

BETWEEN

RECORDED ARTISTS ACTORS PERFORMERS LIMITED

PLAINTIFF

AND

PHONOGRAPHIC PERFORMANCE (IRELAND) LIMITED

DEFENDANT

JUDGMENT of Mr Justice Garrett Simons delivered on 11 January 2019

Abbreviations

"RAAP" Recorded Artists Actors Performers Ltd.

"PPI" Phonographic Performance (Ireland) Ltd.

OVERVIEW

1. These proceedings relate to an ongoing dispute as to the distribution of licence fees payable in respect of the secondary use of recorded music. Secondary use refers to activities such as *inter alia* the playing of recorded music in public, or its use in radio or television broadcasts.

2. These proceedings are the second of two sets of proceedings which the plaintiff, Recorded Artists Actors Performers Ltd. ("RAAP") has instituted against Phonographic Performance (Ireland) Ltd. ("PPI"). Both sets of proceedings raise issues as to the sharing of the licence fees as between (i) the owner of the copyright in the sound recording, i.e. the producer, and (ii) the performers whose performances have been fixed in the sound recording.

3. The principal issue in the first set of proceedings, *Recorded Artist Actors Performers Ltd v. Phonographic Performance (Ireland) Ltd.* (High Court 2016 No. 6897 P.), concerns the criteria prescribed in domestic law for determining which performers qualify to share in the licence fee. RAAP contends that the criteria do not comply with a European Directive on rights related to copyright protection (Directive 2006/115/EC).

4. The principal issue in the second set of proceedings concerns the statutory functions of the organisations which represent producers and performers, respectively. In particular, an issue arises as to which organisation is charged with calculating the licence fees payable to individual performers. RAAP contends that this role resides with it, as the collective management organisation representing performers. On this argument, PPI is required to make a lump sum payment to RAAP, and RAAP will then distribute that sum—less deductions for administrative costs—to individual performers. There is a second issue as to whether RAAP is entitled to collect on behalf of *all* of the performers within a particular class, or only those performers who have actually assigned that right to it.

5. By the order of the High Court (Cregan J.) of 30 April 2018, the trial of a number of preliminary issues was directed in each of the two sets of proceedings. The trial of the preliminary issues came on for hearing before me on 20 November 2018, and ran for four days. I am delivering judgment in both sets of proceedings this morning (11 January 2019).

LEGISLATIVE BACKGROUND

6. In order to put the preliminary issues the subject-matter of this judgment into context, it is necessary to provide a brief summary of the legislative background.

Directive 2006/115/EC

7. The starting point is the relevant European Directive on rights related to copyright, namely Directive 2006/115/EC ("the 2006 Directive"). The 2006 Directive is a codified version of an earlier directive, namely Directive 92/100/EEC ("the 1992 Directive"). Both versions of the Directive provided for a shared right of equitable remuneration as between the owner of the copyright in a sound recording, i.e. a producer, and the performers. In each version of the Directive, the relevant provision is found at article 8, and is in the following terms.

"Article 8

Broadcasting and communication to the public

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.

3. Member States shall provide for broadcasting organisations the exclusive right to authorise or prohibit the rebroadcasting of their broadcasts by wireless means, as well as the communication to the public of their broadcasts if such communication is made in places accessible to the public against payment of an entrance fee."

8. As appears, article 8(2) envisages two steps, first, the user of the sound recording is to make a single payment ("equitable remuneration"); and secondly, this equitable remuneration is then to be shared between the relevant performers and phonogram producers.

9. The Irish State did not implement the 1992 Directive within the time allowed, and this delay was the subject of infringement proceedings before the Court of Justice, Case C 213/98 *Commission v. Ireland*, EU:C:1999:496.

10. The Irish State has since implemented the requirements of what was the 1992 Directive and is now the 2006 Directive in the

Copyright and Related Rights Act 2000 ("*Copyright Act 2000*"). The two steps envisaged by article 8(2) are reflected under section 38, and sections 205 and 208 of the Copyright Act 2000.

Section 38

11. Section 38 provides for the payment of a single licence fee by a person who wishes to play recorded music in a public place or to include a sound recording in a broadcast. This licence fee is payable by the user to a licensing body which represents producers. A "licensing body" is defined for this purpose as follows.

"(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."

12. As appears from this definition, the licensing body must either be (i) the owner or prospective owner of copyright in the sound recording, or (ii) the owner's or prospective owner's exclusive licensee, agent or designated representative. In effect, this definition envisages that a licensing body which is not the owner of the copyright will obtain its right to act as such via some sort of contractual arrangement with the owner of the copyright. As discussed at paragraph 45 *et seq.* below, RAAP contends that no such contractual arrangement is necessary in the case of a body representing *performers*.

13. PPI is registered as a licensing body with the Controller of Patents and Designs ("*the Controller*"). Thus if the owner of a bar, nightclub or any other public place wishes to play recorded music to their patrons, then the owner is required to pay a licence fee to PPI. Similarly if a radio station wishes to include recorded music in a broadcast, it must pay a licence fee to PPI.

14. The licence under section 38 is a licence as of right, i.e. there is no necessity for the user to negotiate with individual producers. See, in particular, sections 38(2) to (3) as follows.

"(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."

Sections 205, 208 and 265

15. The second step envisaged by article 8(2) involves the sharing of the equitable remuneration, i.e. the licence fee collected from the user, as between the producer and the performer. This is provided for under the Copyright Act 2000 principally at section 205 and section 208.

16. Section 205(1) provides that a performer has the exclusive right to authorise or prohibit the making available to the public of copies of a recording of the whole or any substantial part of a qualifying performance. Section 205(2) provides that—where a copy of a sound recording is played in public or included in a broadcast or cable programme service—this right shall be deemed to be satisfied by the payment of equitable remuneration as specified under section 208.

17. The right to receive equitable remuneration is created under section 208(1).

"208.—(1) A performer has a right to equitable remuneration from the owner of the copyright in a sound recording where the sound recording of the whole or any substantial part of a qualifying performance which has been made available to the public for commercial purposes is—

(a) played in public, or

(b) included in a broadcast or cable programme service."

18. As appears, a performer's right to equitable remuneration is a right as against the owner of the copyright in a sound recording, i.e. the producer. This is to be contrasted with the payment of a licence fee by the user under section 38, where the licence fee is payable to a *licensing body*. There is no obligation on the user to make a payment to the producer.

19. A performer may assign their right to equitable remuneration to a collecting society. This is provided for under section 208(2).

"(2) A performer shall not assign the right to equitable remuneration under this section except to a collecting society for the purpose of enabling the collecting society to exercise that right on his or her behalf."

20. The language of section 208(2) indicates that it operates as a curb on the right of assignment. It appears that the legislation seeks to protect performers from the risk that they might be put under pressure to assign the right to equitable remuneration to a third party, such as, for example, a record company. A performer may only assign the right of equitable remuneration to a collecting society. The wording of section 208(2) clearly envisages that there will be an actual assignment, rather than some form of *deemed* assignment. This is significant when we come to consider the second of the two preliminary issues to be tried in these proceedings.

21. The requirement for an actual assignment tends to be confirmed by the provisions of section 208(3) which indicate that the right to equitable remuneration is capable of being transmitted and assigned.

"(3) The right to equitable remuneration is transmissible by testamentary disposition or by operation of law, as personal or moveable property, and it may be assigned or further transmitted, including by assignment, by any person who legally acquires the right."

22. The scheme of section 208, therefore, is that a producer is obliged to make a payment either (i) to a performer, or (ii) to a collecting society to whom the right to equitable remuneration has been assigned by the performer.

23. The term "collecting society" is not defined in this context. There is, however, a definition provided for a "licensing body" in the context of performers under section 265 as follows.

"'licensing body' means a society or other organisation which has as its main object, or one of its main objects, the negotiating or granting, either as owner or prospective owner of a performer's property rights, or as exclusive licensee or as agent for him or her, of performers' property rights licences, and whose objects include the granting of licences relating to the performances of more than one performer;"

24. Section 208(4) envisages that the amount of equitable remuneration payable is to be agreed by or on behalf of the persons by and to whom it is payable.

"(4) Subject to subsections (5) to (9), the amount of equitable remuneration payable under this section is that which has been agreed by or on behalf of the persons by and to whom it is payable."

25. Crucially, however, sections 208(5) to (9) provide for a dispute resolution mechanism. Specifically, in default of agreement as to the amount of equitable remuneration payable, the person by or to whom it is payable may apply to the Controller for an order determining the method of calculating and paying equitable remuneration.

"(5) In default of agreement as to the amount of equitable remuneration payable, the person by or to whom it is payable may apply to the Controller for an order under subsection (8).

(6) Subject to subsection (7), a person to or by whom equitable remuneration is payable may also apply to the Controller

(a) vary any agreement as to the amount payable, or

(b) to vary any previous determination of the Controller as to the amount payable.

(7) An application may not be made under subsection (6) within 12 months from the date of the previous determination except with the special leave of the Controller.

(8) On an application being made under this section, the Controller shall consider the matter and make such order as to the method of calculating and paying equitable remuneration as he or she may determine to be reasonable in the circumstances, having regard to the importance of the contribution of the performer to the sound recording.

(9) An order made under this section shall have effect from the date on which it is made or such later date as may be specified by the Controller."

26. Finally, section 208(10) provides as follows.

"(10) An agreement as to the amount of equitable remuneration payable shall be void in so far as it purports—

(a) to exclude or restrict the right to equitable remuneration conferred by this section,

(b) to prevent a person questioning the amount of equitable remuneration, or

(c) to restrict the powers of the Controller conferred by this section."

Sections 280, 281 and 286

27. The registration of licensing bodies in respect of the licensing of performers' property rights is to be found at Part III, Chapter 8 of the Copyright Act 2000.

28. Section 286 provides as follows.

"286.—(1) Any body operating as a licensing body within the meaning specified in section 265 shall be obliged to register in accordance with the provisions of this Chapter, and to remain registered for so long as it continues to operate in this capacity."

29. The criteria governing the decision to grant or refuse registration to a licensing body are set out at section 280 as follows.

"(4) An application for registration or renewal of a registration of a licensing body shall be made to the Controller in such form and manner as may be prescribed by the Minister and shall be subject to the payment of such fee as may be prescribed by the Minister with the consent of the Minister for Finance.

(5) The Controller shall register an applicant or renew a registration where the Controller is satisfied that—

- (a) the applicant complies with the definition of a licensing body specified in section 265 , and
- (b) the applicant has provided such information and satisfied such conditions as may be prescribed by the Minister for the purposes of registration.

(6) The information to be prescribed by the Minister under subsection (5)(b) shall include the following:

- (a) the name of the applicant;
- (b) the address of the applicant;
- (c) the names of the chairperson and other members of the board or officers, or names of partners, as the case may be, of the applicant;
- (d) a copy of the memorandum and articles of association or partnership agreement, of the applicant;
- (e) details of the scheme;
- (f) details of the scales of charges or proposed charges to be levied by the applicant; and
- (g) the class of rightsowners represented or proposed to be represented by the applicant."

"281.—A certificate granted under section 280(7) shall include the particulars specified in subsection (6) of that section and the certificate shall be evidence of the right of the licensing body, until the contrary is proved, to act on behalf of the classes of rightsowners for whom it claims representation rights or on behalf of the rightsowners who have assigned rights to it, or exclusively licensed it, as specified in that certificate."

31. RAAP contends that the effect of section 281 is to confer upon a registered licensing body a right to act on behalf of the entire class of performers, and that this right may be an exclusive right. I return to this point at paragraph 47 below. As discussed at paragraph 63 below, there is also a dispute between the parties as to whether a "licensing body"—as opposed to a "collecting society"—has any function at all under section 208.

32. Having completed this summary of the legislative background, we can now proceed to consider the first of the two preliminary issues set down for trial by the order of 30 April 2018.

(1) CALUCATION OF PAYMENT TO INDIVIDUAL PERFORMERS

33. The first preliminary issue concerns the question of which of the two parties—RAAP or PPI—bears the statutory obligation of determining the amount of the payments to be made by way of equitable remuneration to individual performers. It will be recalled that RAAP contends that this role resides with it, as the collective management organisation representing performers. On this argument, PPI is required to make a lump sum payment to RAAP, and RAAP will then distribute that sum—less deductions for administrative costs—to individual performers.

34. The issue is framed as follows by the order of the High Court of 30 April 2018.

"Whether s. 208(1) The Copyright & Related Rights Act, 2000 (The Act of 2000), places the statutory obligation to determine the payments to be made by way of equitable remuneration to performers upon the Plaintiff (RAAP), and not the Defendant (PPI)?"

35. The issue was elaborated upon in the judgment of 21 February 2018 as follows at page 50.

"123. The first issue sought is whether PPI or the plaintiff has a statutory duty to determine payments to performers. This issue is clear-cut: PPI claim that they have a statutory duty to determine payments to performers whereas RAAP maintains that PPI has no statutory duty in this regard. If PPI does have such a statutory duty then it cannot be open to RAAP to object on any basis to PPI carrying out that duty. This therefore is a clear issue of law to be decided by a court on the interpretation of the relevant provision.

124. It is clear that if the court decides that PPI does have a statutory obligation to determine payments to performers imposed upon it this clearly will remove the requirement to have a costly, and lengthy hearing on abuse of dominance, breach of the regulations and malicious falsehoods. No convincing argument has been put forward by RAAP as to why this is not so."

36. In brief, the preliminary issue which I have to determine is whether the combined effect of the provisions of the Copyright Act 2000 discussed under the previous heading above—and in particular the interaction between section 38, section 205 and section 281—is to confer a statutory obligation on either PPI or RAAP to determine the equitable remuneration payable to individual performers.

37. It occurs to me that much of the dispute between the parties in this regard arises from a failure on the part of RAAP to distinguish clearly between a number of distinct functions, as follows.

(i). Collection

38. The first function conferred on a collecting society, under section 208(2), is to *collect* the equitable remuneration payable to a qualifying performer. This function may only be exercised by a collecting society in circumstances where the individual performer has assigned their right to the collecting society. I address this latter point in more detail in the discussion of the second preliminary issue: see paragraph 45 below.

(ii). Negotiation

39. A collecting society has a second, related function of *negotiating* the manner in which the equitable remuneration is to be divided up as between, in the first instance, performers and producers; and, secondly, as between performers *intra se*. This right to negotiate derives from section 208(4), and, by implication, from the Collective Rights Management Directive 2014/26/EU.

(iii). *Determination of equitable remuneration*

40. The holding of a right to negotiate does not, however, confer upon RAAP a right to determine the amounts payable to individual performers. The only entity with legal authority to *determine* the amounts payable is the Controller. Whereas the Copyright Act 2000 does envisage that the basis for the distribution of the equitable remuneration will be achieved by agreement, it expressly provides a dispute resolution mechanism in default of agreement. RAAP is entitled, as a collecting society, to seek to *negotiate* a particular scheme of distribution on behalf of those performers who have assigned the right to collect equitable remuneration to it. If, however, an agreement cannot be reached, then the matter must be referred to the Controller pursuant to the provisions of sections 208(5) to (9). The language of section 208(5) is sufficiently broad to allow a collecting society, which has been assigned the right to collect the equitable remuneration, to refer a dispute to the Controller as “the person [...] to whom it is payable”, i.e. as assignee. Even if I am incorrect in thinking this, a work-around, similar to that employed in *Carrickdale Hotel Ltd. v. Controller of Industrial and Commercial Property* (High Court 2002 No. 350 SP), can be employed whereby the position of an individual performer is put forward as a test case to govern all performers in a similar position.

(iv). *Calculation of payment to individual performers*

41. There then remains the separate, narrow function of *calculating* the payment due to individual performers in accordance with an agreed—or imposed—scheme of distribution. This is a mechanical exercise, and requires an analysis of matters such as the frequency with which a particular sound recording has been made available to the public, and the identification of the individual performers involved in that sound recording and their roles, e.g. featured or non-featured performer. It will also require consideration of whether individual performers qualify for the payment of the equitable remuneration in accordance with the qualifying criteria prescribed under Part III, Chapter 9 of the Copyright Act 2000. (This latter issue is the subject-matter of the first set of proceedings).

42. A collecting society, such as RAAP, does not have a statutory function in this regard. This is because the statutory obligation to make a payment resides with the producer (or its representative). Once the detail of a scheme of distribution has been finalised—whether by agreement or by the Controller—it is a matter for the producer (or its representative) to pay out the relevant amounts to individual performers. The fact that an individual performer might express a preference that the equitable remuneration be paid to a collecting society on his or her behalf does not confer a function on the collecting society of *calculating* the payment. Rather, the function of the collecting society is confined to the collection of the fee, and, in the event of some discrepancy between the fee paid and the terms of the distribution scheme, to pursuing this with the producer (or its representative).

43. The fact that RAAP does not have a role in *calculating* the amounts payable to individual performers does not detract from its role in *representing* performers who have assigned rights to it. In particular, the important role of negotiating a scheme of distribution remains.

44. In summary, my conclusions in respect of the first preliminary issue are as follows. A collecting society is entitled (i) to negotiate on behalf of its members, and (ii) to collect the amounts payable in accordance with a scheme of distribution. A collecting society has no function in making the final determination as to how licence fees are to be distributed between (i) performers and producers, and (ii) performers *intra se*. That function resides with the Controller. The separate mechanical function of calculating the amounts of the payments accruing to individual performers in accordance with a distribution scheme is a matter for the producer (or its representative).

(2) DOES REGISTRATION EXTEND TO ALL PERFORMERS?

45. The second preliminary issue is defined as follows in the order of 30 April 2018.

“Whether, under s. 281 of the Act of 2000, RAAP is entitled to receive all remuneration payable by PPI to performers arising out of the playing in public, broadcasting or cable transmission of recordings of their performances in the State.”

46. As appears from the judgement of Cregan J. of 21 February 2018, the background to this issue is that RAAP asserts that it is entitled, by virtue of its registration as a licensing body under sections 280 and 281 of the Copyright Act, to collect on behalf of *all* performers within the licensed classes irrespective of whether the individual performer has assigned his or her rights to RAAP.

“125. The second issue is whether under s. 281 of the 2000 Act RAAP is entitled to receive all remuneration payable by PPI to performers in respect of performances. The matter is succinctly stated at para. 90 of the defendant’s legal submissions wherein it is submitted that PPI accepts that a performer may assign his right to receive remuneration to a collecting society under s. 208(2) of the Act. However PPI does not accept that RAAP is entitled to represent all performers (regardless of whether they have ever conferred upon RAAP any appointment to receive monies on their behalf) and thus receive all remuneration payable by PPI to performers. Thus the issue is whether RAAP is entitled to represent all performers even if they have never assigned their right to receive remuneration to RAAP. PPI submits that if RAAP is entitled to represent all performers generally as a matter of law then it is entitled to receive all remuneration payable by PPI and to calculate the payments due to individual performers. Thus they submit that whether RAAP is entitled to represent ‘performers generally’ is a question of law and must be decided by reference to the 2000 Act.”

(i) Legal effect of registration as a licensing body

47. RAAP’s principal argument is based on what it says is the legal effect of its having been registered as a licensing body under sections 280 and 281.

48. The essence of the argument is summarised at page 13 of RAAP’s written submissions as follows.

“25. Registration of a licensing body is not an optional matter. Section 286(1) requires anybody operating as a licensing body within the meaning of section 265 to register under the Act and to remain registered for so long as it continues to operate in that capacity. RAAP is a registered licensing body with a certificate of registration specifically authorising it to act on behalf of performers. Section 281 provides that ‘the certificate shall be evidence of the right of the licensing body, until the contrary is proved, to act on behalf of the classes of rights owners for whom it claims representation rights or on behalf of the rights owners who have assigned rights to it, or exclusively licensed it, as specified in that certificate.’ Therefore, by virtue of section 281, the persons for whom RAAP acts are, in effect, all of the performers on the sound

recordings in respect of which PPI collects licencing fees. RAAP is accordingly entitled under the Act to receive all remuneration payable by PPI to performers arising out of the playing and broadcasting etc. of recording of their performances in the State."

49. For the reasons which follow, I reject RAAP's argument.

50. RAAP's argument requires it to adopt the extreme position that sections 280 and 281 empower the Controller to grant an *exclusive* licence whereby a single entity is authorised to collect equitable remuneration on behalf of all of the performers within an entire class. Leading counsel for RAAP, Michael Collins, SC, suggested in oral argument that whereas there was nothing in the legislation which actually prohibits the Controller from registering a second licensing body in respect of the same class, the Controller would have to take into account the fact that there was already an existing registration. In particular, the Controller would have to consider whether the rights of the performers in question would be effectively protected were the Controller to register a "conflicting" licensing body which duplicated the functions of the existing registered licensing body. It was also suggested in argument that the Controller would have discretion to defer a decision on the application of the second applicant pending a decision on the renewal of the existing registration of the first licensing body. (Transcript, Day 2, pages 119 to 125).

51. With respect, an entitlement on the part of the Controller to grant an exclusive licence simply cannot be read into section 280. Express statutory language would be required in order to confer such an entitlement on the Controller. See, by analogy, the judgment of the Supreme Court in *O'Neill v. Minister for Agriculture and Food* [1998] 1 I.R. 539.

52. Had the legislative intent been to create a form of exclusive licence of the type now contended for by RAAP, not only would express statutory language to that effect be required, but also the *criteria* against which a decision to grant or refuse registration falls to be determined would have to be broadly drawn, and would have to allow for consideration of policy matters relevant to the grant of exclusivity. No such criteria are found under section 280. Rather, the criteria are confined to narrow administrative matters, and suggest that, if these are fulfilled, then the Controller is obliged ("shall") to grant registration.

53. The matters which the Controller is to take into account in deciding whether to grant or refuse registration are set out at section 280(5).

"(5) The Controller shall register an applicant or renew a registration where the Controller is satisfied that—

- (a) the applicant complies with the definition of a licensing body specified in section 265 , and
- (b) the applicant has provided such information and satisfied such conditions as may be prescribed by the Minister for the purposes of registration."

54. As appears, the prescribed criteria require consideration of two very narrow issues. First, whether the applicant for registration complies with the definition of a "licensing body" specified in section 265. This merely requires consideration of matters such as whether the applicant is "not for profit". Secondly, the Controller must be satisfied that the applicant has provided such information as may be prescribed by the Minister. The type of information which may be prescribed is then set out at section 280(6).

"(6) The information to be prescribed by the Minister under subsection (5)(b) shall include the following:

- (a) the name of the applicant;
- (b) the address of the applicant;
- (c) the names of the chairperson and other members of the board or officers, or names of partners, as the case may be, of the applicant;
- (d) a copy of the memorandum and articles of association or partnership agreement, of the applicant;
- (e) details of the scheme;
- (f) details of the scales of charges or proposed charges to be levied by the applicant; and
- (g) the class of rightsowners represented or proposed to be represented by the applicant."

55. Again, had the legislative intent been to allow the Controller to make the dramatic decision of granting an *exclusive* right to a licensing body to represent the *entirety* of a specified class of performers, this would require consideration of a greater range of policy matters than those actually prescribed.

56. I have concluded that the legislative intent in imposing a requirement under section 286 to register as a licensing body was merely to provide for the establishment of a publicly accessible register of entities who hold themselves out as willing to act on behalf of certain classes of performers. The register allows individual performers to identify representative bodies, and to have the assurance that the entity has met certain minimal requirements in terms of its legal form etc. It also allows the individual performers to consider the details of the scale of charges or proposed charges to be levied by the registered licensing body.

57. RAAP's argument overstates the legal effect of section 281. This section provides as follows.

"281.—A certificate granted under section 280(7) shall include the particulars specified in subsection (6) of that section and the certificate shall be evidence of the right of the licensing body, until the contrary is proved, to act on behalf of the classes of rightsowners for whom it claims representation rights or on behalf of the rightsowners who have assigned rights to it, or exclusively licensed it, as specified in that certificate."

58. The practical effect of the section appears to be that a certificate of registration gives rise to a rebuttable presumption in respect of two propositions. First, that the licensing body has the right to act on behalf of the classes of rights owners for whom it claims representation rights. Secondly, that the licensing body has the right to act on behalf of the rights owners who have assigned rights to it, or exclusively licensed it, as specified in that certificate.

59. The second of these two propositions is uncontroversial. A licensing body to which rights have actually been assigned or licensed

clearly has the right to act on behalf of the owners of those rights.

60. The dispute between the parties centres on the first proposition. RAAP seek to interpret the phrase “the classes of rights owners for whom it claims representation rights” as if the term “claims” means assert a legal claim to the right. RAAP appears to argue that, by applying to be registered in respect of a certain class of performer, RAAP is asserting that it is presumptively entitled to act as if the rights of those performers had actually been assigned or licensed to it. With respect, the statutory language does not bear this meaning. Rather, the language is intended to reflect the fact that—under section 280(6)(g)—an application for registration can be made in respect not only of a class of rights owners already represented by the applicant, but also in respect of a class *proposed* to be represented by the applicant. In the case of a proposed class, the applicant will self-evidently not yet have the benefit of assignments or licences. The language of section 281 reflects this distinction. The registered licensing body can hold itself out as *available* to represent the proposed class, i.e. it claims the right to represent individual performers within the class. This does not dispense with the necessity for those individual performers to request representation, and to grant the requisite assignments or exclusive licences to authorise the licensing body to act on their behalf.

61. In this regard, a loose analogy might be drawn with a trade union. The fact that a union might be licensed to represent a particular class of workers, say, transport workers, does not mean that it actually represents that class but only that it has the legal authorisation to do so.

62. In summary, registration as a licensing body does not confer a presumptive right to act on behalf of *all* performers within the registered classes without any requirement for assignment or licensing. Applying this to the facts of the case, RAAP is only entitled to collect the equitable remuneration on behalf of those individual performers who have actually assigned the right to do so to it pursuant to the provisions of section 208(2).

Licensing activity

63. The parties were in disagreement as to whether it is necessary for a collecting society to register with the Controller in order to be lawfully entitled to collect on behalf of performers pursuant to section 208(2). Counsel on behalf of PPI, Jonathan Newman, SC, submitted that section 208 did not give rise to any licensing activity at all. Counsel made a detailed submission, comparing and contrasting the structure of section 208 with that of section 38. It was submitted, in particular, that only the latter section gave rise to a licence as of right. Attention was drawn to the fact that only section 38 prescribed the criteria which a user had to fulfil in order to be entitled to this licence as of right. Reliance was also placed, by analogy, on the Supreme Court judgment in *Phonographic Performance (Ireland) Ltd. v. Controller of Commercial and Industrial Property Ltd.* [1996] 2 I.R. 560 at 572 which suggested, albeit in the context of the old copyright legislation, that the concept of remuneration is different to the concept of the paying of a licence fee.

64. The import of this line of argument was that there was no connection between registration under section 280, and the collection of equitable remuneration under section 208. On this analysis, RAAP simply could not rely at all on its having been registered under section 280 as giving it any particular rights for the purposes of section 208.

65. Counsel on behalf of RAAP, Mr Collins, SC, took issue with this analysis, and sought to characterise the argument as one alleging that RAAP had no function at all under section 208. (See, in particular, Transcript Day 4, pages 128 to 136). With respect, this is not an entirely accurate characterisation of PPI’s position. As I understood the argument, the point being made by PPI is that a licence is not required in order to carry out the function of a collecting society under section 208. PPI was not saying that RAAP could not carry out the function under section 208, but rather that registration as a licensing body under section 280 was not a prerequisite to its doing so.

66. Ultimately, however, I do not think that it is necessary for me to resolve this particular dispute. This is because—even if I were to accept that the collection of equitable remuneration under section 208 is a licensing activity and thus is capable of registration—I do not accept, for the reasons set out earlier, that registration under section 280 has the far-reaching effect for which RAAP contends.

67. For what it is worth, I should note that it would be more satisfactory had the position of performers’ collecting societies been addressed in more detail under the Copyright Act. Even if one accepts the argument that section 208 does not give rise to a licence as of right—and thus does not trigger a requirement for registration under section 286—it does seem that there should be some regulation of collecting societies. In this connection, I simply observe without further comment that the marginal note to section 265 reads as follows.

“Obligation of collecting societies to register (performers’ property rights)”

68. The section is then confined in terms to licensing bodies.

69. Of course, section 18(g) of the Interpretation Act 2005 indicates that—save in the case of section 7—a marginal note shall not be taken to be part of the enactment or be construed or judicially noticed in relation to the construction or interpretation of the enactment.

Summary

70. In summary, the structure of section 208 is clear. The principal functions conferred on a collecting society are (i) to collect the equitable remuneration on behalf of an individual performer; and (ii) to negotiate on behalf of individual performers. The language used in section 208 is deliberate, and refers to a “collecting society” as opposed to a “licensing body”. The scheme envisaged under section 208 is, therefore, different from that envisaged under section 38.

71. The right of a collecting society to collect under section 208(2) is predicated on there being an actual assignment of the right by the individual performer to the collecting society. The legislation adopts a protective attitude towards performers, and imposes a curb on the right of assignment. Presumably, part of the concern was that a performer might be pressurised by a record company to assign their rights to the record company. Given the express language used, there is no basis for implying some sort of presumptive assignment in favour of a collecting society.

(ii) Collective Rights Management Directive

72. RAAP sought to rely on Directive 2014/26/EU on collective management of copyright and related rights (“*CRM Directive*”), and the domestic regulations which implement same, S.I. No. 156 of 2016 (“*the 2016 Regulations*”).

73. Article 3 of the CRM Directive defines a “collective management organisation” as follows. (This definition is mirrored at regulation 2 of the 2016 Regulations).

“‘collective management organisation’ means any organisation which is authorised by law or by way of assignment, licence or any other contractual arrangement to manage copyright or rights related to copyright on behalf of more than one rightholder, for the collective benefit of those rightholders, as its sole or main purpose, and which fulfils one or both of the following criteria:

- (i) it is owned or controlled by its members;
- (ii) it is organised on a not-for-profit basis;”

74. This definition envisages that a collective management organisation (“CMO”) may be authorised to manage rights related to copyright either (i) by law, or (ii) by a contractual arrangement. RAAP relies on this definition to argue that not only is it a “collective management organisation”—which does not appear to be in dispute—but that RAAP benefits from both possible sources of authorisation, namely authorisation by law pursuant to its registration under section 280 and 281 of the Copyright Act 2000, and by virtue of its contractual arrangements with its own members and affiliated foreign CMOs.

75. With respect, this argument is entirely circular. The definition under the CRM Directive merely indicates that an organisation will be regarded as a CMO—and thus subject to the procedural requirements of the Directive—irrespective of whether it derives its authorisation from statute law or from contract. The CRM Directive is not prescriptive as to which form is to apply; rather, this remains a matter for the *discretion* of the individual Member States when implementing the CRM Directive. RAAP cannot, therefore, rely on the definition in support of an argument that section 281 must be interpreted as giving rise to some sort of statutory authorisation to act on behalf of performers, i.e. as opposed to a contractual authorisation. The CRM Directive does not require a Member State to provide for a statutory authorisation. In the circumstances, section 281 falls to be interpreted on its own terms, and reliance on the CRM Directive cannot advance matters. For the reasons set out earlier, section 281, on its correct interpretation, does have the effect contended for by RAAP.

76. RAAP also place reliance on articles 4 and 5 of the CRM Directive as follows.

“Article 4

General principles

Member States shall ensure that collective management organisations act in the best interests of the rightholders whose rights they represent and that they do not impose on them any obligations which are not objectively necessary for the protection of their rights and interests or for the effective management of their rights.

Article 5

Rights of rightholders

1. Member States shall ensure that rightholders have the rights laid down in paragraphs 2 to 8 and that those rights are set out in the statute or membership terms of the collective management organisation.
2. Rightholders shall have the right to authorise a collective management organisation of their choice to manage the rights, categories of rights or types of works and other subject-matter of their choice, for the territories of their choice, irrespective of the Member State of nationality, residence or establishment of either the collective management organisation or the rightholder. Unless the collective management organisation has objectively justified reasons to refuse management, it shall be obliged to manage such rights, categories of rights or types of works and other subject-matter, provided that their management falls within the scope of its activity.”

77. As part of their written submissions of 1 August 2018, RAAP makes the following arguments in respect of the CRM Directive.

“37. Denying the right of performers to have their own CMO represent their interests and negotiate and receive the payment of the equitable remuneration for performers would be contrary to core pillars of the CRM Regulations; namely, the requirements that CMOs act in the best interests of the rightholders they represent; refrain from imposing on rightholders any obligations that are not objectively necessary for the protection of their rights; and that rightholders have the right to choose the CMO that is to manage their rights.

[...]

42. RAAP’s members have chosen RAAP to act for them and RAAP’s affiliated bodies have chosen RAAP to act for their members. No performer or performers’ CMO has chosen PPI to act for performers and if the Act were to be given the construction suggested by PPI, it would represent a statutory usurpation of the right of performers to have a CMO of their choice act for them.

43. Such a construction would have the effect of imposing on performers conditions (namely forcible representation by PPI) that are not only not objectively necessary for the protection of their rights and interests, or for the effective management of their rights but diametrically opposed to those objects. This can be deduced as a matter of principle from such a structure, but it is also evident from the underlying facts of this case.”

78. One of the paradoxes of this case is that—in order to pursue its arguments—RAAP had to make submissions which undermine the importance of its own role in the process. In particular, RAAP is coerced to make an argument which downplays its role in negotiating a scheme of distribution under section 208(4). Having made this argument, RAAP then complains that PPI is usurping its functions.

79. This is so notwithstanding that PPI has made its position clear in its written legal submissions of 15 October 2018.

“6. Therefore, to be absolutely clear from the outset, PPI does not dispute, and has never disputed:—

- (i) the entitlement of RAAP to negotiate on behalf of the performers whom it represents, the share of remuneration from the public performance of commercially published sound recordings incorporating their ‘Qualifying Performances’ to which they are entitled (currently agreed at being 50% of the remuneration); or

(ii) that RAAP has the entitlement to receive the sums due to the performers whom it represents when the right to receive such is assigned in accordance with Section 208(2).

7. What is in dispute is whether RAAP is entitled to be given the 50% portion of the remuneration paid by users in respect of the public performance, broadcast and cable transmission of commercially published sound recordings (net of expenses) as a lump sum, which sum RAAP would then divide up amongst individual performers, with RAAP presumably retaining the sums due in respect of non-qualifying performances. That will be the consequence of a positive response to the questions of law posed."

80. The line of argument pursued by RAAP in this regard was described by counsel for PPI as RAAP seeking to write itself out of section 208. This point is well made. It is not open to RAAP to put forward an overly restrictive interpretation of the legislation which affords a collecting society a minimal role. On its proper interpretation, section 208 confers an important role on a collecting society. The functions which a collecting society has have been set out earlier at paragraphs 37 and onwards. This role is not undermined by the fact that the narrow administrative function of calculating the amounts payable to individual performers resides with the producer (or its representative).

81. Moreover, RAAP's submissions in respect of the CRM Directive are further undermined by a mistaken belief that the CRM Directive is substantive, rather than procedural, in nature. As appears from the recitals to the CRM Directive, however, it is not intended to alter the *substantive* law of copyright and related rights. This is evident, in particular, from recitals (7) to (9) as follows.

"(7) The protection of the interests of the members of collective management organisations, rightholders and third parties requires that the laws of the Member States relating to copyright management and multi-territorial licensing of online rights in musical works should be coordinated with a view to having equivalent safeguards throughout the Union. Therefore, this Directive should have as a legal base Article 50(1) TFEU.

(8) The aim of this Directive is to provide for coordination of national rules concerning access to the activity of managing copyright and related rights by collective management organisations, the modalities for their governance, and their supervisory framework, and it should therefore also have as a legal base Article 53(1) TFEU. In addition, since it is concerned with a sector offering services across the Union, this Directive should have as a legal base Article 62 TFEU.

(9) The aim of this Directive is to lay down requirements applicable to collective management organisations, in order to ensure a high standard of governance, financial management, transparency and reporting. This should not, however, prevent Member States from maintaining or imposing, in relation to collective management organisations established in their territories, more stringent standards than those laid down in Title II of this Directive, provided that such more stringent standards are compatible with Union law."

(iii) Competition Law

82. RAAP also advance an argument by reference to competition law. More specifically, it is argued that the court, by reference to the double construction rule, should avoid an interpretation of the Copyright Act 2000 which would give rise to a result contrary to competition law. I must admit that I have some hesitation as to whether this issue is properly part of the preliminary issues at all. As appears from the judgment of Cregan J. of 21 February 2018, part of the rationale for directing the trial of preliminary issues was that an answer to the questions of statutory interpretation might avoid the necessity of having to address the alleged abuse of a dominant position by PPI. It would appear to be inconsistent with that rationale to address issues of competition law as part of the preliminary issues. Notwithstanding this concern, I will deal with the arguments *de bene esse*.

83. The arguments in relation to competition law suffer from precisely the same infirmity as those in respect of the CRM Directive discussed under the previous heading above. In both instances, RAAP must—paradoxically—seek to minimise its actual role under the legislation so as to advance an argument that PPI has usurped that role. RAAP appears determined to write itself out of the legislation, and then complains that its emasculated role offends against competition law.

84. RAAP's arguments in this regard fail to distinguish between the various roles provided for under section 208, and, in particular, fail to recognise that the ultimate decision to determine the amount of equitable remuneration is a matter for the Controller.

CONCLUSIONS

85. My conclusions in respect of the first preliminary issue are as follows. A collecting society is entitled (i) to negotiate on behalf of its members, and (ii) to collect the amounts payable in accordance with a scheme of distribution. A collecting society has no function in making the final determination as to how licence fees are to be distributed between (i) performers and producers, and (ii) performers *intra se*. That function resides with the Controller. The separate mechanical function of calculating the amount of the payments accruing to individual performers in accordance with a distribution scheme is a matter for the producer (or its representative).

86. My conclusions in respect of the second preliminary issues are as follows. Registration as a licensing body under section 280 does not confer a presumptive right to act on behalf of *all* performers within the registered classes without any requirement for assignment or licensing. Applying this to the facts of the case, RAAP is only entitled to collect the equitable remuneration on behalf of those individual performers who have actually assigned the right to do so to it pursuant to the provisions of section 208(2).

87. I will hear counsel as to the precise form of the order to be made on the preliminary issues.