Performing artists’ right to remuneration – on the junction of external treaty competence, national treatment, material reciprocity and fundamental rights

Case C-265/19, Recorded Artists Actors Performers Ltd v Phonographic Performance (Ireland) Ltd and Others, judgment of the CJEU (Grand Chamber) of 8 September 2020, EU:C:2020:677¹

1. Introduction

On 8 September 2020 the Grand Chamber of the CJEU delivered a judgment with the potential to alter international copyright law altogether. Concretely, the case concerned the interpretation of Article 8(2) of the Rental and Lending Directive (RLD; dir. 2006/116/EC),² which provides a remuneration right for performing artists and phonogram producers for the communication to the public of sound recordings. The judgment of the CJEU was a preliminary ruling on the request of the Irish High Court regarding a dispute between two Irish collecting societies – Recording Artists Actors Performers Ltd (RAAP) and Phonogram Producers Ireland Ltd (PPI) – as to whether performing artists from outside the European Economic Area (EEA) were entitled to remuneration. The questions from the High Court concerned the interpretation of the term “relevant performers” in Article 8(2) RLD. To cut it short at this stage, the CJEU found that it was not compatible with this provision to limit the scope of the remuneration right to performers with connection to the EEA. One central issue of the underlying dispute was whether performers from the United States (US) could be excluded from the remuneration right, and in result the CJEU also answers this question in the negative.

The ruling thus raises questions about the interrelationship between EU law and international conventions in the fields of copyright and neigbouring rights (the rights of performing artists and phonogram producers being classified as neigbouring rights). To be sure, the CJEU in its interpretation of Article 8(2) RLD relies heavily on the international conventions in the field,

¹ The author of this annotation has also published a different article on the same judgment, see O.-A. Rognstad, ‘The RAAP Decision of the CJEU – What Happened to Reciprocity?’, in M. Rosenmeier et al. (eds.), Festskrift til Jørgen Blomqvist, Copenhagen: Ex Tuto (2021), 525–547. Several of the viewpoints, references and some of the phrases used are common to the two contributions, which nevertheless are different in content, focus points and structure.
notably the WIPO Phonograms and Performances Treaty (WPTT) of 1996, to which the EU itself has acceded along with the Member States, and consequently is an integral part of EU law. The Treaty contains, in line with its ‘sister treaty’, the Rome Convention for the protection of performers, producers of phonograms and broadcasting organisations (RC) of 1961, detailed rules on national treatment (formal reciprocity) and material reciprocity.

National treatment – also called formal reciprocity – implies giving the same treatment that you provide for your own nationals. In the context of the case that means that nationals of third states shall have equal remuneration rights as the EU provides for its own nationals. Material reciprocity, on the other hand, means giving others the same treatment as they give you. Concretely, if the US does not provide for remuneration rights for European performers and producers, the EU is not obliged to grant remuneration rights to US performers and producers. The concepts of formal and material reciprocity are keys to understanding the context of the RAAP case.

The CJEU decision gives rise to a numerous questions to discuss and various angles can be taken. In my comments in section 6 below I will concentrate on the following – (i) the CJEU’s handling of the international conventions, including the concepts of formal and material reciprocity and the significance of the EU’s exclusive competence to regulate and enter into agreements with third party states, (ii) the CJEU’s reference to fundamental rights as an argument to extend the remuneration rights to nationals of third countries, (iii) the implication of the RAAP case for the Agreement of the European Economic Area (EEA), which is a question aside, and (iv) reflections on policy issues and the further consequences of the decision.

2. More on the Legal background

Ever since the European Union (Community) entered the fields as a regulator in the early 1990s, it is evident that the relationship between EU law and international conventions is a complex one. The consequences of the quite famous Phil Collins judgment of 1993 may serve as an example. Here, the CJEU derived a general principle of national treatment for copyright and related rights from the non-discrimination rule in Article 7 of the Rome Treaty

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3 Joined cases C-92/92 and C-326/92, Phil Collins v Imtrat Handelsgesellschaft mbH and Patricia Im- und Export Verwaltungsgesellschaft mbH and Leif Emanuel Kraul v EMI Electrola GmbH, EU:C:1993:847.
(cf. TFEU Article 18). Already this judgment sent shockwaves through the international copyright community, since according to Article 7(8) of the Berne Convention for the protection of literary and artistic works (1886), the Convention states are not required to grant authors a term of protection that exceeds the term fixed in the country of origin. This implies a rule of material reciprocity instead of the national treatment prescribed for in Article 5(1) of the Convention. The Phil Collins decision changed this paradigm for EU (EEA) states, and additional complexity followed from the Term Directive, which obliged Member States to grant authors protection for the life of the author and 70 years after their death, in contrast to the 50 years rule in the Berne Convention. Adding the question whether the most favoured nation rule in Article 4 of the TRIPs Agreement implied that Member States now had to grant authors from all WTO states the same term of protection to the picture, shows the possible repercussions of the CJEU intervening into what has believed to be the domain of international copyright regulation.

The RAAP case is yet another example of such an intervention. The details of the facts of the case will be further explained in section 3 below. Here I will only briefly sketch out the international convention background of the remuneration right since it is of utmost importance in order to understand the legal context of the CJEU decision.

The remuneration right for the communication to the public of sound recordings is regulated by the already mentioned Rome Convention (RC). All EU (and EEA) Member States are parties to the RC, but neither the EU itself nor the US have acceded to the Convention. Article 12 of this Convention provides that a single equitable remuneration shall be paid by the user to the performers, or to the producers of the phonograms, or to both in case of broadcasting or any communication to the public of phonogram published for commercial purposes. At the same time, there are important exceptions to this obligation set out in Article 16 RC. The exceptions permit inter alia the contracting parties to make reservations against the application of the remuneration right altogether (Article 16 (i)(a)) or to apply the principle of material reciprocity instead of national treatment provided for in Article 2 RC (Article

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6 See Jehoram (fn. 4 supra), 826–827.
The latter implies that the protection is limited to the extent to which the other state grants protection to phonograms first fixed by a national of the State making the reservation.

As to national treatment (formal reciprocity) – i.e. the same treatment that is granted to the State’s own nationals – Article 4(b) RC provides that such treatment for performers is triggered when the performance is incorporated in a phonogram protected under Article 5 of the Convention. And Article 5 grants national treatment to producers of phonograms if any of the following conditions is met: (a) the producer of the phonogram is a national of another Contracting State (criterion of nationality); (b) the first fixation of the sound was made in another Contracting State (criterion of fixation); (c) the phonogram was first published in another Contracting State (criterion of publication). These are the main so-called points of attachment (eligibility criteria) for protection of phonograms under the Rome Convention.

Turning to WPPT, it is to be noted that this treaty is acceded by the EU itself, the EU Member States as well as the US. Also this treaty provides for a remuneration right for performers and phonogram producers for broadcasting or any kind of communication to the public (Article 15(1)), but similarly to the RC, WPPT Article 15(3) grants the Contracting Party a right to make reservations against the full or partly application of the right. The application of the remuneration right triggers the requirement of national treatment pursuant to Article 4(1), implying that each Contracting Party shall accord nationals of other Contracting party the treatment it accords to its own ‘nationals’ subject to the same points of attachment as provided under the Rome Convention which were mentioned above (see Article 3(2) WPPT). However, an important exception to the national treatment obligation is set out in Article 4(2): It does not apply to the extent that another Contracting Party makes use of the reservations permitted by Article 15(3) of this Treaty. In other words, the principle of national treatment (formal reciprocity) is limited by the principle of material reciprocity. It is to be noted, as an important feature of the RAAP case, that the United States have notified a reservation under

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7 See M. Fiscor, The Law of Copyright and the Internet. The 1996 WIPO Treaties, their Interpretation and Implementation, Oxford: Oxford University Press (2002), 605–616, on the background and the content of the national treatment provision of Article 4 WPPT. The author points out that WPPT (and TRIPs) differ from the Rome Convention in respect of the national treatment issue in that they do not provide for national treatment in ‘a strict sense’, and makes it «permissible to deny national treatment under Article 4 in respect of exclusive rights other than those ‘specifically granted in the Treaty’ and rights to equitable remuneration other than the one provided for in Article 15 (also taking into account the exception in respect of the latter in paragraph (2) of Article 4)». For a different view of the national treatment obligation in the Rome Convention, see S. von Lewinski, International Copyright Law and Policy, Oxford: Oxford University Press (2008), 201–202.
Article 15(3) WPPT, limiting the application of the remuneration right under Article 15(1) to «certain acts of broadcasting and communication to the public by digital means … and for other retransmissions and digital phonorecord deliveries, as provided under the United States law». Consequently, other Contracting Parties’s, including the EU’s, obligation to grant the remuneration right to US performers and producers is limited to these acts. We will come back to how the CJEU handled this important limitation to its obligation to national treatment.

In any case, the international regulation sketched out above forms an important background to the core question of interpretation in the RAAP case: What does term ‘relevant performers and producers’ entitled to the remuneration right under RLD Article 8(2) mean? As we also will come back to, the CJEU’s answer to this question is not necessarily crystal-clear. However, the decision leaves no doubt as to the relevance of the international conventions, and most notably the WPPT, to the questions raised by the Irish High Court.

3 The Facts of the Case and the Questions Referred for the Preliminary Ruling

The dispute of the case concerned the entitlement to remuneration fees for the playing of sound recordings in public in Ireland. The organisations RAAP, representing performers, and PPI, on behalf of phonogram producers had entered into an agreement about the collection and distribution of license fee, but disagreement arose as to which categories of performers that were entitled to fees. The background for this dispute was the fact that the Irish Copyright and Related Rights Act of 2000 (hereinafter CRRA) employed different criteria of eligibility for performers and producers respectively. Hence, to cut it short, according to these criteria only performers with connection to the EEA, by nationality, residence or place of recording, had a right to remuneration. While RAAP considered that license fees payable under the CRRA must under Article 8(2) RLD be shared between performers and producers irrespective of their nationality, PPI opined that this position implied violation of the international reciprocity approach adopted by Ireland and contained in the CRRA. Adopting the RAAP position, US performers would be paid in Ireland, even though Irish performers do not receive equitable remuneration in the US. The result of the PPI position would on the other hand

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9 See judgment paras. 32–34 and Advocate General Tanchev’s opinion, EU:C:2020:512, paras. 23–40.
imply that the producer would receive the totality of licence fees payable by users in Ireland a sound recording involving US producers and US performers.

Against this background, RAAP brought proceedings before the High Court claiming that the Irish rules were incompatible with Article 8(2) RLD. Requesting a preliminary ruling from the CJEU, the High Court observed that in this case it was – contrary to the Phil Collins case mentioned in section 2 – not a question about violation of the non-discrimination rule in the EU (TEUF Article 18) or the EEA (EEA Agreement Article 4). The referring court noted that it remained uncertain to which extent it would be necessary to rely upon provisions of the WPPT and the RC in order to interpret Article 8(2) RLD, including the impact of the obligations to national treatment in these conventions. In particular, the fact that the national treatment concept was not expressly taken over in RLD, but on the other hand was part of EU law due to the conclusion of the WPPT by the EU, created some ambiguity in this respect.

The High Court also sought guidance as to whether the asymmetric treatment of producers and performers represented a legitimate response to a reservation made under Article 15(3) WPPT. Against this background, the High Court decided to stay the proceedings and to refer the following questions to the CJEU for a preliminary ruling:

1. Is the obligation on a national court to interpret … Directive 2006/115 … in the light of the purpose and objective of the Rome Convention and/or the WPPT confined to concepts which are expressly referenced in [that] Directive, or does it, alternatively, extend to concepts which are only to be found in the two international agreements? In particular, to what extent must Article 8 of [that] Directive be interpreted in light of the requirement for “national treatment” under Article 4 of the WPPT?

2. Does a Member State have discretion to prescribe criteria for determining which performers qualify as “relevant performers” under Article 8 of the Directive? In particular, can a Member State restrict the right to share in equitable remuneration to circumstances where either (i) the performance takes place in an [EEA] country, or (ii) the performers are domiciled in or residents of an EEA country?

3. What discretion does a Member State enjoy in responding to a reservation entered by another Contracting Party under Article 15(3) of the WPPT? In particular, is the Member State required to mirror precisely the terms of the reservation entered by
the other Contracting Party? Is a Contracting Party required not to apply the 30-day rule in Article 5 of the Rome Convention to the extent that it may result in a producer from the reserving party receiving remuneration under Article 15(1) but not the performers of the same recording receiving remuneration? Alternatively, is the responding party entitled to provide rights to the nationals of the reserving party on a more generous basis than the reserving party has done, i.e. can the responding party provide rights which are not reciprocated by the reserving party?

(4) Is it permissible in any circumstances to confine the right to equitable remuneration to the producers of a sound recording, i.e. to deny the right to the performers whose performances have been fixed in that sound recording?’

After having received the preliminary ruling from the CJEU, the High Court decided the case in favour of RAAP, declaring “remuneration accorded to owners of sound recordings in respect of the broadcasting and of any communication to the public in the State of the said sound recordings to be equally accorded to all performers whose performances are incorporated on the said sound recordings”.

4 The Opinion of the Advocate General

In answering the first question about whether the RLD required consideration of concepts found in the RC and the WPPT, notably national treatment, the Advocate General Tanchev (AG) opined that Article 8(2) was to be interpreted in light of the requirements in WPPT, including the obligation to national treatment in Article 4. The Advocate General emphasized that on the occasion of the ratification of the WPPT, the Union made no reservation and so remained bound by the obligation to provide national treatment and to apply RLD without restriction. The AG drew the conclusion that the RLD had to be interpreted as far as possible in light of the concepts of the WPPT, including that of national treatment. According to the AG applying Article 8(2) RLD to “beneficiaries from other Contracting Parties [would be] consistent not only with the national treatment obligation, but also with the aim and objective of the directive, which is a uniform and high level of protection”. Against this background, the AG opined that Ireland did not have (and never had) discretion to apply its own criteria for

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11 Paras. 75 and 76 of the Opinion.
12 Para. 81 of the Opinion.
determining which performers qualify as ‘relevant performers’. Interpreting Article 8(2) RLD in light of the national treatment obligation in Article 4 WPPT was consistent with the Union’s international obligation and unaffected by the fact that national treatment is not expressly referenced in the directive.\textsuperscript{13}

Consistent with his conclusion to the first question, the AG answered the second question whether Member States have discretion to apply their own criteria to the notion of ‘relevant performers’ in Article 8(2) RLD in the negative. In rejecting the argument of PPI that Member States retained discretion to determine criteria for the remuneration right, the AG noted that while Contracting Parties to the RC and the WPPT enjoy some discretion in relation to aspects of their national treatment obligations, this is a clear obligation without any possibility of derogation. Thus, a Member State could not restrict the right to share in equitable remuneration to circumstances where the performance takes place in the EEA. The AG noted that Article 8(2) RLD differed from Articles 4 and 5 RC, which allow contracting parties to apply a criterion of nationality or fixation or publication both for producers and for performances fixed in phonograms, whereas this was not the case for Article 8(2) RLD. Since the Directive makes no express reference to the law of the Member States for the purpose of determining the meaning and scope of any of the concepts referred to in Article 8(2), the AG concluded that a Member State could not restrict the right to share in equitable remuneration to circumstances where the performance takes place in the EEA.\textsuperscript{14}

Under the third question, about the impact of reservations against the remuneration right made pursuant to Article 15(3) WPPT, the AG concentrated on the Member States’ competence to respond to reservations by third parties, in light of the limitation to national treatment in Article 4(2) WPPT in the case of such reservations. The AG concurred with the view of the Commission that the Member States cannot respond on their own to these reservations, since the field covered by the RLD is one of EU’s exclusive competence.\textsuperscript{15} The AG admitted that the obligation to interpret secondary legislation in conformity with a mixed agreement does not extend to “obligations contained in that agreement which fall within the spheres where the European Union has not yet exercised its powers and legislated in sufficient importance”.\textsuperscript{16}

\textsuperscript{13} Paras. 82–87 of the Opinion.
\textsuperscript{14} Paras. 105–110 of the Opinion.
\textsuperscript{15} Para. 125, cf. paras. 123 and 124, of the Opinion.
\textsuperscript{16} Para. 130 of the Opinion.
As to what represented the ‘sphere’ of regulation in this respect, the AG opined that it would not be intellectual property at large, but rather the rights in sound recordings. Here, the AG added that Article 8(2) RLD applied to all nationals in absence of express regulation. The AG contrasted the case to various instances in the copyright field that expressly address the personal scope of protection, remarking that “[i]f one sought to circumvent the rights of third-country nationals, then it would be for the Union legislature to do, in an express manner, by a legislative technique”. The AG also rejected other possible grounds for finding that the EU did not have exclusive competence in the relevant sphere and concluded that “if the Union legislature wishes to modify Directive 2006/115 and exclude third-country nationals, then that is for the Union to undertake and not for the 27 Member States to attempt in a multitude of ways. Indeed, to leave it to Member States would alter the scope of the common rules adopted by the Union”. Additionally, as an obiter, he stated that the Member States’ own reservations under Article 15(3) would in any case be inapplicable insofar as the effect of those reservations would be to hinder the application of EU law.

Finally, answering the fourth question, the AG found that it would be inconsistent with Article 8(2) RLD to limit the remuneration right in such a way that the performer receive no remuneration while it accrues only to the benefit of the producer. The AG pointed out that the very wording of the provision requires Member States to ensure that there is a sharing of remuneration and that a sharing which equates to receiving no actual remuneration would be de facto an expropriation of the right even where this is agreed between the record producers and the performers. The possible discretion to determine criteria for assuring that performers and producers receive reasonable remuneration could not extend to a determination ratione personae of the beneficiaries under Article 8(2). Rather, this discretion was limited to an assessment of what is equitable in terms of the remuneration.

5 The Ruling of the Court of Justice

The ruling of the Grand Chamber mostly follows the Advocate General’s approach, but there are differences in the details as to both the angle of the reasoning and the concrete arguments.

17 Paras. 131–151 of the Opinion.
18 Para. 152 of the Opinion.
19 Paras. 153 and 154 of the Opinion.
20 See paras. 159–168 of the Opinion.
In line with the Advocate General’s opinion, the CJEU found that the core concepts of Article 8(2), like ‘relevant performers’, ‘equitable remuneration’, and ‘public’ are autonomous concepts in the EU which also had to be interpreted in compliance with the international conventions in the copyright field.\textsuperscript{21} Even the CJEU emphasized the importance of the WPPT in this respect since the European Union is party to this Convention, and the primacy which international agreements concluded by the EU have over other categories of secondary legislation.\textsuperscript{22} Thus, Article 8(2) RLD had to be interpreted, as far as possible, in a manner consistent with the WPPT as an integral part of the EU legal order.\textsuperscript{23} Like the Advocate General, the CJEU found that Article 8(2), in light of the remuneration right in WPPT Article 15 and the obligation to national treatment in Article 4(1), precluded Member States from limiting the equitable remuneration to performers who are nationals of an EEA State. However, some specific features of the CJEU decision should be noted here.

First, unlike the AG, the CJEU found the eligibility criteria (points of attachment) in Articles 4 and 5 of the Rome Convention relevant when interpreting Article 8(2). Here, the Court referred to Article 3(2) WPPT, which states that the term ‘nationals’ in the latter convention “shall be understood to be those performers or producers of phonograms who would meet the criteria for eligibility for protection provided under the Rome Convention”.\textsuperscript{24} The conclusion that the Court drew from this is nevertheless a different one than the argument that the AG rejected. Thus, the CJEU observed that

under Article 4 of the Rome Convention, any performer who is a national of a contracting State to that convention must enjoy the national treatment accorded by the other contracting States to their own nationals where, inter alia, the performance is incorporated in a phonogram which is protected under Article 5 of that convention. That is the case inter alia, as is apparent from Article 5(1)(a), where the phonogram producer is a national of a contracting State to the Rome Convention other than that on whose territory the phonogram is used.\textsuperscript{25}

Second, the Court also discussed the impact of Member States’ notification of reservations under the Rome Convention. After having concluded that Article 8(2) could not be

\textsuperscript{21} See paras. 45–51 of the judgment.
\textsuperscript{22} See paras. 52–62 of the judgment, referring, in para. 62, to Article 216(2) TFEU and case C-366/10, Air Transport Association of America and Others, C-366/10, EU:C:2011:864, para. 50.
\textsuperscript{23} Para. 62 of the judgment.
\textsuperscript{24} Paras. 65 and 66 of the judgment.
\textsuperscript{25} Para. 67 of the judgment.
implemented by a Member State as to exclude from the right to equitable remuneration performers connected to the EEA, the Court asserted that this conclusion was not affected by certain Member States’ reservation against various points of attachments set out in Article 5(3) and 17 of the Convention. Despite the facts that WPPT Article 3(3) endorses these reservations and Article 1 of the same convention provides that no provision of the WPPT can exempt the Member States for their obligation under the Rome Convention, the Court found that Article 8(2) RLD remained unaffected by these reservations. The Court observed that the reservations only enabled the commitments entered into by a Member State under RC to be restricted, and did not create any obligation for that Member State, and in any event not an obligation that conflicted with Article 8(2) RLD.

Third, the Court repeated what was alluded to in the AG Opinion, that “the European Union, its Member States, and a large number of third States which are contracting parties to the WPPT have not given notification of a reservation under Article 15(3) of the WPPT and are, consequently, mutually bound by Article 4(1) and Article 15(1) thereof”.

Fourth, the angle that the Court takes when answering the third question about the impact of a reservation notified by third States under Article 15(3) WPPT is a bit different from that of the AG. While the AG Opinion, in accordance with the question asked by the Irish Court, concentrated on the discretion on part of the Member States to respond to reservations by third parties, the CJEU mainly discussed the impact of such reservations – notably by the United States – on the interpretation of Article 8(2) RLD. Here the Court made a few observations that are absent in the AG Opinion because of the different angle. The Court commented that the refusal of third States to grant performers and phonogram producers of EU Member States a right to remuneration would imply that these performers and producers would not be treated equally with third States producers and performers who would receive income whenever their recorded music is played in the European Union. The Court emphasized on the one hand that the need to safeguard fair conditions of involvement in the recorded music business constitutes an objective in the public interest capable of justifying a limitation of the right related to copyright provided for in Article 8(2) of Directive. On the other hand, however, it noted that the right to a single equitable remuneration constitutes is

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26 Para. 70 of the judgment.
27 Para. 82 of the judgments.
28 Paras. 83 and 84 of the judgment.
protected as intellectual property under Article 17(2) of the Charter of Fundamental Rights of the European Union. As such, any limitation of the right required clear and precise definition of the scope of the limitation. This requirement is not fulfilled by the mere existence of a reservation duly notified in accordance with Article 15(3) of the WPPT, since such a reservation allegedly «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».29

Against this background, the CJEU stated that since Article 8(2) RLD is a harmonized rule it is up to the European Union, and not the Member States, to determine whether the grant of a remuneration right should be limited in respect of nationals of third states, and, if so, to define that limitation clearly and precisely. The Court noted that neither that provision nor any other provision of EU law contains a limitation of that kind. The Court added that the European Union has the exclusive external competence to negotiate new reciprocal commitments with regard to the remuneration right. As a consequence of all these elaborations, the CJEU concluded that reservations made according to Article 15(3) WPPT does not limit the scope of Article 8(2) RLD, although that provision may be limited in the future. Article 8(2) RLD therefore precludes a Member State from limiting the remuneration right in respect of performers and producers who are nationals of a third State that has made such a reservation.30

As to the fourth question about the asymmetry between performers and producers right to remuneration, the CJEU concurred with the view of the AG and concluded that Article 8(2) also precludes a Member States from providing that the equitable remuneration be granted only to the producer of the phonogram and not to the performer contributing to it.31 In addition to following from the wording of the provision, the CJEU held that ruling out the sharing of the remuneration “would undermine the objective of RLD in ensuring further creative and artistic work of authors and performers, by providing for harmonised legal protection which guarantees the possibility for them of securing an adequate income and recouping their investments”.32

29 Paras. 85–87 of the judgment.
30 Paras. 88–91 and 97 (conclusion) pt.2 of the judgment.
31 Paras. 92–96 of the judgment.
32 Para. 95 of the judgment.
6 Comments

6.1 The Court’s Treatment of the International Conventions and Its Relation to Exclusive Competence

Certain aspects of the RAAP decision are neither surprising nor particularly controversial. It is understandable and expected that the CJEU opted for a harmonized approach to the geographical and personal scope of the remuneration right in Article 8(2) and that it refused to accept that producers and performers are not equally entitled to the remuneration. Given that the CJEU itself is party to the WPPT, the Court also seems correct – in accordance with the opinion of the Advocate General – to state that Article 8(2) RLD must be interpreted in light of the obligation to national treatment in WPPT Article 4 irrespective of the fact that national treatment is not explicitly referenced in the provision.33 There are nevertheless many debatable points in the Court’s handling of the international conventions, including its relation to the finding that the EU has exclusive competence to regulate and to enter into new reciprocal commitments with third states.

One problematic issue is the Court’s treatment of the Rome Convention. To be sure, the Court ‘repaired’ the obviously flawed conclusion of the AG that this convention is irrelevant to the interpretation of Article 8(2) RLD since only the Member States and not the EU has acceded to the RC. The relevance of the RC is clear so long as Article 8(2) is to be interpreted in light of the WPPT, since Article 3(2) WPPT provides that the term ‘nationals of other Contracting Parties’ in this convention is to be ‘understood as those performers or producer who would meet the criteria of eligibility provided under the Rome Convention’. The Court recognizes this by pointing out that the combined effect of Article 3(2) and Article 4(1) WPPT is that the criteria set out in the Rome Convention are relevant for determining the scope of the national treatment of the remuneration right.34 The wording of its reasoning, however, leaves the impression that national treatment under Article 4(1) WPPT means treating performers equally based on their citizenship.35 If this is the intention it is certainly not correct since performers’ citizenship is not a relevant factor when assessing the scope of national treatment

33 Para. 69, cf. para. 68, of the judgment; para. 83 of the Opinion.
34 Para. 66 of the judgment.
35 See para. 67 where the Court speaks about performers who are ‘nationals’ of a contracting State without specifying the implication of the eligibility criteria (points of attachment) in Article 4 RC. See further J. Blomqvist and M. Rosenmeier, “International Protection of Performers in the EU”, 268 Revue Internationale du Droit d’Auteur (RIDA) (2021), forthcoming, section 4a.
under Article 4(1) WPPT because Article 4 RC provides for other points of attachment. As the scope of protection following from the RAAP decision apparently extends beyond national treatment (formal reciprocity) prescribed for in the WPPT, to which we will come back, the problem with the uncleanness on this point does not come to a head. Nevertheless, the Court’s concept of national treatment seems to be influenced by the fact that the point of attachment in Irish copyright law is the performer’s citizenship rather than the eligibility criteria of the RC. The former is, however, irrelevant to the scope of national treatment under WPPT.

Sticking to the scope of the obligation to national treatment that follows from Article 4 WPPT, another problem with the CJEU decision is that it fails to combine the principles of formal and material reciprocity inherent in the provision. Thus, the CJEU ruling in particular, but also the AG Opinion, are misleading on this point when under the second question basing the obligation to national treatment on Article 4(1), discussing the impact of third party reservations only under the third question about the Member States’ competence to respond to such reservations. It follows explicitly from Article 4(2) WPPT that the obligation to national treatment in Article 4(1) does not apply to the extent that another Contracting Party makes use of its reservations pursuant to Article 15(3) WPPT. In other words: the EU and its Member States’ are not obliged under Article 4(1) WPPT to US performers and producers to the extent that US has made use of a reservation – in other words for all acts of communication to the public save webcasting. In this context, the CJEU’s observation that the EU and its Member States and a large number of third states “have not given notification of a reservation under Article 15(3) of the WPPT and are, consequently, mutually bound by Article 4(1) and Article 15(1) thereof”, as a response to the limitation in Article 4(2), is deceptive. The statement leaves the impression that a Contracting Party’s own notification is necessary in order to escape the obligation to national treatment under Article 4(1) WPPT. Even though other statements, under the third question, indicate that the Court has understood the interrelationship between formal reciprocity in Article 4(1) and material reciprocity in Article 4(2) correctly, it is incomprehensible that the Court fails to connect the two when

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36 See Blomqvist/Rosenmeier, ibid.
37 See Blomqvist/Rosenmeier, ibid.
39 Para. 70 of the judgment.
40 See paras. 79 and 80 of the judgment.
answering the first two questions. To be clear, the lack of notification of a reservation on part on the EU and its Member States is irrelevant for their obligation to provide national treatment to performers and producers who are ‘nationals’ of a Contracting Party that has notified a reservation (eg. the US). Thus, the reasoning of the Court, and its conclusion under the first and second sentence where the Court exclusively refers to Articles 4(1) and 15(1) WPPT, are misleading. This is particularly so when recalling that the underlying dispute concerned whether ‘US performers’ can be excluded from protection. The clear answer to that question is that they can without any notification from the EU or its Member States being necessary.

When answering the third question, about the Member States’ competence to respond to third party reservations, both the CJEU and the Advocate General put forward the argument that Article 8(2) is unlimited in scope. To be sure, the CJEU explicitly rejects the view that a third party’s (the US) reservation under Article 15(3) has an impact on the scope of Article 8(2) RLD for the reasons set out above and which we will come back to. In other words, the limitation to the obligation of formal reciprocity that follows from the rule of material reciprocity in Article 4(2) WPPT, does not affect the interpretation of Article 8(2). Building on the argument that neither this provision nor any other provision of EU law contain a limitation in respect of nationals of third States, the CJEU also seems to ignore the principle of formal reciprocity that follows from Article 4(1) WPPT. In fact this is a different kind of argument that deviates from the point of departure that Article 8(2) RLD must be interpreted consistently with the EU’s international obligations. Quite on contrary, the CJEU states that since Article 8(2) is a harmonized rule, “it is for the EU legislature … to determine whether the grant in the European Union 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”. The argument certainly implies that the interpretation must comply with WPPT, but it is independent of formal reciprocity as laid down in the Convention and repeatedly referred to by the Court.

This is confusing and makes it difficult to deduce with absolute certainty whether it means that Article 8(2) RLD applies to all phonogram recordings and every producer and performer

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41 See subsection 5.2, infra.
42 Para. 88 of the judgment.
43 Ibid.
that participate in such recordings or to all producers and performers that are subject to national treatment under WPPT Article 4(1). The conclusion to the third question

«Article 15(3) of the WPPT and Article 8(2) of Directive 2006/115 must, as EU law currently stands, be interpreted as meaning that reservations notified by third States under Article 15(3) of the WPPT that have the effect of limiting on their territories the right to a single equitable remuneration laid down in Article 15(1) of the WPPT do not lead in the European Union to limitations of the right provided for in Article 8(2) of Directive 2006/115, in respect of nationals of those third States».

44 gives no absolute answer. To be sure, the cited passage rejects the interpretation based on the rule of material reciprocity, but it leaves open for speculation whether the principle of formal reciprocity laid down in WPPT Article 4(1) applies or whether the principle is abandoned for the benefit of all performers and producers. In the end, the logic that it is up to the EU legislator to adapt express rules on the territorial limitation of the remuneration right, and the phrasing «neither [Article 8(2)] nor any other provision contains a limitation [in respect of the nationals of third States]», 45 suggest that there is no limitation. In the same vein, also the Court’s confirmation that the EU has the exclusive competence for the purpose of negotiating with third states new reciprocal agreements seems to suggest that the EU will have to act if the scope of the remuneration right is to be limited to certain performers or producers. If this understanding of the Court’s reasoning is correct, and I believe that it is, Article 8(2) RLD at date applies to any recording and grant rights to any performer and producer. The Advocate General’s argument that provisions in the copyright field regulate limitations if such are to be applied, 46 may also support this conclusion.

The consequences of this logic may, however, be quite dramatic and have repercussions far beyond Article 8(2) RLD. 47 It should not be forgotten that only few provisions in EU copyright law contain express limitations to the territorial scope of protection. 48 Most EU rights provisions on copyright and related rights do not regulate the third country dimension despite the fact that the rights are covered by international conventions that prescribe national treatment to right holder from other convention states. Should the silence of these provisions always mean that the rights apply to any right holder, irrespective of the obligations of EU or

44 Paras. 91 and 97 (conclusion) pt.2 of the judgment.
45 Para. 88 of the judgment.
46 See paras. 143–146 of the Opinion.
47 For examples, see Blomqvist/Rosenmeier (fn. 35, supra), section 6.
48 See further Rognstad (fn. 1, supra), 459–461.
their Member States to grant protection and national treatment to nationals of the conventions states, the principle of formal reciprocity becomes rather redundant in the EU context. The protection will in this situation be granted to any right holder fulfilling the substantial conditions for protection irrespective of the rule of material reciprocity governing the limits of the obligation to national treatment in the international conventions and even irrespective of the rule of formal reciprocity inherent in national treatment itself. We will come back to this in the closing section 5.4.

6.2 The Relevance of the Fundamental Rights Argument of the CJEU

The CJEU’s reference to the remuneration right being protected as ‘intellectual property’ under Article 17(2) of the EU Charter of Fundamental Rights (hereinafter EU Charter) appears in the judgment as the main basis for rejecting the relevance of third party reservations pursuant to Article 15(3) WPPT in interpreting Article 8(2) RLD. The argument that “any limitation on the exercise of that right related to copyright must be provided for by law” is derived from Article 52 of the EU Charter on the premise that the remuneration right is protected as a fundamental right under Article 17(2). In this commentator’s opinion, this premise is at best questionable as is also the following assumption of the Court that a notified reservation does not fulfil the requirement.49

In a similar manner as the property protection under Protocol 1 Article 1 (P1-1) of the European Convention of Human Rights (ECHR), the protection of property and intellectual property in Article 17 of the EU charter protects assets derived from existing legal positions and not mere interests.50 In other words, the assumption that somebody deserves legal protection is not sufficient in order to enjoy (IP) property protection under Article 17. In the EU case law, this position is confirmed in case C-283/11 (Sky Österreich) where the Court held that Article 17(1) «does not apply to mere commercial interests or opportunities but applies to rights with an asset value creating an established legal position under the legal system».51 In respect of intellectual property, this means that “the right of property will not support an author’s claim to a form of legal protection which is not already recognized in positive law.52 The Court deviates from this when using the property protection as an

49 See also Rognstad (fn. 1, supra), 455–458.
51 Case C-283/11, Sky Österreich GmbH v. Österreichischer Rundfunk, ECLI:EU:C:2013:28, para. 34.
52 J. Griffiths, “Universalism, Pluralism or Isolationism? The Relationship Between Authors Rights and Creators’ Human Rights”, in Tatiana Eleni Synodinou (ed.), Pluralism or Universalism in International Copyright Law,
argument in favour of extending the remuneration right to third country performers and producers in a situation where these actors are not guaranteed protection under WPPT Article 15(1). Provided that Article 8(2) RLD grants US performers and producers remuneration rights, there is a property interest to protect. However, Article 17 is no ground in itself for granting such protection. The reasoning of the CJEU is therefore inconsistent with previous case law and in any case fully circular. The latter because the answer to the relevant question (whether third party nationals of Contracting Parties that have notified a reservation to the remuneration right has such a right and therefore a protected legal position) is used as a ground of justification for that same answer.

This is not to exclude that there are human rights aspects inherent in performances as such. Article 15(1)(c) of the International Covenant on Economic Social and Cultural Rights (ICESCR) recognizes the right of everyone “to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author”. The possible impact of this provision, and the corresponding statement in Article 27(2) of the Universal Declaration of Human Rights (UDHR), on current copyright and related rights regimes, is disputed and in any case rather uncertain. Whether it can support a claim that performers shall be entitled to remuneration is subject to discussion even if discrimination on the ground of nationality in principle at first glance seems incompatible with the statement that ‘everyone’ should have the right to benefit from the protection of material interests resulting from an artistic production. On the other hand, like one author has put it, “it does not seem reasonable either to understand the provision as imposing obligations on states to grant protection for works, and so on, originating from countries that have chosen to remain outside the international system of protection instruments”. In any case, it is for the reason put forward above misconceived to base the ‘weighing’ of interests on Article 17 of the EU Charter. The conclusion that the CJEU draws from this – that the ‘limitation’ of Article 8(2) should be drawn clearly and precisely – should in this situation at least have been based on a different legal ground than Article 52 of the Charter. A different story is the Court’s assertion that a reservation under Article 15(3) does not fulfil the

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53 See the discussion in Griffiths (fn. 52, supra), 625–634, with further references.
54 Compare Griffiths (fn. 52, supra), 637.
requirements of clarity 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”.

This statement ignores both the express limitation to national treatment inherent in Article 4(2) and the fact that WPPT is an integral part of the EU legal order. Thus, it is difficult to see that limiting the scope of Article 8(2) RLD in accordance with the limitation in Article 4(2) WPPT would not provide for the necessary clarity and preciseness irrespective of the legal foundation for the latter requirement.

6.3 The Implication of the RAAP Judgment for the EEA Agreement

The RAAP decision makes many references to the “EEA”, ie. the European Economic Area, consisting of the EFTA states Norway, Iceland and Liechtenstein in addition to the EU and its Member States. Like the WPPT, the EEA Agreement is a ‘mixed agreement’ to which both the EU and its Member States are parties. A specific feature of the EEA Agreement is that a large portion of the EU acquis, including more than 6000 existing legal acts, are incorporated into the Agreement. Thus, the RLD, including Article 8(2) is also part of the EEA Agreement. The interpretation of the EEA Agreement is governed by the principle of homogeneity – that the common rules shall be interpreted in the same manner as ‘equivalent’ EU rules. This raises, however, considerable challenges because of the different scope and ambitions of the EU and the EEA cooperation respectively. To put it short, the EEA Agreement was meant as an extension of the internal market to include the EFTA countries that are parties to the Agreement, not as a fully integrated political union. Hence, there are important differences as to the scope and not least the dynamics of the EU and the EEA, the latter reflected in the fact that the main part of the EEA Agreement has not been amended since its adoption in 1992. The EFTA ‘equivalence’ of the CJEU, the EFTA Court, has made many attempts to tighten

56 Para. 87 of the judgment.
57 See further Rognstad (fn 1, supra), 457–458.
the ‘widening gap’ by a result-oriented approach to the principle of homogeneity. At the same time, the CJEU has also demonstrated a willingness to dynamic interpretation of the EEA Agreement in the relatively few cases it hitherto has dealt with the Agreement. Nevertheless, the question is whether homogeneity can, and should be achieved in every situation where an EEA provision mirrors an EU rule. The EFTA Court alluded to a negative answer in its Maglite case regarding the question whether Trade Mark Directive precluded the EFTA states from maintaining rules on international exhaustion of trade marks. Later, after the CJEU had confirmed that the Directive precluded international exhaustion in the EU context, the EFTA Court in the L’Oreal case overturned its position in Maglite with reference to the homogeneity principle. There might be different views as to whether the EFTA Court had good reasons to do so in that case. However, as elaborated on elsewhere it is possible to claim that the RAAP case may provide for better arguments for deviating from the homogeneity principle when interpreting two apparently equivalent provisions in the EU and the EEA context respectively. Here, only a few considerations to demonstrate the point.

One central difference between the EU and the EFTA pillar of the EEA Agreement is the lack of co-ordinated third country policy in the latter. This is reflected in Recital 16 of the EEA Agreement, which states that the Agreement “does not restrict the decision-making autonomy or the treaty-making power of the Contracting Parties, subject to the provisions of this Agreement and the limitations set by public international law”. As a matter of fact, and law, the EFTA states are not bound by the European Union entering into international agreements in the copyright field. Hence, for example, the CJEU’s statement in RAAP that «the European Union has the exclusive external competence referred to in Article 3(2) [TFEU] for the purpose of negotiating with third States new reciprocal commitments, within the framework

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60 See, for example, on the interpretation of the EU Citizen Directive, despite the fact that the EU citizenship is not covered by the EEA Agreement, case E-26/13, Atli Gunnarsson v. the Icelandic State; case E-28/15, Yankuba Jabbi v Staten v/Utlendingsnemnda; case E-4/19, Campbell v. the Norwegian Government.

61 See, for example, case C-452/01, Margaret Ospelt and Schlössle Weissenberg Familienstiftung, ECLI:EU:C:2003:493, where the Court interpreted the rules on free movement on capital in the EEA Agreement in accordance with EU rules, although only the latter had been subject to considerable amendments pursuant to the Maastricht Treaty.


64 Joined cases E-9/07 and E-10/07, L’Oreál Norge As and L’Oreál SA v. Per Aarskog AS et al.

65 See, for example, Baudenbacher, “The Relationship Between the EFTA Court and the Court of Justice of the European Union” (fn. 58, supra), who notes that the EFTA Court “could have distinguished the case both on the facts and on the law”.

66 See more detailed Rognstad (fn. 1, supra), 463–468.
of WPPT or outside it», does not apply to the EFTA States. The EEA Agreement does not entail a corresponding provision on external competence.

Thus, for example, Norway – as party to the EEA Agreement as a non EU Member – has not yet acceded to the WPPT, nor is it bound by the EU’s external competence to enter into this Agreement. If Article 8(2) RLD in this situation is to be interpreted in accordance with the RAAP case also in the EEA context, Norway’s decision-making autonomy both with respect to abstaining from acceding the WPPT, and to notify a reservation pursuant to WPPT Article 15(3) if it decides to join the Convention, becomes obsolete. Either way it will be bound to apply the remuneration right to all performers and producers and dependent on the decision of the EU legislative power as to whether principles of material reciprocity shall have effect or not. Thus, its Treaty-making power in this matter will be considerably restricted as a result of the EEA Agreement.

The situation would have been different if there were an express obligation as to this effect – if so, the restriction of the Treaty-making power would undeniably follow from the Agreement. To derive such restriction from a provision (Article 8(2)) that is completely silent on the matter, with reference to the principle of homogeneity, is a different story. To solve this problem, there are two options as it would seem. Either to interpret Article 8(2) differently in the EEA context as to allow the EFTA states to apply the remuneration right to performers and producers in accordance with their international obligations. Alternatively, one could amend Article 8(2) in the EEA Agreement. As the latter option would require a decision of the EEA Joint Committee, and consequently the consent of the EU, this will not remedy the restriction of the Treaty-Making power on part of the EFTA states. Given also that the RAAP case may have repercussions far beyond the field of Article 8(2) RLD, it may be held that the personal and geographical scope of copyright and related rights is a possible example of a situation where the case for deviating from the homogeneity principle in the EEA Agreement is a strong one.

6.4 Reflections on Policy Issues and the Consequences of the Judgment

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67 Para. 89 of the judgment.
68 Compare Protocol 12 of the EEA Agreement which expressly restricts the EFTA States’ competence with regard to entering into mutual recognition agreements with third countries concerning conformity assessment for products where the use of a mark is provided for in EC legislation. See F. Arnesen and H.H. Fredriksen, in F. Arnesen et. al. (fn. 59, supra), 170.
Again, the CJEU has reached a decision that creates turmoil with the application of international copyright principles at the EU and EEA level. Unlike the Phil Collins decision, however, that logically applied the non-discrimination rule in EU law to copyright law, the RAAP judgment mixes two different, and conflicting, considerations – the application of international agreements as part of the EU legal order and an implied principle that rights are granted to all persons unless otherwise specified. As has been pointed out above, both a misconception of the scope of formal reciprocity and a misplaced reference to fundamental rights seem to underpin the latter. This is not in itself tantamount to saying that that the result is unjustified from a policy point of view, but the legal arguments for reaching this result are unconvincing. In addition, the result creates considerable problems for its transference to the EEA Agreement. Furthermore, in mixing the two different considerations, the Grand Chamber decision leaves uncleanness as to the scope of the protection, although it seems from the reasoning that the latter consideration (unlimited scope until otherwise explicitly decided) takes precedence.

Considered solely from a policy point of view, the judgment entails apparently an aspect of fairness in that actors (performers and producers) that have contributed to an achievement (sound recording) are being remunerated for its exploitation. Indeed, as emphasized by the CJEU itself, the coin is flip-sided, in that the refusal of third States (US) to grant a remuneration right to phonogram producers and performers from the EU may “prejudice the ability of performers and phonogram producers of the Member States of the European Union to be involved in that business on equal terms with performers and phonogram producers of the third State”.69 It is this kind of unfairness that the principle of material reciprocity, inherent in the limits to formal reciprocity in WPPT Article 4(2), is meant to prevent. In other words, fairness must go both ways – otherwise there will be no incentives to harmonize fairness standards at a global level. One could certainly wish welcome a universal humans rights based non-discriminatory copyright regime, but it does not exist for the moment and the idea of it is likely to remain unaffected by the CJEU flipping the one side of the coin. The way things are now, after the RAAP decision, the international (US) music industry is pressing for remuneration to the detriment of solutions that are meant to preserve cultural concerns at a national level. In particular in times of the pandemic, that does not seem to be the most fortunate outcome, although there are certainly different opinions also in this respect.

69 Para. 83 of the judgment.
depending on the perspective.\textsuperscript{70} It follows, however, from the discussion in section 6.3 above that the situation for the EEA-EFTA states is, in my opinion, different from that of the EU Member States.

Regarding the latter, one may speculate on the further consequences of the decision, for example the liability of EU Member States for failing to implement Article 8(2) RLD correctly and the future destiny of Article 8(2) RLD which is certainly subject to intense discussion after the RAAP ruling. It is in any case evident that no additional Council Decision on the EU notification of a reservation under Article 15(3) is necessary in order to limit the application of Article 8(2) RLD to third countries, although the CJEU ruling deceivably can leave the impression that it will be. As follows from the discussion in section 6.1 it suffices to ascertain that the third country has notified a reservation, whereupon an amendment of the Directive can be enacted pursuant to the principle of material reciprocity reflected in Article 4(2) WPPT. The RAAP decision nevertheless urges future legislation in the fields of copyright and related rights to explicitly take the geographical scope of protection into account.\textsuperscript{71}

This leads to the general observation that Member States in the past presumably have counted on their freedom to regulate the geographical scope of the remuneration right in accordance with material reciprocity reflected in the RC as well as the WPPT.\textsuperscript{72} The Court’s argument regarding Member States reservations under the RC that such reservations create no obligations sounds hollow in light of the facts that the RC predates any version of the RLD and the lack of discussion during the legislative processes leading to the enactment of the RLD, neither prior to dir. 92/100 nor the current 2006/115. In my opinion these factors should be relevant to the question of liability for incorrect implementation of the Directive. Since the Court relies heavily on the EU’s obligations under WPPT in its interpretation of Article 8(2), and the argument that the provision applies to all performers and producers depends on the exclusive competence of the EU, the normal ex tunc effect of the possible liability should in any event not predate the EU ratification of the WPPT, ie. 14 March 2010.\textsuperscript{73} However, as has

\textsuperscript{71} Compare Blomqvist/Rosenmeier (fn. 35, supra), section 7.
\textsuperscript{72} See J. Rosén, «The Rome Convention, WPPT and a right to remuneration – Details of the RAAP case”, in M. Rosenmeier et al. (eds.), Festskrift til Jørgen Blomqvist (fn. 1, supra), 549–567, 560.
\textsuperscript{73} See also Rosén, op. cit., 566.
followed from the foregoing analysis, the judgment is in this commentator’s opinion far from delivering convincing arguments in its deviation from the international copyright regulation, and this should somehow be reflected in the consequences of the decision.

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