC 3804, para 6.

<sup>245</sup> CDPA 1988, s 1.

<sup>246</sup> text to note 39 and 133.

<sup>247</sup> See for example, Paris, 4e ch, 20 novembre 1996: JCP G 1997, 22937, note Pollaud-Dullian; RIDA 1997, No 173,321 obs. Kerever ; Cass, 27 mai 1942: S. 1942m 1,124 ; Paris, 4 Ch, 1er avril 1957: D 1957,436, 1<sup>re</sup> esp.) ; Paris, 4 Ch, 4 mars 1982: D 1983, inf. rap. p. 93 obs. Colombet. Terminology repeated in Paris, 4Ch 27 octobre 1993: D 1994, somm. Comm. 89, obs. Colombet ; D 1983, inf. rap. p. 152 obs. Colombet. Terminology repeated in Paris, 4Ch 27 octobre 1993: D 1994, somm. Comm. 89, obs. Colombet ; Versailles, 12r Ch, 22 novembre 2001, Aubard: Legipresse 2002 No 188, p.6. ; TGI Nanterre, 10 mars 1993: RIDA 1993, No 157, 343, note Gaubiac. TGI Paris, 27 novembre 2007, n° 07/10531. This point is further discussed in text to note 399.

protected work of the mind'.<sup>248</sup> This similarity between the European and the French approaches lead scholars to assume the second had filtered up to the first and coloured the European narrative with French nuances.<sup>249</sup> Indeed, both jurisprudences refer in their own words to the copyright work as a 'work of the mind' or 'intellectual creations' and to the presence of the author's personality in the work, or personal touch, as evidence of originality. Considering the origins of the European doctrine, it is not surprising that no major change in the civil courts' narrative framing the originality condition was observed following the *Infopaq* jurisprudence.

### c) *Intellectual input*

The notions of 'personality, 'stamp of personality, or 'personal touch' do not preclude intellectualised conceptions of the originality requirement. Indeed, in its many expressive tools to refer to originality, the French bench has consistently relied on the concept of "intellectual input"<sup>250</sup> as a shortcut to evidence originality, i.e. the presence of one's personality in the work candidate to protection. On various occasions, the civil Supreme Court reminded the parties that the work must bear the author's intellectual input for it to be original".<sup>251</sup>

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<sup>248</sup> The French Intellectual Property Code enforces no other condition to protection than originality. As a result anything satisfying the original condition becomes automatically a copyright work, de facto merging the two concepts together. The CoJ suggests exactly the same approach to the two notions in C-604/10 *Football Dataco and Others v Yahoo! UK Ltd* [2012] WLR (D) 57, para 37. See text to note 231.

<sup>249</sup> Rahmatian (n 78) 58-9.

<sup>250</sup> The phrase read as "apport intellectuel" in French language.

<sup>251</sup> Cass, crim, 7 octobre 1998, n° 97-83.243: Bull. Crim. 1998 N° 248 p. 717. See also, Cass, 1ère civ, 2 mars 1999, n° 97-10.179: inédit au bulletin, Legifrance available at : <<http://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007400026>> accessed 10 March 2016. Author's translation, see Appendix 1 for original text.

The concept evolved to become, at times, “an unprecedented intellectual input”<sup>252</sup> requiring “personal creative efforts”,<sup>253</sup> or a “creative input” on the part of the author.<sup>254</sup> The notion of ‘input’ also led the courts to look for artists’ “personal input”<sup>255</sup> in their work to qualify them as original.<sup>256</sup> The phrase of ‘personal input’ echoes the doctrine of ‘the author’s stamp of personality’ also found in the European narrative under the phrase of ‘personal touch’.<sup>257</sup> Even in the expression ‘personal input’ elements of intellectuality are present. In a decision dating back to 2002, the French Court of Cassation held that originality lay in its author’s “personal input [...] in [...] the intellectual creation [...] of the work”.<sup>258</sup> If the author’s input must be injected in an intellectual process, in all logic, the same personal input ought to be intellectual itself. Confirming the intellectual nature of authors’ original input in their work, the Paris Court of Appeal came to resort to the notion of “intellectual effort” in a

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<sup>252</sup> Cass, 1<sup>ère</sup> civ, 5 février 2002, « Les Muses Productions » n° 99-21.444: Bull. 2002 I N° 46 p. 36; JCP G, 2002, II, 10193, note S. Crevel ; D. 2003, p. 436, note B. Edelman ; D. 2002 juris. p 2253 note Edelman; JCP E 2002, chron. 1334, n 3. Author’s translation, see Appendix 1 for original text.

<sup>253</sup> Author’s translation. Original text reads “effort de creation personelle”, in Cass, 1<sup>ère</sup> civ, 5 février 2002, « Les Muses Productions » n° 99-21.444: Bull. 2002 I N° 46 p. 36; JCP G, 2002, II, 10193, note S. Crevel ; D. 2003, p. 436, note B. Edelman ; D. 2002 juris. p 2253 note Edelman; JCP E 2002, chron. 1334, n 3.

<sup>254</sup> Author’s translation. Original text reads: “apport créatif de l’auteur” in Paris, 4<sup>e</sup> Ch B, 14 déc. 2007, Delhaye et Guerrib c Sté Européenne de magazines : Propr. intell. avr. 2008. 225, obs. Bruguière; see also Cass, 1<sup>ère</sup> civ, 6 mai 2003, « Ste Video Adapt » n° 01-02.237 : Bull. civ. 2003 I N° 110 p. 86 ; RTDCom 2004 p. 267 Obs Pollaud Dullian.

<sup>255</sup> Author’s translation. Original text reads ‘apport personnel’: Cass, 1<sup>ère</sup> civ, 5 février 2002, « Les Muses Productions » n° 99-21.444 : Bull. 2002 I N° 46 p. 36 ; JCP G, 2002, II, 10193, note S. Crevel ; D. 2003, p. 436, note B. Edelman ; D. 2002 juris. p 2253 note Edelman ; JCP E 2002, chron. 1334, n 3. The same notion of ‘personal effort’ (“effort personnel”) was used to describe creativity by the delegation of the Bruxelles conference in 1948. See, Brussels Conference Documents (n 118)140.

<sup>256</sup> The notion of personal input had been as longstanding feature of the originality condition in France. See Robert Plaisant, *Le Droit Des Auteurs et Des Artistes Exécutants* (Delmas et Cie 1970) 12-3.

<sup>257</sup> C-145/10 *Eva-Maria Painer v Standard VerlagsGmbH and Others* [2011] EUECJ C-145/10, EU:C:2011:798, ECLI:EU:C:2011:798 para 92 ; C-604/10 *Football Dataco and Others v Yahoo! UK Ltd and Others* [2012] WLR(D) 57, [2012] Bus LR 1753, [2012] EUECJ C-604/10, [2012] WLR (D) 57, para 38.

<sup>258</sup> Author’s translation. The original text reads: « apport personnel [...] dans [...] la création intellectuelle [...] de l’oeuvre. » in Cass, 1<sup>ère</sup> civ, 5 février 2002, « Les Muses Productions » n° 99-21.444 : Bull. 2002 I N° 46 p. 36 ; JCP G, 2002, II, 10193, note S. Crevel ; D. 2003, p. 436, note B. Edelman ; D. 2002 juris. p 2253 note Edelman ; JCP E 2002, chron. 1334, n 3.

series of decisions,<sup>259</sup> a concept which forms the cornerstone of Australian discourse on originality.<sup>260</sup>

The term of intellectual or personal input requires some degree of proactivity on the part of the author. Being involved in a creative process and intellectually responding to the task does not suffice for the work to be regarded as being stamped by one's personality or touch. On that basis, the Paris Court of Appeal held that an interviewee could not be regarded as either the author or the co-author of the recorded interview even though he is intellectually involved in the exchange. In the eyes of the Court, such person lacks "personal initiative in the intellectual conception of the work".<sup>261</sup>

The previous developments highlighted how each jurisdiction developed their own national standard of originality adding their own touch to the condition, yet all shared an emphasis on its intellectual requirement.

## 2. Creative sparks

Another belief identified by Sawyer describes creativity as a "moment of insight".<sup>262</sup> The insight theory forms another fold of the intellectual paradigm framing creativity. According to this understanding, the valuable input of the creative process is encapsulated in the idea which springs from the author's intellect. Consequently, any subsequent steps is regarded as the mere manual or technical execution of that idea

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<sup>259</sup> Paris, 11 mai 2011, *SELAFA MJA c/ Michel G*, n° 09/20755 : inédit.

<sup>260</sup> text to note 104.

<sup>261</sup> Author's translation. Original text reads: « faute d'avoir eu une initiative personnelle dans sa conception intellectuelle de cette œuvre » in Cass, 1ère civ, 5 février 2002, « Les Muses Productions » n° 99-21.444 : Bull. 2002 I N° 46 p. 36 ; JCP G, 2002, II, 10193, note S. Crevel ; D. 2003, p. 436, note B. Edelman ; D. 2002 juris. p. 2253 note Edelman ; JCP E 2002, chron. 1334, n 3.

<sup>262</sup> Sawyer *Explaining Creativity* (n 6) 12-4, 87-8, 107-8; Sawyer *Western Cultural Model* (n 12) 2030.

which is therefore deprived of any creative value.<sup>263</sup> This take on creativity is at the core of the difference between the idealist and action theories mentioned in introductory comments.<sup>264</sup> According to the former, creativity is a spark which occurs and is completed in an instant, a 'eureka moment',<sup>265</sup> whilst for the second, such sparks of creativity cannot be regarded as the finished work since many creative decisions occur during the stage of execution.

The following paragraphs describe how reasoning resembling idealist theories<sup>266</sup> can be found in the narrative of the jurisdictions included in the study in this analysis. However, no matter how dominant intellectualised depictions of creativity are in the judicial narrative, the courts can never escape acknowledging the inherent creative nature involved in the process. In doing so, judges automatically diminish the grip of their belief in creativity as being a 'moment of insight' over the legal narrative.

#### a) *Creative instants*

References to creativity as a 'creative spark' were made by the judiciary in the US and Australia to define the originality condition. This suggests that the judicial narrative of those jurisdictions does side with an idealist take on creativity.

The Court of Appeal of the seventh circuit held in its two *Mid America Title Co v Kirk*<sup>267</sup> decisions that judges must "identify the requisite spark of creativity" in the work to grant copyright protection to its creator.<sup>268</sup> In *Kelley v Chicago Park Dist.*<sup>269</sup>

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<sup>263</sup> Braembussche (n 4) 43-56. Kumar Saxena (n 2) 6-7, 35-6; Boucher and Vincent (n 5) 66-7.

<sup>264</sup> *ibid*; Sawyer *Explaining Creativity* (n 6) 87-8; text to note 9.

<sup>265</sup> Sawyer *Western Cultural Model* (n 12) 2035.

<sup>266</sup> text to note 9; Braembussche (n 4) 43-56. Kumar Saxena (n 2) 6-7, 35-6; Boucher and Vincent (n 5) 66-7.

<sup>267</sup> *Mid America Title Co v Kirk*, 991 F.2d 417 (7th Cir 1993) ; *Mid America Title Co v Kirk*, 59 F 3d 719 (7th Cir 1995).

<sup>268</sup> *Mid America Title Co v Kirk*, 991 F.2d 417 (7th Cir 1993) 423 ; *Mid America Title Co v Kirk*, 59 F 3d 719 (7th Cir 1995) 723

<sup>269</sup> *Kelley v Chicago Park District*, 635 F 3d 290 (7th Cir 2011), 97 USPQ 2d 1841 (7th Cir 2011)

the Court confirmed that the necessity to display “some creative spark”<sup>270</sup> did not imply a higher threshold of originality. To the contrary, the circuit court judges stated that “[t]he vast majority of works make the grade quite easily”.<sup>271</sup>

The bench of the ninth circuit joined their neighbour in using the creative spark as an effective test of originality in *Ets-Hokin v Skyy Spirits*.<sup>272</sup> The Court stated:

In assessing the "creative spark" of a photograph, we are reminded of Judge Learned Hand's comment that no photograph, however simple, can be unaffected by the personal influence of the author.<sup>273</sup>

The Bench proceeded to assert that in the copyright area “[t]his approach [...] has become the prevailing view”<sup>274</sup> basing its interpretation on the work of the celebrated scholar David Nimmer.<sup>275</sup>

A similar position was held by Australian courts in leading copyright cases but did not make consensus until 2009. In *Desktop Marketing Systems Pty Ltd v Telstra Corporation Ltd*<sup>276</sup> the Federal Court of Australia discussed in great length whether the doctrine of the creative spark traditionally seen in the American judicial discourse could find similar applications within the Australian copyright framework. Fearing that such standard would raise the threshold of originality beyond what “Anglo-Australian law”<sup>277</sup> has accepted thus far, the Court rejected this proposition.<sup>278</sup>

Seven years later, the High Court of Australia overturned this decision in *IceTV Pty*

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<sup>270</sup> *Kelley v Chicago Park Dist*, 635 F 3d 290 (7th Cir 2011) 302.

<sup>271</sup> *ibid.*

<sup>272</sup> *Ets-Hokin v Skyy Spirits Inc*, 225 F. 3d 1068 (9th Cir 2000).

<sup>273</sup> *ibid.*, 1076. Citations omitted.

<sup>274</sup> *ibid.* Citations omitted.

<sup>275</sup> *ibid.*, citing B Melvin and David Nimmer, *Nimmer on Copyright: A Treatise on the Law of Literary, Musical and Artistic Property. And the Protection of Ideas* (1999).

<sup>276</sup> *Desktop Marketing Systems Pty Ltd v Telstra Corporation Ltd* (2002) 55 IPR 1.

<sup>277</sup> *ibid.*

<sup>278</sup> *ibid.*, 3, 53.

*Ltd v Nine Network Australia Pty Ltd*.<sup>279</sup> Sparring the parties long and winded developments on the question, the court stated in two sentences:

One final point should be made. This concerns the submission by the Digital Alliance that this court consider the Full Court's decision in *Desktop Marketing* and, to the contrary of *Desktop Marketing*, affirm that there must be some "creative spark" or exercise of "skill and judgment" before a work is sufficiently "original" for the subsistence of copyright.<sup>280</sup>

The Federal court shortly followed suit with the decision in *Telstra Corporation Ltd v Phone Directories Co Pty Ltd*<sup>281</sup> where the judges concluded that "none of the [w]orks [they assessed were] original [because] the creation of the [w]orks did not involve some "creative spark" or the exercise of the requisite "skill and judgment".<sup>282</sup>

#### *b) Sparking processes*

As mentioned in introductory comments, the idealist theory views creation as an instant, not a process. The material act of making the work can thus be delegated to other individuals without them having any input in the creativity embodied in the final product.<sup>283</sup>

As much as the legal narrative adopted this representation by borrowing its language, describing creativity as an intellectual 'spark' springing from the author's brain, it could not escape the reality of practice and contradicted this idealist paradigm on other accounts. No matter how intellectualised and idealist the narrative can be in describing authorship and the figure of the author, the judicial discourse cannot but accept that creativity is a process so much so that the author's involvement in the latter was considered as important as being the brain

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<sup>279</sup> *IceTV Pty Ltd v Nine Network Australia Pty Ltd* [2009] HCA 14 (unreported BC200902942).

<sup>280</sup> *ibid*, para 187. References omitted.

<sup>281</sup> *Telstra Corporation Ltd v Phone Directories Co Pty Ltd* [2010] FCA 44 (2010) 264 ALR 617.

<sup>282</sup> *ibid*, 684 para 340.

<sup>283</sup> text to note 9 and 11.



conceptualising the work when evidencing authorship over a piece. In *Aalmuhammed v Lee*<sup>284</sup> which offers an intellectualised representation of the author at its paroxysm,<sup>285</sup> authorship remains associated with a hands-on approach to creation. The cohabitation of those two contradictory conditions, intellectuality and involvement in implementation of the creative idea, describes and rewards a kind of creativity which is as much a process as it is a mental moment of insight. The Court stated that:

First, an author superintends the work by exercising control. This will likely be a person who has actually formed the picture by putting the persons in position, and arranging the place where the people are to be-the man who is the effective cause of that, or the inventive or master mind who creates, or gives effect to the idea.<sup>286</sup>

This suggests that the legal discourse may have adopted a slightly more nuanced approach to creativity than represented so far. Similarly, often will the courts take into consideration the process of creation rather than the finished product to assess their eligibility to copyright, in the context of photographic works.<sup>287</sup>

However, those nuances have not be used to mitigate or soften the edges separating authors from performers, or authors from individuals who are regarded as assistants to creation. To the contrary, they were employed to reinforce the figure of the author represented as the creative mastermind controlling the whole process

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<sup>284</sup> *Aalmuhammed v Lee*, 202 F. 3d 1227 (9th Cir 2000).

<sup>285</sup> For a description of creators as ‘inventive master minds’, see *Aalmuhammed v Lee*, 202 F. 3d 1227 (9th Cir 2000) 1233.

<sup>286</sup> *ibid*, 1232-3.

<sup>287</sup> France: Paris, 4ème Ch, 5 décembre 2007, n° 06/15937, SIPA Press : D. 2008 jurispr. P. 461 note Bruguière; RTDCom. 2008 p. 300 obs. Pollaud-Dullian (the work of a paparazzi is not eligible to copyright protection because their contribution is passive and mechanical) ; Paris, 1ere Ch, pole5, 14 novembre 2012, *SARL Acces Photo c/ Tours FC*, n° 11/03286: inédit. (the work of sport photographers covering games is not eligible to copyright because the creative process is mechanical); UK: *Antiquesportfolio.com plc v Rodney Fitch & Co* [2001] E.C.D.R. 5; European Union : C-145/10 *Eva-Maria Painer v Standard VerlagsGmbH and Others* [2011] EUECJ C-145/10, EU:C:2011:798.

from its intellectual conception to its physical rendering.<sup>288</sup>

### **III. Rejection of the labours of the body**

Legal narratives built the image of an intellectualised authorship on the basis of the opposition between inputs of the mind and inputs of the body. In this logic, the first is creative, not the second. It is submitted that this feature of copyright contributed to undermining the valorisation of performers' creativity. The performative process is regarded as the lending of one's body<sup>289</sup> as opposed to the engagement of the mind.<sup>290</sup>

This section argues that the doctrine of 'the imprint of personality' recently brought into European copyright by the CoJ may be a useful concept to soften this phenomenon of intellectualisation. It would allow legal frameworks to bring in the concept of originality elements of embodiment in order to widen the scope of authorship and progressively erase the author-performer divide.

#### **A. Opposing labours of the mind to labours of the body**

Towards the end of the eighteenth century, it became clear in the legal narrative that the chosen subject-matter protected by copyright was intellectual and therefore would not include mere physical labour. Interestingly, the distinction between mental and physical work began with an analogy rather than an opposition. The analogy

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<sup>288</sup> The same case and representation was conveyed in relation to the work of performers in *Garcia v Google Inc*, 743 F. 3d 1258 (9th Cir 2014) 1274, 1263.

<sup>289</sup> In his dissenting opinion Smith J. depicted this very representation of performances as being the activity of lending one's body for it to be at the service of the authorial work, see *Garcia v Google Inc*, 766 F. 3d 929 (9th Cir 2014) 1274.

<sup>290</sup> See text to note 105 on the necessity for the mind to be fully engaged in the process for artists to be considered as authoring.

was intended to promote the protection of intellectual labour by pointing to the resemblance between the work of the mind and that of the body. However, such comparison was short lived. The situation rapidly evolved and legal discourses came to exclude from the realm of copyright activities perceived as mainly manual. Remnants of this early intellectualisation process can still be found in contemporary intellectual property systems. They took the form of refusing to recognise handiwork or the ‘sweat of the brow’ as processes and skills worthy of authors’ rights.

### **1. An analogy**

To begin with, the work of the mind was associated with the work of the body to justify the protection of intangible creative works. The analogy between manual and mental work was then deployed to enable the extension of property theories to intangible products.

This logic is apparent in *Millar v Taylor*<sup>291</sup> where the Court discussed the feasibility of ‘propertising’ intellectual creations. Relying on Blackstone’s theories, the British judges explained:

Mr. Blackstone observed that the labours of the mind and productions of the brain are as justly entitled to the benefit and emoluments that may arise from them, as the labours of the body are; and that literary compositions, being the produce of the author's own labour and abilities, he has a moral and equitable right to the profits they produce [...].<sup>292</sup>

Then, the Court assessed comparison between the labours of the body and the labours of the mind to be an argument with a “captivating sound”<sup>293</sup> but refused to fully endorse the property analogy between tangible and intangible products for it

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<sup>291</sup> *Millar v Taylor* (1769) 4 Burrow 2303.

<sup>292</sup> *ibid*, 2359.

<sup>293</sup> *ibid*.

would grant authors with a perpetual monopoly in their work which would be, in turn, detrimental to the common.<sup>294</sup> Therefore, the Court only “readily admit[ted]” the fact that “every man [was] intitled to the fruits of his own labour”<sup>295</sup> as in the case of manual work. This case illustrates how, first, the comparison between manual and intellectual work was one of analogy rather than opposition.

A similar reasoning was followed by the US Supreme Court in *Wheaton and Donaldson v Peters and Grigg*.<sup>296</sup> In its decision the Court stated that intangible creations resulting from the exertion of one’s intellect are as worthy as the tangible product stemming from one’s physical effort:

The great principle on which the author's right rests, is, that it is the fruit or production of his own labour, and which may, by the labour of the faculties of the mind, establish a right of property, as well as by the faculties of the body; and it is difficult to perceive any well founded objection to such a claim of right.<sup>297</sup>

The American Court sided with Blackstone’s argument half a century after the latter was considered in *Millar v Taylor*.<sup>298</sup> Again, the work of the body is used to justify the legitimacy of granting protection to the work of the mind, despite its intangibility. This comparison is regarded as the [t]e great principle on which author’s right rests”.<sup>299</sup>

The analogy soon moved towards opposing the two types of activity.<sup>300</sup> Mental labour became the focus of legal authorship and physical labour was progressively excluded from its scope. In *The Making of Modern Intellectual Property*,<sup>301</sup> Sherman and Bently stress the fact that traces of this distinction were already present in the

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<sup>294</sup> *Millar v Taylor* (1769) 4 Burrow 2303, 2359.

<sup>295</sup> *ibid*, 2303.

<sup>296</sup> *Wheaton and Donaldson v Peters and Grigg*, 33 US 591 (Supreme Court 1834).

<sup>297</sup> *ibid*, 669-70.

<sup>298</sup> *Millar v Taylor* (1769) 4 Burrow 2303, 2359.

<sup>299</sup> *Wheaton and Donaldson v Peters and Grigg*, 33 US 591 (Supreme Court 1834) 669-70.

<sup>300</sup> Sherman and Bently *The Making of Modern IP* (n 16) 15-6.

<sup>301</sup> *ibid*.

narrative of *Millar v Taylor*.<sup>302</sup> They proceed to detail how the opposition transpired through the logic of the legislative reforms carried out towards the end of the eighteenth century<sup>303</sup> but only became a consistent narrative towards the beginning of the nineteenth century.<sup>304</sup> As the legitimacy of rights vested in intangible objects ceased to require justification, the analogy between mental and physical labour disappeared to be replaced by an opposition of the two concepts.

## 2. An opposition

It is submitted that the antinomy between mental and physical work is still alive in current intellectual property frameworks. The courts have rejected the idea that authorship can rise from the mere craft of the hand or industrious efforts. Although none of those traits would preclude the award of copyright protection, their presence alone is not enough to satisfy the originality requirement. An intellectual creative intent must drive the artist's crafty hands and his laborious efforts for them to amount to a form of protectable material.

### a) *No craft of the hand*

As prescribed in *Millar v Taylor*,<sup>305</sup> the mere craft of the hand does not suffice to meet the originality requirement and be worthy of authorship. The mind must be engaged and intellectual skills exerted. The exclusion of physical labour from the scope of copyright still underpins the logic of modern and contemporary frameworks.

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<sup>302</sup> *Millar v Taylor* (1769) 4 Burrow 2303, 98 E.R. 201.

<sup>303</sup> The scholars refer to the 1742 Act for Securing to John Byrom, Masters of Arts, the Sole Right of Publishing for a Certain Term of Years the Art and Method of Shorthand, Invented by Him and the 1735 Engravers' Act, An Act for the Encouragement of the Arts of Designing, Engravings, and Etchings Historical and Other Prints, by Vesting the Properties thereof in Inventors and Engravers during the Time therein Mentioned, 8 Geo. IIc. 13; cited in, Sherman and Bently *The Making of Modern IP* (n 16) 15-6.

<sup>304</sup> Sherman and Bently *The Making of Modern IP* (n 16) 15-6.

<sup>305</sup> *Millar v Taylor* (1769) 4 Burrow 2303, 2387.

In *Walter v Lane*<sup>306</sup> LJ Brampton reinforced the intellectual nature of the reporter's activity, rejecting thereby its relegation to mere "handiwork". He affirmed:

True it is that the reporter was not the author of the speech; but he was the composer and author of the book. Without his brain and handiwork the book would never have had existence, and the words of Lord Rosebery would have remained unrecorded save in the memories of the comparatively few who were present on those occasions.<sup>307</sup>

If the reporter's short-hand writings had not required the engagement of his intellect in preparing his article, his work would have been reduced to mere manual and mechanical effort, failing the originality threshold. In order to regard the verbatim short-hand notation of a speech as protectable, the Court had to purposefully 'intellectualise' the representation of the reporter's activity so as to justify bestowing authorship. Without this stage of intellectualisation, no protection could have been extended to the journalist's work. Dissenting opinions saw no originality in the verbatim passages of the reporter's article for he acted as the speaker's scribe when notating his speech. To them, his work was the result of physical exertion rather than the display of intellectual faculties, and no attempt to 'intellectualise' the depiction of his input would manage to disguise its physical dimension.<sup>308</sup>

In Australia, the landmark decision on the question of originality, *IceTV Pty Ltd v Nine Network Australia Pty Ltd*,<sup>309</sup> opposed the "intellectual work" of making creative products from "manual work" when commenting on compilations.<sup>310</sup> The decision based its reasoning on the authority of *Sands And Mcdougall Pty Ltd v Robinson*<sup>311</sup>

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<sup>306</sup> *Walter v Lane* [1900] AC 539.

<sup>307</sup> *ibid*, 559.

<sup>308</sup> See for instance the opinion of LJ Robertson in *Walter v Lane* [1900] AC 539, 559.

<sup>309</sup> *IceTV Pty Ltd v Nine Network Australia Pty Ltd* [2009] HCA 14 (unreported BC200902942).

<sup>310</sup> *ibid*, para 73.

<sup>311</sup> *Sands And Mcdougall Pty Ltd v Robinson* [1917] 23 CLRJ 55.

which itself grounded part of its argument on *Walter v Lane*<sup>312</sup> but narrowed its application.<sup>313</sup>

*Sands And Mcdougall Pty Ltd v Robinson* quoted the words of LJ Brampton who recognised in the reporter's handiwork the engagement of his brain, thereby justified the award of authorship over the former's work. Isaac J then proceeded to underline the fact that although the conclusions of the British case remained good law, "the Act does not depend on any strict examination of the language of *Walter v Lane*".<sup>314</sup> In other words, *Walter v Lane* has not made of all craft or handiwork intellectual creations deserving legal protection. *Sands*<sup>315</sup> interpreted the British authority as the exception which proves the rule according to which authorship cannot be extended beyond the boundaries defining "mental operation[s]".<sup>316</sup> The last decision of the *Sands* dispute<sup>317</sup> does not explicitly reiterate the dichotomy between "intellectual" and "manual work" as did the first decision.<sup>318</sup> However, it did reach the same conclusion and was careful to warn Australian judges of the exceptional nature of cases where a degree of intellectuality can be found in otherwise largely physical endeavours such as verbatim short-hand notation. By containing the reach of *Walter v Lane*, the Australian judicial narrative expressly maintained the antinomy between mental and manual labour.

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<sup>312</sup> *Walter v Lane* [1900] AC 539.

<sup>313</sup> *Sands And Mcdougall Pty Ltd v Robinson* [1917] 23 CLRJ 55. A similar use of *Walter v Lane* was employed by the British House of Lords in *Hyperion Records Ltd v Sawkins* [2005] EWCA Civ 565, para 69.

<sup>314</sup> *Sands And Mcdougall Pty Ltd v Robinson* [1917] 23 CLRJ 55. Italics added.

<sup>315</sup> *ibid.*

<sup>316</sup> *ibid.*

<sup>317</sup> *ibid.*, 49.

<sup>318</sup> *IceTV Pty Ltd v Nine Network Australia Pty Ltd* [2009] HCA 14 (unreported BC200902942) para 73.

This interpretation of *Walter v Lane* was confirmed in *IceTV Pty Ltd v Nine Network Australia Pty Ltd*.<sup>319</sup> In this case, the Australian bench drew the opposition between “intellectual” and “manual work” from Isaac J’s decision.

The phrase "intellectual creations" may be compared with the distinction drawn by Barton J in *Robinson v Sands & McDougall Pty Ltd* [(1916) 22 CLR 124 at 129; [1916] HCA 51] between the "intellectual work" and the "manual work" involved in compiling the map in dispute in that case.<sup>320</sup>

*b) No sweat of the brow*

Moving to the US, the courts expressed the same rejection of laborious physical efforts deprived of any intellectual element was expressed by the courts. The refusal took the form of denying any legal stance or validity to the doctrine of the ‘sweat of the brow’. The theory regarded the expense of industrious labour as worthy of reward by copyright. According to the US Supreme Court, “a classic formulation of the doctrine appeared in *Jeweler's Circular Publishing Co v Keystone Publishing Co*”.<sup>321</sup> Quoting the second circuit decision, the Bench defined the doctrine as:

The right to copyright a book upon which one has expended labor in its preparation does not depend upon whether the materials which he has collected consist or not of matters which are publici juris, or whether such materials show literary skill *or originality*, either in thought or in language, or anything more than industrious collection. The man who goes through the streets of a town and puts down the names of each of the inhabitants, with their occupations and their street number, acquires material of which he is the author" (emphasis added).<sup>322</sup>

According to the sweat of the brow theory, if the creation of a piece had entailed a large volume of work on its creators’ part, the latter could still be regarded as original

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<sup>319</sup> *IceTV Pty Ltd v Nine Network Australia Pty Ltd* [2009] HCA 14 (unreported BC200902942) para 73.

<sup>320</sup> *ibid.*

<sup>321</sup> Reference omitted. *Feist Publications, Inc v Rural Telephone Service Co Inc*, 499 US 340 (Supreme Court 1991) 352-3

<sup>322</sup> *Feist Publications, Inc v Rural Telephone Service Co Inc*, 499 US 340 (Supreme Court 1991) 352-3.



on copyright terms, even though there was no particular creativity in its expression, design, organisation or structure. This interpretation of the originality requirement was later expressly rejected by the US Supreme Court in the landmark decision of *Feist Publications v Rural Telephone Service Co.*<sup>323</sup> The doctrine was criticised for allowing the extension of copyright to facts thereby “flout[ing] basic copyright principles”.<sup>324</sup>

The "sweat of the brow" doctrine had numerous flaws, the most glaring being that it extended copyright protection in a compilation beyond selection and arrangement—the compiler's original contributions—to the facts themselves. Under the doctrine, the only defense to infringement was independent creation. A subsequent compiler was not entitled to take one word of information previously published, but rather had to independently wor[k] out the matter for himself, so as to arrive at the same result from the same common sources of information. "Sweat of the brow" courts thereby eschewed the most fundamental axiom of copyright law—that no one may copyright facts or ideas.<sup>325</sup>

In short, intense physical labour in the creation of a work does not suffice to trigger the bestowal of authors' rights. To be regarded as the originator of creative material and thus be worthy of authorship, the process must involve a degree of intellectual input in arranging and structuring such material.<sup>326</sup>

Like in Australia, the jurisprudence litigated over the particular case of compilations. The reason why intellectual activity was not found in the making of compilations might have been influenced by the fact that those creations do not occur ex nihilo. This would suggest that the pre-conditions to copyright lying being one, creation from nothing, and two, creating with one's mind are two requirements more permeable

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<sup>323</sup> *Feist Publications, Inc v Rural Telephone Service Co Inc*, 499 US 340 (Supreme Court 1991) 352-3, citing *Jeweler's Circular Publishing Co v Keystone Publishing Co*, 281 F 83 (2<sup>nd</sup> cir 1922).

<sup>324</sup> *Feist Publications Inc v Rural Telephone Service Co Inc*, 499 US 340 (Supreme Court 1991) 354.

<sup>325</sup> *Feist Publications, Inc v Rural Telephone Service Co Inc*, 499 US 340 (Supreme Court 1991) 353.

<sup>326</sup> Ginsburg summarises this position as favouring “mind over muscles” in Jane Ginsburg, ‘The Concept of Authorship in Comparative Copyright Law’ (2003) 52 DePaul Law Review 1063, 1072.

than presented thus far. Those observations remain putative since no cases have yet formulated the problem as such.

The above comments described how legal narratives came to endorse the opposition of intellectual and manual work also found in cultural discourses framing authorship and creation.<sup>327</sup> Although courts made it clear that authorship shall not reward mere physical effort, the most express rejection of the body as subject-matter protectable by copyright was expressed in the context of performances. In the same manner the craft of the hand or the sweat of the brow were denied authorial qualities, performances, understood as the “lending”<sup>328</sup> of one’s body were too made ineligible to copyright protection.

## **B. Lending one’s body**

Judicial narratives described performing as the work of the body rather the work of the mind. For this reason, it cannot enter the scope of copyright protection. When performances did reach the rank of subject-matter protected by authors’ rights, this stretch of copyright was enabled by intellectualising performances so as to cover up their embodied nature.

### **1. Mindless bodies**

Performing is the exercise of the body.<sup>329</sup> Performers lend their face, voice, body to the interpretation of a pre-existing authorial work. Because the style, look and sound

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<sup>327</sup> text to note 332, Chapter 2.

<sup>328</sup> See Smith J’s dissenting opinion in *Garcia v Google Inc*, 743 F 3d 1258 (9th Cir 2014) 1274.

<sup>329</sup> The physical nature of performances has been recently reaffirmed in the legal narrative in *Garcia v Google Inc*, 786 F. 3d 733 (9<sup>th</sup> Cir 2015) 751-2, where Kozinski J in his dissenting opinion described film performances as “an actor physically performing [a script]”.

of interpretations depend on the performer's body which is itself "not authored",<sup>330</sup> performances may not be granted the protection of legal authorship. This simplistic representation of the performing process overlooks any possible involvement of the performing artist's mind in the use of his body, intellectual engagement which could potentially justify the award of authorship.<sup>331</sup>

This depiction of performances has been conveyed by every jurisdiction under study with varying nuances. The majority of the judicature's observations commented on the inability to author or copyright voices, or works deriving from vocal interpretations.

In *Toney v L'Oreal USA*<sup>332</sup> the court of appeal of the seventh circuit generally stated that an individual's persona was not subject to copyright,<sup>333</sup> including one's voice in the umbrella term of 'persona'.<sup>334</sup> This position had been preceded by the ninth circuit in *Midler v Ford*,<sup>335</sup> *Sinatra v The Goodyear Tire & Rubber Co*,<sup>336</sup> and *Waits v Frito-Lay*<sup>337</sup> where the imitation of voices was not regarded as an infringement of any copyright interest vested in the performer since vocal interpretations are not eligible to such protection in the first place. Very clearly, the ninth circuit stated that "voice is not a subject-matter of copyright",<sup>338</sup> a position confirmed over a decade later in *Laws v Sony Music Entertainment*.<sup>339</sup>

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<sup>330</sup> *Toney v L'Oreal USA Inc*, 406 F 3d 905 (7th Cir 2005) 910 para 6. On this see text to note 193.

<sup>331</sup> text to note 368.

<sup>332</sup> *Toney v L'Oreal USA, Inc*, 406 F 3d 905 (7th Cir 2005).

<sup>333</sup> *ibid*, 910.

<sup>334</sup> *ibid*, 908.

<sup>335</sup> *Midler v Ford*, 1988 849 F.2d 460 (9th Cir 1988) 462-3

<sup>336</sup> *Sinatra v The Goodyear Tire & Rubber co* 435 F.2d 711 (9<sup>th</sup> Cir 1970).

<sup>337</sup> *Waits v Frito-Lay Inc*, 978 F. 2d 1093 (9th Cir 1992) 1100.

<sup>338</sup> *ibid*.

<sup>339</sup> *Laws v Sony Music Entertainment Inc*, 448 F. 3d 1134 (9th Cir 2006) 1140.

In France, the “tone of one’s voice” was too denied the originality required to obtain authors’ rights.<sup>340</sup> In 2008, the Court of Appeal of Versailles held that the artist who “lends his voice” to a character does not mark the character with the stamp of his personality because “he did not create the voice of the character who appeared in commercials in 1971 and was subject to sound recording in French language by several artists since then”.<sup>341</sup> The Court proceeded to argue that “his personality does not transpire in his performance which consisted in reading the text, with the tone of a voice and an accent which are his own, even though he accentuated those traits”.<sup>342</sup>

Following a similar line of reasoning, the Australian court concluded in *CBS Records Australia Ltd v Guy Gross*<sup>343</sup> that changes to a musical work stemming from a different interpretation of vocal lines could not amount to creating an original derivative work as the modifications between the previous and new work are caused by the singer’s vocal abilities and no other intellectual creative intent. On this basis, the Court affirmed:

For copyright in an arrangement to subsist, the differences from the work arranged must be such that a new original work can be identified. Differences resulting from mere interpretation, particularly differences brought about by an arrangement of a work to suit the qualities of a particular singer's voice, do not result in the creation of an original work. [...] Creational composition is required to bring into being an original work.

As many decisions did before this one, the Bench opposed performative and creational, or compositional, inputs. Here, the basis of this distinction appears to lie in the physical or vocal nature of the performers’ input as opposed to the intellectual contribution a composer or arranger would make. The outcome of this decision may

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<sup>340</sup> Versailles, 9 octobre 2008, *Randall G. c/ Ste First Media*, n° 06/03959.

<sup>341</sup> *ibid.* Author’s translation, see Appendix 1 for original text.

<sup>342</sup> *ibid.* Author’s translation, see Appendix 1 for original text.

<sup>343</sup> *CBS Records Australia Ltd v Guy Gross* (1989) 15 IPR 385.

have been influenced by the fact that the second interpretation of the song, over which the performer claims copyright protection, was judged by expert witnesses and the court to be of a lesser quality than the first. Indeed, the Court confirmed the experts' opinion according to which the notable differences between the previous and new work mainly derives from the fact that the second singer (Colette) was unable to perform the song with the technicality displayed by the performer (Anita Ward) in its original version. The judges explained:

Collette sings the basic melody of "Ring My Bell" in a simple direct way. Much of the colour and variety which Anita Ward was able to give by her singing and which Collette could not reproduce or did not attempt to reproduce, were introduced by other means, as by emphasising the sound of bells and by having a male voice sing a part of the song.

I am left with the impression that, in so far as Collette's vocal lines were concerned, they did not flow from a new composition of which Guy was the author but resulted from the fact that Collette sang "Ring My Bell" as best she could having regard to her style of singing, her limited range, the qualities of her voice and her experience.<sup>344</sup>

In this case, it seems as though there were two impediments preventing the performer to obtain legal authorship for the purpose of her creative interpretation of *Ring my Bell*. First, her input resided in vocal interpretations, themselves depending on her natural tone and pitch which do not form the relevant substance for copyright protection. Second, the changes in the musical phrase were driven by the singer's inability to perform the song as it was originally interpreted. The subsequent performance had thus been arranged to help with Colette's vocal shortcomings as opposed to being intentional compositional decisions, one might say free creative choices.

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<sup>344</sup> *CBS Records Australia Ltd v Guy Gross* (1989) 15 IPR 385, 392.

In the UK, vocal performances were compared to the sounds of instruments, constituting “a part of the overall orchestration of a musical work”<sup>345</sup> but not the substance of a musical composition itself eligible to copyright protection. This comparison emphasises the intellectual inertia of performers in their interpretations. It stresses their input as that of objects, or puppets, animated by the mind of the author.<sup>346</sup>

That said, in *Torry v Pink*<sup>347</sup> the British Court was reported as granting full copyright protection over a singer’s contribution which consisting in vocal lines she had executed on one of the Pink Floyd’s records. The Court accepted her claim according to which she deserved co-ownership of the musical work since her singing technique (‘wailing’) contributed to the original composition of the song, thereby going beyond the mere activity of interpretation.<sup>348</sup>

The representation of the performer as the artist who lend her body, or whose body is borrowed by the author has also been conveyed in the jurisprudence of the ninth circuit. In *Garcia v Google*,<sup>349</sup> Justice Smith’s dissented with the majority decision who had concluded to the eligibility of performers to copyright protection on the basis that their activity is deprived of any originality since they consist in lending one’s body. He wrote:

An actress like Garcia makes a creative contribution to a film much like a vocalist’s addition to a musical recording. Garcia did not write the script; she followed it. Garcia did not add words or thoughts to the film. She lent her voice to the words and her body to the scene. Her creativity came in the form of facial expression, body movement, and voice. Similarly, a singer’s voice is her personal mobilization of words and musical notes to a fluid sound. Inflection,

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<sup>345</sup> *Hayes v Phonogram Ltd* [2002] EWHC 2062 (Ch) para 60.

<sup>346</sup> This particular point is further developed in Chapter, text to note 93.

<sup>347</sup> *Torry v Pink Floyd* (2005) unreported, cited in *Bently Authorship in Popular Music* (n 67) 186.

<sup>348</sup> A similar position was held in France in the *ERA case*, Paris, 4ème Ch, 4 juillet 2008, n° 06/21406, *Universal Music*... : RTDCom. 2008, 745, obs. Pollaud-Dullian.

<sup>349</sup> *Garcia v Google Inc*, 743 F. 3d 1258 (9th Cir 2014) 1274-5.

intonation, pronunciation, and pitch are the vocalist's creative contributions. Yet, this circuit has determined that such, though perhaps creative, is too personal to be fixed. [...] As a result, it does not seem copyrightable.<sup>350</sup>

In each one of the above mentioned cases,<sup>351</sup> what performers sought was the protection of their interpretation of the musical work they had performed. In their response, the courts built their argument around the idea that one's performances equated to one's body, so much so that when assessing the eligibility of interpretations to copyright the judges compared the features of the performing body to the characteristics of the subject-matter protected by copyright. In doing so, the courts reduced performers' input in the musical work to that of their body. This reduction operates by way of metonymy where the performing body is taken for the performance, and as such excluded from copyright considerations.

## **2. Mindful performances**

The portrayal of performers as mindless bodies knows very few exceptions. Rare were the occasions when performers have been granted the status of authors for the purpose of their performances. Such instances were enabled by intellectualising the performing process so as to bring the essence of interpretations closer to the subject-matter protected by authorship. A similar intellectualisation of performances formed the base of early philosophical works on the art of acting. According to theories dating back to the nineteenth century, performers are, or should be, intellectual gymnasts utilising their body via the strength of their mind.

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<sup>350</sup> *Garcia v Google Inc*, 743 F. 3d 1258 (9th Cir 2014) 1274-5. The decision was overturned by the same court in its en banc formation. It then sided with Smith J. though did not engage with this part of his argumentation against performers' copyright. See, *Garcia v Google Inc*, 786 F. 3d 733 (9<sup>th</sup> Cir 2015).

<sup>351</sup> To the exception of *Torry v Pink: Torry v Pink Floyd* (2005) unreported, cited in *Bently Authorship in Popular Music* (n 67) 186.

a) *Intellectualisation of performances*

In France, where the author-performer divide is the least stringent,<sup>352</sup> the courts applied traditional concepts of originality in assessing interpretations without necessarily expressly inviting physical or corporeal aspects of performers' work in the scope of authorial creativity. Performers were depicted as observing a creative process fairly similar to traditional authorial patterns, i.e. involving a degree of intellectuality in performing. This was notably the case in a decision of the Tribunal of Seine dating back to 1937<sup>353</sup> where the bench explained that the actor « conceives, creates in his mind his interpretation beforehand, through an effort which is often long and meticulous, the rendering of which he performs, forming a continuous creation”.<sup>354</sup> Since recordings were then allowing the mutilation of performances, the actor was considered as vulnerable as is as deserving of protection as painters or sculptors, thus in need of equal protection.<sup>355</sup> This description of the acting process strikingly resembles the representation of composers' work patterns given by Park J in *Hadley v Kemp*.<sup>356</sup>

In the *Sorbelli case*,<sup>357</sup> the Paris Court of Appeal arrived at the same conclusion but softened ever so slightly the intellectual nature of the originality displayed by the performer which justified his award of authorship. To obtain the status of co-author of the picture in which he featured as model, the performer evidenced artistic “initiative”<sup>358</sup> in the creative process and an “active role”<sup>359</sup> in his collaboration with

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<sup>352</sup> That is, out of the jurisdictions under study, see text to note 267, Chapter 2.

<sup>353</sup> Trib Seine, 23 avril 1937, *Rigault dit Marnay c. Chaperot et Copelier* : Le Droit d'Auteur, No 11 p 129.

<sup>354</sup> *ibid*, 130. Author's translation, see Appendix 1 for original text.

<sup>355</sup> *ibid*.

<sup>356</sup> *Hadley v Kemp* [1999] All ER (D) 450 ; [1999] EMLR 58, para N5.

<sup>357</sup> Paris, 3 décembre 2004, *Sorbelli c/ Yoshida*, n° 04/06726: D. 2005, juris, p. 1237 [lexbase=A0681DGC], JCP E 2005, No1863 para 3.

<sup>358</sup> *ibid*. Author's translation, original text reads : « c'est à son initiative et en raison de l'existence de sa création ».

<sup>359</sup> Paris, 3 décembre 2004, *Sorbelli c/ Yoshida*, n° 04/06726: D. 2005, juris, p. 1237. Author's translation,



the photographer. For this reason, his portraits were adjudged to be the result of both photography and performances combined, warranting the performer the status of co-author. Yet, in the depiction of this creative process, the Court did not describe performances as manual, physical or embodied works. The presence of the body in Sorbelli's work was left aside and the Court focused on his intellectual or intentional input in the composition of the photographs. His creative choices of standing dressed like a prostitute in front of the Leonardo Da Vinci's Mona Lisa, taking poses he improvised without the direction of the photographer were the elements regarded as worthy of protection, not his physical traits. Indeed, very much like its common-law counterparts the French Bench refuses to see in physical silhouettes any aspects of subject-matter eligible to copyright protection.<sup>360</sup> No reference to the physical involvement of the artist in his interpretation was made or used as grounds for protection. Similarly, in a previous decision litigating over a trumpeter's jazz improvisation,<sup>361</sup> the same court limited its assessment of originality to evidence whether or not the musician's performance bore the "mark of his own style"<sup>362</sup> so as to present "the characteristics of an original creation".<sup>363</sup> Again, the physical presence of the artist in his improvised rendition of the musical work was left out of the Court's reasoning.

In *Stuart v Barrett*,<sup>364</sup> British judges described with the same economy of words the

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original text reads: "tenait un rôle actif".

<sup>360</sup> Versailles, 9 octobre 2008, *Randall G. c/ Ste First Media*, n° 06/03959 (the tone of one's voice is not original enough to justify the protection of performer's rights, assessment which applies the same test as do dispositions pertinent to authors' rights); Paris, 1ere Ch, pole5, 14 novembre 2012, *SARL Acces Photo c/ Tours FC*, n° 11/03286 : inédit (in this case pertinent to the eligibility to copyright protection of football photographs, the Court reminded the parties that physical traits, here 'physionomies' were not eligible to protection by authors' rights).

<sup>361</sup> Cass, crim. 13 décembre 1995 : Bull. crim., 1995 N° 379 p 1110 ; D. 1997. p.196.

<sup>362</sup> *ibid.* Author's translation, original text reads : « morceaux de trompette improvisés par Pierre X... portent la marque de son style propre ».

<sup>363</sup> *ibid.* Author's translation, original text reads : « présentent le caractère d'une création originale ».

<sup>364</sup> *Stuart v Barrett* [1994] EMLR 448.

compositional element involved in improvised performances of a music band during jamming sessions. In depicting the input of performers, no mention was made to their bodily presence or to the physical nature of their work. Instead, the judge referred to the inherently compositional nature of their contribution since the musicians were not given any scores or notation of the idea they were expected to express through their instrument.<sup>365</sup> The group of performers were described as having “made important original contributions to the work”.<sup>366</sup> The whole process was narrated by the Court as having occurred in the following way:

[s]omeone started to play and the rest joined in and improvised and improved the original idea. The final piece was indeed the product of the joint compositional skills of the members of the group present at the time.<sup>367</sup>

Here, both the intellectual representation of composing and the manual conception of performing were dropped to adopt a more neutral phrase referring to “compositional skills” and “original contributions”.

#### *b) Patterns of intellectualisation*

The intellectualisation of largely physical creative processes is neither a recent nor a novel phenomenon of the copyright discourse. Indeed, in *Walter v Lane*<sup>368</sup> the Court brought out the mental work underlying the manual activity of shorthand notating a speech in order to justify granting full copyright to the reporter for his verbatim written rendition of a previous oral work.<sup>369</sup> The same logical ‘trick’ was played in the context of performances to erase its physical component and augment its intellectual

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<sup>365</sup> In doing so, the Court stressed the ex nihilo nature of their contributions rather their embodied essence.

<sup>366</sup> *Stuart v Barrett* [1994] EMLR 448.

<sup>367</sup> *ibid.*

<sup>368</sup> *Walter v Lane* [1900] AC 539.

<sup>369</sup> *ibid.*, 559.

substance so as to satisfy the cultural bias which portrays true creativity worthy of authorship as an intellectual endeavour in the legal narrative.<sup>370</sup>

This phenomenon of intellectualisation of performances can also be found in the tiering of performing artists enforced by the French Intellectual Property and Employment Law codes. As explained in previous developments,<sup>371</sup> the civilist system distinguishes between performers, auxiliary performers and models. According to statutory dispositions and their associated jurisprudence, such categorisation is based on the more or less original or active nature of performing artists' inputs.

Previous observations described the lack of clarity in the rules and tests separating models from auxiliary performers and auxiliary performers from performer.<sup>372</sup> The overall scheme does however function on the premise that auxiliary performers demonstrate more originality, *id est* personality, *id est* intellectuality, than models but less so than 'regular' performers. Models are defined as passive individuals who pose in front of the camera according to the direction they receive from photographers and directors. According to the Employment Law Code, their activity is also restricted to conveying commercial or advertising messages.<sup>373</sup> The passive nature of their input in the photography precludes the expression of their personality for it lacks both creative freedom and intellectuality. Because models are depicted as the epitome of human puppets,<sup>374</sup> the act of modelling does not deserve the protection extended to 'works of the mind' or performances displaying a higher level of 'personality', in other words intellectuality.

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<sup>370</sup> text to note 420, Chapter 2.

<sup>371</sup> text to note 283, Chapter 2.

<sup>372</sup> text to note 303, Chapter 2.

<sup>373</sup> Labour Law Code, Art L 7123-2.

<sup>374</sup> The analogy is further examined in subsequent developments, see text to note 92 Chapter 5.

This categorisation of performing artists is implicitly based on a grading of the intellectual effort invested by the artists in their interpretation. Modelling, portrayed as almost exclusively physical, receives the least protection from the law. The relevant protective regimes improves as performing artists' work evidence stronger intellectual content, climbing up the ladder from models, to regular performers all the way up to author-performers as performers.<sup>375</sup>

c) *Theories of intellectualisation: Diderot's "tears of the brain"*

The intellectualisation of performances is not exclusive to legal narratives. Traces of similar thinking can be found in philosophical debates studying performing processes. As one of the first philosophers to examine the act of performing by focusing on the art of acting,<sup>376</sup> Denis Diderot<sup>377</sup> believed and explained how performing is and ought to be an intellectual effort rather than an embodied, or in his phrasing, emotional process.<sup>378</sup> The philosopher applied his mind/body dualist theory to the art of acting to conclude that performing is both an intellectual and physical exercise during which actors ought to resort to their intellect in order to control their body with their mind rather than their own sensibility.<sup>379</sup> According to the French theorist, actors must manipulate their body by employing reason so as to mould the

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<sup>375</sup> Performers evidencing the highest form of intellectuality could be in the position of receiving full authors' rights, see text to note 303, Chapter 2.

<sup>376</sup> If the art of performing, understood in its broadest sense, has been under study since the Ancient Greece, the focus of the discussion was placed on the impact performances had on the community rather than on the relationship tying the performer to the author's work. See, Aristotle (Trans. Whalley G., *Aristotle's Poetics* (McGill-Queen University Press 1997); Anastasia-Erasmia Peponi, *Performance and Culture in Plato's Laws* (Cambridge University Press 2013); Jean-Jacques Rousseau (Trans. Bloom A., *Letter to M. D'Alembert and Writings for the Theatre, The Collected Writings of Rousseau* (CE Butterworth and C Kelly eds, University Press of New England 2004).

<sup>377</sup> Denis Diderot, *The Paradox of Acting* (Kessinger Publishing 1883); Denis Diderot, 'Letter on the Deaf and the Dum', *Diderot's Early Philosophical Works* (Open Court Publishing 1916); see also, Herbert Dieckmann, 'Le Thème de L'acteur Dans La Pensée de Diderot' (1961) 13 Cahiers de l'Association internationale des études francaises 157.

<sup>378</sup> Diderot *The Paradox* (n 377).

<sup>379</sup> Mathilde Pavis, 'Is There Any-Body on Stage? A Legal (mis)Understanding of Performances' (2014) 8 Platform : Journal of Theatre and Performing Arts 12, 15-6.

former into taking any forms, emotions or movements required by the role. In this logic, performing becomes an exercise taxing of the mind, but never the body.<sup>380</sup> Acting on the basis of one's sensibility would be resorting to lower forms of performance, where the body is inevitably less malleable because it is impossible for actors to have encountered all the life experiences, stories and emotions playwrights may wish to convey to the public. When performers rely on this lower form of acting, they risk becoming "wretched pasteboard[s] figure[s]"<sup>381</sup> from which the public will be unable to grasp the characters and messages authors wished to paint. The great performer on the other hand, manages to make of himself the perfect puppet in the writer's hand by exercising his rational skills so to shed "tears of the brain"<sup>382</sup> and not tears of emotions.<sup>383</sup>

His theory reflects how valuable performances were too depicted as intellectualised form of expression during the nineteenth century.<sup>384</sup> In light of these observations, this bias favouring intellectual processes to the detriment of physical ones appears to have reached both philosophical and legal discourses framing the questions of creativity, authorship, and performances.

Since then, the intellectuality involved in performances has been acknowledged by subsequent theories<sup>385</sup> and made consensus in the performing art literature. However, performance narratives are careful not to portray performing as wholly

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<sup>380</sup> Diderot *The Paradox* (n 377) 53, 61-2.

<sup>381</sup> *ibid.*, 62.

<sup>382</sup> Diderot *The Paradox* (n 377) 9, 16-7.

<sup>383</sup> *ibid.*

<sup>384</sup> See for equivalent processes in the legal narrative previous comments on *Walter v Lane* [1900] AC 539; *Stuart v Barrett* [1994] EMLR 448 ; Trib Seine, 23 avril 1937, *Rigault dit Marnay c. Chaperot et Copelier* : Le Droit d'Auteur, No 11 p 129; Paris, 3 décembre 2004, *Sorbelli c/ Yoshida*, n° 04/06726: D. 2005, juris, p. 1237 [lexbase=A0681DGC], JCP E 2005, No1863 para 3. See text to note 352.

<sup>385</sup> See for instance the theory developed by George Simmel, text to note 478, Chapter 2.

intellectual but as the result of a subtle mixture of both intellectual and physical effort, they often refer to as 'embodiment'.<sup>386</sup>

### 3. Embodied exceptions to the intellectualisation of performances

When accessing the rank of copyright work, performances were not always intellectualised by the courts. *Garcia v Google*<sup>387</sup> stands as an exception in this series of decisions. In 2014, the court of appeal of the ninth circuit concluded that Garcia, the actress, was vested with a copyright interest in her performance. Unlike preceding jurisprudence, the decision affirmed the valuable and creative nature of performers' interpretations for what they are: embodied processes drawing on artists' physical traits and creative abilities. The Court presided by Kozinski J stated:

Google argues that Garcia didn't make a protectible contribution to the film because Youssef wrote the dialogue she spoke, managed all aspects of the production and later dubbed over a portion of her scene. But 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 shmuck is an actor because everyone knows how to read.

An actor's performance, when fixed, is copyrightable if it evinces some minimal degree of creativity ... 'no matter how crude, humble or obvious' it might be. That is true whether the actor speaks, is dubbed over or, like Buster Keaton, performs without any words at all.<sup>388</sup>

In this decision, the ninth circuit court did not attempt to disguise the nature of performances under a veil of intellectuality but embraced its originality for what it defined as being a process of "embodiment" including "body languages, facial

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<sup>386</sup> This point is further discussed in Chapter 5, text to note 147.

<sup>387</sup> *Garcia v Google Inc*, 743 F. 3d 1258 (9th Cir 2014).

<sup>388</sup> *ibid*, 1263-4. Citation and references omitted.

expressions and reactions to other actors and elements of a scene".<sup>389</sup> Despite the significant presence of the body in this form of creative expression, the Court maintained its finding for originality and authorship. For precisely this reason, mixing his argument with considerations of fixation Smith J dissented from the majority's judgement.<sup>390</sup> In appeal the decision was overturned, but neither the majority nor the dissenting opinions reiterated their arguments on the question of originality.<sup>391</sup> The en banc panel limited its argumentation to the questions of fixation and layering of rights.<sup>392</sup> Kozinski J, dissenting in this appeal, did not repeat his reasoning on performer's creativity although he did reaffirm the physical nature of performances,<sup>393</sup> and in parallel, insisted on the fact that the originality requirement was indeed met by performances.<sup>394</sup>

A decade earlier, the same circuit had followed a similar reasoning to that of first *Garcia* decision.<sup>395</sup> In *Newton v Diamond*,<sup>396</sup> the American court of appeal did not dismiss the possibility for a performer to receive copyright protection in his performance, without intellectualising the process. The Court affirmed:

[I]t is clear that Newton goes beyond the score in his performance. For example, Dr. Dobrian [expert witness] declared that "Mr. Newton blows and sings in such a way as to emphasize the upper partials of the flute's complex harmonic tone, [although] such a modification of tone color is not explicitly requested in the score." More generally, Dr. Wilson explained Newton's performance technique as follows:

[T]he Newton technique produces a musical event in which the component sounds resulting from the simultaneous singing of one or more pitches and the interaction of this pitch or pitches with the various components of the

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<sup>389</sup> *Garcia v Google Inc*, 743 F. 3d 1258 (9th Cir 2014), 1274.

<sup>390</sup> *ibid*, 1274-5.

<sup>391</sup> *Garcia v Google Inc*, 786 F. 3d 733 (9<sup>th</sup> Cir 2015).

<sup>392</sup> *ibid*, 742-4. See on this, text to note 53, Chapter 1.

<sup>393</sup> *Garcia v Google Inc*, 786 F. 3d 733 (9<sup>th</sup> Cir 2015).

<sup>394</sup> *ibid*, 749-50.

<sup>395</sup> *Garcia v Google Inc*, 743 F. 3d 1258 (9th Cir 2014).

<sup>396</sup> *Newton v Diamond*, 349 F. 3d 591 (9th Cir 2003).

multiphonic array of pitches produced on the flute create a relatively dense cluster of pitches and ambient sounds that sometimes change over time.

Whatever copyright interest Newton obtained in this "dense cluster of pitches and ambient sounds," he licensed that interest to ECM Records over twenty years ago, and ECM Records in turn licensed that interest to Beastie Boys.<sup>397</sup>

What is described as being both creative and original here is the performing style of the musician, not the intellectual choices or compositional skills he might have displayed whilst performing. The Court envisaged the possibility for an activity a priori deprived of intellectual components to benefit from legal protection. The degree to which the body was involved in this case might have been slightly undermined by the dominant presence of an instrument (the flute), yet there is no trace in this argument of an attempt to augment the intellectual nature of performing or downplay the input of a performing style in the originality of the musical composition. Nevertheless, the outcome of the decision did not play out in favour of the performer unlike the 2014 *Garcia* case,<sup>398</sup> because the former had retained his right in the composition but not in the performance.<sup>399</sup>

This section illustrated how the legal narrative of all jurisdictions under study came to distinguish between the work of the mind and the work of the body, rewarding and encouraging the first but not the second. The following and last part of this chapter suggests that the concept of 'personality' may be a notion useful to reunite both kinds of inputs in the originality condition, intellectual and physical.

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<sup>397</sup> *Newton v Diamond*, 349 F. 3d 591 (9th Cir 2003), 595-6.

<sup>398</sup> *Garcia v Google Inc*, 743 F. 3d 1258 (9th Cir 2014).

<sup>399</sup> Text to note 253, Chapter 2.



### **C. Joining the mind to the body**

This section envisages the notion of ‘personality’ or ‘imprint of the personality’ as a door opening the originality condition to embodied aspects of creation as such those displayed in performative works. By definition, the concept of ‘personality’ is at the intersection of one’s mind and body. The notion has been used by both copyright and performers’ rights to target the essence of the subject-matter protected by each set of rights. The same concept is also known of other areas of law such as personality or publicity rights, which may have made the courts reluctant to fully explore the concept from an intellectual property perspective.

#### **1. Building a bridge: personality**

Personality can be defined as “the combination of characteristics or qualities that form an individuals’ character”.<sup>400</sup> It is commonly accepted that one’s character is both formed by one’s mind and one’s body. Both understandings of personality, as intellectual and embodied, have formed the premise of different fields of law. Whilst intellectual property law has envisaged the concept from an intellectual stand point, publicity rights have acknowledged its corporeal and physical dimension. Indeed, one’s image, silhouette and voice, all physical traits, may be subject to legal protection under tort, personality or publicity rights in every jurisdiction envisaged in this analysis.<sup>401</sup> The protection of physical attributes composing one’s personality reached an unprecedented level in the American case *White v Samsung Electronics America*<sup>402</sup> where the vague resemblance of a television presenter (Vanna White) was artificially reproduced onto a robot for the purpose of a Samsung commercial. In

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<sup>400</sup> Judy Pearsall and Patrick Hanks (eds), *The New Oxford Dictionary* (Oxford University Press 1999) 1385.

<sup>401</sup> On this see, Sheldon Halpern, ‘Publicity Rights, Trademark Rights, and Property Rights’ in Neil Wilkof and Shannad Basheer (eds), *Overlapping Intellectual Property Rights* (2nd edn, Open University Press 2012). See also, text to note 196, Chapter 1 and text to note 2, Chapter 2.

<sup>402</sup> *White v Samsung Electronics America Inc*, 971 F. 2d 1395 (9th Cir 1992).

this case, the presenter's persona was considered as being illegally reproduced by the technology company.<sup>403</sup> Even though the law does seem to acknowledge the intellectual and embodied elements of the concept of personality, they remain separated and dealt with by different, sometimes clashing,<sup>404</sup> areas of law. This section proposes to embed the notion in intellectual property systems so as to widen its understanding of originality and overall approach to creativity.

## **2. Personality as definition of the originality condition**

Throughout the evolution of copyright laws, the notion of personality came to find itself a place at the heart of the framework. In France, the courts developed the doctrine of 'imprint of personality' to define the originality condition. The same doctrine is said to have inspired the recent harmonisation of copyright across the European Union driven by the CoJ. Going beyond the borders of Europe, early American cases have also relied on the concept to define the essence of authorship.

### *a) The French doctrine of 'imprint of personality'*

As illustrated in previous developments,<sup>405</sup> the notion of originality in the French system led to the creation and development of the doctrine of the "imprint of the author's personality".<sup>406</sup> According to the doctrine, a work of the mind can be considered as such, so long that it bears the print of its author's personality. Such personal mark may be expressed in a variety of ways which do not involve any

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<sup>403</sup> Kozinski J. vehemently dissented from the majority's opinion in this case, see *White v Samsung Electronics America Inc*, 989 F. 2d 1512 (9th Cir 1993 - Dissenting opinion).

<sup>404</sup> In the US, the law was reformed in 1978 so as to have federal copyright pre-empt personality right: *Midler v Ford* 1988 849 F.2d 460 (9th Cir 1988); *Laws v Sony Music Entertainment, Inc*, 448 F. 3d 1134 (9th Cir 2006). See US Code, Title 17 para 301. This amendment of the Code was introduced by the Public Law 94-553, made effective as of 1978. See also, 'Performance Rights in Sound Recordings (95th Congress, 2d Session Committee Print No 15)' (1978) 4, later referred to as the '1978 Committee Report'.

<sup>405</sup> Text to note 262, Chapter 2.

<sup>406</sup> See for instance, Paris, 4e ch, 20 novembre 1996 : JCP G 1997, 22937, note Pollaud-Dullian; RIDA 1997, No 173,321 obs. Kerever.

condition of novelty or quality, in accordance with other basic principles of copyright law also found in common law jurisdictions.<sup>407</sup> In 2008, the Paris Court of Appeal explained that the author's personality can be evidenced by the array of creative choices she has made during the creative process.<sup>408</sup>

A variety of phrases to refer to the doctrine blossomed in the French jurisprudence. Relying on by-products and derivatives of the term 'personality' courts used the expressions of "personal work",<sup>409</sup> "personal imprint",<sup>410</sup> "reflect of personality"<sup>411</sup> and "mark of personality".<sup>412</sup> In some decisions, the terminology shifted towards "the imprint of personality identifiable in the author's personal sensibility"<sup>413</sup> or the author's "emotional personal imprint".<sup>414</sup> The Court of Cassation more consistently refers to the "creative effort bearing the imprint of the authors' personality"<sup>415</sup> specifying that such requirement is the "sole effort able to confer the quality of original protected work".<sup>416</sup>

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<sup>407</sup> See for instance, Cass, 1ère civ, 16 avril 1991, n° 89-21.071: Bull. 1991 I N° 139 p. 92; D 1992, somm. 13, obs Colombet. (novelty does not enter the scope of originality in granting authors' rights).

<sup>408</sup> Paris, 4e Ch 21 novembre 2008: Sodisud: PIBD 2009, 889, III, 792. Confirmed in Paris, 6 février 2009 : JCP E 2010, 1470, No 1 obs. Vivant, Mallet-Poujol et Bruguiere ; JurisData No 2009-002267. Author's translation, original text reads : « travail personnel » Author's translation, original text reads : "l'empreinte de la personnalité de l'auteur".

<sup>409</sup> Cass, 27 mai 1942: S. 1942m 1,124. Author's translation, original text reads : « travail personnel »

<sup>410</sup> Paris, 4 Ch, 1er avril 1957: D 1957,436, 1<sup>re</sup> esp. Author's translation, original text reads : "empreinte personnelle".

<sup>411</sup> Paris, 4 Ch, 4 mars 1982: D 1983, inf. rap. p. 93 obs. Colombet. Terminology repeated in Paris, 4 Ch 27 octobre 1993: D 1994, somm. Comm. 89, obs. Colombet. Author's translation, original text reads : "reflet de la personnalité".

<sup>412</sup> Paris, 11e Ch, 23 novembre 1982: D 1983, inf. rap. p. 152 obs. Colombet. Terminology repeated in Paris, 4eme Ch 27 octobre 1993: D 1994, somm. Comm. 89, obs. Colombet. Author's translation, original text reads : "marque de la personnalité".

<sup>413</sup> Versailles, 12r Ch, 22 novembre 2001, Aubard: Legipresse 2002 No 188, p.6. Author's translation, original text reads : "empreinte de la personnalité discernible dans la sensibilité de l'auteur que laisse transparaître l'oeuvre".

<sup>414</sup> TGI Nanterre, 10 mars 1993: RIDA 1993, No 157, 343, note Gaubiac. Author's translation, original text reads : « empreinte émotionnelle personnelle ».

<sup>415</sup> See for instance, Cass, crim, 4 novembre 2008, n° 08-81.955: JCP 2009, No 25,30, para 1, obs. Caron; RLDI janv 2009, No 1474, p 16; RIDA 2009, 219, p. 341, obs Sirinelli. Author's translation, original text reads : « un effort créatif portant l'empreinte de la personnalité de leurs auteurs ». See also, Cass, Ass. Plénière, 7 mars 1986, « Atari et Williams Electronics » 83-10.477 : D. 1986, 405 note Edelman Concl. Cabannes.

<sup>416</sup> Cass, crim, 4 novembre 2008, n° 08-81.955: JCP 2009, No 25,30, para 1, obs. Caron; RLDI janv 2009, No 1474, p 16; RIDA 2009, 219, p. 341, obs Sirinelli. Author's translation, original text reads : « seul de nature à

In the context of the originality condition, the concept of personality is not entirely foreign to the British system either. Sherman and Bently point to the fact that although the work of the mind was defined as the subject-matter protected by the British copyright model as early as the pre-modern era, before that, a broad definition of the mental work was adopted by the courts so as to include elements of personality.<sup>417</sup>

The preceding chapter described how the French judiciary extended authorship to performers in cases heard before the 1985 reform on performers' rights, but continued to do so under exceptional circumstances after that.<sup>418</sup> The present chapter has also underlined that in doing so, the same courts may have intellectualised the notion of performances or performative inputs so as to render the act of performing eligible to author's rights. The question remains whether in this process the courts applied to performers and performances the same test of the imprint of personality or not. If so, this would suggest that the doctrine may already be utilised to include embodied elements as part of individuals' creative expression. If not, the decision to avoid the doctrine might indicate that the concept of personality remains too intellectualised to be applied to performances, so much so that the courts were careful to employ different expressions or standards in these particular circumstances.<sup>419</sup>

In 1937, the Seine Tribunal recognised that interpretations were "personal creations"<sup>420</sup> just like sculptures, paintings or engravings.<sup>421</sup> The notion of "personal

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leur conférer le caractère d'une œuvre originale protégée ».

<sup>417</sup> Sherman and Bently *The Making of Modern IP* (n 16) 15, footnote 17.

<sup>418</sup> Text to note 260, Chapter 2.

<sup>419</sup> Comment on how the discourse in the French legal narrative is not policed and that the terminology describing originality is rather rich compared to other.

<sup>420</sup> Trib Seine, 23 avril 1937, *Rigault dit Marnay c. Chaperot et Copelier* : Le Droit d'Auteur, No 11 p 129, 130. Author's translation, original text reads : « créations personnelles ».

creations” resembles what later became by-products of the doctrine of ‘imprint of personality’ but no trace of its express mention can be found in the case.

In 1995, the Court of Cassation referred to the jazz musician’s “mark of its own style bearing the character of original creation”<sup>422</sup> to justify his award of author’s rights over his improvisation on the record “Mademoiselle Chante le Blues”. Here again, the notion of “the mark of one’s own style” does not fall far from the concept of the imprint of the personality but the expression does not feature in the decision verbatim.

In *Soberlli v Yoshida*,<sup>423</sup> the court granted authorship to the performer for his artistic direction and control over the composition of Yoshida’s photographs. Soberlli was himself present in the frame, but such physical presence was discussed under the cover of image rights rather than intellectual property issues. Although, the Court acknowledged his obvious physical presence in the work, they emphasised his creative initiatives and artistic control over the work to justify his co-authorship. The court referred to the series of choices he had made during his performance in front of the camera, but his interpretation was not described as having marked the work with the imprint of his personality. However, the doctrine was applied to the photographer’s contribution. Indeed, after assessing Sorbelli’s input in the work, the Court examined Yoshida’s. It concluded that she too deserved to share the ownership over the portraits as she had been in charge of arranging the lighting, choosing the angle and equipment with which to take the photographs. The Court

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<sup>421</sup> Trib Seine, 23 avril 1937, *Rigault dit Marnay c. Chaperot et Copelier* : Le Droit d’Auteur, No 11 p 129, 130.

<sup>422</sup> Cass, crim. 13 décembre 1995 : Bull. crim., 1995 N° 379 p 1110 ; D. 1997. p.196. Author’s translation, see Appendix 1 for original text.

<sup>423</sup> Paris, 3 décembre 2004, *Sorbelli c/ Yoshida*, n° 04/06726: D. 2005, juris, p. 1237 [lexbase=A0681DGC], JCP E 2005, No1863 para 3.

concluded that this series of choices led to seal on the work “Miss Yoshida’s personal imprint”.<sup>424</sup>

One cannot help but wonder whether the application of the doctrine to the photographer’s input only, was a conscious and deliberate choice on the part of the Court. Is the doctrine of imprint of personality exclusive to authorial works? Did the Court apply to Sorbelli’s performance a different test, yet concluded that their respective inputs were equal in value? It would be both logical and reasonable to assume that the performer was applied the same test regardless of the lack of express reference to it.

This review has left us with more questions than answers. As the law and jurisprudence stand in France, it is uncertain whether the notion of personality in the context of intellectual property issues could be widened to include physical elements. The above mentioned cases do seem to indicate that this hypothesis remains a possibility. As a result, the doctrine of ‘imprint of personality’ may offer the flexibility judges would need to further extend the close circle of authors and welcome performers without having to complicate their intellectual property framework with new notions, concepts or rights.

*b) A European take on the ‘expression of ones’ personality’*

The development of the European jurisprudence on the question of originality in copyright works tends to confirm that the French doctrine may be the right tool to focus on in order to include embodied inputs as original in its scope so as to soften the edges of the author-performer divide.

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<sup>424</sup> Paris, 3 décembre 2004, *Sorbelli c/ Yoshida*, n° 04/06726: D. 2005, juris, p. 1237 [lexbase=A0681DGC], JCP E 2005, No1863 para 3. Author’s translation, original text reads : « : l’empreinte personnelle de Mlle Yoshida ».

The French doctrine has been identified as the inspiration and origin of the European position on the originality condition in copyright law.<sup>425</sup> In the context of photographic works, European policy-makers embedded in the 1993 Term Directive<sup>426</sup> a verbatim equivalent of the French doctrine. The seventeenth recital of the regulatory instrument reads:

[W]hereas a photographic work within the meaning of the Berne Convention is to be considered original if it is the author's own intellectual creation reflecting his personality, no other criteria such as merit or purpose being taken into account; whereas the protection of other photographs should be left to national law<sup>427</sup>

Although the authors of the directive appear to attribute the paternity of its terminology to the Berne Convention, the only commonality between this statement and the wording of the international convention is the description of copyright works as “intellectual creations”. Nowhere in the Convention can be read that such intellectual creations must reflect their author’s personality. The phrase itself is absent from the language of its dispositions. This addition is a direct import from the French jurisprudence by the authors of the 1993 Term Directive. The Directive had the unhidden agenda of harmonising the originality condition as applied to photographic works across national jurisdictions:

Whereas the protection of photographs in the Member States is the subject of varying regimes; whereas in order to achieve a sufficient harmonization of the term of protection of photographic works, in particular of those which, due to their artistic or professional character, are of importance within the internal market, it is necessary to define the level of originality required in this Directive<sup>428</sup>

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<sup>425</sup> Rahmatian (n 78) 58-9.

<sup>426</sup> Council Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights.

<sup>427</sup> *ibid*, Recital 17.

<sup>428</sup> *ibid*.

This renewed definition of original photographic works as the intellectual creations bearing their author's personality was duly noted by the CoJ which applied the test as spelled out in the 1993 Term Directive. In its *Painer* decision,<sup>429</sup> the European judges stated:

In view of the foregoing, a portrait photograph can [...] be protected by copyright if [...] such photograph is an intellectual creation of the author reflecting his personality [...].<sup>430</sup>

The Directive formed the base of the Court's decision which it cited on many occasions.<sup>431</sup> The same judgement coined the expression of "personal touch"<sup>432</sup> as by-product from the directive-inspired doctrine, which is not without reminding us of what first instance courts have done in France.<sup>433</sup>

The European endorsement of the French interpretation increases the relevance of the personality doctrine when considering ways to shift the thinking around originality to include embodied aspects of creativity. Indeed, under the authority of the CoJ, the doctrine should be able to go up from the French jurisdiction to the European Union level and back down to the British national framework - as well as in any other Member States' system.

The European take on the doctrine was followed by Proudman J, in *The Newspaper Licensing Agency Ltd v Meltwater Holding BV*<sup>434</sup> where the national judge came close to introducing a verbatim equivalent of the continental paradigm into the British discourse as a consequence of the *Infopaq* jurisprudence. Her decision stated that:

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<sup>429</sup> C-145/10 *Eva-Maria Painer v Standard VerlagsGmbH and Others* [2011] EUECJ C-145/10.

<sup>430</sup> *ibid*, para 94

<sup>431</sup> *ibid*, para 88, 94.

<sup>432</sup> *ibid*, para 92.

<sup>433</sup> See for instance, the use of the phrase in the Sorbelli case, text to note 423.

<sup>434</sup> *The Newspaper Licensing Agency Ltd v Meltwater Holding BV* [2010] EWHC 3099 (Ch) para 101.



The effect of *Infopaq* is that even a very small part of the original may be protected by copyright if it demonstrates the stamp of individuality reflective of the creation of the author or authors of the article.<sup>435</sup>

Yet despite Proudman J's judgement being confirmed by the Court of Appeal,<sup>436</sup> the High Court denied any significance to the impact of the European jurisprudence on the British copyright framework two years later. Indeed, in *Temple Island Collections Ltd v New English Teas Ltd*,<sup>437</sup> the Patent County Court reviewed the state of the national jurisprudence in light of the Franco-European doctrine of 'imprint of author's personality' to conclude that equivalent tests already present in the British narrative would lead to the same result. The Court explained that there was no difference beyond the question of language between the standards imposed by European policies and those known to domestic judges. When one of the parties referred the Patent county judge to a decision of the Austrian Supreme Court complying with the *Infopaq* and *Painer* jurisprudence,<sup>438</sup> he replied:

In accordance with more recent jurisdiction of the finding Senate, photographs are to be considered photographic works [...] if they are the result of the creator's own intellectual creation, with no specific measure of originality being required. [...]

Although the language used in this judgment differs from the way in which an English court would traditionally express itself in a copyright case, I believe there is no difference in substance between the law as applied here by the Austrian Supreme Court and the law here.<sup>439</sup>

In order words, the Patent County court found no difference in substance between the traditional 'skills, judgement and effort' doctrine<sup>440</sup> used in British copyright law to evidence originality and the doctrine of the 'imprint of the author's originality'. This

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<sup>435</sup> *The Newspaper Licensing Agency Ltd v Meltwater Holding BV* [2010] EWHC 3099 (Ch), para 83.

<sup>436</sup> *ibid*, para 44. Although confirmed, the appeal judgement makes no reference to the expression of "stamp of individuality reflective of the creation of the author".

<sup>437</sup> *Temple Island Collections Ltd v New English Teas Ltd* [2012] EWPC 1.

<sup>438</sup> *ibid*, para 18.

<sup>439</sup> *ibid*, para 19-20.

<sup>440</sup> *University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch 601, 611.

suggests that the national bench has no intention to revise its core copyright principles. This attitude may severely limit the reach of the Franco-European interpretation of originality, unless further decisions of the CoJ specify the need for a change of language in national frameworks. Finally, the question remains whether the doctrine will stay contained to the question of photographic works or whether its scope will be extended to all intellectual creations, as it is the case in France.

c) *The expression of personality as originality in the United States*

Even though British courts may be wrestling with the recent European jurisprudence by resisting its influence, the US seems to have embraced the notion of 'personality' as far as the originality condition is concerned. Indeed, as early as 1903, the US Supreme Court stated in *Bleistein v Donaldson Lithographing Co*<sup>441</sup> that:

Personality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible, which is one man's alone. That something he may copyright unless there is a restriction in the words of the act.<sup>442</sup>

This decision placed the notion of personality at the core of copyright as it defined the originality condition as well as the essence of authorship in the American framework. This aligns the discourse of the transatlantic common law jurisdiction with that of its French counterpart, reinforcing the relevance of exploring the concept as a possible route to extend the scope of copyright. The presence of the notion in early American copyright cases also confirms Sherman and Bently's finding according to which the notion of personality was blended with the concept of intellectual work during the pre-modern era of copyright.<sup>443</sup>

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<sup>441</sup> *Bleistein v Donaldson Lithographing Co*, 188 US 239 (Supreme Court 1903).

<sup>442</sup> *ibid*, 250.

<sup>443</sup> Sherman and Bently *The Making of Modern IP* (n 16) 15, footnote 17.

### 3. Personality as the subject-matter protected by performers' rights

The concept of personality is not exclusive of authors' rights. Legal regimes applicable to performers also intend to protect elements of artists' personality and its expression.<sup>444</sup> Publicity or personality rights are two examples. Yet again, copyright protection affords a greater level of protection than their non-intellectual property neighbours, despite the fact that they cover similar subject-matters.

#### a) *Performer's imprint of personality*

Although the French IPC never mentioned 'personality' as a defining criteria of 'performers' or 'performances', the jurisprudence developed on its basis the distinction between the three categories of performing artists. The expression of the performer's personality in his or her interpretation was used to differentiate between the work of the model, the auxiliary performer and the performer. The judges of the hexagon explained:

Considering that in the interpretation of a determined musical work, auxiliary performers are to be distinguished from performers not only because of the complementary and accessory nature of their role, but also and most importantly because their personality does not transpire in their interpretation unlike performers who are entirely invested in their performance and make it original.<sup>445</sup>

The exact same reference and wording was again used by the Paris Court of Appeal in 2008,<sup>446</sup> where the Bench held that in the absence of professional conventions outlining what amounts to performership and what does not, the expression of the artist's personality would be the standard applied by the courts:

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<sup>444</sup> Rahmatian (n 78) 60.

<sup>445</sup> Paris, 18ème Ch, 18 février 1993, n° [XP180293X] : D. 1993, p 397 note Weksteinbeg. Author's translation, see Appendix 1 for original text.

<sup>446</sup> Paris, 4ème Ch, 4 juillet 2008, n° 06/21406, Universal Music... : RTDCom. 2008, 745, obs. Pollaud-Dullian.

In cases where there are no professional conventions applicable in the field to identify the nature of the respondents' interpretations, one must appreciate their character on the basis of the evidence presented to the Court and taking into account that auxiliary artists distinguish themselves from performers not only by the complementary and accessory nature of their role, but also and most importantly by the fact that their personality does not transpire in their interpretation<sup>447</sup>

Later the same year, the judges seating at the Versailles Court of Appeal followed their Parisian colleagues' argument in the *Uncle Ben's case*:<sup>448</sup>

His personality does not transpire in his interpretation which consisted in reading a text, with the tone of a voice and an accent both of which are his own, even though he exaggerates the later [...].<sup>449</sup>

In light of those cases, the mother jurisdiction of the imprint of personality doctrine clearly appears to have extended its precept to performers' legal rights. Going further, one could envisage utilising the concept of personality to diversify the types of creativity protected by intellectual property confirms its strength since the French doctrine is at the source of current interpretations of the EU copyright framework.

This instrumentalisation of the notion of personality gained further ground as a result of Kozinski J's opinion in the 2015 *Garcia case*.<sup>450</sup> In his dissent, the ninth circuit judge relied on this very concept to open up the notion of originality to embodied creations such as performances. After acknowledging that performing is indeed a physical exercise, the federal judge concluded to its eligibility to copyright protection since originality is to be understood as the expression of one's personality. Referring to the Supreme Court's authorities on the question, he affirmed:

Garcia's performance had at least some minimal degree of creativity apart from the script and Youssef's direction. One's personality always contains

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<sup>447</sup> Paris, 4ème Ch, 4 juillet 2008, n° 06/21406, Universal Music... : RTDCom. 2008, 745, obs. Pollaud-Dullian, author's translation, see Appendix 1 for original text.

<sup>448</sup> Versailles, 9 octobre 2008, *Randall G. c/ Ste First Media*, n° 06/03959.

<sup>449</sup> Versailles, 9 octobre 2008, *Randall G. c/ Ste First Media*, n° 06/03959. Author's translation, see Appendix 1 for original text.

<sup>450</sup> *Garcia v Google Inc*, 786 F. 3d 733 (9<sup>th</sup> Cir 2015) 751.

something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something which is one man's alone.<sup>451</sup>

*b) The shadows of personality rights*

The presence of performers' personality in their work have also barred their protection by intellectual property laws. Indeed, elements of the performing artists' persona invested in their performances may trigger the enforcement of publicity or personality rights, thereby precluding their enforcement at the federal level.<sup>452</sup> In the US, Title 17 of the Constitution were specifically amended to prevent such protection from trumping the enforcement of federal copyright interests.<sup>453</sup> The reform was motivated by the wish to limit state-law-originated remedies protective of performers from hampering the protection and monopoly conferred to authors by federal copyright law.

It is contended that one's persona and the expression of one's personality are two different subject-matter of which legal frameworks would be able to draw the respective boundaries if equipped with the adequate structure. It is clear that in many cases, what performing artists aimed to obtain was protection for the creative work invested in the creation of their interpretation. Their claim failed because of narrow understandings of the copyright work and originality. Although the courts were correct in assuming that a part of performers' work is infused with their persona and personality, reducing performances and performers' creativity to just that is overlooking the conclusions of a century worth of research on and around the

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<sup>451</sup> *Garcia v Google Inc*, 786 F. 3d 733 (9<sup>th</sup> Cirt 2015), 751-2, citations omitted. The passage directly quotes *Feist Publications Inc v Rural Telephone Service Co Inc*, 499 US 340 (Supreme Court 1991) 345 and *Bleistein v Donaldson Lithographing Co*, 188 US 239 (Supreme Court 1903) 250.

<sup>452</sup> text to note 328, Chapter 2 ; On this, see also, Halpern (n 401).

<sup>453</sup> US Code, Title 17 para 301. This amendment of the Code was introduced by the Public Law 94-553, made effective as of 1978. See also, 1978 Committee Report (n 404) 4 and text to note 328, Chapter 2.

performing process.<sup>454</sup> Because performing goes beyond the passive display of one's persona, its protection should not be limited or exclusive to publicity or personality rights.

This line of reasoning was supported by Kozinski J when he presided the first *Garcia v Google* decision<sup>455</sup> of the ninth circuit court of appeal:

Just because someone's voice — its particular timbre and quality — can't be copyrighted, doesn't mean that a performance made using that voice can never be protected.<sup>456</sup>

The accumulation of both regimes would a workable option, were it to be adequately designed by either policy-makers, the courts, or both. The French judicature opted for this alternative and managed to articulate the two types of prerogatives in the context of performances, whereby performers' persona is generally protected as any other individuals as well as when it is injected in their work as artists.

The courts acknowledge that although both sets of rights are available to performers, third parties may only be liable to one of the two when the same act was found to breach both. As a result, whenever a breach of the performers' rights is found, this higher level of protection shall trump one's right to the protection of their image. Ruling on the use of a clip recording a performance of the Macarena dance by its choreographer Mia Frye and accompanying dancers,<sup>457</sup> the Paris Tribunal held that:

The Tribunal considers that the defenders are correct in asserting that Mme X [Mia Frye] who asks for the protection of her interpretation as performer, cannot invoke her right to one's image for the purpose of the same infringing acts since the two sets of rights are not cumulative.<sup>458</sup>

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<sup>454</sup> This point is further discussed in Chapter 5, text to note 147.

<sup>455</sup> *Garcia v Google Inc*, 743 F3d 1258 (9th Cir 2014).

<sup>456</sup> *ibid*, 1264.

<sup>457</sup> TGI Paris, 4 juin 2008, n° 05/06811.

<sup>458</sup> *ibid*, author's translation, see original text in Appendix 1.

This position reflects the nature of performances as being the combination of both intellectual and embodied creativity expressing one's personality without depriving the artists of their rights to protect their image whenever their performances would be regarded as ineligible to intellectual property rights. The Court maintained balance between performers' and third parties' interests by allowing the two sets of rights to coexist but not to be cumulated when actioned. The position of the French judiciary suggests that legal frameworks can function by protecting both individuals' persona and performing artists' expression of personality even when the two levels of rights overlap.

## **Summary**

Legal narratives reflect western cultural representations of creativity depicting the latter as an intellectual endeavour. Indeed, the comparative study of the American, Australian, British and French systems revealed that western intellectual property frameworks do convey a bias towards intellectualised understanding of creativity which translates in the definition of the author, the copyright work and the originality condition. This chapter stressed how such intellectualised representations of authorship have negatively impacted the development of performers' protection whose work remain perceived as a lesser contribution to our culture.<sup>459</sup> By opposing the labour of the mind, authoring, to the labour of the body, performing, the laws of Australia, France, UK and the US maintain in contemporary intellectual property systems understandings of performances dating back to the nineteenth century if not earlier. Although doors opening on modern definitions of creativity are available,

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<sup>459</sup> Brad Sherman and Lionel Bently, 'Performers' Rights: Options for Reform' (Report to the Interdepartmental Committee 1995) 59 para 7.4.3.7. Sherman and Bently suggest that properly protecting performers' rights would send the "cultural message" that their contribution is valued by the Australian society.

such as the notions of personality<sup>460</sup> or embodiment,<sup>461</sup> very few are the courts who engaged on this path.

It is contended that raising awareness around the influence intellectual biases have had on the finding of authorship may trigger the necessary changes in the way gatekeepers, judges and policy-makers, handle copyright issues involving performances.<sup>462</sup> By lowering the degree of intellectuality with which authors are expected to infuse their work and acknowledging the level embodied creativity which inherently composes any work, the courts may be able to strike the right balance allowing both traditional authors and performers to be protected by copyright. In this attempt, the notion of 'personality' may present itself as an available and useful tool.<sup>463</sup> The following chapter explores how the intellectualisation of authorship had the direct consequence of 'disembodying performances', comparing the role of performers as that of puppets.

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<sup>460</sup> text to note 399.

<sup>461</sup> This notion is further discussed in Chapter 5 text to note 147.

<sup>462</sup> This point is further discussed in Chapter 6, text to note 101.

<sup>463</sup> This question is further discussed in Chapter 6, see text to note 94.



## Chapter Five

### The disembodiment of performances

*Grown-ups like numbers. [...] If you tell grown-ups, "I saw a beautiful red brick house, with geraniums at the windows and doves on the roof...", they won't be able to imagine such a house. You have to tell them, "I saw a house worth a hundred thousand francs." Then they exclaim, "What a pretty house!"*<sup>1</sup>

Antoine de Saint-Exupéry, 1943

James Bond was first born British but became half-Scottish, half-Swiss ten years after his literary birth.<sup>2</sup> This change of nationality had nothing to do with marriage or permanent residency in either Scotland or Switzerland. It occurred after the author of the novels watched Sean Connery's impersonation of the famous spy.<sup>3</sup>

Following the actor's performance, the literary character borrowed some of the personal traits brought to him by Connery. In other words, the performer re-shaped James Bond's profile during and after his interpretation. This transformative input was later made tangible by Fleming's decision to rewrite his character's family history. This anecdote illustrates in concrete terms the extent to which the act of performing participates in the creation of meaning. Although this position has been long-accepted by modern performance theories,<sup>4</sup> it has not been so from a legal perspective. It is contended that this situation resulted in shaping the author-

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<sup>1</sup> Antoine de Saint-Exupéry, *The Little Prince* (Richard Howard trans., 2013 edn, Houghton Mifflin Harcourt 1943).

<sup>2</sup> Ben Macintyre, *For Your Eye Only: Ian Fleming and James Bond* (Bloomsbury Publishing 2008) 205. Macintyre writes: "[in] the books Fleming wrote after Connery had taken on the role [...] Bond seems to have developed a sense of humour, and some Scottish ancestry to go with his new-found accent." (205).

<sup>3</sup> *ibid.*

<sup>4</sup> see subsequent developments in text to note 152.

performer divide legal narratives have entrenched in the intellectual property systems.

Previous chapters grounded the presence of the author-performer divide in the belief of ex nihilo creation and in the intellectualisation of creativity. It is now submitted that the divide is also enabled by a third theoretical principle which, to a certain extent, draws on the second. This third theoretical explanation is referred to as the 'disembodiment of performances'. It is submitted that such disembodiment contributes to conceiving the performing process as an uncreative stage in the production of creative works, or at least inferior to authoring. This depiction of performers allows for the over-simplification of performances which in turn, supports its alleged inferiority. This perception of performances is itself based on two distinct but interlinked premises: the ability for all performing bodies to interpret all works as if they are universal human puppets (1), themselves controlled by the author's transcendental creative thought (2). This chapter unfolds those two principles and underscores their resonance in the legal narrative. The last section reinstates the creative contribution of performances by emphasising the role and impact of 'embodiment'. It relies on contemporary interdisciplinary research and evidence dismissing the reduction of performers as authors' mouthpieces.

## **I. Simplifying performances**

Previous developments stressed the extent to which the legal narrative perceived performances to be of a lesser creative value than authorial works.<sup>5</sup> The subsequent section explores a third possible explanation for such hierarchy. It is contended that the split existing between authors and performers, authorial works and performances

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<sup>5</sup> text to note 329, Chapter 4.

stems from, first, conflating the figure of the author, and second, from reducing the role of performers to that of puppets. Those premises will be examined in turn before highlighting the consequences they have had on defining and assessing the essence of performing.

### **A. Conflating authors**

The disembodiment of performances is closely connected with the intellectualisation of creativity and authorship.<sup>6</sup> Both the authorial figure and product are depicted as intellectual. As a result, creators worthy of legal protection are, or ought to be, intellectually-gifted individuals. Building on this representation, legal narratives portrayed those individuals as geniuses blessed with foreseeing clairvoyance whose artistic authority ought to be respected. This deference for the figure of the author lent support for the view that the latter's voice transcends subsequent stages of communication of the work to the public. In the context of works destined to the stage, such as dramatic, choreographic or musical pieces, this vision suggests that the message conveyed by the authorial composition reaches the audience thanks to the authority of its prose rather than the enabling process of performances. The work would dominate the stage of performances through the authoritative meaning the author injected in it. The work written, composed or choreographed by the author is thus constructed as the exact entity leaving his mind to reach that of the audience without distortion, provided that performers offer the necessary skills. This exaggerated representation of authorship can be evidenced in the legal narrative on

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<sup>6</sup> see generally Chapter 4 ; text to note 329, Chapter 4.

different levels. It resonates in decisions which religiously defer to archetypes of the authorial figure and belief in the complete and transcendental nature of their work.

## 1. Deferring to creative geniuses

This deference to the authorial figure built its archetype in the image of long dead artists, portrayed as pillars of western cultures. Represented as extensions of authors' personality, original works are too subject to the same protectionism by the Courts. In France, the doctrine of moral right further enables such veneration by shielding protected works against artistic distortions in the name of creative paternity and integrity.

### a) *Canonising legendary authors*

In describing creativity, Courts often drew on the practice of celebrated artists who thereby became human representations of the authorial archetype. The legal narrative rallied Mozart, Bach, Beethoven and Dickens to the cause on various occasions. In *Rockford Map Publishers v Directory Service Co of Colorado*<sup>7</sup> the court of appeal of the seventh circuit explained that the timeframe during which the creative product is made is irrelevant to its eligibility to copyright. It was so decided by referring to the creative experiences of those distinguished names. The American bench stated:

In 14 hours Mozart could write a piano concerto, J.S. Bach a cantata, or Dickens a week's installment of *Bleak House*. The Laffer Curve, an economic graph prominent in political debates, appeared on the back of a napkin after dinner, the work of a minute. All of these are copyrightable. Dickens did not need to complete *Bleak House* before receiving a copyright; every chapter-indeed every sentence-could be protected standing alone. [...] [The plaintiff], like Dickens, loses none of its rights by publishing copyrightable matter in smaller units.<sup>8</sup>

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<sup>7</sup> *Rockford Map Publishers Inc v Directory Service Co of Colorado Inc*, 768 F 2d 145 (7th Cir 1985).

<sup>8</sup> *ibid*, 148-9. References and citation omitted.

Departing slightly from intellectual property considerations,<sup>9</sup> a similar pedestal was again erected for Mozart and Beethoven, this time accompanied by Balanchine, Oscar Wilde, Rembrandt and Bathus to only name a few.<sup>10</sup>

Nevertheless, it must be noted that the court of appeal of the ninth circuit appears to have recently updated its repertoire as it built its legal argument referring to the cinematographic productions of the *Lords of the Rings* and the various performances it involved.<sup>11</sup> This mention granted the American actor Elijah Wood his first feature in intellectual property jurisprudence, next to Wilde, Mozart et alii.<sup>12</sup>

Moving to the UK, the courts there too relied on representations of venerated composers' creative process. In *Hadley v Kemp*,<sup>13</sup> the parties' composing practice were yet again compared to the late Beethoven's<sup>14</sup> even though the Court admitted that musical creative processes had changed significantly since then.<sup>15</sup>

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<sup>9</sup> The case of *Miller v Civil City of South Bend* was not concerned with a dispute on intellectual property grounds but on the legality of a ban of strip-teasing establishments in light of the first amendment of freedom of expression. See, *Miller v Civil City of South Bend*, 904 F 2d 1081 (7th Cir 1990).

<sup>10</sup> see for example *Miller v Civil City of South Bend*, 904 F 2d 1081 (7th Cir 1990) 1093-5. Stepping away from artistic references, American judiciary also reverted to the work of Albert Einstein, the epitome of creativity in sciences, to illustrate what creative material is covered by copyright : "Any original literary work may be copyrighted. The necessary degree of "originality" is low, and the work need not be aesthetically pleasing to be "literary." [...] Scholarship that explicates important facts about the universe likewise is well within this domain. Einstein's articles laying out the special and general theories of relativity were original works even though many of the core equations, such as the famous  $E=mc^2$ , express "facts" and therefore are not copyrightable. Einstein could have explained relativity in any of a hundred different ways; another physicist could expound the same principles differently." in *American Dental Association v Delta Dental Plans Association*, 126 F 3d 977 (7th Cir 1997) 979, see also *Seng-TiongHo v Taflove*, 648 F 3d 489 (7th Cir 2011) 499-500.

<sup>11</sup> *Garcia v Google Inc*, 786 F. 3d 733 (9<sup>th</sup> Cir 2015) 742-3.

<sup>12</sup> That the author is aware of.

<sup>13</sup> *Hadley v Kemp* [1999] All ER (D) 450; [1999] EMLR 58, para N5. See also, text to note 53.

<sup>14</sup> *ibid*, para N3, Park J states: "To describe Gary Kemp as the 'writer' of the music could be misleading without adding a little explanation. As I have said once or twice already he did not write the music down on paper. We have all seen imaginative sketches of the great classical composers of the past sitting at their desks in what one imagines might be an attic, quill pens in hand and sheafs of musical paper before them, writing out their compositions by hand. Popular music is not usually created that way, and Gary Kemp did not create his music that way. He composed at home, with a guitar and sometimes a piano. In this way for each song he developed, and fixed in his musical consciousness, the melody, the chords, the rhythm or groove, and the general structure of the song from beginning to end. Usually at the same stage he wrote the entire lyrics for the song."

<sup>15</sup> *Hadley v Kemp* [1999] All ER (D) 450 ; [1999] EMLR 58, para N5. In the same decision, Park J states: "After all, when Mr Kemp devised the song he devised it for performance, not by himself as a solo artist, but by Mr

References to such emblematic personalities of western culture combined with a description of the creative process as an intellectual and solitary experience confirm the contentions expressed by the critique of romantic authorship.<sup>16</sup> Indeed, those decisions appear to fall in line with an exaggeration of the authorial figure criticised by Woodmansee and Jaszi amongst others.<sup>17</sup>

*b. Sanctifying authorial works*

In France, the same “author-worship”<sup>18</sup> explicitly transpired in a 2004 decision of the Paris Court of Appeal. In this case, the Court sided with Victor Hugo’s estate who argued that the publication of sequels of the French writer’s most famous novels was a breach of his moral right of integrity. In deciding so, the Bench stressed the cultural importance of the stories which made them relics of both national and international literature. Consequently, derivative works could do nothing but damage the quality and integrity of Hugo’s legacy. Expressing an unhidden deference to the author’s work, the French Court stated:

Considering that, outlawing sequels of *LES MISERABLES* does not, as the parties contend, breach the principle of free creation since, in the facts presented before us, this work, a real monument of world literature [...] is not just a mere novel for it presents a philosophical and political angle [...];

Considering that, it follows that no sequel shall ever be given to a piece such as *LES MISERABLES*, forever complete, and that, the company Plon has, in editing and publishing *COSETTE OU LE TEMPS DES ILLUSIONS* and *MARIUS OU LE FUGITIF*, presenting the works as sequels of *LES MISERABLES*, infringed Victor Hugo’s moral right vested in the latter literary work;<sup>19</sup>

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Hadley and the whole band. A composer can 'hear' the sound of his composition in his mind before he ever hears it played. Beethoven could hear his music in this sense even when he was deaf.” (para N5)

<sup>16</sup> text to note 421, Chapter 2.

<sup>17</sup> text to note 430, Chapter 2.

<sup>18</sup> Peter Jaszi, ‘Is There Such a Thing as Postmodern Copyright?’ (2009) 12 105, 116.

<sup>19</sup> Paris, 4<sup>ème</sup> Ch, A, 31 mars 2004, « *Les Misérables* » : D. 2004, jurispr. P2028 note Edelman ; JCP E 2005 N 1216 § 1. Author’s translation, see original text in Appendix 1.

The decision held the publishing company liable for the symbolic amount of one euro in damages for breach of Hugo's moral right. Confronted with contradictory evidence of the author's opinion regarding possible creative reuses of his work, the Court was eventually swayed by the reputation of Hugo's work. In the decision, *Les Misérables* appeared as a "philosophical and political" sanctified entity of "world literature" the Court made its mission to protect. Despite the Bench's passion and lyricism, the judgement was reversed by the Court of Cassation three years later.<sup>20</sup> The highest civil court held that criteria of merit or completeness do not, and shall not, enter into the scope of the author's moral right of integrity. The right cannot be placed as a barrier to exercise the right of adaptation or the freedom of creation which is protected by both the Intellectual Property Code and the Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>21</sup>

However, the same right to one's freedom of creation did not receive the same degree of protection in the *Beckett* case.<sup>22</sup> A decade earlier, the Paris Tribunal de Grande Instance litigated in favour of Samuel Beckett's estate and forbade the performance of *Waiting for Godot* by a female cast. Here again, the claim had been brought on the basis of the late author's right of integrity. Because the Irish playwright had explicitly expressed his wish for the lead characters to be performed by male performers only before his death, the French Tribunal accepted his heirs' request to ban the production who had staged women as Vladimir and Estragon.<sup>23</sup> In

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<sup>20</sup> Cass, civ 1, 30 janvier 2007, N° 04-15.543, arrêt n° 125, *Société Plon et autre c/ P. Hugo et Société des gens de lettres*: Bulletin 2007, N° 47 p. 41.

<sup>21</sup> *ibid.*

<sup>22</sup> TGI Paris 15 oct. 1992, *Lindon et Sacd c/ La Compagnie Brut de Béton et Boussagol* : inédit, RTD com. 1993. P. 98 note Françon.

<sup>23</sup> Near identical facts were presented before the Rome Court of Appeal but received the opposite outcome. The Court refused to uphold the French interpretation of the moral right doctrine on the basis that it was a breach of the performers' human right of expression according to McMahon's account. See, Barbara McMahon, 'Beckett

this decision, the performers' rights of adaptation and to "freedom of creation", in the Court of Cassation's own words, were trumped by Beckett's pre-mortem artistic wishes.

This jurisprudence draws new and deeper lines within and around the author-performer divide. It appears that users considered as future authors are better protected than user-performers whose to free creation can be curbed by underlying authors' rights, even for questions of gender. Although the *Hugo* and *Beckett* cases are far from identical in their contentions,<sup>24</sup> they may implicitly contribute to furthering the hierarchy instigated by the moral right doctrine between authors and performers.<sup>25</sup> Although mitigated by the Court of Cassation in 2007, this line of jurisprudence contributes to aligning the judiciary's deference to esteemed creative works with that of their highly-regarded authors. The intellectual aura granted to authors by the legal narrative appears to be extended to their works regarded as the vessels of their talent and personality. This particular trait of 'author-worship' is not contained to the civil jurisdiction. Indeed, similar prerogatives were enabled by the legal American system beyond the frontiers of the continental doctrine.

In the US, where the moral right doctrine has barely any grip,<sup>26</sup> a dispute presenting facts not dissimilar to that of the French *Beckett* case rose between licensees and licensors of Twain's *The Adventures of the Huckleberry Finn*. A school production had staged *Big River*, the musical adaptation of the famous novel.<sup>27</sup> For the purpose

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Estate Fails to Stop Women Waiting for Godot' *The Guardian* (Rome, 2006) <<http://www.theguardian.com/world/2006/feb/04/arts.italy>> accessed 10 March 2016.

<sup>24</sup> Respectively, one relates to the question of writing a sequel independently from the work itself, the other concerns the performance of the work itself by actors of a different gender than specified by the author.

<sup>25</sup> text to note 133, Chapter 2.

<sup>26</sup> As explained in previous developments, the US only provide a limited range of moral rights in the context of works of visual arts. Dramatic, musical or choreographic works know no protection from this perspective. US: US Code, Title 17 para 16 (1) to (6), 106 A. See also, text to note 142, Chapter 2.

<sup>27</sup> Michael Carroll, 'Copyright's Creative Hierarchy in the Performing Arts' (2012) 14 Vand. J Ent. & Tech. L. 797, 798.



of their production, Glenelg High School had cast a black student to perform the role of Huckleberry Finn, a white character, but a white actor to interpret the role of Jim the Afro-American slave.<sup>28</sup> In the same manner the prohibited production staging *Waiting for Godot* presented a cross-gender interpretation of the play, the school's version of *Big River* had reversed the race of the main characters. The school production was stopped by Twain's right holders who considered such reversal as a breach of the license agreement they had extended to the theater company. Although American copyright law does not grant rights to dramatic works,<sup>29</sup> the presence of economic rights in Twain's works and its adaptation coupled with contractual prerogatives were enough to leverage the licensee's bargaining power and deter the students from performing their interpretation of the piece.<sup>30</sup> Those legal rights functioned in a very similar manner moral rights did in the context of the *Beckett case*, in a jurisdiction otherwise reluctant to enforce the civil doctrine.<sup>31</sup>

The British judiciary went further by rewarding with authorship the task of pursuing previous authors' creative agenda. In *Hyperion Records Ltd v Sawkins*,<sup>32</sup> the House of Lords rewarded the skills, time and effort the musicologist Sawkins spent on reproducing in modern notations the late composer's intentions:<sup>33</sup>

It was the aim of Dr Sawkins, so far as was possible, to reproduce faithfully Lalande's music in the form of an accurate edition close to the composer's original intentions.<sup>34</sup>

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<sup>28</sup> Carroll (n 27) 798.

<sup>29</sup> n 26.

<sup>30</sup> Carroll (n 27) 798.

<sup>31</sup> Respecting those wishes, the Courts are careful not to allow parties to create ersatz of moral rights to fill in this voluntary gap by relying on other available mechanism. For an illustration of this point, see for instance, *Lee v ART Co*, 125 F 3d 580 (7th Cir 1997), 582-3. See also, n 32.

<sup>32</sup> *Hyperion Records Ltd v Sawkins* [2005] EWCA Civ 565.

<sup>33</sup> *ibid*, para 22.

<sup>34</sup> *ibid*.

The presence of the Lalande's underlying composition was no obstacle to granting full copyright over the modern notation of the late musician's work to Sawkins.<sup>35</sup> In this case, the Court seems to have managed the lack of *ex nihilo* creation for Sawkins deployed a significant amount of creative effort in faithfully reproducing the author's original wishes. The Court concluded:

The first question is whether the performing editions are incapable of being regarded as "original" works because Lalande composed the music and Dr Sawkins made his editions of that music with the intention that they should be as close as possible to the Lalande originals.<sup>36</sup> [...]

In my judgment, [...] the effort, skill and time which the judge found Dr Sawkins spent in making the 3 performing editions were sufficient to satisfy the requirement that they should be "original" works in the copyright sense. This is so even though (a) Dr Sawkins worked on the scores of existing musical works composed by another person (Lalande); (b) Lalande's works are out of copyright; and (c) Dr Sawkins had no intention of adding any new notes of music of his own.<sup>37</sup>

The decision confirms and reinforces the need to chase and faithfully materialise the composer's authorial will.

This deference to the sanctified representation of the authorial figure is not without exception. Beside the 2007 decision of the French civil Supreme Court in the dispute opposing Plon publishing company to Victor Hugo's heirs, an earlier Australian judgement had too made a dent in the protectionism of authorial relics. In *Schott Musik International GmbH v Colossal Records of Australia Pty*,<sup>38</sup> the Court refused to recognise a breach of the author's rights in the electro adaptation of Carl Orff's composition of classical music *O Fortuna*. The recording company defended its contention by relying on the notion of 'debasement' as limiting one's right to produce

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<sup>35</sup> *Hyperion Records Ltd v Sawkins* [2005] EWCA Civ 565, para 33 and 36.

<sup>36</sup> *Hyperion Records Ltd v Sawkins* [2005] EWCA Civ, para 33.

<sup>37</sup> *ibid*, para 36.

<sup>38</sup> *Schott Musik International GmbH & Co v Colossal Records of Australia Pty Ltd* (1997) 145 ALR 483.

derivative works whenever the latter distorts the original piece.<sup>39</sup> According to the claimant, the techno-version of *O Fortuna* had debased the Orff's work presenting his work to the public in a degrading manner. This argument was rejected as it would have required the formulation of an aesthetical judgement, which the Court categorically refused to deliver.<sup>40</sup> Concurring with this argument, Lindgren J also took into consideration the fact that the modern adaptation of the musical work had made a traditional musical composition popular among more recent sub-cultures.<sup>41</sup> He affirmed:

In my view, an arrangement will be less likely to be a debasement where, as here, it is an arrangement which "makes available" the original musical work to the musical tastes of a different period of time or of a different subculture, or (as here) of both, and which thereby acquires its own integrity.<sup>42</sup>

The Australian decision substituted the opinion of a "reasonable person" to that of the author in deciding what amounted to adaptations debasing her work.<sup>43</sup>

Although isolated exceptions are to be noted, the line of jurisprudence described above evidences a clear conflation of the authorial figure as a genius mastermind who ought to be respected. In turn, this led the Courts to cherish authorial works as the material remnants of those talented minds. The subsequent paragraphs stress

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<sup>39</sup> *Schott Musik International GmbH & Co v Colossal Records of Australia Pty Ltd* (1997) 145 ALR 483, 484-5.

<sup>40</sup> *ibid*, 498-9. Lindgren J comments: As Hill J has observed, the capacity to describe music is limited, and "However, I express my agreement with the substance of the observations made by Wilcox J as to when an adaptation will be a debasement or degradation of an original work. Without repeating all those observations, I would emphasise that "debase" is a strong term which "requires much more than an opinion, even an expert opinion, that the adaptation is musically inferior". It seems to me to be significant that the question posed relates to music composed by Carl Orff in 1936, but must be answered by an application of s 55(2) in the context of the musical technology, societal phenomena and musical genres of the 1990s. As the trial judge said (at ALR 434; IPR 268-9): The adaptation of the work is recorded on a compact disc known as "Excalibur", which contains four remixed tracks of the "O Fortuna" chorus. The chorus comprises the opening and closing sequences of *Carmina Burana*. The evidence indicates that the "techno" genre is a form of music particularly favoured at "raves" which have been described in evidence as all-night dance sessions where loud pulsating music is played. It is said that the techno genre embodies a "slavish" devotion to the use of rhythm as a hypnotic tool that is, largely, if not primarily, interpreted by electronic means" (at 498-9).

<sup>41</sup> *Schott Musik International GmbH & Co v Colossal Records of Australia Pty Ltd* (1997) 145 ALR 483, 499.

<sup>42</sup> *ibid*, 498.

<sup>43</sup> *Schott Musik International GmbH & Co v Colossal Records of Australia Pty Ltd* (1997) 145 ALR 483.

the great powers legal discourses conferred on authors, going beyond the status of intellectual artists. Those alleged powers may explain or justify why the same narratives express such devotion to authors.

## 2. Depicting foreseeing geniuses

Previous chapters pointed to the intellectualisation of creativity in legal narratives.<sup>44</sup> This section confirms and furthers this argument. It is submitted that more than being an intellectual, the author is represented as a creative genius gifted with near omniscience or artistic clairvoyance. As the copyright work forms the extension of the author's person, it itself holds the same wholeness and authority in the legal discourses.

### a) Omniscient authors

According to legal narratives, authors are either omniscient or clairvoyant. This claim is made on the basis of descriptions of the creative process which depict the author, often the composer, as the individual not only able to compose the musical work in his mind,<sup>45</sup> or "consciousness"<sup>46</sup> but as the person who can also anticipate what the work will sound like once performed by musicians. This point was the crux of the dispute opposing the parties in *Hadley v Kemp*.<sup>47</sup> In the decision, Park J granted Kemp with the skill of foreseeing, or 'fore-hearing', the performances of his collaborators so much so that, his mental composition of the song had already included any interpretative variations they performed before their performance was executed. The British judge stated:

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<sup>44</sup> text to note 12, Chapter 4.

<sup>45</sup> *Hadley v Kemp* [1999] All ER (D) 450, para N5; *White-Smith Music Publishing Co v Apollo Co*, 209 US 1 (Supreme Court 1908) 17. See also, text to note 9 and 262, Chapter 2.

<sup>46</sup> *Hadley v Kemp* [1999] All ER (D) 450, para N5.

<sup>47</sup> *Hadley v Kemp* [1999] All ER (D) 450.

A composer can 'hear' the sound of his composition in his mind before he ever hears it played. [...] When Mr Kemp was devising his songs the sound which he had in his musical consciousness must surely have been the sound they would have when performed by Spandau Ballet, not the sound they would have when sung by Mr Kemp alone to the accompaniment just of his own guitar.<sup>48</sup>

Park J did not overlook the fact that significant differences may exist between the work presented by the author to the group and the work performed by them for the purpose of the record. However, the judge asserted that no differences exist between the mental version of the work the musician had composed and the recorded version performed by the group. The two versions form the one and only vision of the same work the author had in mind. For this reasoning to function, the author must have anticipated the performance of each musician before they occurred. The Court affirmed:

As to [...] the critical point is that, in my opinion, the songs in their recorded form were the same musical works as the songs which Mr Kemp had composed in his mind and his memory. Of course there was a marked difference between (a) the sound of the song sung by Mr Kemp to the accompaniment of himself on an acoustic guitar, and (b) the sound of the song sung by Mr Hadley with the backing of the whole Spandau Ballet band. But that does not mean that the whole band were creating a new and different musical work. Rather they were reducing Mr Kemp's musical work to the material form of a recording. After all, when Mr Kemp devised the song he devised it for performance, not by himself as a solo artist, but by Mr Hadley and the whole band.<sup>49</sup>

A similar portrayal of the musical work as being a complete unity first conceived in the composers' mind and later played by musicians was also put forward by the US Supreme Court. In *White-Smith Music Publishing v Apollo*,<sup>50</sup> the Court held that "[a]musical composition is an intellectual creation which first exists in the mind of the

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<sup>48</sup> *Hadley v Kemp* [1999] All ER (D) 450, para N5.

<sup>49</sup> *ibid.*

<sup>50</sup> *White-Smith Music Publishing Co v Apollo Co*, 209 US 1 (Supreme Court 1908).

composer; he may play it for the first time upon an instrument".<sup>51</sup> According to the American bench, the performance by the musician is a copy of the pre-existing mental work which had somehow anticipated its sounds, pace and interpretation. Like in *Hadley*,<sup>52</sup> the American Supreme Court regards the performance of the musical work as the exact materialisation by the performer of the mental composition created by the author since the former anticipated the inflections of the former. For this reason, the author becomes an intellectual individual gifted with the rare talent of foreseeing how others will receive, understand and in turn interpret his work, for his creation conveys and carries the necessary authoritative creative power to achieve this feat.

*b) Omnipotent works*

Represented as the material image of the author's creative intention, the written, fixed or recorded work has become the second authoritative reference in the performing process, after the author herself. Not only can the author foresee what and how performers will interpret the work, but the work itself is the embodiment of that prediction. As a result, performances must refer to and abide by the predications of the written work. As the author appears to be omniscient, the work becomes by the same token somewhat omnipotent in its ability to communicate through time and bodies the genial thought of its creator. This assumes that the mental conception of the work was complete in the author's mind and that the same completeness was then encapsulated in its material form. In this logic, performers need not to intervene in the composition of the work's substance when interpreting it since the latter is complete, therefore readily performable. Performing artists thus limit their input to

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<sup>51</sup> *White-Smith Music Publishing Co v Apollo Co*, 209 US 1 (Supreme Court 1908) 17.

<sup>52</sup> *Hadley v Kemp* [1999] All ER (D) 450; [1999] EMLR 58.

lending their body, a consequence the legal narrative explicitly noted in the American decision *Garcia v Google*.<sup>53</sup> The presence of the script as the complete embodiment of the film maker's creative thought made of performing a creative contribution irrelevant for copyright purposes. Smith J noted:

Garcia did not write the script; she followed it. Garcia did not add words or thoughts to the film. She lent her voice to the words and her body to the scene.<sup>54</sup>

This passage illustrates how the performing input is conceived as channelling the complete work of the author rather than adding any substantial additional meaning. This representation of performances is only possible if the work itself is perceived and understood as the whole representation of the authorial thought.

*i. The myth of the musical work*

In the field of music studies, and particularly in classical music, the relationship between the musical work, the scores and the performance is the subject of much debate.

Classic, one might say conservative, theories believe in the existence of the musical work, as the unchanging result of the author's composing process. According to this understanding, composers conceive and create musical works whose contours, depth, notes, pitches and tempos are definite and set in stone.<sup>55</sup> As a result, every performer interpreting them must strive to replicate those works with the same exactitude the composer created them with.<sup>56</sup> In this logic, each musical creation has

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<sup>53</sup> *Garcia v Google Inc*, 743 F. 3d 1258 (9<sup>th</sup> Cir 2014). See dissenting opinion at 1274. See also text to note 329.

<sup>54</sup> *ibid*, 1274.

<sup>55</sup> Nicholas Cook and Erick Clarke, 'Introduction: What Is Empirical Musicology?' in Nicholas Cook and Eric Clarke (eds), *Empirical Musicology: Aims, Methods and Prospects* (Oxford University Press 2004) 226-7.

<sup>56</sup> See for example Schoenberg's position explained in Nicholas Cook, *Music, Imagination and Culture* (Clarendon Press 1990) 226-7; Edward Cone, *The Composer's Voice* (University of California Press 1974) 62-3.

its own immaterial avatar, performers faithfully reproduce in order to be regarded as acceptable references of a particular work.<sup>57</sup> In their task, performers are aided by the scores or records<sup>58</sup> which are often taken for near perfect embodiments of the musical work.<sup>59</sup>

In *Sawkins v Hyperion Records Ltd*,<sup>60</sup> the British High Court of the Chancery Division confirmed this function of the scores:

Clearly the more comprehensive the instructions to the performers in the score are, the less room there will be for the performers to experiment or improvise. By the same token the composer may, by producing a detailed score of this kind, be able to convey to the audience a more precise version of the music he intended.

In *The Composer's Advocate*, Enrich Leinsdorf supports a strong protection of composers' wishes and creative intentions against "the risk of interpretation".<sup>61</sup> That said, the theorist also contends that the best way to convey and have one's creative intentions respected by future performers is to allow for the work its material renditions (i.e. the scores) to evolve with its audience. According to him, "the score with the fewest directives is usually the most resilient, because the text itself, free of extra comments, allows for the changes that decades and centuries bring about."<sup>62</sup>

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<sup>57</sup> Although Leinsdorf notes that the task relies on both knowledge and experience, he advocates for the search of the author's intention, "mind" and genius when performing musical works. See, Enrich Leinsdorf, *The Composer's Advocate: A Radical Orthodoxy for Musicians* (Yale University Press 1981) 20-46.

<sup>58</sup> See for the impacts on performers of the shift from musical notations to records in Daniel Leech-Wilkinson, 'The Changing Sound of Music: Approaches to Studying Recorded Musical Performances' [2009] CHARM <<http://www.charm.kcl.ac.uk/studies/chapters/chap2.html>> accessed 10 March 2016 para 6-9. See for developments on the relationship between the perceived input of the scores and of performers' creativity in Keith Sawyer, *Explaining Creativity The Science of Human Innovation* (2nd edn, Oxford University Press 2012) 342-4

<sup>59</sup> Although notations and records offer a sound base of what composers intended to convey to their audience, classic theorists recognise the entirety of the musical work cannot always be transcribed on paper. Leinsdorf (n 62) 48.

<sup>60</sup> *Sawkins v Hyperion Records Ltd* [2004] EWHC 1530, para 59. This position was later confirmed in appeal before the House of Lords. See, *Hyperion Records Ltd v Sawkins* [2005] EWCA Civ 565.

<sup>61</sup> Leinsdorf (n 57) 51.

<sup>62</sup> *ibid.* The author carries on his explanation by comparing the musical work to the human body evolving between birth and death.



Leinsdorf advocates that “the interpreter’s chief task is to perform works of earlier times in ways that make them most meaningful to audiences of his own generation, without in any way distorting the intrinsic nature of the works or violating the intention of the composer or playwright”.<sup>63</sup> Performers should be able to achieve such effect by differentiating between “the essential character of a work – its structure, tone, and meaning – and its time-bound externals”.<sup>64</sup> The theorist compares musical works and scores to planes and buildings which too, must adapt to the environment elements surrounding them in order to survive the pressure they work against:

[Bach’s] music reminds us of great buildings and bridges that must sway with the winds and yield to the elements, lest they crack under the strain of too rigid resistance. Ships and airplanes too also must be flexible; and scores that are to survive the ages have some of these qualities.<sup>65</sup>

Modern or radical views question the very existence of musical works as this immutable avatar of the composer’s creative intention.<sup>66</sup> According to the latter movement, music does not have any set, definite musical works with clear-cut boundaries and invariable parameters, depth, notes, pitches or tempos. Compositions are conceived as ever evolving, existing in the moment of performance and vanishing after that.<sup>67</sup> There are no works to refer to as music is defined by the lived experience of performing and hearing the performance. This conceptualisation of music thus emphasises its intangibility and immateriality.<sup>68</sup> The same critique underlines the development of sound records as reinforcing the myth

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<sup>63</sup> Leinsdorf (n 57) 51.

<sup>64</sup> *ibid.*

<sup>65</sup> Leinsdorf (n 57) 51.

<sup>66</sup> See for example, Jose Bowen, ‘The History of Remembered Innovation: Tradition and Its Role in the Relationship between Musical Works and Their Performances’ (1993) 11 *The Journal of Musicology* 139.

<sup>67</sup> For a phenomenological study of music and performances see, Thomas Clifton, *Music as Heard: A Study in Applied Phenomenology* (Yale University Press 1983).

<sup>68</sup> This approach to the musical work stresses its nature as an event rather than an object. This brings the field of music in line with performance studies and their perception of theatre performances. Erika Fischer-Lichte, *The Transformative Power of Performance - A New Aesthetics* (Routledge 2008) 32.

of the musical work and of the scores as an objective point of reference to abide by.<sup>69</sup>

ii. *Doubting the scores*

The modern movement envisages musical scores as representations of compositions inevitably incomplete because their two-dimensional nature fails to convey every element of performativity. Cook points to the historical evolution of musical notations to evidences their intrinsic inability to be taken for the perfect representation of the composer's wishes.<sup>70</sup> He writes:

c) *Passive audiences*

This representation of the author and work as transcending the performing stage ultimately depicts audiences or readers as passive agents. Although this observation takes the present analysis on a slight detour from its focus on the relationship between authors and performers, works and performances, it remains relevant for it is a direct consequence of the premises established so far. This conception of authors has made them the creator of meaning, and their work the source of it. Their powerful authority is not limited to controlling and moulding the stage of performances but also assumes that authors entertain the same power relationship

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<sup>69</sup> Leech Wilkinson points to the consequence the development of musical records have had on reinforcing the myth of the musical work which itself had the knock-on effect of policing performances and performing styles by offering the possibility of creating an 'objective' and tangible representation of the composition. See, Daniel Leech-Wilkinson 'The Changing Sound of Music' (n 58) para 6-9; Daniel Leech-Wilkinson, 'Compositions, Scores, Performances, Meanings' (2012) 18 Society for Music Theory <<http://www.mtosmt.org/issues/mto.12.18.1/mto.12.18.1.leech-wilkinson.php>>, para 1.1 to 1.4; Daniel Leech-Wilkinson, 'Classic Music: Utopia or Police State?' [2014] Paper at the conference 'Performing under Pressure - International and Interdisciplinary Symposium: 46th Annual ASP Conference & Art in Motion. According to the scholar, this phenomenon fed the anxiety performers' now experience in performing works of celebrated artists without distortion, or what is considered according to contemporary conventions as performative distortions.

<sup>70</sup> Cook (n 56) 219-21.

with readers and spectators who become passive recipients of the meaning they compose.

A substantial body of research has challenged this vision of the author, of its authority and of the creation of meaning.<sup>71</sup> This critique formed the backbone of post-modern theories on authorship and continues to inform contemporary scholarship in the fields concerned.<sup>72</sup> Taking the example of literature studies, Louise Rosenblatt narrates how obsolete the fiction is that paints readers as passive agents on the receiving end of the transaction of meaning sent by the author.<sup>73</sup> She stresses the conversational and proactive approach to reading many theorists and philosophers<sup>74</sup> adopted. Indeed, the latter reconceptualised the act of reading as a phase of active contemplation,<sup>75</sup> deciphering,<sup>76</sup> and co-creation of meaning.

In the legal discourse, similar representation of readers' active input has been noted by the court of appeal of the seventh circuit. In *Gaiman v McFarlane*,<sup>77</sup> Posner J drew the difference between "literary and graphic expression".<sup>78</sup> The circuit judge explained that "[a] reader of unillustrated fiction completes the work in his mind"<sup>79</sup> whilst "the reader of a comic book or the viewer of a movie is passive".<sup>80</sup> According to him, "[t]he description of a character in prose leaves much to the imagination,

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<sup>71</sup> See for an analysis of literature theories from this perspective, Louise Rosenblatt, *The Reader, The Text, The Poem* (Carbondale: Southern Illinois University Press 1978) 4-5.

<sup>72</sup> Roland Barthes, 'From Work to Text' in Josue V Harari (ed), *Textual Strategies: perspectives on post structuralist criticism* (1979) ; Roland Barthes, 'The Death of the Author', *Image - Music - Text* (Fontana Press 1977) ; Michel Foucault, 'What Is an Author?' in James Faubion (ed), *Aesthetics, Method, and Epistemology* (Essential , The New Press 1998). See for a detailed review of postmodern thinking in music studies, Kenneth Gloag, *Postmodernism in Music* (Cambridge University Press 2012).

<sup>73</sup> Rosenblatt (n 82) 169.

<sup>74</sup> *ibid*, 4, 30-1, 97, 164-5.

<sup>75</sup> Rosenblatt (n 82), 30-1.

<sup>76</sup> *ibid*, 164.

<sup>77</sup> *Gaiman v McFarlane*, 360 F 3d 644 (7th Cir 2004).

<sup>78</sup> *ibid*, 660.

<sup>79</sup> *ibid*, 660-1.

<sup>80</sup> *Gaiman v McFarlane*, 360 F 3d 644 (7th Cir2004) 660-1.

even when the description is detailed".<sup>81</sup> Although the proactive position of readers is only acknowledged in the context of unillustrated literary works and the decision makes no particular reference to post-modernist or academic views on the question, the seventh circuit's definition of the reader brings the legal discourse a step closer to modern theories.

## **B. Standardising performers**

As explained above, authors are described as able to predict performances for they mentally anticipated them and designed the work accordingly. This ability is either enabled by the gift of clairvoyance and omniscience, or by the reduction of performers to one identical performing body, or both. The above described model of authorship thus functions on the premise that all performers are the same, that is, that all performing bodies present similar physicality and skills. Performers become universal therefore inter-exchangeable. This approach to the performing body enables the first premise which assumes that the author is able to anticipate any interpretation given by any performing body.

### **1. Authors' puppets**

By reducing the input of performers to that of identical blank canvasses onto which authors paint their work to the public regardless of who the performing individuals are, the latter are essentially reduced to being their puppets. The analogy between performers and puppets reflects the position of performers as artists entirely controlled by the author through the authoritative power of his work. Performing artists would mould their body to each creative piece as its creator requires, taking

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<sup>81</sup> *ibid*, 660.

shapes and forms on command. As a result, the same work, performed by different performers to different audience, would and should have the same impact and convey the same message.

Parts of the legal narrative have endorsed this representation or understanding of performers. Though, cases have not expressly referred to performers as ‘puppets’, passages describing their interaction with other the alleged authors or copyright works illustrate the comparison. This analogy assumes two distinct characteristics of the performing body which are characteristics of the puppet figure: its malleability in the hands of the author, and its interchangeability with others of the same kind.

*a) Performers as malleable mannequins*

In France, it appears that the ability to shape the performing body is an integral component of authorship. By contrast, malleability appears to be the skill of the performing body, at least as far as models are concerned. In a 2008 decision of the Paris Court of Appeal,<sup>82</sup> the Bench held the photographer’s control over the pose and expression of the actress he photographed on the set evidenced the authorial nature of his input in the shots he took.<sup>83</sup> The power-relationship between the actress, here model, and the photographer defined his position as author of the work produced by their collaboration. In contrast, the depiction of his control over her posture contributed to describing her input as that of a passive mannequin, or block of clay ready to be moulded by the photographer in the same way a sculptor would. The courts points to this specific interaction between the author and the performer as included in the range of creative choices, photographers make when they produce original protectable works. The judgement concluded:

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<sup>82</sup> Paris, 20 février 2008, n° 06/22330, *SARL Les archives to 7eme Art c/ Stéphane Mirkine* : Propr, Intell. 2008, p. 319 note Lucas (photographie de plateau).

<sup>83</sup> For more on the condition of originality in the context of photographic works in France, see text to Annex 7.

It follows that the photograph reproduced on the cover of the publication entitled CINEGUIDE 2001 bears the mark of [the photographer]'s because the choices he made – position of the actress, angling, lighting – contributed to make of the photography an original work of the mind, and as such, eligible to the protection granted by Title I of the Intellectual Property Code.<sup>84</sup>

It appears that the French jurisprudence had included the artist's control of the pose of the subjects she photographs to the list of the elements traditionally taken into consideration by the CoJ to evidence the right type of originality in a photographic work. This position seems to have been maintained after the *Painer* decision given by the CoJ three years after Paris Court of Appeal's decision.<sup>85</sup> Indeed, in the *Jimi Hendrix case*,<sup>86</sup> the Paris Tribunal might have implicitly taken into consideration the lack of control over the musician's posture and expression to deny copyright protection to the photographic work.<sup>87</sup> This 'implicit' approach to assessing originality may explain why the Parisian jurisdiction declared its decision compliant with the European authority. Indeed, whilst Gered Mankowitz (Hendrix's photographer) was described as having had not say in the icon's demeanour in front of the camera, the opposite was proved in the context of Ms Eva-Maria Painer's work. Although the positioning and expression of the child she photographed is not mentioned as one of the elements the Court would have included in the series of creative choices the author must make in order to inject her personality in her work, it is very likely that she was indeed in control of this aspect of the picture's composition as well, unlike Mankowitz. Indeed, the model's position in front of the camera is one of the aspects of photographic portraits regimented by aesthetic conventions applied to this type of portrait, alongside the lighting, the angle and choice of background. This criterion

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<sup>84</sup> Paris, 20 février 2008, n° 06/22330, *SARL Les archives to 7eme Art c/ Stéphane Mirkine* : Propr, Intell. 2008, p. 319 note Lucas. Author's translation, see original text in Appendix 1.

<sup>85</sup> TGI Paris, 3eme ch., 21 mai 2015, *Société Bowstir Ltd, G. M. c/ Egotrade SARL* : Legalisavailable at : <[http://www.legalis.net/spip.php?page=jurisprudence-decision&id\\_article=4612](http://www.legalis.net/spip.php?page=jurisprudence-decision&id_article=4612)> accessed 10 March 2016

<sup>86</sup> *ibid.*

<sup>87</sup> The case and its relationship with the European jurisprudence was further discussed in Chapter, see text to note 64, Chapter 4.

appears to be the only logical argument reconciling the French jurisprudence to the European position, although no mention of it is made by either decision.

The same reasoning according to which the performer is not in control of his or her body during the interpretation of underlying creative works was expressed in the American judicial discourse. As mentioned on many occasions before, this was the point put forward by Smith J in it dissenting opinion in the first decision given by the ninth circuit in the *Garcia* dispute.<sup>88</sup> The circuit judge pointed to the fact that the performer speaks the words and embodies the movement determined by another creative mastermind, that is, the author.<sup>89</sup>

*b) Performers as interchangeable marionettes*

The second key feature of the performer-puppet analogy is their uniformity or interchangeability. Since puppets can take any form at the pull of their strings, performers too should present the same universal corporeality or uniformity. As such, one performer would and should be replaceable by another without significantly impacting the rendition of the work.

This particular trait was underlined by the French jurisprudence on the question of auxiliary performers. One key aspects of this class of performers is, according to the civil judges, their ability to be replaced by others without modifying the overall performance. The notion of interchangeability of performers has sometimes been permuted with or evidenced by the impossibility to identify or distinguish a particular performer from the rest of her performing cohort. In a decision dating back to 1993,

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<sup>88</sup> *Garcia v Google Inc*, 743 F 3d 1258 (9<sup>th</sup> Cir 2014).

<sup>89</sup> *ibid*, 1274. Similar contentions were confirmed by the majority decision in the 2015 *en banc* appeal of the decision. See, *Garcia v Google Inc*, 786 F. 3d 733 (9<sup>th</sup> Cir 2015) 742-4.

the Paris court of appeal<sup>90</sup> affirmed that granting the status of performers to auxiliary performers on the occasion of a performance identical to that of other extras would empty the notion of auxiliary performers. Basing its decisions upon legislative intent, the Bench submitted:

Considering that Mr Armbruster plays, in this film, one of the three wolves, which all adopt exactly the same attitude, execute de same movements and cannot be distinguished from one another ; that in their segment, the wolves do not have prominent role, that their performance is shorter (few seconds at most) than that of the couples; that impersonating the character of the wolves does not require any particular skills, not that any of the other roles do, that the performers interpreting the wolves cannot be given the status of performer, without emptying the category of auxiliary performers of its substance and extending the advantages of “neighbouring rights” beyond what the legislator intended, as the public ministry pointed out correctly ; in such circumstances, the first instance judges were correct in denying Mr Armbruster the status of performer for the purpose of his performance in the advertising clip [...].

Fifteen years later,<sup>91</sup> the same court deployed a similar logic in the reasoning of its 2008 *Uncle Ben’s* decision,<sup>92</sup> distinguishing between performers and auxiliary performers:

The expert noted in his report dated 30 November 2005 that even case when the recordings were played independently from the advertising clips, only careful listening or listening in excellent conditions could allow the identification of [the claimant]’s voice among previously recorded renditions of the character by other performers who lent their voices to Uncle Ben, and so despite the obvious qualities of his voice presents. In light of these elements, [the claimant] cannot be granted the status of performer since his performance was the work of an auxiliary performer [...]<sup>93</sup>

The interchangeability of performances and performing bodies was made the bedrock of the distinction between the categories and auxiliary performers by the

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<sup>90</sup> Paris, 18eme ch, 18 février 1993, n° [XP180293X] : D. 1993, p 397 note Weksteinbeg. Author’s translation, see Appendix 1 for original text.

<sup>91</sup> Versailles, 9 octobre 2008, *Randall G. c/ Ste First Media*, n° 06/03959.

<sup>92</sup> *ibid.*

<sup>93</sup> Versailles, 9 octobre 2008, *Randall G. c/ Ste First Media*, n° 06/03959. Author’s translation, see Appendix 1 for original text.



French jurisprudence. The Paris Court of Appeal went further in affirming that this criterion shall be the primary element to define the scope of performership, trumping other considerations such as duration and prominence of performances. Litigating a dispute between two solo singers collaborating with the choir Era and the group's recording company.<sup>94</sup> The Court stated:

Despite their brief duration, [their performance] is not secondary but, to the contrary, marks a change in the overall work giving it a noticeable coloration;

Considering that, it can neither be said of their voices that they are interchangeable; that indeed, another performer with another tone of voices would necessarily give the work a different coloration [...].<sup>95</sup>

The question remains whether the colouration of one's voice is considered as varying because no two performers are identical, or because the Court accepts that, like instruments, different categories of instruments will offer variety within the range of the their class that is here voices. In this case, performers are no longer puppets but human instruments, a new comparison further discussed in the following paragraphs.

### c) *Performing bodies as instruments*

The passivity supporting the performer-puppet comparison continues to prevail when performers are taken for living instruments. When commenting on the relationship between lyrics and musical works in *Williamson v Pearson Partnership*,<sup>96</sup> the British High Court stated:

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<sup>94</sup> Paris, 4ème ch., 4 juillet 2008, n° 06/21406, Universal Music... :RTDCom. 2008, 745, obs. Pollaud-Dullian p 397 note Weksteinbeg. In the same decision, the court recognised the fact that the quality of the performer's voice justified an increase of his remuneration since the audience was expected to react positively to its particularities, although his voice was almost identical to that of previously recorded actors.

<sup>95</sup> Paris, 4ème ch., 4 juillet 2008, n° 06/21406, Universal Music... : RTDCom. 2008, 745, obs. Pollaud-Dullian p 397 note Weksteinbeg. Author's translation, see Appendix 1 for original text.

<sup>96</sup> *Williamson v Pearson Partnership* [1987] F.S.R.97 (Eng).

After all one gets enjoyment from hearing a song sung in a language with which one is totally unfamiliar. The enjoyment could well be diminished if the vocal line were replaced by another instrument, eg, the piano or a flute.<sup>97</sup>

Here, Baker J seems to take for synonymous the performance of a musical phrase by an instrument, and that of a vocal line by a performer. The human voice appears to be associated with an instrument used by the performer as the seating judge employs the phrase “another instrument” to refer to pianos and flutes, implying that one’s voice belongs to this group. Although the decision of the Court does point to the unique character and input of performer’s voices compared to instruments, it maintains the analogy between the two, suggesting that they are inter-exchangeable, like instruments within the same class.

This interpretation of Baker J’s comment is comforted by the observations made in *Hayes v Phonogram Ltd*.<sup>98</sup> in which Blackburne J based his reasoning on the verbatim quote of the previous decision, here above cited.<sup>99</sup> Leaning on this statement, the judge sitting at the Chancery division insisted on the association between the performer’s use of his or her body and that of an instrument.

Responding to the claimant’s argument, he confirmed:

I understand [Baker QC’s] observations to mean no more than that the human voice can constitute a part of the overall orchestration of a musical work, much like a musical instrument in a band or an orchestra.<sup>100</sup>

This comment expressly reasserts the association between performers’ use of their body and that of musical instruments. This suggests that the performing body can be reduced to being an instrument, usable and malleable at will by the performer in

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<sup>97</sup> *ibid*, 109.

<sup>98</sup> *Hayes v Phonogram Ltd* [2002] EWHC 2062 (Ch).

<sup>99</sup> *ibid*, para 59.

<sup>100</sup> *Hayes v Phonogram Ltd* [2002] EWHC 2062 (Ch), para 60.

order to channel without distortion the author's creative intention, so expressed in the copyright work, or any other material renditions of it.

In Australia, the Spicer Committee expressed a similar view in the context of musical performances. In its 1959 report,<sup>101</sup> the committee proposed to substitute the word "performers" for "instruments" in the wording of Section 8(6) of the 1956 Act related to adaptation rights.<sup>102</sup> The original disposition read:

(6) For the purposes of this section an adaptation of a work shall be taken to be similar to an adaptation thereof contained in previous records if the two adaptations do not substantially differ in their treatment of the work, either in respect of style or (apart from any difference in numbers) in respect of the performers required for performing them.<sup>103</sup>

According to the Spicer committee "[t]he meaning of this provision is rather obscure"<sup>104</sup> because "it is not clear whether the last requirement refers to the quality of the performers or the instruments or to both."<sup>105</sup> The report details:

It seems to us that different instruments rather than performers is the vital factor. We therefore recommend the enactment of a provision to the effect of section 8 (6) substituting "instruments" for "performers".<sup>106</sup>

In *Schott Musik International GmbH v Colossal Records of Australia*,<sup>107</sup> the Federal Court of Australia pointed to the substitution advised by the Committee and subsequently enacted by the Australian Parliament in May 1967.<sup>108</sup> In the same decision, the Bench noted that such modification "did not mark a difference of substance from the then recently enacted United Kingdom provision."<sup>109</sup> This suggests that neither legislators nor the judiciary considered the amendment

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<sup>101</sup> JA Spicer, 'Spicer Report to Consider What Alterations Are Desirable in The Copyright Law of the Commonwealth' (1959), later referred to as the 'Spicer Report'.

<sup>102</sup> *ibid.*, 42, para 212-3.

<sup>103</sup> *ibid.*, 42, para 212. See also, Copyright Act 1956, 4 & 5 Eliz 2, Ch 74.

<sup>104</sup> Spicer report (n 112) 42, para 213.

<sup>105</sup> *ibid.*

<sup>106</sup> Spicer report (n 112) 42, para 213.

<sup>107</sup> *Schott Musik International GmbH & Co v Colossal Records of Australia Pty Ltd* (1997) 145 ALR 483.

<sup>108</sup> *ibid.*, 494-5.

<sup>109</sup> *ibid.*

important in defining the relationships between authorial works, derivative works and performances. This analysis rejects and contradicts this view. It is contended that such swap is indeed revealing of both legislative and judicial perceptions of performers. Policy-makers appear to consider the roles of performers and instruments as similar, if not as identical, in the interpretation of musical works. The analogy between the performing body and the instrument furthers the perception of performing artists as passive objects in the delivery of the work to the audience. This confirms the interchangeable nature of their contribution, and their ability to behave like puppets channelling the author's mind.

## 2. Ingenious puppets

The analogy between the performer and the puppet is more refined than the above paragraphs suggest. In *The Paradox of Acting*,<sup>110</sup> Diderot developed an interesting, but equally reductive, theory on the role of performers. He distinguishes between two types of puppets, associated with two kinds of performers. As explained in previous developments,<sup>111</sup> the French philosopher emphasises the difference between interpretation coming from the performer's sensitivity and those emulated by his mind.<sup>112</sup> According to Diderot, only the second can be considered as developing the art of acting, whilst the other is a pale imitation of it.<sup>113</sup> When the actor deploys the strength of his intellect to places on his/her body at the service of the author, the latter becomes a universal "pasteboard figure",<sup>114</sup> whose "own special shape never interferes with the shapes he assumes"<sup>115</sup> so much so that he can be "everything

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<sup>110</sup> Denis Diderot, *The Paradox of Acting* (Kessinger Publishing 1883).

<sup>111</sup> text to note 376, Chapter 4.

<sup>112</sup> *ibid.* Diderot (n 121) 9, 16-7.

<sup>113</sup> Diderot (n 121) 9, 16-7; text to note 376, Chapter 4.

<sup>114</sup> Diderot (n 121) 53, 62; Mathilde Pavis, 'Is There Any-Body on Stage? A Legal (mis)Understanding of Performances' (2014) 8 Platform : Journal of Theatre and Performing Arts 12, 15-7.

<sup>115</sup> Diderot (n 121) 53; Pavis (n 125) 15-7.

and nothing”.<sup>116</sup> Diderot unequivocally relies on the puppet/performer analogy to elicit the essence of the art of performing.<sup>117</sup> He explains that “a great actor is also a most ingenious puppet, and his strings are held by the poet; who at each line indicates the true form he must take”.<sup>118</sup> Like “most ingenious puppets take every kind of shape at the pull of the string in his master’s hand”;<sup>119</sup> the performer who knows his craft<sup>120</sup> is able to offer a universal corporeality to be moulded by the author’s creative intentions.

The French theorist stresses the rarity of such skill and for this reason rejects the comparison between instrument and performing bodies. According to him, “a great actor is neither a piano forte, nor harp, nor a violin [...] he has no key peculiar to him, he takes the key and the tone fit for his part of the score and he can take up any. I put a high value on this talent of a great; he is a rare being as rare as, and perhaps, greater than, a poet”.<sup>121</sup> The performer is more than an instrument, he is an ingenious puppet. A talent so rare to display, that Diderot offers to reverse the author-performer hierarchy in favour of the latter under the exceptional circumstances where a performer would evidence the rarest ability of all: disembodying his own body.

Indeed, what Diderot suggests here, is that no performing body is actually universal, therefore interchangeable as the legal discourse may suggest, but can be made so via the exercise of the mind. To him, the embodiment or interpretation of a dramatic or musical work is enabled by a primary stage of disembodiment of the performers’ own corporeality, who thereby stripes his body from any particularities, histories,

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<sup>116</sup> *ibid.*

<sup>117</sup> Diderot (n 121) 61; Pavis (n 125) 15.

<sup>118</sup> Diderot (n 121) 62 ; Pavis (n 125) 14.

<sup>119</sup> Diderot (n 121) 62.

<sup>120</sup> *ibid.*, 61-2.

<sup>121</sup> Diderot (n 121) 61.

emotions or sensitivity in order to offer himself as an immaculate human canvas onto which the author will be able to paint his work to the audience without distortion. For Diderot recognises the complexity of disembodiment of one's own body for the purpose of embodying somebody else's creative intention, he places a high value on this particular skill.

This understanding of the art of acting as an art of 'disembodiment' offers an application of mind-body dualism at its paroxysm. According to Diderot's theory, the actor's body assists the creative purpose of another mind, that of the author. The performer's mind has no interaction with the meaning produced by the author. To the contrary, it is focused on preparing his body to channel the authorial work from the page to the stage without modification, in full obedience to the playwright's wishes.<sup>122</sup>

### **3. Disruptive puppets**

The channelling transaction between the author, the performer and the audience may be prejudiced whenever the actor fails to adequately 'disembody' his body thereby becoming what Diderot refers to as a "wretched pasteboard".<sup>123</sup> In such circumstances, the work presented to the audience will be unintentionally coloured by the performers' particularities and the message will be conveyed proportionally distorted. As a result of this chaotic transaction linking the author to the spectator via the ill-equipped performer, the work communicated to the public will be deformed.<sup>124</sup>

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<sup>122</sup> Parts of Diderot's theory made its way into the legal literature in the 1930's, though it seems to have disappeared from it after this period. See, Homburg (n 78) 2-3 and Paul Olgner, *Le Droit Des Artistes Interprètes et Exécutants* (Librairie Générale de Droit et de Jurisprudence 1937) 24-5.

<sup>123</sup> Diderot (n 121) 62.

<sup>124</sup> See for a similar position being held in the context of music, Cone (n 56) 62-3.

The Australian case *CBS Records Australia Ltd v Guy Gross*<sup>125</sup> dealt with this particular hypothesis. In this case, the performer had modified the original musical work because her interpretation skills did not allow her to perform it otherwise.

In this decision, the Court refused to see the modifications of a song triggered by the singer's inability to replicate the original performing style as amounting to composing a derivative work or giving rise to arranging rights in the subsequent version. In other words, the modification of a work arising from a poor performance is not to be rewarded with authorship. The threshold of originality may be modest, but it is not quite that low. The Court stated:

[I]n so far as Collette's vocal lines were concerned, they did not flow from a new composition of which Guy was the author but resulted from the fact that Collette sang "Ring My Bell" as best she could having regard to her style of singing, her limited range, the qualities of her voice and her experience.

[...] Differences resulting from mere interpretation, particularly differences brought about by an arrangement of a work to suit the qualities of a particular singer's voice, do not result in the creation of an original work.<sup>126</sup>

The facts presented before the Australian court illustrate the theoretical notion of performers as "wretched pasteboard[s]",<sup>127</sup> who become dysfunctional puppets. In distinguishing between compositional modifications and modifications of a work caused by the lack of the performer's skills, the Court appears to side with Diderot in noting the risks of mutilating musical works poor performances create.<sup>128</sup> If such occurrences are not sanctioned by the Australian framework, they shall not be encouraged or rewarded either.

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<sup>125</sup> *CBS Records Australia Ltd v Guy Gross* (1989) 15 IPR 385.

<sup>126</sup> *CBS Records Australia Ltd v Guy Gross* (1989) 15 IPR 385, 932.

<sup>127</sup> Diderot (n 121) 62.

<sup>128</sup> On Diderot comparing the performing body to a pasteboard which, if wretched by poor performing skills, can deform the authorial work presented before the public, see text to note 442, Chapter 2 and 380, Chapter 4.

### C. Streamlining performances

The previous developments illustrated how legal discourses endorsed a one-sided transitional approach to the relationship between authors and performances. Performing is conceived as enabling the author's creative authority to reach audiences by offering her a passive and malleable channelling platform. The conflation of the authorial figure combined with the reduction of the performing input form two sides of one coin otherwise referred to as the process of disembodiment.

The disembodiment of performances allows the representation of the performing stage as an uncreative and linear step in the process of communicating the work to the public. From this perspective, such performances form one link of the larger chain connecting the author to the end-user. This wider chain is streamlined as a one-way uniform transaction,<sup>129</sup> where the author is the source of meaning which she conveys in the work the user receives passively. In this transaction, performers form an enabling step whenever the authorial work needs interpretation to be fully accessible by the audience, whether it is by performing scores or offering a lived three-dimensional experience of a dramatic and musical work. In this logic, performers' contribution to the chain is and should remain limited to this basic enablement, leaving the initial authorial meaning intact, neither distorted nor augmented. In the context of music, some have contended that performers were in fact an unfortunate necessity to cope with the audience's illiteracy. Arnold Schoenberg once explained that "[m]usic need not to be performed any more than books need to be read aloud, for its logic is perfectly represented on the printed page; and the performer [...] is totally unnecessary except as his interpretations

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<sup>129</sup> See for a summary and review of transactional theories developed in literature, Rosenblatt (n 82) 4, 30-1, 97, 164-5.



make the music understandable for an audience unfortunate enough not to be able read it in print".<sup>130</sup> This position represents the musical work as an objective entity, a depiction of the authorial creation post-modern views on authorship aimed to dismiss.<sup>131</sup>

This model assumes a variety characteristics of the performing process. Mirroring the overarching communicative transaction, performances are a transparent stage during which the work is channelled without distortion whenever authors are fortunate enough to have their creation interpreted by performers with the necessary skills.<sup>132</sup> Performances do not result in the production of any additional meaning beyond the substance already contained in the work. Being a transitional step in the communication chain, performances do not lead to the creation of any product, tangible or not, but enabled the full accomplishment of a pre-existing one: the authorial work.<sup>133</sup>

This model summarises the performing stage as first, transparent and linear and second, unproductive and intangible. Those two traits combined made of the performing phase an invisible step in the creation of meaning and cultural narrative. It is submitted in the subsequent developments that the value of performances in the communication of creative works can only be accepted if it is made more ascertainable, more visible.

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<sup>130</sup> Dika Newlin, *Schoenberg Remembered: Diaries and Recollections (1938-76)* (Pendragon Press 1980) 180, cited in Cook (n 56) 226-7.

<sup>131</sup> n 82 ; see also, text to note 430, Chapter 2.

<sup>132</sup> Diderot (n 121) 62.

<sup>133</sup> Adam Smith, *The Wealth of the Nations* (1961 edn Hayes Barton Press - The Originals, 1776) 221.

## **II. Reinstating performances**

This section points to theories and concepts which would allow the reinstatement of performances as creative original expression, and cultural narratives in general. It is argued that the valorisation of performances can be achieved by the inclusion of the notion of 'embodiment' in the concept of originality in relation to copyright laws. Although defining 'embodiment' may be a challenge, it is contended that the concept remains the relevant path to explore in order to insert performances within the category of protected subject-matter. For this insertion to be successful, it is crucial to make it accessible to non-experts such as lawyers, judges and policy-makers.

### **A. Acknowledging embodiment**

It is submitted that performers' creative input lies in the process of embodiment. The value of performance resides in the necessity for this stage to occur for the performances to take place. The notion of 'embodiment' moves away from a transactional representation of the relationship between the authorial work and the performing artist. It pictures a complex triangular connection between the author, the work and the performer. This redefined conceptualisation of the performance and performing body implicitly rejects the notion that the latter are, or can be made, the same. The very concept of embodiment functions on the premise that performing bodies vary from one to the other so much so that no authorial work can ever be able to predict every one of those variations.

## 1. Works as complex ménage à trois

Acknowledging the role of embodiment walks hand in hand with dismissing the disembodiment of performances identified in the previous developments. Approaches critical of disembodied takes on the performing process reject arguments according to which the authorial work is complete, therefore readily performable, and that universal performing bodies exists. The following paragraphs point to the various aspects of the western legal narratives included in this analysis which have supported the same criticism, intentionally or not.

Previous comments stressed the conceptualisation of the authorial work as encapsulating an omniscient creative thought with omnipotent capabilities in shaping performances. This theorisation echoed Diderot's analogy between the performer and puppet in which the author, or in his narrative the poet, becomes the master puppeteer controlling its movements, shapes and says.<sup>134</sup> Modern approaches have challenged this reduction of performances to mouthing the authors' words on stage since the early twentieth century and their position still informs current thinking in performance theories. Their findings were adopted by Kozinski J in the ninth circuit court of appeal's first decision on the *Garcia* dispute.<sup>135</sup> The decision marks the first penetration of contemporary performance theories into the legal narrative as a base for justifying performers' eligibility to copyright authorship.

### a) *Re-embodiment performances*

At the very beginning of the twentieth century, Georg Simmel challenged Diderot's conception of the performer despite the strong aesthetic conventions still favouring

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<sup>134</sup> Diderot (n 121) 62.

<sup>135</sup> *Garcia v Google Inc*, 743 F 3d 1258 (9<sup>th</sup> Cir 2014).

his French predecessor at the time.<sup>136</sup> For the German philosopher, acting has nothing to do with the ability of being human canvases onto which the author can paint his play to the spectators. Simmel describes the complex 'ménage a trois' between the character depicted by the author in writing, its understanding by the performer, and the performer's own personality and physicality. To him, a subtle fusion of the three composes the performance. More importantly, Simmel appears to be the first author to question the author's ability to conceive 'ready-to-be-performed' characters. He argues that even the most meticulous playwright is unable to describe a character in such details:

The dramatic character given in a text is, in some sense, an incomplete human being; he does not represent a sensual human being but the sum of all that can be known about a human being through literature. The poet cannot predetermine the voice or pitch, the *ritardando* or *accelerato* of his speech, his gestures or even the special aura of the living figure. Instead, the poet has assigned fate, appearance, and the soul to the merely one-dimensional processes of the mind.<sup>137</sup>

Simmel is presented as the first philosopher to acknowledge the necessary and inevitable input performers inject in their interpretations, even when working with the strictest stage directions and guidelines.<sup>138</sup> This view was later deepened by theorists who emphasised performers' free and indispensable contribution. Jerzi Grotowski's assimilated the actor's performance to the river flowing between the banks built by the text.<sup>139</sup> Influenced by the Polish playwright's work and agreeing with this understanding of performances, Richard Schechner later described performers' gestures as the flame in the candle glass formed by the text.<sup>140</sup> Building on these new foundations and redefinition of performance as a fully embodied act,

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<sup>136</sup>Georg Simmel, *La philosophie du comédien* (Circe 2001).Simmel's work was published after his death.

<sup>137</sup> Erika Fischer-Lichte (n 68) 79, citing Simmel (n 147) 79.

<sup>138</sup> Erika Fischer-Lichte (n 68) 79.

<sup>139</sup> Richard Schechner, *Essays on Performance Theory 1970-1976* (Drama Book Specialists 1977) 20.

<sup>140</sup> In this comparison, Richard Schechner directly cites Ryszard Cieslak's metaphore when he writes "If we expand Cieslak's analogy, the gestures and text are the candle-glass and the action is the flame" in Schechner (n 156) 25.

contemporary theorists further challenged the boundaries of performances and investigated its components.<sup>141</sup>

Furthering Simmel's work, an aesthetic shift was more clearly made in the 1960's which was identified by Fischer-Lichte as the "performative turn".<sup>142</sup> As mentioned in previous developments, this "turn" recognised the value of performance for itself, independent from the underlying work's meaning and quality. The performance is now perceived as adding value to the work, and performers as contributing to our culture and the construction of knowledge. As such, performances are as valuable<sup>143</sup> and worthy of recognition as the work of authors whose dominant position in the creative process has been over-estimated for too long.<sup>144</sup>

#### **b) *The breakthrough of embodiment***

As mentioned on numerous occasions now,<sup>145</sup> the majority position in *Garcia v Google* presided by Kozinski J is the first explicit reference made by the legal discourse to contemporary performance theories in finding for authorship.<sup>146</sup> When envisaging performances' originality, the circuit judge explicitly referred to the concept of 'embodiment' to translate the unique creative process and moment occurring when performing. The Court explained:

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<sup>141</sup> The audience has always been under the scrutiny of theatre theorists since Plato and Aristotle, however the performative shift was accompanied by a 'spectatorial' turn which regards spectators as active participants in shaping the performance and as co-creators of meaning. After valorising the presence of the performer's body and its impact on the author's underlying work, writers realised that the performers' bodies are not the only bodies involved. Spectators became the subject of observation and analysis to the extent of broadly defining performances as the event constituted of the bodily co-presence of performers and spectators. On this see, text to note 487, Chapter 2.

<sup>142</sup> Erika Fischer-Lichte (n 68) 34; see also, text to note 483, Chapter 2.

<sup>143</sup> Erika Fischer-Lichte (n 68) 30.

<sup>144</sup> Fischer-Lichte eloquently summarized the evolution of these theories in an accessible piece of academic writing in *The Transformative Power of Performance - A New Aesthetics* (Routledge 2008).

<sup>145</sup> Text to note 313 and 324 in Chapter 2, and to note 449 in Chapter 4.

<sup>146</sup> Previous developments pointed to the fact that earlier decisions had already adopted variations of the concept of embodiment in the context of performances, see text to note 359, Chapter 2. See also, Henri Gregory, 'Report of the Copyright Committee' (1952) 61, para 170). Nevertheless, the 2014 *Garcia v Google* decision remains the first case where the notion is explicitly mentioned in the Court's reasoning.

[A]n 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 shmuck... is an actor because everyone... knows how to read.”<sup>147</sup>

The decision then proceeded to associate ‘embodiment’ to the modicum of creativity required by federal copyright law to obtain legal authorship. It concluded that such threshold was easily met by performing artists given that the US Supreme Court had continuously repeated its low level.<sup>148</sup>

In finding for authorship, the majority decision referred to the literature of contemporary performance studies. The court of the ninth circuit quoted Constantin Stanislavski and held that the actor “must live his part inwardly, and then give to his experience an external embodiment”.<sup>149</sup> In the same passage, the author writes how performing requires the union of the mind and the body:

I ask you to note especially that the dependence of the body on the soul is particularly important [...]. In order to express a most delicate and largely subconscious life it is necessary to have control of an unusually responsive, excellently prepared vocal and physical apparatus. This apparatus must be ready instantly and exactly to reproduce most delicate and all but intangible feelings with great sensitiveness and directness. That is why an actor of our type is obliged to work [...], both on his inner equipment, which creates the life of the part, and also on his outer physical apparatus, which should reproduce the results of the creative work of his emotions with precision.<sup>150</sup>

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<sup>147</sup> *Garcia v Google Inc*, 743 F 3d 1258 (9<sup>th</sup> Cir 2014) 1263. References and citation marks omitted.

<sup>148</sup> The majority stated: “An actor’s performance, when fixed, is copyrightable if it evinces “some minimal degree of creativity ... no matter how crude, humble or obvious’ it might be.” *Feist Publ’ns, Inc v Rural Tel. Serv Co*, 499 U.S. 340, 345, 111 S.Ct. 1282, 113 L.Ed.2d 358 (1991)” in *Garcia v Google Inc*, 743 F 3d 1258 (9<sup>th</sup> Cir 2014) 1263.

<sup>149</sup> Sanford Meisner and Dennis Longwell, *Sanford Meisner on Acting* (Random House House 1987) 15-6.

<sup>150</sup> Meisner and Longwell (n 160) 15-6.

Like Simmel, Stranislavski stepped away from Diderot's classic conception of acting, imbued with mind-body dualism.<sup>151</sup> He rejected the idea that the performer is the "ingenious puppet"<sup>152</sup> in charge of reproducing the work exactly as the author had conceived but that the former should rather focus on faithfully recreating the emotions he experiences through the work.

The 2014 *Garcia* decision also cited the words of Sanford Meisner,<sup>153</sup> according to whom the actor cannot just be the mere mouthpiece of the author otherwise "every shmuck [...] is an actor because everyone [...] knows how to read."<sup>154</sup> It is clear to the ninth circuit court that the process of embodiment is not to be confused with the mere presence of one's body on stage or in front of the camera. As such, the majority refused to adopt the metonymic logic according to which granting legal authorship to performances equates to copyrighting the performing body evolved in it. The Court appeared confident that the legal system and its practitioners were apt to work with this fine yet fundamental line:

A performer's voice is analogous to her image, which we've said "is not a work of authorship" under the Copyright Act. *Downing v Abercrombie & Fitch*, 265 F.3d 994, 1004 (9th Cir.2001). But that doesn't answer the question of whether the artist's creativity, expressed *through* her voice or image, is protected by copyright. Just because someone's voice — its particular timbre and quality — can't be copyrighted, doesn't mean that a performance made using that voice can never be protected. In fact, many vocal performances *are* copyrighted. See, e.g., *Laws v Sony Music Entm't, Inc*, 448 F.3d 1134, 1141 (9th Cir.2006).<sup>155</sup>

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<sup>151</sup> On Simmel's position see text to note 478, Chapter 2; on Diderot's position see text to note 449, Chapter 4 and 437, Chapter 2.

<sup>152</sup> Diderot (n 121) 62.

<sup>153</sup> *Garcia v Google Inc*, 743 F 3d 1258 (9<sup>th</sup> Cir 2014) 1264.

<sup>154</sup> Meisner and Longwell (n 160) 178.

<sup>155</sup> *Garcia v Google Inc*, 743 F 3d 1258 (9<sup>th</sup> Cir 2014) 1264.

It is interesting to note that the discourse forming the first *Garcia* decision mirrors the contradictory holdings which oppose classic to modern theories on performance. Indeed, whilst the majority of the ninth circuit court of appeal appear to have sided with the Simmel conclusions' and that of those walking in his footsteps (i.e. Meinser and Stranislavski), Smith J dissented on the basis of a reasoning pertinent to Diderot's vision of the art of acting. To him, the actor only functions as the author's puppet, and limits his input to speaking the word of the script. In 2015, the en banc formation of the ninth circuit court of appeal reverted to classic definitions of performances by overturning the majority's decision. Although the literature on performing theories did not feature in the second decision, Kozinski J maintained his position with regard to performers' creativity in a colourful dissenting opinion.

## **2. Varying performing body**

By incorporating the performing body in the creativity of performances, those modern theories emphasised the need for performers to not only complete the work for it to reach a three-dimensional format but to adjust it to their body. This reasoning indirectly presents the performing body as never identical to any other, and therefore not non-interchangeable with any other. As, two bodies are never the same, neither are performing ones. For this reason, no author is in the position of being able to envision and then create a work suiting every kind of physicality without requiring any adjustments. Claiming the contrary would confer on authors will the gift of either omniscience or clairvoyance,<sup>156</sup> and on performing bodies characteristics of blank templates.

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<sup>156</sup> text to note 45.



a) *Positive and explicit judicial affirmation*

As the term embodiment appeared in the American judicial discourse in 2014, the impossibility for performers to be taken for inter-changeable objects also made its way in the narrative of other jurisdictions on other occasions. Those particular occurrences took place in France and were each time a construction of the courts.

As explained in previous developments,<sup>157</sup> the French intellectual property framework categorises performers according to their input in the communicative chain of the creative work. Although the categorisation of performers was decided by the legislator and inserted in either the IPC or the employment law code, its thresholds, conditions and enforcement were details devised by the civil judiciary. In doing so, the courts firmly stated that the key feature raising performers above the rank of extras, also known as ‘auxiliary performers’, is the ability to be distinguished from the mass and are non-interchangeable. The very notion of ‘non-interchangeability’ evidences the essence of performership in the French legal system.<sup>158</sup> The Paris Court of Appeal is clear: “[d]espite their brief duration, [the performer’s interpretation] is not secondary but, to the contrary, marks a change in the overall work giving it a noticeable coloration; [c]onsidering that, it can neither be said of their voices that they are interchangeable; that indeed, another performer with another tone of voices would necessarily give the work a different coloration”.<sup>159</sup> In this particular case, the Court went as far as concluding that the singer’s performances were so unique that their presence on the record had contributed to the compositional structure of the overall musical work:

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<sup>157</sup> text to note 282, Chapter 2 and to note 443, Chapter 4.

<sup>158</sup> text to note 100.

<sup>159</sup> Paris, 4<sup>ème</sup> ch., 4 juillet 2008, n° 06/21406, Universal Music...: RTDCom. 2008, 745, obs. Pollaud-Dullian p 397 note Weksteinbeg. Author’s translation see Appendix 1 for original text.

Considering that after listening to the musical works [...] the Court also noted that the claimants' particular tone of voice contributed to melodic line of the segments sung by them, breaking with of both the choir and the instrumental parts so much so that it plays a role in the composition of the works.<sup>160</sup>

Unlike the 2014 *Garcia* decision,<sup>161</sup> this acknowledgement of embodiment and of performers' creative input in the authorial substance of the work was not approached in the discussion focused on the author-performer divide but on the one separating performers from auxiliary performers. Yet, the Parisian's judgement should not go unnoticed. It reveals judges' sensitivity to performers' creativity in the context of musical works where the presence of the scores has until then dismissed performing musicians' opportunities to reach authorship.<sup>162</sup> The next step would be to explore and shift boundaries on the grounds of authorship rather than 'performership'.

Refusing to recognise performers as interchangeable is rejecting the idea that all performing bodies are the same and that performers' corporeality can be made the same. Nevertheless, this does not suggest that there are no shadows of disembodiment left over the French intellectual property framework. Indeed, the recognition of performers as unique came into play as a criterion delineating the class of performers from that of auxiliary performers. Unlike the former, the latter are indeed inter-changeable, for less significant in the production and easily replaceable. Consequently, the same line of jurisprudence simultaneously embodies and disembodies different groups of performers according to their input in the work.

*b) Negative and implicit judicial affirmation*

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<sup>160</sup> Paris, 4ème ch., 4 juillet 2008, n° 06/21406, *Universal Music...*: RTDCom. 2008, 745, obs. Pollaud-Dullian p 397 note Weksteinbeg. Author's translation see Appendix 1 for original text.

<sup>161</sup> *Garcia v Google Inc*, 743 F. 3d 1258 (9<sup>th</sup> Cir 2014) 1264.

<sup>162</sup> text to note 70.

The French courts were again faced with the necessity to refute the existence of universal performing bodies when litigating disputes on an entirely different aspect of intellectual property law. This time, the discussion took place in the context of authorial rights, and more specifically, moral authorial rights.

In the *Beckett case*,<sup>163</sup> the Paris Tribunal de Grande Instance judged the performance by female comedians of the play *Waiting for Godot* disrespectful of the author's moral of integrity.<sup>164</sup> The French court recognised that such swap in the actors' gender was enough to compromise the work's integrity and breach the author's moral right. In ruling so, not only did the French judges enforce a very strict application of the moral doctrine, reinstating the controlling power of the author over its work, but they also, and paradoxically, acknowledged the impact of the performing body on the work, that is, on the performed body. The appeal judges agreed to pierce the conventional veil of illusion behind which the *performing* body supposedly disappears to only embody the *performed* character. The court considered that even though the characters were interpreted as males, female performing bodies yet altered the work because their female corporeality remained accessible to the audience. The illusion of theatre, even when invoking and staging the best authors, seems to never offer a veil thick enough to cover up the performing body.<sup>165</sup>

By acknowledging that the act of performing required a series of decisions on the performer's part and that the latter is not always inter-changeable with another artist, the courts dismissed the argument according to which the authorial work is a

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<sup>163</sup> TGI Paris 15 oct. 1992, *Lindon et Sacd c/ La Compagnie Brut de Béton et Boussagol* : inédit, RTD com. 1993. p98 note Françon.

<sup>164</sup> text to note 22; see also, text to note 282, Chapter 2.

<sup>165</sup> Pavis (n 125) 12, 21-2.

complete creative entity waiting to be communicated to its public by the universal pasteboard that the performing body would form.

Recognising performers' input in theory may be facilitated by pointing to more material evidence of its existence in practice. It is submitted that performing artists' contribution in creative process has been overlooked because of its intangibility and invisibility. Modern theories of embodiment would make a more compelling argument in favour of performers if material evidence of the latter's input would illustrate or confirm its existence.

## **B. Evidencing embodiment**

Many scholars and artists have dedicated their work to unravelling the mystery of performances in order to better understand the process, or make visible the invisible. It is contended that evidencing the transformative impact of performances may facilitate the endorsement of performers' original input by the legal discourse.

It must be noted that invisible creative inputs have been and are currently protected by copyright laws.<sup>166</sup> This suggests that the visibility of performers' input may be more needed to convince gatekeepers of intellectual property laws than to enable the system to function efficiently.

### **1. Expressing the ineffable**

In researching the art of performing, scholars and practitioners explored both theoretical and empirical methodologies. Despite the range of those studies, it may

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<sup>166</sup> text to note 127, chapter 1.

be that a legal audience will find more accessible, and thereby useful, the approach offered by contemporary practices.

Performance, theatre, music and creativity studies have offered alternative methods to investigate performers' creativity. Ranging from the development of analogies to the collection of data, this attempt to define or measure creativity remains an issue to be tackled.

Although those attempts propose interesting perspectives, they produce complex outputs which become in turn less easily transferable into legal analyses. As Kozinski J explained in June 2015 to an audience of intellectual property lawyers,<sup>167</sup> simple arguments using simple analogies are the most efficient ones in court. After noting that intellectual property disputes are prone to involve a fairly high degree of complexity because of the subject-matter this particular area of law governs, the ninth circuit judge advised advocates to keep legal and interdisciplinary niceties simple when building arguments. More importantly, technical knowledge ought to be made understandable to the Bench for arguments relying on it to appear compelling.<sup>168</sup> Keeping this recommendation in mind, the subsequent developments offer a succinct overview of a varied body of literature which has engaged with the task of determining the boundaries of the performing process. It attempts to select examples of outputs documenting performer's creativity which are both relevant and accessible to a legal audience.

a) *Wording the ineffable*

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<sup>167</sup> Alex Kozinski, Judge of the Ninth Circuit Court of Appeal of the United States, 'IP and Advocacy' (The Sir Hugh Laddie Lecture given at the UCL Institute for Brand and Innovation Law, London, 24 June 2015).

<sup>168</sup> *ibid.* The judge gave the example of the opening arguments given by Galoobs' counsel in *Lewis Galoob Toys, Inc v Nintendo of America, Inc*, 964 F 2d 965 (9th Cir 1992) where they explain the functioning of Galoob's creation in reference to with which technologies the judges composing the ninth court appeal were familiar.

Building on Simmel's conclusions, contemporary performance theorists developed new approaches to performances, involving a variety of analogies to describe the performing process. Jerzi Grotowski offers to define performances as the water flowing between the banks formed by the text.<sup>169</sup> The river is constantly moving and evolving, shaping the banks themselves over time. This representation emphasises the interlinked relationship between the text and the performance which was missing from Diderot's performer-puppet analogy.<sup>170</sup> Similarly, but reaching a somewhat diametrically opposed metaphor, Ryszard Cieslak proposed to compare performances and their connection with the underlying work as that existing between a candle and a candle-glass.<sup>171</sup> According to the Polish writer, the performance would be the flame situated in the candle glass erected by the play. Referring to the text and the *mise-en-scene* as the 'scores' of the performance, Cieslak's explains:

The score is like the candle inside which the candle is burning. The glass is solid, it is there, you can depend on it. It contains and guides the flame. But it is not the flame. The flame is my inner process each night. The flame is what illuminates the scores, what the spectators see through the scores. The flame is alive. Just as the flame, in the candle-glass moves, flutters, rises, fall, almost goes out, suddenly glows brightly, responds to each breath of wind – so my inner life varies from night to night, from moment to moment.<sup>172</sup>

Schechner furthers the Polish thinker's analogy to offer a more refined application where the text and gestures compose the candle-glass and the performer's action becomes the fire.<sup>173</sup>

Although those analogies propose interesting illustrations of the relationship performances entertain with authorial works, they do not seem to offer workable standards from a legal perspective. If anything, those references develop the

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<sup>169</sup> Schechner, *Performance Theory* (Routledge 2003) 47.

<sup>170</sup> Diderot (n 121) 62; text to note 127.

<sup>171</sup> Schechner *Performance Theory* (n 180) 46-7.

<sup>172</sup> Personal conversation (1970) cited in Schechner *Performance Theory* (n 180) 47.

<sup>173</sup> Schechner *Performance Theory* (n 180) 53-4.

intangibility and ephemerality of the concept, aspects about which the legal scholarship appears to be rather anxious.<sup>174</sup> Even if, the intellectual property narrative is familiar with the construction of analogies to elucidate complex concepts,<sup>175</sup> those illustrative explanations are unlikely to present the most compelling argument in evidencing the existence of performers' input for their lack materiality. Though they elicit a complex phenomenon but do not evidence its presence. They would prove useful in wording the performing phenomenon but in no way proves or magnifies the existence of performers' input in the layperson's eyes. Moreover, those analogies might be unsuccessful in easing the uninitiated reader into the literature composing the field. Comparisons between performers and candle fire or fine distinctions between performing gestures and performing actions risk increasing the sophistication of arguments initially intended to demystify the substance of performances.

#### *b) Measuring the ineffable*

Moving away from theoretical attempts to define performances, musicology has extensively explored empirical methodologies since the 1930's,<sup>176</sup> as enabled by

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<sup>174</sup> text to note 109, Chapter 1.

<sup>175</sup> Kozinski recommends the use of comparisons and analogies explaining in simple terms complex technologies or arguments, in Kozinski (n184). The American circuit judge took the example of the argument developed by the advocates representing Galoob in *Lewis Galoob Toys, Inc v Nintendo of America, Inc*, 964 F 2d 965 (9th Cir 1992). The advocate opened his motion by comparing Galoob's technologies as the possibility for consumers to fastforward a legally-obtained video game in the same way they would with a VCR and a video tape. This comparison was embedded in the Court's decision who sided with the council's argument. See *Galoob in Lewis Galoob Toys, Inc v Nintendo of America, Inc*, 964 F 2d 965 (9th Cir 1992) 971.

More generally, the Courts do rely on analogies for explicit complex terms or notions composing the copyright framework. This suggests that analogies are an accepted and valid logical methodology. See,

France: CE, 27 juillet 2009, n° 312165 : Lebon 2009 ; Légifrance available at : <<http://www.legifrance.gouv.fr/affichJuriAdmin.do?idTexte=CETATEXT000020936222>> ; European Union: C-406/10 SAS Institute Inc v World Programming Ltd [2012] WLR(D) 131, para 55; UK: *Shelley v Cunane* [1983] F.S.R. 390, 393; US: *Heilman v Bell* 583 F 2d 373 (7th Cir 1978) 376; *Gaiman v McFarlane*, 360 F 3d 644 (7th Cir 2004) 659; *Janky v Lake County Convention And Visitors Bureau*, 576 F 3d 356 (7th Cir 2011) 362; *Kelley v Chicago Park Dist*, 635 F 3d 290 (7th Cir 2011) 305; *Seng-Tiong Ho v Taflove*, 648 F 3d 489 (7th Cir 2011) 499-500; *Peters v West*, 692 F 3d 629 (7th Cir 2012) 635; *Neri v Monroe*, 726 F 3d 989 (7th Cir 2013) 992; *Altera Corp v Clear Logic, Inc*, 424 F. 3d 1079 (9th Cir 2005) 1084.

<sup>176</sup> Erik Clarke, 'Empirical Methods in the Study of Performances' in Eric Clarke and Nicholas Cook (eds), *Empirical Musicology: Aims, Methods and Prospects* (Oxford University Press 2004) 77-9.

recording technologies.<sup>177</sup> Technologies of audio and sound analysis made possible the conversion of performed sound into tangible measurable data. Taking the form of numbers or graphs, performances can be represented on paper with a relatively high degree of accuracy.<sup>178</sup> This conversion allows the eye<sup>179</sup> to grasp what the expert hears. It articulates in a different medium what a listener fails to notice otherwise.<sup>180</sup>

In *Empirical Methods in the Study of Performances*,<sup>181</sup> Erick Clarke selected the examples of such outputs to illustrate the kind of outputs of data analysis produce from recorded performances. They have been reproduced in Appendix 2 as Figures 13 to 17. Through their media, sounds become quantifiable numbers and variations in performances of the same work are objectively revealed in the varying lines of graphics (Figure 14 to 17). Those figures identify and measure the variation between two performances of the same musical piece. In this regard, they evidence the presence of embodiment. They reveal that each interpretation inevitably incurs a variation in the rendering of the work in a concrete, tangible and empirical manner.

No matter how useful empirical analysis may be, this method is not infallible.<sup>182</sup> Clark notes that data is often extracted from the recording of performances occurring in unnatural circumstances, where the performer executes a piece for the purpose of a particular study in the absence of the audience.<sup>183</sup> They also frequently ignore the visual components of musical performances, although this aspect has been recently

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<sup>177</sup> Erik Clarke, 'Empirical Methods in the Study of Performances' in Eric Clarke and Nicholas Cook (eds), *Empirical Musicology: Aims, Methods and Prospects* (Oxford University Press 2004) 77-9.

<sup>178</sup> Although empirical analyses are not able to capture every aspect of performances or reproduce authentic performing conditions. Clarke (n 187) 87-8,92-3, 99.

<sup>179</sup> It can be argued that the urge to make performers' visible to the eye in order for it to be acknowledged, and in turn protected, is a consequence of the ocular-centrism of intellectual property frameworks, or the law in general. See on the relationship between Law and ocular-centrism: Lionel Bently and Leo Flynn, *Law and the Senses* (Pluto Press 1996) 7-12.

<sup>180</sup> Clark and Cook (n 55) 5. They would also further enable this obsession for the law for visual evidence as sight as a guiding sense over others. See Bently and Flynn (n 190) 7-12.

<sup>181</sup> Clark and Cook (n 55) 82-3, 87.

<sup>182</sup> Clarke (n 187) 84, 86-8, 91-3, 98-9.

<sup>183</sup> *ibid*, 87-8, 91.



investigated by more recent studies which focus on musician's body positions during the performances.<sup>184</sup> More generally, the scholar stresses how empirical studies of performances tend to fix, simplify<sup>185</sup> and reify interpretations, reducing them to objects rather than processes.<sup>186</sup> All those remarks contribute to feeding the difference between hard fact and data which is a danger also red-flagged by Cook and Clarke.<sup>187</sup> Those methodological flaws contribute to making of the data a form of partial truth, or Clarke's words "a very partial view of what happens in performance".<sup>188</sup> Therefore, just as musical scores are unable to fully represent the musical work, so empirical recorded data are unable to fully grasp the substance of the performing process. Finally Clark criticises the very objective and premise which motivate and base empirical musicology employed to study performances' creativity. The music scholar explains how those methods were, and still are, used to scrutinise performers' expression and input in interpreting musical works.<sup>189</sup> To him, this standpoint implies and endorses a perception of music as "a kind of disembodied, ahistorical"<sup>190</sup> piece "divorced from any cultural assumptions about how the notation may be understood and interpreted".<sup>191</sup> In a way, the perspective of empirical musicology still separates the performance from the production of music and prevents the recognition of performers' full contribution in the production of musical events.

Considering this shortcoming, the input of empirical musicology may be an unsatisfactory candidate to fill in a legal reasoning for the purpose of illustrating

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<sup>184</sup> Clarke (n 187) 87, 92-3.

<sup>185</sup> *ibid*, 98.

<sup>186</sup> *ibid*, 99.

<sup>187</sup> Clarke and Cook (n 55) 3-5.

<sup>188</sup> Clarke (n 187) 91.

<sup>189</sup> *ibid*, 84.

<sup>190</sup> Clarke (n 187) 84.

<sup>191</sup> Clarke (n 187) 84.

performers' originality. In addition to these remarks, the format in which such outputs are produced remain fairly complex which further limits their accessibility by a legal audience unfamiliar with musicology studies, their science and jargon. Nevertheless, they present the advantage to contribute to making visible the invisible, i.e. performers' input in the scores.

## **2. Making the invisible visible**

Like other disciplines, creativity research is also aimed at obtaining a firmer grasp on the essence of the performing process. In this endeavour, Sawyer appears to have been able to compose a useful and approachable narrative relying on an interdisciplinary methodology. However, it is submitted that better evidence of the embodiment stage involved in performances is to be found in the recorded work of dance artist and choreographer Caroline Bowditch.

### *a) Wording the invisible*

Sawyer too confesses the complexity of researching and investigating the kind of creativity involved in performances.<sup>192</sup> In *The Interdisciplinary Study of Creativity in Performance*,<sup>193</sup> the creativity scholar reflects on his experience of studying the work of performers. He stresses the recent development of performance studies at the time, and that the body of scientific, ethnographic, or ethnomusicologist had focused

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<sup>192</sup> Sawyer *Explaining Creativity* (n 58) 344-7,362-5; Keith Sawyer, 'The Interdisciplinary Study of Creativity in Performance' (1998) 11 *Creativity Research Journal* 11; Keith Sawyer, 'Improvisation and the Creative Process: Dewey, Collingwood, and the Aesthetics of Spontaneity' (2000) 58 *The Journal of Aesthetics and Art Criticism* 149.

<sup>193</sup> Sawyer *The Interdisciplinary Study* (n 203) 11-13.

on fixed elements of performances rather than their ritual and lived experiences.<sup>194</sup> In his later treatise on creativity research, *Explaining Creativity: The Science of Human Innovation*,<sup>195</sup> Sawyer summarises the position of the field a decade later. He underlines how the focus on the assessment of the product's creativity had led to overlook the one present in performances,<sup>196</sup> thereby dismissing the historical roots of dramatic works being 'all' performative before the invention of writing.<sup>197</sup> He points to the work of theatre director Brian Crow who attempted to highlight the input performers must have in the written text in order to embody them on.<sup>198</sup> Crow developed a notation system which mimics on paper the natural oral phrasing adopted by the actor on stage on the basis of the text.<sup>199</sup> Working from the evidence uncovered by Crow's technique of "conversation analysis", Sawyer describes the input of performers as follows:

Normal scripts don't have this much detail – normally actors have to decide where to pause, and how long each pause should be; whether there should be speaker overlap at various points in the dialogue; and how to deliver each line = which words to emphasize, and with what intonation of voice. When you see a transcript like [Crow's], you realise how much information is left out of the typical script. Everything that's put back in by the actors involves acting creativity. And although a lot of those decisions are made in rehearsal, many of them are made improvisationally every night, on stage, in front of the audience.<sup>200</sup>

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<sup>194</sup> Sawyer *The Interdisciplinary Study* (n 203) 11-13.

<sup>195</sup> Sawyer *Explaining Creativity* (n 58).

<sup>196</sup> *ibid.*, 367; Sawyer *The Interdisciplinary Study* (n 203) 11.

<sup>197</sup> Sawyer, *Explaining Creativity* (n 58) 359.

<sup>198</sup> Sawyer, *Explaining Creativity* (n 58) 361.

<sup>199</sup> The author invites the reader to read the example of notation selected by the creativity scholar: Sawyer, *Explaining Creativity* (n 58) 361, reproduced in Appendix 3.

<sup>200</sup> Sawyer, *Explaining Creativity* (n 58) 361.

Sawyer stresses to the fact that as the aesthetic of realist performance developed, the skill of performing described by Crow was intensified. Like Kozinski in the 2014 *Garcia* case,<sup>201</sup> the scholar reverts to the work of Constantin Stanislavski and his performing practice.<sup>202</sup>

Furthermore, Sawyer concludes that performers may display a greater sense of creativity for their decision-making is made live, in front of an audience, unlike painters and sculptures who can correct their creative choices at will before presenting their work.<sup>203</sup>

The simplicity with which Sawyers extracts and articulates the findings of performance theories is the level at which the findings of those experts should be pitched to be accessible and re-usable by a legal audience. It is the level at which the ninth circuit court presided by Kozinski J introduced the concept of embodiment to include it in the notion of originality in the 2014 *Garcia v Google* decision.<sup>204</sup>

*b) Performing the invisible*

It is submitted that the contemporary dance practice described in the following paragraphs furthers the accessibility of embodiment to parties still left unconvinced by the above arguments. The performance may achieve to convey what words fail to explain with “rational means”.<sup>205</sup>

This section reviews the work of dance artist and choreographer Caroline Bowditch and contends that her recast of the work *Love Games* originally choreographed by Joan Clevillé conveys in motion what Sawyer and Kozinski attempted to express in words. The author invites the reader to watch Bowditch’s performance of *Love*

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<sup>201</sup> *Garcia v Google Inc*, 743 F 3d 1258 (9<sup>th</sup> Cir 2014) 1264.

<sup>202</sup> Sawyer, *Explaining Creativity* (n 58) 364.

<sup>203</sup> *ibid*, 367.

<sup>204</sup> *Garcia v Google Inc*, 743 F 3d 1258 (9<sup>th</sup> Cir 2014) 1264.

<sup>205</sup> *Miller v Civil City of South Bend*, 904 F 2d 1081 (7<sup>th</sup> Cir 1990) 1085.

*Games*, a record can be found on page 311. Alternatively, the piece is available online at [http://www.youtube.com /watch?v=6YEtEyr6N4g](http://www.youtube.com/watch?v=6YEtEyr6N4g).<sup>206</sup> This video is a montage juxtaposing two performances of the same choreographic work. It captures extracts of the original *Love Games* authored by Clevillé, interpreted in 2011 by Naomi Murray (on the right hand side) and in 2012 by Caroline Bowditch (on the left hand side), both accompanied by the same male partner, Jori Kerremans.<sup>207</sup> The performance was described by Sarah Whatley as follows:

In the film, the two 'versions' of the duet run on screen side-by-side. The 'original' version features Naomi Murray and her male partner Jori Kerremans. In the second version, Bowditch is cast in the female role with the (same) male partner. The duet in *Love Games* explores the dynamics of a male/female relationship that is playful and affectionate. In the Murray version, moments of gentle touching, embracing, and lyrical lifts and swoops are interspersed with more dynamic confrontations. The dancing is marked by an easy fluidity, a spirited youthfulness and athleticism as the dancers move through a sequence of intricate entanglements. Murray conforms to the image of the 'dancer's body'; she is long-limbed, long-haired and graceful, with a femininity that is highlighted by the male partner, who is the stronger of the two, and who supports her and lifts her with ease. It generally upholds many of the conventions of a typically hetero-normative duet. The recasting of Bowditch imposes a new frame, which blurs traditional gender roles. The female 'dancerly body' is refracted through the very different physicality of Bowditch, who dances in her wheelchair. In many ways the recasting is a clear example of how to 'translate' a role from one dancer to another but in so doing it exposes much more about the politics of translation and adaptation within mainstream theatre dance. The opening moment sees each woman lifted into an embrace by the man. What is striking is that Bowditch is just over three feet tall, so she resembles a child when held by her partner. But this image quickly dissolves as the duet continues and her confident physicality as a wheelchair dancer resists any reading of youth or innocence. The emphasis on verticality and linearity in the first duet gives way; the man moves more into and from the floor to negotiate new ways to partner Bowditch in her wheelchair, who refuses to be his muse. Bowditch's wheelchair opens up a different kind of dialogue on the stage space. So often a powerful signifier of disability/immobility, her wheelchair is now enabling, signifying mobility, independence and the power to support. Bowditch manoeuvres her chair with a technical virtuosity equal to the technical feats of the non-disabled dancers,

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<sup>206</sup> Caroline Bowditch, Scottish Dance Theatre, 'A Casting Exploration' (2012) < [http://www.youtube.com /watch?v=6YEtEyr6N4g](http://www.youtube.com/watch?v=6YEtEyr6N4g) > accessed 10 March 2016. Alternatively, browse for the video on the YouTube website searching with the keywords 'Caroline Bowditch'; 'Love Games'; 'Scottish Dance Theatre'.

<sup>207</sup> Charlotte Waelde, Sarah Whatley and Mathilde Pavis, 'Let's Dance! But Who Owns It?' (2014) 36 *European Intellectual Property Law Review* 217, 220.

integrating the chair into her dancing in a way that chimes with Albright's description of Charlene Curtiss's dancing: '[Curtiss] claims the chair as an extension to her own body [and] revises the cultural significance of the chair, expanding its legibility as a signal of the handicapped into a sign of embodiment.'<sup>208</sup>

The above description underlines the marked differences between the two works. Without drawing attention to them, the lay spectator is able to notice the variation between the two interpretations of *Love Games*. This visible difference is the result of embodiment. The noticeable changes between the two interpretations equate to what performers' invest in the authorial work in order to be able to perform it. In this particular case, the interpretation or re-creation of the work is such that Bowditch's performance may come across as a derivative work, possibly giving rise to arranging rights.<sup>209</sup> In the context of this analysis, it is submitted that the visible differences are in fact evidence of the performing process, no more and no less.<sup>210</sup>

Bowditch's input is purely performative. One may be inclined to redefine it as authorial because of its stark visibility. It is argued that, although this particular production makes Bowditch's personal contribution in the work more visible, its nature has not changed, and still belongs to the realm of performership. The urge to classify her input as authorial<sup>211</sup> only stresses that once the performer's input is made visible, the author-performer divide is no longer tenable, and collapses. Performers become authors. The substance targeted by Bowditch's potential intellectual property rights in her performance is her embodiment, i.e. interpretation, of Clevillé's work. Her input is no more, nor less creative than that of the

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<sup>208</sup> Waelde and others (n 218) 220.

<sup>209</sup> *ibid*, 226.

<sup>210</sup> *ibid*, 225-6. In this article, it was suggested that Bowditch could be eligible to arranging rights for her performance. This conclusion is reached on the basis of a conservative approach to authorship and performance. It is as biased as the legal narrative it works with regarding the author/performer divide.

<sup>211</sup> By categorising her performance as a derivative or arranging work. Waelde and others. (n 218) 225-6.

choreographer and has been made as visible and tangible by way of records featuring juxtaposed screens.

The process of embodiment became more noticeable in this instance because of Bowditch's disability. The differently-abled dance artist contradicts all theories on the universality of the performing body. She also confronts any argument according to which a different body is a "wretched pasteboard figure".<sup>212</sup> Whatley stressed the quality of the re-cast and the respect it paid to the essence of the work and of its creative intentions.<sup>213</sup> The differences between the work rises from the differences between the expected physicality of the female dancing body (i.e. a non-disabled, ballerina-like physique) and Bowditch's unique corporeality. There was no possibility for the choreographer to predict Bowditch's physicality and range of movements both shaping the work before the audience. The dancer had to adjust the work to her physique in order to convey *Love Games* with her own, and only available, vocabulary of movements. This adjusting is what every performer does, disabled or not, with any authorial works they interpret. The presence of Bowditch's disability acts as a magnifying glass over the embodiment process and for this reason it is submitted that her work is a useful illustration of the argument this chapter has developed. It is claimed that the embodiment process is made more obvious, therefore accessible and, in turn, re-usable by a legal audience, since it can not only be worded clearly and simply but is also visible to the naked eye.<sup>214</sup>

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<sup>212</sup> Diderot (n 121) 62; text to note 134 ; on Diderot comparing the performing body to a pasteboard which, if wretched by poor performing skills, can deform the authorial work presented before the public, see also text to note 442, Chapter 2 and 380, Chapter 4.

<sup>213</sup> Waelde and others (n 218), 220-1.

<sup>214</sup> on the notion of ocular-centrism in law see Bently and Flynn (n 190) 7-12.

### C. Defining embodiment

For the notion of embodiment to be used by judges as a way to widen the condition of originality in copyright, the concept ought to be given clear contours and substance. How does 'embodiment' manifest itself in the performing process? What should performances evidence 'embodied' originality to be satisfied? Can performances fail the test of embodiment? If so, how? All those questions relate to what the concept would entail in the context of extending authors' rights to performers.

Interestingly, the ninth circuit court of appeal did not find themselves required to provide any definition of the term when the majority made this very notion the cornerstone of their decision in the 2014 *Garcia*.<sup>215</sup> The circuit court judges simply referred to the input performers invest in the work in order to fill in the gaps left between written and embodied versions of a work. To this end, the decision associated embodiment with the series of adjustments actors make to the underlying work in order to interpret it before the camera.<sup>216</sup>

This begs the question whether a clear-cut and tangible definition of the notion of embodiment is at all needed for the term to be made part of the armoury of legal references available to intellectual property advocates, courts and policy-makers. More generally, this approach questions whether intellectual property can function effectively even when relying on key terms difficult to ascertain objectively. Previous jurisprudence seems to answer by the affirmative. The presence of porous concepts is evidenced and confirmed by the use of the 'elephant test' in intellectual property law cases. The test refers to the instinctive knowledge rising from personal

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<sup>215</sup> *Garcia v Google Inc*, 743 F 3d 1258 (9<sup>th</sup> Cir 2014) 1264.

<sup>216</sup> *ibid*.



encounters. Literally, the test presumes that one should instinctively know what an elephant is at the sight of the mammal. The test was used in a number of British decisions to define subject-matter protected by copyright. In *IPC Media Ltd v Highbury-Leisure Publishing Ltd*,<sup>217</sup> the Court stated:

These principles apply to the copyright in artistic works. Although describing what is at too high a level of abstraction to be protected may be difficult, like the elephant, you recognise it when you see it.<sup>218</sup>

In adjudicating so, Laddie J directly drew upon the methodology followed by LJ Hoffman in dealing with the dispute of *Designers Guild Ltd v Russell Williams*.<sup>219</sup> Though practical, the elephant test is rarely lauded. Recently, the UK Supreme Court took a rather critical stance towards such approach. In *Lucas Ltd v Ainsworth*,<sup>220</sup> the highest court of the UK expressed their doubts towards the logical standing of deductions stemming from the same elephant test which had been, again, employed by the Court:

We would uphold the judgments below very largely for the reasons that they give. But (at the risk of appearing humourless) we are not enthusiastic about the “elephant test” in para [77] of the Court of Appeal’s judgment (“knowing one when you see it”). Any zoologist has no difficulty in recognising an elephant on sight, and most could no doubt also give a clear and accurate description of its essential identifying features. By contrast a judge, even one very experienced in intellectual property matters, does not have some special power of divination which leads instantly to an infallible conclusion, and no judge would claim to have such a power. The judge reads and hears the evidence (often including expert evidence), reads and listens to the advocates’ submissions, and takes what the Court of Appeal rightly called a multi-factorial approach. Moreover the judge has to give reasons to explain his or her conclusions.<sup>221</sup>

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<sup>217</sup> *IPC Media Ltd v Highbury-Leisure Publishing Ltd* [2004] All ER (D) 342 (Dec).

<sup>218</sup> *ibid*, para 14.

<sup>219</sup> *IPC Media Ltd v Highbury-Leisure Publishing Ltd* [2004] All ER (D) 342 (Dec), para 14, citing LJ Hoffman in *Designers Guild Ltd. v Russell Williams (Textiles) Ltd. (trading as Washington D.C.)*. [2000] 1 W.L.R. 2416, 2423.

<sup>220</sup> *Lucasfilm Ltd v Ainsworth* [2011] UKSC 39 ; [2011] Bus LR 1211.

<sup>221</sup> *ibid*, para 47.

This decision suggests that knowing what embodiment is when one sees it might not meet the standards of accuracy sound legal references require. An intermediate solution between avoiding a rigid definition and applying an ersatz of the elephant test would resort to agreeing on an open-ended and abstract definition.<sup>222</sup>

Drawing on Kozinski's use of the term in the *Garcia v Google* and the input of performance theories discussed in above paragraphs,<sup>223</sup> embodiment could be defined as the intellectual and physical adjustment performers go through during the interpretation of any pre-existing creative works, without which no performance of any work would be possible. More specifically, the concept could be understood as the combination of skills and creative effort performers employ to bridge the gap left by authors between the written work and the performance, gap which takes the form of the exercise of the performing mind and body. Borrowing the wording of the French judiciary and that of the CoJ, the notion of embodiment could also be taken for the umbrella term used to refer to the series of creative decisions and choices performers make in bringing to life and to a three-dimensional standing existing creative works, thereby marking such interpretation with the print of his/her personal personality. Alternatively, a British take on the same concept might be more inclined to embed the concept of 'embodiment' as the judgement, skills and effort exerted by a performer during the interpretation of an underlying work. Finally, a less prescriptive approach to embodiment could also view the concept as the additional source meaning added to the authorial work when interpreted by a performer.

It is submitted that all of those definitions may be workable references from a legal perspectives. They all acknowledge the intellectual and physical nature of

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<sup>222</sup> This option is further discussed in the subsequent chapter, see text to note 96, Chapter 6.

<sup>223</sup> text to note 147.

performers' creativity, creativity which is affirmed despite the presence of an underlying protectable work. In light of the above comments, this analysis concludes that the concept of embodiment is a notion readily employable by the legal narrative to strengthen the protection of performers and soften the edges of the author-performer divide.<sup>224</sup> Its boundaries would be ascertainable by the courts in the same manner the scopes of the doctrines of 'free creative choices'<sup>225</sup> or 'skills, judgement effort' have been in the past.<sup>226</sup>

It must be clearly articulated that the proposed definition of embodiment is distinct from other meanings the courts have associated the same term with in previous intellectual property cases, unrelated to performances. The courts relied on the concept of embodiment as the materialisation of abstract concepts, referring thereby to the primary sense of the word that defines it as the "representation or expression" of "an idea, quality or feeling" in "a tangible or visible form".<sup>227</sup> In this context the notion of embodiment was used as synonym of the fixed versions or copies of creative works.<sup>228</sup> The Australian Federal Court stated that that "the word

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<sup>224</sup> This definition of embodiment draws in part on theories stemming from legal feminist thinking on the same notion. Indeed, the proposed approach and the position put forward by this school of thought are driven by similar theoretical perspectives on the commonality between the mind and the body as well as the 'contextful' nature of the body, which is reflected in performances in this context. However, their input on the notion of embodiment focuses primarily on redefining the notion of body, subject and personhood as the result of situated epistemology. For this reason, even though those analyses are useful to contextualize this conversation within wider discussions on the creation of meaning and of the rule of law, exploring their contribution further would take the present discussion off to a tangent of little direct relevance to the deconstruction of the author-performer divide in practice. For more on feminist legal writing on the question of embodiment see generally, Elizabeth Grosz, *Volatile Bodies - Towards a Corporeal Feminism* (Indiana University Press 1994); Kate Cregan, *The Sociology of the Body* (Sage Publications 2006); Mensch JR, *Embodiments: From the Body to the Body Politic* (Northwestern University Press 2009); Marie Fox and Therese Murphy, 'The Body, Bodies and Embodiment: Feminist Legal Engagement with Health' in Margaret Davies and Vanessa Munro (eds), *The Ashgate Research Companion in Feminist Legal Theory* (Ashgate 2013).

<sup>225</sup> C-145/10 *Eva-Maria Painer v Standard VerlagsGmbH* [2011] EUECJ C-145/10, para 89 citing Joined cases C-403/08 and C-429/08 *Football Association Premier League & Ors v QC Leisure, and Karen Murphy v Media Protection Services Ltd* [2011] EUECJ C-403/08\_O, para 98.

<sup>226</sup> *University of London Press Ltd v University Tutorial Press, Ltd* [1916] 2 Ch 601, 611.

<sup>227</sup> Judy Pearsall and Patrick Hanks (eds), *The New Oxford Dictionary* (Oxford University Press 1999) 602.

<sup>228</sup> See for instance, in Australia: *Coogi Australia Pty Ltd v Hysport International Pty Ltd* where the court stated that "[c]opyright can only subsist in forms of expression that are fixed in some permanent embodiment." (at 594); "[T]he Romans recognised no exception for copyright. They recognised no monopoly in the result of

“embodied” refers to the giving of a material or discernible form to an abstract principle or concept”,<sup>229</sup> after reminding the parties that “[t]he statutory definition says nothing about the form of the embodiment”.<sup>230</sup> This meaning of the word is not the one with which the present discussion proposes to engage, simply because it is disconnected from the question of the relationship between fixed and performed creative works.

## Summary

This chapter uncovered and explained the phenomenon of disembodiment performances. Connected with the intellectualisation of authorship, it is submitted that such phenomenon fuelled the divide and hierarchy separating authors from performers. It was submitted that the disembodiment of performances is enabled by two distinct but interlinked premises according to which, authors are able to predict the interpretation of their work by all performers, for all performers are the same. Those two premises were themselves supported by conflated representations of the author-figure and the reduction of performers’ input to that of human canvasses, or puppets. This model leads to streamlining the performing process as a transparent, linear and unproductive stage in the communication of creative works by authors to their audience. It assumes that both performers and spectators are passive agents in

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literary, artistic or musical effort. Rather, the Romans were concerned only with ownership of the physical embodiment of a literary, artistic or musical work” in *Emi Songs Australia Pty Ltd And Another v Larrikin Music Publishing Pty Ltd* [2011] FCAFC 47, para 31; UK: *Interlego A.G v Tyco Industries Inc* (Hong Kong) [1988] UKPC 3 ; [1989] AC 217, 241. In this case, the court stated : “Indeed the whole purpose of a design is that it shall not stand on its own as an artistic work but shall be copied by embodiment in a commercially produced artefact.” ; see also, *Lucasfilm Ltd v Ainsworth* [2008] EWHC 1878 (Ch), para 61. See in the US: *JCW Investments Inc v Novelty Inc*, 482 F3d 910 (7th Cir2007) 917 : “It is not the idea of a farting, crude man that is protected, but this particular embodiment of that concept. Novelty could have created another plush doll of a middle-aged farting man that would seem nothing like Fred”.

<sup>229</sup> *Galaxy Electronics Pty Ltd v Sega Enterprises Ltd* (1997) 37 IPR 462, 470.

<sup>230</sup> *Galaxy Electronics Pty Ltd v Sega Enterprises Ltd* (1997) 37 IPR 462 (ii). The Australian bench read in this silence the possibility of extending the term to modern forms of tangible representation such as video images built in computer software or in the video game machine.

this one-way transaction. On many accounts, the legal narrative reflect and perpetuate such model in western the intellectual property frameworks, despite the long-standing body of literature criticising this simplistic description of the construction of meaning or knowledge. It is submitted that, contemporary theories and artistic practices can bring to the legal narrative the necessary tools to modernise its understanding of authorship, 'performership' and creativity. Although this interdisciplinary approach may present difficulty in transferring usable findings, data and highly specialised knowledge, pathways between the disciplines of law, creativity research and performance theories remain available. This chapter puts forward the concept of 'embodiment' as one of them. It is contended that the notion may prove useful in widening the condition of originality as currently understood by copyright laws across the jurisdictions under study in this analysis. The next chapter explores this option further, alongside other measures driven by the objective to improve performers' legal protection.

# Chapter Six

## Shifting divides

*My Lords, may I suggest that [performers' rights are] rather like these unenforceable laws of a 30 m.p.h. speed limit? They cannot be enforced, but, on the other hand, it is possible that if they are there the majority of people will obey them.<sup>1</sup>*

Lord Somers, 1963

Previous chapters described how the legal frameworks of Australia, France, the UK and the US came to enforce a divide between authors and performers. It became apparent that the divide is the result of national laws' endorsement of outdated or conflated representations of creativity, originality, authorship and performances. The subsequent developments thus attempt to address this particular issue in places where the disjunction between legal discourses and contemporary artistic narratives seems most acute. Those suggestions are directed towards one aim: erasing, or at least softening, the author-performer divide so as to better reward the contribution performing artists make to our culture. In doing so, this chapter circles back to issues raised in previous comments and offers graded solutions to tackle them. It reviews the questions of the originality condition, the categorisation of performers and the distribution of royalties. The chapter concludes by mitigating the expected difficulties the intellectual property system would have in increasing performer's protection, or in deleting the divide altogether.<sup>2</sup>

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<sup>1</sup> HL Deb., 05 February 1963, Vol. 246, cols 512-20, at 520.

<sup>2</sup> text to note 20, Chapter 1.

The following recommendations are articulated around the distinction between internal and external divides across the legal categories of authors and performers. Within the category of performers itself, the law distinguishes between different types of performing artists. Those additional sub-categories are referred to as *internal* divides for they are located within the same sub-group of artists. Following this logic, the distinction between authors and performers is considered *external*.

In order to improve performers' protection, this chapter envisages options for reforms in the context of both internal and external divides. The overall objective is to either erase or rationalise their boundaries so as to offer a more workable scheme. Raising the profile of performers' protection within their own category would work towards narrowing the width of the spectrum opposing least and most protected artists. The revision of internal categorisations should soften the edges of the external author-performer divide by bringing the antipodes of the spectrum closer together.

## **I. Revising internal divides**

Internal divides can either be horizontal or vertical. Legal frameworks create a horizontal classification among this class of artists by categorising performers as audio (musical) or audio-visual performances. The categorisation becomes vertical when the legal system established a hierarchy amongst performing artists by applying a grading scale of rights to performers, auxiliary performers and models. Changes in the context of both internal divides, horizontal and vertical, are necessary in order to better performers' protection.

## **A. Deleting the divide between audio and visual performers**

Previous developments relating the successive reforms of performers' rights at the international and national levels pointed to the fact that discrepancies exist between the protection of audio (musical) and audio-visual performers.<sup>3</sup> It is submitted that this distinction has legitimate standing other than being the result of ad hoc responses to the evolution of recording technologies. The relatively recent conclusion of the Beijing Treaty on Audio-visual Performances<sup>4</sup> confirms this position as the convention aimed to bridge this gap by aligning the duration of international audio-visual performers' rights with the one applicable to live aural performances since 1996.<sup>5</sup> The subsequent paragraphs argue in favour of furthering this harmonisation of rights between audio (musical) and audio-visual performers at the domestic level.

### **1. Remnants of the horizontal internal divide**

As previously mentioned, the distinction between audio-visual and musical performers lies for the most part in the uneven length of protection each group receives.<sup>6</sup> Whilst, performers involved in live audio performances or sound records receive a protection lasting up to fifty years,<sup>7</sup> audio-visual performing artists are protected for a duration of twenty years.<sup>8</sup> Although harmonising this particular point

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<sup>3</sup> text to note 27, Chapter 2.

<sup>4</sup> Beijing Treaty on the Protection of Audio-visual Performances, adopted on June 24, 2012.

<sup>5</sup> text to note 28, Chapter 2.

<sup>6</sup> text to note 151, Chapter 2.

<sup>7</sup> The International 1996 WPPT had required signatory states to enforce performers' rights lasting at least fifty years for live audio performers. See 1996 WPPT, Art 17; see also, text to note 148, Chapter 2.

<sup>8</sup> Rome Convention, Art 14.; At the national level, the regimes applicable to musical and audio-visual performers had been levelled by the British and the French legislators who enforced the same protection for both group of artists ; see text to note 157, Chapter 2.



was the crux of the Beijing Treaty, the latter is yet to come into force in the countries under study in this analysis.<sup>9</sup>

Rather confusingly, supra national policy-makers have sent mixed messages with regard to such harmonisation. Less than a year before the cohort of signatory countries reached a consensus on this question in Beijing, the European Parliament enacted a directive defeating the treaty's levelling agenda. Indeed, the 2011 European Term Directive<sup>10</sup> added another twenty years to this second term of protection for the benefit of performances fixed in sound recordings,<sup>11</sup> leaving the duration of protection for other performers unchanged.<sup>12</sup> Although there is nothing in the European instrument expressly undercutting the objective of the Beijing Treaty as far as audio-visual performers are concerned, the 2011 Directive has certainly diminished the extent to which the international convention levelled the regime applicable to performers by keeping musical performers a step ahead of their audio-visual peers.

Inadvertently perhaps, this reform maintains a system where the provisions applicable to audio and musical performers run in parallel. This suggests that supra-national policies are still in lack of a holistic approach to the performers' protection. This begs the question whether performers' right should be conceived as a

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<sup>9</sup> The contracting parties having ratified the Treaty as of January 2016 are Botswana, China, Japan, the Syrian Arab Republic, the United Arab Emirates, Russia, Chile, Qatar, Moldova and Slovakia. On February 10, 2016, the President of the United States sent a proposal to Congress with the view to ratify the Treaty. See, 'Message from the President of the United States Transmitting the Beijing Treaty on Audiovisual Performances, done at Beijing on June 24, 2012' 114<sup>th</sup> Congress, 2<sup>nd</sup> session, US Government Publishing Office, 59-118 (Washington 2016). Given the current political context, it seems unlikely that a bill will be passed before the end of the US President's time in office in January 2017.

<sup>10</sup> European Parliament and Council Directive 2011/77/EU of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights, OJ L 265/1.

<sup>11</sup> European Parliament and Council Directive 2011/77/EU, Art 1(2); introduced into national legislations under IPC, Art L211-4 1 in France and CDPA 1988, s. 191(1) and (2) in the UK.

<sup>12</sup> France: IPC Art. L 211-4-2; UK: CDPA 1988, s. 191 (2).

homogenous and overarching regime or as a collection of ad hoc rights. This point is further discussed in subsequent developments.<sup>13</sup>

## 2. Echoes of the horizontal internal divide

The distinction between musical and audio-visual performers goes beyond the mere question of right duration. The substance of their rights has also been affected by the same tiering, placing audio-visual performers in a worse position than their musical peers, without any apparent logical reasons beside hypotheses of unequal lobbying forces. The following comments succinctly gather together provisions applicable to performers in the US, France and Australia, which participate to constructing this horizontal internal divide.

In the US, the federal framework achieved the feat of discriminating between the protection of musical and audio visual performances without enforcing actual performers' rights in the first place.<sup>14</sup> The American Congress never formally introduced performers' rights at the federal level, limiting itself to prohibiting the making of unauthorised records of live musical performances.<sup>15</sup> Although the

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<sup>13</sup> text to note 32.

<sup>14</sup> It was judged that the protection of performances by copyright was not a power granted to Congress by the copyright clause of the federal constitution. Most of the debate focused on the argument that the Congress's legislative intent centred on the protection of copyright works fixed 'in writings' and that performances cannot be regarded as such. Although this reasoning is hardly tenable now with the development of recording technologies and the accession of sound recorders to copyright (see *Goldstein v California*), the position still holds. Judith Kim, 'The Performers' Plight in Sound Recordings - Unique to the US: A Comparative Study of the Development of Performers' Rights in the US, England, and France' (1986) 10 Columbia VLA Journal of Law and the Arts 453, 470-3; *Goldstein v California*, 412 US 546 (Supreme Court 1973). Kimberlee Withearall contends that musical performances involved in the making of sound recording share ownership over the record with the sound record. See, Kimberlee Weatherall, "'Pretend-y Rights" On the Insanely Complicated New Regime for Performers' Rights in Australia, and How Australian Performers Got Gyped', *New Directions in Copyright Law, Vol. III* (Edward Elgar Press 2005) 196. This position does not seem to be shared by the American scholarship, see for instance, Mary LaFrance, 'Authorship and Termination Rights in Sound Recordings' (2002) 75 Cal. L. Rev. 375, 392.

<sup>15</sup> US Code, Title 17 para 1101. This was the result of the 1994 Uruguay Round of multilateral trade negotiations. See, US Code, Title 17 s.1101 amended by the Public Law 103-465 of December 8, 1994: A of An Act To Implement the Results of the Uruguay Round of Multilateral Trade Negotiations (Title V, subtitle A)

provision does not compare with what other jurisdictions refer to as ‘performers’ rights’, it offers a minimal degree of protection which, yet again, does not include audio-visual performers. The situation may be affected by the Beijing Treaty, but as it is the case with all of the other jurisdictions under analysis in this study, the ratification and enforcement of the international instrument by the American federal legislator is still pending at the time of writing.

Adopting a diametrically-opposed position, the Australian legislator embedded a similar form of discrimination at the heart of its version of performers’ protection. Unlike their American counterparts, Australian policy-makers enforced a much stronger set of rights in the favour of performing artists. Indeed, not only did they introduce full performers’ rights in their national intellectual property system, but they also made performers involved in the making of sound-recordings co-owners of the material rendering of their works, i.e. the record.<sup>16</sup> Erasing in this instance the author-performer divide, Australian laws increased by the same token the gap separating musical performers from their audio-visual peers, as the same privilege was not extended to cinematographic works.<sup>17</sup>

The framework of the European Union too bears the mark of this horizontal internal divide. In 1992, European Directives geared towards harmonising the rental rights attached to protected works introduced the right to equitable remuneration for the commercial use of phonograms.<sup>18</sup> On this instance, European policy-makers, and in

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<sup>16</sup> 1968 Copyright Act, section 22; text to note 80, Chapter 2.

<sup>17</sup> The legitimacy of enforcing different protective measures for different categories of performers is further discussed in subsequent developments, see text to note 32.

Moreover, the gap existing between performers and sound recorders may have been bridged as the Australian statute may maintain the divide by granting performers the status of ‘makers’ or ‘co-owners’ but necessarily that of ‘authors’. On this see text to note 63.

<sup>18</sup> Council Directive 92/100/EEC of November 19, 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, [1992] OJ L77 20PO). The 1992 Directive was repealed by the Directive 2006/115/EEC. In 2012, the Beijing Treaty extended the right to equitable remuneration for audio-visual performers when performances were communicated to the public via broadcast

turn, national legislators came close to bridging the gap separating authors and performers since both groups of artists are to be compensated on an equitable basis for the use of their work<sup>19</sup> when it has been recorded on phonograms later rented for commercial purposes.<sup>20</sup> Nevertheless, by erasing this external divide, the same directives continued to convey an artificial gap between musical and audio-visual performers<sup>21</sup> as the same right was not been introduced in the context of recorded cinematographic works.<sup>22</sup> Although the provisions include film performers as recipients of the right to equitable remuneration, it is limited to the commercialisation of their work in the form of sound recordings, leaving out the format which represents the essential of their practice: video records.<sup>23</sup>

This slight double standard of protection was furthered by the 2011 Term Directive<sup>24</sup> which coined the ‘use-it-or-lose-it’ provision<sup>25</sup> accompanied by the 20-per-cent fund.<sup>26</sup> The benefits granted by those rights were left unmatched by the regime applicable to audio-visual performers involved in the film industry.<sup>27</sup> Those dispositions are further discussed in subsequent paragraphs.<sup>28</sup>

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*or otherwise transferred. See, 2012 Beijing Treaty, Art. 11.2 and 12.3. The ratification of the Treaty is still pending. However, Article 12.3 Beijing Treaty does enforce the right to equitable remuneration to audio visual performers.*

<sup>19</sup> Though equitable, the remuneration is not necessarily equal.

<sup>20</sup> Australia: 1968 Copyright Act, s. 22(3A)(b) (performers considered as makers of sound recordings of their live performers are co-owners of the copyright in the latter); France: IPC, Art. L 214-1 ; UK: 1988 CDPA, S. 182D; European Union: Council Directive 92/100/EEC, Art. 4.

<sup>21</sup> Rights to equitable remuneration on the transfer of performers’ rights to producers or other third parties, whether rental or otherwise, do exist in the context of audio-visual performers. See for example, in the UK: 1988 CDPA, s. 191F to 191H, and in France: IPC, Art. L 212-3 and L 212-5. See on this, Charlotte Waelde and others, *Contemporary Intellectual Property* (3rd edn, Oxford University Press 2013) 230-1.

<sup>22</sup> Council Directive 92/100/EEC, Art 4.

<sup>23</sup> Waelde (n 21) 230-1.

<sup>24</sup> European Parliament and Council Directive 2011/77/EU, of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights, L 265/1.

<sup>25</sup> European Parliament and Council Directive 2011/77/EU, Art 1(2)(c).

<sup>26</sup> European Parliament and Council Directive 2011/77/EU, Art 1(2)(c).

<sup>27</sup> Understood broadly as being any visually recorded performances.

<sup>28</sup> text to note 34.

Moving away from EU-imposed measures, dispositions unique to the French intellectual property code (IPC) also relay aspects of this horizontal internal divide. The continental legislator made a dent in audio-visual performers' legal shield in regulating the form performers' consent must take for it to be considered a valid transfer of their rights to third parties. Whilst French intellectual property laws require performers' consent to be express and made in writing,<sup>29</sup> an exception was introduced in the context of audio-visual recording contracts signed between audio-visual performers and their producers.<sup>30</sup> Article L 212-4 of the French Code specifies that such contract will be taken for implicit consent to "fix, reproduce and communicate to the public the performance of the performer"<sup>31</sup> for the duration of the agreement.<sup>32</sup> Again, without the expression of any particular rationale behind this exception, this difference of treatment between audio-visual and musical performers contributes to forming an unjustified gap between the two sets of performing artists.

### 3. Discrimination or tailoring?

The present analysis by no means advocates for the creation of an identical regime in the protection of musical and audio-visual performers. Although harmonisation is

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<sup>29</sup> IPC, Art. L 212-3. The Courts specified what constituted consent given in writing and what did not. For instance, the authorisation given in writing by an event organiser to broadcast a performer's interpretation does not hold (see Paris, 16 juin 1993, n° [XP160693X] : D. 194 p 218 Edelman ; D. somm. com. p. 277). The recording contract agreed between a producer and an event organiser authorising the reproduction of performances cannot amount to a legally authorised transfer of performers' rights if the latter were not party to the contract (Cass, 1ère civ, 16 juillet 1992, n° 90-19.207: Bull. 1992 civ i p 234; RIDA 1993, n 155, 177 obs. Kéréver). Although, implied consent to the use of the record seems to have been accepted by the Court in the following case: Paris, 18 janvier 2012, *Société Civile De Perception Et De Distribution Des Droits Des Artistes Intepretes De La Musique Et De La Danse c/ L'institut National De L'audiovisuel*, n° 09/29162 : inédit.

<sup>30</sup> Article L 212-4 reads "The signature of a contract between the performer and a producer for the making of an audio-visual work shall imply the authorization to fix, reproduce and communicate to the public the performance of the performer. Such contract shall lay down separate remuneration for each mode of exploitation of the work." IPC, Art. L 212-4. Official translation. See also, Cass, soc, 10 février 1998, n° 95-43.510: Légipresse 1998, No 153, III, 101, note Veysière Bull. 1998 v N° 82 p. 59.

<sup>31</sup> IPC, Art. L 212-4. Official translation. See also, Cass, soc, 10 février 1998, n° 95-43.510: Légipresse 1998, No 153,III, 101, note Veysière Bull. 1998 v N° 82 p. 59.

<sup>32</sup> *ibid.* This may be a remnant in the French narrative of the longstanding distinction the international community maintained between musical and audio-visual performers, recently revived by the 2011 European Term Directive. European Parliament and Council Directive 2011/77/EU of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights, OJ L 265/1.

sought between the two groups of performing artists, such objective could, and perhaps should, be achieved whilst accommodating ad hoc needs with measures tailored to either musical or audio-visual works specifically. Indeed, it may be that the needs of each creative industry differ from one another. However, policy-makers and legislators ought to be able to carefully elect which rules are pertinent to suitable tailoring of the law, and those which are the mere result of slow or discontinued reforms of the law pressured by varying lobbying forces. Whilst there may not be any adequate test already available to policy-makers to distinguish between desirable and undesirable individualisation of regimes, existing provisions may provide useful basic cardinal principles to guide future reforms.

Uneven protection with regard to basic rights such as the right to authorise fixation and distribution of the work, alongside provisions specifying the duration of such rights and conditions in which they can be transferred form a fundamental protective base which should not differ from one horizontal category to the other. Modifications to this fundamental base of rights would represent undesirable differences of treatment because hardly justifiable. Variations may however be introduced in the context of other additional rights designed to tackle specific issues arising from practices unique to particular sectors. Those would compose a flexible added protective layer, tailored to the needs of performers and other stakeholders involved in the field concerned.

Taking the 2011 Term Directive as an example,<sup>33</sup> the regulatory instrument enforced both desirable and undesirable variations in the protection of musical and audio-visual performers. As mentioned above, the Term Directive reinforced the internal divide by augmenting by twenty years the protection extended to performers involved

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<sup>33</sup> European Parliament and Council Directive 2011/77/EU of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights, OJ L 265/1.

in sound recordings.<sup>34</sup> In addition to longer rights, the European Regulatory body voted for the enactment of a ‘use-it-or-lose-it’ provision<sup>35</sup> and for the creation of a ‘twenty-per-cent-fund’,<sup>36</sup> to further protect musical performers’ financial interests. The ‘use-it-or-lose-it’ privilege allows performers who have assigned their rights over to recording companies to claim them back if the latter failed to commercially release their performances in sufficient quantity within the extended twenty-year period.<sup>37</sup> Additionally, a ‘twenty-per-cent-fund’ will be formed for companies to repay twenty per cent of revenues earned during the twenty year extension.<sup>38</sup> Once collected, those revenues will then be distributed in the form of annual supplement to performers who had transferred or assigned their right to equitable remuneration in exchange of a one-off payment. Those mechanisms were introduced to allow performers who had assigned their rights to benefit from the term extension.<sup>39</sup>

Comparing the introduction of those three different protective measures to above suggested test, one would fall within the scope of undesirable variations of treatment between musical and audio-visual performers, while the other two could be associated with welcome tailoring of the legal framework in the music industry. Changes in the term of protection affect the core of the protection offered by performers’ rights and therefore should not vary across horizontal internal categories. Consequently, the extension of musical performers’ rights should also concern audio-visual performing artists. In contrast, the provisions introducing the ‘use-it-or-lose-it’ disposition and the ‘twenty-per-cent fund’ constitute justifiable variations between the two categories of performers. They respond to specific

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<sup>34</sup> European Parliament and Council Directive 2011/77/EU, Art 7.

<sup>35</sup> *ibid*, Art 1(2)(a).

<sup>36</sup> European Parliament and Council Directive 2011/77/EU, Art 1(2)(c).

<sup>37</sup> European Parliament and Council Directive 2011/77/EU, Art 1(2)(a).

<sup>38</sup> *ibid*, Art 1(2)(c).

<sup>39</sup> *ibid*, recital 5 ; see also, Waelde and others (n 21) 231.

issues, believed to be unique to the structure and practices of the music recording industry. For this reason, those two additional prerogatives may differ within sub-groups of performers.

### **B. Vertical internal divides**

In addition to internal horizontal divides, the French legislator embedded at the core of performers' protection an additional categorisation between performing artists. On many occasions the present analysis described and detailed the distinction intellectual property and employment laws created between performers, auxiliary performers and models.<sup>40</sup> This labelling exercise ultimately impacts the degree of protection performing artists receive.<sup>41</sup>

If seemingly clear, the categorisation deployed by the French legislator remains an unfinished piece of regulatory work the judiciary had to complete. Indeed, the professional conventions taking the precaution of defining what constitutes an auxiliary performer or extra in their own field are scarce. Such texts exist in the context of theatre performances and dramatic performances recorded for the

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<sup>40</sup> The Intellectual Property Code refers to performers as the performing artists who interprets a work but is not an auxiliary performer. Aside their mention in this provision, auxiliary performers are absent from the Intellectual Property Code which refers to "customary conventions" relevant to each sector of the creative industries to define the category. The Employment Law Code picks up again on the category but fails to define the term. Models on the other hand have been granted their own definition. According to, the Employment Code, models are the individuals who are "charged of other presenting to the public, directly or indirectly by way of reproduction of his/her image on any visual or audio-visual medium, a product, a service or an advertising message; or of posing as model, with or without later use of his/her image". See, IPC, L 212-1; Employment Law Code, Art 762-1, L 7121-2, L 7121-3 and L 1723-4.

<sup>41</sup> As performers, the latter would be entitled to both performers' rights and employment law benefits. As auxiliary performers or models however, they become ineligible to intellectual property, their position being fully assimilated to that of employees of the creative or advertising industries. Models form the category of performing artists which receives the thinnest protection of all three groups. See on this, text to note 282, Chapter 2.



purpose of television drama,<sup>42</sup> but no equivalent can be found in the context of dance or music performances for instance.<sup>43</sup>

Whenever confronted to the silence of professional agreements, the courts developed their own tests and conditions to draw lines between the categories of performers, auxiliary performers and models. In doing so, the French bench created a confusing condition of originality, cousin to what is known in the context of authors' rights in the hexagon.<sup>44</sup> Although each category is distinct, they all are differentiated on the basis of the same test: the artist's imprint of his/her personality on the disputed work (performance). Reading the jurisprudence, the presence of the same input, is what makes an artist, author but not performer, performer but not auxiliary performer, auxiliary performer but not model.<sup>45</sup> As a result, this test blurs all the categories situated between authors and models into one, securing only one firm distinction: the test between models and authors.<sup>46</sup> Indeed, authors always print their creation with the mark of their personality, whilst the work of a model never does. Anything between those two poles cannot be clearly ascertained. As previous developments discussed this particular point in more details, this section will not repeat them but refers to previous comments made in Chapter Two.<sup>47</sup>

It is contended that the French grading scale of rights remains a useful tool despite the complexity categorising the various types of performing artists may involve.<sup>48</sup> The

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<sup>42</sup> see Paris, 18eme ch., 18 février 1993, n° [XP180293X] : D. 1993, p 397 note Weksteinbeg.

<sup>43</sup> *ibid* ; Paris, 4ème ch., 4 juillet 2008, n° 06/21406, Universal Music... : RTDCom. 2008, 745, obs. Pollaud-Dullian ; Versailles, 9 octobre 2008, *Randall G. c/ Ste First Media*, n° 06/03959.

<sup>44</sup> text to note 303, Chapter 2.

<sup>45</sup> *ibid*.

<sup>46</sup> *ibid*.

<sup>47</sup> *ibid*.

<sup>48</sup> Subsequent developments explain how such categorisation system may present itself useful in other jurisdictions to cope with the 'floodgate argument' if the author-performer divide was to be dropped, see text to note 166.

scheme would be to be completed by either legislators or the courts to meet the standard of sound law.

After considering options to reform internal classifications, the following developments review ways in which the external dimension of the author-performer divide could be tackled.

## **II. Dropping the Author-Performer divide**

Policy-makers have at their disposal a range of possible avenues to explore, should they wish to remove the author-performer divide from intellectual property frameworks. This could be achieved by explicitly including performers in the class of authors, widening the categories of protected subject-matter or by remodelling the originality condition. Whilst the first two options would require legislators to reform statutory provisions,<sup>49</sup> the last one could be achieved directly by the courts. In this respect, the first two options are holistic proposals in comparison to the third alternative which would rely on an incremental change of the law.<sup>50</sup>

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<sup>49</sup> There is no reason to believe that such reforms would place national legislators in breach of international treaties on authors' and performers' rights. Indeed, both France and the UK went beyond the minimal standard of protection required by the Rome Convention when each jurisdiction respectively introduced performers' rights at domestic levels. It is submitted that introducing performers' rights equal to copyright would be comparable to those earlier predicaments.

<sup>50</sup> To refer to the dichotomy employed by Arnold J. in Richard Arnold, 'The Need for a New Copyright Act : A Case Study in Law Reform' (2015) 5 Queen Mary Journal of Intellectual Property 110, 110-11.

## **A. Opening the circle of authors**

Like photographers,<sup>51</sup> sound recording producers,<sup>52</sup> broadcasters<sup>53</sup> and computer software designers<sup>54</sup> before them, performers could be introduced as a new subclass of copyright holders. This modification would require national legislators to formally amend their copyright provisions. The gradual extension of copyright to new areas of the innovation industries proves that such change is possible, was it to be supported in parliamentary chambers.

### **1. Leading by (comparative) example**

Not only do previous reforms prove that such amending of the law is possible, but comparative examples also confirm that the integration of performers as copyright holders has already been endorsed, at least partially. As mentioned earlier,<sup>55</sup> the Australian legislator made of musical performers involved in the recording of their live performances<sup>56</sup> co-owner of the record.<sup>57</sup> This demonstrates that intellectual property systems are able to devise mechanisms where performers can be rewarded on par with other copyright holders for their contribution. The Australian position also suggests that bringing performers' rights on an equal footing with other right holders of the copyright ecosystem is manageable despite the risks of clashing or overlapping claims. This is not to say that the Australian model could not be

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<sup>51</sup> n 449, Chapter 2.

<sup>52</sup> n 463, Chapter 2.

<sup>53</sup> n 464, Chapter 2.

<sup>54</sup> n 465 and 466, Chapter 2.

<sup>55</sup> text to note 80, Chapter 2.

<sup>56</sup> The Act does not provide any particular legal definition of the term 'live performance'. It is unclear whether such performances require the presence of an audience, or for the performance to be recorded in the context of a musical event for their performers to be co-owner of the record. It could be argued that all performances executed for the purpose of a recording are to an extent 'live performances' but this understanding would depart from what is commonly understood as 'live performances' which references to unrecorded real time performances. Indeed, The Act defines the "sound recording of a live performance" as the "sound recording, made at the time of the live performance, consisting of, or including, the sounds of the performance." 1968 Copyright Act, s 22.

<sup>57</sup> 1968 Copyright Act, s 22(3A) and s 100AD.

improved. At present, performers' co-ownership is only applicable in the cases of live musical performances,<sup>58</sup> whenever their work has not been commissioned.<sup>59</sup> For the author-performer divide to regress, the benefit granted by Section 22 of the Australian 1968 Copyright Act ought to be extended to all categories of performers.

It is claimed that similar reforms should take place in the jurisdictions of France, the UK and the US, in order to erase the author-performer divide.<sup>60</sup> Naturally, those reforms must be embedded in a manner which respects the terminology and logical structure of each domestic statutory framework.<sup>61</sup> By listing performances alongside already protected authorial works, the legislator would in effect add performers to the circle of authors, and would thereby confirm current judge-made authorship for performers already awarded in jurisdictions like France.<sup>62</sup>

## **2. Ownership does not make authorship – or does it?**

The Australian Copyright Act is clear: live musical performers are “makers” of sound recordings. For this reason they are made “co-owners” of the copyright subsisting in it.<sup>63</sup> The terminology begs the question whether co-ownership equates to authorship. Are live musical performers *authors* under Australian copyright law, or simply *co-owners*?

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<sup>58</sup> The Act defines the “sound recording of a live performance” as the “sound recording, made at the time of the live performance, consisting of, or including, the sounds of the performance.” 1968 Copyright Act, s 22.

<sup>59</sup> 1968 Copyright Act, s 97(3).

<sup>60</sup> It would also be desirable for the divide to be formally removed from international conventions as well however, reforming domestic frameworks appear more realistic than tackling international treaties as the supra national community struggles to reach consensus which considerably slows down reforms. See for instance, records of discussions considering the reform of the Berne Convention in 1948 at the Brussels conference : ‘Documents de La Conférence de Bruxelles 5-26 Juin 1948’ (1951).

<sup>61</sup> For example, in the UK, for performers to become legal authors and copyright owners, section 9 of the 1988 Copyright, Designs and Patent Act would have to be amended, as well as all other relevant dispositions building on its provisions. Substantial changes along similar lines would have to be carried out in the American Federal copyright systems and the Australian framework.

In France, authorship is not defined. Instead, the list of works eligible to authors' rights is provided by the Intellectual Property Code, and the latter defines the categories of artists eligible to their protection. The Courts have utilised the open-ended nature of the concept of ‘work of the mind’ to include performances whenever they considered the originality condition fulfilled by the performing artists concerned.

<sup>62</sup> text to note 260, Chapter 2.

<sup>63</sup> 1968 Copyright Act, s. 22 and s. 100AD.

The 1968 Copyright Act does not expressly articulate the relationship between authorship and ownership. What is openly stated by the British Copyright, Designs and Patent Act 1988,<sup>64</sup> may be taken for granted by its Australian equivalent, that is, that initial ownership follows authorship. As per the British statute, the author of the work is its initial owner, unless the right was transferred or it is stated otherwise.<sup>65</sup> Unlike its European counterpart, the Australian copyright statute does not make a systematic use of the term author or authorship to refer to the first or initial owner.<sup>66</sup> The concept of authorship seems to be attributed to a particular class of copyright holders, which are not to be confused with others, such as “makers” or “publishers”.<sup>67</sup> Indeed, Section 29(7)(b) relating to unauthorised uses of protected material, specifies that the creators of sound recordings are not “authors” but “makers”.<sup>68</sup> Linking this specification with the phraseology employed by Section 22, it appears that performers, if co-owners, are not “authors” but “makers” as per the wording of the 1968 Copyright Act, and that the two concepts should not be amalgamated. Taking this distinction into account, it seems that the Australian system too, adopted a restricted view on authorship, which does not include performership, even in the context of the sound recording of live musical performances. Though subtle, the Australian Act thus maintains a distinction between authorship and co-ownership attributable to performers. If performership can reach ownership, it cannot access authorship. Instead, the status of ‘makership’

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<sup>64</sup> CDPA 1988, s. 9 (for a definition of authorship) and s. 11(1) (for the articulation of authorship and ownership).

<sup>65</sup> CDPA 1988, s 11(1) to (3).

<sup>66</sup> The terms do appear on some occasions. See, section 10 dedicated to definitions, sections 78 to 83 on joint authorship, sections 34(3) and 34 (5) related to the duration of rights definition, and sections 193 to 195 concerning moral rights.

<sup>67</sup> 1968 Copyright Act, s. 29(7)(i) -(ii).

<sup>68</sup> 1968 Copyright Act, s. 29(7)(i) -(ii) read: “(b) copyright did not subsist in the work or other subject-matter and the act concerned was done otherwise than by, or with the licence of: (i) the author or, in the case of a sound recording, cinematograph film or edition of a work, the maker or publisher, as the case may be; or (ii) persons lawfully claiming under the author, maker or publisher”.

is granted as ersatz authorship. Therefore, even under Australian laws a formal distinction between authorship and performership is maintained despite the presence of performers' copyright co-ownership in sound recordings.

This divorce between granting ownership and extending authorship conveys the stigma attached to performership into the legal narrative. Although, the legal regime of performing artist is improved by accessing copyright ownership, their exclusion from authorship maintains a cultural divide at the core of the Australian legal discourse. That said, if terminological technicalities were the last remnants of the divide in the copyright framework regulating Australian creative industries, it is submitted that performers in this jurisdiction would enjoy a satisfactory level of protection. Lexical discrimination in labelling their status, between owners and authors, may be an acceptable price to pay, were all other facets of their legal protection to be levelled with that of authors.

### **3. (Mis)reading the Constitution**

This analysis submits that the rights granted to performers by Section 22 of the 1968 Copyright Act are unique to the Australian jurisdiction, but others have argued that a similar level of protection to performing artists was also available in the US.<sup>69</sup> The dispositions of paragraph 201 of the federal copyright clause related to joint authorship have been read as granting performing musicians co-ownership over the record of their live performances.<sup>70</sup> The author sides with other scholars on the question,<sup>71</sup> and rejects this interpretation of the Constitutional provision. Nowhere in the wording of the provision is it explicitly stated that performers are granted co-

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<sup>69</sup> Weatherall (n 14) 196.

<sup>70</sup> US Code Title 17, para 201; see, Weatherall (n 14) 196.

<sup>71</sup> See for instance, Richard Arnold, *Performers' Rights* (4th edn, Sweet and Maxwell 2008) 308; Mary LaFrance, 'Authorship and Termination Rights in Sound Recordings' (2002) 75 Cal. L. Rev. 375, 392.

ownership of the sound recording made out of their live performance simply because their authorisation is required to fix their interpretation in the first place. This provision is closer to the functioning of traditional performers' rights, than that of copyright.

## **B. Opening the categories of protectable works**

In many jurisdictions, authors are identified by the work they produce since authorship is triggered by the characteristics of their creation rather than their condition as artist. This is why opening up the circle of authors to performers can only be fully achieved if, in turn, performances are listed as protected subject-matter by statutory provisions. The following comments draw on past examples where a similar extension of copyright material was achieved through legislative reforms. It considers the possibility of inserting the concept of 'performances' or 'performative work' under the relevant dispositions so as to have interpretations protected by authors' rights as a copyright work rather than as its neighbour. However, the necessity of carrying out such reforms may be mitigated in the context of European jurisdictions since the CoJ begun a movement of 'de-categorisation' of the subject-matter covered by copyright law. This jurisprudence would render obsolete any further effort of categorisation, once fully endorsed at the national level, at least theoretically.

### **1. A familiar process**

As explained in the above section,<sup>72</sup> this would not be the first time copyright extends its scope to a new subject-matter. As technologies and cultural practices evolved,

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<sup>72</sup> text to note 51.

new authors and new protected works were born and baptised under the sacraments of copyright.<sup>73</sup> The present suggestions build on the historical evolution of copyright to assess the feasibility of adding performances to the list of protected subject-matter. As comments under Chapter Two envisaged such evolution in details, those arguments will not be repeated here.<sup>74</sup> Instead, the analysis will move on to review the modifications national intellectual property framework would require in order to have performances feature as copyright works. The following suggestions are by no means thought to be acceptable work of legislative draftsmanship. They serve the more modest design of depicting in concrete terms the ways in which the law could be amended.

## **2. The ‘performative work’**

All jurisdictions under study provide a list of the works covered by authors’ rights.<sup>75</sup> In order to remove the author-performer divide from domestic intellectual property frameworks, it is submitted that performances must appear on those lists to be protected by copyright systems on par with other more traditional work such as dramatic, literary, artistic, musical works. This introduction would remove the hurdle of categorisation in countries where fitting in one of the categories of protectable works form a condition for artists to abide by in order to obtain copyright protection.<sup>76</sup> It is argued that such modification is necessary even in France where the list of protected works was made not exhaustive but merely illustrative.<sup>77</sup> This is because the list functions as a confirmation of the ways in which the *de minima* concept of

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<sup>73</sup> *ibid.*

<sup>74</sup> text to note 51, Chapter 2.

<sup>75</sup> Australia: 1968 Copyright Act, s.10; France: IPC, Art. L. 112-2; UK: s. 1; US: US Code, Title 17 para 101.

<sup>76</sup> That is Australia, the UK and the US. See subsequent comment with regard to the UK in light of the jurisprudence of the CoJ.

<sup>77</sup> IPC, Art L 112-2.



'oeuvre de l'esprit'<sup>78</sup> (work of the mind) ought to be interpreted by the courts. Although, on rare occasions the French bench has already allowed performances to access the rank of authorship by relying on the open-ended approach of the IPC, reforming Article L 112-2 would fully endorse the precursor to judge-made legal construction.

The phraseology employed by the proposed reforms would have to be moulded on the terminology already used by each domestic law. In the UK, Sections 1 and 3 of the 1988 Copyright, Designs and Patent Act (CDPA) could be amended to include performances by referring directly to interpretations as 'performances', very simply, or as 'performative work' in order to fit in the alliteration of the Act.

The phrase 'performative work' would allow the reform to avoid confusion with the other ways in which the term 'performance' is used in the Act.<sup>79</sup> Moreover, the word 'performative' is commonly used and understood by performance, theatre, dance, and music scholars as expressing the essential characteristics of a performance, or performing event.<sup>80</sup> Even though this proposal recommends adding a new concept to an already complicated framework, the phrase presents two advantages: side-stepping possible confusion and inviting a piece of the narrative emerging from the specialised literature into the body of law which it is designed to regulate. For similar reasons,<sup>81</sup> the adoption of the same phrase is considered a suitable option for reform to introduce under Title 17 of the US Copyright Clause.

Although the language used in the Australian 1968 Copyright Act offers more variety in the ways the statute refers to protected material, the word 'performance' is already

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<sup>78</sup> *ibid.*

<sup>79</sup> The concept of performance is used by the Act to refer to one type of uses of the work. See for example, 1988 CDPA, s. 19(2).

<sup>80</sup> Erika Fischer-Lichte, *The Transformative Power of Performance - A New Aesthetics* (Routledge 2008) 5.

<sup>81</sup> The concept of performance is used by the Act to refer to one type of uses of the work. See for example, US Code, Title 17, para 101.

in use two similar phrases – ‘performance’<sup>82</sup> and ‘live performance’<sup>83</sup> – which themselves refer to two entirely different concepts. For this reason, the 1968 Copyright Act could also benefit from inserting performances as its own category of works protectable by copyright under the label ‘performative work’.

In France, the wording of the reform would take a slightly different route due to linguistic specificities. The word ‘performance’, in French ‘*interprétation*’ or ‘*prestation*’ could be inserted under the dispositions of Art. L 112-2 of the French IPC so as to confirm the protection by authors’ rights of original performative works under the French law.

### 3. European (ir)relevance

Reforming the copyright laws of France and of the UK may appear irrelevant in the light of the recent position of the CoJ. Indeed, the *Infopaq* jurisprudence<sup>84</sup> was read by many as suppressing the condition of categorisation from the national framework of Member States.<sup>85</sup> From this perspective, introducing an additional type of protectable work within a classification system already made redundant by the CoJ seems counter-productive, or simply useless. Nevertheless, a few points ought to be raised to mitigate this objection.

Although the categorisation may have lost of its grasp on the definition of the copyright work, the list of creative works may maintain some authority as evidence of

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<sup>82</sup> See for example, 1968 Copyright Act, s. 39.

<sup>83</sup> 1968 Copyright Act, s. 22(3)(a).

<sup>84</sup> C-5/08 *Infopaq International A S v Danske Dagblades Forening* [2009] EUECJ C-5/08\_O; C-393/09 *Bezpečnostní softwarová asociace Svaz softwarové ochrany v Ministerstvo kultury* [ 2010] EUECJ C-393/09, EU:C:2010:816, ECLI:EU:C:2010:816, [2011] FSR 18, [2011] ECDR 3; C-604/10 *Football Dataco and Others v Yahoo! UK Ltd And Others* [2012] WLR(D) 57, [2012] Bus LR 1753, [2012] EUECJ C-604/10, [2012] WLR (D) 57; C-145/10 *Eva-Maria Painer v Standard VerlagsGmbH and Others* [2011] EUECJ C-145/10, EU:C:2011:798, ECLI:EU:C:2011:798.

<sup>85</sup> Eleonora Rosati, ‘Originality in a Work, or a Work of Originality: The Effects of the Infopaq Decision’ (2011) 58 *Journal Copyright Society of the USA* 795, 803-807; Griffiths in Jonathan Griffiths, ‘Dematerialization, Pragmatism and the European Copyright Revolution’ (2013) 33 *Oxford J Legal Studies* 767; see also, text to note 39, Chapter 4.

legislative intent to protect performances as authorial works. Judges may be more likely to see performances as the artist's "own intellectual creation" if the latter are already regarded a protectable type of work by their respective Parliament. This is the approach District Judge Clarke appears to have adopted in *Taylor v Maguire*<sup>86</sup> which concerned paper cutting works. In this logic, both Section 3 of the CDPA and Article L 112-2 of the French IPC would serve the same illustrative purpose.<sup>87</sup> Moreover, British courts may be reluctant fully to adopt an open-ended approach to copyright protection. Consequently, until the European position finds itself fully endorsed on British territory, reforming Section 3 of the CDPA would prove useful.

### C. Opening (up to) originality

The originality condition would have to be widened in order to open up to new forms of creativity regardless of the long-term impact the CoJ's jurisprudence will have on domestic laws. In doing so, the courts are advised to *de*-intellectualise the current narrative framing the originality condition in order to allow for a *re*-embodiment of creativity in the legal discourse. This approach proposes to counter-act both phenomena of intellectualisation of the subject-matter protected and disembodiment of performances uncovered in previous chapters.<sup>88</sup> It is contended that triggering an effective and long-lasting change of discourse must also involve sensitising the authors and gatekeepers of those narratives, being in this case, the judiciary.<sup>89</sup>

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<sup>86</sup> *Taylor v Maguire* [2013] EWHC 3804 (IPEC) ; [2014] ECDR 4, para 6.

<sup>87</sup> This may be the only point of actual harmonisation achieved by the *Infopaq* jurisprudence.

<sup>88</sup> see on the intellectualisation and disembodiment of intellectual property laws text to note 68, Chapter 4 and note 138, Chapter 5 respectively.

<sup>89</sup> Judges are seen as the author of the originality condition because the latter was not defined by none of statutory provisions of any jurisdictions included in this analysis. The Courts were tasked by legislators to shape the content of the requirement.

## 1. De-intellectualising originality

The following paragraphs aim to offer conceptual tools to reshape the courts' current approach to originality in order to re-direct the subject-matter covered by copyright towards embodied creative expressions such as performances. The following recommendations review options envisaged in previous chapters such as the use of 'personality' or 'embodiment'.

### a) *A literal de-intellectualisation of originality*

The least invasive measure the courts of Australia, France, the UK and the US could pursue in order to soften the current intellectualisation framing the originality condition, is avoiding the adjectives 'intellectual' and 'mental' when referring to the kind of input, creativity, skills or labour necessary which compose a work eligible to copyright protection. If above mentioned standards must go with a qualifier, more neutral epithets such as 'original' or 'creative' could be accolated to 'works', 'skills', 'labour' or 'input' in order to complete respective expressions. It is contended that the notions of creative 'skills' or 'original' 'labour' would be no less or more nebulous than referring to the 'author's own intellectual creation',<sup>90</sup> 'mental labour',<sup>91</sup> origination<sup>92</sup> or 'independent intellectual effort'.<sup>93</sup> Yet, they would still present the advantage of neither favouring intellectual representations of creation nor rejecting others considered more manual-oriented.

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<sup>90</sup> *C-5/08 Infopaq International A S v Danske Dagblades Forening* [2009] EUECJ C-5/08\_O para 44, 48; *Taylor v Maguire* [2013] EWHC 3804 (IPEC); [2014] ECDR 4, para 6. For more examples, see comments made under; see also text to note 70, Chapter 4.

<sup>91</sup> *Millar v Taylor* (1769) 4 Burrow 2303, 2359; *Baltimore Orioles Inc. v Major League Baseball Players Association*, 805 F.2d 663(7th Cir.1986) 668; see also text to note 70, Chapter 4.

<sup>92</sup> *Kelley v Chicago Park Dist*, 635 F3d 290 (7th Cir.2011) 304-5; <sup>92</sup> *Sands and Mcdougall Pty Ltd v Robinson* (1917) 23 CLR 49, 56; see also text to note 205, Chapter 4.

<sup>93</sup> *Sands and Mcdougall Pty Ltd v Robinson* (1917) 23 CLR 49, 56; see also text to note 203, Chapter 4.

### *b) Persona-lising originality*

Previous chapters<sup>94</sup> explored whether French courts' openness to include performative originality within the category of creativity protected by authors' rights. The present comment will not repeat details of arguments formulated earlier,<sup>95</sup> but it stresses the ability of the concept to bridge within one term the notions of mental and physical creative labours.

The legitimacy of this proposal was made all the stronger by the jurisprudence of the CoJ who invited parts of the doctrine of the author's print of personality at the supranational level. The doctrine is expected to trickle back down to domestic frameworks at a later time. From that perspective, utilising personality to widen the originality condition may be a less invasive way of reforming national laws. Indeed, was the notion to be embedded, this evolution would fit in the general process of Europeanisation of domestic intellectual property laws. The welcoming of performers as authors and performances as copyright works would thus be part of a wider plan of harmonisation of the French and British systems according to European standards.

### *c) Re-embodiment originality: including embodiment*

The preceding chapter reviewed the possibility of opening the originality condition to the notion of 'embodiment' so as to have performances become work eligible to copyright protection.<sup>96</sup> The fleeting appearance of the concept in the 2014 *Garcia* case<sup>97</sup> confirmed its relevance in the context of improving performers' protection by intellectual property laws. The presence of the notion in the jurisprudence of the

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<sup>94</sup> text to note 279, Chapter 2 and to note 400, Chapter 4.

<sup>95</sup> *ibid.*

<sup>96</sup> Since this option was examined in more depth in the preceding chapter, this paragraph will not repeat comments made in earlier developments but merely aims to place the argumentation within the context of this chapter reviewing recommendations for reforms.

<sup>97</sup> *Garcia v Google Inc*, 743 F 3d 1258 (9<sup>th</sup> Cir. 2014) 1263

ninth circuit also confirms that the latter is accessible and usable by legal audiences.<sup>98</sup> This signals that a long-term transplant of the concept in the legal repertoire is likely to be successful despite the fact that the term finds its origin in a difference discipline, i.e. performance theory.

Furthermore, it was argued that the interdisciplinary nature of the concept also plays to its strength.<sup>99</sup> Importing the notion of ‘embodiment’ would therefore contribute to realigning legal paradigms with discourses found in the performing arts where the term is widely-accepted as a reference to performers’ input in stage or studio interpretations.<sup>100</sup>

## **2. Inviting a new repertoire**

Opening up legal authorship to a new range of artists does not just require the formal reform of the law. It also requires of institutions in charge of following or adapting the law to be convinced of the cultural legitimacy driving the proposed policy. To this aim, it is submitted that the judiciary ought to be sensitised to contemporary references and literature framing current discussions on authorship, performership and creativity. It is believed that by updating the theoretical culture underpinning their legal reasoning, judges will be able to better ground the legal perspectives suggested here above. Helping them in this task, the following developments review the role of expert-counselling in the Courtroom which is embodied by expert witnesses and professional conventions.

### **a) *sensitising gatekeepers***

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<sup>98</sup> text to note 232, Chapter 5.

<sup>99</sup> text to note 170, Chapter 5.

<sup>100</sup> *ibid.*

The judiciary would have to open up to new references reaching beyond the boundaries of legal scholarship in order to strengthen the cultural backbone of the legal argument defending performers' creativity,. In developing their endorsement of performers' authorship, the courts of common-law jurisdictions would be also confronted with the hurdle of departing from precedents which have plainly rejected such hypothesis in the past. Finally, in the absence of reforms, the judiciary would have to be confident in creatively interpreting current dispositions so as to fully include performers in the realm of copyright. All those points acknowledge the normative power of judges in modernising their domestic intellectual property framework. Although they are not supposed to directly author the law, they do contribute to re-shaping its substance by enforcing it on a case-per-case basis.<sup>101</sup>

*i. Opening the gate to new references*

Chapter Five reviewed the body of literature that could be effectively relied on in order to align the applied letter of the law with contemporary theories on performances, authorship and creativity. Drawing on Kozinski J's experience with the ninth circuit court of appeal, it is contended that the sensitisation of the judiciary to cross-disciplinary theories ought to be built in their training as early as their first introduction to performers' rights in university curricula. This strategy would allow contemporary paradigms on performances to not be the mere fleeting eccentricities they have been taken for by Kozinski's detractors,<sup>102</sup> but a body of theories with which the legal audience would be familiar, at least from an academic perspective. To this aim, it is claimed that reforming intellectual property curricula, whether delivered at universities or later as part of professional trainings, may prove useful to

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<sup>101</sup> Sara Ramshaw, 'Jamming the Law: Improvisational Theatre and the "Spontaneity of Judgment"' (2010) 14 *Law Text Culture* 133, 142-4.

<sup>102</sup> See the majority decision in *Garcia v Google Inc*, 786 F 3d 733 (9th Cir 2015).

modify counsels' and judges' position towards performers' input in the chain of creative value protected by copyright.<sup>103</sup>

Exposure to cross-disciplinary references, if not training, is believed to be all the more relevant that the remits of intellectual property laws are closely connected to understanding the subject-matter it regulates.<sup>104</sup> This training must, however, ensure to encompass contemporary literature so as to avoid the sole repetition of outdated, conservative references.<sup>105</sup>

ii. *Side-stepping old references*

Not matter how convinced by cross-disciplinary literature precedent-abiding judges may be, earlier case law is clear: performers are not authors, interpretation is not composition. This statement was grounded in the law and applied as such by preceding decisions in nearly every jurisdiction included in this analysis.<sup>106</sup>

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<sup>103</sup> In the context of new technologies, judges of the ninth circuit court of appeal may have even suggested that such training should take place in the courtroom and be properly embedded in the decision's report, in extreme cases: "I salute the district court and the parties for having held a tutorial on the technology. It was undoubtedly valuable to the district judge. The only problem is, it was unreported (which is understandable, as a principal benefit of a tutorial is the opportunity for informal exchange) and thus, it was unavailable to assist *us*. In future cases where such formats are used — and I encourage it, having benefitted from similar tutorials when I served as a district judge — I urge district judges and litigants to consider the possibility of videotaping the tutorial for whatever assistance it may be to the court of appeals", in *Altera Corp v Clear Logic Inc*, 424 F3d 1079 (9th Cir. 2005) 1093.

This validity of this argument is comforted by the fact that legal scholars with a background in the performing arts or who have engaged with interdisciplinary work in the context of performances support the idea that performers' input is as valuable as that of authors and should be protected as such. See for instance, Robert Homburg, *Le Droit d'Interprétation Des Acteurs et Des Artistes Exécutants* (Receuil Sirey 1930) 68-92; Richard Arnold, *Performers' Rights* (4th edn, Sweet and Maxwell 2008) 241; and more generally, Andreas Rahmatian, *Copyright and Creativity: The Making of Property Rights in Creative Works* (Edward Elgar 2011) 42.

<sup>104</sup> Those points were raised by Kozinski J in his keynote, see Alex Kozinski, Judge of the Ninth Circuit Court of Appeal of the United States, 'IP and Advocacy' (The Sir Hugh Laddie Lecture given at the UCL Institute for Brand and Innovation Law, London, 24 June 2015). The Court relayed similar comments in relation to judges' technological literacy in *Altera Corp v Clear Logic, Inc*, 424 F 3d 1079 (9th Cir. 2005) 1084, 1093.

<sup>105</sup> Lionel Bently points to this issue when he underlines the similarity of educational background in music received by both judges and expert witnesses leading to the former accepting with great 'deference' the arguments of the latter, in 'Authorship in Popular Music in UK Copyright Law' (2009) 12 Information, Communication and Society 179, 194 n46. The same point was also discussed in Stephen Skopelj, 'The Boundaries of Authorship and Performance in Musical Copyright' (2015) 15 UNSWLJ, 24.

<sup>106</sup> The exception being France; see text to note 267, Chapter 2.



Possibilities to by-pass earlier authorities siding against performers' authorship will be specific to each jurisdiction, and so would be each dispute presented before judges since finding for authorship is extremely fact-sensitive.<sup>107</sup> The following comments will illustrate options for doing so, but is by no mean an exhaustive report of all solutions as they only focus on the British jurisdiction.

The first avenue to consider lies in the fact that the statutory provisions the former applied may have been repealed since then. This was notably the case for *Godfrey v Lees*,<sup>108</sup> *Hadley v Kemp*<sup>109</sup> or *Island records v Corkindale*<sup>110</sup> where judgements were passed as per provisions of the 1956 Copyright Act. Courts could then argue that the CDPA commands a different ruling as it introduced new perspectives on authorship and evidenced care for the protection of performers' interests.<sup>111</sup> This possibility was suggested in passing by High Court of Justice in *Sawkins v Hyperion Records Ltd*<sup>112</sup> by Patten J.<sup>113</sup>

An alternative option would utilise the flexibility in defining the copyright work introduced by the *Infopaq* jurisprudence to depart from previous authorities. Though possible, this option was considerably hampered by British courts' interpretation which considered that the European authorities did not substantially differ from what was already enforced at the domestic level.<sup>114</sup>

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<sup>107</sup> Bently (105) 192; see also n 66, Chapter 4. See the *Henderson* case for an example where fact-sensitivity was stressed to avoid the application of a precedent, in *Henderson v All Around the World Recordings Ltd & Anor* [2013] EWPC 7, para 43-4.

<sup>108</sup> *Godfrey v John Lees* [1995] EMLR 307 [1990] 2 All ER 1024.

<sup>109</sup> *Hadley v Kemp* [1999] All ER (D) 450; [1999] EMLR 58.

<sup>110</sup> *Island Records Ltd v Corkindale* [1978] Ch. 122, 132.

<sup>111</sup> Indeed, the 1988 CDPA was the first act to formally introduce (civil) performers' rights. This may have modified the understanding of performers' work, and their relationship with authors, or authorship, opening in turn an avenue for judges to explore in redefining the previously accepted boundaries of interpretation of interpretation or composition.

<sup>112</sup> *Sawkins v Hyperion Records Ltd* [2004] EWHC 1530 (Ch) [2004] 4 All ER 418.

<sup>113</sup> *ibid*, para 59.

<sup>114</sup> See the interpretation of the European jurisprudence on the originality and categorisation conditions expressed by the British judiciary in the following cases : See for instance the legal analyses in *The Newspaper*

iii. *Stepping in improvisation*

Opening intellectual property disputes to new references is likely to lead judges to depart from the letter of the law. Courts would thus be confronted not only with the task of inviting a new repertoire of references, but with the responsibility of improvising a new set of rules by interpreting the regulatory framework through an innovative, contemporary and cross-disciplinary lens. This new approach to passing judgements may provoke concerns of unpredictability, inconsistency and judicial activism as judges would be<sup>115</sup> in effect granted a licence to ‘improvise’ a large part of the law. Yet, it is claimed that, improvisation, has always been at the core of passing fair judgements, if not all judgements.<sup>116</sup>

In her work, Sara Ramshaw stresses the improvised component of legal decision-making in the context of family law.<sup>117</sup> She underlines the similarities between theatrical, musical and ‘legal’ improvisations, by drawing parallels between the responsibilities of litigating sensitive disputes to the task of improvising in a theatrical or musical context. In doing so, Ramshaw corrects two preconceptions about passing legal judgements and artistic improvisation. Firstly, she emphasises that theatrical or musical improvisation requires knowing and abiding by a large number of conventions whether concerned with the stage, the audience, collaborators, or the content itself such as tempos, harmonies and so forth.<sup>118</sup> Secondly, Ramshaw points

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*Licensing Agency Ltd v Meltwater Holding BV* [2011] EWCA Civ 890 ; [2012] Bus LR 53; or in *Taylor v Maguire* [2013] EWHC 3804 (IPEC) ; [2014] ECDR 4. On this, see also text to note 156, Chapter 4.

<sup>115</sup> Ramshaw *Jamming the Law* (n 101) 142-3. The British jurisprudence on performers’ civil cause for action preceding the reform introduced by the CDPA 1988 on this point corroborates this interpretation. On this, see text to note 305, Chapter 2.

<sup>116</sup> Ramshaw *Jamming the Law* (n 101) 133.

<sup>117</sup> see generally, Sara Ramshaw, *Justice as Improvisation* (Routledge 2013) ; Sara Ramshaw, ‘Jamming the Law: Improvisational Theatre and the “Spontaneity of Judgment”’ (2010) 14 *Law Text Culture* 133 ; Sara Ramshaw, ‘The Paradox of Performative Immediacy: Law, Music, Improvisation’ [2013] *Law, Culture and the Humanities* 1; Sara Ramshaw, ‘Deconstructin(g) Jazz Improvisation: Derrida and the Law of the Singular Event’ (2006) 2 in *Improvisation/Études critiques en improvisation* 1.

<sup>118</sup> Ramshaw *Justice as improvisaton* (n 117) 7.

to the fact that every judgement is in part improvised or 'spontaneous', even when respectful of previous precedents,<sup>119</sup> because each decision is indeed fact-sensitive.

Drawing on Derrida's theory, the scholar argues that a better understanding of theatrical or musical improvisers' training and approach to what makes 'good' improvisation could provide a useful insight in perfecting a skill which is transferable to judges' practice.<sup>120</sup> Indeed, adapting a general rigid framework to the specificities of each case requires the investment of both thorough knowledge of the rule of law and creative interpretation of it. This is precisely where the skill of 'improvising' would come into play. Theatrical and musical improvisation is set on the very same premises and commandments. It is contended that Ramshaw's conclusions drawn from the experience of judges in family law are relevant to intellectual property law and the present discussion.

The skill of improvising within the boundaries of a rigid framework or within the scope of an open-ended rule of law becomes all the more relevant in a European context since the CoJ appears to have endorsed the approach of the civil jurisdiction.

#### ***b) Advising gatekeepers***

Judges can be assisted in their improvisation by the counsel of other professionals, taking the form of expert opinions or professional conventions. Those two sources of specialised knowledge are examined in the subsequent paragraphs.

##### *i. Inviting expert witnesses*

By definition expert witnesses are trained experts in the field of their trade. Some are also accustomed to infringement procedures, the functioning of courtrooms and

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<sup>119</sup> Ramshaw *Jamming the Law* (n 101) 134, 143.

<sup>120</sup> *ibid*, 134-5.

more generally the intellectual property framework.<sup>121</sup> Between their background and experience, experts may form a bridge for the judiciary to rely on to combine legal reasoning and accessible expert cross-disciplinary knowledge so as to reach the fairest outcome possible. As a matter of fact, expert witnesses are indeed intended to fulfill such role. From this perspective, they would make the Bench's best-equipped assistants in guiding their panels through contemporary performance theories and creativity research.

Yet, not all opinions have proved useful in legal debates. At times, judges have been rather forceful in expressing their distrust of the witnesses testifying before them:

The [expert's] report turned out to be an embarrassment, as it contained material that was not placed in context by any other report [...], and its nature ensured that it contained no nuance.<sup>122</sup>

A number of judges have protested at the willingness of some experts to exploit the ignorance of the court on matters within their special expertise. Where the subject-matter of the action lies in a highly technical area it is of particular importance that the expert is scrupulous in putting forward all relevant considerations which occur to him or her as being relevant to the issue to be decided. The court has no points of reference other than those provided by the expert. It is reprehensible for the expert to hold back relevant information. The danger is manifest. If both experts lack objectivity the court is deprived of any proper basis to arrive at a decision.<sup>123</sup>

This reveals that inviting expert opinions may increase opacity where one would have assumed that resorting to specialists' input would bring clarity.<sup>124</sup> This concern was very clearly expressed in *Altera Corp v Clear Logic Incorporated*.<sup>125</sup> Litigating

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<sup>121</sup> see for example the case of Victor Herbert in Joseph Bellido, 'Looking Right: The Art of Visual Literacy in British Copyright Litigation' (2014) 10 Law, Culture and the Humanities 66, 67; or Guy Protheroe who was involved in various high-profile cases as expert musicologist, see Bently (105) 192.

<sup>122</sup> *Navitaire Inc v EasyJet Airline Co Ltd* [2004] EWHC 1725 (Ch), [2006] RPC 3 at [9].

<sup>123</sup> *SAS Institute Inc v World Programming Ltd* [2010] EWHC 1829 (Ch) para 20 citing *Cantor Fitzgerald International v Tradition (UK) Ltd* [2000] RPC 95, 70.

<sup>124</sup> On this point see also, *Newton v Diamond*, 349 F 3d 591 (9th Cir. 2003) 599.

<sup>125</sup> *Altera Corp. v Clear Logic Inc*, 424 F 3d 1079 (9th Cir. 2005).

the alleged infringement of copyright vested in computer chips, the ninth circuit court stated:

Where chips appeared to be similar, Congress assumed that admitting expert testimony to assist in determining whether subtle changes in a mask work layout were significant would resolve the problem of distinguishing a copy from a legitimate reverse engineering attempt in most cases.<sup>126</sup>

The same panel later concluded:

[T]his is the type of case in which it might have been useful to have a court-appointed, independent expert. Neutral definitions and a common understanding of the underlying technology would have been extremely helpful as background for determining whether the chips should have been compared for substantial similarity only at the transistor level, only at the component level, or at some level in between.<sup>127</sup>

This points to a series of flaws the assistance of expert opinions may present. First, expert witnesses have been criticised for lacking independence or evidencing bias.

In *Cala Homes Ltd v Alfred McAlpine Homes Ltd*,<sup>128</sup> the British Court stated:

Whilst the court is aware that a party is likely to choose as an expert someone whose view is most sympathetic to its position, the court is likely to assume that the expert is more interested in being honest and right than ensuring that one side or another wins. An expert should not consider that it is his job to stand shoulder-to-shoulder through thick and thin with the side which is paying his bill. The judge is not a rustic who has chosen to play a game of Three Card Trick. He is not fair game. Neither is the truth.<sup>129</sup>

Moreover, expert witnesses may also be influenced by the economic weight of parties on the market, instigating further bias in addition to the pressure inevitably applied by the litigants' payment of their commission fees. They may fear to be

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<sup>126</sup> *Altera Corp. v Clear Logic Inc*, 424 F 3d 1079 (9th Cir. 2005), 1084.

<sup>127</sup> *ibid*, 1093.

<sup>128</sup> *Cala Homes (South) Limited v Alfred McAlpine Homes East Limited* [1995] F.S.R. 818.

<sup>129</sup> *Cala Homes (South) Limited v Alfred McAlpine Homes East Limited* [1995] F.S.R. 818, 821, citing *the "Ikarian Reefer"* [1993] F.S.R. 563. Quotation marks omitted.

black-listed as expert witnesses by influential companies were they to testify against them in court.<sup>130</sup>

For Highbury, Mr Mellor displayed some lack of enthusiasm for the need for expert evidence. In particular, he said that Highbury perceives it to be likely that there will be real reluctance on the part of any would-be experts to give evidence against IPC, an organisation which is regarded as king in the relevant field. The perceived concern of such would-be witnesses is that, if they give evidence, IPC might then put them on a black list and so exclude them from the opportunity of providing services to IPC that it might otherwise have been willing to engage.

Another weakness in relying on expert opinions to guide judges' decision is the fact that most intellectual property tests, notably of infringement or originality, are assessed from the perspective of the reasonable lay-person and not that of an expert. This rule keeps a backdoor open for judges to escape any expert conclusions they would disagree with. In *Norowzian v Arks Ltd*,<sup>131</sup> Rattee J valued his perspective over that of expert opinions presented before him by the parties:

[The expert witness's] approach amounts, in my opinion, to analysing the real effect of the film out of existence. The question whether one film is a copy of a substantial part of the other is, in my judgment, on which can be answered by the judge seeing the films and using the evidence supplied by his or her own eyes, as indeed Mr. Norowzian's expert, Mr. Brignull, inevitably accepted in the course of his cross-examination. In my judgment, the expenditure of time and money on expert evidence on this sort of question is to be deprecated.<sup>132</sup>

The combination of all those pitfalls challenges the ability of expert witnesses to assist judges in their law-making tasks.

ii. *Relying on professional conventions and customary rules*

Alongside expert opinions, customary rules as well as professional conventions, also known as *conventions collectives* in France, may be useful in supporting judges'

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<sup>130</sup> *IPC Media Ltd v Highbury Leisure Publishing Ltd* [2004] EWHC 1967 (Ch) para 10.

<sup>131</sup> *Norowzian v Arks Ltd* [1998] EWHC Ch 315.

<sup>132</sup> *ibid*, para 29.

design of performers' protection. This option was explored and adopted by the French legislator. The IPC directly refers to customary rules in applying the categorisation of performing artists<sup>133</sup> which distinguish between performers, auxiliary performers and models.

This strategy enables the enforcement of a one-size-fit all regime in the first place whilst leaving room for tailoring the law to specific needs in the second. Nevertheless, this legislative construction is far from perfect. The French system fell short by assuming that every artistic sector was organised and uniform enough to formulate consensual definitions of what distinguishes a performer, from an auxiliary performer or a model. Case law reveals that, on many occasions, the French bench had to design the rules collective conventions failed to provide. In their task, they relied on expert evidence as well as tests of originality they had devised.<sup>134</sup> Judges explicitly rejected the option of drawing on the customary rules applicable to particular fields to fill in the gaps left in others.<sup>135</sup> Despite its loopholes, this regulatory framework successfully delivered a model meeting its stakeholders' expectations wherever guidelines were supplied by the relevant professional bodies. On this basis, it is believed that the input of unions or other organised professional representatives may prove useful in devising a better and fairer body of performers' rights.

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<sup>133</sup> IPC, L 212-1.

<sup>134</sup> Paris, 18ème ch., 18 février 1993, n° [XP180293X] : D. 1993, p 397 note Weksteinbeg (no collective conventions or customary rules available in the context of dance performers) ; Paris, 4ème ch., 4 juillet 2008, n° 06/21406, Universal Music... : RTDCom. 2008, 745, obs. Pollaud-Dullian (no collective conventions or customary rules available in the context of music performances).

<sup>135</sup> The Courts refused stating that extending the scope of one collective convention to another field would defeat the legislator's intent to let each sector tailor the law to their needs. See, Paris, 18ème ch., 18 février 1993, n° [XP180293X] : D. 1993, p 397 note Weksteinbeg (no collective conventions or customary rules available in the context of dance performers) ; Paris, 4ème ch., 4 juillet 2008, n° 06/21406, Universal Music... : RTDCom. 2008, 745, obs. Pollaud-Dullian (no collective conventions or customary rules available in the context of music performances).

The previous paragraphs offered suggestions for reforms or changes at every level composing legal authorship: the author, the work, and the originality condition. One condition to protection, fixation, was left out of the present chapter because it was dealt with in more details earlier in this analysis.<sup>136</sup> This particular question was ignored because the issue has been discussed in more details in previous developments and in greater length in the literature.<sup>137</sup> It is the author's contention that the fixation problem seems to have been used as a pretext to rule out the possibility of protecting performers as authors for all the cultural reasons explained in preceding chapters.<sup>138</sup> Cases from various jurisdictions proved that western intellectual property frameworks are indeed able to function efficiently even when handling material as intangible as performances.<sup>139</sup>

The theoretical feasibility of creation a performers' copyright is not the only concern which would stand against the present proposals. Many may take issue with the practical question of managing and enforcing performers' augmented rights. The last section of this chapter reviews those concerns with the view to mitigate their reality and reach.

### **III. Managing without divides**

Dropping the author-performer divide raises a larger number of question pertaining to the attribution and administration of performers' protection once upgraded to the standard of copyright. Those questions stem from the difficulty of foreseeing

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<sup>136</sup> text to note 85, Chapter 1.

<sup>137</sup> *ibid.*

<sup>138</sup> For the influence of the doctrine of *ex nihilo* creation, the intellectualisation of creativity and the disembodiment of performances see Chapter 3, 4 and 5 respectively.

<sup>139</sup> text to note 126, Chapter 1.



straightforward infringement procedures involving performances, and the possibility of paralysing the management of both performers' and authors' rights, especially in the context of complex creative productions. The following developments envisage in turn the different folds of those arguments in turn.

### **A. Creation of rights**

Extending copyright to performances, or upgraded performers' rights to the standard of their authorial counterparts will require defining the scope and boundaries of those new privileges. What would the conditions of attribution of a performer's copyright be? Which performances are protected and when does their protection begin?

Fortunately, those questions were, at least in part, answered by the introduction of performers' rights at the international and domestic level. Although one might argue that the current definition of protectable performances or of protected performers is unsatisfactory, the presence of those rights remain proof that policy-makers and courts are able to create a legal nomenclature for this type of artistic expression. For this reason, the present developments will not delve into more details regarding the definition of performers or performances.<sup>140</sup> The current framework could be improved through the consultation of performers' unions and representatives so that the relevant categories of performative works find themselves covered by future proposal of reforms.

It is also submitted that the level of originality performers should display in order to be eligible for their (augmented) rights, was it to be made a requirement for their protection, would be left to the courts to define, as it was and still is the case in the

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<sup>140</sup> For additional comments on this see text to note 21, Chapter 1.

context of authorial works. In this process, the courts may rely on elements suggested in previous paragraphs such as embodiment or personality, as well as expert opinions.<sup>141</sup>

In light of previous comments, the only consideration which is yet to be answered or decided is the point of departure of augmented performers' rights, or of performers' copyright. Performers' rights currently protect the artists' consent from the making and use of recordings of his/her performance, and subsequent uses. Therefore although the right may be considered as vested in the performer from the moment of performance, one might say creation, it only becomes actionable upon fixation of the performance.

This situation is not dissimilar to what can be found under the copyright provisions in Australia, UK and US.<sup>142</sup> Indeed, as mentioned in previous developments, though the fixation requirement is a necessity to obtain authorial rights, the latter protect the work retrospectively so as to include in its coverage the period situated between the moment of creation and the moment of fixation.<sup>143</sup> France operates under slightly different principles as the IPC considerably relaxed the requirement of fixation to officially enforce no such condition - although procedural rules in cases of infringement would necessitate a degree of materiality of the work to be protected in courts.<sup>144</sup> Taking into consideration rules applicable to authors' rights, it seems as though performers' improved protection ought to be triggered by the act of creation, or in their case the act of interpretation rather the moment of its material fixation in recordings. That said, the moments of fixation and of interpretations should almost always coincide. Therefore, the practical importance of distinguishing between the

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<sup>141</sup> On this see text to note 88 and 121.

<sup>142</sup> text to note 134, Chapter 1.

<sup>143</sup> *ibid.*

<sup>144</sup> text to note 134, Chapter 1.

two events in relation to performances may be moot. Nevertheless, the distinction may hold grounds to justify its presence for at least three reasons.

First, policy-makers may wish to anticipate future technological advancements which may radically change the ways records are made nowadays. Second, maintaining the point of departure of performers' rights on the day of interpretation rather than the day of fixation achieves a full alignment with traditional copyright holders from a theoretical perspective, but also in jurisdictions where the moment of creation suffices to trigger legal protection such as France. In Australia, the UK and the US, the same alignment would be performed by recognising performers protection upon fixation with retrospective effect from the day of interpretation. Third, including the day of interpretation as a parameter of the legal protection of performers also confirms the fact that the subject-matter protected by reformed performers' rights is not merely the use of the recorded performances but its underlying immaterial components too. Under rare circumstances, this may allow performers to protect their interpretation against imitation or other acts which would otherwise not amount to literal copying.<sup>145</sup> This last point is further discussed in the following paragraphs.

## **B. Infringement of rights**

Aligning authors and performers' rights supposes the creation of greater depth in the current protection of performers which remains limited to consenting to the fixation and use of one's recorded performance.<sup>146</sup> This proposition soon triggers concerns related to the possibility of sanctioning non-literal copies of performances. The issue

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<sup>145</sup> This gap between the protection of authors and performers was stressed in Chapter Two, see text to note 74, Chapter 2.

<sup>146</sup> text to note 67, Chapter 2.

of distinguishing between original elements pertaining to a performative input and those stemming from the underlying work may also present itself as a potential challenge for the courts. Those observations combined, although never raised until now,<sup>147</sup> may spur reluctance amongst the judiciary who is expected to pave the way for a reform favourable to introducing performers' copyright, or equivalent.

## 1. Unwanted flattery

One of the key substantial differences between current authors' and performers' rights is the fact copyright covers the immaterial side of the work, whereas performers' protection does not.<sup>148</sup> Performers' rights are constrained to sanctioning the unauthorised fixation of performances and its use, but no elements composing the performance itself, nor the performing style falls within that scope. As it stands, performers are therefore unprotected against the imitation of their performances or performing style,<sup>149</sup> unlike authors who may find in copyright legal remedies against such unwanted flattery.<sup>150</sup>

A few simple objections can be raised to mitigate this fear of subjective decisions ruling over alleged imitations of performances. First, the task of drawing fine lines

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<sup>147</sup> As far as the author is aware.

<sup>148</sup> text to note 78, Chapter 2.

<sup>149</sup> For an express refusal to include imitation within the range of act prohibited by performers' legal protection, see *Booth v Colgate-Palmolive Company*, 362 F Supp 343 (Dist. Court, SD New York 1973) 346.

<sup>150</sup> France: Cass, 1<sup>ère</sup> civ. 4 février 1992, n° 90-21.630: Bull. 1992 I N° 42 p. 31; D. 1992. p.182 (The novel (*La Bicyclette Bleue*) infringed the Margaret's Mitchell famous novel "Gone with the Wind" by re-using storylines, key scenes and character in its modern adaptation); UK: *Temple Island Collections Ltd v New English Teas Ltd* [2012] EWPC 1, [2012] FSR 9 ; [2012] All ER (D) 49 ; [2012] ECDR 11.

<sup>150</sup> France: Paris, 1<sup>ère</sup> ch., 11 mai 1965, *Dali c/ Théâtre royal de la monnaie de Bruxelles et a.* : D. 1968, 382 (the painter who draws the sketches for the purpose of making costumes, also own the rights in the costumes themselves); Cass, 1<sup>ère</sup> civ, 12 juin 2001, n° 98-22.591 : Bull civ. 2001 I N° 171 p. 111 (*Le Petit Prince* case, the owner of a literary work also controls its conversion into a cartoon); UK: *Bauman v Fussell* [1978] RPC 485 (18 May 1953); US: *Pickett v Prince*, 207 F3d 402 (7th Cir.2000) 405, 406 (the adaptation of a the two-dimensional symbol into a three dimensional object infringes the copyright vested in the symbol), *Entertainment Research v Genesis Creative Group*, 122 F3d 1211 (9th Cir. 1997) (on costumes infringing the copyright in two-dimensional cartoon characters).

between un-authorised non-literal copying and imitation falling outside the scope of copyright has been a responsibility resting on judges since the introduction of copyright laws. Indeed, this complex exercise is already at the heart of copyright infringement procedures and the burden of identifying substantial similarities or applying any other test is no greater because the subject-matter now considered would include comparing one performance to the other. Judges would be able to resort to the same skills, experiences and resources such as expert evidence and specialist literature to guide them through the litigation of those cases.

Second, one could argue that the embodiment process so often mentioned in this analysis would theoretically prevent any admission of a non-literal copy of a performance by another person, another body. Indeed, if one considers that each performance is unique not only to particular moment in time, but also to a particular performer, no two performances can be the same, whether performed by the same person or not. Therefore the un-authorised reproduction by another performing body of a protected performance should be theoretically impossible - in accordance to the embodiment theory which bases the legitimacy of performers' augmented protection in the first place. Yet, this argument of embodiment only defeats the possibility of an exact replica of a performance by another performing artist. The embodiment theory does not prevent the eventuality of an interpretation being substantially similar to a previous one, especially less so now that performances can be recorded with a very high level of accuracy and re-played at leisure at very low cost. Moreover, the embodiment theory would argue against the likelihood of two separate individuals coming up with the near identical performances of the same work. Similarities may indeed be caused by the guidance of the underlying work or the pressure of following performing conventions. Yet the marginal difference made up by the performances

between those parameters and the completed performance delivered on stage or in studios remains the fruit of a unique set of factors personal to each individual performers. Therefore, for the result of the equation which includes all those elements to be exactly the same, imitation or copying is likely to have taken place, making this hypothesis worth considering for infringement purposes.

Finally, one might find comfort in the idea that non-literal copying of performances is likely to constitute a smaller portion of the disputes generated by the introduction of augmented performers' rights. It is expected that the vast majority of disputes will still centre on the un-authorised fixation and un-authorised use of recorded performances as those infringing acts remain more common than imitation of performances, and their associated litigation avenues more familiar to right-holders and their counsels.

## **2. Disentangling original inputs**

One may also legitimately fear that granting copyright protection, or any equivalent, to performances will put subsequent interpretations of the same work at risk of infringing preceding ones. As a result, performers' liability to intellectual property infringement would increase significantly, thereby deterring them from practising their art by way of automatic reflex. This situation would defeat the primary purpose of augmenting the protection of performers according to the traditional theory that intellectual property laws, especially since copyright and authors' rights are driven by the goals of incentivising creative individuals.

This concern bases its argument on the idea that judges would not be able to distinguish between compositional input and interpretative contribution worthy of the same protection. However, this exercise has been practised by the courts of

Australia,<sup>151</sup> France,<sup>152</sup> the UK<sup>153</sup> and the US<sup>154</sup> on many occasions, without questioning judges' ability to draw the lines which maintain the author-centred nomenclature national frameworks currently enforce. This analysis simply encourages judges to continue engaging with the same qualification task but with reference to more current indicators of originality, and definitions of authorship or performership. This line of litigation may involve a degree of subjectivity, yet it is contended that the latter is no less present in the context of traditional copyright cases.<sup>155</sup> On this point, the French Bench noted that the fact a work could be perceived in different ways by different individuals should not be an obstacle to copyright protection, even though the lack of objective reference to the work complicates the litigation of such those rights.<sup>156</sup> This proves that seating judges are comfortable with the idea of engaging in decision-making which may involve various degrees of subjective assessments of the disputed subject-matter.

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<sup>151</sup> *CBS Records Australia Ltd v Guy Gross* (1989) 15 IPR 385, 932; see also text to note 209, Chapter 2.

<sup>152</sup> Paris, 3 décembre 2004, *Sorbelli c/ Yoshida*, n° 04/06726: D. 2005, juris, p. 1237 [lexbase=A0681DGC], JCP E 2005, No1863 para 3; see also, text to note 209, Chapter 2.

<sup>153</sup> See for example, *Hadley v Kemp* [1999] All ER (D) 450, para N5 ; *Coffey v Warner Chappell Music Ltd* [2005] All ER (D) 329, para 5 to 7 ; *Bamgboye v Reed* [2002] EWHC 2922 (QB) [2004] EMLR 5 ; On this, see also *Bently* (n 105)185-7; *Skopelja* (n 5).

<sup>154</sup> *Neri v Monroe*, 726 F 3d 989 (7th Cir. 2013) 992 ; *Erikson v Trinity Theatre Inc et al*, 13 F3d 1061 (7th Cir 1994) 1072 ; *Newton v Diamond*, 349 F 3d 591 (9th Cir. 2003) 595; see also text to note 209, Chapter 2.

<sup>155</sup> Even though judges may traditionally be reluctant to the idea of passing aesthetical judgment, the latter nevertheless infiltrate legal reasoning's trading the fine line between legal and aesthetic principles especially when statutory provisions come close to invite them to do so, taking for example provisions applicable to artistic craftsmanship. The lack of definition of the notion of 'artistic craftsmanship' led courts to design awkward guidelines as to what constituted protectable craftsmanship and what did not, mixing both legal and aesthetical judgements. On this, see text to note 395, Chapter 2.

<sup>156</sup> In 2006, the Court of Appeal of Paris concluded that perfumes could indeed be protected even if they were hardly ascertainable because sometimes perceived by different individuals. See, Paris, 25 janvier 2006, n° 04/18300: D. 2006 jurispr. P 580 obs. Daleau; JCP E 2006, 1386 note Caron (concluding that perfumes are protectable by copyright even though they may also be patented). The decision reads: Considering that the fixation of the work is not a requirement of legal protection so long that the work is perceptible; that a fragrance whose olfactory composition is determinable satisfies this condition, no matter whether the composition can be experienced differently by different individuals unlike literary, graphic or musical works which, too, demand the execution of savoir-faire"; author's translation, see original text in Appendix 1.

## **C. Management of rights**

Detractors to performers' augmented rights often solely focus their efforts on issues regarding the management of rights.<sup>157</sup> First in line are arguments questioning whether increasing the substance of performers' rights will, in practice and effect, translate into an actual and substantial improvement of their economic power. In short, this questions whether more rights would mean more protection. Additionally, author-centred arguments would and could argue that the arrival of new recipients eligible to full copyright in the interpretation of underlying work they own will prejudice their interest. From their perspective, more protection for performing artists would equate to diminishing the substance of their rights. The following section examines counter-arguments to those two issues taken with the notion of equal protection between authors and performers.

### **1. More rights, no more protection**

Improving performers' legal protection may not translate into bettering their economic situation. Often placed in a weaker bargaining position, performers may have neither the opportunity nor the resources to action their rights. It might be that imbalanced contractual arrangements waive their protection and assign their copyright for the same amount of money they would obtain through the performers' rights currently covering their practice.

An extreme solution to this issue would be to make performers' rights equal to authors' as well as going further by making their copyright neither waivable nor transferable. However, doing so would give rise to a number of issues. First this would introduce an unbalance in favour of performers, making their protection of a

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<sup>157</sup> On this see text to note 53 (layering of rights) and to note 39 (floodgate argument), Chapter 1.



higher standard than that of authors for no justifiable or logical reasons besides correcting current economic patterns. Second, 'un-waivability' and non-transferability would be both contradictory to the nature of copyright and burdensome for its management. Indeed, copyright incentivises the commercialisation of creative works to later reward their production. It is contended that locking the mobilisation of works involving performers would defeat this objective. This is not to suggest that granting non-transferable performers' rights would be unworkable. The introduction of a carefully crafted licensing scheme whereby performers retain the long-term control of their rights whilst allowing the immediate commercial exploitation of their works, could alleviate those concerns.<sup>158</sup>

Another possibility for policy-makers to secure the economic gain associated with their rights is to further the construction of equitable remuneration introduced in the context of recorded musical performances. This comment refers back to the remarks made earlier with regard to the abolition of internal divides existing between musical and audio-visual performing artists.<sup>159</sup>

It is asserted that protecting performers on par with authors would not be a vain exercise despite the fact that performers' economic position is slow to improve. Indeed, it would send a cultural message to artists that their respective society values their input in the creative industries, and wishes to reward their contribution accordingly.<sup>160</sup> This comment was made in Sherman and Bently's report commissioned by the Australian government on ways to improve performers' rights

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<sup>158</sup> This model was the one introduced by the German legislator in the context of the transfer of authors' rights. In Germany, authors' rights are not transferable but may be assigned by way of contracts or licenses. See, Copyright Act of 9 September 1965 (Federal Law Gazette Part I, p. 1273), as last amended by Article 8 of the Act of 1 October 2013 (Federal Law Gazette Part I, p. 3714), Art 29.

<sup>159</sup> text to note 3.

<sup>160</sup> Brad Sherman and Lionel Bently, 'Performers' Rights: Options for Reform' (Report to the Interdepartmental Committee 1995) 58-9, para 7.4.3.6.

at the national level in 1995.<sup>161</sup> It is reiterated here as the argument has not lost any of its relevance.

Moreover, the issue that a positive economic impact on performers' working conditions would not necessarily follow suit the introduction of (more) performers' rights, was also a point raised during the debate the British Parliament held when the introduction of civil remedies for the bootlegging of recorded performances was discussed in 1963.<sup>162</sup> Showing a clear sense of pragmatism, Lord Somers compared the introduction of performers' rights to thirty-mile-per-hour limitations placed in urban areas. In his analogy, he points to the fact that the majority of drivers do respect those rules despite the absence of any mechanisms to enforce them.<sup>163</sup> It is contended that, fifty years later, this argument still stands. It is submitted that the introduction and enforcement of performers' augmented rights could be enough of a deterring factor to bent current practices in the creative industries on the long term.

## **2. More rights, less protection**

The last paragraphs of this chapter circles back to specific objections reviewed in the introductory comments of this analysis.<sup>164</sup> It assumes that the criticisms voiced regarding the increase and overlap of both claims and claimants would, again, be raised against the proposal of granting performers with full copyright protection. The following paragraphs suggest ways of addressing this issue, whether performers' protection is made equal to that of authors, or simply improved.

Objections which have already been disregarded will not be repeated here; only issues which have only been mitigated in previous developments will be addressed.

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<sup>161</sup> Sherman and Bently *Options for Reform* (n 160) 58-9, para 7.4.3.6.

<sup>162</sup> HL Deb., 05 February 1963, Vol. 246, cols 512-20.

<sup>163</sup> *ibid.*, 520.

<sup>164</sup> text to note 53 (layering of rights) and to note 39 (floodgate argument), Chapter 1.

Therefore, the section considers primarily the ‘floodgate’ argument<sup>165</sup> in all its declinations. Concerns with regard to parasite claims made by individuals located at the outskirts of what would traditionally be considered as performances from an intellectual property perspective will be tackled first. Second, and lastly, the section concludes by succinctly reviewing solutions to facilitate the pressure added by extending protection to performers equivalent to that of authors.

*a) Coping with flooding and dilution*

The above recommendations do not imply that all performers should be made eligible to full copyright protection or equivalent. Only a section of the group composed by performing artists would qualify for rights equalling that of authors. For this reason, in jurisdictions where either courts or legislators would opt for protecting performers on par with authors, a categorisation of performers similar to the scheme enforced in France would be strongly recommended in order to rationalise which performers would be eligible to legal authorship and which would not. Finally, to further mitigate this fear of dilution, the argument concludes by drawing on the experience of the French and Australian intellectual property systems which protect performers as authors or co-authors without collapsing, or flooding courts with claims.

*i. Performers: a disappearing legal species*

Granting full copyright to performers would in effect make the latter legal authors. As a result, a large portion of performers would be lifted from the latter category to join the ranks of legal authors. Doing so, would reduce the ranks of individuals

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<sup>165</sup> text to note 39, Chapter 1.

considered as performers, possibly to the extent of extinguishing their class. This hypothesis ultimately questions the legitimacy of maintaining a legal regime for performers. Alternatively, the risk would be to fill the category of performers with performative practices originally left out of the scope of intellectual property protection such as sportive performances, journalism to only name a few examples considered as an undesirable stretch of the intellectual property scope.<sup>166</sup> This scenario would create a dilution of the interests protected by authors' and performers' rights by including works or performances located at the outskirts of the subject-matter targeted by intellectual property.

Although those hypotheses are possible risks, they could be easily managed. Indeed, the present analysis does not advocate for upgrading all performers currently protected by intellectual property laws to the level of legal authors. Only those satisfying the originality test proposed in above comments would access to copyright protection or its equivalent.<sup>167</sup> It is contended this situation should concern only a small portion of the population of performers. Furthermore, it is important to note that this analysis does not recommend enlarging of the subject-matter covered by intellectual property laws. Its objective only focuses on reshuffling the distribution of rights amongst artists already protected by copyright and performers' rights.

*ii. Categorising performers*

Jurisdictions contemplating the option of extending copyright to performers are also recommended to accompany the reform with the introduction of a categorisation of performers as it exists in France. Although the French model is to be improved and rationalised on many accounts, its enforcement allows a clearer read of the

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<sup>166</sup> text to note 40, Chapter 1.

<sup>167</sup> text to note 89.

population protected by intellectual property laws whilst allowing for more nuances in protecting it. By creating the categories of author-performers, performers, auxiliary performers and models, the law would devise a scheme which takes into account the different nature of performers' input according to their line of practice. Such scheme would allow a more realistic representation of performers' practices even though the former remains a simplistic representation of their range.

This recommendation is made with the caveats expressed in previous comments with regard to the model currently enforced in France.<sup>168</sup> Inconsistencies and gaps would have to be corrected in collaboration with bodies representing the interests involved, i.e. performers' and authors' unions or societies, and taking into consideration the sliding roles and inputs of each category according to the discipline they are involved in.<sup>169</sup> However, it must be noted that if the categories must be tailored to the artistic market they relate to, the present argument does not recommend the introduction of horizontal internal divides between performers, but only a vertical one for the reasons expressed in previous developments.<sup>170</sup>

*iii. No flooding abroad*

Performers are protected as legal authors or co-owners in both France and Australia, in limited cases.<sup>171</sup> This was achieved without paralysing neither their intellectual property frameworks nor the courts operating them. Although there is no empirical data available to support this claim,<sup>172</sup> the fact that performers' authorship and co-ownership have not been repealed suggests that granting equal rights to performers

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<sup>168</sup> text to note 40.

<sup>169</sup> In 1963, this particular issue was raised during parliamentary debates, and LJ Mancroft suggested that the question of defining eligible performers was a task for scholars and academics to handle. See, HC Deb 21 June 1963 vol 679 cc895, 897.

<sup>170</sup> text to note 32.

<sup>171</sup> text to note 55.

<sup>172</sup> that the author is aware of.

is feasible under both common-law and civil-law inspired intellectual property systems.

*b) Relieving pressure*

This chapter concludes its analysis by pointing to already existing mechanisms designed to manage multiple, sometimes competing, copyright claims involved within the same creative product. It is argued that the same solutions would be able to handle performers' copyright or equivalent, as they do with authors', sound recorders' and broadcasters' interests.<sup>173</sup> It is contended that contractual arrangements, statutory licensing and right collecting societies are all be options to explore in order to facilitate the collection of copyright owned by the hundred musicians playing in McCardie J's orchestra.<sup>174</sup> They aim at releasing the pressure of clashing rights over the same piece of work by rationalising its management. In effect, they offer to manage the undesired phenomenon of layering of rights described in Chapter One.<sup>175</sup>

*i. Contracts*

Copyrights can be transferred, assigned, licensed or left unused by their owners. Performers' copyright or authorial rights would be no exception to this flexibility. Therefore, producers or copyright holders fearful of right management issues may devise contractual agreements to remove this hurdle.

Contractual assignments or transfers of copyright would not be more cumbersome than already existing administrative procedures remunerating performers.<sup>176</sup> From

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<sup>173</sup> The same position is supported by Arnold J. in *Arnold Performers' Rights* (n 50) 10-1.

<sup>174</sup> *Musical Performers' Protection Association Ltd v British International Pictures Ltd* (1930) 46 TLR 485, 488; text to note 77, Chapter 1.

<sup>175</sup> text to note 53, Chapter 1.

<sup>176</sup> See for example, cases requiring the personal authorisation for each performing musicians involved in the ensemble during recording sessions : Cass, 1ère civ, 1 mars 2005, n° 02-10.903 : Bull. civ. 2005 I N° 107 p. 93 ;

this perspective, granting performers copyright would in fact be as burdensome as the protection they currently receive from other intellectual property or employment laws.<sup>177</sup> Neither the number of performers involved in an ensemble nor the fact that each performance may trigger its own copyright are issues which would significantly increase the administrative weight of transferring those rights by contracts. Indeed, actors, extras, session musicians are required to sign presence sheets to count their hours in order to be adequately remunerated for their time. It is customary practice for the same presence sheets to also collect performers' consent to be recorded and the conditions in which such recording may be used in the future. It would thus be reasonable to conceive that the same presence sheets would also gather agreement to assign or license performers' authorial rights was this option adopted by national, federal or regional parliaments. From this perspective, the introduction of performers' copyright would add little, if no, administrative or transactional burden to existing working relationships. The ease with which performers' copyright could be transferred signals that their bargaining power may as easily diminished. This comment ties contractual practices to earlier points made with regard to the realistic impact on performers' working condition of reforms erasing the author-performer divide. Again, although it is accepted the increasing performers' legal protection may not be followed by a proportionate augmentation of their economic power, it is held that such reforms remain a step in the right direction.<sup>178</sup>

*ii. Compulsory licences*

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D. 2005, act. Jurispr. P 1353 note Allaeyts ; Aix, 2ch, 25 juin 1992,: ID no 1992 No 043727 and. Paris, 16 juin 1993, n° [XP160693X] : D. 1994 p 218 Edelman ; D. somm. com. p. 277.

<sup>177</sup> In France, performers are presumed to be employee and benefit from employee's legal protection unless stated otherwise as Art L 7121-3 and L 7121-4 of the Employment Law Code.

<sup>178</sup> text to note 159.

In order to avoid paralysing the utilisation of underlying works' copyright, a system of compulsory licenses extended to all performances could be devised to centralise the management of performers' augmented rights whilst ensuring a fair remuneration for their input. This option has been adopted by many jurisdictions under study<sup>179</sup> in varying contexts whether they helped regulating the use of musical works, orphan works or copyright material used for educational purposes.<sup>180</sup> It is contended that if the same scheme was introduced for the management of performers' copyright, especially in the context of productions involving a large number of performers, compulsory licenses' schemes would be a useful mechanism to reduce the legal pressure increased rights would exert on the management of creative products involving performances.<sup>181</sup> Compulsory or statutory licenses would have to be applicable to all horizontal categories of performers to avoid creating internal horizontal divides between performers.

### *iii. Collecting societies*

Finally, developing the roles of right collecting societies may be a third and last option to consider in order to relieve the pressure of layering multiple copyrights over the same artistic production. However, this suggestion bears at least one caveat. Right collecting societies have been criticised for lacking accountability and

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<sup>179</sup> See for example in Australia: 1968 Copyright Act, s. 47 regarding broadcasting; France: IPC, Art L 214-1; UK: 1988 CDPA, s. 144A ; US: US Code, Title 17, para 111(4)(d).

<sup>180</sup> This list is non-exhaustive. Articles 11bis(2) and 13 of the Berne Convention as well as Article 14 of the Rome Convention introduced the position for domestic laws to tailor compulsory licence schemes in the context of musical works. It has been argued that most countries have under-used this option. See, Waelde and others (n 21) 911.

<sup>181</sup> It is contended that the advantages compulsory licences present in handling the claims of multiple recipients counter-balances the shortcomings of such schemes. See for a case made in favour and against the further implementation of compulsory licensing, Jane Ginsburg, 'Creation and Commercial Value: Copyright Protection of Works of Information' (1990) 90 Colum. L. Rev. See also, Dina Lapolt, Jay Rosenthal and John Meller, 'A Response to Professor Menell: A Remix Compulsory License Is Not Justified' (2015) 38 Columbia Journal of Law and Arts 365.



transparency in the management of artists and right holders' interests<sup>182</sup> which is fostered in part by their dominant positions on national markets,<sup>183</sup> and so despite legislative efforts at national and regional levels to tackle some of those issues.<sup>184</sup> It was also argued that the bureaucratic weight created by those organisations in the right clearance process could now be by-passed by reverting back to individual management thanks to new technologies which offer better platforms for such transactions to take place at low costs.<sup>185</sup> Those observations inevitably challenge the ability for collecting societies to be in charge of the management of more substantial performers' rights. Though their structure and services could be improved,<sup>186</sup> it is submitted that their role would remain essential in tackling concerns related to multiple claims because they have both the experience and expertise in dealing with such transactions.<sup>187</sup>

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<sup>182</sup> Martin Kretschmer, 'Access and Reward in the Information Society: Regulating the Collective Management of Copyright' <<http://eprints.bournemouth.ac.uk/3695/1/CollSoc07.pdf>>, 7 accessed 10 March 2016; Daniel Gervais, 'The Evolving Role(s) of Copyright Collectives' in Christoph Beat Graber and others (eds), *Digital Rights Management: The End of Collecting Societies?* (Stämpfli 2005) 30-5.

<sup>183</sup> Kretschmer *Access and Reward* (n 182) ; Dorothea Senn, 'Competition Law Aspects of Digital and Collective Rights Management Systems' in Christoph Beat Graber and others (eds), *Digital Rights Management: The End of Collecting Societies?* (Stämpfli 2005) 128-9.

<sup>184</sup> Australia: 1968 Copyright Act, s. 135D to 135JAA, 135P to 135SSA, 135SZF, 135 ZWAA, 135 ZZT to 135ZZWA, 135 ZZZH; France: IPC, Title II, Chapters I to II and Chapters V to VII, Title II, Chapter I ; UK: CDPA 1988, Chapters VII and VIII, notably s. 143 and 144A ; US: The US do not regulate the activities of right collecting societies in the context of federal intellectual property law. Title 17 of the US Code acknowledges the existence of such bodies inasmuch as it mentions them on two instances, one of which defines the concept of 'performing rights societies': US Code Title 17, para 114(d)(3)C and 114(d)(3)(E)ii. That is not to say that those organizations are left unregulated as the general framework of antitrust law would apply. ; EU: Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market Text with EEA relevance, see also from the angle of competition law the CoJ jurisprudence in *Tournier and Lucazeau* cases: C-395/07 *Ministere Public v Tournier* [1991] 4 CMLR 248, [1990] 2 CEC 815, [1989] ECR 2521, [1989] EUECJ R-395/87; Joined cases C-110/88, 242/88, *Lucazeau v SACEM* [1989] ECR 2811. See also, *Seen* (n 183) 128-9; Adolf Dietz, 'legal Regulation of Collective Management of Copyright (Collecting Societies Law) in Western and Eastern Europe' (2002) 49 J. Copyright Soc'y U.S.A. 897, 897-901.

<sup>185</sup> Martin Kretschmer, 'The failure of property rules in collective administration: rethinking copyright societies as regulatory instruments' (2002) 24 *European Intellectual Property Law Review* 126, 133; Gervais (n 182) 34 ;

<sup>186</sup> See for ways in which collecting right societies could be improved and monitored: Kretschmer *Access and Reward* (n 182).

<sup>187</sup> Gervais (n 182) 34.

## Summary

The chapter proposed to rationalise divides internal to the category of performers as well as to delete, or at least soften, the external distinction between authors and performers. In so doing, it offered a number of suggestions for legislators or judges to take into consideration when reforming performers' rights at the national level. Although the overall objective of aligning authors' and performers' legal regimes could be regarded as rather radical considering the current stance taken by legal scholarship on the question, the above proposals aimed towards this goal are not. The proposed changes in law or legal decision-making are thought to fit within the current regional and national frameworks, so much so that the introduction of performers' protection equivalent to copyright would not necessarily require legislators to reconstruct their domestic copyright system. It is contended that the necessary changes could be triggered by re-directing key concepts of the intellectual property paradigm such as the originality condition, authorship, performership, approaches to tangibility, or fixation. It is submitted that if those concepts central to the Australian, France, British and American frameworks were to be modernised to take into account contemporary considerations, little work should be required in terms of formal reform. Moreover, the integration of the authors' and performers' legal regimes would contribute to perform a more general mutation of current copyright frameworks. The latter would move away from its current modern model<sup>188</sup> to embrace a contemporary form whose paradigm would welcome both intellectual and embodied forms of creativity, including performances.<sup>189</sup> In the same manner,

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<sup>188</sup> It is contended that the framework currently enforced is still very much entrenched in the 'modern' era of copyright history as delimited by Sherman and Bently in Brad Sherman and Lionel Bently, *The Making of Modern Intellectual Property - The British Experience 1760-1911* (Cambridge University Press 1999).

<sup>189</sup> Sherman and Bently identified that early copyright cases have envisaged the subject-matter with a greater degree of performativity whereby the process could be added to the assessment of a work's originality, bringing

copyright law evolved from a pre-modern to a modern paradigm,<sup>190</sup> the extension of authorial privileges to performers would have its current modern structure mutate into a third contemporary model.

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with it the manual component of the work executed by the artists claiming protection. Brad Sherman and Lionel Bently, *The Making of Modern Intellectual Property* (n 188) 49.  
<sup>190</sup> *ibid.*

# Conclusion

*Interdisciplinary activity, valued today as an important aspect of research, cannot be accomplished by simple confrontations between various specialized branches of knowledge. Interdisciplinary work is not a peaceful operation: it begins effectively when the solidarity of the old disciplines breaks down [...].*<sup>1</sup>

Roland Barthes, 1979

At this point, the author hopes the reader understands why Kozinski J's decision to grant the actress full copyright over her performance in the *Garcia* case<sup>2</sup> was the right one indeed. The subsequent developments synthesise the reasoning this thesis followed to side with the ninth-circuit judge. They review its research questions and findings before tying them back to the wider context contemporary intellectual property laws sit in. Without repeating comments made in previous chapters, this conclusion succinctly summarises the theoretical and practical implications the findings entail. Finally, suggestions for future research with the view to further the contribution of this thesis will close its concluding remarks.

## I. Research questions and findings

This research project assessed the substance of the legal distinction between authors and performers; a feature common to most western intellectual property frameworks and certainly found in all the jurisdictions under study in this analysis, those being Australia, France, the UK and the US. Due the supranational dimension

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<sup>1</sup> Roland Barthes, 'From Work to Text' in Josue v Harari (ed), *Textual Strategies: perspectives on post structuralist criticism* (1979) 77.

<sup>2</sup> *Garcia v Google Inc*, 743 F 3d 1258 (9<sup>th</sup> Cir. 2014).

of this field of law, the scope of this project also included policies initiated at global and regional levels as expressed in international conventions and the framework of the European Union.

The research explored the existence, depth and rationale behind the legal categorisation of artists as either authors or performers, a phenomenon it referred to as the 'author-performer divide'. The main objective was to identify how the divide manifested itself in legal narratives and whether its enforcement was a conscious decision made by policy-makers. Simply put, this analysis aimed to uncover both the divide itself and its foundations by answering how, where, when, why and by whom it has been introduced into the above listed western intellectual property models.

### **A. How & where in the law**

This thesis concluded that the author-performer divide is present at every level of the protection provided by intellectual property laws. Indeed, the name, substance and duration granted to authors or performers bear the mark of a hierarchy favouring the former group. Performers' work is covered by 'neighbouring' rights to copyright within a narrower scope and for a shorter period.<sup>3</sup> Scholars have commented on the fact that the introduction of performers' moral rights by the WPPT in 1996<sup>4</sup> should be interpreted as the breaking of performing artists' glass ceiling, existing in intellectual property frameworks.<sup>5</sup> This claim was vigorously challenged by stressing the number of provisions that continue to maintain a significant gap between copyright and

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<sup>3</sup> text to note 33, 78 and 148 in Chapter 2.

<sup>4</sup> 1996 WIPO Performance and Phonograms Treaty, Art 17.

<sup>5</sup> Mira Sundara Rajan, 'Center Stage: Performers and Their Moral Rights in the WPPT Law, Technology and the Arts Symposium: The WIPO Copyright Treaties: 10 Years Later' (2006) 57 Case W. Res. L. Rev 767; Ruth Towse, 'The Singer or the Song? Developments in Performers' Rights from the Perspective of a Cultural Economist' (2007) 3 Review of Law and Economics 745, 746. See text to note 65, Chapter 2.

performers' rights. There is indeed much to achieve before the regime of authors' and performers' right can be considered harmonised. Performers would have to be granted a protection lasting their lifetime from the day of the first performance plus seventy years,<sup>6</sup> the scope of economic rights would have to be extended to the substance of performances,<sup>7</sup> and two additional moral rights would have to be introduced in jurisdictions which offer the full portfolio of the doctrine.<sup>8</sup> This is without mentioning the internal divide existing between musical and audio-visual performers.<sup>9</sup> None of those changes are minor adjustments for legislators to make. Reforms to the core of copyright and neighbouring rights would have to be implemented, for a levelling of the two regimes to take place. This is because the core of copyright regulation is precisely where the author-performer divide is anchored.

## **B. Written by whom**

Uncovering the divide also revealed its authors. Parliamentary bodies whether located at the international, regional or national level used the letter of the law pertinent to either copyright or neighbouring rights to shape the divide. It is clear from legislative debates and reports commissioned by policy-makers at all those levels that the crystallisation in the law of a hierarchy between authors and performers was no inadvertent move on their part.<sup>10</sup> The author-performer divide is the result of a deliberate choice to favour authors, and to ensure that the introduction of performers' protection would not threaten their rights.

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<sup>6</sup> text to note 148, Chapter 2.

<sup>7</sup> text to note 78, Chapter 2.

<sup>8</sup> in this case, France.

<sup>9</sup> text to note 28, Chapter 2 and to note 3, Chapter 6.

<sup>10</sup> text to note 160, Chapter 2.

In turn, in every jurisdiction the divide was followed by the courts as the sacred expression of legislative intent. In applying the categorisation, judges laid out the flesh on its skeleton built by legislators. They gave the divide a practical significance which had them draw questionable lines between modes of creative expression regarded as either creation or interpretation. Though it must be noted that if the judicial discourse was respectful of the hierarchy created by legislative bodies overall, it has sometimes poked holes in the wall the law erected between authors and performers. On a number of occasions in France, the UK or the US, judges have abolished the author-performer divide<sup>11</sup> or preceded legislative reforms to improve performers' protection.<sup>12</sup> As a result, the distinction between the two groups of artists has been made much more porous in jurisdictions like France where the courts have been particularly active in redefining the scope of authorship and performership.<sup>13</sup>

### **C. When**

It was never the agenda of this investigation to offer a thorough historiography of the author-performer divide. Nevertheless, the research pinpointed the crystallisation of the author-performer divide in the 1960s, more specifically in 1961 with the passing of the Rome Convention.<sup>14</sup> Although traces of the divide have been noted before this particular point in time,<sup>15</sup> the international treaty and the national reforms it triggered formalised in intellectual property paradigms. The 1961 Convention and its requirement on signatory states to provide performers with a civil right of action separate from copyright, was the first time the distinction was materialised on

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<sup>11</sup> text to note 259, Chapter 2.

<sup>12</sup> cf. in the work of the Courts in the UK, text to note 305, Chapter 2.

<sup>13</sup> text to note 260, Chapter 2.

<sup>14</sup> text to note 12, Chapter 2.

<sup>15</sup> text to note 160, Chapter 2.

statutory intellectual property grounds at the international level, signalling thereby the consensus of western policy-makers in this regard.

#### **D. Why**

Explaining the rationale behind the divide has been the main research objective of this thesis. It avoided reiterating arguments which had the discussion stagnate on questions of fixation or hypothetical legal millefeuilles.<sup>16</sup> Instead, a deeper investigation was carried out into the reasoning deployed by courts and policy-makers to justify the divide. Surprisingly perhaps, the justifications usually articulated in the literature on this point were not necessarily dominating the legislative or judicial narrative. Careful qualitative analyses of the those discourses revealed that most decisions and reports were motivated by more complex underlying cultural beliefs on creativity, authorship and performership which played against the evaluation of performers as equal to authors, going beyond mere legal or economic concerns. The same analyses revealed how cultural beliefs framing the notions of creativity, authorship and performership have been imported into the legal discourse to be translated in legal arguments to support the author-performer divide enforced by the law. In so doing, this thesis identified three distinct phenomena which served as the theoretical basis to building a case against performers' equal protection: the doctrine of *ex nihilo* creation,<sup>17</sup> the intellectualisation of the subject-matter protected,<sup>18</sup> and the disembodiment of performances.<sup>19</sup> Three chapters of this thesis were dedicated to explaining and illustrating each argument.

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<sup>16</sup> respectively, text to note 85 and 53, Chapter 1.

<sup>17</sup> see Chapter 3.

<sup>18</sup> see Chapter 4.



Interestingly, each one of these chapters stressed the existence of a gap separating legal conceptions on the notions of originality, authorship and performances from those endorsed by scholars or practitioners in the performing arts.<sup>20</sup> Those discrepancies led this thesis to conclude that the author-performer divide is the result of outdated perceptions of creativity, authoring and performing. It is contended that those legal references should be removed from intellectual property models and replaced by contemporary equivalents found in performance theories and the literature in the arts more generally. Only then will the intellectual property models be able to meet the expectations of a wider range of stakeholders, including both authors and performers.

## **II. Theoretical and practical implications**

This thesis advocated for the removal of the author-performer divide from the intellectual property frameworks listed above because of the discrepancies in understanding performances it creates between the law and the fields it is designed to regulate. It posits that their legitimacy and cultural standing withered a little over half a century ago if one takes the 'performative turn' as the starting point of consensual modern considerations on performers' creativity. It is submitted that the author-performer divide is the remnant of outdated paradigms on both creativity and performances which anchors great *archaism* at the heart of what are supposed to be our society's laws of *innovation*.

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<sup>19</sup> see chapter 5.

<sup>20</sup> text to note 486, chapter 2; to note 188 in Chapter 3, to note 385 in Chapter 4; to note 153 in Chapter 5.

The preceding chapter proposed various ways, some more radical than others, in which the legal frameworks listed above could be geared towards a contemporary model of intellectual property laws rewarding both intellectual and embodied forms of creative expression on an equal basis.<sup>21</sup> One of the main recommendations suggests involving greater '*interdisciplinarity*' in the work of intellectual property lawyers and policy-makers understood broadly.<sup>22</sup> It is submitted that intellectual property paradigms and the enforcement of the rights they offer could be significantly improved by learning more from and about the fields this body of law is designed to regulate.<sup>23</sup> To this end, *interdisciplinarity* ought to be better integrated into the training of policy-makers, judges and counsels. However, as with any work involving an interdisciplinary dimension, one runs the risk of engaging with other fields on a superficial manner, and in turn risks repeating stereotypical concepts or outdated views in relation to those areas. It is believed that this problem can be addressed by ensuring that meaningful collaboration between experts takes place to guide cross-disciplinary ventures.<sup>24</sup>

### **III. Future Research**

Moving forward, the work undertaken by this thesis could be furthered in many ways. First of all, its comparative study could be improved by including in its scope at least Canada and Germany. Both jurisdictions are considered western countries and have developed interesting national intellectual property doctrines. Comparing and testing

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<sup>21</sup> text to note 88 chapter 6.

<sup>22</sup> text to note 100 chapter 6.

<sup>23</sup> text to note 99, Chapter 6.

<sup>24</sup> text to note 121 and 133 in Chapter 6.

the present findings against the Canadian and German frameworks could thus complete the range of this study.

The present argumentation could also gain in strength by including numerical data representing the flow of incomes circulating between producers, authors and performers within different creative markets. Right collecting societies and main music publishers had been contacted in order to obtain such data without success. This area of research was therefore left unexplored.

Keeping to the topic of right collecting societies, further work would have to be undertaken in order to assess whether those institutions are indeed a suitable option to administer performers' *new* rights – were reforms to take place. To this end, more research on their structure, management and distribution policies would have to be carried out.

Additionally, it is contended that a more detailed knowledge of the structure, patterns and functioning of each creative industry employing performing artists could valuably deepen the analyses of this project. For instance, this would enable a more substantial assessment of the relevance of vertically categorising performers as well as allow the research to convert some of its theoretical principles into more practical solutions.

Another recommendation expressed in Chapter Six was to rely on the guidance of expert witnesses to update core concepts of intellectual property laws.<sup>25</sup> Were this route to be taken, it seems necessary to do further research on the procedural rules applicable to expert witnesses in different jurisdictions in order to accurately ascertain the risks involved in increasing the weight of their opinions on the judicial

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<sup>25</sup> text to note 121 chapter 6.

decision-making. In doing so, it would be interesting to investigate judges' relationship or attitudes to expert opinions according to their jurisdictions but also according to witnesses' expertise.<sup>26</sup>

On the same note, judges should also be the focus of further research. More precisely, judges' training should be studied in greater detail to investigate whether a correlation exists between their stake on creativity, authorship and performership and their background.<sup>27</sup>

#### **IV. Original contribution of the research**

As it stands, this thesis offers an original contribution to the literature on performers' protection by providing the first in-depth theoretical analysis of the relationship between performers' and authors' rights at the national, regional and international level. Previous research either focused on detailing the substance of performers' rights,<sup>28</sup> or proposed superficial suggestions as to why performers' rights were designed as the Cinderella sister of intellectual property rights, but no deeper investigation had been carried out.<sup>29</sup> The present analysis bridged this gap in

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<sup>26</sup> Work on this point has already be done by notably Joseph Bellido as far as the British intellectual property system is concerned. See, Joseph Bellido, 'Looking Right: The Art of Visual Literacy in British Copyright Litigation' (2014) 10 *Law, Culture and the Humanities* 66. However, a more extensive and comparative analysis is yet to be performed.

<sup>27</sup> This point was brought up by Lionel Bently in 'Authorship in Popular Music in UK Copyright Law' (2009) 12 *Information, Communication and Society* 179, 192.

<sup>28</sup> See for example, Richard Arnold, *Performers' Rights* (4th edn, Sweet and Maxwell 2008); Owen Morgan, *International Protection of Performers' Rights* (Hart Publishing 2002); Elizabeth Adeney, *The Moral Rights of Authors and Performers: An International and Comparative Analysis* (Oxford University Press 2006); Bonnie Teller, 'Toward a Better Protection of Performers in the United States: A Comparative Look at Performers' Rights in the United States, under the Rome Convention and in France' (1990) 28 *Colum. J. Transnat'l L.*

<sup>29</sup> See for example, Rebecca Tushnet, 'Performance Anxiety: Copyright Embodied and Disembodied' (2013) 60 *Journal Copyright Society of the USA* 209; Paul Olganier, *Le Droit Des Artistes Interprètes et Exécutants* (Librairie Générale de Droit et de Jurisprudence 1937); Judy Kim, 'The Performers' Plight in Sound Recordings - Unique to the US: A Comparative Study of the Development of Performers' Rights in the United States, England, and France' (1986) 10 *Columbia VLA Journal of Law and the Arts* 453 ; Ruth Towse, 'The Singer or the Song? Developments in Performers' Rights from the Perspective of a Cultural Economist' (2007) 3 *Review of Law and Economics* 745.

knowledge by relying on an extensive interdisciplinary qualitative and comparative study of western intellectual property models which included the jurisdictions listed above.

In this process, this thesis uncovered the author-performer divide and the theoretical arguments supporting it: the intellectualisation of the subject-matter protected by copyright, the reproduction of the doctrine of *ex nihilo* creation and the disembodiment of performances. All of those patterns are new conceptual avenues to use and explore when critically assessing intellectual property laws. The findings of this thesis have allowed the discussion on performers' rights to leave the state of stagnation the current literature had it locked in. In doing so, this research revitalised the need for intellectual property frameworks, narratives and models to update their standards of references and cornerstone concepts. Not only would it impact the regime applicable to performing artists, but it would also affect that of any other creative agents currently left out of the scope of copyright protection because of current models' biases towards intellectual creativity and *ex nihilo* creation. Ultimately, this research thus offers a critical lens through which to analyse current intellectual property laws with the view to better protect future forms of creative expressions.

Finally, this thesis also proposes new ways of undertaking qualitative research in intellectual property law. As explained in introductory comments,<sup>30</sup> the research findings were the result of the study of a substantial volume of cases, reports and statutes enabled by the software program *NVivo* which is more commonly used to analyse interviews and testimonies. This methodology allowed the construction of a thorough qualitative data analysis, laying out the solid foundations of this work. It

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<sup>30</sup> text to note 36, Introduction.

contributes to validating the legitimacy and rigour of qualitative studies in law by easing the processing of a significantly larger number of judicial decisions and legislative documents compared to traditional manual techniques.

# Annex 1

## *On harmonization in copyright law (or lack thereof)*

*Referenced in Chapter 1, note 51*

See “Infopaq” case: C-5/08 Infopaq International A S v Danske Dagblades Forening [2009] EUECJ C-5/08\_O and the “BSA” decision: C-393/09 Bezpečnostní softwarová asociace Svaz softwarové ochrany v Ministerstvo kultury [ 2010] EUECJ C-393/09, EU:C:2010:816, ECLI:EU:C:2010:816, [2011] FSR 18, [2011] ECDR 3. Eleonora Rosati, ‘Originality in a Work, or a Work of Originality’ (2011) 58 Copyright Society USA 795, at 803-16; Eleonora Rosati, *Originality In EU Copyright - Full Harmonisation through Case Law* (Edward Elgar 2013), 207. Jonathan Griffiths, ‘Infopaq, BSA and the “Europeanisation” of United Kingdom Copyright Law’ (2011) 16 Media & Arts Law Review.

Outside the scope of the European Union’s authority, there is little in the form of harmonisation. Unsurprisingly perhaps core copyright concepts vary from one national system to another. The definition of the work and the necessary condition to satisfy vary significantly from one jurisdiction to another. Taking the fixation condition for example, whilst it is strictly applied in the United States (US Code Title 17 para 101), United Kingdom (CDPA 1988, S. 3(2)) and Australia (1968 Copyright Act S. 22(1) to (3)), France does not enforce any condition of the sort in theory (see IPC Art L 111-1 and L111-2). The IPC reads that “[t]he author of a work of the mind shall enjoy in that work, by the mere fact of its creation, an exclusive incorporeal property right which shall be enforceable against all persons” and that “[a] work shall be deemed to have been created, irrespective of any public disclosure, by the mere fact of realization of the author’s concept, even if incomplete” (official translation). An exception is made in the case of choreographic works which need to be “fixed in writing or in another manner” (art. L112-2 4°). However, this absence of fixation requirement must be read in light of civil procedural rules which require a form of fixation to pursue litigation in application of the adage “*Idem est non probari et non esse; non deficit jus, sed probatio*” (in English: What does not appear and what is not is the same; it is not the defect of the law, but the want of proof). On this, see Ysolde Gendreau, ‘Le Critère de Fixation En Droit Français’ (1994) 159 *Revue internationale du droit d’auteur* 111. The lack of international harmonisation on the question of fixation is largely due to the failure of the negotiations of the Berne Convention in reaching a consensus on question. See Berne Convention 1886, as amended in 1979, Article 2(2): “It shall, however, be a matter for legislation in the countries of the Union to prescribe that works in general or any specified categories of works shall not be protected unless they have been fixed in some material form.”

As a result of those varying requirements to obtain copyright, the definition of the 'authorial' will vary from one jurisdiction to another, leaving authors protected in some countries and not in other. For example, perfumes are authorial works protectable by authors' rights in France whilst they are unlikely to obtain equivalent protection in the above mentioned jurisdictions for they lack the necessary materiality. See, Paris, 25 janvier 2006, n° 04/18300: D. 2006 jurispr. P 580 obs. Daleau; JCP E 2006, 1386 note Caron (concluding that perfumes are protectable by copyright even though they may also be patented).

The absence of a clear, streamlined copyright framework is also absent from domestic frameworks to the extent that courts find themselves challenged by the application of their own national law. This led Wood J to state that "[t]he standard for copying is surprisingly muddled [...] [t]he various efforts to define these two key concepts [i.e. originality and substantial similarity], however, have unfortunately had the unintended effect of obscuring rather than clarifying the issues." To which he added that "[o]ther circuits have also had trouble expressing the test with any clarity" in *Peters v West*, 692 F.3d 629 (7th Cir. 2012) at 632,633 para 6. On the same note, the same circuit compared the copyright to a "maze" on questions as narrow as the eligibility to protection of video games. Evans J commented: "[i]t seems somehow fitting that the Atari case, involving the insatiable little yellow circle PAC-MAN, is a leading case guiding us through the maze of copyright law as applied to video games" (Evans J.) in *Incredible Technologies Inc v Virtual Technologies Golf*, 400 F3d 1007 (7th Cir.2005) at 1011. On this, see also, Alex Kozinski, 'How I Narrowly Escaped Insanity' (2001) 48 UCLA L. Rev 1293.

In France, the jurisprudence framing the protection of perfumes is equally puzzling as Courts have been accepting or rejecting claims covering fragrances on the basis of conditions foreign to the French Intellectual Property Code. See for an example of contradicting decisions: Paris, 4ème ch., 14 février 2007, n° 06/09813, Beaute Prestige...: JCP G 2007, I, 176 N 4 obs. Caron (agreeing that perfumes are eligible to copyright protection); Cass, 1ère civ, 13 juin 2006, n° 02-44.718: Bull. Civ. 2006 I N° 307 p. 267; D. 2006, act. P 1741 note Daleau ; pan. p. 2993 obs. Sirinelli (accepting perfumes as protectable by copyright on the condition that they are not the mere result of 'savoir faire').



## Annex 2

### *On the jurisprudence on collaboration*

*Referenced in Chapter 1, note 57*

The narrow interpretation of joint authorship is intentional and deliberate. The jurisprudence in each jurisdiction has been very careful not to include too many collaborators in the realm of legal authorship. In Australia: *Dynamic Supplies Pty Ltd v Tonnex International Pty Ltd* [2011] FCA 362 (2011) 91 IPR 488 (no case of joint authorship for several employees working on production of the same document); *Telstra Corporation Ltd v Phone Directories Co Pty Ltd* [2010] FCA 44 (2010) 264 ALR 617 (same position held in this case in the context of directories made by employees of a company) ; *Sanofi-Aventis Australia Pty Ltd v Apotex Pty Ltd* (No 3) [2011] FCA 846 (unreported BC201105581) (the intervention of different persons in the redaction of information sheets, do not make them joint authors of the documents) ; *Prior v Sheldon* [2000] FCA 0438, (2000) 48 IPR 301, para 64 (contributing to the theme of a work does not suffice to obtain joint authorship); *Fairfax Media Publications Pty Ltd v Reed International Books Australia Pty Ltd* [2010] FCA 984 (2010) 272 ALR 547 (the writing of headlines does not trigger joint authorship over the article it refers to); *Brumar Contractors v Mt Gambier Garden Cemetery* [1999] SASC 1636, (1999) 47 IPR 321 (supplying ideas and measurement for the creation of a vault does not amount to joint authorship over its design); *Bartos v Scott* (1993) 26 IPR 27 (collaborators must be involved in fixing the expression of the work to be regarded as joint authors, the mere provision of tables, research and suggestions as to the final format of the work does not suffice); *Primary Health Care Ltd v Commissioner Of Taxation* [2010] FCA 419 (2010) 267 ALR 648 (the contribution of various doctors to the redaction of patient records does not amount to joint authorship over those records).

France: Paris, 1ère ch., 11 mai 1965, Dali c/ Théâtre royal de la monnaie de Bruxelles et a. : D. 1968, 382 (the painter Salvador Dali cannot be regarded as joint author of the ballet for having sketched four costumes out of thirty six as the ballet was inspired by previous works and composed of various contribution from different artists for the composition of the music and the choreography. To be regarded as joint authors, collaborators must share “spiritual intimacy in the making of a common piece of work and create the later by means of their artistic input whether they belong to the same artform or not” author’s translation, the original text reads: “Considérant que sont co-auteurs, ceux qui, dans une intimité spirituelle ont collaboré à l'oeuvre commune et l'ont créée par leurs apports artistiques dans un art semblable ou différent” ; Cass, 1ère civ, 10 mars 1993, n° 91-15.774: Bull. 1993 I N° 105 p. 70 (the re-edition of a guide does not make the second edition a joint work but a derivative work); Cass, 1ère civ, 2 décembre 1997, n° 95-16.653 : Bull.1997 I N° 348 p. 236 ; RIDA 1998 N 176, p. 409 (in the production of a comic, the work of the designer and writer amount to joint-authorship if it is the result of “concerted collaboration and creative efforts with the objective to create the characters”

(author's translation – the original text reads: 'Attendu que les griefs du pourvoi se heurtent à l'appréciation des juges du fond qui ont caractérisé la participation de M. X... pour le graphisme et de M. Y..., pour les dialogues, résultant d'un travail concerté et créatif conduit en commun, en vue de la réalisation des personnages litigieux, qui ont acquis leur identité par la conjonction des efforts des deux coauteurs'. Judges in the first instance enjoy full discretionary power to determine whether the contribution of each collaboration satisfy the test for joint authorship); Cass, 1ère civ, 6 mai 1997, n° 95-11.284 : Bull. 1997 I N 145, p. 97 ; RIDA 1997 N 174, p. 231 Obs. Kéréver ; D. 1998, p. 80 (Judges cannot assume that the collaboration between cartoonists and writers in the context of the production of a comic book will lead to joint authorship, the court must identify their respective contributions in the work and assess their nature before concluding to joint authorship).

United Kingdom: *Celebrity Pictures Ltd & Anor v B Hannah Ltd* [2012] EWPC 32 (19 July 2012) para 1 to 6 (instructions given to a photographer does not amount to joint authorship); *Creation Records Ltd. & Ors v News Group Newspapers Ltd* [1997] EMLR 444, at 450-451 (the person who chooses the angles, sets the scene to photograph and directs the person who presses the button on the camera is the sole author of the photograph, there is no joint authorship involved); *Ray v Classic FM Plc* [1998] EWHC Patents 333, para 27-28 (A joint author is a person “(1) who collaborates with another author in the production of a work; (2) who (as an author) provides a significant creative input; and (3) whose contribution is not distinct from that of the other author.”); *Godfrey v John Lees and others* [1995] EMLR 307; *Wiseman v George Weidenfeld & Nicolson Ltd. and Donaldson* [1985] F.S.R. 525 (the “helpful critic and adviser” of a play is not its joint author as his contribution lacks the necessary “artistic involvement”); *Fylde microsystems v key radio systems* [1998] F.S.R. 449 ; (1998) IP & T Digest 11 (suggesting corrections does not amount to joint authorship); *Levy v Rutley* (1870-71) L.R. 6 C.P. 523 (who suggests an original idea without participating in its expression is not a joint author); *Stuart v Barrett and Others* [1994] EMLR 448, at 463 (same) ; *Cala homes v McAlpine* [1996] F.S.R. 36.

United States: Ripple I. admitted that creative processes are more collaborative than copyright law reflects: “We have observed in the past that published creations are almost always collaborative efforts to some degree—peers make suggestions, editors tweak words, and so forth. Were we to deem every person who had a hand in the process a co-author, copyright would explode.” (citation omitted) In *Janky v Lake County Convention And Visitors Bureau*, 576 F.3d 356 (7th Cir. 2011) at 363 (The artists who compose the music of a song and write its lyrics with the intend to jointly create a work are joint authors); *Gaiman v McFarlane*, 360 F.3d 644 (7th Cir.2004), 2004 Copr.L.Dec. P 28,758 (7th Cir.2004), 69 U.S.P.Q.2d 1946 (7th Cir.2004); *Gaiman v McFarlane*, 360 F.3d 644 (7th Cir.2004), at 658 (if suggestions sufficed to amount to joint authorship, “copyright would explode”); *Seshadri v Kasraian*, 130 F.3d 798, 75 Fair Empl.Prac.Cas. (BNA) 934 (7th Cir. 1997), 72 Empl. Prac. Dec. P 45,111 (7th Cir. 1997), 1997 Copr.L.Dec. P 27,706 (7th Cir. 1997), 122 Ed. Law Rep.

603, 45 U.S.P.Q.2d 1040 (7th Cir. 1997); *Erikson v Trinity Theatre Inc et al.*, 13 F3d 1061 (7th Cir. 1994), at 1064 (inviting authors to contribute to the script of a play does not make them joint authors if the playwright controls “what eventually [is] put in the script”; *Aalmuhammed v Lee*, 202 F. 3d 1227, at 1235-36 (9th Cir. 2000) (“Claimjumping by research assistants, editors, and former spouses, lovers and friends would endanger authors who talked with people about what they were doing, if creative copyrightable contribution were all that authorship required.”).

See also on this, Rebecca Tushnet, ‘Performance Anxiety: Copyright Embodied and Disembodied’ (2013) 60 *Journal Copyright Society of the USA* 209, 216-8

## Annex 3

### *On derivative works*

*Referenced in Chapter 1, note 70 and Chapter 3, note 212*

The Australian and British statutes do not explicitly mention the concept of 'derivative work' in their provisions. The Australian 1968 Copyright Act refers extensively to the concept of adaptation whose definition can be found under s. 31 (1)(vi)-(vii) (4) (5) (7). See, Australian Copyright Office, 'Artists & Copyright' 1, 5 [www.copyright.org.au/admin/cms.../342838564504046861d3bf.pdf](http://www.copyright.org.au/admin/cms.../342838564504046861d3bf.pdf) (accessed 10 March 2016). See also, s. 10, 13 (2), 14 (b), s. 21(2), s. 27(4), s. 40 (1)-(2), s. 41, s.42, s. 43A, s.44, s. 45, s. 46, s. 47. In the British copyright framework, sound recordings, films and broadcast will be regarded as derivative work (See Bainbridge DI, *Intellectual Property* (9th edn, Pearson 2012) 994) so are adaptations (see CDPA 1988, s. 16 9e) and s. 21(1) to (5)).

France: IPC, Art. L. 112-3 refers to "composite work" (*oeuvre composite*) as: "Composite work shall mean a new work in which a pre-existing work is incorporated without the collaboration of the author of the latter work. The authors of translations, adaptations, transformations or arrangements of works of the mind shall enjoy the protection afforded by this Code, without prejudice to the rights of the author of the original work. The same shall apply to the authors of anthologies or collections of miscellaneous works or data, such as databases, which, by reason of the selection or the arrangement of their contents, constitute intellectual creations". Official translation, emphasis omitted.

United States: US Code, Title 17 para 101, 103 (a)-(b). Para 101 reads "A "derivative work" is a work based upon one or more pre-existing works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications, which, as a whole, represent an original work of authorship, is a "derivative work".

Although derivative works are protected by copyright independently from the underlying work, the primary author whose work is being used remains entitled to infringement proceedings if he has not consented to the re-creation of his work.

## Annex 4

### *On collective works*

*Referenced in Chapter 1, note 71*

Unlike derivative works, collective works have been defined with a varying degree of care by all national legislation included in this analysis. In the UK, the 1988 CDPA considers that both works of joint authorship (a) and works “ in which there are distinct contributions by different authors or in which works or parts of works of different authors are incorporated”(b) (CDPA 1988, s. 178 (a)-(b)). In Australia, France and the US, collective works only refer to the second tier of the British definition (1968 Copyright Act, s. 204(2) (a)-(c); IPC, Art. L 113-2; US Code, Title 17 para 101).

Australia: the term ‘collective work’ is mentioned in two places throughout the 1968 Copyright Act (s.204-2 and 239-4 (c)) without clear definition given apart from under s. 204 (transitional provisions) which reads : “collective work means: (a) an encyclopaedia, dictionary, year book or similar work; (b) a newspaper, review, magazine or similar periodical; or (c) a work written in distinct parts by different authors, or in which works or parts of works of different authors are incorporated.” (italicisation omitted).

France: IPC, Art. L 113-2 reads: “Collective work” shall mean a work created at the initiative of a natural or legal person who edits it, publishes it and discloses it under his direction and name and in which the personal contributions of the various authors who participated in its production are merged in the overall work for which they were conceived, without it being possible to attribute to each author a separate right in the work as created.” (official translation)

United Kingdom: the term ‘collective word’ is mentioned at various places throughout the CDPA 1988 without offering a clear definition. See for instance CDPA 1988, s.6 (b), s. 81 (4)(b), s. 116 (4)(a), s. 79 (6)(b), s. 178(b), and Schedule 1, s. 27 (5)(c). Section 178(b) reads: “ [In this Part] ‘collective work’ means [...] a work in which there are distinct contributions by different authors or in which works or parts of works of different authors are incorporated”.

United States: US Code, Title 17, para 101 reads: “collective work” is a work, such as a periodical issue, anthology, or encyclopaedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole.

## Annex 5

### *On the original author's claim over derivative works*

*Referenced in Chapter 1, note 74*

See Annex 3 and Chapter 1, note 70 plus its accompanying text on the regulatory framework of derivative works and adaptations. The overarching claim of the underlying work's author has been confirmed by the Courts:

Australia: *EMI Songs Australia Pty Ltd v Larrikin Music Publishing Pty Ltd* (2011) 191 FCR 444 : "the aural resemblance need not be resounding or obvious" to infringe (on musical derivative works) ; *CBS Records Australia Ltd v Guy Gross* (1989) 15 IPR 385 (on arrangement rights) ; *CHH Australia Ltd v Accounting Systems 2000 (Developments) Pty Ltd* (1991) 20 IPR 555 (on adaptation of computer program); *George Milpurrurru v Indofurn Pty Ltd* [1994] FCR 240 ; [1994] 130 ALR 659 ; [1994] 30 IPR 209 (reproduction of a painting on a carpet); *Australian Medic-C2099.10.30are Co Ltd v Hamilton Pharmaceutical Pty Ltd* [2009] FCA 1220, (2009) 261 ALR 501 (overarching rights in translation).

France: Cass, 1ère civ, 24 novembre 1993, *Dopagne c/ Cts Vian*, n° 91-18.881 : D. 1994, p. 405 note Edelman (adaptation of a novel into a script); Paris, 4ème ch. B, 27 septembre 1996, *Centre culturel Aragon Triolet c/ Instant Théâtre* : D. 1997, p. 357 note Edelman (the adaptation on stage of a play must respect the wishes of the playwright) ; Cass, 1ère civ, 12 juin 2001, n° 98-22.591 : Bull civ. 2001 I N° 171 p. 111 (even though derivative works must respect the rights attached to the underlying work including the right of integrity, such rights must be enforced in light of the needs to modify the work for the purpose of the adaptation); Paris, 5 février 1997, n° 96 02074 (arrangement rights).

United Kingdom: *ZYX Music GmbH v King* (1995) 31 IPR 207 (on arrangement rights) *Brooker & Anor v Fisher* [2008] EWCA Civ 287 [2008] Bus LR 1123, [2008] FSR 26, [2008] EWCA Civ 287, [2008] EMLR 13 (same); *Morrison Leahy Music Limited and Another v Lightbond Limited and Others* [1993] EMLR 144.

United States: *Schroeder v William Morrow & Co*, 566 F.2d 3 (7th Cir. 1977) 3; *Gracen v Bradford Exchange* 698 F.2d 300 (7th Cir. 1983) at 302 (on painting made out of photograph); *Midway Mfg. Co. v Artic Intern., Inc.*, 704 F.2d 1009(7th Cir. 1983) para 8 (derivative work of a video game); *Weinstein v University of Illinois* 811 F.2d 1091 (7th Cir. 1987) at FN3 (however, authors cannot use the derivative work doctrine to enforce a right equivalent to the moral right of integrity); *Pickett v Prince*, 207 F.3d 402 (7th Cir.2000) 405, 406 (the adaptation of a the two-dimensional symbol into a three dimensional object infringes the copyright vested in the symbol); *Neri v Monroe*, 726 F.3d 989 (7th Cir. 2013) 992, 993 (derivative works involved in

the creation of a sculpture); *Benny v Loew's Incorporated*, 239 F. 2d 532 (9th Circuit 1956) 536,537 : (McAllister J) "Whether the audience is gripped with tense emotion in viewing the original drama, or, on the other hand, laughs at the burlesque, does not absolve the copier." (on burlesque adaptation of a play; fair use did not apply); *Entertainment Research v Genesis Creative Group*, 122 F. 3d 1211 (9th Cir. 1997) 1218 to 1221 (costumes inspired by two-dimensional cartoon characters are derivative works infringing the copyright vested in the designs of the characters); *US Auto Parts Network, Inc. v Parts Geek, LLC*, 692 F. 3d 1009 (9th Cir. 2012) 1015,1016.

## Annex 6

### *On one's right to one's name*

*Referenced in Chapter 1, note 197*

France: TGI Paris, 4 juin 2008, n° 05/06811 (In this case the Court awards the dancer damages for breach of the right of image but rejected her claim based on performers' rights declaring that the two protection cannot be cumulated); Cass, 1ère civ, 24 septembre 2009, n° 08-11.112 « Jacky Boy Music »: Bull. 2009, I, n° 184; D. 2009 act. Jurispr. P2486, note Dalleau (the French supreme court held that the use of a performer's image on the cover of a record when neither the use of the photograph nor that of the record was authorised breaches the artist's right to image which bears its own economic value); Paris, 3 décembre 2004, Sorbelli c/ Yoshida, n° 04/06726: D. 2005, juris, p. 1237 [lexbase=A0681DGC], JCP E 2005, No1863 para 3. (reproducing and selling the photographs taken of a performing artist without his consent is a breach of his right of image; the performer was also made co-author of the photograph); Versailles, 9 octobre 2008, Randall G. c/ Ste First Media, n° 06/03959 (In France, the use of a person's voice without his consent is protected by the right to one's image. The same right can be assimilated to the performer's right to control the use of his performance and the moral right to control the use of his name in relation to his performance);

UK: *Campbell v MGV Ltd* [2004] UKHL 22; *Peck v United Kingdom*, [2011] ECHR 1661.



## Annex 7

### *On photographic works and originality in France*

*Referenced in Chapter 2, note 458, 459 and 460; in Chapter 5, note 94*

For instance, the Paris Court would not regard the work of paparazzo as creative.<sup>1</sup> Similarly, sport photographers would contend themselves with shooting football players' performances in automatic mode cannot claim copyright protection for their photographs as they who fail the originality condition.<sup>2</sup> The Paris tribunal explained:

Considering that if the choices in the technical techniques belong to the photographer, whenever the situations he shoots present themselves to his camera during the course of a game, as it is the case here, such situations are to be regarded as banal football actions which have been published in sport magazines for decades; that photographs taken during a game without the protagonists' knowledge is the mere result of chance which founds its source in the phases of the game and whose setting is out of the photograph's control, his input being limited to capturing a fleeting moment; Considering therefore that the collection of indivisible photographs is not eligible to copyright protection as they do not reveal the photographer's personal search for the appropriate angle, frame, contrast or light, and that neither light nor the physiognomy photographed can be protected.<sup>3</sup>

The same position was held regarding team shots, about which the court commented:

“Considering that, as it was correctly pointed out the judges in first instance, this photographic work respects ordinary conventions in the representation of a group of people where the individuals are organised in ranks and lined up so for everybody to be visible; and that the framing is dictated by the necessity to have a shot of the overall group on the photograph; and finally that the exterior background [chosen by the photographer] is barely noticeable; those characteristics are banal for this type of photographic works; Considering the subsequent touching up are the mere results of technical manipulations eased by the use of computer programs designed for

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<sup>1</sup> Paris, 4ème ch., 5 décembre 2007, n° 06/15937, SIPA Press : D. 2008 jurispr. P. 461 note Bruguière; RTDCom. 2008 p. 300 obs. Pollaud-Dullian (the work of a paparazzi is not eligible to copyright protection);

<sup>2</sup> Paris, 1ere ch., pole5, 14 novembre 2012, *SARL Acces Photo c/ Tours FC*, n° 11/03286: inédit. The Australian jurisdiction held a similar position in the context of film recordings of the Olympic Games. The latter cannot be considered as a dramatic works, as the film recorder has no power over the actions taking place before the camera, in *Australian Olympic Committee Inc v Big Fights Inc* [1999] FCA 1042; (1999) 46 IPR 53, para 42.

<sup>3</sup> Paris, 1ere ch., pole5, 14 novembre 2012, *SARL Acces Photo c/ Tours FC*, n° 11/03286: inédit. Author's translation, original text reads : « Considérant d'autre part que si le choix des moyens techniques incombe au photographe, les situations qui, comme en l'espèce, s'offrent à son objectif au cours d'un match ne sont que de banales scènes de jeu ou d'actions footballistiques qui sont données à voir depuis des décennies dans tous les magazines sportifs; que la photographie prise au cours d'un match à l'insu des protagonistes n'est que le fruit du hasard qui trouve son origine dans les phases animées du jeu, dont tant la mise en oeuvre que le résultat échappe à la volonté du photographe qui ne fait qu'intercepter un instant fugace; Considérant qu'il y a donc lieu de considérer que cet ensemble non individualisé de photographies en ce qu'il ne révèle aucune recherche personnelle du photographe sur l'angle de prise de vue, le cadrage, les contrastes, la lumière et les physionomies n'est pas éligible à la protection du droit d'auteur ».

numeric photographic alterations were also banal and did not bear the print of the author's personality".<sup>4</sup>

Other jurisdictions are not as strict and follow a lower threshold of originality as far as photographic works are concerned.<sup>5</sup> One could wonder whether the French approach to photographic works comply with the European doctrine as expressed in the *Painer* decision.<sup>6</sup> In 2015, the Paris Tribunal confirmed the compliance of the French position on the originality of photographic works. The bench held that the characteristics described by the photographer were pertinent to the artistic quality of his work but not to its originality. The originality condition will only be satisfied when the author has injected elements of his/her personality in the photograph which can only be verified by evidencing the 'author's reflexion on the photograph and its subject'. The judges here seemed to suggest that photographic works must be the result of a conscious and careful creation decision-making process by the photographer to be copyrighted. Without this intentional input, the original condition is not met. This interpretation of the originality condition and 'imprint of personality' seems to have raised the threshold of the originality condition by adding another fold of deliberate creative choices to the test. This additional requirement is all the more problematic to enforce that it will rely on artists' ability to bring evidence as to their intent prior to making the photographs which very often are not formulated or expressed but through the photographic work itself.

The difficulty of enforcing this interpretation of the originality condition transpired in an earlier decision of the Paris Court of Appeal in 2008.<sup>7</sup> In this case, the Court concluded that the same shooting, involving the same set and aesthetics lead to the production of both copyrightable and non-copyrightable pictures of the same model. The claimant had been invited to take photographs during the production of a film. The set, some of the lighting, the general ambiance of the scene and the subjects he would photograph were not parameters he was able to control. Therefore, any photographic works capturing those elements would fail the originality requirement. However, the shots which were the result of the photographer directing the actress to take poses going against the general mood created by the film set will be copyrightable. Although the distinction may seem workable in theory, the practical burden of proving and documenting one's intentional decision-making or creative choices whenever involved in a collaborative setting is a heavy onus on the photographers; a burden which is not bore by any other art form protected by French intellectual property law.

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<sup>4</sup> Paris, 1ere ch., pole5, 14 novembre 2012, *SARL Acces Photo c/ Tours FC*, n° 11/03286: inédit; Author's translation, original text reads: « Mais considérant, comme l'ont relevé à juste titre les premiers juges, que cette photographie est conforme aux représentations habituelles de groupe où les personnes sont disposées sur plusieurs rangs et alignées de manière à être toutes visibles et où le cadrage est dicté par la nécessité d'avoir l'ensemble des personnes sur la photographie, qu'enfin le lieu, en extérieur, est à peine visible; que l'ensemble de ces caractéristiques est banal pour ce genre de photographie; Considérant que les retouches ultérieures ne sont que le résultat de manipulations techniques facilitées par l'emploi des logiciels de retouche photographique numérique et présentent également un caractère banal ne portant pas l'empreinte de la personnalité du photographe; »

<sup>5</sup> UK: See for instance, *Antiquesportfolio.com plc v Rodney Fitch & Co* [2001] E.C.D.R. 5; [2001] E.B.L.R. 20; [2001] FS.R. 23; [2000] *Masons C.L.R.* 51; (2000) 23(11) I.P.D. 23092; (2000) 97(30) L.S.G. 41; *Times*, July 21, 2000.; EU: C-145/10 *Eva-Maria Painer v Standard VerlagsGmbH and Others* [2011] EUECJ C-145/10, EU:C:2011:798, ECLI:EU:C:2011:798

<sup>6</sup> EU: C-145/10 *Eva-Maria Painer v Standard VerlagsGmbH and Others* [2011] EUECJ C-145/10, EU:C:2011:798, ECLI:EU:C:2011:798

<sup>7</sup> Paris, 20 février 2008, n° 06/22330, *SARL Les archives to 7eme Art c/ Stéphane Mirkine* : Propr, Intell. 2008, p. 319 note Lucas (photographie de plateau)

## Appendix 1: Original text in French language

### Chapter One

**Note 10:** Jolibois Report No 212 (n 7) 28. Author's translation. Original text reads : [L]es droits voisins du droit d'auteur [ici comprendre droit des artistes interprètes] porteraient incontestablement atteinte aux droits des auteurs. Ce qui serait inacceptable. D'une manière très concrète, il risque d'en être ainsi lorsque l'utilisation d'une œuvre devra acquitter une nouvelle rémunération en vertu des droits voisins. La tendance naturelle sera alors, soit de verser une rémunération moindre à tel auteur en particulier, soit d'utiliser moins d'œuvres et donc de verser moins aux auteurs en général. *Conclusion* : La ratification de la Convention de Rome ou l'adoption en l'état du projet the loi risquent d'avoir des effets pervers à l'égard des droits des auteurs et même de la création en général.

**Note 11** : Brussels Conference Documents (n 8) 309. Author's translation. The original text reads : « En toute bonne foi, il serait donc impossible de soutenir que le droit des exécutants sera certainement sans répercussion sur les recettes des auteurs aussi longtemps qu'il n'est pas prouvé que la redevance due aux exécutants puisse être englobée dans le prix fait à l'acheteur. »

**Note 151** : Cass, 1ère civ, 14 novembre 1973, « affaire du Prince Igor et opéra de Borodine » n° 71-14.709 : Bull civ I, p.390, RIDA avril 1974, p.66, author's translation. The original text reads : « Mais attendu que les juges du second degré qui, dans l'exercice de leur pouvoir souverain d'appréciation, ont considéré que Rimsky-Korsakov et Y... A avaient repris sans les modifier des fragments exécutés par Borodine devant certains auditeurs qui les avaient conservés intacts dans leur mémoire, ont, par là-même, constaté que ces morceaux avaient été créés ».

**Note 152** : Cass, 1ère civ, 14 novembre 1973, « affaire du Prince Igor et opéra de Borodine » n° 71-14.709 : Bull civ I, p.390, RIDA avril 1974, p.66 . Author's translation, original text reads : « Mais attendu que la cour d'appel a relevé qu'il ressortait du "Journal de ma vie" de Rimsky-Korsakov que le premier chœur, les danses polovtsiennes, la plainte de Iaroslavna, le récital de la chanson de Vladimir x..., l'air de Kotschkovna et du prince Vladimir z..., ainsi que le chœur final avaient été terminés et orchestrés par Borodine que Rimsky-Korsakov et Y... avaient décidé d'achever l'opéra et d'en rendre possible la publication »

**Note 211** : Cass, 1ère civ, 11 décembre 2008, n° 07-19.494 : Bull. 2008, I, n° 282. Author's translation. The original text reads : « si ce droit peut valablement donner lieu à l'établissement de contrats conférant à une partie les prérogatives d'ordre patrimonial qui lui sont attachées, l'objet de la transmission doit être précisément déterminé, ce qui implique que le domaine d'exploitation des droits cédés soit délimité quant à son étendue et à sa destination, quant au lieu et quant à la durée ».

**Note 212** : Cass, 1ère civ, 11 décembre 2008, n° 07-19.494 : Bull. 2008, I, n° 282. Author's translation. The original text reads : « sous toutes ses formes et par tous procédés, pour toute destination et pour le monde entier, pour une durée de quinze ans renouvelables ».

**Note 214** : Versailles, 9 octobre 2008, *Randall G. c/ Ste First Media*, n° 06/03959. Author's translation, original text reads: "Il résulte du rapport d'expertise (rapport d'étape au 30 novembre 2005) qu'en 1995, le cachet journalier de base d'un comédien enregistrant sa voix pour un film publicitaire était de l'ordre de 4 500 [francs] (686,02 [euros]), cette somme comprenant les droits liés à l'utilisation de la voix pendant une durée d'un an à compter de la première diffusion de l'enregistrement, mais pouvait donner lieu à majoration en raison notamment de la notoriété de l'intéressé ou de certaines spécificités tenant à sa voix. L'expert, qui a estimé que la voix de M. G. était typée et flatteuse et que le public pouvait y être sensible a estimé qu'une telle majoration pouvait être appliquée et qu'il y avait lieu de retenir un coefficient multiplicateur de 1,5 à 4 »

**Note 227** : TGI Paris, 3ème ch., 27 septembre 1996, *Daures c/ Sté Western Passion et a.*, n° 13957/95. Author's translation, original text reads : « Attendu qu'il est acquis aux débats que Jean-Philippe DAURES est l'auteur du dessin qu'il a tatoué en septembre 1992 sur le bras de l'artiste Johnny HALLIDAY; Attendu que ce dessin d'inspiration amérindienne représente en blanc et noir, une tête d'aigle au-dessus d'une plume d'aigle placée à l'horizontale et comportant une médaille ronde frappée d'un oiseau stylisée; Attendu qu'il s'agit d'une oeuvre de l'esprit dont l'originalité n'est pas contestée. Que Jean-Philippe DAURES est recevable à agir sur le terrain des droits d'auteur; [...] »

**Note 229** : Paris, 3 juillet 1998 in *Carrière* (n 228); Author's translation, original text reads : « Considérant que le dessin de Jean-Philippe DAURES tatoué sur le bras droit de Johnny HALLYDAY constitue certes un attribut de la personnalité du chanteur; qu'il serait donc loisible à la société POLYGRAM d'exploiter, avec l'accord de Johnny HALLYDAY, la photographie de ce dernier sur le bras duquel, comme l'ont indiqué les premiers juges, le tatouage serait visible "nécessairement mais de façon accessoire"; Mais considérant que tel n'est pas le cas en l'espèce où la société POLYGRAM et la société WESTERN PASSION ont reproduit, non pas une photographie de Johnny HALLYDAY sur laquelle serait visible le tatouage de celui-ci, mais le dessin de ce tatouage dont Jean-Philippe DAURES est l'auteur et sur le quel Johnny HALLYDAY ne possède ni ne peut céder de droits. »

## *Chapter Two*

**Note 166** : Brussels Conference Document (n 34) 310. Author's translation, original text reads : « Le Gouvernement français persiste à penser que les interprètes et les exécutants ne sont point des créateurs d'œuvres de l'esprit et que la protection international qui leur es due [...] ne peut a aucun titre prendre place dans la Convention d'Union de Berne destinée à protéger les droits des créateurs d'œuvres littéraires et artistiques »

**Note 165** : Brussels Conference Document (n 34) 310-1. the original text reads : « "Sans préjudice des droits des auteurs, l'artiste exécutant sera protégé, dans le Pays où l'exécution a lieu, contre toute confection non autorisée par lui de disques ou d'instruments similaires servant à reproduire les sons par les moyens desquels son interprétation d'une oeuvre dramatique ou musicale peut être reproduite, qu'il s'agisse d'une oeuvre tombée dans le domaine public ou non". Documents de La Conférence de Bruxelles 5-26 Juin 1948' (1951) 310-1.

**Note 167** : Brussels Conference Document (n 34) 309. original text reads : Sans préjudice des droits des auteurs, l'artiste exécutant sera protégé, dans le Pays où l'exécution a lieu,

contre toute confection non autorisée par lui de disques ou d'instruments similaires servant à reproduire les sons par le moyen desquels son interprétation d'une œuvre dramatique ou musicale peut être reproduite, qu'il s'agisse d'une œuvre tombée dans le domaine public ou non.

**Note 175 :** Jolibois Report No 212 (n 4) 27. Author's translation, original text reads : " L'ambition du projet français est d'autant plus grande qu'il accorde un droit moral aux artistes-interprètes, ce que ne fait pas la Convention de Rome. En résumé, l'actuel projet de loi va très au de-là de ce qui est nécessaire pour ratifier la Convention de Rome et le Gouvernement souhaite mettre en place la législation la plus avancée en matière de droits d'auteur et de droits voisins du droit d'auteur. »

**Note 245:** Paris, 1<sup>re</sup> Ch, 8 juin 1960, *Eudes c/ Jean Cocteau* : JCP G 1960, II, 11710 conclusions de l'avocat général Combaldieu. Confirming the decision in first instance : Trib. Seine, 2 juillet 1959, *Eudes c/ Gutman, Cocteau et autres* : Le Droit d'Auteur 1959, vol 72 No 5 p. 93. Author's translation, original text reads : « Certes, le ballet peut être, est, en général, une oeuvre de collaboration. Mais, en l'espèce, la partition musicale mise à part, Jean Cocteau apparaît comme le seul auteur. Son génie universel dans le domaine littéraire et artistique (que ce soit le théâtre, le cinéma, la chorégraphie et j'en passe) lui permet ce tour de force, assez inhabituel il est vrai. ».

**Note 246 :** Paris, 1<sup>re</sup> Ch, 8 juin 1960, *Eudes c/ Jean Cocteau* : JCP G 1960, II, 11710 conclusions de l'avocat général Combaldieu. Confirming the decision in first instance : Trib. Seine, 2 juillet 1959, *Eudes c/ Gutman, Cocteau et autres* : Le Droit d'Auteur 1959, vol 72 No 5 p. 93. Author's translation, original text reads: « S'il y avait un propriétaire de la chorégraphie, ce serait d'ailleurs Monsieur Roland Petit et non Monsieur Eudes qui le serait. Or Roland Petit n'a jamais rien réclamé; il ne s'y est pas trompé, il a justement considéré que son rôle était celui d'un conseiller technique, Jean Cocteau l'avait précisément choisi parce qu'il l'écouterait et le traduirait dans le langage de la danse.»

**Note 261 :** Trib Seine, 23 avril 1937, *Rigault dit Marnay c. Chaperot et Copelier* : Le Droit d'Auteur, No 11 p 129, 130 Author's translation, original text reads : «Attendu, en effet, que si en général et sauf exceptions, les artistes dramatiques ou cinématographiques ne peuvent prétendre à aucun droit sur l'ensemble que constitue l'œuvre dramatique ou le film, il est équitable, par contre, de leur reconnaître, au même titre qu'aux autres artistes, peintres, sculpteurs, graveurs, architectes, un « droit » sur leurs créations personnelles, c'est-à-dire, en l'espèce, sur l'interprétation qu'ils donnent aux rôles qui leur sont confiés et qui constituent la seule manifestation de leur art qui soit perceptible aux sens, qui soit publiée »

**Note 262 :** Trib Seine, 23 avril 1937, *Rigault dit Marnay c. Chaperot et Copelier* : Le Droit d'Auteur, No 11 p 129, 130. Original text reads : « Attendu que ce droit ne peut toutefois leur être concédé, de même qu'aux autres artistes, que dans la mesure où leur oeuvre présente un caractère personnel et original, et constitue, dès lors, une «création» au sens donné à ce mot lorsqu'il est appliqué aux productions de l'art ». Author's translation : "Considering that, however, just like other artists, this right can only be granted if their performances evidence personal and original characteristics which would thus make them 'creations' when the word is used and understood in the context of artistic productions"

**Note 263 :** Trib Seine, 23 avril 1937, *Rigault dit Marnay c. Chaperot et Copelier* : Le Droit d'Auteur, No 11 p 129, 130. The original text reads : "[Attendu que] d'ailleurs, l'usage actuel de faire figurer, sur les programmes des spectacles et sur le «générique» des films le nom de chaque interprète en regard de celui du personnage qu'il incarne, peut être considéré comme une manifestation de ce droit de l'artiste, puisqu'il permet au public, grâce à cette identification, d'attribuer à chaque acteur le mérite de son œuvre ». Author's translation:

« [Considering that] as a matter of fact, the current practice of featuring, on the programme of shows and on films' generic the names of each performer in relation to the character he/she interpreted can be considered as an expression of this artist's right, since it allows the public, thanks to this identification to apportion to each artist the credit he/she deserves for his/her work.»

**Note 268:** Paris, 3 décembre 2004, *Sorbelli c/ Yoshida*, n° 04/06726: D. 2005, juris, p. 1237 [lexbase=A0681DGC], JCP E 2005, No1863 para 3. Author's translation, original text reads : « Considérant qu'en l'espèce, comme le fait observer à juste titre M. Sorbelli il n'a pas été seulement un sujet pris en photo par Mlle Yoshida, sujet inactif, qui aurait pris des poses dictées par la photographe, mais a été un sujet actif »

**Note 269 :** Paris, 3 décembre 2004, *Sorbelli c/ Yoshida*, n° 04/06726: D. 2005, juris, p. 1237 [lexbase=A0681DGC], JCP E 2005, No1863 para 3. Author's translation, original text reads : « qu'en effet, c'est à son initiative et en raison de l'existence de sa création, puisqu'il s'agissait, lors de cette prise de vue, de réaliser son portrait « en situation », que la photographe a pu fixer des moments de cette création »

**Note 273 :** Cass, crim. 13 décembre 1995 : Bull. crim., 1995 N° 379 p 1110; D. 1997. p.196. author's translation, original text reads : « qu'en vue de la production d'un disque, Bernard E..., qui a procédé à l'orchestration de la chanson, a fait appel au trompettiste Pierre X... afin qu'il exécute des improvisations de jazz «dans le style de Louis Armstrong » ».

**Note 275 :** Paris, 5 février 1997, n° 96 02074. Author's translation, original text reads : « [c]onsidérant qu'il ressort du rapport d'expertise [...], la nécessité de reconnaître à [l'artiste interprète] M. Pierre Dutour la qualité d'auteur d'une œuvre originale de création personnelle, protégeable et qui comporte la marque de son originalité ainsi que de son style propre »

**Note 277 :** Paris, 3 mai 2006, n° 05/01400, « Ph. Chany » : D. 2007 jurispr. P 2653. Author's translation. Original text reads : « Considérant, en revanche, que la société FRANCE 2 et la société TOP 50 contestent à l'appelant la qualité d'artiste interprète des enregistrements de ces oeuvres musicales; qu'elles font valoir que celles-ci, ayant été créées par l'intermédiaire de logiciels de composition, il n'y aurait lieu à aucune interprétation, le choix des sons et de leurs critères s'effectuant uniquement par l'intermédiaire de la souris, alors que, toujours selon elles, un artiste musicien, au sens de l'article L. 212 1 du Code de la propriété intellectuelle, s'entendrait exclusivement d'une personne qui exécute ou joue une partition musicale par l'intermédiaire d'un instrument musical quelconque et non d'une personne se contentant de donner des instructions informatiques dans le cadre de l'utilisation d'un logiciel proposant des banques de données sonores ».

**Note 278 :** Paris, 3 mai 2006, n° 05/01400, « Ph. Chany » : D. 2007 jurispr. P 2653. Author's translation. Original text reads: « Philippe C. fait valoir que, comme beaucoup de compositeurs interprètes de sa génération qui écrivent pour les secteurs audiovisuels, il est à la fois le compositeur de ses musiques, l'artisan de leur interprétation qu'il dirige comme un chef d'orchestre et qu'il assure, en même temps, l'exécution des oeuvres en tant que musicien interprète sur plusieurs instruments (claviers) et au synthétiseur » [...] « Mais considérant que l'on ne saurait méconnaître, a priori, l'apport des techniques informatiques tant dans le domaine de la création que de l'interprétation, [...] il apparaît ici que les musiques de base, c'est-à-dire préexistantes dans des durées excédant largement celles définitives retenues ensuite, ne peuvent avoir été réalisées dans une forme aussi aboutie qu'après élaboration par le compositeur d'une structure musicale établie, que celui-ci a fait jouer, exécuter par des musiciens placés sous sa direction, quand il ne l'a pas interprété lui-

même en précisant dans tous les cas de figure, l'ordinateur, aussi sophistiqué soit-il, ne peut se substituer à la pensée musicale créatrice, n'apportant un soutien logistique à l'œuvre de l'esprit dont seuls le compositeur, le musicien interprète et le directeur artistique gardent la maîtrise tout au long de la réalisation ».

**Note 286** : Conseil d'Etat 23 février 1998: Lebon 1998. The highest administrative court here reminds that the artist acting as performer does more than what a mannequin which is 'limited to the sole exploitation of his/her image'. Author's translation – the original text reads: 'lorsqu'un artiste interprète se livre, dans le cadre du tournage d'un film publicitaire, à une prestation répondant à cette définition, qui ne se réduit pas à la seule utilisation de son image, il ne se produit pas en qualité de mannequin'.

**Note 287** : Employment Law Code, Art L 7123-2. Author's translation - original text reads: 1° Soit de présenter au public, directement ou indirectement par reproduction de son image sur tout support visuel ou audiovisuel, un produit, un service ou un message publicitaire; 2° Soit de poser comme modèle, avec ou sans utilisation ultérieure de son image. »

**Note 295** : Paris, 18eme Ch, 18 février 1993, n° [XP180293X]: D. 1993, p 397 note Weksteinbeg. Author's translation. The original text reads: "à l'exclusion de l'artiste de complément (même s'ils sont appelés à réciter ou à chanter collectivement un texte connu), silhouettes (artistes de compléments dont le personnage doit pour les nécessités de la mise en scène, ressortir dans le champ de la camera), [...], doublures lumière".

**Note 298**: Charles Jolibois, 'Rapport No 212 Fait Au Nom de La Commission Spéciale Sur Le Projet de Loi Adopté Par l'Assemblée National Relatif Aux Droits D'auteur et Aux Droits Des Artistes-Interprètes, Des Producteurs de Phonogrammes et de Vidéogrammes et Des Entreprises de Communication audiovisuelle', vol Tome II (1985) 83 Authors' translation – original text reads: « les artistes dont le rôle a un caractère anonyme car ils sont 'perdus dans la foule' et les artistes de complément dont le rôle est tout à fait secondaire »

**Note 458**: Paris, 1ere ch., pole5, 14 novembre 2012, SARL Acces Photo c/ Tours FC, n° 11/03286 : inédit. Author's translation, original text reads : « Considérant d'autre part que si le choix des moyens techniques incombe au photographe, les situations qui, comme en l'espèce, s'offrent à son objectif au cours d'un match ne sont que de banales scènes de jeu ou d'actions footballistiques qui sont données à voir depuis des décennies dans tous les magazines sportifs; que la photographie prise au cours d'un match à l'insu des protagonistes n'est que le fruit du hasard qui trouve son origine dans les phases animées du jeu, dont tant la mise en oeuvre que le résultat échappe à la volonté du photographe qui ne fait qu'intercepter un instant fugace; Considérant qu'il y a donc lieu de considérer que cet ensemble non individualisé de photographies en ce qu'il ne révèle aucune recherche personnelle du photographe sur l'angle de prise de vue, le cadrage, les contrastes, la lumière et les physionomies n'est pas éligible à la protection du droit d'auteur »

### **Chapter Three**

**Note 77**: TGI Paris, 11 juillet 2007, n° 05/08920. Author's translation, original text reads : « En l'espèce s'agissant de la captation de jeux télévisés, le " réalisateur " est limité dans ses interventions qui sont contraintes par le format et le règles dudit jeux».

**Note 102**: Cass, 1ère civ, 13 juin 2006, n° 02-44.718: Bull. Civ. 2006 I N° 307 p. 267; D. 2006, act. P 1741 note Daleau ; pan. p. 2993 obs. Sirinelli. Author's translation, original text reads: "Mais attendu que la fragrance d'un parfum, qui procède de la simple mise en oeuvre

d'un savoir-faire, ne constitue pas au sens [du code de la propriété intellectuelle], la création d'une forme d'expression pouvant bénéficier de la protection des oeuvres de l'esprit par le droit d'auteur ; d'où il suit que le moyen n'est pas fondé »

**Note 104** : Paris, 4ème ch., 14 février 2007, n° 06/09813, Beauté Prestige... : JCP G 2007, I, 176 N 4 obs. Caron. Author's translation, original text reads: "Considérant, [...] que la fixation de l'oeuvre ne constitue pas un critère exigé pour accéder à la protection dès lors que sa forme est perceptible ; qu'une fragrance, dont la composition olfactive est déterminable, remplit cette condition, peu important qu'elle soit différemment perçue, à l'instar des oeuvres littéraires, picturales ou musicales qui, elles aussi, requièrent un savoir-faire ».

**Note 116** : Paris, 1ère ch., pole 5, 21 octobre 2009, n° 08/09096 Fresnay... : propr. Intell. 2010N 34 p. 614 obs. Lucas. Author's translation, the original text reads: "[le décorateur de théâtre] ne se contente pas de concevoir les décors, mais doit assurer le suivi de leur construction et de leur montage. Il est responsable, vis-à-vis de la direction du théâtre, du respect des délais (le décor doit être prêt pour la générale) et du budget. Qu'il s'infère de ces informations que le décorateur de théâtre est certes astreint au suivi de la construction et du montage des éléments du décor, qu'il est tenu de veiller au respect de délais qui lui sont impartis, qu'il est encore soumis à des contraintes budgétaires qui lui sont imposées, qu'il n'en demeure pas moins qu'il lui appartient d'imaginer, de concevoir et de mettre en forme, en composant avec le metteur en scène, le décor de la pièce et qu'il lui est à ce titre possible, dans une mesure qu'il convient d'apprécier au cas d'espèce, de conférer à son ouvrage la marque de sa sensibilité personnelle »

**Note 130** : Paris, 17 décembre 2003, n° [XP171203X] : D. 2004 jurisp. P 1588 note Fleury ; D. 2005 pan. P 1485, obs. Sirinelli. This decision reaffirms a long standing principle expressed in previous decision such as Paris, 1ère ch., 11 mai 1965, *Dali c/ Théâtre royal de la monnaie de Bruxelles et a.* : D. 1968, 382 (in this case, the creation of additional costumes inspired from the initial drawings executed by Dali were considered as no infringement of the famous painter's rights in his sketches). Author's translation, original text reads: "[O]riginalité constitue l'apport artistique propre à l'auteur de la création quant [sic] bien même celui-ci s'inspire d'oeuvres préexistantes expressions du genre [...] »

**Note 183** : Cass, 1ère civ, 9 novembre 1993, n° 91-17.061: Bull. 1993 I N° 318 p. 221. Author's translation, original text reads: "Attendu qu'à l'appui de cette appréciation, l'arrêt énonce que M. X... s'est borné à utiliser divers motifs de sculpture qu'il a puisés dans le répertoire ornemental d'une époque déterminée, sans que ce travail dépasse la simple répétition et l'accumulation de ces motifs et qu'il ne s'en dégage aucun des éléments caractéristiques d'une création ;  
Attendu qu'en se déterminant ainsi, alors qu'il n'était pas contesté que les sculptures litigieuses avaient été exécutées de la main de M. X..., la cour d'appel, en ne recherchant pas si, comme il était soutenu, cette exécution personnelle ne leur conférait pas, par elle-même, un caractère d'originalité, n'a pas donné de base légale à sa décision ; »

**Note 233** : Jolibois Report No 212 (n 288) 29. Author's translation, original text reads : « **[Les artistes-interprètes] interviennent lorsque l'oeuvre est achevée. L'interprétation ne peut donc être considérée ni comme une oeuvre de collaboration, ni comme une oeuvre composite** – car l'interprétation ne peut se détacher de l'oeuvre originale. Même si, il est parfois parlé d'une interprétation comme étant une oeuvre, l'emploi de cette terminologie n'implique pas en lui-même la reconnaissance d'un droit d'auteur au profit de l'interprète. Il peut certes s'agir d'un **droit intellectuel** mais d'une autre mais d'une autre nature que le droit d'auteur. » (original emphasis).



**Note 234** : 'Documents de La Conférence de Bruxelles 5-26 Juin 1948' (1951) 310. Author's translation. The original text reads : « le Gouvernement français persiste à penser que les interprètes et les exécutants ne sont point des créateurs ».

**Note 241** : Paris, 3 mai 2006, n° 05/01400, « Ph. Chany » : D. 2007 jurispr. P 2653 note Edelman et Levinas ; RTCom. 2007, 104 obs. Paullaud-Dullian Author's translation, original text reads: « Qu'en effet, la société intimée ne saurait, comme elle le soutient, dénaturer ce rapport en limitant l'apport de l'outil informatique à la seule oeuvre de création à l'exclusion du domaine de l'interprétation, dès lors que Gérard S. aborde ces deux domaines et, ainsi qu'il l'a été précédemment indiqué, a, sans ambiguïté, conclu que cet outil n'est, précisément, qu'un instrument, autre que ceux plus traditionnels, permettant l'exécution d'une oeuvre préalablement créée »

**Note 265**: Cass, 1ère civ, 24 avril 2013, n° 11-19.901: Bull. 2013, I, n° 83. Author's translation, original text reads: "[A]ttendu que c'est sans se contredire que la cour d'appel a relevé que les participants à l'émission en cause n'avaient aucun rôle à jouer ni aucun texte à dire, qu'il ne leur était demandé que d'être eux-mêmes et d'exprimer leurs réactions face aux situations auxquelles ils étaient confrontés et que le caractère artificiel de ces situations et de leur enchaînement ne suffisait pas à leur donner la qualité d'acteurs ; qu'ayant ainsi fait ressortir que leur prestation n'impliquait aucune interprétation, elle a décidé à bon droit que la qualité d'artiste-interprète ne pouvait leur être reconnue »

**Note 266** : Author's translation. The original text reads: « le métier d'acteur consiste à interpréter un personnage autre que soi-même » in Cass, 1ère civ, 24 avril 2013, n° 11-19.901 : Bull. 2013, I, n° 83

**Note 268** : Cass, 1ère civ, 13 novembre 2008, n° 06-16.278, « Etre et avoir » : JCP 2009, N 25, 30 §3 obs. Caron. Author's translation, original text reads : « [A]ttendu que l'arrêt constate que M. Y... [l'instituteur] a été filmé, tout au long du documentaire, dans l'exercice de sa profession d'instituteur et que la scène fugace relatant la disparition d'un enfant s'inscrit naturellement dans le quotidien de la classe ; qu'ayant ainsi relevé que l'instituteur apparaissait exclusivement dans la réalité de son activité sans interpréter pour autant, au service de l'oeuvre, un rôle qui ne serait pas le sien, la cour d'appel a décidé à bon droit, que la qualité d'artiste-interprète ne pouvait lui être reconnue, s'agissant d'un simple documentaire excluant comme tel, toute interprétation ».

## Chapter Four

**Note 109** : Author's translation. The decision reads : « l'exposition dénommée « Musée du Cinéma H. Langlois » création originale de son auteur et qui fait appel aux qualités intellectuelles et de sensibilité de ses visiteurs, constitue indiscutablement une oeuvre de l'esprit », in Paris, 1ere ch, 2 octobre 1997 : D. 1998, p. 312 note Edelman ; RIDA 1998 n 176, p. 422.

**Note 123** : Brussels Conference Documents (n 118) 140. Author's translation. The original text reads : « A notre Avis, cette fixation de sons [naturels ou de machine] qui ne sont pas produits par l'intelligence humaine n'est une activité créatrice devant être protégée par la législation sur le droit d'auteur ».

**Note 155** : TGI Tarascon, 21 septembre 2012, n° 09/02027 : RLDI Octobre 2013 N 97,comm. 3213 p 18 note Amine. Author's translation. Original text reads: "production intellectuelle puissante". (the Court recognises the production as work of the mind of magical

performances but does not find for infringement due to the technical differences distinguishing the two tricks)

**Note 251:** Cass, crim, 7 octobre 1998, n° 97-83.243 : Bull. Crim. 1998 N° 248 p. 717. See also, Cass, 1ère civ, 2 mars 1999, n° 97-10.179: inédit au bulletin, Legifrance available at : <<http://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007400026>>.

Author's translation, original text reads : "[l']apport intellectuel de l'auteur caractérisant son originalité ». See for an appeal decision also relying on the notion of 'intellectual input' Paris, 4ème Ch, sect. A, 15 janvier 1997, VF Diffusion et autres c/ Chantelle.

**Note 252:** Cass, 1ère civ, 5 février 2002, « Les Muses Productions » n° 99-21.444 : Bull. 2002 I N° 46 p. 36 ; JCP G, 2002, II, 10193, note S. Crevel ; D. 2003, p. 436, note B. Edelman ; D. 2002 juris. p 2253 note Edelman ; JCP E 2002, chron. 1334, n 3. Author's translation. Original text reads "apport intellectuel inédit", (This particular decision refers to a standard of novelty or lack of anteriority which is precluded by the rest of the jurisprudence as entering the definition of originality)

**Note 341:** Versailles, 9 octobre 2008, *Randall G. c/ Ste First Media*, n° 06/03959. Author's translation, original text reads: « il n'a pas créé la voix de ce personnage qui apparaissait dans des films publicitaires depuis 1971 et qui avait donné lieu à des enregistrements sonores réalisés en langue française par plusieurs artistes depuis lors. ».

**Note 342 :** Versailles, 9 octobre 2008, *Randall G. c/ Ste First Media*, n° 06/03959. Author's translation, original text reads: "Sa personnalité ne transparaît pas dans sa prestation consistant à lire un texte, avec le timbre de voix et l'accent qui lui sont propres, même s'il accentue ce dernier »

**Note 354 :** Trib Seine, 23 avril 1937, *Rigault dit Marnay c. Chaperot et Copelier* : Le Droit d'Auteur, No 11 p 129,130. Author's translation, original text reads : « concevoir, réaliser en pensée son interprétation grâce a un travail préalable, souvent long et minutieux, l'exteriorisation qu'il en donne constitue une création continue ».

**Note 360:** Versailles, 9 octobre 2008, *Randall G. c/ Ste First Media*, n° 06/03959 (the tone of one's voice is not original enough to justify the protection of performer's rights, assessment which applies the same test as do dispositions pertinent to authors' rights); Paris, 1ere Ch, pole5, 14 novembre 2012, *SARL Acces Photo c/ Tours FC*, n° 11/03286 : inédit (in this case pertinent to the eligibility to copyright protection of football photographs, the Court reminded the parties that physical traits, here 'physionomies' were not eligible to protection by authors' rights)

**Note 422:** Cass, crim. 13 décembre 1995 : Bull. crim., 1995 N° 379 p 1110 ; D. 1997. p.196. Author's translation, original text reads : « les morceaux de trompette improvisés par Pierre X... portent la marque de son style propre et présentent le caractère d'une création originale ».

**Note 445:** Paris, 18eme Ch, 18 février 1993, n° [XP180293X] : D. 1993, p 397 note Weksteinbeg. Author's translation, original text reads: "Considérant que l'artiste de complément se distingue de l'artiste-interprète dans une oeuvre déterminée non seulement par le caractère complémentaire, accessoire de son rôle, mais surtout par le fait que sa personnalité ne transparaît pas dans sa prestation, à la différence de l'artiste-interprète qui s'investit plus complètement et rend ainsi son interprétation originale ».

**Note 447 :** Paris, 4ème Ch, 4 juillet 2008, n° 06/21406, *Universal Music...* : RTDCom. 2008, 745, obs. Pollaud-Dullian. Author's translation, original text reads: " [I]l convient en conséquence en l'absence de tout usage professionnel de rechercher la qualification de la prestation des intimées en fonction des éléments du dossier, étant précisé que l'artiste de

complément se distingue de l'artiste interprète, non seulement par le caractère complémentaire, accessoire de son rôle, mais surtout par le fait que sa personnalité ne transparaît pas dans sa prestation ».

**Note 449** : Versailles, 9 octobre 2008, *Randall G. c/ Ste First Media*, n° 06/03959. Author's translation, original text reads: "Sa personnalité ne transparaît pas dans sa prestation consistant à lire un texte, avec le timbre de voix et l'accent qui lui sont propres, même s'il accentue ce dernier [...]»

**Note 458** : TGI Paris, 4 juin 2008, n° 05/06811. Author's translation, original text reads: "Le tribunal considère que c'est à juste titre que les défendeurs soutiennent que Mme X [Mia Frye] qui réclame également la protection de sa prestation d'artiste interprète, ne peut invoquer son droit à l'image, pour protéger les mêmes atteintes, les deux protections n'étant pas cumulables. ».

## **Chapter Five**

**Note 19** : Paris, 4ème Ch., A, 31 mars 2004, « Les Misérables » : D. 2004, jurispr. P2028 note Edelman ; JCP E 2005 N 1216 § 1. Author's translation. The original text reads : Considérant qu'interdire toute suite aux MISERABLES ne saurait constituer, ainsi que les intimés le soutiennent à tort, une atteinte au principe de la libre création puisque, en l'espèce, cette œuvre, véritable monument de la littérature mondiale, [...] n'est pas un simple roman en ce qu'elle procède d'une démarche philosophique et politique [...] Considérant qu'il s'ensuit qu'aucune suite ne saurait être donnée à une œuvre telle que LES MISERABLES, à jamais achevée, et que, la société PLON a, en éditant et publiant COSETTE OU LE TEMPS DES ILLUSIONS et MARIUS OU LE FUGITIF et en les faisant passer pour la suite des MISERABLES, porté atteinte au droit moral de VICTOR HUGO sur cette œuvre littéraire.

**Note 95**: Paris, 20 février 2008, n° 06/22330, *SARL Les archives to 7eme Art c/ Stéphane Mirkine* : Propr, Intell. 2008, p. 319 note Lucas. Author's translation. The original text reads: "Qu'il en résulte que la photographie reproduite en couverture de l'ouvrage CINEGUIDE 2001 porte l'empreinte de la personnalité [du photographe] par les choix qu'il a opérés - position de l'actrice, cadrage, éclairage - de sorte que cette photographie présente le caractère d'originalité requis pour être qualifiée d'oeuvre de l'esprit et à ce titre éligible à la protection instituée au Livre I du Code de la propriété intellectuelle ».

**Note 101** : Paris, 18eme ch, 18 février 1993, n° [XP180293X] : D. 1993, p 397 note Weksteinbeg. Author's translation. The original text reads: « Considérant que M. Armbruster tient dans ce film le rôle d'un des trois loups, lesquels ont exactement la même attitude, font les mêmes gestes et ne se distinguent pas les uns des autres ; que la séquence où apparaissent les loups n'a pas une place prépondérante dans le film ; qu'elle est plus brève (quelques secondes tout au plus) que celle des couples ; que le rôle des loups n'exige - pas plus d'ailleurs que les autres rôles - de qualités particulières de la part des exécutants de l'oeuvre ; qu'ils ne sauraient dès lors se voir attribuer la qualité d'artistes-interprètes, sous peine de vider la notion d'artiste de complément, comme l'a justement fait observer le ministère public, de toute signification et d'étendre le bénéfice des « droits voisins » au-delà de ce qu'a voulu le législateur ; que dans ces conditions c'est à juste titre que les premiers juges ont dénié à M. Armbruster la qualité d'artiste-interprète pour sa prestation dans le film publicitaire [...]».

**Note 104** : Versailles, 9 octobre 2008, *Randall G. c/ Ste First Media*, n° 06/03959. Author's translation. The original text reads : « L'expert a relevé dans son rapport d'étape du 30

novembre 2005 qu'en cas d'audition isolée des enregistrements des annonces publicitaires, seule une écoute attentive ou réalisée dans de bonnes conditions permettait de distinguer la voix [du demandeur] de celles des autres comédiens ayant prêté leur voix au personnage d'Uncle Ben lors l'enregistrements antérieurs, malgré les qualités indéniables qu'elle présente. Il résulte de l'ensemble de ces éléments que [le demandeur] ne peut revendiquer le statut d'artiste interprète mais qu'il a réalisé une prestation d'artiste de complément [...] »

**Note 106** : Paris, 4ème ch., 4 juillet 2008, n° 06/21406, Universal Music...: RTDCom. 2008, 745, obs. Pollaud-Dullian p 397 note Weksteinbeg. Author's translation. The original text reads: « [M]algré la courte durée, [leur interprétation] n'est pas secondaire mais fait au contraire une rupture dans l'ensemble de l'œuvre et lui donne une coloration spécifique; Considérant qu'il ne peut davantage être dit que leur voix est interchangeable ; qu'en effet, une autre interprétation avec un autre timbre de voix donnerait nécessairement une coloration différente au morceau [...] ».

**Note 170** : Paris, 4ème ch., 4 juillet 2008, n° 06/21406, Universal Music...: RTDCom. 2008, 745, obs. Pollaud-Dullian p 397 note Weksteinbeg. Author's translation. The original text reads: [M]algré la courte durée, [leur interprétation] n'est pas secondaire mais fait au contraire une rupture dans l'ensemble de l'œuvre et lui donne une coloration spécifique; Considérant qu'il ne peut davantage être dit que leur voix est interchangeable ; qu'en effet, une autre interprétation avec un autre timbre de voix donnerait nécessairement une coloration différente au morceau [...].

**Note 171** : Paris, 4ème ch., 4 juillet 2008, n° 06/21406, Universal Music...: RTDCom. 2008, 745, obs. Pollaud-Dullian. Author's translation, the original text reads: « Considérant qu'à l'écoute de ces deux oeuvres, [...] la cour a relevé qu'outre le timbre de voix particulier de chacun des intimes, la ligne mélodique qui rompt avec le rythme tant des chœurs que de la partie instrumentale joue un rôle dans la composition de l'œuvre ».

## Chapter Six

**Note 156** : In 2006, the Court of Appeal of Paris concluded that perfumes could indeed be protected even if they were hardly ascertainable because sometimes perceived by different individuals. See, Paris, 25 janvier 2006, n° 04/18300: D. 2006 jurispr. P 580 obs. Daleau; JCP E 2006, 1386 note Caron (concluding that perfumes are protectable by copyright even though they may also be patented). The decision reads: Considering that the fixation of the work is not a requirement of legal protection so long that the work is perceptible; that a fragrance whose olfactory composition is determinable satisfies this condition, no matter whether the composition can be experienced differently by different individuals unlike literary, graphic or musical works which, too, demand the execution of savoir-faire" (author's translation). The original decision reads: "Considérant, d'autre part, que la fixation de l'oeuvre ne constitue pas un critère exigé pour accéder à la protection dès lors que sa forme est perceptible ; qu'une fragrance, dont la composition olfactive est déterminable, remplit cette condition, peu important qu'elle soit différemment perçue, à l'instar des oeuvres littéraires, picturales ou musicales ».

### Appendix 3: Clark's figures

Referenced in Chapter 5, text to note 192

The following figures have been reproduced from : Erick Clarke, 'Empirical Methods in the Study of Performances' in Eric Clarke and Nicholas Cook (eds), *Empirical Musicology: Aims, Methods and Prospects* (Oxford University Press 2004).

Figure 13: "Sample performance data (in milliseconds) for two performances of a simple rhythmic pattern"<sup>8</sup>

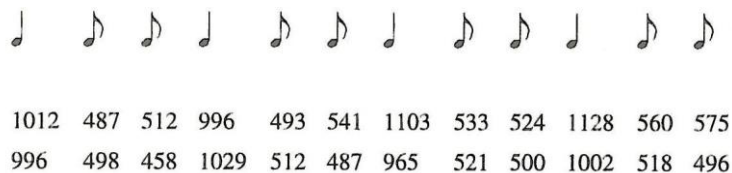
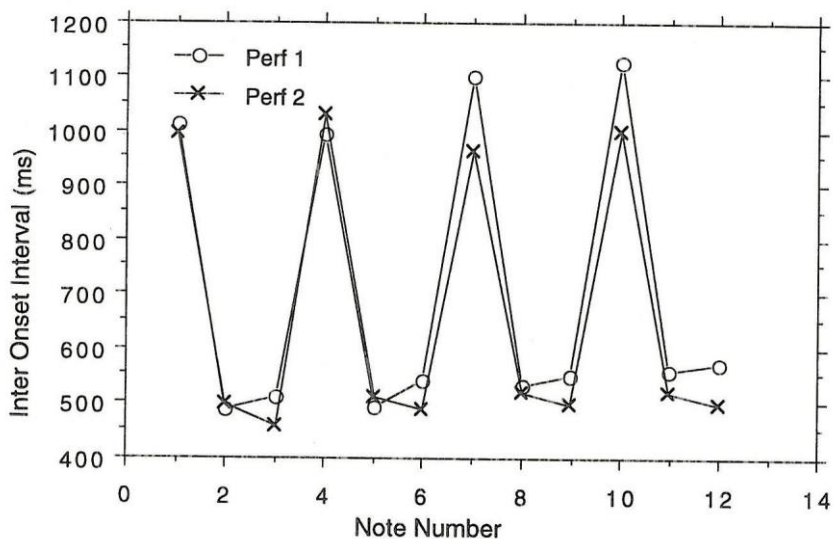


Figure 14: "Raw timing data for two performances of a simple rhythmic pattern"<sup>9</sup>



<sup>8</sup> Erick Clarke, 'Empirical Methods in the Study of Performances' in Eric Clarke and Nicholas Cook (eds), *Empirical Musicology: Aims, Methods and Prospects* (Oxford University Press 2004) 82.

<sup>9</sup> *ibid.*

Figure 15: "Normalised timing data for performances of a simple rhythmic pattern"<sup>10</sup>

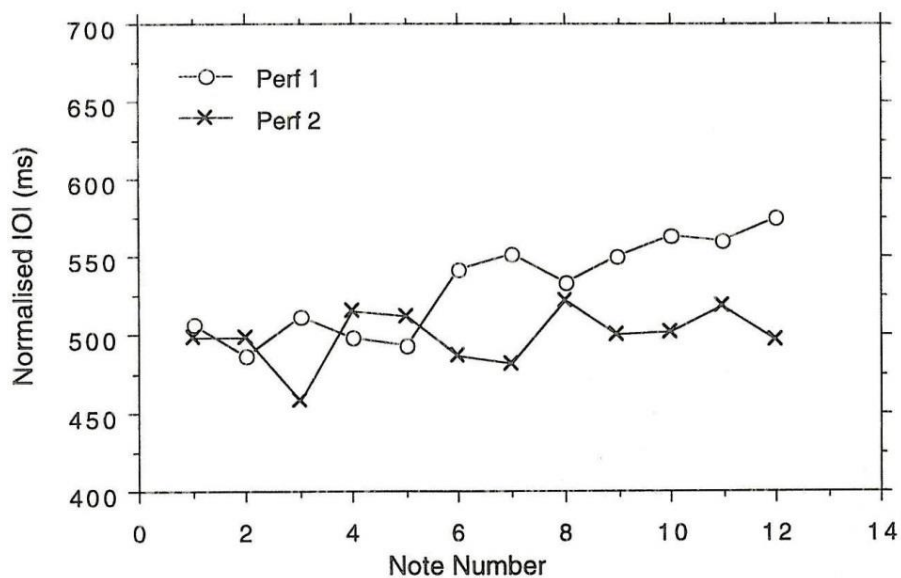
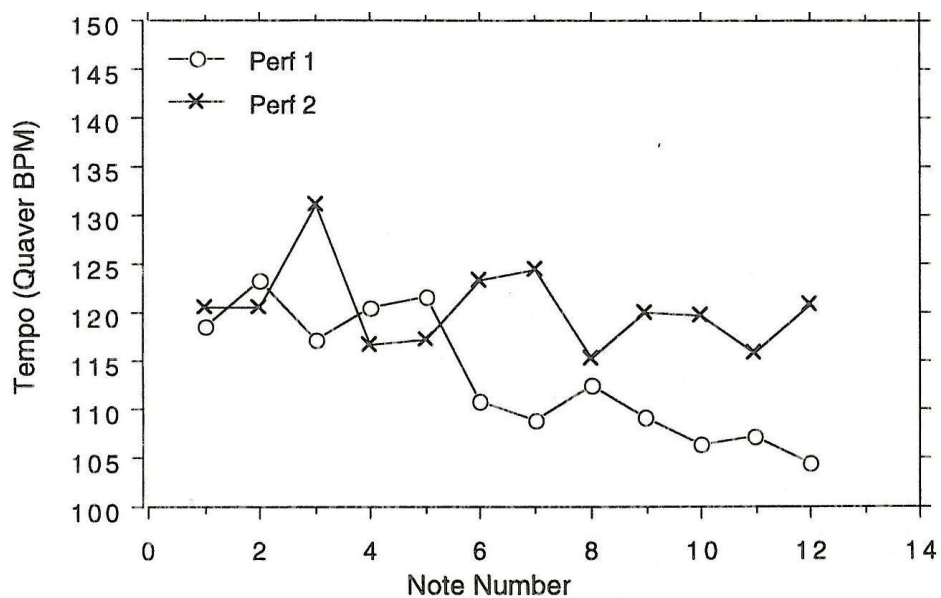


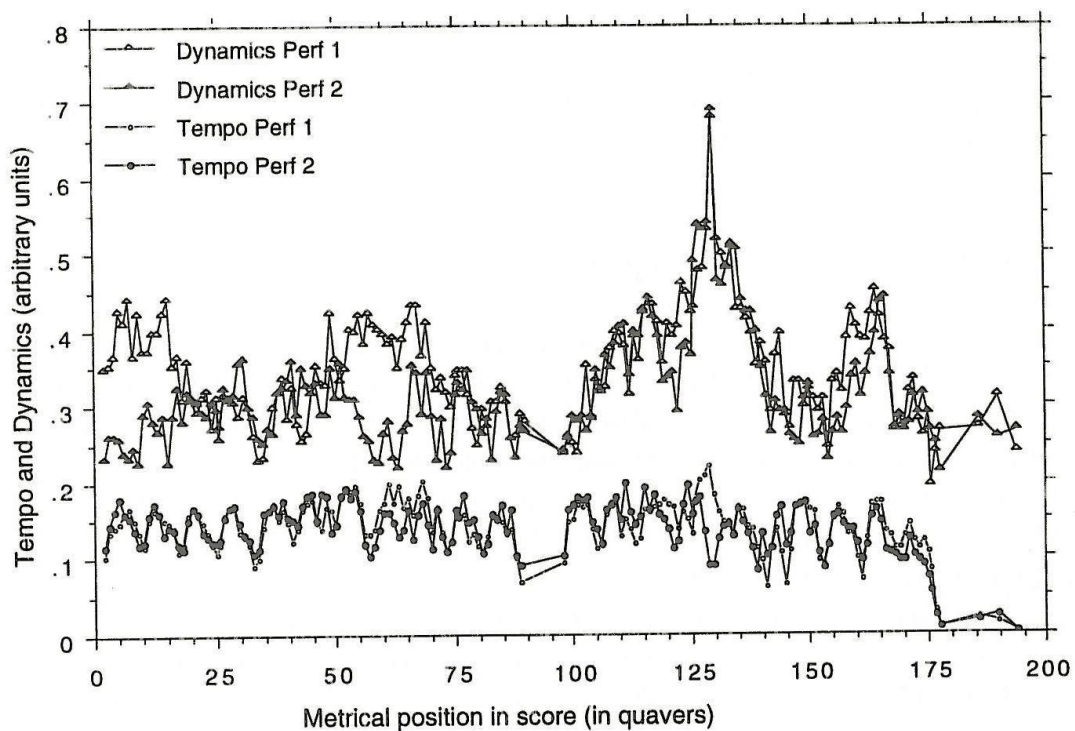
Figure 16: "Timing Data in terms of momentary tempo (in quaver beats per minute)"<sup>11</sup>



<sup>10</sup> *ibid*, 83.

<sup>11</sup> Erick Clarke, 'Empirical Methods in the Study of Performances' in Eric Clarke and Nicholas Cook (eds), *Empirical Musicology: Aims, Methods and Prospects* (Oxford University Press 2004) 83.

Figure 17: "Tempo and dynamic data from expert performances of the Chopin Prelude in E minor, Op. 28 no. 4"<sup>12</sup>



<sup>12</sup> Erick Clarke, 'Empirical Methods in the Study of Performances' in Eric Clarke and Nicholas Cook (eds), *Empirical Musicology: Aims, Methods and Prospects* (Oxford University Press 2004) 87.

### Appendix 3: Crow's notation

Referenced in Chapter 5, note 210

Reproduction of Figure 19.1 from Keith Sawyer, *Explaining Creativity The Science of Human Innovation* (2nd edn, Oxford University Press 2012) 361, with accompanying title and note: 'Transcript of conversation that was performed by a theater group exactly as it was originally spoken. The punctuation marks indicate pitch changes, volume, emphasis, and overlapping speech, which the actors were required to copy exactly' (reprinted from TDR/The Drama Review, 32:3, 23-54. Brian K. New York University and the Massachusetts Institute of Technology. Copyright 1988.)

Figure 18: Crow's Notation

K: That was last night  
J: That's what I said last night  
(4.0)  
K: Well I—  
[  
J: Getting to know you  
K: ((laughs))  
J: You'll accept everything but you do nothing  
K: Wo:::::  
[  
J: No: that's not true  
K: Everybody's that way in certain instances (.) are they not?  
J: Not me:, =  
K: = Not you:, oh no  
[  
J: ((laugh)) Wonderful me  
[  
K: It's your turn—It's your turn to  
get the tea  
Oh:: no (.) I did it six months ago it's  
your turn  
[  
J: ((laughs))  
[  
K: heheh  
J: No



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\* The table of cases and opinions gather all the decisions which have been included in the qualitative analysis to the exception of decisions appearing in bold characters. Those were included in the analysis for their relevance with regard to tattoo-related litigation.

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## **Lectures**

Kozinski A, Judge of the US Ninth Circuit Court of Appeal, 'IP and Advocacy' (The Sir Hugh Laddie Lecture given at the UCL Institute for Brand and Innovation Law, London, 24 June 2015)

# Thesis Documentation

The following work has been recorded on the attached CD-Rom for the purpose of submission:

Caroline Bowditch, Scottish Dance Theatre, 'A Casting Exploration' (2012)