"In fashion, one day you are* in*, the next you are* out*": comparative perspectives on the exclusion of fashion models from performers' rights

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***Abstract** – This article explores the exclusion of models from performers' rights. Taking the example of France, which has* expressly *excluded models from intellectual property rights, the author demonstrates that this interpretation of performers' rights breaches* breach of *international intellectual property treaties.*

1. Introduction

The precarious position of models within the creative industries is not a recent development and it has left models vulnerable to what is routinely described as a form of exploitation. Although this situation has been acknowledged by national policy-makers around the world,[1] fashion models continue to face poor working conditions marked by low levels of remuneration and insufficient legal protection.[2]

Models' vulnerability is also reflected in intellectual property (IP) law to the extent that modelling does not feature in the range of subject-matter protected either by copyright or performers' rights. This absence of IP protection, which we will couch in terms of *exclusion from* IP rights, has either been tacit or express depending on jurisdiction.

It has been tacit in countries like the United Kingdom, where neither the legislator nor the courts have expressly excluded models from the scope of performers' rights.[3] This may be due to models not claiming their rights or not being granted them by those commercialising their work as a matter of commercial practice, despite the fact that the letter of the law is flexible enough to accommodate models' claims for performers' rights, as discussed by the author elsewhere.[4] Such tacit exclusions may result from a general perception that modelling falls outside the conventional subject-matter covered by IP, unlike contributions to performances made by session musicians or actors for example.[5]

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* *University of Exeter.* *I am grateful to the members of the Sciences, Culture and the Law Research Centre for their comments on earlier version of this article. Any errors or mistakes are my own.*

[1] See for recent reports and policy statements, in the UK: British Fashion Council, Fashioning a Healthy Future: The Report of the Model Health Inquiry (September 2007) <http://www.britishfashioncouncil.com/uploads/files/1/The%20Report%20of%20the%20Model%20Health%20Inquiry,%20September%202007.pdf>. For the most recent review of the Inquiry see here, British Fashion Council, Review of Model Health Inquiry Recommendations and Opportunities (2016) <http://www.britishfashioncouncil.com/uploads/files/1/Model%20Health%20Inquiry%20Review%20Feb%2016.pdf> both accessed 7 March 2019; in France: Law 2016-41 of 26 January 2016 on the modernization of the French health system Decree 2017-738 of 4 May 2017 pertaining to photographs used for commercial purposes of models whose physical appearance has been modified. See also, Yann Basir 'To be or not to be…photoshopped' (2018) 13(3) JIPLP 177.

[2] On the precarious working conditions of models, see the recent anthropological study by Giula Mensitieri : '*Le Plus Beau Métier du Monde' – Dans les Coulisses de la Mode* (La Découverte, 2018). Noting the lack of publicly available information with regard to remuneration levels, see Mathilde Pavis, 'Runway models, runway *performers*? Unravelling the Ashby jurisprudence under UK law' (2018) 13(11) JIPLP 867, 868.

[3] A similar position applies in Israel, New Zealand, Australia and Canada, as far as the author is aware of.

[4] This point is further discussed in Pavis (n 2). See also Richard Arnold, Performers' Rights (3rd, Sweet Maxwell, 2016) 68, para 2.17.

[5] World Intellectual Property Office, Guide to the Rome Convention and to the Phonograms Convention (WIPO, 1981) (WIPO Guide) 21-2 para 3.4, Arnold (n 4) 74-5.

By contrast, France has expressly excluded fashion models from the scope of IP rights, and more particularly, from the scope of performers' rights. French courts and legislature have consistently refused to regard models as 'performers' within the scope of the French Intellectual Property Code (IPC). Instead, models may rely on a *sui generis* set of rights rooted in employment law, similar to what is also conferred to professionals classed as 'performing artists'. These rights recognised by employment law and codified under the Labour Code (LC) are designed to guarantee minimum levels of remuneration,[6] control models' physical fitness to work,[7] and regulate modelling agencies.[8] In this regard, French law offers stronger safeguards against exploitation to models than other countries.[9]

Yet the LC does not secure to models the revenues associated with the commercialisation of performances that are fixed in photographs or audio-visual recordings as the IPC does for its enumerated list of protected performers.[10] Under employment law, no right of remuneration exists for any subsequent use of models' performances because their physical presence is no longer required.[11] Past the point of the runway show or photoshoot, employment law is spent and models enjoy no additional legal provisions to leverage payment from the commercial exploitation of their work. For this reason, securing protection via IP law, to bolster rights otherwise recognised in employment law, presents a clear financial and contractual advantage to models which goes beyond what they would otherwise receive by virtue of image or personality rights.[12]

This article challenges an interpretation of IP that excludes models from the scope of performers' rights. It argues that any blanket exclusion of models from the scope of performers' rights, whether tacit or express, falls afoul the minimum level of protection guaranteed by performers' rights under international law. This argument is based on the provisions of international treaties, such as the Rome Convention, WPPT and Beijing Treaty, which require signatories to grant performers' rights to any qualifying individual who interprets or otherwise performs a literary or artistic work subject to copyright

[6] LC, Articles L7123-3, 7123-4, L7123-6 to L7123-10. See also, Convention collective nationale des mannequins adultes et mannequins enfants de moins de 16 ans employés par les agences de mannequins du 22 juin 2004. Etendue par arrêté du 13 avril 2005 JORF 27 avril 2005. Mannequins adultes et mannequins enfants de moins de 16 ans employés par les agences de mannequins, Brochure n° 3318, IDCC 2397, available < https://www.legifrance.gouv.fr/affichIDCC.do?idConvention=KALICONT000005635138> accessed 7 March 2019. See for the 2018 remuneration scale, Accord du 19 octobre 2017 relatif aux rémunérations minimales pour l'année 2018 (1), Accord IDCC 2397, available < https://www.legifrance.gouv.fr/affichIDCC.do;jsessionid=CA741337DEC7430D7F218EA3B2867696.tplgfr38s_2?idConvention=KALICONT000005635138&cidTexte=KALITEXT000036512313&dateTexte=> accessed 7 March 2019.

[7] LC, Article L7123-2-1. This disposition provides that employment for modelling purposes is conditioned upon the issue of a medical certificate confirming the medical and physical fitness of the model, notably in relation to his/her weight.

[8] LC, Articles L7123-7 to L7123-32.

[9] Contrast for example with UK law on this, see Pavis (n 2) 867-868. It should be noted that France is not the only country following this pattern of protection, as Greece is reported to offer a similar level of protection.

[10] LC, Article 7123-6. The article reads: "The remuneration owed to the model for the transfer or commercialisation of the recording of their presentation by the employer, or any other user, may not be regarded as a salary when the physical presence of the model is no longer required for the use the recording and that the aforementioned remuneration is not part of the salary received for the production of their presentation, but is contingent of the proceeds of the transfer or commercialisation of the recording". Author's translation.

[11] LC, Article L7123-6.

[12] See also the contractual protection conferred by the IPC, text to n 75. However, on this point see two recent decisions by the Paris Tribunal boosting models' image rights: Paris Tribunal (TGI), interim order (ordonnance de référé) 16 November 2018: *Mr X v Umanlife*; TGI de Paris, 17th chamber, judgement of the 21st November 2018: *Mrs X v SARL Denim*. These decisions were issued between the time of writing and publication of this article. For case comments in English language see, Mathilde Pavis, 'Commercial use of image rights: Paris Tribunal boosts models and performers' protection' The IPKAT (3 December 2018) <http://ipkitten.blogspot.com/2018/12/commercial-use-of-image-rights-paris.html> accessed 7 March 2019.

protection.[13] It follows a literal interpretation of this obligation that a performance is eligible for protection under performers' rights *de minima*, whenever it constitutes the interpretation or embodiment of an underlying copyright 'work'.[14] This is so in any country that has transposed these international conventions into national law, as is the case for both the UK and France.[15] Considering that runway shows and advertising campaigns are recognised copyright 'works' in both jurisdictions,[16] the extension of performers' rights to models who feature in the works is overdue and warranted. Until the categorical exclusion of models from performer's rights is remedied, countries like the UK and France contravene international IP law.[17]

For the purpose of this demonstration, this article focuses on the French law because it overtly contradicts international IP law insofar as case law *expressly* excludes models from the scope of performers' rights, without distinguishing between models who embody copyright works and those who do not.[18] By tracing its development, the analysis reveals that the exclusion is the result of a categorisation of rightsholders created by judges which combines four distinct statutory definitions belonging two different codes: the IPC and the LC. French courts have inferred a normative relationship between the two categories of employees protected under employment law ('performing artists' and 'models') and the two categories of performing artists defined by IP law ('performers' and 'ancillary performers'). In making these cross-code connections, the courts established that the status of 'model' under the LC and that of 'performer' under the IPC were mutually exclusive despite the fact that nothing in the letter of the law supports a joint interpretation of the codes.

Of interest from a comparative perspective, is the rationale behind such an interpretation of the law. This farrago of categories was introduced by judges to fill gaps in the statutory provisions defining 'models', 'performing artists', 'performers' and 'ancillary performers'. The codes failed to sufficiently define the category of protected performers, which required the courts to turn to neighbouring provisions for guidance. In short, the exclusion of models from performers' rights results from a poor definition and understanding of what protected performers are. This may seem surprising considering that the IPC transplanted the international definition of protected performers, as prescribed by the Rome Convention and subsequent treaties, almost verbatim. This evidences that both international and national provisions on performers' rights, as important as those defining the applicable subject-matter, lack clear and accurate interpretation.

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[13] 1961 Rome Convention, Article 3(a); 1996 WPPT, Article 2(a); 2012 Beijing Treaty, Article 2(a); Berne Convention for the Protection of Literary and Artistic Works. of September 9, 1886, completed at Paris, on May 4, 1896, last amended on September 28, 1979, Article 2(1); IPC, Article L121-4. It should be noted that, at the time of writing, the Beijing Treaty has not yet entered into force, and will not until at least 30 eligible signatory parties have ratified it.

[14] Pavis (n 2) 871-874.

[15] UK: Performers' Protection Act 1963, Section 1(1).; France : Loi n° 86-1300 du 23 décembre 1986 autorisant la ratification d'une convention internationale sur la protection des artistes interprètes ou exécutants, des producteurs de phonogrammes et des organismes de radiodiffusion ; Décret n°88-234 du 9 mars 1988 portant publication de la convention internationale sur la protection des artistes interprètes ou exécutants, des producteurs de phonogrammes et des organismes de radiodiffusion, faite à Rome le 26 octobre 1961 (1), available < https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006066461&dateTexte=20180909> accessed 7 March 2019 (entry into force of the Rome Convention 3 July 1987, D1988 Decree Article 1(1)).

[16] Or 'work of the mind' as per the terminology of the IPC (Article L112-4). See for runway shows: Cass, crim., 5 February 2008, *X v Gaulme, Kenzo et Lacroix*, No 07-81.387: Bull. crim. 2008 No 28 p. 109; D. 2008 act. P. 611 (*Ashby* France); JCP E 2008, 1456; *Ashby Donald and Others v France* [2013] ECHR 28 (*Ashby* ECtHR); for video clips: Paris Court of Appeal, 1 May 1994 (4th Chamber, D. 1995, p. 185): *Socadance*.

[17] This point is further discussed in Section 3.2 of this Article, text to n 105.

[18] Pavis (n 2) 871-874.

Noting that models' legal exclusion originates from ambiguous statutory provisions, this article proposes a new test for defining protected performers under the IPC. The article recommends performers' rights protection to be extended to any performance, interpretation or presentation of an underlying copyrightable 'work'. By endorsing the subsistence of an underlying work as a criterion for protection, French courts will be able to sever the ties they have forged between the IPC and LC and reverse the exclusion of models from performers' rights.

This revised definition of protected performers will bring French performers' rights in line with the minimum standard of protection guaranteed by international treaties for the proposed definition derives from the literal interpretation of these instruments.[19] Going further, it is argued that the test for the application of performers' rights this article puts forward is, in fact, the only definition of protected performers compatible with the minimum standard of protection prescribed by international texts. For this reason, the findings of this analysis will be of relevance to any signatory to the Rome Convention, the WPPT or the Beijing Treaty, and to those who envisage transposing these treaties into their national law, such as the United States and others.[20]

2. The exclusion of fashion models from performers' rights under French law: a categorisation across codes

French IP and employment law each recognize two types of rightsholders: 'performers' and 'ancillary performers' under the IPC and 'performing artists' and 'models' under the LC. Taken collectively, these four categories have a potential for overlap as they will apply across similar groups of professionals. For example, a session musician will class as a 'performer' under the IPC and 'performing artist' under the LC. This double-qualification ensures that s/he paid for his/her physical presence in rehearsals, in studios or during public performances and that s/he receives a royalty for the commercial use of any recording of his/her performance. The same double-qualification is also relevant to models as their contribution to creative productions such as photoshoots or runway shows are similar to that of session musicians in their respective genre. But can a model class as 'performers' under the IPC even though they do not fit the definition of 'performing artist' under the LC?

This question requires an examination of whether there is a normative connection between the four types of rightsholders, and whether the two codes should be applied jointly. Might the application of a particular class of employees under employment condition the award of performers' rights under IP law, *et vice versa*? Put simply, can a 'performer' under the IPC be a 'model' under the LC?

Both codes are silent on this point, but nothing in the letter of the law prevents such an interpretation. As it currently stands, the law could allow for a model to be a performer and for a performer to be a model. Yet the courts have opted for a different position in a decision dating back to 1997, instead preferring an interpretation which reasons that the respective categories of 'model' under the LC and

[19] The literal interpretation of international texts is discussed in length in Pavis (n 2).

[20] Message from the President of the United States transmitting the Beijing Treaty on Audiovisual Performances, done at Beijing on June 24, 2012 (Beijing Treaty). Senate. Treaty Doc 114-8, 114th Congress, 2nd session. Available < https://www.foreign.senate.gov/imo/media/doc/Treaty_114-8.pdf> accessed 29 October 2018. This was the last action recorded by the Senate at the time of writing (October 2018). See also, ongoing reforms of performers' rights in South Africa, 2016 Performers' Protection Amendment Bill <https://juta.co.za/media/filestore/2018/11/B24B_2016.pdf> accessed 7 March 2019.

'performer' under the IPC are mutually exclusive.[21] This position was summarised and endorsed in the administrative guidelines issued by the French Ministry of Labour in 2007.[22]

Case law development and the 2007 guidelines reveal that the joint application of the codes performed by the court was introduced to address the fact that statutory definitions of employees were ambiguous.[23] Conversely, it is precisely because the IPC lacked a detailed, or clearer, definition of protected performers that courts were able to introduce and sustain such joint interpretation, resulting in the blanket exclusion of models from the scope of performers' rights. It is thus important to unpack the evolution of each class of rightsholders under employment and IP law respectively to understand how they came to be jointly interpreted by the courts and French administration.

2.1. 'Models' and 'performing artists' under the French Labour Code

In 1969, the French government reformed employment law to bring within its ambit 'performing artists' (*artistes du spectacle*) and 'models' (*mannequins*).[24] This was achieved by introducing a legal presumption that any contract formed for the purpose of hiring a performing artist or a model is presumed a contract of employment. This presumption, which continues to apply today, triggered the application of a protective regime ensuring, notably, minimum levels of remuneration[25] and contributions to social security and state pensions by employers.[26]

The current statutory definitions of 'models' and 'performing artists' are similar to the provisions of Law of 1969, implemented fifty years ago.[27] In its current iteration, the LC enumerates a number of professions satisfying the category of employee under Article L7121-1. The relevant section reads

[21] Conseil d'Etat, 17 March 1997, No 167586, 1/4 SSR; Conseil d'Etat, 23 February 1998, No 172735.

[22] Inter-ministerial Intertepretative Guildeimes ("circulaire interministérielle") DGT/DPM No 2007-19 du 20 December 2007 related to the enforcement of Articles L763-1 (L7123-1) and following of the LC regarding the employment of models and modelling agencies, NOR: MTST0710774C (not published in *Journal Officiel*) (2007 guidelines). Available : <https://expat-elan.fr/images/10-textes-de-lois/circulaires/2007/circ-interministerielle_2007-12-20_DGT-DPM_no2007-19.pdf> accessed 29 October 2018. The Guidelines read: "In the decision SPI, No 167585, dated 17 March 1997, the Conseil d'Etat, established the principle according to which when, during the shooting of an advertising clip, an individual executes a performance fitting the definition for protection prescribed by Article L212-1 of the intellectual property code, and which goes beyond the mere use of his/her image, s/he does not act as a model in the meaning of Article L763-1 (now L7123-2) of the Labour Code, but as a performer" (p. 2). […] Stating that the reverse applies: "In any case, the individual whose performance does not fit the conditions for protection prescribed by Article L212-1 of the intellectual property code is a model and is subject to the legal regime provided under and Article L763-1 (L7123-1) and following of the Labour Code" (p. 2). Author's translation.

[23] The 2007 Guidelines indicates that clarification was required: "The distinction between models and performers (defined by Article L 212-1(1) if the Intellectual Property Code) was clarified by the jurisprudence of the civil and administrative jurisdictions." (p.2). Author's translation.

[24] Law of 26 December 1969 No 69-1186 related to the legal status of performing artists and models (JORF 30 December 1969, page 12732 (Law of 1969).

[25] See n 7.

[26] Circulaire No DSS/5B/2012/161 du 20 avril 2012 relative au régime social des redevances et avances sur redevances. Available here < http://circulaire.legifrance.gouv.fr/pdf/2012/04/cir_35114.pdf> 29 October 2018.

[27] Law of 1969, Articles 29s, para 3 and 29t para 3. Article 29s, para 3 read "are regarded as performing artists, notably, lyrical artists, dramatic artists, dance artists, variety artists, musicians, cabaret artists, conductors, arranger-orchestrators, and for the material delivery of their artistic concept, the director". Article 29t, para3 "is regarded as a model the individual, of either gender, who is in charge of presenting to the publics designs and new items, notably of clothing or adornment, or of posing for any kind of presentation, even when this activity is only performed occasionally". Author's translation.

> "Those regarded as performing artists are, notably: 1. Lyrical artists; 2. Dramatic artists; 3. Dance artists ; 4. Variety artists ; 5. Musicians ; 6. Lyricists ; 7. Cabaret artists ; 8. Conductors ; 9. Arranger-orchestrators ; 10. Directors, producers and choreographers, for the material delivery of their artistic concept; 11. Circus artists; 12. Puppeteers; 13. Individuals whose activity is defined as the profession of performer by extended collective conventions on the performing arts".[28]

As signalled by the word 'notably' which precedes the definition, the list is non-exhaustive and can encompass other professions recognised as 'collective conventions'. Collective conventions are sector-wide agreements reached by employees' and employers' representative bodies which may be annexed to, referenced in or edited via government regulations and supplement the list enumerated by Article L7121-1.[29] In this case, such agreements provide a broader definition of 'performing artists' for specific industries. For example, the 1984 'National Collective Convention of Artistic and Cultural Industries'[30] regards no less than 78 professions to be 'performing artists' under Article L7121-2.[31]

Models, on the other hand, are defined by the LC under Article L7123-2 as

> "any person who is either: 1. Presenting to the public a product, a service or promotional content, directly or indirectly via the reproduction of their image on any visual or audio-visual medium; or, 2. Posing as model, with r without subsequent use of their image".[32]

The definition applies whether or not such activity is performed only occasionally by the model (Article L7123-2).

It is worth noting that neither the definition for 'models' nor 'performing artists' refers to the other. Further, Article L7121-2 and L7123-2 adopt different approaches when identifying the relevant groups of employees: Article L7121-2 enumerates a range of professions to be treated as 'performing artists' with the possibility of expanding this group via collective conventions, whilst Article L7123-2 refers to the act constituting modelling itself.

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[28] Article L7121-2 (as amended by Law No 2016-925 of the 7th of July 2016, Article 2016). This provision replaced the former Article L 762-1 Code du travail. Article L 762-1 was repealed by Article 12 of Ordonnance No 2007-329 dated 12 March 2007 JORF 13 mars 2007. Entry into force 1 March 2008). Author's translation.

[29] IPC, Article L212-8.

[30] 'Convention collective nationale pour les entreprises artistiques et culturelles du 1er janvier 1984'. Amended by Regulations (arrêté) dated 4 January 1994 JORF 26 January 1994. (as Amended on 20 February) <https://www.legifrance.gouv.fr/affichIDCCArticle.do;jsessionid=CF099124184951F7E4363F2D5704290F.tplgfr29s_2?cidTexte=KALITEXT000020782671&idArticle=KALIARTI000020782713&dateTexte=20090624&categorieLien=cid#KALIARTI000020782713> accessed 7 March 2019.

[31] Ibid, Article Annexe A (as amended by via secondary regulations ('avenant' and 'arrêté') dated 20 February and 30 December 2009 respectively). See, Regulations ('Arrêté'(dated 23 December 2009 related to the extension of the agreements and amendments reached in the context of the national collective convnetion of artistic and cultural industries (No 125) NOR: MTST0931722A, JORF n°0302 du 30 December 2009 page 22780, texte No 105.

[32] Article codified within the employment law Code in 2007 by the Ordonnance 2007-329 2007-03-12 JORF 13 March 2007. Available < https://www.legifrance.gouv.fr/affichTexte.do;jsessionid=7AA63C0AA255D54A942E320AD12E32F7.tplgfr22s_1?cidTexte=JORFTEXT000000465978&dateTexte=20070313&categorieLien=cid%20-%20JORFTEXT000000465978> accessed 7 March 2019.

The LC was reformed in 1990[33] to modify *inter alia* the rules applicable to modelling contracts which, until then, had remained identical to those formed for the hire of performing artists.[34] The 1990 reform thus marked the first step toward substantial differences between the two employment law regimes, and fuelled litigation teasing out the distinction between models and performing artists.

It followed that the law had to differentiate between a 'performing artist' and a 'model'. In practice, the distinction went beyond a mere academic exercise of categorisation as it affected the legal regime applicable to parties' contracts, recruitment processes and their level of remuneration. Difficulties of interpretation arose in the context of acting performances delivered for advertising purposes. Was the performer be treated as a 'dramatic artist' listed under L7121-2 or as a person "presenting a product or services" therefore acting as 'model' within the meaning of the LC? Were actors featuring in advertising clips 'performing artists' or 'models'?

Statutory definitions offered no solution to this issue. Accordingly, courts relied on two subsequent dispositions of the LC relating to the remuneration of performing artists and models in a series of decisions handed down between 1993 and 1995. Articles L762-2 and L763-2 (now L7121-8 and L7123-6) specified that payments made in relation to IP rights were not to be confused with, or (mis)taken for, the remuneration paid for the performing artists' or models' physical presence on set or stage. In referring to performing artists, Article L762-2 read:

> "The remuneration owed to the artist for the transfer or commercialisation of the recording of their interpretation, execution or presentation by the employer, or any other user, may not be regarded as a salary".[35]

Article L763-2, regarding models' remuneration, stressed the same point, but instead of referring to the "artists' interpretation, execution or presentation", the provision mentioned the "models' presentation", reading: "The remuneration owed to the model for the transfer or commercialisation of the recording of their presentation".[36]

The courts have interpreted this change in wording between the "artist's interpretation, execution and presentation" and the "model's presentation" as a criterion of distinction according to which performing artists 'interpret' whilst models merely 'present' content, i.e. products or services for commercial purposes. This was the position held in the *Cocinelle* decision of the Court of Cassation in 1993,[37] which was implemented by the Paris Court of Appeal two years later in *Chaudat v SARL Coccinelle*.[38] The 2007 Ministry of Labour interpretative guidelines repeat this interpretation of the LC and clarify that any distinction between the two classes of employees should be made in light of the skills employed in the performance, not its genre.[39]

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[33] Law of 12 July 1990, No 90-603 amending the Labour Code and related to models and to the protection of children and adults performing modelling services NOR: FAMX9000011L (Law of 1990).
[34] Although they were each given a different heading in the LC under former Articles L762ff and L763ff respectively.
[35] The full provision reads: "The remuneration owed to the artist for the transfer or commercialisation of the recording of their interpretation, execution or presentation by the employer, or any other user, may not be regarded as a salary when the physical presence of the artiste is no longer required for the use the recording and that the aforementioned remuneration is not part of the salary received for the production of their interpretation, execution or presentation, but is contingent of the proceeds of the transfer or commercialisation of this recording". Author's translation.
[36] See n 8 for the full provision.
[37] Cour Cass, criminal chamber, 9 March 1993, No 91-844363: *Coccinelle*.
[38] CA Paris 27 January 1995 18th ch.: *C. Chaudat v SARL Coccinelle and others*, RJS 1995 p. 448.
[39] 2007 guidelines (n 22).

The nuanced language of the LC was introduced by the 1990 reform.[40] As such, it could only serve as a distinction criterion between models and performing artists from 1 January 1991, the date of the reform's entry into force.[41] Prior to this date, Articles L762-2 and L763-2 of the LC were perfectly identical and referred to the 'interpretation, execution and presentation' of both performing artists and models indistinctively.[42] For this reason, courts had to seek out a different criterion to differentiate performing artists from models to assess claims. This is the point at which, the Conseil d'Etat turned to the IPC provisions to support their interpretation of the LC,[43] an approach which continues to influence the interpretation of employment law today.

In two decisions dated 17 March 1997[44] and 23 February 1998,[45] the highest administrative court concluded that a distinction between 'models' and 'performing artists' under employment law must take into consideration whether the claimant qualified as a 'performer' within the meaning of the IPC.[46] If so, s/he could not be classed a model under employment law and ought to be regarded as a performing artist within the meaning of Article L762-1 (now L7121-1).

This jurisprudence corrected a previous interpretation of the LC applied by the French Ministry of Employment specifying the distinction between models and performing artists should look to the purpose, aim or genre of the performance for guidance.[47] If the performance was primarily aimed at encouraging sales of a product or a service, the performer was to be classed as a model. The Conseil d'Etat found this interpretation of 'models' overbroad, as many performers protected by the IPC would fall within that category, conflating the regimes of the IPC and the LC in deciding so.[48] The administrative court's approach was subsequently endorsed by civil jurisdictions, including the Court of Cassation.[49]

This prevailing interpretation effectively places the category of 'models' under employment law and 'performer' under IP as mutually exclusive. It is only for a lack of clarity in the LC's distinction between 'performing artists' and 'models' as distinct classes of employees that the courts resorted to using definition protected performers under the IPC.

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[40] Law of 1990, Article 12.

[41] Challenging that the change of wording should be interpreted as the legislative intention to base the distinction on this element: François Corone, 'La définition juridique du mannequin: Méli-mélo drame en quête d'interprétation' (1995) 3(9) *Legicom – Victoires Editions* 3, 8.

[42] LC, Article L762-2 read: "The remuneration owed to the artist for the transfer or commercialisation of the recording of their interpretation, execution or presentation by the employer, or any other user, may not be regarded as a salary when the physical presence of the artist is no longer required for the use the recording and that the aforementioned remuneration is not part of the salary received for the production of their interpretation, execution or presentation, but is contingent of the proceeds of the transfer or commercialisation of this recording." Author's translation. LC, Article L763-2 read: "The remuneration owed to the model for the transfer or commercialisation of the recording of their interpretation, execution or presentation by the employer, or any other user, may not be regarded as a salary when the physical presence of the model is no longer required for the use the recording and that the aforementioned remuneration is not part of the salary received for the production of their interpretation, execution or presentation, but is contingent of the proceeds of the transfer or commercialisation of this recording." Author's translation. This wording originated from the Law of 1969 (Article 2).

[43] Conseil d'Etat, 17 March 1997, No 167586, 1/4 SSR; Conseil d'Etat, 23 February 1998, No 172735.

[44] Conseil d'Etat, 17 March 1997, No 167586, 1/4 SSR.

[45] Conseil d'Etat, 23 February 1998, No 172735.

[46] Conseil d'Etat, 17 March 1997, No 167586, 1/4 SSR; Conseil d'Etat, 23 February 1998, No 172735.

[47] Interpretative Guidelines ('circulaires') DRI No 95/2 dated 2 January 1995 and DRI No 93-1 dated 4 June 1993, issued by the Ministry of Labour.

[48] Conseil d'Etat, 17 March 1997, No 167586, 1/4 SSR; Conseil d'Etat, 23 February 1998, No 172735.

[49] Cour Cass 10 February 1998, Claim No 95-43.510 Bulletin 1998 V N° 82 p. 59; Cour Cass, 9 March 1993, Claim No 91-84363 [unreported], CA Paris, 27 January 1995, RJS 1995 p. 448.

2.2. 'Performers' and 'ancillary performers' under the French IP Property Code

France introduced performers' rights within its IP regime for the first time in 1985, which were subsequently codified in the IPC in 1992.[50] Neither the 1985 nor the 1992 reforms of IP law referenced models in their provisions. This is unsurprising considering the international instrument (the 1961 Rome Convention) prompting the introduction of IP rights with civil-based remedies for performers also lacked any express reference to models.[51] Rather, the aim had been to introduce an open-ended definition of protected performers.[52] Article L212-1 defining the eligible performers reads:

> *"*Save for 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*"*.[53]

The reference to ancillary performers in IPC Article L212-1 is itself unclear. Whilst the Article refers to professional conventions or customs to frame this category,[54] it overlooks the fact that the category or denomination is relevant to only acting professions and has no equivalence in other genres of the creative industries employing performers, like music, dance or variety acts.[55] Therefore sector-wide professional agreements defining 'ancillary performers' in such sectors are sparse. This generates a fundamental distinction between 'performers' and 'ancillary performers', i.e. protected and unprotected performers, without providing a useful definition.

Without any IPC definition for 'ancillary performers', French courts have been left to devise their own test to determine the scope of application of performers' rights, which has been largely shaped by their relation to ancillary performers. The resulting test is therefore far from straightforward, as no single formulation was coined in Article L212-1's thirty-three years of existence. Instead, a number of pointers have emerged from the jurisprudence. For instance, a performer has been characterised as the artist who

[50] Law of 1 July 1992, No 92-597 regarding the Intellectual Property Code, JORF No 0153 3 July 1992, page 8801.

[51] WIPO Guide, 21-22; 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 (Jolibois Report II) (1985) 84.

[52] WIPO Guide, 21-22, para 3.1 to 3.5.

[53] Official translation. IPC, available here <https://www.legifrance.gouv.fr/content/location/1742> accessed 30 October 2018.

[54] See for example, the 'National collective convention of performers recruited for the purpose of television shows productions' defines under Article 1.1 performers as: We define as 'performers' ['artistes interprètes'] the individuals hired as dramatic artist (including off-screen voiceover acting), lyrical artists, dance artists, variety artists (including cabaret artists, circus artists, artists performing visual acts [numéros visuels]), stunt actors, puppeteers, choir members (defined by Articles 5, 14, 3 of the present convention), but ancillary performers (even when they recite or sing a well-known text collectively), silouhettes (ancillary artist whose character need to come off the camera's range, for stage direction and design purposes), 'chef de file', light stand-ins and musicians are excluded." (dated 30 December 1992, as amended by secondary regulations dated 24 January 1994, JORF 4 February 1994, and 29 January 2007 concerning the editing of the convention). By contrast, the 'National Collective Convention of actors and ancillary actors in cinematographic productions' defines the ancillary performer as the person who interprets of less than 13 lines. (dated 1 September 1967, cited in CA Paris, 18th chamber, 18 February 1993: D. 1993, 397, note Weksteinteg, JurisData No 1993-026090 (*Armbruster v Telema* (Sté)) and in Jolibois Report II, 85).

[55] This difficulty was anticipated by the Senate (Jolibois Report II, 85) but the reference to conventions and customs was deemed addressed by referring to professional customs ('usages professionnels') (Law of 1985, Article 16) which was replaced by collective conventions by the 1992 codification of the text which created Article L212-2.

injects 'personal character' in his/her performance, unlike the ancillary performer.[56] In some cases, the notion of 'personal character' was evidenced by the prominent role the performance played in the overall piece.[57] In others, the 'personal character' was interpreted to require the 'stamp of personality of the performer' over his/her work.[58] Reminiscent of the originality threshold applicable to author's rights in France,[59] these criteria were raised during national and international parliamentary debates in relation to the definition of protected performers under French law.[60] Although this may explain why the courts themselves relied on these aspects of the performance, there is no explicit reference to these debates in the jurisprudence to confirm this analysis.[61]

The 'personality' or 'personal character' of a performer is demonstrated when the artist cannot be changed for another without affecting the outcome of the performance or production.[62] By comparison, a performance will be found to be lacking personal character if cannot be individually identified in the resulting piece or within a group performance.[63] Importantly, the length is irrelevant, as a performance may be brief and still carry 'personal character'.[64] In practice, the upshot of this line of jurisprudence is that the category of ancillary performers has been construed narrowly by the court, as intended by the legislator.[65] In turn, this makes for a broad definition of protected performers.[66]

This piece-meal approach to the distinction between 'ancillary performer' and 'performer' is relevant to the case of models because it has shaped the definition of protected performers more generally. It is now commonly accepted that a protected performer under the French IPC is the performer, who aside from satisfying the statutory definition provided by Article L212-2, marks his/her interpretation with his/her personality or personal character.[67] As such, courts relied upon this definition when interpreting the LC to distinguish between 'models' and 'performing artists' in the period preceding the introduction of the 1990 reform.

In comparison to employment law jurisprudence, IP case law has made little reference to the LC in its application of performers' rights. Only one decision from the Paris Court of Appeal, *Delafoulhouze v Ste Daimler Chrisler and others*,[68] dated 21 January 2005, rejects awarding performers' rights to a claimant because his performance satisfied the definition of modelling prescribed by the LC, and as

[56] CA Paris, 21st chamber, 31 May 1996: JurisData No 1996-023442; Cour Cass, 1st civil chamber, 24 April 2013, X.: Comm. Com. Eléctr. 20113, comm. 75, note Caron; JurisData No 2013-007959; CA Paris, 5th pole, 2nd chamber, 25 September 2009, SAS Europe 1…: Prop. Intell. 2010, No 34, obs. Bruguière, and p. 638 obs. Lucas.
[57] CA Paris, 4th chamber, 11 May 1994 (D. 1995, p. 185).
[58] CA Paris, 18th chamber, 18 February 1993: D. 1993, 397, note Weksteinteg, JurisData No 1993-026090; CA Paris, 4th chamber, 4 July 2008, Universal Music: RTD com. 2008, 745, obs. Pollaud-Dulian; CA Versailles, 15th chamber, 9 October 2008, *Randall Garrett*: Propr. Intell. 2009, No 31, p. 173, obs. Bruguière (Uncle Bens' voice).
[59] text to n 105.
[60] WIPO Guide, 21-22 para 3.4.
[61] WIPO Guide, 21-22.
[62] CA Paris, 18th chamber, 18 February 1993; CA Paris, 21st chamber, 6 May 1996: JurisData No 1996-022066.
[63] Ibid.
[64] Cour Cass, 1st civil chamber, 6 July 1999, No 96-43.749: *Telema v Dame Leclaire*. CA Paris, 4th chamber, 4 July 2008, Universal Music: RTD com. 2008, 745, obs. Pollaud-Dulian.
[65] Jolibois Report II, 84.
[66] Cour Cass, 6 July 1999, Bull. Civ. I, No 230, p. 148 No 97-405572 and 96-43749 (2 decisions).
[67] See for example, text commentary below Article L 121-2 of the IPC in Michel Vivant, and Jean-Louise Navarro (eds) 'Intellectual Property Code 2018' (2017) page (214: 291-292). See also, Nicolas Binctin, Droit de la propriete intellectuelle – Droit d'auteur, brevet, droits voisins, marque, dessins et modèles (LGDJ Lextenso, 2018).
[68] CA Paris, 4th chamber B, 21 January 2005, [unreported], case note by D Lefranc, La Semaine Juridique Enterprise et Affaires, No 35, 1er Septembre 2005, 1216.

such could not be regarded as a 'true' performer in the meaning of the IPC. This case was nevertheless cited in the 2007 Guidelines, in support of the legal exclusion of models from the IPC.[69]

In *Delafoulhouze*,[70] the claimant, a professional actor, had been hired to feature in an audio-visual clip advertising cars. The Court noted that "the participation of Mr Delafoulhouze in the film had the objective to promote the sales of a vehicle and did not, in any way, involve the interpretation of an artistic or literary work".[71] The Court acknowledged that the actor's performance was part of an artistic work, the 'film', but rejected that such participation amounted to an *interpretation*. Here, 'interpretation' was defined with reference to the LC and its notion of modelling, and not with reference to the performer's expression of personal character or personality in his/her performance which would have been more consistent with past case law. In this case, the actor's personal character or imprint of personality would have been easily demonstrated considering that his body and face featured in the clip. Yet the Paris Court of Appeal stressed that the actor's performance was not "limited to lending his image without engaging in authentic stage acting"[72] in what was reported to be a very succinct *ratio decidendi*.[73] In support of this argument the Court referred to Article L763-1(3) of the LC.[74] This reference in the decision perhaps implies that the actor's performance was to be regarded as a presentation of a product, and not an 'authentic' interpretation, falling short of meeting the standard of Article L212-1 of the IPC.

Whilst this decision is inconsistent with past IP case law, it is coherent with administrative jurisprudence on this matter.[75] First, it excludes actors from the IPC on the basis of applying the definition of models under the LC, in the same way actors were excluded from the scope of 'models' on the basis of the definition of protected performers under the IPC.[76] Second, the decision also prescribes that the distinction between models and performing artists under the LC be made on the basis of 'skills', regardless of whether there is an interpretation or a presentation, as previously discussed.[77]

Delafoulhouze is not the only decision that excluded models from the scope of the IPC, but it is the only reported case to date which does so expressly and with reference to the LC. Three years later, in the *Photoalto* jurisprudence, three decisions by the Court of Cassation and the Paris Court of Appeal have been interpreted to exclude models form the scope of authors' or performers' rights in a more implied manner.[78] In these cases, models submitted that the legal regime governing their assignment of image rights was similar to what is otherwise applicable to similar IP-right assignment contracts under the IPC.

In a section related to authors' rights, the IPC provides that contract terms transferring copyright must be specific regarding the uses assigned or licensed, the duration, the geographic scope and the level of

[69] 2007 Guidelines, 2.
[70] Ibid.
[71] Author's translation. Excerpts of the decision reported in case summary by D Lefranc, La Semaine Juridique Enterprise et Affaires, No 35, 1er September 2005, 1216.
[72] Author's translation. Excerpts of the decision reported in case summary by D Lefranc, La Semaine Juridique Enterprise et Affaires, No 35, 1er September 2005, 1216.
[73] CA Paris, 4th chamber B, 21 January 2005, [unreported], case note by D Lefranc, La Semaine Juridique Enterprise et Affaires, No 35, 1er September 2005, 1216. This case has not been reported in full in legal databases. Only a case note on the decision (cited in this note), featuring excerpts of the decision, is available.
[74] Ibid.
[75] Text to n 34.
[76] Text to n 41.
[77] Ibid.
[78] Paris 4th Chamber A, 10 September 2008 No 07/06621, *St Photoalto v Paul* [unreported] in RTD com. 2008. 746 ; Cour Cass, 1st civil chamber, 11 December 2008, Claim No 07-19.494, *Brossard-Martinez v St Photoalto*, Bulletin 2008, I, n° 282, Dalloz 2009 AJ 100, note Paullaud-Dulian; RTD Com 2009, p. 141.

payment for which such use is granted.[79] The validity of contracts failing to meet this standard of precision may be affected. Because it limits the enforcement of cheap blanket assignments of rights, this measure is more protective than common contract law or provisions related to image rights. The IPC has been interpreted to require the same level of specificity in relation to performers' rights due to their similar nature, even though no equivalent provision features in the code in relation to performers' contracts specifically.[80]

In the *Photoalto* cases, the claimants submitted that similar principles also applied to their modelling contracts. Yet neither the parties nor the courts refer to the IPC directly in their arguments. Instead, the matter was decided on the basis of employment law[81] and general contract law.[82] It is nevertheless clear the claimants sought the protection conferred by IP law, which was categorically denied by the Paris Court of Appeal and the Court of Cassation in failing to recognize models as protected performers under this IPC.

Scholars interpreted this position as a firm refusal to draw any analogy between the work of authors and performers on the one hand, and that of models on the other.[83] This also suggests that the joint interpretation of the LC and the IPC is limited to the provisions concerning the definitions of 'models' and 'performers' and nothing else. Therefore, the only point of consistency in the joint interpretation of the codes seems to lie in the courts' reluctance to include models within the scope of performers' rights.

3. Challenging the exclusion of models from performers' rights in France

This article challenges the exclusion of models from performers' rights and the cross-code categorisation which underpins it. This criticism is based on two grounds. First, the joint interpretation of the codes contradicts national principles of statutory interpretation on the one hand, and IP law's commitment to aesthetic neutrality on the other. Second, the exclusion of models from performers' rights contravenes international IP law for it falls short of delivering the required minimum standard of protection prescribed by international instruments. As such, the exclusion of models from performers' rights, as enforced in France, flouts both national and international law.

3.1. A joint interpretation contrary to national law

There are no detailed codified principles of statutory interpretation under French Law. The Civil Code only prescribes that judges cannot 'refuse to give judgment on the pretext of legislation being silent, obscure or insufficient'[84] and 'are forbidden to decide cases submitted to them by way of general and regulatory provisions'.[85] It transpires from the practical application of these broad principles that judges

[79] IPC, Article L131-1.
[80] See for commentary at the time, Agnès and Henri-Jacques Lucas, Traité de la propriété intellectuelle, (3 edn, 2006, Litec) 1085-1086; Frédéric Paullaud-Dulian, Case Notes to Paris 4th Chamber A, 10 September 2008 No 07/06621, *St Photoalto v Paul* [unreported] in RTD com. 2008. 746, and to Cour Cass, 1st civil chamber, 11 December 2008, No 07-19.494, *Brossard-Martinez v St Photoalto*, Dalloz 2009 AJ 100; RTD Com 2009, p. 141.
[81] LC, Articles L763-1, L763-2.
[82] French Civil Code, (former) Articles 1108 and 1131.
[83] Frédéric Paullaud-Dulian, Case Note to Paris 4th Chamber A, 10 September 2008 No 07/06621, *St Photoalto v Paul* [unreported] in RTD com. 2008. 746; Frédéric Pollaud-Dulian, Case note to Cour Cass, 1st civil chamber, 11 December 2008, No 07-19.494, *Brossard-Martinez v St Photoalsto*, Dalloz 2009 AJ 100; RTD Com 2009, p. 141.
[84] Civil Code, Article 4.
[85] Civil Code, Article 5. This Article also forms the legal basis according to which there is no binding legal precedent under French law. See on this, Cass Crim 24 July 1967, Claim No 66-90.807: JCP 1968, II, 15339; Cass, 3rd civil chamber, 27 March 1991, Claim No 89-20.149: JurisData No 1991-001274, Bull civ III, No 101.

will traditionally focus on a textual interpretation of the law, seeking to apply its provisions in light of the legislator's intention as reflected in the text, parliamentary debates or preparatory work.[86] In this regard, the techniques of statutory interpretation applied by French courts is similar to what has been adopted by UK courts,[87] or to what is prescribed by the Vienna Convention on the Law of Treaties.[88]

The joint application of the codes contradicts the methods of literal objective interpretation on three counts. First, the objective of either code is different so much so that they cannot be taken for the same expression of legislative intention. Second, the joint application contradicts the legal maxim according to which the court cannot discriminate where the law itself does not. Third, it affects the IPC's principle of artistic neutrality.

It is argued that the joint interpretation cannot be inferred from a literal application of the texts because IP and employment law answer to different rationales, leaving no leeway to assume or imply that they were to be implemented as a coherent whole. The LC introduced rights to ensure that creative professionals' time contribution for their physical presence on set or stage is remunerated in accordance with the legal minimum levels of remuneration (minimum wages). The categorisation between 'performing artists' and 'models' was necessary because these professions did not readily fit the general definition of 'employee' then implemented under French law. The rationale underlying the implementation of IP rights such as performers' rights is rather different. This category of rights guarantees access to revenues flowing from the commercialisation of the recordings of their performance. As such, performers' rights are more concerned with remunerating artists for the fixation and subsequent use of their recorded performances than for the time spent delivering or recording them. Considering the objective differences in each set of rights, their provisions should not be conflated and interpreted jointly where the legislator has not expressly requested it. In parliamentary debates leading to the introduction of performers' rights and employment rights for performing artists and models, neither's legislative aims were described with reference to the other. In the *Photoalto* jurisprudence, the Court of Cassation rejected the view that any analogies be inferred between the IPC and the LC regarding modelling contracts precisely because their aims were too distinct. The same ought to apply as regards the statutory definitions of rightsholders.

On only one occasion was the LC referenced in the preparatory works preceding the implementation of performers' rights. This was done to stress the similarity of syntax in the drafting of Rome Convention and the LC.[89] Considering that no further association was made between the IPC and the LC in subsequent debates, it is clear that the provisions of the LC were not intended to carry any normative or interpretative weight over the application of performer's rights.[90]

[86] This approach is generally referred to as the textual (exegetic) interpretation of the law, often described as emerging from the 19th century and forming the basis of the French methodology of statutory interpretation. See, Philippe Remy, *'Eloge de l'exégèse'* (1985) 1 Droits 115.
[87] *Pepper v Hart* [1993] AC 593 (HL). See comments by Lord Denning in *Davis v Johnson* [1979] AC 264, 276–77, *Hadmore Production v Hamilton* [1983] 1 AC 191, 201. For cases excluding parliamentary debates: *Millar v Taylor* (1769) 4 Burr 2303, 2332 (Willes J) (KB); Holger Fleischer, 'Comparative Approaches to the Use of Legislative History in Statutory Interpretation' (2012) 60(2) Am J Comp L 401.
[88] Vienna Convention on the Law of Treaties, entered into force 27 January 1980, Treaties Series No 58 (1980) (Vienne Convention).
[89] Jolibois Report II, 83. Comparing Article 3(a) of the Rome Convention to Article L761-2 (former) of the LC.
[90] Ibid, 83-86.

Additionally, the joint interpretation of the Codes contradicts a traditional legal maxim of civil law by which judges should not distinguish or discriminate where the law does not itself prescribe so.[91] This rule is better known in its original Latin form as '*ubi lex non distinguit nec nos distinguere debemus'*.[92] Yet distinguishing where there is ground to do so is precisely the result of the cross-code categorisation proposed by the courts which excludes models on the basis of Labour Law when the IPC makes no such provisions.

Finally, the courts' joint interpretation of the codes also threatens the artistic neutrality of the IPC.[93] This long-standing principle provides that IP law applies without consideration for the function, genre or aesthetic quality of the pieces presented to the court.[94] The rule has been expressly formulated by the IPC in relation to authors' works and it has been interpreted as applying to neighbouring rights like performers' rights more generally by way of analogy.[95] No similar safeguard applies under employment law. Consequently, the jurisprudence related to the LC has contravened this principle by using both the genre and aesthetic quality of performances to distinguish between the category of 'models' and 'performing artists' under Article L7121-1 and L7123-2. The categorisation between models 'merely presenting' a product or a service and a performing artist who 'authentically acts or interprets a work' relies on a subjective assessment of the quality of the performance. The jurisprudence opens the back door for aesthetic consideration to enter the scope of IP rights by applying performers' rights with reference to the LC's distinction between model and performing artist, which is itself based on aesthetic judgements. This approach was most noticeable in the *Delafoulhouze* decision handed down by the Paris Court of Appeal in 2005, described above in Section 2.2.[96] The risk of having considerations of artistic quality influence the application of performers' rights adds further weight to the argument the joint interpretation of the codes would be an unwelcome development of law's interpretation.

3.2. A joint interpretation contrary to international law

Going further, this article argues that the joint interpretation of the codes is untenable because models are to be regarded as performers by virtue of international IP law. This line of argument takes us back to the definition of protected performers under international texts.

All three international conventions on performers' rights, the Rome Convention, the WPPT and the Beijing Treaty, have defined protected performers with reference to an underlying 'work' -- the short-hand term referring to subject-matter protected under the Berne Convention.[97] Article 3(a) of the Rome Convention defines eligible performers as "actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, or otherwise perform literary or artistic works". The WPPT reiterates verbatim the definition of protected performers under Article 2(a) adding "or expressions of folklore"

[91] Jean Hilaire, Adages et maximes du droit français (2nd edn, Dalloz 2015) 220. See for an application of this principle, jurisprudence Discussing the authority of maxims under French law Pascale Deumier and Xavier Magnon Les adages en droit public (1) (2014) RFDA 2014 3.
[92] Hilaire (n 91) 220.
[93] IPC, 112-1.
[94] Ibid. See for its application, Cour Cass, Criminal Chamber, 2 May 1961: JCP G 1961, II, 12242; Cour Cass, Criminal Chamber, Plenary Assembly, 7 March 1986 (two decisions): D 1986, 405, concl. Cabannes note Edelman (regarding video games); Cour Cass, Criminal Chamber, 6 May 1986: JCP G 1986, IV, 200; 1986, 130, 149 and Cour Cass, Criminal Chamber, 28 September 1999, No 10-12.046, Prop. Intell. 2011, No 40, p. 325, obs. Sabatier (regarding pornographic films).
[95] David Lefranc, Case note, La Semaine Juridique Enterprise et Affaires, No 35, 1er Septembre 2005, 1216.
[96] 2007 Guidelines, 2. See also, David Lefranc, Case note, La Semaine Juridique Enterprise et Affaires, No 35, 1er Septembre 2005, 1216.
[97] Pavis (n 2) 871-874.

so that the clause concludes with "or otherwise perform literary or artistic works or expressions of folklore". In 2012, the Beijing Treaty specified that this definition included" those who perform a literary or artistic work that is created or first fixed in the course of a performance" to ensure that improvised interpretations were indeed classed as a type of protected performances even in cases where the creation of the underlying work is simultaneous to its performance.[98]

Applying a literal interpretation of international texts compliant with the Vienna Convention,[99] the author has demonstrated elsewhere that the use of the word 'work' is to be read as a defining characteristic of the subject-matter covered by performers' rights *de minima*.[100] In other words, international law guarantees that performers' rights apply, at the very least, to any individual performing or otherwise interpreting a copyright work. This interpretation is consistent with a subsequent provision of the Rome Convention (Article 9) which reads that '[a]ny Contracting State may, by its domestic laws and regulations, extend the protection provided for in this Convention to artists *who do not perform literary or artistic works*'. In other words, Article 9 allows, but does not bind, signatory states to extend protection to performances lacking an underlying copyright work.[101]

This interpretation has the effect of triggering the application of performers' rights to any performances of a copyright work, whatever the genre. This is particularly relevant for models as the French Supreme Court confirmed that fashion shows were eligible to copyright protection as a 'work of the mind' in the meaning of the IPC in the *Ashby* decision. In 2006, the Paris Court of Appeal and the Court of Cassation confirmed that fashion shows were protectable works ('oeuvres de l'esprit') under the IPC which raised no controversy between the parties or within the wider scholarship. Indeed, fashion works satisfy the requirements for protection under French copyright law ('droit d'auteur') which, in France, is essentially limited to the originality requirement as there is no condition of categorization[102] or fixation[103] as in other countries like the United Kingdom. In France, the originality condition is met whenever the work bears the imprint of the author's personality[104] which can be easily evidenced by demonstrating the range of creative choices made in relation to the selection and arrangement of the garments on display, the lighting, timing and staging of the overall performance.[105]

As such, runway shows must be added to the list of other copyright works, like photographs or films, that runway models perform in or otherwise interpret. This jurisprudence combined with the literal

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[98] Agreed Statements concerning the Beijing Treaty on Audiovisual Performances adopted by the Diplomatic Conference on the Protection of Audiovisual Performances in Beijing, on June 24, 2012. < http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=379657> accessed 17 September 2018.

[99] The UK instrument of ratification was deposited on 25 June 1971 and the Convention entered into force on 27 January 1980, Articles 31 and 33.

[100] Pavis (n 2) 871-875.

[101] Emphasis added. Article 9 in the text of the treaty published by WIPO bears the heading of 'Variety and Circus Artists'. This indication is an editorial modification and bears no normative weight. See, WIPO Guide, 21-22. *Nota bene* Article 9 finds no equivalent provisions under the WPPT.

[102] IPC, Articles L112-1, L112-2, L112-4.

[103] Ibid. Paris, 4ème ch., 14 février 2007, n° 06/09813, *Beauté Prestige*…: JCP G 2007, I, 176 N 4 obs. Caron. 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, Article 1359. The amount was fixed by the decree of August 20, 2004 (Décret No 2004-836 du 20 August 2004).

[104] CA Paris, 4th Chamber, 20 November 1996: JCP G 1997, 22937, note Pollaud-Dulian; RIDA 1997, No 173, 321, obs. Kéréver; Cour Cass, Criminal Chamber, 4 November 2008, n° 08-81.955: JCP 2009, No 25,30, para 1, obs. Caron; RLDI January 2009, No 1474, p 16; RIDA 2009, 219, p. 341, obs. Sirinelli ; Cour Cass, Plenary Assembly, 7 March 1986, Claim No 83-10.477 *"Atari and Williams Electronics"*: D. 1986, 405 note Edelman Concl. Cabannes.

[105] CA Paris, 1st chamber, 2 October 1997: D. 1998, p. 312 note Edelman; RIDA 1998 n 176, p. 422 (confirming that an exhibition can be a copyright work).

interpretations of the international convention, effectively incorporated by the IPC, renders fashion models eligible to protection by performers' rights.

This interpretation of the international definitions would also challenge the current definition provided by the IPC, and its associated jurisprudence, which require that the interpretations be marked by a form of originality defined as the individual's print of personality or personal character. Such interpretation of the international provisions would also question the extent to which the category of 'ancillary performer' introduced by the IPC and interpreted by the Court is compatible with the minimum level of protection set by the treaties. This is because nothing in the disposition of the Rome Convention, WPPT or Beijing Convention allows for 'personal character' as a requisite for awarding performers' rights if it can be proven that those performances are interpretations of a 'work'. Both of these points are further discussed in Section 4.2.

It follows that French law, as it currently stands, must extend performers' rights to models by virtue of international law combined with the *Ashby* jurisprudence. Failing to do so may render France liable for infringement of Rome Convention, WPPT and Beijing Treaty. Procedurally, this translates into possible sanctions imposed by the WTO or the EU. This is because both the Rome Convention and WPPT are annexed to the Agreement in Trade-Related Aspects of Intellectual Property Rights,[106] which are themselves attached to the WTO agreement.[107] Since both the WPPT and the WTO Agreement are European Treaties,[108] their implementation falls within the purview of the European Commission's scrutiny.[109]

4. Removing the exclusion of models from performers' rights in France

In order to address the explicit exclusions of models from French performers' rights, this article puts forward two recommendations. The first is to declare, or abide by, a principle of autonomy of interpretation between the LC and the IPC insofar as their respective classes of rightsholders are concerned. The second is to adopt a new, clearer, definition for protected performers under IP law to avoid future cross-code categorisations and the IPC in line with international performers' rights.

4.1. Principle of autonomy of interpretation: no cross-code categorisation

Interpretations of the LC and IPC should be kept independent in light of their relevant national, European and international obligations to address/avoid the definitional issues at national and international levels outlined above. In practice, this means that claims to protected performers be

[106] Agreement in Trade-related Aspects of Intellectual Property Rights, Article 14.
[107] WTO Agreement, Annex 1C.
[108] On the WPPT Agreement: Council Decision of 16 March 2000 on the approval, on behalf of the European Community, of the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, Official Journal L 89 of 11 April 2000, p. 6 "WPPT Notification No. 78, WIPO Performances and Phonograms Treaty, Accessions or Ratifications by the European Union and some of its Member States", 10 December 2009; On the WTO agreement: 94/800/EC: Council Decision (of 22 December 1994) concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) OJ L 336, 23.12.1994, p. 1–2 ; Notice concerning the entry into force of the Protocol amending the Marrakesh Agreement establishing the World Trade Organization OJ L 54, 1.3.2017, p. 1–1.
[109] Opinion of Advocate General Mischo, C-13/00 *Commission of the European Communities v Ireland* (27 November 2001) ECLI:EU:C:2001:643, [2002] ECRD 17; Judgement of the Court, C-13/00 *Commission v Ireland* (19 March 2002) ECLI:EU:C:2002:184. On issues related to the joint liability of the EU and Members States before the WTO, Eva Steinberger, 'The WTO Treaty as a Mixed Agreement: Problems with the EC's and the EC Member States' Membership of the WTO' (2006) 17(4) *European Journal of International Law* 837–862.

assessed solely on the basis of Article L212-2 (IPC), regardless of their classification under the LC. Conversely, the status of models and that of performing artists under employment law should be assessed solely on the grounds of the provisions and purpose of the LC. This will enable performers' rights under the IPC and models' rights under the LC to apply concurrently.

The feasibility of the Codes' autonomous interpretation has already been tested and proven by a case of the Paris Court of Appeal dated 11 May 1994, related to the performance of a model in a video-clip entitled 'Socadance'.[110] In this case, the claim to performers' rights protection of models and dancers featuring in a video clip was accepted due to the prominence of their performance in the finished version of the clip. The claimant, a professional model, had been hired along with other models and dancers to appear the video. The model sought the status of performers' rights before the court which was granted on the basis that

> "the dancers and most notably the models hired […], such as Miss C [the claimant], hold an important role in the visual dimension of the work which grants them the status of performers in the meaning of the Law of 3 July 1985, and not that of ancillary performer".[111]

The Paris Court of Appeal applied the provision of Article L212-2 of the IPC without referring to the LC.

If applied to the 2005 *Delafoulhouze* decision,[112] this principle of autonomy would have prevented the Court from referring to the LC to justify the actor's exclusion from the IPC. This outcome would have allowed the claim to be addressed solely in light of the provisions of the IPC and its associated jurisprudence, and stand a good chance of success as a result.

The article thus argues that courts and the French administration should adapt this approach to future cases thereby expressly and systematically establishing a clear principle of autonomy between the two codes and their respective definitions.

4.2. A new definition of protected performers under the IPC

In addition to proscribing the joint interpretation of the IPC and the LC, this article proposes sharpening the definition of protected performers by framing it around a single, clear criterion: the presence of an underlying work. According to this new, refocused, definition of protected performers, any person performing or otherwise interpreting a copyright work in the meaning of authors' rights will receive performers' rights under the IPC. In the context of models, the copyrightable work may be the fashion show underpinning a catwalk or the dramatic work embodied in a photoshoot or a video clip. In turn, unauthorized photographs or audio-visual recordings of such performances would become acts of infringements of models' performers' rights,[113] thereby boosting their level of protection, bargaining

[110] Paris Court of Appeal, 1 May 1994 (4th Chamber, D. 1995, p. 185): *Socadance*.
[111] Ibid. Author's translation.
[112] Text to n 69.
[113] Still shots (e.g. photographs), sound and audio-visual recordings are susceptible to be acts of infringement under French Law. See, CA Versailles, 1st Chamber, Section 1, 21 January 2016: *Sud Presse v. Marion Cotillard*. Legalist (26 January 2016) < https://www.legalis.net/jurisprudences/cour-dappel-de-versailles-1ere-chambre-1ere-section-arret-contradictoire-du-21-janvier-2016/> 7 March 2019. It is not clear whether unauthorized photographs would also amount to infringement of performers' rights as the law does not define what a 'copy' of a performance means. See, Copyrights, Designs and Patent Act 1988, Section s. 182A and s. 211 and s. 179 referring to s. 17. See, Arnold (n 4) 152. For other implications of extending performers' rights to models generally, see Pavis (n 2) 875-877.

power and opportunities for remuneration. This definition also triggers the application of contractual measures more protective than what applies in relation to the assignment of image rights, discussed in Section 2.2 of this article.[114]

This new definition replaces the constellations of hazy pointers currently used by courts to detect protected performances, such as the personal character or imprint of personality, with an objectively identifiable criterion: the underlying copyright work. By using the copyright work as requisite for definition, courts will be able to draw on a long-standing body of jurisprudence honing this concept under French law, providing more objectivity and certainty to the application of performers' rights.

This proposal is not a stark departure from the IPC's current letter but from its interpretation by the courts. In fact, the proposed definition of protected performers aims to bring the interpretation of the code closer to a literal and objective read of its provisions by re-centring the scope of application of performers' rights on the actual wording of Article L212-1, which expressly references 'literary and artistic works'. Adopting this refined interpretation of Article L212-1 removes notions of 'originality', 'personal character' or 'imprint of personality' from the application of performers' rights. This approach may also have the effect of further relegating the category of ancillary performers.

To an extent, this interpretation of Article L212-1 has already received some traction in case law in some instances where the Court required a work or a role be interpreted in order for performers' rights to attach. In instances where performances were brief or of an unusual genre, Courts have pointed to the subsistence of a role or 'literary and artist work' underpinning the performance to confirm that the latter satisfied the notion of 'interpretation' within the meaning of Article L212-1. The courts' logic on this point goes as follows: the presence of an underlying work or role in the performer confirms it is an interpretation which by definition carries personal character and/or the performers' print of his/her personality, and, as such, it is protected by the IPC. For example, in the decision *Delhaye and Guerrib v Sté Européenne de magazines*,[115] the Paris Court of Paris refused to consider two martial art specialists as 'performers' for they failed to demonstrate that their martial art routine qualified as a choreographic work in the meaning of authors' rights, so much so that the Court could neither confirm nor infer whether their performance was an interpretation in the meaning of the IPC. Similarly, the same court accepted that a voice-over actor reading a text, however technical, received performers' rights for his performance because the text he read was a work protected by copyright and bore the mark of the author's personality, which then had to be interpreted by the actor.[116] Conversely, it is the absence of a

[114] text to n 78.
[115] CA Paris, 4th chamber B, 14 December 2007, *Delhaye and Guerrib v Ste Européenne de magazines*.
[116] CA Paris, 4th chamber, 10 October 2003, R Boulet Despales: Propr. Intell. 2004, No 10, p. 560, obs. Lucas, RIDA 2004, No 200, p. 324, obs. Kéréver.

role played or interpreted which prevents Reality TV participants[117] or individuals featuring in the documentary,[118] or TV columnists, even in a lead 'role', from claiming performers' rights protection.[119]

In these cases, the jurisprudence points to the presence of a work underling the performance as evidence the personal character of the performance or that the performance fits the notion of 'interpretation' in the meaning of the IPC. Therefore, the proposed definition streamlines the current definition of protected performers by relying solely and exclusively on the presence of an underlying copyright work in the performance, without any further mention of 'personal character', 'imprint of the personality' or 'interpretation'.

Finally, and more importantly, the refocused interpretation of Article L212-1 would bring French IP law in compliance with international obligations as interpreted in Section 3.2. of this article. Going further, this article submits that the proposed definition of protected performers is the only definition that is compatible with international conventions. As such, adopting this refocused definition is not only a matter of streamlining national law, but also a matter of realizing compliance with international law.

The proposed definition may be directly introduced by national courts without the need for any reform because it derives from a literal and objective interpretation of the IPC. Departing from past case law is facilitated by the fact that France does not follow a principle of binding precedent.[120] Lastly, French courts are bound to interpret the IPC in light of the Rome Convention and the WPPT since both subsequent treaties were effectively ratified. Adding to their normative weight is the fact that France follows a monist approach to the direct effect of international treaties so much so that ratified conventions are of direct application by national courts under French constitutional law.[121] In practice, this means that national judges must interpret national legislation in light of international texts and set aside the former whenever it infringes the latter. This can be easily done by implementing the definition for protected performers outlined above.

5. Conclusion

This article explored the (un)lawfulness of express exclusions of models from the scope of performers' rights in France. By retracing the development of this exclusion in French jurisprudence, the article evidences that such exclusion is, in fact, neither written in French IP law nor derived from an objective interpretation of national or international IP law. Going further, the analysis demonstrated that such an

[117] Cour Cass, 1st civil chamber, 24 April 2013, No 11-19.901: Bull. 2013, I, n° 83 : « 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" Author's translation.

[118] Cour Cass, 1st civil chamber, 13 novembre 2008, No 06-16.278, « Etre et avoir » : JCP 2009, N 25, 30 §3 obs. Caron: "Considering that the decision noted that Mr Y 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." (author's translation).

[119] Cour Cass, 1st civil chamber, 24 April 2013, No 11-20900: *Kawai girl*.

[120] Civil Code, Article 5.

[121] Constitution of the 4th of October 1958 (as amended), Article 55. See also, Conseil Constitutionnel, décision No 86-216 DC 3 September 1986, Recueil p. 135 ; No 89-268 DC 29 December 1989, Recueil p. 110 ; Conseil d'Etat, Plenary Assembly, 20 October 1989, *Nicolo*, Recueil p. 190, concl. Frydman.

exclusion is unlawful both in relation to basic national principles of IP and international performers' rights which are interpreted to require the award of performers' right to any professional who acts or otherwise interprets a work within the meaning of copyright. Following the *Ashby* jurisprudence which, in France, recognized the runway shows as a 'work', models taking part in defilés and fashion shows have a claim to performers' rights protection as any other models featuring in more conventional copyright works such as films or photographs. On this basis, this article puts forward that this very criterion —that is, the interpretation of a copyrightable work — should be the sole condition of subsistence for performers' rights in a model's performance under the IPC. In light of the literal interpretation of international performers' rights, it is also argued that the proposed test is the only definition for protected performances compatible with the international IP law. The same conclusions are applicable to any signatory to the Rome Convention, WPPT and, when it enters into force, the Beijing Treaty. This article thus invites national legislators and courts to re-evaluate the compatibility of the definition of performer's rights within their jurisdictions in light of the test outlined above, in relation to models as well as any other performative professions. As a result, and contrary to the conventional wisdom according to which 'in fashion one day you are *in* and the next you are *out'*, on this occasion models were deemed *out* but are now squarely *in* protection by performers' rights.