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The universal nature of performers' rights under EU law  
(a note on Case C-265/19, *Recorded Artists Actors  
Performers v Phonographic Performance Ireland*)

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# **The universal nature of performers' rights under EU law (a note on Case C-265/19, *Recorded Artists Actors Performers v Phonographic Performance Ireland*)**

Maurizio Borghi

## **Abstract**

Copyright's neighbouring rights have been the subject of several referrals to the Court of Justice of the European Union (CJEU). In its judgment of 8 September 2020 in Case C-265/19 (*Recorded Artists Actors Performers Ltd v Phonographic Performance (Ireland) Ltd*), the Court has defined for the first time the subjects of the right to remuneration for performers under EU law, as well as the limits imposed on the national legislator. The judgment opens up interesting perspectives on the shared competences between the EU and Member States in the application of international treaties, and invites some reflection on the recognition of the individual status of performer in EU law, as well as on the scope and limits of intellectual property as a fundamental right of a universal nature.

## **Foreword**

The questions referred to the Court of Justice by the High Court of Ireland in the *Recorded Artists Actors Performers (RAAP)* case<sup>1</sup> concerned the admissibility of national laws that exclude certain categories of individuals from the performers' right of remuneration for so-called "secondary uses" of phonograms. "Secondary uses" are commonly understood as uses subsequent to the fixation of the performance in the phonogram, such as broadcasting and diffusion in public places, but also other forms of communication to the public, including electronic transmission by cable or internet, such as *webcasting* and *simulcasting*.<sup>2</sup> In respect of such uses, which are clearly of paramount importance for the commercial exploitation of sound recordings, the author of the work fixed in the phonogram has an exclusive right, while the performer and the phonogram producer have a mere

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<sup>1</sup> Case C-265/19, *Recorded Artists Actors Performers Ltd v Phonographic Performance (Ireland) Ltd*, 20 September 2020 (hereafter: *RAAP*).

<sup>2</sup> The spectrum of uses covered by the notion of "secondary uses" varies from country to country, even within the European Union: see the report of the Association of European Performers' Organisations (AEPO-ARTIS) *Performers' Rights in International and European Legislation: Situation and Elements for Improvement*, December 2014, p. 11.

right to receive equitable remuneration.<sup>3</sup> This is one of the most relevant copyright-related rights harmonised by EU legislation transposing international treaties. The Court of Justice has already ruled on this provision on several occasions, in particular in response to preliminary questions concerning the objective scope of the right to remuneration.<sup>4</sup> With the *RAAP* judgment, the Court focuses instead on the *subjects* of this right, defining precise limits to the action of national legislators. Apart from two previous judgments on ancillary aspects,<sup>5</sup> the *RAAP* decision is the first intervention of the Luxembourg judges that defines the *status* of performer in EU law.

### **The protection of performers' rights: a brief comparative overview**

Among the rights related to copyright, those protecting performers stand out for the breadth and complexity of their legal and cultural background in the respective legal traditions in Europe and beyond. Historically, protection of performers in civil law systems is premised on personal civil rights, in particular the right to work and the integrity of the person, since dramatic or musical performance is an element of the performer's personality.<sup>6</sup> In this sense, the interpretation or performance of a creative work is not only protectable by civil law instruments for the protection of the worker and of the individual or collective business activity,<sup>7</sup> but it is also capable of giving rise to certain patrimonial and moral rights "connected" to those of the author of the performed work. These rights in respect to certain uses of the performance overlap with those of the author in a

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<sup>3</sup> The right is enshrined in Article 8(2) of Directive 2006/115 on rental right and lending right and rights related to copyright (codified version of dir. 92/100). The notion of "phonogram" includes any "exclusively aural" fixation of the sounds of a performance (or other sounds), thus excluding audiovisual recordings (so in Case C-147/19, *Atresmedia v AGEDI*, 18 November 2020, par. 37).

<sup>4</sup> The Court has clarified that, for the application of the right to remuneration, the broadcasting of television programmes by means of apparatus installed in a rehabilitation centre constitutes 'communication to the public' (so in Case C-117/15, *Reha Training*, 31 May 2016) or in hotel rooms (Case C-162/10, *Phonographic Performance (Ireland) v. Ireland*, 15 March 2012), but not the broadcasting inside private premises where a freelance economic activity is exercised (in the case at hand, a dental practice: Case C-135/10, *Società Consortile Fonografici (SCF) v. Marco Del Corso*, 15 March 2012) nor the rental of vehicles equipped with radio systems (so in Case C-753/18, *STIM v Fleetmanager Sweden*, 2 April 2020). The Court of Justice has also clarified that the notion of 'communication to the public' is to be understood in the same way when it refers to the exclusive right of the author (Article 3(1) of Directive 2001/29) or to the remuneration right of the performer and the phonogram producer (Article 8(2) of Directive 2006/115): so in *Reha Training*, cit., par. 32, partially correcting the position previously expressed in the *OSA* case, where the Court had instead excluded that the principles drawn from the *SFC* judgment on the interpretation of communication to the public in relation to related rights could also apply in relation to copyright (Case C-351/12, *OSA*, 27 February 2014, par. 35).

<sup>5</sup> Previous rulings on the subjects of the remuneration right concerned the admissibility of a calculation model for the collection and distribution of the remuneration (Case C-245/00, *SENA v. NOS*, 6 February 2003) and on the remuneration in the case of trans-frontier transmission of phonograms (Case C-192/04, *Lagardère Active Broadcast*, 14 July 2005).

<sup>6</sup> R. Arnold, *Performers' Rights*, 5th ed., London 2015.

<sup>7</sup> These include in particular the protection against unfair competition. For a review of Italian case law on related rights before the entry into force of law 633/1941, see M. Fabiani, *Il diritto d'autore nella giurisprudenza*, Padova 1963, ch. VI.

manner not dissimilar to what occurs in the case of the translation of a literary work or the arrangement of a musical work.<sup>8</sup>

The doctrinal approach in common law countries focuses instead on the functional aspect of the performance in relation to the intrinsic value of the work and its economic exploitation. Once the work has been created, the author benefits from the technical and creative contribution of others who contribute to enhance the work's quality, renown and hence ultimately its commercial value. The performer is one of them.<sup>9</sup> Although the performer is generally protected by contract and labour law, or by other instruments such as the right of publicity,<sup>10</sup> it is recognised that certain uses of the performance may justify enforceable rights *erga omnes* similar to those conferred on the author.<sup>11</sup>

Although the rights of performers have been recognised in most jurisdictions since the 1930s (i.e., since the advent of the first mass reproduction and broadcasting technologies), the assimilation of these rights to those of the author met with resistance in both common law and civil law countries. The first objection consisted in the fear that adding an additional layer of rights on intellectual works in favour of third parties other than the author, in particular in relation to the secondary uses of the sound recordings on which the work is fixed, would end up harming the authors themselves. Indeed, under the same market value of a certain use of the phonogram, the remuneration would have had to be shared among a greater number of subjects, with the inevitable effect of reducing the share due to the authors.<sup>12</sup> On a legal level, the main objection was that an exclusive right of the performer could unduly interfere with that of the author, for example by giving the performer of a musical work the power to prohibit certain uses that the author has legitimately authorised.

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<sup>8</sup> Just as the use of translation requires the dual consent of the author and the translator, the use of dramatic or musical interpretation requires the consent of both the author and the performer. The analogy, widely discussed in doctrine, goes back to J. Kohler, *Das literarische und artistische Kunstwerk und sein Autorschutz*, Mannheim 1892.

<sup>9</sup> The others are the phonogram producer and the broadcasting organisation.

<sup>10</sup> As recognised by the US Supreme Court in *Zacchini v. Scripps-Howard Broadcasting Co.* 433 U.S. 562 (1977).

<sup>11</sup> Common law countries tend to classify such rights as copyright rather than “neighbouring rights”, although they differ from the rights of the author in terms of duration, extent and conditions of subsistence (D. Gervais, ‘The Protection of Performers Under U.S. Law in Comparative Perspective’, *IP Theory*, Vol. 5: Iss. 1, 2015).

<sup>12</sup> The objection, which concerns all related rights and not only those accruing to performers, is known in doctrine as the “theory of the cake”, meaning that “there is supposed to be only one cake and if the neighbouring right owners get a slice of it, the slice of the author would be smaller” (S.M. Stewart, *International copyright and neighbouring rights*, 2<sup>nd</sup> ed., 1989, p. 179). The conclusions of the WIPO Intergovernmental Committee on the implementation of the Rome Convention, however, categorically excluded that the introduction of neighbouring rights caused a reduction in remuneration for authors (*Recommendations concerning the protection of performers, producers of phonograms and broadcasting organizations*, § 28, in *Copyright. Monthly Review of the World Intellectual Property Organization*, y. 15, no. 4, April 1979, p. 107).

The 1961 Rome Convention partly overcame this resistance by introducing a flexible regime that allowed national states to accede without forcing their legislation. To this end, the Convention refrained from requiring member states to grant proprietary rights to performers and left the national legislator free to grant lower level protection as long as it “prevented” certain activities.<sup>13</sup> The protection required by the Convention could therefore be obtained in the absence of exclusive rights by means of labour law, unfair competition law or criminal sanctions.<sup>14</sup> Moreover, the protection was limited to sound recordings and did not apply where the performer had consented to the incorporation of his performance into audiovisual content. Finally, the Convention established a remuneration right in favour of performers and producers for *secondary uses* of phonograms. Because of its economic implications, such right to remuneration was considered the most important result of the Convention, its “focal point”.<sup>15</sup> However, the Convention allowed contracting parties to derogate from the application of the rule by exercising a “reservation”.

Despite the adoption of a flexible regime, only the United Kingdom, among the common law countries, adhered to the Rome Convention when it was concluded in 1961. Other common law countries acceded in the following years, with the notable exception of the United States.<sup>16</sup> For a more substantial international harmonisation of related rights, at least in terms of adhering countries, performers had to wait for the TRIPs Agreement<sup>17</sup> and, above all, the WIPO Performances and Phonograms Treaty (WPPT) of 1996.<sup>18</sup>

### **Secondary uses of the phonogram: the right to remuneration in international law**

The approach of the Rome Convention to respect the different national approaches to secondary uses of phonograms is also reflected in the WPPT. As mentioned earlier, secondary uses consist of broadcasting and other form of communication to the public of the phonogram. While there is a

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<sup>13</sup> The activities protected by the Convention (Article 7) include the broadcasting of the performance, its fixation on a tangible medium and the reproduction of that fixation for purposes other than those for which the performer has given his consent. It should be recalled that the Convention imposes proprietary protection on phonogram producers and broadcasting organisations.

<sup>14</sup> This power allowed the United Kingdom, which at the time provided only criminal and not civil remedies, to sign the Convention (R. Arnold, *Performers' Rights*, 5th ed., London 2015, 1.52-1.58).

<sup>15</sup> WIPO *Guide de la Convention de Rome*, Geneva, 1981, p. 60.

<sup>16</sup> Ireland ratified it in 1979, only after joining the (then) European Economic Community, while Australia and Canada acceded in 1992 and 1998 respectively, both exercising their reservation in respect of the remuneration right for secondary uses (WIPO, *Guide to the Copyright and Related Rights Treaties Administered by WIPO*, 2003, p. 8).

<sup>17</sup> Agreement on Trade-related Aspects of Intellectual Property 1994 (TRIPs), art. 14.

<sup>18</sup> WIPO Performances and Phonograms Treaty 1996 (WPPT). Unlike the Rome Convention, the WPPT only covers the related rights of performers and phonogram producers and does not include broadcasting organisations.

universally recognised exclusive right of the *author* over such uses,<sup>19</sup> the application of the remuneration right for the other categories of rightholders is much more fragmented and patchy, with substantial differences from country to country.

At the international level, the right to remuneration is enshrined in Article 12 of the Rome Convention, the wording of which is taken over almost verbatim by Article 15 of the WPPT.<sup>20</sup> It provides that the use of published phonograms for commercial purposes for broadcasting or other communication to the public shall be subject to payment of “single equitable remuneration” to be paid *either* to the performer, *or to* the phonogram producer, *or to* both, in accordance with modalities of distribution to be decided by agreement between the parties or, in the absence of such agreement, by the national legislator. However, both treaties provide for a “reservation”, whereby a Contracting State may derogate, in whole or in part, from the application of the aforementioned right of remuneration by notifying the Secretary-General of WIPO.<sup>21</sup> In particular, a State may declare that it does not recognise a right to remuneration at all, or that it recognises it only in relation to certain uses, or it may limit its exercise in other ways.<sup>22</sup>

It is important to note that, according to the principle of material reciprocity accepted by international law and expressly referred to by the WPPT, the exercise of the reservation by one Contracting State relieves other States of the obligation to recognise the right to natural and legal persons of that State.<sup>23</sup>

The relevance of this clause is increased by the fact that a considerable number of contracting states have made use of the reservation. In particular, among the States parties to the WPPT, some do not recognise the right to remuneration in any form,<sup>24</sup> others recognise it only partially or in a form

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<sup>19</sup> This right is enshrined in Article 11bis of the Berne Convention, to which the TRIPs Agreement gives binding force for all WTO member countries.

<sup>20</sup> The main difference is that Article 12 of the Rome Convention provides for the activation of the right when the phonogram is “used *directly* for broadcasting or for any communication to the public”, whereas Article 15 of the WPPT extends its application also to when it is used “indirectly”. The most relevant example of “indirect” use is when the radio broadcast is transmitted in a public place: in this circumstance, the WPPT provides that the obligation to pay the single equitable remuneration is incumbent not only on the radio station but also on the operator of the public place.

<sup>21</sup> Rome Convention, Article 16; WPPT, Article 15(3).

<sup>22</sup> The wording of the WPPT is more succinct than that of the Rome Convention, but essentially repeats the same conditions.

<sup>23</sup> Vienna Convention, Article 21. The rule is made explicit in Article 4(2) of the WPPT, which reads “The obligation [*scil.* of reciprocity] shall not apply where a Contracting Party makes use of the reservations permitted under Article 15(2)”.

<sup>24</sup> These are China (WPPT Notification No. 66 of 9 March 2007), Australia (No. 67 of 26 April 2007), India (No. 92 of 25 September 2018) and New Zealand (No. 94 of 17 December 2018).

other than that provided for in the treaty,<sup>25</sup> and still others only in relation to certain subjects.<sup>26</sup> The United States recognises the right to remuneration only in relation to broadcasting, to “for-profit” communication to the public and other acts established by federal law.<sup>27</sup>

### **European harmonisation of related rights**

As already mentioned, the European legislator has transposed the rights related to copyright in Directive 92/100, now codified in Directive 2006/115. The right to fair compensation for broadcasting and communication to the public, enshrined in Article 8(2),<sup>28</sup> takes up almost verbatim the wording of the Rome Convention, to which not all Member States of the (then) European Community were party at the time of the entry into force of the Directive.<sup>29</sup>

Article 8(2) of Directive 2006/115 grants performers and phonogram producers a right to remuneration for broadcasting and communication to the public. The Directive thus adopts the minimum level of protection required by Article 12 of the Rome Convention (subsequently reflected in Article 15(1) of the WPPT), merely encouraging Member States to provide for “more far-reaching protection”.<sup>30</sup> Unlike the Rome Convention and the WPPT, however, the Directive does not allow Member States to exercise a reservation on the recognition of the right. Moreover, it does not leave any discretion as to the beneficiaries of the right and requires that the single equitable remuneration be “shared between the relevant performers and phonogram producers”.<sup>31</sup> In the event of failure to reach agreement between the parties, Member States may lay down the criteria for sharing the remuneration.

In accordance with the principle established in international treaties, the equitable remuneration for secondary uses of the phonogram must be “single”, i.e. it must not take into account the relative

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<sup>25</sup> Among them, Canada does not apply a fee right for phonogram retransmission (WPPT Notification No. 86 of 13 May 2014), while Korea expressly excludes internet transmission (No. 75 of 18 December 2008). Japan also includes *on-demand* transmission (No. 99 of 27 May 2019) and Singapore applies an exclusive right of phonogram producers for “digital” transmission (No. 52 of 17 January 2005).

<sup>26</sup> Hong Kong only recognises it in relation to phonographic producers to the exclusion of performers (WPPT Notification No. 73 of 23 September 2008), while Russia excludes nationals and legal entities of third countries (No. 74 of 5 November 2008).

<sup>27</sup> WPPT Notification No. 8 of 14 September 1999. U.S. law provides for a system of compulsory licensing for certain types of radio broadcasting such as *webcasting* (non-interactive digital broadcasting), 17 U.S. Code § 114.

<sup>28</sup> The numbering and wording of this provision are identical in the two directives.

<sup>29</sup> The Convention was not ratified by the Netherlands, Belgium, Greece and Portugal.

<sup>30</sup> Dir. 2006/115/EC, rec. 16. On the question of whether the Directive allows Member States to confer an exclusive right of communication to the public on phonogram producers, the Commercial Court of Madrid had made a preliminary reference to the European Court, but this was subsequently withdrawn (see order of removal from the Court’s register: 12 January 2009, Case C-98/08).

<sup>31</sup> Dir. 2006/115/EC, Article 8(2).

contribution of the performer and the producer and cannot be subject to separate contributions for the two categories of rightholders. In practice, this implies that the remuneration is collected by a single entity (usually a collecting society) and then divided between the two parties. In the *SENA* case, the ECJ ruled that Member States are free to adopt their preferred model of calculation for the distribution of royalties, as long as it “strikes an appropriate balance between the interests of performers and producers”.<sup>32</sup> However, in accordance with the principle of autonomy of EU law, the notion of equitable remuneration must be interpreted uniformly in all Member States.<sup>33</sup>

### **The case of *RAAP v. PPI* on the distribution of income from royalties**

The case before the Court of Justice arose out of a dispute between two Irish collective rights management organisations: Recorded Artists Actors Performers (RAAP), an agency representing performers on the territory of the Republic of Ireland, and Phonographic Performance Ireland (PPI), acting on behalf of phonogram producers. The two societies had entered into a contract to share the revenue generated by licences of sound recordings for broadcasting in public places. The revenue was collected by PPI, which then transferred part of it to RAAP. The disagreement concerned the amount of the share due to RAAP: according to the latter, the performers’ share must be calculated on all recorded music licensed for broadcasting and communication to the public, whereas according to PPI the calculation must exclude music by performers from the United States and other countries outside the European Economic Area. Taking the view that the fee paid was lower than that due, RAAP brought an action against the PPI before the *High Court*.

The Irish court noted that, in the section on equitable remuneration, the Copyright and Related Rights Act provides for different eligibility criteria for phonogram producers and performers.<sup>34</sup> In fact, the law reserves protection to performances made by an Irish national (or resident in Ireland or in another Member State of the European Economic Area) or, alternatively, taking place on Irish territory (or the European Economic Area), whereas this condition does not apply to phonogram producers. Consequently, in the case of a phonogram made by a US performer and/or producer, or made in the US, only the producer is entitled to equitable remuneration for secondary uses of the phonogram in question, whereas the performer is excluded. That disparity is reflected in the distribution of the rights between collecting societies representing the two categories of rightholders on the Irish territory.

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<sup>32</sup> *SENA v. NOS*, cit., par. 36.

<sup>33</sup> *Ibid.*, par. 38.

<sup>34</sup> Copyright and Related Rights Act 2000, art. 208 and 287.

However, on this point the court observed that the Irish law, while complying with the rules of the TFEU prohibiting any discrimination between nationals of the European Economic Area, raises a doubt of compatibility with the *acquis communautaire* on rights related to copyright, in particular with the right to remuneration for broadcasting and communication to the public of Article 8(2) of Directive 2006/115. As we have seen, the article provides that Member States must ensure that a single equitable remuneration is paid by the user and is then shared between the performers and the producers of the phonogram. The first question referred to the Court for a preliminary ruling was therefore whether, and to what extent, Member States, also in the light of the “national treatment” requirement of the Rome Convention and the WPPT, were entitled to determine the criteria for access to equitable remuneration on a territorial basis. In this context, the question of whether a Member State could reflect the conditions of a possible reservation made by a third State under Article 15(3) of the WPPT was of particular relevance. This point was particularly relevant to the present case since, as mentioned above, the United States is one of the countries that have made use of such a reservation.<sup>35</sup> Finally, it remained to be clarified whether it was generally permissible to limit the right to remuneration to phonogram producers only and exclude performers whose performances are fixed in such phonograms.

### **The Court’s ruling**

In response to the questions referred for a preliminary ruling, the CJEU first observed that the term “performer” is an autonomous concept of European law which requires uniform interpretation throughout the EU.<sup>36</sup> Directive 2006/115 makes it clear that the right to equitable remuneration arises for the performer and the phonogram producer at the moment when the phonogram is communicated to the public within the territory of the European Union. However, it does not lay down any condition as to the nationality of the rightholders, or their place of residence, or the place where the phonogram was recorded. According to the Court, a reading of this provision in the light of the international treaties to which the European Union and the Member States are parties prevents national legislators from imposing conditions which are not expressly provided for in the Directive.

The reasoning of Advocate General Tanchev, whose conclusions were upheld in their entirety by the Court, started from the consideration of the obligation of the WPPT Contracting Parties to grant

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<sup>35</sup> *Supra*, footnote 24.

<sup>36</sup> *RAAP*, cit., par. 46. The Court had already established the same principle with regard to the notion of “equitable remuneration” in the corresponding article of the previous Directive 92/100 (*SENA v. NOS*, cit., par. 38).

the protection provided by the Treaty to the nationals of the other Contracting Parties.<sup>37</sup> It noted that, among the rights recognised by the Treaty, the right to remuneration for broadcasting and communication to the public of phonograms is subject to an important limitation, insofar as a Contracting Party is free to exercise a reservation to its application which, in turn, releases the other Contracting Parties from the obligation of reciprocity.<sup>38</sup> In the case before the Court, that limitation translates into the fact that the Union and its Member States are not obliged to grant the right to compensation to natural or legal persons from the United States. Moreover, the Court observed that the recognition of that right *erga omnes* by the EU creates a difference in treatment which penalises not only performers but also phonogram producers in the EU compared with their counterparts in the US (or in other countries which have exercised the reservation provided for by the WPPT), with the latter benefiting from revenues for the use of their phonograms in EU territory which are denied to EU performers and producers for the use of their phonograms in the US (and in other countries).<sup>39</sup>

However, a rule laying down the exclusion of certain persons from the right to remuneration – even if permissible under international law and justifiable from the point of view of the Union’s commercial policy – cannot be inferred from the wording of the Directive, nor is it within the powers of the national legislator. In fact, the right to a single equitable remuneration is not only a matter harmonised by EU law, which therefore requires an autonomous and uniform interpretation, but is also “an *integral part of the protection of intellectual property enshrined in Article 17(2) of the Charter of Fundamental Rights of the European Union*”.<sup>40</sup> As such, any limitation thereof may only be introduced by the Union legislature, subject to the requirements of legality and proportionality laid down in Article 52(1) of the EU Charter.<sup>41</sup> Therefore, even where there are clear differences in treatment in the international trade of recorded music, Member States have no discretion to react independently to reservations made under the WPPT.<sup>42</sup>

Finally, on the last question, the Court made it clear that it is not permissible to exclude performers from sharing the equitable remuneration with phonogram producers. Indeed, the wording of the

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<sup>37</sup> WPPT, Article 3.

<sup>38</sup> RAAP, cit., Opinion of Advocate General Tanchev, par. 50.

<sup>39</sup> RAAP, cit., par. 83. The argument seemingly echoes the “theory of the cake” mentioned above (footnote 11). It could be argued that the exclusion of third countries from the remuneration right would be a protectionist measure to the benefit of EU performers and phonographic producers, rather than a way to ensure a level playing field in the internal market.

<sup>40</sup> *Ibid.*, par. 85 (emphasis mine).

<sup>41</sup> *Ibid.* par. 88.

<sup>42</sup> *Ibid.* par. 83-84.

Directive is clear in requiring that the remuneration levied for the use of the phonogram be “shared” between the two categories of rightholders, although it leaves Member States the discretion to lay down the conditions for such sharing in the absence of agreement between the parties. According to the Court, that discretion cannot extend to the point of excluding one category of rightholders altogether, since such a transposition would undermine one of the objectives of the directive, which is to ensure furthering the creative and artistic work of authors and performers.<sup>43</sup>

### **Some considerations on remuneration as a fundamental property right**

The recognition of the performer as an autonomous subject of rights, including fundamental rights, recognised by the EU, is a process that goes back a long way. Even before the transposition of Directive 92/100 (of which Directive 2006/115 at issue in the *RAAP* case is the codified version), the European Court had ruled that the related rights of performers, like copyright, are subject to the principle of non-discrimination laid down in Article 7 of the EEC Treaty. In the *Phil Collins* case, the Court concluded that the protection granted to a performer by the law of one Member State of the (then) European Economic Community must extend to the nationals of all the other Member States, irrespective of whether there is Community legislation in this field.<sup>44</sup>

In the *RAAP* judgment, the Court goes further and establishes that related-rights protection is not limited to citizens of the Union but, in the absence of specific provisions expressly laid down by Union law, is universal in scope and extends also to nationals of third countries. As has been seen, the Court does not prohibit the exclusion of natural or legal persons from third countries from the exercise of the remuneration right, but states that it is the exclusive competence of the European Union legislature to provide for such an exclusion. According to the Court, the fact that the right to remuneration provided for in international treaties is harmonised by Directive 2006/115 makes it an exclusive matter for the European Union legislature, even in relation to the provisions of those treaties which are not expressly implemented by Union law. Not only that. The harmonisation of the law absorbs the competences of the Member States in relation to equivalent provisions laid down in treaties to which only the Member States are parties, such as the Rome Convention.

As we have seen, in fact, Directive 2006/115 is silent on the exception to the obligation of reciprocity, deducible from the rules of international law and explicitly provided for in Article 4(2)

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<sup>43</sup> *Ibid.* par. 94-95.

<sup>44</sup> Joined Cases C-92/92 and C-326/92, *Phil Collins v Imtrat Handelsgesellschaft and Patricia Im- und Export Verwaltungsgesellschaft mbH v EMI Electrola GmbH*, 20 October 1993). The fact that, at the time, not all Member States were signatories to the Rome Convention did not, in the Court’s view, constitute sufficient grounds for derogating from the principle of non-discrimination on grounds of nationality expressed in Article 7 of the EEC Treaty.

of the WPPT. And yet, for the Court, such silence does not give the Member States discretion to apply the exception, either in application of the WPTT (to which the Union *and* the Member States are contracting parties) or as members of the Rome Convention (to which only the Member States are contracting parties).

In this respect, the *RAAP* judgment confirms the tendency of European jurisprudence to limit the shared competences of the Member States in the application of “mixed agreements”, i.e. international agreements concluded jointly by the Union and the Member States.<sup>45</sup> In the present case, however, the Court extends the limitation to agreements signed by Member States alone when they concern matters similar or analogous to those contained in mixed agreements.

But beyond the aspects concerning the balance of powers between Member States and the EU, it is worth noting that the Court in this case derives the exclusive competence of the Union not only from an extensive reading of the Treaties,<sup>46</sup> but also from a higher source of law, namely the right to protection of intellectual property enshrined in Article 17(2) of the Charter of Fundamental Rights of the European Union. The point is forcefully expressed in the opinion of Advocate General Tanchev, according to whom:

Arguably, from a fundamental rights perspective, both the Member States and the European Union must ensure that, in the Union, every performer and producer receives equitable remuneration for the communication of his or her performance to the public, notwithstanding the existence of a reservation made by a third State which has the effect that EEA performers and producers do not receive such remuneration on the territory of that third State. *Fundamental rights are universal in nature and what is at issue here is the right to property.*<sup>47</sup>

It is therefore primarily as a *fundamental right of a universal nature* that the remuneration right provided for in the *acquis* can only be limited by the Union legislature. The Advocate General’s and the Court’s argument on this point confirms the trend towards an expansive interpretation of the notion of intellectual property as an integral part of the right to property, dating back to European

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<sup>45</sup> The notion of “mixed” treaties include the WPPT and the TRIPs Agreement (on the latter see the Court’s Opinion 1/94 of 15 November 1994 and the Opinion of the Advocate General in Case C-89/99, *V.O.F. Schieving-Nijstad v Robert Groeneveld*, par. 9). However, it does not include the Rome Convention, which is nevertheless capable of producing “indirect effects” on Union law, since the WPPT commits the Union not to hinder the fulfilment by the Member States of their obligations under it (see *SCF v Marco Del Corso*, cit., par. 50).

<sup>46</sup> In particular Article 216(2) TFEU.

<sup>47</sup> Opinion of Advocate General Tanchev, par. 53 (emphasis added).

legislation prior to the entry into force of the EU Charter.<sup>48</sup> After the entry into force of the Lisbon Treaty and the subsequent conferral of binding force of the EU Charter, the Court of Justice of the EU has repeatedly ruled on Article 17(2) of the Charter in preliminary rulings on copyright and related rights.

Also in this respect, the *RAAP* judgment constitutes a new element in the definition of the fundamental right protected by the EU Charter, insofar as it affirms that the notion of intellectual property is not limited to rights of a proprietary nature in the strict sense (i.e. exclusive rights), but also extends to mere remuneration rights. The judgment thus paves the way, by analogy, to the recognition as fundamental rights of other remuneration rights recognised in the *acquis*, such as fair compensation for private copying,<sup>49</sup> photocopying<sup>50</sup> and rental of phonograms and films.<sup>51</sup>

### **The status of performer in the context of a “personalistic” interpretation of intellectual property rights**

While it is true that the *RAAP* judgment lays the foundations for a broad interpretation of the notion of intellectual property, so as to include also rights which are not strictly proprietary, it must be remembered that the Court has repeatedly rejected an “absolutist” interpretation of this fundamental right:

The protection of the right to intellectual property is indeed enshrined in Article 17(2) of the Charter of Fundamental Rights of the European Union (‘the Charter’). There is, however, *nothing whatsoever* in the wording of that provision or in the Court’s case-law to suggest that that right is *inviolable and must for that reason be absolutely protected*.<sup>52</sup>

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<sup>48</sup> Additional Protocol to the European Convention on Human Rights (ECHR), Article 1 “protection of property”. The European Court of Human Rights (ECtHR) had interpreted the term “property” as including intellectual property (ECtHR, 11 January 2007, *Anheuser-Busch v Portugal*, 73049/01, par. 63), which in turn included not only enforceable rights (in the case before the Court, the registered trade mark), but also certain constituent actions (the filing of a trade mark application), to the extent that they are in themselves capable of giving rise to interests of a proprietary nature (*ibid.*, par. 78). For a critical examination see M. Ricolfi, “Trademarks and Human Rights”, in P. Torremans, *Intellectual property and human rights*, Kluwer, 2005, p. 593.

<sup>49</sup> Dir. 2001/29/EC, Article 5(2)(b).

<sup>50</sup> Dir. 2001/29/EC, Article 5(2)(a).

<sup>51</sup> Dir. 2006/115/EC, Article 5.

<sup>52</sup> Case C-70/10, *Scarlet Extended v SABAM*, 24 November 2011, par. 43. See also Case C-360/10, *SABAM v Netlog*, 16 February 2012, par. 41, and Case C-314/12, *UPC Telekabel*, 27 March 2014, par. 61. In relation to exceptions and limitations to copyright, the same principle has been referred to in the “trilogy”: Case C-476/17, *Pelham*, 29 July 2019, par. 33, Case C-516/17, *Spiegel Online*, 29 July 2019, par. 56, and Case C-469/17, *Funke Medien*, 29 July 2019, par. 73.

Indeed, the protection of intellectual property must be understood in the light of the principle of “fair balance”, as reflected in primary EU legislation on copyright and related rights.<sup>53</sup> In this respect, the Court has variously struck a balance between fundamental rights: on the one hand, the right to property, often associated with the right to an effective remedy<sup>54</sup> and sometimes with other interests inherent in the person of the author, such as the right not to have the work associated with a discriminatory message.<sup>55</sup> On the other hand, and on an equal footing, the rights of the users of protected works, consisting mainly of respect for private and family life,<sup>56</sup> protection of personal data,<sup>57</sup> and freedom of expression and/or information.<sup>58</sup>

Although the Court does not go into this exercise in the *RAAP* judgment, it nevertheless suggests that proprietary protection can be balanced not only against other fundamental rights (such as freedom of expression, etc.), but also against lower-ranking interests, such as ensuring favourable economic conditions for EU citizens and entrepreneurs in the global market.

In this sense, it can also be observed that, in promoting the right to remuneration as an integral part of a *fundamental right of a universal nature*, the Court pays particular care to stress that this right belongs inalienably to the *performer*, categorically excluding any interpretation that limits its enjoyment to phonographic producers only.<sup>59</sup> As in other cases, the Court shows a tendency to promote an “extended” interpretation of the right to the protection of intellectual property when it protects the interests of the individual as opposed to when it is the expression of purely business interests, or even when it is in opposition to those interests. In the recent case law of the Court, this

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<sup>53</sup> Dir. 2001/29/EC, rec. 31: “A fair balance of rights and interests between the different categories of rightholders, as well as between the different categories of rightholders and users of protected subject-matter must be safeguarded”.

<sup>54</sup> EU Charter, Article 47.

<sup>55</sup> EU Charter, Article 12(1), in Case C-201/13, *Deckmyn v. Vandersteen*, 3 September 2014, par. 30-31. The right considered by the Court in this case has some analogy with the so-called moral right to the integrity of the work, which is recognised in all national laws of the Member States but not subject to harmonisation in EU law.

<sup>56</sup> EU Charter, Article 7, in Case C-149/17, *Bastei Lübbe v Strotzer*, 18 October 2018, par. 48-49.

<sup>57</sup> EU Charter, Article 8, in *Scarlet Extended v SABAM*, cit., par. 50 and *SABAM v Netlog*, cit., par. 48.

<sup>58</sup> EU Charter, Art. 11 and Dir. 2001/29/EC, rec. 3 (“The proposed harmonisation will help to implement the four freedoms of the internal market and relates to compliance with the fundamental principles of law and especially of property, including intellectual property, and freedom of expression and the public interest.”). The right to freedom of expression and information was referred to in Case C-161/17, *Land Nordrhein-Westfalen v Renckhoff*, 7 August 2018, par. 41, in *Deckmyn v Vandersteen*, cit., par. 25, and in *Spiegel Online*, cit., par. 42. Other rights have been scrutinised by the Court in relation to specific exceptions to copyright, e.g. the right to education (enshrined in the EU Charter, Article 14) in *Land Nordrhein-Westfalen v. Renckhoff*, cit., par. 42, and the right to freedom of the arts (EU Charter, Article 13), in *Pelham*, cit. par. 35.

<sup>59</sup> *RAAP*, cit., par 94-96. The point is forcefully made by the Advocate General: “Given that this right cannot be waived, a sharing which equates to receiving no actual remuneration would be *de facto an expropriation of the right* even where this is agreed between the record producers and the performers” (Opinion of Advocate General Tanchev, par. 162. Emphasis added)

tendency seems to be affirmed even in contrast to the guidelines not only of the national legislator, but also of the EU legislator. Exemplary in this respect, also in terms of its relevance to copyright-related rights, is the argument developed by the Court in *Luksan*, according to which legislation granting certain exploitation rights of the film work to the producer alone, to the exclusion of the principal director, would be “tantamount to depriving” the director of lawfully acquired intellectual property rights, and this “would not be consistent with the requirements flowing from Article 17(2) of the Charter of Fundamental Rights guaranteeing the protection of intellectual property”.<sup>60</sup> The Court therefore declared contrary to EU law not only the national legislation in question,<sup>61</sup> but also an interpretation of the *acquis* that would have the effect of depriving the person of the director of certain patrimonial rights over the cinematographic work, or even only create a presumption of transfer of the right to fair compensation in favour of the producer.<sup>62</sup>

On another occasion, again with reference to a remuneration right, the Court specified that the concept of ‘author’ in Directive 29/2001 must be interpreted strictly, so that the rights accruing to the ‘author’ cannot be extended to other business entities not provided for in the text of the directive. In particular, the Court held that the benefit of receiving fair compensation for reprography and private copying was the prerogative of authors alone, and that Member States were not authorised to allocate part of that compensation “to the publishers of works created by authors”, when those publishers are “under no obligation to ensure that the authors benefit, even indirectly, from some of the compensation of which they have been deprived”.<sup>63</sup>

The *RAAP* judgment, by explicitly recognising for the first time performers as the holders of fundamental rights inherent to their *status as* artists, confirms an interpretative approach of EU law aimed at guaranteeing the personal interests protected by intellectual property rights, even (and especially) when they are opposed to competing corporate interests.<sup>64</sup> In this sense, the Court

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<sup>60</sup> Case C-277/10, *Luksan v Petrus van der Let*, 9 February 2012, par. 70-71.

<sup>61</sup> i.e. the Austrian Copyright Act: Urheberrechtsgesetz (UrhG), BGBl. Nr. 111/1936. Section 38(1) UrhG provides that the exploitation rights shall be attributed to the film producer alone, while the statutory remuneration rights shall belong to the film producer and the author of the film each for half, but expressly allows agreements to derogate from this principle, even with regard to the half due to the author of the film (*Luksan*, cit., par. 32-33).

<sup>62</sup> The Court came to this conclusion by filling the gaps in the *acquis* through a restrictive interpretation of the Berne Convention (*Luksan*, cit., par. 58-64).

<sup>63</sup> Case C-572/13, *Hewlett-Packard Belgium v Reprobel*, 12 November 2015, par. 49. It is interesting to note that the EU legislator has promptly “remedied” the Court’s interpretation by now expressly providing that the transfer or licence in favour of the publisher “constitutes a sufficient legal basis for the publisher to be entitled to a share of the compensation for the use of the work made under an exception or limitation to the transferred or licensed right.” (Dir. 2019/790, Article 16).

<sup>64</sup> One could also read in this sense the *Soulier and Doke* judgment, which declared incompatible with EU law a national law entrusting a collecting and distributing society with the exercise of the author’s exclusive right to authorise

promotes a “personalistic” view of intellectual property as a fundamental right, which contrasts with the view often expressed by the legislature, which instead aims primarily to extend the scope of proprietary rights protecting investment. The recognition of the specificity of the individual *status* of the performer, in its irreducible difference from other entrepreneurial subjects, provides a precise regulatory framework that could guide the action of the national legislator and jurisprudence in the years to come.

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the reproduction and representation in digital form of “unavailable books”: Case C 301/15, *Soulier and Doke*, 16 November 2016.