

# Comment of the European Copyright Society on the impact and consequences of the CJEU decision in C-265/19 (RAAP)

## Executive summary

In its *RAAP judgment*, the CJEU held that a Member State may not deny performing artists from third countries outside the European Economic Area (EEA) a right to remuneration by invoking the reciprocity clause of the WIPO Performances and Phonograms Treaty (WPPT). The Court arrived at its judgment despite the fact that WPPT limits the obligation to accord national treatment when another Contracting Party makes use of reservations permitted by Article 15(3) WPPT, i.e. reservations regarding the right to equitable remunerations in domestic law.

The Court considers the performers' harmonised right to remuneration for certain forms of communication to the public under Article 8(2) of Directive 2006/115 (the Rental and Lending Directive) among other things from the perspective of fundamental rights. Because the Court views the remuneration right as an *in abstracto* right protected under Article 17(2) of the Charter of Fundamental Rights, any such limitation must be defined clearly and precisely. In this situation, the EU legislature has not implemented such a clear and precise limitation. However, the consequences of the Court's approach to the harmonised rights as rights *in abstracto*, rather than as individual rights, remain unclear. The Court's conclusion is that because the remuneration right is a harmonised rule, only the EU legislature can limit that right for nationals of third States. As a result, Member States' past application of material reciprocity requirements on the basis of Article 4(2) WPPT are now problematic. Because the Court did not address retroactive effects in the *RAAP* case, the relevant date for determining the existence of a right for a third State national is also unclear. This creates further legal uncertainty.

More importantly, in light of this generic reasoning, the European Copyright Society considers that the case may have wider consequences. The Court's approach implies that Member States can never rely on reciprocity in areas which are harmonised by Union law, unless Union law explicitly permits or requires such discrimination. The resulting legal uncertainty could have been avoided had the Court opted for an alternative interpretation. It could have taken the position that, in light of Article 4(2) WPPT, the remuneration right applies only with respect to

performers to whom there is a direct and unreserved obligation under the WPPT to grant protection. The Court has not taken that position.

The European Copyright Society is of the opinion that the EU legislature should now at least clarify in a legal instrument the conditions under which performers who are nationals of States outside the EEA should have the right to equitable remuneration for the communication to the public of their recordings under Article 8(2) Rental and Lending Directive. The instrument should also clarify the temporal aspects, notably on retroactive applicability.

What would be even better is the development of an instrument with a more general ambit. After all, the arguments of the CJEU in the *RAAP* decision are of a more general nature and could also be applied to various international treaties and other rights of authors, performers and other right holders. Such an instrument should clarify the conditions under which national treatment and minimum rights under the international treaties are to be granted in the EU to nationals of third states. It should also include clear rules on any temporal aspects, and address the question of how the EU and its Member States deal with reservations in international treaties and where material reciprocity applies.

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## **0. Significance of the RAAP judgment**

The principles of territoriality and national treatment (coupled with minimum rights), are the backbone of the international copyright and neighbouring rights system as contained in the Berne Convention, Rome Convention, WIPO Copyright Treaty (WCT), WIPO Performances and Phonograms Treaty (WPPT) and various other multilateral instruments to which the EU or its Member States are bound in various constellations. These treaties allow contracting states to withhold national treatment only in special cases. One such case concerns remuneration rights for performing artists and phonogram producers for certain uses of their recordings.

In the *RAAP* case, the Grand Chamber of the CJEU considered whether a Member State could avail itself of the possibility of denying performing artists from third countries outside the European Economic Area (EEA) a right to remuneration by invoking the reciprocity clause of the WPPT (Article 2).<sup>1</sup> The answer was a resounding No. The question arrived at the Court

<sup>1</sup> Case C-265/19, *Recorded Artists Actors Performers Ltd v Phonographic Performance (Ireland) Ltd and Others*, EU:C:2020:677.

because Article 8(2) of the Rental and Lending Directive (RLD) harmonises the right to remuneration for certain forms of communication to the public (Directive 92/100/EEC, replaced by Directive 2006/115/EC). This means that the power of Member States to invoke reciprocity clauses or make reservations under treaties is limited by the competence of the EU. Also, since the Charter recognises protection of intellectual property (Article 17(2) of the Charter of Fundamental Rights (CFREU)), complex issues around the relationship between fundamental rights, international copyright norms, and harmonised copyright norms surfaced in this case. Herein particularly lies the broader significance of the *RAAP* case for intellectual property law.

In the aftermath of the CJEU decision in the *RAAP* case, the European Copyright Society expresses some concerns about the possible wider consequences of the case. This opinion distinguishes between the reasons given by the Court for reaching the results described above and an assessment of the scope of the decision. As will be detailed in this opinion, the Court approaches the matter of reciprocity largely from the perspective of fundamental rights. As a consequence, significant legal uncertainty arises concerning (i) the identity of those who are entitled (retroactively) to invoke intellectual property rights (or conversely can be made to pay remuneration); (ii) the validity of reservations made historically by Member States with respect to treaties to which they are signatories; (iii) the application of reciprocity clauses; and (iv) the implications of Article 17(2) CFREU on the EU and Member States' drafting and interpretation of limitations to IP rights.

## **A. Overview of and critical view on RAAP**

### ***I. Brief on the findings.***

The case concerns the payment of remuneration for certain uses of recordings by performing artists (and phonogram producers) from states that do not themselves recognise those remuneration rights. Following the conclusions of the ruling, Article 8(2) RLD must be interpreted as precluding a Member State from excluding performers who are nationals of states outside the EEA from the right to equitable remuneration for the communication to the public of their recordings. Moreover, the Court stated that reservations notified to the World Intellectual Property Organisation (WIPO) by third states under Article 15(3) of the WPPT do

not currently lead to limitations of the remuneration right in Article 8(2) RLD.<sup>2</sup> Such limitations could be introduced only by the EU legislature, and must be compliant with the requirements of Article 52(1) CFREU.<sup>3</sup> Any limitation to the exercise of rights protected under the Charter must “be provided for by law, which implies that the legal basis which permits the interference with that right must itself define, clearly and precisely, the scope of the limitation on its exercise”. The exclusion of non-EEA rightholders from the right to remuneration must be made explicitly. This is the case because the right to equitable remuneration falls within the fundamental right to intellectual property in Article 17(2) CFREU.<sup>4</sup> The Court further held that Article 8(2) RLD cannot be interpreted in such a way that only the producer of the phonogram is entitled to receive remuneration, as opposed to having to share it with the performer who has contributed to that phonogram.<sup>5</sup>

These conclusions mirror the questions raised by the Irish High Court, and the facts of the case. However, the reasoning of the CJEU may carry broader consequences than follow directly from the concluding part of the judgment. In section B below we will present different possible interpretations of the decision.

## ***II. Some critical remarks***

In reaching its conclusion, the CJEU confirms that Article 8(2) RLD, as far as possible, must be interpreted consistently with the WPPT, the EU having acceded to the Convention and the WPPT therefore being part of the EU legal order with primacy over other secondary legislation (para. 62). Clearly that is true. Our critique is two-pronged. First, the Court gives no (adequate) weight to the material reciprocity clause of Article 4(2) WPPT. Second, the Court unduly enlarges the scope of Article 17(2) CFREU. The Court does this by assessing whether a claim for remuneration triggers application of Article 17(2) in the abstract, when a concrete test would be more appropriate for intellectual property rights. Arguably, the Court also fails to distinguish limitations to the *existence* of intellectual property rights from limitations to their *exercise*, thus appearing further to expand the scope of such rights.

<sup>2</sup> Case C-265/19, *Recorded Artists Actors Performers Ltd v Phonographic Performance (Ireland) Ltd and Others*, EU:C:2020:677, para. 91 and the conclusion, pts. 1 and 2.

<sup>3</sup> Case C-265/19, *Recorded Artists Actors Performers Ltd v Phonographic Performance (Ireland) Ltd and Others*, EU:C:2020:677, paras. 86 and 88.

<sup>4</sup> Case C-265/19, *Recorded Artists Actors Performers Ltd v Phonographic Performance (Ireland) Ltd and Others*, EU:C:2020:677, para. 85.

<sup>5</sup> Case C-265/19, *Recorded Artists Actors Performers Ltd v Phonographic Performance (Ireland) Ltd and Others*, EU:C:2020:677, paras. 92–96 and conclusion pt. 3.

### **The material reciprocity clause of Article 4(2) WPPT**

The Court rejects an interpretation of Article 8(2) RLD in line with the principle of material reciprocity enshrined in Article 4(2) WPPT. The latter states that the obligation to accord national treatment (formal reciprocity) provided for in Article 4(1) WPPT shall not apply to the extent that another Contracting Party makes use of reservations permitted by Article 15(3) WPPT, i.e. reservations regarding the right to equitable remunerations in domestic law. The Contracting Parties, including the EU, are not *obliged* to apply material reciprocity. Article 4(2) merely allows states to refuse foreign performers and phonogram producers the right to equitable remuneration in cases where the contracting state that is their country of origin has declared under Article 15(3) WPPT that it does not recognize a right to remuneration (e.g. for certain uses, or not at all).<sup>6</sup> An alternative interpretation of Article 8(2) RLD, in light of Article 4(2) WPPT, could nevertheless have been that the Directive’s remuneration right applies only with respect to performers to whom there is a direct and unreserved obligation under the WPPT to grant protection. The consequence of such an interpretation, combined with the finding that Article 8(2) RLD is a harmonised rule (para. 88), would have been – to paraphrase the Court – that it is for the EU legislature alone to *extend* the remuneration right to performers to whom there is no obligation under current EU law (WPPT) to grant protection.

The CJEU seems implicitly to reject this alternative interpretation. However, the Court’s reasoning supporting such a rejection is not convincing. The conclusion under the second question – that Article 8(2) RLD, in light of Article 4(1) and Article 15(1) WPPT, must be interpreted as precluding a Member State from excluding performers *who are nationals of States outside the EEA* – is, taken at face value, confusing.<sup>7</sup> Since the obligation to recognise

<sup>6</sup> ‘Formal reciprocity’ in international agreements implies that every contracting party agrees to assume the treaty obligations because the other parties do the same. As international IP agreements normally incorporate the principle of national treatment (non-discrimination), the latter principle implements formal reciprocity as opposed to material reciprocity, meaning that each contracting party grants nationals of other contracting parties the same rights as the other contracting party grants its own nationals, compare Silke von Lewinsky, “Intellectual Property, Nationality and Non-Discrimination”, [https://www.wipo.int/edocs/mdocs/tk/en/wipo\\_unhchr\\_ip\\_pnl\\_98/wipo\\_unhchr\\_ip\\_pnl\\_98\\_6.pdf](https://www.wipo.int/edocs/mdocs/tk/en/wipo_unhchr_ip_pnl_98/wipo_unhchr_ip_pnl_98_6.pdf), p. 8 with further references. Thus, Article 4(2) WPPT deviates from the obligation to formal reciprocity without obliging the Contracting Parties to apply material reciprocity.

<sup>7</sup> Case C-265/19, *Recorded Artists Actors Performers Ltd v Phonographic Performance (Ireland) Ltd and Others*, EU:C:2020:677, para. 75, cf. paras. 70–71. See the criticism in Ole-Andreas Rognstad, “Performing artists’ right to remuneration – on the junction of external treaty competence, national treatment, material reciprocity and fundamental rights: RAAP”, 58 *Common Market Law Review* (2021), 1523–1545, 1535–1536.

national treatment under Article 4(1) WPPT does not apply to situations mentioned in Article 4(2), Articles 4(1) and 15(1) do not provide arguments for precluding Member States from excluding *all nationals* of WPPT states outside the EEA, namely nationals of states that have made a reservation under Article 15(3). Thus, the conclusion leaves the impression that Article 4(1) extends beyond its actual scope. In this sense, the conclusion under the second question is biased since it does not take account of the limitation implicit in the principle of reciprocity enshrined in Article 4(2) WPPT. This is most striking given the facts of the case, the core question of which was whether Ireland had the obligation to grant remuneration right to US performers, the US having made extensive reservations under Article 15(3) WPPT.

### **Unduly enlarged scope of Article 17(2) CFREU**

In concluding that third party reservations under Article 15(3) WPPT cannot affect the scope of Article 8(2) RLD, the CJEU relies on Article 17(2) CFREU in combination with Article 52 CFREU. The Court states that since the remuneration right is “a right related to copyright ...it is accordingly an integral part of the protection of intellectual property enshrined in Article 17(2) of the Charter of Fundamental Rights of the European Union”. Consequently, the Court holds, “pursuant to Article 52(1) of the Charter, any limitation on the exercise of that right related to copyright must be provided for by law, which implies that the legal basis which permits the interference with that right must itself define, clearly and precisely, the scope of the limitation on its exercise”.<sup>8</sup>

The ECS has some concerns with this approach to the protection of intellectual property as a fundamental right. Clearly, individual performers (and producers) do not have a remuneration right *unless* Article 8(2) RLD is interpreted in a way that includes them under the scope of protection. By asserting that the remuneration right is a “an integral part of the protection of intellectual property enshrined in Article 17(2)” which is subject to the requirements under Article 52 CFREU, before deciding whether the right applies to all nationals from third countries that have made a reservation under Article 15(3) RLD, the CJEU applies Article 17(2) CFREU to the remuneration right in abstracto and not to the remuneration right as an individual right. In essence, the Court seems to regard the obligation to pay remuneration as crystallised in EU law and therefore requires any interferences with that right to satisfy the conditions set

<sup>8</sup> Case C-265/19, *Recorded Artists Actors Performers Ltd v Phonographic Performance (Ireland) Ltd and Others*, EU:C:2020:677, paras. 85–86.

out in Article 52 CFREU. In such circumstances, the risk is that the "property" in EU copyright law is viewed as a broad, abstract entitlement, rather than as an entitlement that is already qualified by limitations in the legislative scheme.<sup>9</sup>

This conceptual hiatus and the risks it engenders are worsened by the use the Court makes of Article 52(1) CFREU, which may cause confusion on the scope of this provision *vis-à-vis* Article 17(2) CFREU.<sup>10</sup> As it appears clear from its wording, the provision refers to limitations on the exercise of the Charter's rights and freedoms, not on their existence. This difference is ignored in *RAAP*, where the Court uses Article 52(1) CFREU to censure an Irish provision that does not limit the exercise of rights granted by Article 8(2) RLD. The Irish provision does not recognise the existence of a particular remuneration right for U.S. performers, who are however identified as rightholders by the CJEU under its extensive reading of Article 8(2) RLD.<sup>11</sup>

The distinction between IP rights in abstracto on the one hand and as concrete, individual rights on the other is important. By protecting IPRs as abstract entitlements, any kind of limitation of the right would qualify as an interference with the IPR as property. The *RAAP* ruling may thus *improperly* suggest that any limitations upon rights protected under Article 17 CFREU should be clearly and specifically defined in black-letter law, thus excluding any judicial intervention on their scope. However, this hint conflicts with the CJEU's case law on copyright exceptions and limitations, and particularly on the fair balance between copyright (or, more broadly, IPRs) and fundamental rights. The Court has recalled Article 52(1) CFREU in connection with Article 17(2) CFREU to guide the balancing assessment in a number of important decisions, citing the provision as precluding the application of a fair balance analysis where there is an extreme compression – and thus violation – of the essence of an IP right.<sup>12</sup> However, in no instance was

<sup>9</sup> Compare, for example, with the German Basic Law (Grundgesetz) Article 14(1), which states that the content and limits of property "shall be defined by the laws" – in other words, property is not guaranteed in the abstract.

<sup>10</sup> Article 52(1) CFREU provides that "any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms", and that "subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others".

<sup>11</sup> In this sense, and albeit contestable, the Court operated a clearer qualification in *Luksan* (see fn. 13 *infra*). By ruling that the Austrian regulation denying the attribution of copyright to the film director was illegitimate because it violated Article 17(1) CFREU, for it **deprived** film directors of a (property) right conferred by them by EU law, the Court correctly distinguished deprivations (existence) from limitations (exercise), thus avoiding improper references to Article 52(1) CFREU

<sup>12</sup> Eg. case C-230/16, *Coty Germany GmbH v Stadtsparkasse Magdeburg*, EU:C:2015:485, para. 35; case C-149/17, *Bastei Lübbe GmbH & Co. KG v. Michael Strotzer*, EU:C:2018:841, para. 46; case C-371/18, *Sky Österreich GmbH v Österreichischer Rundfunk*, EU:C:2013:28, para. 48; case C-314/12, *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH*, EU:C:2014:192, para. 63.

Article 52(1) CFREU to be considered as justifying the concept of IPRs as broad, abstract entitlements.<sup>13</sup> The RAAP ruling should, accordingly, not be viewed as establishing broad protection for IPR as abstract entitlements.

A general objection to the CJEU's approach to Article 17 is that it is superficial and potentially dangerous. More or less like in *Luksan*,<sup>14</sup> the reference represents nothing else but a collateral support to the decisive secondary-law-based argument, which is the all-encompassing interpretation of Article 8(2) RLD as referring to all performers and producers, irrespective of the presence of points of attachment under the Rome Convention (via WPPT). However, such a cursory introduction of fundamental rights reasoning creates a dangerous rhetorical precedent without a further explanation of the relationship between Charter rights and the secondary legislation..

## **B. Interpretations**

Even though the ECS is critical of the CJEU arguments, a question nevertheless arises as to what are the further consequences of the Court's holding in *RAAP*. Here we will discuss three possible interpretations of the decision: (i) narrow interpretation; (ii) possible wider interpretation; (iii) widest possible interpretation

### ***I. Narrow interpretation***

The dispute in the main proceedings, the questions referred to the CJEU and the ruling all concern the specific question of how to interpret Article 15(3) WPPT and Article 8(2) of Directive 2006/115 (RLD) regarding the possible right of performers to a part of the single equitable remuneration referred to therein. In such a context, a preliminary conclusion might be that the decision has to be interpreted narrowly and that possible legislative initiatives on the part of the European institutions should also be focusing solely on the remuneration of performers and phonogram producers.

### ***II. Possible wider interpretation***

<sup>13</sup> Cf. the cases cited by the CJEU in RAAP para. 86, case C-419/14, *WebMindLicenses Kft v. Nemzeti Adó- és Vámhivatal Kiemelt Adó- és Vám Főigazgatóság*, EU:C:2015:832, para. 81; Opinion 1/15, *EU-Canada PNR Agreement*, EU:C:2017:592, para. 139; case C-311/18, *Facebook Ireland and Schrems*, EU:C:2020:559, paras. 175 and 176.

<sup>14</sup> Case C-277/10, *Martin Luksan v Petrus van der Let*, EU:C:2012:65.



However, it is likely that *RAAP* has a wider effect, because the reasoning of the CJEU is drafted in rather general terms. The Court seems to construe Directive 2006/115 in its entirety as providing rights for performers and phonogram producers irrespective of their nationality, residence or other connection to a particular EU or EEA Member State whenever the broadcasting or communication to the public takes place on EU territory. To cite the Court, “Directive 2006/115, which refers without further specification to ‘performers’ and ‘phonogram producers’, lays down no condition under which the performer or phonogram producer should be a national of an EEA Member State or domiciled or resident in such a State, nor a condition under which the place where the creative or artistic work is carried out should fall within the territory of an EEA Member State.”<sup>15</sup> It is therefore possible that performers or producers could succeed when arguing against any discrimination based on nationality, place of performance or similar criteria.

### ***III. Possible widest interpretation***

Yet, the decision in *RAAP* may also be interpreted as a rejection of any differentiation based on citizenship or national treatment doctrines at the level of Member States’ law. The CJEU uses its jurisprudence following the *AETR* decision<sup>16</sup> to justify the conclusion that the EU has exclusive external competence to enter into reciprocal agreements with third states that are liable to alter the scope of Article 8(2) RLD. If we are to taking this argument seriously, EU Member States cannot discriminate against authors, performers, phonogram producers or others entitled under European legislation on copyright (and potentially other IP rights) unless such discrimination is foreseen at the level of Union law (as e.g. for “sui generis” databases in Article 11 of Directive 96/9), notwithstanding the question of whether any reciprocity requirement must be explicitly stipulated in EU instruments. The line of argument of the Court is of a general nature: “Since Article 8(2) of Directive 2006/115 is a harmonised rule, it is for the EU legislature alone and not the national legislatures to determine whether the grant in the European Union of that right related to copyright should be limited in respect of the nationals of third States and, if so, to define that limitation clearly and precisely.”<sup>17</sup> Such a wide interpretation

15 Case C-265/19, *Recorded Artists Actors Performers Ltd v Phonographic Performance (Ireland) Ltd and Others*, EU:C:2020:677, para. 61.

16 Case 22/70, *Commission of the European Communities v Council of the European Communities. European Agreement on Road Transport (AETR)*, EU:C:1971:32. See case C-265/19, *Recorded Artists Actors Performers Ltd v Phonographic Performance (Ireland) Ltd and Others*, EU:C:2020:677, para. 90, with reference to case C-114/12, *Commission v Council*, EU:C:2014:2151, paragraphs 68 to 70, and joined cases C-626/15 and C-659/16, *Commission v Council (Antarctic MPAs)*, EU:C:2018:925, paragraph 113.

17 Case C-265/19, *Recorded Artists Actors Performers Ltd v Phonographic Performance (Ireland) Ltd and Others*, EU:C:2020:677, para. 88.

would only allow for discrimination in areas which are not harmonised by Union law or where Union law permits or requires such a discrimination, as e.g. for the term of protection under Article 7 of Directive 2006/116 and for the resale right under Article 7 Directive 2001/84. In this regard, it must be emphasised that the exclusive competence of the Union is not limited to rights covered by the WPPT, cf. the Court’s statement “that the European Union has the exclusive external competence referred to in Article 3(2) TFEU for the purpose of negotiating with third States new reciprocal commitments, within the framework of the WPPT or outside it, relating to the right to a single equitable remuneration for producers of phonograms published for commercial purposes and performers contributing to those phonograms.”<sup>18</sup> This line of argument could potentially also apply to the WCT and the TRIPS agreement, which have both been signed by the EU, and to the obligations under the Berne Convention, which have been incorporated in Article 9 TRIPS.

#### **IV. Most plausible interpretation**

Given the fact, that the EU has taken the lead in the negotiations of international treaties in the field of copyright and related rights since the 1990s within WTO and WIPO and in preferential free trade agreements, it seems a logical consequence that national treatment and minimum rights for authors, performers and other right holders from third States must be regulated at EU level. Any other conclusion would lead to friction in the internal market. It is hardly conceivable that the EU would accept the obligation to protect right holders from third States under certain conditions at the international level and then give flexibility to EU Member States to offer a more generous or a more limited level of protection to the nationals of those third States. From this perspective, the judgment of the CJEU in *RAAP* simply reveals a shift in competence that has already taken place. Still, there seems to be some maintenance work left to do, a point we address in section D below.

#### **C. Direct consequences of RAAP**

##### ***I. National regimes and practices for the remuneration of artists, loss of revenue for European artists***

<sup>18</sup> Case C-265/19, *Recorded Artists Actors Performers Ltd v Phonographic Performance (Ireland) Ltd and Others*, EU:C:2020:677, para. 89.

The exact nature of the impact of *RAAP* in various Member States depends *inter alia* on whether reciprocal protection has so far been the norm, and on the way which fees are set and collected. The fact that in quite a number of Member States non-EEA performers and phonogram producers are not remunerated because international law allows material reciprocity, in itself indicates that perceptions differ substantially on the impact of Article 17(2) CFREU. In this respect the situation in Europe is quite diverse in Member States, as is illustrated in the following.

Although it seems that the discrimination between performers and phonogram producers occurring in Irish law prior to *RAAP* has not been a widespread phenomenon, the producer of phonogram has historically been identified as the only rightholder *vis-à-vis* users in Italian law. However, after several legislative amendments, the current version of the Italian Copyright Act (l.aut) Article 73, attributes the remuneration right independently to producers and performers, and assigns its exercise to CMOs and independent entities appointed in writing by rightholders.

Thus, in Italian law, *RAAP* does not seem to change the situation by requiring an immediate re-allocation of revenues between performers and phonogram producers from EU/EEA Member States and third countries. No reservation is made under the Rome Convention, nor does the relevant provision<sup>19</sup> refer to any principle of formal or material reciprocity which could ground a discrimination between performers on the basis of their nationality or establishment. In fact, current practices of calculation and distribution of remuneration by CMOs confirm the equal treatment of performers regardless of their nationality and establishment.

The situation is similar in Germany as the current provision of the German Copyright Act Section 125(5) refers to protection granted under the international treaties, including the WPPT, without any reservation for performers from the US or other third countries. Material reciprocity was not and is still not required before and after the *RAAP* decision unless the legislator intervenes. Therefore, collecting societies need not change their distribution schemes after the decision.

<sup>19</sup> Originally the presidential decree D.p.c.m 2 February 2015, replaced by the ministerial decree D.M. 5 September 2018, no.386.

Also in Hungary, equitable remuneration is due to performers and phonogram producers irrespective of their nationality/domicile. The right for the equitable remuneration is codified in Article 77(2) of the Hungarian Copyright Act, and does not refer to any reciprocity requirement. Indeed, when Hungary joined the Rome Convention, it did it without any reservation. Consequently, collecting societies must not change their distribution schemes after the RAAP decision.

In the Netherlands, the legislator clarified the Neighbouring Rights Act (*Wet op de Naburige rechten*) after *RAAP*.<sup>20</sup> It had always been the case that if rightholders can derive rights from the WPPT, they are also entitled to invoke the corresponding rights of the Neighbouring Rights Act. Prior to the recent clarification the common interpretation of the law – also that adopted by collective management organisations – was that in view of Article 4(2) WPPT, no remuneration was due to performers from non-EEA countries for uses for which those countries do not recognize remuneration rights. Through the legislative amendment it has been clarified that domestic law does however not impose a reciprocity requirement; all that is required for non-EEA performers and phonogram producers is that they qualify for protection under the specific application criteria of the WPPT itself. A reciprocity requirement might in the future flow from EU law. It is logical to assume that, henceforth, performers from the U.S. will be included in the distribution of monies, that as a consequence of the dominance of the US-originating repertoire in the Netherlands, other artists will receive less.

French law provides for a distinction based on the location of the fixation as to the payment of the remuneration. Pursuant to article L.214-2 Intellectual Property Code (IPC), the remuneration rights are, “subject to international conventions ... divided between performers and phonogram producers for phonograms fixed for the first time in a Member State of the European Community”, thereby restricting the distribution of the remuneration to the mere first-time-EU-fixed phonograms. What is meant by “subject to international conventions” in this provision is not quite clear and subject to various interpretations. One interpretation excludes any payment of the remuneration right when the phonogram has been fixed outside EU in a country that was not a member of the Rome Convention, like the US, even for the fixation of the French performer’s performance and even after the entry into force of the WPPT. Another interpretation is reflected in the fact that some CMOs have always paid French artists,

<sup>20</sup> The applicability of the Dutch Neighbouring Rights Act is regulated in Article IIIa of the Copyright Act 1912 Adaptation Act, etc. (Implementation of Directive on Copyright and Related Rights in the Information Society), Stb. 2004, 336, as amended by Stb. 2020, 560; Parliamentary Papers II 2020/21, 35317, no. 8.

notwithstanding the location of fixation of their performance. A specific CMO (SPRE) has been created to collect this remuneration and organise the sharing of the royalties between its four CMOs members (two for the producers, SPPF, SCPP, and two for the performers, ADAMI, SPEDIDAM). For phonograms fixed for the first time outside the EU, remuneration for the communication to the public or broadcasting is in practice collected but not distributed – neither to the producer nor to the performer. On the contrary it is kept by the CMOs as non-distributable royalties (“irrepartissables”) and exclusively used by them according to article L. 324-17 IPC for purposes of funding creation, helping live performance diffusion and artistic or cultural education. The RAAP decision raises the question of the conformity of the French system (as applied by the CMOs) with the CJEU interpretation of the international obligations of France as regards the possibility to retain and distribute the money corresponding to the broadcasting of US phonograms in France.

To some extent or other, the Scandinavian countries have all subjected the remuneration right to the principle of material reciprocity. Both in Denmark and in Sweden, the right of both performers and phonogram producers apply only to the extent and at the time that the foreign country protects recordings attached to the respective countries. In both countries’ legislation, moreover, it is specified that the remuneration right does not apply to the extent that a Contracting Party to the WPPT has made a reservation pursuant to Article 15(3) WPPT.<sup>21</sup> Norway, as a non-EU member but party to the EEA, has not yet acceded to the WPPT but applies the principle of material reciprocity in that the remuneration right for performers and phonogram producers is applicable to all sound recordings made by producers from a country that has acceded to the Rome Convention, on the condition that the latter country grants a remuneration right to performers and producers of sound recordings pursuant to the provisions in Article 12 of the Rome Convention. However, the situation is more complex since the remuneration right also applies to all recordings on which performers from the EEA participate, and in practice all performers and phonogram producers participating on such recordings (also from third countries) have received remuneration.<sup>22</sup> In 2019, a bill was launched in order to limit the beneficiaries of the remuneration right to performers on and producers of recordings

21 Cf. the Danish Copyright Act 1995 Section 68(2) and Regulation for the application of the Copyright Act in relation to other countries Sections 14 and 16, and the Swedish Copyright Act 1960 Section 47 and the International Copyright Regulation Sections 13 and 26.

22 See Sections 21 and 114 of the Norwegian Copyright Act 2018 and Sections 47 and 56 of the General Regulation to the Copyright Act 2021.

made by producers from Rome Convention countries.<sup>23</sup> An important backdrop to the proposal is that recordings that are not subject to the remuneration right are subject instead to a levy that is meant to benefit cultural life in Norway.<sup>24</sup> The bill has been put on hold as a consequence of the *RAAP* decision, but the consequence of the decision for the EEA Agreement, is uncertain, as the agreement is unaffected by the EU's external competence and entails no coordinated policy on third country matters.<sup>25</sup>

Despite Brexit, the *RAAP* decision is also important for the United Kingdom. There, the rules on qualification for protection of sound recordings and performers apply a form of material reciprocity, though the precise rules differ for sound recordings and performances. For sound recordings, those which qualify by virtue of a relevant link to a Rome or WPPT country, are assimilated to local recordings, unless the link is to a country that is a party to WPPT but not Rome, in which case the copyright holder does not benefit from a right to control the broadcast of the work. For sound recordings with links only to Berne and WTO countries, protection does not extend to the right to prevent public playing or communication of the sound recording. As regards performances, those with Rome links are assimilated, *prima facie*, to local performances, with the benefit of full national treatment. Thereafter, the law differentiates between four other categories (1) those with links to countries that are party to Rome but with Article 16(1)(a) declarations; (2) those with links to WPPT countries with declarations under Art 15(3); (3) those with links to countries parties to WPPT but not Rome; and (4) those with links to parties only to the WTO. Different levels of protection apply to performances depending on which of these four links justify protection under UK law. As regards 1 and 2, the remuneration right for communication to the public is withheld.<sup>26</sup>

Because the *RAAP* decision was issued in September 2020, that is, four months before the end of the so-called 'Implementation Period,' (which ended on 30 December 2020), the decision constitutes 'retained case-law' for the purposes of interpreting the provisions of UK law that

<sup>23</sup> Proposal of 9 December 2019.

<sup>24</sup> See Act relating to a levy for the communication of recordings of performers' performances 1956 Section 3, second paragraph.

<sup>25</sup> See, by comparison, the decision of the EFTA Court in case E-2/97, *Mag. Instrument Inc. v. California Trading Company Norway, Ulsteen*, in particular paragraph 27. See further Ole-Andreas Rognstad, "The *RAAP* Decision of the CJEU - What Happened to Reciprocity?", in Morten Rosenmeier et al., *Festschrift til Jørgen Blomqvist*, Ex Tuto: Copenhagen (2021), 525-548, 540-546.

<sup>26</sup> See Copyright, Designs and Patents Act 1988, Sections. 20, 182D, 159(2)-(3) and 206(1)(bb), and Copyright and Performances (Application to other Countries) Order, SI 2016/1219, Recitals. 3 and 4, Sections. 206(1)(c) and 208, and Recitals 9-12.

are ‘retained EU-law.’<sup>27</sup> In principle, the doctrine of supremacy of EU law (applicable in relation to retained EU law) might require the disapplication of the rules of material reciprocity just set out.<sup>28</sup> However, it would be open to an appellate court (the Court of Appeal or Supreme Court) to decide not to follow the case on the basis that it generates injustice or impedes the proper development of the law.<sup>29</sup> It could certainly be argued that the *RAAP* decision related primarily to a question of the internal allocation of powers as between the European Union and its Member States which, post Brexit, is no longer relevant to the proper development of UK law. Presumably, also, a court’s refusal to follow the statutory scheme (on the basis of *RAAP*) followed by legislative reiteration of that scheme would not constitute “proper development” of the law

It is not known how, if at all, the relevant CMO, PPL Ltd (which represents both recording companies in relation to the collection of licensing fees for playing and communication and performers in relation to the distribution of equitable remuneration), has reacted to the decision, or whether foreign performers are planning to take any action. If the courts were to decide to disapply the existing law and follow *RAAP*, it would be open to the UK legislature to pass legislation confirming the existing statutory rules on material reciprocity (perhaps even with retrospective effect, given the unusual retrospective impact of *RAAP* to some, as yet, unidentified date). Of course, if the government takes that course, it would be sensible to clarify the position in relation to all rules of qualification that might have been affected by a broad interpretation of the CJEU ruling.

## ***II. Retroactive application***

As demonstrated above, before *RAAP*, differences existed in Member States with respect to remuneration of non-EEA performers (and phonogram producers). For those Member States where performers from non-EEA countries were not treated the same as performers from EEA

<sup>27</sup> Retained case-law is defined in European Union (Withdrawal) Act Section 6(7); ‘retained EU law’ is defined by reference to sections 2-4 of the same Act, and includes implemented EU directives (s. 2), such as the Rental and Lending Directive.

<sup>28</sup> European Union (Withdrawal) Act 2018 Section 5(3).

<sup>29</sup> European Union (Withdrawal) Act 2018 Section 6(4); European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020 Recital 3 (extending to Court of Appeal). The relevant test for deviating from retained case-law is discussed in *Tune-In v. Warner Music UK* [2021] EWCA Civ 441, [77]-[89] (Arnold LJ), [184] (Rose LJ), [196]-[202] (Vos MR) (in which the Court of Appeal decided against deviating from the CJEU’s case-law on communication to the public, in particular, by hyperlinking).

countries, *RAAP* may require changes. One important question is what standard is to be used to determine the extent to which *RAAP* has retroactive effects. What is the relevant point in time?

According to established case law, the CJEU's interpretation of the EU law on a preliminary question is deemed to be consistent with the norm since its entry into force, unless the Court decides to limit the retroactive effect of its decision.<sup>30</sup> This can be done in exceptional cases only, and relevant factors include legitimate expectations of the Member States' governments, and the severity of harmful consequences that such an interpretation would cause. The Court did not address retroactive effects in the *RAAP* case. It is settled case-law that the Court may only limit the temporal effect in its actual judgment.<sup>31</sup> Thus, Member States' past application of material reciprocity requirements on the basis of Article 4(2) WPPT are now problematic too. Yet, it is still unclear what the relevant date is. Numerous possibilities exist: the coming into effect of the WPPT for the E.U. (March 14, 2010; different dates for individual Member States); the date when the Charter of Fundamental Rights gained full legal effect (Lisbon Treaty, 1 December 2009); the date of the (initial) entry into force of the 1992 Lending and Rental Directive which harmonised the right to remuneration in the first place (1<sup>st</sup> July 1994); or perhaps its implementation dates.

As the WPPT was signed both by the EU Commission and by Member States as a mixed agreement,<sup>32</sup> at which moment should it have come to pass that Member States lost their power to rely on reservations in international treaties or material reciprocity, to the extent that they were no longer able to exclude some right holders from the benefit of remuneration right (and, by the way, other rights) under the principles of international law contained in the Vienna Convention on the Law of Treaties?

Should it be considered that the exclusive external competence of the EU on the matter derives from the *AERT* jurisprudence and starts from the exercise of the internal competence in 1992, or that it was triggered only later by the Lisbon treaty (1 December 2009) and the inclusion of

<sup>30</sup> See Lionel Bently, "Judicial Creativity and Transitions in EU Intellectual Property Law", in Niklas Bruun et al. (eds.), *Transition and Coherence in Intellectual Property Law: Essays in Honour of Annette Kur*, Cambridge: Cambridge University Press (2021), 25 –45.

<sup>31</sup> See e.g. case C-437/97, *EKW/Austria*, EU:C:2000:110, para 57.

<sup>32</sup> Several Member States have made reservations under the WPPT from the beginning, without any opposition from the EU Commission. This implies at the time the Commission considered that Member States retained the competence to do so.



IP within the realm of international trade? The Directive predates both Charter and WPPT. As the Court mentions the need to ensure that limits on IP rights in a EU instrument comply with the Charter, is the date of the entry into force of the Charter relevant?

Through its silence on retroactive effect and by not addressing the complexities of transitional law (of note: the referring court did not ask about these), the Court has left Member States and ultimately the EU legislator to deal with the resulting legal uncertainty. A further complication of any retroactive effect – from whatever precise date – is that it will be difficult to calculate the amounts due for past uses and identify the person to whom they are due. Also, it raises the thorny questions of who is liable (individuals? Member States?) and how performers must enforce claims for past payments due considering the time limitation for introducing a claim.

### ***III. Leeway for Member States legislative measures, AERT jurisprudence applied***

The Court’s reference in para. 90 of the *RAAP* decision to Article 3(2) TFEU and the *AETR* jurisprudence<sup>33</sup> reflects the limitations of the Member States’ room for manoeuvre in international copyright law. According to Article 3(2) TFEU, the EU has exclusive competence to conclude an international agreement when its conclusion is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope. The competence of the Union is not only exclusive in cases where the international agreement in question falls directly and with all its provisions within the scope of internal Union law – so that Member States’ international activities would potentially provoke conflicts with the Union law – but also if this ‘match’ of international and internal is not full only applicable “to a large extent”.<sup>34</sup> From this perspective, it is not possible to pick and choose specific aspects from national copyright law not yet harmonised and to allow Member States to implement reciprocity requirements or other kinds of discriminatory rules for authors, performers or other right holders from third countries. Yet, there are still areas of copyright which have not been harmonised in the EU and where Article 3(2) TFEU, and as a consequence the *RAAP* principles, should not apply.

### **D. Ways forward**

<sup>33</sup> See fn. 15 *supra*.

<sup>34</sup> Case C-114/12, *Commission v Council*, EU:C:2014:2151, paragraph 102.

### ***I Only the European legislature can fix the issues***

As in the case of other landmark CJEU decisions which have revolutionized the interpretation of EU provisions and requested substantial changes in the approach adopted by Member States, advancing the degree of harmonization of EU copyright law, the *RAAP* decision also raises critical questions and creates short-circuits that only the EU legislator may be able to solve consistently. This applies particularly, to (1) the retroactivity of the decision; (2) the definition of the margin of discretion left to Member States in discriminating between rightholders on the basis of nationality or other criteria, and of the areas and instance where such discretion, if any, may still be exercised (for example whether the money collected can be used for cultural purposes rather than distributions to foreign rightholders); (3) the negative impact of *RAAP* on the amount of remuneration left for European artists, and the weakening of their position *vis-à-vis* counterparts coming from countries that do not grant remuneration to European performers. Given the legal uncertainty for all parties involved, the Commission should react in a timely manner and initiate a legislative project. Such legislation should either set definite rules on the EU level in the form of a regulation, which would be the preferred option in light of the apparent need of the affected parties for legal clarity, or at least could clarify the EU framework and the residual discretion of Member States in a directive.

### ***II. Room for manoeuvre under Article 17 CFREU***

The use *RAAP* makes of Article 17(2) CFREU carries a number of important implications for the room for manoeuvre still left to Member States in areas touched upon by EU harmonisation. First, in holding that reservations notified by third States under Article 15(3) WPPT do not lead to limitations of the right provided for in Article 8(2) RLD in the European Union, the Court crystallises the existence of a legal position for the nationals of those countries under Article 17(2) CFREU, excluding any margin of appreciation for Member States. Second, *RAAP* offers a definite answer to the question – raised in several Member States – whether the protection offered by Article 17(2) CFREU should be understood as limited to exclusive rights or as also cover remuneration rights such as the one introduced by Article 8(2) RLD. In line with the approach adopted by the CJEU in its constitutional property jurisprudence, which aims to be consistent with Member States’ common constitutional traditions and case law, the Court clarifies that the protection offered by the Charter’s provision extends to all IP rights, with no regard to their content and degree of exclusivity.

Combining these findings with the CJEU’s slippery holding in *Luksan*,<sup>35</sup> where a national regulation of film ownership was considered a deprivation of the film director’s copyright, one might get the impression that the reference to Article 17(2) CFREU imposes a general obligation on legislators to protect the right to a single equitable remuneration. The context of the overall reasoning in *RAAP*, however, suggests that the effect of the reference to Article 17(2) CFREU serves only as a side support to the main argument, which is that Article 8(2) RLD “is a harmonised rule”, and thus “it is for the EU legislature alone and not the national legislatures to determine whether the grant in the European Union of that right related to copyright should be limited in respect of the nationals of third States and, if so, to define that limitation clearly and precisely” (para 88). Beside this constraint, the Court admits that the EU legislator has considerable leeway in determining the subjective scope of the right, as long as it fulfils the requirements laid down in Article 52(1) CFREU: any interference with or limitation on the exercise of that right must be provided for by law, and its scope should be defined in a clear and precise fashion (para 86).

The implications of the Court’s holding on Article 17(2) CFREU in *RAAP* are thus two-fold. On the one hand, the competence to limit the scope, content and range of rightholders rests with the EU legislator only. On the other hand, an *ex post* limitation is always possible if introduced in a clear fashion by law and in compliance with the conditions set by Article 52 CFREU. Against this background, it is reasonable to conclude that while Article 17(2) CFREU protects remuneration rights and thus any non-proprietary entitlement belonging to or deriving from the category of IP rights, it by no means it constitutes an obstacle to an intervention by the EU legislator to clarify the problematic or uncertain points raised by *RAAP*.

In the following, we now turn from an analysis of the decision to policy options for the Commission and the European legislature:

### ***III. Option 1: Specific measure on remuneration or artists and retroactivity + interim flexibility for member states***

At least as a minimum solution, the Commission should consider opening, at least as a minimum solution, a legislative procedure with the aim of clarifying the conditions under which performers who are nationals of States outside the European Economic Area (EEA) should have

<sup>35</sup> Case C-277/10, *Martin Luksan v Petrus van der Let*, EU:C:2012:65, paras 68-70.

the right to equitable remuneration for the communication to the public of their recordings under Article 8(2) RLD. Such a “small fix” should also clarify the retroactive applicability of such a rule.

#### ***IV. Option 2: General instrument (Regulation) on application of international copyright treaties in the EU***

Given the fact that the arguments of the CJEU in the *RAAP* decision are of a more general nature and could also be applied to other international treaties and other rights of authors, performers and other right holders, the Commission should seriously consider proposing an instrument with a more general ambit. Such an instrument should clarify the conditions under which national treatment and minimum rights under the international treaties should be granted (or limited). It should also define the circumstances under which nationals of third states are to be granted protection beyond the international treaties, i.e. based on autonomous EU law. Moreover, it should include clear rules on retroactive application, the role of reservations in international treaties and the field of application of material reciprocity. In the light of the reasoning of the CJEU in *RAAP*, the remaining margin of discretion for the EU Member States is rather limited since the EU has already exercised its competence on the international level to a large extent. Therefore, a regulation would be the proper legal instrument. Clarification of the existence of rights for nationals of non-EEA countries in such a regulation would also resolve a problem with article 8(1) of the Rome II regulation (Regulation 864/2007). The latter mandates that the law of the Member State for the territory in which protection is claimed, governs the question whether an intellectual property right is infringed. The Rome II regulation however, does not address the question of the law which governs the existence of a copyright or related right as such; a question that must be answered before any infringement can be assessed.

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