

# Opinion of the European Copyright Society on certain selected aspects of Case C-227/23, *Kwantum Nederland and Kwantum België*

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**Drafting Committee:** Mireille van Eechoud, Axel Metzger, João Pedro Quintais, Ole-Andreas Rognstad

## Executive Summary

The Berne Convention underscores the national treatment of foreign authors, allowing Union states to protect designs through various means. Article 2(7) introduces a material reciprocity test, limiting copyright protection for works of applied art not protected in their country of origin. The *Kwantum* case (C-227/23), involving a dispute over a work of design or applied art, questions the application of the reciprocity test in light of harmonized copyright law and the Court of Justice of the EU (CJEU) decision in *RAAP* (C-265/19). The Dutch Supreme Court seeks clarity on whether EU law mandates copyright limitation through reciprocity, especially concerning non-EU right holders.

In EU law, the Design Directive and Regulation govern the relationship between copyright and design protection for works of applied art. Both instruments stress the possibility of cumulation of rights, allowing registered designs to qualify for copyright protection. Judicial harmonization, notably in *Cofemel* (C-683/17) and *Brompton Bicycle* (C-833/18), extended the originality requirements to all works—including works of applied art—limiting Member States' autonomy. The proposed Design Directive and Regulation maintain the cumulation principle, aligning with CJEU case law on originality. In this Opinion, the ECS does not make any pronouncement on the desirability of cumulation.

On the topic of material reciprocity, the CJEU in *RAAP* ruled that Article 8(2) of the Rental and Lending Directive (RLD) prohibits a Member State from excluding non-EEA performers from equitable remuneration for communication to the public of their recordings. The Court clarified that limitations to this right can only be introduced by the EU legislature and must comply with Article 52(1) of the Charter of Fundamental Rights of the EU (CFREU). Any limitation must be clearly defined by law. The Court emphasized that exclusion of non-EEA rightholders from remuneration must be explicit, as the right falls within the fundamental right to intellectual property in Article 17(2) CFREU. Additionally, the Court stated that Article 8(2) RLD should not be interpreted to grant a remuneration right solely to the phonogram producer, excluding the performer who contributed to the phonogram.

The ECS criticized the potential wider implications of *RAAP*, proposing an alternative interpretation for the remuneration right under Article 4(2) WPPT, suggesting that it should apply only to performers towards whom a direct and unreserved obligation exists on the basis of the WPPT. The ECS also criticized the Court's reliance on the CFREU, particularly viewing

harmonized rights as abstract rather than individual, creating uncertainty about limitations. The Court's conclusion that only the EU legislature can limit the right for nationals of third states raises concerns about past material reciprocity applications by Member States, and the retroactive effects of the interpretation remain unclear, contributing to legal uncertainty.

In *RAAP*, the CJEU interpreted the WPPT, emphasizing compliance with TRIPS and the Berne Convention's core provisions in EU law. The Court stressed that material reciprocity must be explicit in statutory law, with only the EU legislature defining limitations under harmonized rules like Article 8(2) RLD. However, EU design legislation allows Member States autonomy, despite harmonized concepts established in cases like *Cofemel* and *Brompton Bicycle*.

Unlike *RAAP*, the CJEU may have more flexibility in interpreting EU copyright law for applied art in the *Kwantum* case. Precedents like *Cofemel* and *Brompton Bicycle* allow the Court to interpret material reciprocity under Article 2(7) Berne Convention without legislative intervention. Two alternatives for the Court are interpreting Article 2(7) to mandate material reciprocity, preventing internal market issues, or declaring Member States' application compatible with Union law, whether they apply material reciprocity or offer unreserved national treatment to works of applied art based on Article 19 of the Berne Convention.

Comparing *RAAP* and *Kwantum*, material reciprocity differs under Article 4(2) WPPT and Article 2(7) Berne Convention. *RAAP* dealt with a conditional exception, while Article 2(7) of Berne appears as a mandatory rule, implying that Union countries must deny copyright protection to works solely protected as designs and models in their country of origin. While countries can choose to set aside material reciprocity under Article 19 of Berne, if the CJEU views Article 2(7) as limiting copyright as an intellectual property right under Article 17(2) CFREU, the requirements in Article 52(1) CFREU are already fulfilled without legislative intervention.

Applying these considerations to the *Kwantum* case, it is noted that Dutch law does not provide greater protection than Article 2(7) Berne Convention. Given Article 2(7)'s precedence over domestic law in the Dutch legal order, Dutch courts must apply the material reciprocity clause unless EU law dictates otherwise. In our view, the CJEU could either recognize material reciprocity as a requirement of Union law or declare Member States' rules mirroring Berne's reciprocity clause as compatible with EU law.

In conclusion, *Kwantum* reflects the uncertainty stemming from *RAAP*. The ECS advocates a nuanced approach to the international application of EU copyrights and related rights, where due consideration is taken to the regulation of international conventions as part of the EU legal order. In the case of copyright protection of works of applied art, the CJEU could either apply the reciprocity rule set out in Article 2(7) Berne Convention directly as a first step or leave it to the Member States to decide on material reciprocity or national treatment, in accordance with the principles of the Berne Convention. As a second step the EU legislature would be well advised to address the questions raised by *RAAP* and *Kwantum* at a more fundamental level through legislative intervention.

## 1. Introduction and overview of *Kwantum*

## 1.1. Introduction

The European Copyright Society (ECS) was founded in January 2012 with the aim of creating a platform for critical and independent scholarly thinking on European Copyright Law and policy. Its members are scholars and academics from various countries of Europe, seeking to articulate and promote their views of the overall public interest on all topics in the field of authors rights, neighbouring rights and related matters. The ECS is neither funded nor instructed by any particular stakeholders. Its Opinions represent the independent views of a majority of ECS members.

The ECS sees it as part of its mission to give opinions on cases pending at the Court of Justice of the EU (CJEU or Court). The ECS has published a comment on the impact and consequences of the CJEU decision in C-265/19 (*RAAP*)<sup>1</sup>, which was the first case of the Court explicitly focused on questions of material reciprocity in international copyright law. The present Opinion addresses the recent preliminary reference in case C-227/23, *Kwantum Nederland and Kwantum België (Kwantum)*.<sup>2</sup> It reiterates the ECS's criticism of the CJEU's approach in *RAAP* and formulates suggestions as to how the Court could now come to a different decision in *Kwantum*.

### 1.2. Facts and referred questions in *Kwantum*

The Berne Convention's key principle is that of national treatment of foreign authors, coupled with minimum rights that Union states must guarantee foreign works. However, the Convention recognizes that Union states may protect design through copyright, design right or otherwise. As a consequence, the Berne Convention does not oblige Union countries to always grant protection to foreign designs under copyright on the basis of national treatment. Rather, it sets out a material reciprocity test in Article 2(7), which limits protection under copyright for works of applied art that are not protected by copyright in their country of origin.

As the ECS and others predicted after *RAAP*, it was only a matter of time before the CJEU would be asked to clarify how Member States' courts must interpret this provision on material reciprocity for works of applied art. This is the issue at the heart of the referral by the Dutch Supreme Court in *Kwantum*.

The parties to this case are Kwantum and Vitra. Kwantum marketed and distributed a chair in the Netherlands (and Belgium) which according to Vitra infringed the copyright in the design of the so-called DSW chair, a well-known design of American origin. It is not in dispute that under Dutch copyright law, the work in question would qualify as a work of applied art. Nor is it in dispute that the U.S. are the country of origin of the work, according to Article 5(4) Berne Convention. In the Dutch courts however, the parties disagreed on whether considering the state of harmonized copyright law, the court should apply the reciprocity test, or whether the

<sup>1</sup> Comment of the European Copyright Society on the impact and consequences of the CJEU decision in C-265/19 (RAAP) (2022), <https://europeancopyrightsocietydotorg.files.wordpress.com/2022/05/comment-of-the-european-copyright-society-on-the-impact-and-consequences-of-the-cjeu-decision-in-c-265.19-raap-1.pdf>.

<sup>2</sup> Request for a preliminary ruling from the Hoge Raad der Nederlanden (Netherlands) lodged on 11 April 2023 — Kwantum Nederland BV, Kwantum België BV v Vitra Collections AG (Case C-227/23, Kwantum Nederland and Kwantum België) (2023/C 252/24), [EUR-Lex - 62023CN0227 - EN - EUR-Lex \(europa.eu\)](#)

CJEU decision in *RAAP* implies otherwise. Of relevance is that under Article 93 of the Dutch Constitution, international law takes precedence over domestic law. Ratified instruments like the Berne Convention do not need to be implemented. The Dutch Copyright Act (*Auteurswet*) contains a provision that sets out its scope of application, essentially by defining when the Netherlands qualifies as the country of origin of works in line with Article 5(4) Berne Convention.<sup>3</sup> It does not otherwise refer to the Berne Convention directly.

Article 2(7) Berne Convention contains rules on how to deal with cases where country of origin and country of protection have different regimes. It provides:

*“Subject to the provisions of Article 7(4) of this Convention, it shall be a matter for legislation in the countries of the Union to determine the extent of the application of their laws to works of applied art and industrial designs and models, as well as the conditions under which such works, designs and models shall be protected. Works protected in the country of origin solely as designs and models shall be entitled in another country of the Union only to such special protection as is granted in that country to designs and models; however, if no such special protection is granted in that country, such works shall be protected as artistic works.”*

In its referral to the CJEU, the Dutch Supreme Court asks first whether the case at hand is within the scope of EU law. If it is not, the CJEU would not be competent to hear it. Assuming the CJEU is competent, the Dutch Supreme Court asks the following questions, which we have reworded and shortened for the purposes of clarity and to delimit the scope of our analysis:

- Does reciprocity constitute a limitation on the exercise of copyright, and does EU law, specifically as harmonized by the Copyright the Information Society Directive (2001/29/EC), require that this limitation is to be provided for by law and, because of Article 52(1) of the Charter of Fundamental Rights of the EU (CFREU), in a clear and precise manner?
- Are Member States still allowed to apply the Berne Convention’s reciprocity clause in respect of non-EU right holders, or has the EU become exclusively competent in this matter?

## **2. Legal background: Cumulation of copyright and design protection for works of applied art in EU law**

In EU law, the relationship between copyright and design protection for works of applied art is regulated in the Design Directive (Article 17 and supporting recital 8) and the Design Regulation (Article 96(2) and supporting recital 32).<sup>4</sup> Both instruments set forth a principle of cumulation of rights in similar wording. In essence, they state that in the absence of harmonisation of copyright law, a registered design (national or EU title) is also eligible for protection under copyright law as from the date on which the design was created or fixed in any form. Furthermore, it is clarified that Member States are free to establish the extent of copyright protection and the conditions under which such protection is conferred.

<sup>3</sup> Dutch Copyright Act, Article 47.

<sup>4</sup> See, respectively, Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs, ELI: <http://data.europa.eu/eli/dir/1998/71/oj>; and Council Regulation (EC) N o 6/2002 of 12 December 2001 on Community designs, ELI: <http://data.europa.eu/eli/reg/2002/6/2013-07-01> .

These provisions were enacted in the context of EU legislative instruments on copyright that for the most part did not harmonize the concept of work of authorship. The only explicit exceptions to this are computer programs, photographs, databases, and (one could argue more recently) works of visual art.<sup>5</sup> For these categories, the legal provisions at issue condition protection on the requirement that the work be original in the sense of expressing the “author’s own intellectual creation”.

Until 2009, it was generally accepted that outside the specific subject matter covered by the rules on computer programs, photographs and original databases, Member States were free to determine the concept of work of authorship.<sup>6</sup> This was also true for works of applied art. After 2009, the CJEU seized on the legislative language mentioned in the earlier specific subject matter Directives to gradually harmonize the concept of work of authorship, extending it to all types of works. This judicial harmonization process played out in a number of cases spanning different types of subject matter: *Infopaq*; *Football Dataco*; *SAS Institute*; *Premier League*; *Levola Hengelo*; *Funke Medien*; *Cofemel*; and *Brompton Bicycle*.<sup>7</sup> The latter two cases – *Cofemel* and *Brompton Bicycle* – refer specifically to works of applied art and designs.

In general terms, it emerges from these cases that subject matter may be protected by copyright if it is original in the sense that it is “the author’s own intellectual creation”, meaning in addition that the author must make personal creative choices that are expressed in the subject matter.<sup>8</sup> Furthermore, as from *Levola Hengelo*, the Court has explicitly required that the work must be in a precise and objective form of expression. In *Cofemel*, the CJEU essentially clarified that Member States no longer have the freedom to choose the level of originality pertaining to works of applied art, industrial designs and works of design. Rather, they must apply the CJEU standard of “the author’s own intellectual creation” to such works, as developed by the Court in its case law on originality. The conditions for copyright protection set forth therein are both necessary and sufficient. The upshot is that national laws may not require in addition that a work of design generates a distinctive and significant visual effect from an aesthetic viewpoint in order to merit copyright protection, as that would require a subjective assessment. These conclusions were confirmed by the Court in *Brompton Bicycle*, where their application was considered in the context of designs potentially dictated by their technical function.<sup>9</sup>

<sup>5</sup> Art. 1(3) Computer Programs Directive; Art. 3(1) Database Directive; Art. 6 Term Directive; Art. 14 CDSM Directive (on works of visual art in the public domain).

<sup>6</sup> Commission Staff Working Paper on the review of copyright, SEC(2004)995, p. 14.

<sup>7</sup> CJEU, 16 July 2009, case C-05/08, ECLI:EU:C:2009:465, *Infopaq International* (*Infopaq*); CJEU, 1 March 2012, case C-604/10, EU:C:2012:115, *Football Dataco*; CJEU, 12 May 2012, case C-406/10, EU:C:2010:259, *SAS Institute*; CJEU, 4 October 2011, Joined Cases C-403/08 and C-429/08, ECLI:EU:C:2011:631, *Football Association Premier League and Others* (*Premier League*); CJEU, 13 November 2018, case C-310/17, ECLI:EU:C:2018:899, *Levola Hengelo* (*Levola Hengelo*); CJEU, 29 July 2019, case C-469/17, ECLI:EU:C:2019:623, *Funke Medien* (*Funke Medien*); CJEU, 12 September 2019, case C-683/17, ECLI:EU:C:2019:721, *Cofemel* (*Cofemel*); and CJEU, 11 June 2020, case C-833/18, ECLI:EU:C:2020:461, *Brompton Bicycle* (*Brompton Bicycle*).

<sup>8</sup> See e.g., CJEU, *Levola Hengelo*, para. 36, and CJEU, *Cofemel*, para. 29.

<sup>9</sup> At writing, there are two additional preliminary references on this topic before the CJEU: C-580/23, *Mio and others*; and a referral from German Federal Court of Justice in Decision of 21 December 2023 (I ZR 96/22) (“*USM Haller*”).



Building on this case law, the proposals for a new Design Directive<sup>10</sup> and Regulation<sup>11</sup> both maintain the principle of cumulation of design and copyright protection, while taking into account the harmonisation of the relevant concepts by virtue of CJEU case law. In short, both proposals state that cumulation is possible as from the date on which the design was created or fixed in any form “provided that the requirements of Union copyright law are met”. For our purposes, the eventual adoption of these instruments does not affect our reasoning and conclusions below. Moreover, it should be clearly stated that with this Opinion the ECS does not make any pronouncement on the desirability of cumulation of protection between copyright law and design law, which is deserving of a separate treatment and critique.

### **3. CJEU case law on material reciprocity and its implications for Kwantum**

#### **3.1. Facts and decision in *RAAP***

Kwantum is the second case after *RAAP* (2020) on material reciprocity within a relatively short period of time. The *RAAP* case concerned the payment of remuneration for certain uses of recordings by performing artists (and phonogram producers) from states that do not themselves recognize those remuneration rights. Following *RAAP*, Article 8(2) of the Rental and Lending Directive<sup>12</sup> (RLD) must be interpreted as precluding a Member State from excluding performers who are nationals of states outside the EEA from the right to equitable remuneration for the communication to the public of their recordings. Moreover, the Court stated that reservations notified to the World Intellectual Property Organisation (WIPO) by third states under Article 15(3) of the WIPO Performances and Phonograms Treaty (WPPT) do not currently lead to limitations of the remuneration right in Article 8(2) RLD. Such limitations could be introduced only by the EU legislature and must be compliant with the requirements of Article 52(1) CFREU. Any limitation to the exercise of rights protected under the CFREU must “be provided for by law, which implies that the legal basis which permits the interference with that right must itself define, clearly and precisely, the scope of the limitation on its exercise”.<sup>13</sup> The exclusion of non-EEA rightholders from the right to remuneration must be made explicitly. This is the case because the right to equitable remuneration falls within the fundamental right to intellectual property in Article 17(2) CFREU. The Court further held that Article 8(2) RLD cannot be interpreted in such a way that only the producer of the phonogram is entitled to receive remuneration, as opposed to having to share it with the performer who has contributed to that phonogram.

#### **3.2. ECS Opinion and criticism on *RAAP***

The ECS in its Comment on *RAAP* criticized the Court for not sufficiently considering that the case may have wider consequences. The Court’s approach implied that Member States can never rely on reciprocity under international treaties in areas that are harmonized by Union law, unless Union law explicitly permits or requires it. The arguments of the Court were drafted in

<sup>10</sup> Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the legal protection of designs (recast) COM/2022/667 final, Article 23.

<sup>11</sup> Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Council Regulation (EC) No 6/2002 on Community designs and repealing Commission Regulation (EC) No 2246/2002, COM/2022/666 final, Article 96(2) and recital 33.

<sup>12</sup> Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version) (RLD)

<sup>13</sup> CJEU, *RAAP*, para. 86.

general terms and could also be applied to various international treaties and other rights of authors, performers and other right holders. The resulting legal uncertainty could have been avoided had the Court opted for an alternative interpretation. It could have taken the position that, in light of Article 4(2) WPPT, the remuneration right applied only with respect to performers to whom there is a direct and unreserved obligation under the WPPT to grant protection. The Court did not take that position.

The ECS also took a critical stance on the Court's arguments based on the CFREU. In *RAAP*, the Court considered the performers' harmonized right to remuneration for certain forms of communication to the public in Article 8(2) RLD from the perspective of fundamental rights. Because the Court views the remuneration right as an *in abstracto* right protected under Article 17(2) CFREU, any limitation to it must be defined clearly and precisely. In this situation, the Court considered that the EU legislature has not implemented such a clear and precise limitation. However, the consequences of the Court's approach to the harmonized rights as rights *in abstracto*, rather than as individual rights *in concreto*, remain unclear. The Court's conclusion is that because the remuneration right is a harmonized rule, only the EU legislature can limit that right for nationals of third States. As a result, Member States' past application of material reciprocity requirements on the basis of Article 4(2) WPPT becomes problematic. Furthermore, since the Court did not address retroactive effects of its interpretation in *RAAP*, the relevant date for determining the existence of a right for a third State national is also unclear. As noted in our previous Comment on *RAAP*, this creates further legal uncertainty.

### 3.3. Why *Kwantum* differs from *RAAP*

#### 3.3.1. EU not directly bound to the Berne Convention (but indirectly via WCT and TRIPS)

In *RAAP*, the CJEU was called upon to interpret the WPPT's provision on remuneration. The EU and Member States are party to the WPPT. By contrast, the EU is not a party to the Berne Convention. However, the EU is party to TRIPS, and to the 1996 WCT, a special agreement within the meaning of Article 20 Berne Convention which reiterates that parties will apply the provisions of Articles 2 through 6 Berne Convention to the matters addressed in the WCT. Article 9(1) TRIPS mandates compliance with the core provisions of the Berne Convention, with the exception of moral rights. Furthermore, Article 3 TRIPS reiterates the applicability of national treatment subject to the exceptions already stated in the Berne Convention. Those core provisions of Berne can therefore be considered part of the EU's legal order.<sup>14</sup> EU copyright law (and national implementations by Member States) must therefore be consistent with the international obligations of the EU. Also, measures designed to implement the EU's international obligations have to be interpreted in light of the obligations under TRIPS and the Berne Convention.

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<sup>14</sup> See e.g., CJEU 19 October 2023, case C-655/21, EU:C:2023:791, Rayonna prokuratura Burgas, TO Nesebar, para. 39, which confirms that the TRIPS agreement is an integral part of EU law, with reference *inter alia* to CJEU 15 March 2012, ECLI:EU:C:2012:140, Marco de Corso, paras. 39 and 40. By contrast the CJEU emphasized in the latter case that the Rome Convention (protection of neighbouring rights) is not directly applicable in the EU and is *not* part of the Union's legal order (paras. 41-42). The EU is not party to the Rome Convention, and TRIPS does not bind states to the Rome Convention in the way that it binds them to the Berne Convention.

### 3.3.2. The EU has not enacted legislation on protectability of applied art but the CJEU has developed principles *praeter legem* in *Cofemel* and *Brompton Bicycle*

The CJEU in *RAAP* insisted on the argument that material reciprocity must be explicit in the statutory law. As the Court explained:

*“Pursuant to Article 52(1) of the Charter, any limitation on the exercise of that right related to copyright must be provided for by law, which implies that the legal basis which permits the interference with that right must itself define, clearly and precisely, the scope of the limitation on its exercise. (...) Since Article 8(2) [RLD] is a harmonised rule, it is for the EU legislature alone and not the national legislatures to determine whether the grant in the EU of that right related to copyright should be limited in respect of the nationals of third States and, if so, to define that limitation clearly and precisely.”<sup>15</sup>*

Different from the legal situation in *RAAP*, it has not been the EU legislature that has introduced the rule that works of applied art should be governed according to the same principles as other categories of copyright protected works. On the contrary, to date EU design legislation explicitly leaves it to Member States to decide on the standards for protection of applied art as copyright works. But despite those provisions, building on its previous case law developing an EU concept of copyright work, the CJEU itself has ruled that for applied art the harmonized work concept applies, in the cases of *Cofemel* and *Brompton Bicycle* (see *supra* at 2).

It might therefore be less compelling than in the *RAAP* case that the Union legislator alone is authorized to uphold or ban restrictions like a material reciprocity requirement. The Court itself could interpret EU copyright law in accordance with the material reciprocity requirement set out in Article 2(7) Berne Convention. The judicial recognition that all copyright works, including works of applied art, are to be subjected to the same work concept, as recognized in *Cofemel* and *Brompton Bicycle*, enables the Court to take this approach by judicial fiat, without any intervention by the legislature being necessary (albeit the legislature would be well advised to intervene, as discussed below). Of note, interpreting EU law to mandate a rule of national treatment for works of applied art despite the wording of Article 2(7) Berne Convention, would imply that the Court sets aside the principle of legal certainty, which is an important legal principle in EU law. This would be a problematic outcome, even more so in case there are retroactive effects dating back to the Infosoc Directive’s entry into force.

In our view, then, the Court has two viable options. First, it can interpret the operation of Article 2(7) Berne Convention in the EU legal order as subjecting copyright protection to material reciprocity. This option would likely best prevent frictions in the internal market and lead to harmonised results. In the alternative, the Court could declare Member States’ application of Article 2(7) to be compatible with Union law, whether a Member State applies material reciprocity or offers unreserved national treatment to works of applied art on the basis of Article 19 Berne Convention.<sup>16</sup> We will discuss the two options further below.

<sup>15</sup> CJEU, *RAAP*, paras. 86, 88.

<sup>16</sup> Article 19 (Protection Greater than Resulting from Convention) states: “The provisions of this Convention shall not preclude the making of a claim to the benefit of any greater protection which may be granted by legislation in a country of the Union.”



### 3.3.3. Different regulation of material reciprocity

It is important to be clear on the differences between *RAAP* and *Kwantum* in how material reciprocity is regulated in Article 4(2) WPPT and Article 2(7) Berne Convention. It is a fact that the application of this exception is conditional upon a Contractual Party opting out of the remuneration system by notifying a reservation to the WIPO General Secretariat pursuant to Article 15(3) WPPT. The CJEU in *RAAP* considered Article 15(3) WPPT as a limitation of the remuneration right in Article 8(2) RLD – an intellectual property right protected by Article 17(2) CFREU. The CJEU further found that this limitation did not fulfill the criteria of clearness and preciseness in Article 52 CFREU “because such a reservation does not enable nationals of the third State in question to ascertain in precisely what way their right to a single equitable remuneration would, consequently, be limited in the European Union”.<sup>17</sup> As a consequence, the EU legislator would have to intervene in order to provide a precise and clear limitation of the remuneration right. Of note, the ECS was critical about this approach to Article 4(2) WPPT in its Comment on *RAAP*.

The reciprocity situation in *Kwantum* is different from that in *RAAP*. Unlike Article 4(2) WPPT, Article 2(7) Berne Convention, as an exception to the national treatment rule set out in Article 5 of the Convention (and Article 3 TRIPS), is not conditional. On the contrary, material reciprocity pursuant to this provision appears as a mandatory rule, in that its wording implies Union countries are required to deny copyright protection to works that are not protected by copyright in their country of origin but that do qualify for design protection there (or have done so).<sup>18</sup> The relevant part reads: “Works protected in the country of origin solely as designs and models shall be entitled in another country of the Union only to such special protection as is granted in that country to designs and models” (our emphasis).

To the extent the CJEU will consider Article 2(7) of Berne as a limitation to copyright as an intellectual property right under Article 17(2) CFREU – in parallel with its treatment of Article 8(2) RLD in *RAAP* – the requirements in Article 52(1) CFREU should be considered fulfilled with no need for intervention by the legislature. In other words, the rule of material reciprocity in Article 2(7) limits the scope of Articles 2 to 4 InfoSoc Directive in a sufficiently clear and precise way.

To be sure, the Berne Convention does allow countries to set aside material reciprocity and offer protection under copyright. After all, Article 19 of Berne specifies that the provisions “shall not preclude the making of a claim to the benefit of any greater protection which may be granted by legislation in a country of the Union.” However, there is no clear legislation at EU level to this effect, and Member States have to date dealt differently with the issue.

For example, Dutch law does not contain any provision that affords greater protection than that provided in Article 2(7) Berne Convention. With article 2(7) taking precedence over domestic law in the Dutch legal order, Dutch courts must apply the material reciprocity clause, unless EU law dictates otherwise. Also, for those Member States that have mirrored the Berne’s

<sup>17</sup> CJEU, *RAAP*, para. 87.

<sup>18</sup> Vienna Convention on the Law of Treaties, Article 31: interpret in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

reciprocity clause in their copyright legislations (e.g. Denmark) the question arises whether applying it contravenes EU law. Faced with this situation, as stated above, the CJEU could either recognise material reciprocity as a requirement of Union law or at least declare Member States's rules to be compatible with EU law. Obviously, the latter solution continues the current situation where a work of applied art originating from non-EU countries enjoys different types of protection in different EU Member States. Of the two possibilities outlined this would constitute the more cautious solution. It would however not bring about harmonization of EU law in this area.

By contrast, a mandatory rule of material reciprocity would result in harmonization in this area. This would be in accordance with the CJEU's general tendency to emphasize the harmonization goal of copyright legislation when interpreting directives. To reduce legal uncertainty, it would be helpful if the CJEU gives guidance on any retroactive effects arising from this solution. The main drawback of this option is that it bars Member States that have so far applied national treatment from continuing to do so. Also, works of applied art originating from outside the EU/EEA will not enjoy identical protection within the EU, as protection would depend on the legal situation in the country of origin.

No matter which of the two options the CJEU chooses to apply – leave it to Member States or accept a material reciprocity requirement as harmonized rule – legislative intervention at EU level will ultimately be necessary to ensure legal certainty.

#### **4. Conclusion and outlook**

The general phrasing of *RAAP*, without due account of the further consequences of the case, might leave the impression that all copyrights and related rights provided for in EU law apply to all right holders irrespective of their nationality unless the EU legislature contains an express limitation. The *Kwantum* case brought before the CJEU by the Dutch Supreme Court is a symptom of the uncertainty that the *RAAP* decision has created in this respect. The ECS advocates a nuanced approach to the international application of EU copyrights and related rights, where due consideration is taken to the regulation of international conventions as part of the EU legal order. In the case of copyright protection of works of applied art, the CJEU could either apply the reciprocity rule set out in Article 2(7) Berne Convention directly as a first step or leave it to the Member States to decide on material reciprocity or national treatment, in accordance with the principles of the Berne Convention. As a second step the EU legislature would be well advised to address the questions raised by *RAAP* and *Kwantum* at a more fundamental level through legislative intervention.

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#### **Signatories**

Prof. Valérie Laure Benabou, Professor, Université Paris Saclay / UVSQ, France

Prof. Estelle Derclaye, Professor of intellectual property law, University of Nottingham, United Kingdom

Prof. Thomas Dreier, Professor of Law, Institute for Information and Economic Law, Karlsruhe Institute of Technology (KIT), Karlsruhe, Germany

Prof. Séverine Dusollier, Professor, School of Law, Sciences Po, Paris, France

Prof. Reto Hilty, Director, Max Planck Institute for Innovation and Competition, Munich, Germany

Prof. Martin Husovec, Associate Professor, London School of Economics and Political Science (LSE), LSE Law School, United Kingdom

Prof. Marie-Christine Janssens, Professor of Intellectual Property Law, Head of CiTiP (Centre for IT & IP Law), University Leuven (KU Leuven), Belgium

Prof. Martin Kretschmer, Professor of Intellectual Property Law, University of Glasgow and Director, CREATE, United Kingdom

Prof. Axel Metzger, Professor of Civil and Intellectual Property Law, Humboldt-Universität, Berlin, Germany

Prof. Péter Mezei, Associate Professor, University of Szeged, Hungary; Adjunct professor (dosentti), University of Turku, Finland

Prof. Alexander Peukert, Goethe-Universität Frankfurt am Main, Germany

Prof. João Pedro Quintais, Assistant Professor, University of Amsterdam, Institute for Information Law (IViR), Netherlands

Prof. Ole-Andreas Rognstad, Professor of Law, Department of Private Law/Centre for European Law, University of Oslo, Norway

Prof. Martin Senftleben, Professor of Intellectual Property, Law and Director of the Institute for Information Law (IViR), University of Amsterdam, Netherlands

Prof. Caterina Sganga, Associate Professor of Comparative Private Law, Scuola Superiore Sant'Anna (Pisa), Italy

Prof. Alain Strowel, Professor, Saint-Louis University and UCLouvain, Belgium

Prof. Mireille van Eechoud, Professor of Information Law, University of Amsterdam, Institute for Information Law (IViR), The Netherlands