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Opinion of the European Copyright Society on Certain Selected Aspects of Case C-227/23, *Kwantum Nederland and Kwantum België*

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Abstract The Berne Convention underscores the national treatment of foreign authors, allowing countries of the Union to protect designs through various means. Article 2(7) of the Convention (Berne) 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 the light of harmonised copyright law and the decision by the Court of Justice of the European Union (CJEU) in *RAAP* (C-265/19). The Dutch Supreme Court seeks clarity on whether EU law mandates a copyright limitation through reciprocity, especially for non-EU right holders. In EU law, the Design Directive and Design Regulation govern the relationship between copyright and design protection for works of applied art. Both instruments stress the possibility of the cumulation of rights, allowing registered designs to qualify for copyright protection. Judicial harmonisation, notably in *Cofemel* (C-683/17) and *Brompton Bicycle* (C-833/18), extended

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the originality requirements to all works – including works of applied art – and thus limited EU Member States’ autonomy. The proposed Design Directive and Design Regulation maintain the cumulation principle, aligning with CJEU case-law on originality. In this Opinion, the European Copyright Society (ECS) does not make any pronouncement on the desirability of cumulation. On the topic of material reciprocity, the CJEU ruled in *RAAP* that Art. 8(2) of the Rental and Lending Directive (RLD) prohibited 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 could be introduced only by the EU legislature and had to comply with Art. 52(1) of the Charter of Fundamental Rights of the European Union (CFREU). Any limitation had to be clearly defined by law. The Court emphasised that any exclusion of non-EEA right holders from remuneration must be explicit, as the right fell within the fundamental right to intellectual property of Art. 17(2) CFREU. Additionally, the Court stated that Art. 8(2) RLD should not be interpreted as granting a remuneration right solely to the phonogram producer and excluding the performer who contributed to the phonogram. The ECS criticised the potential wider implications of *RAAP*, proposing an alternative interpretation of the remuneration right under Art. 4(2) of the WIPO Performance and Phonograms Treaty (WPPT), suggesting that it should apply only to performers towards whom a direct and unreserved obligation existed on the basis of the WPPT. The ECS also criticised the Court’s reliance on the CFREU, particularly insofar as the Court viewed harmonised rights as abstract rather than individual, thus creating uncertainty about limitations. The Court’s conclusion that only the EU legislature could limit the right for nationals of non-EU states raises concerns about the application of material reciprocity by Member States in the past, and the retroactive effects of the interpretation remain unclear, contributing to legal uncertainty. In *RAAP*, the CJEU interpreted the WPPT, emphasising compliance with TRIPS and the Berne Convention’s core provisions in EU law. The Court stressed that material reciprocity had to be explicit in statutory law, with only the EU legislature defining limitations under harmonised rules such as Art. 8(2) RLD. However, EU design legislation grants Member States autonomy despite harmonised concepts established in cases like *Cofemel* and *Brompton Bicycle*. Unlike in *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 Art. 2(7) Berne without legislative intervention. Two alternatives for the Court are to interpret Art. 2(7) as mandating material reciprocity, preventing internal market issues, or to declare Member States’ application compatible with EU law, whether they apply material reciprocity or offer unreserved national treatment to works of applied art on the basis of Art. 19 Berne. Comparing *RAAP* and *Kwantum*, material reciprocity differs under Art. 4(2) WPPT and Art. 2(7) Berne. *RAAP* dealt with a conditional exception, while Art. 2(7) Berne is a mandatory rule, implying that countries of the Union must deny copyright protection to works protected solely as designs and models in their country of origin. While countries can choose to set aside material reciprocity under Art. 19 Berne, if the CJEU views Art. 2(7) Berne as limiting copyright as an intellectual property right under Art. 17(2) CFREU, the requirements in Art. 52(1) CFREU are already

fulfilled without legislative intervention. Applying these considerations to the *Kwantum* case, it is noted that Dutch law provides no more protection than Art. 2(7) Berne. Given Art. 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 recognise material reciprocity as a requirement of EU law or declare Member State rules that mirror Berne's reciprocity clause to be compatible with EU law. In conclusion, *Kwantum* reflects the uncertainty stemming from RAAP. The ECS advocates for a nuanced approach to the international application of EU copyright and related rights, giving due consideration to the regulations of international conventions as part of the EU legal order. In the case of copyright protection of works of applied art, the CJEU could, as a first step, either apply the reciprocity rule set out in Art. 2(7) Berne directly, 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.

Keywords *Kwantum Nederland and Kwantum België* · Copyright law · RAAP · Applied art

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, who seek 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 its opinion on cases pending at the Court of Justice of the European Union (CJEU or Court). The ECS has published a comment on the impact and consequences of the CJEU's decision in C-265/19 (RAAP),¹ which was the first Court case to explicitly focus on questions of material reciprocity in international copyright law. The present Opinion addresses the recent reference for a preliminary ruling in case C-227/23, *Kwantum Nederland and Kwantum België* (*Kwantum*).² It reiterates the ECS's criticism of the CJEU's

¹ 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>.

² 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,

approach in *RAAP* and offers suggestions as to how the Court could now come to a different decision in *Kwantum*.

1.2 Facts and Questions Referred in *Kwantum*

The Berne Convention's key principle is that of the national treatment of foreign authors, coupled with minimum rights that countries of the Union must guarantee foreign works. However, the Convention recognises that countries of the Union may protect design through copyright, design right or otherwise. As a consequence, the Berne Convention does not oblige countries of the Union to always grant protection to foreign designs under copyright on the basis of national treatment. Rather, it sets out a material reciprocity test in Art. 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 State courts were to 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) that, according to Vitra, infringed copyright in the design of the so-called "DSW chair", a well-known design of American origin. It is not disputed that, under Dutch copyright law, the work in question would qualify as a work of applied art. Nor is it disputed that, in accordance with Art. 5(4) Berne, the US is the country of origin of the work. However, in the Dutch courts, the parties disagreed on whether, considering the state of harmonised copyright law, the court should apply the reciprocity test, or whether the CJEU's decision in *RAAP* implied otherwise. It is of relevance that, under Art. 93 of the Dutch Constitution, international law takes precedence over domestic law. Instruments that have been ratified, such as 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 Art. 5(4) Berne.³ It does not otherwise refer to the Berne Convention directly.

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

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;

Footnote 2 continued

Kwantum Nederland and Kwantum België) (2023/C 252/24), EUR-Lex - 62023CN0227 - EN - EUR-Lex (europa.eu).

³ Dutch Copyright Act, Art. 47.

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 in question falls within the scope of EU law. If 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 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 harmonised by Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society (InfoSoc Directive), require this limitation to be provided for by law and, because of Art. 52(1) CFREU, in a clear and precise manner?
- Are EU Member States still allowed to apply the Berne Convention's reciprocity clause in respect of non-EU right holders, or has the EU acquired exclusive competence 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 by the Design Directive (Art. 17 and recital 8) and the Design Regulation (Art. 96(2) and recital 32).⁴ Both instruments describe the principle of cumulation of rights in similar wording. In essence, they state that, where there is no harmonised 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.

These provisions were enacted in the context of EU legislative instruments on copyright that for the most part did not harmonise 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.⁵ For these categories, the relevant legal provisions make protection subject to 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,

⁴ 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) No. 6/2002 of 12 December 2001 on Community designs, ELI: <http://data.europa.eu/eli/reg/2002/6/oj>.

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

Member States were free to determine the concept of work of authorship.⁶ This was also true for works of applied art. After 2009, the CJEU seized on the legislative language used in the earlier directives relating to specific subject matter in order to gradually harmonise the concept of work of authorship, extending it to all types of works. This judicial harmonisation 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*.⁷ 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 that the author must make personal creative choices that are expressed in the subject matter.⁸ Furthermore, ever since *Levola Hengelo*, the Court has explicitly required that the work 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 for works of applied art, industrial designs and works of design. Rather, they must apply to such works the CJEU standard of “the author’s own intellectual creation”, 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 generate 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.⁹

Building on this case-law, the proposals for a new Design Directive¹⁰ and Design Regulation¹¹ both maintain the principle of cumulation of design and copyright protection, while taking into account the harmonisation of the relevant concepts by

⁶ Commission staff working paper on the review of the EC legal framework in the field of copyright and related rights, SEC(2004)995, p. 14.

⁷ 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, 2 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*; CJEU, 29 July 2019, case C-469/17, ECLI:EU:C:2019:623, *Funke Medien*; CJEU, 12 September 2019, case C-683/17, ECLI:EU:C:2019:721, *Cofemel*; and CJEU, 11 June 2020, case C-833/18, ECLI:EU:C:2020:461, *Brompton Bicycle*.

⁸ See, e.g., CJEU, *Levola Hengelo*, para. 36, and CJEU, *Cofemel*, para. 29.

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

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

¹¹ 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, Art. 96(2) and recital 33.

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, whether or not these instruments are adopted 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 deserves separate treatment and critique.

3 CJEU Case Law on Material Reciprocity and Its Implications for *Kwantum*

3.1 Facts and Decision in *RAAP*

After *RAAP* (2020), *Kwantum* is the second case within a relatively short period of time on material reciprocity. 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 recognise those remuneration rights. Following *RAAP*, Art. 8(2) RLD¹² must be interpreted as preventing EU Member States from excluding performers who are nationals of non-EEA states 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 non-member states under Art. 15(3) WPPT did not currently lead to limitations of the remuneration right in Art. 8(2) RLD. Such limitations could be introduced only by the EU legislature and had to comply with the requirements of Art. 52(1) CFREU. Any limitation of the exercise of rights protected under the CFREU had to “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”.¹³ The exclusion of non-EEA right holders from the right to remuneration had to be explicit. This was because the right to equitable remuneration fell within the fundamental right to intellectual property of Art. 17(2) CFREU. The Court further held that Art. 8(2) RLD could not be interpreted in such a way that only the producer of the phonogram would be entitled to receive remuneration, as opposed to having to share it with the performer who had contributed to that phonogram.

3.2 ECS Opinion and Criticism on *RAAP*

In its Comment on *RAAP*, the ECS criticised the Court for not sufficiently considering that the case might have wider consequences. The Court’s approach implied that Member States could never rely on reciprocity under international treaties in areas harmonised by EU law, unless EU law explicitly permitted or

¹² 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).

¹³ CJEU, *RAAP*, para. 86.

required it. The Court's arguments were drafted in 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 the light of Art. 4(2) WPPT, the remuneration right applied only with respect to performers to whom there was 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' harmonised right to remuneration for certain forms of communication to the public, enshrined in Art. 8(2) RLD, from the perspective of fundamental rights. Because the Court views the remuneration right as an *in abstracto* right protected under Art. 17(2) CFREU, any limitation of it must be defined clearly and precisely. In this situation, the Court considered that the EU legislature had not implemented such a clear and precise limitation. However, the consequences of the Court's viewing the harmonised rights as *in abstracto*, rather than as individual rights *in concreto*, remain unclear. The Court's conclusion is that, because the remuneration right is a harmonised rule, only the EU legislature can limit that right for nationals of non-EU states. As a result, Member States' past application of material reciprocity requirements on the basis of Art. 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 non-EU 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 *The EU Is Not Directly Bound to the Berne Convention (but Indirectly via the WCT and TRIPS)*

In *RAAP*, the CJEU was called upon to interpret the WPPT's provision on remuneration. The EU is party to the WPPT, but not to the Berne Convention. However, it is party to TRIPS, and to the 1996 WIPO Copyright Treaty (WCT), a special agreement within the meaning of Art. 20 Berne, which reiterates that parties will apply the provisions of Arts. 2 to 6 Berne 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, Art. 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.¹⁴ EU copyright law (and national

¹⁴ 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, case C-135/10, EU:C:2012:140, *SCF*, paras. 39 and 40. By contrast, the CJEU emphasised in the latter case that the Rome Convention (protection of neighbouring rights) was not directly applicable in the EU and was *not* part of the EU'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.

implementations by Member States) must therefore comply with the EU's international obligations. Furthermore, measures designed to implement the EU's international obligations have to be interpreted in the light of the obligations under TRIPS and the Berne Convention.

3.3.2 *The EU Has Not Enacted Legislation on the Protectability of Applied Art but the CJEU Has Developed Principles Praeter Legem in Cofemel and Brompton Bicycle*

In *RAAP*, the CJEU insisted that material reciprocity must be explicit in the statutory law. As the Court explained:

[P]ursuant 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.¹⁵

In contrast to 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 works protected by copyright. On the contrary, to date, EU design legislation has explicitly left it to Member States themselves to decide on the standards for protection of applied art as copyright works. However, despite those provisions, the CJEU itself, building on its previous case-law that had developed an EU concept of copyright work, ruled in the cases of *Cofemel* and *Brompton Bicycle* (see *supra* at 2) that the harmonised work concept extended to applied art.

It might therefore be less convincing than in the *RAAP* case that the EU legislator alone is authorised to uphold or ban restrictions such as a material reciprocity requirement. The Court itself could interpret EU copyright law in accordance with the material reciprocity requirement set out in Art. 2(7) Berne. The judicial recognition that all copyright works, including works of applied art, are to be subjected to the same work concept, as recognised in *Cofemel* and *Brompton Bicycle*, enables the Court to take this approach by judicial fiat, without any intervention by the legislature being necessary (although the legislature would be well advised to intervene, as discussed below). It is noteworthy that interpreting EU law to mandate a rule of national treatment for works of applied art despite the wording of Art. 2(7) Berne 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 if there are retroactive effects dating back to the entry into force of the InfoSoc Directive.

¹⁵ CJEU, *RAAP*, paras. 86, 88.

In our view, then, the Court has two viable options. First, it can interpret the operation of Art. 2(7) Berne in the EU legal order as subjecting copyright protection to material reciprocity. This option would likely be preferable for preventing friction in the internal market and lead to harmonised results. Alternatively, the Court could declare Member States' application of Art. 2(7) Berne to be compatible with EU law, whether a Member State applies material reciprocity or offers unreserved national treatment to works of applied art on the basis of Art. 19 Berne.¹⁶ We will discuss these two options further below.

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 Art. 4(2) WPPT and Art. 2(7) Berne. It is known that the application of this exception is conditional upon a Contractual Party opting out of the remuneration system by notifying the Director General of WIPO accordingly pursuant to Art. 15(3) WPPT. In *RAAP*, the CJEU considered Art. 15(3) WPPT to be a limitation of the remuneration right in Art. 8(2) RLD – an intellectual property right protected by Art. 17(2) CFREU. The CJEU further found that this limitation did not fulfil the Art. 52 CFREU criteria of clearness and preciseness “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”.¹⁷ As a consequence, the EU legislator would have to intervene in order to provide a precise and clear limitation of the remuneration right. It should be noted that the ECS criticised this approach to Art. 4(2) WPPT in its Comment on *RAAP*.

The reciprocity situation in *Kwantum* is different from that in *RAAP*. Unlike Art. 4(2) WPPT, Art. 2(7) Berne, as an exception to the national treatment rule set out in Art. 5 Berne (and Art. 3 TRIPS), is not conditional. On the contrary, material reciprocity pursuant to this provision takes the form of a mandatory rule, in that its wording implies that countries of the Union 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 in the past).¹⁸ 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” (emphasis added).

Insofar as the CJEU considers Art. 2(7) Berne to limit copyright as an intellectual property right under Art. 17(2) CFREU – in parallel with its treatment of Art. 8(2) RLD in *RAAP* – the requirements in Art. 52(1) CFREU should be considered fulfilled, with no need for intervention by the legislature. In other words, the rule of

¹⁶ 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”.

¹⁷ CJEU, *RAAP*, para. 87.

¹⁸ Vienna Convention on the Law of Treaties, Art. 31: “A treaty shall be interpreted 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”.

material reciprocity in Art. 2(7) Berne limits the scope of Arts. 2 to 4 of the InfoSoc Directive in a sufficiently clear and precise way.

Certainly, the Berne Convention does allow countries to set aside material reciprocity and offer protection under copyright. After all, Art. 19 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 Art. 2(7) Berne. With Art. 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 Berne’s reciprocity clause in their copyright legislation (e.g. Denmark) the question arises whether applying it contravenes EU law. Faced with this situation, the CJEU could, as stated above, either recognise material reciprocity as a requirement of EU law or at least declare Member States’ rules on the application of Art. 2(7) Berne 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. However, it would not bring about harmonisation of EU law in this area.

By contrast, a mandatory rule of material reciprocity would result in harmonisation in this area. This would be in accordance with the CJEU’s general tendency to emphasise the goal of harmonising copyright legislation when interpreting directives. To reduce legal uncertainty, it would be helpful if the CJEU were to give 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. Furthermore, works of applied art originating from outside the EU/EEA would 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 – whether leaving it to Member States or accepting a material reciprocity requirement as a harmonised rule – legislative intervention at EU level will ultimately be necessary to ensure legal certainty.

4 Conclusion and Outlook

The general wording of *RAAP*, with no account being taken of the further consequences of the case, might give 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 *RAAP* has created in this respect. The ECS advocates a nuanced approach to the international application of EU copyrights and related rights, giving due consideration to regulation by 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 Art. 2(7) Berne 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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