

Kluwer Copyright Blog

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

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*This blog post contains an edited version of the European Copyright Society's Opinion on Case C-227/23, *Kwantum Nederland* and *Kwantum België*.*



Source: European Copyright Society

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, as per reservations under the [WIPO Performances and Phonograms Treaty](#) (WPPT), 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.

Readers that want to discuss these and other cutting-edge copyright topics are invited to join the ECS Conference this year in Frankfurt.

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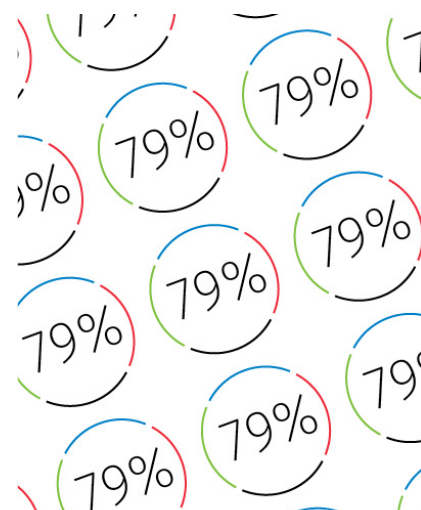
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