THE HIGH COURT

2016 No. 6897 P.

BETWEEN

RECORDED ARTISTS ACTORS PERFORMERS LIMITED

PLAINTIFF

AND

PHONOGRAPHIC PERFORMANCE (IRELAND) LIMITED
MINISTER FOR JOBS ENTERPRISE AND INNOVATION
IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

JUDGMENT of Mr Justice Garrett Simons delivered on 11 January 2019

Abbreviations
"WPPT" WIPO Performances and Phonograms Treaty 1996
"RAAP" Recorded Artists Actors Performers Ltd.
"PPI" Phonographic Performance (Ireland) Ltd.

OVERVIEW

1. These proceedings concern the proper interpretation of the provisions of a European Directive on copyright in the field of intellectual property. Although the issues raised are of immediate and vital interest to the parties to the proceedings, most would consider the case as involving a very specialist and esoteric area of law. However, the proceedings are of more general interest in that they also raise important issues as to the interaction between domestic legislation, EU legislation, and treaties and conventions which the European Union has either entered into or wishes to give effect to.

2. The case concerns the collection and distribution of licence fees payable in respect of the playing of recorded music in public or the broadcasting of recorded music. The legislative scheme will be explained in more detail presently, but for introductory purposes it is sufficient to note that the owner of a bar, night club or any other public place who wishes to play recorded music is required to pay a licence fee in respect of same. Similarly, if a person wishes to include a sound recording in a broadcast or a cable programme service then they too must pay a licence fee in respect of same. This obligation is set out in detail under domestic law in the Copyright and Related Rights Act 2000. The legislation envisages that the user will pay a single licence fee to a licensing body representing the producer of the sound recording, but that the sum so collected will then be shared as between the producer and the performers. This sum is described as "equitable remuneration" under the European Directive.

3. Irish domestic law employs different qualifying criteria for producers and performers, respectively. A producer, as the copyright owner, will qualify to share in the equitable remuneration in circumstances where the sound recording is first lawfully made available to the public in the Irish State or in a European Economic Area ("EEA") country. A producer also has the benefit of the so-called thirty day rule (discussed at paragraph 23 below). By contrast, a performer is not entitled to share in the equitable remuneration unless they are (i) an Irish citizen or domiciled or resident in Ireland, or (ii) domiciled or resident in an EEA country.

4. The central issue in these proceedings is whether it is consistent with EU law to exclude certain *performers* from the benefit of a share in this equitable remuneration in circumstances where the *producer* of the same sound recording will be paid. The fact that the domestic legislation treats EEA domiciles and residents in the same manner as Irish nationals means that the legislation does not offend against the general principle of non-discrimination under EU law. However, the plaintiff complains that the relevant European Directive, when properly interpreted, requires that a *performer*—irrespective of their domicile or residence—must be afforded a right to a share of the equitable remuneration in circumstances where their performance has been fixed in a sound recording which itself qualifies for protection. On this argument, it is not permissible to employ criteria based on the domicile or residence of the performer.

5. There is little doubt but that if the relevant treaty provisions were *directly applicable* in the domestic legal order, then the plaintiff's complaint would be well founded. See, by analogy, Arnold, *Performers' Rights* (5th edition, Sweet & Maxwell Thomson Reuters), §2.39. (This is subject to the point flagged at paragraph 7 below). However, the case law indicates that the treaty is not directly applicable. In order to succeed in its claim, therefore, the plaintiff must establish that the sparse language of the European Directive can be elaborated upon by reference to the more detailed provisions of the treaty.

6. The resolution of these proceedings necessitates careful consideration of the relevant European Directive, and two international agreements which, or so it is said, the Directive is intended to give effect to. This court is then invited either (i) to interpret the domestic legislation in such a way as to give effect to what the plaintiff says are its rights under EU law or, alternatively, (ii) to disapply the relevant provisions of domestic law. The striking feature of the case is that the relevant provisions of domestic law are clear and unambiguous, and expressly prescribe less generous eligibility criteria for performers than for producers. Thus, even if the plaintiff is correct in its argument that the imposition of such eligibility criteria is inconsistent with EU law, it does not seem that the domestic legislation can be interpreted so as to conform with what the plaintiff says are the requirements of EU law. In effect, the plaintiff is contending that domestic law must be overridden by provisions of EU law. This is so notwithstanding the fact that the domestic legislation is clear and unambiguous; and the Court of Justice has ruled that the relevant provisions of the treaty relied upon do not have direct effect.

7. A further issue arises as to whether—on the assumption that the provisions of the treaty do govern the interpretation of the European Directive—the approach taken under the domestic legislation is justified as a response to a *reservation* entered by some parties to the treaty. This point will become clearer once we have considered the relevant treaty provisions. I will return to this point at paragraph 91 below.

PROCEDURAL HISTORY

8. The matter comes before the court by way of the trial of a number of preliminary issues pursuant to an order of the High Court (Cregan J.) dated 30 March 2018. The precise issues, and the reasons for the making of the order, are set out in a comprehensive written judgment of 21 February 2018. The plaintiff purports to act as a collective management organisation for performers. The plaintiff is registered with the Controller of Patents, Designs and Trade Marks ("*the Controller*") as a licensing body for performers. The precise legal effect of this registration is the subject of a second, related set of proceedings in which I also deliver judgment today, *Recorded Artists Actors and Performers v. Phonographic Performance (Ireland) Ltd.* (High Court 2016 No. 10801 P). The first named defendant is a licensing body for copyright owners, and is also registered with the Controller.

9. For the balance of this judgment, I will use the shorthand "*RAAP*" to refer to the plaintiff, Recorded Artists Actors Performers Ltd., and the shorthand "*PPI*" to refer to the first named defendant, Phonographic Performance (Ireland) Ltd.

10. As appears from the judgment of Cregan J., the underlying dispute between the parties concerns the interpretation of an agreement entered into between RAAP and PPI. The agreement purports to regulate how licence fees, i.e. the equitable remuneration, collected by PPI from the users of sound recordings, e.g. night clubs, bars and broadcasters, is to be shared as between producers and performers. The interpretation of that agreement, in turn, depends on the correct interpretation of the provisions of domestic law and the interaction of same with EU law and two international agreements. The dispute between the parties centres largely on the treatment of licence fees collected in respect of sound recordings featuring non EEA performers. PPI maintains that such performers are not entitled to any share of the remuneration notwithstanding that the sound recording itself does attract a licence fee. In effect, the remuneration is to accrue for the benefit of the producer alone. RAAP refutes this, and says that the correct criteria should be whether the sound recording attracts copyright protection: if it does, then any performer whose performance is fixed in that sound recording is entitled to a share in the remuneration, i.e. the licence fee.

11. The trial of the preliminary issues came before me for hearing in mid-November 2018. The order directing the trial of the preliminary issues defines the issues at the level of general principle only, and the court was asked to interpret the relevant provisions, in a sense, in the abstract. For this reason, then, it is unnecessary to set out the factual background in any great detail.

12. It may be helpful, however, to flag that much of the discussion at the hearing centred on the treatment of sound recordings which were first published in the United States of America ("*USA*"). Under the relevant treaty, the WIPO Performances and Phonograms Treaty 1996, the effect of first publication in the territory of a Contracting Party would normally be that producers and performers would qualify to a share in the equitable remuneration regardless of their domicile or residence. The position under the Irish domestic legislation is different, and, as noted above, insofar as performers is concerned looks to the domicile or residence of the performers, or to the place of performance.

13. The difference in approach between the two systems is of little practical effect in the case of an EEA performer in circumstances where the sound recording is first published in an EEA country. Thus, for example, if a French artist were to record a song, and the sound recording is first published in France, then the performer would qualify for shared remuneration irrespective of whether one applies the WPPT rule, i.e. place of first publication, or the Irish rule, i.e. domicile or residence of the performer, or place of performance.

14. The position in the case of a sound recording produced in the USA is more complicated. If the sound recording qualifies for copyright protection under Irish domestic law on the basis of first publication—whether by reference to the thirty day rule or otherwise–then the producer is entitled to share in the equitable remuneration irrespective of their domicile or residence. A US performer will not, however, qualify under domestic law. This discrepancy appears *prima facie* to be inconsistent with the WPPT. Matters are further complicated by the fact that the USA has entered a reservation under article 15(3) of the WPPT, and this allows other Contracting Parties, such as Ireland, to respond to the reservation. See paragraph 91 below.

INTERNATIONAL AGREEMENTS

15. The gravamen of RAAP's case is that a performer—irrespective of their domicile or residence—is automatically entitled to shared remuneration in circumstances where their performance has been fixed in a sound recording which itself qualifies for protection. In order to understand this argument, it is necessary to provide a brief overview of the two international agreements relied upon by RAAP.

(i) Rome Convention 1961

16. The long title of the Rome Convention is the "International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations". The Rome Convention was "done" at Rome on 26 October 1961. The European Union is not a party to the Rome Convention.

17. Relevantly for these proceedings, the Rome Convention introduces the concept of "national treatment". This is defined at article 2(1)(a) as meaning the treatment accorded by the domestic law of the Contracting State in which protection is claimed to performers who are its nationals, as regards performances taking place, broadcast, or first fixed, on its territory. In effect, this requires that qualifying performers are entitled to the full benefit of the rights provided under domestic law. Put otherwise, it introduces a requirement for non-discrimination. If domestic law provides rights more generous than those required under the Rome Convention, then the qualifying performers are entitled to those rights too.

18. Article 4 provides as follows.

> "Each Contracting State shall grant national treatment to performers if any of the following conditions is met:
>
> (a) the performance takes place in another Contracting State;
>
> (b) the performance is incorporated in a phonogram which is protected under Article 5 of this Convention;
>
> (c) the performance, not being fixed on a phonogram, is carried by a broadcast which is protected by Article 6 of this Convention."

19. Article 4(b) is of particular relevance to these proceedings as it forges a link between performers' rights and those of producers.

20. The WIPO Guide to the Rome Convention states as follows, at page 27.

> "4.6. Article 4 thus sets out the cases in which performers may claim protection: namely, if (a) the performance takes place in another Contracting State or (b) the performance is incorporated in a phonogram which is protected under Article 5 of the Convention, or (c) the performance, not being fixed in a phonogram, is carried by a broadcast protected by Article 6 of the Convention. It is worth bearing in mind the meaning of 'performance' (see comments on Article 3(a) above).
>
> 4.7. As the General Report points out, it was stated during the Conference that the purpose of items (b) and (c) was to establish a system under which performances recorded on phonograms are protected when the phonogram producer is protected, and under which broadcast performances (other than those fixed on phonograms) are protected when the

broadcasting organizations transmitting them are protected. As to item (a), the fact that in this Convention, unlike the copyright conventions, the criterion of nationality is not included in the points of attachment, makes it necessary for the right to national treatment to depend on the State in which the performance takes place. It was thought best to reject the criterion of nationality because of the almost insurmountable difficulties arising particularly over such things as collective performances (choirs and orchestras, etc.), and to adopt instead merely a criterion of territoriality."

21. Article 5 provides as follows.

> "1. Each Contracting State shall grant 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).
>
> 2. If a phonogram was first published in a non-contracting State but if it was also published, within thirty days of its first publication, in a Contracting State (simultaneous publication), it shall be considered as first published in the Contracting State.
>
> 3. By means of a notification deposited with the Secretary-General of the United Nations, any Contracting State may declare that it will not apply the criterion of publication or, alternatively, the criterion of fixation. Such notification may be deposited at the time of ratification, acceptance or accession, or at any time thereafter; in the last case, it shall become effective six months after it has been deposited."

22. The term "publication" is defined under article 3(d) as meaning the offering of copies of a phonogram to the public in reasonable quantity.

23. Leading counsel for RAAP, Michael Collins, SC, places particular emphasis on the practical implications of the so-called "thirty day" rule under article 5(2). This rule has the potential to extend significantly the range of producers entitled to the benefit of national treatment because it regards a publication made within thirty days of first publication in a non-Contracting State as if it were first published in a Contracting State. Counsel suggests that if a sound recording first published in the USA has any merit at all, then it is almost certainly going to be reproduced and published in the territories of at least some of the other Contracting States within thirty days.

(ii) WIPO Performances and Phonograms Treaty 1996 ("WPPT")

24. The WPPT was adopted in Geneva on 20 December 1996. The European Union deposited its instrument of ratification on 14 December 2009, and the WPPT entered into force in respect of the European Union on 14 March 2010. (Ireland ratified the WPPT on the same date). See the earlier Council Decision 2000/278/EC of 16 March 2000 on the approval, on behalf of the European Community, of the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. Recitals (4) to (7) of the Council Decision read as follows.

> "(4) It follows that the approval of the WCT and the WPPT is a matter for both the Community and its Member States.
>
> (5) The WCT and the WPPT should therefore be approved on behalf of the Community with regard to matters within its competence.
>
> (6) The Community has already signed the WCT and the WPPT, subject to final conclusion.
>
> (7) The deposit of the instruments of conclusion of the Community should take place as far as possible simultaneously with the deposit of the instruments of ratification of the Member States,"

25. The relationship between the WPPT and the Rome Convention is explained as follows at article 1(1) of the WPPT.

> "(1) Nothing in this Treaty shall derogate from existing obligations that Contracting Parties have to each other under the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations done in Rome, October 26, 1961 (hereinafter the 'Rome Convention')."

26. A requirement for national treatment is provided for under article 4 of the WPPT as follows.

> "National Treatment
>
> (1) Each Contracting Party shall accord to nationals of other Contracting Parties, as defined in Article 3(2), the treatment it accords to its own nationals with regard to the exclusive rights specifically granted in this Treaty, and to the right to equitable remuneration provided for in Article 15 of this Treaty.
>
> (2) The obligation provided for in paragraph (1) does not apply to the extent that another Contracting Party makes use of the reservations permitted by Article 15(3) of this Treaty."

27. Relevantly, article 15(1) provides that performers and producers of phonograms shall enjoy the right to a single equitable remuneration for the direct or indirect use of phonograms. (Article 15 is set out in full at paragraph 33 below).

28. The concept of national treatment under article 4 of the WPPT is narrower than under the Rome Convention in that it is confined to the rights granted under the treaty, i.e. if domestic law affords more generous rights to its own nationals, there is no obligation to extend the *additional* rights to nationals of other Contracting Parties.

29. The concept of "nationals of other Contracting Parties" is defined at article 3(2) as follows.

"(2) The nationals of other Contracting Parties 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, were all the Contracting Parties to this Treaty Contracting States of that Convention. In respect of these criteria of eligibility, Contracting Parties shall apply the relevant definitions in Article 2 of this Treaty."

30. This definition thus forges a link between the WPPT and the Rome Convention. It is submitted on behalf of RAAP that the qualifying criteria under article 4 of the Rome Convention thus apply to the WPPT, and that this has the consequence that a performer is entitled to share in the remuneration in all cases where the producer qualifies under article 5. This was described in argument before me as the performer being able to "piggyback" on the fact that the producer has qualified under article 5 of the Rome Convention. On this analysis, it was said that the Irish copyright legislation was inconsistent with the requirements of the WPPT insofar as the Irish legislation purports to treat performers and producers differently. Specifically, it is said that the reliance, in the case of performers, on criteria which are solely based on the residence or domicile of a performer is impermissible.

31. As discussed in more detail presently, PPI's primary response to all of this is to say (i) that the principle of national treatment has not been incorporated in the European Directive, and (ii) that neither the Rome Convention nor the WPPT are directly applicable. On this argument, Ireland enjoys a discretion as to how to define "relevant performers", and is entitled to exclude non-EEA domiciles and residents from copyright protection.

32. PPI makes a second, alternative argument based on the system of reservations allowed for under the WPPT. In order to understand this argument, it is necessary to refer to the following additional provisions of the WPPT.

33. As appears from article 4(2), the requirement for national treatment is subject to the possibility of a reservation under article 15. Article 15 in full provides as follows.

"(1) Performers and producers of phonograms shall enjoy the right to a single equitable remuneration for the direct or indirect use of phonograms published for commercial purposes for broadcasting or for any communication to the public.

(2) Contracting Parties may establish in their national legislation that the single equitable remuneration shall be claimed from the user by the performer or by the producer of a phonogram or by both. Contracting Parties may enact national legislation that, in the absence of an agreement between the performer and the producer of a phonogram, sets the terms according to which performers and producers of phonograms shall share the single equitable remuneration.

(3) Any Contracting Party may, in a notification deposited with the Director General of WIPO, declare that it will apply the provisions of paragraph (1) only in respect of certain uses, or that it will limit their application in some other way, or that it will not apply these provisions at all.

(4) For the purposes of this Article, phonograms made available to the public by wire or wireless means in such a way that members of the public may access them from a place and at a time individually chosen by them shall be considered as if they had been published for commercial purposes."

34. PPI contend that insofar as the definition of qualifying performers under the Irish copyright legislation has the effect that certain performers from non-EEA countries, such as, in particular, the United States of America, do not qualify, this is a lawful response to the reservation which the USA has entered under article 15(3). I will return to this argument at paragraph 91 below.

OVERVIEW OF THE COPYRIGHT AND RELATED RIGHTS ACT 2000

35. It may be convenient at this stage of the judgment to provide an overview of the Copyright and Related Rights Act 2000 ("*Copyright Act 2000*").

36. The starting point is section 37(1) of the Copyright Act 2000. This provides that the owner of the copyright in a work has the exclusive right to undertake or authorise others to undertake all or any of certain specified acts, including, relevantly, the right to make the work available to the public. The definition of "work" includes a "sound recording". A "sound recording" is defined, under section 2, as meaning a fixation of sounds, or of the representations thereof, from which the sounds are capable of being reproduced, regardless of the medium on which the recording is made, or the method by which the sounds are reproduced. Section 19 provides that copyright shall not subsist in a sound recording until the first fixation of the sound recording is made.

37. Section 38 then provides for a licence as of right in certain circumstances. Given their centrality to the dispute between the parties, it is necessary to set out subsections 38(1) to (4) in full.

"38.—(1) Notwithstanding the provisions of section 37, where a person proposes to—

(a) play a sound recording in public, or

(b) include a sound recording in a broadcast or a cable programme service,

he or she may do so as of right where he or she—

(i) agrees to make payments in respect of such playing or inclusion in a broadcast or a cable programme service to a licensing body, and

(ii) complies with the requirements of this section.

(2) A person may avail of the right to play a sound recording in public or to include a sound recording in a broadcast or a cable programme service, where he or she—

(a) gives notice to each licensing body concerned of his or her intention to play sound recordings in public or include sound recordings in a broadcast or a cable programme service,

(b) informs each of those bodies of the date on and from which he or she intends to play sound recordings in public

or include sound recordings in a broadcast or a cable programme service,

(c) makes payments to the licensing body at intervals of not less than 3 months in arrears,

(d) complies with any reasonable conditions relating to payments under this section as may be notified to him or her by the licensing body from time to time, and

(e) complies with any reasonable requests for information from the licensing body to enable it to calculate and manage payments under this section."

(3) A person who satisfies the conditions specified in subsection (2) shall be deemed to be in the same position as regards infringement of copyright as if he or she had been the holder of a licence granted by the owner of the copyright in question at all material times.

38. As appears from section 38(3) (above), a user who satisfies the conditions specified is deemed to be in the same position as regards infringement of copyright *as if* he or she had been the holder of a licence granted by the owner of the copyright. In the case of a sound recording, the owner of the copyright is described as the "producer". The parties accept that section 38 gives rise to a licence as of a right as against the producer of a sound recording.

39. (There is a disagreement, however, as to whether the right to remuneration which a qualified *performer* enjoys is capable of licensing at all. This disagreement is one of the issues to be addressed in the second, related set of proceedings, High Court 2016 No. 10801 P. This is the subject of a separate judgment delivered by me today.)

40. The next number of subsections under section 38 address the procedure for making a referral to the Controller, and are not immediately relevant to this aspect of the case.

41. Section 38(15) provides for a special definition of "licensing body" as follows. Again, this definition is relevant to the issues in the second set of proceedings.

"(15) Notwithstanding section 149, in this section 'licensing body' means a society, a company registered under the Companies Acts, 1963 to 1999, or other organisation which has as one of its objects the negotiation or granting of licences to play sound recordings in public or to include sound recordings in broadcasts or cable programme services, either as owner or prospective owner of copyright in the said sound recording or as his or her exclusive licensee, agent or designated representative and shall include a human person who has the right to negotiate or grant a licence to play sound recordings in public or to include sound recordings in broadcasts or cable programme services, either as owner or prospective owner of copyright in the sound recordings."

42. Section 184 prescribes the circumstances in which inter alia a sound recording shall qualify for copyright protection.

"184.—(1) A literary, dramatic, musical or artistic work, sound recording, film, typographical arrangement of a published edition or an original database, shall qualify for copyright protection where it is first lawfully made available to the public—

(a) in the State; or

(b) in any country, territory, state or area to which the relevant provision of this Part extends.

(2) For the purposes of this section, lawfully making available to the public a work in one country, territory, state or area shall be deemed to be the first lawful making available to the public of the work even where the work is simultaneously lawfully made available to the public elsewhere; and for this purpose, lawfully making available to the public of a work elsewhere within the previous 30 days shall be deemed to be simultaneous."

43. As noted earlier, RAAP attach particular importance to what they describe as the "thirty day rule", i.e. notwithstanding that a sound recording may have been first published in the territory of non-contracting party, the sound recording will nevertheless qualify for copyright protection provided that it is published within the territory of a Contracting Party within thirty days.

44. The effect of these provisions is that, insofar as *producers* are concerned, one of the principal criteria is the place of first publication of the sound recording.

45. A producer may also qualify for copyright protection by reference to their domicile or residence in a convention country. This is the combined effect of section 183 of the Copyright Act 2000 and the Copyright (Foreign Countries) Order 1996 (S.I. No. 36 of 1996). The Order provides for copyright protection on the basis of reciprocity. See Article 9.

"9. Copyright subsisting by virtue only of this Order in a sound recording shall not include the right to equitable remuneration under section 17(4) (b) of the Act unless that right or a right giving rise to a claim for equitable remuneration subsists in the country in which the sound recording was first published."

46. This Order is preserved by virtue of the transitional provisions under the Copyright Act 2000. See Paragraph 3(5) of Part 1 of the First Schedule of the Copyright Act 2000 provides as follows.

"(5) Notwithstanding the repeal of the Act of 1963, any regulation, rule or order made under the Act of 1963 and which is in force immediately before the commencement of Part II of this Act shall continue in force and be deemed after the commencement of the said Part II to be made under the corresponding provisions of this Act."

Qualification for Copyright protection

47. The qualifying criteria for performers are set out as follows at Part III, Chapter 9 of the Copyright Act 2000.

"Chapter 9

287.—In this Part, and in Part IV—

'qualifying country' means—

(a) Ireland,

(b) another Member State of the EEA, or

(c) to the extent that an order under section 289 so provides, a country designated under that section;

'qualifying individual' means a citizen or subject of, or an individual domiciled or ordinarily resident in, a qualifying country; and

'qualifying person' means an Irish citizen, or an individual domiciled or ordinarily resident in the State.

288.—A performance is a qualifying performance for the purposes of the provisions of this Part and Part IV if it is given by a qualifying individual or a qualifying person, or takes place in a qualifying country, territory, state or area, in accordance with this Chapter.

48. As appears from the foregoing, in order for a performance to qualify for the right of remuneration provided for under section 208, either (i) there must be a connection between the performer and a qualifying country, or (ii) the performance itself must have taken place in a qualifying country. A qualifying country is defined as including Ireland and any member of the European Economic Area ("EEA"). Thus, for example, if a performance takes place in a recording studio in France, i.e. if the place of performance is an EEA country, then the performers involved will be entitled to the right of remuneration in respect of the subsequent use of that sound recording irrespective of their individual citizenship, residence or domicile. If, however, the performance takes place in a non-EEA country, say the United States, the performers will only be entitled to the right of remuneration if they satisfy the criteria of citizenship, residence or domicile.

49. The qualifying criteria for performers make no reference to the place of first publication of the sound recording. It is this omission which gives rise to the dispute in the present case. As noted earlier, RAAP contend that if a sound recording has copyright protection by virtue of its having been first published in a Contracting Party, then all of the *performers* involved in that recording are automatically entitled to share in the equitable remuneration.

50. Turning now to section 289 of the Copyright Act, provision is made under that section for orders designating additional countries, i.e. over and above Ireland and EEA countries, as qualifying countries.

"289. (1) The Government may by order designate as a qualifying country enjoying protection under this Part and Part IV any country, territory, state or area, as to which the government is satisfied that provision has been or will be made under its law giving adequate protection for Irish performances.

(2) For the purposes of this section, an 'Irish performance' means a performance—

(a) given by an Irish citizen, or by an individual who is domiciled or ordinarily resident in the State, or

(b) taking place in the State.

(3) Where the law of that country, territory, state or area provides adequate protection only for certain descriptions of performance, an order under subsection (1) designating that country, territory, state or area may contain provision limiting to a corresponding extent the protection afforded by this Part or Part IV in relation to performances connected with the country, territory, state or area."

51. No order has yet been made under section 289.

ARTICLE 8 OF DIRECTIVE 2006/115/EC

52. The key legislative provision at issue in these proceedings is article 8 of Directive 2006/115/EC ("*the 2006 Directive*"). As I understand their submissions, RAAP accept, in principle, that the only basis on which the more detailed provisions of the WPPT upon which they seek to rely can be invoked in these proceedings is if same are relevant to the *interpretation* of the 2006 Directive. The WPPT has not been incorporated into the domestic legal order by way of any specific implementing legislation enacted by the Oireachtas. The WPPT does not have direct effect for the reasons set out in the judgment of the Court of Justice in *Società Consortile Fonografici* (SCF), Case C 135/10, EU:C:2012:140. Nonetheless, an international agreement, such as the WPPT, might have *indirect effect* in the domestic legal order if it is material which must be considered in the interpretation of a European Directive. Certain European Directives have to be interpreted *in so far as possible* in the light of the purposes and objectives of international agreements which form part of the EU legal order. There is, in turn, an obligation to interpret national law in the light of the purposes and objectives of the European Directive. See generally *Conway v. Ireland* [2017] 1 I.R. 53. As the words in italics above indicate, however, this interpretative obligation is subject to the *contra legem* principle, i.e. a national court is not required to do violence to the words of the legislation ("i*n so far as possible*"). See Case C 351/12, *OSA*, EU:C:2014:110 at paragraph [45]. See generally *Sweetman v. Shell E & P Ireland Ltd*. [2016] 1 I.R. 742 at [10] ("Of course, no such interpretation can be contrary to law, that would be for the courts wrongfully to distort the meaning of the enactment and so overturn the obligation of the legislature under Article 15.2 of the Constitution […]").

53. For the purposes of these proceedings, therefore, the 2006 Directive, and, in particular, article 8(2), represent a potential "gateway" through which the detailed provisions of the WPPT might be relied upon by RAAP in support of their argument that the qualifying requirements prescribed under Part III, Chapter 9 of the Copyright Act 2000 are inconsistent with EU law.

54. It is necessary, therefore, to consider the terms of article 8(1) and (2) of the 2006 Directive in detail. Articles 8(1) and (2) read as follows.

> "1. Member States shall provide for performers the exclusive right to authorise or prohibit the broadcasting by wireless means and the communication to the public of their performances, except where the performance is itself already a broadcast performance or is made from a fixation.
>
> 2. Member States shall provide a right in order to ensure that a single equitable remuneration is paid by the user, if a phonogram published for commercial purposes, or a reproduction of such phonogram, is used for broadcasting by wireless means or for any communication to the public, and to ensure that this remuneration is shared between the relevant performers and phonogram producers. Member States may, in the absence of agreement between the performers and phonogram producers, lay down the conditions as to the sharing of this remuneration between them."

55. The dispute between the parties to these proceedings centres on the extent, if any, to which individual Member States are entitled to prescribe qualifying criteria for performers. The State, in its written submissions, attaches significance to the use of the term "*relevant*" in the phrase "*relevant performers and phonogram producers*" in article 8(2). The State argues (at para 23) that this means that the 2006 Directive leaves it to the individual Member States to set the scope of the term "relevant", and that the classes of performers may differ from Member State to Member State. A similar submission is made on behalf of PPI.

56. Conversely, RAAP submits that the term "*relevant*" is merely intended to indicate that the right to remuneration in any particular instance is confined to the performers involved in the particular phonogram (sound recording) at issue.

57. RAAP further submits that the provisions of article 8(2) must be read in conjunction with a number of specific provisions of the WPPT. This argument runs to the effect that article 8(2) is in broadly similar terms to article 15 of the WPPT, and that regard must also be had to related provisions of the WPPT, in particular, those in respect of national treatment (Article 4).

58. In response to this submission, PPI and the State make the—obvious—point that the 2006 Directive contains no provisions similar to or equivalent to those relied upon. Had the EU legislature intended to impose obligations on the Member States, such as a requirement for national treatment, then one would have expected to find a provision in the 2006 Directive analogous to that provided for under article 4 of the WPPT. The fact that the 2006 Directive includes some—but not all—of the provisions of the WPPT must, it is argued, be regarded to be of legal significance.

59. One of the first issues to be addressed in these proceedings, therefore, is whether the requirement for national treatment is something which informs the interpretation of the 2006 Directive.

CASE LAW OF CJEU ON ROME CONVENTION AND WPPT

60. The status of the Rome Convention and the WPPT has, helpfully, been addressed in a number of judgments of the Court of Justice.

61. The first case in time to which I have been referred is *Stichting ter Exploitatie van Naburige Rechten* (SENA), Case C 245/00, EU:C:2003:68 (hereinafter "SENA"). This case concerned the interpretation of the precursor to the 2006 Directive, namely Directive 92/100/EEC. The language employed at article 8(2) of both Directives is, however, identical, and thus the discussion in the judgment is equally relevant to the 2006 Directive. The case concerned a dispute between a radio broadcaster and a body (SENA) which had been appointed by the Minister for Justice to be solely responsible for collecting and distributing the equitable remuneration payable to phonogram producers and performing artists. The parties had failed to reach agreement as to the amount of equitable remuneration payable; the matter was brought before the national courts for resolution; and ultimately came before the Hoge Raad der Netherlands which referred a number of questions to the Court of Justice as follows.

> "(1) Is the term 'equitable remuneration' used in Article 8(2) of the directive a Community concept which must be interpreted and applied in the same way in all the Member States of the European Community?
>
> (2) If so:
>
> (a) What are the criteria for determining the amount of such equitable remuneration?
>
> (b) Should guidance be sought from the levels of remuneration which were agreed or were customary as between the organisations concerned prior to entry into force of the directive in the relevant Member State?
>
> (c) Must or may regard be had to the expectations of the persons concerned at the time of enactment of the national legislation implementing the directive in regard to the amount of remuneration?
>
> (d) Should guidance be sought from the levels of remuneration for broadcasts paid under music copyright by broadcasters?
>
> (e) Must the remuneration be related to the potential numbers of listeners or viewers, or to actual numbers, or partly to the former and partly to the latter and, if so, in what proportion?
>
> (3) If the answer to the first question is in the negative, does that mean that the Member States are entirely free to lay down the criteria for determining equitable remuneration? Or is that freedom subject to certain limits and, if so, what are those limits?"

62. It is the answer which the Court of Justice gave to the first question that is of most immediate relevance to the within proceedings. See paragraphs [33] to [38] of the judgment as follows.

> "In the absence of any Community definition of equitable remuneration, there is no objective reason to justify the laying down by the Community judicature of specific methods for determining what constitutes uniform equitable remuneration, which would necessarily entail its acting in the place of the Member States, which are not bound by any particular criteria under Directive 92/100 (see, to that effect, Case C-131/97 Carbonari [1999] ECR I-1103, paragraph 45). It is therefore for the Member States alone to determine, in their own territory, what are the most relevant criteria for ensuring, within

the limits imposed by Community law, and particularly Directive 92/100, adherence to that Community concept.

In that connection, it is apparent that the source of inspiration for Article 8(2) of Directive 92/100 is Article 12 of the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations signed in Rome on 26 October 1961. That convention provides that the payment of equitable remuneration, and the conditions for sharing that remuneration are, in the absence of agreement between the various parties concerned, to be established by domestic law and simply lists a number of factors, which it states to be non-exhaustive, non-binding and potentially relevant, for the purposes of deciding what is equitable in each case.

In those circumstances, the Court's role, in the context of a dispute brought before it, can only be to call upon the Member States to ensure the greatest possible adherence throughout the territory of the Community to the concept of equitable remuneration, a concept which must, in the light of the objectives of Directive 92/100, as specified in particular in the preamble thereto, be viewed as enabling a proper balance to be achieved between the interests of performing artists and producers in obtaining remuneration for the broadcast of a particular phonogram, and the interests of third parties in being able to broadcast the phonogram on terms that are reasonable.

As the Commission points out, whether the remuneration, which represents the consideration for the use of a commercial phonogram, in particular for broadcasting purposes, is equitable is to be assessed, in particular, in the light of the value of that use in trade.

The reply to the first question must therefore be that the concept of equitable remuneration in Article 8(2) of Directive 92/100 must be interpreted uniformly in all the Member States and applied by each Member State; it is for each Member State to determine, in its own territory, the most appropriate criteria for assuring, within the limits imposed by Community law and Directive 92/100 in particular, adherence to that Community concept."

63. A number of observations should be made in respect of the approach of the Court of Justice. First, the Court of Justice had some regard to the provisions of the Rome Convention in interpreting the concept of "equitable remuneration", a concept which was common to both the 1996 Directive and the Rome Convention. The legitimacy of having regard to international agreements in interpreting the 2006 Directive is stated in more forthright terms in the subsequent judgments. Secondly, the Court of Justice recognised that some discretion was afforded to the Member States in determining the criteria for assessing equitable remuneration.

64. By way of an aside, it should be noted that Advocate General Trstenjak in *Phonographic Performance (Ireland) Ltd. v. Ireland* Case C 162/10, EU:C:2011:432 described the approach of the Court of Justice in *SENA* as follows, at paragraph [77] to [79] of his Opinion.

"(a) Autonomous Union law notions

Some of the parties point out that a uniform interpretation of certain notions contained in Article 8(2) of Directive 2006/115, such as the notion of communication to the public, is not required by Union law. It is therefore for the Member States to define those notions.

It must be noted that, in the absence of a reference to the law of the Member States, the notions used in Article 8(2) of the directive are autonomous Union law notions. In the interest of a uniform application of Union law in all Member States and having regard to the principle of equality throughout the European Union, they must be given a uniform interpretation. (23) Only then is it possible to achieve the objective, mentioned in recital 6 in the preamble to Directive 2006/115, of facilitating creative, artistic and entrepreneurial activities through a harmonised legal framework in the Community.

However, in certain cases, only very limited harmonisation can be undertaken, despite the existence of an autonomous Union law notion, with the result that the regulatory intensity of the notion is very low. In such cases, only a broad regulatory framework is laid down in Union law, which must be filled out by the Member States. (24) The Court proceeded from this basis with regard to the equitableness of remuneration within the meaning of Article 8(2) of Directive 2006/115. (25) However, as the regulatory intensity of a notion must be assessed individually for each notion mentioned in a provision, it is not possible to draw any inferences as to the other notions used in Article 8(2) of Directive 2006/115."

65. The judgment in *SENA* is thus of assistance insofar as it addresses some general principles which have a potential resonance for the proceedings before me, i.e. the extent to which international agreements may be called in aid as a guide to the interpretation of the 2006 Directive. As it happens, the Opinion of Advocate General Tizzano in *SENA* is perhaps of even more assistance in that the Advocate General specifically addresses the question of discrimination on the grounds of nationality. The Advocate General first makes the—uncontroversial—point that the freedom of action of the Member States in connection with the concept of "equitable remuneration" under article 8(2) of the 1992 Directive is subject to general principles of Community Law. It would not be appropriate therefore to discriminate against nationals of other Member States. (This principle is respected under the Copyright Act 2000 insofar as the qualifying criteria expressly extend to domiciles and residents of EEA countries).

66. The Advocate General goes on, however, to suggest that the freedom of action on the part of the Member States is further limited by reference to *inter alia* the Rome Convention. See paragraphs [40] to [44] of the Opinion, as follows.

"In my view, similar considerations may be applied to the concept of equitable remuneration under Article 8 of the Directive. Thus, the freedom accorded to the Member States in that connection must be exercised subject to control by the Community Institutions, in accordance with the conditions and limits that flow from the Directive, as well as, more generally, the principles and scheme of the Treaty.

To elucidate further, it seems to me, first of all, to be evident that a Member State cannot determine equitable remuneration in breach of a general principle of Community law.

More particularly, as the Finnish Government rightly emphasises, in this area the scope for action under the national legal systems is restricted by the need to secure the application of the principle of non-discrimination on grounds of nationality, enshrined in Article 12 EC and then further clarified, in so far as is relevant to this case, by the provisions on the free movement of goods, persons and services.

Moreover, the scope of the prohibition of discrimination on grounds of nationality in this area extends beyond the terms of Article 12 EC alone. In fact, as far as related rights are concerned, that prohibition encompasses a range of operators

who, although citizens of third countries and therefore not protected under Article 12 EC, enjoy the protection provided by the World Trade Organisation TRIPS Agreement and the Rome Convention.

The TRIPS Agreement binds the Community and all its Member States; it is also common ground that, notwithstanding the debate on its direct applicability, the rules on national treatment which it contains are an integral part of the law with which the Court must ensure compliance, in accordance with Article 220 EC. The effect of the reference in Article 1(3) of the TRIPS Agreement is to incorporate within it Articles 2, 4 and 5 of the Rome Convention, which require the application of the principle of national treatment to a broad category of operators and situations that have no defined link with the Community, be it membership or establishment, and are not therefore, in principle, protected under Article 12 EC. Consequently, it is as a result of those provisions of TRIPS and the Rome Convention, as well as the provisions of Article 12 EC, that the freedom of action of the Member States in applying the Directive, and particularly Article 8(2) thereof, is limited."

67. The sentiment expressed in these passages is strongly supportive of the argument which RAAP advances. Whereas the Advocate General does not expressly refer to the WPPT—upon which RAAP places particular emphasis in the proceedings before me—this is presumably explicable by the fact that the Opinion predates the European Union's formal ratification of the WPPT in December 2009. For present purposes, it is the fact that the Advocate General concluded that the provisions of the 1992 Directive have to be read in light of the *general principles* of the Rome Convention, i.e. the principle of national treatment, which is significant.

68. The proceedings in *SENA* were concerned with the concept of "equitable remuneration", which was common to both the 1992 Directive and the Rome Convention. Subsequent case law indicates that other concepts under what is now article 8(2) of the 2006 Directive must also be interpreted in the light of the equivalent concepts contained in the Rome Convention, the TRIPS Agreement and the WPPT; and in such a way that they are compatible with those agreements, taking account of the context in which those concepts are found and the purpose of the relevant provisions of the agreements as regards intellectual property.

69. What is perhaps the most detailed discussion of this interpretative obligation is to be found in the judgment in *Società Consortile Fonografici* (SCF), Case C 135/10, EU:C:2012:140 (hereinafter "*SCF*"). The national proceedings involved a dispute as to whether a dentist who broadcasts phonograms to his patients, by way of background music, is making a "communication to the public" within the meaning of article 8(2) of the 1992 Directive.

70. The judgment contains a very comprehensive discussion of the precise status of the Rome Convention and the WPPT in the legal order of the European Union. Much of the detail of this discussion is more directly relevant to the separate issue which I have to decide, namely whether these international agreements can be relied upon to "disapply" provisions of national law which it is alleged are incompatible with the international agreements. I will return to this aspect of the judgment in *SCF* under a separate heading at page 43 below.

71. For present purposes, it is sufficient to refer to the summary of its findings as set out by the Court of Justice at paragraphs [54] to [56] of its judgment, as follows.

"Moreover, it follows from recital 10 of Directive 92/100 that the legislation of the Member States should be approximated in such a way as not to conflict with the international conventions on which many Member States' laws on copyright and related rights are based.

As that directive is intended to harmonise certain aspects of the law on copyright and related rights in the field of intellectual property in compliance with the relevant international agreements such as, inter alia, the Rome Convention, the TRIPS Agreement and the WPPT, it is supposed to establish a set of rules compatible with those contained in those agreements.

It follows from all those considerations that the concepts appearing in Directives 92/100 and 2001/29, such as 'communication to the public' must be interpreted in the light of the equivalent concepts contained in those international agreements and in such a way that they are compatible with those agreements, taking account of the context in which those concepts are found and the purpose of the relevant provisions of the agreements as regards intellectual property.

Having regard to the foregoing considerations, the answer to the first to third questions is:

— the provisions of the TRIPS Agreement and the WPPT are applicable in the legal order of the European Union,

— as the Rome Convention does not form part of the legal order of the European Union it is not applicable there; however, it has indirect effects within the European Union

— individuals may not rely directly either on that convention or on the TRIPS Agreement or the WPPT;

— the concept of 'communication to the public' must be interpreted in the light of the equivalent concepts contained in the Rome Convention, the TRIPS Agreement and the WPPT and in such a way that it is compatible with those agreements, taking account of the context in which those concepts are found and the purpose of the relevant provisions of the agreements as regards intellectual property."

72. The judgment in *SCF* thus confirms that—at least insofar as equivalent concepts are concerned—the 2006 Directive must be interpreted so far as possible in the light of concepts under the Rome Convention and the WPPT. It is also necessary to take account of the "context in which those concepts are found".

73. The judgment in *SCF* had been foreshadowed, to some extent, by that in *Sociedad General de Autores y Editores de España (SGAE),* Case C 306/05, EU:C:2006:764 (hereinafter "*SGAE*"). The dispute in the national proceedings concerned whether the use of television sets and the playing of ambient music within a hotel involved a "communication to the public". The dispute arose in the context of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society. In the course of its judgment, the Court of Justice reiterated that Community legislation must, so far as possible, be interpreted in a manner that is consistent with international law, in particular where its provisions are intended specifically to give effect to an international agreement concluded by the Community.

74. In the course of the submissions in the present case, leading counsel for the State, Patrick McCann, SC, sought to draw a

distinction between (i) international agreements to which the European Union is a party (such as the WPPT), and (ii) other international agreements to which it is not a party (such as the Rome Convention). It was suggested that the Rome Convention only has "indirect effect" in the European legal order.

DISCUSSION

(I) ARTICLE 8(2)

75. The case law above establishes that it is necessary to have regard to the provisions of the WPPT when interpreting the 2006 Directive. In each instance, however, the Court of Justice was considering circumstances where the provision of the 2006 Directive in issue mirrored a provision of the WPPT, e.g. "communication to the public" or "equitable remuneration". The novel aspect of the present case is, of course, that the provisions of the WPPT upon which RAAP rely have no direct counterpart under the 2006 Directive. This raises the question of whether the interpretative obligation extends to concepts under the international agreements which have no express equivalent under the 2006 Directive. Mr Collins, SC has argued cogently on behalf of RAAP that it does. Emphasis is placed on the requirement to take account of the *context* in which concepts are found, and the *purpose* of the international agreements. It is said that a direct lineage can be traced from the provisions of article 8(2) of the 2006 Directive not only to article 15 of the WPPT (which is equivalent to article 8(2)) but also through to article 4 of the WPPT (national treatment) which expressly refers to article 15. On this argument, the equivalent concept common to both the 2006 Directive and the WPPT is a right on the part of performers to share in the equitable remuneration payable in the case of communication to the public. Article 4 of the WPPT indicates that—subject always to the possibility of a reservation under article 4(2)—the beneficiaries of the right are the nationals of the other Contracting Parties as defined in article 3(2) of WPPT. Article 3(2), in turn, provides in effect that the beneficiaries are those nationals who meet the criteria for eligibility for protection under the Rome Convention. The combined effect of article 4 and 5 of the Rome Convention is that once the sound recording is protected, then both producers and performers are entitled to share in the equitable remuneration. Article 5 of the Rome Convention, as a result of the thirty day rule, extends the benefit to producers generally. The result, or so it is said, is that the beneficiaries of the right to a share of equitable remuneration include a broad range of producers and performers far beyond persons just from the particular contracting States.

76. Reference is also made to article 23(1) of the WPPT which provides that the Contracting Parties undertake to adopt, in accordance with their legal systems, the measures necessary to ensure the application of that treaty. Mr Collins, SC observes that the European Union, as a Contracting Party, is subject to this obligation, and goes on to argue that one of the ways in which the EU meets this obligation is through article 8(2) of the 2006 Directive.

77. To summarise RAAP's arguments in this regard, its case is that the concepts of performers and producers sharing a right to single equitable remuneration payable by a user are common to both article 8(2) of the 2006 Directive and article 15 of the WPPT. These are, on RAAP's argument, "equivalent concepts" in the sense in which that phrase is employed by the Court of Justice in its judgment in SCF. Article 8(2) should, it is submitted, be interpreted in a way that is compatible with what counsel describes as the "substantive rights" that are created in the WPPT and by reference to the Rome Convention. It would be inappropriate to adopt a literal interpretation to the 2006 Directive—which relies on the fact that the words "national treatment" do not appear in the 2006 Directive—to jettison all of the machinery and/or substantive rights under the WPPT.

78. The counterargument on behalf of PPI is that there is no principle of law which allows for detailed provisions of the Rome Convention and the WPPT to be imported wholesale into the 2006 Directive. Mr Paul Gallagher, SC describes article 8(2) as a precise provision, which does not prescribe details such as who the qualifying performers are to be. Had the EU legislature wished to be prescriptive as to which producers and performers are to qualify to share the right to remuneration—rather than leave it to the Member States to determine—then this would have been set out in the 2006 Directive. Instead, there is no equivalent concept under the 2006 Directive. Reference was made in this regard to various extracts from *Sterling on World Copyright Law* (4th ed., Sweet & Maxwell Thomson Reuters), in particular at §28B.07. The 2006 Directive goes no further than saying in its recitals that it is not intended to conflict with the international conventions on which the copyright and related rights law of the Member States are based.

79. Mr Gallagher, SC accepts, of course, that a Member State is required, by dint of the general principle of EU law against discrimination on grounds of nationality, to treat the nationals of EU Member States in the same way as its own nationals. (This point was made in connection with the 1992 version of the Directive by the Advocate General in *SENA*. The point is also made in *Sterling on World Copyright Law* (op. cit) at §28B.07). This requirement is met under the Copyright Act 2000 by the express inclusion of EEA countries in the definition of qualifying performances. On PPI's argument, there is no obligation under the 2006 Directive nor under any general principle of EU law, to extend national treatment to non-EEA nationals. There is nothing in the 2006 Directive which makes reference to criteria determining eligibility for protection which can be met by non-EEA citizens.

80. Counsel makes the further point that the expansive interpretation of the 2006 Directive urged upon the court by RAAP would override the opt-out which is expressly provided for under article 4(2) of the WPPT. Thus it is said that even if the 2006 Directive did engage with the question of which producers and performers qualify—which PPI says it does not—there has been no suggestion that the 2006 Directive overrides the WPPT, and, accordingly, the right to respond to a reservation by another contracting party under article 4(2) applies. The recitals of the 2006 Directive make it clear that it is intended not to conflict with international convention. (I will return to this point at paragraph 91 *et seq.*)

81. Reference is also made to the transitional provisions of the 2006 Directive. These, it is submitted, involve an acknowledgment of the domestic legislation of the Member States and that it applies to the rights protected as of 1 July 1994. This, it is said, negates any suggestion (i) that the rights are being dealt with in the 2006 Directive; (ii) that the rights are being harmonised; or (iii) that the national legislation is inconsistent with the 2006 Directive or indeed the WPPT.

82. The State, in its oral submissions, drew attention to the wording of Recital 6 and the use of the phrase "a harmonised legal protection within the Community". This, it was suggested, indicated that the target of the 2006 Directive is economic actors within the Community, and not intended to address the position of economic actors *outside* the Community.

DECISION ON INTERPRETATION OF ARTICLE 8

83. I have come to the conclusion that the interpretation of article 8 of the 2006 Directive is not *acte clair*. In particular, the extent to which it is legitimate to rely upon provisions of the WPPT and the Rome Convention to interpret article 8 remains uncertain. Whereas the case law of the Court of Justice discussed above confirms that the 2006 Directive must be interpreted as far as is possible in the light of the two international agreements, in each instance the Court of Justice was concerned with a concept under the international agreements for which there was a direct equivalent under the 2006 Directive, e.g. "communication to the public" or "equitable remuneration". The novel aspect of the present case is, of course, that the provisions of the Rome Convention and the WPPT relied upon have no direct counterpart under the 2006 Directive. There is no express provision made under the 2006 Directive for national treatment.

84. If I were deciding the case by reference to Irish principles of statutory interpretation, I would have much sympathy for the approach contended for by PPI. In particular, I would attach significant weight to the fact that the EU legislature chose not to incorporate a requirement for national treatment into the 2006 Directive. This was so notwithstanding the fact that a Council Decision had been adopted to approve the WPPT a number of years earlier (16 March 2000). The EU legislature was conscious of the requirements of the WPPT but nevertheless omitted to replicate the requirement for national treatment. As a common—as opposed to a civil—lawyer, I would regard this omission as deliberate, and as having the legal consequence that the Member States retained *discretion* to prescribe the qualifying criteria for producers and performers. Of course, the Member States would be obliged to comply with the general principle of European law in respect of non-discrimination. This general principle would not, however, require Member States to afford copyright protection to non-EEA countries such as the USA.

85. It occurs to me, however, that the expansive approach evident from the case law of the Court of Justice suggests that there is a real possibility that the Court of Justice would rule that the interpretative obligation extends even to concepts which are not expressly referenced in the 2006 Directive. In this regard, I cannot ignore the fact that Advocate General Tizzano in *SENA* had concluded that the rules on national treatment under the Rome Convention are an integral part of European law. See paragraph 65 above. Notwithstanding that the Advocate General's conclusion was not formally endorsed by the Court of Justice in its judgment in *SENA*, the very fact that such an eminent Advocate General seems to have been prepared to accept that the requirement for national treatment under the Rome Convention informs the interpretation of the concept of "equitable remuneration" even in the absence of any express provision to like effect under the 1992 Directive itself is—at the very least—relevant to the question of whether the interpretation of article 8(2) of the 2006 Directive is *acte clair*. Even if I do not necessarily agree with the expansive approach to interpretation suggested by Advocate General Tizzano, it would be difficult to say that the correct application of EU law is so obvious as to leave no scope for any reasonable doubt.

86. Given my conclusion that the issue is not *acte clair*, I must now consider whether it is appropriate to make a reference to the Court of Justice for a preliminary ruling. The High Court is not a court of final remedy within the meaning of Article 267 of the Treaty on the Functioning of the European Union ("*TFEU*") in that there would be an automatic right of appeal to the Court of Appeal from any substantive judgment that this court might give. Accordingly, the making of a reference is not mandatory.

87. In the particular circumstances of this case, however, it occurs to me that it would be preferable that a reference be made at this stage, rather than to await any possible appeal to the Court of Appeal, for the following two reasons.

88. First, upon the application of PPI, the correct interpretation of the 2006 Directive has been set down for trial as a preliminary issue. Part of the logic of that application, and of the judgment of Cregan J. in February 2018, was that it could lead to a saving in time and costs to have these legal issues determined first. In particular, it might avoid a lengthy hearing on factual issues involving an assessment of the quantum of licence fees payable. It seems to me that similar logic applies to the timing of an Article 267 reference. It occurs to me that it is almost inevitable that this case will ultimately end up before the Court of Justice, given that the legal issues are not *acte clair*. It seems preferable that this process begin sooner rather than later. The workload of the Court of Appeal is such that a hearing date for any appeal might not be allocated for at least a year or two. There would then be a further delay were the matter only to be referred to the Court of Justice for the first time at that stage. The hearing and final determination of a reference might take another eighteen months thereafter. There is much to be said for short circuiting matters and making a reference now.

89. Secondly, I note that—albeit at different points in time—both parties had canvassed the possibility of the High Court making a reference. At the hearing before me in mid-November 2018, counsel for RAAP had suggested that a reference might be made, and had helpfully prepared some draft questions for consideration. Although counsel for PPI at the hearing before me opposed the making of a reference on the basis that same was not necessary, I note from the judgment of Cregan J. that the possibility of a reference was one of the factors informing the decision to direct the trial of preliminary issues.

90. In the premises, I propose to make a reference to the Court of Justice. I will now consider whether the reference should be confined to the interpretative issues discussed above, or whether it should extend to include the issue of the "response to the reservation". In this regard, it will be recalled that PPI contend that insofar as the definition of qualifying performers under the Irish copyright legislation has the effect that certain performers from non-EEA countries, such as, in particular, the United States of America, do not qualify, this is a lawful response to the reservation which the USA has entered under article 15(3) of WPPT. I address this issue under the next heading below.

RESPONSE TO RESERVATION

91. As appears from the summary of the relevant provisions of the WPPT set out at paragraph 24 *et seq*. above, the obligation under article 4 to extend the right of equitable remuneration to the nationals of other Contracting Parties is subject to the possibility of a reservation under article 15(3). The Contracting Parties enjoy a wide measure of discretion as to the type of reservation which they may enter. The right to a single equitable remuneration under article 15(1) may (i) be applied in respect of certain uses only, (ii) be limited in some other way, or (iii) not be applied at all.

92. Although the proceedings come before the court by way of the trial of a number of preliminary issues, and raise questions as to the interpretation of the legislation at a very high level of general principle, the parties were all agreed that it was legitimate to have regard to the position of the USA as providing a practical example of the interaction between the Irish copyright legislation and the WPPT.

93. The USA is a Contracting Party to the WPPT but has entered a reservation under article 15(3) as follows.

> "Pursuant to Article 15(3) of the WIPO Performances and Phonograms Treaty, the United States will apply the provisions of Article 15(1) of the WIPO Performances and Phonograms Treaty only in respect of certain acts of broadcasting and communication to the public by digital means for which a direct or indirect fee is charged for reception, and for other retransmissions and digital phonorecord deliveries, as provided for under United States law."

94. But for this reservation, the Irish State *would have been* obliged under the WPPT to afford national treatment to US nationals. A US producer would be entitled to copyright protection on the basis of either (i) their being a US domicile or resident (the combined effect of section 183 of the Copyright Act 2000 and the Copyright (Foreign Countries) Order 1996), or (ii) the sound recording having been first published in the USA (section 184 of the Copyright Act 2000). In order for a US performer to be entitled to copyright protection, it *would have been* necessary for the Minister to make a designation order under section 289 in favour of the USA. (A US performer does not meet the existing qualifying criteria under section 287 and 288 for the obvious reason that the USA is not an EEA country).

95. Of course, the fact that the USA has entered a reservation under article 15(3) has the consequence that the Irish State is

relieved of the obligation to extend national treatment to US nationals. However, the actual effect of the Copyright Act 2000 is that US producers will, in many instances, qualify for copyright protection, whereas US performers will usually not qualify. This difference in treatment occurs because a US producer can avail of the "first publication" criteria under section 184 to qualify for copyright protection, whereas a US performer cannot. The upshot of all of this is that in the case of some sound recordings involving US producers and US performers, the *entirety* of the licence fee payable under section 38, i.e. the equitable remuneration, accrues for the sole benefit of the producer. There was considerable disagreement between the parties to these proceedings as to whether this asymmetric treatment of producers and performers, respectively, represented a legitimate response to the article 15(3) reservation entered by the USA.

96. Counsel for RAAP placed particular emphasis on the phrase "to the extent" in article 4(2). It was suggested that any response to a reservation must *mirror* the reservation. The responding Contracting Party must respect the fundamental imperatives under article 4(1) of affording national treatment, and affording a right to a *shared* remuneration. It was submitted that the reservation constrains the response, and that the requirement for national treatment can only be departed from to the same extent that the reservation is made. The reservation entered by the USA is defined by reference to the *use* to be made of the sound recording. The reservation thus applies equally to producers and performers. It was submitted that it was not permissible for the Irish State to respond to this reservation by extending copyright protection to producers in circumstances where (i) the USA would not provide copyright protection on a reciprocal basis, and (ii) performers on the same sound recording would not be entitled to share in the single equitable remuneration.

97. Counsel made a further argument by reference to the Rome Convention. Article 1(1) of the WPPT provides that nothing in that treaty shall derogate from existing obligations that the Contracting Parties have to each other under the Rome Convention. Counsel suggested that Ireland had not invoked article 16 which would have allowed for a reservation to article 12 of the Rome Convention.

98. Counsel argues that the introduction of the qualifying criteria for performers under the Copyright Act 2000 could never be an appropriate response to an article 15(3) reservation because the qualifying criteria do not reflect the correct eligibility criteria under the WPPT. The WPPT requires each Contracting Party to afford the protection of national treatment on one of two grounds. First, that the performance takes place in the territory of a Contracting Party. Secondly, that the performance has been fixed in a sound recording which recording is itself protected under the WPPT (including protection by virtue of the thirty day rule).

99. The qualifying criteria for performers under the Copyright Act 2000 are different. A performer is only entitled to share in the equitable remuneration in circumstances where either (i) the performance has taken place in Ireland or an EEA country, or (ii) the performer in question has the requisite personal connecting factor with Ireland or an EEA country. It is submitted that the first criteria, i.e. place of performance, is incorrectly defined in that it is wrongly limited to EEA countries as opposed to the territory of any Contracting Party. The second criteria, i.e. domicile or residence, is a criteria which, it is submitted, had been explicitly abandoned under the WPPT. Instead it is said that the requisite criteria, namely an automatic right to share in the equitable remuneration for performers whose performances are contained in protected sound recordings, has been omitted completely from the domestic legislation.

100. Counsel suggests that a lawful response to a reservation under article 15(3) of the WPPT can only be achieved by withholding copyright protection on a reciprocal basis by reference to the correct eligibility criteria.

101. Conversely, PPI argue that—as a consequence of the USA having entered its reservation under article 15(3)—there was no obligation at all to provide any reciprocal rights to US producers or performers. The fact that the Irish State was relieved of its obligation under article 4 of the WPPT in respect of US domiciles and residents did not, however, preclude the Irish State from providing copyright protection on a *voluntary* basis. Thus, whereas there was no obligation under the WPPT to do so, Ireland was entitled to lay down eligibility criteria in such a way that US producers might qualify to be paid equitable remuneration in certain circumstances.

DECISION ON RESPONSE TO RESERVATION

102. I must admit that I have very real doubts as to whether the Copyright Act 2000 properly implements the WPPT insofar as Contracting Parties which are non-EEA countries are concerned. I think that there is much force in RAAP's submission that the eligibility criteria prescribed under the Act do not properly reflect those laid down under the WPPT for performers. Of course, this court does not have jurisdiction to rule on the compatibility of domestic legislation with an international agreement. Under Article 29 of the Irish Constitution, an international agreement only becomes part of the domestic legal order to the extent that the Oireachtas has legislated for same. The WPPT has not been incorporated into domestic law.

103. The only possible relevance for this court of the WPPT is as an aid to the interpretation of the 2006 Directive. If article 8(2) of the 2006 Directive must be viewed through the lens of the WPPT—in particular, the requirement for national treatment under article 4, and share remuneration under article 15—then it is necessary to consider whether the Copyright Act 2000 contains a lawful response to the reservation by the USA under article 15(3).

104. The resolution of this issue requires careful consideration of the provisions of the WPPT. In particular, it requires consideration of what is meant by the phrase "to the extent" as used in article 4(2). It also requires, more generally, a consideration of the concept of national treatment and, in particular, the inter-action between the WPPT and the Rome Convention.

105. In the absence of case law of the Court of Justice on these points, I have concluded that the issues are not *acte clair*. In particular, it is unclear whether a response to a reservation must mirror the reservation.

106. Indeed, a question might arise as to whether a national court, such as this court, has jurisdiction to interpret these provisions of the WPPT. As appears from the Council Decision to ratify the WPPT, the agreement is what is described in the case law as a "mixed agreement", with certain obligations on the European Union and on the individual Member States.

107. The judgement in *Lesoochranárske zoskupenie VLK*, Case C-240/09, EU:C:2011:125 ("*Brown Bear I*") suggests that, at least insofar as the determination of whether a mixed agreement has direct effect is concerned, the Court of Justice is the appropriate forum with exclusive competence. I must admit that I have some doubt as to whether this court would have jurisdiction to interpret the WPPT. At all events, it is clear that this court is entitled to make reference to the Court of Justice for a preliminary ruling. I propose to include questions in respect of the "response to the reservation" as part of the Article 267 reference. I set out a draft form of question in an Appendix to this judgment.

SHOULD ARTICLE 267 REFERENCE ADDRESS THE REMEDY?

108. The final issue to be considered is whether the Article 267 reference should also raise questions as to the nature of the *remedy*

which should be provided in the event that RAAP were to be successful in its arguments as to the correct interpretation of the 2006 Directive. The case as pleaded invites the court to give a purposive or conforming interpretation to domestic legislation. However, in circumstances where the domestic legislation is clear and unambiguous, it does not seem to me that a conforming interpretation is open. The legislation clearly discriminates on the basis of domicile and residence, and there is no room for reading any other interpretation into the legislation.

109. The alternative approach was to invite the court to disapply the provisions of domestic law. There was some debate before me as to whether a national court's jurisdiction to disapply provisions of domestic legislation is limited to circumstances where the relevant EU legislation has direct effect or is directly applicable. This issue is of importance in the present case in circumstances where the Court of Justice has ruled in *SCF* at [48] that the provisions of the WPPT have no direct effect in the law of the European Union, and are not such as to create rights for individuals which they may rely on before the courts by virtue of that law. This finding was reached on the basis that the provisions of the WPPT in their implementation or effects, are subject to the adoption of subsequent measures under article 23(1).

110. It is my understanding that the jurisdiction of a national court to set aside or disapply provisions of domestic legislation only arises in circumstances where (i) the EU legislation relied upon has direct effect or is directly applicable, and (ii) the proceedings are taken against an emanation of the State. If both of those conditions are not met, then the obligation on a national court is confined to an interpretive obligation. The national court is required to interpret national legislation insofar as is possible in light of the purpose and objective of the EU legislation. This formulation implies a limitation, i.e. the *contra legem* principle.

111. Mr Gallagher, SC on behalf of PPI helpfully referred me to the judgment in Case C 351/12, *OSA*, EU:C:2014:110 at paragraphs [42] to [48].

> "By its second question, the referring court asks, in essence, whether Article 3(1) of Directive 2001/29 must be interpreted as meaning that it can be relied on by a collecting society in a dispute between individuals for the purpose of setting aside national legislation which is contrary to that provision.
>
> In that respect, it must be recalled that, according to settled case-law, even a clear, precise and unconditional provision of a directive seeking to confer rights or impose obligations on individuals cannot of itself apply in proceedings exclusively between private parties (Case C 176/12 *Association de médiation sociale* [2014] ECR, paragraph 36 and the case-law cited).
>
> However, the Court has held that a national court, when hearing a case between individuals, is required, when applying the provisions of domestic law, to consider the whole body of rules of national law and to interpret them, so far as possible, in the light of the wording and purpose of the directive in order to achieve an outcome consistent with the objective pursued by the directive (see, to that effect, *Association de médiation sociale*, paragraph 38 and the case-law cited).
>
> Nevertheless, the Court has stated that this principle of interpreting national law in conformity with European Union law has certain limits. Thus the obligation on a national court to refer to the content of a directive when interpreting and applying the relevant rules of domestic law is limited by general principles of law and it cannot serve as the basis for an interpretation of national law *contra legem* (*Association de médiation sociale*, paragraph 39 and the case-law cited).
>
> In addition, since, in the context of the reasons stated for the second question, the referring court raises an issue concerning the real nature of a collecting society such as OSA, referring to Case C 188/89 *Foster and Others* [1990] ECR I 3313, it must be added that such a collecting society would still not be able to rely on Article 3(1) of Directive 2001/29 in order to set aside national legislation contrary to that provision if it were to be regarded as an emanation of the State.
>
> If that were the case, the situation, in circumstance such as those in the main proceedings, would not be that of an individual invoking the direct effect of a provision of a directive against a Member State, but rather the reverse. It is settled case-law that a directive cannot of itself impose obligations on an individual and cannot therefore be relied on as such against an individual (Case C 282/10 *Dominguez* [2012] ECR, paragraph 37 and the case-law cited).
>
> In view of the foregoing, the answer to the second question is that Article 3(1) of Directive 2001/29 must be interpreted as meaning that it cannot be relied on by a collecting society in a dispute between individuals for the purpose of setting aside national legislation contrary to that provision. However, the national court hearing such a case is required to interpret that legislation, so far as possible, in the light of the wording and purpose of the directive in order to achieve an outcome consistent with the objective pursued by the directive."

112. This approach appears to be consistent with the recent judgment of the Grand Chamber of the Court of Justice in *Smith v. Meade*, Case C 122/17, EU:C:2018:223. In that judgment, the Court of Justice held that a national court, hearing a dispute between private persons, which finds itself unable to interpret provisions of its national law in a manner that is compatible with a directive, is not obliged, solely on the basis of EU law, to disapply the provisions of its national law which are contrary to those provisions of that directive that fulfil all the conditions required for them to produce direct effect.

113. This approach also appears to be consistent with the very recent judgment of the Grand Chamber of the Court of Justice in *Minister for Justice v. Commissioner of An Garda Síochána*, Case C 378/17, EU:C:2018:979. This case concerned the obligation, if any, on an administrative tribunal (on the facts, the Workplace Relations Commission) to disapply provisions of national law. For present purposes, what is relevant is that the Court of Justice appeared to proceed on the assumption that the obligation to disapply only ever arises in the case of "directly applicable" EU rules. See paragraphs [34] to [36].

> "The Member States have the task of designating the courts and/or institutions empowered to review the validity of a national provision, and of prescribing the legal remedies and the procedures for contesting its validity and, where the action is well founded, for striking it down and, as the case may be, determining the effects of such striking down.
>
> On the other hand, in accordance with the Court's settled case-law, the primacy of EU law means that the national courts called upon, in the exercise of their jurisdiction, to apply provisions of EU law must be under a duty to give full effect to those provisions, if necessary refusing of their own motion to apply any conflicting provision of national law, and without requesting or awaiting the prior setting aside of that provision of national law by legislative or other constitutional means (see, to that effect, judgments of 9 March 1978, *Simmenthal*, 106/77, EU:C:1978:49, paragraphs 17, 21 and 24, and of 6 March 2018, *SEGRO and Horváth*, C-52/16 and C-113/16, EU:C:2018:157, paragraph 46 and the case-law cited).

> Accordingly, any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of EU law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to disregard national legislative provisions which might prevent directly applicable EU rules from having full force and effect are incompatible with the requirements which are the very essence of EU law (see, to that effect, judgments of 9 March 1978, *Simmenthal,* 106/77, EU:C:1978:49, paragraph 22; of 19 June 1990, *Factortame and Others*, C-213/89, EU:C:1990:257, paragraph 20; and of 8 September 2010, *Winner Wetten*, C-409/06, EU:C:2010:503, paragraph 56)."

114. Given that the judgment in *Minister for Justice v. Commissioner of An Garda Síochána* was only delivered *subsequent* to the hearing in the present case, I will, of course, afford the parties an opportunity to make submissions on same before I make any decision as to whether to include, as part of the proposed Article 267 reference, a question on the nature of the remedy, if any, which might arise in the circumstances of the present proceedings.

CONCLUSION

115. For the reasons outlined, I propose to make a reference pursuant to Article 267 of the TFEU to the Court of Justice for a preliminary ruling in respect of a number of issues arising in this case. I have set out the possible form of those questions as an Appendix to this judgment. I will, however, hear from counsel before settling on the final form of the questions.

116. I will also hear from counsel in respect of the last of the issues discussed above, namely whether the proposed Article 267 reference should include an additional question on the nature of the remedy, if any, which might arise in the circumstances of the present proceedings. In particular, I invite submissions in respect of the judgment in *Minister for Justice v. Commissioner of An Garda Síochána*, Case C 378/17, EU:C:2018:979.

APPENDIX

1. Is the obligation on a national court to interpret the Directive 2006/115 on rental right and lending right and on certain rights related to copyright in the field of intellectual property ("the Directive") in the light of the purpose and objective of the Rome Convention and/or the WPPT confined to concepts which are expressly referenced in the 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 the 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 a European Economic Area ("EEA") country, or (ii) the performers are domiciles 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? 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?