

Is There Any-*body* on Stage? A Legal (mis)Understanding of Performances

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Abstract

This article investigates the legal narrative which frames the protection of performances. From a legal research background, the author uses an interdisciplinary approach to examine the overlap between the narratives describing performers' creativity present in the performing art studies and in the legal jurisprudence in order to analyse whether the law has followed similar theoretical evolutions these creative fields experienced. It is argued that a fundamental theoretical gap still separates the two worlds on core issues like creativity, authorship or performance. This article identifies when such a divide occurred and attempts to explain this split has not yet been bridged by policy-makers. The artistic practice of Disability Dance is used to highlight the possible causes of lawyers' (mis)understanding of the act of performing but is also presented as an argument for reform.

Introduction

When designing the regulation of performers' work (CDPA 1988, Part II),² policy makers did not attempt to define the term 'performance' or 'performing' and by-passed this issue by merely listing the types of performances qualifying for legal protection (CDPA 1988, s. 180(2)).³ Looking at the definition of the word,

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2 Performers' works are protected by Performers' right under Part II the Copyright, Designs and Patent Act 1988 (subsequently referred as CDPA 1988) as a neighbouring right. This article focuses on the legal system of the United Kingdom but is using examples from foreign jurisdictions when relevant.

3 Section 180(2) (2) In this part "performance" means (a) a dramatic performance (which includes dance and mime),(b) a musical performance,(c) a reading or recitation of a literary

performing appears to be a form of embodiment. Indeed, under 'performance' Oxford dictionaries read: "*An act of presenting a play, concert, or other form of entertainment*" whilst embodiment is defined as "*1. A tangible or visible form of an idea, quality, or feeling; 1.1: The representation or expression of something in a tangible or visible form*" (Oxford dictionaries). According to these two rather simple definitions, it may seem fair to consider performances as a form of embodiment. If plays, musical compositions, or choreographic works are the collection of their author's expression of ideas, then their performed versions¹ are all embodiments of such ideas since their performance "represent [them] in a tangible or visible form" for the audience. Whilst this approach is straightforward and the argument tenable, it is also inconveniently simplistic for it reduces the work of performers as 'embodiers' rather than creators, minimising their creative relationship with the work they perform.

The (r)evolution in theorising around embodiment and performance is not a question of definition. Diverging performance theories agree on associating performances with embodiment but differ from one another on the nature of the relationship performances entertain with the material they interpret. This situation urges the question of what performances are in comparison to the text they communicate. Are they lived copies of the text or a recreation of it? What does it take to "embody" (perform) a work? What does the performer do with her body and her mind when she performs the work of another? Is interpreting a character creative? This thread of interrogations leads to question the existence and nature of performers' creativity. If performing arts studies have come ac-

work, or (d) a performance of a variety act or any similar presentation, which is, or so far as it is, a live performance given by one or more individuals; and "recording", in relation to a performance, means a film or sound recording—(a) made directly from the live performance, (b) made from a broadcast of . . . the performance, or (c) made, directly or indirectly, from another recording of the performance.

¹ i.e. the theatre production, the concert or the dance performance

knowledge the valuable relationship between performers and the written work of its transformative dimension (Fisher-Lichte), the legal jurisprudence¹ has dealt with this complex connection in a very simplified manner, denying performances their creative value.

These questions ultimately tie the present discussion to a wider questioning around mind/body dualism and authorship. Since intellectual property laws do not align with the former philosophical debate, it is through its regulating of authorship (copyright) that policy makers reveal their understanding of performances. This article briefly exposes significant philosophies of performance detailing some elements of the shift from historical to more recent sources (I) before comparing such narratives to the current legal framework (II). The last section gives possible reasons as to why the law has not bridged the theoretical gap, which separates it from theatre, performance and dance studies (III). This article does not aim to give a thorough analysis of the twists and turns taken by these studies in their theorising the act of performing. The objective is to compare the two sets of narrative, aesthetic and legal, in order to assess whether the law has updated its concepts on the basis of the development the field envisaged.

Philosophies of performance

If the art of performing has been under study² since Ancient Greece, the focus of the discussion was placed on the impact of performances on the community, rather than on the relationship between the performer and the author's work (Aristotle; Peponi; Rousseau). Analyses examining the connection between the performing artist and the material she interprets only emerged in the eighteenth century with notably the work of Denis Diderot (Did-

¹ This article focuses its discussion on the legal framework of the United Kingdom but does also include decisions held in other jurisdictions (United States and France) when they prove to be particularly relevant to the discussion.

² Understood in its broadest sense.

erot, *The Paradox of Acting*; Dieckmann) to become two centuries later the focus of performance and theatre studies (Fischer-Lichte; Schechner).

Early works on the process of performing focused on the “art of acting” (Diderot, *The Paradox of Acting*; Diderot, “Letter on the Deaf and the Dum”; Simmel).¹ Diderot is one of the first philosophers to dedicate a part of his writing to its study,² claiming that the performer is a puppet at the service of the master’s mind, the author of the play. He writes: “a great actor is also a most ingenious puppet, and his strings are held by the poet; who at each line indicates the true form he must take” (*The Paradox of Acting* 62). Diderot’s writing illustrates the eighteenth century’s beliefs about actors’ creative input in the performance, which persisted through the late nineteenth century and still marks our current legal thinking. This assumption envisages performers only as the neutral medium through which the playwright communicates her work to the audience. From its first writing to its reception the audience via the performance, the work and the meaning it conveys are controlled by the author and the authority of her prose.

This model relies on two different but interlinked premises. The first one regards the playwright as the sole author of both the written work and the performance since the two versions are considered as identical in their substance. Plays, like musical compositions,³ are conceived as readily performable collection of ideas. As a result, not only do performers not have any input in their activity, the performance, but they also must not; they must not

1 However, it is submitted that their observations could be applicable to the work of the musician or the dancer. Regarding musical works, see for a summary of various composer’s views on the musician’s roles the work of Leinsdorf, *The Composer’s Advocate*

2 Denis Diderot, “Letter on the Deaf and the Dum” in Diderot’s Early Philosophical Works, *The Paradox of the Acting*

3 Arguing that that the musical work exists in the score which are to be respected and performed as written by the musicians see the work of (Leinsdorf) Writing against this conception of the musical works and defending performers’ creative input in the performance read: (Leech-Wilkinson, “Compositions,” “The Changing Sound of Music,” and “Classic Music: Utopia or Police State?”)

alter or modify the underlying work. The performer is seen as a vessel through which meaning can be conveyed without distortion for the text transcends the performative stage. The authority of the text itself is such that performances of the same dramatic piece should not substantially vary from one another. On this point, a clear parallel can be drawn between Diderot's work and the myth of the 'author-genius'¹ often referred to as the theoretical and philosophical base of authorship in the legal literature (Woodmansee and Jaszi). Diderot's *Paradox of Acting* illustrates the impact such deference for authors has on understanding the art of performing by positioning performers as the lesser artists.

This first assumption is enabled by the belief in performers' universal and malleable body, which forms the second premise underpinning this model. This perspective is embedded in Diderot's analogy between the actor and the puppet where he compared their corporeality. To him, the great (real) actor is an ingenious puppet because "most ingenious puppets take every kind of shape at the pull of the string in his master's hand" (61). Diderot associates the performer's body to a "pasteboard" (62) and the actor to a "pasteboard figure" whose "own special shape never interferes with the shapes he assumes" (53). The great actor's body is so neutral

¹ This approach to performances is consistent with the myth of the 'author-genius', composers or writers enjoyed during this period. This phrase, 'author-genius' was retrospectively used by legal scholars to label this commonly accepted vision of authors as sole and unitary sources of meaning, independent fathers of creative works they brought to life by relying on materials produced by their own mind. This position justified and justifies the attribution of authorship to the author, denying any credit or 'inspirative' function to previous works. This approach was heavily criticised by various fields, philosophy, literature, the law and started with the ever so often echoed critiques of Foucault (*What is an author?*) and Barthes ("The Death of the Author"). Researchers often consider the eighteenth century as being the date of birth of this author-worship but few draw the parallels between this author-centred construction of authorship and the legal situation and understanding of performers (Foucault; Barthes; Woodmansee, "The Genius and the Copyright"; Jaszi, "Toward a Theory of Copyright"; Rosenblatt). It is interesting to note that in the context of musical works this rise of the author genius appeared a little later than in literature. There is a marked change in the treatment of performers and their obedience to the musical scores and the conventional performing style of the time in the nineteenth century. This shift was triggered by the possibility to record sound introduced by Edison's invention in 1877 (Leech-Wilkinson, "The Changing Sound of Music").

and universal that it can be “everything and nothing” (53). For the French philosopher, performing is not an embodied experience for the actor but the mastery of the performers’ mind in using his/her body as a reliable machine at the service of the author’s creation. In his logic, performing can be summarised in the ability to offer a disembodied body onto which meaning can be plastered. In his logic, actors intellectually prepare their body to be the channel of the work and the emotions it conveys.¹ Here lies the craft of the great actor who manages to channel the author’s work through his/her body when utilised by his reasoned mind. Such craft only tests the actor’s physical strength he ought to practice like a gymnast (16). Indeed, the good actor is the performer who understands that the art of acting is the art of controlling one’s body with reason and not sensibility. The actor’s tears should never be the tears of emotions but that of the brains in order to make sure that he remains the neutral pasteboard he should be (9; 16-7).² Diderot never doubts that such universal and chameleon physicality exists. The theorist does not attribute the incapacity of actors to perform characters without modifying them to the fact that ‘normative’ bodies, or bodies stripped of all physical or socially constructed particularities, do not exist but to the performer’s lack of basic acting skills. Whenever, the mediocre performer finds herself unable to master the basic of her art, she becomes a “wretched pasteboard figure” (62).

During the eighteenth century, this philosophical understanding of acting made of performing an art of disembodiment. Only a disembodied body, understood as a body stripped from its physical or socially constructed particularities, is able to

1 Diderot realised that the actor could not be feeling the emotions he/she displayed after watching David Garrick performed a series of various facial expressions, his head placed between sliding doors. This exercised is said to have inspired the philosopher to write his essay on what he later named ‘the paradox of acting’. (Soto-Morettini 116)

2 “The player’s tears come from the brain, the sensitive being’s from his heart” (Diderot, *The Paradox of Acting* 9;16–17)

perform and respect the work in the way artistic conventions demand it. Disembodiment is thought as the very skill of actors. The great actor is disembodied as he must present a body free of meaning, symbols or peculiarities in order to convey the author's work without any distortion. This vision of the performer illustrates the mind/body dualist theory at its paroxysm, where the actor's body assists the creative purpose of another mind. The performer's mind has no interaction with the meaning interpreted. She controls her body only to better serve the skilfully expressed ideas of the author's intellect. The mind and the body could not be more separate from one another.

Diderot does recognize the rarity of such talent (the ability to offer a 'disembodied' body). He comments: "a great actor is neither a piano forte nor a harp, nor a violin [...] he has no key peculiar to him, he takes the key and the tone fit for his part of the score and he can take up any. I put a high value on this talent of a great actor; he is a rare being as rare as, and perhaps, greater than, a poet"(61). One could only agree with him on the rarity of such individual, and the fact that a disembodied acting body would be of a greater value than that of a great poet since, unlike the latter, it does not exist. Like unicorns, the disembodied body is a wonder as rare as it is fanciful.

At the very beginning of the twentieth century, Georg Simmel challenged Diderot's conception of the performer despite the strong aesthetic conventions still favouring the classic author at the time (Simmel). For the German philosopher, acting has nothing to do with the ability of being a human canvass onto which the author can paint his/her play to the spectators. Simmel describes the complex 'ménage a trois' between the character depicted by the author in writing, its understanding by the performer, and the performer's own personality and physicality. To him, a subtle fusion

of the three composes the performance. More importantly, Simmel appears to be the first author to question the author's ability to conceive 'off-the-shelf' ready-to-be-performed characters. He argues that even the most meticulous playwright is unable to describe a character in such details. He explains:

The dramatic character given in a text is, in some sense, an incomplete human being; he does not represent a sensual human being but the sum of all that can be known about a human being through literature. The poet cannot pre-determine the voice or pitch, the *ritardando* or *accelerato* of his speech, his gestures or even the special aura of the living figure. Instead, the poet has assigned fate, appearance, and the soul to the merely one-dimensional processes of the mind. (Fischer-Lichte 79)

Simmel is presented as the first philosopher to acknowledge the necessary and inevitable input of performers in their representation of characters, even when working with the strictest stage directions and guidelines (Fischer-Lichte 79). This view was deepened by later theorists who emphasised on the necessary and free input of performers. Jerzi Grotowski's assimilated the actor's performance to the river flowing between the banks built by the text (Schechner 20). Influenced by the Polish directors' work and agreeing with this understanding of performances, Richard Schechner later described performers' gestures as the flame in the candle glass formed by the text (25).¹

Building on these new foundations and redefinition of performance as a fully embodied act, contemporary theorists further challenged the boundaries of performances and investigated its components. After valorising the presence of the performer's body and its impact on the author's underlying work, writers realised

¹ In this comparison, Richard Schechner directly cites Ryszard Cieslak's metaphor when he writes "If we expand Cieslak's analogy, the gestures and text are the candle-glass and the action is the flame" (25)

that the performers' bodies are not the only bodies involved. Spectators became the subject of observation and analysis to the extent of broadly defining performances as the event constituted of the bodily co-presence of performers and spectators.¹

Furthering Simmel's work, an aesthetic shift was more clearly made in the 1960's which was identified by Fischer-Lichte as the "performative turn" (Fischer-Lichte 34). Such "turn" recognizes the value of performance for itself, independent from the underlying work's meaning and quality. The performance is now perceived as adding value to the work, performers do contribute to our culture, to the construction of knowledge. As such, performances are as valuable (30) and worthy recognition as the work of authors whose dominant position in the creative process has been over-estimated for too long.²

A legal perspective on performances

Intellectual property laws protect the "work of the intellectual mind"³ or works showing significant intellectual input. In its protection of creative works, the law establishes an evident hierarchy between authors' and performers' rights which, without surprise, favours the first category of artists. The substance and duration of performers' rights make them economically less interesting than authors' rights. Performers will never be in the position of receiving copyright for their performance if they cannot show significant intellectual input.⁴ The legal narrative is

1 The audience has always been under the scrutiny of theatre theorists since Plato and Aristotle, however the performative shift was accompanied by a 'spectatorial' turn which regards spectators as active participants in shaping the performance and as co-creators of meaning.

2 Fischer-Lichte brilliantly summarized the evolution of these theories in an accessible piece of academic writing in *The Transformative Power of Performance*.

3 See the position of the European Court of Justice on the categorisation of protectable work: *Infopaq* [2009] E.C.R. I-6569, [2009] E.C.D.R. 16 at [45]; *Bezpečnostní softwarová asociace* [2011] E.C.D.R. 3 at [50]; *Painer* [2012] E.C.D.R. 6 at [89]; *Football Dataco Ltd v Sportradar GmbH* (C-173/11) [2013] 1 C.M.L.R. 29 at [38].

4 As well as satisfy the other relevant requirements (categorisation, fixation and originality). (CDPA, 1998 Ch. I)

very clear in its conception and understanding of authors' creativity compared to that of performers: performing is not creating. As a result, performers legally cannot be authors.¹ Very often, variations suggested by performers during the creative process will be considered as mere derivations of the author's creative impulse. As such, these contributions are not true "intellectual inputs" for which the performer is entitled to obtain authorship but rather the bodily translation of the author's overarching ideas. In *Hadley v Kemp* (1999)², Park J. shows obvious first-hand experience of musical composition when he comments:

[I]n my opinion, the songs in their recorded form were the same musical works as the songs which Mr Kemp had composed in his mind and his memory. Of course there was a marked difference between (a) the sound of the song sung by Mr Kemp to the accompaniment of himself on an acoustic guitar, and (b) the sound of the song sung by Mr Hadley with the backing of the whole Spandau Ballet band. But that does not mean that the whole band were creating a new and different musical work. Rather they were reducing Mr Kemp's musical work to the material form of a recording. After all, when Mr Kemp devised the song he devised it for performance, not by himself as a solo artist, but by Mr Hadley and the whole band. A composer can "hear" the sound of his composition in his mind before he ever hears it played. Beethoven could hear his music in this sense even when he was deaf. When Mr

¹ The legal analysis of this article is based on the hypothesis where the performer interprets a pre-existing underlying work (a play, a script authored by another artist). In the situation where the performer interprets his/her own work, the artist will receive the status and rights of author and performer independently so long that the material he/she interprets can qualify for copyright protection by meeting the requirement of originality and fixation. The condition of fixation is usually the hurdle performing artists face when wishing to obtain legal protection, especially in the context of improvisation (Donat). Failing to fix his/her script or performance in writing or otherwise, the performer will lose his/her eligibility to copyright protection regarding the material he/she performed.

² *Hadley and others v Kemp and another* [1999] All ER (D) 450

Kemp was devising his songs the sound which he had in his musical consciousness must surely have been the sound they would have when performed by Spandau Ballet, not the sound they would have when sung by Mr Kemp alone to the accompaniment just of his own guitar.¹

Such legal narratives clearly emphasise a highly intellectualised conception of creativity and individualistic approach to authorship. Both of these traits have been highlighted and criticised elsewhere.²In light of these dispositions, the superiority of authors and the valorisation of intellectual effort over corporeal work in law makes no doubt.

The *Beckett case* (1992)³ is another excellent illustration of how authorial rights, in the form of the moral rights, can be actioned to the detriment of performers' creativity. Alongside economic rights, the moral right doctrine be considered as another endorsement of this hierarchy between authors and performers for it allows any author or beneficiary to prevent future performances from breaching the 'integrity' of the protected work, precluding on this basis any modification or alteration of copyrighted materials.⁴ Use out of context or lack of quality in the reproduction of the work has been considered as breaching authors' rights of integrity (CDPA, 1988 s. 180. ; Adeney) and so was cross-gender casting performing artists. This particular point was the crux of the *Beckett case*, heard in 1992 by the Paris Court of Appeal.

_____ Despite the hegemonic position of the author in this de-
1 *ibid.*

2 See the work of Keith Sawyer on creativity (*Explaining Creativity The Science of Human Innovation*, "Western Cultural Model of Creativity", "The Interdisciplinary Study of Creativity in Performance") and the criticism of romantic authorship and the figure of the author-genius by Martha Woodmansee and Peter Jaszi (Woodmansee, "The Genius and the Copyright" and "Response to David Nimmer"; Jaszi, "Toward a Theory of Copyright" and "On the Author Effect"; Woodmansee and Jaszi)

3 TGI Paris 15 oct. 1992, *Lindon et Sacd c/ La Compagnie Brut de Béton et Boussagol*, inédit, RTD Com. 1993 p. 98 ; Lindon c Boussagol TGI Paris, 15 October 1992, RIDA janvier 1993, p. 225

4 Moral rights protect authorial works against modification or alterations the author disapproves. Elizabeth Adeney, *The Moral Rights of Authors and Performers*.

cision, the case may nevertheless, and paradoxically, have come to indirectly acknowledge the “performative power of performance” as put forward by, inter alia, the performance studies theorist Erika Fischer-Lichte. In this case, the Court of Appeal judged the performance by female comedians of the play *Waiting for Godot* (1992) disrespectful of the author’s moral of integrity. Samuel Beckett’s estate filed a complaint against Bruno Boussagol, director of the production, for having staged a female cast to embody male characters against the late author’s wishes. The French court recognized that such swap in the actors’ gender was enough to compromise the work’s integrity and breach the author’s moral right. In ruling so, not only did the French judges enforce a very strict application of the moral doctrine, reinstating the controlling power of the author over its work, but they also, and paradoxically, acknowledged the impact of the performing body on the work, that is, on the performed body. The appeal judges agreed to pierce the conventional veil of illusion behind which the performing body supposedly disappears to only embody the performed character. The court considered that even though the characters were interpreted as males, female performing bodies were yet altering the work since their female corporeality remained accessible to the audience. The illusion of theatre, even when invoking and staging the best authors, seems to never offer a veil thick enough to cover up the performing body.

Should the *Beckett case* be taken as a sign that the law confirms the transformative power of performance? The Court did recognise the comedians as able to alter, here damage, the meaning of the underlying work, and so despite the fact that they faithfully respected the text and stage directions. Implicitly, the judges have agreed that the performer’s body, even when reduced to its gender, was able to influence the work interpreted. Ruling so, the French jurisprudence seems to corroborate the idea that performances are

able to modify, thus create, meaning. This timid assimilation of performances as sources of meaning could be interpreted as a confirmation of their creativity and equal value with authorial works. Is the legal narrative now siding with contemporary performance theories? Maybe. A shy step seems to have been made in this direction although there is no evidence that it was intentional. To the contrary, the legal literature often refers to this case as the illustration of the author's command over her work, beyond her grave.¹ Additionally, such creative embodiment was recognised in a rather negative way in this case. There was not just *transformation* through performance (creative embodiment) but *distortion* which was sanctioned accordingly (i.e. prohibited²). In other words, there is a much bigger step for the law to make between acknowledging the transformative power of performance and admitting that such power is creative and worthy of authorship.³

This desired endorsement of performance theories by the legal narrative might have been prompted by American judges very

recently. In *Garcia v. Google* (2014)⁴, the appeal judges recognised 1 TGI Paris 15 oct. 1992, *Lindon et Sacd c/ La Compagnie Brut de Béton et Boussagol*, inédit, RTD Com. 1993 p. 98 ; Lindon c Boussagol TGI Paris, 15 October 1992, RIDA janvier 1993, p. 225. In Italy, the same facts were litigated but the performance by female comedians of *Waiting for Godot* was allowed by the Court on the grounds of freedom of expression. Barbara McMahon, "Beckett Estate Fails to Stop Women Waiting for Godot."

2 An injunction was issued against the performance of the play with the female cast.

3 A similar limitation on the performers' physicality was enforced in the United States via the use of a copyright license. In this case the roles between performing and performed bodies were swapped. (Carroll 798; Harding)

4 *Garcia v. Google, Inc.*, No. 12-57302 (9th Cir. Feb. 26, 2014) available at: <https://www.eff.org/files/2014/02/26/garcia_opinion.pdf> <accessed 10/07/2014>. In this case, the actress Cindy Lee Garcia was hired by Mark Bassale Youssef to perform in a low-budget independent entertainment action movie named "Desert Warrior". The actress was given four pages of the script and worked three and a half days under the direction of the film makers for which she was paid approximately five hundred dollars. The film or project "Desert Warrior" was never produced. Instead, the film makers directed an anti-Islamic clip, entitled the "Innocence of Muslims", where Garcia's performance was dubbed and featured as disparaging Islamic practices. After uploading the video on internet via *Youtube* and *Google*, Islamic clerics ordered a fatwa against all individuals involved in the film, the actress received life threatening letters. Among the various protective measures Garcia took in reaction to these threats was the request for the film to be taken down by *Youtube* and *Google*. Her claim was based on the fact that she owned copyright over her performance the film featured. As such, she would be legally allowed to prevent the dissemination of the video on the internet. In appeal, the court received her claim and considered that her performance was a copyright-

the actress (Garcia) of a film as the legal author of her performance in the clip. The Second Circuit Court explicitly referred to the literature of performing studies¹ to justify the attribution of copyright to the actress. They assessed her input in the film as equivalent to that of an author explaining that:

Google argues that Garcia didn't make a protectable contribution to the film because Youssef wrote the dialogue she spoke, managed all aspects of the production and later dubbed over a portion of her scene. But an actor does far more than speak words on a page; he must "live his part inwardly, and then . . . give to his experience an external embodiment." Constantin Stanislavski, *An Actor Prepares* 15, 219 (Elizabeth Reynolds Hapgood trans., 1936). That embodiment includes body language, facial expression and reactions to other actors and elements of a scene. *Id.* At 218–19. Otherwise, "every shmuck . . . is an actor because everyone . . . knows how to read." Sanford Meisner & Dennis Longwell, *Sanford Meisner on Acting* 178 (1987)."² [...] An actor's performance, when fixed, is copyrightable if it evinces "some minimal degree of creativity . . . 'no matter how crude, humble or obvious' it might be." *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991) (quoting 1 Nimmer on Copyright § 1.08[C] [1]). That is true whether the actor speaks, is dubbed over or, like Buster Keaton, performs without any words at all. Cf. 17 U.S.C. § 102(a) (4) (noting "pantomimes and cho-

able contribution to the film and granted the injunction against the internet companies to withdraw the film from the internet. The majority of the judges seating on the panel of the appeal ruled in favour of the claimant. Even though she was a performer, her contribution to the film (her performance) was found to satisfy every condition to obtain copyright protection. Garcia might be the first performer to be recognised as a legal author on the basis of her acting by a western court of law.

1 *Ibid.* The Court quoted the work and words of Constantin Stanislavski and Sanford Meisner, among others.

2 *Garcia v. Google, Inc.*, No. 12-57302 (9th Cir. Feb. 26, 2014) p 6-8

reographic works” are eligible for copyright protection). It’s clear that Garcia’s performance meets these minimum requirements.¹

This conclusion and direct reference to the performing art literature do appear as a breakthrough of their theories in the legal narrative. This might be the first time that the performer’s creative and transformative input is not only acknowledged by a western court but is also rewarded with authorship, the highest distinction there is in this field of law.² The actress’s performance was recognised as an embodied but yet creative ‘work’.

Interestingly, the opposition between the majority’s ruling and the dissenting opinion mirrors the situation found in performance studies before and after the performative turn. On the one hand, the majority of the panel agrees and validates the ‘post-performative turn’ approaches to performances whilst, on the other, the analysis of the dissenting Circuit Judge N. R. Smith sides with Diderot’s philosophy, a position in line with the ‘pre-performative turn’.³ To him, the actress is not an author because her performance was dictated by the script and the director’s direction, so much so that the originality requirement is not satisfied. He compared the

1 *ibid.*

2 In the *Beckett* case, the transformative power of performance seems to be implicitly acknowledged but is sanctioned rather than rewarded. See comments here above and note..

3 See Judge Smith’s depiction of the act of performing: “Just as “an actor does far more than speak words on a page,” maj. op. at 8, so too does a vocalist. Indeed, one might say that otherwise, “every schmuck” is a vocalist, “because everyone . . . knows how to read.” *Id.* at 8 (quoting Sanford Meisner& Dennis Longwell, *Sanford Meisner on Acting* 178 (1987)) (quotation marks omitted). An actress like Garcia makes a creative contribution to a film much like a vocalist’s addition to a musical recording. Garcia did not write the script; she followed it. Garcia did not add words or thoughts to the film. She lent her voice to the words and her body to the scene. Her creativity came in the form of facial expression, body movement, and voice. Similarly, a singer’s voice is her personal mobilization of words and musical notes to a fluid sound. Inflection, intonation, pronunciation, and pitch are the vocalist’s creative contributions. Yet, this circuit has determined that such, though perhaps creative, is too personal to be fixed. See *Midler*, 849 F.2d at 462. Under this line of cases, an actress’s performance in a film is more like the personal act of singing a song than the complete copyrighted works in *Laws* and *Jules Jordan*. As a result, it does not seem copyrightable. Thus, the law and facts do not clearly support Garcia’s claim that her.” *Garcia v. Google, Inc.*, No. 12-57302 (9th Cir. Feb. 26, 2014) 30

work of the actress as that of the vocalist¹ where the voice is the central element of her work is her body, her voice, and as such cannot be copyrighted.² He explained:

An actress like Garcia makes a creative contribution to a film much like a vocalist's addition to a musical recording. Garcia did not write the script; she followed it. Garcia did not add words or thoughts to the film. She lent her voice to the words and her body to the scene. Her creativity came in the form of facial expression, body movement, and voice.³

Unfortunately, the *Garcia* case was, and still is, largely dismissed and criticised by legal experts who see in the decision more of a legal faux pas than a breakthrough in the judiciary's understanding of performances. The critique of the decision reached consensus among all spheres of the legal community - practitioners, academics, and the judiciary. The main concern voiced by practitioners is the absurdity of the Court's interpretation of copyright laws.⁴ To them, the Congress never intended to grant copyright protection to performances, therefore the Court were never to read in the statutory dispositions the possibility of extending legal authorship to performers. The situation could potentially challenge the current structures onto which the creative industries are built.⁵ If the

1 *Garcia v. Google, Inc.*, No. 12-57302 (9th Cir. Feb. 26, 2014) 30

2 Judge N.R. Smith makes an odd reference to the performance being too 'personal' to be fixed, thus copyrightable. We can only assume that being too personal refers to the fact that the performer's work relies too much on her body to be considered as a creative product of the mind or reproducible and thus protected by law. *Garcia v. Google, Inc.*, No. 12-57302 (9th Cir. Feb. 26, 2014) 21, 30

3 *Garcia v. Google, Inc.*, No. 12-57302 (9th Cir. Feb. 26, 2014) 30. Circuit Judge N.R. Smith also points out that were the originality condition to be fulfilled, two additional conditions must be observed: fitting in one type of protected works listed by the law and being fixed in a tangible manner. Performances are not listed as one of the protected subject matter neither does it comply with the fixation condition by being essentially ephemeral and transient. N.R. Smith considers that the performer's contribution, the performance, lies in her body and, therefore, cannot be subject to fixation.

4 (Masnick, "Horrible Appeals Court Ruling S")(Moore)(McClellan)

5 This critique worries that the creative industries will be blocked by performers' claims if they were granted copyright interests.

Court aimed to sooth these concerns by underlining the rarity of the circumstances they were presented with in the *Garcia* case¹, this observation was apparently not enough to convince practitioners who read in the decision a poor understanding of the law.

Along the same lines, legal academics expressed similar concerns (Heald; Goldman and Balasubramani; Tushnet, “My Long, Sad Garcia v. Google Post”). They underline the inaccurate application of the law as well as its potentially harmful consequences on the freedom of expression and the risk of censorship. The facts of the case contributed to undermining the legitimacy of the decision (Heald; Goldman and Balasubramani; Tushnet, “My Long, Sad Garcia v. Google Post”). Indeed, the actress participated in an anti-islamic production without her knowledge and received death threats following the dissemination of the film. A fatwa, or opinion on a point of Islamic law, calling for the execution of the performer had been issued by members of the Islamic cleric. This situation may have forced judges to read in the law the solution they wanted to enforce: agreeing to the copyrightability of her performance in order for the comedian to be allowed to take down the video from the internet. The American Court is found guilty of judicial activism² by legal experts (Heald; Goldman and Balasubramani). This critique is all the stronger that it is supported by scholars who evidenced a firm grasp on the complexity of performances in their research and have highlighted some of the flaws of the legal framework in the matter, such as Rebecca Tushnet (“Performance Anxiety: Copyright Embodied and Disembodied”).

Could this situation still be a blessing in disguise for performers and performance theories? If so, it would be a blessing

¹ *Garcia v. Google, Inc.*, No. 12-57302 (9th Cir. Feb. 26, 2014) 15: “The situation in which a filmmaker uses a performance in a way that exceeds the bounds of the broad implied license granted by an actor will be extraordinarily rare. But this is such a case.”

² In cases of judicial activism, the law is manipulated by judges in order to produce the desired outcome rather than the solution the classic application of the rules would have concluded to.

of a short duration. Indeed, the *Garcia* decision was also directly contradicted by fellow judges, shortly after its publication. The seventh circuit rejected the argument according to which an actress could copyright her work, in the *Banana Lady* case of April 2014 (Masnick, 'Banana Lady Case'; Moore).¹ Catherine Conrad, also known as 'Banana Lady', performs in her banana costumes for various occasions. As part of her performing activities, she was hired by a credit trade union association to perform a singing telegram at one of their events. Even though the artist informed the association that pictures and videos of her performance were not to be taken except for personal use, the organisation failed to communicate this information to the audience who photographed and videotaped her singing telegram to subsequently share it via online social media. The artist considered that uploading videos and photos of her performance online cannot be considered as personal use and sued the credit trade union for breach of her copyright. In this decision, the judge sided with Judge N.R. Smith and refused to see in the actress's performance any copyrightable element other than the ones listed by the American Copyright Act (i.e. her costume and accessories, the recording she might have made of her performance).² If this decision does not formally repeal the *Garcia* case,³ it introduces a split between the American circuit courts which will allow the possibility for appeal before the Supreme Court of the United States. Only the latter will be able to clarify the situation and confirm whether the *Garcia* decision is a breakthrough for performance studies or a faux pas from the ninth circuit judges. The appeal before the highest court of the country is yet to be filed.

Beyond the legal narrative produced by the jurisprudence, the author/performer divide or hierarchy remains visible in

1 *Conrad v. AM Community Credit Union*, case no. 13-2896(7th Cir. Apr. 14, 2014).

2 *ibid.*

3 The Ninth Circuit Court (*Garcia* case) and the Seventh Circuit Court (*Banana Lady* case) are of the same level of authority. Only a decision of the Supreme Court could overturn their position.

international and domestic regulatory texts. There are unhidden discrepancies between authors' and performers' rights at various levels. The scope of the protection as well as its length is less significant in the case of performers. Despite the recent reforms on performers' rights,¹ the legal framework was far from experiencing the revolution literature and theatre studies underwent in the 1960's.

As previously mentioned, legal authorship protects creative works with two ranges of prerogatives: economic and moral rights. Whilst the first prevents others from copying the work and reaping the financial fruits it generates without the consent of its author (CDPA, 1988 Ch. I-II), the second aim to protect the name of the author and the integrity of the piece (CDPA, 1988 Ch. IV s.77 and 80). It is true that performers were successively granted powers in both of these compartments. Performers' rights now cover economic rights and moral rights. Some legal scholars have commented that the introduction of moral rights for performers at the international level by the WIPO treaties² was a reform of great significance which equated to bringing performers' rights to a standard close to that of authors. Yet again on both sides, economic and moral, performers' rights remain of lesser substance and narrower scope than that of authors.

Authors' rights protect the material form of the work as well as its immaterial content.³ For instance, artists are not allowed to copy the physical pages of a copyrighted book nor the style and expression in which the book describes the adventures and char-

1 In 1996 the World Intellectual Property Organisation adopted two treaties enforceable in signatory countries' jurisdictions such as the United States, the United Kingdom and other European nations. The World Intellectual Property Organisation (WIPO) Treaties refer to the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty (also referred to as WPPT).

2 In 1996 the World Intellectual and Phonograms Treaty (also referred to as WPPT). More recently, in 2012 the Beijing Treaty on Audiovisual Performance extended the protection of performers to fifty years.

3 Since the early ages of copyright, it was agreed that the legal protection went beyond the physical boundaries of the work and was thus extended to limit translation or adaptation of the work which did not literally copy the work as physical object but its immaterial content, the expression of ideas it conveyed. (Sherman and Bently; Sherman)

acters it contains, without the writer's consent. The situation with performers' rights is different. If their consent to record or use the recording of their performance is required, the performance embodied in the record is not covered by those rights. The use of the *record* is protected by performers' rights, but the performance it conveys is not. As a result, permission must be obtained from the performer (and sound recorder) for an audio or video record of the performance to be used but the re-acting or mimicking of her interpretation itself may be done freely. Intonation, gestures and all aspects of the embodiment process which compose the performance are left unprotected, whether or not it is fixed in recording. The protection of performance by the law is thus reduced and limited to the protection of the material fixed version, the record, unlike authors' rights which are extended to both the physical object and its immaterial content. Only material elements of the performance may enter the realm of authors' rights such as the set, costumes, photographs, the choreography 'behind' the performance or the written stage directions. The performance itself which articulate all these elements remains out of the copyright scope.¹

Not only is the substance of performers' protection less significant than authors' rights but its duration is also shorter. Whilst authors receive copyright lasting their lifetime plus seventy years after their death, performers' rights only last fifty years from the end of year the performance took place (CDPA 1988, s. 191). This fifty year term of protection is the result of an international re-

¹ In the United States, the actors' right of publicity was envisaged as a potential mechanism to complete performers' protection with regard to their embodiment of characters. The right of publicity is the right to protect one's physical and moral persona and prevent third parties from appropriating the distinctive trait composing your persona target the identity of the performer herself not that of her embodied character. The major limit of this right with regard to protecting performances, is that it specifically targets the identity of the performer herself not that of her embodied character. This loophole makes of the right of publicity a rather inefficient protective instrument which proved to have been useful only in rare occasions. Where, for instance, the actors were strongly attached to a character such like Stan Laurel and Oliver Hardy to 'Laurel' and 'Hardy' and Charlie Chaplin to 'Charlot'. The United Kingdom does not recognise such right of publicity. See, (Cook; Stallard)

form introduced by the Beijing Treaty in 2012¹ where the duration was then extended from twenty-five to fifty years. Even though the change in law made a step in the right direction in increasing the period of the protection, the international community did not take this opportunity of reform to level out the regime of performers with that of authors.

Explaining the gap in narratives

This article suggests that this discrepancy between the legal and aesthetical narratives may be caused by at least two factors. First, the performer's input in the performed version is so subtle that it might remain invisible to the layperson. Second, the resistance of embodied experiences (performances) to fixation might be another cause for the reluctance of the law to assimilate performances to protectable creative works. It is submitted that one of the possible reasons why performers are not rewarded with equal rights for their creative effort in interpreting works is because their interpretation, the performance, is impossible to separate from the work itself. The boundaries of the performance are so hard to delineate that the law erases this stage in the favour of the authorial work. Because the performer's input is hard to clearly ascertain, it is denied and his/her creativity is attributed to the author. The performing stage and the creativity it carries are ignored and become invisible. As such, the sole author of the entire process is

¹ The Beijing Treaty on Audiovisual Performances was signed on the 26th of June 2012 by the signatory countries of the World Intellectual Property Organisation. The treaty aimed at further harmonising the legal protection of performers across the jurisdiction party to the agreement. In doing so, it extended the minimum duration of protection from twenty-five to fifty years and extended the scope of the protection to audio-visual performers recognising the gap in the protection of this class of performers previous agreements, had left, such as the WIPO Treaty and Live Performances and Phonograms which focused on live and audio performers. The official publication of the treaty is available at: http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=208966.

only that of the underlying work.

Some of the most contemporary artistic practices challenge the invisibility of performers' input in the work but very few legal scholars have used the insight of these practices to re-assess legal policies. *InVisible Difference*¹ is one of these few research projects which compare the experience of artists to the support, or lack thereof, Intellectual Property laws offer. The project focuses on the practice of Disability Dance as a case study for its fieldwork and empirical data.² Its empirical investigation reveals that the practice of Disability Dance, as many other contemporary movements in the performing arts, challenges and shifts the classic legal boundaries of authorship set by the law by rendering visible the dancers' input in the choreographer's work (Waelde, Whatley, and Pavis).

To illustrate this point, the author invites you to watch Caroline Bowditch's recasting of *Loves Games* choreographed by Joan Clevillé,³ available at: <http://www.youtube.com/watch?v=6YEtEy-r6N4g>. The footage of video shows two records of two different performances of Clevillé's piece. On the left hand side, one can view Clevillé's *Love Games* directed by himself and performed by two 'normative' dancers (a man and a woman) whilst on the right hand side features Bowditch's recast of the same work with her male partner.

Love Games was originally designed for 'normative bodies', i.e. non-disabled bodies. As a result, in order for her to interpret the work, Bowditch has to adapt it to her physicality which was not the corporeality and an associated range of movements expected

¹The AHRC funded *InVisible Difference* project investigates the intersection between Dance, Disability and the Law. This interdisciplinary project gathers together academics and practitioners from legal and dance backgrounds. The project is working in close collaboration with artists like Caroline Bowditch and Claire Cunningham. For more information visit: www.invisibledifference.org.uk (last visited 01/05/2014). AHRC grant number AH/J006491/1.

²Disability Dance is the dance practice made by or for differently abled bodies, or involving non normative bodies throughout its creative process.

³*Love Games* was choreographed by Joan Clevillé and first performed in the Scottish Dance Theatre. Caroline presented her recasting in 2012 at the Pathways to the Profession Symposium in Dundee.

by the choreographer. Indeed, Bowditch is a wheel-chair user and dancer of a very petite physical build. By adjusting *Love Games* to her body, the dancer modifies the work. Between the reliance of the art of dance on the performer's body and Bowditch's unique physicality, the piece she performs becomes visibly different from its 'original' version. Bowditch's performance nearly recreates Clevillé's work. These adjustments are necessary, somehow inevitable since Bowditch's physicality was not factored in the original piece, but they nevertheless remain conscious and creative. Commenting on Bowditch's recast,

Commenting on Bowditch's recast, Whatley expresses how much skills, technique and creativity such adjustments were made in this piece when she describes:

Bowditch's wheelchair opens up a different kind of dialogue on the stage space. So often a powerful signifier of disability/immobility, her wheelchair is now enabling, signifying mobility, independence and the power to support. Bowditch manoeuvres her chair with a technical virtuosity equal to the technical feats of the non-disabled dancers, integrating the chair into her dancing [...]. (220)

The adaptation of the work to the performer's (different) body is made ascertainable to the layperson by the montage. The amount of the Bowditch's original input into Clevillé's work is embodied in the obvious difference between the two recorded performances. The presence of the wheelchair and the modified the steps executed by Bowditch and her partner become quantifiable changes the dancer made to the choreographic work for the specific purpose of its performance.

It is argued that the creative choices made by Bowditch in adjusting *Love Games* to her body illuminate the essence of performing. Every performer, disabled or not, undertakes the same

series of creative choices when confronted with the task of interpreting a work. The only difference separating their performance to Bowditch's is the visibility of their input. Hers is more visible than that of non-disabled dancers because the latter's physicality is closer to the one imagined by the author when she designed the work to be performed.

It is held that this process of embodiment or adaptation the performer executes in order to interpret a piece corresponds to the creative intellectual input or 'time, skills and effort'¹ the law protects with legal authorship and judges look for in authorial work when assessing their eligibility to copyright (223). The sole difference between the authors' and performers' inputs is their visibility and the tangibility of their boundaries. Whilst the work of the author bears clearer boundaries, the performer's act of embodiment lacks materiality because it does not lead to the creation of a product or artefact. As such, the performative work disappears in the shadow of the book, the script, and the stage directions.

The question of performances' lack of materiality is a second possible factor hindering their accession to copyright. As explained before, modern theories have emphasised the role of embodiment in performances. By stressing this trait, such theories also made performances all the more resistant to the idea of fixation. Performances are described as events, ephemeral and transient in essence, thus unable to be captured (Fischer-Lichte 75). This logic refuses the assimilation of performances to 'works of art' since the latter are artistic artefact with fixed contours (75).

In parallel, copyright laws grant authorship to fixed works. Two out of three conditions artists need to fulfil in order to obtain

¹ Before the Infopaq decision of the Court of Justice of the European Union, copyright protection used to be attributed to artists who had spent "time, skills and effort" in the making of artistic works (Waelde, Whatley, and Pavis 223). This doctrine was replaced by the more abstract phrase of "creative intellectual input" but such input can still be evidenced by the amount of time, skills and effort one has dedicated to his/her creation when its eligibility to copyright protection is assessed by the Court.

legal protection over their creations is for their pieces to be on the list of protectable works as well as to be fixed in a tangible manner (written, sculpted, video/audio taped, etc.) (CDPA, 1988 s. 3). In the *Garcia case*, the problem of fixation is one of the points put forward by the dissenting opinion in arguing against granting copyright of her performance to the actress. As a result of these approaches to ‘works of art’ and ‘protectable works’, performances do not appear as viable candidates for legal protection. Performances are unfixable while the law requires fixation to grant its protection. This situation may be one of the reasons why the legal narrative never aligned performances with protectable works of art.¹

However, one might take a different stance on this argument by underlining that ‘works of art’ and ‘protectable works’ are not synonymous. If all traditional works of art are protectable under copyright laws, not all protectable works are works of art. For instance, databases and computer software are protected with authors’ rights in the exact same way paintings, books, dramatic or choreographic works are. This underlines the fact that the concept of ‘protectable works’ is a malleable notion. The category of copyrightable works is flexible enough to be extended to creative pieces policy-makers judge necessary to protect even though they cannot be assimilated to the traditional definition of “works of art”. Thus the lack of a semantic connection between ‘performances’ and ‘works of art’ should not preclude the association of the former with the category of ‘protectable work’.

The fixation issue is even less convincing that video and

¹ Bently and Sherman retraces the difficulty law makers faced in protecting intellectual property in the first place, intellectual creations being immaterial. Their historical investigation in the construction of early copyright laws show that moving towards fixed representation of authorial work and some form of materiality was the compromise the law had to make in order to be enforceable. In attempting to protect creativity, the law lost its performative nature. They comment : “*no matter how much the law wished to present itself as protecting the performative aspect of creation, it was unable to do so [...] the law found itself in the paradoxical position of protecting a dynamic creativity but yet unable to account for it*” in (Sherman and Bently 49)

audio technologies have now allowed *a* form of fixation of performative pieces at low costs. Against the argument that performative events can never be captured in their entirety due to their inherent transience, one may suggest that fixation for the purpose of copyright and fixation for creative purposes are two means with different objectives. Indeed, copyright laws do not require the essence of the authorial work to be fixed in its entirety to be protected. The requirement of fixation is a mere condition to ease litigation procedures and evidence management in case of dispute. Hence the expectations of the law are not as high as artists' when considering the degree to which the essence of their work ought to be faithfully captured. Copyright laws would only expect such fixation to record the performance's substantial elements such as the tone, musicality and rhythm of the vocalist, the body movements, voice and embodiment of the actor. Most methods of fixation will struggle to convey other facets of the performance such as its three-dimensional aspect or its effect on the audience. They would be equally unable to re-create the feedback loop between the performers and the audience, another central feature of the performing arts. Yet it is submitted that encapsulating the main components of the performance, as suggested above, would suffice to identify performers' creative input in the work they interpret, and in turn, ascertain where the originality of the written material ends and theirs begins. This approach to fixation is purely instrumentalist but does allow a legal alignment of performers with authors, bringing closer together the fields of intellectual property law and the performing arts.

Conclusion

The comparison between the narrative of performing art studies and intellectual property law revealed that there is still a wide gap between their theorisation and understandings of the act of

performing. While performance and theatre studies have explored and adopted new approaches towards the performing body, the role of the underlying work or that of the audience, policy-makers seem determined in holding on to philosophies dating back to the eighteenth century. The current legal narrative endorses a rigid hierarchy between the author and the performer, relegating the latter to the rank of lesser artist. Considering the growing complexity of the arts and their industries, such gap ought to be bridged in order for the law to better support the individuals it is designed to inspire.¹ Interdisciplinary collaboration appears to be the only solution to reduce such gap and work towards the reach of a consensus between the disciplines of the performing arts and law. Policy-makers and lawyers ought to engage with the narratives present in the performing arts in order to better their understanding of performers' work and improve the law accordingly. This exchange of knowledge is necessary for relevant reforms to take place and for intellectual property law to meet artists' needs and expectations.

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¹ Since their introduction in 1710 by the Statute of Anne; Intellectual Property Laws were designed to encourage creativity and dissemination of knowledge in the arts and Sciences.

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